Superior Court of New Jersey

Appellate Division

Docket No. A-002548-24

ROGER PETROCELLI and NURY PETROCELLI, *Plaintiffs-Respondents,* vs. MIGUEL E. BUENO, ALLEN FARNHAM, CITY OF HACKENSACK, CITY OF HACKENSACK POLICE DEPARTMENT, COUNTY OF BERGEN and JOHN DOES 1-5 (fictitious names representing unknown individuals), *Defendants-Respondents,* and SVETLANA FAKHROUTDINOV, *Defendant-Appellant.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY CONSOLIDATED DOCKET NO. BER-L-3902-21 Sat Below: HON. JOHN D. O'DWYER, P.J.Cv.

(For Continuation of Caption See Inside Cover)

BRIEF ON BEHALF OF DEFENDANT-APPELLANT IN ACTION 1 AND PLAINTIFFS-APPELLANTS IN ACTION 2

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SVETLANA FAKHROUTDINOV and KIRILL FAKHROUTDINOV, *Plaintiffs-Appellants,* vs. CITY OF HACKENSACK, COUNTY OF BERGEN, NEW JERSEY DEPARTMENT OF TRANSPORTATION, STATE OF NEW JERSEY, JOHN DOES l-5 (fictitious names representing unknown individuals) and/or ABC BUSINESS ENTITIES 1-5 (fictitious names representing unknown corporations), *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY DOCKET NO. BER-L-4220-21 Sat Below: HON. JOHN D. O'DWYER, P.J.Cv.

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PROCEDURAL HISTORY

This case arises from a serious car accident which occurred on July 1, 2019, on the River Walk pedestrian pathway located in Foschini Park in Hackensack, New Jersey. (Pa60). At the time of the accident, the pathway was in a dangerous condition because its designed route ended at a location adjacent to a two-lane roadway, which left pedestrians completely exposed to the dangers of oncoming traffic, without a safe place to stand, let alone safe and accessible means to cross the roadway, or the ability to safely walk to the nearest and safest crossing location. (Pa78). Despite having prior notice of this dangerous condition, the Defendant City of Hackensack ("Defendant") did nothing to remediate it, and as a result, Plaintiff Svetlana Fakhroutdinov ("Plaintiff") was struck by a motor vehicle as she was standing in Foschini Park at the designated end of the pathway. (Pa655-656).

On June 29, 2021, Plaintiff and her husband Kirill Fakhroutdinov filed a complaint against Defendant based upon the above-described dangerous condition on Defendant's property. (Pa53).

During the discovery period, Plaintiff served four reports of her expert forensic engineer Nicholas Bellizzi, P.E. dated December 28, 2023 (Pa650), March 27, 2024 (Pa657), April 21, 2024 (Pa669) and August 7, 2024 (Pa673).

In response to Mr. Bellizzi's initial report, Defendant served the report of its expert engineer, David M. Caruso, P.E. dated February 29, 2024. (Pa711).

After the discovery deadline in this matter expired on April 2, 2024, this case was arbitrated on May 2, 2024. (Pa752).

On May 15, 2024, Defendant filed a motion to reopen and extend discovery in order to serve a report from a new expert in the field of accident reconstruction, based on the assertion that it needed a new expert because it just discovered after arbitration that Plaintiff's theory of liability against the Defendant had "changed and evolved". (Pa734). Oral argument of the motion was heard by the trial court on June 11, 2024. (1T)[1]. Plaintiff's opposition was premised upon the fact that the motion was untimely and Defendant failed to meet its burden of proving exceptional circumstances which would warrant the re-opening of discovery. (1T13-15).

On June 11, 2024, the trial court issued an order granting Defendant's

[1] Numbers in parenthesis, which are preceded by the letter "T" refer to transcripts of oral argument and/or decisions placed on the record before the trial court. "1T" refers to the corrected transcript dated June 11, 2024, "2T" refers to the corrected transcript dated July 22, 2024, "3T" refers to the corrected transcript dated September 13, 2024, and "4T" refers to the corrected transcript dated September 19, 2024.

motion and re-opened discovery through to September 16, 2024. (Pa9). The trial court explained its reasoning on the record during oral argument. (1T).

On June 13, 2024, Defendant served the report of its expert engineer, John A. Desch, P.E. dated June 10, 2024. (Pa479).

On July 1, 2024, Plaintiff filed a motion for reconsideration of the trial court's order. (Pa699). Oral argument of the motion was heard by the trial court on July 22, 2024. (2T). In support of the motion, Plaintiff argued that the trial court failed to (1) consider, or appreciate the fact, that the Defendant's motion was untimely, and by granting the Defendant's motion inadvertently deviated from established legal precedent and the New Jersey Court Rules, and (2) give sufficient consideration to the fact that the Defendant's motion was entirely groundless, and did not to meet the "heightened standard of exceptional circumstances" recognized by our State's highest Court for reopening discovery upon motion made after arbitration and after the scheduling of a trial date. (2T16-19, 24-25).

On July 23, 2024, the trial court issued an order denying the motion for reconsideration. (Pa7). The trial court explained its reasoning on the record during oral argument. (2T).

On August 2, 2024, Defendant filed a motion for summary judgment.

(Pa47). Oral argument of the motion was heard by the trial court on September 13, 2024 (3T), and on September 19, 2024, the trial court issued an order granting Defendant summary judgment dismissing Plaintiff's case. (Pa5). The trial court explained its reasoning on the record after oral argument. (4T).

STATEMENT OF FACTS

Plaintiff is a professional ice-skating instructor who trains skaters at the Ice House, which is an ice-skating facility located on Salem Street Extension, directly across from Foschini Park ("Park"), a publicly accessible recreational park in Hackensack, New Jersey, which is owned, operated and maintained by the Defendant and its Department of Public Works. See hackensack.recdesk.com/Community/Facility/Detail?facilityId=17. (Pa135-137, 140, 460-461, 608). It is not a rural property, but a park located in an area of the city zoned for residential, retail and commercial uses. (Pa621).

During the morning of July 1, 2019, Plaintiff was at the Ice House and decided to take a break until her next training session at 11:15 a.m., so she left the building at approximately 10:00 a.m. and walked with two of her students to the Park. (Pa257-262).

To walk to the Park, Plaintiff walked across the Ice House parking lot, then across the westbound lanes of Salem Street Extension and entered the

Park at the pathway's southern entrance located at Salem Street Extension, via a pedestrian pathway known as the River Walk Pathway (hereinafter referred to as "River Walk Pathway" and/or "pathway"). (Pa587-589).

In addition to a utility pole, 2 metal bollards were in place at the southern end of the pathway's southern entrance to prevent vehicles from turning into the Park's path from the roadway. (Pa587). Notably absent at the pathway's entrance were in-street pedestrian warning signs or a right-of-way/crosswalk, to provide pedestrians with safe passage out of the Park, over the westbound lanes of Salem Street Extension. In addition, there was no sidewalk allowing pedestrians who came to the end of the pathway to access any crosswalks in that area of the Park. To make matters even worse, there was only a solid white line painted on the roadway, demarcating the end of the Park and the roadway, thereby exposing Park pedestrians standing at the end of the pathway to the dangers of oncoming traffic. (Pa587, 589, 594-595).

Plaintiff sat in the Park for a short time and watched her students exercise and then decided to return to the Ice House for her next training session, by walking back through the Park on the pathway which led to Salem Street Extension. (Pa265-266). A police photograph taken on the day of the accident depicts the pathway as it existed on Plaintiff's walk back to work,

bounded on each side by lawn and two signposts facing pedestrians walking to the pathway's southern end, which were located approximately 20 feet from Salem Street Extension. Each sign read "DANGER ROAD AHEAD" and were erected by Defendant. (Pa636-643).

When Plaintiff got to the end of the pathway, before attempting to cross the roadway, she stopped and stood next to the bollards on her left and the utility pole on her right and leaned over to observe if there was any vehicular traffic which would prevent her from safely crossing Salem Street Extension. (Pa266-267, 299-300, 302).

As she remained standing in the Park at the southern end of the pathway near the utility pole, a Honda vehicle stopped in the left lane to allow her to cross the roadway. Before she took a step into the roadway, and while she remained standing in the Park, a Toyota vehicle, also driven in the left lane behind the Honda vehicle, swerved to the right lane to avoid striking the Honda vehicle, and in so doing, drove out of control and off the road, knocking down the bollards at the end of the pathway, and colliding and coming to a stop against the nearby utility pole. (Pa243, 588, 594, 591). Before coming to a stop, the Toyota vehicle struck and severely injured Plaintiff, as she stood off the road in the Park. (Pa241-246, Pa266-267).

Plaintiff did not cross or even attempt to cross the road before this accident. She was simply following the Park pathway which led pedestrians to the edge of the roadway. At the time of the accident, she was standing at the end of the pedestrian pathway inside the Park. (Pa266-267, 305).

The pathway was in a dangerous condition because it left pedestrians to fend for themselves and walk either on the roadway or the edge of the roadway in search of the closest and safest means of crossing. If pedestrians are expected to walk to the nearest and safest means of crossing the roadway after reaching the end of the pathway, the standards of care for the maintenance of the Park required that they be provided with crosswalks at or near the end of the pathway, or a sidewalk which would have allowed pedestrians to safely walk to the closest safe means of crossing the roadway. (Pa655-656). To make things even worse, there wasn't even a sign at the end of the pathway, which directed pedestrians to the closest and safest means of crossing the roadway. (Pa651-656, at Pa656).

Unbeknownst to Plaintiff, approximately one year before the accident, on July 26, 2018, a Traffic Study was published as part of a plan called the Hackensack Urban Renewal Project ("Project"), which involved, among other things, the reconstruction of Salem Street Extension. (Pa597-617).

The Traffic Study was submitted as part of a site plan for the Project, which was submitted by Memo dated November 29, 2018, from the engineering firm retained to plan and design the Project, to the City of Hackensack Planning Board. (Pa619-631). The Memo outlined a proposed reconstruction of Salem Street Extension to include two crosswalks, one of which was designed to be installed in line with the end of the pathway where this accident occurred. (Pa626, at ¶ 10).

The Memo (Pa619-631) put into writing what Defendant's key personnel knew for years; that a crosswalk was needed at or near the end of the pathway where this accident occurred, so as to ameliorate what was a well-known dangerous condition, i.e., exposing pathway pedestrians to the dangers of being exposed to a two lane roadway, without a safe means to cross the roadway, or safely walk to a safe means of crossing.

Application for approval of the Project site plan was submitted to Defendant's Planning Board 8 months prior to the accident on January 9, 2019. (Pa633). On February 27, 2020, the Defendant's Planning Board approved the application, and construction was started shortly thereafter in 2020. (Pa633-634).

The Project site plan included the construction of a temporary crosswalk

approximately 100 feet east from the accident location, and a sidewalk along Salem Street Extension, on the southern perimeter of Foschini Park, to allow safe pedestrian travel and access to the Park along Salem Street Extension. (Pa357-358). Photos taken in October 2020 depict the location of the temporary crosswalk and the sidewalk, erected after the Project was approved and construction began. (Pa645-647).

The fact that the temporary crosswalk was built so quickly after the construction project began, proves that it was feasible to provide pedestrians with a safe and easily accessible means of crossing Salem Street Extension, at the southern end of the pathway, at the time the project was formally proposed to Defendant, seven (7) months before the accident occurred. This would have provided a safe and accessible means of crossing for Park pedestrians when they reached the end of the pathway. Most importantly, the construction of such a crosswalk would have completely prevented the accident. (Pa651-656 at Pa656).

A photograph taken in August 2023, after the Project's completion, shows the placement of the permanent crosswalk across the westbound lanes of Salem Street Extension, with accompanying yellow flashing beacon lights. (Pa649).

The evidence in this case also reflects that well prior to the submission of the Project site plan, Defendant was well aware of the dangerous condition posed to pathway pedestrians, starting when it first erected the warning signs which read "DANGER ROAD AHEAD", located approximately 20 feet from the end of the pathway at Salem Street Extension. According to Mr. Robert Rodriguez, the Supervisor of Defendant's Parks Department, those signs have been in place as far back as 2009, and the wording on those signs has never been changed. (Pa160-163). A Photograph dated August 2009, depicts the same danger signs posted on the day of the accident, and was identified by Mr, Rodriguez. (Pa678), and as testified by Mr. Rodriguez, is evidence of the fact that Defendant was aware and on notice of the dangers at issue, years before the accident occurred. (Pa161-163). At that point, as soon as the danger signs were posted, the urgency in taking comprehensive action to provide pedestrians and users of the Park with a safe means to cross Salem Street Extension should have been apparent. (Pa651-656 at Pa656).

Mr. Rodriguez admitted that the danger signs were erected in an attempt to avoid the exact type of accident that occurred in this case, by warning of the dangerous condition at issue, i.e., exposing pedestrians to oncoming traffic at the end of the pathway, mid-block on Salem Street Extension where it was

known that pedestrians were crossing at an uncontrolled location. (Pa160, 164).

Mr. Rodriguez also admitted that from the time he started working for Defendant in 2016, he has been aware of the dangerous condition at issue, and the dangers it posed to pedestrians, especially children, who he would see cross the roadway to and from the Ice House and the Park via the subject pathway, at a mid-block and uncontrolled location with fast moving traffic, where the nearest crosswalk was about a quarter of a mile away at River Street. (Pa163-164, 167).

Most significantly, Mr. Rodriguez acknowledged that the danger signs on the pathway were not sufficient to address the dangerous condition at the southern end of the pathway. (Pa168). However, despite this acknowledgment, and his long-time awareness of the dangerous conditions to which pedestrians were exposed at the end of the pathway, Mr. Rodriguez testified that he never made any recommendation that enhanced warnings or other remedial measures be put into place to protect against this known dangerous condition. (Pa166, 168).

In addition to Mr. Rodriguez, Mr. Joseph Inglima, the Defendant's Superintendent of DPW, was also aware of the dangerous condition at issue for

years before the accident. (Pa464). Before assuming his role as Superintendent of DPW, he worked as a police officer for Defendant, handling motor vehicle accidents and working in the Traffic Division, between the years 1986-2013. (Pa458). Mr. Inglima testified that for years prior to this incident, he was aware that pedestrians were crossing the roadway to and from the Ice House from the end of the pathway in Foschini Park. (Pa464). He also acknowledged that the accident location has now been rendered safer with the installation of a crosswalk and flashing beacon lights at the end of the pathway as well as sidewalks on either side of the end of the pathway. (Pa471).

Ultimately, given the facts and circumstances set forth above, the accident was caused by the Defendant's failure to ameliorate a well-known dangerous condition in Foschini Park, i.e., a pedestrian pathway which led to a location adjacent to a major roadway that lacked a safe place to traverse the roadway. Though signs were erected in the Park prior to the accident which warned of the dangerous condition, there was no in-street pedestrian warning sign or right-of-way/crosswalk that would have allowed for the safe crossing of the roadway. Had the pathway been constructed to lead users of the Park to a safe place to cross the roadway, this accident would not have occurred. (Pa651-656 at Pa655).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED BY ISSUING AN ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BECAUSE IT CONCLUDED THAT AS A MATTER OF LAW PLAINTIFFS ARE UNABLE TO ESTABLISH THAT A DANGEROUS CONDITION EXISTED ON PUBLIC PROPERTY FOR WHICH DEFENDANT CAN BE HELD LIABLE UNDER THE NEW JERSEY TORT CLAIMS ACT, AND MUST THEREFORE BE REVERSED (Pa5)

A public entity's liability for a dangerous condition of public property is governed by the New Jersey Tort Claims Act ("TCA") N.J.S.A. § 59:4-1, et seq. The elements of proof that are required to impose liability are set forth in N.J.S.A. § 59:4-2, which states in pertinent part, that 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, 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.

The TCA defines a "dangerous condition" as "a condition of property that creates a substantial risk of injury when such property is used with due

care in a manner in which it is reasonably foreseeable that it will be used." See Garrison v. Twp. of Middletown, 154 N.J. 282, 286-87, 712 A.2d 1101 (1998) (quoting N.J.S.A. § 59:4-1(a)).

Under section 59:4-3 of the TCA, a public entity is deemed to have actual notice of the dangerous condition at issue, if "it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character."

Whether public property is in a "dangerous condition" is a question of fact for the jury. Vincitore v. Sports and Expo. Auth., 169 N.J. 119, 123 (2001); Roe by M.J. v. NJ Transit Rail Operations, 317 N.J. Super. 72, 77-78 (App. Div. 1998), certif. den. 160 N.J. 89 (1999); Daniel v. State Dept. of Transp., 239 N.J. Super. 563, 573 (App. Div.), certif. den. 122 N.J. 325 (1990).

Analysis of whether public property can be considered to be in a dangerous condition, is in part objective (the reasonable person) and, in part, subjective (how the specific plaintiff used the property). Garrison v. Township of Middletown, *supra.*, at 292 (1998); Furey v. County of Ocean, 273 N.J. Super. 300, 311-312 (App. Div.), certif. den. 138 N.J. 272 (1994); Daniel v. State Dept. of Transp., *supra.*, at 586-588 (App. Div. 1990); Speziale v. Newark Hous. Auth., 193 N.J. Super. 413, 418-419 (App. Div. 1984).

In this case it is alleged that a dangerous condition existed in Foschini Park at the time of the subject accident, which exposed Plaintiff to a substantial risk of injury while she used the Park with due care and in the manner for which it was reasonably foreseen to be used. Given the existence of the dangerous condition, Plaintiff's allegation of Defendant's liability is based on the undisputed evidence that Defendant had both actual and constructive notice of the dangerous condition at issue and had more than sufficient time prior to the accident to have taken measures to protect against the dangerous condition, which was a proximate cause of the subject occurrence.

The Supreme Court, in Vincitore v. Sports and Expo. Auth., *supra.*, provided clear guidance as to the manner in which this issue should be addressed, stating in pertinent part:

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

. . . and comparative fault." Id. at 126.

The evidence in this case clearly reflects that each aspect of the three-part analysis approved by the Supreme Court in Vincitore, is satisfied, thus enabling Plaintiff to prove that the pathway was in a dangerous condition at the time of her accident. First, the pathway was being used by Plaintiff in its normal, foreseeable manner in the minutes leading up to the accident; second, Plaintiff's use of the pathway was not "so objectively unreasonable" that the condition of the pathway cannot reasonably be said to have caused her injury, and third, Plaintiff was using the pedestrian pathway in the manner for which it was constructed and in a proper and foreseeable manner.

The trial court below failed to apply the three-part analysis mandated by our Supreme Court to determine the existence of a dangerous condition in this case and therefore committed reversible error.

A. The trial court erred because it failed to apply the three-pronged test mandated by the Supreme Court in Vincitore v N. J. Sports & Exposition Auth., 169 N.J. 119 (2001) to determine the existence of a dangerous condition of property

(Raised But Not Addressed Below re. Order Dated 9/19/24 (Pa5))

Instead of applying the three-part analysis mandated by Vincitore, the trial court simply concluded that Plaintiff "cannot establish a dangerous

condition" because the "event causing the Plaintiff's injuries" is the "driver's inattention". (4IT, pp. 15-17.). Had the trial court adhered to the central tenet that there can be more than one proximate cause of an accident (see Davis v. Brooks, 280 N.J. Super. 406, 411, 655 A.2d 927 (App. Div., 1993), and applied the proper analysis to determine the existence of a dangerous condition that may have also been a proximate cause of Plaintiff's accident, it would have become clear that the evidence in this case satisfies each of the three prongs of the Vincitore analysis thus establishing that the pathway was in a dangerous condition.

i. The trial court erred because it disregarded evidence establishing questions of fact as to whether the River Walk Pathway posed dangers to the public when used in a normal and foreseeable manner

(Raised and Addressed In-Part Below: 4T15-17, re. Order Dated 9/19/24 (Pa5))

The River Walk pathway constituted a danger to the public when used in its normal, foreseeable manner, which Plaintiff was doing in the minutes leading up to the accident.

After she finished taking her break in the Park, she decided to return to the Ice House for her next training session by walking south on the pathway which ended at Salem Street Extension. At the southern end of the pathway at

Salem Street Extension, there were two bollards to prevent vehicles from being driven onto the pathway. The pathway's southern end was bounded on each side by grass covered ground, and two signposts which were erected by the Defendant. The signposts, which were located approximately 20 feet from the pathway's southern terminus, each had the same warning signs which read "DANGER ROAD AHEAD". (Pa587-589, 591). At the end of the pathway, the only thing separating pedestrians from the cars driving on the Salem Street Extension roadway, was a solid white line demarcation, which separated the roadway from the end of the pathway. There was no sidewalk or crosswalk leading to a safe location, and the area between the white line demarcation between the roadway and Foschini Park was not wide enough to safely walk to the nearest crosswalk. (Pa587-589).

As pointed out by Plaintiff's expert, the location at the end of the pathway constituted a trap for Park pedestrian users of the pathway, who were left at a location adjacent to a major roadway thereby exposing them to the dangers of oncoming traffic, and without a safe place to traverse the roadway, or even a safe place to stand, or walk to the nearest and safest means of crossing the roadway once they reached the end of the pathway. (Pa659-660).

As Plaintiff's expert explains, the danger to which Park pedestrians were

exposed in this case, is what is described in traffic engineering terms as a "dual threat" which is a multiple threat condition with two (2) approaches. Under such "dual threat" conditions, it is foreseeable that one approaching vehicle will stop to allow a pedestrian to cross, i.e., the vehicle closest to the pedestrian, such as it was in this case. When this happens, the vehicle in the adjacent lane, or behind that vehicle, such as in this case, not knowing why that vehicle is stopping in the middle of a block with no traffic control devices, decides to keep going in the second (adjacent) lane and does not stop. The pedestrians, seeing the first vehicle stopping to allow them to cross, now believe that they can proceed to cross the street which results in them going into the path of the vehicle in the second lane, thus the term "dual threat". As such, merely placing "danger" signs at the end of the pathway was insufficient given the dangers to which the pedestrians were exposed as they reached the pathway's terminus. (Pa661).

As Plaintiff's expert also avers, the southern end of the pathway was clearly in a dangerous condition because it was a trap for Park pedestrians, who upon arrival at the pathway's southern end, were exposed to the dangers of oncoming traffic on Salem Street Extension, while at the same time leaving them to "fend for themselves, and walk either on the roadway or the edge of

the roadway in search of the closest and safest means of crossing the roadway", constituting "a clear violation of the applicable standards of care. To make things even worse, there wasn't even a sign at the end of the pathway, which directed pedestrians to the closest and safest means of crossing the roadway. This, in my opinion, was a reckless and egregious deviation from the standards of care." (Pa651-656 at Pa656).

By reason of the above, the trial court overlooked irrefutable evidence which fulfills the first prong of the Vincitore analysis to prove that the River Walk pathway was in a dangerous condition.

ii. The trial court erred because it erroneously concluded that Plaintiff's standing at the end of the pathway was so objectively unreasonable that her activity rather than the condition of the pathway was responsible for the accident

(Raised and Addressed Below: 4T21, re. Order Dated 9/19/24 (Pa5))

Having fulfilled the first prong of the Vincitore analysis by proving that the subject pathway posed a danger to the general public when used in its normal and foreseeable manner, attention is then focused on the second prong of the test, i.e, whether or not Plaintiff's use of the pathway was "so objectively unreasonable" that the condition of the pathway cannot reasonably be said to have caused her injury. Vincitore, 169 N.J., at 129.

Though the court below never specifically applied the Vincitore analysis to this case, the court below seemingly arrived at the erroneous conclusion that by standing at the end of the pathway before the accident occurred, it was Plaintiff's activity, as opposed to the dangerous condition of the pathway itself, which caused the accident. (4IT, at p. 21).

Prior to the accident Plaintiff was simply using the pathway to walk back to work in the direction which the pathway was designed and constructed to take her. She was not engaged in any recreational, or otherwise objectively unreasonable activity while on the pathway, nor did she leave the pathway in the moment prior to the accident. There is no question that she was using the pathway as it was intended to be used, and in a proper and foreseeable manner. In fact, as the lower court acknowledged, she was simply standing at the end of the pathway, and still inside the Park, at the time she was struck by the Toyota vehicle. (4IT at p.21).

Under the facts and circumstances underlying this case, a jury could reasonably conclude that Plaintiff's activity, standing at the designated end of the pathway inside Foschini Park, was not so objectively unreasonable that the activity rather than the condition of the crossing was responsible for the

accident, and that the property created a substantial risk of injury when used with due care.

iii. The trial court erred because it disregarded evidence establishing that Plaintiff's activity at the time of her accident was objectively reasonable.

(Raised and Addressed Below: 4T21 re. Order Dated 9/19/24 (Pa5))

The answers to the first two inquiries of the Vincitore analysis, determine whether a plaintiff's claim satisfies the Act's "due care" requirement. The third involves review of the manner in which the specific plaintiff engaged in the specific activity. That conduct is relevant only to proximate causation and comparative fault. Vincitore, 169 N.J. at 126.

Again, though the trial court never applied the correct analysis, it implied that the manner in which the Plaintiff engaged in the activity at issue, i.e., walking to the designated end of the pathway, was somehow unreasonable. (4IT, at p. 21). It is respectfully submitted that it cannot be credibly argued that Plaintiff, in any way, used the pathway in a manner in which it was not intended to be used, since walking and/or standing on the pathway was certainly a use that was foreseen for the pathway. In any event, the manner in which Plaintiff was engaged in the conduct at issue conduct is only relevant to proximate causation . . . and comparative fault." Id. at 126.

In this regard, as will be set forth herein, in arriving at its decision the lower court overlooked well settled case law that any putative comparative fault on the part of the Plaintiff does not automatically bar recovery against the public entity. Speziale v. Newark Hous. Auth., *supra.*, at 418, and that there can be more than one proximate cause for an accident. Davis v Brooks, *supra.*, at 411.

iv. The trial court misapplied the holding in Buddy v Knapp, 469 N.J. Super. 168, 262 A.3d 1227 (App. Div., 2021) and therefore erred in holding that a dangerous condition of property could not be proven because the sole cause of Plaintiff's accident was driver inattention

(Raised and Addressed Below: 4T18-19 re. Order Dated 9/19/24 (Pa5))

In reaching its decision the trial court below reasoned that '[I]t is presumed that the dang–driver (*sic*) failed to exercise due care in the operation of his vehicle and struck by it, and it also cannot be said that the Plaintiff was exercising due care in planning to cross the street at an undesignated point. Because neither actor involved with the due care necessary to comply with the statute fails to meet this requirement of dangerous condition". (4IT, p.18). In support of this reasoning the Court cited this Court's holding in Buddy v

Knapp, 469 N.J. Super. 168, 262 A.3d 1227 (App. Div., 2021), an analysis of which exposes the flawed reasoning of the trial court.

In Buddy, defendant driver, while driving his vehicle in the westbound lanes of a highway, decided to make an illegal left turn over the oncoming eastbound lanes, in an attempt to enter the driveway entrance of a WaWa convenience store. In so doing, his vehicle struck an eastbound motorcycle operated by Plaintiff. A similar accident occurred a year later at another driveway entrance of the WaWa store. Both defendant drivers acknowledged the existence of jug handles close by, in order to safely turn into the convenience store. Both plaintiffs sued WaWa contending that it knew, or should have known, that a dangerous condition, i.e., driveway entrances that attract illegal left turns, existed in the State's right-of-way and posed a danger to its customers. In its defense, Wawa contended that it did not owe plaintiffs a duty of care with respect to the design of the driveway entrances. In addition, it asserted that the driveway entrances were not dangerous conditions and that the actions taken by defendants were not only illegal, but unnecessary to enter the parking lot, and did not comport with the intended use of the driveway entrances. There was also no evidence that Wawa designed its driveway to invite drivers to make illegal turns to access its property.

In affirming the trial court's decision granting summary judgment to the defendants in Buddy, this Court correctly observed that Wawa owed no duty to the plaintiffs for a dangerous condition on its property, because the accident did not happen on its property at all. This Court also reasoned that there was no evidence in that case that Wawa in any way invited drivers to make illegal left turns into its driveway from the other side of the road.

The fact pattern in Buddy stands in sharp contrast to the fact pattern at bar, rendering the holding in that case inapposite to this one. In this case, the accident occurred on Defendant's property, not in the middle of the roadway. Moreover, unlike the case Buddy, in which the store's driveway was not intended to be used by drivers making illegal left turns across the road, Plaintiff in this case, was using the pathway as intended, and was simply walking to the pathway's designated end, and remained standing there when the accident occurred.

A more appropriate set of facts to compare to this case, and one which was completely overlooked by the trial court below, is the one that our Supreme Court considered in Vincitore v N.J. Sports Exposition Auth., *supra*.

In Vincitore, the plaintiff's decedent was killed when his car was struck by a train while crossing a railroad track that ran through racetrack grounds

owned by defendant sports authority. The tracks were not guarded by flashing lights or cross-bucks, but instead, the defendant installed sliding metal gates made of fencing on both sides of the tracks. After the decedent drove through the first gate, which was undisputably left open, a train approached the crossing and collided with his car. After a bench trial, the court found the Authority liable, concluding that the railroad crossing was a "dangerous condition" under the TCA. The court also found that decedent was comparatively negligent and reduced plaintiff's recovery by the percentage of fault attributed to decedent. The Authority appealed, and in reversing the trial court's decision, this court reasoned that the railroad crossing was not in a "dangerous condition", because if used with due care, members of the the general public would expect to cross without incident. The Supreme Court reversed and affirmed the trial court, reasoning that a reasonable driver in the decedent's position, having driven up to open gates at a railroad crossing, would interpret that to mean that it was safe to cross. The Supreme Court held in pertinent part, that a reasonable fact finder could have concluded that the railroad crossing, with gates open, exposed the objectively reasonable member of the general public to a substantial risk of injury, and could also have concluded that decedent's activity, driving across the tracks, was not so

objectively unreasonable that the activity rather than the condition of the crossing was responsible for the collision. Therefore, the Supreme Court concluded that the property created a substantial risk of injury when used with due care, and was in a dangerous condition as defined by the TCA.

So too in this case, in which Plaintiff walked to the end of the River Walk pathway as intended. A reasonable jury could easily conclude that her activity, i.e, walking to the end of the pathway, was not so objectively unreasonable so as to render her activity, as opposed to the condition of the pathway ending at a two-lane roadway absent a sidewalk or safe means of passage, responsible for the accident. In this regard, and as the trial court did in Vincitore, there is nothing that would preclude a reasonable jury in this case from concluding that in addition to the Defendant, other parties may have been comparatively negligent for Plaintiff's injuries. However, to hold as the lower court did, that the driver's inattention was the sole cause of the accident, is inconsistent with the facts and Supreme Court precedent above.

B. The trial court erred because it disregarded evidence establishing questions of fact as to whether Defendant had both actual and constructive notice of the dangerous conditions existing on the River Walk Pathway

(Raised and Addressed Below: 4T20-21 re. Order Dated 9/19/24 (Pa5))

Upon proof of the existence of a dangerous condition, the TCA [N.J.S.A. 59:4-2.] requires a plaintiff to also demonstrate:

> 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. [the] public entity had actual or constructive notice of the dangerous condition under [N.J.S.A.] 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

In this case, the trial court below disregarded abundant evidence that Defendant had both actual and constructive notice of the pathway's dangerous condition.

Mr. Robert Rodriguez, Defendant's Park Supervisor, testified that at the time of the accident, his department conducted inspections of all of Defendant's major parks, including Foschini Park, on a daily basis five (5) days per week during winter months, and seven (7) days per week during summer months. (Pa136, 154). He confirmed that the border of Foschini Park along Salem Street Extension did not have a sidewalk and that the nearest crosswalk was about a quarter of a mile away at River Street. (Pa164).

For the three-year period prior to the accident, he was aware of the dangers posed to pedestrians exiting the Park at a two-lane roadway, mid-block with fast moving traffic, and was concerned about the dangers posed to

both pedestrians and bicyclists exiting the Park at Salem Street Extension. In rather moving terms, during his deposition he described how he was concerned not only about the dangers posed to Park pedestrians, but especially about the dangers posed to the children who he would see cross the roadway at the accident location going to and from the Ice House, which was located across the street from Foschini Park. He also testified that he observed vehicular traffic traveling at a high rate of speed past the pathway's termination point since the next traffic signal was far away. (Pa160, 164).

Incredibly, Mr. Rodriguez also questioned the sufficiency of the two (2) "Danger Road Ahead" signs posted along the subject pathway near its termination at Salem Street Extension and acknowledged that Defendant did not provide sufficient warnings of the known dangers to pedestrians as described above. Despite this, he never made any recommendation that enhanced warnings or other remedial measures be put into place to protect against these known dangers. (Pa166, 168).

It wasn't just the Defendant's Park Supervisor who was aware of the dangerous condition of the subject pathway, which exposed to fast-moving oncoming traffic. Joseph Inglima, Defendant's Superintendent of DPW, testified that for years prior to this incident, he was aware that pedestrians

were crossing the roadway to and from the Ice House from the end of the pathway in Foschini Park. (Pa464). He also acknowledged that the accident location was rendered safer with the installation of a crosswalk and flashing beacon lights at the end of the pathway as well as sidewalks on either side of the end of the pathway. (Pa471). The evidence clearly reflects that Defendant, through its Park Supervisor and Superintendent of DPW, had actual notice of the dangerous condition of the pathway for years prior to the accident, and instead of taking steps to re-direct the pathway to a safe terminus, relied on two useless danger signs near the end of the subject pathway, that Defendant's own Park Supervisor admitted did nothing to ameliorate the condition.

To make matters worse, almost a year before the accident, Defendant was given a full set of construction plans to take easy steps to correct and remediate the condition, in a memo to the Defendant's Planning Board dated November 29, 2018 (Pa619-631). The construction plans prove that it was not only feasible to correct the dangerous condition before the accident, but that despite being given actual notice of plans to remediate the dangerous condition of the pathway seven (7) months before the accident occurred, the Defendant did nothing. Had Defendant constructed the temporary crosswalk and sidewalk shortly after the construction plans were received, pedestrians at the southern

end of the pathway would have had easy access to a safe means of crossing Salem Street Extension, and this accident would not have occurred. (Pa655-656).

The trial court committed egregious error in disregarding compelling evidence of Defendant's actual notice of the dangerous condition, failing to even acknowledge the Project site plan, and dismissing Mr. Rodriguez's compelling testimony as "insufficiently related to Plaintiff's assertions of a dangerous condition at the end of the walkway path." (4IT, p. 20-21).

Actual notice is proven if the public entity had "actual knowledge of the existence of the condition and knew or should have known of its dangerous character." N.J.S.A. 59:4-3(a). Est. of Massi v. Barr, 479 N.J. Super 144, 159, 319 A.3d 483 (App. Div., 2024). It is respectfully submitted that in this case, the evidence that Defendant was actually aware of the dangerous condition of the pathway is overwhelming.

It must also be stressed that alternatively, constructive notice is satisfied if the plaintiff shows "the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." N.J.S.A. 59:4-3(b). See, e.g., Est. of Massi v. Barr, supra. at 159, Chatman v.

Hall, 128 N.J. 394, 418, 608 A.2d 263 (1992). When a dangerous condition is obvious and existed for such a period of time that the public entity should have discovered it through the exercise of reasonable care, the public entity is on constructive notice. See TCA, N.J.S.A. § 59:4-3(b); Polzo v. County of Essex, 209 N.J. 51, 67 (2012).

In this case, through the testimony of Defendant's employees Rodriguez and Inglima, Plaintiff has also established questions of fact as to both the protracted length of time the dangerous condition of the pathway existed and its obvious nature.

As set forth above, the pathway's southern end at Salem Street Extension was bounded on each side by two signposts that were erected by Defendant (Pa636-643) approximately 20 feet from the pathway's southern terminus, and which each read "DANGER ROAD AHEAD". (Pa678). According to Mr. Rodriguez, the Defendant's Supervisor of Parks Department, those signs have been in place as far back as 2009, and the wording on those signs has never been changed. (Pa161-163). Setting aside the fact that Mr. Rodriguez questioned the sufficiency of those signs, and/or the sufficiency of the warnings in that signage, the mere fact that Defendant posted those signs to begin with, in an attempt to warn of the dangerous

condition at the end of the pathway, is evidence that Defendant was constructively aware, and in fact actually aware, of the dangerous condition as far back as 2009.

Under the factors and principles set forth above, it is respectfully submitted that the evidence reflects that the dangerous condition at issue had been open and obvious for years prior to the accident, which is why Defendant constructed the warning signs at the end of the pathway.

As illustrated above, the trial court below disregarded overwhelming evidence that Defendant was aware for years before the accident, both actually and constructively, of the dangerous condition of the pathway.

C. The trial court erred because it disregarded evidence establishing questions of fact as to whether Defendant's failure to address the dangerous condition on the River Walk Pathway was palpably unreasonable

(Raised but Not Addressed Below re. Order Dated 9/19/24 (Pa5))

For a public entity to be liable for maintaining dangerous condition on its property, a plaintiff must establish that the entity acted in a palpably unreasonable manner. N.J.S.A. § 59:4-2 clearly states that in determining a claim against a public entity for a dangerous condition on its property, the finder of fact must determine "if the action the entity took to protect against

the condition or the failure to take such action was not palpably unreasonable.".

In its holding in Holloway v. State, 125 N.J. 386, 403-404 (1991), the Supreme Court observed that the term "palpably unreasonable", implies "behavior that is patently unacceptable under any circumstance" and that "it must be manifest and obvious that no prudent person would approve of its course of action or inaction." citing Kolitch v. Lindedahl, 100 N.J. 485, 493, 497 A.2d 183 (1985).

Presenting evidence of palpable unreasonableness with respect to the public entity's actions or failures to act is part of a plaintiff's *prima facie* cause of action.[2] However, it cannot be overemphasized that palpable unreasonableness is a question of fact. Vincitore, *supra.*, at 130, citing Furey v. County of Ocean, 273 N.J. Super. 300, 313, 641 A.2d 1091 (App. Div.), certif. denied,138 N.J. 272, 649 A.2d 1291 (1994). Also see Posey ex rel. Bordentown Sewerage Auth., 171 N.J. 172, 191 (2002).

[2] However, when the issue of palpable unreasonableness is raised as a defense, the burden of producing evidence falls upon the public entity. Brown v. Brown, 86 N.J. 565, 578-579 (1981); Fox v. Township of Parsippany-Troy Hills, 199 N.J. Super. 82, 91 (App. Div., 1985), certif. den. 101 N.J. 287 (1985).

New Jersey courts have repeatedly found that when a public entity knew or should have known of a dangerous condition and fails in its basic inspection and/or maintenance obligations, a jury should determine whether the public entity's actions or inactions were palpably unreasonable. See Furey v. County of Ocean, *supra*., at 313, (evidence that a county's failure to properly inspect, maintain, and repair the shoulder of roadway was a proximate cause of decedent's loss of control of his vehicle, which sent it across the roadway and into a tree, causing his fatal injury, created a question of fact for a jury as to whether the public entity's conduct was palpably unreasonable); Shuttleworth v. Conti Constr. Co., 193 N.J. Super. 469 (App. Div. 1984), (whether a city's failure to properly keep a stop sign cleared of overhanging brush was palpably unreasonable, was a question of fact for a jury); Schwartz v. Jordan, 337 N.J. Super. 550 (App Div. 2001), (court found that the public entities knew about a dangerous condition and did not appropriately maintain same and therefore could be found to have acted palpably unreasonably); Wooley v. Bd. of Chosen Freeholders, 218 N.J. Super. 56 (App. Div. 1987), (question for a jury as to whether the public entity had acted palpably unreasonably in its maintenance of a guard rail); Tymczyszyn v. Columbus Gardens, 422 N.J. Super. 253, 265 (App. Div. 2011), certif. den. 209 N.J. 98 (2012) (holding that

a jury could find that the public entity's actions were palpably unreasonable in ensuring that a sidewalk was free of snow during high pedestrian traffic time); Ball v. New Jersey Bell Telephone Co., 207 N.J. Super. 100, 110-111 (App. Div., 1986), certif. den. 104 N.J. 383 (1986) (whether State was palpably unreasonable in failing to remedy a dangerous condition created by a telephone pole on the traffic side of a guardrail); Roe by M.J. v. NJ Transit Rail Operations, 317 N.J. Super. 72, 82 (App. Div. 1998), certif. den. 160 N.J. 89 (1999) holding that it was a question for the jury as to whether NJ Transit's decision, to leave a gate permanently open in a dark area known to be frequented by criminals, was palpably unreasonable under the circumstances).

In fact, a common thread in those cases that have been dismissed upon a finding that the public entity's actions or inactions were not palpably unreasonable, is that they each involve situations where the public entity was completely unaware of the condition, and it was not established that it had a requirement to recognize same. See e.g., Polzo v. County of Essex, 209 N.J. 51 (N.J. 2012) and Gaskill v. Active Environmental Technologies, Inc., 360 N.J. Super. 530 (App. Div. 2003).

Of particular relevance is the Supreme Court case of Brown v Brown, *supra*., which raises similar issues to the case at bar. In Brown, plaintiffs,

husband and wife, sustained personal injuries when, during a rainstorm, their vehicle spun out of control and hit another vehicle after encountering water that accumulated in a curve on a state highway. Several years before the accident, the evidence reflected that public officials were aware that water runoff across the roadway after a rainfall caused vehicles to hydroplane and lose control, and about a year before the accident, a recommendation was made to construct a "swale", to re-direct waters along the edge of the road's shoulder. The jury found the State responsible, having acted in a palpably unreasonable manner in delaying the construction of the swale, and the state appealed.

The Supreme Court affirmed a jury verdict in favor of the plaintiffs, finding that the State's decision not to proceed with the construction of the swale sooner, was palpably unreasonable. The Court went onto hold that the state "was fully aware of the danger of vehicles hydroplaning because of the rainwater being directed onto the highway" and "also had available the as built drawings reflecting the swale ditch". The court concluded that the state's delay in responding to the dangerous condition, which had been brought to its attention a little over a year before the accident, was palpably unreasonable.

Thus, the Supreme Court concluded that the state was "not immune from liability for a discretionary determination which was palpably unreasonable".

The fact pattern in this case is strikingly similar to the one which confronted the Supreme Court in Brown. Just as in Brown, Defendant was specifically placed on notice of the dangerous condition almost a year prior to the accident by Memo dated November 29, 2018, from the engineering firm retained to plan and design the Hackensack Urban Renewal Project, which outlined a proposed reconstruction of Salem Street Extension to include two crosswalks, one of which was designed to be installed in line with the end of the pathway where this accident occurred. (Pa626, at ¶ 10).

The fact that the temporary crosswalk was built so quickly after the construction project began, as well as a photograph taken after the Project's completion, depicting the permanent crosswalk traversing Salem Street Extension from the pathway (Pa649), proves that it was feasible to provide pedestrians with a safe and easily accessible means of crossing Salem Street Extension.

It is respectfully submitted that if the fact pattern in Brown presented issues of fact regarding the public entity's palpably unreasonable behavior, then so does the fact pattern in this case. The factors discussed above clearly

present issues of fact as to whether Defendant's failure to take any action to protect against the dangerous condition of the pathway was palpably unreasonable.

POINT II

THE TRIAL COURT ERRED BY ISSUING AN ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT BECAUSE IT MISAPPLIED THE STATUTORY IMMUNITY UNDER THE LANDOWNER'S LIABILITY ACT AS A BASIS FOR GRANTING SUMMARY JUDGMENT TO DEFENDANT CITY OF HACKENSACK (Pa5)

The Landowner's Liability Act ("LLA") N.J.S.A. 2A:42A-2, exempts an owner, lessee, or occupant of property located in an undeveloped area from liability to persons who use the property for sport or recreational activities, unless the owner, lessee, or occupant charges a fee to persons who come onto the property for those purposes.

In Harrison v. Middlesex Water Co., 80 NJ. 391, 403, 403 A.2d 910 (1979), the Supreme Court established four factors to determine whether the LLA applies to certain lands: (1) the use for which the land is zoned; (2) the nature of the community in which it is located; (3) its relative isolation from densely populated neighborhoods; and (4) its general accessibility to the public at large. Id at 401. The Court found that the property at issue was "situated in a highly populated suburban community . . . surrounded by both private homes

as well as public recreational facilities." Id. at 401-02. Accordingly, the Court reasoned that the concern the LLA was meant to address, i.e., the inability of the owners of rural and semi-rural lands to guard against intermittent trespassers, are "less substantial" in populous settings, and declined to extend immunity under the LLA. Id. at 399, 402.

In so doing, the Supreme Court emphasized that "[D]ecisions which totally disregard the use for which the land is zoned, the nature of the community in which it is located, its relative isolation from densely populated neighborhoods, as well as its general accessibility to the public at large, take too expansive a view of the immunity conferred by the Legislature." Id at 401.

Moreover, the Supreme Court emphasized that the LLA "must be strictly construed" and "does not apply to instances of injury incurred through activities not within the contemplation of the Act." Id at 402.

The trial court below committed reversible error in failing to apply or even address the analysis mandated by our Supreme Court in Harrison, in concluding that the LLA is applicable to the activities in which the Plaintiff was engaged at the time of her accident. Had it applied the appropriate standard, it would have reached the opposite conclusion.

A. The trial court ignored binding Supreme Court precedent in applying an over-broad and incorrect interpretation of the scope of the LLA

(Raised In-Part and Addressed In-Part Below: 4T22-23 re. Order Dated 9/19/24 (Pa5))

It is a fundamental part of our state judicial system that Supreme Court decisions are binding on all trial courts. Liberty Mutual Ins. v. Rodriguez, 458 N.J. Super. 515, 521 (App. Div. 2019). Yet here, the trial court did the exact opposite by (1) failing to apply the analysis mandated by the Supreme Court to determine whether the LLA applies to Foschini Park and (2) applying an overly expansive application of instances of injury incurred through activities, such as that engaged in by Plaintiff at the time of her accident, which are clearly not within the contemplation of the LLA.

i. The trial court erred because it disregarded the four factor test mandated by the Supreme Court in Harrison v Middlesex Water Co., 80 N.J. 391, 403 A.2d 910 (1979) in erroneously immunizing Defendant from liability in this case.

(Not Raised Below re. Order Dated 9/19/24 (Pa5))

The first two Harrison factors look at the use for which the property is zoned and the nature of the community in which it is located. As described in the Zoning Analysis prepared for the Hackensack Urban Renewal Project, located directly across from Foschini Park, the area is zoned for multiple uses

including residential, retail and commercial. (Pa621). Therefore, the first two factors disfavor extending LLA immunity to Defendants.

The third Harrison factor looks at a property's "relative isolation from densely populated neighborhoods." In this case, Foschini Park is located in the heart of densely populated neighborhoods, straddling residential and commercial neighborhoods in the City of Hackensack. (Pa621). The Park is accessible from all sides, with no agrestic buffer between the tightly packed residential and commercial neighborhoods and the Park. The property denied immunity in Harrison was more isolated from densely populated neighborhoods, being bound "by a regional high school, several athletic fields, a tennis court, two social clubs, and a number of private homes." Harrison, *supra.*, 80 N.J. at 394. Thus, the third factor also disfavors LLA immunity in this case.

The fourth Harrison factor focuses on the property's "general accessibility to the public at large." Id. at 401. The LLA does not immunize owners of land that are "freely used by the general public located in populated neighborhoods in urban or suburban areas." Id. Rather, the LLA was intended to protect landowners "against intermittent trespassers" and invitees. Id. at 402. Foschini Park is freely used by the public, in one of the most populated

cities in Bergen County. The Park is not located in a rural, isolated area where it would be difficult for the public to access it. Instead, the Park is easily accessible from major roadways and offers free access to the public. (Pa608). Accordingly, Foschini Park fails every Harrison factor and should not be afforded immunity from suit under the LLA.

ii. The trial court erred because it applied an overly expansive definition of the "sports" and recreational" activities encompassed by the LLA

(Raised and Addressed Below: 4T22-23 re. Order Dated 9/19/24 (Pa5))

As set forth above, the LLA (§ 2A:42A-3) exempts an owner, lessee, or occupant of property located in an undeveloped area from liability to persons who use the property for sport or recreational activities, unless the owner, lessee, or occupant charges a fee to persons who come onto the property for those purposes.

In this case, Plaintiff was not engaged in any "sport or recreational activity", at the time of her accident. One need only consult the definitions set forth in the LLA (N.J.S.A. § 2A:42A-2) to make this determination. N.J.S.A. § 2A:42A-2, defines the terms "sport and recreational activities" as "hunting; fishing; trapping; horseback riding; training of dogs; hiking; camping;

picnicking; swimming; skating; skiing; sledding; tobogganing; operating or riding snowmobiles, all-terrain vehicles or dirt bikes; and any other outdoor sport, game and recreational activity including practice and instruction in any of these activities."

In this case, Plaintiff was not engaged in any activity that comes under the definition of "sport and recreational activities" set forth in the LLA. She was simply standing at the end of the pathway in Foschini Park. Unless the activity of "standing" somehow comes under the definition of "sport and recreational activities" in the LLA, it is respectfully submitted that this statute does not serve as the basis for any assertion of immunity on behalf of Defendant.

In direct conflict with the plain language of the LLA, the lower court held that Plaintiff's use of the pathway "is covered under the statute's definition of recreational activity." (4IT at p. 23), solely relying on the holding in Arias v County of Bergen, 479 N.J. Super. 268 (App. Div., 2024). (4IT at p. 22).

It should initially be noted that the Supreme Court has granted certification of the holding in Arias, and its status as binding precedent in this case is subject to question. See 260 N.J. 223, 331 A.3d 1293 (2025).

The Arias case was based upon an accident in which the plaintiff fell in a hole while rollerblading on a paved pedestrian pathway in Van Saun County Park, a public park owned and operated by the County of Bergen, in Paramus, New Jersey. After the plaintiff filed her complaint, Defendant County filed a motion to dismiss for failure to state a claim, relying on the immunities set forth in the LLA. Plaintiff opposed the motion by arguing that the LLA was intended "to apply to rural and semi-rural tracts of land" and "was never intended to apply to residential and suburban neighborhoods." The plaintiff asserted the County was not entitled to immunity under the LLA because the park in question contained structures within a densely populated suburban neighborhood. The Appellate Division concluded that because of the park's "dominant character as an open space for sport and recreational activities", it is the type of property entitled to the protections under the LLA.

Whether or not the holding in Arias is ultimately reversed, the facts underlying that case render the holding completely inapposite to this case, for unlike the plaintiff in Arias, the Plaintiff in this case was not rollerblading, or for that matter hunting, fishing, trapping, or otherwise engaged in any of the other activities defined as "sport and recreational" set forth in the LLA. Therefore, even if the dominant character of Foschini Park is assumed,

arguendo, to be rural or semi-rural, the activities engaged in by Plaintiff at the time of her accident do not bring it within the ambit of the LLA.

POINT III

THE TRIAL COURT ERRED BY ISSUING AN ORDER DENYING RECONSIDERATION OF ITS PRIOR ERRONEOUS ORDER GRANTING DEFENDANT'S MOTION TO REOPEN AND EXTEND DISCOVERY (Pa7) (Pa9)

In this case, Defendant's motion to reopen discovery failed to adhere to the requirements of R. 4:24-1 (c) and should have been denied outright.

A. Defendant's motion to reopen discovery was untimely

(Raised and Addressed Below: 2T16-19, 24-25 re. Order Dated 7/23/24 (Pa7))

Our New Jersey Court Rules are explicit as to the timing of discovery-related motions. Specifically, R. 4:24-1(c) provides that any motion seeking to extend the discovery period must be made returnable before the expiration of the discovery period.

Defendant's motion was filed on May 15, 2024, and made returnable on June 7, 2024. (Pa734-735). By the time the motion was filed, the discovery end date of April 2, 2024, had expired, thereby rendering Defendant's motion untimely and in violation of the Court Rules. Accordingly, the motion should have been denied.

B. Even if Defendant's motion to reopen discovery was deemed timely, the trial court improperly granted the motion due to Defendant's failure to establish exceptional circumstances

(Raised and Addressed Below: 2T16-19, 24-25 re. Order Dated 7/23/24 (Pa7))

Not only should Defendant's motion have been denied as untimely, it was also deficient due to Defendant's failure to establish exceptional circumstances as a basis for an extension of discovery in the first place.

R. 4:24-1 (c) specifically provides that "[N]o extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown." Although the rule does not provide a definition of "exceptional circumstances," the term has been defined as "extraordinary circumstances" or "something unusual or remarkable". See Vitti v Brown, 359 N.J. Super. 40, 818 A.2d 384 (Law Div. 2003) certif. denied, 185 N.J. 296, 884 A.2d 1266 (2005) and Flagg v Township of Hazlet, 321 N.J. Super. 256, 728 A.2d 847 (App. Div. 1999).

It is well settled that there are four inquiries that must be made to determine whether a moving party has satisfied the "exceptional circumstances" requirement: (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the

additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time. See Garden Howe Urban Renewal Assocs. v. HACBM Architects Engr's Planners, LLC, 439 N.J. Super. 446, 110 A.3d 82 2015 (App. Div., 2015).

In this case, Defendant failed to satisfy any of the four inquiries established by our courts. Defendant failed to offer a valid reason as to why this expert had not been retained during the discovery process (inquiry 1). This expert was not essential to Defendant's case because Defendant had already submitted the report of an engineering expert (Pa712) (inquiry 2). Moreover, Defendant failed to offer any justifiable explanation for failing to request an extension of discovery within the original time period (inquiry 3), and did not submit an explanation as to why the circumstances presented were clearly beyond its control (inquiry 4), other than to assert the fabricated excuse that it was just discovered after arbitration that a new expert was needed. (Pa738 at ¶ 11).

Moreover, in reopening discovery after arbitration, the lower court erred in failing to adhere to Supreme Court precedent established in Szalontai v.

Yazbo's Sports Cafe, 183 N.J. 386, 874 A. 2d 507 (2005), a case which is dispositive of the issues raised at bar. In Szalontai, after rejecting a post-discovery arbitration award, and demanding a trial *de novo,* the plaintiff retained a new expert and also sought leave of court to reopen discovery. In support of the motion, plaintiff's counsel asserted that he learned "for the first time" during arbitration that his theory of liability based on "*res ipsa loquitur*" would not be successful, because the defendant alleged, also "for the first time", that the construction work at issue in the case, might not have been done at the location where plaintiff was injured. Id. at 392.

The trial court's denial of the motion to reopen discovery was ultimately affirmed by the Supreme Court, which held that a heightened standard of exceptional circumstances was necessary for any extension of discovery requested after an arbitration or trial date is fixed. Id. at 397. It was in that context that the Supreme Court, in affirming the denial of the motion, quoted the words of the trial court in expressing a concern that by allowing discovery to proceed after arbitration, it would be undermining the whole effort of the court system to have discovery concluded prior to the arbitration. Id. at 397.

It is therefore respectfully submitted that the trial court committed reversible error in failing to adhere to the Supreme Court holding in Szalontai and apply the same principles to the case at bar.

CONCLUSION

Based upon the foregoing, the Orders appealed from should be reversed. Defendant's motions for summary judgment and to reopen discovery should be denied, and Plaintiff's Complaint reinstated.

Respectfully submitted,

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Dated: July 18, 2025 Seth D. Bader

ROGER PETROCELLI and NURY PETROCELLI, Plaintiffs, v. MIGUEL E. BUENO, ALLEN FARNHAM, CITY OF HACKENSACK, CITY OF HACKENSACK POLICE DEPARTMENT, COUNTY OF BERGEN, SVETLANA FAKHROUTDINOV and JOHN DOES 1-5 (fictitious names representing unknown individuals), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY CONSOLIDATED DOCKET NO. BER-L-3902-21 ON APPEAL FROM FINAL JUDGMENT DISMISSING THE CASE ENTERED IN THE LAW DIVISION, BERGEN COUNTY SAT BELOW: HON. JOHN D. O'DYWER, P.J.S.C.
SVETLANA FAKHROUTDINOV and KIRILL FAKHROUTDINOV, Plaintiffs, v. CITY OF HACKENSACK, COUNTY OF BERGEN, NEW JERSEY DEPARTMENT OF TRANSPORTATION, STATE OF NEW JERSEY, JOHN DOES 1-5 (fictitious names representing unknown individuals) AND/OR ABC BUSINESS ENTITIES 1-5 (fictitious names representing unknown corporations), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO. BER-L-4220-21

RESPONDENT'S BRIEF AND APPENDIX

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PRELIMINARY STATEMENT

In this appeal, Plaintiffs-Appellants[2] ask the Appellate Division to extend the notion of premises liability to deem a property "dangerous" simply because it adjoins another premises, from which dangers created the conduct of third parties beyond the property owner's control could cross onto the subject property. The Court below correctly concluded that Plaintiffs' theory would render the statutory definition so broad as to become meaningless: making every inch of every public sidewalk, tree lawn, front lawn, roadside park, picnic area, or bike- or foot-path adjacent to a roadway a "dangerous condition" under the N.J. Tort Claims Act simply because a driver on the roadway might, under some unknown circumstance, lose control of a vehicle. Because this rationale for premises liability is so attenuated, and Plaintiffs' argument is so unrealistic, the trial Court's grant of summary judgment in favor of Defendant-Respondent the City of Hackensack was correct and should be affirmed.

This case can best be summarized as an unfortunate motor vehicle accident masquerading as a premises liability action. By Plaintiffs' own account, Ms. Fakhroutdinov was standing inside Hackensack's Foschini Park, adjacent to the two westbound lanes of the Salem Street Extension, a Bergen County

[2] The Plaintiffs-Appellants in this action are Svetlana Fakhroutdinov, who sustained physical injuries due to the subject accident, and her husband Kirill. When singular, "Plaintiff" or "Appellant" refers to Svetlana.

roadway, when a vehicle came to a stop in the roadway's left westbound lane. With Plaintiff still standing in Foschini Park, another vehicle, also driving in the left westbound lane, swerved to avoid striking the first vehicle, drove off the road, and struck two individuals: Plaintiff Svetlana Fakhroutdinov and an employee of the City of Hackensack's Department of Public Works, Roger Petrocelli. Having settled their claims against the two drivers, Plaintiffs pursued litigation against the City of Hackensack, asking the Court to find fault—not against the driver(s) or even those responsible for the road—but against the municipal owner of the park land beside the roadway where the accident began.

Plaintiff's argument when applied to the facts here, merely boils down to that the risk of harm to pedestrians **near a roadway** is elevated when a driver operates a motor vehicle without due care. The corollary of Plaintiffs' proposition, that the effects of activity on or adjacent to a property are what determine whether a "dangerous condition" exists, would mean that whenever danger exists, so does a dangerous condition. Adopting this theory would expand the definition of the statutory phrase "dangerous condition" beyond any reasonable boundary. The term would cease to be an identifiable—and thus remediable— attribute of the public property (such as a pothole or loose railing) and would come to mean "nearby any possible dangerous event or activity."

For all these reasons, and as set forth at length below, the trial Court

correctly concluded that Plaintiffs cannot overcome the statutory immunities of the N.J. Tort Claims Act—and, specifically, that the accident was caused not by any dangerous condition but by the driver's and Plaintiff's own lack of due care. As a separate and independently-adequate rationale for summary judgment, the Court also correctly noted that the Landowner's Liability Act shields Hackensack from liability. There was no error in either of these rulings, and Plaintiffs can offer no rationale for reversal on appeal. Instead, the Law Division's ruling for the defense on summary judgment should be affirmed.

Plaintiffs' tortured rationale for municipal liability also meant that they repeatedly changed their theory of the case—targeting, over the course of discovery, the lack of a crosswalk on the County road, the placement or absence of signs and signals, the nature of Plaintiff's actions in the park that day, notice issues, and more. The result was an extended and later re-opened discovery period. Appellants are also appealing the Trial Court's decision to re-open discovery on the City's motion, allowing the defense time to serve an accident reconstruction report and Plaintiffs the opportunity to rebut it.[3] For the reasons discussed below, the trial Court's decisions on this motion was sound and within its discretion, see R. 1:1-2, and should not be disturbed.

[3] Strictly speaking, Plaintiffs have appealed the Law Division's denial of their motion to reconsider the discovery ruling.

STATEMENT OF FACTS & PROCEDURAL HISTORY

On June 29, 2021, Plaintiffs-Appellants Svetlana and Kirill Fakhroutdinov filed a Complaint against the City of Hackensack ("City" or "Defendant") alleging a dangerous condition existed on the City's property. [Pa53]. Plaintiffs' allegations stem from a motor vehicle accident that occurred on July 1, 2019, when the inattentive[4] driver of a motor vehicle, Defendant Miguel Bueno ("Bueno"), struck another vehicle on County Road 56 [Pa759, ¶ 18] and careened into Foschini Park, causing extensive property damage and injuring Plaintiff and a City employee. [Pa60]. The Complaint also named Bergen County as a Defendant, but did not name the two drivers, who had settled with Plaintiffs prior to suit. [Pa57; Pa549-553].

The City moved to dismiss Plaintiffs' Complaint, a motion that was opposed by both Plaintiffs and the County and ultimately denied by the Court. [Da009]. The City and the County answered, impleading Bueno and the other driver, Allen Farnham ("Farnham"), as third-party defendants. [Da011]. On the County's motion, this action was consolidated with a separate action brought by

[4] Phone records showed the speeding driver who struck Plaintiff made an outgoing call that ended seconds before he called 911 to report the accident. [Pa543-544].

the City's employee who had also been injured in the accident, Roger Petrocelli, and his wife.[5] [Da024].

After consolidation, Third-Party Defendant Farnham moved for Summary Judgment, which was opposed by the City, Bueno, and the Petrocellis. Farnham's Motion was ultimately denied. [Da027]. On May 13, 2024, Plaintiffs filed a stipulation of dismissal to dismiss the County of Bergen, which was improper because Plaintiffs failed to comply with the requirements of Rule 4:37-1(a) that all parties—not just Plaintiffs and the affected defendant—must stipulate to such dismissals. [Da030]. Although improper, the Court allowed Bergen County's dismissal from the case. Then, on June 7, 2024, Plaintiff, as a defendant in "Action 1," moved for Summary Judgment against Petrocelli. Plaintiff's Motion was opposed by Petrocelli and Bueno, and ultimately denied. [Da032].

During discovery, Plaintiffs served a total of four expert reports of their traffic engineering expert Nicholas Bellizzi ("Bellizzi"), dated December 28, 2023 [Pa650]; March 27, 2024 [Pa657]; April 21, 2024 [Pa669] and August 7, 2024 [Pa673]. In response to Mr. Bellizzi's initial report, Defendant served the

[5] As Plaintiffs' brief indicates, the Petrocelli matter was designated as "Action 1" and the Fakhroutdinovs' lawsuit was designed as "Action 2."

report of its expert engineer, David M. Caruso, O.E., dated February 29, 2024. [Pa711].

After the discovery deadline expired on April 2, 2024, and arbitration was held on May 2, 2024, [Pa752] the City moved to reopen and extend discovery to serve a report from its accident reconstruction expert; this had become necessary because of Plaintiffs' evolving theory of the case. [Pa734]. The City promptly served the report of its expert engineer, John A. Desch, P.E., on June 11, 2024, ahead of oral argument. [Pa479]. The trial court found exceptional circumstances and granted Defendant's motion on June 11, 2024, extending discovery through to September 16, 2024. The City's report having been served, the extension of the discovery period gave Plaintiffs the opportunity to provide a rebuttal or depose the expert. [Pa9]. Plaintiffs took advantage of this opportunity by producing a third supplemental expert report on August 7, 2024, while also moving unsuccessfully for reconsideration of the trial court's discovery extension. [Pa673, Pa699]. Plaintiffs' reconsideration motion was denied in an order dated July 23, 2024. [Pa7].

Once discovery was over, Defendant moved for summary judgment on the grounds (1) that it was entitled to statutory immunity under N.J.S.A. 59:1-1 et seq., ("Crosswalk Immunity"); (2) that Plaintiffs could not satisfy the premises liability requirements of the N.J. Tort Claims Act, N.J.S.A. 59:1-1 et

seq., because they cannot show that the pathway was in a dangerous condition that proximately caused Plaintiff's injuries, that City had actual or constructive notice of the alleged condition, nor that the City's conduct concerning the allegedly dangerous condition was palpably unreasonable; (3) that the County roadway was not City property, making the City not liable for Plaintiff's main theory of liability; and (4) that the City was entitled to immunity under the Landowners Liability Act, N.J.S.A. 2A:42A-1 et seq. ("LLA"). [Pa47]. At the same time as it moved for Summary Judgment, Defendant also moved to bar the testimony and report of Mr. Bellizzi as a net opinion; Defendant's Motion was opposed and subsequently granted. [Da042].

After oral argument on September 13, 2024, [3T], the trial Court granted the City's Motion for Summary Judgment in all respects, dismissing Plaintiffs' claims in their entirety with prejudice. The trial Court explained its reasoning on the record [4T], specifically finding that Plaintiffs' theory regarding crosswalk placement was barred under N.J.S.A. 59:4-5; that the Foschini Park pathway was not a dangerous condition as contemplated under N.J.S.A. 59:4-2; and that the City enjoyed immunity under the LLA.

Plaintiffs appealed the Law Division's ruling on summary judgment and its earlier decision to re-open and extend discovery. The City of Hackensack

now hereby opposes Plaintiffs' application and urges this Court to affirm the Law Division's ruling in all respects, for the reasons set forth below.

STANDARD OF REVIEW – SUMMARY JUDGMENT

This Court reviews *de novo* the rulings of lower courts on summary judgment. Globe Motor Co. v. Igadlev, 225 N.J. 469, 479 (2016). However, the function of the Appellate Division is to review the decision of the trial Court, not to decide the motion *tabula rasa*. Estate of Doerfler v. Fed. Ins. Co., 454 N.J. Super. 298, 301-02 (App. Div. 2018). Accordingly, the trial judge's factual findings are "binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974) (citing N.J. Turnpike Auth. v. Sisselman, 106 N.J. Super. 358 (App. Div. 1969)). In particular, reviewing courts must accord "deference to those findings of the trial judge which are substantially influenced by his [or her] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Id. (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). As our Supreme Court has stated, the appellate function is a limited one:

> '[W]e do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interest of justice,' Fagliarone v. Twp. of No. Bergen, 78 N.J.

> Super. 154, 155 (App. Div. 1963), and the appellate court therefore ponders whether, on the contrary, there is substantial evidence in support of the trial judge's findings and conclusions. Weiss v. I. Zapinsky, Inc., 65 N.J. Super. 351, 357 (App.Div.1961).

Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974).

The standard for whether the trial Court's ruling on summary judgment was appropriate is well-known: a Court should not hesitate to enter summary judgment if the evidence "is so one-sided that one party must prevail as a matter of law." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (App. Div. 2007). Summary judgment is appropriate where there is no genuine issue as to any material facts challenged, R. 4:46-2(c), and the movant is thus entitled to—and judicial economy is best served by—entry of judgment as a matter of law. See, e.g., Millison v. E.I. duPont de Nemours & Co., 101 N.J. 161, 167 (1985).

Importantly, summary judgment may not be denied based upon conclusions lacking factual support, Peterson v. Twp. of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011), self-serving statements, Heyert v. Taddese, 431 N.J. Super. 388, 414 (App. Div. 2013), or disputed facts "of an insubstantial nature." Pressler & Verniero, Current N.J. Court Rules, cmt. 2.1 on R. 4:46-2 (2023).

Here, a review of the record below demonstrates that the trial court evaluated the information provided to it and correctly concluded that Plaintiffs had failed to make and support the showings required to defeat the protections

of the Tort Claims Act, N.J.S.A. 59:1-1 et seq. ("TCA" or "Act"), or the Landowner's liability Act, N.J.S.A. 2A:42A-1 et seq. ("LLA"), or otherwise to demonstrate a dispute worthy of submission to a finder of fact.

STANDARD OF REVIEW – REOPENING & EXTENDING DISCOVERY

A trial court's discovery rulings are reviewed for abuse of discretion. State v. Brown, 236 N.J. 497, 521 (2019). It is under this standard that the Appellate Court "generally defer[s] to a trial court's disposition of discovery matters." Id. (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)). Indeed, "[t]he abuse of discretion standard instructs [the Court] to '**generously sustain** [the trial court's] decision, provided it is supported by credible evidence in the record.'" Id. (quoting Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384 (2010)) (emphasis added) (second alteration in original). Notably, and as this Court is aware, "New Jersey's discovery rules are to be construed liberally in favor of broad pretrial discovery." Payton v. N.J. Tpk. Auth., 148 N.J. 524, 535 (1997). Moreover, the Court is permitted to relax any Court Rule in the interests of justice: "Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice." R. 1:1-2.

Clearly, the trial Court's decision to re-open discovery for a limited and specific purpose—as to which **both sides** were able to supplement the record during the extension—was well-founded and not in any way an abuse of its discretion.

LEGAL ARGUMENT

I. SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE PLAINTIFFS CANNOT SHOW A DANGEROUS CONDITION.

The "guiding principle" of the Tort Claims Act is "that 'immunity from tort liability is the general rule and liability is the exception'" D.D. v. Univ. of Med. & Dentistry of N.J., 213 N.J. 130, 133 (2013) (quoting Coyne v. State Dep't of Transp., 182 N.J. 481, 488 (2005). It has always been the intention of the Legislature that the Act be strictly construed to effectuate its purpose. Hawes v. New Jersey Dept. of Transp., 232 N.J. Super. 160 (Law Div.), aff'd o.b., 232 N.J. Super. 159 (App. Div. 1988); see also, e.g., Pico v. State, 116 N.J. 55, 59 (1989) (Courts should employ an analysis that presumes public entity immunity unless there is a specific provision for liability).

The first principle of public liability for a dangerous condition is that the condition must be on property owned or controlled by the public entity. N.J.S.A. 59:4-2 ("[a] public entity is liable for injury caused by a condition **of its property** …") (emphasis added); see Patrick ex rel. Lint v. City of Elizabeth, 449 N.J. Super. 565, 576 (App. Div. 2017) ("To impose liability under the TCA, there must be ownership of the pertinent property."). A public entity is not liable for dangerous conditions on the property of others. Dickson v. Twp. of Hamilton, 400 N.J. Super. 189, 197 (App. Div. 2008). Here, however, Plaintiffs attempt to attribute liability to the City for dangers associated with traffic

conditions on a county road—property the City does not own or control. The Law Division correctly concluded that Plaintiffs' theory must fail. See Brothers v. Borough of Highlands, 178 N.J. Super. 146 (App. Div. 1981 (rejecting appellant's attempt to extend liability under the TCA to property not owned by the municipality).

Moreover, the trial court barred Plaintiffs from arguing that a lack of a crosswalk at the accident location was a dangerous condition under N.J.S.A. 59:4-5 (hereinafter, "crosswalk immunity"). Yet Plaintiffs' theory of liability repeatedly points to absence of a crosswalk or traffic signal at the location as the culprit of Ms. Svetlana's injuries. [See, e.g., Pa18, Pa62, Pa78, Pa80; pb at 5, 7, 9, 12, 18, 30]. Not only are these omissions expressly immunized under the TCA, see id., they are also—again—allegations regarding a **roadway** the City does not control, not the **park** that it does. Even Plaintiffs' expert opined that the activity associated with County property, namely, the traffic conditions on the Salem Street Extension and absence of a crosswalk and traffic signals around the end of the pathway, allegedly caused the harm to Plaintiff. [See Pa653, Pa655]. These factors both implicate the immunity provisions under the TCA, Weiss v. N.J. Transit, 128 N.J. 376, 385 (1993), and re-emphasize that any allegedly dangerous condition is found on property that is not Hackensack's.

Plaintiffs cannot satisfy a single one of the statutory requirements to show a dangerous condition existed on public property. To impose liability, a plaintiff must establish **all** the factors set forth in N.J.S.A. 59:4-2: the existence of a "dangerous condition" "of [the City's] property," that the condition proximately caused the injury, that it "created a reasonably foreseeable risk of the kind of injury which incurred," that either the dangerous condition was caused by a negligent employee or the entity knew about the condition, and that the entity's conduct was "palpably unreasonable." Id. The trial court correctly concluded that Plaintiffs could not satisfy **any** of these requirements—much less all of them, as the law requires.

There is no evidence that the pathway is dangerous when used in a normal, foreseeable manner. Only the activity of inattentive drivers on the adjacent roadway made it dangerous to Plaintiff, but this fact is not unique to Foschini Park or the pathway; it is true of every roadway-adjacent public property in the world, making it meaningless as a legal standard or factual basis for liability. If this Court were to accept Plaintiffs' theory of the case, it would mean anytime that property abuts a road, a dangerous condition exists.

Moreover, Plaintiff in this case failed to exercise due care by planning to cross the roadway at an undesigned location without a crosswalk or other traffic signals. See infra, §I(a). Nor did any physical attribute of the pathway contribute

to Plaintiff's injuries—rather, reckless and inattentive driving of a third party, not the City, was the cause of her injuries. [4T, at 16:25-17:10]. Even if the pathway contributed to Plaintiff's injury—a conclusion not supported by the evidence, and rejected by the trial court—surely the driver's speeding and negligent driving was a superseding cause, as the pathway itself, absent the driver's existence and intervening actions, would not and could not have caused Plaintiff's injuries. [4T, at 18:2-9].

Nothing Plaintiff was able to adduce in evidence contracts this obvious conclusion. Without a defect on its property or any previous accidents or complaints, there is no basis to find that the Foschini Park pathway is dangerous, even less so that the City knew or should have discovered—or could even have anticipated—the sort of danger that ultimately resulted in Ms. Fakhroutdinov's injuries. [See 4T, at 16:25-17:10]. Therefore, any action or inaction on its part in discovering or repairing the alleged condition was not palpably unreasonable.

For all these reasons, the Law Division correctly concluded that Plaintiffs could not establish a dangerous condition on the City's property, and this Court should affirm.

a. Contrary to Plaintiffs' Argument, Applying Vincitore's Three-Prong Test Shows That No Dangerous Condition Existed.

N.J.S.A. 59:4-1(a) defines a dangerous condition as "a condition of property that creates a substantial risk of injury **when such property is used**

with due care in a manner in which it is reasonably foreseeable that it will be used." (emphasis added). The phrase "used with due care" means an "objectively reasonable" use from the community perspective. Garrison v. Twp. of Middletown, 154 N.J. 282, 291 (1998). "If a public entity's property is dangerous only when used without due care, the property is not a dangerous condition." Id. at 287.

Moreover, "[a] dangerous condition under [N.J.S.A. 59:4-1(a)] refers to the 'physical condition of the property itself and not to activities on the property.'" Wymbs v. Twp. of Wayne, 163 N.J. 523 (2000) (quoting Levin v. Cnty. of Salem, 133 N.J. 35, 44 (1993). Use of public property alone cannot create a dangerous condition absent the existence of a physical defect of the property. Levin, 133 N.J. at 44. Our courts have consistently rejected the idea that dangerous activities of other persons on public property, **even if reasonably foreseeable**, establish a dangerous condition of the property itself. Ross v. Moore, 221 N.J. Super. 1, 5 (App. Div. 1987) (emphasis added).

This proposition is best illustrated in Ross v. Moore, 221 N.J. Super. 1 (App. Div. 1987), where an injured plaintiff argued that an inadequate number of parking spaces on public school property was a dangerous condition of the property because it led students to park in a nearby shopping center parking lot and cross the street at an unguarded intersection, exposing them to the resultant

dangers. Id. at 4. The Appellate Division rejected that argument because "no danger inhered in the school's property itself in the relative shortage of parking spaces", and "no danger was let loose on the school's property which resulted in injury to plaintiff on the adjoining public highway." Id. at 5-6. Applying that reasoning here, it's clear that no danger inhered in the Foschini Park pathway itself, but rather that any danger would be created only by the activity of reckless drivers on the adjoining road. This leaves Plaintiffs with, at best, the argument that the **actions** of third parties on non-City premises makes the City's **property** dangerous. This argument fails. See id.; see also Levin v. County of Salem, 133 N.J. 35, 49 (1993); Margolis & Novak, comment on N.J.S.A. 59:4-2 at 129 ("[A]bsent a defect in the public property itself foreseeability of risk is not enough to create a dangerous condition."); see generally Speaks v. Hous. Auth. of City of Jersey City, 193 N.J. Super. 405, 411 (1984) (emphasis added) ("While the degree of that risk may vary from slight to nonexistent to great depending on the use made, it remains the **condition of the property** which will determine whether any risk exists.").

In Garrison v. Twp. of Middletown, 154 N.J. 282, 291-93 (1998), the Supreme Court set forth a two-part analysis for determining the existence of due care with a third criteria for determining proximate cause. More recently, the Vincitore Court cited that same analysis. See Vincitore v. N.J. Sports &

Exposition Auth., 169 N.J. 119, 26 (2001). Plaintiff argues that analyzing the facts of this case under Vincitore requires reversal. [pb at 15-16]. On the contrary, the trial Court correctly applied the three-pronged analysis in Vincitore when it concluded that (1) the condition of the Foschini Park pathway did not create a reasonably foreseeable risk that a pedestrian would be struck by a driver swerving of the road to avoid hitting another vehicle; (2) that Plaintiff did not exhibit due care if she intended to cross the County road at an unmarked location; and (3) Plaintiff's activity was so objectively unreasonable that it cannot be said the pathway contributed to her injuries. [4T, at 18:2-9]. Rather, it was Plaintiff's admitted intention to cross the road illegally, see infra, §I(b), combined with the inattentive driving of Miguel Beuno, that caused the accident. These findings are amply supported by the record, and the trial Court's correct application of precedent to the factual record should not be disturbed on appeal.

i. The Pathway Was Not Dangerous When Used In A Normal And Foreseeable Manner.

Here, there was no defect on the pathway that, even when combined with the foreseeable neglect of third-party drivers, "render[ed] the property unfit." Levin, 133 N.J. at 49. Moreover, testimony from over a dozen individuals with knowledge of the accident site revealed that the pathway was not dangerous to

pedestrians when used in a normal and foreseeable fashion.[6] Neither the County nor the City ever received any complaints regarding the alleged dangerous condition of the pathway. Thus, Plaintiff cannot establish that Foschini Park was in a dangerous condition at the time of her injury "because if drivers exercise[d] due care, the subject accident would not [have been] reasonably foreseeable." Buddy v. Knapp, 469 N.J. Super. 168, 186 (2021) (granting summary judgment for the State because "if motorists were exercising due care by utilizing the designated … jug handle to access the Wawa, accidents such as this would not be reasonably foreseeable.").

Plaintiff claims that she was "trapped" at the pathway's end and left to "fend for [herself], and walk either on the roadway or the edge of the roadway or the edge of the roadway in search of the closest and safest means of crossing the roadway." [pb at 19-20]. But when Bueno swerved into the park and struck her, Plaintiff was standing on the pedestrian pathway inside the park. [pb at 7; Pa760, ¶¶ 20-23]. Thus, by her own admission, Plaintiff was not trapped, nor

[6] Joseph Inglima, Superintendent of the Department of Public Works for the City of Hackensack; Greg Polyniak, Engineer with the City of Hackensack; Al Dib, Director of Redevelopment for the City of Hackensack; Robert Rodriguez, the Parks Director for the City's Department of Public Works; Ryan Westra, Project Manager for the City of Hackensack; and Nancy Dargis, assistant Bergen County Engineer and head of the County's Engineering Division, all denied knowledge of any prior accidents in the area [Pa763-766, ¶¶ 34, 37, 40, 41, 44, 47, 48].

was she crossing the road. Even if Plaintiff was intending to cross, as the evidence indicates, she could have safely and legally done so by walking along the grass between the road and the Park, or following the pathway which loops through Foschini Park, to reach the nearest crosswalk. [See Pa761-763, ¶¶ 27, 31, 35].

Plaintiffs' expert, Bellizzi, similarly fails to point to a single defect on the Foschini Park pathway. Instead, he focuses exclusively on the traffic conditions associated with the adjacent Salem Street Extension, which he described in traffic engineering terms as a "dual threat." Putting aside the merits of Bellizzi's "dual threat" analysis,[7] the City cannot be held liable because it does not own or maintain the county road, nor does it have a responsibility to warn pedestrians of the dangers associated with traffic conditions by mere virtue of its proximity to the road. See N.J.S.A. 59:4-4 (imposing liability only for failure "to warn of a dangerous condition … **not** … **reasonably apparent to, and would not have been anticipated by**, a person exercising due care") (emphasis added).

Thus, Plaintiffs' theory of liability against the City fails because they do not allege any actual **defect** on the City's property, but rather, an ordinary,

[7] Mr. Bellizzi's analysis consistently points to a lack of a crosswalk as the culprit of Plaintiff's injuries. However, the trial judge barred Mr. Bellizzi from offering opinions critical of the City's failure to provide crosswalks; warning signs; and/or other traffic control devices at the location based upon the immunity afforded by N.J.S.A. 59:4-5, in an Order dated September 13, 2024. [Da034-35].

continuing and longstanding traffic **condition** on the adjoining County Road, which she claims is the cause of her injuries. See e.g., Lee v. Gilberti, A-0418-10T4, 2013 WL 2319398, at *8 (App. Div. May 29, 2013) (rejecting that a dangerous condition existed on State property because there was no defect in the property and the "accident was caused by the activities of people on Route 38; plaintiff's, in crossing the highway other than at a controlled intersection or pedestrian walkway, and the drivers', who were speeding, and perhaps racing").

Applying all this case law to the facts at bar, the Trial Court correctly concluded that the Foschini Park pathway was not a dangerous condition.

ii. Plaintiff's Activity Was So Objectively Unreasonable That The Condition Of The Pathway Cannot Reasonably Be Said To Have Caused Her Injuries.

The second prong of the Vincitore test focuses on the care exercised by the individual at the time of the injury. The reasonable user requirement contained in N.J.S.A. 59:4-1(a) "presupposes some uniform standard of behavior with regard to persons utilizing public property." Lopez v. N.J. Transit, 295 N.J. Super. 196, 203 (App. Div. 1996). "The focus of the inquiry is not on the details of the plaintiff's activity, but on the nature of the activity itself." Id. at 126. Thus, in the context of Plaintiff's claim, the question is whether planning to cross a county road at an area not marked by crosswalks or similar traffic control signals constitutes a use of the property with the care that was due.

"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[.]'" 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.

Here, it cannot be said that activity Plaintiff was engaging in—planning to cross at a location not marked with a crosswalk or traffic signals—was objectively reasonable. On the contrary, had she carried through with her plan to cross the road she would have been violating New Jersey's jaywalking statutes. This alone is sufficient to bar application of N.J.S.A. 59:4-4 as argued by Plaintiffs, because liability under the statute is limited to those who were injured while "exercising due care." Thus, the Trial Court correctly determined that the nature of Plaintiff's activity was so unreasonable that the injury had little or nothing to do with the condition of the pathway.

The facts here are strikingly similar to those in Jean Louis Deravil v. Pantaleone, A-2064-18T3, 2019 WL 5681205 (App. Div. Nov. 1, 2019). In that

case, the decedent was struck by a car after entering the roadway at an undesignated crossing location where the sidewalk abruptly ended. Id. at *1. The plaintiff argued that the abrupt termination of the sidewalk "could reasonably be interpreted as a signal to the pedestrian that it is unsafe to travel further and that she must cross the street to continue her path forward." Id. at *2. Instead, the trial court granted summary judgment in favor of the Township because the Township did not own, control, or maintain the roadway or streetlights and therefore could not be liable for any dangerous condition of the road. Id. The judge further concluded that summary judgment was appropriate because decedent "choose to take this risk," "presumably could see cars coming," and thus failed to exercise due care in crossing the road. Id. Relying on Vincitore, the court explained that "plaintiff provided no evidence the road was unsafe for pedestrians who used it in a normal and foreseeable manner by crossing at designated crosswalks." Id. at *2. The judge in Deravil further held that the decedent's "use of the road was so objectively unreasonable that the condition itself cannot be said to have caused the injury." Id. This Court affirmed, finding that the trial judge correctly concluded plaintiff could not satisfy the first two prongs of Vincitore. Id. at *3.

Similarly, here, Plaintiffs argue that the City should be held liable for the traffic conditions on a roadway that it neither owns, controls, nor maintains.

Plaintiffs also failed to provide any evidence that the pathway was unsafe for pedestrians who used it in a normal and foreseeable manner by crossing only at designated crosswalks. Finally, the Court in Deravil rejected the plaintiff's argument that the location where the sidewalk abruptly ended "could reasonably be interpreted as a signal to the pedestrian that it is unsafe to travel further and that she must cross the street to continue her path forward," id. at *1, and this Court should reject Plaintiffs claim that the fact that the pathway ended at the Salem Street Extension could reasonably be interpreted by Plaintiff as a signal that she must cross the street at that location.

In sum, the Law Division correctly found that Plaintiff was not exercising due care in planning to cross the street at an undesignated location lacking a crosswalk or traffic control signals. That finding being supported by the facts before the Court, and the clear weight case law therefore favoring summary judgment, the Law Division's ruling should not be disturbed.

iii. The Way Plaintiff Engaged In The Activity At The Time Of The Accident Was Objectively Unreasonable.

Third, Vincitore requires review of the manner in which Plaintiff engaged in the activity that preceded or resulted in her injury. 169 N.J. at 126. This conduct is relevant only to proximate causation and comparative fault. Id. The

trial Court correctly concluded Plaintiff failed to act in an objectively reasonable manner by planning to cross the County roadway at an unmarked location[8]

The Hackensack Police Department crash investigation report states that Plaintiff "was standing in an area not marked for pedestrian crossing in the area of Foschini Park." [Pa760, ¶ 22]. Yet, it is undisputed that Plaintiff stopped at the end of the pathway and "leaned over to observe if there was any vehicular traffic which would prevent her from safely crossing Salem Street Extension," [pb at 6] while the "Honda vehicle stopped in the left lane to allow her to cross the roadway." [Id.]. By her own admission, the accident was caused by the vehicle behind the Honda, driven by the inattentive Mr. Bueno, who was speeding and on his phone at the time, [Pa767, ¶ 50] careened off the road and into the park. [Pa757-758, ¶ 12]. Thus, absent Plaintiff's activity that caused the Honda to stop, this accident would have never occurred.

Even Plaintiffs' expert's testimony supports this conclusion. As Mr. Bellizzi stated, "**it is foreseeable that one approaching vehicle will stop to allow a pedestrian to cross**," and a driver behind that vehicle, "**not knowing**

[8] Remarkably, Plaintiff now characterizes her own activity as "simply standing at the end of the pathway, and still inside Foschini Park," while still arguing that a jury could conclude that her activity was "was not so objectively unreasonable that the activity, rather than the **condition of the crossing** was responsible for the accident." [pb at 21-22 (emphasis added)]. On the latter point, her argument fails under the second and third prongs of Vincitore; as to the former, it fails because there is no inherent danger to standing inside Foschini Park. See supra, §I(a)(ii)

why the vehicle is stopping in the middle of a block with no traffic control devices, decides to keep going in the second (adjacent) lane and **does not stop**." [pb at 19 (emphasis added)]. Thus, Plaintiff's activity was objectively unreasonable. Her conduct, rather than any condition of Foschini Park, was responsible for the accident. Under Vincitore, this supports a conclusion of non-liability of the property owner, and therefore warrants affirmance of the trial Court's ruling on summary judgment.

b. The Trial Court Correctly Applied Buddy To Find Plaintiff's And Bueno's Carelessness To Be The Cause Of The Accident.

The trial Court applied the reasoning in Buddy v. Knapp, 469 N.J. Super. 168 (App. Div. 2021), to determine that neither Plaintiff nor the driver that struck her had exercised the necessary due care to satisfy the requirements for showing a dangerous condition.[9] [4T, at 17-18]. As the trial Court pointed out, the relevant test is whether the condition complained about—*i.e.*, the location where the pathway ends—is dangerous and creates a substantial risk of injury, **despite the exercise of due care** by motorists and pedestrians. [4T, at 19]. Applying that reasoning, as in Buddy, the trial Court correctly found that the location of the pathway did not create a substantial risk of on injury because "if

[9] Appellants address proximate causation and the trial court's application of Buddy v. Knapp in the same section of their brief. For clarity and organization, Defendant will discuss proximate causation separately in the next section.

the driver had exercised due care, the subject acts would not be reasonably foreseeable." [Id. at 18]. In other words, "it was unforeseeable and clearly not an exercise of due care for a driver to disregard motor vehicle laws and cause a plaintiff's injuries" by careening off the road and into the park. [Id.].

Plaintiffs argue that the trial court misapplied the reasoning in Buddy. In doing so, however, they improperly attempt to foist upon a public defendant the reasoning the Buddy Court's applied against the private property owner, Wawa, rather than the standard applicable to a State actor. In other words, Plaintiffs ask this Court to invoke commercial premises liability standards applicable to a private property-owner like Wawa, rather than the Legislature's standard for governmental property as articulated in the TCA.

Buddy involved two separate motor vehicle accidents that occurred about a year apart in approximately the same location under similar circumstances. Id. at 178. In both instances, a driver traveling westbound on Route 322 in Folsom Borough made an illegal left turn across double yellow lines and the eastbound lanes in order to access one of two driveway entrances to a Wawa's convenience store and struck a motorcycle traveling eastbound on the highway. Id. Wawa was not authorized to modify the driveway entrances because they were in the State's right of way. Id. at 180. The plaintiffs alleged that Wawa was negligent in creating unsafe driveway entrances to its parking lot and in failing to maintain

the premises in a safe condition for its commercial invitees. Id. at 182. They also alleged that the State created an unsafe condition by "failing to properly maintain the roadway in a safe condition and to exercise proper control, supervision, maintenance, repair, and general safekeeping of the roadway," despite the fact that it knew or should have known of the dangerous condition in the roadway and its right-of-way. Id. The court found that the statutory exception to immunity for dangerous conditions on public property was inapplicable against the State "because if drivers exercise due care, the subject accidents would not be reasonably foreseeable." Buddy, 469 N.J. Super. at 186. It granted summary judgment in favor of the State and against plaintiffs on all claims alleged. Id. Applying that same reasoning here, the trial judge correctly concluded that the Foschini Park pathway was not in a dangerous condition because if drivers like Bueno and Farnham exercised due care, and pedestrians like Plaintiff followed the law, the accident would not be reasonably foreseeable.

Plaintiff claims that a more appropriate set of facts to compare her case are those in Vincitore, where a defendant was killed when his car was struck by a train while attempting to cross a railroad track. In Vincitore, the Supreme Court reasoned that a reasonable driver could have driven up to the open gates at the railroad crossing and interpreted that to mean that it was safe to cross. Id. at 129. It also emphasized the foreseeability of the decedent's activity, stating

"Vincitore drove across tracks at a crossing designed for that purpose." Id. at 128. Notably, the Court found that the public-sector defendant in that case acted in palpably unreasonable manner because it "knew of the risk, knew that having guards operate the gate eliminated the risk, and knew that people who ordinarily traversed the crossing during the racing season likely would have believed that open gates meant it was safe to proceed." Id. at 130.

Here, unlike the designated railroad crossing in Vincitore, Plaintiff was planning on crossing illegally at an unmarked location. [Pa757, ¶¶ 9-10]. And absent any prior accidents in the subject area, or even any complaints, there is no evidence that the City "knew the risks" or that any action or inaction on the part of the City caused pedestrians to believe it was safe to jaywalk at that location. Moreover, even if others had illegally crossed the County road at the subject location in the past, such dangerous activity does not establish a dangerous condition on the City property itself. See, e.g., Ross, 221 N.J. Super. at 5 ("In applying the Tort Claims Act, N.J.S.A. 59:1-1 et seq., we have consistently rejected the contention that the dangerous activities of other persons on public property, even if reasonably foreseeable, establish a dangerous condition on the property itself.") (internal citations omitted).

Thus, the trial court correctly applied the reasoning in Buddy to the facts here, by finding that this accident would not have happened if Plaintiff and

Bueno had exercised due care. [See 4T, at 16:25-17:10 ("The event causing the Plaintiff's injuries is the driver's inattention causing the driver to hit the vehicle in front of his vehicle and then careen off the roadway into the Plaintiff. Nothing intrinsic to the park or the path brought that about. This event occurring at this specific location is no more probable than a similar event occurring at many locations adjacent to roadways throughout New Jersey."); 4T, at 18:2-9 ("It is presumed that the dang-- the driver failed to exercise due care in the operation of his vehicle and struck by it, and it also cannot be said that the Plaintiff was exercising due care in planning to cross the street at an undesignated point. Because neither actor involved with the due care necessary to comply with the statute fails to meet this requirement of dangerous condition.")].

c. The Proximate Cause Of Plaintiff's Injuries Was Driver Inattention, Not The Park Pathway.

The trial Court correctly determined that the cause of the accident was Bueno's inattentive driving, noting that "it also cannot be said that the Plaintiff was exercising due care in planning to cross the street at an undesignated point." [4T, at 16:25-17:10, 18:2-9]. The requirement of showing a proximate causal relationship between a dangerous condition of public property and an injury allegedly caused by that condition is essentially the same as in common law negligence action. See Garrison v. Tp. Of Middletown, 154 N.J. 282, 307 (1998). Proximate cause has been defined as "any cause in which the natural and

continuous sequence, unbroken by an efficient intervening cause, produces the result complained of without which the result would not have occurred." Id.

"In determining the existence of proximate cause, we must first inquire whether defendant's conduct constituted a cause in fact of plaintiff's loss." Daniel v. State, Dept. of Transp., 239 N.J. Super. 563, 595 (1999) (quoting Kulas v. Public Service Elec. And Gas Co., 41 N.J. 311, 317 (1964)). Plaintiff bears the burden of proving by preponderance of the evidence that Defendant's negligent or otherwise culpable conduct was a proximate cause of the accident and resulting injury. Pisano v. S. Klein, 78 N.J. Super. 375, 392 (App. Div.), certif. denied., 40 N.J. 220 (1963).

"An essential element of proximate cause is foreseeability. When injuries resulting from negligence are not foreseeable, there can be no finding of proximate cause." Yun v. Ford Motor Co., 143 N.J. 162, 163 (1996). Here, it cannot be said that the alleged dangerous condition created a reasonably foreseeable risk that a pedestrian and a DPW worker, standing in the park behind two bollards, would be struck by a negligent driver swerving off the road to avoid hitting another vehicle. As amply noted above, there was no defect in the Foschini Park pathway that caused or contributed to the tragic accident. Dangerous activities of third parties created the danger.

Specifically, as cell phone records show, Miguel Bueno was using his cell phone from 10:33 am until he called 911 at 10:53 am, right after the accident. [Pa767, ¶ 50]. The Accident Reconstruction Report found that at his "reported speed of 20-25 mph, Mr. Bueno would be able to bring his vehicle to a complete stop and avoid this collision in less than 50 feet had he been attentive to the slowing and stopping Farnham Honda in the roadway ahead of him." [Pa772, ¶ 79]. Thus, Bueno's inattentive driving indisputably caused Plaintiff's injuries. Plaintiff's own testimony supports that conclusion. [Pa757-756, ¶ 12].

Even if Plaintiffs could establish that the pathway in Foschini Park was a dangerous condition, Bueno's negligent driving was surely a superseding cause of Plaintiff's injuries. Without the existence and dangerousness of a vehicle careening off the road, there is no way that the pathway, "in the natural and continuous sequence, unbroken by an efficient intervening cause," could or would produce Ms. Fakhroutdinov's injury. Garrison v. Township of Middletown, 154 N.J. 282, 307 (1998).

In conclusion, the record clearly establishes that the negligent conduct of an automobile driver, Mr. Bueno, was the proximate cause of Plaintiff's injuries. To hold otherwise would impermissibly broaden the scope of N.J.S.A. 59:4-2 and do what our Courts have repeatedly cautioned against: treating the mere coincidence of an injury occurring on public property as a reason to find

municipal liability. Summary judgment for the defense was the correct outcome of the motions below, and the trial Court's ruling should be affirmed.

d. The Trial Court Correctly Concluded Plaintiff Could Not Show Actual or Constructive Notice Of The Allegedly Dangerous Condition.

i. Defendant Had No Actual Notice Of Any Danger.

The discovery record makes it abundantly clear that the City did not have "actual knowledge of the existence of a condition." N.J.S.A. 59:4-3(a). On the contrary, City and County officials uniformly reported no complaints or discussions regarding the lack of a crosswalk at the Salem Street extension in Foschini Park or the fact that the riverfront walkway ends at the edge of the street. [See Pa765-766, ¶¶ 42-43, 48]. Moreover, the City has no knowledge of any prior accidents occurring in the area where Plaintiff was injured. [Pa763-766, ¶¶ 34, 37, 40, 41, 44]. Even Plaintiff, who frequented the pathway, admitted never contacting the City or the County to complain about any allegedly dangerous nature or condition. [Pa760-761, ¶ 25].

Clearly unable to identify anything dangerous about the pathway, Plaintiffs are relegated to focusing on the dangers posed by vehicular traffic on the adjacent roadway. But these dangers are not unique to Foschini Park or the City: Anywhere an out-of-control vehicle could leave a roadway is, to that extent, a "dangerous" location for a pedestrian to stand.

Plaintiffs argue that the testimony of Robert Rodriguez and Joseph Inglima is evidence of actual notice of the alleged dangerous condition. [pb at 28-29]. However, their testimony regarding pedestrians exiting the Park and crossing Salem Street Extension does not establish that the City had actual notice of the alleged dangerous condition that caused Plaintiff's injuries. This is true, first and foremost, because Plaintiff was not crossing the street when she was struck. It is also true because the law does not require a property owner to anticipate illegal activity by persons exiting its property. See supra, §I(a)(iv). Thus, the Law Division in this case correctly determined that testimony concerning pedestrians crossing the roadway was insufficiently related to Plaintiff's claims that the Foschini Park pathway was in a dangerous condition to provide any indicia of notice, actual or constructive.

Moreover, testimony concerning the speed of motor vehicles on Salem Street Extension have nothing to do with the City as it does not own the roadway. It's equally obvious that the mere fact that the location was rendered safer **after the accident** with the installation of crosswalk and flashing beacon lights does not establish actual notice of a dangerous condition on the pathway at the time Plaintiff was injured.[10] See, e.g., Manieri v. Volkswagenwerk, 151 N.J.Super.

[10] Indeed, Mr. Inglima also testified that "I'm not saying that this sport is going to be any more dangerous than other spot would be. So that's my opinion on it is that just crossing a road in general is dangerous." [Pa471].

422, 432 (App. Div. 1977), certif. denied, 75 N.J. 594 (1978) ("evidence of subsequent remedial or precautionary conduct is inadmissible to prove negligence or culpable conduct in connection with a previous event"); N.J.R.E. 407.

Just as disingenuous is Plaintiff's assertion that existing signage near the pathway's terminus is probative of the pathway's allegedly dangerous condition, let alone evidence of actual notice. The signs located twenty (20) feet from the end of the pathway reading "DANGER, ROAD AHEAD," reflect nothing more than a belief that the public needed to be alerted to the existence of the pathway's end and the road ahead. The signs could not reasonably be understood as an admission that the pathway—or even the County roadway—was in a "dangerous condition." Nor, without more, do they tend to establish that any physical attribute of the pathway itself created "a substantial risk of injury when … used with due care." Garrison v. Twp. of Middletown, 154 N.J. 282, 286 (1998); see also Weiss v. N.J. Transit, 128 N.J. 376, 385 (1992) ("when the absence of a traffic signal … is the true culprit, government is immune.").

Finally, in a poor attempt at using sleight of hand, Plaintiff argues that because a Project Site Plan submitted to the Planning Board included plans for the construction of a temporary crosswalk 100 feet away from the accident location, and a temporary sidewalk was built in the months following the

accident, all that somehow means that it was feasible for the City to provide a pedestrian sidewalk at the subject location at the very moment it was proposed. [pb at 30]. Indeed, they claim that "[h]ad Defendant constructed the temporary crosswalk and sidewalk shortly after the construction plans were received, … this accident would not have occurred." [pb at 31].

This argument fails for numerous reasons, mainly that Plaintiff was not crossing the street when she was struck, but also because the site plan was submitted to Bergen County Planning Board, not the City's, and did not receive approval from the County until eight months after the accident, with construction of the temporary sidewalk beginning even later. This argument also fails to take account of the fact that either government, City or County, would benefit from crosswalk immunity under N.J.S.A. 59:4-5. Plaintiff's argument is even further attenuated because the temporary crosswalk was not built at the location of the accident, but only nearby.

Based on the foregoing, Plaintiff cannot show that the City had actual knowledge of any "dangerous" condition prior to Plaintiff's injury, and that essential prong of N.J.S.A. 59:4-2 is not satisfied.

ii. Defendant Had No Constructive Notice Of Any Danger.

In the absence of actual notice, constructive notice can be established by showing that "the condition had existed for such a period of time and was of

such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." N.J.S.A. 59:4-3(b). In considering the meaning of this language, New Jersey courts have been careful to make clear that the "mere [e]xistence of an alleged dangerous condition is not constructive notice of it." Polzo v. Cnty. of Essex, 196 N.J. 569, 581 (2008) (quotation removed).

Here, the record offers nothing to support Plaintiff's argument that the subject area of Foschini Park was in a dangerous condition, let alone that such a condition "had existed for a period of time and was of such an obvious nature" that the City reasonably should have discovered it and its dangerous condition. N.J.S.A. 59:4-3(b). Despite being a frequently traversed area of the City—including by Plaintiff herself—no residents or visitors ever complained of the allegedly dangerous condition and no accidents have ever been reported in the subject area prior to Plaintiff's injuries. [Pa760-761, ¶ 25]. Nor had the subject location even been a topic of safety discussions within government. [See Pa763-766, ¶¶ 34, 37, 40, 41, 44].

Without any evidence of previous accidents, prior complaints by pedestrians like Plaintiff, or even a defect on the property, no reasonable juror could find that the alleged dangerous condition of the Foschini Park pathway was even dangerous—much less so obviously dangerous that the City should

have discovered and remediated it. Plaintiff is thus unable to satisfy the "constructive notice" requirement of the TCA, and the Law Division's summary judgment ruling should be affirmed.

e. The City Did Not Act Palpably Unreasonably.

In a footnote, Plaintiffs attempt to engage in improper burden-shifting by claiming that the City must show its actions or inactions were not palpably unreasonable. [See pb at 34, n. 2]. Plaintiff seems to confuse the phrase "palpably unreasonable" as it appears in N.J.S.A.59:4-2, with the same phrase in N.J.S.A: 59:2-3(d). In the former provision, "it relates to the action taken or omitted by the public entity." Brown v. Brown, 86 N.J. 565, 579 (1981). Thus, "if that action or inaction were not palpably unreasonable the plaintiff would be barred from recovery." Id. As to the latter provision, the "public entity is immune from liability resulting from its exercise of discretion with respect to competing demands if its exercise of that discretion has not been palpably unreasonable." Id.

"[N]owhere does the Supreme Court hold that in actions under N.J.S.A. 59:4-2, where the allocation of resource immunity defense is not raised, the burden of proof is on the public entity." Fox v. Parsippany-Troy Hills Tp., 199 N.J. Super. 82, 91 (App. Div. 1985). Thus, Plaintiffs' argument that if the fact pattern in Brown presented an issue of fact regarding a public entity's palpably

unreasonable behavior, then so does that fact pattern in this case, must fail. [See pb at 36-39]. Unlike the public entity in Brown, Hackensack did not raise an allocation of resource immunity defense, and the case was not tried under such a theory. Thus, the heavy burden of proving that the City's actions or inactions were palpably unreasonable still lies with Plaintiffs. Because they cannot satisfy it, affirmance of the summary judgment ruling is warranted.

Moreover, the fact pattern in Brown is too different the facts here to be meaningfully precedential. In Brown, the State "knew of the substantial number of accidents that had occurred at this curve in the road," and was "fully aware of the danger of vehicles hydroplaning because of the rain water being directed on the highway." Id. at 579. Moreover, "[t]he State agreed that the road condition was dangerous, that the highway was under its control, that it aware of the precarious situation, and that it intended to take corrective measures." Id. at 578. Its defense was that it was confronted with competing demands for other projects which had been accorded priority. Id. Here, unlike in Brown, the City denies that any dangerous condition even exists on its property, and Plaintiffs have failed to proffer any evidence that would support a contrary finding. There were no previous accidents in the area, nor even any complaints regarding the alleged dangerous condition. There was no evidence that the City could unilaterally decide to build a crosswalk across a county road. Even assuming

arguendo that sidewalk plans had been submitted for City approval rather than to the County Planning Board, the plans in evidence make no mention of a dangerous condition on the Foschini Park pathway. [See Pa596-634]. Plaintiffs did not even provide expert testimony on the applicable standards of care for parks or pathways, or any evidence that the City violated those standards.

Finally, unlike the work in Brown, which took less than a day to complete was essentially maintenance rather than design, the site plan submitted to the County Planning Board eight months prior to the accident did not receive approval until eight months after the accident, with construction beginning even later. Regardless, the standard is not whether it was feasible to construct a crosswalk, but rather whether any failure to do so sooner was "palpably unacceptable under any circumstance," and so "manifest and obvious that no prudent person would approve of its course of action or inaction." Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985). And, for that matter, whether any such failure—none being admitted—can even by laid at the City's feed when the road in question belongs to Bergen County.

Applying the standard to the facts here, it's clear that Plaintiffs cannot find, anywhere in the discovery record, the evidence needed to satisfy "the heavy burden of establishing that [Hackensack's] conduct was palpably unreasonable." Russo Farms v. Vineland Bd. of Educ., 144 N.J. 84, 106 (1996). Therefore, the

trial Court properly concluded that no action or inaction on the City's part was palpably unreasonable, and summary judgment for the defense was appropriate. Plainiffs provide no rationale for this court to disturb that decision.

Plaintiffs being unable to satisfy any—much less all—of the statutory requirements for municipal premises liability, see N.J.S.A. 59:4-2, the entry of summary judgment was appropriate and should be affirmed on appeal

II. THE LAW DIVISION CORRECTLY DISMISSED PLAINTIFFS' CLAIM UNDER THE LANDOWNER'S LIABILITY ACT.

In addition to the immunities discussed above, the trial Court also found that Hackensack was entitled to immunity under the Landowner's Liability Act ("LLA"), N.J.S.A. 2A:42A-1 to -10, as discussed in the Appellate Division's opinion in Arias v. Cnty. of Bergen, 479 N.J. Super. 268 (App. Div. 2024). In Arias, the Court granted Bergen County immunity for injuries the plaintiff alleged to have occurred in Van Saun County Park, determining that the Park is a "premises" under N.J.S.A. 2A:42A-3(a), and thus, immunized from liability.

When it amended the LLA in 1991, the Legislature enacted a new provision, N.J.S.A. 2A:42A-5.1, which states: "The provisions of [the LLA] shall be liberally construed to serve as an inducement to the owners, lessees and occupants of property, that might otherwise be reluctant to do so for fear of liability, to permit persons to come onto their property for sport and recreational activities." See L. 1991, c. 496 at § 3. The Appellate Division reasoned that by

enacting the 1991 LLA amendment, "the Legislature recognized a need to maintain open land for the public's enjoyment," particularly for citizens living in cities, urban communities, and other densely populated locales. Arias at 285.

When analyzing whether a "premises"—in Arias, Van Saun Park; here, Foschini Park—is entitled to immunity under the LLA, the Court considers the "dominant character of the land." 479 N.J. Super. at 284-285. The Arias Court applied this analysis to conclude that Van Saun, a Bergen County park, offers the public "access to picnic areas, playgrounds, pavilions, athletic fields, wooded areas, bicycling and walking paths, and a dog park— without charging a fee." Id. at 289. Since Van Saun's dominant character was as "open space for sport and recreational activities," the park was precisely the type of property entitled to LLA protections, and is thus a "premises" as defined by N.J.S.A. 2A:42A-3(a). Having so concluded, this Court found Bergen County to be immune from liability under the LLA.

The above analysis applies squarely to this action. Like Van Saun Park, Foschini Park offers the public access to picnic areas, playgrounds, athletic fields, riverfront bicycling and walking paths, and other recreational amenities, free of charge.[11] Thus, under the "dominant character of land" analysis, Foschini

[11] See https://hackensack.recdesk.com/Community/Facility/Detail?facilityId=17 (last visited Aug. 24, 2025). The Court may take judicial notice of this publicly available and accurate description of Foschini Park. See N.J.R.E. 202(b).

Park would also be classified as "open space for sport and recreational activities" and, therefore, as a "premises" immunized under the Landowner's Liability Act. N.J.S.A. 2A:42A-3(a).

Moreover, further evidencing both the dominant character of Foschini Park and the City's entitlement to LLA immunity, at the time of the subject accident, Plaintiff testified she was utilizing Foschini Park's athletic fields and open space for sport and recreational activities. Indeed, Plaintiff was using the open space of Foschini Park, as she testified she did on a regular basis, to take a walk in the Park between ice skating lessons with her daughter. [Pa757, ¶ 7]. Thus, not only is Foschini Park deserving of immunity under the LLA due to its dominant characteristics, but Plaintiff herself was present in the park for the exact purposes discussed and immunized under the LLA—sports and recreational activities which she was enjoying free of charge.

Appellant argues that the trial court erred by (1) failing to apply the analysis mandated by the Supreme Court in Harrison v. Middlesex Water Co., 80 N.J. 391 (1979), to determine whether the LLA applies to Foschini Park, and (2) applying an overly expansive definition of the activities covered under the act. However, Plaintiff's reliance on Harrison is misplaced because that decision predated the 1991 amendments to the LLA that mandated a liberal construction of the statute and expanded the definition of "premises" to include premises

"whether or not improved or maintained in a natural condition, or used as part of a commercial enterprise" N.J.S.A. 2A:42A-3.

Since the 1991 amendments, the four-factor test in Harrison has been found to be "incongruous with the 'dominant character' of the land analysis under Toogood in determining whether a specific 'premises' is entitled to immunity under the LLA." Arias v. Cnty. of Bergen, 479 N.J. Super. 268, 285-86 (App. Div. 2024); See Toogood v. St. Andrews at Valley Brook Condominium Association, 313 N.J. Super. 418, 425-26 (App. Div. 1998) ("The 1991 amendments to the Act are clearly designed to focus the inquiry on the dominant character of the land and to account for the evolving types of activities considered recreational pursuits."). Given the liberal construction the Legislature intended, and its purpose to encourage property owners to open their premises for recreation, this Court should decline Plaintiffs' invitation to apply Harrison or any pre-1991 interpretations of the LLA.

Applying the dominant character of the land analysis, the City is clearly entitled to immunity because Foschini Park qualified as a "premises" under the Act and Appellant had entered and was using the park for recreational activities.

a. The Trial Court Properly Concluded That Foschini Park Was A Premises Under The Landowner Liability Act.

Plaintiffs argue that the LLA was designed solely to foster immunity from liability for owners and occupiers of rural, semi-rural and large open tracks of

land. Invoking Harrison, they claim that because Foschini Park "is not located in a rural, isolated area where it would be difficult for the public to access it," the City should not be protected by the LLA. [pb at 43]. This argument fails to account for the Legislature's amendments to the LLA broadening the definition of premises and mandating the statute be liberally construed.

Moreover, it overlooks even the Harrison Court's pronouncements concerning LLA immunity. For instance, the court noted that the 1968 LLA's immunity provision could be applied to recreational activities conducted not just "upon large sized tracts of rural or semi-rural lands," but also upon "other lands having similar characteristics." Harrison, 80 N.J. at 400. Thus, it is of no significance whether the property is rural or located in a densely populated area. See Alfano v. Middlesex Water Co., A-1679-08T2, 2009 WL 2568004, at *3 (App. Div. Aug. 21, 2009) ("Whether the property itself is rural or semi-rural is immaterial to this analysis, as is the fact that this property is located in the densely populated City of South Plainfield, as plaintiffs contend.") (internal citations and quotations omitted).

Here, applying the dominant character of the land analysis, it is undisputable that Foschini Park like the park in Arias, has as its "dominant character . . . an open space for sport and recreational activities" and that this "renders the Park the type of property entitled to protections under the LLA."

479 N.J. Super. at 289; see also Toogood, 313 N.J. Super. at 425 ("maintenance of an open track of land and allowance of access by the general public for passive and active recreational purposes are precisely the types of conduct the Legislature seeks to encourage"). Foschini Park is undoubtedly a "premises" under N.J.S.A. 2A:42A-3(a), making the LLA's immunities available to the City and the Law Division's ruling on summary judgment eminently reasonable.

b. The Trial Court Correctly Determined That Appellant Was Engaged In "Sports And Recreational" Activities While On The City's Property.

The LLA's statutory list of "sport and recreational activities" is **non-exclusive**. For example, although the list includes "hiking," it also includes "any other outdoor sport, game and recreational activity." N.J.S.A. 2A:42A-2. Thus, "[a] nature walk, or an easy stroll along flat, well-maintained paths are among the 'recreational' uses of open spaces that the LLA was intended to cover." Monk v. State, A-5089-09T1, 2011 WL 2349856, at *2-3 (App. Div. May 6, 2011).[12]

Appellant argues that the LLA does not govern here because she was not engaged in recreational activities at the moment she as injured, but rather that she was merely "standing." [pb at 44]. Plaintiff cites no authority for her disingenuous and narrow construction of the Act, which is belied by its plain language: N.J.S.A. 2A:42A-3a clearly states that no duty is owed "to persons

[12] A copy of Monk v. State is contained in Appellant's Appendix, starting at Pa689.

entering for such [recreational] purposes." (emphasis added); see also N.J.S.A. 2A:42A-3b (landowner incurs no liability for injury to a person who is given permission "to **enter upon** such premises for a sport or recreational activity or purpose…") (emphasis added). Plaintiffs' position is also squarely at odds with case law. See, e.g., Vaxter v. Liberty State Park, A-1044-09T2, 2010 WL 4237242, at *2 (App. Div. Oct. 28, 2010) ("[t]he LLA's protective immunity is neither restricted nor limited to injuries incurring **during** recreation but rather extends to persons who have entered qualified premises for recreational activity or purpose.") (emphasis added).[13]

The Act, therefore, applies to Appellant's claim for injury because she indisputably entered and was on the park premises for a recreational purpose or activity. To conclude otherwise would be contrary to the LLA's plain language and inconsistent with its purpose to induce landowners to open their premises for recreational activity. See N.J.S.A. 2A:42A-3a. Such a conclusion would also be inconsistent with the Act's instruction that it be liberally construed to achieve its purpose. N.J.S.A. 2A:42A-5.1.

For all these reasons, the Court's grant of summary judgment based upon LLA immunity was appropriate and should be affirmed.

[13] A copy of Vaxter v. Liberty State Park is contained in Appellant's Appendix at Pa694.

III. THE TRIAL COURT PROPERLY GRANTED DEFENDANT'S MOTION TO REOPEN AND EXTEND DISCOVERY.

A trial judge's decision to extend discovery is an exercise of discretion. Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011). "We generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." Rivers v. LSC P'ship, 378 N.J. Super. 68, 80 (App. Div. 2005) (citing Payton v. N.J. Tpk. Auth., 148 N.J. 524, 559 (1997). An abuse of discretion "arises when a decision [wa]s made without a rational explanation, inexplicably departed from established polices, or rested on an impermissible basis." Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (quotations omitted). An appellant must show not just an abuse of discretion, but also that the abuse was capable of producing an unjust result; otherwise, "[a]ny error or omission shall be disregarded by the appellate court[.]" R. 2:10-2.

The New Jersey Supreme Court has held that requests to re-open discovery after an arbitration or trial date has been fixed should be granted when the requesting party can demonstrate exceptional circumstances. Szalontai v. Yazbo's Sports Café, 183 N.J. 386, 396 (2005); See R. 4:24-1(c). Exceptional circumstances are established when:

> (1) Counsel [has been] diligent in pursuing discovery during the discovery time period; (2) the additional discovery or disclosure sought is essential to the case; (3) the reason why

> counsel failed to request an extension of discovery within the original discovery period is provided; and (4) the circumstances surrounding the failure to complete discovery are clearly beyond the control of both the attorney and the litigant seeking the extension.

Zadigan v. Cole, 369 N.J. Super. 123, 133 (Law. Div. 2004).

Here, the first prong was satisfied. Defendant had been diligent in pursuing discovery during the initial and extended discovery periods, completing an Independent Medical Examination upon Plaintiff Svetlana Fakhroutdinov, retaining an engineering expert to complete a rebuttal expert report and analysis, participating in extensive paper discover exchange among the Plaintiffs, many defendants, and third-party defendants, and completing and/or defending seventeen (17) depositions.

As to the second prong, the completion of a motor vehicle reconstruction report was essential where Plaintiffs' theories of liability alleged against the City had repeatedly changed and evolved over the course of discovery, motion practice, and even arbitration.

Under the third factor, Respondent did not request an extension of the DED before its expiration because the aforementioned motor vehicle accident reconstruction report did not appear to be necessary at the time. However, after receiving Appellant's April 21, 2024, supplemental expert engineering report, and after completing the May 2, 2024, arbitration session, it became clear to the

defense that a motor vehicle accident reconstruction report would be essential to resolving the ultimate issue of this litigation: Who is liable for Svetlana Fakhroutdinov's alleged injuries?

Plaintiffs incorrectly argue that the decision in Szalontai is dispositive here. In that case, the Appellate Division succinctly stated that plaintiff's "failure to conduct discovery until after he lost at the arbitration was sufficient reason to deny his motion to extend discovery." 183 N.J. at 395. At the time the plaintiff's request to re-open discovery was made, no depositions had been taken, and all the information in the expert report was available before the discovery end date. Id. at 397. That request included plaintiff's statement that even his own deposition needed to be taken. Id. Here, by contrast, the City was diligent in pursuing discovery: completing or defending seventeen depositions, retaining a rebuttal expert, completing an independent medical examination, and participating in extensive paper discovery practice throughout an extended discovery period that involved multiple parties. Moreover, the City's request, when it became necessary, was to re-open discovery for a very brief period and for a discrete and singular purpose.

Nor can it be said that Plaintiffs were prejudiced by the re-opening of discovery. On the contrary, Plaintiffs had the opportunity to respond to the City's motor vehicle accident reconstruction report with a written response of

their own. These documents together assisted in the ultimate resolution of this matter on the merits.

Plaintiffs decry the re-opening of discovery to allow Defendant to submit an additional expert report but do not argue that the trial judge's decision to allow Defendant to introduce the report caused them any prejudice. Nor could they: as noted, the extension also enabled them to provide a written rebuttal before the facts and expert analysis were presented to the trial Court on summary judgment. Thus, there is no manifest justice to be corrected. See Hisenaj v. Kuehner, 194 N.J. 6, 25 (2008) (quoting State v. Wakefield, 190 N.J. 397, 435 (2007) (admissibility of expert testimony is within the trial court's discretion, and its admission is reversible only if it causes "a manifest denial of justice").

Finally, there is no judicial efficiency to be found in granting Plaintiff's request here: It would, at most, send this mater back to the trial Court to be addressed again on summary judgment—this time with less information, and all the same core deficiencies in Plaintiffs' case. See supra, §§ I. and II. In fact, there is no evidence whatsoever that the trial Court's decision to grant summary judgment under the TCA and LLA even took into consideration the accident reconstruction information provided during the extended discovery period.

Given Plaintiff's constantly shifting theory of liability against the City, and the exceptional circumstances discussed above, the City's motion was properly granted. The trial Court's ruling should not be reversed on appeal.

CONCLUSION

For the reasons set forth above, the City of Hackensack respectfully submits that the Court's ruling below—granting summary judgment for the defense on Plaintiffs' entire case—should be affirmed.

Respectfully submitted,

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Attorneys for Defendant/Respondent

By: 
TYLER NEWMAN, ESQ.

Dated: August 25, 2025

Superior Court of New Jersey

Appellate Division

Docket No. A-002548-24

ROGER PETROCELLI and NURY PETROCELLI, *Plaintiffs-Respondents,* vs. MIGUEL E. BUENO, ALLEN FARNHAM, CITY OF HACKENSACK, CITY OF HACKENSACK POLICE DEPARTMENT, COUNTY OF BERGEN and JOHN DOES 1-5 (fictitious names representing unknown individuals), *Defendants-Respondents,* and SVETLANA FAKHROUTDINOV, *Defendant-Appellant.*	CIVIL ACTION ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY CONSOLIDATED DOCKET NO. BER-L-3902-21 Sat Below: HON. JOHN D. O'DWYER, P.J.Cv.

(For Continuation of Caption See Inside Cover)

REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT IN ACTION 1 AND PLAINTIFFS-APPELLANTS IN ACTION 2

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SVETLANA FAKHROUTDINOV and KIRILL FAKHROUTDINOV, *Plaintiffs-Appellants,* vs. CITY OF HACKENSACK, COUNTY OF BERGEN, NEW JERSEY DEPARTMENT OF TRANSPORTATION, STATE OF NEW JERSEY, JOHN DOES l-5 (fictitious names representing unknown individuals) and/or ABC BUSINESS ENTITIES 1-5 (fictitious names representing unknown corporations), *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY DOCKET NO. BER-L-4220-21 Sat Below: HON. JOHN D. O'DWYER, P.J.Cv.

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INTRODUCTION

Respondent - Defendant City of Hackensack ("Defendant") continues to misrepresent Appellants' - Plaintiffs' ("Plaintiff") claims as being attributable to a dangerous condition on Salem Street Extension ("Roadway") adjacent to Foschini Park ("Park"), or solely to the actions of reckless drivers. In doing so, Defendant ignores the dangerous condition consistently identified by Plaintiff: The abrupt termination of the Park's River Walk Pathway ("Pathway") at the edge of the Roadway, which exposed pedestrians to foreseeable dangers simply by standing at the Pathway's designated end, inside the Park.

Taking Defendant's argument to its logical conclusion, a pathway in a municipal park could terminate at the edge of a cliff, and if a pedestrian were startled by a passing bird and fell off the cliff's edge, the fault would lie with the bird, not with the municipality's decision to design the pathway to end at a perilous edge. Such logic defies both common sense and the legal principles governing public entity liability for dangerous conditions.

PROCEDURAL HISTORY

Plaintiff relies upon the Procedural History included in her original Brief.

STATEMENT OF FACTS

Plaintiff relies upon the Statement of Facts included in her original Brief.

LEGAL ARGUMENT

POINT I

A DANGEROUS CONDITION EXISTED ON THE PATHWAY (Pa5)

Rather than address the premise of Plaintiff's claim of a dangerous condition of the Pathway, Defendant instead chooses to selectively frame the facts in a manner that distorts the actual evidentiary context of this case, by mischaracterizing Plaintiff's claim as being based on a dangerous condition on Salem Street Extension, or that municipal parks should not abut roadways.[1] Plaintiff's allegation of a dangerous condition on the Pathway has never been based on any defect of or on Salem Street Extension itself. Plaintiff's argument is that the Pathway, when used as intended, presented dangers to pedestrians because it terminated at a location devoid of a crosswalk, traffic signal,

[1] To this end, Defendant takes considerable liberty in its portrayal of the record below, by asserting that the trial court "barred" Plaintiff from arguing that Salem Street Extension was in a dangerous condition because it lacked a crosswalk. In fact, Plaintiff voluntarily dismissed her case against the County of Bergen based on any dangerous conditions existing on Salem Street Extension, before Defendant moved for summary judgment in the court below (Da30).

sidewalk, or any safe place to stand, that would have protected pedestrians and allowed them to safely stand, cross or walk to the nearest crosswalk.

A. Issues of fact exist as to whether the Pathway was in a dangerous condition at the time of the accident (Pa5).

The Pathway Posed Dangers When Used as Intended

What Defendant fails to address is the plain and critical fact, that as a direct and proximate result of Plaintiff's reasonable decision to walk along the Pathway on her way back to work, and use the Pathway in its normal and foreseeable manner, she wound up at the edge of the Roadway, where she was exposed to foreseeable dangers which were known to the Defendant. In this case, the Park's pathway terminated directly at the edge of the two-lane Roadway, with nothing more than a solid white painted line separating pedestrians from vehicular traffic. There was no sidewalk, no crosswalk, and no safe means of traversing the roadway. (Pa587–589.) The narrow-painted strip between the Pathway's end and the Roadway was insufficient to allow pedestrians to safely stand or walk to the nearest crosswalk. Given the frequency of dangerous and reckless driving, an entirely foreseeable risk, the Pathway's design posed a clear hazard to pedestrians using it as intended. Indeed, Defendant's own placement of "Danger" signs at the Pathway's terminus underscores its awareness of the risks posed by this configuration.

Simply stated, the evidence reflects that Plaintiff would not have been at the accident location and exposed to the dangers that ultimately caused her accident and injuries, had she not used the Pathway as it was designed and intended. Defendant has failed to refute such evidence, which satisfies the first part of the three-part analysis of the existence of a dangerous condition, as required by our Supreme Court in Vincitore v. Sports and Expo. Auth., 169 N.J. 119, 123 (2001).

The Plaintiff 's Actions Were Reasonable

Defendant avers that Plaintiff acted unreasonably under the circumstances, arguing that after reaching the end of the Pathway, she could have safely walked along the grass between the Roadway and the Park to reach the nearest crosswalk at the end of Salem Street Extension.

The fallacy of Defendant's argument is laid bare in the mere assertion of Plaintiff undertaking such action, for it defies both common sense and basic principles of pedestrian safety. There was no sidewalk, no designated pedestrian path, and no safe place for pedestrians to walk from the end of the Pathway to the nearest crosswalk, only a painted white line demarcating the edge of the two-lane Roadway. It is unreasonable to expect that a pedestrian should traverse such a hazardous area, especially in a location where vehicular

traffic is frequent and unpredictable. Defendant's argument ignores the foreseeable risks inherent in the Pathway's design and also underscores the very danger that Plaintiff's claim seeks to address.

Perhaps realizing the fallacy of this argument, Defendant goes to the extent of averring that the holding in Vincitore is inapplicable to this case, because "Plaintiff was planning to cross illegally" at the accident location. This is representative of yet another example of Defendant's selective framing of the facts to distort the evidence in this case. The fact is that Plaintiff never took one step into the roadway before the accident, and whatever she had in mind before the accident is irrelevant, because she never acted on any of her supposed plans. She was simply standing inside the Park, at the designated end of the Pathway, when the accident occurred. Accordingly, the unreported case-law (Da39) cited by Defendant in support of this specious argument is completely inapposite, because that case involved a pedestrian who was struck by a vehicle while she was in the roadway, after she attempted to cross the roadway outside of a crosswalk or other designated area for crossing. In this case, Plaintiff never stepped into the Roadway and was struck while standing on the Pathway inside the Park.

Defendant also takes liberties with the factual record in this case in arguing that it is absolved from liability because Plaintiff's activity caused the Honda vehicle to stop in the middle of the Roadway before the accident. This argument is either reflective of a complete disconnect from reality or an attempt to mislead this Court, for Defendant is fully aware that Plaintiff did nothing to cause, or in any way induce the driver of the Honda vehicle to stop.

The driver of the Honda vehicle, Allen Farnham, testified at deposition that Plaintiff never looked at him nor gave him any indication that she wanted to cross the Roadway before he stopped, and he also admitted that at the time he stopped, Plaintiff had her head turned away from him and was talking to Defendant's employee who was working in the area. (Pa448). He also acknowledged that though he stopped to allow Plaintiff an opportunity to cross the Roadway, she didn't step into the Roadway or speak with him, before the accident. (Pa442, 448 and 450). In sidestepping the factual record, Defendant attempts to recast sole blame for the accident onto Plaintiff and the vehicle drivers, evidently to support the trial court's flawed application of the holding in Buddy v. Knapp, 469 N.J. Super. 168, 262 A.3d 1227 (App. Div. 2021).

In urging the application of the holding in Buddy, Defendant argues that Plaintiff cannot establish a dangerous condition because the accident would

not have occurred had the drivers exercised due care. This contention, however, overlooks the materially different factual context underlying Buddy and those present here. In Buddy, the plaintiff alleged that the placement of a driveway on the defendant's property encouraged reckless driving, prompting the defendant driver to make an illegal turn into oncoming traffic and cause the collision. Here, Plaintiff does not assert that the Pathway itself incited negligent or reckless driving. Rather, Plaintiff contends that the Pathway's terminus, marked only by a painted white line separating pedestrians from the adjacent Roadway by mere feet or inches, created a foreseeable risk that a vehicle could cross or veer into the Pathway and strike an unsuspecting park visitor. What the trial court failed to perceive, is that the dangerous condition here is not the conduct of drivers in isolation, but the configuration of the Pathway that placed unwitting pedestrians at risk of injury from foreseeable hazards when standing at the end of the Pathway. Defendant's knowledge of that precise risk is underscored by the Defendant's own placement of danger signs near the Pathway's terminus.

Try as Defendant might to distort the record, the fact remains that Plaintiff's mere standing at the end of the Pathway was not "objectively unreasonable" so as to make it unreasonable to conclude that the Pathway's

dangerous condition caused the accident. In fact, her actions prior to the accident, in using the Pathway in its normal and foreseeable manner, were perfectly reasonable under the circumstances, thus satisfying the second and third prongs of the factual analysis under Vincitore, and establishing a question of fact as to whether the Pathway was in a dangerous condition at the time of the accident.

B. Issues of fact exist as to whether Defendant had actual and constructive notice of the Pathway's dangerous condition(Pa5).

Defendant accuses Plaintiff of being "disingenuous" in asserting that the placement of two "Danger Road Ahead" signs near the Pathway's terminus at the Roadway constitutes actual notice of the hazards posed to pedestrians. Yet it is Defendant's own characterization of the signage that strains credulity. Defendant claims the signs merely reflect "a belief that the public needed to be alerted to the existence of the pathway's end and the road ahead", as though the prominent use of the word "DANGER" was incidental. This argument invites the obvious question: If the intent was merely directional, why not post signs simply reading "Road Ahead"? The deliberate choice of bold, cautionary language speaks for itself, rendering Defendant's argument untenable.

Equally untenable is Defendant's argument that this Court should disregard the testimony of its Park Supervisor and Superintendent of DPW,

Messrs. Rodriguez and Inglima, contending, quite bizarrely, that their observations are relevant only to dangers faced by pedestrians "exiting the Park and crossing Salem Street Extension" at the accident site. Defendant thus advances a contradictory position: On one hand, it asserts that Plaintiff is entirely at fault because she "intended" to cross the street; on the other, it claims it lacked notice of any danger except to those actually crossing the Roadway. This strained logic not only undermines Defendant's credibility but also lays bare the internal inconsistency at the heart of its opposition.

The evidentiary record is replete with evidence of Defendant's prior actual and constructive notice of the dangerous condition on the Pathway which it failed to mitigate, including: Defendant's posting of inadequate signs warning of known dangers (Pa591); a written memorandum issued nearly a year before the incident by Defendant's own engineering firm (Pa626); and the testimony of Messrs. Rodriguez and Inglima, both of whom testified that Defendant had prior notice of, and failed to address, the dangerous condition that exposed pedestrians to fast-moving traffic on the Roadway.

Defendant has failed to rebut the evidence of its actual and constructive notice of the dangerous condition of the Pathway for years before the accident.

C. Issues of fact exist as to whether Defendant's failure to address the dangerous condition of the Pathway was palpably unreasonable (Pa5).

Defendant's strategic concession that it is not asserting a "resource allocation" defense is illuminating, particularly because no such concession was made during oral argument before the trial court. See 3T 14–15.

Notably, Defendant offers no substantive rebuttal to Plaintiff's arguments establishing its palpably unreasonable conduct. Its only response is a feeble attempt to distinguish this case from Brown v. Brown, 86 N.J. 565 (1981), by asserting that Brown involved prior accidents that placed the public entity on notice, whereas here, it claims such notice is lacking.

The implication that only "evidence of previous accidents or prior complaints by pedestrians," is sufficient to establish Defendant's notice of the Pathway's hazardous condition, is a particularly troubling argument which runs through Defendant's Brief. Tellingly, Defendant cites no legal or factual support for this narrow and unfounded proposition and perhaps explains its equally baseless assertion that this Court should disregard the testimony of Messrs. Rodriguez and Inglima.

Taken together, the evidence demonstrates that Defendant had actual knowledge of the Pathway's dangerous condition and failed to take corrective

measures. These facts present a genuine issue for the jury to determine whether Defendant's conduct, by action or inaction, was palpably unreasonable. See Posey ex rel. Bordentown Sewerage Auth., 171 N.J. 172, 191 (2002), Furey v. County of Ocean, 273 N.J. Super. 300, 313, 641 A.2d 1091 (App. Div.), certif. denied,138 N.J. 272 (1994).

POINT II

THE LANDOWNER'S LIABILITY ACT DOES NOT APPLY TO FOSCHINI PARK (Pa5)

A. The Harrison analysis to determine entitlement to immunity under the Landowner's Liability Act, has not been displaced (Pa5).

Defendant misconstrues case law in arguing that this Court's holding in Toogood v. St. Andrews at Valley Brook Condominium Ass'n, 313 N.J. Super. 418 (App. Div. 1998), conflicts with our Supreme Court's holding in Harrison v. Middlesex Water Co., 80 NJ. 391 (1979). Such a conflict does not exist.

The holding in Toogood explicitly reiterated the holding in Harrison that the Landowner's Liability Act ("LLA" or "Act") was never intended to immunize "land situate . . . in residential and populated neighborhoods." Toogood, *supra.*, at 423. Additionally, the panel in Toogood, held that the 1991 Amendments to the LLA, which added the language "whether or not improved or maintained in a natural condition, or used as part of a commercial

enterprise," were not intended "to expand the scope of the premises subject to the Act but to enhance and remove impediments to the immunity already afforded to rural and semi-rural tracts of land." Id. at 425. In other words, the 1991 Amendments were not "intended to radically alter the law of premises liability by extending immunity to suburban or urban landowners." Id. at 426. Thus, the 1991 Amendments were not intended to supplant the analysis discussed in Harrison. Id. at 423.

Yet, despite this precedent, Defendant urges affirmance of the trial court's incorrect extension of immunity under the LLA to Foschini Park, which is precisely the type of land that was never intended to be immunized. The trial court's decision was solely based on the decision in Arias v County of Bergen, 479 N.J. Super. 268 (App. Div., 2024), the only reported case since Harrison, in which a court in the State of New Jersey blatantly refused to consider the nature and character of a land's surrounding community when determining if that land qualified as "premises" under the LLA. While this may explain the Supreme Court's decision to grant certification in Arias, (260 N.J. 223, 331 A.3d 1293 (2025)), the fact remains that affirming the ruling below would endorse a holding which is currently under review and contradicts over four decades of precedent published since our Supreme

Court's decision in Harrison, and after the 1991 amendments to the LLA. See Toogood, *supra.*, at 425-426. Also see, Benjamin v. Corcoran, 268 N.J. Super. 517, 532 (App. Div. 1993) and Mancuso ex rel. Mancuso v. Klose, 322 N.J. Super. 289, 295 (App. Div. 1999).

Defendant's own analysis reflects that the area surrounding the Park is zoned for mixed use, including residential, retail, and commercial. (Pa621). This undisputed fact, central to the Act's applicability, makes clear that Foschini Park does not qualify for immunity under the LLA.

B. Plaintiff was not engaged in "sports or recreational" activities (Pa5).

Even assuming, *arguendo*, that the Park qualifies as a "premises" under the LLA, it cannot be overemphasized that the protective immunity afforded by the Act only exempts owners of qualified "premises" from liability to individuals who enter or use such premises "for sport or recreational activities." See N.J.S.A. § 2A:42A-3.

In this case, Plaintiff entered the Park on foot, sat briefly on a bench, and was subsequently struck by a vehicle while standing on the Pathway within the Park. Neither sitting nor standing constitutes "sport or recreational" activity under any ordinary or legal definition, and certainly not under the statutory language of the LLA. See N.J.S.A. § 2A:42A-3. Had the Legislature intended

to extend immunity to any and all activities occurring on qualifying land, it would not have expressly limited the Act's scope to "sport or recreational activities." To interpret Plaintiff's passive presence in the Park as falling within the ambit of protected sport or recreational use would require an unprecedented and impermissibly expansive reading of the statute.

Respectfully, if this Court were to adopt the trial court's reasoning and conclude that Plaintiff was engaged in "sport or recreational" activity, it would be endorsing an overly expansive construction of the LLA that departs from its plain meaning and legislative intent.

POINT III

THE TRIAL COURT ERRED IN REOPENING DISCOVERY (Pa7)(Pa9)

Defendant's attempt to distinguish this case from Szalontai v. Yazbo's Sports Cafe, 183 N.J. 386, 874 A.2d 507 (2005), falls short of the mark. Defendant contends that Szalontai is inapplicable because, at the time the motion to reopen discovery was filed in that case, no depositions had been taken and all information in the expert report was available prior to the close of discovery. This distinction is immaterial. The Supreme Court's holding in Szalontai did not turn on the timing or completeness of discovery. Rather, the Court focused on the inequity that would result from permitting discovery to

proceed after arbitration, specifically, the retention of a new expert post-arbitration, as happened here. Id. at 397.

Defendant cites no authority to support the trial court's decision to reopen discovery in this case post-arbitration, thus underscoring the impropriety of the trial court's ruling.

CONCLUSION

Based upon the foregoing, the Orders appealed from should be reversed. Defendant's motions for summary judgment and to reopen discovery should be denied, and Plaintiff's Complaint reinstated.

Respectfully submitted,

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Seth D. Bader

Dated: September 3, 2025 Seth D. Bader