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MICHAEL SHAW, Plaintiff(s)-Appellant(s), -vs- Town of Kearny, County of Hudson, State of New Jersey, John Does 1-10 (fictitious names representing unknown individuals) and/or XYZ Corps. 1-10 (fictitious names representing unknown corporations, partnerships and/or Limited Liability Companies or other types of legal entities), Defendant(s)-Respondent(s)	Superior Court of New Jersey Appellate Division Docket No.: A-002537-23 *Civil Action* On Appeal From: Superior Court of New Jersey Law Division Hudson County Docket No. HUD-L-000650-22 Sat Below: Hon. Kimberley Espinales-Maloney, J.S.C.

BRIEF OF PLAINTIFF-APPELLANT MICHAEL SHAW

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PRELIMINARY STATEMENT

This appeal arises out of an incident that occurred on or about January 29, 2021. At the aforesaid time, Plaintiff, Michael Shaw was crossing the street near 534 Kearny Avenue in Kearny, NJ. As he was returning to his vehicle, he was suddenly caused to trip, lose his balance and fall down to the pavement by a pothole, thereby causing the Plaintiff to sustain serious personal injuries. At the time of the accident, visibility was dark and there was no street lighting in the area where the Plaintiff fell and sustained his injuries. The location of the pothole was in the center of town, within close proximity to Kearny Town Hall and the Kearny Department of Public Works.

The overall size and depth of the pothole was large enough to have posed a danger to motor vehicles and pedestrians alike. Moreover, there is evidence that the pothole existed at least three years prior to the accident and may have existed as far back as 2012. Finally, there is also evidence that a Town Administrator and members of the Department of Public Works was aware of pothole issues on this particular roadway prior to the time of the Plaintiffs accident.

N.J.S.A. 59:4-2 states that a public entity is liable if a plaintiff establishes: (1)" public property was in dangerous condition at the time of the injury"; (2) "the injury was proximately caused by the dangerous condition"; (3) "the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred"; and (4) "a negligent or wrongful act or omission of [a public] employee . . . created the dangerous condition"; or "a public entity had actual or constructive notice of the dangerous condition . . . ." Additionally, a public entity is not liable for a dangerous condition of its property if "the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable."

Michael Shaw filed suit against Defendant-Respondent Town of Kearny and other Defendants alleging that the roadway was in a dangerous

condition at the time of the accident; that the injury was proximately caused by the dangerous condition; the condition was reasonably foreseeable; that the Defendants has notice of the dangerous condition; and that the actions of the Defendants were palpably unreasonable. Other Defendants were released via stipulation of dismissal, as the roadway in question was owned, operated and/or controlled by the Defendant Town of Kearny. The Town of Kearny moved for Summary Judgment, arguing that (1) The Town of Kearny is immune under N.J.S.A. 59:4-2 because the Town did not have notice of a dangerous condition; (2) That the Town of Kearny is entitled to immunity under N.J.S.A. 59:2-3 because the Kearny Roadway project represented an exercise of discretionary spending.

At Oral Argument, the Defendant Town of Kearny conceded that an issue of material fact existed as to discretionary spending under N.J.S.A. 59:2-3 but insisted that it lacked notice of a dangerous condition under N.J.S.A. 59:4-2. The trial court agreed and granted summary judgment, resulting in the subject appeal. The main issues on appeal concern the application of N.J.S.A. 59:4-2. More specifically, whether the Defendant, Town of Kearny, had notice of a dangerous condition on its property at the time of the Defendant's accident.

It is respectfully submitted that the Defendant, Town of Kearny had notice of the dangerous condition of its property at the time of the Plaintiffs accident within the meaning ofN.J.S.A. 59:4-2.

As set forth more fully below, the Trial Court erred in granting summary judgment.

PROCEDURAL HISTORY

On February 23, 2022, Plaintiff-Appellant filed suit against the Defendants, Town of Kearny, County of Hudson and State of New Jersey. (Pa.1-Pa7). Thereafter, a Request to Enter Default was filed on April 22, 2022, against Defendant State of New Jersey. (Pa9-Pal6). Plaintiff then filed Stipulations of Dismissal without Prejudice as to Defendants County of Hudson and State of New Jersey on April 14, 2022, and December 28, 2022, respectively. (Pa16-Pa19). On March 10, 2022, Defendant Town of Kearny filed an Answer to the Complaint, essentially denying all claims. (Pa20-Pa.32).

The parties exchanged written discovery and completed depositions. Plaintiff also obtain an expert report. Thereafter, on February 12, 2024, the Town of Kearny moved for summary judgment, arguing that (1) The Town of Kearny is immune under N.J.S.A. 59:4-2 because the Town did not have notice of a dangerous condition; (2) That the Town of Kearny entitled to

immunity under N.J.S.A. 59:2-3 because the Kearny Roadway project represented an exercise of discretionary spending. (Pa33-Pa427). Plaintiff filed opposition dated March 7, 2024, arguing that (1) Summary Judgment should be denied because the Plaintiff has met is burden under N.J.S.A. 59:4-2 and (2) N.J.S.A. 59:2-3 is inapplicable because the Defendant has not shown that the Plaintiffs injury was caused from "High Level Decision Making. (Pa428-Pa674).

Defendant filed a reply brief dated March 15, 2024(Pa675-Pa699) and Plaintiff filed a Letter Brief in response dated March 22, 2024 (Pa700-Pa712). Oral argument of the summary judgment motion was entertained by the Honorable Kimberly Espinales-Maloney, J.S.C. on April 3, 2024. Summary Judgment was granted on April 22, 2024 (Pa.713).

STATEMENT OF FACTS

On January 29, 2021, Plaintiff, Michael Shaw was crossing the street near 534 Kearny Avenue in Kearny, New Jersey. As he was returning to his vehicle, he was suddenly caused to trip, lose his balance and fall down to the pavement due to a pothole. (Pa1-Pa2). As a result, the Plaintiff sustained the following injuries: Right hip femoral neck fracture; Status post right hip

bipolar hemiarthroplasty; Chronic lumbar strain; Lumbar facet syndrome; Aggravation of pre-existing lumbar degenerative disc disease. (Pa 668-674).

The visibility was dark and that there was no street lighting in the area where the Plaintiff fell and sustained his injuries. (Pa474:Deposition of the Plaintiff p.32:6-10.).The Plaintiff was also wearing prescription glasses at the time of the accident. (Pa 474: Deposition of the Plaintiff p.33:16-22). Plaintiff was not walking in a crosswalk at the time of his fall. (Pa 475 Deposition of the Plaintiff p.36:1-9). However, the proximity of the crosswalk to where the Plaintiff fell is unclear.

The location where the Plaintiff sustained his injuries is within 1,600 feet from the town hall, which is located at 402 Kearny Avenue. (Pa 649). Additionally, the Kearny Department of Public Works is located within 1.2 miles of the accident location along a route to the Kearny Town Hall. (Pa 649). The overall size of the subject pothole is approximately 4-feet in in length (measured perpendicular to the roadway) and 12-inches wide (measured parallel to the striping). (Pa 609) It is estimated that the deepest portion of the pothole approximates 18-inches long by 12-inches wide by a minimum of 2-inches deep (the depth of the surface course). (Pa 609). Kelly-Ann Kimiecik, P.E. noted in her report that a depression in the ground the size of that pothole would have posed a danger not only to the Plaintiff

but to drivers and emergency personnel. (Pa 313: report of Kelly-Ann Kimiecik.)

Google Maps historical imagery dated August 2012 and September 2015 depict pavement cracking and surface depressions in the roadway at the accident location. (Pa 372 and Pa 373). Google Maps historical street view imagery dated October 2017 depicts the advanced deterioration of the pavement at the subject accident location including spalled asphalt (pothole). (Pa374). In comparing the imagery dated September 2015 and October 2017 it is observed that a trench cut was made for subsurface utility work directly south of the accident location, including pavement restoration in that area. (Pa 373 and Pa 374:report of Kelly-Ann Kimiecik Appendix A.).

It is also observed that numerous markings exist on the pavement surface as a result of a utility mark out; utilized to identify subsurface utilities in anticipation of excavation work (to avoid interaction with the same). It is also observed that the double yellow line was restriped over the deteriorated pavement prior to the trenching. (Pa 373 and Pa 374: report of Kelly-Ann Kimiecik Appendix A.). Google Maps historical street view imagery dated July 2018 depicts the continued advancement of pavement deterioration at the accident location, including the pothole formation (pavement spall). (Pa 375report of Kelly-Ann Kimiecik. Exhibit A).

Google Maps historical street view imagery dated October 2020 depicts the continued advancement of pavement deterioration at the accident location, including the increased size of the pothole formation (pavement spall). (Pa 378: report of Kelly-Ann Kimiecik. Exhibit A.) Google Maps historical street view imagery dated July 2019 depicts the continued advancement of pavement deterioration at the accident location, including the pothole formation (pavement spall). (Pa 377: report of Kelly-Ann Kimiecik. Exhibit A). In comparing the imagery dated July 2018 to the imagery dated July 2019 pavement repairs were undertaken at the settled utility trench cut, that was previously constructed, as well as at the manhole that exists immediately adjacent to the accident location; however, the subject pothole remained unmitigated. (Pa 375 and PA 377: report of Kelly-Ann Kimiecik. Exhibit A).

A further review of the Google Maps historical imagery referenced above reveals that the pavement region along the double yellow striping, between the longitudinal pavement cracks/seam, reveals that transverse cracks are present at random intervals across the same. (Pa 332) As such, the pavement at the longitudinal and transverse cracks is subject to deteriorate at an advanced rate than a pavement surface devoid of cracks. (Pa 332 report of Kelly-Ann Kimiecik.)

An email from Steven Marks, who was the Town Administrator to David Silva and Michael Neglia from Neglia Engineering Associates, dated July 16, 2020, indicates that the Town Administrator had been travelling Kearny Avenue in 2020 to observe for paver defects and thus, had an opportunity to observe the pothole existing at the accident location. (Pa. 386). Another email from David Silva to Steven Marks, dated October 2, 2020, states, "Stephen . . .as previously requested we have an item for resetting pavers included in the Kearny Avenue Roadway Improvements project. I have the Town's DPW list for the paver problem areas and our office also has walked the streetscape and generated a list." (Pa 400).

On September 17, 2020, there was a damaged pole reported at 534 Kearny Avenue that was assigned to the Kearny Department of Public Works. (Pa 519: Deposition of Kevin Murphy at 30:21-31:5.). Kevin Murphy is the Acting Superintendent of Public Works for the Town of Kearny. (Pa 514: Deposition of Kevin Murphy p.10:14-19.). At the time of the Plaintiffs accident, he was the Assistant Superintendent of Public Works. (Pa 514). He stated that the Kearny Department of Public Works was responsible for maintenance and inspection of roads in Kearny. (Pa 514). He stated that if a DPW worker discovers a pothole or if a pothole is reported, it is the responsibility of DPW to repair the pothole and to decide how soon

the pothole is repaired based on whether it is a "dangerous" pothole. (Pa 515).

Mr. Murphy further confirmed in his deposition testimony that on or about September 17th and September 21st of 2020, DPW workers were doing work in the area where the Plaintiffs injury occurred. (Pa 519). He further confirmed that when working in the area, he typically makes inspections of the roadway. (Pa 519). He also stated that if one of his employees noticed the pothole, he would expect them to report it. (Pa 519).

Mr. Murphy also testified that street sweepers pass by the area four times per week and sweep each side of the street twice per week. (Pa 520).

Mr. David Silva, who is employed by Neglia Engineering Associates, stated that that his company was hired by the township of Kearny to perform roadwork in connection with the Kearny Avenue Roadway Improvement Project, which included the vicinity of 534 Kearny Avenue, which is the subject of the Plaintiffs accident. (Pa 540⁄\ Deposition Testimony of David Silva at 6:23-25.). Michael Neglia stated in his deposition testimony that he is the President and the sole owner/principal of Neglia Engineering. (Pa 541). Several grant applications by the town of Kearny were sent to NJDOT to secure funding for roadway improvements along Kearny Avenue, including a Municipal Aid Application for 2021 that included roadway

improvements to an area on Kearny Avenue south of the subject accident location. The application included, but was not limited to, photographs of exemplar deteriorated conditions within the aforementioned limits of Kearny Avenue. (Pa 281)**.** Neglia Engineering was hired to repave the roadway that is the subject of the Plaintiffs Complaint and began working on that project on April 7, 2020. The town awarded this firm the project on October 6, 2020 and the work was completed by July 21, 2021. (Pa 219: Deposition Testimony of Michael Neglia at 69:18-21.). According to the Grant Application that was filed, the Project Distance was 0.87 miles of roadway. (Pa 258).

The DPW is not involved in the determination of which roadways are repaved. (Pa 521). On March 15, 2021, the Defendant, Town of Kearny Department of Public Works repaired the pothole in question. (Pa 521). A few days later, the repair did not hold up. Therefore, the DPW made the decision to reopen and refill the pothole. After this was done, the pothole repair held up until July when the Town had an opportunity to repave the roadway. (Pa 521).

Kelly-Ann Kimiecik, P.E. issued an engineering expert report with her conclusions based on a site inspection on August 18, 2022, a review of the Plaintiffs Complaint, a review of the parties answers to interrogatories and

other written discovery, deposition transcripts of the parties, grant applications for roadwork submitted to DOT by the Township of Kearny, color photographs of the area where plaintiff fell. (Pa 313). Kelly-Ann Kimiecik P.E. concluded, in part, the existence of the pothole for an extended period of time (October 2017 through the time of the plaintiffs incident) underscores the lack of maintenance afforded to the roadway pavement, resulting in the estimated 2-inch minimum pothole formation which ultimately caused the plaintiffs accident/injury to occur. (Pa 357). During her inspection, Ms. Kimiecik also noted that a worker was observed to be watering/maintaining the plantings along Kearny Avenue and utilizing a "Town of Kearny" vehicle. It was also observed that another worker was sweeping the sidewalk region along Kearny Avenue. (Pa 313).

Kelly-Ann Kimiecik, P.E. concluded further that the roadway where the Plaintiff sustained injuries should have been monitored and the subject pothole was or should have been observed and mitigated given the longstanding deteriorated condition of Kearny Avenue which is the "heart of the Town's community business district." (Pa 345) Kelly-Ann Kimiecik, P.E. also concluded that the defendants had notice or constructive notice of the pothole based on her observations at her inspection and the documents that she reviewed. (Pa 358).

LEGAL ARGUMENT

POINT I

SUMMARY JUDGMENT IS NOT APPROPRIATE, WHEREAS THERE EXISTS GENUINE ISSUES OF MATERIAL FACT AND DEFENDANTS ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW (Pa. 440-Pa.442)

New Jersey Court Rule 4:46-1, sets forth the criteria for granting Summary Judgment:

The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. R. 4:46-1.

Historically, when the Court entertains a summary judgment motion, "…the standards of decision governing the granting or denial of Summary Judgment emphasize that a party opposing the Motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact." Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954). "It is a movant's burden to exclude any reasonable doubt as to the existence of an issue of material fact, and all inferences of doubt are to be drawn against the movant in favor of opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers are indulgently treated." Kugler v. Tiller,127 N.J. Super. 468, 476 (App. Div. 1974)

"…[Sjummary judgments are to be granted with extreme caution… the moving papers are to be considered most favorably to the party opposing the motion for summary judgment…all doubts are resolved against the person moving for summary judgment." Revulvo v. American Casualty Co., 39 N.J. 490, 492 (1960). In reviewing the moving papers and papers in opposition, the judge must consider the papers" … most favorably for the party opposing the motion and all doubts are resolved against the movant. Id. "If there is the slightest doubt as to the facts, the motion should be denied." Friedman v. Friendly Ice Cream Co., Metuchen, 35 N.J. 193, 195-196 (1961). In fact, the burden is on the judgment to show the clear absence of a genuine issue of material fact. Monmouth Lumber Company v. Indemnity Ins. Co. of N. America, 21 N.J. 439, 440 (1956).

Under the holding of Brill v. Guardian Life Insurance Company, 142 N.J. 520 (1995), our Supreme Court set forth the following test:

"…when deciding a motion for summary judgment under R. 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the nonmoving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact-finder to resolve the alleged disputed

issue in favor of the non-moving party. This assessment of the evidence is to be conducted in the same manner as that required under R. 4:46-2."

The judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there exists a genuine issue for trial. Anderson v. Liberty Lobby, Inc.,477 U.S. 242, 249 (1986).

It is a movant's burden to exclude any reasonable doubt as to the existence of genuine issue of material fact, and all inferences of doubt are to be drawn against the movant in favor of opponent of the Motion. In connection with the Court's analysis of the matters presented on such a motion, all inferences of doubts are drawn against the movant in favor of the party opposing the motion and such a motion should be granted with great caution. Boule v. Borough of Bradley Beach, 42 N.J. Super. 159 (App. Div. 1956). Additionally, summary judgment procedure should not be a substitute for a full plenary trial. United Advertising Corp. v. Metuchen, 38 N.J. 193 (1961). All doubts must be resolved by a conventional trial. Frank Rizzo, Inc. v. Alatsas, 27 N.J. 400 (1958).

In reviewing the Memorandum of Decision, as rendered by the Honorable Kimberly Espinales-Maloney, J.S.C., it is apparent that the trial court did not comply with the standard for Summary Judgment, as was laid

out in R. 4:46-1 and as explained in Brill v. Guardian Life Insurance Company, 142 NJ. 520 (1995).

In the "Factual Background" section of the court's memorandum, the facts are laid out verbatim exactly as they were presented in Defendant/Respondent Town of Kearny's brief. (Pa 714-Pa720; See also Defendant Town of Kearny's Statement of Undisputed Material Facts at Pa 52-Pa 62).[i] The court's "Factual Background" even includes illustrations and excerpts exactly as drafted in the Defense brief to the court. Pa 714-Pa720; See also Defendant Town of Kearny's Statement of Undisputed Material Facts at Pa 52-Pa 62). In rendering its Decision, the trial court cited to and relied upon every fact as stated by the Defendant/Respondent Town of Kearny. Not a single fact stated by the Plaintiff/Appellant in his Statement of Facts was cited to or mentioned in the Decision by the trial court. The court also failed to consider that many of the facts as stated by the Defendant were not accepted by the Plaintiff. (Pa 428-439).

After effectively regurgitating the Defendant/Respondent's facts, the trial court then proceeded to rely on those facts and consider them in the light most favorable to the *moving party,* thereby granting Summary Judgment to the Defendants. This is the exact opposite of what was required under the law and as such, the Decision of the trial court must be reversed.

Summary judgment is not appropriate here. In this case, there exist a plethora of genuine issues of material fact, all of which alone would be sufficient to overcome this motion for Summary Judgment. There are issues for the jury to decide regarding whether the conduct of the Township of Kearney, its agents and employees were palpably unreasonable, and notice to the defendants of the issues giving rise to plaintiffs fall. For the reasons stated above, it is respectfully submitted to this Court that the defendants herein have not met the burdens established under Rule 4:46-2 or satisfied the test set forth in Brill v. Guardian Life Insurance Company, supra.

POINT II

SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE PLAINTIFF CAN PROVE THAT THE DEFENDANTS HAD CONSTRUCTIVE NOTICE OF A DANGEROUS CONDITION AND MET HIS BURDEN UNDER N.J.S.A. 59:4-2(Pa.442-Pa.451)

"The Tort Claims Act., N.J.S.A. 59: 1-1 et.seq. indisputably governs causes of action in tort against governmental agencies within New Jersey." Gomes v. Cnty. of Monmouth, 444 N.J. Super. 479, 487 (App. Div. 2016); see also Nieves v. Adolf 241 NJ. 567,571 (2020). One of the fundamental principles embodied in the TCA is governmental immunity is the rule unless the legislature created an exception. Caicedo v. Caicedo, 439

N.J. Super. 615, 623 (App. Div. 2015). N.J.S.A. 59:4-2 states that a public entity is liable if a plaintiff establishes: (1)" public property was in dangerous condition at the time of the injury"; (2) "the injury was proximately caused by the dangerous condition"; (3) "the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred"; and (4) "a negligent or wrongful act or omission of [a public] employee . . . created the dangerous condition"; or "a public entity had actual or **constructive notice** of the dangerous condition . . . ."(emphasis added). Additionally, a public entity is not liable for a dangerous condition of its property if "the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable." Id. To overcome a public entity's immunity under this section, a plaintiff must establish by a preponderance of the evidence that: (1) 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 that occurred; (4) the public entity had actual or constructive notice of the condition in sufficient time prior to the injury to correct the dangerous condition; and (5) the action or inaction taken by the entity to protect against the dangerous condition was palpably unreasonable. Muhammad v. N.J. Transit, 176 N.J. 185, 194 (2003).

N.J.S.A. 59:4-1(a) defines "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." N.J.S.A. 59:4-1(c) 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 are located on the property of the public entity but are not owned or controlled by the public entity."

Plaintiff also must establish either that defendant "had actual knowledge of the existence of the condition and knew or should have known of its dangerous character" or 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 he discovered the condition and its dangerous character." N.J.S.A. 59:4-3.

Finally, the Plaintiff must establish that the action the entity took to protect against the condition or the failure to take such action was palpably unreasonable. "Palpably unreasonable" has been defined as "behavior that is patently unacceptable under any given circumstance." ." Polyard v. Terry, 148 N.J. Super. 202, 216 (Law Div. 1977), Plaintiff must show that it is "manifest and obvious that no prudent person would approve of its course of

action or inaction. Id. "Part of the equation in determining whether a public entity acted in a palpably unreasonable manner involves the exercise of its 'discretion in determining what action should or should not have been taken.'" Brown v. Brown, 86 N.J. 565, 575 (1981). The question of palpable unreasonableness is a question of fact for a jury. Maslo v. City of Jersey City, 346 N.J. Super. 346, 349 (App. Div. 2002).

In the matter before the Court, the Plaintiff has met all of the requirements to establish liability against the Township of Kearny under N.J.S.A. 59:4-2. The location where the Mr. Shaw's accident occurred was controlled by the Township of Kearny, as evidenced by the fact that they contracted with Neglia Engineering Associates to repair the roadway and received grants from NJDOT to perform work along the roadway. Therefore, the roadway is public property under. N.J.S.A. 59:4-1(c). Moreover, the pothole constituted a "dangerous condition" under N.J.S.A. 59:4-1(a). The overall size of the subject pothole was approximately 4-feet in length (measured perpendicular to the roadway) and 12-inches wide (measured parallel to the striping). (Pa 609) It is estimated that the deepest portion of the pothole approximates 18-inches long by 12-inches wide by a minimum of 2-inches deep (the depth of the surface course). (Pa 609). As Kelly-Ann Kimiecik, P.E. noted in her report, a depression in the ground the size of that

pothole would have posed a danger not only to the Plaintiff but to drivers and emergency personnel. (Pa 313: report of Kelly-Ann Kimiecik.) Therefore, the pothole constituted a dangerous condition.

The Plaintiff was outside of the crosswalk. However, the location of the nearest cross walk and the distance of the pothole from the crosswalk is not clear from the record. In Little v. City of Atlantic City, No. A-2466-20 (Unpublished) (App. Div. Oct. 20, 2021)(Pa 734-Pa744), the plaintiff crossed Pacific Avenue outside of the crosswalk in a commercial district in Atlantic City. There, the Court held that potholes have qualified as a dangerous condition under the TCA. Id. See also: Whaley v. Cnty. of Hudson, 146 N.J. Super. 76 (Law Div. 1976). Furthermore, the Court noted the size of the pothole and the seven to ten feet distance from the pothole to the crosswalk. Id.

The Court further noted that plaintiffs fall occurred in a busy commercial area surrounded by casinos, hotels, and restaurants. Id. In affirming the trial court's denial of summary judgment the Court then explained that a jury could consider the fact that plaintiff was walking outside of the crosswalk, but that in "giving the plaintiff the benefit of all of the facts and all the inferences that flow from the facts" it is foreseeable that a person crossing Pacific Avenue would walk outside of the crosswalk."

Little v. City of Atlantic City, No. A-2466-20 (Unpublished) (App. Div. Oct. 20, 2021)(Pa734-Pa744).

As in this case, the Defendant in Little relied heavily on the fact that plaintiff crossed the street outside of the crosswalk, violating N.J.S.A. 39:4-33.1. The Court, however, reminded us that "a plaintiff uses property with due care when: 1) the condition of the property poses a danger to the general public when used in a reasonable and foreseeable manner; and 2) when the plaintiffs conduct is not "so unreasonable" that the property cannot reasonably be said to have caused the injury." Id. The Court stated that the fact that the Plaintiff was outside of the crosswalk did not preclude a finding of due care because the plaintiff was unaware of the existence of the defect and that plaintiffs actions were reasonable from a community perspective. Id. "Anyone who spends time in urban centers in the United States will observe individuals crossing the street outside of the designated crosswalk . . .even though plaintiff was not supposed to cross in this manner, it is entirely possible that this practice is common enough to be reasonable from a community perspective. A jury should make that call." Id.

Furthermore, the Plaintiff will be able to prove at trial that the Defendant Township of Kearny had actual and constructive notice of the dangerous condition because 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. N.J.S.A 59:4-3 states " 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."

While it is true that the mere existence of a dangerous condition does not demonstrate constructive notice of it, there is sufficient evidence demonstrating the length of the time that the condition existed. In Chatman v. Hall, 128 N.J. 394 (1992), the Court held that "the length of time during which the hole existed as well as its alleged size created a reasonable inference that the defendant employees had either actual or constructive notice of the hole." The Court also noted that , whether notice and a failure to act would give rise to liability again depends on the standard practice in the City in responding to that type of condition and that "the evidence reveals a sufficient basis for a triable issue relating to whether the failure to repair the hole was the result of the determination of policy or the carrying

out of policy decisions already made, and, respectively, whether such failure was palpably unreasonable or merely unreasonable." Id.

In Lodato v. Evesham Twp., 388 N.J. Super. 501 (App. Div. 2006), the Court was satisfied that plaintiffs proofs were sufficient to create a question of fact as to whether the Township had constructive notice under N.J.S.A. 59:4.3b because in that case. (1) the "condition was open and obvious"; (2) "the same condition existed for almost eighteen years before the accident and those similar conditions existed throughout the neighborhood"; and (3) "individuals from the Township were in the immediate vicinity on at least two occasions when they removed trees causing a similar condition adjacent to and on either side of the open and obvious condition that was subject to the litigation." See Also: Santana v. Bergen County Community College, et. ah No. A-2884-21 (N.J. Super. Ct. App. Div. Mar. 19, 2024).

As in Chatman, the evidence in this case reveals a sufficient basis for a triable issue relating to whether the failure to repair the hole was the result of the determination of policy or the carrying out of policy decisions already made, and, respectively, whether such failure was palpably unreasonable or merely unreasonable. While the Defendants have stated that they were under no obligation to inspect the roadway, the Plaintiffs contention is that the

Defendants had constructive notice of the dangerous condition, not a failure to inspect.

In that regard, we must mention the following: The overall size of the subject pothole is approximately 4-feet in in length (measured perpendicular to the roadway) and 12-inches wide (measured parallel to the striping). It is estimated that the deepest portion of the pothole approximates 18-inches long by 12-inches wide by a minimum of 2-inches deep (the depth of the surface course). (Pa 609: report of Kelly-Ann Kimiecik.) The pothole existed for an extended period of time. Google Maps historical imagery dated August 2012 and September 2015 depict pavement cracking and surface depressions in the roadway at the accident location. (Pa 373 and Pa 374: report of Kelly-Ann Kimiecik Appendix A.).

Google Maps historical street view imagery dated October 2017 depicts the advanced deterioration of the pavement at the subject accident location including spalled asphalt (pothole). (Pa374). In comparing the imagery dated September 2015 and October 2017 it is observed that a trench cut was made for subsurface utility work directly south of the accident location; including pavement restoration in that area. (Pa 373 and Pa 374:report of Kelly-Ann Kimiecik Appendix A.).

It is also observed that numerous markings exist on the pavement surface as a result of a utility mark out; utilized to identify subsurface utilities in anticipation of excavation work (to avoid interaction with the same). It is also observed that the double yellow line was restriped over the deteriorated pavement prior to the trenching. (Pa 373 and Pa 374: report of Kelly-Ann Kimiecik Appendix A.). Google Maps historical street view imagery dated July 2018 depicts the continued advancement of pavement deterioration at the accident location; including the pothole formation (pavement spall). (Pa 375:report of Kelly-Ann Kimiecik. Exhibit A).

Google Maps historical street view imagery dated October 2020 depicts the continued advancement of pavement deterioration at the accident location; including the increased size of the pothole formation (pavement spall). (Pa 378: report of Kelly-Ann Kimiecik. Exhibit A.)

Google Maps historical street view imagery dated July 2019 depicts the continued advancement of pavement deterioration at the accident location, including the pothole formation (pavement spall). (Pa 375 and PA 377: report of Kelly-Ann Kimiecik. Exhibit A). In comparing the imagery dated July 2018 to the imagery dated July 2019 pavement repairs were undertaken at the settled utility trench cut, that was previously constructed, as well as at the manhole that exists immediately adjacent to the accident location;

however, the subject pothole remained unmitigated. (Pa 375 and PA 377: report of Kelly-Ann Kimiecik. Exhibit A).

A further review of the Google Maps historical imagery referenced above reveals that the pavement region along the double yellow striping, between the longitudinal pavement cracks/seam, reveals that transverse cracks are present at random intervals across the same. (Pa 332) As such, the pavement at the longitudinal and transverse cracks is subject to deteriorate at an advanced rate than a pavement surface devoid of cracks. (Pa 332 report of Kelly-Ann Kimiecik.)

The location where the Plaintiff sustained his injuries is within 1,600 feet from the town hall, which is located at 402 Kearny Avenue. (Pa 649). This is directly in the heart of town. Additionally, the Kearny Department of Public Works is located within 1.2 miles of the accident location along a route to the Kearny Town Hall. More compellingly, Kevin Murphy, the Acting Superintendent of Public Works for the Town of Kearny, stated that DPW is responsible for repairing potholes and that if any other entity within the town noticed a pothole, that entity would report it to DPW and they would repair it. (Pa 514).

Mr. Murphy also confirmed in his deposition testimony that on or about September 17th and September 21st of 2020, DPW workers were doing work

in the area where the Plaintiffs injury occurred. (Pa 519). He also confirmed that on September 17, 2020, there was a damaged pole reported at 534 Kearny Avenue that was assigned to the Kearny Department of Public Works. (Pa 519: Deposition of Kevin Murphy at 30:21-31:5.). He further confirmed that when working in the area, he typically makes inspections of the roadway. (Pa 519) He also stated that if one of his employees noticed the pothole, he would expect them to report it. (Pa 519). Moreover, Mr. Murphy also testified that street sweepers pass by the area four times per week and sweep each side of the street twice per week (Pa 520).

Finally, an email from Steven Marks, who was the Town Administrator to David Silva and Michael Neglia from Neglia Engineering Associates, dated July 16, 2020, indicates that the Town Administrator had been travelling Kearny Avenue in 2020 to observe for paver defects and thus, had an opportunity to observe the pothole existing at the accident location. (Pa 386). Also, another email from David Silva to Steven Marks, dated October 2, 2020, states, "Stephen . . .as previously requested we have an item for resetting pavers included in the Kearny Avenue Roadway Improvements project. I have the Town's DPW list for the paver problem areas and our office also has walked the streetscape and generated a list." (Pa 400).

Given the size of the pothole, the length of time that it existed, the gradual deterioration of the pothole, the location of the pothole and the fact that town officials were aware that the area was problematic in terms of potholes, this raises a genuine issue of material fact as to whether the Defendant has constructive notice and even actual notice of the dangerous condition. As such, the Motion for Summary Judgment should have been denied.

POINT III

THE PLAINTIFF CAN ESTABLISH THAT THE CONDUCT OF THE DEFENDANTS WERE PALPABLY UNREASONABLE

Under N.J.S.A. 59:4-2, no liability lies against a public entity for a dangerous condition "if the action the entity took to **protect against** the condition or the failure to take such act was not palpably unreasonable." "Palpably unreasonable" behavior "implies behavior that is patently unacceptable under any given circumstances." Polzo v. Cnty of Essex (Polzo **II**), 209 N.J. 51, 75 (2012) citing Muhammad v. NJ Transit, 176 NT 185, 195 (2003). To find that a public entity acted or failed to act in a palpably unreasonable manner, "it must be manifest and obvious that no prudent person would approve of its course of action or inaction." Muhammad, *supra*, 176 N.J. at 195-96. "The question of whether a public entity acted in

a palpably unreasonable manner is a matter for the jury . . . ." Polzo v. Cnty. of Essex, 209 NJ, 51, 75 n.12 (2012). Under N.J.S.A. 59:4-1, "protect against" is defined to include "repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition."

In matters such as this one, the Courts have routinely found that the actions of the municipality raises a material issue of fact as to whether its conduct was palpably unreasonable. In Polzo v. County of Essex 209 N.J. 51,35 A.3d 653 (2012), Mathi Kahn-Polzo and other experienced bicyclists were riding downhill on the shoulder of Parsonage Hill Road, which was owned and maintained by Essex County. She rode over a depression on the shoulder, lost control and fell, suffered a catastrophic head injury despite wearing a helmet, and died twenty-six days later. In that case, the Court stated that the actions of defendant Essex County were not palpably unreasonable because Essex County was responsible for an extensive network of roads and "a public entity might reasonably give lesser priority to the shoulder of a roadway, which is not intended for ordinary travel." Id. Therefore, "in view of the County's considerable responsibility for road maintenance in a world of limited public resources, the depression here might not have been deemed a high priority. Id.

Unlike Polzo, in which the County had to account for an extensive network of roads, the extent of Kearny Avenue was approximately 0.87 miles. (Pa 258). Furthermore, Plaintiff here suffered his accident from a depression in the middle of a main roadway within the Township of Kearny. Indeed, the location where the Plaintiff sustained his injuries is within 1,600 feet from the town hall, which is located at 402 Kearny Avenue. (Pa 649). This accident basically occurred in the heart of town, an area that most municipalities would consider a main priority.

Indeed, there was evidence that the township was aware that Kearny Avenue was badly in need of repairs as evidenced by an email from Steven Marks, who was the Town Administrator to David Silva and Michael Neglia from Neglia Engineering Associates, dated July 16, 2020. This email indicates that the Town Administrator had been travelling Kearny Avenue in 2020 to observe for paver defects and thus, had an opportunity to observe the pothole existing at the accident location.

There was also another email from David Silva to Steven Marks, dated October 2, 2020 that states "Stephen . . .as previously requested we have an item for resetting pavers included in the Kearny Avenue Roadway Improvements project. I have the Town's DPW list for the paver problem

areas and our office also has walked the streetscape and generated a list." (Pa 400).

This indicates that the town knew that this area was a problem long before the Plaintiffs sustained injuries and the failure to rectify this problem was palpably unreasonable because it is "manifest and obvious that no prudent person would approve of its course of action or inaction." ." Polyard v. Terry, 148 N.J. Super. 202, 216 (Law Div. 1977).

Moreover, Mr. Murphy also confirmed in his deposition testimony that on or about September 17th and September 21st of 2020, DPW workers were doing work in the area where the Plaintiffs injury occurred. (Pa 519). He also confirmed that on September 17, 2020, there was a damaged pole reported at 534 Kearny Avenue that was assigned to the Kearny Department of Public Works. (Pa 519: Deposition of Kevin Murphy at 30:21-31:5.).

He further confirmed that when working in the area, he typically makes inspections of the roadway. (Pa 519). He also stated that if one of his employees noticed the pothole, he would expect them to report it. (Pa 519). Moreover, Mr. Murphy also testified that street sweepers pass by the area four times per week and sweep each side of the street twice per week. (Pa 520).

The Respondent in this matter seeks to rely upon Shilinsky v. Borough of Ridgefield, No. A-0028-14T2, 2015 WL10718483, at *3 (N.J. Super. Ct. App. Div. Apr. 26, 2016). However, this case is to be distinguished from that one in several respects. First, in Shikinsky, the Court noted that "inherent dangers confront pedestrians on roadways that are not faced by operators of motor vehicles." Ich_ A "depression . . . that a car would harmlessly pass over" might trip a pedestrian. Id_ Therefore, the Court stated that it was not palpably unreasonable for the Borough not to repair a depression. Id.

In the matter before the Court, the overall size of the subject pothole was approximately 4-feet in length (measured perpendicular to the roadway) and 12-inches wide (measured parallel to the striping). (Pa 609) It is estimated that the deepest portion of the pothole approximates 18-inches long by 12-inches wide by a minimum of 2-inches deep (the depth of the surface course). (Pa 609). As Kelly-Ann Kimiecik, P.E. noted in her report, a depression in the ground the size of that pothole would have posed a danger not only to the Plaintiff but to drivers and emergency personnel. (Pa 313: report of Kelly-Ann Kimiecik.) Therefore, this is not a pothole that "that a car would harmlessly pass over" as was the case in Shikinsky. The Defense has offered no evidence to rebut this fact. Moreover, the Defendants

themselves have acknowledged through a representative that they have a responsibility to maintain roadways that are safe for both motor vehicles and pedestrians, which is the very point that they now seek to argue against. (Pa 514:Deposition of Kevin Murphy at 14:9-20.) Therefore, there is an issue for the trier of fact as to whether the conduct of the Town of Kearny was palpably unreasonable and as such, Summary Judgment should have beeen denied.

CONCLUSION

For the reasons set forth above, itisclearthatthe trial court erred when Plaintiffs-Appellants' case was dismissed on Summary Judgment, as the Appellant can meet his burden under N.J.S.A. 59:4-2 .

Respectfully Submitted,
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On the Brief

[1] Under R. 2:6-1(a)(2) "briefs submitted to the trial court shall not be included in the appendix, unless either the brief is referred to in the decision of the court or agency, or the question of whether an issue was raised in the trial court is germane to the appeal." However, because the trial court effectively cited to and relied upon every fact as stated by the Defendant/Respondent Town of Kearny and not a single fact stated by the Plaintiff/Appellant in his Statement of Facts was cited to or mentioned in the Decision by the trial court, portions of the briefs are included as an exception to this rule. Also, the question of which issues were raised in the trial court is germane to this appeal.

Superior Court of New Jersey

Appellate Division

Docket No. A-002537-23

MICHAEL SHAW, *Plaintiff-Appellant,* vs. TOWN OF KEARNY, COUNTY OF HUDSON, STATE OF NEW JERSEY, JOHN DOES 1-10 (fictitious names representing unknown individuals) and/or XYZ CORPS. 1-10 (fictitious names representing unknown corporations, partnerships and/or Limited Liability Companies or other types of legal entities), *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY Docket No. HUD-L-000650-22 Sat Below: HON. KIMBERLEY ESPINALES-MALONEY, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-RESPONDENT TOWN OF KEARNY

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PRELIMINARY STATEMENT

The within appeal by the Plaintiff, from an order granting summary judgment in favor of the Defendants-Respondents, arises out of a Complaint by the Plaintiff-Appellant, alleging he tripped and fell in a hole in the pavement in the middle of a public roadway in the vicinity of 534 Kearny Avenue, Kearny, New Jersey (the "Subject Roadway"). Defendant-Respondent Town of Kearny ("Kearny"), is a municipality that, pursuant to New Jersey Tort Claims Act, N.J.S. 59:1-1 (the "Tort Claims Act") is entitled to a number defenses and immunities thereunder. The trial court dismissed Plaintiff's Complaint with prejudice because it determined that there was no evidence of actual nor constructive notice of the alleged condition in the Subject roadway.

It is uncontested that there was no actual notice of the alleged condition. The majority of discovery presented by Plaintiff, in an attempt to prove constructive notice, arose out of documents produced concerning a wholescale re-pavement of Kearny Avenue, which was conceived in 2018 (the "Kearny Roadway Project"). This project clearly was done for and to inure to a public benefit. This incident took place in 2020 and the pothole which allegedly caused Plaintiff's fall was re-paved pursuant to that project in 2021.

Plaintiff argued that survey photographs taken by town engineers Neglia Engineers, as well as due diligence inspections performed during the

conception and execution of the Kearny Roadway Project were sufficient to place the Town of Kearny ("Kearny") on notice of the pothole which allegedly caused Plaintiff's fall (and, logically, all potholes on or along Kearny Avenue).

Plaintiff's argument, although creative, slaps against both public policy and the very purpose of the New Jersey Tort Claims Act. For this Court to rule that the due diligence done in preparation for any public roadway project constitutes constructive notice of all roadway conditions is simply inequitable and against the spirit of the Tort Claims Act. Kearny has limited resources available. To argue that Kearny should have patched potholes while in the middle of the Kearny Roadway Project, which logically sought to correct any and all deficient roadway conditions, is illogical and contrary to established policy.

Additionally, the Plaintiff has consistently attempted to mischaracterize Google Maps images produced in discovery. Argument was made that a Google Maps photograph dated July 2019 showed the condition existed at that time. This is simply not true - the image produced shows, at best, a crack in the general area of the fall. The only Google Maps image produced showing the alleged condition is dated October 2020, whereas this incident occurred in January 2021. There is no case law which suggests that 3 months time is

sufficient for a court to infer constructive notice in this context, let alone based on a Google Maps image.

Even if this Court were to agree that there was somehow constructive notice of the alleged condition, this court must still find that Kearny's actions were not palpably unreasonable, thus meaning that Kearny is nonetheless entitled to dismissal with prejudice. The alleged condition is nowhere near a public crosswalk. Kearny instituted a plan to re-pave the entirety of Kearny Avenue. Plaintiff may not agree with how Kearny chose to address the pothole, but choosing a full scale re-pave over simply continuing to patch individual pot holes is not and cannot be characterized as palpably unreasonable (in fact it is perfectly logical).

For these reasons, Plaintiff-Appellants arguments fail as a matter of law.

PROCEDURAL HISTORY

For the sake of brevity, the Defendant-Respondent, Condo Association, adopts the Procedural History set forth in the Plaintiff-Appellant's Brief.

STATEMENT OF FACTS

Plaintiff, Michael Shaw ("Plaintiff") alleges that, on or about January 29, 2021, he was caused to trip and fall due to a pothole on a public roadway located at or near 534 Kearny Avenue, Kearny, New Jersey. **(Pa84).** Photographs of the pothole in question show, without question, that the pothole was in the middle of the roadway and not within a crosswalk. **(Da1).**[1] The weather conditions were clear on the date of the accident. **(Pa104, 30:2-4).** Prior to the accident, Plaintiff had parked his car on Kearny Avenue and intended to pick up some custard cups at a bakery in Kearny. **(Pa104, 31:12-19).** Plaintiff parked his car on Kearny Avenue on the opposite side of the street from the bakery. **(Pa104, 35:11-25).** Plaintiff had been to the bakery in question over 20 times and would take the same route, across Kearny Avenue, during those prior visits. **(Pa104, 35:15-25).** Plaintiff crossed Kearny Avenue without issue, obtained his pastries and was returning to his vehicle at the time of the incident. **(Pa104, 36:1-3).** Plaintiff did not utilize a crosswalk to cross the street, instead, he jaywalked across Kearny Avenue. **(Pa104, 36:1-3).** Plaintiff was not looking at the ground in the moments before his

[1] Plaintiff attached some photographs in his Appendices, but they are of poor quality and produced in black and white. They are reproduced in color in Defendant/Respondent's Appendix to allow the Court to property view the area in question.

accident; instead, he was focused on his pastries out in front of him. **(Pa104, 37:3-15).**

During the course of discovery, Plaintiff made no allegation that Kearny had actual notice of the pothole in question; at his deposition, he testified that he did not know of anyone who complained to Kearny with regard to the pothole where he tripped. **(Pa104-05, 39:25-40:3).** Kevin Murphy ("Mr. Murphy"), is and was the Acting Superintendent of Public Works for Kearny at the time of the incident. **(Pa152, 10:13-19).** Mr. Murphy reviewed Kearny's complaint system and found no complaints regarding the pothole question prior to plaintiff's accident. **(Pa149-50, 7:21-8:3).**

The roadway where Plaintiff's incident took place was paved over on or about March 15, 2021. **(Pa254-55).** Repaving work is ordered by Kearny based on available capital. **(Pa208, 23:4-24:7).** In or around 2018, Neglia Engineering assisted Kearny in drafting and finally a grant package with the State of New Jersey, Department of Transportation to subsidize the re-paving of Kearny Avenue. **(Pa280).** The purpose of the re-paving was to generally, resurface Kearny Avenue due to deterioration caused by traffic and weather. **(Pa284).** The application for the portion of the Kearny Avenue re-paving which paved over the condition wherein Plaintiff fell was requested via municipal aide application in 2020. **(Pa280).** The 2020 application contained

photographs of multiple potholes, but not the pothole Plaintiff alleges causes his fall. **(Pa294-305).**

Plaintiff produced a report authored by Kelly Anne Kimciek ("Kimciek") in the course of discovery. **(Pa310).** Kimciek attempts to impart constructive notice of Kearny throughout her report in many ways. She argues, essentially, that the creation of the 2020 Grant Application/due diligence in creating the application created a duty for Kearny to continuously monitor every pothole. **(Pa353-54).** She additionally argues that the condition existed in 2019, which is simply not true - the image produced shows at best a crack in the general area of the fall. (**Pa 376-377**). The only Google Maps image produced showing the alleged condition is dated October 2020; this incident occurred in January 2021. (**Pa2; Pa378**).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY APPLIED THE SUMMARY JUDGMENT STANDARD

Plaintiff's argument is that the Trial Court failed to properly apply the summary judgment standard set forth in Brill v. Guardian Life Insurance Company, 142 N.J. 520 (1995). In support of this argument, Plaintiff cites to the fact that the Trial Court used the facts set forth in Kearny's Statement of Undisputed Material Facts and failed to consider Plaintiff's denial of some of those facts. Plaintiff's argument is without merit and mischaracterizes the Trial Court's use of Defendant's Material Statement of Facts ("DSOMF").

To begin, the "Factual Background" is not verbatim and does not rely on "every fact as stated" by Kearny. DSOMF contains 37 enumerated paragraphs. **(Pa52-Pa62)**. The "Factual Background" set forth by the Trial Court contains 29 enumerated paragraphs. **(Pa713-724).** This alone discredits the argument set forth by Plaintiff as clearly, the Trial Court did not "cite[] to and rel[y] upon every fact as stated by [Kearny]." **Of note, and of large significance, the Trial Court did not list a single fact, which was summarily denied by Plaintiff, in the "Factual Background" section of the Order**.

Six of the material facts listed in DSOMF by Kearny were partially denied by Plaintiff, and included in the Trial Court's "Factual Background." They were the following:

- The weather conditions were clear on the date of the accident.
    - Plaintiff issued a partial denial clarifying that plaintiff testified "the visibility was dark." **(Pa429).**
- The plaintiff did not use a crosswalk when he was returning to his car, he instead jaywalked in the middle of the street.
    - Plaintiff issued a partial denial again clarifying that plaintiff testified "the visibility was dark" and "plaintiff was wearing prescription eyeglasses." **(Pa429).**

Neither of these denials by Plaintiff present facts that would overcome a motion for summary judgment – lighting, and Plaintiff's eyeglass prescription, were not at issue in this case.

The additional facts that were partially denied by Plaintiff were:

- Kevin Murphy ("Murphy") was deposed on behalf of the Kearny Department of Public Works ("DPW"). Mr. Murphy reviewed the computer system called City Works that logs all Complaints that the DPW receives. He reviewed that at to the address the pothole was and

did not find any complaints regarding the pothole prior to the plaintiff's accident.

- Plaintiff issued a partial denial indicating that Mr. Murphy testified that he "noticed something coming up when he put in 537 Kearny Avenue" and Mr. Murphy indicated a specific address would make a difference. **(Pa429).**

The denial by Plaintiff in this matter fails to establish constructive or actual notice because the testimony referred to by Plaintiff, given by Mr. Murphy, relates to a complaint found in the system which post-dates Plaintiff's accident, in fact, the complaint was about Plaintiff's accident:

Q: Okay. In the system, how do you go about, like, doing the search? Is it just that you put the street address and anything comes up or how does it work?

A: We put in the street address. If nothing comes up, we look in the general area. In this case, I put in 500s Kearny Avenue, and that's how I got the information that came up.

Q: Okay. Since you put in 500 Kearny Avenue, would it make a difference in doing your search, if you put 534 or 529 or another address?

A: Yes. I tried 534 first, and nothing came up. When I hit 537, that is when I noticed something coming up; and looking at the picture, I realized it was the same one.

Q: Okay. So 537, something did come up?

A: Yes.

Q: What came up?

A: We received a call on February 28th of 2021 from Joe Nobile – he's one of our insurance investigators—asking us if we were aware of Mr. Shaw's fall and aware there as a pothole at that address. He called me personally. I said no, we weren't. and I put a notice into our City Works at the address of 537 Kearny Avenue that Mr. Nobile had called informing us of a pothole in that area.

(Pa150-51, 8:4-9:5).

The final facts partially disputed by Plaintiff were:

- The sole purpose of photographs taken during due diligence were to assist in the drafting of the DOT Application and drafting plans - the photographs were not taken at the direction of the Town nor shared with the Town.
    - Plaintiff issued a partial denial indicating that Mr. Neglia did not specifically state that the photos were never shared with the Town. **(Pa432).**
- It was not the purpose and scope of survey photographs to identify specific deteriorations on Kearny Ave.
    - Plaintiff issued a partial denial based on the fact that specific defects such as a crack or an age of pavement wouldn't be evident in all photos." **(Pa432).**

- The 2020 Grant Application contained photos of multiple potholes, but not the pothole Plaintiff alleges caused his fall.
    - Plaintiff issued a partial denial based on the fact that it is uncertain whether potholes depicted were all the potholes addressed by Kearny during the project. **(Pa432).**

The sole basis of Plaintiff's argument that the Trial Court did not properly apply the Brill standard is that the Trial Court listed the DSOMF verbatim. That is false, thereby rendering Plaintiff's argument without merit. Furthermore, as set forth above, of the six facts that were listed by the Court, wherein the Plaintiff issued partial denials, those partial denials are not sufficient to create genuine issues of material fact and overcome the immunities and defenses afforded to Kearny under Title 59.

POINT II

PLAINTIFF DID NOT ESTABLISH THAT KEARNY HAD CONSTRUCTIVE NOTICE OF A DANGEROUS CONDITION AND THEREFORE FAILED TO MEET HIS BURDEN UNDER N.J.S.A. 59:4-2

The Town of Kearny, as a public entity, is entitled to all the defenses and immunities set forth in our New Jersey Tort Claims Act, N.J.S. 59:1-1, et seq. N.J.S. 59:1-2 (the "Tort Claims Act") declares:

> [I]t 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.
>
> N.J.S. 59:2-1 furthermore, provides that:
>
> a. Except as otherwise provided by this act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.
>
> b. Any liability of a public entity established by this is subject to any immunity of the public entity and is subject to any defenses that would be available to the public entity and is subject to any defenses that would be available to the public entity if it were a private person.

According to N.J.S.A. 59:1-2 and N.J.S. 59:2-1, "public entities are only liable for negligence within the limitations of the New Jersey Tort Claims Act; there is no liability except as provided by the Act." See McGowan v. Borough of Eatontown, 151 N.J. Super. 440, 446 (App. Div. 1977). "By its very terms,

liability under this section is limited to injuries proximately caused by a dangerous condition on the property owned by the public entity". Ball v. N.J. Bell Tel. Co., 207 N.J. Super. 100, 107 (App. Div. 1986).

N.J.S.A. 59:4-2 sets forth the extent to which a public entity may be held liable. Specifically, 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.
>
> 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.

i. There Is No Argument That Actual Notice Was Established.

N.J.S. 59:4-3(a**)** establishes the situation in which a public entity is deemed to have actual notice of a "dangerous condition." It provides that:

> 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.

Plaintiff failed to set forth any evidence or argument that actual notice was established in the case at bar.

ii. Plaintiff Failed to Establish Constructive Notice

N.J.S.A. 59:4-3(b) defines the situation in which a public entity may be said to have constructive notice of a "dangerous condition" of its property. It provides that:

> 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 established 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 order for Kearny to be liable for Plaintiff's injuries on the theory that it had constructive notice of a dangerous condition on the roadway, Plaintiff must offer evidence that would allow the trier of fact to conclude that any condition "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. 59:4-3. Plaintiff failed to meet his burden.

Plaintiff cites Chatman v. Hall, 128 N.J. 394 (1992), in support of his constructive notice argument. In that case, plaintiff was leaning over the hood of a parked car when another car hit a pothole in the street, causing its passenger side door to swing open and strike the plaintiff. Id. at 399. The

record showed that the pothole ran across much of the street and affidavits were submitted by residents attesting to calls made to the city, at least one year prior to the incident, reagrding this very pothole. Id. at 400. Plaintiff's citation to the record fails to leave out the final part of the Court's holding. In its totality, the Court held: "The length of time during which the hole existed as well as its alleged size create a reasonable inference that the defendant employees had either actual or constructive notice of the hole, **as does the affidavit of a neighbor who reported the hole.**" Id. at 418 (emphasis added). It was not merely the length of time that led the Court in Chatman to find there was constructive notice – it was the totality of the circumstances, including the affidavits, which led to this determination. The totality of the circumstances also led to the Chatman Court's finding that the issue of palpably unreasonable should be addressed by a jury. This will be further evaluated in Point III, infra.

Plaintiff also relies on Lodato v. Evesham Twp., 388 N.J. Super. 501 (App. Div. 2006). That matter involves a plaintiff tripping and falling over a sidewalk slab raised by a tree root. Id. at 503. In finding that constructive notice existed, the Court relied on the fact that the same condition existed for almost eighteen years and similar conditions existed throughout the neighborhood. Id. at 512. Additionally, the homeowners on both sides of the

property in question, had similar conditions in front of their houses and the DPW removed those threes, but not the tree in question. Ibid. Lodato is factually distinct from the case at bar. Here, we are dealing with a pothole in the middle of a street and there is no evidence that the pothole existed for eighteen years.

Plaintiff attempts to hold this matter akin to Chatman and Lodato by citing to the size of the pothole and, based solely on Google images, the amount of time the pothole existed. Plaintiff attaches black and white copies of Google images making it impossible to see the area in question. Color photographs show the following, in 2012, the red arrow points to what appears to be a small crack in the roadway. **(Da2).** September 2015 Google images show the roadway looks similar to how it did in 2015. **(Da3).** October 2017 Google images again show the roadway looks similar to how it did in 2017. **(Da4)**, as do the July 2018 Google images **(Da5)**, and the July 2019 Google images **(Da6-7).** The October 2020 Google images, for the first time, show a visible pothole in the roadway – three months before the accident. **(Da8).** Our courts have long held that the "mere existence of an alleged dangerous condition is not constructive notice of it." Polzo v. County of Essex, 196 N.J. 569, 581 (2008) sub nom., 209 N.J. 51 (2012) (internal quotation marks and alterations omitted).

Plaintiff also argues that trenches cut in the roadway and/or utility work near or at the accident location and pavement restoration is sufficient to establish constructive notice. Plaintiff does not cite to any caselaw to support this position and provides not discovery to substantiate his argument that the work in question was conducted by Kearny or its employees. Plaintiff also argues that Plaintiff sustained his injuries within 1,600 feet (.3 miles) from Town Hall and that DPW workers were during work in the area where Plaintiff's injury occurred. Plaintiff's arguments fail to address that Kearny is under no duty to inspect. N.J.S.A. 59:2-6 states:

> A public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property; provided, however, that nothing in this section shall exonerate a public entity from liability for negligence during the course of, but outside the scope of, any inspection conducted by it, nor shall this section exonerate a public entity from liability for failure to protect against a dangerous condition as provided in chapter 4.

A similar immunity is set forth for public employees in N.J.S.A 59:3-7 which provides:

> A public employee is not liable for injury caused by his failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property; provided, however, that nothing in this section shall exonerate a public employee from liability for negligence during the course of, but outside the scope of, any inspection conducted by him, nor shall this section exonerate a public employee from liability for failure to protect against a dangerous condition as provided in chapter 4.

Any claim that the accident in question was the result of the Town of Kearny's failure to inspect is therefore immunized. As N.J.S.A. 59:2-6 and 59:3-7.

N.J.S.A. 59:4-3(b) defines the situation in which a public entity may be said to have constructive notice of a "dangerous condition" of its property. It provides that:

> 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 established 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 order for Town of Kearny to be liable for Plaintiff's injuries on the theory that it had constructive notice of a dangerous condition on the roadway, the plaintiff must offer evidence that would allow the trier of fact to conclude that any condition "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. 59:4-3. In the matter at bar, Plaintiff failed to present any evidence that would reach the level of constructive notice. Every argument set forth by Plaintiff is essentially that because employees of Kearny were in or about the area where the accident occurred, they have constructive notice. This argument is unsupported by the statute or caselaw and to give Plaintiff's argument merit would essentially render Title 59 and its protections for municipalities' meaningless.

POINT III

PLAINTIFF CANNOT ESTABLISH THAT KEARNY ACTED IN A PALPABLY UNREASONABLE MANNER

As set forth in Ogborne v. Mercer Cemetery Corp., 197 N.J. 448 (2009) (quoting Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985)), "for a public entity to have acted or failed to act in a manner that is palpably unreasonable, it must be manifest and obvious that no prudent person would approve of its course of action or inaction." In addition, Kolitch, supra, clarified this by stating that "[T]he term implies behavior that is patently unacceptable under any given circumstance." Kolitch, 100 N.J. at 493 (emphasis added). The actions of the defendant in this case clearly did not meet this standard. The standard "implies a more obvious and manifest breach of duty and imposes a more onerous burden on the plaintiff." Ogborne, supra, 197 N.J. at 459 (quoting Kolitch, supra, 100 N.J. at 493).

Here, the Trial Court did not reach the palpably unreasonable argument as it found that Kearny had no notice, neither actual, nor constructive, of the pothole in question. Had the Trial Court reached the palpably unreasonably analysis, however, it is submitted that it would have ruled in favor of Kearny. Where there is simply no credible evidence of palpably unreasonable conduct, the question of palpable unreasonableness may be decided by the court as a

matter of law upon application for summary judgment. Muhammad v. NJ Transit, 176 N.J. 185, 199-200 (2003).

Here, it is undisputed that Plaintiff was crossing in the middle of a roadway in an area not designated for pedestrians. This is also called jaywalking. "At intersections where traffic is directed by a police officer or traffic signal, no pedestrian shall enter upon or cross the highway at a point other than a crosswalk." N.J.S.A. 39:4–33. "Where traffic is not controlled and directed either by a police officer or a traffic control signal, pedestrians shall cross the roadway within a crosswalk[.]" N.J.S.A. 39:4–34. "[T]hese two sections are aimed at preventing the conduct commonly known as 'jaywalking[.]'' See Abad v. Gagliardi, 378 N.J. Super. 503, 507 (App. Div.), certif. denied, 185 N.J. 295 (2005). They "require pedestrians to walk to an available crosswalk rather than crossing in the middle of a block." Id. at 508. The Appellate Division, in the unpublished opinion of Shilinsky v. Borough of Ridgefield, No. A-0028-14T2, 2015 WL 10718483, at *3 (N.J. Super. Ct. App. Div. Apr. 26, 2016)[2], established in an almost identical case, that "Ridgefield's failure to take action to repair the Abbott Avenue roadway for pedestrians crossing in the middle of the roadway, not in a crosswalk, was not palpably

[2] Pursuant to Court Rules, a copy of the court's opinion in Shilinsky v. Borough of Ridgefield, No. A-0028-14T2, 2015 WL 10718483 (N.J. Super. Ct. App. Div. Apr. 26, 2016) is annexed hereto. As of the filing of this motion Shilinsky has no negative treatment to the knowledge of counsel after having made diligent inquiry.

unreasonable." **(Pa685).** The Shilinsky court relied heavily on the ruling in Polzo II for the proposition that the area where the accident occurred was not intended for pedestrian use, and therefore the failure to address a defect in that area could not be termed palpably unreasonable. See Polzo II, supra, 209 N.J. 51 at 71-72.

As Plaintiff did at the Trial Court level, he relies heavily on distinguishing Polzo v. County of Essex, 209 N.J. 51 (2012), from the case at bar. In making its distinction, Plaintiff argues that unlike the County of Essex in Polzo, Kearny Avenue is only .87 miles long. This is an illogical argument – Kearny does not consist of one road, Kearny has approximately 105 miles of roadway to maintain. **(Pa692).** Similarly, the argument that the pothole was located some .3 miles from Town Hall is not sufficient to establish that Kearny acted in a palpably unreasonable manner, nor is Plaintiff's self-serving assertion that the pothole was in the "heart of town."

Plaintiff, in an attempt to establish palpably unreasonable behavior, as it did in attempt to establish constructive notice, cites to instances, generally, when Kearny employees were on Kearny Avenue or in the area and had an opportunity to see the pothole in question. As set forth above, this is not sufficient to establish constructive notice and its certainly not sufficient to establish palpably unreasonably behavior on behalf of Kearny. Plaintiff fails

to cite to a single case or statute which establishes that employees allegedly being in the vicinity of a pothole and not fixing that pothole is palpably unreasonably conduct.

Additionally, Plaintiff's continued claims that "the town knew that this area was a problem long before the Plaintiffs sustained injuries and the failure to rectify this problem was palpably unreasonable" are defeated by their continued citation to documents produced pursuant to the Kearny Avenue Project. The Plaintiff may disagree with it, but to attempt to characterize a full scale, state subsidized roadway project as a "palpably unreasonable" response to a deteriorating roadway borders on the absurd. To take Plaintiff's claim to its logical conclusion, any municipality deciding to do any large or medium scale re-pave would be found to be behaving in a "palpably unreasonable" manner. Municipalities operate on a limited budget - to go patch all potholes in the middle of roadways in the middle of a re-pavement project lacks all logical sense and slaps against the scope and purpose of the tort claims act. There simply are no underlying facts that are tied to the palpably unreasonable standard.

Plaintiff also argues that the proximity of a crosswalk to where Plaintiff fell is unclear, via citation to Little v. City of Atlantic City, No. A-2466-20 (Unpublished) (App. Div. Oct. 20, 2021). (**Pa734-744**). Once more, this

argument is without merit, Kearny Avenue has crosswalks at every intersection, and in fact, a crosswalk can be seen in **(Da6)** which is a photograph attached to Plaintiff's expert report. These photographs were included in the motion record by Plaintiff. There is no dispute as to the location of the fall, nor the fact that the fall location was nowhere near a crosswalk. Plaintiff had every opportunity to walk within the crosswalk to ensure safe passage across the roadway – his failure to do so is not the fault of Kearny and certainly does not make Kearny's behavior palpably unreasonable.

CONCLUSION

The record in this matter unequivocally reflects that the Plaintiff-Appellant has not shown how the motion judge made a reversible error in this case. Simply put, the Defendant-Respondents' home is qualified as residential and the condition that caused the Plaintiff to fall was not caused by Defendant-Respondents.

For the foregoing reasons, Defendant-Respondents respectfully submit that the Trial Court's decision to grant the Defendant-Respondents' motion for summary judgment should be sustained by the Appellate Division and the Plaintiff-Appellant's appeal should be denied.

Respectfully Submitted,

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MICHAEL SHAW, Plaintiff(s)-Appellant(s), -vs- Town of Kearny, County of Hudson, State of New Jersey, John Does 1-10 (fictitious names representing unknown individuals) and/or XYZ Corps. 1-10 (fictitious names representing unknown corporations, partnerships and/or Limited Liability Companies or other types of legal entities), Defendant(s)-Respondent(s)	Superior Court of New Jersey Appellate Division Docket No.: A-002537-23 *Civil Action* On Appeal From: Superior Court of New Jersey Law Division Hudson County Docket No. HUD-L-000650-22 Sat Below: Hon. Kimberley Espinales-Maloney, J.S.C.

RESPONSE BRIEF OF PLAINTIFF-APPELLANT MICHAEL SHAW

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PRELIMINARY STATEMENT

The Plaintiff-Appellant will rely on his Preliminary Statement as stated in his initial brief.

PROCEDURAL HISTORY

The Plaintiff-Appellant will rely on the Procedural History as stated in his initial brief.

STATEMENT OF FACTS

The Plaintiff-Appellant will rely on the Statement of Facts as stated in his initial brief.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT PROPERLY APPLY THE SUMMARY JUDGMENT STANDARD (Pa. 440-Pa.442)

New Jersey Court Rule 4:46-1, sets forth the criteria for granting Summary Judgment:

The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. R. 4:46-1.

Historically, when the Court entertains a summary judgment motion, "…the standards of decision governing the granting or denial of Summary Judgment emphasize that a party opposing the Motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact." Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954). "It is a movant's burden to exclude any reasonable doubt as to the existence of an issue of material fact, and all inferences of doubt are to be drawn against the movant in favor of opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers are indulgently treated." Kugler v. Tiller,127 N.J. Super. 468, 476 (App. Div. 1974)

"…[S]ummary judgments are to be granted with extreme caution… the moving papers are to be considered most favorably to the party opposing the motion for summary judgment…all doubts are resolved against the person moving for summary judgment." Revulvo v. American Casualty Co., 39 N.J. 490, 492 (1960). In reviewing the moving papers and papers in opposition, the judge must consider the papers" … most favorably for the party opposing the motion and all doubts are resolved against the movant. Id. "If there is the slightest doubt as to the facts, the motion should be denied." Friedman v. Friendly Ice Cream Co., Metuchen, 35 N.J. 193, 195-196 (1961). In fact, the burden is on the judgment to show the clear absence of a genuine issue of material fact. Monmouth Lumber Company v. Indemnity Ins. Co. of N. America, 21 N.J. 439, 440 (1956).

Under the holding of Brill v. Guardian Life Insurance Company, 142 N.J. 520 (1995), our Supreme Court set forth the following test:

"…when deciding a motion for summary judgment under R. 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the nonmoving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact-finder to resolve the alleged disputed

issue in favor of the non-moving party. This assessment of the evidence is to be conducted in the same manner as that required under R. 4:46-2." The judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there exists a genuine issue for trial. Anderson v. Liberty Lobby, Inc.,477 U.S. 242, 249 (1986).

It is a movant's burden to exclude any reasonable doubt as to the existence of genuine issue of material fact, and all inferences of doubt are to be drawn against the movant in favor of opponent of the Motion. In connection with the Court's analysis of the matters presented on such a motion, all inferences of doubts are drawn against the movant in favor of the party opposing the motion and such a motion should be granted with great caution. Boule v. Borough of Bradley Beach, 42 N.J. Super. 159 (App. Div. 1956). Additionally, summary judgment procedure should not be a substitute for a full plenary trial. United Advertising Corp. v. Metuchen, 38 N.J. 193 (1961). All doubts must be resolved by a conventional trial. Frank Rizzo, Inc. v. Alatsas, 27 N.J. 400 (1958).

In the matter before the Court, the Defendant has characterized the Plaintiff's description of the "Factual Background" section of the trial court's Memorandum of Decision as "false" saying that the trial court did not actually use the Defendant's Statement of Material Facts "verbatim." The

Defense further attempts to illustrate this point by mentioning that the trial court's Facts included 29 paragraphs as opposed to the 37 paragraphs in the Defendant's Statement of Facts. However, the facts that are stated in the Memorandum of Law and the facts, as by the Defendant in its Brief are strikingly similar. Moreover, as the Defendant themselves admit, the Plaintiff summarily denied eight facts, as stated by the Defendant in its brief. While the Defendant was generous enough to point out the facts that the Plaintiff denied in part and explain why those facts in and of themselves may not give rise to a material issue of fact, the Defendant made no mention of the specific facts that the Plaintiff summarily denied.

Moreover, the Defendant failed to mention that after the Defendant submitted its Statement of Facts as part of the moving papers, Plaintiff submitted a response brief. In its response, Plaintiff included its own Statement of Facts. (Pa 433-439). Plaintiff's Statement of Facts, like Defendant's Statement of Facts, also included 37 paragraphs. Of those paragraphs, none of those facts were mentioned by the trial court. (Pa 714-Pa720).

Of the 37 facts that were mentioned in Plaintiff's Statement of Facts, the Defendant admitted 12, summarily denied 9 facts and partially denied 16. (Pa 693-699). It is a movant's burden to exclude <u>any</u> reasonable doubt

as to the existence of genuine issue of material fact, and **all inferences of doubt are to be drawn against the movant in favor of opponent of the Motion.** Boule v. Borough of Bradley Beach, 42 N.J. Super. 159 (App. Div. 1956).

Every Factual Statement that is denied either in whole or in part by either party raises an inference of doubt as to that fact. This means that in order for a court to find in favor of a Defendant and grant summary judgment, the Court must find that **all facts** even if taken as true and viewed in the light most favorable to the non-moving party still does not allow the Plaintiff to meet its burden. In this case, even the Defendant has admitted that the Court did not consider any fact in its moving papers that the Plaintiff summarily denied. Moreover, the Court failed to consider **any fact** that was stated by the Plaintiff. As such, a proper summary judgment analysis was not done and this decision should be reversed.

POINT II

THE PLAINTIFF ESTABLISHED THAT KEARNY HAD CONSTRUCTIVE NOTICE OF A DANGEROUS CONDITION OF PUBLIC PROPERTY UNDER N.J.S.A. 59:4-2(Pa.442-Pa.451)

"The Tort Claims Act., N.J.S.A. 59: 1-1 et.seq. (“TCA”) indisputably governs causes of action in tort against governmental agencies within New Jersey." Gomes v. Cnty. of Monmouth, 444 N.J. Super. 479,

487 (App. Div. 2016); see also Nieves v. Adolf, 241 N.J. 567,571 (2020). One of the fundamental principles embodied in the TCA is governmental immunity is the rule unless the legislature created an exception. Caicedo v. Caicedo, 439 N.J. Super. 615, 623 (App. Div. 2015).

As was explained by the Plaintiff at length in his initial brief, the Plaintiff has met all of the requirements to establish liability against the Township of Kearny under N.J.S.A. 59:4-2. The pothole constituted a "dangerous condition" under N.J.S.A. 59:4-1(a). The overall size of the subject pothole was approximately 4-feet in length (measured perpendicular to the roadway) and 12-inches wide (measured parallel to the striping). (Pa 609) It is estimated that the deepest portion of the pothole approximates 18-inches long by 12-inches wide by a minimum of 2-inches deep (the depth of the surface course). (Pa 609). As Kelly-Ann Kimiecik, P.E. noted in her report, a depression in the ground the size of that pothole would have posed a danger not only to the Plaintiff but to drivers and emergency personnel. (Pa 313: report of Kelly-Ann Kimiecik.) Therefore, the pothole constituted a dangerous condition.

The Plaintiff was outside of the crosswalk. However, the location of the nearest cross walk and the distance of the pothole from the crosswalk is not clear from the record. There are no facts in the record regarding any

measurement in terms of feet that would indicate where the crosswalk was located in relation to where the Plaintiff fell. Defense in its brief makes two contrary statements regarding the location of the crosswalk in relation to where the Plaintiff fell. On one hand, the Defendant states on page 21 of its brief that "the Plaintiff was in the middle of the roadway in an area not designated for pedestrians." This would tend to indicate that the Plaintiff was nowhere near a crosswalk. On the other hand, on page 24 of its brief, the Defendant also says "Kearny Avenue has crosswalks at every intersection and in fact, a crosswalk can be seen at (Da 6) which is attached to the Plaintiff's expert report." This indicates that the crosswalk seemed to be nearby the location of the accident,

If this is true, the Court must also consider that at the time of the accident, the Plaintiff was returning to his vehicle with a box in his hands. Visibility was dark and the Plaintiff was wearing prescription glasses at the time of his accident. If the Defendant's second indication that the Plaintiff was not far from the crosswalk is true, then it can hardly be said that the Defendant was using the roadway in a careless manner or failed to use it in a manner for which it was intended. Both statements by the Defendant taken together raises an issue of fact as to the location of the crosswalk and whether Defendant used the roadway in a manner for which it was intended.

Moreover, N.J.S.A. 59:9-4 states:

> Contributory negligence shall not bar recovery in an action by any party or his legal representative to recover damages to the extent permitted under this act, if such negligence was not greater than the negligence of the party against whom recovery is sought or was not greater than the combined negligence of the persons against whom recovery is sought. Any damages sustained shall be diminished by the percentage of negligence attributable to the person recovering.
> In all negligence actions in which the question of liability is in dispute, the trier of fact shall make the following as findings of fact:
> **a.** The amount of damages which would be recoverable by the injured party regardless of any consideration of negligence, that is, the full value of the injured party's damages to the extent permitted under this act.
> **b.** The extent, in the form of a percentage, of each party's negligence. The percentage of negligence of each party shall be based on 100% of the total of all percentages of negligence of all the parties to a suit shall be 100%.
> **c.** The judge shall mold the judgment from the findings of fact made by the trier of fact in accordance with the provisions of this act.

Our Courts have held that "due care is not a prerequisite to recovery by a plaintiff, but a plaintiff's lack of due care triggers the comparative negligence issue" and "if persons generally using due care would have been placed at risk by a condition at issue, there is a "dangerous condition," but, if a plaintiff was, in fact, negligent in approaching the risk, that negligence is relevant only as a contributory negligence defense available to the public entity. Grzanka v. Pfeifer, 301 N.J. Super. 563, 694 A.2d 295, 1997 N.J. Super. LEXIS 256 (App.Div.), certif. denied, 154 N.J. 607, 713 A.2d 498, 1997 N.J. LEXIS 1271 (N.J. 1997). This means even if the Court finds that

the Plaintiff was negligent in crossing the street, that is only relevant as a contributory negligence issue and must be decided by the jury.

N.J.S.A 59:4-3 states " 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."

Contrary to what the Defense have proffered, there is a material issue of fact as to whether the Town of Kearny had **actual notice** of the dangerous condition under N.J.S.A. 59:4-2. An email from Steven Marks, who was the Town Administrator to David Silva and Michael Neglia from Neglia Engineering Associates, dated July 16, 2020, indicates that the Town Administrator had been travelling Kearny Avenue in 2020 to observe for paver defects and thus, had an opportunity to observe the pothole existing at the accident location. (Pa. 386). Another email from David Silva to Steven Marks, dated October 2, 2020, states, "Stephen . . .as previously requested we have an item for resetting pavers included in the Kearny Avenue Roadway Improvements project. I have the Town's DPW list for the paver problem areas and our office also has walked the streetscape and generated a

list." (Pa 400). These facts raise a question of fact as to whether the town had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.

The Town of Kearny also had constructive notice of the dangerous condition. While it is true that the mere existence of a dangerous condition does not demonstrate constructive notice of it, there is sufficient evidence demonstrating the length of the time that the condition existed.

The Defendant attempts to distinguish this case from Chatman v. Hall, by mentioning that the hole in question covered the entire roadway and that there were affidavits by neighbors. However, the Defendant omits the fact that in Chatman, the Supreme Court assumed the validity of the neighbor's complaints but found those complaints could not "serve as notice to defendant in respect of plaintiff's defective curb." Chatman v. Hall, 128 N.J. 394 (1992).The Court observed: (1) the complaints did not specify dates; (2) the neighbor's property was on a different side of the street; and (3) plaintiff stated, "the condition of curbing on the street varied from home to home, with most of it 'pretty bad,' although '[n]ot all.'" Id. The Court also noted a neighbor's "complaints about his own curb cannot serve as notice of a defective curb at a *different location*." Id. at 447-48.

In spite of this, the Court still found that the Plaintiff had satisfied the notice requirement because that "the length of time during which the hole existed as well as its alleged size created a reasonable inference that the defendant employees had either actual or constructive notice of the hole." The Court also noted that , whether notice and a failure to act would give rise to liability again depends on the standard practice in the City in responding to that type of condition and that "the evidence reveals a sufficient basis for a triable issue relating to whether the failure to repair the hole was the result of the determination of policy or the carrying out of policy decisions already made, and, respectively, whether such failure was palpably unreasonable or merely unreasonable." Id.

As in Chatman, the evidence in this case reveals a sufficient basis for a triable issue relating to whether the failure to repair the hole was the result of the determination of policy or the carrying out of policy decisions already made, and, respectively, whether such failure was palpably unreasonable or merely unreasonable. While the Defendants have stated that they were under no obligation to inspect the roadway, the Plaintiff's contention is that the Defendants had constructive notice of the dangerous condition, not a failure to inspect.

Given the size of the pothole, the length of time that it existed, the gradual deterioration of the pothole, the location of the pothole and the fact that town officials were aware that the area was problematic in terms of potholes, this raises a genuine issue of material fact as to whether the Defendant has constructive notice and even actual notice of the dangerous condition. As such, the Motion for Summary Judgment should have been denied.

POINT III

THE PLAINTIFF CAN ESTABLISH THAT THE CONDUCT OF THE DEFENDANTS WERE PALPABLY UNREASONABLE

Under N.J.S.A. 59:4-2, no liability lies against a public entity for a dangerous condition "if the action the entity took to **protect against** the condition or the failure to take such act was not palpably unreasonable." "Palpably unreasonable" behavior "implies behavior that is patently unacceptable under any given circumstances." Polzo v. Cnty of Essex (Polzo II), 209 N.J. 51, 75 (2012) citing Muhammad v. NJ Transit, 176 N.J. 185, 195 (2003).

In matters such as this one, the Courts have routinely found that the actions of the municipality raise a material issue of fact as to whether its conduct was palpably unreasonable. In Polzo v. County of Essex 209 N.J. 51,35 A.3d 653 (2012), the Court stated that the actions of defendant Essex

County were not palpably unreasonable because Essex County was responsible for an extensive network of roads and "a public entity might reasonably give lesser priority to the shoulder of a roadway, which is not intended for ordinary travel." Id. Therefore, "in view of the County's considerable responsibility for road maintenance in a world of limited public resources, the depression here might not have been deemed a high priority. Id.

In the matter before the Court, the Defendant attempts to make it seem as if Plaintiff is indicating that the Kearny Avenue Roadway Project amounts to palpably unreasonable behavior. This could not be further from the truth. It is also not the Plaintiff's argument that the Town of Kearny was under a duty to inspect roadways. The issue in this matter is notice. As mentioned earlier, the Defendant Town of Kearny had constructive and actual notice of a dangerous condition on its property.

Unlike Polzo, in which the County had to account for an extensive network of roads, the extent of Kearny Avenue was approximately 0.87 miles. (Pa 258). Although the Defendant has indicated that the entire town consists of 105 miles of roadway, the Defendant has not tendered any information to indicate that it is entitled to immunity for Discretionary Activities under N.J.S.A 59:2.3.

The Plaintiff's arguments here have nothing to do with the Kearny Avenue Repavement Project. In fact, the Kearny DPW is not involved in the determination of which roadways are repaved. (Pa 521). On March 15, 2021, the Defendant, Town of Kearny Department of Public Works repaired the pothole in question. (Pa 521). A few days later, the repair did not hold up. Therefore, the DPW made the decision to reopen and refill the pothole. After this was done, the pothole repair held up until July when the Town had an opportunity to repave the roadway. (Pa 521). Therefore, the Plaintiff's argument about the Palpably unreasonable conduct of the Defendant has nothing to do with the Roadway Project and is simply stating that the town has notice of the defect that caused the Plaintiff's injuries and had every opportunity to repair it prior to the Plaintiff's accident but failed to do so. Therefore, their conduct was palpably unreasonable.

Moreover, Mr. Murphy also confirmed in his deposition testimony that on or about September 17th and September 21st of 2020, **prior to the Plaintiff's accident**, DPW workers were doing work in the area where the Plaintiff's injury occurred. (Pa 519). He also confirmed that on September 17, 2020, there was a damaged pole reported at 534 Kearny Avenue that was assigned to the Kearny Department of Public Works. (Pa 519: Deposition of Kevin Murphy at 30:21-31:5.).

He further confirmed that when working in the area, he typically makes inspections of the roadway. (Pa 519). He also stated that if one of his employees noticed the pothole, he would expect them to report it. (Pa 519). Moreover, Mr. Murphy also testified that street sweepers pass by the area four times per week and sweep each side of the street twice per week. (Pa 520). There is an issue of fact as to whether the Town of Kearny and its employees had notice of this condition and failed to repair it.

CONCLUSION

For the reasons set forth above, it is clear that the trial court erred when Plaintiffs-Appellants' case was dismissed on Summary Judgment, as the Appellant can meet his burden under N.J.S.A. 59:4-2 .

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