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GALINA BENIMOVICH

PLAINTIFF(S),

VS.

BOROUGH OF MONTVALE,
TOWNSHIP OF RIVER VALE, JOHN
DOE 1-10 AND ABC CORP. 1-10,

DEFENDANT(S).

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO.: A-000892-24 TEAM 01

CIVIL ACTION

Appeal of the November 22, 2024 Order of
the Hon. William C. Soukas, J.S.C.

Sat Below:
William C. Soukas, J.S.C.

PLAINTIFF/APPELLANT'S LEGAL BRIEF

Kris A. Krause, Esq.
Attorney of Record

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PROCEDURAL HISTORY

1. Plaintiff Galina Benimovich ("Plaintiff") filed her complaint in this matter on December 6, 2024 alleging personal injuries as a result of a May 25, 2021 trip and fall that occurred on the roadway of Hickory Hill, in the Borough of Montvale, County of Bergen, and State of New Jersey at or near 28 Hickory Hill, Montvale, New Jersey. (Pa1-7; Pa105-106).
2. Defendant Borough of Montvale and Defendant Township of River Vale (collectively "Defendants") filed a joint-answer on May 5, 2022. (Pa8-13).
3. Defendants filed a motion for summary judgment, returnable August 16, 2024. (See Pa14-15).
4. On November 22, 2024, oral argument was heard before the Honorable William C. Soukas, J.S.C. regarding Defendants' motion for summary judgment. (See Pa18; Transcript).
5. On November 22, 2024, the Honorable William C. Soukas, J.S.C. filed an Order granting Defendants' motion for summary judgment, finding that Plaintiff's claim did not satisfy the requirements of N.J.S.A. 59:4-2. (Pa18; T52:10-21).
6. On November 25, 2024, Plaintiff filed her notice of appeal of the Honorable William C. Soukas, J.S.C.'s November 22, 2024 Order granting Defendants' motion for summary judgment. (See Pa19-22).

7. On December 4, 2024, Plaintiff filed her amended notice of appeal of the Honorable William C. Soukas, J.S.C.'s November 22, 2024 Order granting Defendants' motion for summary judgment to match the caption of the appeal to the caption as it appears on the Honorable William C. Soukas, J.S.C.'s November 22, 2024 Order granting Defendants' motion for summary judgment. (See Pa23-26).

STATEMENT OF FACTS

1. On or about May 25, 2021, Plaintiff tripped and fell due to a depression in the roadway of Hickory Hill, in the Borough of Montvale, County of Bergen, and State of New Jersey at or near 28 Hickory Hill, Montvale, New Jersey. (Pa1-7; Pa105-106).
2. The depression measured approximately 34" in length, 13" in width, and up to 1 ½" in depth. (Pa112).
3. Hickory Hill is a residential street in the Borough of Montvale that does not have any sidewalks for pedestrians to walk on. (See Pa100 at T61:10-15; Pa114).
4. Plaintiff described Hickory Hill as a residential street with infrequent automobile traffic. (See Pa100 at T20:6-17).
5. None of the streets surrounding Hickory Hill were equipped with sidewalks making pedestrians foreseeable users of the streets throughout the Borough of Montvale. (See Pa100 at T61:10-15).

6. At the time of Plaintiff's fall, she was walking through the residential neighborhood where her daughter, Helen Merrit ("Ms. Merrit"), lives. (Pa76 at T23:24-24:4).

7. Prior to Plaintiff's fall, and at all relevant times, Defendants were engaged in an agreement under which the Borough of Montvale dissolved its Department of Public Works ("DPW") and the Township of River Vale DPW was responsible, inter alia, for street repair and maintenance throughout the Borough of Montvale. (See Pa89-90 at T14:12-16:4, T18:18-20:24. See also Pa123-140).

8. The September 24, 2019 Shared Services Agreement appointed the Township of River Vale as the lead agency who was responsible for ensuring that DPW services were provided to both municipalities in accordance with the terms of said agreement. (See Pa124-125).

9. The September 24, 2019 Shared Services Agreement made the Borough of Montvale responsible for agreeing to service level expectations, which were memorialized in an addendum to the shared services agreement. (Pa125).

10. The September 24, 2019 Shared Services Agreement Addendum requires asphalt pothole repair within the Borough of Montvale to be completed per the street maintenance schedule and as reported by residents or commuters. (Pa136).

11. Pursuant to the agreement, street sweeping of residential areas is to be performed seven times per year between April 1 and December 31. Id.

12. The September 24, 2019 Shared Services Agreement created a Department of Public Works Advisory Committee to ensure that all the obligations of the agreement were being satisfied. (Pa129).

13. Specifically, the “Committee shall meet at such times and places as deemed necessary, but in no event less than four (4) times annually, and shall be responsible for raising and addressing questions or concerns related to shared DPW services delivery and long term planning.” (emphasis added). Id.

14. The Department of Public Works Advisory Committee was to consist of two representatives from each municipality and the River Vale Business Administrator with quarterly meetings scheduled for 5:30pm on the second Tuesday of March, June, September, and December. Id.

15. Richard Campanelli (“Mr. Campanelli”) was deposed as a representative of Defendants in his capacity as the Superintendent of the DPW for the Township of River Vale. (See Generally Pa 85a-104a).

16. Mr. Campanelli testified that the Department of Public Works Advisory Committee had not met for a couple of years and that the committee did not meet the required four times per year since it was created. (See Pa91 at T23:15-25:21).

17. As the River Vale Superintendent of the Department of Public Works, Mr. Campanelli’s relevant job responsibilities, inter alia, included overseeing the entire

department and its approximately 20-25 employees. (Pa88 at T11:9-12; Pa93 at T31:14-24; and Pa103 at T72:12-21)

18. Regarding potholes and depressions in the roadways specifically, Mr. Campanelli was responsible for making lists of the reported potholes in Montvale each year, and determining which potholes were dangerous enough to require a repair and which were, as he termed it, a “resident’s wish list.” (Pa99-100 at T57:15-58:25).

19. Mr. Campanelli was the sole decision-maker as to whether a reported roadway depression in the Borough of Montvale would be fixed. (Pa103 at T71:19-22).

20. Mr. Campanelli could testify as to what kind of roadway depression would create a danger to a tire. However, he was unable to provide any clear standard he relies upon to determine if a roadway depression is a tripping hazard to a pedestrian. (See Pa102-103 at T69:1-71:18).

21. When asked directly, “what would be a safety concern for a . . . pedestrian particularly on a road where there's no sidewalks?” Mr. Campanelli responded, “I can't really answer that question.” (Pa103 at T71:9-18).

22. Plaintiff retained Scott D. Moore, P.E., C.S.P. as a liability expert for this matter. Mr. Moore authored two reports. The first was served on defense counsel on November 29, 2023 as an amendment to Answers to Interrogatories and an

addendum report was served as an amendment to Answers to Interrogatories on May 22, 2024 after additional discovery was provided by Defendants. (Pa107-122 and Pa162-169).

23. Mr. Moore reviewed, inter alia, all written discovery, all deposition transcripts, and multiple photographs in forming his expert opinions. He also conducted a site inspection on June 24, 2021. Id.

24. Mr. Moore opined that a walkway tripping hazard is any vertical elevation change exceeding $\frac{1}{4}$ inch. (See Pa117 and Pa119).

25. Mr. Moore measured the pothole that caused Plaintiff to fall to be 1.5 inches deep, or six times higher than the definition of a tripping hazard. (Pa114).

26. In reviewing publicly available photographs of Hickory Hill, Mr. Moore identified alligator cracking in the area of the pothole as early as June 2018, which he opined was a clear warning sign that the roadway's asphalt had "completely failed and was going to become a pothole." (Pa114-115).

27. Plaintiff's daughter, Ms. Merritt submitted an affidavit that she has lived at 28 Hickory Hill since 2012 and will testify at the time of trial that the pothole that caused Plaintiff to fall had existed for years prior to Plaintiff's fall. (See Pa170-171)

28. Ms. Merritt will also testify that Defendants had actual notice of the defect because Ms. Merritt personally reported it to them for years prior to Plaintiff's fall.

Id.

29. Through the course of discovery, Defendants produced 8 spreadsheets for the years between 2014-2022, with the exception of the year 2018, which were authored by Mr. Campanelli and purport to document Defendants' knowledge of potholes in Montvale, and in particular on Hickory Hill, each year. (Pa93 at T32:17-54:4).

30. The formatting of the pothole spreadsheets varied from year to year. Mr. Campanelli testified: "If I knew I had to keep better records with Excel obviously I would have kept the same format. These records again were just for my knowledge." (Pa98 at T51:6-8).

31. Despite the records being for Mr. Campanelli's knowledge, he was unable to testify whether said records documented complaints of potholes or records of pothole repairs. Id. at T50:3-51:9.

32. The yearly lists of potholes evidence that Defendants had actual knowledge of the existence of potholes on Hickory Hill dating back to at least 2014, when the shared service agreement went into effect. Id.

33. In 2014, Defendants are documented to have knowledge of 2 potholes on Hickory Hill. (See Pa141-143).

34. In 2015, Defendants are documented to have knowledge of 4 potholes on Hickory Hill, including 1 in the vicinity of 28 Hickory Hill. (See Pa144-146).

35. In 2016, Defendants are documented to have knowledge of 1 pothole on Hickory Hill, which was in the vicinity of 28 Hickory Hill. (See Pa147-149).

36. In 2017, Defendants are documented to have knowledge of 8 potholes on Hickory Hill, including 1 in the vicinity of 25 Hickory Hill, the house across the street from 28 Hickory Hill. (See Pa150-152).

37. No record was produced for the year 2018. As to why a similar record was missing for the year 2018, Mr. Campanelli testified “I’m not sure. Back in ’18 maybe I didn’t feel like doing it. Maybe it got lost.” (Pa98 at T52:8-9.)

38. Of note, in April 2018, the Township of River Vale intended to terminated the shared services agreement until the municipalities eventually renegotiated and signed the September 24, 2019 Shared Services Agreement. (See Pa153-155).

39. In 2019, Defendants are documented to have knowledge of 10 potholes on Hickory Hill, including 1 in the vicinity of 28 Hickory Hill and 1 in the vicinity of 25 Hickory Hill, the house across the street from 28 Hickory Hill. (See Pa156-158).

40. In 2020, Defendants are documented to have knowledge of 1 pothole on Hickory Hill, which was in the vicinity of 28 Hickory Hill. (See Pa159-161).

41. Despite the fact that a 2021 Pothole Report was produced containing no reported potholes on Hickory Hill for that year, Defendants received notice of the instant claim and advised of a hazardous condition in the roadway on Hickory Hill in the year 2021, as required by N.J.S.A. 59:8-8. (See T26:1-27:8 and T48:17-49:2)

42. As a result of the accident at bar, Plaintiff suffered a right wrist fracture, which required an open reduction internal excision which required hardware, namely plates and screws, to be installed into Plaintiff's arm to repair her displaced, comminuted fracture. She also sustained a right shoulder tear. (Pa172-178).

LEGAL ARGUMENT

POINT I

DEFENDANTS DO NOT MEET THE STANDARD FOR SUMMARY JUDGMENT SET FORTH IN R. 4:46-2 AND THE CASE LAW. SUMMARY JUDGMENT SHOULD THEREFORE HAVE BEEN DENIED. (T21:17-23:7; T27:9-28:14; T35:2-37:12)

Motions for Summary Judgment are governed by R. 4:46-2(c): "The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." A "genuine issue with respect to a material fact" exists where the "competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." See Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995).

The essence of the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. "The motion judge must determine if there is a genuine issue as to material fact, but not decide the issue if [the court] finds it to exist. . . . [T]he absence of undisputed material facts must appear

‘palpably.’ All inferences of doubt are drawn against the movant in favor of the opponent of the motion." Milacci v. Mato Realty Co., Inc., 217 N.J. Super. 297, 300 (App. Div. 1987) (citations omitted).

This Court’s review of summary judgment is to be done de novo and is governed by the same standard governing the motion court under R. 4:46–2(c). Khandelwal v. Zurich Ins. Co., 427 N.J. Super. 577, 585 (App. Div. 2012), cert. den., 212 N.J. 430 (2012). The “trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference” McDade v. Siazon, 208 N.J. 463, 473 (2011) (quotations omitted).

POINT II

THE COMPETENT EVIDENCE AND AFFIDAVITS PRESENTED TO THE TRIAL COURT WERE SUFFICIENT TO MEET THE FORESEEABLE RISK REQUIREMENTS OF N.J.S.A. 59:4-2 UNDER THE SUMMARY JUDGMENT STANDARD. (T44:18-46:2)

Pursuant to N.J.S.A. 59:4-2:

A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and . . .

a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the

action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.

As to the foreseeable risk requirement, Atalese v. Long Beach Township, 365 N.J. Super. 1, (App. Div. 2003) is the most analogous precedent. In Atalese, the plaintiff was a pedestrian who tripped and fell due to a block-long, $\frac{3}{4}$ inch deep differential in the pavement of a pedestrian and bicycle lane on a residential street. Id. at 3-4. “There were no sidewalks in the area.” Id. at 3 (emphasis added). The Atalese Court found that a $\frac{3}{4}$ inch roadway depression “could be accepted by a jury as . . . a dangerous condition” since the plaintiff, who tripped into the depression while walking, was a foreseeable user of the lane. Atalese v. Long Beach Township, 365 N.J. Super. at 3-6. The Atalese Court distinguished the facts before it from Polyard v. Terry, 160 N.J. Super. 497 (App. Div. 1978), aff’d 79 N.J. 547 (1979).

[T]he differential in pavement was on an area of the roadway designated for pedestrians and bicyclists. As such, the reasonably foreseeable users include walkers, runners, and all types of bicyclists. Given these anticipated uses, we conclude that a three-quarter inch difference in the level of the pavement occupying a significant portion of a bike lane and spanning an entire block could be accepted by a jury as creating a substantial risk of injury and hence a dangerous condition under the Tort Claims Act.

Atalese, 365 N.J. Super. at 6 (emphasis added).

Like the plaintiff in Atalese, here Plaintiff is a foreseeable user of the Hickory Hill roadway because there are no sidewalks on Hickory Hill for

pedestrians to walk on and it is a residential street where the reasonably foreseeable, and socially beneficial, use of the roads would include residents, and their guests, walking through the neighborhood. In fact, a reasonable jury could infer, based on the evidence before the Trial Court, that Hickory Hill sees more pedestrian and pedicyclist traffic than it sees automobile traffic. See Pa100 at T20:6-17.

The Trial Court, however, relied on Polzo v. County of Essex, 209 N.J. 51, 71 (2012) in reaching its determination that Plaintiff was not a foreseeable user of Hickory Hill. In Polzo, the New Jersey Supreme Court determined that Essex County was not liable to a bicyclist who was died as a result of falling due to a depression on the surface of the shoulder of Parsonage Hill Road in the Township of Millburn. Id. at 57-57, 70.

Key to the determination made by the Supreme Court in Polzo was the fact that bicyclists may choose to use a shoulder of a road from time to time due to a perception that it would be safer to use than to share the roadway with motor vehicles, but bicyclists are directed to use the roadway, not the shoulder, of the road. Id. at 71.

Here, Plaintiff could make no such choice to not use the roadway. There were no sidewalks or shoulders on Hickory Hill. The only way for a pedestrian to traverse this residential road was to walk on the roadway itself. This is an entirely

different set of facts than those that formed the basis of the Polzo decision, and the Trial Court erred in relying on Polzo over the more analogous Atalese case when determining whether Plaintiff walking as a pedestrian was a foreseeable use of the Hickory Hill roadway.

The record below is clear. Hickory Hill is not a highway or even a busy main road. It is a road meant for residents and their guests to not only drive through but live on and walk over. As such, Plaintiff respectfully submits that the Trial Court erred in finding that Plaintiff was not a foreseeable user of the Hickory Hill roadway and that the entry of Summary Judgment should be reversed.

POINT III

THE COMPETENT EVIDENCE AND AFFIDAVITS PRESENTED TO THE TRIAL COURT WERE SUFFICIENT TO MEET THE DANGEROUS CONDITION REQUIREMENTS OF N.J.S.A. 59:4-2 UNDER THE SUMMARY JUDGMENT STANDARD. (T40:4-44:17)

N.J.S.A. 59:4-1(a) defines a “dangerous condition” 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.” This definition governs the use of the term “dangerous condition” as it is used in N.J.S.A. 59:4-2. See Point II, supra. As the Trial Court noted, the issue of whether a property is in a dangerous condition is generally one for the jury. Vincitore v. New Jersey Sports & Exposition Authority, 169 N.J. 119, 123 (2001) and T40:4-8.

As discussed in Point II, supra, Plaintiff walking on the roadway of Hickory Hill as a pedestrian was reasonably foreseeable by Defendants given that this was a residential street with no sidewalks. The next factor to determine is whether Hickory Hill was in a condition that created a substantial risk of injury to pedestrians walking on the roadway.

For the purposes of Summary Judgment, there was no dispute between the parties that the depression that caused Plaintiff to fall measured approximately 34" in length, 13" in width, and up to 1 ½" in depth. Pa112. The Trial Court accepted these measurements and that this particular defect was the cause of Plaintiff's fall. T41:11-44:5. However, Plaintiff respectfully submits that the Trial Court erred when it relied upon cases with distinguishable fact patterns, and ignored the uncontested expert opinion of Plaintiff's engineer.

As discussed in Point II, supra, and argued below, the most analogous case to the facts at bar are those of Atalese v. Long Beach Township, 365 N.J. Super. 1, (App. Div. 2003). In Atalese, the roadway depression that the Atalese Court found to be a dangerous condition for a pedestrian measured ¾ of an inch deep. That is half the depth of the roadway depression that caused Plaintiff's fall in the matter at bar, yet a ¾ inch deep depression was a sufficient tripping hazard for the Atalese Court, in a decision that was binding upon the Trial Court, to find a "dangerous condition" pursuant to N.J.S.A. 59:4-2 where pedestrian travel on the road was a

foreseeable use, as it is here. See Atalese, 365 N.J. Super. at 5-6. See also T23:8-13.

Similarly, the Trial Court had the benefit of two reports authored by Plaintiff's engineering expert, Scott D. Moore, P.E., who opined that a vertical elevation change exceeding $\frac{1}{4}$ inch is a tripping hazard for a person who is walking. See Pa117 and Pa119. Mr. Moore's definition of a tripping hazard is consistent with the decision in Atalese, and Defendants provided the Trial Court with no evidence to contradict this opinion.

Even Polzo v. County of Essex, 209 N.J. 51 (2012), the case the Trial Court relied heavily on in reaching its decision, is clear that evidence that a roadway surface is routinely used for other purposes besides vehicular travel, such as bicyclist or pedestrian travel, is something that should be considered in assessing whether there is a "dangerous condition," particularly when it is coupled with evidence of prior complaints about depressions in the roadway. Polzo, 209 N.J. at 74. See also Point IV, infra. The evidence in this case is that Hickory Hill is a "quiet," residential street, with no sidewalks, and at least 26 known potholes in the seven years prior to Plaintiff's fall. See Pa100 at T20:6-17 and Pa141-171.

The Trial Court's conclusion that no reasonable jury could find a dangerous condition existed is incompatible with the case law and the evidence presented below. As such, Plaintiff respectfully submits that the Trial Court erred in finding

that the 1.5 inch depression in the roadway of the Hickory Hill was not a dangerous condition pursuant to N.J.S.A. 59:4-2. Summary Judgment should therefore be reversed.

POINT IV

THE COMPETENT EVIDENCE AND AFFIDAVITS PRESENTED TO THE TRIAL COURT WERE SUFFICIENT TO MEET THE NOTICE REQUIREMENTS OF N.J.S.A. 59:4-2 UNDER THE SUMMARY JUDGMENT STANDARD. (T47:11-50:17)

The competent evidence before the Trial Court, under the Summary Judgment standard, established that Defendants had both actual and constructive notice. The issue of notice is governed both by N.J.S.A. 59:4-2 and N.J.S.A. 59:4-3. N.J.S.A. 59:4-2 requires that “a public entity had actual or constructive notice of the dangerous condition under [N.J.S.A.] 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition . . .”

As to actual notice, N.J.S.A. 59:4-3(a) states that a “public entity shall be deemed to have actual notice of a dangerous condition within the meaning of [N.J.S.A. 59:4-2] if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.” Here, the Trial Court was presented with the August 6, 2024 Affidavit of Helen Merritt which stated that Ms. Merritt had personally observed the depression for years prior to the accident at bar and similarly complained of the roadway depression that caused Plaintiff’s fall to

Defendants for years prior to the accident at bar, but Defendants did not remedy the depression. Pa170-171. The Trial Court's role when presented with this evidence was to "determine if there is a genuine issue as to material fact, but not decide the issue if [the court] finds it to exist. . . . [T]he absence of undisputed material facts must appear 'palpably.' All inferences of doubt are drawn against the movant in favor of the opponent of the motion." Milacci, 217 N.J. Super. at 300 (App. Div. 1987) (citations omitted).

Ms. Merritt's affidavit presented the Trial Court, as it presents this Court, with a genuine issue of material fact. The Trial Court was required to grant Plaintiff, as the non-moving party, all inferences of doubt. However, rather than adhering to this standard, Plaintiff respectfully submits that the Trial Court erred in drawing inferences in favor of Defendants, the moving party.

In analyzing Ms. Merritt's affidavit, the Trial Court opined:

There is no other evidence that's been presented, other than statement on this motion record. There's no other indication that from the municipality or from the plaintiff herself that this, in fact, was reported to the municipality, such that the municipality was on actual notice, and such municipality should have taken action to repair it. Therefore, for those reasons, the Court finds that there, in fact, was no actual notice of this, and that there's no reasonable question of fact that there was no reasonable notice here.

As to the Trial Court's requirement that additional evidence support Ms. Merritt's statement, the Trial Court has placed upon Plaintiff, the non-moving party, the burden of proving that there is no evidence that contradicts Ms. Merritt's

version of events. That is not the Court granting Plaintiff all inferences of doubt. The Trial Court sought to weigh in on disputed evidence, and that was not its role.

As acknowledged both by the Trial Court and Defendants' DPW Supervisor, Richard Campanelli, Mr. Campanelli did not take clear and complete records of pothole complaints throughout the Borough of Montvale. See Pa98 at T50:3-51:9 and T51:6-8 ("If I knew I had to keep better records with Excel obviously I would have kept the same format. These records again were just for my knowledge."). In fact, Mr. Campanelli admitted to making records based on his own whims, resulting in no records being taken or preserved for the entire year of 2018. Pa98 at T52:8-9 ("Back in '18 maybe I didn't feel like doing it. Maybe it got lost.").

Any inference of doubt as to what was or was not contained in Defendants' records about complaints of potholes and roadway depressions on Hickory Hill should have been granted to Plaintiff. What the records did show, over a seven year period, with the exception of the recordless 2018, is that Defendants were constantly on notice of not only complaints of roadway depressions on Hickory Hill, but in particular roadway depressions in front of 28 Hickory Hill, the exact location of Plaintiff's fall. There are six instances of complaints about potholes directly in front of 28 Hickory Hill or 25 Hickory Hill (the house directly across the street) in that seven year period, and 26 overall for Hickory Hill. See Pa141-171.

That means there are 26 documented cases of actual notice of roadway depressions on Hickory Hill from 2014-2020. Id. Although not submitted to the Trial Court on Summary Judgment, the parties agree that Defendants also produced a list of pothole complaints for the year 2021, and this is the only year that contains no complaints, according to Defendants' records, of potholes on Hickory Hill. Yet, we know this information is inaccurate as there is no dispute that Plaintiff complied with her obligations under Title 59 to notify Defendants of the mechanism of her fall within 90 days, and yet this notice of a dangerous roadway depression on Hickory Hill did not make it to Defendants records for the year 2021, the year of the accident at bar. And, Defendants produced records for 2022 with 14 records of potholes on Hickory Hill in 2022, which would make no record of potholes on Hickory Hill in 2021 peculiarly atypical. See Pa110.

Despite Mr. Campanelli's admission that he is not a reliable record keeper, the Trial Court made the determination that no reasonable juror could find that Ms. Merritt reported the roadway depression to Defendants. It is respectfully submitted that this finding is incompatible with the Summary Judgment standard and that Plaintiff has shown evidence of actual notice in keeping with N.J.S.A. 59:4-2 and N.J.S.A. 59:4-3. Ms. Merritt's affidavit is competent evidence of actual notice and with all inferences of doubt granted to Plaintiff, in light of the admittedly inconsistent and incomplete record keeping on the part of Defendants, the Trial

Court should have found that Plaintiff demonstrated actual notice for the purposes of Summary Judgment.

Furthermore, the evidence presented clearly demonstrates constructive notice as well pursuant to N.J.S.A. 59:4-3(b). Pursuant to N.J.S.A. 59:4-3(b), constructive notice should be found where “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.”

The evidence is clear that Defendants were on notice since 2014, the year their shared DPW services agreement began, that Hickory Hill was in a chronic and persisting state of potholes and roadway depressions that required continuous maintenance. There can be no doubt that Defendants knew Hickory Hill was a residential street and that it did not contain sidewalks, thereby requiring residents to walk on the roadway to visit their neighbors or get routine exercise without the use of an automobile.

Approximately two and a half weeks prior to the filing of Defendants’ motion for Summary Judgment, the Appellate Division published its decision in Estate of Massi v. Barr, 479 N.J. Super. 144 (App. Div. 2024). In Massi, the plaintiff was injured while riding his bicycle when he swerved to avoid a passing truck. Id. at 150. The relevant public entities had admitted to responding to

“hundreds” of pothole complaints and repairs on the road in question. Id. at 152.

The Massi Court noted that this evidence “bespeaks a chronic and persisting dangerous condition that required continuous maintenance” and was sufficient evidence to establish constructive notice under N.J.S.A. 59:4-2. Id. at 166-67.

Between the records supplied by Defendants and the Affidavit of Ms. Merritt, there is no doubt that Defendants were under continuous notice of dangerous roadway depressions sufficient to allow the Trial Court to find both actual and constructive notice pursuant to N.J.S.A. 59:4-2 and N.J.S.A. 59:4-3. As such, Plaintiff respectfully submits that the Trial Court erred in finding that Plaintiff failed to show notice pursuant to N.J.S.A. 59:4-2. Summary Judgment should therefore be reversed.

POINT V

THE COMPETENT EVIDENCE AND AFFIDAVITS PRESENTED TO THE TRIAL COURT WERE SUFFICIENT TO MEET THE PALPABLY UNREASONABLE REQUIREMENTS OF N.J.S.A. 59:4-2 UNDER THE SUMMARY JUDGMENT STANDARD. (T50:18-52:9)

The final requirement of N.J.S.A. 59:4-2 is that of palpably unreasonably conduct on the part of the responsible public entities. No liability will be found on a public entity “for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.” N.J.S.A. 59:4-2.

In the matter at bar, it has clearly been established that Defendants knew Hickory Hill was a residential road that contained no sidewalks and had a consistent history of known complaints of roadway depressions and potholes. Yet despite this, Defendants enacted a system whereby only one person would keep records of the complaints and that same person would be the final say as to whether any complaints were addressed or ignored.

In this case, that one person was Mr. Campanelli, who, when asked what would constitute a dangerous roadway depression for a pedestrian, could not answer the question. When asked directly, “what would be a safety concern for a . . . pedestrian particularly on a road where there's no sidewalks?” Mr. Campanelli responded, “I can't really answer that question.” Pa103 at T71:9-18.

Despite being presented with a chronic and persisting dangerous condition, when used foreseeably, that required continuous maintenance, Defendants had no standard to evaluate or prioritize their response to complaints of tripping hazards because they simply had no idea what a tripping hazard would be.

Furthermore, in agreeing to enter into a shared services agreement, Defendants foresaw that service levels across two municipalities would need to be monitored, and created a Department of Public Works Advisory Committee to ensure that all the obligations of the agreement were being satisfied. Pa129.

However, according to Mr. Campanelli, this Department of Public Works Advisory Committee did not meet. See Pa91 at T23:15-25:21.

The question of palpably unreasonable conduct is generally one for the jury. Vincitore, 169 N.J. at 130. The Massi Court found that

the conduct of the township defendants could logically be deemed by a jury to have been palpably unreasonable. The chronically poor condition of the roadway, and the failure of hundreds of attempted repairs and patches to cure the defect, plus the numerous complaints received, are enough to present a triable issue.

Massi, 479 N.J. Super. at 172.

As such, Plaintiff respectfully submits that the Trial Court erred in finding that Plaintiff failed to show palpably unreasonable conduct pursuant to N.J.S.A. 59:4-2. Summary Judgment should therefore be reversed.

CONCLUSION

For all the foregoing reasons, this Appellate Court, applying a de novo review, should reverse Judge Soukas's November 22, 2024 order granting Summary Judgment in Favor of Defendants, and remand this case back to the Law Division for trial.

FREDSON, STATMORE, BITTERMAN, LLC

A handwritten signature in black ink, appearing to read "Kris A. Krause". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

BY: Kris A. Krause

Dated: January 21, 2025

Superior Court of New Jersey

Appellate Division

Docket No. A-000892-24

GALINA BENIMOVICH,	:	CIVIL ACTION
	:	
<i>Plaintiff-Appellant,</i>	:	DOCKET NO.: BER-L-7974-21
	:	
vs.	:	ON APPEAL FROM THE
	:	FINAL ORDER OF THE
	:	SUPERIOR COURT OF
BOROUGH OF MONTVALE,	:	NEW JERSEY,
TOWNSHIP OF RIVER VALE,	:	BERGEN COUNTY
JOHN DOE 1-10 and ABC CORP.	:	LAW DIVISION
1-10,	:	
	:	Sat Below:
	:	
<i>Defendants-Respondents.</i>	:	HON. WILLIAM C. SOUKAS, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS BOROUGH OF MONTVALE AND TOWNSHIP OF RIVERVALE

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Date Submitted: March 20, 2025



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PRELIMINARY STATEMENT

This matter arises out of a trip and fall on a depression in the middle of a residential street in the Borough of Montvale. This appeal arises out of the trial court's well-reasoned decision granting summary judgment in favor of Defendants, the Borough of Montvale and the Township of River Vale, and dismissing Plaintiff's claims with prejudice under the New Jersey Tort Claims Act ("TCA"), N.J.S.A. 59:1-1, et seq.

The trial court correctly determined that Plaintiff failed to establish any of the elements necessary to sustain a claim under the TCA, including (1) that the alleged condition constituted a "dangerous condition," that Defendants had actual or constructive notice of the condition as required, and (3) that Defendants' alleged failure to remediate the condition was "palpably unreasonable."

Furthermore, Plaintiff's attempts to establish actual or constructive notice of the alleged condition were unsupported by the record. The trial court correctly disregarded the last-minute certification submitted by Plaintiff's daughter, Helen Merritt, which was both untimely and lacked the required certification of due diligence under R. 4:17-7. The court further found that Plaintiff failed to produce any competent evidence that Defendants had prior knowledge of the specific condition that Plaintiff alleges caused her injury or that it had existed

for such a period of time and was so obvious that the municipalities should have discovered and repaired it.

Finally, the trial court properly held that Defendants' failure to remediate an unnoticed, minor roadway depression was not "palpably unreasonable." New Jersey courts have long recognized that municipalities must allocate their limited resources in maintaining roadways and cannot be expected to proactively identify and repair every minor imperfection. The Borough of Montvale and Township of River Vale, covering over 8.3 square miles of roadways, maintain an active system of pothole repairs and infrastructure maintenance, and there is no basis to conclude that their prioritization of road defects was arbitrary, capricious, or patently unacceptable.

Plaintiff's appeal seeks to impose an unworkable burden on municipalities that is contrary to the purpose of the TCA and well-established precedent. If accepted, Plaintiff's arguments would require public entities to routinely inspect and repair every minor roadway imperfection, regardless of notice, risk level, or available resources—an obligation that New Jersey courts have consistently rejected. Because the trial court's decision was fully supported by the factual record and applicable law, this Court should affirm the dismissal of Plaintiff's claims in their entirety.

PROCEDURAL HISTORY

Plaintiff's complaint was filed on December 6, 2021, alleging personal injury as a result of a May 25, 2021, trip and fall that occurred in the middle of the Hickory Hill roadway in the Borough of Montvale, New Jersey. (Pa1-7; Pa105-106). Defendant Borough of Montvale and Defendant Township of River Vale (collectively "Defendants") filed an Answer on May 5, 2022. (Pa8-13).

On July 16, 2024, Defendants filed a Motion for Summary Judgment. (See Pa14-15). On August 6, 2024, Plaintiff's submitted Opposition to Defendant's Motion for Summary Judgment, along with a never-before-seen Certification of Plaintiff's daughter, Helen Merritt, also dated August 6, 2024. (See Pa170-171).

On November 22, 2024, the Honorable William C. Soukas, J.S.C., after hearing oral argument, issued a ruling granting summary judgment in favor of Defendants, finding that Plaintiff's claim did not satisfy the requirements of N.J.S.A. 59:4-2. (Pa18; T52:10-21).

Defendants now submit this opposition brief requesting that the Appellate Division affirm the trial court's grant of summary judgment.

COUNTER-STATEMENT OF FACTS

The Incident

Plaintiff alleges that she tripped and fell due to a depression in the middle of the roadway near 28 Hickory Hill on May 25, 2021. (Pa1-7, Pa66-69). At the time of the alleged incident, Plaintiff was walking in the middle of the roadway, with her daughter, the property owner of 28 Hickory Hill, Hellen Merrit. (Pa74-Pa75 at 17:17 to 18:18).

Plaintiff fell down in a depression in front of her daughter's home. (Pa76 at T24:19-21). The mailbox of 28 Hickory Hill can be seen in the photographs of the depression at Pa66 to Pa69 demonstrating that the depression was right outside the home of Plaintiff's daughter, Helen Merrit. Plaintiff did not know how long the depression was in existence. (Pa80 at T38:24 to T39:1). Plaintiff testified that her daughter indicated that the depression was in existence for merely a few months and/or weeks, testifying "since the snow went out" and "since winter it was not fixed." (Pa80 at T39:6 to T39:13).

The Department of Public Works for Rivervale and Montvale

Richard Campanelli is the Superintendent of the Department of Public Works ("DPW") for the Township of River Vale and the Borough of Montvale. (Pa87 at 11:10-15).

Hickory Hill is a residential street in Montvale, and his Department of

Public Works and the DPW oversees pothole repair for that street. (Pa94 at T34:2-13). Mr. Campanelli stated the municipalities contain over 400 blocks of streets which cover 8.3 square miles. (Pa95 at 62:9-17)

Mr. Campanelli explained that municipalities have limited budgets and manpower, and they cannot repair every minor imperfection but must prioritize road repairs based on severity. (Pa101 at T63:21 to 64:11). He confirmed that “manpower is an issue and cost is an issue.” (Pa95 at T42:24-25).

Despite these constraints, the municipalities actively identify and repair hazardous road conditions through multiple methods:

- Municipal employees report potholes they observe to the DPW,
- The municipal street sweeper flags potholes of concern,
- Residents are encouraged to report potholes. (Pa95 at T42:14-23).

When a pothole is reported, Mr. Campanelli or one of his employees inspects it to determine whether it requires repair, which depends on its severity. (Pa99 at T57:15 to T58:12). He clarified that not all road imperfections qualify as potholes: “Is it a pothole? That's the first question. There's a difference between a pothole, a skin patch, a depression, crack in the street, an alligator crack, absolutely nothing.” (Pa99 at T57:19 to T58:24).

Because of finite municipal resources, minor road imperfections like “depressions” and “cracks” are not automatically prioritized for repair: “A

depression, a crack in the street, an alligator—that is not considered a pothole. Those are considered, in my terminology, a ‘wish list.’ A resident just wants a wish list.” (Pa100 at T58:1-4).

In contrast, potholes are defined as conditions that pose an immediate hazard: “A pothole is something that's considered an emergency and needs to be taken care of right away. A skin patch or depression, you know, they're not considered an emergency and sometimes they're not even there.” (Pa100 at T60:5-10).

Regarding what qualifies as an “emergency”, Mr. Campanelli testified: “One that would take out a tire. One that would take a bicycle. One that would cause harm to the public. Not something an inch deep.” (Pa100 at T60:13-15).

As to what constitutes a pothole, Mr. Campanelli clarified: “They are typically three or four inches deep and it's the size of a pot... which can take out a tire or a bicycle or be considered a tripping hazard.” (Pa101 at T65:1-7).

In contrast, a 1.5-inch depression, like the one at issue here, does not meet the threshold for repair as an emergency hazard.

Defendants’ Active Pothole Repair Efforts

Mr. Campanelli further underscored that “[i]f it needed required action it would be taken care of. We take the potholes quite serious. You know, we take care of over 400 blocks of municipalities. You can tell as you can see by these

dates we go out 12 months a year. We take the pothole very seriously. If it's a pothole I can ensure you we're filling it.” (Pa100 at T60:23 to T61:4).

It's clear that Defendants' approach to road maintenance is based on rational prioritization and limited resources, and not every minor road imperfection or depression warrants immediate repair.

Regarding the existence of potholes located near 28 Hickory Hill, the municipal records were checked to determine if the municipalities were aware of any alleged potholes on that street. The records from 2019 showed a pothole was noticed and repaired on June 24, in 2020 a pothole was noticed and repaired on February 24 and that no potholes were noticed or reported in 2021. (Pa102 at T66:7 to T68:12).

This evidence overwhelmingly supports the trial court's findings that Plaintiff's claims fail under the TCA. First, the depression at issue was only 1.5 inches deep—far below the size of conditions that warrant emergency repair. Second, Defendants had no actual or constructive notice of the alleged depression, as there were no reports or prior complaints about its specific existence. Third, Defendants maintain an active and reasonable roadway maintenance system, prioritizing repairs that pose a genuine danger to vehicles and pedestrians.

Perhaps most significantly, discovery revealed no evidence that Plaintiff's

daughter, Helen Merritt, who, for over a decade, owned the property directly in front of the alleged depression, never reported it to the municipalities. If anyone would have been aware of the condition and had the opportunity to report it, it was Ms. Merritt. Her failure to do so underscores that the alleged defect was not an obvious hazard requiring immediate municipal action.

For these reasons, Plaintiff cannot meet her burden under the TCA, and the trial court correctly granted summary judgment in favor of Defendants.

LEGAL ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT THE MIDDLE OF THE ROAD-WAY DEPRESSION DID NOT CONSTITUTE A DANGEROUS CONDITION TO A PEDESTRIAN UNDER THE TORT CLAIMS ACT

The trial court properly granted summary judgment, finding that the depression in the roadway did not constitute a “dangerous condition” as defined by the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:4-1 et seq. The court’s ruling was supported by extensive case law establishing that minor road imperfections, such as the 1.5-inch depression at issue here, do not meet the threshold for a “dangerous condition” under the TCA. Furthermore, the court correctly applied Polzo v. County of Essex, 209 N.J. 51 (2012), in determining that the middle of roadways are designed for vehicular traffic, not pedestrians, and that municipalities are not required to eliminate all roadway imperfections.

a. The Trial Court’s Analysis of the “Dangerous Condition” Standard

Under N.J.S.A. 59:4-1(a), a “[d]angerous condition’ means 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; see also Garrison v. Twp. of Middletown, 154 N.J. 282, 291-92 (1998) (stating that one consideration in determining whether “dangerous condition” exists is “whether the property creates a substantial risk

of injury “to persons generally, who would use the property with due care in a foreseeable manner.”” (quoting Daniel v. New Jersey Dep't of Transp., 239 N.J. Super. 563, 587 (App. Div.), certif. denied, 122 N.J. 325 (1990))). The burden is on the plaintiff to prove that the condition posed such a risk. Here, the trial court correctly determined that Plaintiff failed to meet this burden.

In its ruling, the court explicitly recognized that:

Significant case law has been presented in the defendants' moving brief regarding what the courts find is a . . . dangerous condition, when we're talking about claims arising out of potholes. The Court finds that these cases include depressions or potholes significantly of more significant depth, than what we are talking about here, which is a difference at maximum of 1 and ½ inches. T43:15-22.

The court further reviewed photographic evidence of the alleged defect and found that:

Given the Court's review of those photos, review of the relevant case law presented by the defendant, the Court is hard pressed to conclude that the plaintiff would be able to meet its burden of proving that the condition is a dangerous condition within the meaning and intent of the New Jersey Tort Claims Act. And the Court finds that a reasonable fact finder similarly could not find that the plaintiff established that the property is in a dangerous condition. So, I do make that preliminary finding that—that plaintiff is unable to prove that this is a dangerous condition. T44:7-17

This conclusion aligns with well-established New Jersey Supreme Court precedent, including Polzo, supra, and its progeny, which has consistently held that municipalities are not liable for minor imperfections in roadways.

b. The Trial Court Properly Applied Supreme Court and Appellate Division Caselaw in Holding That The Depression Did Not Pose A Substantial Risk of Injury and Was Not A Dangerous Condition

The trial court correctly relied on Polzo v. County of Essex, where the New Jersey Supreme Court held that:

We understand that many bicyclists may be inclined to ride on a roadway's shoulder to stay clear of vehicular traffic and out of concern for their safety. Nevertheless, inherent dangers confront bicyclists who travel on roadways that are not faced by operators of motor vehicles. A tree branch, a stone, and even a pothole or depression might destabilize a bicycle that a car would harmlessly pass over. Public entities do not have the ability or resources to remove all dangers peculiar to bicycles. Roadways cannot possibly be made or maintained completely risk-free for bicyclists. 209 N.J. 51, 71 (2012).

Applying this rationale, the trial court extended this principle to pedestrians, concluding that:

The Court finds, however, that when people walk on the roadway, they know that they are walking on a street that is meant for vehicular traffic, okay. And, therefore, Polzo is applicable, because, again, when—the roadways can have any type of impedi—any type of damage or condition on them. Polzo noted a tree branch, stone, pothole or depression that might

destabilize. In that case a bicycle, but in this case, it destabilized an individual pedestrian. T45-19 to T46-2.

This finding is reinforced by the Appellate Division's decision in Powers-Feigel v. Twp. of W. Milford, No. A-2909-20, 2023 N.J. Super. Unpub. LEXIS 495, at 10-11 (App. Div. Apr. 3, 2023), where the court affirmed summary judgment for a municipality, holding:

Based on our jurisprudence and viewing the facts most favorably to plaintiffs, we conclude, as did the [trial] court, that no reasonable jury could find the pothole or 'long depression' cracks or divots gave rise to a substantial risk of injury to Patrice. E.g., Wilson, 334 N.J. Super. at 648-49 (upholding summary judgment for the municipality, where there was a noticeable gap between sidewalk pavers because this did not constitute a dangerous condition.) We also agree with the trial court that while Polzo II dealt with a bicyclist's use of a shoulder, the same rationale can apply to a 'rural roadway's shoulder being used by an exercising pedestrian.'

Applying Polzo, supra, the Appellate Division in Powers-Feigel underscored the fact that pedestrians assume certain risks when walking on roadways and that minor depressions in a street do not rise to the level of a dangerous condition under the TCA.

Plaintiff relied on the recent case, Estate of Masi v. Barr, 479 N.J. Super. 144 (App. Div. 2024) to support her contentions. See Pbr21-22. However, Estate of Masi undermines rather than supports Plaintiff's claims. In that case, the Appellate Division reaffirmed that "[i]f it can be shown that public property is

safe unless foreseeable users fail to exercise due care, there is not a dangerous condition for the purposes of the TCA.” Id. citing, Garrison v. Twp. Of Middletown, 154 N.J. 282, 290 (1998). “Further, where the ‘physical characteristics’ of the property themselves would reasonably notify prospective users that their proposed activity will be hazardous, then the plaintiff’s engagement in that activity is not an exercise of due care...” Id. The physical characteristics and location of the alleged depression in this case fall squarely within these principles as the photographs in the record (Pa66-69) confirm that the depression was small and shallow, measuring only 1.5 inches deep at most.

c. The Trial Court Properly Held The Alleged Defect Was a Mere Roadway Imperfection, Not a Dangerous Condition

Finally, the trial court correctly concluded that the alleged depression was an insignificant road defect that did not meet the statutory definition of a dangerous condition. The trial court stated:

Even taking Ms. Benimovich at her word that she tripped over this particular pothole, the Court finds that at less than an inch and a—at an inch a half deep or less, this is—a mere imperfection, doesn’t constitute a dangerous condition. And certainly not one that is actionable in negligence under the New Jersey Tort Claims Act, N.J.S.A. 59:4-1. T46:5-12.

This determination aligns with cases in which New Jersey courts have ruled that minor defects in roadways do not constitute “dangerous conditions”

under the TCA. See Polzo v. County of Essex, 209 N.J. at 75 (holding that a two-foot wide, 1.5-inch depression on the shoulder of a county roadway was not a dangerous condition); see also Polyard v. Terry, 160 N.J. Super. 497, 507 (App. Div. 1978) affd o.b. 79 N.J. 547 (1979) (“potholes in the macadam surface” described as “small areas in the macadam where the concrete subsurface was exposed” were not a dangerous condition as a matter of law and despite plaintiff’s expert report).

Specifically, the Polzo Court held: “Even assuming that the depth of the depression was one-and-one-half inches at the time the road crew surveyed the entire 2.6 mile length of Parsonage Hill Road five weeks before the accident and that the depression would have been obvious to the naked eye on the roadway’s shoulder, still it would not have been obvious to the reasonable observer that the depression presented a dangerous condition as defined in N.J.S.A. 59:4-1.” Id. at 73. In the case at bar, the trial court’s decision correctly followed this precedent, recognizing that a 1.5-inch depression is not a dangerous condition as a matter of law and that municipalities cannot be expected to repair every minor imperfection in a roadway.

However, the rationale of Polzo is even more applicable in the present case because the minor depression here was not on the roadway shoulder—but in the middle of the road, an area intended and designed exclusively for

vehicular traffic. (See Pa66-69 – photographs). If the 1.5-inch depression on the roadway shoulder in Polzo was not a dangerous condition, then a 1.5-inch depression in the middle of the road—where pedestrians are not even expected—certainly does not qualify.

Thus, the trial court properly determined that Plaintiff failed to establish that the alleged depression constituted a “dangerous condition” under the TCA. T44:15-17 (“So, I do make that preliminary finding that – that plaintiff is unable to prove that this is a dangerous condition”).

The defect at issue—measuring at most 1.5 inches in depth—was a minor roadway imperfection that courts have consistently found insufficient to support liability under N.J.S.A. 59:4-2 as a matter of law. Furthermore, the trial court correctly applied Polzo, holding that roads are intended for vehicular traffic, not pedestrians, a pedestrian using a road should use due care and that municipalities are not required to eliminate every minor hazard. Because Plaintiff has failed to demonstrate a genuine issue of material fact regarding the existence of a dangerous condition, the trial court’s ruling should be affirmed.

d. Plaintiff’s Reliance On Atalese Is Misplaced Because The Depression Was In The Middle Of A Rural Roadway, Not In A Designated Pedestrian Or Bicycle Lane

Plaintiff relies heavily on Atalese v. Long Beach Township, 365 N.J. Super. 1 (App. Div. 2003), claiming it is “the most analogous precedent” (Pb12-

13). However, Atalese is easily distinguishable from the present case because the defect in Atalese was located in a “designated pedestrian-bicycle lane (bike lane)”, whereas the minor depression at issue here was located in the middle of a rural roadway, an area meant exclusively for vehicular traffic. Id. at 3.

Moreover, Atalese involved a “significant”, continuous depression “for a distance of approximately one block as a result of apparent settling of a storm drain serviced by three storm grates.” Id. The length of the Atalese defect meant that any pedestrian or bicyclist using the designated lane could not reasonably avoid it. The defect here, by contrast, was a minor imperfection in the middle of the roadway that posed no risk to motorists—the road’s intended users. There was no continuous hazard extending for an entire block. Here, the size and location of the depression meant that it was easily avoidable by any pedestrian who, despite the risks, chose to walk in the roadway.

Furthermore, even if Atalese had some relevance (which it does not), it is an Appellate Division decision, whereas Polzo v. County of Essex, 209 N.J. 51 (2012), is controlling precedent from the New Jersey Supreme Court and is therefore binding. Given that Polzo directly applies to defects on vehicular roadways, it is the more applicable and governing authority, not Atalese.

II. THE TRIAL COURT PROPERLY FOUND THAT DEFENDANTS HAD NEITHER ACTUAL NOR CONSTRUCTIVE NOTICE OF THE DEPRESSION

The trial court correctly found that neither Montvale nor River Vale had actual or constructive notice of the minor depression in the roadway as required under N.J.S.A. 59:4-2. (T46:18 to T50:17). Plaintiff's failure to establish actual or constructive notice is dispositive and independently warrants dismissal of her claims under the New Jersey Tort Claims Act ("TCA").

a. Plaintiff Failed to Establish Actual Notice

To prevail under N.J.S.A. 59:4-2, Plaintiff was required to show that Defendants had actual notice of the specific defect in question. In Norris v. Borough of Leonia, 160 N.J. 427 (1999), the New Jersey Supreme Court held that in order to establish actual notice, the municipality must have received notice of the specific condition which gives rise to the liability. Here, the trial court correctly found that there was no such evidence in the record. As the court stated: "I don't know that the record reflects there was actual notice of this particular pothole or depression, whatever you want to call it." (T13:12-14).

Plaintiff attempted to argue that general pothole reports may have covered this particular depression. However, the trial court explicitly rejected this argument, explaining that generalized references to potholes in the area do not establish actual notice of the specific defect at issue:

Plaintiff has argued that there is a report—that the pothole reports may, in fact, cover this particular pothole. However, the Court finds that that type of argument...will fall short of the type of proofs that are required on summary judgment that would establish that, in fact, Montvale had notice of this particular pothole, and either ignored or possibly remedied it at some time in the past. T46:22 to T47:6.

The only assertion regarding actual notice came from Plaintiff's daughter, Helen Merritt, who never raised this claim during discovery but instead submitted an eleventh-hour self-serving certification after Defendants had already moved for summary judgment. Discovery closed on July 23, 2024 (Pa15). Ms. Merritt's certification, presented for the first time as an exhibit to Plaintiff's opposition to Defendant's Motion for Summary Judgment, is dated August 6, 2024. (Pa170-171).

As defense counsel made clear below:

I would note that, and I'm not implying anything, but it is kind of interesting that we filed our motion for summary judgment making these arguments in July, after, obviously discovery was over with. Then on August 4th was the first time that the daughter said something that was completely new about oh, we reported this. It was out of discovery, there was no way we could have done anything. We couldn't have reopened up the case, taken depositions. It came at the absolute last minute, and is contrary to the evidence that is in existence in this particular case. T34:7-17.

The trial court addressed Plaintiff's reliance on her daughter, Helen Merritt's, belated claim that she reported the depression. Specifically, the trial

court found that Ms. Merritt's assertion was not supported by any evidence in the record:

In the moving papers there was a statement by Helen Merritt, the daughter of the plaintiff, **which is at odds with the testimony of the plaintiff.** Specifically, because in that statement Ms. Merritt states that she notified the municipality numerous times of the ho—the depression at the end of her driveway at 28 Rising Ridge (sic). T47:24 to T48:6 (emphasis added).

Importantly, the trial court noted that there was no record from the municipality or Plaintiff herself to corroborate that any such complaint was ever made:

There is no other evidence that's been presented, other than [Merritt's] statement on this motion record. There's no other indication...that this, in fact, was reported to the municipality, such that the municipality was on actual notice, and such municipality should have taken action to repair it. T48:6-12.

Accordingly, the trial court properly rejected Plaintiff's last-minute assertion of actual notice and found that no genuine issue of material fact existed as to whether Defendants had actual knowledge of the depression:

Therefore, for those reasons, the Court finds that there, in fact, was no actual notice of this, and that there's no reasonable question of fact that there was no reasonable notice here. T48:12-16.

It's important to note that while Merritt's eleventh-hour certification says she reported it, she never says how (Pa170-171). There is no evidence of a phone

call, a letter or an email to the Borough supporting her last-minute certification. Furthermore, Ms. Merritt admitted that she had lived on Hickory Hill since 2012. (Pa170-171).

Recognizing that Plaintiff's case lacked any viable basis on actual or constructive notice, Plaintiff sought to salvage her claim at the eleventh hour by attaching a last-minute certification from Helen Merritt. The trial court properly rejected this tactic, as should this court. See Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999) ("By the same token, bare conclusory assertions in an answering affidavit are insufficient to defeat a meritorious application for summary judgment.").

b. Merritt Certification was Properly Rejected as Untimely and Lacking the Required Certification of Due Diligence Under R. 4:17-7

The trial court properly disregarded the eleventh-hour certification of Helen Merritt because it was submitted after the close of discovery and lacked the mandatory certification of due diligence required by New Jersey Court Rule 4:17-7.

Under New Jersey Court Rule 4:24-1(c), once discovery closes, no further extensions or new evidence submissions are permitted unless the court finds exceptional circumstances. The rule states: "No extension of the discovery

period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown.”

Here, discovery had already closed when Plaintiff submitted Merritt’s certification. Plaintiff never moved for an extension of the discovery period, nor did she demonstrate exceptional circumstances to justify this late submission.

Even if Plaintiff had attempted to amend her discovery responses to include Merritt’s statement, the certification was properly disregarded because it lacked the required certificate of due diligence under R. 4:17-7.

Rule 4:17-7 provides that a party may amend its interrogatory answers after the close of discovery only if it includes a certification that the new information was not available earlier through reasonable diligence. The rule states: “Amendments may be allowed thereafter only if the party seeking to amend certifies therein that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date.” Here, Plaintiff’s failure to disclose Merritt’s statement during the discovery period—despite having every opportunity to do so—warrants its exclusion.

c. *The Trial Court Properly Found Plaintiff Failed to Establish Constructive Notice*

Under N.J.S.A. 59:4-3(b), a public entity has constructive notice if a dangerous condition existed for such a period of time and was so obvious that,

in the exercise of due care, the entity should have discovered it. The trial court correctly held that Plaintiff failed to provide any evidence that the depression met this standard.

Plaintiff's only assertion regarding how long the defect existed came from her own testimony, which suggested that the depression may have been there since the conclusion of winter—approximately six to eight weeks before her fall. (Pa80 at T39:6 to T39:13). The trial court properly rejected this as insufficient to establish constructive notice:

We do have testimony from the plaintiff in her deposition that her daughter told her that the condition was there since the conclusion of winter, okay. And defense counsel argues that that—that was a period of weeks or perhaps two months at the most. During which time, even if the Town had known, that that would not have been enough time to remedy or correct the situation. T47:15-22.

Additionally, Plaintiff pointed to pothole repair records from the Borough and Township in an attempt to argue that Defendants should have known about the condition. However, the trial court properly considered these reports:

As far as constructive notice, the Court notes that there is a pothole repair—pothole report that indicates that certain potholes—that there were potholes on this particular street. The reports spanned a timeframe from 2014 through 2022, and that in each of those years there was, at least, one pothole that was repaired, except with respect to 2021. T48:17

The trial court found that Plaintiff's argument that Defendants' general knowledge of potholes in the area should constitute constructive notice of this specific depression was speculative and unpersuasive:

The mere fact that there were reports, and there were potholes elsewhere on the street is not...sufficient to convince the trier of fact that, in fact, there was constructive notice of this particular depression condition. T49:16-21.

The trial court carefully analyzed the record and unequivocally found that Plaintiff had not met her burden in proving constructive notice:

"And as I mentioned earlier, there was no actual knowledge of this particular condition. And the mere-- the argument that -- that it is possible that this pothole may have been included in one of the potholes that was addressed in earlier years, is not sufficient in this case to -- to convince the Court that it would necessarily raise a difference in the mind of a reasonable juror. There's no evidence that the -- that the Township had notice of this at any point in time or there's no credible evidence that the I'm sorry, competent evidence that they were put on notice or knew that there was a depression on which the plaintiff fell in this particular instance. Or that there was a sufficient amount of time for the municipality in an exercise of due care to discover the condition, and its dangerous character, which is the criteria that is required to be shown in N.J.S.A. 59:4-3b. Therefore, I don't believe that -- I -- I think that the arguments are speculative in nature at best, and I find the plaintiff has not met the burden with respect to the issue of constructive notice." T49:22 to T50:17.

The trial court's reasoning was correct — municipalities cannot be held liable under the TCA simply because a defect might have existed for a few weeks. Courts have consistently held that constructive notice requires more than just the mere passage of time—it requires evidence that the defect was so obvious that the public entity should have discovered and corrected it. See Cherry v. City of Newark, 2017 N.J. Super. Unpub. LEXIS 1206 (App. Div. May 17, 2017) at Pa28-30 (“The main reason for granting summary judgment was the 'lack of evidence regarding how long that pothole existed ... A jury would have to 'engage in guess work and speculation in order to determine how long that pothole existed in or the depression.”); Gaskill v. Active Envt'l Techs., Inc. 360 N.J. Super. 530, 537 (App. Div. 2003) (“[E]ven Plaintiff a resident of the neighborhood who frequently walked down High Street, never noticed the raised grate prior to her fall. If anyone should have been aware of the problem and reported it to the township, it was plaintiff.”).

The trial findings are based on sound legal reasoning and should be upheld by the Appellate Division. Plaintiff's case rests on conjecture and speculation—not on the competent evidence disclosed during the discovery period, which is required to survive summary judgment.

**III. THE TRIAL COURT PROPERLY FOUND
THAT DEFENDANTS ACTION OR INACTION
WAS NOT PALPABLY UNREASONABLE**

Even if Plaintiff had met her burden that a minor middle of the roadway depression constituted a dangerous condition and that Defendants had actual or constructive notice (which they did not), she still would have had to prove that Defendants' failure to remediate the condition was “palpably unreasonable.”

Palpably unreasonable “implies behavior that is patently unacceptable under any given circumstance.” Kolitch v. Lindedahl, 193 N.J. Super. 540 (App. Div. 1984) *affd* 100 N.J. 485, 493 (1985). To meet this requirement of N.J.S.A. 59:4-2, the plaintiff must establish that the public entity acted in an “arbitrary, capricious or outrageous manner.” Johnson v. Essex County, 223 N.J. Super. 239 (Law Div. 1987). “When a public entity acts in a palpably unreasonable manner, it should be ‘obvious that no prudent person would approve of its course of action or inaction.’” Polzo, 209 N.J. at 76. Furthermore, “[t]he duty to refrain from palpably unreasonable conduct differs in degree from the ordinary duty of care that is owed under the negligence standard.” Id.

The TCA’s heightened standard—which differs significantly from the ordinary duty of care under negligence law—reflects the fundamental principle that government agencies must be afforded discretion in allocating resources for infrastructure maintenance. See Polzo, 209 N.J. at 76 (“[A] public entity's

discretionary decisions to act or not to act in the face of competing demands should generally be free from the second-guessing of a coordinate branch of government.”) (quoting Bergen v. Koppenal, 52 N.J. 478, 480 (1968)).

a. The Trial Court Properly Applied Polzo in Finding That a 1.5-Inch Depression in the Middle of the Road Did Not Warrant Priority Repair

In Polzo, the seminal case on the palpable unreasonableness of road depressions, our New Jersey Supreme Court found “that in view of the County's considerable responsibility for road maintenance in a world of limited public resources, the depression here, barely one-and-one-half inches in depth on the roadway's shoulder, might not have been deemed a high priority, even if the County were on notice of its presence.” Id. at 77-78. **Identical reasoning applies here.**

As in *Polzo*, the depression in question was only 1.5 inches deep at most, and Defendants were not on notice of its existence. Just as the Supreme Court in Polzo found that the failure to remediate such a minor depression did not rise to the level of palpable unreasonableness, the trial court here properly reached the same conclusion.

The trial court correctly applied Polzo in holding that municipalities are not required to make roadways risk-free for pedestrians:

The Court finds, however, that when people walk on the roadway, they know that they are walking on a street

that is meant for vehicular traffic, okay. And, therefore, Polzo is applicable, because, again, when—the roadways can have any type of impedi—any type of damage or condition on them. T45:19-24.

The trial court correctly held that Defendants’ failure to repair a slight, unnoticed depression in the middle of a residential roadway was not palpably unreasonable under N.J.S.A. 59:4-2. The New Jersey Tort Claims Act (TCA) sets a high threshold for establishing palpable unreasonableness, which Plaintiff failed to meet. This holding aligns with Polzo’s core principle that public roadways are intended for motor vehicles, not pedestrians or bicycles, and municipalities do not have an absolute duty to make them hazard-free for those who choose to walk or ride on them.

b. Defendants Maintained an Active Road Maintenance Program and Were Not Obligated to Inspect Every Inch of Roadway Daily

Here, Defendants maintained an existing system for roadway maintenance through the shared services agreement between the Borough of Montvale and the Township of River Vale. (Pa123-140.) The law does not impose a burden on municipalities to inspect every inch of roadway for minor depressions.

The trial court recognized that the deposition testimony of Superintendent Campanello established that Defendants “take action to address the roadway issues. The fact that the pothole -- that there is a pothole report reflecting that

repairs are made, and -- repairs are made, and inspections are done of these areas reflect the municipality does, in fact, take such action here.” T51:10-14.

The trial court also credited Superintendent Campanelli’s testimony “that when the pothole is deep enough to damage a vehicle when it goes over it, that is something the municipality will address, okay. Specifically, said when potholes are repaired, if they're large enough to be deemed a danger, and he estimated approximately 3 to 4 feet [sic] deep. And in Mr. Campanello's (sic) view, a depression 1 inch or so deep is not even a considered a pothole, okay.” T51:21 to T52:1.

The trial court emphasized that municipalities must prioritize repairs based on the severity of roadway conditions and are not expected to maintain roadways in a perfectly risk-free condition:

Municipalities have limited funds, and manpower. That is just the nature of municipal work, and municipal existence. Our Appellate Division notes that that is the case as well. And what it means is municipalities have limited resources to attempt to maintain the standard of living in an acceptable way for its residents. T52:3-9.

The trial court also properly recognized that the size of the municipalities and the scope of road maintenance responsibilities further support the finding that Defendants’ conduct was not palpably unreasonable:

Montvale is a municipality approximately 8.3 square miles in size, and the municipality is responsible for maintaining those roads. To -- to I don't think it's

reasonable, and I don't think the record reflects that this -- in fact, that the lack of correction or the filling in of this particular depression, in light of the fact that there was no actual or constructive notice of the same, was palpably unreasonable on the part of the municipality. Therefore, for those reasons, I will grant the municipality's motion for summary judgement. T52:11-19.

New Jersey courts have long recognized that public entities must allocate their limited resources based on the most pressing infrastructure needs. Our Supreme Court in Polzo recognized that the Tort Claims Act “recognizes the difficulties inherent in a public entity's responsibility for maintaining its vast amounts of public property. Thus it is specifically provided that when a public entity exercises or fails to exercise its discretion in determining what action should or should not be taken to protect against the dangerous condition that judgment should only be reversed where it is clear to the court that it was palpably unreasonable.” Id. at 76 (referencing Bergen v. Koppenal, 52 N.J. 478, 480 (1968)).

The Appellate Division in Cruz v. Camden County, 2019 NJ Super Unpub Lexis 385 (App. Div. 2019) (Pa39-43), determined summary judgment was appropriate where plaintiff was injured when she tripped and fell over a pothole in the middle of the roadway that measured 18" in length, 6" in width and 3" in depth.

Specifically, the Cruz Court, relying directly upon Supreme Court precedent of Polvard v. Terry, 160 N.J. Super. 497 (App. Div. 1978), affd o.b., 79 N.J. 547 (1979), found that the Plaintiff failed to show the County was palpably unreasonable because it did not allocate its limited resources for the discovery and repair of a pothole in the middle of the roadway so it would be safer for pedestrians to cross there ... Courts do not have the authority or expertise to dictate to public entities the ideal form of road inspection and repair program, particularly given the limited resources available to them .. In view of the County's considerable responsibility for road maintenance in a world of limited public resources the discovery and repair of the three inch deep pothole might not have been deemed a high priority.” Id. at *12-13.

c. The Trial Court’s Decision Should Be Affirmed as the Alternative Creates An Impossible and Unworkable Burden On Municipalities That is Contrary to Our Established Precedent

The trial court’s well-reasoned decision should be affirmed because Plaintiff has failed to meet the exceptionally high burden of proving that Defendants’ failure to remediate an unnoticed, minor roadway depression was palpably unreasonable under the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:4-2.

Even assuming, arguendo, that Plaintiff had satisfied the first two elements of her claim by proving both a “dangerous condition” and actual or

constructive notice—neither of which she has—she still failed to demonstrate that Defendants' inaction rose to the level of palpable unreasonableness, which requires a showing that their conduct was patently unacceptable, arbitrary, capricious, or outrageous. Kolitch v. Lindedahl, 193 N.J. Super. 540, 549 (App. Div. 1984), *aff'd*, 100 N.J. 485, 493 (1985); Polzo v. Cnty. of Essex, 209 N.J. 51, 76 (2012).

If the Appellate Division were to overturn the trial court's ruling, it would create an unworkable and unrealistic obligation on municipalities to proactively inspect and repair every minor imperfection in their roadways, regardless of notice, risk level, or resource limitations. This would directly contradict the New Jersey Supreme Court's longstanding guidance that “[a] public entity's discretionary decisions to act or not to act in the face of competing demands should generally be free from the second-guessing of a coordinate branch of government.” Polzo, 209 N.J. at 76.

The impracticality of holding municipalities liable for every conceivable roadway imperfection is compounded by real-world conditions. Road surfaces are subject to constant wear, weather-related deterioration, and damage caused by third parties, such as utility companies, private contractors, and even motorists. Unlike sidewalks, which remain relatively stable, roadways are in a constant state of flux, making perfect maintenance impossible.

The Court should reject Plaintiff's attempt to expand dangerous condition liability beyond its reasonable and intended scope. Holding municipalities responsible for every alleged depression in the middle of a roadway sets an impossible and unrealistic standard that would divert resources from essential government functions, increase litigation and costs, and disrupt the careful balance established by the TCA. Public policy must reflect practical realities, and the responsibility for roadway conditions should remain within the current framework, preserving municipal discretion and fiscal sustainability while still ensuring reasonable public safety.

IV. TCA TO BE STRICTLY CONSTRUED TO EFFECTUATE ITS AVOWED PURPOSE OF PUBLIC ENTITY IMMUNITY

Since the inception of the New Jersey Tort Claims Act (hereinafter "TCA") in 1972, a legion of case law has established a powerful legislative mandate that the New Jersey TCA broadly limits public entity liability. Manna v. State 129 N.J. 341, 346 (1992); Rochinsky v. State of N.J. Dept. of Transportation, 110 N.J. 399 (1988); see also, Comment to N.J.S.A. 59:1-2. In fact, case law has made it clear that the Legislature intended the New Jersey TCA to be strictly construed to effectuate its avowed purpose. Hawes v. New Jersey Dept. of Transportation, 232 N.J. Super. 160 (Law Div. 1988), aff'd O.B. 232 N.J. Super. 159 (App. Div. 1988) (emphasis supplied). For this reason, trial

courts have been admonished to be cautious in sanctioning novel causes of action against public entities. Avers v. Jackson Twp., 189 N.J. Super. 561 (Law Div. 1983), aff'd as modified, 202 N.J. Super. 106 (App. Div. 1985), aff'd in part, rev'd in part, 106 N.J. 557, 574-75 (1987).

The New Jersey Supreme Court has specifically advised trial courts, when assessing potential public entity liability under the TCA, to employ an analysis that assumes public entity immunity unless there is a specific provision for liability. Pico v. State, 116 N.J. 55, 59 (1989); Lee v. Doe, 232 N.J. Super. 569, 573 (App. Div. 1989); Garry v. Payne, 224 N.J. Super. 729, 735 (App. Div. 1988); Rosa v. Moore, 221 N.J. Super. 1, 6 (App. Div. 1987); see also, Task Force Commentary and Legislative Comment to N.J.S.A. 59:2-1. With this approach in mind, the Legislature hoped that “the courts will exercise restraint in the acceptance of novel causes of action against public entities.” N.J.S.A. 59:2-1, 1972 Task Force Comment; Brothers v. Highland, 197 N.J. Super. 146, 150 (App. Div. 1981). The Legislature specifically intended that the immunity provisions should supersede the liability provisions. Speziale v. Newark Housing Authority, 193 N.J. Super. 413, 417 (App. Div. 1984).

The Borough of Montvale and the Township of River Vale are included within the definition of a public entity contained in N.J.S.A. 59:1-3, which encompasses “any municipality”. Therefore, the liability, if any, of Defendants,

must rest upon the provisions of N.J.S.A. 59:1-2 et seq. The Legislature in N.J.S.A. 59:1-2 declared:

The Legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity, on the other hand the Legislature recognizes that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done. Consequently, it is hereby declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with fair and uniform principles established herein. All of the provisions of this act should be construed with a view to carry out the above legislative declaration. (Emphasis supplied).

The case law developed thus far has reiterated and reaffirmed the above legislative declaration. See Ball v. New Jersey Bell Telephone Co., 207 N.J. Super. 100, 107-108 (App. Div. 1986) (... the plainly expressed legislative mandate ... is to immunize public bodies except where there is a statutory declaration to the contrary); Kolitch v. Lindedahl, 193 N.J. Super. 540, 546 (App. Div. 1984), aff'd, 100 N.J. 485 (1985). (Immunity is the rule except as expressly provided for in N.J.S.A. 59:1-1, et. seq.); Guerriero v. Palmer, 175 N.J. Super. 1, 4 (App. Div. 1979) (“...the act proceeds from an assumption of immunity subject to any liability provided in the act”); McGowan v. Borough of

Eatontown, 151 N.J. Super. 440, 446 (App. Div. 1977) (“ ... there is no liability except as provided by the Act”); Tower Marine, Inc. v. New Brunswick, 175 N.J. Super. 526, 531 (Ch. Div. 1980) (“The act purports to circumscribe all governmental immunity by stating that (e)xcept as otherwise provided by this act, a public entity is not liable for any injury, whether such injuries arise out of an act or omission of the public entity or a public employee or any other person”).

The “1972 Task Force Comment” to the same section adds that “[t]he basic statutory approach ... shall be that immunity of all governmental bodies in New Jersey is re-established.”

[A]ny liability of a public entity established by this act is subject to any immunity of the public entity and is subject to any defenses that would be available to the public entity if it were a private person. N.J.S.A. 59:2-1(b).

Public entities, such as Defendants are only liable for negligence within the limitations of the TCA, and there is no liability except as expressly provided for by the Act. McGowan v. Borough of Eatontown, 151 N.J. Super. 440, 446 (App. Div. 1977). Under the TCA, New Jersey courts have found immunity, rather than liability, to be the general rule. See, Ritchie v. Cahall, 386 F. Supp. 1207, 1209 (D.N.J. 1974); see also, Speziale v. Newark Housing Authority, supra. (Appellate court must favor immunity provisions over liability when

construing the Act). Essentially, the Act was intended to reestablish sovereign immunity, except in very limited and exceptional circumstances. See, LaBarrie v. Housing Authority of Jersey City, 143 N.J. Super. 61 (Law Div 1976).

V. STANDARD OF REVIEW

a. The Trial Court Properly Applied the Summary Judgment Standard in Dismissing Plaintiff's Complaint with Prejudice

The Appellate Division reviews a grant for summary judgment de novo, using the same standard as the trial court. Driscoll Const. Co., In. v. State Dept. of Transportation, 371 N.J. Super 304, 313 (App. Div. 2004). Summary judgment must be granted if “the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.” R. 4:46-2(c). The trial court’s “function is not . . . to weigh the evidence and determine the truth . . . but to determine whether there is a genuine issue for trial.” Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). The trial judge must consider “whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.” Id.

When the facts present “a single, unavoidable resolution” and the evidence “is so one-sided that one party must prevail as a matter of law,” then a trial court should grant summary judgment. *Id.* Further, the court is to guard “against groundless claims and frivolous defenses,” thus saving the resources of the parties and the court. Brill, 142 N.J. at 541-42. If the non-moving party “points only to disputed issues of fact that are of an insubstantial nature, the proper disposition is summary judgment. *Id.* at 529. And “[b]are conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment.” U.S. Pipe & Foundry Co. v. Am. Arbitration Association, 67 N.J. Super. 384, 399-400 (App. Div. 1961) (citing Gherardi v. Trenton Board of Education, 53 N.J. Super. 349, 358 (App. Div. 1958)).

“By the same token, bare conclusory assertions in an answering affidavit are insufficient to defeat a meritorious application for summary judgment.” Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999).

“Because the dispute here involves the application of the TCA to the facts of this case, we review the determination de novo.” Lee v. Brown, 232 N.J. 114, 126-27 (2018) (referencing State v. Nantambu, 221 N.J. 390, 404 (2015)). “That is, we give ‘deference to the supported factual findings of the trial court, but’ not to its ‘application of legal principles to such factual findings.’” *Id.*

Here the trial court properly applied the standard stating:

In deciding a motion to dismiss for summary judgment, in a case where plaintiff has alleged dangerous condition of roadway, the court must examine the issue pragmatically to determine whether the particular irregularities complained of were such that reasonable minds could differ as to whether they manifested that the roadway was in a dangerous condition. That's Polyard, 160 N.J. Super. at 510. If the evidence is inadequate to meet the standard, the motion should be granted. T40:15-24.

In the case at bar, the undisputed facts establish that the Defendants were not negligent and trial court properly applied the well-established summary judgment standard and correctly dismissed Plaintiff's claims under the TCA.

CONCLUSION

For the foregoing reasons, the trial court properly granted summary judgment in favor of Defendants, Montvale and River Vale. Plaintiff failed to establish any of the necessary elements of her claim under the New Jersey Tort Claims Act (N.J.S.A. 59:4-1, et seq.), including that the alleged 1.5-inch roadway depression constituted a “dangerous condition,” that Defendants had actual or constructive notice of the condition, or that Defendants' alleged failure to remediate it was palpably unreasonable.

Accepting Plaintiff's arguments would effectively impose an impractical and legally unsupported duty on municipalities to inspect and repair every minor imperfection in their roadways—an obligation that New Jersey courts have

consistently rejected. Because Plaintiff has failed to meet her burden under the TCA, and because the trial court's decision was fully supported by the factual record and governing legal principles, this Court should affirm the dismissal of Plaintiff's claims in their entirety.

Respectfully submitted,
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/s/ David J. Guzik

By: _____
DAVID J. GUZIK, ESQ.

Dated: March 20, 2025



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Marie C. Hanley, Clerk
Superior Court of New Jersey
Appellate Division
Hughes Justice Complex
25 West Market Street
P.O. Box 006
Trenton, NJ 08625

April 3, 2025

Re: Benimovich v. Borough of Montvale, et al.
Docket No.: A-000892-24-T1
Appeal of the November 22, 2024 Order of the Honorable
William C. Soukas, J.S.C.
Sat Below: Hon. William C. Soukas, J.S.C.
Attorney of Record: Kris A. Krause, Esq.
ATTORNEY ID # 029672012

Dear Ms. Hanley:

Pursuant to R. 2:6-2(b), please accept this reply letter brief on behalf of Plaintiff/Appellant Galina Benimovich.

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LEGAL ARGUMENT

POINT I

**THE AFFIDAVIT OF HELEN MERRIT IS COMPETENT EVIDENTIAL
MATERIAL THAT THE TRIAL COURT FAILED TO PROPERLY
CONSIDER IN THE LIGHT MOST FAVORABLE TO PLAINTIFF, AS
THE NON-MOVING PARTY. (T8:21-T9:24; T13:2-T14:13; T15:21-T16:22;
T21:17-T22:10; T27:9-T28:14; T33:23-T35:5; T36:3-T37:9; T46:18-T50:17)**

As discussed in Point I of Plaintiff Galina Benimovich's ("Plaintiff") Appellate Brief, motions for Summary Judgment are governed by R. 4:46-2(c):

The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

(emphasis added).

In their opposition to Plaintiff's appeal, Defendant Borough of Montvale and Defendant Township of River Vale (collectively "Defendants") argue that their failure to depose Plaintiff's daughter, Helen Merrit ("Ms. Merrit"), a key witness, identified multiple times in the course of discovery as a person with relevant information, somehow entitles them to strike any knowledge she has about the case from the record before the trial Court. This is wholly unsupported by the rules and cases delineating the summary judgment standard.

The plain language of R. 4:46-2(c) permits trial courts to consider any affidavits filed as a part of the summary judgment motion to determine if there is a genuine issue as to any material fact. Although not directly on point, the New Jersey Supreme Court, in Shelcusky v. Garjulio, 172 N.J. 185, 193-202 (2002), adopted a framework for evaluating affidavits submitted in opposition to a summary judgment motion that contradict the affiant's prior deposition testimony. If submitting an affidavit in opposition to a summary judgment motion was not

allowed, the Supreme Court would not need to have spent nearly ten pages analyzing other Courts' approaches before adopting a framework to evaluate such affidavits. The Supreme Court would simply need to write that it is not proper to consider an affidavit submitted in opposition to a summary judgment motion. No such language is contained in the Shelcusky decision or in any case my research has identified.

Instead, the Shelcusky decision holds that Courts should consider the affidavit of a witness where (1) the initial statement was not inconsistent with the subsequent certification; and (2) the witness had a plausible explanation for any perceived inconsistency in their representations to the Court. Shelcusky, 172 N.J. at 202. Again, while this is not the exact situation before the Court, the Shelcusky decision clearly evidences both an acceptance of the use of affidavits to oppose summary judgment and the Supreme Court's view on the role of a Trial Court on summary judgment where there is an allegation of conflicting statements.

Here, there can be no contradiction with Ms. Merrit's prior testimony because Defendants did not depose Ms. Merrit despite the fact that Plaintiff named her as a witness and described the type of information she may have. Although there was a typo in the last letter of her last name, Ms. Merrit was first named as a witness with relevant information in Plaintiff's Certified Answers to Form A Interrogatories, specifically in her responses to Form A Interrogatories Nos. 16 and 17, which were served on Defendants on or about October 26, 2022. See Pa179-

187 at Pa182. Ms. Merrit was again disclosed as a witness during Plaintiff's March 29, 2023 deposition. See Pa70-84 at Pa75 at T18:15-19:17 and T21:3-25; Pa76-77 at T22:1-26:11; Pa80 at T38:4-39:23.

The record leaves no doubt that Defendants were aware that Ms. Merrit was someone who had relevant knowledge that they would be wise to learn more from. Defendants went as far as to ask Plaintiff for hearsay statements made by Ms. Merrit as to how long the pothole was there, clearly recognizing that Ms. Merrit was a source of important information about the case that Defendant would benefit from learning more about. See Pa80 at T38:19-39:13. See also, N.J.R.E. 801(c) ("Hearsay" means a statement that: (1) the declarant does not make while testifying at the current trial or hearings; and (2) a party offers into evidence to prove the truth of the matter asserted in the statement.").

Additionally, Plaintiff's statement about her recollection of her conversation with Ms. Merrit about how long the pothole existed is not on its face inconsistent with the affidavit Ms. Merrit provided as part of the summary judgment record below. Plaintiff merely stated that she recalled Ms. Merrit telling her that the pothole was not fixed since the winter time. See Pa80 at T39:9-13. This sets a lower limit as to how long the pot hole existed, but it does not exclude the pothole existing prior to that time. Nor was Plaintiff asked how long prior to her deposition that any conversation with Ms. Merrit occurred. It is clear that Plaintiff's testimony

also contains some speculation about Defendants' work to fix potholes in the area. "Maybe they did fix something, but not at this area." See Pa80 at T39:12-13.

When view against the fact that Plaintiff was only visiting Ms. Merrit, did not regularly live in the area or have any first hand knowledge about how long the potholes existed, and was testifying about a conversation that occurred as long as 22 months prior to her deposition, Plaintiff was entitled to the inference that her memory of her one conversation with her daughter about how long the pothole was there, conducted in a casual setting and not as part of a legal proceeding, was incomplete or distorted, while Ms. Merrit's recollection of her own actions about a condition outside of her own home are at the very least a genuine issue of material fact to be determined by the jury.

In addition, to the extent admissible, to the questions about how accurately Plaintiff recalls Ms. Merrit's recollection of how long the pot hole existed, there are details about Ms. Merrit's reporting of the pothole to Defendants that Defendants point out have not been fully fleshed out. The problem for Defendants is that all of these details go to questions of credibility, and not to any topic that is appropriate to the Court's summary judgment analysis.

While Shelcusky permits a Court, on summary judgment, to weigh two sworn statements by the same witness, it is impossible for a Court to decide that there is no genuine issue of material fact when confronted with two statements by two different witnesses, one sworn and the other hearsay, without improperly

weighing the evidence. On summary judgment, 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. Credibility determinations will continue to be made by a jury and not the judge.” Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995) (quotations omitted, emphasis added).

The Trial Court appears to have taken the position that Ms. Merrit’s affidavit alone was insufficient to establish evidence that she reported to Defendants the condition that caused Plaintiff’s fall numerous times. See T47:15-48:16. At oral argument, Plaintiff maintained her position that Ms. Merrit’s recollection would be the stronger evidence, but any weighing of the statements would be the function of the jury. See T27:14-28:14.

As such, it is respectfully submitted that the Affidavit of Helen Merrit was properly before the Trial Court as a part of the summary judgment record, and that the Trial Court committed reversible error when it improperly weighed and discarded the sworn statement of Ms. Merrit on the issue of notice. Plaintiff requests that this Court, on de novo review, reverse the Trial Court’s order granting summary judgment and remand the case back to the Trial Court to be listed for trial.

POINT II

THE TRIAL COURT ERRED IN RELYING UPON DEFENDANTS’ POTHOLE RECORDS TO PROVE DEFENDANTS WERE NOT ON NOTICE OF THE POTHOLE THAT CAUSED PLAINTIFF’S FALL. (T13:8-T15:5; T19:22-T23:7; T25:16-T28:5; T46:18-T47:13; T48:17-T51:1)

As discussed more thoroughly in Point I, supra, the Trial Court improperly weigh issues of credibility in analyzing the issue of notice, and therefore summary judgment was not appropriate. However, it is also worth noting that credibility weighing aside, the Trial Court compounded its error by not following the appropriate evidential standard to evaluate Defendants’ pothole reports as evidence that the particular pothole at issue was never reported to Defendants.

The admissibility of the pothole reports are governed by N.J.R.E. 803(c)(7) and N.J.R.E. 803(c)(8). Both rules are hearsay exceptions that allow for the admissibility of records. N.J.R.E. 803(c)(7) permits a record of a regularly conducted activity to be admitted to prove that the absence of a record proves that the matter did not occur. N.J.R.E. 803(c)(8) permits a public record or report to be admitted where it was made by a public official whose duty was “either to perform the act reported or to observe the act, condition, or event reported and to make the written statement”

Both of these rules, however, conclude with a very important caveat that excludes a factfinder from relying on Defendants’ pothole reports in the way the

Trial Court did. The hearsay exception at N.J.R.E. 803(c)(7) “does not apply if the sources of information or other circumstances indicate that the inference of nonoccurrence or nonexistence is not trustworthy.” In other words, where there is a finding that the record or recordkeeping is untrustworthy, the absence of an entry in the record cannot be relied upon to prove that the matter, in this case the report of the pothole at issue, did not occur or exist. See N.J.R.E. 803(c)(7).

Similarly, the hearsay exception at N.J.R.E. 803(c)(8) “does not apply if the sources of information or other circumstances indicate that such statistical findings are not trustworthy.” In other words, where there is a finding that the record or recordkeeping is untrustworthy, the record cannot be relied upon to prove the data, in this case the frequency of pothole complaints on Hickory Hill. See N.J.R.E. 803(c)(8).

Although the Trial Court did not mention N.J.R.E. 803(c)(7) or N.J.R.E. 803(c)(8) in its opinion, it is clear, on de novo review, that these rules do not allow the Trial Court to rely upon Defendants’ pothole reports as evidence that Defendants were not on notice of the pothole at issue. Critical to this analysis is the fact that no one disputes that Defendants’ Superintendent of the DPW, Richard Campanelli (“Mr. Campanelli”) is not a trustworthy recordkeeper.

Plaintiff explicitly pointed out to the Trial Court that Mr. Campanelli was not a trustworthy recordkeeper. See T22:11-T23:7. Defendants do not attempt to argue that his records are reliable. See Generally, Transcript. Mr. Campanelli

himself admitted that his records were incomplete and unreliable. He testified, “If I knew I had to keep better records with Excel obviously I would have kept the same format. These records again were just for my knowledge.” Pa98 at T51:6-8. He also indicated that the degree to which he chose to make records could depend on how he felt at the time. When asked why there were no record for the entire year of 2018, Mr. Campanelli testified, “I’m not sure. Back in ’18 maybe I didn’t feel like doing it. Maybe it got lost.” Pa98 at T52:8-9. The Trial Court too acknowledged that “Mr. Campanelli is not the paragon of recordkeeping” and Mr. Campanelli’s “recordkeeping may not be -- may not be ideal or perfect.” T49:10-11 and T50:24-25.

Despite this universal agreement between the parties, the witness, and the Trial Court that Mr. Campanelli’s recordkeeping was untrustworthy, the Trial Court relied upon these reports to find that there was no evidence of actual notice or of constructive notice. See T48:17-T52:1. The only appropriate inferences that can be drawn from these pothole reports, especially under the summary judgment standard, are that 1) Defendants’ pothole reports are incomplete, and willfully incomplete at least as it pertains to the year 2018, and 2) despite the incomplete nature of Defendants’ pothole reports, they still provide evidence of widespread and yearslong complaints of potholes in the road at the exact location where Plaintiff fell. It is therefore respectfully submitted that this matter requires a

reversal of the Honorable William C. Soukas’s November 22, 2024 Order Granting Summary Judgment.

POINT III

THE STREET DEFECT AT BAR IS A DANGEROUS CONDITION BECAUSE IT EXISTED ON A RESIDENTIAL STREET WITH NO SIDEWALKS. (T11:11-T12:22; T18:4-T19:21; T23:8-T25:15; T28:18-T30:24; T31:5-T33:22; T39:9-46:12)

Pursuant to N.J.S.A. 59:4-2:

A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred

Multiple cases have been cited by the parties that analyze roadway defects under N.J.S.A. 59:4-2. The analysis in all of these cases centers on “the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred . . .” Defendants, however, have taken the position that roads are always for cars and a public entity is never in a position to reasonably foresee injury to pedestrians if they trip on any kind of roadway.

This position is not supported by the case law, even the cases Defendant relies upon that ruled against their respective plaintiffs. A careful analysis was always undertaken to consider what kind of road the fall down took place on and what alternative routes were available to the plaintiff. Polzo v. County of Essex, 209 N.J. 51 (2012), the case the Trial Court relied heavily on in reaching its

decision, is clear that evidence that a roadway surface is routinely used for other purposes besides vehicular travel, such as bicyclist or pedestrian travel, is something that should be considered in assessing whether there is a “dangerous condition,” particularly when it is coupled with evidence of prior complaints about depressions in the roadway. Polzo, 209 N.J. at 74.

In their Appellate Brief, Defendants point to an unreported case, Cruz v. Camden Ctv., 2019 N.J. Super. Unpub. LEXIS 385 (App. Div. February 19, 2019). See Pa39-43. In Cruz, the plaintiff tripped in a pothole while crossing a “busy two-lane concrete urban roadway in an area of mixed residential and commercial buildings.” Cruz, Pa39 at *2. The plaintiff in Cruz was not crossing the street in a sidewalk and was carrying a couch that obscured her view when she fell. Id. There were no records of any work performed by the DPW in the vicinity of the fall down for ten years. Id. at *3. The Trial Court in Cruz found that the roadway, which again was described as a “busy two-lane concrete urban roadway in an area of mixed residential and commercial buildings,” was generally intended for vehicular use. Id. at *2 and *5. This can be contrasted with the street at issue, which is agreed to be a residential street. The inference can even be made that this street receives as much pedestrian traffic as it does vehicular traffic due to the lack of sidewalks in the area, density of homes, and low vehicular traffic levels.

The matter at bar is not a case where the municipality did not have a history of complaints. It is not some far-ranging, mostly unpopulated stretch of road or a

busy commercial street most traveled by cars. The road at issue is a quiet, residential street that has no sidewalks, but is surrounded by families, including elderly and minor pedestrians, whom Defendants have every reason to believe will be walking through on the roadway of Hickory Hill. This Court, on de novo review, in keeping with prior cases that have analyzed all the relevant factors that determine what reasonably foreseeable uses exists for each individual roadway should therefore find that Plaintiff has met its burden, under the summary judgment standard. The order granting Defendants' motion for summary judgment should therefore be reversed as the question of a dangerous condition is typically one for the jury, Vincitore v. New Jersey Sports & Exposition Authority, 169 N.J. 119, 123 (2001).

CONCLUSION

For all the foregoing reasons, this Appellate Court, applying a de novo review, should reverse the Honorable William C. Soukas's November 22, 2024 order granting Summary Judgment in Favor of Defendants and remand this case back to the Law Division for further proceedings.

Respectfully Submitted,

FREDSON, STATMORE, BITTERMAN, LLC


BY: Kris A. Krause

Dated: April 3, 2025