EVELYN AVILES, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER GARCIA & JEFFREY GARCIA, Plaintiffs, vs. CITY OF HOBOKEN; HOBOKEN POLICE DEPARTMENT; HOBOKEN HOUSING AUTHORITY; JOHN DOES (1-10); ABC COMPANIES (1-10); XYZ GOVERNMENTAL ENTITIES (1-10), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-001199-23 Trial Court Docket No.: HUD-L-2210-23 CIVIL ACTION On Appeal From: Superior Court of New Jersey, Law Division, Civil Part, Hudson County Sat Below: Hon. Anthony V. D'Elia, J.S.C.

BRIEF OF PLAINTIFFS/APPELLANTS

LAW OFFICE OF ERIC J. WARNER, LLC
Eric J. Warner, Esq.
Bar No.: 03651-2006
991 US Highway 22
Suite 200
Bridgewater, NJ 08807
Tel: (201) 403-5937
Fax: (908) 758-1201 (fax)
Email: eric@ejwlawfirm.com
Counsel for Plaintiffs

OF COUNSEL & ON THE BRIEF:
ERIC J. WARNER, ESQ.

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS & RULINGS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Plaintiffs, Evelyn Aviles, individually and as Administrator of the Estate of Christopher Garcia, and Jeffrey Garcia (collectively "Plaintiffs"), brought this action against Defendants, City of Hoboken, Hoboken Police Department, and Hoboken Housing Authority, alleging, *inter alia*, survivorship, wrongful death, and negligent infliction of emotional distress over the shooting and murder of Christopher Garcia ("Decedent" or "Mr. Garcia"), upon real property at or about 501 Marshall Dr Hoboken, NJ 07030 (the "Subject Premises"), which at all relevant times, is and was owned and controlled by Defendants City of Hoboken and Hoboken Housing Authority, and which at all relevant times was patrolled and surveilled (or was supposed to be patrolled and surveilled) by Defendant Hoboken Police Department.

On or about September 25, 2022, the Decedent was shot first in the leg (at or about the Subject Premises) and later in the chest by a patron of an illegal, large, makeshift liquor concession stand, which had been set up on the Subject Premises for months and continuously served alcohol to the residents of the Subject Premises and adjacent affordable housing well into the night and early morning hours. The Decedent's brother, Plaintiff Jeffrey Garcia, was forced to watch his brother be brutally gunned down in acts of senseless violence. At all relevant times, both Defendants failed to protect against a dangerous condition on the Subject Premises – the open and obvious operation of an illegal, large, makeshift liquor concession

stand, causing the public inebriation of dozens of residents and other congregants, resulting in frequent physical fighting and similar mayhem, and eventually resulting in the murder of Mr. Garcia. At all relevant times, the Defendants' employees failed in their ministerial duties to terminate the illegal and ongoing sale of alcohol at the illegal, large, makeshift liquor concession stand by removing it from the Subject Premises, for months prior to the shooting. The illegal, large, makeshift liquor concession stand was routinely set up in plain view, giving Defendants actual and constructive knowledge of its existence before Mr. Garcia was murdered.

The presence of the large, makeshift liquor concession stand on the Subject Premises was illegal, since the sale of alcoholic beverages on the Subject Premises – near a basketball court and playground – was illegal. Plaintiffs alleged facts to support a finding of a dangerous condition on public property – the presence of the illegal, large, makeshift liquor concession stand on the Subject Premises for months before Decedent was shot, for which the Defendants are not immune from liability under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.* ("TCA"). Defendants permitted the physical presence of the illegal, large, makeshift liquor concession stand on the Subject Premises, which created a dangerous condition beyond the "mere presence on public property of persons with criminal intent," as it lured those persons and the public to the Subject Premises for months, leading to Mr. Garcia's murder. For the reasons provided in greater detail below, Plaintiffs respectfully

submit that the lower court's dismissal of Plaintiffs' Complaint with prejudice should be reversed, and the matter remanded back to the lower court for further proceedings.

PROCEDURAL HISTORY

On June 22, 2023, Plaintiffs filed a complaint alleging, *inter alia*, survivorship, wrongful death, and negligent infliction of emotional distress over the shooting and murder of Mr. Garcia, upon the Subject Premises, which at all relevant times, is and was owned and controlled by Defendants City of Hoboken and Hoboken Housing Authority, and which at all relevant times was patrolled and surveilled (or was supposed to be patrolled and surveilled) by Defendant Hoboken Police Department. (P-1.)

On July 12, 2023, Defendant Hoboken Housing Authority answered the Complaint. (P-42.) On July 28, 2023, Defendants City of Hoboken and Hoboken Police Department answered the Complaint. (P-15.) On September 29, 2023, Defendants City of Hoboken and Hoboken Police Department filed their Motion to Dismiss the Complaint pursuant to Rule 4:6-2(e) for failure to state a claim upon which relief could be granted. (P-8.) On October 13, 2023, Defendant Hoboken Housing Authority filed its Motion to Dismiss the Complaint pursuant to Rule 4:6-2(e) for failure to state a claim upon which relief could be granted. (P-36.) On

October 16, 2023, and November 2, 2023, Plaintiffs opposed Defendants' respective Motions to Dismiss.

On November 17, 2023, the lower court held oral argument and on November 22, 2023, granted Defendants' Motions to Dismiss with prejudice. (P-59.)

STATEMENT OF FACTS

On September 25, 2022, the Decedent was shot first in the leg (at or about the Subject Premises) and then later in the chest by a patron of an illegal, large, makeshift liquor concession stand that had been set up for months on the Subject Premises, continuously serving alcohol to the residents of the Subject Premises and adjacent affordable housing well into the night and early hours (P-2, ¶ 2.) The Decedent was taken to Jersey City Medical Center, where he succumbed to his injuries. (P-2, ¶ 3.) The illegal, large, makeshift liquor concession stand was present on the Subject Premises for several months before Decedent was fatally shot. (P-2, ¶ 4.) It was set up in plain view and lured residents to congregate into the early morning hours. (Id.) It enticed residents and the public to become inebriated in public, which often resulted in frequent physical fighting and similar mayhem. (Id.) Defendants City of Hoboken and Hoboken Housing Authority, which owned and controlled the Subject Premises, and Defendant Hoboken Police Department, whose duty it was to patrol the Subject Premises, had actual or constructive knowledge of

the presence of the illegal, large, makeshift liquor concession stand. (P-1-2, ¶¶ 1, 4.) Yet, at no time did Defendants attempt to shut down or in any way charge the proprietor of the illegal, large, makeshift liquor concession stand, despite that fact that it was in plain view. (P-2, ¶ 4.) The illegal, large makeshift liquor concession stand was closely situated to all local public housing projects – in fact, it was located near a basketball court and a playground – and created an unstable and highly dangerous condition on public property, which eventually resulted in the death of Mr. Garcia. (P-2, ¶ 5; P-58.)

LEGAL ARGUMENT

POINT I: THIS COURT SHOULD REVERSE THE LOWER COURT'S GRANT OF DISMISSAL WITH PREJUDICE. (P-59.)

Plaintiffs sufficiently pleaded their causes of action to withstand a motion to dismiss. Specifically, Plaintiffs sufficiently pleaded that the illegal, large, makeshift liquor concession stand on the Subject Premises went beyond merely being the criminal activities of third parties over which Defendants had no control. Plaintiffs sufficiently pleaded that the illegal, large makeshift liquor concession stand was a dangerous condition on public property, which lured residents and the general public to the Subject Premises like moths to a flame, and enticed them to become intoxicated in public, which often resulted in fighting and similar mayhem. Plaintiffs

sufficiently pleaded that Defendants ignored the presence of the illegal, large makeshift liquor for several months before Mr. Garcia was murdered. Plaintiffs sufficiently pleaded that Defendants had actual or constructive knowledge of the presence of the illegal, large, makeshift liquor stand, which Defendants either discovered or should have discovered in the course of surveilling and maintaining the Subject Premises. Thus, Defendants are not automatically entitled to immunity under the under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.* ("TCA"), and a jury should be allowed to decide whether Plaintiffs have satisfied all of the elements of their claims after Plaintiffs have engaged in discovery.

"When reviewing a motion to dismiss on the pleadings, [the Court] must give the plaintiff the benefit of 'every reasonable inference of fact' and read the complaint in the light most favorable to plaintiff." Jenkins v. Region Nine Hous. Corp., 306 N.J. Super. 258, 260 (App. Div. 1997) (quoting Printing Mart-Morristown v. Sharp Electronics, Inc., 116 N.J. 739, 746 (1989)). Moreover, on a motion to dismiss for failure to state a claim upon which relief can be granted, the Court must accord a plaintiff a meticulous and indulgent exam. Cusseaux v. Picket, 279 N.J. Super. 335, 338 (App. Div. 1994).

A motion made under Rule 4:6-2(e) is based on the pleadings themselves. Sellers v. Schonfeld, 270 N.J. Super. 424 (App. Div. 1993). In reviewing a complaint under R. 4:6-2(e), a Court's inquiry is limited to examining the legal sufficiency of

the facts alleged on the face of the complaint. Reider v. State Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). A complaint should not be dismissed under this rule where a cause of action is suggested by the facts and a theory of actionability may be articulated by way of amendment. Printing Mart, 116 N.J. at 746.

At this preliminary stage of the litigation, the Court is concerned merely whether a cause of action is "suggested" by the facts alleged. Leon v. Rite Aid Corp., 340 N.J. Super. 462, 466 (App. Div. 2001) "If a generous reading of the allegations merely suggests a cause of action, the complaint will withstand the motion." F.G. v. MacDonell, 150 N.J. 550, 556 (1997). If the complaint states no basis for relief and discovery would not provide one, dismissal of the complaint is appropriate. Camden County Energy Recovery Assocs., L.P. v. N.J. Dep't of Envtl. Prot., 320 N.J. Super. 59, 64 (1999), aff'd Camden County, 170 N.J. 246 (2001). Ordinarily, as the lower court acknowledged, if a complaint is not sufficiently specific, a dismissal under Rule 4:6-2(e) should be without prejudice with an opportunity for leave to amend. [11/17/23 Transcript of Motion ("Tr."), 12:25-13:3.]

With great respect to the lower court, for the reasons set forth herein, the lower court should be overturned on the dismissal of Plaintiffs' complaint with prejudice and remand the matter back to the lower court to allow Plaintiffs to engage in discovery to prove their claims.

POINT II: THIS COURT SHOULD REVERSE THE LOWER COURT'S DISMISSAL OF PLAINTIFFS' COMPLAINT, WHERE THE LOWER COURT ERRED BY FINDING THAT THE ILLEGAL, LARGE, MAKESHIFT LIQUOR CONCESSION STAND WAS NOT A DANGEROUS CONDITION ON PUBLIC PROPERTY. (P-59.)

The operation of the large, makeshift liquor concession stand on the Subject Premises was illegal, and Plaintiffs adequately pleaded that the presence of the illegal, large, makeshift liquor stand on the Subject Premises created a dangerous condition on public property under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.* ("TCA"). (See P-1-5, ¶¶ 1-5, 9, 12-19, 21-24.) Specifically, N.J.S.A. 59:4-2 provides:

> A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> a. a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> b. a public entity had actual or 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.

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." In order to pose a "'substantial risk of injury' a condition of property cannot be minor, trivial, or insignificant. However, the defect cannot be viewed in a vacuum. Instead, it must be considered together with the anticipated use of the property…" Atalese v. Twp. of Long Beach, 365 N.J. Super. 1, 5 (App. Div. 2003). Whether a property is in a "dangerous condition" is generally a question for the finder of fact. Vincitore v. N.J. Sports & Expo. Auth., 169 N.J. 119, 123 (2001).

The lower court erred by completely ignoring the presence of the illegal, large, makeshift liquor concession stand that Defendants allowed to operate illegally on the Subject Premises for months. Instead, the lower court described the event as a "drive-by shooting that occurred," [Tr., 4:14-15.] something that was factually incorrect:

> Mr. Warner: Actually, Your Honor, we'll – just to start out, it was not a drive-by shooting. One of the individuals who was becoming intoxicated until the – into the early morning hours went to his vehicle to obtain a gun, but he – it was not a drive-by.
>
> The Court: Oh.
>
> Mr. Warner: He then went back back, and then shot my – shot the decedent in the leg, and then in the chest.

> The Court: Okay. So I – that's what I – when I read vehicle, I assumed it was a drive-by. He had a gun –
>
> Mr. Warner: No, sir, no.

[Tr., 6:16-7:3.]

Despite being corrected by undersigned counsel that the incident was not a drive-by shooting, the lower court unfairly characterized the event as merely criminal activity among third parties and completely ignored the presence of the illegal, large makeshift liquor concession stand. [Tr., 4:19-22 ("People would sell liquor, I don't know, maybe do liquor or drugs, get drunk, et cetera, et cetera, et cetera, play basketball, hang out, and a fight breaks out"); see also id., 5:15-18 ("And in addition, selling liquor makes it a dangerous condition requiring some kind of police presence. Did I summarize everybody's arguments accurately enough?")]

By ignoring the presence of the illegal, large, makeshift liquor stand on the Subject Premises and erroneously describing the event as a "drive-by shooting," the lower court respectfully erred by finding that the illegal, large, makeshift liquor concession stand was not a defect in the physical condition of public property that was meant for use as a basketball court and a playground, a defect that lured the public to the Subject Premises to become intoxicated and cause mayhem. [See Tr., 12:7-13:7.] Respectfully, the lower court erred because a "dangerous condition of property may be found to exist when an unreasonable risk of harm is created by a

combination of a defect in the property and the acts of third parties." Roe by M.J. v. N.J. Transit Rail Operations, Inc., 317 N.J. Super. 72, 74-75 (App. Div. 1998), certif. denied, 160 N.J. 89 (1999); see also Saldana v. DiMedio, 275 N.J. Super. 488, 503-04 (App. Div. 1994). As acknowledged by Roe:

> **The cases [including Levin v. County of Salem, 133 N.J. 35 (1993); Rodriguez v. N.J. Sports Exposition Authority, 193 N.J. Super 39 (App. Div. 1983); Setrin v. Glassboro State College, 136 N.J. Super. 329 (App. Div. 1975), all cited with approval by the lower court, (Tr., 11:23-12:16)] are inapposite** since they involved injuries caused not by the condition of the property but by the acts of the injured party himself or the dangerous activities of other persons. **Thus, in those cases, the property itself did not contribute in any way to the causing of the injuries.** The injuries merely happened to occur on public property. Here, plaintiff alleges that the dangerous condition of the property itself enhanced her exposure to the criminal attack.

317 N.J. Super. at 79 (emphasis added). Roe's holding, which was inapposite to several cases cited by the lower court, was not even acknowledged by the lower court at all. [Tr., 11:23-12:16.] In Roe, a twelve-year old girl took a shortcut to a swimming pool through a New Jersey Transit train station gate that was bolted into an open position. The gate opened onto park land under a highway overpass. The area was poorly lit, surrounded by thick vegetation, and had a history, known to the authorities, of criminal assault. The New Jersey Transit route into the park was regularly taken by the public. On the day in question, a man dragged the twelve-year old girl off as she crossed the gate and brutally raped her. 317 N.J. Super. at 82.

The Roe Court concluded that a jury could determine that by bolting its gate open, New Jersey Transit invited the public "to traverse the perilous foot path under the I-280 overpass, thereby substantially enhancing the public's risk of harm." Id. Similar to the open gate in Roe, for several months before Mr. Garcia was murdered, the presence of the illegal, large, makeshift liquor concession stand on the Subject Premises enticed residents and the public to become intoxicated near a basketball court and a playground well into the night and early morning hours, resulting in frequent physical fighting and similar mayhem, thus creating a known dangerous area. The fact that the large, makeshift liquor concession stand was illegal and did not belong anywhere near a basketball court or a playground means that the physical condition of the Subject Premises was defective or dangerous. The large, makeshift liquor concession stand, in full view of the residents and the public, was not "minor, trivial, or insignificant." Atalese, supra, 365 N.J. Super. at 5.

The fact that the makeshift liquor concession stand operated illegally means that it was a danger to all users when operating, whether or not the Decedent and his brother failed to exercise due care by being present at the Subject Premises. "If a public entity's property is dangerous only when used without due care, the property is not in a 'dangerous condition.'" Garrison v. Twp. of Middletown, 154 N.J. 282, 287 (1998). "When the property poses a danger to all users," however, "an injured party may establish that property was in a dangerous condition notwithstanding his

or her failure to exercise due care." Id. at 292. The test to assess whether those involved in bringing about an injury to another were exercising due care is two-fold. Once a dangerous condition is found to exist, a court must determine: (1) "whether the property poses a danger to the general public when used in [a] normal, foreseeable manner," and (2) "whether the nature of the … activity is 'so objectively unreasonable' that the condition of the property cannot reasonably be said to have caused the injury." Vincitore, supra, 169 N.J. at 125. The Garrison Court explained that use of the subject public property must be "objectively reasonable from the community perspective" to be considered as used "with due care." 154 N.J. at 291. The Garrison Court also clarified that "'used with due care' refers not to the conduct of the injured party, but to the objectively reasonable use by the public generally." Id. Accordingly, whether a member of the public acted with due care on public property depends on whether the property was used in a reasonably foreseeable manner. Buddy v. Knapp, 469 N.J. Super. 168, 198 (App. Div. 2021).

Since the large, makeshift liquor concession stand was illegal, its physical presence on the Subject Premises was not reasonably foreseeable, nor was the presence of intoxicated patrons lured to the Subject Premises at late hours of the night and early morning hours. The illegal, large, makeshift liquor concession stand was a danger to all users of the Subject Premises, whether or not they acted with due care. See Garrison, supra, 154 N.J. at 297. The acts of the intoxicated patrons,

including the one that murdered Mr. Garcia, do not absolve Defendants of liability. See Saldana, supra, 275 N.J. Super. at 503 (holding that independent intervening acts did not absolve the city from liability as a landowner for the condition of the property, which, together with the intervening acts, caused the damage); cf. Roe, supra, 317 N.J. Super. at 80 (intervening acts of a rapist did not absolve the public entity from liability).

Plaintiffs adequately pleaded all the elements required to establish Defendants' liability for a dangerous condition on public property under N.J.S.A. 59:4-2, and the resolution of these elements are findings of fact that should be left to a jury. See, e.g., Foster v. Newark Housing Authority, 389 N.J. Super. 60, 87 (App. Div. 2006). A jury could reasonably find that Mr. Garcia's murder was proximately caused by the dangerous condition of a large, makeshift liquor concession stand illegally operating on the Defendants' property for months; that Mr. Garcia's murder by an intoxicated patron of the illegal, large, makeshift liquor concession stand was a reasonably foreseeable risk; that the dangerous condition was caused by a negligent employee of the Defendants, or that Defendants had actual or constructive notice of the dangerous condition for a sufficient period of time to have corrected it, and the Defendants' conduct in failing to do so was "palpably unreasonable." See Vincitore, supra, 169 N.J. at 125; Foster, supra, 389 N.J. Super. at 87; Roe, supra, 317 N.J. Super. at 77-78. In Foster, the outer door to a Newark Housing Authority residential

complex "had a lock that the Housing Authority had installed but had not made operational and [] the Housing Authority had, in other ways, negligently failed to provide adequate security." 389 N.J. Super. at 63-64. The plaintiff was a police officer who entered the building with a female victim to accompany her to her apartment to obtain evidence against the victim's ex-boyfriend. The victim had to use her key to enter her apartment while her ex-boyfriend had entered the building through its unlocked door and managed to break into her apartment. When the police officer escorted the victim into her apartment, the ex-boyfriend repeatedly shot the police officer without provocation. 389 N.J. Super. at 64-65. The Foster Court found:

> In this case, the police officer was injured at an unlawful incident that arguably resulted, in part, from the Housing Authority's negligent conduct in failing to provide a working lock for the building's outside door….Unquestionably, a jury could find that the failure to provide a lock for the front entrance of a building was a dangerous condition of the property….And the jury could also find that [the police officer's] injuries were proximately caused by the dangerous condition; that in the context of this case this was a reasonably foreseeable risk; that the dangerous condition was the result of the public entity's negligence; and that the public entity had actual notice of the dangerous condition for a sufficient period of time to have corrected it.

389 N.J. Super. at 67, 68-69 (internal citations omitted).

Plaintiffs have adequately pleaded that the illegal, large, makeshift liquor concession stand on the Subject Premises was a defect in the physical condition of the Subject Premises, causing a dangerous condition on public property, for which

Defendants could be liable under the TCA. This Court should respectfully reverse the lower court's grant of dismissal of Plaintiffs' Complaint with prejudice and remand the matter back to the lower court for further proceedings.

POINT III: PLAINTIFFS ADEQUATELY PLEADED THAT DEFENDANTS HAD ACTUAL OR CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION ON PUBLIC PROPERTY (P-59.)

Plaintiffs adequately pleaded that the illegal, large, makeshift liquor concession stand was routinely set up in plain view on the Subject Premises over a period of several months before Mr. Garcia was murdered, giving Defendants actual or constructive notice pursuant to N.J.S.A. 59:4-2(b). (See P-1-3, ¶¶ 2, 4, 5, 12-13; see also P-65.) N.J.S.A. 59:4-3 provides:

> a. A public entity shall be deemed to have actual notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.
>
> b. A public entity shall be deemed to have constructive notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character.

Similar to the open gate in Roe, which New Jersey Transit knew or should have known invited the public into a known dangerous area, 317 N.J. Super. at 82, the illegal, large, makeshift liquor concession stand, which operated for several months

on the Subject Premises, was "of such an obvious nature," that Defendants "should have discovered the condition and its dangerous character." N.J.S.A. 59:4-3(b).

Thus, Defendants are liable unless the failure to protect against the dangerous condition was not "palpably unreasonable." As to whether Defendants' conduct was "palpably unreasonable," that question should also be left to a jury. Vincitore, supra, 169 N.J. at 130. "Protect against" includes "repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition." N.J.S.A. 59:4-1(b). "Palpably unreasonable" means "behavior that is patently unacceptable under any given circumstance." Muhammad v. N.J. Transit, 176 N.J. 185, 195 (2003) (quoting Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985)). The Roe Court held that the conduct of New Jersey Transit when it bolted open a gate, thereby inviting the plaintiff to enter a known dangerous area where she was brutally raped, could be found to have been palpably unreasonable. 317 N.J. Super. at 82. The Saldana Court held that a jury should determine whether the City of Camden was palpably unreasonable when it failed to secure dilapidated, abandoned city buildings after a third party started a fire in one of them. 275 N.J. Super. at 488. The Foster Court held that whether the Newark Housing Authority's failure to provide a lock for the front entrance of an apartment building, enabling a nonresident to enter and shoot a police officer accompanying a tenant, was palpably unreasonable should be left to the jury. 389 N.J. Super. at 87.

Accordingly, this Court should respectfully reverse the lower court's grant of dismissal of Plaintiffs' Complaint with prejudice and remand the matter back to the lower court for further proceedings.

POINT IV: PLAINTIFFS ADEQUATELY PLEADED THAT DEFENDANTS' EMPLOYEES FAILED IN THEIR MINISTERIAL DUTIES (P-59.)

To the extent that Defendants' failure to shut down the illegal, makeshift liquor concession stand was due to a negligent or wrongful act or omission of one of their employees pursuant to N.J.S.A. 59:4-2(a), the lower court erred by finding that Defendants have immunity and are not liable for failing to provide supervision of the Subject Premises. The lower court respectfully erred by finding that Defendants' employees' failure to remedy the dangerous condition of the large, illegal, makeshift liquor concession stand on the Subject Premises was discretionary instead of ministerial, and that Defendants did not have actual or constructive notice of the presence of the illegal, large makeshift liquor concession stand that Defendants allowed to operate on the Subject Premises for months before Mr. Garcia was murdered. This is because the lower court erred by completely ignoring the presence of the illegal, large makeshift liquor concession stand on the Subject Premises, as pleaded in the Complaint, erroneously characterizing the incident as a "drive-by shooting." [Tr., 4:15.]

"The standard for liability under the TCA depends on whether the conduct of individuals acting on behalf of the public entity was ministerial or discretionary." Henebema v. S. Jersey Transp. Auth., 219 N.J. 481, 490 (2014) (citing N.J.S.A. 59:2-3(d)). When a public entity's or employee's actions are discretionary, liability is imposed only for "palpably unreasonable conduct." Id. at 495. Liability for ministerial actions, in contrast, "is evaluated based on an ordinary negligence standard." Id. at 490. "Nothing in [N.J.S.A. 59:2-3] shall exonerate a public entity for negligence arising out of the acts or omissions of its employees in carrying out their ministerial functions." N.J.S.A. 59:2-3d; see also Costa v. Josey, 83 N.J. 49, 54-55 (1980) (cited with approval by Coyne v. N.J. Dept. of Transport., 182 N.J. 481, 489 (2005)).

The TCA does not define "discretionary act" or "ministerial act." Gonzalez v. City of Jersey City, 247 N.J. 551, 571 (2021). The Supreme Court of New Jersey has "made clear" that:

> the "exercise of … discretion" in N.J.S.A. 59:2-3(a) refers to actual, high-level policymaking decisions involving the balancing of competing considerations. Such decisions have been traditionally entrusted to coordinate branches of government, and courts, utilizing standard tort principles, are ill-equipped to interfere with them. These discretionary determinations likely include such decisions as "whether to utilize the Department's resources and expend funds for the maintenance of [a] road; whether to repair the road by patching or resurfacing, [and] what roads should be repaired…" Once it is determined that a maintenance program involving resurfacing will be

> undertaken, however, the government will ordinarily be held to the standard of care set forth in N.J.S.A. 59:4-2. Although the exercise of some discretion may still be involved (e.g., the transportation planners may choose one resurfacing plan over another), the immunity rule will protect only basic policy determinations.

Coyne, supra, 182 N.J. at 489-90 (citing Costa, supra, 83 N.J. at 55 (internal citation omitted)). Ministerial acts, in contrast, are those "which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done." Gonzalez, supra, 247 N.J. at 571-72 (internal citations omitted). Such actions are not immunized even when they may entail "[o]perational judgments," such as "when, where and how" to carry out a required duty." Id. at 572 (internal citations omitted).

In Coyne, the Department of Transportation ("DOT") argued that its road crew's behavior consonant with the DOT's Safety Manual automatically immunized that behavior. The Coyne Court disagreed, finding that "[s]traightforward logic compels the conclusion that the State cannot, under the guise of engaging in a discretionary act, delegate to a road crew the protections from suit afforded only to policy makers." 182 N.J. at 492. The Coyne Court further explained:

> That the discretionary function immunity should be limited to actual policymaking is further supported by practical considerations. It is apparent that a literal interpretation of the term "discretion" would effectively exempt from the operation of the [TCA] *all* government

> action unless it resulted from mere inadvertence. Almost all official conduct, no matter how ministerial, involves the exercise of some judgment and decision-making. To construe [*N.J.S.A.* 59:2-3a] that broadly, however, would in effect eliminate most of the liability which the Legislature clearly intended to permit when it enacted the statute.

Id. (citing Costa, supra, 83 N.J. at 60 (emphasis in original)).

Similar to the Coyne Court's determination that the DOT's highway cleaning operations were ministerial, Defendants' duty to shut down the illegal, large, makeshift liquor concession stand on the Subject Premises was ministerial, not discretionary. The reasoning of McGowan v. Borough of Eatontown, 151 N.J. Super. 440 (App. Div. 1977) may also be instructive. In McGowan, the plaintiff alleged that ice on the roadway caused him to lose control of his car and presented evidence that the State had prior actual knowledge of icy accumulations at that location on the highway. 151 N.J. Super. at 444-45. The Appellate Division held that the weather-immunity provision of the TCA would not bar plaintiff's complaint of negligent maintenance of a highway because the legislative comment to that provision:

> [S]uggests a duty on the public entity . . . where the existing condition constitutes a "trap" to a person otherwise using due care. . . . We do not deem the Legislature to have considered the public entitled to any less warning where the [dangerous condition] recurs predictably and periodically and the public entity is on notice of this likelihood, than in a situation where the [dangerous condition] consists of a single passing episode.

151 N.J. Super. at 450.

Defendants argued that their failure to notice and remove the illegal, large, makeshift liquor concession stand on the Subject Premises boils down to an allocation of resources, i.e., discretionary. [Tr., 6:1-13.] However, if Defendants had received prior complaints or reports of prior fights or other mayhem at the Subject Premises due to the presence of the illegal, large, makeshift liquor concession stand, the analysis would be different, i.e., ministerial. Garrison, supra, 154 N.J. at 285; cf. Foster, supra, 389 N.J. Super. at 68-69 (holding that a jury could find that the defendant housing authority was negligent in failing to provide a lock for the front entrance of a building and had actual notice of the dangerous condition for a sufficient period of time to have corrected it).

To the extent that Defendants assigned one or more of their employees to patrol or otherwise monitor the condition of the Subject Premises, the TCA does not protect Defendants from the results of the negligent performance of its employees' ministerial duties. Shore v. Housing Authority of Harrison, 208 N.J. Super. 348, 350 (App. Div. 1986). In Shore, the housing authority operated two adjacent public housing projects, both of which were patrolled by a security service provided by two non-police personnel. Id. The public entity conceded that its relationship with the security guard was that of employer and employee, and the employee was providing a police function. Id. The Shore plaintiff was injured while attempting to dodge a

firecracker thrown at her by a juvenile on the premises owned by the housing authority. Id. at 351. The plaintiff alleged that the security guard was not at his assigned post at the time of the incident. Id. Similar to the lower court's ruling in the instant case, in granting the housing authority's motion for summary judgment, the trial court in Shore reasoned that the public entity was immune because the employee's negligent performance of his patrol duties was nothing more than the failure of the housing authority to provide police protection service. Id. The Appellate Division disagreed, holding that "there is a distinction between the failure to provide police protection service, or sufficient police protection service, and the negligent performance by a police officer of his assigned duties. The latter is not immunized by N.J.S.A. 59:5-4." Id. Accordingly, this Court should respectfully reverse the lower court's grant of dismissal of Plaintiffs' Complaint with prejudice with respect to Defendants City of Hoboken and Hoboken Housing Authority and remand the matter back to the lower court for further proceedings.

With respect to Defendant Hoboken Police Department, police officers observing the presence of the illegal, large, makeshift liquor concession stand and its intoxicated patrons would have a duty to shut it down, and this act would be ministerial. The Supreme Court of New Jersey has found that police officers have a duty to respond to accident scenes and render assistance, and such an act would be ministerial. Gonzalez, supra, 247 N.J. at 572. The Supreme Court of New Jersey has

found that an officer's conduct during a car chase was not immunized as discretionary because "[t]he officer's conduct, comprised of the decision whether to pursue, how to pursue, and whether to continue to pursue, is … infinitely distant from high-level policy or planning decisions." Tice v. Cramer, 133 N.J. 347, 351 (1993). Police officers, faced with reports of violent and intoxicated persons causing a fight similar to those at the illegal, large, makeshift liquor concession stand, also have a duty to respond and investigate it, and this act would be ministerial. See Rooster Bar LLC v. Borough of Cliffside Park, Docket No. A-1022-12T1, at *11-12 (N.J. Super. App. Div. Nov. 1, 2013) ("[I]t is reasonable for a [police] officer to patrol outside a [legally operating] bar at closing time so as to observe patrons leaving and prevent them from driving while intoxicated . . . faced with a report of a fight in which a knife was involved, the police had a duty to respond and investigate it.") (P-80.) Accordingly, this Court should respectfully reverse the lower court's grant of dismissal of Plaintiffs' Complaint with prejudice with respect to Defendant Hoboken Police Department and remand the matter back to the lower court for further proceedings.

The lower court erred by characterizing Plaintiffs' arguments as "allocation of police force, et cetera," [Tr., 6:6-7] and simply "that [Defendants] should have had cops there." [Tr., 9:19-20.] The lower court further erred by finding "[t]here is no prescribed manner for how they should have dealt with liquor on a basketball

court." [Tr., 10:8-10.] The lower court mischaracterized Plaintiffs' arguments, which were: 1) Defendants had actual or constructive notice of the illegal, large, makeshift liquor concession stand due to its presence on the Subject Premises for several months before Mr. Garcia's murder, and 2) upon discovering the presence of the illegal, large, makeshift liquor concession stand, Defendants would have a duty to shut down the large, makeshift liquor concession stand because it was illegal. While the allocation of resources to maintain and patrol the Subject Premises is discretionary, the duty to shut down the illegal, large, makeshift liquor concession stand once discovered was ministerial. Plaintiffs sufficiently pleaded the distinction in their Complaint and are entitled to discovery to determine what resources were allocated to maintain and surveil the Subject Premises that would have discovered the illegal, large, makeshift liquor concession stand before Mr. Garcia was murdered, and whether there were prior reports of fights or other mayhem due to its presence on the Subject Premises.

CONCLUSION

This Court should respectfully reverse the lower court's grant of dismissal of Plaintiffs' Complaint with prejudice and remand the matter back to the lower court for further proceedings.

LAW OFFICE OF ERIC J. WARNER, LLC
Attorney for Plaintiffs

By:_____
Eric J. Warner, Esq.

Dated: February 2, 2024

EVELYN AVILES, individually and as Administrator of the Estate of Christopher Garcia, & JEFFREY GARCIA ***, Plaintiff-Appellant(s),*** v. CITY OF HOBOKEN; HOBOKEN POLICE DEPARTMENT; HOBOKEN HOUSING AUTHORITY; JOHN DOES (1-10); ABC COMPANIES (1-10); XYZ GOVERNMENTAL ENTITIES (1-10) ***, Defendant-Respondent(s).***	Superior Court of New Jersey APPELLATE DIVISION Appellate Division Docket No.: A-1199-23 Civil Action ON APPEAL FROM: Superior Court of New Jersey Law Division-Hudson County Docket No.: HUD-L-2210-23 SAT BELOW: Hon. Anthony V. D'Elia, J.S.C.

BRIEF of DEFENDANT-RESPONDENT HOBOKEN HOUSING AUTHORITY

KEENAN & DORIS, LLC
71 Union Avenue, Suite 105
Rutherford, New Jersey 07070
(T): (201) 355-8110
(F): (201) 355-8118
(E): idoris@keenandoris.com
(E): dscheidel@keenandoris.com
Our File No. 1011-27
Attorneys for Defendant-Respondent Hoboken Housing Authority

Date Submitted: May 10, 2024

On the Brief and Of Counsel:
Ian C. Doris, Esq. (022481993)

On the Brief:
David F. Scheidel II, Esq. (216252019)

TABLE OF CONTENTS

Page

TABLE OF JUDGMENTS, ORDERS AND RULINGS

TABLE OF AUTHORITIES

CASES **Page**

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This matter arises out of an appeal by Plaintiff-Appellants, Evelyn Aviles, individually and as administrator of the Estate of Christopher Garcia, and Jeffrey Garcia (hereinafter collectively "Plaintiffs"), of the Trial Court's Order dismissing Plaintiffs' Complaint with prejudice for failure to state a claim upon which relief can be granted.

Plaintiffs' Complaint alleges claims against Defendant-Respondents, City of Hoboken, Hoboken Police Department (collectively "Hoboken") and Hoboken Housing Authority (hereinafter "HHA"), for *inter-alia* survivorship and wrongful death. Plaintiffs allege that Christopher Garcia (deceased) was murdered by a third-party as result of a "makeshift stand routinely operated for the illegal sale of alcoholic beverages" located on public property. Plaintiffs argue that this "makeshift stand" ***alone*** is a dangerous condition of public property within the meaning of the Tort Claims Act (hereinafter "TCA") and therefore Plaintiffs' Complaint should not have been dismissed.

Plaintiffs' contention that this "makeshift stand" alone is a dangerous condition is inapposite to the TCA and its longstanding interpretive caselaw because this "makeshift stand" is, at best, an activity, *not* a condition of public property. As public entities the Defendants are entitled to the "presumption of

immunity" granted to same pursuant to the terms of the New Jersey Tort Claims Act.

The test for determining if an *activity* is a dangerous condition of public property requires Plaintiffs to show ***both*** (1) a *defect* of the public property *itself* ***and*** (2) that the activity was reasonably foreseeable. Only this ***combination*** can bring an activity, such as the one plead herein, within the meaning of the TCA. However, that is not where the test ends, but is merely a threshold issue. Plaintiffs are still obligated to satisfy all four of the other prongs of the dangerous condition test to succeed on the merits of their case; not to mention the additional grants of immunity afforded to the municipal Defendants in this matter. Plaintiffs simply cannot overcome this threshold issue nor can Plaintiffs overcome the remaining immunities to succeed on their claims.

In the matter at bar, Plaintiffs have not, cannot and will never be able to show that there was a **defect** of the property itself that contributed to the death of Mr. Garcia. Furthermore, Plaintiffs have not, cannot and will never be able to prove that the admitted illegal activity is a reasonably foreseeable use of the property. Plaintiffs have failed in their burden to plead sufficient facts to constitute *inter-alia* a *prima facie* case of liability based on a "dangerous condition" of public property under N.J.S.A. 59:4-2 and no amount of discovery will change this fact.

Accordingly, for the reasons stated herein, this Court should AFFIRM the decision of the Trial Court as a result of the complete dearth of facts necessary (and the inability of discovery to show otherwise) for Plaintiffs to assert a cognizable claim.

PROCEDURAL HISTORY

On June 22, 2023, Plaintiff filed their Complaint alleging *inter-alia* that a "dangerous condition" of public property was the cause of the death of Christopher Garcia by an unknown third-party. (See P1-P7).

On July 12, 2023, Defendant, Hoboken Housing Authority, filed their Answer (see P42-P56) and on July 28, 2023, Defendants, City of Hoboken and Hoboken Police Department, filed their Answer (see P15-P35).

On September 29, 2023, Hoboken filed their Motion to Dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be Granted (see P10-P35) and on October 13, 2023, HHA filed their Motion to Dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted (see P36-P58). Subsequently, Plaintiff filed their Opposition to both Defendants' Motions and Defendants filed their respective Replies.

On November 17, 2023, the Trial Court heard Oral Argument on both Defendants' Motions and rendered an Oral Decision on the record. (See T1-T14).

On November 22, 2023, the Trial Court entered an Order dismissing with prejudice Plaintiff's Complaint for the reasons set forth on the record. (See P59-P60).

This Appeal followed.

STATEMENT OF FACTS

This matter arises out of the tragic death of Christopher Garcia (hereinafter "Mr. Garcia") by an *unidentified third-party* which occurred on September 25, 2022. (See P1, ¶1).

The death of Mr. Garcia occurred in the public space at or about the outdoor public basketball court located at 501 Marshall Drive in Hoboken, New Jersey at approximately 3:00AM. (See P1, ¶1; P3, ¶¶ 13-14).

On or about September 25, 2022, residents and/or other unidentified third-persons were allegedly engaging in **illegal** activity by selling, purchasing and/or consuming alcoholic beverages at or about the outdoor public basketball court located at 501 Marshall Drive. (See P2, ¶¶2, 4-5; P3, ¶¶12-14).

Selling, purchasing and consuming alcoholic beverages on public grounds or in public parks is illegal in Hoboken. See Alcoholic Beverages, HOBOKEN MUNICIPAL CODE, ch. 68, §68-13.

On the aforementioned date, residents and/or other unidentified third-persons, including Christopher Garcia, were allegedly also engaging in physical altercations with each other. (See P3, ¶15-16).

Mr. Garcia intervened in one such physical altercation and engaged with an unidentified person – who will ultimately be the individual that murders Mr. Garcia – in an effort to "quell the shooter's aggression." (See P3, ¶15).

During the physical altercation, Plaintiffs admit that Mr. Garcia "punched" the unidentified shooter in the face prior to being shot. (See P3, ¶16). The unidentified shooter then deliberately sought out his own vehicle to obtain his weapon (*i.e.*, a firearm). (See P3, ¶16).

After the unidentified shooter obtained the weapon (*i.e.*, the firearm), the unidentified shooter hunted down Mr. Garcia with the intent to do him grievous harm and proceeded to discharge his weapon at and/or into Mr. Garcia multiple times. (See P3, ¶16; P4, ¶¶17-18).

Christopher Garcia ultimately died as a direct result of multiple gunshot wounds caused by the unidentified shooter with whom Mr. Garcia engaged in a physical altercation earlier that same day. (See P4, ¶18).

On June 22, 2023, Plaintiffs filed a three (3) Count Complaint alleging causes of action as the result of an alleged "dangerous condition" of public property against Defendants, City of Hoboken, Hoboken Police Department and Hoboken Housing Authority. (See P1-P7).

Plaintiffs allege that the "dangerous condition" of public property **are** the illegal activities themselves, **not** a defect in the property. (See P4, ¶21).

Plaintiffs ***do not*** allege any facts that even appear to suggest the presence of a defect in the physical property itself, *e.g.*, a declivity in the surface of the basketball court or playground near to where the incident occurred. (See P1-P7).

Plaintiffs further allege that the location of the illegal activities (*i.e.*, selling, purchasing and/or consuming alcoholic beverages) was a public recreational facility, *i.e.*, the "501 Marshall Drive Basketball Court." (See P3, ¶13).

Further, none of the facts pled in Plaintiffs' Complaint suggest that HHA approved of, endorsed, acquiesced, participated in, *etc.* the illegal activity(ies) of selling, purchasing and/or consumption of alcoholic beverages on public property. (See P1-P7). In fact, HHA is prohibited from selling alcohol in a public building and/or on public property. See N.J.S.A. 33:1-42.

Additionally, the facts pled in Plaintiffs' Complaint plainly show that there was an intervening cause (*i.e.*, the physical altercation between Mr. Garica and the unidentified shooter) creating a clear separation between Plaintiffs' injuries and the alleged "dangerous condition" of public property. (See P3, ¶¶15-16; P4, ¶¶17-18).

HHA did not approve of, endorse, allow, acquiesce or participate in the illegal action(s) (*i.e.*, *inter-alia* fighting and shooting) of third-parties, including Christopher Garcia, which ultimately resulted in the death of Mr. Garcia on public property. (See P1-P7).

HHA simply owned the property where such illegal activities and/or actions occurred, which does not in-and-of-itself create liability.

LEGAL ARGUMENT

I. THE STANDARD OF REVIEW.

Motions pursuant to Rule 4:6-2(e) for failure to state a claim upon which relief can be granted are reviewed *de novo*. See, e.g., Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (citing Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019)). "A reviewing court must examine 'the **legal sufficiency of the facts alleged** on the face of the complaint,' giving the plaintiff the benefit of 'every reasonable inference of fact.' Id. (citing Dimitrakopoulos, 237 N.J. at 107 (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989))) (emphasis added).

"The complaint must be searched thoroughly 'and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" Id. (citing Printing Mart, 116 N.J. at 746 (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957))). "'Nonetheless, if the complaint states no claim that supports relief, and discovery will not give rise to such a claim, the action should be dismissed.'" Id. (quoting Dimitrakopoulos, 237 N.J. at 107).

While "dismissals under *Rule* 4:6-2(e) are ordinarily without prejudice…a dismissal with prejudice is 'mandated where the factual allegations are palpably

insufficient to support a claim upon which relief can be granted,' [] or if 'discovery will not give rise to such a claim[.]' See Mac Property Group LLC & The Cake Boutique LLC v. Selective Fire and Cas. Ins. Co., 473 N.J. Super. 1, 17 (App. Div. 2022) (quoting Rieder v. State, 221 N.J. Super. 547, 552 (App. Div. 1987) and Dimitrakopoulos 237 N.J. at 107)).

The Court Below properly dismissed this matter with prejudice because "the factual allegations are palpably insufficient to support a claim upon which relief can be granted" ***and*** "discovery will not give rise to such a claim." A thorough search of Plaintiffs' Complaint can only yield one conclusion: there is no "fundament of a cause of action" which may "be gleaned" from any of the allegations contained in the Complaint. As described in detail below Plaintiff **does not** plead any ***defect of the physical property itself*** in combination with the alleged (illegal) activities which occurred as required by the dangerous condition provision of the TCA and longstanding caselaw interpreting same.

II. THE COURT BELOW DID NOT ERR BY DETERMINING THAT NO "DANGEROUS CONDITION" OF PUBLIC PROPERTY EXISTED. (T11-T12)

In the case at bar, Plaintiffs cannot establish (even if discovery was permitted) the necessary elements of a "dangerous condition" of public property because *inter-alia* the "dangerous condition" at issue is *not a condition of public*

property, but rather an illegal activity and/or action by third-parties that merely occurred on public property.

The Tort Claims Act, N.J.S.A. 59:1-1, *et seq*, sets forth the immunities and limited conditions under which a public entity may be found liable. Specifically, liability for an alleged dangerous condition of a public entity's property is as follows:

> A public entity is liable for injury caused by a ***condition*** **of its property** if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> a. a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> b. a public entity had actual or 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.

N.J.S.A. 59:4-2 (emphasis added). The TCA further defines "dangerous condition" as follows:

> [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 (emphasis added). New Jersey Courts, as commanded by the legislature, are required to *strictly interpret* the principals set forth in the TCA.

In following this strict interpretation, the New Jersey Supreme Court in Polyard v. Terry, 160 N.J. Super. 497 (App. Div. 1978) (aff'd, 79 N.J. 547 (1979)), held that in order to prevail, a plaintiff **must prove ALL five elements** of a dangerous condition pursuant to the TCA as follows: (1) That a dangerous condition existed on the property at the time of the injury; (2) The dangerous condition proximately caused the injury; (3) The dangerous condition created a foreseeable risk of the kind of injury incurred; (4) That either (a) a public employee created the dangerous condition or (b) that a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have protected against the condition; and (5) The action or inaction of the public entity in respect of its effort to protect against the condition was palpably unreasonable. See, e.g., Ibid.; see also N.J.S.A. 59:4-2.

Failure to prove even one of these elements should result in summary judgment. See, e.g., Polzo v. County of Essex, 209 N.J. 51, 66 (2012) ("Even if plaintiff has met all of these elements, the public entity still will not be liable unless the public entity's failure to protect against the dangerous condition can be deemed 'palpably unreasonable.'"). Plaintiff herein cannot prove the first element (*i.e.*, the existence of a "condition of public property") let alone the

remaining four elements because the facts herein unequivocally show no physical defects of the property at issue and no reasonably foreseeable conduct.

New Jersey Courts have long "understood [that] a 'dangerous condition' as defined in *N.J.S.A.* 59:4-1a refers to the '**physical condition of the property itself and not to activities on the property.**'" Levin v. County of Salem, 133 N.J. 35, 44 (1993) (quoting Sharra v. Atlantic City, 199 N.J. Super. 535, 540 (App. Div. 1985)) (italics in original) (emphasis added); see also Verni ex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 210-211 (App. Div. 2006) (cert. denied 189 N.J. 429 (2007)). The Levin Court, following the reasoning in an analogous line of cases from California, explained as follows:

> Even though the [municipal entity] allegedly knew that children used its playground for skateboarding and took no measures to prevent the activity, the court found that plaintiffs failed to state a cause of action for a "dangerous condition of public property" because the injury was the **direct result of the childrens' dangerous conduct, not a defect in the physical condition of the property.**

Levin at 47 (emphasis added). The Levin Court *cautioned against* the "proposition—that we look to effects to determine whether a dangerous condition of property exists—[because that] would [mean] that whenever danger exists, so does a dangerous condition of property." Id. at 49. To ignore this cautionary pronouncement by our Supreme Court would directly contradict the

legislative intent of the TCA: immunity being the rule, not the exception. The Levin Court ultimately concluded that:

> Of course, a **physical defect** in the property, for example, a missing window, **combined with the foreseeable** neglect or misconduct of third parties, may result in the imposition of liability on the public entity **because the combination renders the property unfit.**
>
> Some conditions of the property itself impair the safety of its intended or foreseeable uses. *See, e.g., Speaks, supra*, 193 *N.J. Super.* at 412, 474 *A.*2d 1081 (finding that housing authority's failure to replace missing window created dangerous condition in common yard frequented by children directly under window when foreseeable risk existed that someone would drop or throw object out of window).
>
> **In this case, there was no missing plate, no broken bolt, no defect in the bridge itself that caused or contributed to cause the tragic accident.** The danger arose because the bridge was where the shallow water was. No other activity or inactivity of the public entities in this case forms a basis for liability under the Act (such as the failure to adopt or enforce laws prohibiting diving, or to provide supervision of the diving).

Ibid. (italics in original) (emphasis added). Stated another way: If there are no physical defects then (even if foreseeable) conduct alone cannot impose liability for a "dangerous condition" under the Tort Claims Act.

The facts of the matter at bar, as pled by Plaintiffs, unequivocally show that this tragedy was the **direct result** of the illegal actions of a third-party, ***not*** the result of a "contributing" defect of the physical property itself. No amount of discovery will change the simple fact that there was no "defect" of the physical public property at issue which (may) have contributed to Plaintiffs

injuries. See Morris v. Jersey City, 179 N.J. Super. 460, 463 (App. Div. 1981) ("As the trial judge recognized, clearly there was simply no causative nexus between the board and this accident. **The board's only connection in any respect was that it owned the building. No defect in the premises was suggested**...") (emphasis added).

This instant situation – wherein the facts pled do not indicate any defect in the physical property nor suggest the use was an intended purpose of the property at issue – is similar to that in Guerra v. Twp. of Lyndhurst wherein the Appellate Division held:

> [L]ike the parking lot in *Garrison* and the bridge in *Levin*, the park was not constructed for snow tubing. It was constructed to provide, among other uses, a playground with slides and a jungle gym for young children.
>
> There was **no defect** in the construction of the park or the playground equipment for its **intended uses.**
>
> It was plaintiff's decision to use the sloped area of the park for her snow tubing activity **rather than the condition of the property itself that caused plaintiff's accident and injury.**

See Guerra v. Twp. of Lyndhurst, 2015 N.J. Super. Unpub. LEXIS 1816, *13-*14 (App. Div. 2015) (emphasis added)[1]. Furthermore, our Courts have long held that:

> There cannot be the slightest doubt that the **mere presence...of persons with criminal intent or purpose does not constitute a**

[1] Pursuant to R. 1:36-3, a copy of the unpublished opinion Guerra v. Twp. of Lyndhurst, 2015 N.J. Super. Unpub. LEXIS 1816 (App. Div. 2015), is available beginning at HHA_Da001.

> **dangerous condition within the meaning of the [TCA]** so as to impose liability upon the [public entity]. To the contrary, liability cannot be visited upon the [public entity] under the Tort Claims Act by reason of the criminal assault and robbery of [plaintiff].

Rodriguez v. New Jersey Sports & Exposition Authority, 193 N.J. 39, 44 (App. Div. 1983) (citing Setrin v. Glassboro State College, 136 N.J. Super. 329, 333 (App. Div. 1975)) (emphasis added); see also Posey v. Bordentown Sewerage Auth., 171 N.J. 172, 188 (2002); Pagan v. Newark Housing Authority, 2017 N.J. Super. Unpub. LEXIS 2485, *4-*6 (App. Div. 2017)[2].

Much like in Rodriguez, supra, the facts of the matter at bar, as pled by Plaintiffs, additionally and unequivocally show that Christopher Garcia was the ***victim of a third-party who clearly intended grievous harm.*** The mere presence of this third-party upon public property, who ultimately had "criminal intent or purpose" to do harm to Mr. Garcia, **does not** create a "dangerous condition" of public property.

The Court Below, in accordance with longstanding caselaw in New Jersey, correctly determined that no defect of the physical property was plead nor existed which in conjunction with the alleged (illegal) activity could equate to a "dangerous condition" of public property. The Court Below did not ignore the activity (*i.e.*, the illegal makeshift liquor stand) as argued by Plaintiff, but rather

---

[2] Pursuant to R. 1:36-3, a copy of the unpublished opinion Pagan v. Newark Housing Authority, 2017 N.J. Super. Unpub. LEXIS 2485 (App. Div. 2017), is available beginning at HHA_Da007.

simply placed it appropriately within the second prong of the test. The Trial Court's determination was contingent on Plaintiffs' failure to plead a defect of the physical public property itself, nothing more, nothing less. Any reference by Plaintiffs to the Trial Court's inadvertent mischaracterization of the shooting is a red herring intended only to confuse this Court and the issues before it.

Further, whether or not the Court Below mischaracterized the shooting itself is irrelevant to the "dangerous condition" analysis and not the issue before this Court. The issue before the Court is whether or not Plaintiffs sufficiently plead a meritorious cause of action (*i.e.*, a defect of the property itself in addition to an activity). And the answer is that Plaintiffs failed to plead such a defect and no amount of discovery will make up for Plaintiffs' failure. Accordingly, the decision of the Court Below should be AFFIRMED.

A. Plaintiffs' Reliance on Foster v. Newark Housing Authority, Roe by M.J. v. New Jersey Transit Operations, and Saldana v. DiMedio is Misplaced.

Plaintiffs principally rely on three cases – Foster v. Newark Housing Authority, 389 N.J. Super. 60 (App. Div. 2006); Roe by M.J. v. New Jersey Transit Operations, Inc., 317 N.J. Super. 72 (App. Div. 1998); and Saldana v. DiMedio, 275 N.J. Super. 488 (App. Div. 1994) – in support of their position that "an illegal, large, makeshift liquor concession stand" is a "condition" (*i.e.*, physical defect) of public property within the meaning of the Tort Claims Act.

Plaintiffs' reliance on these cases is in error because the aforementioned cases do not in fact support Plaintiffs' supposition, but rather support HHA's position that the Trial Court's Order should be affirmed.

The first case Plaintiffs rely on is Foster v. Newark Housing Authority. Foster involved claims for *inter-alia* injuries caused to a Newark Police Detective while on duty escorting a victim of domestic violence to her home located in public housing controlled by the Newark Housing Authority. Foster 389 N.J. Super. at 63-64. In his Complaint, the Detective alleged *inter-alia* that his injuries were the result of a "dangerous condition" of public property. Ibid. Specifically, it was alleged, and more importantly the Foster Court factually determined, as follows:

> ...the **front doors of all the building had locks that the [Newark] Housing Authority installed to improve security but had not made operational**...her ex-boyfriend had entered her building through its unlocked door and somehow also entered her apartment...and when she and Detective Foster entered the apartment, her ex-boyfriend repeatedly shot Detective Foster without provocation, causing him severe injuries...

Id. at 64. The Foster Court after addressing various other issues appealed specifically addressed the allegation that a "dangerous condition" existed. Id. at 68. Before coming to a determination, the Court noted the long-held precedent in New Jersey as follows:

> **Of course,** a dangerous condition of property is **not shown** by evidence that **only indicates foreseeable criminal activities** of a

> third party that injure plaintiff.
>
> But "a dangerous condition of property may be found to exist when an unreasonable risk of harm is **created by the combination of [(1)] a defect in the property and [(2)] the acts of third parties.**

Id. at 68 (citing Setrin, 136 N.J. Super. at 333;, Roe, 317 N.J. Super. at 74-75; Saldana, 275 N.J. Super. at 33; Rodriguez, 193 N.J. at 44) (emphasis added). With this long held precedent in mind the Foster Court determined that:

> Unquestionably, a jury could find that the failure to **provide a lock for the front entrance of a building** was a dangerous condition of property.

Id. at 68. The Court's determination in Foster is in accord with precedent. The ***combination*** of (1) the defect of public property (*i.e.*, the non-working locks on the doors of the building) ***and*** (2) the foreseeable acts of third parties (*i.e.*, the ex-boyfriend going through the door with the non-working lock) could be found to create a "dangerous condition" under the Tort Claims Act.

The second case Plaintiffs rely on is Roe by M.J. v. New Jersey Transit Rail Operations, Inc. Roe involved the terrible sexual assault of an underage girl as the result of an alleged defect on NJ Transit's property and known actions in the area. Roe 317 N.J. Super. at 74-76. The Roe Court first noted that:

> NJ Transit **correctly argues** that the term 'dangerous condition' refers to **physical conditions of the property itself and not to activities conducted on the property.**

Id. at 79 (citing Levin, 133 N.J. at 44-45; Sharra, 199 N.J. at 540-541; Rodriguez, 193 N.J. Super. at 43-44; Cogsville v. Trenton, 159 N.J. Super. 71

(App. Div. 1978); and Setrin, 136 N.J. Super. 329 (App. Div. 1975)) (emphasis added). However, the Roe Court distinguished the aforementioned cases as follows:

> These cases are inapposite since they involved injuries ***caused not by the condition of the property*** **but by acts of the injured party himself or the dangerous activities of other persons.**
>
> Thus, in those cases, **the property itself did not contribute in any way to the causing of the injuries. The injuries merely happened to occur on public property.**
>
> **Here,** plaintiff alleges that the dangerous condition of **the property itself enhanced her exposure to the criminal attack.**

Id. at 79 (emphasis added). Thereafter, the Roe Court, properly, stated the standard in such an instance wherein a defect of the property at issue is alleged to have contributed in combination with the activity which ultimately caused the injury as follows:

> It is well-settled that a dangerous condition of property may be found to exist when an unreasonable risk of harm is created by the **combination of a defect in the property itself and the acts of third parties.**

Ibid. (emphasis added) (citations omitted). With that in mind, the Roe Court ultimately held that

> ...when viewing the evidence in the light most favorable to the plaintiff, a jury could reasonably conclude that plaintiff was injured due to a **dangerous condition of the fence and gate owned or controlled by NJ Transit, that is, the bolting open of the gate,** thus inviting the public to traverse a known dangerous area.

Id. at 82 (emphasis added). Therefore, the Roe Court, also in accord with

precedent, found that the ***combination*** of the defect of the property (*i.e.*, the bolted open gate) ***and*** the acts of the third party (*i.e.*, the assault committed by the assailant) amounted to a "dangerous condition" of public property.

The third case Plaintiffs rely on is Saldana v. DiMedio. Saldana involved *inter-alia* claims for the destruction of property as the result of a fire by unauthorized persons that occurred in abandoned buildings owned by the City of Camden. Saldana, 275 N.J. Super. at 491-492. The Saldana Court, once again just as the later Courts in Roe and Foster, affirmed that in New Jersey a "dangerous condition" as defined in the Tort Claims Act "refer[s] to the '**physical condition of the property itself and not to activities on the property.**'" Id. at 502 (citing Sharra, 199 N.J. Super. at 540 and Levin, 133 N.J. at 44) (emphasis added). The Saldana Court continued:

> Consequently, in *Speaks*, foreseeability of risk existed in combination with a defective or dangerous condition of property;
>
> in *Levin*, there was only foreseeability of risk.
>
> **In the former situation liability of the public entity attaches, in the latter situation it does not.**

Id. at 503 (citations omitted) (emphasis added). With this in mind the Saldana Court ultimately determined that

> Camden clearly had knowledge that the vacant buildings were in a dangerous condition; this is evidenced by Camden's own building inspection report with regard to the building adjacent to several of the plaintiffs' properties. That report reads "STRUCTURE A HAZARD TO THE PUBLIC-DEMOLISH"…

> This known hazardous condition of the buildings **combined** with the foreseeable misconduct of third parties starting fires therein would be sufficient to satisfy the "dangerous condition" element of *N.J.S.A.* 59:4-2.

Id. at 503. Thus, the Saldana Court determined that the ***combination*** of a defect of public property (*i.e.*, hazardous, abandoned buildings that needed to be demolished) ***and*** the acts of third parties (*i.e.*, unauthorized persons setting fires) was sufficient for a "dangerous condition" as is the law in New Jersey.

Unlike in Foster, Roe and Saldana, Plaintiff herein does not even plead a ***defect*** in the public property at issue. Plaintiffs erroneously assert that the ***mere existence*** of an "illegal, makeshift liquor concession" creates a "dangerous condition." That is simply not true and inapposite to long-held precedent in New Jersey (including the cases which Plaintiffs rely upon). The "illegal, makeshift liquor concession" could, at best, be considered the *second part* of the test (*i.e.*, "the acts of third parties"). However, there still **must be "a defect in the property"** which in *combination* with the "acts of third parties" may constitute a "dangerous condition" within the meaning of the TCA. No such defect exists.

Plaintiffs simply gloss over the first part of the test and want this Court to overturn the determination of the Court Below for properly adhering to longstanding precedent in New Jersey. There is no (alleged or otherwise) "bolted open gate" nor "non-locking locked doors" nor "hazardous buildings to be demolished" in this instant matter. Plaintiffs allege ***only*** the illegal activities of

third parties that happened to occur on public property. Plaintiffs **do not** allege something wrong (*i.e.*, a defect) with the property itself.

Accordingly, Plaintiff's Complaint does not allege facts sufficient (and discovery would not change this) to sustain a claim because there is no "condition" of the physical public property at issue. Therefore, Plaintiffs' Complaint, as correctly determined by the Court Below, was properly dismissed with prejudice as a matter of law and such a determination should be AFFIRMED.

III. ASSUMING *ARGUENDO* THE COURT DETERMINED THAT THE ACTIVITY AT ISSUE WAS A "CONDITION" OF PUBLIC PROPERTY, THE ACTIVITY IS NOT A REASONABLY FORESEEABLE USE OF PUBLIC PROPERTY. (Briefed Below)

Assuming *arguendo* this Court were to overturn the Court Below and determine that the activity alleged by Plaintiffs to be sufficient – without the necessary defect of the property itself – to create a cognizable "dangerous condition", the activity is still not a "reasonably foreseeable" use of the public property at issue.

The New Jersey Supreme Court in Vincitore v. N.J. Sports & Exposition Authority – reaffirming the approach of the Court in Garrison v. Twp. of Middletown – described the three-part analysis for determining "reasonably foreseeable" in the context of the TCA. The Vincitore Court stated as follows:

> The **first** consideration is whether the property poses a danger to the general public **when used in the normal, foreseeable manner.**
>
> The **second** is whether the **nature of the plaintiff's activity is "so objectively unreasonable"** that the condition of the property cannot reasonably be said to have caused the injury.
>
> The answers to those two questions determine whether a plaintiff's claim satisfies the Act's "due care" requirement.
>
> The third involves review of the manner in which the specific plaintiff engaged in the specific activity. That conduct is relevant only to proximate causation, *N.J.S.A.* 59:4-2, and comparative fault, *N.J.S.A.* 59:9-4.

Vincitore, 169 N.J. 119, 126 (2001) (citing Garrison v. Township of Middletown, 154 N.J. 282, 293 (1988) (italics in original) (emphasis added); see also Polzo v. County of Essex, 209 N.J. 51 (2012); Speziale v. Newark Housing Authority, 193 N.J. Super. 413 (App. Div. 1984).

Illegal activities and/or actions are most assuredly not the definition of normal (*i.e.*, used with due care), but rather abnormal; hence, they are *not* "reasonably foreseeable" and *per se* "objectively unreasonable". As the Garrison Court noted: "If a public entity's property is dangerous **only when used without due care**, the property is **not** in a 'dangerous condition.'" Garrison, 154 N.J. at 287 (1998) (emphasis added).

A. The Illegal Sale and Consumption of Alcoholic Beverages is Not "A Normal, Foreseeable" Use of an Outdoor Public Basketball Court/Common Area.

Illegal activities – such as the sale, purchase and/or consumption of alcoholic beverages on public property – should not now nor ever be considered a "normal, foreseeable" use of any property, public or otherwise.

New Jersey does not permit the sale of alcohol except as provided for under the terms of the Alcohol Beverage Control Act, N.J.S.A. 33:1-1, *et seq* ("ABCA"). ABCA sets forth in pertinent part as follows:

> It shall be unlawful to…sell, possess with intent to sell…mix…or distribute alcoholic beverages in this State, except pursuant to and within the terms of a license, or as otherwise expressly authorized, under this chapter…

N.J.S.A. 33:1-2(a). Since Plaintiffs admit to the illegality of the actions herein, clearly the licensing provision of ABCA was not followed.

Furthermore, the City of Hoboken in its municipal code has *inter-alia* adopted the same restrictions as those contained within ABCA. See *Alcoholic Beverages*, HOBOKEN MUNICIPAL CODE, ch. 68; see also N.J.S.A. 33:1-40. Specifically, Hoboken has enacted regulations on the consumption of alcohol in public and on public property as follows:

> The drinking of alcoholic beverages on the public streets of Hoboken is hereby prohibited.
>
> **No person shall serve, sell, dispense, drink or consume any alcoholic beverage…upon any public grounds, parks…**

See *Alcoholic Beverages*, HOBOKEN MUNICIPAL CODE, ch. 68, §68-13 (emphasis added). Consequently, it is illegal to **both** sell alcoholic beverages within the city limits of Hoboken without a license **and** to consume alcoholic beverages on public property. This illegal activity is precisely that which Plaintiffs are alleging is the "dangerous condition" at issue in this instance.

Additionally, and it should go without saying, that the unprovoked attack on another person resulting in significant bodily harm and/or death has – excepted only in extremely limited circumstances – always been illegal and well outside the bounds of reasonable conduct. Assault (and death related thereto) has never, can never and must never be considered a "normal, foreseeable" use of public property, such as a basketball court located within an outdoor public common area on public housing premises. The third-party who attacked Mr. Garcia is strictly to blame, not the Hoboken Housing Authority who merely owned the property wherein this incident occurred.

Accordingly, even if the Court were to determine a "dangerous condition" of public property existed in this matter, illegally selling, purchasing and/or consuming alcohol on public property – and other criminal conduct – is ***not*** a "normal" ***nor*** a "reasonable" ***nor*** a "foreseeable" use of the public property (*i.e.*, an outdoor basketball court/common area) at issue. This is especially true when both New Jersey and Hoboken *specifically prohibits* selling, purchasing and/or

drinking alcoholic beverages on public grounds and parks, thereby making same illegal and punishable by law.

B. The Illegal Activities are "So Objectively Unreasonable" that the Condition of the Property Cannot Reasonably Be Said to Have Caused the Injury.

Illegal activities and/or actions are by their very nature "objectively unreasonable." Society has chosen to proscribe the behavior of the governed through the application of laws and regulations. Society has chosen to declare certain conduct against societal norms and values thereby making this proscribed conduct inherently and "objectively unreasonable."

The selling of alcohol is a highly regulated activity and any deviation from same is, objectively, against the norm and unreasonable. Assault and murder, to wit society has endeavored to eliminate in their entirety, are crimes so heinous in nature that there can be absolutely no argument to be made in favor of "objective reasonableness."

> **A use that is not objectively reasonable from the community perspective is not one "with due care."** To this extent, "used with due care" **refers not** to the conduct of the injured party, **but to the objectively reasonable use by the public generally.**

See, e.g., Garrison, 154 N.J. at 291 (emphasis added). In this instance, the "objectively reasonable public" are not murderers or bootleggers, but residents of the surrounding public housing units just trying to live their lives.

A reasonable use of the premises (*i.e.*, an outdoor public basketball court/common area) would be for playing basketball or some such other related activity. Turning the area into a "pop-up bar" is most assuredly not the intended, reasonable, foreseeable use of an outdoor public basketball court. Thus, it cannot be argued in good faith that the reasonable public would seek to use the premises at issue for such illegal activities and/or conduct such as that pled by Plaintiffs in this matter.

Accordingly, the illegal sale, purchase and/or consumption of alcohol and/or criminally harmful conduct by third-parties ***are*** "objectively unreasonable" within the meaning of the Tort Claims Act.

IV. THE ACTIONS OR INACTIONS OF THE HOBOKEN HOUSING AUTHORITY AS PLED BY PLAINTIFFS WERE NOT PALPABLY UNREASONABLE. (Briefed Below)

The Tort Claims Act provides in pertinent part as follows: "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**." N.J.S.A. 59:4-2 (emphasis added). The term "palpably unreasonable" is not explicitly defined by the TCA, however, the term implies **behavior that is patently unacceptable under any given**

circumstances. See Kolitch v. Lindedahl, 100 N.J. 485 (1985). Therefore, "palpably unreasonable conduct" constitutes plainly, obviously, patently, distinctly and manifestly unreasonable conduct. Polyard v. Terry, 79 N.J. 547 (1979); see also Johnson v. Essex County, 223 N.J. Super. 239, 257 (Law Div. 1987) (citing Williams v. Phillipsburg, 171 N.J. Super. 278, 286 (App. Div. 1979)) (Palpably unreasonable conduct must "be action or inaction that is plainly and obviously without reason or reasonable basis, capricious, arbitrary or outrageous.").

Hence, it is clear that the duty of ordinary care, which is termed negligence, is different in degree from palpably unreasonable conduct. Palpably unreasonable conduct implies a more **obvious and manifest breach of duty and puts a more onerous burden on the plaintiff**. Williams v. Phillipsburg, 171 N.J. Super. 278 (App. Div. 1979). It is undisputed that the question of palpably unreasonable conduct may be decided by the Court as a matter of law in appropriate cases, such as the one at bar. Garrison, 154 N.J. at 311.

In Polzo v. County of Essex, 209 N.J. 51 (2012), the New Jersey Supreme Court analyzed the palpably unreasonable conduct standard and held that a Court may decide the issue on summary judgment. See Polzo at 75-76. The Polzo Court, citing the 1972 Task Force Comment on N.J.S.A. 59:4-2 (Dangerous Condition of Public Property), quoted the following:

> This section 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 (emphasis added). The Polzo Court continued by quoting with approval Justice Stein's concurrence in Garrison v. Twp. of Middletown, 154 N.J. 282 (1998) as follows:

> In *Garrison*, a boy, just shy of his seventeenth birthday, was injured while playing night touch football on property owned by Middletown Township -- a parking lot that had an uneven surface, **a declivity of one-and-one-half inches**. Plaintiff argued that the declivity posed a substantial risk of injury to a foreseeable user exercising due care. Apparently, the declivity remained because the Township had suspended a repaving project.
>
> Justice Stein **accepted those facts, but concluded that "the Township's failure to devote its resources to the completion of repaving or to the amelioration of the declivity cannot be deemed palpably unreasonable."**
>
> He observed that it was reasonable to infer that the declivity could be viewed as a maintenance item of low priority.
>
> **He further observed that "[h]ad the Township received prior complaints or reports of prior injuries with regard to the alleged dangerous condition, the issue might be viewed differently," but that there was "no evidence of prior injuries or complaints."**

Id. at 76-77 (quoting Garrison, 154 N.J. at 285, 311) (italics in original) (emphasis added). Plaintiffs assert that HHA "failed to maintain and control" the public property at issue (*i.e.*, a public basketball court located within a public

housing project). In this instant matter, Plaintiffs do not plead (and discovery will not show) facts sufficient to prove that Defendant's conduct (or lack thereof) is "plainly and obviously without reason or reasonable basis, capricious, arbitrary or outrageous."

Furthermore, it should be noted that HHA does not provide security related services to the property at issue and therefore response to this argument is primarily left to the Brief submitted by Defendants, City of Hoboken and Hoboken Police Department. To the extent necessary, HHA responds as follows.

No municipal government – any government really – has unlimited resources. The allocation of resources is reasonably targeted to provide the most good for the greatest number. Plaintiffs do not allege that any complaints or reports were made regarding the illegal activity alleged to have been occurring at the time of Christopher Garcia's injuries. One can only surmise that this was because the third-parties participating in that activity knew it was illegal. However, the why does not matter. Without knowledge that something was occurring (*i.e.*, complaints or other such reports) there was no reason to believe that the additional presence of police was necessary. Even so, the municipal defendants are absolutely immunized pursuant to N.J.S.A. 59:5-4 for failure to provide police protection and for discretionary decisions, such as allocation of police resources, pursuant to N.J.S.A. 59:2-3(a), (c) and (d).

V. THE HOBOKEN HOUSING AUTHORITY IS ADDITIONALLY IMMUNE BECAUSE IT IS NOT LIABLE FOR FAILURE TO PROVIDE SUPERVISION AT A PUBLIC BASKETBALL COURT. (Briefed Below)

The Hoboken Housing Authority is undisputedly a public entity within the meaning of the Tort Claims Act. See N.J.S.A. 59:1-3; see also Bligen v Jersey City Hous. Auth., 131 N.J. 124, 131 (1993) ("...public housing authorities are public entities under the Tort Claims Act.").

Furthermore, the area in question is unquestionably a public space with a freely accessible outdoor basketball court and playground. (P3, ¶13). The area is available to the residents of the public housing project as well as to other members of the general public. Accordingly, the area in question, as pled by Plaintiffs, is clearly a public recreational facility within the meaning of the TCA.

The situation in Verni ex rel. Burstein v. Harry M. Stevens, Inc. is instructive and bears on this instant matter. Therein the plaintiffs were caused harm by Defendant Daniel Lanzaro who had been drinking during a Giants game and at various other locations. Verni ex rel. Burstein, 387 N.J. Super. at 175-180. The Verni Court upheld the summary judgment granted to the public entity defendant, The New Jersey Sports & Exposition Authority. Id. at 210-211. The Verni Court simply held:

> The Sports Authority is a public entity within the meaning of the Tort Claims Act, *N.J.S.A.* 59:1-1 to 12-3. As such, the Sports Authority is "not liable for failure to provide supervision of public

> recreational facilities…"
>
> Although an exception allows liability for failure to protect against a dangerous condition, *ibid.,* this exception relates to the physical condition of the property not to activities that take place on it.

Ibid. The parking area abutting Giants Stadium is part and parcel of a public recreational facility for which the government entity has no liability for supervision. Ibid.

If a parking lot at a stadium is considered a public recreational facility, then there can be no doubt that an outdoor basketball court and surrounding public area with a playground open to not only the residents of the public housing project, but the community-at-large would also be considered a public recreational facility. Accordingly, similar to the situation in Verni, the Hoboken Housing Authority has absolute immunity since "[a] public entity is **not liable** for failure to provide supervision of public recreational facilities[.]" N.J.S.A. 59:2-7 (emphasis added); see also Sharra v. Atlantic City, 199 N.J. Super. 535 (App. Div. 1985); Morris v. Jersey City, 179 N.J. Super. 460, 463 (App. Div. 1981) ("Clearly, the city was immune from tort liability for the alleged failure to provide supervision."); Setrin v. Glassboro State College, 136 N.J. Super. 329 (App. Div. 1975).

VI. DEFENDANTS ARE ABSOLUTELY IMMUNE FOR FAILIRE TO PROVIDE POLICE PROTECTION. (T10)

Defendant Hoboken Housing Authority, leaves any response to be made regarding Plaintiffs' arguments in Point IV of their Brief in the capable hands of counsel for Defendants, City of Hoboken and Hoboken Police Department, because HHA ***does not*** provide security services to the property at issue. To the extent necessary, HHA agrees with and supports the arguments of Defendants, City of Hoboken and Hoboken Police Department, that the municipal defendants are absolutely immunized for failure to provide police protection. See N.J.S.A. 59:5-4.

CONCLUSION

For the reasons set forth above Defendant-Respondent, Hoboken Housing Authority, respectfully submits that this Court should AFFIRM the decision of the Trial Court.

KEENAN & DORIS, LLC
Attorneys for Defendant-Respondent
Hoboken Housing Authority

David F. Scheidel II, Esq.

EVELYN AVILES, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE IF CHRISTOPHER GARCIA AND JEFFREY GARCIA, **Plaintiffs,** **vs.** **CITY OF HOBOKEN; HOBOKEN POLICE DEPARTMENT; HOBOKEN HOUSING AURHORITY; JOHN DOES (1-10); ABC COMPANIES (1-10); XYZ GOVERNMENTAL ENTITIES (1-10),** **Defendants.**	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: A-001199-23** **CIVIL ACTION** **ON APPEAL FROM HUDSON COUNTY, LAW DIVISION** **DOCKET NO. BELOW HUD-L-2210-23** **SAT BEFORE:** **HON. ANTHONY V. D'ELIA, J.S.C.** **DATE SUBMITTED: MAY 10, 2024**

BRIEF OF DEFENDANTS/RESPONDENTS, CITY OF HOBOKEN AND HOBOKEN POLICE DEPARTMENT

Of Counsel:
Edward J. Florio, Esq. (025311987)
On the Brief:
Christopher K. Harriott (035382001)
Ryan Renzulli, Esq. (037282001)

FLORIO KENNY RAVAL, L.L.P.
125 Chubb Avenue, Suite 310 - N
Lyndhurst, NJ 07071
(201)659-8011
{01083967}

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES:

PRELIMINARY STATEMENT

DEFENDANTS/RESPONDENTS, CITY OF HOBOKEN ("CITY") and HOBOKEN POLICE DEPARTMENT ("HPD") (collectively "RESPONDENTS,") respectfully request that this Appellate Panel affirm the November 22, 2023 Order granting RESPONDENTS' Motion to Dismiss and dismissing the Complaint of PLAINTIFFS/APPELLANTS, EVELYN AVILES, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER GARICA and JEFFREY GARCIA, ("APPELLANTS,") with prejudice. The Trial Court's determination that APPELLANTS' Complaint failed to state a claim upon which relief could be granted pursuant to R. 4:6-2(e) was correct in as much as APPELLANTS failed to plead sufficient facts to overcome the immunities and defenses of the New Jersey Tort Claims Act, N.J.S.A. 59:-1-1, et seq., ("TCA.") APPELLANTS' Complaint alleges that on September 25, 2022, Christopher Garcia ("Mr. Garica") was shot and killed by a patron of an illegal, makeshift liquor store that was located outside of property owned by DEFENDANT/RESPONDENT, HOBOKEN HOUSING AUTHORITY, ("HHA,") at 501 Marshall Drive, Hoboken, New Jersey. While the DECEDENT was not injured by the makeshift liquor store itself, APPELLANTS' Complaint alleges same to be a dangerous condition of public property as its presence "created an unstable and highly dangerous situation, which eventually resulted in Mr. Garcia's

death." The Complaint also alleges that HPD officers failed to take action to remove the dangerous condition during their patrol of the area. Even assuming, for purposes of the Motion, the truth of the facts set forth in APPELLANTS' Complaint, those facts cannot over the TCA'S immunity for failure to provide police protection under N.J.S.A. 59:5-4, nor do they establish a dangerous condition of public property as defined by N.J.S.A. 59:4-2.

In as much as the entirety of the Complaint is premised upon the alleged failure of HPD officers to properly perform their duties, RESPONDENTS are immune under N.J.S.A. 59:5-4 as that Complaint fails to set forth sufficient facts to establish that HPD officers had a ministerial duty to immediately remove the makeshift liquor store from the premises. APPELLANTS failed to cite any statute, rule or regulation establishing this alleged ministerial duty in opposition to RESPONDENTS' Motion to Dismiss nor do they do so today. Moreover, with respect to the existence of a dangerous condition of public property, APPELLANTS' Complaint failed to set forth sufficient facts to establish that RESPONDENTS owned, controlled or maintained the premises or that Mr. Garcia's death was caused by the condition of the property itself, rather than its use by third persons with criminal intentions.

For reasons set forth herein, RESPONDENTS respectfully request that this Appellate Panel affirm the Trial Court's Order of November 21, 2023 dismissing APPELLANTS' Complaint with prejudice.

PROCEDURAL HISTORY

APPELLANTS' Complaint was filed on June 22, 2023 (P1). HHA filed an Answer on July 12, 2023 (P42) and RESPONDENTS filed their Answer on July 28, 2023. (P15). Thereafter, on September 29, 2023, RESPONDENTS filed a Motion to Dismiss pursuant to R. 4:6-2(e). (P8-P35). On October 13, 2023, HHA filed a similar Motion to Dismiss. (P36-P58). Both Motions were opposed by APPELLANTS and oral argument was conducted before the Honorable Anthony V. D'Elia, J.S.C. on November 17, 2023 (T1[1]) An Order dismissing APPELLANTS' Complaint with prejudice as to RESPONDENTS was entered on November 22, 2023 (P59-P60). The present appeal follows.

STATEMENT OF FACTS

This matter arises out of the September 25, 2022, shooting death of Mr. Garcia. The shooting occurred at or near the public basketball courts located at 501 Mashall Drive, Hoboken, New Jersey at approximately 3:00 am. (P1 at ¶1) APPELLANTS' Complaint alleges that for several months prior to the shooting, there was makeshift stand illegally selling alcohol outside of that location. (P2 at

[1] T references the transcript of the November 17, 2023 oral argument before Judge D'Elia.

¶4 and P3 at ¶12). At approximately 3:00 am on the night of the incident, the proprietors of the illegal alcohol stand had been selling large quantities of alcohol to a substantial number of individuals many of whom were intoxicated (P3 at ¶14). Several altercations broke out including altercations involving the individual who ultimately shot and killed Mr. Garcia. (P3 at ¶14). An altercation between Mr. Garica and an unnamed individual present at the makeshift liquor stand broke out with Mr. Garcia striking the individual in the face (P3 at ¶16). The individual subsequently went to a vehicle, obtained a firearm and subsequently shot Mr. Garica two times (P3 at ¶16-17).

Count One of APPELLANTS Complaint (Survivorship) alleges that the CITY and HHA failed to maintain and control the premises where the incident occurred allowing a dangerous condition to arise (P4 at ¶21). APPELLANTS allege therein that the dangerous condition was the open and obvious illegal sale of alcohol at a large makeshift stand (P4 at ¶21). Count One further alleges that HPD failed to terminate the illegal sale of alcohol on the property which had been going on for months prior to the shooting (P4 at ¶22). Count Two of APPELLANTS' Complaint alleges that RESPONDENTS' "aforesaid acts and omissions, resulting in Decedent's death, Plaintiffs lost the pecuniary value of Decedent's financial support, love, affection, guidance, wisdom and companionship." (P4 at ¶26)

LEGAL ARGUMENT

APPELLANTS' COMPLAINT FAILS TO SET FORTH FACTS WHICH STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A. THE STANDARD OF REVIEW.

An appellate court reviews de novo the trial court's determination of the motion to dismiss under Rule 4:6-2(e). Stop & Shop Supermarket Co., LLC v. County of Bergen, 450 N.J. Super. 286, 290, (App. Div. 2017). An appellate court applies the same standard under Rule 4:6-2(e) that governed the motion judge and look to "the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)

The standard governing a motion to dismiss for failure to state a claim pursuant to R. 4:6-2(e) is that the Complaint must be examined "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Id. The motion should be based on the pleadings, with the court accepting as true the facts alleged in the complaint. Rieder v. State Dept. of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). A motion to dismiss a complaint for failure to state a claim "may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiffs' claim must be apparent from the complaint itself." Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202, (App. Div. 2003), certif. denied, 176

N.J. 278 (2003). Contrary to popular belief, "New Jersey is a 'fact' rather than a 'notice' pleading jurisdiction, which means that a plaintiff must allege facts to support his or her claim rather than merely reciting the elements of a cause of action." Nostrame v. Santiago, 420 N.J. Super. 427, 436 (App. Div. 2011). It has long been established that pleadings reciting mere conclusions without facts and reliance on subsequent discovery do not justify a lawsuit. Gruccio v. Baxter, 135 N.J. Super. 290, 294-95 (Law Div. 1975).

A dismissal with prejudice is "mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted," Rieder v. State, 221 N.J. Super. 547, 552 (App. Div. 1987), or if "discovery will not give rise to such a claim[.]" Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman and Stahl, P.C., 237 N.J. 91, 107 (2019).

Here, the Court below properly granted RESPONDENTS' Motion to Dismiss for failure to state a claim upon which relief can be granted. Even when examining APPELLANTS' Complaint with great liberality, the factual allegations set forth therein are palpably insufficient to state a claim for liability under the TCA. Id. Further, in as much as RESPONDENTS are immune from liability under Section 59:5-4 the TCA, discovery could not possibly give rise to facts which would state such a claim.

B. RESPONDENTS ARE IMMUNE FROM LIABILITY UNDER THE TCA FOR FAILURE TO PROVIDE POLICE PROTECTION.

RESPONDENTS are immune from liability under Section 59:5-4 of the TCA for failure to provide police protection. As such, APPELLANTS' Complaint was properly dismissed with prejudice.

The TCA applies to all claims against a public entity/public employee sounding in tort and supersedes all prior common law causes of action against same. See Tower Marine, Inc. v. New Brunswick, 175 N.J. Super. 526, 531 (Ch. Div. 1980). N.J.S.A. 59: 1-2, the legislative declaration of the TCA states:

> 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 the 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.

Id.

Consistent with this legislative mandate, the New Jersey Supreme Court has recognized and emphasized that the TCA should be interpreted broadly to limit public entity liability. Manna v. State, 129 N.J. 341, 346 (1992). The TCA

supersedes all prior common law tort causes of action. Tower Marine, Inc. v. City of New Brunswick, 175 N.J. Super. 526, 531 (Ch. Div. 1980). The polestar of the TCA is that public immunity is the general rule and liability is the exception. Coyne v. N.J. Dep't of Transp., 182 N.J. 481, 488 (2005). The Legislature's overriding philosophy is that immunity for public entities is the general rule and liability is the exception. See Collins v. Union County Jail, 150 N.J. 407, (1997). The TCA re-establishes an all-inclusive immunity from tort liability for public entities absent specific provisions therein imposing liability upon them. Coppola v. State, 177 N.J. Super. 37, 39 (App.Div. 1981), certif. den. 87 N.J. 398 (1981). The only provisions of the TCA that impose liability are Section 59:2-2 (vicarious liability for injury proximately caused by an act or omission of a public employee) and Section 59:4-2 (liability for injury caused by a dangerous condition of public property).

When one of the TCA'S provisions establishes liability, that liability is ordinarily negated if the public entity possesses a corresponding immunity." Rochinsky v. State of N.J. Dept. of Transp., 110 N.J. 399, 408, (1988). Among the specific immunities granted to public entities by the TCA is the immunity from liability for failure to provide police protection. Section 59:5-4 states "Neither a public entity nor a public employee is liable for failure to provide police protection

service or, if police protection service is provided, for failure to provide sufficient police protection service." Id.

Section 59:5-4 of the TCA precludes suits against municipalities and their responsible officers based upon contentions that damage occurred from the absence of a police force or from the presence of an inadequate one. How many officers a town should employ, how each should be equipped and whether a town should have any police at all are political decisions which should not be made the subject of any tort duty. Suarez v. Dosky 171 N.J. Super. 1,9 (App. Div. 1979) cert. denied 82 N.J. 300 (1980). Thus, the public entity can determine with impunity whether to provide police protection service and, if provided, to what extent. Rodriguez v. New Jersey Sports & Exposition Auth., 193 N.J.Super. 39, 43, (App. Div. 1983), certif. denied, 96 N.J. 291 (1984). This section should be construed as conferring a broad immunity. Id.

The purpose of the immunity afforded in Section 59:5-4 concerns the right of the public entity to allocate its resources in accordance with its conception of how the public interest will be best served, an exercise of political power which should be insulated from interference by judge or jury in a tort action." Suarez, 171 N.J. Super. at 9. The policy underlying Section 59:5-4 of the TCA is to shield a public entity's discretionary decisions regarding how to allocate and direct scarce

police resources. L.E. v Plainfield School District, 456 N.J. Super. 336, 345 (App. Div. 2018) certif. den. 236 N.J. 627 (2019).

Section 59:5-4 immunizes discretionary decisions regarding use of resources and does not apply for negligence in the performance of ministerial police duties once the police have undertaken to protect. See Massachi v. AHL Servs Inc., 396 N.J. Super. 486 (App. Div. 2007) certif. den. 195 N.J. 419 (2008). Ministerial acts are those "which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being. Gonzalez v, City of Jersey City, 247 N.J. 551, 572 (2021) (quoting S.P. v. Newark Police Dep't, 428 N.J. Super. 210, 231 (App. Div. 2012)). Ministerial acts are not immunized even when they may entail operational judgments," such as "when, where and how" to carry out a required duty. Id. The explicit immunity provided by Section 59:5-4 is not diminished by Section 59:2-2 (vicarious liability for injury proximately caused by an act or omission of a public employee) or Section 59:2-3 (discretionary acts). Wuethrich v Delia, 155 N.J. Super. 324, 326 (App. Div. 1978) certif. den. 77 N.J. 486 (1978)

The scope of the immunity provided by Section 59:5-4 was thoroughly analyzed by the Appellate Division in Suarez v. Dosky, supra. In that case, New Jersey State Troopers responded to an accident on Interstate 80 that rendered a

motor vehicle inoperable. The troopers refused escort the stranded occupants of the vehicle despite the occupants' requests to do so. A mother and young child were killed by a motorist while attempting to get across Route 80. The Appellate Division rejected the State's position that Section 59:5-4 should afford all public entities complete tort immunity arising out of all acts or admissions of the police in the performance of their official duties and that the immunity provided therein does not insulate police officers from unfortunate results of their negligently executed ministerial duties. Id at 10.

In the case at hand, APPELLANTS' Complaint alleges that RESPONDENTS failed to maintain control of the premises by allowing a dangerous condition to arise - the open and obvious sale of alcohol at a large makeshift stand. (P4 at ¶21). The Complaint further alleges that HPD "failed to terminate the illegal and ongoing sale of alcohol, which was open and obvious, and which had been occurring at the same location over a large concession stand months prior to the shooting (P4 at ¶22).

However, despite those allegations, APPELLANTS' Complaint failed to set forth any facts which established that HPD, or its officers, had a ministerial duty to immediately remove the makeshift liquor store from the premises. The Trial Court expressly cited such failure in reaching its decision to dismiss the Complaint with prejudice. (T at 10:10-17) APPELLANTS' Complaint fails to include any facts

which set forth that HPD officers were mandated to act in a prescribed fashion or failed to carry out a retired duty. APPELLANTS' reliance on Shore v. Housing Authority of Harrison, 208 N.J. Super. 348 (App. Div. 1987) is misplaced. In Shore, "the allegation is that the officer was not where he should have been because of his socializing and failure to patrol the project as his duties required." Id. at 353. Here, APPELLANTS' Complaint does not allege that HPD officers failed to patrol the premises as required, it alleges the officers failed to carry out a specific action – removing the liquor stand – while on duty. That is far afield from the conduct at issue in Shore – a complete failure to perform required duties, at all – and, in the absence of facts establishing a firm and unwaivable mandate to act in that fashion, is an exercise of discretion which is immunized from liability under Section 59:5-4 of the TCA.

APPELLANTS' reliance on the unpublished Appellate decision in Rooster Bar LLC v. Borough of Cliffside Park, 2013 WL 5852758 (November 2013) is equally misplaced. First, the decision is unpublished and not binding on this Appellate Panel or the Trial Court. Moreover, the issue in Rooster Bar was not, as APPELLANTS contend, the application of Section 59:5-4's immunity. Rather, Rooster Bar involved a claim by the owners of the bar against the Cliffside Park Police Department due to alleged harassment of patrons of an establishment owned by the plaintiffs. At issue was the application of two entirely different sections of

the TCA – Section 59:3-3's "good faith" immunity and Section 59:2-10's immunity for willful misconduct. (Pa10) Rooster Bar, by its own terms, does not impose a ministerial duty on a police department to patrol a certain area and the Appellate Division's comments in analyzing two entirely different sections of the TCA should not be read to create one.

Again, the Trial Court correctly stated that there is no legal authority that HPD or its officers had to obediently follow without regard to exercising judgement or discretion. (T 10:10-13) In their Brief, APPELLANTS once again do not cite any authority to support the argument that RESPONDENTS had a prescribed, mandated, ministerial duty to immediately remove the makeshift liquor stand from the property upon encountering same. As the Trial Court astutely recognized, APPELLANTS' interpretation of a ministerial act would "convert everything into a ministerial act." (T 10:13-15) Simply deeming something "illegal" without more, does not establish a mandate for HPD officers to immediately take action. Again, APPELLANT'S Complaint seeks to hold HPD liable for its officer's exercise of discretion during the course of their patrol. Those actions are protected under Section 59:5-4 and, as such, APPELLANTS' Complaint was properly dismissed with prejudice.

C. APPELLANTS' COMPLAINT FAILED TO SET FORTH SUFFICIENT FACTS TO STATE A CLAIM FOR THE EXISTENCE OF A DANGEROUS CONDITION OF PUBLIC PROPERTY.

APPELLANTS' Complaint failed to set forth sufficient facts to state a claim upon which relief can be granted under the TCA for the existence of a dangerous condition of public property. Not only did APPELLANTS' Complaint fail to set forth sufficient facts to establish that RESPONDENTS owned, controlled or maintained the premises, it also failed to set forth the necessary facts to establish that Mr. Garcia's death was caused by the condition of the property itself, rather than its use by third persons with criminal intentions[2]. As such, the Trial Court properly dismissed APPELLANTS' Complaint with prejudice.

The TCA defines the limited parameters within which a claimant may recover damages for a tortuous injury from a public entity. The basic legislative premise of the TCA is to re-establish immunity for all public entities except under limited circumstances as enumerated by the TCA. The mere happening of an accident is insufficient to impose liability upon a governmental entity. Wilson v. Jacobs, 334 N.J. Super. 640 (App. Div. 2000). Rather, to establish liability against a public entity under the TCA, a Plaintiff must demonstrate that:

(1) the public property was in a dangerous condition at the time of the injury;

---

[2] RESPONDENTS rely upon, and incorporate herewith the arguments of CO-RESPONDENT HHA as if set forth fully herein.

(2) the condition proximately caused the injury;

(3) the condition created a reasonably foreseeable risk of the kind of injury that occurred;

(4) either the condition was wrongfully created by an employee of the entity or the entity had actual or constructive notice long enough to have taken measures to protect against it; and

(5) the action or inaction of the public entity in protecting against the condition was palpably unreasonable.

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

Each of these five elements must be proven by the plaintiff in order to establish liability. Rochinsky v. N.J. Dep't of Transp., 110 N.J. at 413. Under Section 59:4-1(a), a dangerous condition is defined as "a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." This definition refers to the physical conditions of the property and not to the activities on the property. Levin v Cnty of Salem, 133 N.J. 35, 44 (1993).

The mere presence on public property of persons with criminal intent or purpose does not constitute a dangerous condition within the meaning of N.J.S.A. 59:4-1(a). Rodriguez v. N.J. Sports & Exposition Authority, 193 N.J. Super. 39 (App. Div. 1983) Nor does criminal conduct of a person create a 'dangerous condition' so as to impose liability on a public entity N.J.S.A. 59:4—1(a). Setrin v. Glassboro State College, 136 N.J. Super. 329, 333 (App. Div. 1975). See also

Vanchieri v. N.J.Sports & Expos. Auth., 201 N.J. Super. 34, 39-41 (App. Div. 1985), rev'd on other grounds, 104 N.J. 80 (1986) (explaining that "absent some contributing defect in the property itself 'harmful third-party conduct' has not been deemed a dangerous condition" under the TCA and thus holding that "the activities of the rompish boys playing touch football" who knocked the plaintiff to the ground was not a "dangerous condition")

Here, while the DECEDENT was not injured by the makeshift liquor store itself, APPELLANTS' Complaint alleges same to be a dangerous condition of public property as its presence "created an unstable and highly dangerous situation, which eventually resulted in Mr. Garcia's death." APPELLANTS' Complaint fails to set forth sufficient facts to establish that RESPONDENTS owed, controlled or maintained the subject premises, alleging only that HPD had a general duty to patrol same, as it did all areas of the City of Hoboken. Section 59:4-1(c) of the TCA defines public property as: "real or personal property owned or controlled by the public entity, but does not include easements, encroachments, and other property that is located on the property of the public entity, but are not owned or controlled by the public entity." Id.

Moreover, the word "controlled", as used in Section 59:4-1(c) of the TCA, should not be construed as extending beyond possessory control. Danow v. Penn Central Transportation Company, 153 N.J. Super. 597, 603 (Law Div. 1977). To do

so would enlarge governmental tort liability without authority in decisional law or legislative history. Ibid. In the absence of such ownership or control, RESPONDENTS cannot be liable for this incident under a dangerous condition theory.

APPELLANTS' Complaint does not allege any defect of the property other than the presence of an illegal makeshift liquor stand. The sale of alcohol itself relates to activities on the property and not conditions of the property itself. As such the presence of the liquor stand cannot be a dangerous condition on public property.

Further, the individual who shot and killed Mr. Garcia cannot be considered a dangerous condition on public property, as the mere presence on public property with criminal intent or purpose cannot constitute a dangerous condition. Rodriguez, supra, at 39.

CONCLUSION

Accordingly, for the reasons set forth herein, DEFENDANTS/RESPONDENTS, CITY OF HOBOKEN ("CITY") and HOBOKEN POLICE DEPARTMENT ("HPD") (collectively "RESPONDENTS,") respectfully request that this Appellate Panel affirm the November 22, 2023 Order granting RESPONDENTS' Motion to Dismiss and dismissing the Complaint of PLAINTIFFS/APPELLANTS, EVELYN AVILES, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER GARICA and JEFFREY GARCIA, ("APPELLANTS,") with prejudice.

Respectfully submitted,

FLORIO♦KENNY♦RAVAL, L.L.P.

Edward J. Florio

EDWARD J. FLORIO, ESQ.
ATTORNEYS FOR DEFENDANT,
TOWN OF HARRISON

cc: All Counsel of Record (ECourts)

EVELYN AVILES, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER GARCIA & JEFFREY GARCIA, Plaintiffs, vs. CITY OF HOBOKEN; HOBOKEN POLICE DEPARTMENT; HOBOKEN HOUSING AUTHORITY; JOHN DOES (1-10); ABC COMPANIES (1-10); XYZ GOVERNMENTAL ENTITIES (1-10), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-001199-23 Trial Court Docket No.: HUD-L-2210-23 CIVIL ACTION On Appeal From: Superior Court of New Jersey, Law Division, Civil Part, Hudson County Sat Below: Hon. Anthony V. D'Elia, J.S.C.

REPLY BRIEF OF PLAINTIFFS/APPELLANTS

LAW OFFICE OF ERIC J. WARNER, LLC
Eric J. Warner, Esq.
Bar No.: 03651-2006
991 US Highway 22
Suite 200
Bridgewater, NJ 08807
Tel: (201) 403-5937
Fax: (908) 758-1201 (fax)
Email: eric@ejwlawfirm.com
Counsel for Plaintiffs

OF COUNSEL & ON THE BRIEF:
ERIC J. WARNER, ESQ.

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS & RULINGS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Plaintiffs, Evelyn Aviles, individually and as Administrator of the Estate of Christopher Garcia ("Decedent"), and Jeffrey Garcia (collectively "Plaintiffs"), respectfully submit this brief in reply to the opposition briefs submitted by Defendants, City of Hoboken, Hoboken Police Department, and Hoboken Housing Authority. In their opposition briefs, Defendants/Respondents make several erroneous arguments, all of which misapprehend the ultimate issues on appeal.

Of significant importance to this appeal is whether the presence of the large, makeshift liquor concession stand on the Subject Premises for months before the Decedent was shot, which was illegal, since the sale of alcoholic beverages on the Subject Premises – near a public basketball court and playground, was illegal, was a dangerous condition on public property and more than just the criminal activities of third parties as argued by Defendants.

Respectfully, the trial court failed to consider Plaintiffs' arguments by mischaracterizing the untimely death of Decedent as merely a "drive-by shooting" and ignoring a line of cases holding that a dangerous condition of property may be found to exist under the New Jersey Tort Claims Act, when an unreasonable risk of harm is created by a combination of a defect in the property and the acts of third parties. Defendants' arguments do not support this reversible failure of the trial court to find that the Plaintiffs alleged facts to support a finding of a dangerous condition

on public property – the presence of the illegal, large, makeshift liquor concession stand on the Subject Premises for months before Decedent was shot, for which the Defendants are not immune from liability.

For the reasons set forth below, Defendants' arguments in opposition to Plaintiffs' arguments do not provide any basis to deny the appeal. Similarly, for the reasons set forth below and in Plaintiffs' opening appellate brief, this Court should reverse the lower court's grant of dismissal of Plaintiffs' Complaint with prejudice and remand the matter back to the lower court for further proceedings.

PROCEDURAL HISTORY

Plaintiff hereby incorporates the procedural history as set forth in Plaintiff's opening brief.

STATEMENT OF FACTS

Plaintiff hereby incorporates the allegations contained in the Complaint as if the same were set forth at length herein. (P.1.)

LEGAL ARGUMENT

POINT I: THIS COURT SHOULD REVERSE THE LOWER COURT'S GRANT OF DISMISSAL WITH PREJUDICE. (P-59.)

As Defendants acknowledged, ordinarily, if a complaint is not sufficiently specific, a dismissal under Rule 4:6-2(e) should be without prejudice with an opportunity for leave to amend. See, e.g, Printing Mart-Morristown v. Sharp Elecs.

Corp., 116 N.J. 739, 746 (1989) (cited with approval by Defendants City of Hoboken and Hoboken Police Department, Defs.' Brief at 5, and Defendant Hoboken Housing Authority ("HHA"), Def. HHA's Brief at 8). As discussed herein and in Plaintiffs' initial brief, Plaintiffs sufficiently pleaded that the illegal, large, makeshift liquor concession stand on the Subject Premises was a combination of a defect in the condition of public property and the criminal activities of third parties, in that it lured residents and the general public to the Subject Premises like moths to a flame, enticed them to become intoxicated in public, and caused fighting and similar mayhem. Plaintiffs sufficiently pleaded that Defendants had actual or constructive knowledge of the presence of the illegal, large, makeshift liquor stand, which Defendants either discovered or should have discovered in the course of surveilling and maintaining the Subject Premises or responding to complaints about fighting and mayhem for several months before Decedent was murdered, and ignored it. Thus, Defendants are not automatically entitled to immunity under the under the New Jersey Tort Claims Act, and a jury should be allowed to decide whether Plaintiffs have satisfied all of the elements of their claims after Plaintiffs have engaged in discovery.

POINT II: DEFENDANTS MISCHARACTERIZE THE ILLEGAL, LARGE, MAKESHIFT LIQUOR CONCESSION STAND AS MERELY BEING THE CRIMINAL ACTIVITIES OF THIRD PARTIES. (P-59.)

All Defendants improperly rely on a line of cases, Levin v. County of Salem, 133 N.J. 35 (1993); Rodriguez v. N.J. Sports Exposition Authority, 193 N.J. Super 39 (App. Div. 1983); Setrin v. Glassboro State College, 136 N.J. Super. 329 (App. Div. 1975), and argue that the presence of the illegal, large, makeshift liquor concession stand on the Subject Premises for months before the Decedent was shot was merely the criminal activity of third parties, and not a defect in the condition on public property. Defendant Hoboken Housing Authority ("HHA") claims that "the facts pled do not indicate any defect in the physical property," Def. HHA's Brief at 14, when Plaintiffs explicitly pleaded that the large, makeshift liquor concession stand was a defect in the physical property because its presence there was illegal. Taking Defendants' arguments to their logical conclusion, a broken window on the Subject Premises would merely be the criminal activities of third parties and Defendants would neither be under any obligation to repair the window, nor would they be liable under the TCA, even if the broken window lured others with criminal intent to the Subject Premises and an innocent bystander was injured as a result. See Levin, 133 N.J. at 49 ("Of course, a physical defect in the property, for example, a missing window, combined with the foreseeable neglect or misconduct of third parties, may result in the imposition of liability on the public entity because the

combination renders the property unfit.") (emphasis added) (cited with approval by Defendant HHA, Def. HHA's Brief at 13). New Jersey courts have not denied recovery under the TCA merely because the defect in the condition of public property was caused by a third party. See Saldana v. DiMedio, 275 N.J. Super. 488 (App. Div. 1994) (holding that a jury should determine whether the City of Camden was palpably unreasonable when it failed to secure dilapidated, abandoned city buildings after a third party started a fire in one of them).

As acknowledged by Roe by M.J. v. N.J. Transit Rail Operations, Inc., 317 N.J. Super. 72, 74-75 (App. Div. 1998), certif. denied, 160 N.J. 89 (1999):

> The cases [including Levin v. County of Salem, 133 N.J. 35 (1993); Rodriguez v. N.J. Sports Exposition Authority, 193 N.J. Super 39 (App. Div. 1983); Setrin v. Glassboro State College, 136 N.J. Super. 329 (App. Div. 1975), all cited with approval by the lower court, (Tr., 11:23-12:16)] are inapposite since they involved injuries caused not by the condition of the property but by the acts of the injured party himself or the dangerous activities of other persons. Thus, in those cases, the property itself did not contribute in any way to the causing of the injuries. The injuries merely happened to occur on public property. Here, plaintiff alleges that the dangerous condition of the property itself enhanced her exposure to the criminal attack.

317 N.J. Super. at 79. The Roe Court concluded that a jury could determine that by bolting its gate open, New Jersey Transit invited the public to traverse a perilous foot path, thereby substantially enhancing the public's risk of harm, and could be liable for the criminal activities of their parties against members of the public invited to

traverse the perilous foot path. Id. As in Roe, Plaintiffs alleged that the dangerous condition of the property itself enhanced Decedent's exposure to criminal attack. Id. Similar to the open gate in Roe, a jury could determine that by failing to remediate the presence of the illegal, large, makeshift liquor concession stand on the Subject Premises for several months before Mr. Garcia was murdered, Defendants enticed residents and the public to become intoxicated near a basketball court and a playground well into the night and early morning hours, resulting in frequent physical fighting and similar mayhem, thus creating a known dangerous area.

As acknowledged by Defendant HHA, "a dangerous condition or property may be found to exist when an unreasonable risk of harm is **created by the combination of [(1)] a defect in the property and [(2)] the acts of third parties.**" Def. HHA's Brief at 17-18 (citing Foster v. Newark Housing Authority, 389 N.J. Super. 60, 68 (App. Div. 2006)) (emphasis added). Contrary to Defendant HHA's argument, the Foster Court's determination is in accord with the facts as pleaded: the combination of (1) the defect of public property (*i.e.*, the presence of the illegal, large, makeshift liquor concession stand on the Subject Premises for months) and (2) the foreseeable acts of third parties (*i.e.*, a drunken patron of the illegal, large, makeshift liquor concession stand fighting with Decedent and eventually shooting him) could be found to create a "dangerous condition" under the TCA. Compare Def. HHA's Brief at 18 with Foster, 389 N.J. Super. at 68. So is the Saldana Court's

determination that the combination of a defect in public property (*i.e.*, a hazardous, illegal, large, makeshift liquor concession stand that needed to be removed or demolished) and the acts of third parties (*i.e.*, unauthorized persons getting drunk and starting fights) was sufficient for a "dangerous condition" as is the law in New Jersey. Compare Def. HHA's Brief at 20-21 with Saldana, 275 N.J. Super. at 503.

POINT III: DEFENDANT/RESPONDENT HHA IMPROPERLY ARGUES THAT TURNING THE SUBJECT PREMISES INTO A "POP-UP BAR" WAS THE ONLY USE OF THE SUBJECT PREMISES WHILE THE "POP-UP BAR" OPERATED AND NOT REASONABLY FORESEEABLE. (P-59.)

Plaintiffs agree with Defendant HHA – the operation of the large, makeshift liquor concession stand on the Subject Premises was illegal. See Def. HHA's Brief at 24-25. The Plaintiffs further agree with Defendant HHA that the intended users of the Subject Premises and the "objectively reasonable public" were "residents of the surrounding public housing units just trying to live their lives." Def. HHA's brief at 26. Defendant HHA's argument that the Subject Premises' only use by the public generally was as a "pop-up bar" when the "pop-up bar" was in operation turns the holding of Garrison v. Twp. of Middletown, 154 N.J. 282, 287 (1998) on its head. As Garrison makes clear, "[i]f a public entity's property is dangerous **only** when used without due care, the property is not in a 'dangerous condition.'" Garrison, 154 N.J. at 287 (emphasis added). "When the property poses a danger to all users," id. at 292, such as the "residents of the surrounding public housing units just trying to live their lives," Def. HHA's Brief at 26, "an injured party may establish that property

was in a dangerous condition notwithstanding his or her failure to exercise due care." Garrison, 154 N.J. at 292.

Defendant HHA argues, and Plaintiffs agree, that "[a] reasonable use of the [Subject Premises] (i.e., an outdoor public basketball court/common area) would be for playing basketball or some such other related activity." Def. HHA's Brief at 27. Defendant HHA ignores the fact that members of the general public present at the Subject Premises while the illegal, large, makeshift liquor concession stand was operating may have been at the Subject Premises to play basketball or otherwise "live their lives" and not consume alcohol. The illegal, large, makeshift liquor concession stand was a danger to all users of the Subject Premises, whether or not they acted with due care, and whether or not they were there to purchase alcohol. See Garrison, supra, 154 N.J. at 297. The acts of the intoxicated patrons, including the one that murdered Mr. Garcia, do not absolve Defendants of liability. See Saldana, supra, 275 N.J. Super. at 503 (holding that independent intervening acts did not absolve the city from liability as a landowner for the condition of the property, which, together with the intervening acts, caused the damage); cf. Roe, supra, 317 N.J. Super. at 80 (intervening acts of a rapist did not absolve the public entity from liability).

POINT IV: WHETHER DEFENDANTS' CONDUCT IN FAILING TO REMOVE THE ILLEGAL, LARGE, MAKESHIFT LIQUOR CONCESSION STAND WAS "PALPABLY UNREASONABLE" SHOULD BE LEFT TO A JURY. (P-59.)

Defendant HHA argues that Defendants' conduct in failing to remove the illegal, large, makeshift liquor concession stand on the Subject Premises for several months was not "palpably unreasonable," but this determination should be left to a jury. Vincitore v. New Jersey Sports & Expo. Auth., 169 N.J. 119, 130 (2001). The Roe Court held that the conduct of New Jersey Transit when it bolted open a gate, thereby inviting the plaintiff to enter a known dangerous area where she was brutally raped, could be found to have been palpably unreasonable. 317 N.J. Super. at 82. The Saldana Court held that a jury should determine whether the City of Camden was palpably unreasonable when it failed to secure dilapidated, abandoned city buildings after a third party started a fire in one of them. 275 N.J. Super. at 488. The Foster Court held that whether the Newark Housing Authority's failure to provide a lock for the front entrance of an apartment building, enabling a nonresident to enter and shoot a police officer accompanying a tenant, was palpably unreasonable should be left to the jury. 389 N.J. Super. at 87. Defendant HHA cites Judge Stein's concurrence in Garrison, 154 N.J. at 285, 311, for the proposition that a Court may decide the issue on summary judgment. Def. HHA's Brief at 28-29. But Judge Stein acknowledged that "[h]ad the Township received prior complaints or reports of prior injuries with regard to the alleged dangerous condition, the issue might be viewed

differently." Garrison, 154 N.J. at 311. Plaintiffs adequately pleaded that the presence of the illegal, large, makeshift liquor concession stand caused fighting and mayhem at the Subject Premises for months before Decedent was shot – a very different scenario from the Garrison plaintiff who was injured on a parking lot with an uneven surface of a declivity of just one-and-one-half inches. Garrison, 154 N.J. at 285. Similarly, Defendant HHA's reliance on Polzo v. Cnty of Essex, 209 N.J. 51 (N.J. 2012) is also misplaced. Polzo involved a fatal accident that occurred when a person lost control of her bicycle while riding across a pothole, which is "a common sight on New Jersey's roads and highways." Id. at 55. Whether a public entity's failure to fix a common sight such as pothole is "palpably unreasonable" is quite different from whether Defendants' failure to remove an illegal, large, makeshift liquor concession stand is "palpably unreasonable," and in the instant case, the determination should be left to a jury.

POINT V: PLAINTIFFS ARE ENTITLED TO DISCOVERY REGARDING THE COMPLAINTS ABOUT THE ILLEGAL, LARGE, MAKESHIFT CONCESSION STAND AND THE EXTENT THAT DEFENDANTS' EMPLOYEES FAILED IN THEIR MINISTERIAL DUTIES TO SHUT IT DOWN. (P-59.)

Defendant HHA argues that it does not provide security services to the Subject Premises – Plaintiffs should be able to conduct discovery to determine if this is true. Defendants City of Hoboken and Hoboken Police Department argue that they are not liable for their employees' failure to shut down the illegal, makeshift liquor

concession stand, arguing that their failure of their employees to notice and remove the illegal, large, makeshift liquor concession stand on the Subject Premises boils down to an allocation of resources, i.e., discretionary. However, if Defendants had received prior complaints or reports of prior fights or other mayhem at the Subject Premises due to the presence of the illegal, large, makeshift liquor concession stand, the duty of their employees to employees to notice and remove the illegal, large, makeshift liquor concession stand on the Subject Premises is ministerial. Shore v. Housing Authority of Harrison, 208 N.J. Super. 348, 350-51 (App. Div. 1986) ("there is a distinction between the failure to provide police protection service, or sufficient police protection service, and the negligent performance by a police officer of his assigned duties. The latter is not immunized by N.J.S.A. 59:5-4.")

Plaintiffs agree with Defendants City of Hoboken and Hoboken Police Department that "[m]inisterial acts are not immunized even when they may entail 'operational judgments,' such as 'when, where and how' to carry out a required duty." Defs.' Brief at 10 (citing Gonzalez v. City of Jersey City, 247 N.J. 551, 572 (2021) (internal citation omitted)). Police officers observing the presence of the illegal, large, makeshift liquor concession stand and its intoxicated patrons would have a duty to shut it down, and this act would be ministerial. The Court in Rooster Bar LLC v. Borough of Cliffside Park, Docket No. A-1022-12T1, at *11-12 (N.J. Super. App. Div. Nov. 1, 2013) (P-80) acknowledged that it is common for police

officers to patrol outside legally operating bars to prevent patrons from driving while intoxicated and common sense that a police officer patrolling a legally operating bar would have a duty to respond to and investigate a knife fight. Police officers, faced with reports of violent and intoxicated persons causing a fight similar to those at the illegal, large, makeshift liquor concession stand, have a duty to respond and investigate it, and this act would be ministerial. Plaintiffs adequately pleaded that Defendants had actual or constructive notice of the illegal, large, makeshift liquor concession stand due to its presence on the Subject Premises for several months before Mr. Garcia's murder, and 2) upon discovering the presence of the illegal, large, makeshift liquor concession stand, Defendants had a duty to shut down the large, makeshift liquor concession stand because it was illegal. Plaintiffs are entitled to discovery to determine what resources were allocated to maintain and surveil the Subject Premises that would have discovered the illegal, large, makeshift liquor concession stand before Mr. Garcia was murdered, and prior reports of fights or other mayhem due to its presence on the Subject Premises.

CONCLUSION

This Court should respectfully reverse the lower court's grant of dismissal of Plaintiffs' Complaint with prejudice and remand the matter back to the lower court for further proceedings.

LAW OFFICE OF ERIC J. WARNER, LLC
Attorney for Plaintiffs

By: /s. Eric J. Warner
Eric J. Warner, Esq.

Dated: May 24, 2024