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LISA PESCI Plaintiff, vs. TOWNSHIP OF PARSIPPANY	) SUPERIOR COURT OF NEW JERSEY) LAW DIVISION) MORRIS COUNTY) DOCKET NO. MRS-L-1647-20) Sat Below: Louis S. Sceusi) J.S.C.) *Civil Action*

BRIEF ON BEHALF OF PLAINTIFF/APPELLANT

On the Brief:

John E. Horan, Esq. (040212001)

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PRELIMINARY STATEMENT

This matter arises from damage that occurred to plaintiff, Lisa Pesci's ("Plaintiff"), property located at 3 Cory Court in the Township of Parsippany. The damage that occurred was a result of significant drainage issues in the backyard. Plaintiff tried for several years to have defendant, ("Defendant" or "Township") address the drainage issues without success. Finally, in 2018, the Township performed work in the Plaintiff's backyard, including the installation of a drainage pipe. During the installation of the drainage pipe, it was revealed that Plaintiff's swimming pool had been so severely damaged as a result of the drainage issues that Plaintiff was advised to bury the swimming pool in the ground to assist with drainage. Additionally, while the Defendant was performing the drainage work the Plaintiff's landscaping in her backyard was destroyed and her driveway damaged by one of the Defendant's vehicles.

Despite being a lifelong resident of the Township of Parsippany, Plaintiff's property rights were damaged by the Township. Plaintiff, however, was not provided with her day in court because the trial court improperly dismissed her complaint via Summary Judgment for reasons that are addressed in this submission. Plaintiff is now requesting the opportunity to return back to the trial court so that she may pursue her

damages, and have her property put back to the condition that it was prior to the Township's neglect.

PROCEDURAL HISTORY

1. Plaintiff filed a complaint, pro se, on August 12, 2020. Pa1.
2. On October 29, 2020, Defendant filed a Motion to Dismiss the Complaint based upon various Title 59 immunities. Pa 14.
3. On February 16, 2021, opposition to Defendant's Motion was filed by John E. Horan, Esq., on behalf of Plaintiff. Pa15.
4. On November 12, 2021, oral argument on the Defendant's Motion was heard by Honorable Rosemary E. Ramsey, J.S.C., and the Motion was denied. Pa16.
5. On February 24, 2022, Plaintiff filed an amended complaint. Pa17.
6. On March 10, 2022, Defendant filed an Answer to the Amended Complaint. Pa24.
7. Upon completion of discovery, Defendant filed a Motion for Summary Judgment on April 28, 2023. PA34.
8. Plaintiff filed opposition to Defendant's Motion for Summary Judgment on May 16, 2023. Pa40.

9. On October 20, 2023, oral argument on the Defendant's Motion for Summary Judgment was heard by the Honorable Louis S. Sceusi, J.S.C. Pa377.[1]

10. On October 20, 2023, Defendant's Motion for Summary Judgment was granted. Pa376.

11. On November 29,2023, Plaintiff filed this appeal. Pa387.

[1] A copy of the transcript of the October 20,2023 oral argument before the Honorable Louis S. Sceusi, J.S.C. is being separately submitted herewith. This is the only transcript contained within this appeal.

STATEMENT OF FACTS

Plaintiff resides at property located at 3 Cory Court (the "Property") in the Township of Parsippany. Pa1. Plaintiff's residence is located along the cul-de-sac on the road. Pa1. Plaintiff has resided there since 1978. Pa17. Water issues have existed at the Property for quite a long period of time, beginning around 2004 or 2005. Pa352, T4, 5-1.

A swimming pool was built at the Property in 1979. Pa1. The swimming pool was first repaired in 2000 and then was repaired a second time around 2012. Pa354.

As a result of the water issues the Township of Parsippany installed drained in front of the Plaintiff's residence in 2014 to alleviate the runoff problem. Pa18. Subsequently in 2018 the then Mayor of the Township of Parsippany promised the Plaintiff that the Township would address the problems in the Plaintiff backyard. Pa18. The swimming pool was also located in the backyard. Pa18.

In June 2018 the Township installed a drainage system in the Plaintiff's backyard. Pa18. Plaintiff was never advised of the work that the Township would perform. Pa355. While the work was being performed, Plaintiff discovered extensive water damage to the swimming pool as a result of drainage.

Pa18. Plaintiff was advised by the Township to bury the pool to aid with drainage, which Plaintiff did. Pa18. Additionally, shrubbery and mature foliage was removed during the installation of the drainage system. Pa18. Lastly, while the work was being performed in the backyard one of the Township's trucks severely damaged the Plaintiff's driveway. Pa357.

After the Township failed to restore the Plaintiff's property the Plaintiff filed a Notice of Tort Claim on May 31, 2019. Pa342. Plaintiff then filed the within action on August 12, 2020. Pa1.

LEGAL ARGUMENT

POINT I

PLAINTIFF'S CLAIMS ARE NOT TIME-BARRED (T8)

Throughout the entire Trial Court proceeding Plaintiff has maintained that water problems have existed at the Property for several years dating back until at least 2004. These issues reached their peak in 2018 when the Plaintiff's swimming pool was lifted from the ground and had to be buried as a result of the water damage while the Township performed drainage work in the backyard. Furthermore, in 2018 the Property was destroyed when the Township had to have Plaintiff's shrubbery removed and the Township's vehicle imploded the Plaintiff's driveway.

The lower court improperly held that Plaintiff's claims were time-barred. First, the Court held that the claim regarding the pool ripened before 2018 because Plaintiff claimed that the pool was compromised before the 2018 work that the Township had performed in 2018, and therefore, outside the six (6) year statute of limitations. Pa74. Second, the lower court believed that Plaintiff's claims regarding the landscaping damage and driveway are barred under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq., because Plaintiff did not file a Notice of Tort Claim within ninety (90) days from the accrual of the claim as required by N.J.S.A. 59:8-8.

N.J.S.A. 2A:14-1 provides that the statute of limitations for the Plaintiff's negligence claim is six (6) years. Specifically, the statute provides that:

> Every action at law for trespass for real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods and chattels, for any tortious injury to the rights of another not stated in N.J.S.A. 2A:14-2 or N.J.S.A. 2A:14-3, for the recovery upon a contractual claim or liability, express or implied, not under seal, or upon account other than one which concerns merchant between merchant, their factors, agents and servants, shall be commenced within six years next after the cause of any such action shall have occurred.

In the present matter, Plaintiff was advised that she should bury the swimming pool by the Township when the Township was performing the work in the backyard in 2018. Pa7. Plaintiff is not an engineer and would not have known that damage to the swimming pool was caused by water damage until the work was underway.

The Trial Court held that Plaintiff had been complaining about water since at least 2004. However, under the "discovery rule" the Plaintiff's claim is not time-barred.

The "discovery rule" is an equitable rule. "By operation of the discovery rule, the accrual date is tolled from the date of the tortious injury or act until the injured party either does not know his injury or does not know that a third-party is responsible for the injury." McDade v. Siazon, 208 N.J. 463, 475 (2011).

Whether the discovery rule applies depends upon "whether the facts presented would alert a reasonable person exercising ordinary diligence, that he or she was injured due to the fault of another. Caravaggio v. D'Agostini, 166 N.J. 237, 246 (2001).

The Plaintiff has maintained throughout the matter that drainage issues existed on the Property for many years. However, Plaintiff is not an engineer and the first time that she discovered that the pool was damaged due to drainage issues was when the Township advised her to bury the pool, and provided her with a municipal permit to bury the pool. Therefore, any claim regarding damage to the pool would have accrued in June 2018 and not time-barred under the six (6) year statute of limitations.

Similarly, the lower court held that although Plaintiff's claims regarding her driveway and landscaping, while not time-barred by the six (6) year statute of limitations, were time-barred because Plaintiff failed to file a Notice of Tort Claim within ninety (90) days after the accrual of her claim. Pa74. However, Plaintiff's claims are not time-barred under the New Jersey Tort Claims Act.

N.J.S.A. 59:8-8 requires that a Plaintiff must file a Notice of Tort Claim within ninety (90) days of accrual of the claim. In the present matter, Plaintiff filed her Notice of Tort Claim on May 31, 2019. Pa74. The lower court reasoned that Plaintiff's driveway and landscaping claims accrued in June 2018, and

because more than ninety (90) days passed until Plaintiff filed her Notice of Tort Claim on May 31, 2019, that her claims were barred pursuant to N.J.S.A. 59:8-8.

In the present matter, Plaintiff was advised that she should bury the swimming pool in June 2018 by the Township and her driveway and landscaping were damaged in June 2018. However, Plaintiff also trusted that the Township would repair any damage to the Property because she was a lifelong resident of the Township and had historically a very good relationship with the Township. It was not until May 2019 that the Plaintiff realized that the Township was not going to repair the Property, and she had no option but to file a lawsuit against the Township, which she never wanted to have to file.

It should also be noted that the "discovery rule" also applies to the ninety (90) day time limit contained within N.J.S.A. 59:8-8. In Beauchamp v. Amedio, 164 N.J. 111 (2000) the New Jersey Supreme Court held that the ninety (90) days begin to accrue when plaintiff knew of his or her injury or claim. Id. at 122. Accordingly, although the Plaintiff knew of the damage to the pool, driveway and landscaping in June 2018, Plaintiff did not know that the Township was not going to repair the Property until the work was completed and the Township took no corrective action by May 2019. Therefore, the ninety (90) day time period did not start to run in June 2018.

Lastly, N.J.S.A. 59:8-9 permits a claimant to file a Notice of Tort Claim up to one (1) year from the accrual of the claim if the claimant submits an affidavit setting forth extraordinary reasons for a late filing and no prejudice has been suffered by the public entity. Lowe v. Zarghami, 158 N.J. 606 (1999). Notice provisions of the Tort Claims Act were not intended to be a trap for the unwary. Id. at 629. Extraordinary reasons must be analyzed on a case-by-case basis. O'Donnell v. New Jersey Turnpike Authority, 236 N.J. 335, 337 (2019). Any doubt as to the sufficiency of the reasons should be resolved in favor of the claimant. Escalante v. Township of Cinnaminson, 283 N.J. Super. 244, 249 (App. Div. 1995).

Here, Plaintiff is not an attorney and was unaware of her obligation to file a Notice of Tort Claim. However, the Plaintiff became aware that she had to file a Notice of Tort Claim when she was advised by the Township that a notice was required. Once she was advised she need to file a Notice of Tort Claim she immediately filed it, and the Township knew of the claim because of discussions with the Plaintiff between June 2018 and May 31, 2019.

Accordingly, Plaintiff's claims are not barred under the New Jersey Tort Claims Act for failure to file a timely Notice of Tort Claim.

POINT II

PLAINTIFF HAS ESTABLISHED A VALID CLAIM FOR NEGLIGENCE (Pa382)

Plaintiff's complaint seeks damages for the damage to the Property as a result of the Defendant's actions. Proof of negligence requires "a duty of care, breach of that duty, proximate cause, and actual damages." Polzo v. County of Essex, 196 N.J. 569, 584 (2008); Brunson v. Affinity Federal Credit Union, 199 N.J. 381, 400 (1999). In the present matter the lower court dismissed the Plaintiff's complaint on the basis that the Plaintiff could not prove either causation or damages due to the lack of expert testimony. Pa78. The lower court erred for reasons set forth below.

It is well established that expert testimony is only needed when a jury is unable to understand the salient issues using common judgment and experience. Maison v. New Jersey Transit Corp. 460 N.J. Super. 222, 232 (App. Div. 2019). The Plaintiff did not retain an engineering expert in this matter because Plaintiff relied upon the Township's experts, including Justin Lizza the Township's Engineer, and their assessment of the Property. Pa51. The Plaintiff does not believe that she needed the services of an expert because she reasonably trusted that the Township would repair the Property. Furthermore, the fact that the Township performed the work on the Property indicates that the Township

knew they were responsible for the condition of the Property, otherwise they would have never undertaken the drainage work in 2018.

It must also be noted that the damage that was done to the Property was so obviously caused by drainage issues that expert testimony is not necessary. In other words, a juror using common judgment and experience would be able to opine that Plaintiff's damages were caused by the Township's actions. Lastly, once the Township entered upon the Property and performed the work they took ownership of any damage that their actions caused.

The Court also dismissed the Plaintiff's complaint on the basis that the Plaintiff is unable to prove her damages without expert testimony. Pa78. That is simply untrue. During discovery Plaintiff provided various estimates from contractors as to the work that needed to be performed to transform the Property back into the beautifully landscaped property it once was prior to the Defendant's neglect. Pa55. These documents establish actual damages that can quantify damages without the need for expert testimony. Furthermore, real estate professionals have advised Plaintiff that the Property's value has greatly diminished as a result of the condition of the backyard to which she in entitled damages.

POINT III

PLAINTIFF HAS ESTBALISHED A BREACH OF CONTRACT CLAIM (Pa385)

Plaintiff set forth in her complaint that the Township agreed to replace Plaintiff's driveway, swimming pool and other landscaping items after it completed the work in the Plaintiff's backyard. Specifically, Plaintiff alleges she was promised by the then Mayor Soriano that the Property would be repaired and would be restored. Defendant's failure to abide by its promise constitutes a breach of contract. The basic features of a contract are offer, acceptance, consideration and performance by both parties. Goldfarb v. Solimine, 245 N.J. 326, 339 (2021). Without question there must have been an oral contract because the Township appeared in 2018 to do the drainage work in the backyard.

The trial court dismissed Plaintiff's claim on the basis that N.J.S.A. 40A:4-57 was not satisfied by the Plaintiff. N.J.S.A. 40A:4-57 provides:

> No officer, board, body or commission shall, during any fiscal year, expend any money (except to pay notes, bonds or interest thereon), incur any liability, or enter into any contract which by its terms involves the expenditure of money for any purpose for which no appropriation is provided, or in excess of the amount appropriated for such purpose. Any contract made in violation hereof shall be null and void, and no moneys shall be paid thereon.

The fact that the Township's promise does not comply with the requirement of N.J.S.A. 40A:4-57 and there is no Resolution authorizing or permitting the Township to repair the Property is not relevant. Plaintiff would

still have a valid promissory estoppel claim. Promissory estoppel is comprised of four elements. First, there must be a clear and definite promise. Second, there must be an expectation that the promise will rely upon it. Third there must be reasonable reliance and there must be a definite and substantial detriment. Toll Brothers, Inc. v. Board of Chosen Freeholders of Burlington, 194 N.J. 223, 253 (2008).

Again, Plaintiff buried her pool and allowed her landscaping to be destroyed because she trusted the Township and relied upon the Township's promise that it would restore the Property and repair her driveway. Furthermore, at the time the Township promised to restore the Property, the Township must have expected that the Plaintiff would rely upon it. Moreover, Plaintiff relied on the promise to her detriment because the Property was destroyed. As such, even if the Court were to find that no contract existed, Plaintiff would still be entitled to damages under the doctrine of promissory estoppel.

POINT IV

PLAINTIFF HAS A VALID CLAIM FOR MISREPRESENTATION (Pa386)

In order to have a valid claim for misrepresentation a plaintiff must establish 1) a material misrepresentation by the defendant of a presently existing fact or past fact, (2) knowledge of its falsity, (3) an intent that plaintiff rely on

the statement, (4) reasonable reliance by the plaintiff, and (5) resulting damages. Liberty Mutual Ins. Co. v. Land, 186 N.J. 163, 175 (2006).

Here, the Plaintiff was promised that the Property would be restored to the original condition by the Township. The Township, however, took no action and therefore at the time of the promise did so with the intent to misrepresent to the Plaintiff that she would be made whole. Plaintiff relied upon the misrepresentation and was clearly damaged. As such, there exists a material fact as to whether the defendant committed misrepresentation and Plaintiff should be provided with her day in court and the opportunity to be heard.

CONCLUSION

For all of the above stated reasons, the trial court's granting of Defendant's Motion for Summary Judgment must be reversed.

Respectfully submitted,

By: _____
John E. Horan

Dated: 4/1/24

LISA PESCI, Plaintiff-Appellant, v. **TOWNSHIP OF PARSIPPANY,** Defendant-Respondent.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **DOCKET NO.:** A-000952-23 On Appeal From: Morris County, Law Division Docket No.: MRS-L-001647-20 Sat Below: Hon. Louis S. Sceusi, J.S.C.

AMENDED BRIEF OF DEFENDANT-RESPONDENT, THE TOWNSHIP OF PARSIPPANY-TROY HILLS, IN OPPOSITION TO APPEAL, SUBMITTED MAY 1, 2023

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PRELIMINARY STATEMENT

For more than a quarter of a century, Plaintiff-Appellant, Lisa Pesci, has been trying to blame Defendant-Respondent, the Township of Parsippany-Troy Hills (improperly pleaded as the Township of Parsippany), for problems that have always existed on the property her family has owns. The property is at the bottom of a cul-de-sac and has had water run-off issues for decades, with the land filled with clay soil that prevented any drainage. The Township is not responsible for creating these problems and has no responsibility to fix them. Even so, after being pestered for years to help Pesci fix these problems, the Township spent tens of thousands of dollars to do so and was ultimately successful in remediating both the run-off issues (through the installation of a storm drain in front of Pesci's house) and drainage issues (through the installation of a drainage system in the backyard, plus the removal of the clay soil and its replacement with soil less likely to cause issues).

But no good deed goes unpunished. Even though Pesci admits that these actions have remediated the problems, she is now suing the Township because it has refused to replace her driveway, 50-year-old pool, and shrubbery. Pesci claims that the Township promised to do so, despite no evidence to support her position. In contrast, the Township has offered evidence showing that Pesci removed her pool on her own volition because she was having issues with it for years, and that removing it was unnecessary for the Township to perform the work in her backyard.

Pesci's family purchased a property with known, or knowable, water issues, and lived there for more than 40 years without taking any steps to remediate these issues on their own. Pesci is looking for a scapegoat to pay to replace a backyard that may have been "luxurious," as she claims, back in 1979, but which she wholly failed to maintain in the interim. The Township has gone above-and-beyond in trying to help a longstanding resident and it should not be penalized any further.

The trial court granted the Township's Motion for Summary Judgment because Pesci filed well beyond the relevant statute of limitations, did not have a binding contract with the Township, and failed to proffer sufficient evidence that would allow a reasonable finder of fact to rule in her favor at trial. Similarly, this Court should affirm that decision and dismiss this appeal with prejudice.

RESPONDENT'S COUNTERSTATEMENT OF FACTS

In March of 1979, Plaintiff's family bought a new construction home, located at 3 Cory Court, Parsippany, New Jersey, that had just been built by a developer (the "Property"). (Pa35). The Property was constructed on a cul-de-sac. (Pa35). Shortly after the family moved into the Property, they installed an underground pool and shed in the backyard. (Pa37). Plaintiff acknowledged that there have always been water problems on the Property, including accumulating water and poor drainage. (Pa36). There is testimony that the Property where the house is now located was once the site of some kind of underground stream. (Pa35). Even though Plaintiff admits that the Township has no control or ownership over the presence of naturally occurring water sources, Plaintiff seems to believe that all the problems caused by water damage to her Property are the Township's fault. (Pa35-36).

For approximately 30 years, snow would naturally accumulate in the cul-de-sac during the winter months, where it would be plowed and piled up. (Pa36). As the snow melted, water pooled around the area at the bottom of Plaintiff's driveway, since the Plaintiff's home was situated at the lowest point on the cul-de-sac. (Pa36). In 2015, after Plaintiff had complained for many years to the Township, the Township installed a system of storm drains in the cul-de-sac. (Pa36). Plaintiff admits that following the installation of the storm drains, the water pooling issue was resolved. (Pa36).

With the water problem in front of Plaintiff's driveway no longer an issue, Plaintiff turned to what she admits was a long-standing water problem in her

backyard, centered around what she has labeled an "abandoned mystery drain." (Pa37). It is unclear who constructed this "mystery" drain, but there is no evidence to suggest that it was ever owned or maintained by the Township. (Pa37). The drain consists of an asphalt pipe, which the Township has not used to construct drains in decades. (Pa262). And the Township does not own an easement in the backyard of the Property, which it would normally have if it was responsible for this drain. (Pa38). Plaintiff admits that the drain has been there the entire time that her family has owned the Property, so it is more likely that it was installed by the developer of the Property back when it was constructed. (Pa37).

When Plaintiff's then-20-year-old pool began to fail, in or around 2000, it was repaired. (Pa37). The pool required repair again in 2015. In 2018, prior to the Township completing the drainage work in Plaintiff's backyard, Pesci made the decision to have the pool removed. (Pa37). Along with the removal of the pool, Plaintiff made the decision to remove mature shrubs, foliage, landscape beds, and a rotting shed that had been installed shortly after the Property was purchased. (Pa37).

After decades of Plaintiff's complaints to the Township, and in an effort to provide assistance to a long-time resident, the Township agreed to install a drainage system in Plaintiff's backyard. (Pa37). At no time did the Township own or control any portion of the Property. When the decision to install the drainage system was made, the Township Engineer designed the project, which was then executed by the Township's Department of Public Works. (Pa300, 305). Plaintiff

was informed of the details of the project; however, no written agreement was ever created for the work to be performed. (Pa221-222). Plaintiff consented to the drainage project and was present during the entirety of the day-to-day work. (Pa37). Plaintiff was provided daily updates on the status of the project, and at the completion of the project, she was happy and pleased with the work that was done, as she repeatedly stated to the workers. (Pa37-38). Ultimately, the Township incurred approximately $50,000 to 80,000 to complete the project. (Pa38).

When the Township began the drainage project in Plaintiff's yard, they encountered a large presence of clay soil, which became necessary to remove. (Pa39). Clay soil has a poor drainage quality, and she was advised that without removal of the clay, the drainage system would likely fail. (Pa39). The Department of Public Works supervisor believes that this clay soil, which would have been present on the Property since long before Plaintiff's family purchased the location, is responsible for the drainage issues. (Pa226-227). The Township replaced the clay soil at its own expense before reseeding the entire backyard. (Pa251). Plaintiff alleges that the water problems on her Property, and the alleged "destruction" of her backyard, are somehow the fault of the Township and has brought the within suit as a result. (Pa1).

Plaintiff also alleges that the Township promised her a new driveway and "brand-new" backyard, including a new pool and shrubbery. (Pa5). Plaintiff now claims negligence and breach of contract and seeks for the Township to be held liable to her for various unsupported damages including the value of her former

"luxury" backyard, and the speculative depreciation of her property value. (Pa19).

Plaintiff has failed to hire any experts to causally relate the water damage to some act or omission by the Township, or to support the alleged depreciation of her property value. (Pa39). She cannot produce any written agreement between the Township and Plaintiff for the work performed, much less her allegations that the Township promised her a new driveway, backyard, pool, or shrubbery. (Pa39).

By way of her Amended Complaint, filed February 24, 2022, Pesci brings three causes of action against the Township: (1) negligence; (2) breach of contract; and (3) misrepresentation. (Pa19-20).

Plaintiff originally filed a pro se complaint on August 12, 2020. (Pa1). The Township filed a Motion to Dismiss, relying on the protections and immunities of Title 59 Tort Claims Act. (Pa14). The Motion was opposed by counsel, who Plaintiff had subsequently retained. The parties appeared for oral arguments on the Township's Motion on November 21, 2021, which was ultimately denied. (Pa16). The parties proceeded through the discovery phase until its close on April 3, 2023. At the conclusion of discovery, the Township moved for Summary Judgment on April 28, 2023. (Pa34). Plaintiff filed opposition to the motion on May 16, 2023. (Pa40). The parties appeared for oral arguments on the Township's motion for summary judgment on October 20, 2023, and the Honorable Louis S. Sceusi, J.S.C. granted the motion. (Pa376).

Plaintiff thereafter filed the within appeal on November 29, 2023. (Pa387).

LEGAL ARGUMENT

STANDARD OF REVIEW

Appellate courts review the trial court's grant or denial of a motion for summary judgment *de novo*, applying the same standard used by the trial court. Samolyk v. Berthe, 251 N.J. 73 (2022); Stewart v. N.J. Tpk. Auth./Garden State Parkway, 249 N.J. 642, 655 (2022); Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). The Court must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Summary judgment is a favored practice in New Jersey, as it eliminates cases from crowded court calendars in which a trial would serve no useful purpose. See Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 77 (1954). It is designed to provide a "prompt, businesslike, and inexpensive" method of disposing of any claim that plainly lacks any sufficient disagreement to require submission to a jury. Id. at 74.

For nearly as long as Pesci has complained to the Township about water intrusion on her property, courts in New Jersey have recognized that disposition by summary judgment is proper where the party opposing summary judgment points only to disputed issues of fact that are "of an insubstantial nature." Id. at 75. "Substantial" means "having substance; not imaginary, unreal, or apparent only; true, solid, real . . . ." Brill, 142 N.J. at 529 (citing The Compact Oxford

English Dictionary 1947 (2d ed. 1993)). Merely reciting the elements of a cause of action without supporting facts does not state a claim on which relief may be granted. See Printing Mart Morristown v. Sharp Electronics Corp., 116 N.J. 739, 768 (1989); Nostrame v. Santiago, 420 N.J. Super. 427, 436 (App. Div. 2011). And simply alleging the existence of rights or obligations is insufficient to avoid the entry of a judgment when essential facts are missing. See Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1998). Summary judgment also cannot be defeated if the non-moving party does not offer "concrete evidence from which a reasonable juror could return a verdict in his favor." Housel v. Theodoridis, 314 N.J. Super. 597, 604 (App. Div. 1998) (citing Anderson v. Liberty Lobby, 477 U.S. 242, 256 (1986)); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (holding that metaphysical doubts as to material facts cannot defeat summary judgment). Bare allegations in pleadings and self-serving, conclusory certifications cannot defeat a meritorious application for summary judgment. See United State Pipe & Foundry Co. v. American Arbitration Assn., 67 N.J. Super. 384, 399-400 (App. Div. 1961).

The opponent of a summary judgment motion bears the burden of producing evidence that would support a jury verdict in its favor, and thus must "set forth specific facts showing that there is a genuine issue for trial." Housel, 314 N.J. Super. at 604. However, when the evidence is so one-sided that the moving party must prevail as a matter of law, summary judgment is appropriate and should be affirmed. See Brill, 142 N.J. at 540. Such is the case here.

POINT ONE

PLAINTIFF'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

By Plaintiff's own admission, the Property has been subject to water intrusion issues for decades, essentially since it was first purchased.[1] For literally decades, since at least Mayor Mimi Letts was the Mayor of Parsippany between 1994 and 2005, Plaintiff has complained to the Township about water intrusion on or near her Property that she believes has caused damage to her yard, driveway, pool, shed, landscaping, and various other areas. Even assuming arguendo that Plaintiff has valid claims against the Township for damage to her property caused by this water intrusion, those claims are barred by the statute of limitations. New Jersey has a six-year statute of limitations for tort actions, stating that "[e]very action at law for . . . any tortious injury to real or personal property . . . shall be commenced within 6 years next after the cause of any such action shall have accrued." N.J.S.A. 2A:14-1.

Plaintiff is barred by the relevant statute of limitations because "the traditional rule is that a cause of action accrues on the date when 'the right to institute and maintain a suit' first arises." Rosenau v. City of New Brunswick, 51 N.J. 130, 137 (1968) (citing Fernandi v. Strully, 35 N.J. 434, 449 (1961)). Just as critically, "it is not necessary that the injured party have knowledge of the extent

1. Given the clay soil in the backyard, this is unsurprising. Unless the developer who constructed the Property back in 1979 installed the clay soil for some bizarre, unknown reason, it is likely to have been a problem going back to the Triassic Period, more than 250 million years ago, when streams from the highlands of New Jersey first carried sand, silt, and clay to the area. See Carol S. Lucey, Geology of Morris County in Brief, NEW JERSEY DEP'T OF ENV'T PROT., Dec. 1972, at pg. 7.

of injury before the statute begins to run." P.T. & L Constr. Co. v. Madigan & Hyland, Inc., 245 N.J. Super. 201, 207 (App. Div. 1991).

According to Plaintiff's deposition testimony, the water issues go back to the original development of the Property and the cul-de-sac, which she confirmed was built by a private developer in or around 1978 or 1979. (Pa35, 13:11-15; 14:23-15:3). Plaintiff has also acknowledged that the house and cul-de-sac were constructed on property that was once a farm, and where some kind of water source or stream ran through the property. (Pa35, 50:19-25).

According to Plaintiff's Tort Claim Notice, and reiterated in her deposition testimony, she acknowledged problems with the Property dating back to at least 1990. (Pa36 at 90:1-8). Plaintiff further testified that she's had problems with the Property as of 2000, and that "this issue with the water has been long-standing . . . and the severity of the problem only seemed to get worse as the years went by . . . ." (Pa36, 17:15-21). She now states in her brief that the issue has existed since at least 2004 or 2005. (Pb5).

Yet, even though Plaintiff has complained about the water intrusion on the Property for decades, the initial Complaint was not filed until 2020, **somewhere between twenty to thirty years after any claim accrued, by her own admission**. Even if the water problem was caused by some act or omission by the Township, which they were definitively not, the time to bring a claim regarding water accumulating on the property has long since expired, and Plaintiff is now barred from these claims by the statute of limitations.

Similarly, Plaintiff is also barred by the Tort Claims Act, N.J.S.A. 59:8-3, et seq. Claims relating to a cause of action for injury or damage to person or property must be presented no later than 90 days after accrual of the cause of action. N.J.S.A. 59:8-8. The claimant is barred from recovering against a public entity or public employee if the claimant failed to file his claim with the public entity within 90 days of accrual of the claim. Id. Claims are presented to a local entity when they are delivered or sent by certified mail to the entity. N.J.S.A. 59:8-10. Claimants who fail to file notice of his claim within 90 days may apply to the court to be permitted to file such notice at any time within one year after the accrual of the claim provided that the public entity has not been substantially prejudiced thereby. The application must be supported by affidavits based upon personal knowledge of the affiant showing sufficient reasons constituting extraordinary circumstances for failure to timely file the notice of claim. Under no circumstances, however, may a suit against a public entity or a public employee arising under this act be filed later than two years from the time of the accrual of the claim.

Here, Plaintiff's self-described TCA notice was signed May 31, 2019. The notice states, in question 3(a), "The occurrence or accident which gave rise to the claim: time?" to which Plaintiff answered, "There is no specific time or date, it has been a consistent occurrence, that began approximately on or about 1990." (Pa342). By her own admission, she does not satisfy either the requisite statute of limitations or her obligations under the TCA. Plaintiff's brief, in contrast, says she complained about the water on her property as early as 2004. (Pb5).

However, in every instance, no matter if the accrual date or the first instance of negligence arose in 1990 or 2004, the claim is more than six years old.

Plaintiff argues the statute of limitations did not begin to run until she knew she had a claim against the Township in 2018 when she had to remove her pool due to drainage issues, her driveway was damaged by one of the Township's trucks, and her backyard landscaping was destroyed during construction of the new drainage system.

However, Plaintiff has been complaining about her water issues since at least 2004. Plaintiff does not allege that the work that the Township did in 2018 precipitated her removal of the pool. Plaintiff certified, "**The water issue** that caused the pool to lift out of the ground and crack was the decisionmaker behind the pool being removed. The pool was compromised beyond a regular repair." (Pa354). (emphasis added). Therefore, the pool damage is outside the statute of limitations.

In contrast, the latter two claims stem from a distinct event in 2018. Therefore, these claims are valid under the statute of limitations, but fail under the TCA because the notice was sent more than 90 days later. The TCA notice was signed May 31, 2019, and no affidavit showing sufficient reasons constituting extraordinary circumstances for failure to timely file the notice of claim has been exhibited.

Since there is no dispute as to the time when Plaintiff first acknowledged a water intrusion issue on her Property, summary judgment was appropriate and the Amended Complaint was appropriately dismissed.

POINT TWO

PLAINTIFF CANNOT PROVE NEGLIGENCE AS A MATTER OF LAW

Plaintiff further alleges that the Township was: (1) negligent in the installation of irrigation drains and repairs on her Property; (2) that the Township was negligent in dumping and plowing snow in front of her home; and (3) the Township was negligent in the installation and maintenance of storm drains, and that together these negligent acts caused irreparable damage to Plaintiff's dwelling and Property. It is fundamental that for a cause of action of negligence to exist, Plaintiff must prove four essential elements: (1) the existence of a legal duty owed by the Township to the Plaintiff; (2) a breach of that duty by the Township; (3) that Plaintiff has suffered damages; and (4) that the damages alleged are causally related (or proximately caused) by the Township's breach of a duty. See Townsend v. Pierre, 221 N.J. 36 (2015).

It is well-settled law in New Jersey that negligence is a fact which must be proven and which will never be presumed. See Tong v. Tandy, 36 N.J. 44 (1961). The mere showing of an incidence causing damages sued for is insufficient alone to authorize an inference of negligence on the part of the defendant. See Vander Graef v. Great Atlantic & Pacific Tea Co., 32 N.J. Super. 365 (App. Div. 1954). Similarly, Plaintiff must show by a preponderance of the evidence that the Township's alleged negligence was a proximate cause of the injury. See Townsend, *supra*.

There can be no recovery in a negligence action if the defendant did not violate any duty owed to the plaintiff. See Kravath v. Geller, 34 N.J. Super. 442

(App. Div. 1979), aff'd 31 N.J. 270 (1980). It is this nexus between duty and liability which is necessary for the proof of negligence. See Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48 (App. Div.), aff'd 63 N.J. 577 (1973).

The question of the existence of a duty is one of law and not one of fact. See Essex v. New Jersey Bell Telephone Company, 166 N.J. Super. 124, 127 (App. Div. 1979). "Determinations of the scope of duty in negligence cases has traditionally been a function of the judiciary." Estate of Desir v. Vertus, 214 N.J. 303, 322 (2013). Public policy and fairness are the elements the courts of New Jersey utilize in determining the existence of a duty. The Supreme Court has established a fourpart framework requiring the evaluation of four factors: "the relationship of the parties; the nature of the risk; the ability to exercise care; and public policy considerations." Id. at 317.

For all of Plaintiff's allegations, Plaintiff has not and cannot establish a prima facie case of negligence as she has failed to show the existence of any of the essential elements of this harm. Based on the discovery that has been exchanged, and the testimony taken, Plaintiff has failed to establish even a single element of a claim for negligence against the Township. Applying the above standards, it is clear that in order to prevail, Plaintiff must show that a duty was owed, and that the Township breached that duty, which if observed, would have averted the subsequent damages.

The facts clearly indicate that the Township had no responsibility to install or maintain drains on Plaintiff's private property. For this claim, Plaintiff has failed to establish that a duty existed. Even though the Township owed no duty to

Plaintiff, following years of her complaints to the Township starting in as early as 2010, with her approval and authorization, and to provide assistance to a long-time resident, the Township installed a drain system on Plaintiff's Property. According to Plaintiff's testimony, the work was performed properly, and "[the Township] did what they were supposed to do." (Pa38, 132:3-14).

Even if the Court is inclined to find that some duty was owned by the Township, Plaintiff has failed to establish the next element of negligence, causation. The water intrusion on Plaintiff's Property was not caused by any act or omission on the part of the Township. Plaintiff testified that she was told that the Property upon which the cul-de-sac, and eventually her dwelling, was developed was formerly a farm with a stream running through the property. (Pa35). Further, based on testimony of Township employee, Kenneth Merle, the drainage issues on the property were caused by pre-existing conditions of the soil, specifically that it was composed of clay. (Pa39, 25:10-15). Certainly, there are no allegations that the Township negligently placed the clay soil in her backyard and therefore can be held responsible.

For Plaintiff to establish causation, she would need to produce an expert who is qualified in evaluating the ground conditions, water intrusion, and resulting damage to her Property sufficient to tie the Township's actions to said conditions, intrusions, and damage. Plaintiff has done no such thing. At no point during the decades that Plaintiff has complained of a water condition on her Property has she investigated, or hired anyone qualified to investigate, the cause of the water intrusion. No expert report has been served in discovery, and

therefore Plaintiff cannot establish that the Township's conduct, or omissions, if any, are causally related to the damages claimed. See State v. Cotto, 471 N.J. Super. 489 (App. Div. 2022) (citing N.J.R.E. 702) ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.").

Additionally, Plaintiff has failed to prove any damages resulting from any alleged act or omission on the part of the Township. Plaintiff alleges damages in excess of $500,000 for a "luxury backyard" that was damaged as a result of the Township's purported negligence and breach of contract. Plaintiff has offered no competent evidence to support her claim for damages and has provided no expert opinion on the alleged devaluation of her property.[2] Further, through the testimony offered, there is no dispute that Plaintiff made the decisions to remove a pool, shed, fence, and various trees and shrubbery in and around the property on her own. At no point did the Township or any of its employees request or require Plaintiff to remove or demolish any existing structures or plantings on her property, and to the contrary, Township employees specifically denied that

2. Plaintiff has offered a handwritten statement from "Bob's Pool Service" that indicates that the damage to Plaintiff's pool "could only have been done from water building up from behind the walls of her pool." However, this document is unsigned and undated. (Pa347). It does not list its author, and Plaintiff is not aware of Bob's last name. (Pa103, 53:22). Bob purportedly does pool maintenance, although he never maintained or repaired Plaintiff's pool. Id. at 55:13-17. Plaintiff does not "know even if he's in the pool business now." Id. There is no evidence to suggest that Bob is an engineer or otherwise an expert in determining damage to pools. (Pa347).

any of the actions taken by Plaintiff prior to the drainage work being performed were remotely necessary. (Pa38).

POINT THREE

PLAINTIFF CANNOT PROVE THAT ANY CONTRACT EXISTED, AND EVEN IF IT DID, IT WAS NEVER RATIFIED BY THE TOWNSHIP'S GOVERNING BODY

Plaintiff asserts that she had a binding agreement with the Township to remove her swimming pool, fencing, and shrubbery in exchange for the Township installing a drainage system in her backyard and repairing the associated damage. In Plaintiff's Amended Complaint, she alleges that the Township is in breach of contract for failing to honor this alleged oral agreement. To prevail on a breach of contract claim, a plaintiff must show: (1) a valid contract between the parties; (2) that defendant failed to perform its obligations under the contract; and (3) that the breach caused the claimant to sustain damages. See Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007).

Simply put, the Township cannot breach a contract that did not exist in the first place. Plaintiff has testified that no written contract was made, and no written agreement was ever in place for either the work performed, nor any of the actions she took that she claims the Township told her to do. In fact, it is against the common law of New Jersey, and public policy, for a municipality to "be bound in contract, express or implied, unless the officer or employee has authority to enter into such a contract on behalf of the corporation." Saint Barnabas Med. Ctr. v. Cty. of Essex, 111 N.J. 67, 78-79 (1988). Further, for a contract with a municipality to be binding, it must "be evidenced by an

affirmative act of the governing body, making, either for a contract or ratification thereof . . . ." Ballagh Realty Co. v. Dumont, 111 N.J.L. 32, 37 (1933).

According to Plaintiff's own testimony, she made a "handshake deal," for which there were no witnesses and no corroboration that such a deal took place. (Pa4). Moreover, the terms of the alleged deal are simply unbelievable. It just does not compute that the Township would ever, whether authorized or not, agree to repair and replace the backyard, including a 50-year-old pool and shed, of a private citizen for damages seemingly caused by naturally occurring ground water by which the Township bore no responsibility. Plaintiff admits that the so-called contract was never written down, much less approved or ratified by the Township's governing body. By law, such an agreement, even if it existed, cannot be held binding.

Plaintiff pooh-poohs this requirement by simply stating that it is "not relevant." (Pb14). This is obviously untrue, and Plaintiff provides no support for that position. Plaintiff indicates that regardless, she "would still have a valid promissory estoppel claim." (Pb14-15). But **that** is what is not relevant, as Plaintiff has not pled such a claim, and thus, it is irrelevant.

POINT FOUR

PLAINTIFF CANNOT IDENTIFY ANY MISREPRESENTATIONS MADE BY THE TOWNSHIP

Plaintiff believes that the Township made material misrepresentations relating to the Township's installation of a drainage system in her rear yard.

Plaintiff further alleges that she relied upon these alleged misrepresentations to her detriment and therefore suffered damages.

More specifically, Plaintiff claims in her Amended Complaint that the Township made a material misrepresentation by not advising her that a drainage system was being installed. (Pa20). In reality, and confirmed by Plaintiff's own testimony, she was informed of the details and scope of the planned drainage project prior to any work being performed and was present on the Property for the duration of the entire project. (Pa93, 43:15-25; Pa222, 21:2-11; Pa232, 31:5-9; Pa259, 58:11-20). Plaintiff consented to allowing the Township on her property to install the drainage system. (Pa232, 31:10-19; Pa259, 58:15-17). As testified to by Kenneth Merle, a Township employee who was present every day on the site, Plaintiff was provided with daily updates on the status of the work, (Pa259, 58:15-20), present every day during work, (Pa259-260, 58:21-59:3), often provided lunch to the workers, (Pa222, 21:9-13; Pa266, 65:13-14), and at the conclusion stated that she was happy and satisfied with the outcome of the project. (Pa264, 63:12-13).

Plaintiff further alleges that the Township made a material misrepresentation by advising that the Township would repair the Property. Once again, Plaintiff's own testimony confirms that the Township installed a drainage system, removed clay soil, regraded the soil, planted grass seedlings, and took significant steps to correct the water intrusion issues on her Property. (Pa93, 43:15-19; Pa144 94:6-9; Pa170, 120:11-14). Plaintiff was never in the dark about what was happening,

and the Township did not do **anything** on the Property without Plaintiff's authorization.

Plaintiff would have the Court believe that she was forced to remove a pool, shed, fence, and mature shrubbery, and landscape beds for the Township to perform the drainage work on her Property. In fact, Plaintiff's 50-year-old pool and shed were already failing, and she made the decision to remove them on her own. Both the Township Engineer (who designed the drainage system), and a Department of Public Works Manager (who was hands-on in the installation of the project) confirmed that it was completely unnecessary to remove the pool before the work could be completed. With respect to any landscape foliage, Merle testified that Plaintiff was delighted with the removal of various shrubs because she hated them. (Pa257-258, 56:19-57:4). In sum, there is not a shred of evidence to support Plaintiff's claims that the Township misrepresented the nature and scope of the drainage project, much less to her detriment. Thus, she cannot show any evidence for a reasonable finder of fact to conclude that the Township has misrepresented anything.

CONCLUSION

For the foregoing reasons, the appeal should be denied and summary judgment should be affirmed in favor of the Township and against the Plaintiff, dismissing the Amended Complaint in its entirety and with prejudice.

Respectfully submitted,

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LISA PESCI Plaintiff, vs. TOWNSHIP OF PARSIPPANY	) SUPERIOR COURT OF NEW JERSEY) LAW DIVISION) MORRIS COUNTY) DOCKET NO. MRS-L-1647-20)) Sat Below: Louis S. Sceusi) J.S.C.) *Civil Action*)

REPLY BRIEF ON BEHALF OF PLAINTIFF/APPELLANT

On the Brief:

John E. Horan, Esq. (040212001)

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POINT HEADINGS

TABLE OF JUDGMENT, ORDERS AND RULINGS

TABLE OF AUTHORITIES/CITATIONS

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PROCEDURAL HISTORY

1. Plaintiff filed a complaint, pro se, on August 12, 2020. Pa1.
2. On October 29, 2020, Defendant filed a Motion to Dismiss the Complaint based upon various Title 59 immunities. Pa 14.
3. On February 16, 2021, opposition to Defendant's Motion was filed by John E. Horan, Esq., on behalf of Plaintiff. Pa15.
4. On November 12, 2021, oral argument on the Defendant's Motion was heard by Honorable Rosemary E. Ramsey, J.S.C., and the Motion was denied. Pa16.
5. On February 24, 2022, Plaintiff filed an amended complaint. Pa17.
6. On March 10, 2022, Defendant filed an Answer to the Amended Complaint. Pa24.
7. Upon completion of discovery, Defendant filed a Motion for Summary Judgment on April 28, 2023. PA34.
8. Plaintiff filed opposition to Defendant's Motion for Summary Judgment on May 16, 2023. Pa40.

9. On October 20, 2023, oral argument on the Defendant's Motion for Summary Judgment was heard by the Honorable Louis S. Sceusi, J.S.C. Pa377.[1]

10. On October 20, 2023, Defendant's Motion for Summary Judgment was granted. Pa376.

11. On November 29,2023, Plaintiff filed this appeal. Pa387.

[1] A copy of the transcript of the October 20,2023 oral argument before the Honorable Louis S. Sceusi, J.S.C. is being separately submitted herewith. This is the only transcript contained within this appeal.

LEGAL ARGUMENT

POINT I

PLAINTIFF'S CLAIMS ARE NOT TIME-BARRED AS A RESULT OF THE DISCOVERY RULE (T8)

The Respondent/Defendant in its brief argues two (2) points regarding Plaintiff's claims being time-barred. The first point is that Plaintiff's claims surrounding the swimming pool are time-barred because the applicable statue of limitations is six (6) years. The second point is that the Plaintiff's claims are barred under the New Jersey Tort Claims Act ("TCA") because Plaintiff did not present her claim within ninety (90) days of accrual.

Defendant relies upon Plaintiff's admissions during her deposition and contained in her Notice of Tort Claim that the water problems on the Property go back to 1990 and 2004. Accordingly, Defendant argues that claims are facially time-barred pursuant to N.J.S.A. 2A:14-1. However, that position overlooks the "discovery" rule.

As previously indicated, the accrual date of Plaintiff's claim does not begin to run until the Plaintiff knew or should have known of her claim. In the present matter, Plaintiff may have known for years that water and drainage issues existed on the Property. She was unaware how badly her swimming pool

was comprised as a result of the water issues until 2018. Accordingly, the Plaintiff's claims are not time-barred.

Similarly, Plaintiff's claims are not time-barred under the TCA. Plaintiff filed her Notice of Tort Claim on May 31, 2019. Although the TCA does require pursuant to N.J.S.A. 59:8-8 that the Notice of Tort Claim must be filed within ninety (90) days, a claimant may file the Notice of Tort Claim up to one (1) year after accrual of the claim.

At the time that Plaintiff filed her Notice of Tort Claim she was unrepresented. Although she did not set forth in a Certification at that time reasons constituting extraordinary circumstances, the Defendant suffered no prejudice from the Defendant's failure to do submit the appropriate motion. At the time, Plaintiff had already advised the Defendant of the issues and the Defendant was aware that the issues needed to be resolved. Plaintiff has also testified that she had communications with the Defendant about replacing the swimming pool. Therefore, the failure of the Plaintiff to set forth extraordinary circumstances is of no moment. The Purpose of the Notice of Tort Claim is to allow the public entity the opportunity to investigate the claim prior to filing suit. Here, the Township knew of the claim prior to the Notice of Tort Claim and had the ability to resolve it.

It must also be noted that although the Plaintiff first learned of the extent of the damage to the swimming pool in June 2018, there were discussions, according to Plaintiff, between the parties from June 2018 to May 2019 regarding resolving the swimming pool issue. Therefore, once she discovered in May 2019 that she was required to file a Notice of Tort Claim because the defendant was not going to replace the swimming pool, Plaintiff immediately filed the Notice of Tort Claim.

POINT II

PLAINTIFF HAS ESTABLISHED A CLAIM FOR NEGLIGENCE (Pa382)

The Defendant argues that Plaintiff failed to establish her claim for negligence because she could not establish both causation and damages due to a lack of expert testimony.

Plaintiff's position is that expert testimony regarding causation is not needed. Common sense and judgment could lead a juror to conclude that the Township's actions led to the Plaintiff's damages. Moreover, Plaintiff relied upon the representations of the Township Engineer and therefore didn't need an expert. Lastly, the Township knew that they were responsible for the condition of the Property otherwise they would have never undertaken the drainage work in 2018.

The Defendant also argues that Plaintiff is unable to prove her damages because of lack of expert testimony. In this regard, Plaintiff did produce documentation and estimates from licensed professionals and contractors as to estimates for returning the Property to its condition prior to the damage[1].

The damages suffered by the Defendant are not so complex that expert testimony is necessary. Rather, the property can be repaired and put back to its original condition if the work that is reflected in the estimates is performed. Accordingly, the estimates provide a solid foundation for the damages suffered by the Plaintiff and expert testimony is not requited.

POINT III

THE LACK OF A RESOLUTION OR RATIFYING ACT IS NOT RELEVANT TO PLAINTIFF'S BREACH OF CONTRACT CLAIM (Pa385)

Defendant argues that no Resolution was ever adopted by the governing body for the Township of Parsippany, and moreover, one officer of a municipality cannot bind eth public entity to a contract. In this regard the trial court relied upon N.J.S.A. 40A:4-57 which provides:

> No officer, board, body or commission shall, during any fiscal year, expend any money (except to pay notes, bonds or interest thereon), incur any liability, or enter into any contract which by its terms involves the expenditure of money for any purpose for which no

[1] Plaintiff did submit an estimate for the pool from "Bob's Pool Service." Plaintiff has advised counsel that Bob recently died.

> appropriation is provided, or in excess of the amount appropriated for such purpose. Any contract made in violation hereof shall be null and void, and no moneys shall be paid thereon.

In the present matter the Plaintiff should not be penalized that the Township did not comply with the process for creating a binding contract. The Plaintiff relied upon promises that were made to her by the Mayor at the time and was damaged as a result of the Township's failure to abide by representations that it made. Defendant should not be allowed to benefit from its failure to create a binding contract as a result of a procedural defect that is of no fault of Plaintiff.

POINT IV

PLAINTIFF'S HAS A VALID CLAIM FOR MISPRESENTATION (Pa386)

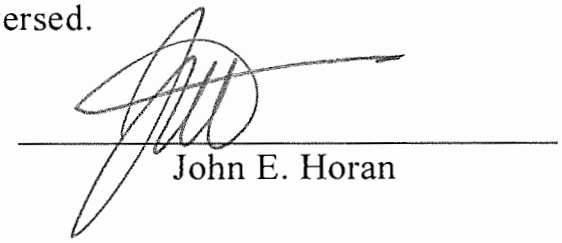
In order to have a valid claim for misrepresentation a plaintiff must establish 1) a material misrepresentation by the defendant of a presently existing fact or past fact, (2) knowledge of its falsity, (3) an intent that plaintiff rely on the statement, (4) reasonable reliance by the plaintiff, and (5) resulting damages. Liberty Mutual Ins. Co. v. Land, 186 N.J. 163, 175 (2006).

Here, Plaintiff has credibly testified that she was advised by the Defendant that the Defendant would restore her Property. The Defendant never took any action to restore the Property and thus knew any representations were false.

Furthermore, it would have no basis to believe the Defendant was not being honest and her reliance was reasonable. Accordingly, a question of facts as to whether Defendant is liable for misrepresentation exist and Summary Judgment was not appropriate.

CONCLUSION

For all of the above stated reasons, the trial court's granting of Defendant's Motion for Summary Judgment must be reversed.



John E. Horan