FILED, Clerk of the Appellate Division, June 13, 2024, **A-002573-23**

Superior Court of New Jersey

Appellate Division

Docket No. A-002573-23 T1

AMADOR CASTRO, *Plaintiff-Appellant,* vs. STATE OF NEW JERSEY, COUNTY OF PASSAIC, PASSAIC COUNTY ROAD DEPARTMENT, CITY OF PASSAIC, CITY OF PASSAIC PUBLIC WORKS, CONGREGATION TIFERETH ISRAEL, ABC COMPANIES 1-10 (names for fictitious entities), JOHN DOES 1-10 (names for fictitious individuals), ABC COMPANIES 11-20 (names for fictitious entities) and JOHN DOES 11-20 (names for fictitious individuals), *Defendants-Respondents.*	:	CIVIL ACTION ON GRANT OF MOTION FOR LEAVE TO APPEAL FROM THE INTERLOCUTORY ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY Docket No. PAS-L-003621-21 Sat Below: HON. VICKI A. CITRINO, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

JACOBY & MEYERS, LLP
Attorneys for Plaintiff-Appellant
550 Broad Street, Suite 608
Newark, New Jersey 07102
(973) 645-6590
ssalzone@jmlawyer.com

On the Brief:
SAMANTHA R. SALZONE, ESQ.
Attorney ID# 422902023

Date Submitted: June 13, 2024

CP COUNSEL PRESS (800) 4-APPEAL • (329405)

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PROCEDURAL HISTORY

Plaintiff, Amador Castro's Appeal seeks Appellate de novo review and reversal of three New Jersey Superior Court, Law Division, Passaic County interlocutory Orders. The orders to be appealed are two orders entered by the Honorable Vicki A. Citrino, J.S.C. on January 19, 2024, granting defendant City of Passaic's Motion for Summary Judgment, and on March 1, 2024, denying plaintiff's Motion for Reconsideration, as well as to review the New Jersey Superior Court, Law Division, Passaic County interlocutory Order, entered by the Honorable Darren J. Del Sardo, Esq. on February 21, 2024, denying plaintiff's Motion to Reopen and Extend Discovery. (Pa1-7, Pa8-12, Pa13-20).

This personal injury action arises out of injuries sustained by plaintiff Amador Castro when a tree fell and landed on appellant's car while he was driving.

This action commenced with the filing of a Summons and Complaint on November 17, 2021. (Pa67-106).

Discovery was initially extended for sixty (60) days, upon consent of all parties, from October 11, 2022 to December 10, 2022 (Pa300-302). By Court Order dated November 18, 2022, discovery was extended from December 10, 2022 to March 10, 2023(Pa303-305). By Court Order dated March 3, 2023,

discovery was extended from March 10, 2023 to May 9, 2023 (Pa306-308). By Court Order dated May 5, 2023, discovery was extended from May 9, 2023 to August 7, 2023 (Pa309-311). By Court Order dated July 11, 2023, discovery was extended from August 7, 2023 to October 11, 2023 (Pa312-314). As per the July 11, 2023 Order, the Court ordered the parties to "get to work"; as such the parties agreed to work beyond the discovery end date. Discovery in this matter ended on October 11, 2023. (Pa312-314).

On November 2, 2023, defendant, City of Passaic filed a Motion for Summary Judgment (Pa27-238). Plaintiff filed an opposition to same and a Cross-Motion to Reopen Discovery. Oral argument ("OA") was heard on January 12, 2024[1]. At oral arguments, the Honorable Vicki A. Citrino requested to hear counsel's comments regarding their motions, Peter Perla, Esq., counsel for defendant City of Passaic began with his opening comments arguing that defendant City of Passaic is afforded many protections as a municipality and under, "Title 59 is -- obviously it affords a municipality ample protection, or substantial protections, I should say, against tort claims that are filed against it because, let's be candid, the municipalities have vast amounts of public property that they're required to

[1] 1T is a copy of the transcript of Oral Argument on January 12, 2024
2T is a copy of the transcript of Oral Argument on March 1, 2024.

maintain. And they can't be held responsible for every accident that occurs." (1T 5:8-14). Mr. Perla, for defendant City of Passaic continued to argue that in this case, "it's the Title 59 is not about finding liability, really liability is the exception to the rule." (1T 6:21-22). Furthermore, Mr. Perla argued that the standard the municipality must be held to is the high burden of actual notice and failed to acknowledge that the standard is actual or constructive notice. (1T 8:1-2).

Counsel for plaintiff Antonio S. Grillo, Esq., argued that the tree was a dangerous condition, "This is an enormous tree. Had the sidewalk repair -- that had the sidewalk repaired and its roots cut. This created a condition which would remain for years." (1T 10:14-16). Mr. Grillo further argued

> "There's no question that the Plaintiff was exercising due care, and it was foreseeable that this matter could happen the way it did. And in no way did the Plaintiff contribute to this -- the occurrence of this incident. There's no question that the dangerous condition is the proximate cause which is also one of the prongs that has been satisfied, and that the City had at the very least constructive notice and possibly actual notice" (1T 13:15-23).

In response, Mr. Perla reiterated what he alleged in his papers that the defendant City of Passaic's allocation of resources defense and continued to argue, "believe me, we have empathy for him. But there is just, you know, the liability here that they're seeking, just it can't be found on this record. And no additional discovery is going to change this." (1T 16:3-6).

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On January 19, 2024, the Court entered an Order granting defendant City of Passaic's Motion for Summary Judgment in accordance with the following reasoning

> "Therefore, Defendants would not have been on constructive notice because the tree appeared to be healthy before it fell. Additionally, Plaintiff's allegation that Defendants needed to inspect the tree after the sidewalk was repaired is unconvincing. Any inspection that occurred would have been related to the sidewalk, not the tree, because the sidewalk is what prompted inspector Johnathan Bello to issue Defendant Congregation Tifereth Israel a violation notice. (See Plaintiff's Exhibit G at p. 13). Lastly, it is not palpably unreasonable for Defendants to rely upon others to notify them of any dangerous conditions created by their trees. Pursuant to the TCA, Court is not in the position to question how Defendants allocate their employees. While the court sympathizes with Plaintiff, it is of the opinion that the Plaintiff did not meet his burden to show that Defendants had constructive or actual notice of the dangerous condition of the tree or that Defendant's conduct was palpably unreasonable under the circumstances." (Pa1-7).

Plaintiff's Cross-Motion was not heard during oral arguments as the Court determined the Cross-Motion did not relate to the Summary Judgment motion. (Pa1-7). The January 19, 2024 Order granted plaintiff the opportunity to file a separate Motion to Reopen Discovery. (Pa1-7). On January 31, 2024, plaintiff refiled a Motion to Extend Discovery, and the Honorable Darren J. Del Sardo, P.J.Cv., denied plaintiff's Motion in the February 21, 2024 Order on the basis that there were no exceptional circumstances. (Pa8-12).

Plaintiff then filed a Motion for Reconsideration of Judge Citrino's Order granting defendant City of Passaic's Motion for Summary Judgment, which was also denied. (Pa13-20). Plaintiff filed the Motion for Reconsideration to address that in the Court's original Summary Judgment Order, they failed to provide a decision on whether defendant City of Passaic caused or created the dangerous condition, as opposed to simply having notice of the dangerous condition. (Pa480-487) Oral argument ("OA") was heard on March 1, 2024. Mr. Grillo, attorney for plaintiff argued that the, "Motion for reconsideration is proper in this case because -- decision -- The Court focused on whether the plaintiff -- actual constructive notice -- . However, the issue we feel is whether the City of Passaic actually caused or created this dangerous condition." (2T 4:21-25, 5:1). Furthermore, plaintiff's Counsel argued that

> "We know that the sidewalk was eventually rebuilt sometime between 2007 and 2012. And we know that it was flush, there was -- sidewalk down, there were no more roots exposed, and the tree was still standing. Therefore, the only person that -- the only entity that could have done to work of removing the - - the -- the root system that was exposed would have been the Department of Public Works employee who testified that they don't even apply for permits whenever they do this type of work." (2T 6:6-16)

Mr. Perla in response argued that the Court's opinion which granted his client, defendant City of Passaic's, Motion for Summary Judgment was spot on, further he argued,

> "the day of the accident, the canopy was green and healthy, and there was no indication that this tree was in imminent danger of collapse. It wasn't leaning, it wasn't tilting. There had been no complaints received by -- about this tree. And the tree had sustained years of bombardment after the alleged repair of the sidewalk, by -- by hurricanes and thunderstorms and never gave any indication that it was -- it was gonna tip or fall over. And the only thing I would add is that it's very important to remember that the Tort Claims Act exists as an active exclusion, not one of inclusion where The Court is supposed to bend the law to find ways to give individuals claims against public entities." (2T 8:1-16).

Mr. Grillo argued in response that, "our position that this condition was created and therefore it was created and caused by the public entity themselves, and therefore whether or not they knew, or should have known or actually had actual notice of it's condition, not relevant to whether or not they created the condition." (2T 9:2-7). Ultimately, the Motion for Reconsideration was denied, as the Court determined that the defendant City of Passaic does not "do sidewalk repair" (Pa13-20). However, plaintiff argues against this point further below.

As a result of the abovementioned three Orders, plaintiff filed a Motion for Leave to Appeal. On April 26, 2024, plaintiff's Motion for Leave to Appeal was granted by the Appellate Division. (Pa488). By this Appeal, Plaintiff seeks interlocutory review and reversal of the trial court's January 19, 2024, February 21, 2024 and March 1, 2024 Orders. (Pa1-7, Pa8-12, Pa13-20).

STATEMENT OF FACTS

On November 2, 2020, plaintiff was driving on Passaic Avenue, Passaic, New Jersey when the subject tree toppled over and landed on plaintiff's vehicle and driver side. (Pa58-59). The tree destroyed the car and plaintiff was severely injured. (Pa58-59). Plaintiff was transported to the hospital and suffered a spinal injury which resulted in paralysis from the chest down which left plaintiff confined to a bed. (Pa58-59,491-507). Plaintiff suffers from quadriplegia and is no longer independent. (Pa491-507). He can no longer maintain regular care of himself including, but not limited to, washing, bathing, eating, walking, using the restroom. (Pa491-507). Plaintiff is unable to move himself from the bed to his wheelchair. (Pa491-507).

On the day the plaintiff sustained his injuries, he underwent spinal fusion surgery. (Pa491-507). Plaintiff was diagnosed with a complete spinal cord injury at C6-7. (Pa491-507). Plaintiff's initial exam revealed that he suffered from a substantial loss of strength of his upper extremities below C6 muscles and complete loss of motor function of his chest, muscles and lower extremities. (Pa491-507). Plaintiff was in the hospital for approximately twelve (12) days following his surgery and diagnosis. (Pa491-507). Plaintiff has never recovered any neurological function.

(Pa491-507). Prior to his injuries, plaintiff was completely independent regarding his daily care and maintenance of his home. (Pa491-507). Plaintiff requires assistance in caring for himself and his apartment, which he had to move into as it was wheelchair accessible unlike his prior home. (Pa491-507).

Plaintiff has a different living arrangement now than prior to the injury. (Pa491-507). The plaintiff's new apartment, though it accommodates a wheelchair including into the bathroom, is not handicap accessible, there is no ability to roll a water-resistant manual wheelchair into the shower. (Pa491-507). There is no adjustable height sink, and no lower kitchen counters. (Pa491-507). Plaintiff's relationships with his friends and family have been negatively affected by the consequences of his accident. (Pa491-507). Plaintiff has feelings of social isolation. (Pa491-507). Plaintiff had just retired prior to the accident and was looking forward to helping with his grandchildren, and traveling, activities which he is no longer capable of doing because of his injuries. (Pa491-507). Plaintiff can no longer use public transportation. (Pa491-507).

Plaintiff underwent surgeries and rehabilitation treatments as result of his injuries. (Pa491-507). Plaintiff's expert Stuart M. Kahn, M.D., a professor of orthopedic and rehabilitation medicine, opined that, "it is my

impression within a reasonable degree of medical certainty that Mr. Amador Castro will require continued and ongoing medical and supportive care for the remainder of his life due to the consequences of his 11/02/2020 accident." (Pa491-507).

On January 12, 2024, Oral arguments were held regarding defendant City of Passaic's Motion for Summary Judgment. Defendant City of Passaic's attorney Peter Perla, Esq. argued, "With that being said, though, there's just simply nothing in this record that shows that the City had any notice whatsoever that this tree that fell on Mr. Castro's car ever had any potential to fall." 1T 5:17-21. Whereas plaintiff's attorney Antonio S. Grillo, Esq. argued

> "And therefore, by their own protocol, knowing that there was construction done there that would have been an inspection, and the report that they exchanged to us indicates that the entire sidewalk had been constructed and had been inspected in 2018. We were never provided with any of those inspection records or any kind of reports that would indicate that that was the case. Now, knowing that what was left was a dangerous condition, and yet they complained not to have had an opportunity to inspect the property, they can't have it both ways. They did have an opportunity to inspect the property because they admit that in 2018, they did so. And that was prior to this incident that occurred." 1T 12:4-16.

During discovery plaintiff had requested documents regarding the repairs of subject tree and subject sidewalk and never received either. On January 19, 2024, the Court granted defendant City of Passaic's Motion for

Summary Judgment after reviewing the briefs and exhibits provided by both parties, on the basis that "While the court sympathizes with Plaintiff, it is of the opinion that the Plaintiff did not meet his burden to show that Defendants had constructive or actual notice of the dangerous condition of the tree or that Defendant's conduct was palpably unreasonable under the circumstances." (Pa1-7).

On March 1, 2024, during Oral arguments held regarding plaintiff's Motion for Reconsideration, Antonio S. Grillo, Esq., attorney for plaintiff argued that

> "Motion for reconsideration is proper in this case because -- decision -- The Court focused on whether the plaintiff -- actual constructive notice -- . However, the issue we feel is whether the City of Passaic actually caused or created this dangerous condition." 2T 4:21-25, 5:1.

The Court on March 1, 2024, ordered that plaintiff's Motion for Reconsideration was denied, "Again, while the court sympathizes with Plaintiff, it is of the opinion that the Plaintiff did not meet his burden to show that Defendants had constructive or actual notice of the dangerous condition of the tree or that Defendant's conduct was palpably unreasonable under the circumstances. Thus, Plaintiff's Motion is Denied." (Pa13-20). After the Court's determination that the defendant City of Passaic does not work on sidewalk repairs, "the Court turned to whether Defendant had actual or constructive notice because there was nothing showing that Defendant acted negligently or

wrongfully to create the dangerous condition." (Pa13-20) As a result, plaintiff's Motion for Reconsideration was denied. (Pa13-20).

LEGAL ARGUMENT

POINT I

PLAINTIFF'S APPEAL SHOULD BE GRANTED AND THE ORDERS APPEALED SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRED BY NOT ANALYZING WHETHER DEFENDANT CAUSED THE DANGEROUS CONDITION (Pa1-7, Pa8-12, Pa13-20)

Plaintiff is requesting review and reversal of three interlocutory orders in this brief. The Orders were filed on January 19, 2024, February 21, 2024 and March 1, 2024 respectively. On March 21, 2024, the Appellate Court in their Order indicated that plaintiff is permitted to appeal all three Orders together and will be addressing each Order separately. On April 26, 2024, plaintiff's Motion for Leave to Appeal was granted. An appellate court's review of rulings of law and issues regarding the applicability, validity (including constitutionality) or interpretation of laws, statutes, or rules is de novo. See In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020) (agency's interpretation of a statute). An appellate court reviews a grant or denial of a motion for summary judgment de novo. *R. 4:46-2(c)*. Therefore, the Court will apply the summary judgment standard. "Our court rules require summary judgment to be granted when the record demonstrates that 'there is no genuine issue as [*406] to any material fact challenged and that the moving party is entitled to a

judgment or order as a matter of law.' *Rule* 4:46-2(c). This Court thus considers '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, 666 A.2d 146 (1995). Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405-406.

In addition, "[A]ppellate courts '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.'" State v. Brown, 236 N.J. 497, 521 (2019) (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)). In both civil and criminal cases, the appellate court reviews a trial judge's discovery rulings under the abuse of discretion standard. "With these principles in mind, and applying an abuse-of-discretion standard of review, *Quail v. Shop-Rite Supermarkets, Inc.*, 455 N.J. Super. 118, 133, 188 A.3d 348 (App. Div. 2018), we turn to the rules applicable to the motion at issue on this appeal." Salazar v. MKGC Design, 458 N.J. Super. 551, 558 (2019).

Respectfully, Judge Citrino's review of the facts and caselaw improperly concluded that City of Passaic was not negligent in their actions, failed to

address if defendant created the dangerous condition, had no constructive or actual notice of the dangerous condition, nor were they at fault for the falling of subject tree. Thus, de novo review of the interlocutory orders is essential in this matter. In addition, Judge Del Sardo was mistaken in determining there were no exceptional circumstances in this matter. Denying reversal of these orders would be a grave injustice to the plaintiff who has suffered severe, lifelong injuries.

POINT II

THE TRIAL COURT ERRED IN GRANTING DEFENDANT CITY OF PASSAIC'S MOTION FOR SUMMARY JUDGMENT WHEN IT DETERMINED THAT THERE IS NOT A QUESTION OF FACT WHETHER CITY OF PASSAIC HAD NOTICE OF OR CREATED THE DANGEROUS CONDITION (Pa1-7)

Plaintiff seeks review and reversal of the Court's January 19, 2024 Order granting defendant City of Passaic's Motion for Summary Judgment due to the fact that the Court determined there was no genuine issue of material fact.

A. The Summary Judgment Standard (Pa1-7)

Summary Judgment should be granted only when there exists no genuine issue of material fact. When determining whether there are any contested facts, the Motion Judge is to:

> "Consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the

> applicable evidentiary standard are sufficient to commit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party".

Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995).

The Motion Judge's assessment is to be conducted in the same manner as that required under R. 4:37-2(b). Brill, 142 N.J. at 535. The trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. Brill, 142 N.J. at 540, (*citing* Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)).

An appellate court employs the same standard as the trial court in reviewing summary judgment orders. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998). It decides first whether there was a genuine issue of fact. If there was not, it then decides whether the lower court's ruling on the law was correct. Walker v. Atlantic Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987). There is still a genuine issue of material fact as to whether defendant City of Passaic caused or created the dangerous condition which resulted in the subject tree falling and injuring plaintiff.

B. Defendant, City Of Passaic Is Not Immune From Liability Pursuant To The New Jersey Tort Claims Act (Pa1-7)

The New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to 12-3, specifies the circumstances under which a public entity can be held liable for injuries to another. Although generally immunity for public entities is the rule and liability is the exception, one relevant exception is found in N.J.S.A. 59:4-2 which provides:

> a public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which has occurred 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.
>
> Public entities may be liable for injuries caused by a dangerous condition in the property of a public entity. Wymbs v. Township of Wayne, 163 N.J. 523,531, 750 A.2d 751 (2000).

In addition, in order to impose liability on a public entity pursuant to said Section, a plaintiff must establish that the entity's conduct was palpably unreasonable. Vincitore v. New Jersey Sports and Exposition Authority, 169 N.J. 119,125, 777 A.2d 9 (2001).

The tree was owned and maintained by defendant City of Passaic. As established in the deposition of Guillermo DeHais on July 28, 2023, who is

a representative for the City of Passaic. “The next, Question 8: "Does the township own this tree?" You answered yes. Yes.” (Pa172-193, Tr 62:14-16). It stands to reason that the only entities that intended to benefit from the repair are the municipality or the property owner, the defendants. The lower Court solely focused on actual or constructive notice, otherwise known as subsection b in the New Jersey Tort Claims Act, “Plaintiff must establish that the condition had existed for such a period of time and was of such an obvious nature that the public entity should have discovered the condition and its dangerous character.” (Pa1-7). When the City of Passaic created a dangerous condition or inspected where it occurred, it could only be of such an obvious nature the City should have noticed it.

It is without contest that the defendant City of Passaic owned and had a duty to maintain the subject tree. Additionally, the lower Court even agreed that maintenance and work was conducted on the subject sidewalk which directly impacted the roots of subject tree. As stated by the lower Court when reviewing plaintiff’s expert narrative by arborist Jason C. Miller, “The report further states that in 2007, Google images showed those portions of sidewalk had lifted because of root upheaval.” (Pa1-7). Mr. Miller goes on to state:

> Many of these incidents can be foreseen and traced back to years of neglect, mistreatment, or the presence of defects. In this case, the

> convergence of various factors, including the presence of new sidewalk blocks visible in the 2012 Google photographs, the absence of roots along a straight-cut line, advanced wood decay in the buttress area in photos from northjersey.com, trunk decay evident in the Passaic-4 photo, and the relatively low wind speed recorded at the time of the tree failure, all align with a scenario consistent with a tree that has experienced significant root damage and internal decay as a result.
> (Pa249-266).

Plaintiff's expert reiterates that tree experienced decay as a result of roots being shaved during the installation of the new sidewalk. Plaintiff has presented that defendant City of Passaic has ownership over subject tree and had a duty to maintain subject tree. As well as evidence of the sidewalk construction that led directly to subject tree being a dangerous condition, decaying and falling. Plaintiff argues that whether the defendant City of Passaic had notice or not is not the only issue at hand, but rather the defendant caused and created the condition. The lower court has continued to review this case in the light of subsection b of the New Jersey Tort Claims Act, but plaintiff argues that defendant created the dangerous condition. Defendant City of Passaic is not immune from liability under the New Jersey Tort Claims Act if they caused and created the dangerous condition of the shaved tree root. "Rather the approach should be *whether* [***11] *an immunity applies and if not, should liability attach*." Weiss v.

N.J. Transit, 128 N.J. 376, 383 (1992). No immunity applies to defendant City of Passaic therefore, liability should attach.

In Sims v. City of Newark, 244 N.J. Super. 32, 36, (1990), the Sims, plaintiffs "were sitting in a car parked at the curb on the southwest side of Nairn Place near the intersection of Clinton Avenue in Newark when a tree limb fell onto the roof of the car owned by Sarah Sims, damaging the car and causing personal injuries to both plaintiffs." Sims v. City of Newark, 244 N.J. Super. 32, 36 (1990). This case centered on whether the defendant City was palpably unreasonable in not inspecting every tree in its city. However, the case sets forth the steps a plaintiff must undergo to prove liability should be imposed upon a municipality.

The Court relies upon the New Jersey Tort Claims Act Chapter 59:4-2 and whether the municipality had created the dangerous condition; or had actual or constructive notice of it. "Therefore, under the provisions of the act, before any liability can be imposed upon the City of Newark, plaintiffs must first prove that the tree which they allege caused their injuries was a dangerous condition and is property owned or controlled by the city." Sims v. City of Newark, 244 N.J. Super. 32, 38 (1990). Plaintiff has provided uncontested evidence that the defendant City of Passaic admitted to owning

the tree which caused plaintiff's injuries. The plaintiff in this case is capable of proving that the tree was owned by the City of Passaic.

The Sims plaintiffs were similarly injured by a decaying tree limb, as plaintiff in this case was severely injured by a decaying tree. However, unlike the Sims plaintiffs, plaintiff argues that defendant City of Passaic created the dangerous condition of the shaved tree root. While the Sims plaintiffs were unsuccessful in their claim, the decision was based upon the fact that "the city does not have financial resources or the manpower to inspect every tree bordering every street in the city. The city is allowed to fund and use its resources as it deems best in the face of competing demands." Id. Plaintiff Castro is not questioning the financial resources of the defendant but continues to argue that defendant City of Passaic caused the decay of the shaved tree root when they conducted the repair of the sidewalk next to the tree. Plaintiff is "not required to prove notice of a dangerous condition if an employee of a public entity [*3] created the dangerous condition by "a negligent or wrongful act or omission[.]" Luciano v. City of Atl. City, 2010 N.J. Super. Unpub. LEXIS 3201, *2-3 (Pa489-490). Although, plaintiff is not required to prove notice if an employee of a public entity created the dangerous condition, plaintiff argues that defendant City of Passaic did have notice of the dangerous condition they created.

Furthermore, "A public entity shall be deemed to have constructive notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." N.J. Stat. § 59:4-3. As provided by plaintiff's expert Jason C. Miller, the construction which resulted in the tree roots being shaved occurred between 2007 and 2012, a minimum of eight years before the tree fell which resulted in plaintiff's catastrophic injuries.

In McGowan v. Borough of Eatontown, 151 N.J.Super. 440, 376 A.2d 1327 (App.Div. 1977), which involved an accident on a state highway, the Court noted that despite the absence of actual notice on the date of the accident, the state had constructive notice where the local police had previously informed it that an icy condition would occur and reoccur under predictable circumstances. See also, Speaks v. Jersey City Housing Authority, 193 N.J.Super. 405, 474 A.2d 1081 (App.Div. 1984) (plaintiff was injured by a bicycle frame hurled through a broken window, and court held that the notice requirement was met by the fact that there had been several previous injuries caused by objects thrown from windows); Milacci v. Mato Realty Company, Inc., 217 N.J.Super. 297, 525 A.2d 1120

(App.Div. 1987) (plaintiff's allegations as to existence of an accumulation of sand and dirt were held to have raised a jury question as to constructive notice of the dangerous condition).

In Lodato v. Evesham Township, 388 N.J. Super. 501, 511-512 (2006), summary judgment was reversed as the Appellate Court found that plaintiff has provided enough information as to create a genuine issue of material fact that defendant had constructive notice of a sidewalk raised by a tree root. "First and foremost, unlike the condition in *Norris,* the **tree** roots and raised sidewalk [***19] condition is [*512] open and obvious. The condition in *Norris* consisted of cracks in a curb. Although Angela Norris was aware of the cracks, she nevertheless stepped on the curb, thus suggesting that the internal instability which caused it to collapse when her weight was applied was hidden and certainly not known to her. By contrast, here, the **tree** roots that caused the sidewalk to heave were so apparent that the Director of the DPW conceded that "obviously" the **tree** required removal." Lodato v. Evesham Tp., 388 N.J. Super. 501, 511-512 (2006).

Similar to the facts in Lodato, in the case at hand, the tree root and raised sidewalk were open and obvious and connected directly to the dangerous condition of the shaved tree root. Even defendant witness Mr. DeHais testified that "But to me, that looks like a main root, and the whole

tree – I would have took the whole tree down before they did the sidewalk." (Pa172-193, Tr 48:23-25-49:1). The tree root in this case was ultimately shaved rather than removed, however defendant here indicates the root was a main root. This can only be of such an apparent, open and obvious nature that defendant City of Passaic should have had constructive notice of it, similar to that of the Lodato tree root. Not only should the defendant have had notice of root when it raised the sidewalk, but the defendant City of Passaic is responsible for the tree it owns and maintains, while also being responsible for shaving or removing such trees. Therefore, reasonable inference requires that the defendant City of Passaic knew or should have known that the main tree root of one of its trees was shaved, when it is the only entity permitted to do such work.

Additionally, if defendant knew that the sidewalk repair was done around the 180 Passaic Avenue address, then there is a question of how the defendant City of Passaic obtained said knowledge. If inspections were being made at the project site and tree roots were being shaved, constructive notice would be justly imposed or at a minimum made a question of fact as it was for the Lodato defendant. While the condition in Lodato lasted for eighteen years a longer amount of time than in plaintiff's case, it can be distinguished by the fact that the root had been raised and then shaved, thus

transforming it from a dangerous condition of a raised sidewalk to a dangerous condition of a shaved tree root created by defendants.

The final prong of the analysis which would impose liability on a public entity is the determination as to whether the action the entity took to protect against the condition or the failure or usage of funds to take such action was palpably unreasonable. Garrison, 154 N.J. at 286. Palpable unreasonableness is a question of fact. Vincitore, 169 N.J. at 130. Palpably unreasonable conduct is more than mere negligence but does not necessarily mean grossly or extraordinarily negligent. Schwartz v. Jordan and Public Service Electric & Gas, 337 N.J.Super. 550,555,767 A.2d 1008 (App.Div. 2001). The inquiry is whether no prudent person could approve of the Governmental entity's action or inaction. Id. Since the plaintiff used the roadway with due care in a manner that was reasonably foreseeable, and the dangerous condition proximately caused his injuries, it was palpably unreasonable for the City of Passaic defendant, which had notice of the dangerous condition, not to take any action in accordance with its protocol and allocated funds to correct the dangerous condition.

Thus, in reversing the defendant New Jersey Transit's grant of summary judgment, the Vincitore Court determined that a reasonable fact finder could have concluded that the railroad crossing exposed the

objectively reasonable member of the general public to a substantial risk of injury. Id. at 129. Therein, decedent, who raced horses at various tracks, crossed railroad tracks that ran across a race track grounds, owned by defendant Authority, in order to reach the stables. Because the track was closed for the off season, they were not guarded by flashing lights or crossbucks. However, the Authority had installed sliding metal gates, which decedent drove through. Once on the tracks, an approaching train collided with Vincitore's car, and he died from his injuries. Vincitore, 169 N.J. at 122.

The Vincitore Court determined that decedent's activity was reasonable as he was familiar with the operation of the gates at the crossing and could have approached the crossing and interpreted the open gates to mean that it was safe to cross. Vincitore, 169 N.J. at 129. The Court concluded that the railroad crossing exposed the objectively reasonable member of the general public to a substantial risk of injury. Additionally, the Court found that since the Authority knew of the risk, knew that having guards to operate the gate eliminated that risk and knew that people who ordinarily traversed the crossing during the racing season would have believed the open gate meant it to be safe, that their conduct in not eliminating the dangerous condition was palpably unreasonable. Id. at 130.

Again, in reversing defendants' grant of summary judgment, the Roe Court found that there were general factual issues regarding whether the defendant was liable under N.J.S.A 59:4-2 for a dangerous condition of property it owned. Therein, the infant plaintiff was assaulted after proceeding through a gate in a fence on property controlled by the defendant, which was a commonly used entrance to a nearby park. Since the gate had been opened for years and was continuously broken, the defendant bolted it open to prevent users from damaging it. Id. at 75.

The Roe Court found that by bolting the gate open and inviting the public to use it, defendant New Jersey Transit substantially and knowingly increased the risk that persons accepting the invitation would encounter the dangers lurking just beyond the gate. Id. at 80. The Court further reasoned that the dangerous condition of the property itself enhanced plaintiff's exposure to the injuries she sustained and that the actions defendant took were palpably unreasonable in view of the relatively minor expense and inconvenience of either relocating the gate or keeping it locked. Id. at 79,81.

In the present case, it is apparent that there are significant questions of fact which preclude summary judgment. Like the Vincitore and Roe plaintiffs, plaintiff used the roadway with due care, as did the general

public. Further, like the Vincitore and Roe plaintiffs, it is reasonably foreseeable that defendant had actual and/or constructive notice that this roadway and sidewalk adjacent to the tree would continue to be used in this manner. Defendant City of Passaic cannot claim that it did not know of a defect when it had a responsibility to inspect the construction of the sidewalk and was the only entity permitted to shave the tree roots. Additionally, the dangerous condition of the tree root, like the property in the Vincitore and Roe matters, was apparent. However, the defendant herein did not take any action to correct it.

While defendant City of Passaic's notice of the dangerous condition is not at issue when they created the condition, plaintiff provides that constructive notice can still be imposed upon defendant City of Passaic and should be if this Court does not find that they created the condition.

The New Jersey Tort Claims Act requires either the defendant created the dangerous condition or had actual/constructive notice of the condition and if these requirements are fulfilled the defendant's conduct must be palpably unreasonable. While the lower Court has stated the defendant had no notice, no decision has ever been rendered as to whether the defendant City of Passaic caused the dangerous condition of the shaved tree root which led to subject tree falling. Summary judgment must be reversed as there is

still a genuine issue of material fact as to defendant City of Passaic creating the dangerous condition which resulted in plaintiff's injuries as well as genuine issues of material fact as to whether defendant's actions were palpably unreasonable.

POINT III

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION WHEN IT DETERMINED THAT THERE IS NOT A QUESTION OF FACT WHETHER CITY OF PASSAIC HAD NOTICE OF OR CREATED THE DANGEROUS CONDITION(Pa13-20)

Plaintiff submits that the trial Court's rulings were erroneous in that defendant City of Passaic did not have notice of or created the dangerous condition of the shaved tree roots and were not negligent in their maintenance of subject tree. The Court in its Order granting defendant's Motion for Summary Judgment determined that

> "Therefore, Defendants would not have been on constructive notice because the tree appeared to be healthy before it fell. Additionally, Plaintiff's allegation that Defendants needed to inspect the tree after the sidewalk was repaired is unconvincing. Any inspection that occurred would have been related to the sidewalk, not the tree, because the sidewalk is what prompted inspector Johnathan Bello to issue Defendant Congregation Tifereth Israel a violation notice" (Pa1-7).

Plaintiff argued in his Motion for Reconsideration that the Court completely disregarded the fact that the inspection of the sidewalk and the tree are inextricably intertwined.

A. The Standard For A Motion For Reconsideration(Pa13-20)

Reconsideration is a matter "within the sound discretion of the Court to be exercised in the interest of justice." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).); see also Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The D'Atria Court warned, however, that "[a] litigant should not seek reconsideration merely because of dissatisfaction with a decision of the Court." D'Atria, 242 N.J. Super. at 401. The ultimate goal of a motion for reconsideration is "substantial justice." Bednarsh v. Bednarsh, 282 N.J. Super. 482, 485 (Ch. Div. 1995).

Reconsideration should be used for those cases wherein the Court has expressed its decision based upon a (1) palpably incorrect or irrational basis or (2) where it is obvious that the Court either did not consider or failed to appreciate the significance of probative, competent evidence, or (3) there is good reason for the Court to reconsider new information. Fusco v. Board of Educ. of the City of Newark, 349 N.J. Super. 455, 462, 793 A.2d 856 (App. Div. 2002); Cummings v. Bahr, 295 N.J. Super. at 384-385. Further, R. 4:49-2 provides that a Motion for Reconsideration seeking to alter or amend a judgment must state the basis on which it is made, including a statement of the matters or a controlling decision which counsel believes the Court has overlooked or to which it has erred.

Herein, the Court failed to consider that there is a genuine question of fact that City of Passaic caused the dangerous condition and instead based its decision incorrectly as to whether the City of Passaic had actual or constructive notice. While the Court determined in its March 1, 2024 Order, "The Department of Public Works does not do sidewalk repair." (Pa13-20), this testimony resulted in the court moving directly to whether defendant City of Passaic had actual or constructive notice of the dangerous condition. The Court in its Order failed to appreciate that this was not an ordinary sidewalk repair but a sidewalk repair that involved tree root. In these circumstances,

> "Okay. No. If the sidewalk - if it was an issue, the homeowner or the company or
> whatever, if they wanted to do the sidewalk, they would have to get a permit from the engineer. Then after, then they would contact DPW to go check it out, check out the roots or anything like that. And then either we take down the tree or
> they can work around the roots. We might shave it down a little bit, maybe an inch or so. But besides that, they have to call the DPW if there's a tree in front of it." Pa172-193, Tr 36:3-13

While the Court correctly asserted that the Department of Public Works does not handle mere sidewalk repairs, Mr. DeHais established the fact that when a sidewalk repair involved a tree root, the Department of Public Works is involved. (Pa172-193, Tr 22:2-3). The Courts decision was made based upon a palpably incorrect basis, focusing solely on it being a sidewalk repair but

ignoring the impact of the tree root on the situation resulted in the Court incorrectly deciding to deny plaintiff's Motion for Reconsideration. The Department of Public works will either issue permits needed to work on the tree or determine if the work can be done around the tree root or even shave the tree roots themselves. The question remains as to whether the defendant City of Passaic caused and created the dangerous condition of the shaved tree root, as opposed to just having notice, which ultimately resulted in the tree falling upon plaintiff's car resulting in his catastrophic injuries. As such, plaintiff's Motion for Reconsideration should have been granted, and the Court erred in denying it.

POINT IV

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION TO REOPEN DISCOVERY WHEN IT DETERMINED THERE WERE NO EXCEPTIONAL CIRCUMSTANCES(Pa8-12)

Plaintiff seeks review of the Court's February 21, 2024 Order denying plaintiff's Motion to Reopen and Extend Discovery due to the fact that the Court determined there were no exceptional circumstances.

A. The Standard to Reopen and Extend Discovery(Pa8-12)

The "Best Practices" rules were designed to improve the efficiency and expedition of the civil litigation process and to restore statewide uniformity in implementing unforeseen discovery trial practices. See Tucci v. Tropicana

Casino and Resort, Inc., 364 N.J. Super. 48, 53, 834 A.2d 448 (App. Div. 2003). The "Best Practices" rules were not designed to do away with substantial justice on the merits or to preclude rule relaxation when necessary to "secure a just determination". Id., *citing* R. 1:1-2.

The "good cause" standard applies to motions to extend discovery unless an arbitration or trial date is fixed. Leitner v. Toms River Regional Schools, 392 N.J. Super. 80, 90-91, 919 A.2d 899 (App. Div. 2007); Ponden v. Ponden, 374 N.J. Super. 1, 8-10, 863 A.2d 366 (App. Div. 2004). Therefore, the rule does not permit a trial court to require a party to establish "exceptional or heretofore unforeseen circumstances" for a discovery extension unless the court has previously fixed an arbitration or trial date. Tynes v. St. Peters Univ. Med. Ctr., 408 N.J. Super. 159, 169, 973 A.2d 993 (App. Div. 2009).

Although this analysis is fact sensitive and decided on a case-by-case basis, exceptional circumstances in the discovery context of R. 4:24-1(c) include but are not limited to: the disruption of one's office by partners or associates having health problems or leaving, especially if they had responsibilities for the matter before the court; a personal sudden health problem of counsel; death of counsel's family member; and death or health problems of a key witness. See O'Donnell v. Ahmed, 363 N.J. Super. 44, 51, 830 A.2d 924 (Law Div. 2003).

Notwithstanding, the interests of justice standard continues fully viable under

Best Practices, and time constraints will yield to exceptional circumstances and fundamental litigation fairness. See Brun v. Cardoso, 390 N.J. Super. 409, 419, 915 A.2d 1053 (App. Div. 2006). As such, the death or other unavoidable and unanticipated unavailability of an expert whose report and testimony are relied on will continue to constitute an exceptional circumstance warranting relief. Pressler & Verniero, Current N.J. Court Rules, (GANN 2019), Comment 1.1 to Rule 4:17-7. While the January 19, 2024 Order and January 12, 2024 Oral arguments denied hearing the initial Cross-Motion to Reopen Discovery, plaintiff claims that extending discovery directly related to defendant city of Passaic's Motion for Summary Judgment and the current appeal. (Pa1-7) Plaintiff at the time of the filing of the original Motion for Summary Judgment requested additional time because subject tree was located at 180 Passaic Avenue, however the address was once formerly 168 Passaic Avenue. Plaintiff required additional discovery depositions and information regarding permits on this additional address and subject tree. (Pa296-299).

Additionally, the Court in its February 21, 2024, Order denied plaintiff's Motion to Reopen and Extend discovery. The Court determined "Here, the court does not find that the Plaintiff has demonstrated exceptional circumstances. The Plaintiff has not stated why the discovery end date expired, arbitration took place, and a Motion for Summary Judgment was heard without filing a Motion

to Extend Discovery" (Pa8-12). Plaintiff had attempted to file a Cross-Motion to Extend Discovery when the Summary Judgment Motion was before the Court. Judge Citrino in her Order granting defendant's City of Passaic's Motion for Summary Judgment also indicated that plaintiff could file a separate motion to reopen discovery. As such, the Motion for Summary Judgment had been granted by the Court by the time plaintiff was informed they could file the separate motion to extend discovery. (Pa1-7). Plaintiff asserts that discovery in this matter has been extensive and as a result of the current appeal and previous exceptional circumstances plaintiff respectfully requests discovery be reopened and extended.

CONCLUSION

Based upon the foregoing, plaintiff respectfully requests that this Honorable Appellate Court reverse the January 19, 2024 Order granting defendant/respondent City of Passaic's Motion for Summary Judgment, reverse the February 21, 2024 Order denying plaintiff/appellant's Motion to Reopen and Extend Discovery and reverse the March 1, 2024 Order denying plaintiff/appellant's Motion for Reconsideration.

Dated: June 13, 2024

Respectfully submitted,
JACOBY & MEYERS, LLP
Attorneys for Plaintiff/Appellant

BY: /s/ Samantha R. Salzone
SAMANTHA R. SALZONE, ESQ.

FILED, Clerk of the Appellate Division, August 22, 2024, **A-002573-23**, **AMENDED**

AMADOR CASTRO, Plaintiff-Appellant, vs. STATE OF NEW JERSEY, COUNTY OF PASSAIC, PASSAIC COUNTY ROAD DEPARTMENT, CITY OF PASSAIC, CITY OF PASSAIC PUBLIC WORKS, CONGREGATION TIFERETH ISRAEL, ABC COMPANIES 1-10 (names for fictitious entities), JOHN DOES 1-10 (names for fictitious individuals), ABC COMPANIES 11-20 (names for fictitious entities) and JOHN DOES 11-20 (names for fictitious individuals), Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLASTE DIVISION DOCKET NO.: A-002573-23T1 Civil Action On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: PASSAIC COUNTY DOCKET NO.: PAS-L-3621-21 Sat Below: Hon. Vicki A. Citrino, J.S.C. Hon. Darren J. Del Sardo, P.J.Cv.

DEFENDANTS-RESPONDENTS CITY OF PASSAIC AND CITY OF PASSAIC PUBLIC WORKS' (Improperly Pled) BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPEAL

PRB Attorneys at Law, LLC
1 Gateway Center, Suite 2600
Newark, NJ 07102
Tel: 973-860-0555
Fax: 973-446-2496
Email: jhoran@prbattorneys.com
pperla@prbattorneys.com
Attorneys for Defendants-Respondents
City of Passaic and City of Passaic Public Works
(improperly pled)

Of Counsel:
Peter P. Perla, Jr., Esq. (Atty. No.: 018991996)

On the Brief:
Peter P. Perla, Jr., Esq. (Atty. No. 018991996)
Joseph P. Horan, II, Esq. (Atty. No. 024961992)

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PRELIMINARY STATEMENT

In 1970, the New Jersey Supreme Court abrogated the doctrine of sovereign immunity finding it was unjust to refuse to provide relief to injured persons. Willis v. Department of Conserv'n & Eco. Dev., 55 N.J. 534, 536-42 (1970). The Court indicated that if this action was improvident, then it was up to the Legislature to devise a comprehensive, statutory solution. Id. at 539. Two years later, the Legislature did just that enacting the Tort Claims Act, N.J.S.A. 59:1-1 *et seq*. ("the Act"), finding sovereign immunity was necessary for public entities, since public entities cannot be expected to bear the same liability as private persons and entities:

> . . . the Legislature recognizes that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done. Consequently, it is hereby declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein. [N.J.S.A. 59:1-2.]

The Tort Claims Act is a statute of *exclusion* not *inclusion*. The 1972 Task Force Comment to N.J.S.A. 59:4-2, established the onerous requirements to hold a public entity liable for an alleged "dangerous condition" of public property:

> This section recognizes the difficulties inherent in a public entity's responsibility for maintaining its vast amounts of public property. Thus, it is specifically provided that when a public entity exercises or fails to exercise its discretion in determining what action should or should not be taken to protect against the dangerous condition, that judgment should

> only be reversed where it is clear to the court that it was palpably unreasonable. [Ibid.]

The Legislature purposely rejected any form of strict liability against a public entity under the Act. N.J.S.A. 59:9-2b.

This is a tree fall case. On or about November 2, 2020, Plaintiff, Amador Castro ("Plaintiff"), was in a vehicle parked in Passaic, New Jersey, when a large tree suddenly toppled over without warning and fell on his vehicle. Plaintiff then sued, among others, Defendant the City of Passaic ("Defendant" or "the City"). As reflected in the undisputed record, the canopy of the tree was green and vibrant, the trunk was solid and showed no sign of distress, and the tree had withstood years of bombardment by extreme weather conditions without incident. Absolutely no one was on notice that the tree would fall.

On appeal, Plaintiff resorts to mischaracterizing the record confronted by this fatal flaw in establishing liability under the Act. True and accurate excerpts of the deposition testimony of City Department of Public Works ("DPW") Supervisor, Guillermo DeHais ("DeHais"), set forth in this Opposition undeniably proves the City had no advanced notice the tree at issue might fall. The case was then no-caused at arbitration.

Thereafter, Plaintiff opposed summary judgment by interjecting the untimely expert report of Arborist, Jason C. Miller ("Miller") (and several others), over the objection of the Defense. The trial court made a prudent move and considered Plaintiff's proposed expert reports rather

than excluding same and properly granted summary judgment for the City. The trial court also exercised its discretion and denied Plaintiff's request to re-open discovery after it had granted four prior extensions of the discovery period. Plaintiff has not remotely demonstrated that the trial court abused its discretion, as he must, to overturn its decision to order discovery closed.

Plaintiff's last resort on appeal is to focus on the catastrophic nature of the injuries he has suffered. The City does not dispute that this was a life-altering tragedy; however, damages alone are insufficient to establish liability under the Act. Indeed, the New Jersey Supreme Court has repeatedly emphasized that the Tort Claims Act is an immunity statute; it is not an insurance plan. The Court has, therefore, upheld the dismissal of claims under the Act in the most tragic of settings, including a prior quadriplegia case that also was dismissed on liability grounds under the Act.

PROCEDURAL HISTORY

Plaintiff filed his complaint with the Superior Court of New Jersey, Law Division, Passaic County, on November 17, 2021. (Ra1; Pa68.) The following day, the Court issued a Track Assignment Notice, assigning it to Track 2 for 300 days of discovery. (Ra8.) The original discovery end date was October 11, 2022. (Ra1.) Defendant, City of Passaic, filed its Answer on January 28, 2022. (Ra3.)

On August 1, 2022, the Court issued a discovery end date reminder. (Ra3.) Plaintiff then filed for a discovery extension by Stipulation of

the Parties on September 22, 2022. (Ra3.) On November 1, 2022, Plaintiff filed his first Motion to Extend Discovery, which was granted on November 18, 2022. (Ra4; Pa304.) The Court's Order required Plaintiff to produce his expert reports by February 10, 2023. (Pa305.)

On January 2, 2023, the Court issued another discovery end date reminder. (Ra4.) On January 24, 2023, Plaintiff filed his second Motion to Extend Discovery, which was granted on March 3, 2023. (Ra4; Pa307.) The Court's Order required Plaintiff to produce his expert reports by April 21, 2023. (Pa308.) On April 12, 2023, Plaintiff filed his third Motion to Extend Discovery, which was granted on May 5, 2023. (Ra4; Pa310.) The Court's Order required Plaintiff to produce his expert reports by July 21, 2023. (Pa311.) The same day, May 5th, the Court also listed the matter for arbitration on August 11, 2023. (Ra4.)

On June 21, 2023, Plaintiff filed his fourth Motion to Extend Discovery, which was granted on July 11, 2023. (Ra4; P313.) The Court's Order extended the deadline for Plaintiff to produce his expert reports until August 21, 2023. (Pa314.) The Court also adjourned arbitration to October 13, 2023. (Ra4.) Discovery closed on October 11, 2023. (Ra1.) On October 13, 2023, Plaintiff's claim was no caused at arbitration on the basis of the Tort Claims Act. (Pa46.) On October 23, 2023, Plaintiff filed for trial *de novo*. (Ra41.)

On November 2, 2023, the City filed its Motion for Summary Judgment. (Ra5.) On December 5, 2023, Plaintiff filed his Opposition as well as a Cross-Motion to reopen discovery. (Ra5.) It must be noted that of the City's twenty-five (25) separate statements of fact, Plaintiff admitted

twenty-three (23) in some form or another. (Ra10-12; Ra16-33.) Plaintiff's Opposition also included the untimely expert report of Miller, an Arborist, along with several other untimely expert reports. (Pa249.) On December 28, 2023, the City filed Opposition to Plaintiff's Cross-Motion to reopen discovery, and on January 2, 2024, the City filed its Reply Brief emphasizing that Plaintiff had admitted virtually all the facts in support of the City's Motion. (Ra5.) On January 19, 2024, the Court granted the City's Motion for Summary Judgment and denied Plaintiff's Cross-Motion. (Ra6.)

On January 31, 2024, Plaintiff filed his fifth Motion to Extend the Discovery Period (his Cross-Motion was deemed improper under the Court Rules). (Ra6.) Specifically, Plaintiff sought to reopen discovery for 120 more days in order to cure his failure to timely produce his expert reports. (Ra45-49.) On February 8, 2024, the City filed Opposition to Plaintiff's Motion to Extend, and Plaintiff filed for reconsideration of the grant of summary judgment. (Ra6.) On February 21, 2024, the Court denied Plaintiff's Motion to Reopen/Extend Discovery. (Ra6.) The following day the City filed Opposition to Plaintiff's Motion for Reconsideration. (Ra6.) On March 1, 2024, the Court denied Plaintiff's Motion for Reconsideration. (Ra6.) On May 8, 2024, Plaintiff filed a Motion for a Stay of the Case. (Ra7.) Plaintiff also filed a Motion for Leave to Appeal to the Appellate Division, which was granted on April 26, 2024. (Pa488.) On May 24, 2024, the Court granted Plaintiff's Motion for a Stay. (Ra7.) There is one remaining Defendant in the case – Congregation Tifereth Israel.

STATEMENT OF FACTS

This case involves a tree that toppled over onto the vehicle Plaintiff was parked and seated inside. (Pa31.) The incident happened on November 2, 2020, at around 9:37 a.m. at 165 Passaic Avenue, Passaic, New Jersey. (Pa32.) Officers from the Passaic Police Department and fire personnel from the Passaic Fire Department responded to the scene. (Pa32.) Plaintiff was immediately extracted from his vehicle and transported to the St. Joseph's University Medical Center in Paterson, New Jersey. (Pa32.) Personnel from the Passaic DPW also responded to the scene, and the tree, which was blocking the street, was cut up and removed, so Plaintiff's vehicle could be towed from the scene and the street reopened. (Pa32.)

Google's street view permits one to look back into the past to see what a street looked like at a particular point in time. (Pa32.) The Google Street View images for the subject tree from 2019, which is the year before the incident occurred, make clear that the tree itself looked perfectly healthy to all outward appearances: it had a full, green leafy canopy throughout, there were no dead spots whatsoever in the canopy, the tree did not show any signs of obvious disease or decay, and there were no dead limbs or leaves lying about its base. (Pa32.) The color images the City provided to the Law Division are in the record. (Pa108-Pa112.) Due to its large size, it is clear that the tree had been growing for many years without issue before the incident occurred on November 2, 2020. (Pa33.)

The weather on the date of Plaintiff's incident, as obtained from the Internet, specifically TimeandDate.com, reflects that it was clear with a breeze between twelve (12) to twenty (20) knots. (Pa33.) Wikipedia has an article entitled "List of New Jersey Hurricanes," and it reflects that there were many hurricanes (which by definition have very strong winds) in the 1990s, the 2000s, the 2010s, and even in 2020 before the subject incident occurred, which demonstrates that the toppling over of the subject tree was a random, fluke, unpredictable incident. (Pa33; Pa195-Pa218.)

Plaintiff's expert report from his Arborist, Miller, which was untimely and improper, was relied upon in his Opposition to the City's Motion for Summary Judgment. Miller suggests that in or around 2012 (approximately eight (8) years before the incident occurred) there was sidewalk work done next to the tree, and at this time the tree's roots may have been affected. (Pb16-Pb17; Pb21-Pb22.)[1] It must be noted that the Wikipedia article for Hurricanes affecting New Jersey from 2012 to November 2020 reflects that there were twenty-seven (27) such storm events to hit the State, and the tree remained standing notwithstanding

[1] Miller's report constitutes an inadmissible net opinion, since he never examined the tree at issue. See e.g. Johnson v. Salem Corp., 97 N.J. 78, 81 (1984) ('The weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated'); Vuocolo v. Diamond Shamrock Chem., 240 N.J. Super. 289, 300-01 (App. Div.), certif. denied, 122 N.J. 333 (1990) ("New Jersey has followed the majority rule and has declined to admit expert opinion without a proper factual foundation"; prohibiting a medical expert from giving an opinion who never examined the decedent).

being subject to intense winds. (Pa203-Pa205.) Miller's report makes no mention of these compelling facts. (Pa250-Pa256.) Rather, Miller's improper net opinion imposes strict liability on the City, if the City did any repairs in the vicinity of this particular tree at any point in time.[2] Ibid.

DeHais, a Supervisor in the City's DPW, provided unrefuted testimony undermining Miller's net opinion; he testified on the following points:

- He was hired by the City in 2006 and assigned to the DPW's Parks Department. (Pa176, at p.12.)
- Two years later, he switched positions to the DPW's Shade Tree Department. (Pa176, p.10, 13.)
- He started as a laborer pruning, trimming, chipping, and cutting trees. (Pa177, p.14, 16.)
- He elevated to Supervisor in 2017. (Pa177, at p.16.)
- The DPW does not repair or inspect sidewalks, that is the responsibility of the "homeowner" (i.e., adjacent property owner). (Pa179, p.22-23.)
- The DPW does not have a scheduled maintenance program for inspecting trees. Instead, if a homeowner calls about a tree, DeHais will go out and look at the tree and then decide what needs to be done. (Pa179, p.23-25.)
- His assessment would consider if the tree appears to be healthy, if it needs any trimming, or if it needs to be removed. (Pa179, p.23-25.)

[2] As will be explained below, strict liability is proscribed by the Tort Claims Act. See N.J.S.A. 59:9-2b.

- Permits to homeowners for sidewalk repairs are handled by the City's Engineering Office. (Pa180, at p.27; Pa182, p.34.)

- He has no knowledge if the sidewalk at the base of the tree was ever repaired or reconstructed. (Pa181, p.33.)

- The DPW's involvement in sidewalk repairs is that he will go and see if a tree's roots need to be shaved. If the roots are shaved, it is minimal and no more, so the sidewalk repair can be done, and the tree can be saved. (Pa182, p.36-37; Pa185, p.47.) If shaving the roots would need to be more extensive, the tree would be taken down. (Pa182, p.37-Pa183, p.38.)

- Regarding shaving the roots of a tree, "[l]ike I said the only way I shave the roots is if I look at it and it's not a lot of roots, it's basically spider roots or something that I am taking away from it. But if it's too many roots, main root, the tree's coming down before, you know, before they do any work on the sidewalk." (Pa185, p46-47.)

- If this shaving of tree roots is done, then it will be entered into the DPW's SDL system, which tracks work orders. (Pa183, p.40-41.)

- He checked the SDL system for the tree in question to see if the tree roots had been shaved, and there were <u>no</u> such entries. (Pa183, p.40-41.)

- The SDL system did <u>not</u> contain any complaints about the tree in question. (Pa184, p.43.)

- Besides homeowner complaints, the DPW will also receive complaints from other City employees about trees, like from the City's Code Enforcement. (Pa184, p.44-45.)

- He has never had job duties of assessing if a sidewalk is safe or needs to be repaired; that is <u>not</u> his job. (Pa184, p.45.)

- After the tree fell down, he was contacted by the Police Department because the tree was across the road. (Pa186, p.50-51.)

- He has no recollection of ever doing any work in that location for that tree or any other tree in the area. (Pa186, p.50-51.)

- When he got to the scene, he looked at the tree, and it was green, so he knew it was alive. (Pa187, p.54.
- He could also tell that "[the tree] was uprooted. So that means that the wind was blowing hard enough for the tree to come down." (Pa187, p.54-55.)

- The DPW then cut up the tree and hauled it away. (Pa187, p.55.)

- He found no record of any maintenance of the tree, and this is not unusual because "[t]here's thousands of trees in here. You know, we only have one tree truck. So, I mean, unless the homeowner calls, calls for a work order, you know, then, you know, we try to do what we can." "I mean there's thousands of trees here and, you know, there's only one tree truck for the whole city." (Pa187, p.57-Pa188, p.58.)

- The City has a New Jersey Forest Service approved Forest Management Plan, and this is so the City would qualify for liability protection. (Pa189, p.62, 65.)

The City also provided the sworn Certification of Judy Sanchez ("Sanchez") who tracks Tort Claim's Notices and lawsuits against the City; she confirmed no one ever filed a Tort Claim's Notice or served any legal papers regarding the tree. (Pa33.) The City also provided the Certification of Fred Corbitt ("Corbitt"), the Assistant Superintendent of the DPW; he verified doing an extensive review of the DPW's records and did not find any evidence that the City had been notified of any

issues regarding the subject tree or it requiring any attention before the incident occurred. (Pa34-Pa35.)

Corbitt also explained the City's approach to dealing with tree issues, which is two-fold. First, the City relies upon the adjacent real property owners to make a complaint to the City about a tree being a problem. (Pa34.) These complaints will range from a tree appearing to be diseased or dead because its canopy or limbs is dying, its trunk is infested with insects, its dropping limbs onto the ground, or its limbs need pruning because they are touching structures, and so forth. (Pa34.) Second, the City relies upon its own employees: City police officers, City fire fighters and DPW employees who are constantly in City vehicles and driving throughout the City, oftentimes around the clock, who will notice an issue with a tree and alert the DPW to it. (Pa34.)

Corbitt explained that the City follows this approach because, in the grand scheme of the many public services that must be provided to the City's citizens, the City does not have unlimited resources, and the City has to make financial resource allocations on the best and most economical way to utilize its limited tax revenues to provide all the City's services to its residents. (Pa34.) Corbitt stated that over time, the City found this approach to be the most prudent, efficient and economical manner to address the maintenance and/or removal of trees and their debris by the City. (Pa34.)

Corbitt also explained that at the time of Plaintiff's incident in November 2020, the City was in good standing with the New Jersey

Department of Environmental Protection's Urban and Community Forestry Program by filing the required documentation with the State. (Pa35; Pa226-Pa231.)

LEGAL ARGUMENT

POINT I

PLAINTIFF DOES NOT IDENTIFY A SINGLE FACT IN DISPUTE TO WARRANT THIS COURT OVERTURNING THE GRANT OF SUMMARY JUDGMENT.

A summary judgment motion must be granted when there is no genuine issue as to any material fact and the moving party has shown entitlement to a judgment as a matter of law. R. 4:46-2. Summary judgment is intended to provide a prompt and businesslike disposition of actions that involve no dispute of essential fact and to cut through frivolous allegations in order to present a matter to the court in its true light and save the time and expense of protracted suit. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995); Golden v. N.W. Mutual Life Ins. Co., 229 N.J. Super. 405, 413 (App. Div. 1988).

To survive summary disposition, the nonmoving party must show the existence of a genuine issue of material fact through competent evidential materials. Robbins v. Jersey City, 23 N.J. 229, 241 (1957). Bare assertions, representations or allegations in pleadings without affidavit or other proper evidentiary support will not defeat summary judgment. See R. 1:6-6, 4:46-2(c); Robbins, 23 N.J. at 241; James Talcott, Inc. v. Shulman, 82 N.J. Super. 438, 443 (App. Div. 1964). Creating a dispute of fact of an insubstantial nature does not preclude

summary judgment. See Prant v. Sterling, 332 N.J. Super. 369, 377 (Ch. Div. 1999), aff'd, 332 N.J. Super. 292 (App. Div. 2000).[3]

It is well settled that the mere occurrence of an accident does not prove any negligence on the part of a defendant. Allendorf v. Kaiserman Enterp., 266 N.J. Super. 662, 670 (App. Div. 1993). There is a presumption against negligence by the defendant and whether an accident is the result of negligence is a fact that must be proven by the plaintiff with competent admissible evidence. See Buckelew, 87 N.J. at 525 (citing Hansen v. Eagle-Picher Lead Co., 8 N.J. 133, 139 (1951)).

Plaintiff has not identified a single material fact in dispute to warrant this Court overturning the Law Division's grant of summary judgment. Plaintiff admitted nearly all the City's facts supporting summary judgment in his opposition papers and did not provide any additional facts of his own in opposition thereto. (Ra10-12; Ra16-33.) Instead, in Paragraph 3 of "Plaintiff's Statement of Material Facts," Plaintiff argued that the trial should consider his extremely late expert reports (i.e., in particular his Arborist, Miller), admitting it was untimely. (Ra13-14.) This is not a proper basis to appeal the grant of summary judgment by the trial court or the denial of a fifth (5th) request to extend discovery. More so, even though it could have, the

[3] Plaintiff bears the burden of persuasion; it is not satisfied by guess or conjecture; rather, the evidence must be such as to demonstrate that the offered hypothesis is a rational inference, that it permits the trier of fact to arrive at a conclusion grounded in a preponderance of the probabilities according to common experience. See Biunno, Current N.J. Rules of Evidence, comment 5 on N.J.R.E. 101(b)(1) (2009), at 37.

trial court considered and did not bar any discovery (including Plaintiff's untimely expert reports) in granting summary judgment. The trial court considered the entire record and still found it insufficient for Plaintiff's claims against the City to withstand summary dismissal.

POINT II

SUMMARY JUDGMENT WAS PROPER BECAUSE THE CITY'S CONDUCT WAS NOT "PALPABLY UNREASONABLE" AS REQUIRED BY N.J.S.A. 59:4-2, AND PLAINTIFF HAS NO PROOF TO THE CONTRARY.

A. The Tort Claims Act Is One of Exclusion Not Inclusion.

It is well established on a dispositive motion filed pursuant to the Tort Claims Act that the trial court is *required* to make a preliminary determination as to whether the alleged condition of property at issue meets all the Act's requirements as to a "dangerous condition." Polyard v. Terry, 160 N.J. Super. 497, 508 aff'd o.b., 79 N.J. 547 (1979), overruled in part on other grounds, Castel Cap. Corp. v. Fireco of N.J., 81 N.J. 489 (1980). Otherwise, the legislatively-decreed restrictive approach to liability against public entities under the Act would be illusory and meaningless. Polyard, 160 N.J. Super. at 124; Maslo v. City of Jersey City, 346 N.J. Super. 346, 350 (App. Div. 2002) (a judge considering a motion for summary judgment as to a claim under the Act should take into account the declared legislative policy which shaped the application and interpretation of the Act and the Commission's Comment to N.J.S.A. 59:4-2 that recognized the difficulties inherent in a public entity's responsibility for maintaining its vast amounts of public property).

As noted above, the Legislature purposely made it arduous for a person to establish liability against a public entity over an alleged "dangerous condition" because of the vast amounts of property a public entity bears responsibility. The Legislature, therefore, provided that a public entity does not have to do all that a private person or private entity may be required to do under the law. N.J.S.A. 59:1-2. Rather, a public entity can only be held liable as specifically provided by the Act. Ibid.

The polestar of the Act is that public entity immunity is the general rule and liability is the exception. Coyne v. N.J. Dep't of Transp., 182 N.J. 481, 488 (2005) ("The guiding principle of the [Act] is that 'immunity from tort liability is the general rule and liability is the exception'"; "'The theme of the Act is immunity for public entities with liability as the exception''; "'When both liability and immunity appear to exist, the latter trumps the former'").

B. A Public Entity Cannot Be Held Liable for a Condition of Property Under the Act Unless Plaintiff Meets All the Requirements.

In order to establish a meritorious claim regarding real property, the plaintiff must prove all the elements set forth in N.J.S.A. 59:4-2, which states as follows:

> A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

> a. a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> b. a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.
>
> Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.

The Gann Law Books manual on the Tort Claims Act provides as follows regarding the spirit and purpose of Chapter 4, which deals with conditions of public property:

> **Chapter 4** deals with conditions of public property and liability of the public entity with respect thereto. Wary of creating unlimited exposure in connection with public entities' responsibility to maintain public property, this chapter provides that liability will be imposed only where the action or inaction of the public entity with respect to its property was palpably unreasonable. The general liability provisions are further limited by the specific immunity sections of Chapter 4 including: immunity for failure to provide ordinary traffic signals; plan and design immunity; immunity for the effect of weather conditions on streets and highways; and immunity for conditions of unimproved or unoccupied public property. Thus, even though a claimant may succeed in providing the existence of a dangerous condition, proximate cause, foreseeable risk, *knowledge (actual or constructive) of a dangerous condition or creation of the condition by a public employee* and that the entity's action or failure to act was palpably unreasonable, the entity may nevertheless be immune under these specific immunity sections. [Margolis and Novack, New

Jersey Statutes Title 59 Claims Against Public Entities (2005), at x. (emphasis supplied).][4]

i. Plaintiff Must First Prove the Property at Issue Was in a "Dangerous Condition."

N.J.S.A. 59:4-1a defines a "dangerous condition" of public property to mean: "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 supplied); Daniel v. State, Dept. of Transp., 239 N.J. Super. 563 (App. Div. 589 (App. Div.), certif. denied, 122 N.J. 325 (1990) ("*N.J.S.A. 59:4-1a means exactly what it says. A condition is not dangerous unless it 'creates a substantial risk of injury when . . . used with due care"*) (emphasis supplied). The use of the phrase "substantial risk of injury" means one that is not minor, trivial, or insignificant. Polyard v. Terry, 160 N.J. Super. 497, 509 (App. Div. 1978), aff'd o.b., 79 N.J. 547 (1979). The manner in which the Legislature crafted N.J.S.A. 59:4-1a regarding what amounts to a "dangerous condition" of public property shows that the Legislature did not intend for municipalities to maintain a property in perfect condition, and that even minor property conditions would not suffice because – to be actionable – the condition has to be such that it creates a *substantial risk* to those who are using due care.

[4] James v. New Jersey Mfrs. Ins. Co., 216 N.J. 552, 572 (2014) ("It is a cardinal rule of statutory construction that full effect should be given, if possible, to every word of a statute").

Plaintiff's evidence must demonstrate that the risk of injury is "substantial." Polyard, 160 N.J. Super. at 509 (emphasis supplied). Proof of insignificant or minor defects is not enough to establish a legitimate claim due to the stringent burden imposed by the Act. Id. at 510. Each case must be pragmatically examined by the trial court to determine whether the particular irregularity is such that reasonable people could differ as to whether it placed the property in a "dangerous condition" as defined by the Act. Ibid.

Here, Plaintiff has absolutely no proof that the tree was in a dangerous condition at the time it toppled over onto Plaintiff's vehicle. Plaintiff suspects, without any record evidence, that the sidewalk near the tree was repaired by the City in 2012 -- approximately eight (8) years before the tree fell. Plaintiff has no admissible evidence that the City had any involvement in the alleged repairs. Instead, Plaintiff relies exclusively on DeHais' testimony where he asked him to speculate/guess as to what might have happened based on a Google photo. This proffer is not sufficient proof to demonstrate the existence of a dangerous condition as that term is defined by the Tort Claims Act. See Levin v. Salem Cty., 133 N.J. 35, 49 (1993) ("The corollary of the proposition – that we look to effects to determine whether a dangerous condition of property exists – would be that whenever danger exists, so does a dangerous condition of property. Heretofore, our cases have not taken that approach. To do so now would require the disapproval of many prior decisions both of this Court and lower courts," indicating it would not take that step).

The City unequivocally established that the tree looked perfectly healthy to all outward appearances on the day it fell: it had a full, green leafy canopy; there were no dead spots in the canopy; the tree did not show any signs of obvious disease or decay; and there were no dead limbs or leaves lying about its base. In fact, due to the very large size of the tree, it is clear to any reasonable person that the tree had been growing in place for years without issue.

The undisputed records demonstrate that the tree falling on the date in question was a random and unpredictable event. As tragic as the consequences might be, this incident is a textbook illustration of an event that the Legislature intended to protect a public entity from being held accountable. Cf. N.J.S.A. 59:4-7 (weather immunity: "Neither a public entity nor a public employee is liable for any injury caused by the effect on the use of streets and highways of weather conditions"); N.J.S.A. 59:2-1b; Bachman Choc. Mfg. Co. v. Lehigh Whse. & Transp. Co., 1 N.J. 239 (1949) (storm of hurricane severity could trigger defense to negligence as an act of God).

The mere fact that a tree fell does not prove it was due to human intervention. On the other hand, the undisputed record evidence establishes that this particular tree withstood years of punishment by extreme weather conditions without incident.[5] Even accepting Plaintiff's

[5] The City provided a "List of New Jersey Hurricanes," and it reflects that there were numerous hurricanes from the 1990s up to 2020 before the incident occurred, and the tree stood tall showing no signs of jeopardy requiring the City (or anyone for that matter) to take any action.

belief that a repair to the nearby sidewalk was done in 2012, again, approximately eight (8) years followed with this tree being pounded by the weather and did not so much as tip slightly. Hence, Absolutely no one was on notice that the tree would fall.

Moreover, DeHais testified he had no personal knowledge of the subject tree before it fell; he never worked on it before; and the DPW had no records of the tree ever being worked on due to any complaints being made about it which, according to DeHais, the City would have had such records had such work been performed by the DPW. After the tree fell, DeHais went to the scene, evaluated the tree, and determined it was healthy and alive at the time it fell. DeHais' assessment was that due to the extreme weather conditions that day, the tree "was uprooted. So that means that the wind was blowing hard enough for the tree to come down."

As to sidewalk repairs, DeHais made it abundantly clear that the DPW's involvement would be to assess if a tree's roots could be shaved and the tree salvaged or if the tree needed to be removed. If roots are shaved, it is minimal and no more, so the sidewalk repair can be done, and the tree can be saved. (Pa182, p.36-37; Pa185, p.47.) If shaving the roots would need to be more extensive, the tree would be taken down. (Pa182, p.37-Pa183, p.38.) If root shaving was necessary, DeHais made it clear that root shaving would involve the spider roots only and would be minimal shaving, and the main structured roots would not be disturbed. (Pa185, p46-47.) Plaintiff proffered no evidence to dispute DeHais' testimony.

Plaintiff must prove by competent record evidence that the subject tree was in a "dangerous condition" at the time of the subject incident. Plaintiff cannot establish this point and, therefore, no further analysis under Chapter 4 of the Act is required warranting dismissal of his claims.

ii. Second, Plaintiff Must Prove That Either a Negligent or Wrongful Act of An Employee Created the Condition, or the Public Entity Had Actual or Constructive Notice of the Condition.

As just explained above, there is no proof that a City took any action with respect to the subject tree or nearby sidewalk. Furthermore, as noted above, Plaintiff must prove the public entity either knew about the employee taking the action or the condition itself in order to assess whether the public entity's response was palpably unreasonable. See Claims Against Public Entities, at x. ("... even though a claimant may succeed in proving ... a dangerous condition, proximate cause, foreseeable risk, *knowledge (actual or constructive) of a dangerous condition or creation of the condition by a public employee* and that the entity's action or failure to act was palpably unreasonable, the entity may nevertheless be immune . . . .").

To prevail on the "notice" issue, a claimant must prove that the public entity had actual or constructive notice of the existence of the condition at issue, as well as the fact that the condition itself was dangerous. See N.J.S.A. 59:4-3. Notice to a public entity may exist when the alleged dangerous condition has been the site of previous accidents. See e.g. Wymbs v. Wayne Tp., 163 N.J. 523, 536-37 (200). It may also

exist when complaints have been made by people to the public entity about the specific condition prior to the subject accident. See e.g. Norris v. Leonia Bor., 160 N.J. 427, 447 (1999). However, when a claimant cannot establish that a public entity had actual or constructive notice of the condition at issue and its dangerous character, summary judgment in favor of the municipality is warranted. Id. 447-48 (citing cases).

Here, the record is devoid of any evidence that the City was aware of any issue with the subject tree. The City has demonstrated that the subject tree looked perfectly healthy to all outward appearances. DeHais had no knowledge of any issue with the tree before it fell, and he supervised the unit within the DPW that handled tree issues. DeHais testified the DPW's electronic database for work orders, and it did not reflect any prior work done to the tree. Corbitt certified he thoroughly searched DPW records and found no record the City was ever notified of any issues with the tree before it fell. Sanchez also certified the City never received a Tort Claims Notice or a lawsuit about the tree before this lawsuit.

Thus, the City was not on notice of any problems with the tree, and Plaintiff has no evidence to the contrary. See Wilson v. Jacobs, 334 N.J. Super. 640 (App. Div. 2000) (the mere happening of an accident on public property is insufficient to impose liability on a public entity; the motion judge correctly "emphasized that the plaintiff had failed to offer any evidence by way of answers to interrogatories, deposition testimony, or certifications that defendant [municipality] had either actual or constructive notice of the alleged sidewalk defect").

Accordingly, dismissal of Plaintiff's claims as to the City is the only just solution. See N.J.S.A. 59:4-2, -3.[6]

iii. Third, Plaintiff Must Prove the Action to Protect Against the Condition or Failure to Take Such Action Was Palpably Unreasonable.

In addition to proving the above elements under the Act, a plaintiff has a final element to prove – *the most onerous one* - that the public entity's conduct in failing to correct the alleged dangerous condition was "palpably unreasonable." N.J.S.A. 59:4-2 states on this point: "Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition *or the failure to take such action was not palpably unreasonable*" (emphasis supplied). Therefore, even if a public entity has notice and is aware of the condition at issue and still did nothing about it, it cannot be held legally liable under the Act – unless the Plaintiff can show its "failure to take such action" was *palpably unreasonable*.

"Palpably unreasonable" means that the public entity acted or failed to act under circumstances which make it manifest and obvious that no prudent person would approve of its course of action or inaction.

[6] The Legislature has rejected holding a public entity liable on the basis of strict liability in N.J.S.A. 59:9-2b. Accord Kenny v. Scientific, Inc., 204 N.J. Super. 228, 237-38, 257-58 (Law Div. 1985) (citing this part of the Act) ("as already mentioned above, *N.J.S.A.* 59:9-2b flatly mandates that "[n]o judgment shall be granted against a public entity or public employee on the basis of strict liability"); Ross v. Lowitz, 222 N.J. 494, 510-11 (2015) (explaining that strict liability is finding someone liable regardless or without fault).

Furey v. Ocean Cty., 273 N.J. Super. 300, 312-13 (App. Div.), certif. denied, 138 N.J. 272 (1994). *This requirement in the Tort Claims Act "imposes a steep burden on a plaintiff" and "implies behavior that is patently unacceptable under any given circumstances."* Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985). In Williams v. Phillipsburg, 171 N.J. Super. 278 (App. Div. 1979), the Appellate Division differentiated palpably unreasonable behavior from garden-variety negligence applicable to private persons, by explaining:

> We conclude that the legislative intention was to allow sufficient latitude for resourceful and imaginative management of public resources while affording relief to those injured because of capricious, arbitrary, whimsical or outrageous decisions of public servants. *We have no doubt that the duty of ordinary care, the breach of which is termed negligence, differs in degree from the duty to refrain from palpably unreasonable conduct. The latter standard implies a more obvious and manifest breach of duty and imposes a more onerous burden on the plaintiff.* [Id. at 286 (emphasis supplied). Accord Ogborne v. Mercer Cemetery Corp., 197 N.J. 448, 459-60 (2009) (holding the Legislature in crafting N.J.S.A. 59:4-2 established a higher standard for the imposition of liability on a public entity by use of the requirement of palpably unreasonable conduct, trumping the ordinary negligence standard).]

The Appellate Division has also held that absent proof of actual or constructive notice of the dangerous condition, the public entity cannot have acted in a palpably unreasonable manner in failing to remedy it. See Maslo v. City of Jersey City, 346 N.J. Super. 346, 350-51 (App. Div. 2002) (also holds that in applying the test set forth in N.J.S.A. 59:4-2, "a judge should consider the declared legislative policy which shaped the application and interpretation of the Act and the [Task Force]

Commission's Comment to [that statute] . . . that '"recognize[d] the difficulties inherent in a public entity's responsibility for maintaining vast amounts of public property'"); Norris v. Borough of Leonia, 160 N.J. 427 (1999) ("the Legislature embrace[d] in the TCA . . . a standard that allows for limited or qualified liability measured only by palpably unreasonable conduct relating to the dangerous condition of improved public property"); Wooley v. Board of Chosen Freeholders, 218 N.J. Super. 56 (App. Div. 1987) ("The burden of proving that the action or inaction of the public entity is so unreasonable as to warrant a recovery under N.J.S.A. 59:4-2 rests with the plaintiff").

Like any other issue under the Tort Claims Act, whether a plaintiff can establish palpably unreasonable behavior in a given case is subject to the court's assessment on a dispositive motion and whether it can be reasonably made under the evidence presented by the plaintiff. Vincitore, 169 N.J. at 124; see also Maslo, 346 N.J. Super. at 350-51 (affirming summary judgment on the issue of palpably unreasonable under the Act; holding the issue can be decided as a question of law).

The case law under the Act makes very clear that courts are supposed to make a *realistic assessment* of the operative circumstances in a given case and whether they are immunized under the Act – either on the issue of whether the condition amounts to a dangerous condition, whether there was notice to the public entity, or the public entity's action or inaction being palpably unreasonable as a matter of law. Here, as set forth above, there is no record evidence the City was on notice that the tree had any issue or was in imminent danger of toppling over. Thus,

it is well established by the prevailing case law provided, it was not "palpably unreasonable" for the City not to address the subject tree.

iv. Numerous Tree Cases Under the Act Have Resulted in Summary Judgment for the Municipality.

Plaintiff failed to cite any "tree cases" below; however, the City offered a number with favorable holdings to municipalities. In Conner v. Township of East Brunswick, 2015 W.L. 10709691 (App. Div., April 20, 2016), plaintiff was clearing his driveway after a snowstorm when a twenty-five foot limb fell from a tree, striking and killing him. The tree was growing in the right-of-way of the Township. Bradford pear trees were commonly planted in the 1980s and 1990s for shade; it was later learned they were defective and dangerous in populated areas because mature trees had the potential to split apart causing serious or fatal injuries. The municipality claimed its recreation department managed its shade tree program and was fully compliant with the requirements set forth in the New Jersey Shade Tree and Community Forestry Assistance Act, triggering immunity under N.J.S.A. 59:4-10. The trial court granted summary judgment on this basis. The Appellate Division affirmed on the basis that the Township did not have notice that the tree in question was defective, only that Bradford pear trees in general *could* have issues, which is insufficient under the Act to establish notice. The Appellate Division also found the Township's conduct was not "palpably unreasonable":

> Plaintiff seemingly contends that since the Township was aware of the inherent dangers of Bradford Pear trees, all such trees should have been removed. We conclude that this

> contention is unreasonable. In Polzo v. County of Essex, 209 N.J. 51 . . . (2012), our Supreme Court recognized that courts do "not have the authority or expertise to dictate to public entities the ideal . . . inspection program, particularly given the limited resources available to them." Accordingly, we refuse to apply constructive notice in this case.
>
> Even accepting that the Township had constructive or actual notice, plaintiff would still have to clear the hurdle of showing the Township's action or inaction was palpably unreasonable, which he has not done.
>
> . . . .
>
> . . . The record in this case convinces us that as a matter of law the Township's actions pertaining to the tree were not palpably unreasonable. . . . Given the limited resources of municipalities, it is not within our power to impose an ideal tree inspection program on the Township. There was no reported problem of decayed Bradford Pear trees alongside Conner's home, or for that matter, in his neighborhood. [2015 W.L. at ** 5-6.]

The conclusion reached was because the Township had its Recreation Department look after its trees, and the tree in question did not give any indication of being unsound. Ibid. See also N.J.S.A. 59:4-2, -3; see also, Russi v. City of Newark, Docket No. A-1064-20, (App. Div. Feb. 17), certif. den. 252 N.J. 125 (2022) (summary judgment for municipality was proper where the plaintiff failed to meet "his burden of proving the City willfully failed to warn against a dangerous condition or acted in a grossly negligent manner. There is no proof the City knew the tree on its property was dangerous. No complaints were made to the City regarding the specific tree.")

In Polito v. Millburn Twp., 2011 W.L. 1405044 (App. Div. April 14, 2011), plaintiff was injured when a large tree branch fell on his truck. The trial court granted summary judgment to the municipal defendant because "(1) the fallen branch did not constitute a dangerous condition under N.J.S.A. 59:4-2; (2) the municipal defendant lacked notice, either actual or constructive, of the alleged dangerous condition; and (3) the municipal defendant's actions or inactions were not palpably unreasonable." Id. at *6. The Appellate Division affirmed:

> Applying the terms of N.J.S.A. 59:4-2 to the present case, we need not focus upon the elements of dangerous condition and notice; notwithstanding the substantial evidential deficiencies identified by the motion judge concerning those two elements. Instead, we rest our analysis upon the pivotal element of palpably unreasonable conduct.
>
> Even if, for the sake of argument, we construed Brown's statements and LaMana's expert report to raise genuine issues of material fact as to whether (1) the oak tree constituted a dangerous condition before the accident, and as to whether (2) the Township's received notice of that danger, we agree with the motion judge that, as a matter of law, there is insufficient proof that the conduct of the municipal defendants was 'palpably unreasonable.' On the record before us, plaintiff could not prove to a jury 'behavior that is patently unacceptable under any given circumstance.'
>
> As the judge recognized, it is unrealistic to expect that a municipality, having numerous trees on its streets, parks, and sidewalks, will be able to prevent every branch from dropping to the ground in public areas. In this case, the branch in question was green and leafy, and its distress would not have been visible when observed from ground level. Plaintiff's own expert LaMana acknowledged that the defect in the branch was latent, not patent. Plaintiff himself did not discern any danger despite his repeated trips to the job site, and even Brown did not bother to warn plaintiff about the falling branches. [Id. at ** 11.]

The City also cited Sims v. City of Newark, 244 N.J. Super. 32 (Law Div. 1990), which will be discussed *infra*.

POINT III

THE CITY IS SHIELDED BY DISCRETIONARY IMMUNITY REGARDING HOW IT ALLOCATES ITS LIMITED PUBLIC RESOURCES TO ADDRESS TREE ISSUES.

One of the immunities provided to public entities is for making discretionary decisions, particularly regarding the allocation of precious public resources in the provision of public services and operations. N.J.S.A. 59:2-3 provides in part:

> a. A public entity is not liable for an injury resulting from the exercise of judgment or discretion vested in the entity;
>
> . . . .
>
> c. A public entity is not liable for the exercise of discretion in determining whether to seek or whether to provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;
>
> d. *A public entity is not liable for the exercise of discretion when, in the face of competing demands, it determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public entity was palpably unreasonable.* Nothing in this section shall exonerate a public entity for negligence arising out of acts or omissions of its employees in carrying out their ministerial functions. [Emphasis supplied.]

In Lopez v. City of Elizabeth, 245 N.J. Super. 153 (App. Div. 1991), the Appellate Division explained the rationale for this immunity in the Tort Claims Act as follows:

> N.J.S.A. 59:2-3 particularly recognizes that government has no choice but to govern. A private person or firm that cannot afford the people and equipment to do a good job can withdraw rather than perform in a dangerous way. Government rarely has that option. It cannot withdraw from law enforcement if its police force is too small, from fire protection if its trucks are in poor repair, or from maintaining streets if it cannot afford to keep them in perfect condition. That is why high level discretionary policy decisions whether to burden the taxpayers to furnish equipment, material, facilities, personnel or services are absolutely immune. *That is also why operational governmental decisions to devote existing resources to one activity at the expense of another are immune unless palpably unreasonable.* The two adjoining statutory provisions exist to protect hard but necessary governmental choices. Often, they treat two sides of the same coin. If the municipal council decides it can afford only three road workers, the department head may have to decide whether to have them fix potholes or repaint faded lines on the roads, because there is not time for both. These two provisions recognizing and protecting government's dilemma are intended to operate in its favor, and not to enhance an injured person's case that arises from imperfect governmental choice. [Id. at 164 (citations omitted) (emphasis supplied).]

In Lopez, the Appellate Division held that where a plaintiff contends a public entity's property amounts to a dangerous condition under the Act and where the public entity defends on the basis of discretionary immunity as to the allocation of limited resources, the "plaintiff retains the burden of proving that defendant's conduct was palpably unreasonable, not only on the general issue of its conduct in protecting against the dangerous condition, but also on the perhaps narrower issue of the reasonableness of the resource allocation

determination." Lopez, 245 N.J. Super. at 161-62; accord Guerriero v. Palmer, 175 N.J. Super. 1, 6 (Law Div. 1979) (holding "[p]laintiff bears a heavy burden to persuade a court that [the Township of] Millburn's failure to allocate resources to repair dangerous sidewalks was 'palpably unreasonable.' Courts will not be quick to second-guess an exercise of such discretion in this context.")

In Williams v. Phillipsburg, 171 N.J. Super. 278 (App. Div. 1979), the Appellate Division held: "the legislative intention was to allow sufficient latitude for resourceful and imaginative management of public resources while affording relief to those injured because of capricious, arbitrary, whimsical or outrageous decisions of public servants." Id. at 286 (emphasis supplied); accord Jones v. Borough of Bogota, 2008 W.L. 4648455, * 6 (App. Div. Oct. 10, 2008) (also holding that "the duty of care, the breach of which is termed negligence, differs in degree from the duty to refrain from palpably unreasonable conduct. The latter standard implies a more obvious and manifest breach of duty and imposes a more onerous burden on the plaintiff"). This is an onerous burden for a plaintiff. Saldana v. Camden, 252 N.J. Super. 188, 198 (App. Div. 1991) ("Under N.J.S.A. 59:2-3d, the public entity is not liable for the exercise of discretion when, in the face of competing demands, it determines how to utilize resources, unless its determination is palpably unreasonable").

In Jones v. Borough of Bogota, 2008 W.L. 4648455 (App. Div. Oct. 10, 2008), the Appellate Division further: "*conclude[d] that the legislative intention was to allow sufficient latitude for resourceful*

and imaginative management of public resources while affording relief to those injured because of capricious, arbitrary, whimsical or outrageous decisions of public servants." Id. at * 6 (also holding "the duty of care, the breach of which is termed negligence, differs in degree from the duty to refrain from palpably unreasonable conduct. The latter standard implies a more obvious and manifest breach of duty and imposes a more onerous burden on the plaintiff.").

In Sims v. City of Newark, 244 N.J. Super. 32 (Law Div. 1990), plaintiffs were motorists who were injured when a limb from a decayed tree fell on their parked car. Judge Villanueva (then sitting in the Law Division) granted the City's Motion for summary judgment under the Tort Claims Act, reasoning:

> Existence of an alleged dangerous condition is not constructive notice of it. Even if this tree were decayed, this by itself may not constitute constructive notice that the top limb would break and fall on a car. However, the court need not decide the issue.
>
> . . . .
>
> Plaintiffs argue that the city should have inspected all trees bordering its streets. In the comment to N.J.S.A. 59:2-1, the Report of the Attorney General's Task Force on Sovereign Immunity, (1972) (Task Force Report) stated: "[T]he approach should be whether an immunity applies and if not, should liability attach. It is hoped that in utilizing this approach the courts will exercise restraint in the acceptance of novel causes of action against public entities. This is such a case.
>
> The city does not have financial resources or the manpower to inspect every tree bordering every street in the city. The

> city is allowed to fund and use its resources as it deems best in the face of competing demands. N.J.S.A. 59:2-3(d). . . .
>
> . . . .
>
> Tree pruning and removal, like snow removal, involves discretionary decisions at every phase of the process: what trees to select, whether to plant, prune or remove them, when and if maintenance is required and the type of maintenance. Therefore, the city has immunity when exercising judgment or discretion in its maintenance of trees, shade trees or otherwise.
>
> . . . Since plaintiffs cannot prove that it is palpably unreasonable for the city not to have a shade tree commission nor to have a staff large enough to inspect all the trees bordering every street in Newark, the city is entitled to immunity. N.J.S.A. 59:2-3(d). [Id. at 42-44.]

Like any other issue under the Act, whether a plaintiff can establish palpably unreasonable behavior in a given case is subject to the court's assessment on a dispositive motion and whether it can be reasonably made under the evidence presented by the plaintiff. Vincitore v. New Jersey Sports & Expo. Auth., 169 N.J. 119, 124 (2001); see also Maslo, 346 N.J. Super. 346, 350-51 (App. Div. 2002) (affirming summary judgment on the issue of palpably unreasonable behavior issue under the Act; holding the issue can be decided as a matter of law).

Over and above the immunity provided to public entities for discretionary decisions, the New Jersey Supreme Court has emphasized that Courts must presume that any governmental action taken by a public entity was made correctly and properly - unless

the person challenging the action has compelling evidence to the contrary and except where unconstitutional action is alleged against the public actors. This is the presumption in favor of good governance. The Court justified the rationale for this principle as follows:

> The presumptive validity of governmental action serves many important values. It acts as the most effective check on judicial interference with executive and legislative actions. *It is justified by the fact that those in government generally act within the powers granted to them and do so properly. Ultimately, it represents an assertion of faith in government, for it casts a heavy imprint of validity on any governmental action challenged by an individual.* Absent particular fundamental interests (such as freedom of speech) that may be impinged upon, *any* governmental action from the issuance of a parking ticket to the seizure of a steel plant is presumptively valid. The genius of our system of laws is that it is only a presumption, for both may be set aside upon proper proof that the presumption was unwarranted. The exception, however, is a rare one, for the presumption goes deep, and indirectly includes the assumption of any conceivable state of facts, rationally conceivable on the record, that will support the validity of the action in question. [See Southern Burlington Cty. NAACP v. Mount Laurel Tp., 92 N.J. 158, 306 (1983) (emphasis supplied).]

N.J.S.A. 59:2-1b provides: "Any liability of a public entity established by this act is subject to any immunity of the public entity and is subject to any defenses that would be available to the public entity if it were a private person." The 1972 Task Force Comment to N.J.S.A. 59:2-1 explained: "Subsection (b) is intended to insure that *any immunity provisions provided in the act or by common law will prevail over the liability provisions*. It is anticipated that the Courts will

realistically interpret both the statutory and common law immunities in order to effectuate their intended scope" (emphasis supplied).

Here, the City has a very thoughtful, logical, and sensible protocol for addressing tree issues, which is two-fold. First, the City relies upon its residents to notify it of a tree issue. Corbitt, the Assistant Superintendent of the DPW, certified that residents call with all sorts of issues regarding trees and, whenever the City receives such a complaint, the DPW responds to and assesses same in a timely manner. Second, the City relies upon its own employees: police officers, fire fighters and DPW employees who constantly traverse through the City around the clock; they will alert and notice the DPW to any tree issues.

DeHais explained at his deposition that the City has thousands of trees, and only he, three other individuals, and a truck are devoted to addressing these issues. DeHais further testified that unless a homeowner complains about a tree, the City does not have the resources to have a regular tree maintenance schedule. However, when a homeowner does call, DeHais made it clear this will generate a work order, and the matter is then attended to in the normal course of events. Corbitt reasoned the City takes this approach because it is the most prudent, efficient and economical manner to address the maintenance and/or removal of trees. Thus, there is nothing about the City's approach to dealing with its tree issues that is palpably unreasonable in this matter. Again, until this matter came to light, the City was unaware that there was any issue at all with the subject tree. Accordingly, summary judgment was proper as to the City.

POINT IV

THE TORT CLAIMS ACT MUST BE STRICTLY CONSTRUED BY THE COURTS IN FAVOR OF PUBLIC ENTITIES AND PUBLIC EMPLOYEES, SUCH AS THE CITY.

The Act must be strictly construed, Brooks v. Odom, 150 N.J. 395, 402 (1997); and courts may not diminish a legislatively intended immunity by inventive judicial interpretation. Civalier v. Estate of Trancucci, 138 N.J. 52, 68 (1994). The New Jersey Supreme Court has stated: "We do not intend to become, and in the past we have not been, advocates of compensation for injured parties in conflict with the legislative will. We have sustained the legislative immunities in the most tragic settings." Ibid. The Court has also stated that the Tort Claims Act is not an insurance plan; it was designed to restore sovereign immunity not to assure compensation to injured victims. Fielder v. Stonack, 141 N.J. 101, 113 (1995). Thus, with respect to the Act, the Court has emphasized: "We do not seek a means of finding compensation in an immunity statute any more than we seek a means of finding immunity in a compulsory insurance statute." Id. at 116. See e.g. Levin v. County of Salem, 133 N.J. 35 (1993); (plaintiff was diving from a bridge into a river below when he struck a submerged sand bar, rendering him a quadriplegic; the bridge was used as a well-known diving platform; the Law Division granted summary judgment under the Act, and the Appellate Division and Court affirmed); Fleuhr v. City of Cape May, 159 N.J. 532 (1999) (plaintiff was an experienced surfer who broke his neck surfing in a hurricane; plaintiff's liability expert faulted the municipality's lifeguards for not closing the beach under the circumstances and for failure to warn; the Law Division granted summary judgment, the Appellate

Division reversed, the Court then affirmed the Law Division's grant of summary judgment to the municipality under the Act).

Accordingly, the fact that Plaintiff may have been severely injured, as tragic as that may be, does not alter or skew a decision in favor of finding a municipality liable. See Parsons v. Mullica Tp. Bd. of Ed., 440 N.J. Super. 79, 97 (App. Div. 2015) (reversing the Law Division failure to grant summary judgment to the public entity under the Act; holding that notwithstanding plaintiff's loss of vision in an eye, "the judiciary's focus must be 'on the meaning of the statute,' despite "where the facts 'involve a profound tragedy' and 'evoke sympathy'), aff'd, 226 N.J. 297, 308-09 (2016) ("In 1972, the Legislature enacted the TCA to serve as 'a comprehensive scheme that "seeks to provide compensation to tort victims without unduly interfering with governmental functions and without imposing an excessive burden on taxpayers"'"; "The TCA's immunities are absolute and any ambiguities must be resolved in favor of immunity"). Thus, the City respectfully urges this Court to affirm summary judgment on its behalf.

POINT V

THE LAW DIVISION PROPERLY DENIED PLAINTIFF'S MOTION TO REOPEN THE DISCOVERY PERIOD.

A. Plaintiff Failed to Comply With the Applicable Court Rule.

In Bender v. Adelson, 187 N.J. 411 (2006), the New Jersey Supreme Court specifically addressed the spirit and purpose of Best Practices,

explaining how R. 4:17-7 was amended to require that amendments to "interrogatories must be served no later than 20 days prior to the end of the discovery period. . . . Amendments may be allowed thereafter *only if the party seeking to amend certifies therein that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date.*" The Court went on to conclude that it would not disturb the trial court's ruling to bar the admission of discovery because "defendants failed to show 'due diligence,' Rule 4:17-7, or 'exceptional circumstances,' Rule 4:24-1(c)" after the defendants submitted three disputed expert names and reports in violation of two mandatory court orders that expressly precluded the submission of experts after the dates specified and after discovery had already been extended twice . . ..."

Bender is not an aberration. It is fully consistent with a number of other cases dealing with requests for additional discovery not made in accordance with the Court Rules. See also Szalontal v. Yazbo's Sports Café, 183 N.J. 386 (2005) ("we affirm the judgment of the Appellate Division. In doing so, we reject plaintiff's claim that he was prejudiced by the application of our "Best Practices" which denied plaintiff leave to extend the discovery deadline and barred his late-tendered liability expert from testifying at trial"); accord O'Donnell v. Ahmed, 363 N.J. Super. 44 (Law Div. 2003) (addressing late provided expert reports without authorization, stating: "It is presumptuous to decide to reopen discovery on one's own without consent of adverse counsel or the court. The arrogation of such authority to oneself is

not consistent with the spirit of our Rules of Court. Counsel should refrain from such conduct in the future"); O'Brien v. Mountainside Hosp., 2017 W.L. 4582823 (App. Div., October 16, 2017) (plaintiff filed a late expert report after discovery closed and a trial date was set and without permission of the trial court; the Appellate Division affirmed the trial court's grant of summary judgment notwithstanding the late provided expert report); Coffey v. Bechemin, 2007 W.L. 419641 (App. Div., February 9, 2007) (plaintiff submitted four new supplemental expert reports in opposition to defendant's summary judgment motion; the trial court refused to consider them because plaintiff did not establish exceptional circumstances as required by R. 4:24-1(c) and granted defendant's summary judgment motion; the Appellate Division affirmed).

Here, Plaintiff did not comply with the discovery rules post-Best Practices, and there was nothing about Plaintiff's motion to reopen discovery that constituted exceptional circumstances. See O'Donnell, 363 N.J. Super. at 51 ("It is time we define examples of what constitutes exceptional circumstances and what does not"; "The disclosure of a disruption of one's office by partners or associates having health problems or leaving, especially if they had responsibilities for the matter before the court would probably be persuasive. The disclosure of personal sudden health problem of counsel would be such an example as well. Death of a family member; injury to a family member requiring the attorney to attend more to that family member; death or health problems of the client; death or health problems of a key witness requiring further discovery to develop information caused by the loss

of the witness are further examples of exceptional circumstances"). To the exact opposite, Plaintiff's motion papers to the Law Division smacked of circumstances reflecting the failure to diligently and timely address routine discovery issues in a Track II case such as this. Thus, the trial court properly closed discovery and did not abuse its discretion.

B. Plaintiff Did Not Have the Authority/Impunity to Blatantly Disregard the Law Division's Numerous Orders Regarding Discovery Deadlines; He Must Be Held to the Same Standard as the City Which Fulfilled Its Discovery Obligations in Timely Fashion.

The Court Rules contain a very clear and comprehensive protocol regarding the taking of discovery in civil matters. See Chapter 3 of the Court Rules, R. 4:10-1 to R. 4:25-7. In this regard, the Court Rules explain when litigants in a case can consent to extend the discovery deadlines. Except for a 60-day extension at the outset of the case, any consent thereafter is not binding on the Court, but merely a factor to be considered. However, once an arbitration or trial date is set, consent by the litigants is no longer an issue or factor. Here, because Plaintiff moved to reopen discovery after his case was no-caused at arbitration, Plaintiff had to meet the requirement of exceptional circumstances. See R. 4:24-1. The Court Rules further make clear that litigants in a civil case cannot simply disregard Court discovery orders with impunity, and doing so can come with a variety of very negative consequences for those who do, including an award of attorney's fees caused by the failure to comply or worse. See R. 4:23-2; see also R. 1:10-1 to -3.

For unknown reasons, Plaintiff, at the very least, is guilty of laches and blatant neglect in his failure to properly prosecute his case in discovery by timely providing the City with his expert reports, and then seek a fifth (5th) discovery extension to cure these deficiencies after he was no-caused at arbitration and the City had moved for summary judgment. Plaintiff was afforded an extra year of discovery from the trial court (via four (4) discovery extensions) and had more than ample time to have his case ready for arbitration and/or trial. Plaintiff's conduct is patently inexcusable. See Lavin v. Board of Ed., 90 N.J. 145 (1982) (explaining that "Pomeroy defines laches as 'such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operat[ing] as a bar in a court of equity'"); accord Paul A. Rowe, Esq., Guidebook to Chancery Practice in N.J. (3rd ed. 1991), at 31-37.

Indeed, Plaintiff has not cited any authority that would permit him to reopen discovery on the facts and circumstances of this matter. See Paragon Contrs., Inc. v. Peachtree Condo. Ass'n, 202 N.J. 415, 424-25 (2010) (parties are presumed to know the law and are obliged to follow it; all persons are *conclusively presumed* to know the law, statutory and otherwise); accord State v. Moran, 202 N.J. 311, 320 (2010) (ignorance of the law will not excuse anyone). The City completed its discovery in a timely fashion and was more than reasonable in conducting meet and confers with Plaintiff to resolve outstanding discovery disputes. However, Plaintiff's behavior in ambushing the City (and disregarding

numerous Orders of the trial court) with last minute, untimely expert reports when he had so many opportunities for additional discovery cannot be countenanced or cured by an application to extend the discovery period that does not satisfy the standards under the Court Rules.

C. Without Expert Testimony, Plaintiff's Case Was Evidentially Deficient and Warranted Summary Judgment.

It is well-settled as a matter of evidential jurisprudence in New Jersey that expert testimony is required if the issue to be decided by the jury is so esoteric that jurors of common judgment and experience cannot form a valid judgment. Said differently, expert testimony is justified when the average juror is relatively helpless in dealing with a subject that is not a matter of common knowledge. See e.g. Hake v. Manchester Tp., 98 N.J. 302, 313-14 (1985); State v. Walker, 216 N.J. Super. 39, 45 (App. Div. 1987); see also Guzzi v. Jersey Central Power & Light Co., 36 N.J. Super. 255, 261-62 (App. Div. 1955) (one of the central objects of expert testimony is to impart to the jurors *supplemental* knowledge beyond the range of their own); Ferlise v. Eiler, 202 N.J. Super. 330, 333-34 (App. Div. 1985) (a proponent of expert testimony must demonstrate first that the proffered testimony will enhance the knowledge and understanding of the lay jurors with respect to other testimony of a special nature normally outside of the usual lay sphere).

Plaintiff's expert reports should have been barred by the trial court; however, the Court elected not to strike same affording Plaintiff every opportunity and inference to defeat summary judgment. Plaintiff

still failed to meet his burden even with these reports in play. Four (4) separate discovery Orders, each of which required Plaintiff to produce his expert reports by a date certain, were ignored by Plaintiff; he then provided same beyond the court-ordered deadlines for same. On September 25, 2023, Plaintiff provided the expert report of Miller, an arborist, and also an expert report by Dillon Turner ("Turner") and Howard Altschule ("Altschule"), purported weather experts. On October 11, 2023, Plaintiff provided an expert report by Bahman Izadmehr ("Izadmehr"), a physical engineer. Finally, on October 23, 2022, twelve days after discovery had ended, Plaintiff provided an expert report by Kristin Kucsma, M.A., an economist ("Kucsma").

On October 13, 2023, the case was arbitrated, and despite his two late-provided expert reports, Plaintiff's case was still issued an award finding that he had "No Cause For Action." Plaintiff then contended the Defense gave him blanket permission to provide expert reports at any time in disregard of the trial court's prior discovery orders. In reality, Defense Counsel stated it would not raise an objection provided Plaintiff's reports were received with ample time for the Defense to respond to same. The discovery end date was October 11, 2023. Miller's, Turner's, and Altschule's reports were served two (2) weeks <u>before</u> discovery closed; Izadmehr's report was served <u>on the last day</u> of discovery; and Kucsma's report was served nearly two (2) weeks <u>after</u> discovery closed. It is not acceptable under any circumstance to sandbag a party with expert reports a litigant had years to procure. Moreover, if Plaintiff needed additional time, he could have drafted a Consent

Order or petitioned the Court for a revised Scheduling Order; however, he did neither.

Plaintiff's expert reports should have been barred and, in the absence of same, further warrant dismissal of these proceedings as to the City. The Law Division properly denied Plaintiff's ability to reopen the discovery period as a tactic to cure his discovery deficiencies. As Plaintiff concedes, in the absence of his requested discovery extension, the aforementioned reports are time-barred and not properly part of the record further warranting summary judgment as a matter of law. Regardless, no amount of additional discovery would cure the fatal defects in the claims Plaintiff asserts against the City.

CONCLUSION

For all of the reasons set forth above, Defendant, City of Passaic, respectfully requests this Honorable Court deny Plaintiff's appeal in its entirety and affirm summary judgment on behalf of the City.

PRB ATTORNEYS AT LAW, LLC

/s/ Peter P. Perla, Jr.

By: ______________________________

Peter P. Perla, Jr, Esq.

Dated: August 22, 2024

FILED, Clerk of the Appellate Division, September 09, 2024, **A-002573-23**

Superior Court of New Jersey

Appellate Division

Docket No. A-002573-23 T1

AMADOR CASTRO, *Plaintiff-Appellant,* vs. STATE OF NEW JERSEY, COUNTY OF PASSAIC, PASSAIC COUNTY ROAD DEPARTMENT, CITY OF PASSAIC, CITY OF PASSAIC PUBLIC WORKS, CONGREGATION TIFERETH ISRAEL, ABC COMPANIES 1-10 (names for fictitious entities), JOHN DOES 1-10 (names for fictitious individuals), ABC COMPANIES 11-20 (names for fictitious entities) and JOHN DOES 11-20 (names for fictitious individuals), *Defendants-Respondents.*	:	CIVIL ACTION ON GRANT OF MOTION FOR LEAVE TO APPEAL FROM THE INTERLOCUTORY ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY Docket No. PAS-L-003621-21 Sat Below: HON. VICKI A. CITRINO, J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

JACOBY & MEYERS, LLP
Attorneys for Plaintiff-Appellant
550 Broad Street, Suite 608
Newark, New Jersey 07102
(973) 645-6590
ssalzone@jmlawyer.com

On the Brief:
SAMANTHA R. SALZONE, ESQ.
Attorney ID# 422902023

Date Submitted: September 9, 2024

COUNSEL PRESS (800) 4-APPEAL • (330736)

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PROCEDURAL HISTORY

Plaintiff/Appellant relies upon the Procedural History included in his original brief.

STATEMENT OF FACTS

Plaintiff/Appellant relies upon the Statement of Facts included in his original brief.

LEGAL ARGUMENT

POINT I

DEFENDANT, CITY OF PASSAIC IS NOT IMMUNE FROM LIABILITY (Pa1-7)

The New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to 12-3, specifies the circumstances under which a public entity can be held liable for injuries to another. Although generally immunity for public entities is the rule and liability is the exception, one relevant exception is found in N.J.S.A. 59:4-2 which provides:

> a public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which has occurred 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.

> Public entities may be liable for injuries caused by a dangerous condition in the property of a public entity. Wymbs v. Township of Wayne, 163 N.J. 523,531, 750 A.2d 751 (2000).

In addition, in order to impose liability on a public entity pursuant to said Section, a plaintiff must establish that the entity's conduct was palpably unreasonable. Vincitore v. New Jersey Sports and Exposition Authority, 169 N.J. 119,125, 777 A.2d 9 (2001). Defendant City of Passaic argues that liability should not be applied to them in this matter. However, plaintiff has argued that a dangerous condition of the tree root existed in this matter and was the cause of plaintiff's injuries which were reasonably foreseeable. Plaintiff continues to argue that a decision has not been rendered as to whether defendant City of Passaic created the dangerous condition of the shaved tree root and subsequent tree falling. Plaintiff has provided uncontested evidence that the defendant City of Passaic admitted to owning the tree which caused plaintiff's injuries. Defendant City of Passaic as the owner had a duty to maintain subject tree. Plaintiff further argues that the Department of Public works will either issue permits needed to work on the tree or determine if the work can be done around the tree root or even shave the tree roots themselves. If they are the ones to shave the root or working with the outside company hired to work on the tree, a permit will not be issued as established in the deposition of Guillermo DeHais, representative

for the City of Passaic. "No, if they're working with us, they don't need a permit if they're working with us. We work hand in hand with them." (Pa172-193, Tr 26:5-7). Whether the defendant City of Passaic had notice or not is not the only issue at hand, but rather the issue is defendant caused and created the condition. The lower court has continued to review this case in the light of subsection b of the New Jersey Tort Claims Act, but plaintiff argues that defendant created the dangerous condition. Defendant City of Passaic is not immune from liability under the New Jersey Tort Claims Act if they caused and created the dangerous condition of the shaved tree root. "Rather the approach should be *whether* [***11] *an immunity applies and if not, should liability attach*." Weiss v. N.J. Transit, 128 N.J. 376, 383, 608 A.2d 254 (1992). Despite defendant's argument to the contrary, no immunity applies to defendant City of Passaic and therefore, liability should attach.

The final prong of the analysis which would impose liability on a public entity is the determination as to whether the action the entity took to protect against the condition or the failure or usage of funds to take such action was palpably unreasonable. Garrison v. Twp. of Middletown, 154 N.J. 282, 712 A.2d 1101 (N.J. 1998). Palpable unreasonableness is a question of fact. Vincitore, 169 N.J. at 130. Palpably unreasonable conduct is more than mere negligence but does not

necessarily mean grossly or extraordinarily negligent. Schwartz v. Jordan and Public Service Electric & Gas, 337 N.J. Super. 550,555,767 A.2d 1008 (App.Div. 2001). The inquiry is whether no prudent person could approve of the Governmental entity's action or inaction. Id. Since the plaintiff used the roadway with due care in a manner that was reasonably foreseeable, and the dangerous condition proximately caused his injuries, it was palpably unreasonable for the City of Passaic defendant, which had notice of the dangerous condition, not to take any action in accordance with its protocol and allocated funds to correct the dangerous condition. Thus, in reversing the defendant New Jersey Transit's grant of summary judgment, the Vincitore Court determined that a reasonable fact finder could have concluded that the railroad crossing exposed the objectively reasonable member of the general public to a substantial risk of injury. Id. at 129. Therein, decedent, who raced horses at various tracks, crossed railroad tracks that ran across a race track grounds, owned by defendant Authority, in order to reach the stables. Because the track was closed for the off season, they were not guarded by flashing lights or crossbucks. However, the Authority had installed sliding metal gates, which decedent drove through. Once on the tracks, an approaching train collided with Vincitore's car, and he died from his injuries. Vincitore, 169 N.J. at 122.

The Vincitore Court determined that decedent's activity was reasonable as he was familiar with the operation of the gates at the crossing and could have

approached the crossing and interpreted the open gates to mean that it was safe to cross. Vincitore, 169 N.J. at 129. The Court concluded that the railroad crossing exposed the objectively reasonable member of the general public to a substantial risk of injury. Additionally, the Court found that since the Authority knew of the risk, knew that having guards to operate the gate eliminated that risk and knew that people who ordinarily traversed the crossing during the racing season would have believed the open gate meant it to be safe, that their conduct in not eliminating the dangerous condition was palpably unreasonable. Id. at 130.

Again, in reversing defendants' grant of summary judgment, the Roe Court found that there were general factual issues regarding whether the defendant was liable under N.J.S.A 59:4-2 for a dangerous condition of property it owned. Therein, the infant plaintiff was assaulted after proceeding through a gate in a fence on property controlled by the defendant, which was a commonly used entrance to a nearby park. Since the gate had been opened for years and was continuously broken, the defendant bolted it open to prevent users from damaging it. Roe by M.J. v. New Jersey Transit Rail Operations, Inc., 317 N.J. Super. 72, 721 A.2d 302 (App. Div. 1998).

The Roe Court found that by bolting the gate open and inviting the public to use it, defendant New Jersey Transit substantially and knowingly increased the risk that persons accepting the invitation would encounter the dangers lurking just

beyond the gate. Id. at 80. The Court further reasoned that the dangerous condition of the property itself enhanced plaintiff's exposure to the injuries she sustained and that the actions defendant took were palpably unreasonable in view of the relatively minor expense and inconvenience of either relocating the gate or keeping it locked. Id. at 79,81.

In the present case, it is apparent that there are significant questions of fact which preclude summary judgment. Like the Vincitore and Roe plaintiffs, the plaintiff used the roadway with due care. Further, like the Vincitore and Roe plaintiffs, it is reasonably foreseeable that defendant had actual and/or constructive notice that this roadway and sidewalk adjacent to the tree would continue to be used in this manner. Defendant City of Passaic cannot claim that it did not know of a defect when it shared responsibility in inspecting the construction of the sidewalk and is responsible for the cutting/shaving of the tree roots. Additionally, the dangerous condition of the tree root, like the property in the Vincitore and Roe matters, was apparent. However, the defendant herein did not take any action to correct it.

Further, like the Vincitore and Roe plaintiffs, it is reasonably foreseeable that defendant had actual and/or constructive notice that this roadway and sidewalk adjacent to the tree would continue to be used in this manner. Defendant City of Passaic cannot claim that it did not know of a defect when it had a responsibility to

inspect the construction of the sidewalk and was the only entity permitted to shave the tree roots.

> "Okay. No. If the sidewalk - if it was an issue, the homeowner or the company or whatever, if they wanted to do the sidewalk, they would have to get a permit from the engineer. Then after, then they would contact DPW to go check it out, check out the roots or anything like that. And then either we take down the tree or they can work around the roots. We might shave it down a little bit, maybe an inch or so. But besides that, they have to call the DPW if there's a tree in front of it." Pa172-193, Tr 36:3-13

Additionally, the dangerous condition of the tree root, like the property in the Vincitore and Roe matters, was apparent. However, the defendant herein did not take any action to correct it.

POINT II

DEFENDANT CITY OF PASSAIC IS NOT SHIELDED BY DISCRETIONARY IMMUNITY (Pa1-7)

Defendant City of Passaic argues that they are shielded by discretionary immunity to allocate their resources as it deems best. In Sims v. City of Newark, 244 N.J. Super. 32, 36, 581 A.2d 524 (1990), the Sims, plaintiffs "were sitting in a car parked at the curb on the southwest side of Nairn Place near the intersection of Clinton Avenue in Newark when a tree limb fell onto the roof of the car owned by Sarah Sims, damaging the car and causing personal injuries to both plaintiffs." Sims v. City of Newark, 244 N.J. Super. 32, 36, 581 A.2d 524 (1990). This case centered on whether the defendant

City was palpably unreasonable in not inspecting every tree in its city. However, the case sets forth the steps a plaintiff must undergo to prove liability should be imposed upon a municipality.

In the Sims case, the plaintiff was unsuccessful in their claim and the decision was based upon the fact that "the city does not have financial resources or the manpower to inspect every tree bordering every street in the city. The city is allowed to fund and use its resources as it deems best in the face of competing demands." Id. The plaintiff must show that the City acted in a palpably unreasonable manner. "Specifically, that section provides that a municipality may be held liable for a dangerous condition on its public property, regardless of the cause, but only if the failure to correct that condition is palpably unreasonable." Norris v. Borough of Leonia, 160 N.J. 427, 441, 734 A.2d 762 (N.J. 1999). Defendant City of Passaic, has asserted that the Department of Public Works does not handle mere sidewalk repairs, Mr. DeHais established the fact that when a sidewalk repair involved a tree root, the Department of Public Works is involved. (Pa172-193, Tr 22:2-3). The tree root was shaved down, the only entity to admit they shave tree roots is the defendant City of Passaic. Mr. DeHais furthered explained "But to me, that looks like a main root, and the whole tree – I would have took the whole tree down before they did the sidewalk." (Pa172-193, Tr 48:23-25-49:1). To shave a main tree root and fail

to correct the condition or remove the tree was palpably unreasonable and therefore, no discretionary immunity should be applied to the actions of the defendant City of Passaic.

POINT III

PLAINTIFF'S EXPERT REPORT IS NOT AN INADMISSIBLE NET OPINION (Pa1-7)

Under Rule 702, expert testimony will be admissible only if it is both relevant and reliable. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). "The proponent of expert evidence must demonstrate its admissibility by a preponderance of the evidence. *Id.* at 592 n. 10. To satisfy these elements of reliability and relevance, Rule 702 requires that: (1) the expert must be qualified to render his or her opinion; (2) the scientific process or methodology employed by the expert in rendering his opinion must be reliable; and (3) the expert's testimony must assist the trier of fact. See Pineda v. Ford Motor Co., 520 F.3d 237, 244 (3d Cir. 2008). In short, an expert's conclusion must meet the "trilogy of restrictions [*5] on expert testimony: qualification, reliability and fit." Schneider v. Fried, 320 F.3d 396, 404 (3d Cir. 2003)." Gonzalez-Lopez v. Perfect Trading, Inc., 2024 U.S. Dist. LEXIS 60277, *4-5. Plaintiff's expert arborist Jason C. Miller provided an admissible narrative report regarding the tree which caused plaintiff's injuries. First, Jason C. Miller is a qualified

expert. He is a "Registered Consulting Arborist®, a Board-Certified Master Arborist®, and a New Jersey Licensed Tree Expert. I am a member in good standing of the American Society of Consulting Arborists, the International Society of Arboriculture (ISA), two local chapters of the ISA, as well as the Arboricultural Research and Education Academy. Additionally, I have been involved in the field of arboriculture for 30 years." (Pa249-266). Mr. Miller wrote his analysis, opinions, and conclusions within a reasonable degree of scientific and arboricultural certainty and they were developed in accordance with commonly accepted arboricultural practices. (Pa249-266). Finally, Mr. Miller's opinion is necessary to help the trier of fact understand the cause of the tree's decay which then resulted in it falling and injuring plaintiff. While Mr. Miller may have never examined the subject tree in person, he was able to examine photographs and documents taken resulting from this incident. Thus, Mr. Miller's expert report is not an inadmissible net opinion, rather is a valid expert report that should be considered by the Court in their decision and was considered by the lower court.

CONCLUSION

Based upon the foregoing and plaintiff/appellant's original brief, plaintiff/appellant respectfully requests that this Honorable Appellate Court reverse the January 19, 2024 Order granting defendant/respondent City of

Passaic's Motion for Summary Judgment, reverse the February 21, 2024 Order denying plaintiff/appellant's Motion to Reopen and Extend Discovery and reverse the March 1, 2024 Order denying plaintiff/appellant's Motion for Reconsideration.

Dated: September 9, 2024

Respectfully submitted,

JACOBY & MEYERS, LLP
Attorneys for Plaintiff/Appellant

By: */s/ Samantha R. Salzone*
Samantha R. Salzone, Esq.