DAVID B. WILSON AND CHERYL WILSON, HUSBAND AND WIFE, Plaintiff/Respondent, v. THE CITY OF NEWARK, STATE OF NEW JERSEY, NORFOLK SOUTHERN CORPORATION, AND JOHN DOES 1-10 Defendants/Appellants.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-001709-23 T2 <u>Civil Action</u> On Appeal From: Superior Court of New Jersey Law Division, Essex County Sat Below: Hon. Thomas R. Vena, J.S.C. Trial Court Docket No.: Docket No. ESX-L-2081-17

REPLY BRIEF FOR APPELLANT THE CITY OF NEWARK

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PRELIMINARY STATEMENT

The New Jersey Tort Claims Act ("TCA") establishes a system for public entities, like the City of Newark ("City"), in which immunity from tort liability is the general rule and liability is the exception. In his opposition to the City's appeal, Plaintiff David Wilson fails to show why this case is an exception to that general rule. Plaintiff does not point to any competent, credible evidence in the record—either at the summary judgment stage or at trial—from which a rational factfinder could determine the City had actual or constructive notice that the sign alerting drivers to the height of the overpass was missing. Plaintiff does not do so because he cannot: There is no evidence in the record as to how long the sign had been missing prior to Plaintiff's accident or as to whether the City had been notified that the sign was missing.

Instead, Plaintiff argues the City created the dangerous condition that resulted in his injuries and, therefore, already had the level of notice required under the TCA to be held liable. Plaintiff supports that argument by speculating and by faulting the City's exercise of its discretion over the placement of traffic signs. But that is not enough for Plaintiff to overcome his heavy burden under the TCA. Indeed, Plaintiff failed to meet his burden at both the summary judgment stage and at trial, and the trial court should have granted the City's motions for summary judgment and directed verdict. In denying those motions,

the trial court failed to adhere to the guiding principles of the TCA and deprived the City of the broad immunity to which it is entitled. This court should reverse the decisions by the trial court and remand this matter with the direction that the trial court enter an order dismissing Plaintiff's Complaint against the City with prejudice.

LEGAL ARGUMENT

I. PLAINTIFF INCORRECTLY ARGUES THIS COURT MUST AFFIRM THE TRIAL COURT'S ORDERS UNLESS IT DETERMINES THERE HAS BEEN A MISCARRIAGE OF JUSTICE SHOCKING THE CONSCIENCE OF THE COURT.

Plaintiff misstates the standard of review governing this appeal. The City appeals the trial court's orders denying its: (1) June 7, 2019 motion for summary judgment; (2) November 2, 2023 motion for directed verdict at the close of Plaintiff's case; and (3) November 9, 2023 motion for a directed verdict after all the evidence had been presented. (Da1; Da3; Da5).[1] This court reviews those orders de novo, applying the same standard that governed the trial court. Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 511 (2019); Carbajal v. Patel, 468 N.J. Super. 139, 157 (App. Div. 2021). That standard does not, as Plaintiff contends, require this Court to determine whether there was a gross miscarriage of justice shocking the conscience of the court.

[1] "Da" refers to the City's appendix.

Rather, in reviewing a motion for summary judgment, the court must determine "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). Similarly, in reviewing a motion for a directed verdict, the court must determine whether, "accepting as true all the evidence which supports the position of the party defending against the motion and according him [or her] the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ." Verdicchio v. Ricca, 179 N.J. 1, 30 (2004) (quoting Est. of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000)); see also Smith v. Millville Rescue Squad, 225 N.J. 373, 397 (2016) (explaining that a motion for directed verdict should "be granted where no rational juror could conclude that the plaintiff marshaled sufficient evidence to satisfy each prima facie element of a cause of action" (quoting Godfrey v. Princeton Theological Seminary, 196 N.J. 178, 197 (2008))).

As the City explained in its opening brief, the trial court wrongly concluded Plaintiff produced sufficient evidence to survive the City's motions for summary judgment and directed verdict. At the summary judgment stage,

Plaintiff failed to rebut the City's motion with competent evidential material showing a genuine issue of material fact existed as to whether the City had notice of the missing sign. Plaintiff did not submit any evidence showing the City had actual notice that the sign was missing before Plaintiff's accident or that the sign had been missing for long enough that the City should have discovered it. Plaintiff relied only on a police report stating the sign was missing at the time of Plaintiff's accident, and two work orders—one from over thirty days before Plaintiff's accident and one more than ninety days after—showing the sign had been knocked down and reinstalled. (Da76; Da181; Da183). This evidence was insufficient to create a genuine issue of material fact as to whether the City had notice of the missing sign, and resulted in the trial court improperly speculating as to how long the sign had been missing. See Carroll v. N.J. Transit, 366 N.J. Super. 380, 388 (App. Div. 2004); Knapp v. Phillips Petroleum Co., 123 N.J. Super. 26, 31 (App. Div. 1973).

At trial, Plaintiff similarly failed to present any evidence from which a rational juror could conclude the City knew or should have known the sign was missing based upon how long the sign had been missing. To demonstrate that the City had notice, Plaintiff introduced three work orders—none of which show the sign was missing in the weeks, days, hours, or minutes before Plaintiff's accident—and his own testimony that the sign was missing at the time of his

accident. (Da181; Da 225; Da226; 5T73:19-74:11).[2] No rational juror could conclude Plaintiff marshaled enough evidence to show the City had actual or constructive notice of the missing sign. Smith, 225 N.J. at 397; see also Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238, 243 (App. Div. 2013) ("The mere '[e]xistence of an alleged dangerous condition is not constructive notice of it.'" (alteration in original) (quoting Sims v. City of Newark, 244 N.J. Super. 32, 42 (Law Div. 1990))). And Plaintiff's failure to do so was fatal to his claim against the City. See Polzo v. Cnty. of Essex, 196 N.J. 569, 585 (2008) (explaining the requirements of the TCA "are accretive; if one or more of the elements is not satisfied, a plaintiff's claim against a public entity alleging that such entity is liable due to the condition of public property must fail").

In his opposition brief, Plaintiff does not point to any evidence in the record showing the City had notice of the missing sign or showing the length of time that the sign had been missing. Rather, Plaintiff simultaneously argues: (1) he did not need to prove notice because the City created a dangerous condition by not placing traffic signs in the appropriate places; and (2) the City, in fact, had notice that it created a dangerous condition by its placement of the

[2] "5T" refers to the November 2, 2023 trial transcript.

traffic sign because the sign had previously been knocked down.[3] These arguments are without merit and must be rejected.

II. PLAINTIFF FAILED TO PRESENT OR INTRODUCE EVIDENCE SHOWING THE CITY'S PLACEMENT OF THE SIGN CONSTITUTED A DANGEROUS CONDITION OR THAT THE CITY HAD NOTICE OF SAME.

Plaintiff contends the City's placement of the sign on Avenue P constituted a dangerous condition because the sign had, on previous occasions, been knocked down. In other words, Plaintiff contends the City's placement of the sign was, in and of itself, a dangerous condition. Plaintiff also argues the City had notice of this allegedly dangerous condition by virtue of the work orders demonstrating the sign had been knocked down and subsequently replaced.

But the evidence presented by Plaintiff at both the summary judgment stage and at trial was insufficient to establish that the City had notice of the missing sign. There is no evidence in the record demonstrating or supporting Plaintiff's contention that the City should not have placed the sign on Avenue P. Plaintiff's argument is simply an ipse dixit: Because the sign had been knocked down on previous occasions, the sign's location therefore must have been inappropriate and dangerous.

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[3] Plaintiff argues that the trial court's order denying the City's motion for summary judgment is somehow mooted by the jury's verdict. That, of course, is not the law. Plaintiff does not cite any case law in support of that proposition. It is well within this Court's authority to vacate the jury's verdict and remand with direction that the trial court enter an order in favor of the City, dismissing this case with prejudice.

The City, however, has discretion over where it places traffic signs. See Smith v. State, Dep't of Transp., 247 N.J. Super. 62, 68 (App. Div. 1991); Aebi v. Monmouth Cnty. Highway Dep't, 148 N.J. Super. 430, 433 (App. Div. 1977); see also U.S. Dep't of Transp., Manual on Uniform Traffic Control Devices for Streets and Highways at 120 (2009 ed.) (Pa8)[4] ("Option: The Low Clearance sign may be installed on or in advance of the structure.") (emphasis added). And there was no expert testimony introduced at summary judgment or at trial showing the City had exercised its discretion in a manner that was palpably unreasonable. See Gonzalez by Gonzalez v. City of Jersey City, 247 N.J. 551, 571 (2021) (explaining that "[w]hen a public entity's or employee's actions are discretionary, liability is imposed only for 'palpably unreasonable conduct'" (quoting Henebema v. S. Jersey Transp. Auth., 219 N.J. 481, 495 (2014))).[5]

In fact, under the TCA a public entity is generally not liable "for an injury caused by the failure to provide ordinary traffic signals, signs, markings or other similar devices." N.J.S.A. 59:4-5. Moreover, Plaintiff completely disregards

[4] "Pa" refers to Plaintiff's appendix.

[5] Plaintiff notes that whether a public entity has acted palpably unreasonable is an issue of fact for the jury. Although the issue of palpable unreasonableness is typically one for the trier of fact, "the issue may may be decided by the court as a matter of law in appropriate cases." Maslo v. City of Jersey City, 346 N.J. Super. 346, 350 (App. Div. 2002).

testimony by Mr. Juan Feijoo, a representative of the City, who explained the City is limited as to where it can place the sign on Avenue P:

> Q: Okay. All right. Now let me ask you this. The City had repeatedly put the sign back up in the place where it was located, correct?
>
> A: Yes.
>
> Q: Why has that site - - has that been chosen?
>
> A: Say again?
>
> Q: Why has it been placed there and not somewhere else?
>
> A: Because it's within the City right-of-way and it's one of the few places we can put that sign at.
>
> Q: Why are there so few places?
>
> A: Because putting it anywhere else would probably be on somebody else's property, if it's not in the City right-of-way.
>
> [5T115:24-116:13.]

It is not up to Plaintiff to second guess the City's exercise of its discretion. Nor should the City be liable for exercising its discretion without some evidence that it acted in a palpably unreasonable manner. N.J.S.A. 59:2-3; see also Gonzalez by Gonzalez, 247 N.J. at 571. As set forth in the City's opening brief, Plaintiff failed to present sufficient evidence to support his contention that the City's placement of the sign on Avenue P constituted a dangerous condition, or that the City had notice that such placement constituted a dangerous condition. Simply put, Plaintiff asks this

court, as he asked the trial court and jury, to speculate about the propriety of the City's exercise of its discretion to place the sign in question. This court must decline to do so and reject Plaintiff's argument.

III. PLAINTIFF FAILED TO PRESENT OR INTRODUCE EVIDENCE SHOWING THAT THE CITY'S EXERCISE OF DISCRETION IN PLACING THE SIGN CONSTITUTED A DANGEROUS CONDITITION.

Plaintiff also argues the City created a dangerous condition by failing to place traffic signs in accordance with N.J.S.A 27:5G-4 and, therefore, Plaintiff need not prove that the City had actual or constructive notice of the missing sign. This argument disregards the City's discretion in the placement of traffic signs and is similarly unsupported by the evidence presented by Plaintiff both at the summary judgment stage and at trial.

According to Plaintiff, N.J.S.A. 27:5G-4 does not provide the City with any discretion over the placement of traffic signs. Rather, N.J.S.A. 27:5G-4 purportedly requires Plaintiff to place a "low overpass" sign on the overpass itself as well as at a location preceding the overpass where the driver of a commercial vehicle could safely make a detour around the overpass. Plaintiff misreads the statute by ignoring that the statute incorporates the Manual on Uniform Traffic Control Devices for Streets and Highways ("Manual") by reference.

Under N.J.S.A. 27:5G-4(a), every bridge or overpass with a clearance of less than fourteen feet six inches "shall have the maximum clearance marked or posted thereon in accordance with the current standards prescribed by the [Manual]." (emphasis added). The Manual, in turn, provides that a low clearance sign "may be installed on or in advance of" the overpass. (Pa8). A proper interpretation of the statute should recognize and effectuate the discretion afforded to the City, as reflected in the Manual. Accordingly, a public entity complies with N.J.S.A. 27:5G-4(a) either by having the maximum clearance marked in accordance with the Manual—that is, installed in advance of the overpass—or posted on the overpass in accordance with Manual. That is precisely what the City did in this case.

As Mr. Feijoo testified, the Manual does not require the City to place a sign on the overpass. (5T117:5-15). Indeed, the overpass on Avenue P is not owned by the City, and the City exercised its discretion, in accordance with the Manual, to place the sign in advance of the overpass at a location within the City's right-of-way. (5T117:2-21). There is no documentary evidence or testimony in the record rebutting Mr. Feijoo's testimony, or otherwise demonstrating the City's exercise of discretion in the placement of the sign was palpably unreasonable. Likewise, Plaintiff failed to submit any evidence showing that the City's placement of the sign constituted a dangerous condition. There is also nothing in the record suggesting the location of the sign did not permit the operator of a motor vehicle to safely detour

around the overpass. Again, Plaintiff asks this court, as it did the trial court and the jury, to speculate as to the propriety of the City's exercise of its discretion. This court must decline to do so and reject Plaintiff's argument.

In sum, Plaintiff's opposition fails to show why the City should not have been afforded the broad immunity to which it is entitled under the TCA. Plaintiff does not point to any evidence in the record—either at the summary judgment stage or at trial—from which a rational factfinder could conclude the City had notice of the missing sign. Plaintiff chooses instead to question the City's exercise of its discretion in placing the sign in advance of the overpass, as it is entitled to do under the Manual. But Plaintiff similarly fails to point to any evidence in the record supporting his contentions. At each stage of this case, Plaintiff failed to meet his burden, and the trial court should have granted the City's motions for summary judgment and directed verdict.

CONCLUSION

For these reasons and those expressed in the City's opening brief, this court should reverse the orders entered by the trial court and remand with instruction to dismiss Plaintiff's Complaint against the City with prejudice.

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The City of Newark

/s/ Raymond M. Brown
RAYMOND M. BROWN

Dated: September 24, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001709-23

DAVID B. WILSON and CHERYL WILSON, husband and wife, Plaintiffs/Respondents, v. **CITY OF NEWARK, STATE OF NEW JERSEY, NORFOLK SOUTHERN CORPORATION, and JOHN DOE(S) 1-10**, Defendants/Appellants.	ON APPEAL FROM ORDEER OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION ESSEX COUNTY SAT BELOW: THE HONORABLE THOMAS R. VENA, J.S.C.

AMENDED BREIF AND APPENDIX OF PLAINTIFFS/RESPONDENTS IN OPPOSITION TO DEFENDANT/APPELLANT'S APPEAL

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PRELIMINARY STATEMENT

This matter arises out of an incident that occurred on March 26, 2015, on a truck route in The City of Newark (hereinafter "Newark"). [Da35 & 5T[1]36:1 to 84:8] Respondent, David Wilson, was attempting to travel beneath an unmarked overpass when the top of Respondent's truck struck the overpass due to improper signage and/or the appropriate signs and warning missing from the overpass and a proceeding exit. [Id.] As a result of the collision, Respondent was caused to suffer serious and permanent injuries. [Da35 & 5T36:1 to 84:8 & Da185] Respondent alleged that Appellant, Newark, was negligent relating to the signing in connection with the overpass. [Id.]

PROCEDURAL HISTORY

The Plaintiff agrees with the Appellant's stated procedural history and further indicates that the personal injury matter was tried to verdict as against Appellant and the jury found in favor of Respondent and against Appellant, resulting in a net jury verdict against the Defendant in the amount of $562,500.00. [7T3:22 to 10:14]

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[1] The trial transcripts are cited as follows:
"2T" refers to the January 17, 2023 motion transcript;
"3T" refers to the October 30, 2023 motion transcript;
"4T" refers to the November 1, 2023 trial transcript;
"5T" refers to the November 2, 2023 trial transcript;
"6T" refers to the November 6, 2023 trial transcript;
"7T" refers to the November 8, 2023 motion transcript; and
"8T" refers to the January 19, 2024 motion transcript.

Appellant lost the jury trial, and thereafter, was unsuccessful on post-trial motions. [8T10:14 to 20:12] There is nothing in the record that would suggest that the jury verdict should be disturbed. [Id.]

CONCISE COUNTER STATEMENT OF FACTS

An overpass on the Defendant Newark's dark street with potholes was too low and not properly marked. [Da35 & 5T36:1 to 84:8] The Plaintiff, a New Jersey citizen operating a truck as a part of his job struck the low overpass and following that occurrence had a neck fusion. [Da35 & 5T36:1 to 84:8 & Da185]

A statute effective September 1986, N.J.S.A. 27:5G-4, sets out the Defendant/Appellant City's duties:

> a. Every bridge or overpass carrying a railroad, with a clearance of less than 14 feet 6 inches from the roadway beneath, shall have the maximum clearance marked or posted thereon in accordance with the current standards prescribed by the Manual on Uniform Traffic Control Devices for Streets and Highways.
>
> b. Signs warning persons driving motor vehicles that they are approaching a bridge or overpass with less than 14 feet 6 inches clearance shall be posted at the last safe exit or detour preceding the bridge or overpass and the maximum clearance of the bridge or overpass shall be indicated on these signs.
>
> c. The signs or markings required by this section shall be posted or marked, as appropriate, by, and shall be maintained by the governmental entity, be it the State or

> the political subdivision, which has jurisdiction over the roadway underneath the bridge or overpass. The provisions of this section shall not apply to the toll road authorities.

[4T150:1 to 52:8 & 5T4:10-14 & the Plaintiff Request for Admission which were deemed admitted by the Trial Court and moved into evidence at trial. Id. & Pa1-13] Appellant, Newark, was negligent relating to the signing in connection with the overpass. [Da35 & 5T36:1to 84:8] Therefore, Respondent respectfully requests that this Honorable Court affirm the trial court's rulings.

STANDARD OF REVIEW

The standard of review is the same standard that a trial court uses when considering a motion for a new trial. Tp. of Manalapan v. Gentile, 242 N.J. 295 (2020). Therefore, to determine whether Appellant/Newark is entitled to a new trial the court must consider whether denying a new trial would result in a miscarriage of justice shocking the conscience of the court. Id. Pursuant to Civil Rule 4:49-1 clearly and convincingly it must appear that there was an injustice under the law to grant a new trial. That is impossible here.

An overpass on the Defendant Newark's dark street with potholes was too low and not properly marked. [Da35 & 5T36:1to 84:8] A New Jersey citizen operating a truck as a part of his job struck the low overpass and following that occurrence had a neck fusion. [Da35 & 5T36:1to 84:8 & Da185]

LEGAL ARGUMENT

I. THE PLAINTIFF'S THEORY OF LIABILITY AGAINST THE DEFENDANT NEWARK INCLUDED TWO THEORIES THAT NEWARK CREATED THE DANGEROUS CONDITION, AND BECAUSE NEWARK CREATED THE DANGEROUS CONDITION, NOTICE OF THE DANGEROUS CONDITION IS IN EFFECT ASSUMED AND THE CONCEPT OF NOTICE IS NOT APPLICABLE AND EVEN IF THE CONCEPT IS APPLICABLE, WHICH IS DENIED, THE JURY COULD HAVE CONCLUDED THAT BECAUSE THE DANGEROUS CONDITION WAS CREATED BY DEFENDANT NEWARK IT HAD NOTICE, AND ACCORDINGLY, THE TRIAL JUDGE DID NOT COMMIT AN ERROR BY ALLOWING THE JURY TO CONSIDER A NOTICE ISSUE.

Initially the Appellant attacks the Court's denial of Summary Judgment. The case was tried to verdict. Substantial evidence was introduced. The jury was instructed on the notice topic. [6T135:3 to 138:7] The Jury was specifically asked a question as to whether the Defendant/Appellant had notice of the dangerous condition. [7T3:22 to10:12] When considering all the evidence and the Trial Court's instructions on the topic the jury concluded and answered in the affirmative that the Defendant in fact had notice of the dangerous condition. Here, the Trial Court did not preclude the issue of notice. Rather, there were jury instructions that notice was required and there was a specific jury interrogatory on the topic. [6T135:3 to138:7 & 7T3:22 to 10:12] Where the Court did not preclude at trial the issue of notice, the evidence introduced at trial, the Court's jury instructions and the jury's conclusions

make in effect the Trial Court's (correct) decision confirmed by the jury moot. The jury's conclusion governs, and the Defendant's appeal should be denied.

Because the height of the overpass was not marked on the overpass and because there was no sign posted at the last safe exit or detour preceding the overpass, the Jury correctly found that a dangerous condition existed and understandably the Defendant at the trial, in its Motion for New Trial below and now in its Appeal ignores obligations imposed by N.J.S.A. 27:5G-4. The statute sets out the Newark's duties:

> a. Every bridge or overpass carrying a railroad, with a clearance of less than 14 feet 6 inches from the roadway beneath, shall have the maximum clearance marked or posted thereon in accordance with the current standards prescribed by the Manual on Uniform Traffic Control Devices for Streets and Highways.
>
> b. Signs warning persons driving motor vehicles that they are approaching a bridge or overpass with less than 14 feet 6 inches clearance shall be posted at the last safe exit or detour preceding the bridge or overpass and the maximum clearance of the bridge or overpass shall be indicated on these signs.
>
> c. The signs or markings required by this section shall be posted or marked, as appropriate, by, and shall be maintained by the governmental entity, be it the State or the political subdivision, which has jurisdiction over the roadway underneath the bridge or overpass. The provisions of this section shall not apply to the toll road authorities.

[4T150:1to 52:8 & 5T4:10-14 & the Plaintiff Request for Admission which were deemed admitted by the Trial Court and moved into evidence at trial. Id. & Pa1-13]

There is no discretion here, the statute required that the heigh of the overpass be placed on the overpass and it was not. There is no discretion here, the statute required that there be a low overpass warning sign at a location where the truck driver could detour around the low overpass and yet there was none.

The Trial Court did not instruct that the Defendant was strictly liable. Rather, the Court instructed that the jury was to consider the statute on the issue of negligence/dangerous condition. Further, the Court instructed the jury with respect to proximate cause. [6T124:6 to 162:20] With respect to these two theories-sign should have been on the overpass & a sign should have been posted at the last safe exit or detour preceding the overpass - N.J.S.A. 59:4-2(a) is applicable, and therefore the notice requirement of N.J.S.A. 59:4-3 is not applicable and notice in effect is assumed. N.J.S.A.59:4-2 states:

> 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.

N.J.S.A. 59:4-2 (emphasis added).

Newark created the dangerous condition by omission-failing to mark the height of the bridge on the bridge itself and by failing to provide a warning of the low bridge at the last exit available for the truck driver to avoid the low bridge. A plain reading of the statute clearly establishes that when a public entity creates the dangerous condition, as is the case here, the notice requirements of N.J.S.A. 59:4-3 are not required. N.J.S.A. 59:4-3, which defines actual and constructive notice, is "not applicable where public employees through neglect or wrongful act or omission within the scope of their employment create a dangerous condition." Atalese v. Long Beach Tp., 365 N.J. Super. 1, 5 (App. Div. 2003). (Emphasis added) "Whether a public employee created a dangerous condition through negligent acts or omissions may be an issue of fact that must be decided by a jury." Tymczyszyn v. Columbus Gardens, 422 N.J. Super. 253, 264 (App. Div. 2011).

The Defendant created the unsafe dangerous condition. Therefore, notice is inapplicable and not required.

There was evidence that the dangerous condition should have been discovered by the exercise of due care. See N.J.S.A. 59:4-3(b). The jury was charged on a notice question and was specifically asked by jury interrogatory the question as to whether the Defendant had constructive notice of the dangerous condition, and the jury answered yes.

Consistent with Plaintiff's Counsel arguments [6T118:2-21 & 6T87:6 to 88:13] the Trial Court on the Motion for New trial correctly concluded that "[t]here was sufficient evidence by which a reasonable jury concluded there was constructive notice of the dangerous condition…. There was evidence of constructive notice and the jury was thoroughly instructed with regard to the law relative to that issue and the jury concluded there was constructive notice. [8T16:14 to 17:17] The Defendant's appeal should be rejected.

II. THE PLAINTIFF'S THIRD THEORY OF LIABILITY WAS THAT THE GROUND SIGN LOCATED TO THE APPROACH TO THE OVERPASS WAS NOT PROPERLY MAINTAINED, AND THE DEFENDANT HAD CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION OF THE SIGN AND AREA AND FAILED TO PROPERLY MAINTAIN THE SIGN AND AREA, AND ACCORDINGLY, THE TRIAL JUDGE DID NOT COMMIT AN ERROR BY ALLOWING THE JURY TO CONSIDER A NOTICE ISSUE.

N.J.S.A. 59:4-3(b) defines constructive notice:

> A public entity shall be deemed to have constructive notice of a dangerous condition within the meaning of subsection b. of section 59:5-2 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.

In Lodato v. Evesham Tp., 388 N.J. Super. 501 (App. Div. 2006), plaintiff did not offer an expert opinion but relied on the fact that the nature of the dangerous condition (raised roots in a residential sidewalk) was open and obvious and that it had existed for eighteen (18) years. The Appellate Division agreed, holding that

when viewed most favorably for the plaintiff, the facts indicating the age and nature of the condition created a jury question. Id. at 512.

Prior work orders concerning the street and overpass in question and relating to the approach to the low overpass the Plaintiff was taking were in evidence. [5T4:15 to 23:17 & 5T35:6-10 & 5T98:21 to 100:13 & 5T104:8-20] The dark road has no curbs and there were several work orders showing the sign placed on the road (by statute a sign should have been on the overpass and at the last opportunity for a driver to detour around the low overpass), showing the sign was not properly placed and not properly maintained. The Trial Court correctly concluded that the Jury could find that the work orders Exhibits P 2 February 13, 2015, P 3 January 11, 2011, P 4 December 13, 2011, and P 5 June 19, 2014, show there is a problem with the sign in question. [Id.] The prior work orders support the Plaintiff's position that problems with the sign show it was not properly placed and not properly maintained. [Id.]

Moreover, the top of the overpass in the Plaintiff's direction of travel was deformed from vehicles/objects striking it. [5T62:3 to 63:20 & 66:21 to 67:18 & see Pa14-16]

The top of the overpass on the other side of the overpass where there was a low height warning sign was not deformed. [Id.]

The dark road has no curbs and there were several work orders showing the sign placed on the road (by statute a sign should have been on the overpass and at the last opportunity for a driver to detour around the low overpass), showing the sign was not properly placed and not properly maintained.

There was evidence that the dangerous condition should have been discovered by the exercise of due care. See N.J.S.A. 59:4-3(b). The jury was charged on a notice question and was specifically asked by jury interrogatory the question as to whether the Defendant had constructive notice of the dangerous condition, and the jury answered yes.

The trial Court on the Motion for New trial correctly concluded that "[t]here was sufficient evidence by which a reasonable jury concluded there was constructive notice of the dangerous condition…. There was evidence of constructive notice and the jury was thoroughly instructed with regard to the law relative to that issue and the jury concluded there was constructive notice. [8T16:11 to 17:17] The Defendant's appeal should be rejected.

III. THE JURY'S CONCLUSION THAT THE DFENDANT'S ACTIONS WERE PAPABLY UNREASONABLE IS SUPPORTED BY THE EVIDENCE.

While there is no appeal concerning the Court's instructions relating to the concept "palpably unreasonable" and the Jury's conclusion in that regard, the

evidence concerning the Defendant's actions supported the Jury's conclusion that the Appellant's actions were probably unreasonable.

The long-standing rule is as follows, "whether or not a public entity's actions were palpably unreasonable is a jury question... except in cases where reasonable men could not differ." May v. Atlantic City Hilton, 128 F. Supp. 2d 195, 202 (D. N.J. 2000) (quoting, Polyard Terry, 148 N.J. Super. 202, 208 (Law D. 1977) (summary judgment for the city was precluded when plaintiff raised a "credible inference" of palpable unreasonableness when plaintiff presented evidence that the city ignored recognized safety standards in the construction and maintenance of a handicap ramp).

The evidence here included:

- It was a dark road [5T52:17to 53:6];
- The height of the overpass was less than 14 feet six inches [5T63:14-17];
- A New Jersey Statute required that the height of the overpass was to be marked on the overpass, but this was not done [4T150:1to 152:6 & 5T4:10-13];
- A New Jersey Statute required that the Defendant place a sign at the last point where a truck driver could detour around the

low over pass warning that a low over pass was on the route, but this was not done [Id.];

- The top of the overpass in the Plaintiff's direction of travel was deformed from vehicles/objects striking it [5T62:3 to 63:20 & 66:21to 67:18 & see Pa14-16];
- The top of the overpass on the other side of the overpass where there was a low overpass warning sign was not deformed. [Id.] and;
- The dark road has no curbs and there were several work orders showing the sign placed on the road (by statute a sign should have been on the overpass and at the last opportunity for a driver to detour around the low overpass), showing the sign was not properly placed and not properly maintained [5T4:15 to 23:17 & 5T35:6-10 & Pa14-16].

The jury was charged concerning the meaning of the palpably unreasonable requirement and by jury interrogatory was specifically asked if the Defendant Newark acted palpably unreasonable and the jury said that it did. The Trial Court was correct. [8T17:18-24].

Accordingly, the Defendant's appeal should be denied.

CONCLUSION

Based upon the foregoing, Defendant's appeal should be rejected, and the Trial Court's rulings and the Jury verdict should stand.

Respectfully submitted,

JARVE GRANATO STARR, LLC

Dated: September 9, 2024

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DAVID B. WILSON AND CHERYL WILSON, HUSBAND AND WIFE, Plaintiff/Respondent, v. THE CITY OF NEWARK, STATE OF NEW JERSEY, NORFOLK SOUTHERN CORPORATION, AND JOHN DOES 1-10 Defendants/Appellants.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-001709-23 T2 <u>Civil Action</u> On Appeal From: Superior Court of New Jersey Law Division, Essex County Sat Below: Hon. Thomas R. Vena, J.S.C. Trial Court Docket No.: Docket No. ESX-L-2081-17

BRIEF AND APPENDICES FOR APPELLANT THE CITY OF NEWARK

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PRELIMARY STATEMENT

Plaintiff David Wilson ("Plaintiff") filed suit against the City of Newark ("City" or "Defendant") alleging that he suffered injury on March 26, 2015, when he drove his trailer into a railroad bridge on Avenue P in Newark. Plaintiff alleges that he drove into the bridge because of a missing sign that warned of the bridge's clearance. The trial court erroneously allowed the case to proceed to trial despite the lack of notice to the City required to impose liability. The City seeks to undo the manifest error by the trial court in denying summary judgment and not granting a directed verdict, ignoring controlling precedent, the plain language and spirit of the New Jersey Tort Claims Act ("TCA"), and the absence of any facts suggesting that the City had notice of the missing sign.

The City is responsible for hundreds of miles of roadways and thousands of traffic signs. It is not the purpose of the TCA, nor the Legislature's intent, to force public entities to perfectly maintain every inch of their properties and keep roadways free of any imperfections. Such a burden is impractical given the scope of the City's responsibilities and limited resources. Despite this, the decisions of the trial court effectively subjected the City to strict liability standards and significantly

undermined the TCA's purpose of granting immunity to public entities in this context.

Our Supreme Court has repeatedly emphasized that any application of the TCA must start from its guiding principle that immunity from tort liability is the general rule and liability is the exception. That is why public entities can only be exposed to tort liability "within the limitations of the TCA." To impose liability on a public entity arising from the condition of property, a plaintiff must establish: (1) the existence of a "dangerous condition;" (2) that the condition proximately caused the injury; (3) that it "created a reasonably foreseeable risk of the kind of injury which was incurred;" (4) that either the dangerous condition was caused by a negligent employee or the entity knew about the condition; and (5) that the entity's conduct was "palpably unreasonable." The law is also clear that a plaintiff's claim against a public entity must fail if one or more of the elements is not satisfied.

In this case, Plaintiff failed to prove that the City had actual or constructive notice of the missing sign, an essential element of establishing liability under the TCA. On summary judgment and at trial, Plaintiff failed to provide any competent evidence demonstrating that the City was aware of the missing sign at the time of the accident, nor did Plaintiff provide evidence as to the length of time the condition existed. Although Plaintiff clearly failed to satisfy the Tort Claims Act requirements,

the trial court vaulted over the constructive notice requirement and allowed the matter to proceed before the jury. The trial court's decision is legally deficient, factually unsupported, and should be reversed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

On the morning of March 26, 2015, while glancing down at the street to look for potholes, Plaintiff drove his 13'6" high trailer into a 12'2" railroad bridge on Avenue P in the City of Newark. [5T54:1-5].[2] On March 21, 2017, Plaintiff filed a three-count complaint against the City in the Essex County Law Division, alleging that the City acted negligently by failing to properly post and maintain signs indicating the height of the railroad bridge. Da035.

Discovery in this matter closed in April 2019 after several extensions. Plaintiff propounded no discovery beyond interrogatories and did not depose anyone

---

[1] The facts and procedural history are intertwined and are discussed together for a more streamlined description of events.

[2] The trial transcripts are cited as follows:
"1T" refers to the June 7, 2019 motion transcript;
"2T" refers to the January 17, 2023 motion transcript;
"3T" refers to the October 30, 2023 motion transcript;
"4T" refers to the November 1, 2023 trial transcript;
"5T" refers to the November 2, 2023 trial transcript;
"6T" refers to the November 6, 2023 trial transcript; and
"7T" refers to the November 8, 2023 motion transcript.
"8T" refers to the January 19, 2024 motion transcript.

from the City. On April 26, 2019, the City's filed its motion for summary judgment. Da57. It argued that Plaintiff could not establish any of the elements required by the TCA to impose liability on a public entity. Specifically, the City raised the issue that nothing in the record supported Plaintiff's contention that the City had notice of the missing sign prior to the accident. [1T13:15-15:12]. The evidence presented by Plaintiff irrefutably supported the City's argument.

Plaintiff's proofs consisted of a police report stating that the sign was missing on the date of the accident and two work orders demonstrating instances where the sign was reported down or missing. Da076; Da181; Da183. One work order was prior to Plaintiff's accident and the second work order was produced after Plaintiff's accident. Da181; Da183. The first work order showed that on February 11, 2015, a citizen called the City to complain of a knocked down sign on Avenue P, indicating the height of the bridge to be 12' 2". Da181. The work order also indicated that the sign was reinstalled on February 17, 2015, six days after receiving notice. Da181. The second work order indicated that the sign was missing on June 29, 2015 and subsequently reinstalled on July 1, 2015, two days after receiving notice. Da183.

Thus, Plaintiff only offered evidence that the sign was down on the date of the accident; a work order showing that the sign was knocked down and reinstalled at least thirty-seven days prior to Plaintiff's accident; and a second work order from a

complaint at least ninety-five days after Plaintiff's accident, also indicating that the sign was reinstalled within days of the complaint. Plaintiff produced no evidence as to when the sign went missing during the thirty-seven days since the sign was last reinstalled and the date of the accident. Nonetheless, following briefing and oral argument on the notice issue, on June 7, 2019, the trial court issued an order denying the City's motion for summary judgment. Da001; [1T21:3-12].

The matter was then scheduled for trial in 2019, before all jury trials were placed in an inactive status due to the COVD-19 pandemic. The matter was then scheduled for trial post-COVID in January of 2022, and a pretrial order was put in place by the trial court on or about December 17, 2021, directing that all documents that were to be used at trial be submitted by January 10, 2022. Da203. After several adjournments, the trial was scheduled for October 30, 2023.

Prior to the trial, on January 17, 2023, the court heard various motions in limine with regard to this action. Da214-223. Notably, Plaintiff attempted to circumvent his burden of proving notice by unsuccessfully moving to bar the City from presenting evidence at trial to support or oppose the notice requirement of the alleged dangerous condition. Da214-215. Additionally, the trial court granted the City's motion to exclude the June 29, 2015 work order from the record in this matter, as evidence of subsequent remedial measures. Da219-220; [2T47:11-25].

This matter was then tried before The Honorable Thomas R. Vena, J.S.C., from October 30th, 2023 through November 8th, 2023. The trial evidence unequivocally established that the City did not have notice of the missing sign prior to the accident. At trial, Plaintiff's case for notice only consisted of three work orders and a brief examination of Mr. Juan Feijoo, a City representative, to authenticate the work orders. Da181; Da225; Da226; [5T27:12-35:17]. The three work orders included the February 2015 work order and two additional work orders dated December 13, 2011 and June 19, 2014, respectively. Da181; Da225; Da226. The December 2011 and June 2014 work orders were incomplete, only specifying the date of when the City was informed that the sign was down and did not provide any information as to when the City reinstalled the sign. Da225; Da226; [5T423-23:4]. To avoid potential prejudice to the City, the work orders were only used to show prior instances where the sign was knocked down. [5T4:23-23:4]. Plaintiff provided no further evidence as to the notice issue.

After the close of Plaintiff's case, the City moved for a directed verdict and again raised the issue regarding the lack of notice. [5T103:3-24]. Plaintiff relied only on the three work orders and Mr. Feijoo's authentication of the work orders to establish notice. Da181; Da225; Da226. The February 2015 work order showed that the sign was knocked down and reinstalled six days later and was reinstalled

approximately thirty-seven days before the accident. Da181. The December 2011 and June 2014 work orders only showed that the sign was previously knocked down. Da225; Da226. Plaintiff provided no additional testimony or documentary evidence indicating whether the City received any complaints about the sign from the time the sign was reinstalled in February to the date of the accident. Although Plaintiff did not offer any evidence as to when the sign was knocked down after it was reinstalled in February, the trial court held that Plaintiff had made a prima facie case to send the case to the jury and denied the City's motion. Da003; [5T104:8-20].

Next, the City presented its case and again emphasized that the record does not support a finding that the City had notice of the missing sign before the accident. This is supported by Mr. Feijoo's testimony, confirming that work orders for sign maintenance are created after the City receives a complaint from a citizen or the police, or if a City employee is in the area and sees an issue with a sign. [5T110:3-7]. Plaintiff did not provide any record of work orders, complaints, or eyewitness testimony stating that the sign was down between the time the sign was reinstalled in February and the date of the accident.

For that reason, the City renewed its motion for a directed verdict, and for the fourth time, raised the issue of the lack of notice. [6T78:16-86:4]. Plaintiff's case relied only on the fact that the sign was down on March 26, 2015 and three work

orders indicating previous instances when the sign was knocked down. Da181; Da225; Da226. Plaintiff did not provide any evidence showing when the sign was knocked down in the thirty-seven days since it was last reinstalled in February. Plaintiff provided no evidence as to the length of time the sign was down since it was last reinstalled in February. Plaintiff offered no testimony that established that the City knew that the sign was down immediately before the accident in question. Despite this clear lack of sufficient evidence to prove notice, the court again denied the City's motion for a directed verdict, stating that the court should not act as a "ninth juror." Da005; [6T88:16-89:12]. After closing statements and jury instructions, the case was submitted to the jury.[3]

On November 8 2023, the jury returned a verdict in favor of Plaintiff in the net amount of $562,500 finding the City 75% at fault. Da233; Da235; [7T8:13-12:8]. On November 28, 2023, the City filed its motion for a new trial. Da229. It argued that the trial court erroneously denied the City's motions for a directed verdict because the court's rulings were not supported by the factual record or the applicable law. Specifically, the trial court made such rulings despite the fact that Plaintiff

[3] During the jury charge conference and after the parties have already submitted their request to charge, Plaintiff also improperly argued that the jury instructions should state that notice is not required. [6T70:20-71:23]. The trial court denied Plaintiff's request, holding that Plaintiff must prove notice and the jury would be instructed on actual and constructive notice. [6T77:1-6].

presented no evidence of notice or palpable unreasonableness. However, on January 22, 2024, the trial court denied the City's motion for a new trial. Da231.

The City filed a notice of appeal to this court on February 9, 2024 and amended notices of appeal on February 22, 2024 and February 26, 2024. Da007; Da012; Da017. The City filed a final amended notice of appeal on March 14, 2024. Da023.

LEGAL ARGUMENT

This court reviews a trial court's denial of a motion for summary judgment and for a directed verdict de novo. Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 511 (2019); Carbajal v. Patel, 468 N.J. Super. 139, 157 (App. Div. 2021). Summary judgment must be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Rule 4:46-2; Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Similarly, a court must grant a motion for a directed verdict when, accepting the plaintiff's facts and considering the applicable law, "no rational jury could draw from the evidence presented" that the plaintiff is entitled to relief. Pitts v. Newark Bd. of Educ., 337 N.J. Super. 331, 340 (App. Div. 2001).

When considering a summary judgment motion in a TCA case, even when giving all of the plaintiff's evidence favorable inferences, a trial court should still "consider the declared legislative policy which shaped the application and interpretation of the Act and the Commission's Comment to N.J.S.A. 59:4-2 that 'recognized the difficulties inherent in a public entity's responsibility for maintaining its vast amounts of public property.'" Maslo v. City of Jersey City, 346 N.J. Super. 346, 350 (App. Div. 2002) (internal citation omitted). Importantly, if one or more of the elements of the TCA is not satisfied, a plaintiff's claim against a public entity alleging that such entity is liable due to the condition of public property must fail. Polzo v. County of Essex, 196 N.J. 569, 585 (2008). For the reasons set forth below, this court should reverse.

I. THE TRIAL COURT ERRED BY DENYING SUMMARY JUDGMENT BECAUSE PLAINTIFF DID NOT SHOW THAT A GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO WHETHER THE CITY HAD CONSTRUCTIVE NOTICE OF THE MISSING SIGN. (Raised Below: Da001; 1T13:15-15:12)

It is well settled that a party opposing summary judgment must do more than "point to any fact in dispute" in order to defeat the motion. Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016) (internal quotations omitted). The opposing party must "demonstrate by competent evidential material that a genuine issue of fact exists." Ibid. "Competent opposition requires competent evidential material beyond

mere speculation and fanciful arguments." Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (citation and internal quotation marks omitted); see also Polzo, 196 N.J. at 586 (stating that plaintiff's burden cannot be satisfied by "incompetent or incomplete proofs").

Further, the motion court must analyze the record in light of the substantive standard and burden of proof that a factfinder would apply in the event that the case was tried. Bhagat v. Bhagat, 217 N.J. 22, 40 (2014). "[N]either the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing the cause of action." Id. at 38. Accordingly, the trial court must consider whether the competent evidential materials presented are sufficient to permit a rational factfinder to conclude, by a preponderance of the evidence, that the City had constructive notice of the alleged dangerous condition. See Friedman v. Martinez, 242 N.J. 449, 472 (2020). Here, Plaintiff failed to proffer any evidence from which a rational fact finder could determine that he satisfied the fundamental requirement of constructive notice under N.J.S.A. 59:4-3(b), specifically that the "condition existed for such a period of time that the public entity should have discovered it."

Pursuant to N.J.S.A. 59:4-2, to impose liability on a public entity arising from an alleged dangerous condition of public property, a plaintiff must establish:

> [T]he 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.
>
> [N.J.S.A. 59:4-2]

In this matter, there is no dispute as to the fact that the City did not have actual notice of the alleged condition, therefore Plaintiff was required to prove constructive notice. N.J.S.A. 59:4-3(b) defines constructive notice:

> A public entity shall be deemed to have constructive notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character.
>
> [N.J.S.A. 59:4-3(b)]

"[W]hen a dangerous condition is 'obvious' and has existed 'for such a period of time' that the public entity should have discovered it through the exercise of

reasonable care, the public entity is on constructive notice." Polzo v. County of Essex, 209 N.J. 51, 67 (2012).

A plaintiff cannot satisfy the notice requirement of N.J.S.A. 59:4-3(b) without providing evidence indicating how long the alleged dangerous condition existed. Carroll v. New Jersey Transit, 366 N.J. Super. 380, 388 (App. Div. 2004). In Carroll, this court found that a plaintiff's proffered evidence failed to create a genuine issue of material fact sufficient to defeat defendant's summary judgment motion because the plaintiff provided no evidence indicating how long the alleged dangerous condition existed:

> [T]here was no evidence of how long the dog feces was on the steps. Therefore, plaintiff could not even meet the fundamental requirement of constructive notice under N.J.S.A. 59:4-3(b), namely that the condition could have existed for such a period of time that the public entity should have discovered it. The dog feces could have been there "hours, minutes or seconds before the accident," one of the reasons we found the proofs inadequate to establish notice in Grzanka v. Pfeifer, 301 N.J. Super. 563, 574, 694 A.2d 295 (App. Div. 1997), certif. denied, 154 N.J. 607, 713 A.2d 487 (1998).

Id. Here, like in Carroll, the record before the trial court contained no evidence at all as to the length of time the sign was down. Plaintiff's evidence consisted of only work orders demonstrating that the sign was knocked down in the past, and the fact that the sign was missing at the time of the accident, but the "mere existence of an

alleged dangerous condition is not constructive notice of it." Sims v. City of Newark, 244 N.J. Super. 32, 42 (Law Div. 1990). Notably, Plaintiff relied on the February 2015 work order demonstrating that the sign was knocked down and reinstalled six days later, approximately 37 days before the accident. Da181. Nothing in the record indicated that there were any complaints regarding the sign at any time between the sign being reinstalled in February and the incident in March. No witness, expert or otherwise, could specify the time the sign was knocked down, nor were there any affidavits from local citizens regarding the length of time the sign was missing after it was reinstalled the previous month.

Plaintiff's proofs could not constitute "competent evidential material beyond mere speculation," because, rather than specifying how long the sign was down, it called for the trial court to assume or speculate such facts. In fact, Plaintiff argued such in his opposition to the City's motion for summary judgment:

> The City was on notice. That there's constructive notice there that there was an issue with the sign. Supporting that is the fact that the police officer noted that the sign was missing. He – he didn't note that the sign was laying on the ground. That the -- the sign was entirely gone. So the City argues that, that doesn't mean anything, but if the sign fell the day before, where did it go? So some period of time -- it's reasonable to draw the inference that the sign was down for a period of time so that it disappeared entirely from the scene.
>
> [1T17:20-25-18:9].

Based on the trial court's finding; to survive summary judgment, a plaintiff may create an issue of genuine material fact by simply offering evidence of the time period between the last time an alleged dangerous condition existed and the current instance at issue. A plaintiff need not specify as to how long the condition existed. Yet, to hold such proofs as creating a genuine issue of material fact contradicts established precedent articulated by this court in Carroll and Grzanka, and emphasized by our Supreme Court in Polzo, which requires some evidence as to how long the alleged dangerous condition existed.

This goes well beyond drawing all legitimate inferences in favor of the opposing party, since "an inference can be drawn only from proved facts and cannot be based upon a foundation of pure conjecture, speculation, surmise or guess." Prioleau v. Kentucky Fried Chicken, Inc., 434 N.J. Super. 558, 570–71 (App. Div. 2014), aff'd as modified and remanded, 223 N.J. 245 (2015); see also Knapp v. Phillips Petroleum Co., 123 N.J. Super. 26, 31 (App. Div. 1973) ("[T]hose inferences drawn are to be taken from established facts and may not be based upon a foundation of pure conjecture, speculation, surmise or guess."). In Troupe, this court provided examples of how a court may infer constructive notice from eyewitness testimony or from the characteristics of the alleged dangerous condition, which may indicate how long the condition lasted. Troupe v. Burlington Coat Factory Warehouse Corp.,

443 N.J. Super. 596, 602 (App. Div. 2016). Specifically, in Troupe, this court held that a trial court correctly found that a plaintiff did not show actual or constructive notice due to the lack of such proofs:

> [T]he trial court was correct that [plaintiff] did not show there was actual or constructive notice of the dangerous condition of the premises prior to her fall. There was no proof Burlington or any employee had actual knowledge about the berry on the floor. There were no eyewitnesses and nothing about the characteristics of the berry that would indicate how long it had been there. There were no other berries in the vicinity. No one was found to have been eating berries in the area.
>
> [Id.]

Here, as in Troupe, Plaintiff provided no proof that any City employee had actual knowledge of the missing sign; no eyewitness reported the missing sign prior to the accident or any City employees in the area prior to the accident; and nothing about the characteristics of the sign indicated how long it had been missing.

In accordance with applicable law and based on the record before it, the trial court should have granted the City's motion for summary judgment. Yet, despite acknowledging that constructive notice depends on whether the alleged condition existed for an unreasonable period of time, the trial court found that a genuine issue of material fact existed as to whether the City had constructive notice of the missing sign and denied summary judgment. Da001; [1T21:3-10]. The trial court's finding

was unsupported, as our Supreme Court and this court's precedent all make clear that constructive notice requires some evidence as to how long the alleged dangerous condition existed. Polzo, 196 N.J. at 586; Carroll, 366 N.J. Super. at 388. The court pointed to no evidence in the record to support such a finding and only made vague references to "reasonable inferences against the movant." [1T21:3-10]. The trial court's error in this regard was particularly egregious because Plaintiff offered no proof from which one could reasonably infer that the sign was down for an unreasonable period of time. And the court could not reasonably infer from the record that the sign was down for an unreasonable period of time and not "hours, minutes or seconds before the accident." It was therefore not possible for the trial court to find that Plaintiff had satisfied his burden by a preponderance of the evidence at the summary judgment stage.

For the same reasons, Plaintiff also could not prove that the City acted palpably unreasonable. There is no evidence that this particular alleged condition had caused accidents prior to Plaintiff's accident, and no indication that the City disregarded complaints regarding the sign. See also Maslo v. City of Jersey City, 346 N.J. Super. 346, 349 (App. Div. 2002) (plaintiff failed to present evidence suggesting that the defendant's failure to repair and monitor the Borough's boardwalk was palpably unreasonable). Here, Plaintiff did not indicate that he, or anyone else,

had previously complained to the City about the alleged dangerous condition. Although the issue of palpable unreasonableness is typically one for the jury, it may be decided by a court as a matter of law in "appropriate" cases. Polzo v. County of Essex, 209 N.J. 51, 75 n.12 (2012). Here, due to the clear lack of notice and additional sufficient evidence, the trial court should have also granted summary judgment because Plaintiff could not prove palpable unreasonableness as a matter of law.

II. THE TRIAL COURT ERRED BY NOT GRANTING A DIRECTED VERDICT BECAUSE PLAINTIFF STILL DID NOT PRODUCE ANY SUFFICIENT EVIDENCE PROVING THAT THE CITY HAD CONSTRUCTIVE NOTICE OF THE MISSING SIGN. (Raised Below: Da003; Da005; 5T103:3-24; 6T78:16-86:4)

Motions for a directed verdict at the close of plaintiff's case-in-chief, Rule 4:40-1, are governed by the same standard as motions for involuntary dismissal, pursuant to Rule 4:37-2(b). Carbajal v. Patel, 468 N.J. Super. 139, 157 (App. Div. 2021) (citing Alves v. Rosenberg, 400 N.J. Super. 553, 565 (App. Div. 2008)). Under Rule 4:37-2(b), a trial judge will grant a motion for a directed verdict only if, accepting the non-moving party's facts and considering the applicable law, "no rational jury could draw from the evidence presented" that the non-moving party is entitled to relief. Pitts v. Newark Bd. of Educ., 337 N.J. Super. 331, 340 (App. Div. 2001); see also Rule 4:37-2(b) (stating that "such motion shall be denied if the evidence,

together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor").

The trial court's decision not to grant a directed verdict after the close of Plaintiff's case and after the close of all evidence was not supported by the applicable law and the facts before it. Although Plaintiff attempted to argue that N.J.S.A. 59:4-3(b)'s notice requirements do not apply in this case, the trial court correctly stated that Plaintiff must prove actual or constructive notice. [6T70:20-77:1-6]. But Plaintiff still presented no evidence as to when the sign went down so that a jury could determine whether the sign was down for an unreasonable period of time. Instead, Plaintiff's proofs begged for a jury to assume, with tremendous prejudice to the City, that the sign was down for an unreasonable period of time based solely on the fact that it was missing. As our Supreme Court and this court have repeatedly emphasized, "the mere existence the mere existence of a dangerous condition does not, in and of itself, establish actual or constructive notice." See e.g., Jeter v. Sam's Club, 250 N.J. 240, 252 (2022); Prioleau, 434 N.J. Super. at 570–71; Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238, 243 (App. Div. 2013). Viewing the evidence most favorably to Plaintiff does not relieve Plaintiff of his burden of establishing an essential element of his claims and providing sufficient evidential material to do so.

The trial court's decision to not grant a directed verdict is only further underscored by the fact that the court correctly instructed the jury as to the standards for establishing constructive notice:

> The public entity is considered to have constructive notice if the condition existed for **such a long period of time** and was of so obvious a nature that the public entity exercising due care should have discovered the dangerous condition and its dangerous character. In addition, if you find that **due to the length of time the dangerous condition was there** and the obviousness of the condition, an employee providing his or her -- performing his or her job with reasonable care should have discovered the dangerous condition and its dangerous character, then the public entity is assumed to have had constructive notice of the condition.
>
> [6T137:19-138:7].

The trial court's jury instructions repeatedly highlighted that the time an alleged dangerous condition existed is an essential factor in determining whether the City had constructive notice of the condition. In considering the City's motion for a directed verdict, in the absence of any documentary or testimonial evidence establishing how long the sign was down, it was inconceivable for the trial court to conclude that a rational factfinder would find that the sign was missing for "such a long period of time" that the City should have discovered it. Therefore, the trial court erred by not granting the City's motions for a directed verdict.

III. THE TRIAL COURT UNDERMINED THE TORT CLAIMS ACT BY DENYING THE CITY'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR A DIRECTED VERDICT. (Raised Below: Da231)

It is well settled law that any application of the Tort Claims Act must start from its guiding principle that immunity from tort liability is the general rule and liability is the exception. N.J.S.A. 59:4-2; Stewart v. New Jersey Tpk. Auth./Garden State Parkway, 249 N.J. 642, 655 (2022). Thus, "[w]hen both liability and immunity appear to exist, the latter trumps the former." Id. (citing Tice v. Cramer, 133 N.J. 347, 356 (1993)). That is why the Legislature provided that public entities could only be held liable for negligence "within the limitations of [the TCA]." N.J.S.A. 59:1-2. Id. The Legislature intended for public entities to receive "broad immunity protection" under the Act, Ogborne v. Mercer Cemetery Corp., 197 N.J. 448, 459 (2009), and for courts to "exercise restraint in the acceptance of novel causes of action against public entities." N.J.S.A. 59:2-1.

For such reasons, the TCA and our Supreme Court precedent make clear that a plaintiff must establish each and every element outlined in N.J.S.A. 59:4-2 to impose liability on a public entity. Stewart, 249 N.J. at 656. "These elements are accretive; if one or more of the elements is not satisfied, a plaintiff's claim against a public entity alleging that such entity is liable due to the condition of public property must fail." Id. (citing Polzo v. County of Essex, 196 N.J. 569, 585 (2008).

Therefore, on a motion for summary judgment and a motion for a directed verdict, the failure to establish one element alone is fatal to a plaintiff's claim.

Here, as discussed earlier, Plaintiff failed to prove that the City had either actual or constructive notice that the sign was down before his accident. Actual or constructive notice is an essential element for establishing the liability of a public entity under the TCA. Plaintiff's lack of sufficient evidence to establish this element should have been fatal to his claim. "Summary judgment should be granted, in particular, 'after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Friedman v. Martinez, 242 N.J. 450, 472 (2020). Under the applicable law and in accordance with the purpose of the TCA, the trial court should have granted the City's summary judgment motion and spared the City, a municipality with limited resources, from continuing costly litigation. Then again, at trial, the trial court should have granted the City's motion for a directed verdict after Plaintiff failed to show actual or constructive notice. See Perez v. Professionally Green, LLC, 215 N.J. 388, 407 (2013) (stating that a directed verdict is appropriate when "no rational jury could conclude from the evidence that an essential element of the plaintiff's case is present") (internal citation and quotation omitted).

Accordingly, it is clear that this case should never have been submitted to the jury. The trial court denied the City's motions despite the fact that Plaintiff presented no evidence of notice, which is required to impose liability on a public entity under the TCA. Thus, the denial of the City's motions resulted in a decision that is essentially on the basis of strict liability, which N.J.S.A. 59:9-2 specifically prohibits. That is, even without actual or constructive notice, the City was liable because the sign was missing. This is the exact opposite result intended by the Legislature in passing the Tort Claims Act and requires reversal.

CONCLUSION

For the foregoing reasons, the City respectfully requests that this court reverse the trial court's decision and remand with instructions to dismiss Plaintiff's complaint against the City with prejudice.

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/s/ Raymond M. Brown

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