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MADELYNE FIGUEREDO, EDUARDO FIGUEREDO (husband), Appellants, v. TOWNSHIP OF UNION; NATC DONUTS INC. d/b/a DUNKIN' DONUTS; JOHN DOE 1-10 (a fictitious name), RICHARD ROE 1-10 (a fictitious name), ABC CORPORATION 1-10 (a fictitious corporation), XYZ CORPORATION 1-10 (a fictitious corporation) Respondents.	SUPERIOR COURT OF NEW JERSEY UNION COUNTY, LAW DIVISION Docket No.: A-002749-22 Civil Action **AMENDED BRIEF BY APPELLANTS IN SUPPORT OF APPEAL** Sat Below: Hon. Daniel R. Lindemann, J.S.C. Docket No.: UNN-L-2808-20

BRIEF ON BEHALF ON APPELLANTS, MADELYNE FIGUEREDO AND EDUARDO FIGUEREDO, IN SUPPORT OF THE APPEAL FROM THE ORDERS DATED NOVEMBER 4, 2022 AND MARCH 28, 2023 OF HONORABLE DANIEL R. LINDEMANN, J.S.C.

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STATEMENT OF PROCEDURAL HISTORY

On August 31, 2020, Appellants filed a Complaint against the Township of Union and NATC Donuts Inc., d/b/a Dunkin' Donuts, in the Superior Court of New Jersey, Union County. (Pa35-47)

On October 13, 2020, Respondent NATC Donuts Inc., d/b/a Dunkin' Donuts (hereinafter "Respondent NATC") filed an Answer to this Complaint. (Pa48-63)

On November 4, 2020, Respondent Township of Union (hereinafter "Respondent Township") filed a Motion for Summary Judgment against Appellant, in lieu of an Answer, which was withdrawn on April 20, 2021.

On November 6, 2020, Respondent Township filed a Motion for Summary Judgment against Respondent NATC, in lieu of an Answer, which was denied on December 18, 2020.

On May 10, 2021, Respondent Township filed an Answer to this Complaint. (Pa278-295)

On September 9, 2022, Respondent Township filed a Motion for Summary Judgment. (Pa64-277)

On September 27, 2022, Respondent NATC filed a Cross-Motion for Summary Judgment.

On October 11, 2022, Appellant filed oppositions to the Motion and Cross-Motion for Summary Judgment. (Pa296-320)

On October 17, 2022, Respondent Township filed a reply brief to Appellant's opposition.

On November 4, 2022, oral argument was heard on Respondent Township's Motion for Summary Judgment and Respondent NATC's Cross-Motion for Summary Judgment.[1] (T1)

On November 16, 2022, an Order was entered granting Respondent Township's Motion for Summary Judgment and Denying Respondent NATC's Cross-Motion. (Pa1-19)

On January 20, 2023, Appellant filed a Motion for Partial Summary Judgment as to Respondent NATC.

On February 7, 2023, Respondent NATC filed a Cross-Motion for Summary Judgment and opposition to Appellant's Motion. (Pa321-419)

On March 13, 2023, Appellant filed a reply brief to Respondent NATC's opposition. (Pa420-435)

[1] 1T – Transcript of November 4, 2022 Oral Argument, previously submitted to this Court.

On March 17, 2023, oral argument was heard on Appellant's Motion for Partial Summary Judgment and Respondent NATC's Cross-Motion for Summary Judgment.[2] (T2)

On March 28, 2023, an Order was entered denying Appellant's Motion for Partial Summary Judgment and granting Respondent NATC's Motion for Summary Judgment. (Pa20-34)

STATEMENT OF FACTS

The following facts were alleged in Appellant's Complaint (Pa35-47):

On or about September 6, 2018, Appellant, Madelyne Figueredo was a lawful business invitee of the Dunkin' Donuts property located at 1982 Morris Avenue, Township of Union, County of Union, State of New Jersey. (Pa35-47) Appellant had parked her vehicle in a Dunkin' Donuts marked spot and was proceeding to walk from her vehicle towards the Dunkin' Donuts when she was caused to trip/slip and fall and sustain serious and permanent injuries which ultimately required surgery. (Pa35-47, Pa236-239) Respondent Township of Union was the owner of the property and Respondent NATC Donuts was the commercial tenant of the property. (Pa35-47, Pa206-225) Respondents carelessly, negligently and/or recklessly maintained certain areas of the

[2] 2T – Transcript of March 17, 2023 Oral Argument, previously submitted to this Court.

premises in a negligent matter so as to allow the parking lot to be damaged, deteriorated, ill-repaired, ill-maintained, contain cracks, crevices, holes, and other situations which presented and posed an unreasonably dangerous and hazardous condition, such that same became and was unsafe to Appellant, Madelyne Figueredo. (Pa1-19, Pa35-47, Pa191-192, Pa241-251,1T)

Appellant was caused to undergo treatment and ultimately surgery for her injuries as a result of this accident. (Pa236-239) Appellant's treating doctor, Dr. Bellapianta, performed the surgery on her ankle, and also provided an expert report. Dr. Bellapianta's report outlines Appellant's injuries to her right knee and her left ankle, including the surgery to her ankle, and he specifically opines that those injuries are permanent in nature and are directly and causally related to Appellant's fall of September 6, 2018. (Pa314-320) Further, Dr. Bellapianta's report states that Appellant's body parts have failed to return to normal function, nor will they return to normal function with continued care and treatment. (Pa314-320)

Respondent NATC Donuts owed a duty to Appellant, as a lawful invitee, to properly maintain the premises for their customers and to provide safe ingress and egress from their designated parking spots to their business. (T2, Pa20-34, Pa207-225) Respondent NATC Donuts had designated parking spots which were allocated in the lease for the use of Dunkin' Donuts customers. (Pa207-

225) The Lease includes 971 square feet of retail commercial real estate, plus ten (10) parking spaces which are considered the "Leased Premises" in the Lease. (Pa207-225) The lease states that "Tenant shall be responsible for day-to-day maintenance and repairs to the Premises..." which includes the 10 designated parking spaces. (Pa207-225)

This case encompasses claims for negligence, carelessness and recklessness of Respondents NATC and Township. (Pa35-47) The decision of the Court below in deciding the Motions for Summary Judgment did not properly take into account the facts alleged and give liberality in reviewing the Complaint, transcripts and other evidence to ascertain actionability. (T1, T2, Pa1-34)

LEGAL ARGUMENT

STANDARD OF REVIEW

The New Jersey Supreme Court in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995), held that pursuant to R. 4:46-2, a court should grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." The Brill

Court stated that, "[b]y its plain language, Rule 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a "genuine issue as to any material fact challenged." Id. at 529.

A determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. Id. at 540.

This case as set forth herein, the substantial factor test applies. The court in Evers v. Dollinger, 95 N.J. 399 (1985), articulated the substantial factor test in increased-risk cases, "when there is evidence that a defendant's negligent act or omission increased the risk of harm to one in the plaintiff's position and that the harm was in fact sustained, it becomes a question for the jury as to whether or not that increased risk was a substantial factor in producing the harm."

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 549 (citing Anderson v. Liberty Lobby, Inc., 477 U.S.

242, 248 (1986)). Summary judgment should only be granted, if the evidence "is so one-sided that one party must prevail as a matter of law […]" Id. at 540.

R. 4:49-2, which governs all motions to alter or amend a judgment or order, states, "the motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred." These controlling decisions can be shown the court by citations to the applicable case law, statutes, or regulations.

In Cummings v. Bahr, 295 N.J. Super. 374, 384 (App.Div. 1996), this language from Rule 4:49-2 was held to define the parameters of when a trial court should grant a motion for reconsideration. The Appellate Division discussed the grounds upon which a court may grant a motion for reconsideration. The first ground is that the Court has based its decision on an "incorrect or irrational basis," i.e., that there is controlling case law overlooked or the court has misapplied the case law. In Morey v. Wildwood Crest Borough, 18 N.J. Tax 335, 341 (App. Div. 1999), the Court stated, "generally, counsel should use reconsideration motions to acquaint the court with controlling decisions counsel believes the court has overlooked or on which it has erred." The second ground is that the Court obviously did not consider or failed to appreciate the probative value of competent evidence. Cummings v Bahr,

supra. Reconsideration is a matter to be exercised in the trial court's sound discretion. Capital Fin. Co. v. Asterbadi, 398 N.J.Super 299, 310 (App. Div. 2008), certif .den. 195 N.J. 521 (2008).

An appellate court uses the same standard as the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). It decides first whether there was a genuine issue of fact. If there wasn't, it then decides whether the lower court's ruling on the law was correct. Walker v. Alt. Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987). And if a judge rules on a summary judgment motion, and also has to decide whether certain evidence is admissible on the motion, it must first decide whether the evidence is admissible, then decide whether the motion should be granted. When the appellate court reviews those decisions, it also reviews the two decisions separately: the evidentiary ruling under the abuse of discretion standard, and the legal conclusions that support the summary judgment ruling de novo. Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384-85 (2010).

POINT I
THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO RESPONDENT TOWNSHIP OF UNION AS THERE WAS SUFFICIENT INFORMATION TO DEMONSTRATE A GENUINE ISSUE OF MATERIAL FACT OF A DANGEROUS CONDITION. (1T, Pa1-19)

Appellant contends that the claims alleged as to a dangerous condition were not properly taken into account by the Trial Court.

The New Jersey Tort Claims Act (Act), N.J.S.A. 59:4-1a, defines a "dangerous condition" on the property of a public entity as "a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." It is obvious in this case, that the parking lot was meant to be walked on and a damaged, deteriorated parking lot with cracks, crevices and potholes would create a substantial risk of injury this making it a dangerous condition as defined by the Tort Claims Act (hereinafter "TCA"). The Trial Court stated that it "is unable to find within the photographs anything more than small cracks or uneven surfaces in the parking lot". (Pa9) While many courts have determined that not every defect is actionable under the TCA, that does not mean that there is no defect that is actionable. The Court in Scheps v. Twp. of Delran "determined that it was up to the jury to determine whether the pothole was a dangerous condition". Scheps v. Twp. of Delran, DOCKET NO. A-0142-18T3, 6 (App. Div. Aug. 23, 2019). In the Scheps case, the pothole was alleged to have violated the American Society of Testing Materials (ASTM) and New Jersey Department of Transportation's (NJDOT) roadway standards, which require roadways to remain flush and even with adjacent surfaces.

The Trial Court in the matter erroneously made a determination as to the dangerousness of the condition when it should have been a matter for a jury to determine. As it was found that there were cracks and uneven surfaces in the parking lot as viewed in the pictures, it created a material question of fact as to the dangerousness of such condition of the parking lot.

Further, the Court stated that "Merely stating that a pothole was in the general vicinity of the parking lot and yet unidentifiable by concededly accurate photographs is not enough to demonstrate a genuine issue of material fact on this issue." (Pa9) This is incorrect as Appellant submitted a photograph in which she circled the area she alleged the pothole to be and the Court does not mention or consider that in their opinion. Despite Appellant's allegations in the Complaint, and the statements set forth in her affidavit dated 1/26/21 along with the attached marked photographs, show that Appellant is able to identify the alleged dangerous condition. (Pa241-251)

Therefore, the Court erred in not properly taking into account the claims alleged as to a dangerous condition and there was sufficient evidence to lead to a substantial issue of material fact for which the jury should have been able to determine whether the condition was considered dangerous.

It can only be concluded that the trial Court, in reviewing pieces of the deposition transcript of Appellant which were provided by the Respondent in

the summary judgment motion, determined that although Appellant was asked to point out the condition in a Google image, which was taken at a different angle and from much further away, that because she could not point to the dangerous condition in that image that she was therefore unable to identify the condition at all. However, this is not accurate as Appellant had previously submitted a certification and marked images of the dangerous condition.

Mr. Ulrich, the Director of Public Works for the Township of Union testified that the parking lot needed to be repaved. (Pa192) And while admittedly not an expert, he did further testified that he saw scaling in the picture. (Pa191) Mr. Ulrich testified that looking at the picture of the pavement from the time of the accident that he would bring that to the attention of his supervisor to make a determination as to whether it should be repaired. (Pa192) Since the Director of Public Works readily stated that he would bring the status of the parking lot to the attention of a supervisor to determine repairs, and ultimately the parking lot was repaved, it is clear that the condition can be interpreted and viewed as potentially dangerous. However, the Court found that "the record demonstrates that the condition of the parking lot was not such that any finder of fact could conclude a dangerous condition existed within the lot". (Pa9) This finding is in direct contradiction with the discovery produced by

Appellant, and the testimony of Mr. Ulrich who is an employee of Respondent Township.

Therefore, since the Complaint alleges a dangerous condition, the Appellant provided marked images of the alleged condition and the Court did state there were "cracks and crevices", this was enough to create a factual issue to meet the Brill standard and survive a motion for summary judgment as there was a genuine issue of material fact in this matter for which a jury should make a determination.

Further, it could be argued that Respondent Township is no longer subject to the immunities of a public entity as they are acting as a private party as they entered into a lease with a private party, specifically bargained for that private party to have designated parking spaces included in the premises, included the responsibility of maintenance of those spaces within the lease terms for the premises. Respondent Township's actions pierce the veil of the immunities provided to a public entity as they have entered into a transaction in which they bargained for and benefitted from the allocation and designation of specific parking spots thereby exposing themselves to the same laws that an ordinary private entity would have. Respondent Township is essentially trying to obtain the benefit of both the TCA and common law which would give them complete and total immunity which is contrary to the law and why there is a

higher standard for public entities in the first place. Respondent Township has tried to extend their immunity to Respondent NATC by contracting the specific parking spaces out, and the trial Court, in essence, found that Respondent NATC is entitled to the same tort threshold as Respondent Township. These findings are inconsistent with public policy.

A review of the allegations in the Complaint, the marked photographs submitted by Appellant, the fact that the parking lot was repaved and the testimony of Mr. Ulrich all provide competent evidence that a dangerous condition existed and were sufficient to defeat a motion for summary judgment.

Additionally, the trial Court found that there was no actual or constructive notice because there was no dangerous condition, and also that Respondent Township did not act palpably unreasonable because there was no dangerous condition. (Pa11-12) Since the trial Court based it's determination of these two factors on it's erroneous determination that there was no dangerous condition, we submit that these factors should be remanded due to the reasoning set forth herein above as there was sufficient evidence to show a material question of fact as to the dangerousness of the condition.

For the foregoing reasons, Appellant submits that the decision below was erroneous and incorrect and must be reversed.

POINT II
THE FINDING THAT APPELLANT HAS NOT SUFFERED A PERMANENT LOSS OF BODILY FUNCTION THAT IS SUBSTANTIAL WAS ERRONEOUS. (1T, Pa1-19)

Appellant asserts that the Court below erred in finding that Appellant has not suffered a permanent loss of bodily function as a result of this incident.

Dr. Bellapianta was Appellant's treating doctor, performed the surgery on her ankle, and also provided an expert report. Dr. Bellapianta's report outlines Appellant's injuries to her right knee and her left ankle, including the surgery to her ankle, and he specifically opines that those injuries are permanent in nature and are directly and causally related to Appellant's fall of September 6, 2018. (Pa314-320) Further, Dr. Bellapianta's report states that Appellant's body parts have failed to return to normal function, nor will they return to normal function with continued care and treatment. (Pa314-320) This shows substantial loss of bodily function for Appellant. Further, Respondent Township had no expert that contradicted the report and findings of Dr. Bellapianta.

Appellant testified that she had a very sharp pain in her ankle and it locks up, that in the morning when she wakes up she has to do exercises she was taught but her ankle is stiff anyway, that it doesn't matter what time of day it is she still has that same issue. (Pa153) Appellant testified that she can't go up and down the stairs without holding the railing because she would have pain in her ankle or her ankle would lock up. (Pa153) Appellant testified that her

ankle regularly has a sharp pain and locks up and she is unable to put weight on it. (Pa154)

The trial Court did reference that "the Supreme Court of New Jersey has found that injuries causing the loss of sight, smell, taste and muscle control satisfy the verbal threshold as well as injuries "that permanently would render a bodily organ or lim substantially useless but for the ability of modern medicine [to] supply replacement parts to mimic the nature function." (Pa12-13) However, the trial Court then erroneously found that the record did not demonstrate that Appellant suffered a permanent loss of bodily function that is substantial and only states that Appellant has "a lessened ability to perform certain tasks" and that "such "lingering pain" does not entitle Appellant to recover under the act." (Pa13) The trial Court failed to even acknowledge that Appellant underwent surgery on her knee, nor was it mentioned in the Statement of Reasons in the Order at all concerning the permanent loss of substantial bodily function. (Pa1-19) The Court in Brooks, as a case referenced by the trial Court in this matter, advises that each case is fact sensitive. In the instant matter, Appellant underwent surgery to her ankle and subsequently complained of continued pain and locking of the ankle prohibiting her from putting weight on it.

The trial Court only references a lessened ability to perform certain tasks and lingering pain in their finding that there was no permanent loss of bodily function that is substantial. The trial Court did not properly take into account the surgery on Appellant's ankle, the fact that there is not just lingering pain, but that when her ankle locks she is unable to put weight on it, thereby rendering it useless, and the report of Dr. Bellapianta which states that Appellant's injuries are permanent in nature and are directly and causally related to Appellant's fall of September 6, 2018 and that Appellant's body parts have failed to return to normal function, nor will they return to normal function with continued care and treatment.

For the foregoing reasons, Appellant submits that the decision below was erroneous and incorrect and must be reversed.

POINT III
THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO RESPONDENT NATC DONUTS AS THERE WERE SUFFICIENT FACTS TO DEMONSTRATE A DUTY OWED BY RESPONDENT NATC DONUTS. (2T, Pa20-34)

Appellant asserts that the Court below erred in granting summary judgment as to Respondent NATC as there were sufficient facts to demonstrate a duty owed by Respondent NATC.

In the trial Court's opinion and Order of November 16, 2022, they found that there was "material disputes of fact regarding who, Defendant NATC Donuts or Defendant Township, had a contractual obligation to maintain the parking lot. Accordingly, whether Defendant NATC Donuts breached its duty to Appellant is a "question of fact" that is best left for the jury. (Pa19) At the time of this finding, the Court had before it the same discovery and evidence as it had before it for the Cross-Motion for Summary Judgment of Respondent NATC and the Order entered on March 28, 2023. However, in complete contradiction with their prior findings, the trial Court erroneously found in the March 28, 2023 Order that Respondent NATC did not owe a duty to Appellant as a matter of public interest as "For all intents and purposes the Defendant Township controls, maintains, and regularly inspects the subject parking lot" and imposing a duty on Respondent NATC "would result in "duplicative efforts" and interfere with the Townships maintenance of the parking lot". (Pa33) The trial Court further found that "It runs astray of fairness under all the circumstances here to hold Defendant NATC, a commercial tenant, responsible for the alleged condition of a multi-use parking lot that was regularly maintained, inspected, and used by the landlord and where there is no assignment of a duty to maintain the parking lot in the Lease." (Pa33)

Respondent NATC Donuts had designated parking spots which were allocated in the lease for the use of Dunkin' Donuts customers. The Lease includes 971 square feet of retail commercial real estate, plus ten (10) parking spaces which are considered the "Leased Premises" in the Lease. (Pa207-225) Although the Lease does not include any provisions as to the responsibility of the parties specifically for the designated Dunkin' Donuts parking spaces, it does state that "Tenant shall be responsible for day-to-day maintenance and repairs to the Premises...". (Pa207-225)

At no time was there any determination of responsibility set forth in the subject lease. There was never a motion for any such determination, and the trial Court had found in the prior Order that there was a material disputes of fact regarding who, Respondent NATC Donuts or Respondent Township, had a contractual obligation to maintain the parking lot. Although Respondent Township stated that they were responsible for the maintenance of the parking lot, there is still a question of fact as to whether the subject lease addresses the maintenance of the specific parking spots bargained for, and assigned to, Respondent NATC. Even though the subject parking lot may be a multi-use parking lot, it is not a multi-tenant parking lot as Respondent NATC is the only tenant that has specifically assigned parking spaces within that lot which benefit Respondent NATC solely. That also does not negate the fact that the lease

specifically states that Tenant shall be responsible for day-to-day maintenance and repairs to the Premises, which was stated to include 971 square feet of retail commercial real estate, plus ten (10) parking spaces. As such, there exists a material question of fact as to the duty owed by Respondent NATC to Appellant.

Mr. Anthony D'Amore, owner of the subject Dunkin' Donuts, testified during his deposition that when the lease was entered into, Defendant NATC Donuts was responsible for the maintenance of those spots that were designated as Dunkin' Donuts spots in the lease as they were responsible for maintaining everything inside of the shaded area. (Pa543; Pa542) Defendant NATC was specifically assigned 10 designated Dunkin' Donuts parking spots in the lot that they were in control of. Further, the Lease requires the Tenant to purchase and maintain "...general public liability insurance adequate to protect against liability or damage claimed through public use of, or arising out of, accidents occurring in or around the Premises...". (Pa207-225) As discussed previously, the "Premises" included the 10 designated spots. This shows that Respondent Township and Respondent NATC both entered into a contract with the intent that Respondent NATC is responsible for the maintenance of their store and the surrounding premises which includes the designated parking spaces.

As the only issue as to duty that was found by the trial Court is the public interest factor, however they erred in finding that imposing a duty would result in "duplicative efforts" and would "create uncertainty and confusion as to which tenants are responsible for certain portions of a parking lot". (Pa32-33) The Court erroneously found that it is not fair to hold Respondent NATC responsible for the condition of a parking lot where it was maintained by the landlord **"and where there is no assignment of a duty to maintain the parking lot in the Lease" (emphasis added)** and did not properly take into consideration that the parking spots were included in the description of the Premises under the Lease and were therefore included in the responsibility and duty of Respondent NATC to maintain and repair. (Pa33)

The trial Court found that all other *Hopkins* factors were satisfied, except for the public interest factor. (Pa32-34) In so finding, the Court erred for the reasons set forth herein above.

For the foregoing reasons, Appellant submits that the decision below was erroneous and incorrect and must be reversed.

POINT IV
THE TRIAL COURT INCORRECTLY DISMISSED THE COMPLAINT AGAINST BOTH RESPONDENTS TOWNSHIP OF UNION AND NATC DONUTS (1T,2T, Pa1-34)

Appellant asserts that the Court below erred in granting summary judgments in this matter as there were questions of material fact that should have been determined by a jury.

As required by the standard set forth in Brill, the Court should determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." As explained above, it is our position that the trial Court erred in finding that there was not sufficient information to demonstrate a genuine issue of material fact of a dangerous condition, that Appellant has not suffered a permanent loss of bodily function that is substantial, and that there was no duty owed by Respondent NATC to Appellant.

For the reasons set forth above, we submit that the trial Court erred in failing to find a question of material fact based upon Appellant's Complaint, testimony of Appellant and Respondents and their employees, and evidence presented, which clearly show sufficient disagreement to require submission to a jury.

For the foregoing reasons, Appellant submits that the decision below was erroneous and incorrect and must be reversed.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the trial Court's decisions granting summary judgment be reversed in their entirety.

Respectfully submitted,
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Dated: 10/19/2023

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Hon. Judge Daniel R. Lindemann, J.S.C.
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MADELYNE FIGUEREDO AND EDUARDO FIGUEREDO, PLAINTIFFS/APPELLANTS, VS. TOWNSHIP OF UNION; NATC DONUTS, INC. D/B/A DUNKIN DONUTS; JOHN DOE 1-10 (A FICTITIOUS NAME); RICHARD ROE 1-10 (A FICTITIOUS NAME; ABC CORPORATION 1-10 (A FICTITIOUS CORPORATION); XYZ CORPORATION 1-10 (A FICTITIOUS CORPORATION), DEFENDANTS/RESPONDENTS.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002749-22 Civil Action **ON APPEAL FROM SUMMARY JUDGMENT IN FAVOR OF DEFENDANT/RESPONDENT IN THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, UNION COUNTY, DOCKET NO. UNN-L-2808-20** SAT BELOW: Hon. Daniel R. Lindemann, J.S.C.

BRIEF OF DEFENDANT/RESPONDENT N.A.T.C. DONUTS, INC. IN RESPONSE TO PLAINTIFFS/APPELLANTS' BRIEF

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Defendant/Respondent, NATC Donuts, Inc. ("NATC"), improperly named as, "NATC Donuts, Inc. D/B/A Dunkin Donuts", hereby submits this Brief in opposition to Plaintiffs/Appellants' Appeal.

PRELIMINARY STATEMENT

Plaintiffs/Appellants Madelyne Figueredo and Eduardo Figueredo appeal from a judgment entered in favor of defendant/respondent N.A.T.C. Donuts, Inc. ("NATC"). This matter arises out of Madelyne Figueredo's alleged slip and fall that occurred in a common area of a multi-use parking lot. Plaintiff is unsure of the exact condition that caused her to fall, but alleges that she tripped and fell on a crack while walking from her car across the common area of the parking lot towards the restaurant leased by NATC. The area where plaintiff fell was part of the common space of the parking lot, open to any shopper, including the customers and employees of all the local stores and the Township of Union ("Township").

NATC submits that there is no question that the record on summary judgment and appeal fully supports the Trial Court's decision and the judgment it entered that

NATC has no duty to plaintiff. NATC leases the store from the Township. NATC is one of a number of stores and other activities in the area that utilize the parking lot. Under the terms of the Lease, the Township was responsible to maintain the "the structural components of the Property." Regardless, plaintiff fell in an area that was not Leased to NATC. The Township's Director of Public Works confirmed that the Township controlled and maintained the parking lot and that he knew of no time in which NATC was asked to perform any repairs. To the contrary, the Township produced evidence of at least three times that they undertook repairs. At this current time, the parking lot has been ripped up by the Township to make way for a new library. The Lease, testimony, and other evidence showed that the Township had exclusive control and responsibility for inspection and maintenance of the parking lot.

Under New Jersey law, absent exclusive control, or a contractual obligation to do so, a tenant in a multi-tenant shopping center has no duty to maintain the common

areas. Because the plaintiff fell in a common area of the parking lot that the Township was contractually obligated to maintain, NATC had no duty to maintain the area. And plaintiff failed to serve a liability expert report to support a claim that defendants deviated from some objective industry standard. Accordingly, as a matter of law, the plaintiff cannot establish that NATC was negligent.

Prior to granting NATC's motion, the Trial Court had already found as a matter of law that a dangerous condition did not exist. Plaintiff was required to prove that defendant NATC had actual or constructive notice of a dangerous condition. Since the Court found that no dangerous condition existed, it follows then that NATC "could not have actual or constructive notice of a condition that did not exist."

For the reasons set forth herein, NATC respectfully requests that the Court affirm the Trial Court's decision to grant NATC's cross-motion for summary judgment.

PROCEDURAL HISTORY

Plaintiffs filed their complaint on August 31, 2020. Pa35-37.

On February 7, 2023, NATC filed a cross-motion for summary judgment. Pa321-22.

On March 17, 2023, the Court heard oral argument on NATC's motion for summary judgment. T2.

By way of orders and opinions, dated March 28, 2023, the motion court dismissed plaintiffs' complaint against NATC with prejudice. Pa20-34.

On May 12, 2023, plaintiffs filed a notice of appeal. [E1562402-05122023].

STATEMENT OF FACTS

The Underlying Accident

1. This matter arises from plaintiff Madelyne Figueredo's September 6, 2018, slip and fall in the parking lot connected to 1982 Morris Avenue, in front of the Union Township Municipal Building (the "Subject Property"), on property leased by the Township of Union ("the Township") to defendant NATC Donuts, Inc. d/b/a Dunkin' Donuts ("NATC"). Pa114-31.

2. Plaintiff parked her car and walked through the parking lot maintained and controlled by the Township towards the Dunkin' Donuts restaurant. Pa132-143 at 8:11 to -13; 9:6 to -10, 11:6 to -8; see also Pa227-35.

3. Plaintiff testified that as she walked across the parking lot, her foot got stuck in a pothole located in the lot, causing her fall:

> Q: . . . I believe you said your foot had gotten stuck in it, in the pothole; is that accurate?
> A: Yes.
>
> [Pa156 at 42:10 to -13].

4. Her testimony alleges that she was "maybe four to five feet away from my car" when she fell. Pa136 at 10:22 to 11:5.

5. However, surveillance video from the store showed Plaintiff exiting her Ford Edge and taking approximately nine steps away from her vehicle before falling. Da5, Camera 16 at 7:38:19.

No Dangerous Condition Existed on the Subject Property

6. Plaintiff asserts a pothole caused her to fall:

> Q: When did you first notice the pothole?
> A: When I -- when I smashed into the ground is when I saw it.

[Pa156 at 42:7-9].

7. Plaintiff submitted an affidavit and photographs showing the location of Plaintiff's fall and the condition of the area Plaintiff alleges to have fallen.

8. In Plaintiff's affidavit, Plaintiff declares that the first two photographs "fairly and accurately depict the condition" where the incident occurred. Pa241-43 at ¶ 5.

9. The referenced photographs do not show a pothole but clearly show a crack in the pavement which was circled by Plaintiff. Pa241-43 at ¶ 5, photographs labeled "Exhibit A" and "Exhibit B."

10. Moreover, Plaintiff avers that the two photographs "accurately depict the general location where the incident occurred." Pa241 at ¶ 6.

11. Those photographs show Plaintiff pointing to an ostensibly smooth spot on the ground where no pothole is visible. Pa241, 244-45 at ¶ 6, photographs labeled "Exhibit C" and "Exhibit D."

12. At Plaintiff's deposition, Plaintiff was presented with a screenshot of the area previously identified in Plaintiff's affidavit. Pa179.

13. However, Plaintiff could not locate or in any way identify the alleged pothole which purportedly caused her fall:

> Q. Are you able to point out the pothole based on this picture from September 2018, in which you fell?
> A. I -- not really.
>
> [Pa159 at 57:19-22].

14. Plaintiff was similarly unable to recall the dimensions, depth, or otherwise describe what Plaintiff initially claimed was a pothole. Pa156-57 at 45:9-46:7.

15. Plaintiff failed to describe the pothole which she alleges caused her fall:

> Q: Could you describe the pothole, its dimensions, or any other description that you could come up with of it?
> A: No, I -- I can't.
>
> [Pa156 at 45:10-13].

16. Ultimately, Plaintiff admitted there was no pothole but in fact cracks in the pavement:

> Q. So Miss Figueredo, this is September of 2018, and I do not see a pothole.
> A. No, but there are ***several cracks***, I could clearly see them.
>
> [Pa160 at 58:23-59:4 (emphasis added)].

17. Plaintiff contradicted herself regarding the existence of a pothole:

> Q. [Y]ou said you saw the pothole?
> A. I -- when I smashed down to the ground, I saw -- I saw a hole.
>
> [Pa156 at 42:7-9].

18. Similarly, Officer Argast, the officer who responded to Plaintiff's fall, stated in his Investigation Report that he observed no pothole in the subject lot Pa253-54.

19. Louis Ulrich, the Township's Director of Public Works, found no safety hazard existed at the Subject Property:

> Q. . . . [D]o you see any that in your opinion would cause a safety hazard?
> A. Based on what I see, no.
>
> [Pa191 at 41:2-3].

20. More specifically, Mr. Ulrich testified the parking lot "doesn't look nice, but there's really no safety hazard. It's just not aesthetically pleasing to look at." Pa192 at 44:9-11.

21. After falling, Plaintiff testified that she crawled on her "right hand and . . . right knee" back to her car. See Pa157 at 46:23 to 47-1.

22. Plaintiff testified that, despite her injuries, she pulled herself onto her feet:

> Q. And then you say you used the back of your vehicle to pull yourself up?

A. Yes.
Q. Onto both feet?
A. No, onto my right foot.
Q. Okay. And were you holding your left foot in the air?
A. Yes, I -- I was anchoring myself with my hand and slowly with my right foot. I couldn't – I couldn't touch my left foot to the ground.

[Pa157 at 47:6-15].

23. Plaintiff testified she then “glided” back to the driver’s seat:

Q. You were holding yourself up by the car, correct?
A. Yes.
Q. Your left foot was in the air because you couldn't put it down, right?
A. I could not put it down, no.
Q. And you were gliding your right foot while your left foot was in the air?
A. Yes.
Q. Was it like you were dragging your right foot? I'm not understanding.
A. Exactly. I couldn't really -- I really couldn't bend my leg 'cause my -- I had just smashed my knee.
Q. Right.
A. And I had to crawl back on that knee 'cause I couldn't move the other leg.

[Pa157 at 48:25-49:16].

24. However, the surveillance video clearly shows Plaintiff pushing herself onto her feet and walking approximately five steps without any issue before

disappearing behind her car and getting back into the driver's side door. Da5, Camera 16 at 7:39:00.

N.A.T.C. Donuts, Inc. Had No Actual or Constructive Notice Relative to the Alleged Defect

25. N.A.T.C. Donuts, Inc. ("NATC") did not have actual or constructive notice of any alleged condition on the Subject Property at any time prior to the alleged incident.

26. Plaintiff testified that she at no point prior or subsequent to September 6, 2018, informed the Township of the alleged condition. Pa156 at 42:3-6.

27. Louis Ulrich, the Township's Director of Public Works, testified that the Township maintains the entirety of the parking lot:

> Q. Do you have any understanding as to the responsibilities and the duties of the township with regard to repairs to that parking lot?
> A. We maintain it. Whatever the agreement is, I – we've always maintained it. We sweep it. We've done pothole repair there. We don't separate the lot. We kind of maintain the whole area.
>
> [Pa187 at 23:12 to -18].

28. Ulrich also testified that the Township inspects the parking lots:

> Q. Okay. Is there any requirement for, let's say checking the area of doing any inspections of the area at any point in time?
> A. Yes, we have a lot of events. Before every event, whether it's a parade, whether it's an event in front of town hall, a hundred percent they're inspected, they're – they're made sure that they're safe, you know. We also do, like – again, we have guys that go though, we expect them to report anything that they see. There's also self-directed from the supervisors. We have 27 parking lots. They go through the lots, they maintain them, you know, they'll make that part of their schedule.

[Pa187 at 24:3 to -16].

29. Not only did the Township maintain the parking lot, they controlled it:

> Q. Okay. You said earlier that the township maintains that parking lot, correct?
> A. I maintain the parking lot. The township – public works maintains it, yes.
> Q. Okay. And so would you also say that the township has control over that parking lot in that aspect?
> A. Yes.

[Pa188 at 27:9 to -15].

30. There is nothing in the record to suggest that NATC had any responsibility for maintenance of the parking lot, owned by the Township.

31. Furthermore, there is nothing to indicate that NATC ever received any notice of a dangerous condition.

32. In fact, the Township's Director of Public Works is unaware of "Dunkin' Donuts" (NATC) ever performing any maintenance on the parking lot, Pa188 at 27:21 to -24, or the Township asking "Dunkin' Donuts" (NATC) to do any maintenance. Pa190 at 35:1 to -4.

33. The Township had previously received three reports of concern regarding the parking lot at issue. Pa183 at 6:4-6.

34. All previous reports of conditions on the Subject Property were marked as completed by the Township, meaning each report was reviewed and, if necessary, repairs were completed by the Township. Pa183-84 at 8:22-23; 11:16-17; 12:19-20.

35. The Township did not receive any other notices, reports, and/or complaints relative to any alleged condition on the Subject Property prior to September 6, 2018. Pa185 at 17:3-7.

Prior To NATC'S Motion For Summary Judgment, The Trial Court Concluded That, As A Matter Of Law, No Dangerous Condition Existed In The Parking Lot

36. The Trial Court found that, in this case:

> Here, in reviewing the record in the light most favorable to the Plaintiff, the record fails to demonstrate that an actionable dangerous condition exists. Plaintiff contends that the photographs she provided with her Affidavit show "significant potholes, cracks and crevices which make traversing a substantial risk of harm." . . . However, this Court is unable to find within the photographs anything more than small cracks or uneven surfaces in the parking lot.
>
> [Pa8-9.].

37. The Court concluded: "Here, the record demonstrates that the condition of the parking lot was not such that any finder of fact could concluded a dangerous condition existed within the lot." Pa9.

38. The Court further found that:

> [I]n reviewing the record in the light most favorable to the Plaintiff, the record does not demonstrate that the Defendant Township had either actual or constructive notice of the alleged condition. As a preliminary matter and as previously discussed, the record does not demonstrate that a dangerous condition existed. It follows then that Defendant Township could not have actual constructive notice of a condition that did not exist.
>
> [Pa11].

The Township Is Required By The Lease To Maintain The Parking Lot Where Plaintiff Fell

39. The Subject Property is owned by the Township and leased to NATC ("Dunkin' Donuts") by Lease Agreement dated December 1, 2006 (the "Lease"). Pa207-225.

40. The leased premises includes 971 square feet of retail commercial real estate plus ten (10) parking spaces (the "Leased Premises" or "Property"). Ibid.

41. NATC owns and operates a Dunkin' Donuts franchise on the Leased Premises. Ibid.

42. As detailed above, plaintiff's accident occurred in a common area of the parking lot controlled and maintained by the Township, not on the Leased Premises.

43. The Lease specifically provides in relevant part:

> 10. Maintenance. Tenant shall be responsible for day-to-day maintenance and repairs to the Premises, including surfaces of the interior wall, floors and ceiling. Any and all appliances located in or on the Property shall be maintained, repaired or replaced, if necessary, by Tenant. Tenant shall, at its expense, obtain and maintain such pest control measures and services as are necessary, in the opinion of the Landlord, to maintain the premises in a clean and sanitary condition. Landlord shall be responsible for the maintenance, repair or

> replacement of all structural components of the Property including the roofing system and drainage systems. Electrical and plumbing, to the extent constructed or renovated by the Tenant shall be the responsibility of the Tenant.
>
> [Ibid.].

44. The Township has since demolished the parking lot, including NATC's alleged 10 spaces and the common area of the parking lot where plaintiff fell to put in a new municipal library. Da1-4 (photo taken on January 13, 2023, and Township of Union's architect's rendering of the Subject Property).

LEGAL ARGUMENT

SUMMARY OF LEGAL ARGUMENT

In reviewing the granting of NATC's cross-motion for summary judgment under Rule 4:46, the Court employs a de novo standard. Townsend v. Pierre, 221 N.J. 36, 59 (2015).

The Trial Court properly found that the "record demonstrates that Defendant NATC does not owe a duty to Plaintiff here." Pa33. "In New Jersey, as elsewhere, it is widely accepted that a negligence cause of action requires the establishment of four elements: (1) a duty of care, (2) a breach of that duty, (3) actual and proximate causation, and (4) damages." Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 594 (2013). Generally, "the question of whether a duty exists is a matter of law properly decided by the court." Strachan v. John F. Kennedy Mem'l Hosp., 109 N.J. 523, 529 (1988). Furthermore, contractual interpretation is a legal matter ordinarily suitable for resolution on summary judgment. Celanese Ltd. v. Essex Cty. Improvement Auth., 404 N.J.

Super. 514, 528 (App. Div. 2009). Thus, here, the issue of whether NATC owed plaintiffs a duty of care is a question of law. Tarabokia, 429 N.J. Super. at 106 (stating that "the scope of the duty of care is a question of law"). Because no material facts were genuinely in dispute, this matter was ripe for summary judgment. Tarabokia, 429 N.J. Super. at 106; Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

The Trial Court made a well-reasoned determination as a matter of law that the Township "controls, maintains, and regularly inspect the subject parking lot. Pa33. The Trial Court correctly found that this was not an instance where the landlord "lacks control of the property" nor does NATC have "exclusive possession" of the premises. Ibid. Indeed, the Trial Court properly noted that:

> It runs astray of fairness under all of the circumstances here to hold Defendant NATC, a commercial tenant, responsible for the alleged condition of a multi-use parking lot that was regularly maintained, inspected, and used by the landlord and where there is no assignment of a duty to maintain the parking lot in the Lease.
>
> [Pa33 at fn.5].

For the same reasons, this Court is respectfully asked to affirm the Trial Court's grant of summary judgment to NATC.

Furthermore, none of the alleged contested facts were material to the Court's analysis. As such, the motion court properly granted summary judgment.

POINT I

AS A TENANT IN A MULTI-USE PARKING LOT, NATC HAD NO DUTY TO MAINTAIN THE COMMON AREAS (Pa27-34)

A duty owed by a defendant is a prerequisite in an action of negligence. Strachan, 109 N.J. at 529. Whether a duty exists is typically a matter of law properly decided by the court, not the jury. Ibid. See also Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 572 (1996); Wang v. Allstate Ins. Co., 125 N.J. 2, 15 (1991).

Negligence is "never presumed, and the mere occurrence of an accident causing injuries is not alone sufficient to justify an inference of negligence." Mockler v. Russman, 102 N.J. Super. 582, 588 (App. Div. 1968). See also Szalontai v. Yazbo's Sports Café, 183 N.J. 386, 400 (2005)(citing Myrlak v. Port Auth. of NY

and NJ, 157 N.J. 84, 95 (1999)(citing Meny v. Carlson, 6 N.J. 82, 91 (1950))); Long v. Landy, 35 N.J. 44, 54 (1961); Vander Groef v. Great Atl. & Pac. Tea Co., 32 N.J. Super. 365, 370 (App. Div. 1954) (citing Hansen v. Eagle-Picher Lead Co., 8 N.J. 133, 139-40 (1951)). In fact, there is a presumption against negligence. Buckelew v. Grossbard, 87 N.J. 512, 525 (1981); Riveria v. Columbus Cadet Corp., 59 N.J. Super. 445, 450 (App. Div. 1960); Vander Groef, 32 N.J. Super. at 370 (citing Hansen, 8 N.J. 133, 139-40).

It is also well established that a business owner is not a guarantor of its business invitees. Simpson v. Duffy, 19 N.J. Super. 339, 343 (App. Div. 1952). Instead, a business owner owes a duty of "reasonable care to guard against any dangerous conditions on his or her property that the owner either knows about or should have discovered." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 434 (1993); Handleman v. Cox, 39 N.J. 95, 103 (1963). "An inference [of negligence] can be drawn only from proven facts and cannot be based upon a foundation of pure conjecture, speculation, surmise or guess." Long, 35 N.J. at 54.

> Whether a person owes a duty of reasonable care towards another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances of public policy. That inquiry involves identifying, weighing, and balancing several factors – the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution.
>
> [Hopkins, 132 N.J. at 439].

Here, plaintiff parked in a public lot that was used by a number of local stores and activities. The attendant risk was an unidentified condition in a common area of the parking lot that the landlord not only controlled, but inspected and maintained. Because the accident occurred in a common area of the parking lot, NATC had neither the opportunity nor ability to control the alleged condition complained of. NATC sells coffee and doughnuts. It is not a department of public works or paving company with readily available resources to address any conditions in the parking lot. Further, the assignment of maintenance responsibility to the Township for structural components set forth in the Lease and confirmed by Louis Ulrich's testimony impacted NATC's opportunity and ability to address the condition. The Lease clearly placed the obligation to maintain the

common areas of the premises on the landlord, including maintenance. Ulrich testified that he and his department controlled and performed all maintenance of the parking lot. There is nothing in the Lease to suggest that NATC exerted any control over the area where plaintiff fell that conflicts with the Township/landlord's obligation to maintain the area. In fact, testimony and other evidence shows that the Township exercised control over the area by maintaining it and did so before and after the date of the accident. In fact, the Township has recently excavated the parking lot area and is currently renovating it for its new library.

More importantly, the public interest weighs in favor of not imposing a duty on NATC under the facts of this case. In Stewart v. 104 Wallace St., 87 N.J. 146 (1981), the Court extended the duty of a commercial landowner to maintain public sidewalks abutting the commercial property. In Luchejko v. City of Hoboken, 207 N.J. 191 (2011), the Court discussed the public policy reasons for extending liability. The Court cited two reasons: (1) absent an imposition of liability, an innocent person could be left without recourse; and (2) it gave

commercial property owners incentive to maintain the adjacent sidewalks. Id. at 202-03. However, in Kandrac v. Marrazzo's Mkt., 429 N.J. Super. 79 (App. Div. 2012), the court held that those considerations did not apply to a tenant in a multi-tenant shopping center where the tenant did "not have control or maintenance responsibilities for common area and [had] no contractual obligation to maintain such areas." Id. at 86 (citing Barrows v. Trs. Of Princeton Univ., 244 N.J. Super. 144, 148 (Law Div. 1990); and Holmes v. Kimco Realty Corp., 598 F.3d 115 (3d Cir. 2010)). Relying on Holmes, the court held that while a tenant derives a benefit from the common areas in a multi-tenant shopping center, "countervailing policy considerations weigh more heavily against imposition of a duty." Id. at 86-87.

Under the facts of this case and the law discussed herein, NATC owed no duty to maintain the area where plaintiff fell. Accordingly, plaintiff cannot make out a *prima facie* case against NATC and, therefore, NATC was entitled to summary judgment as a matter of law.

Absent exclusive control or a contractual obligation, a tenant in a multi-tenant shopping center

has no duty to maintain the common areas of the center. Kandrac, 429 N.J. Super. at 90-91. Accord Holmes, 598 F.3d at 124 ("New Jersey would not impose a duty on an individual tenant for [maintenance of] the common areas of a multi-tenant parking lot when the landlord has retained and exercised that responsibility."); Barrows v. Trustees of Princeton Univ., 244 N.J. Super. 144, 148 (Law Div. 1990) (holding absent a contractual obligation, tenants in a multi-tenant shopping mall do not have a duty to maintain common area sidewalks and walkways); Spano v. SuperValu, Inc., A-2361-14T3 (App. Div. July 22, 2016)[1] (same).

In Kandrac, the Appellate Division decided the issue of whether a commercial tenant in a multi-tenant shopping center owed a duty to its patron to maintain a parking lot that the landlord was contractually obligated to maintain. Id. at 84. The court held that it did not. Id. at 90-91. The plaintiff in Kandrac was injured in the shopping center's parking lot after leaving the defendant's store. The lease between the defendant and

[1] A true and accurate copy of Spano v. SuperValu, Inc., A-2361-14T3 (App. Div. July 22, 2016) is attached to Plaintiffs' Appendix as Pa410-19. Pursuant to Rule 1:36-3, no adverse unpublished opinions are known to counsel.

the landlord obligated the landlord to maintain the common areas of the shopping center. Relying on Holmes, 598 F.3d 115, the motion judge granted the tenant's motion for summary judgment, finding that "as a commercial tenant in a multi-tenant facility, [the tenant] owed no duty of care to its invitee for injury that occurred in the common area of the shopping center." Id. at 83.

On appeal, the plaintiff argued that the motion judge erred in granting the motion because the tenant had a duty to provide a safe ingress and egress from its store, there were genuine issues of material fact, and the judge improperly relied on Holmes, a federal court decision, in interpreting New Jersey law. Ibid. The appellate court was not persuaded by the plaintiff's argument and affirmed the order granting summary judgment to the tenant. Id. at 81.

Adopting the rationale of the Holmes court, the Appellate Division stated that "the imposition of a duty on the tenants [to maintain common areas] would result in duplicative effort and interfere with the landlord's maintenance program." The court went on to hold that an

extension of such a duty "would lead to uncertainty" with respect to the areas that each tenant was responsible to clear and would "encourage 'shotgun' litigation . . . where the customer sued every store at which he has browsed or purchased an item prior to his fall." Ibid. The court also concluded that imposing a duty on an individual tenant in a multi-tenant commercial property would be counterproductive. Ibid.

The Kandrac court also noted that because the landlord was liable for the negligent maintenance of the common areas, no innocent victim would be left without recourse if a corresponding duty was not imposed upon the tenant. Id. at 90.

Ultimately, the Kandrac court held that when a commercial tenant in a multi-tenant shopping center has no control or contractual obligation to maintain a common area shared with other tenants, "the common law does not impose a duty upon the tenant to do so." Id. at 90-91. The Kandrac decision is directly on point and controlling.

In Barrows, the court reached the same conclusion. There, the plaintiff slipped on snow and ice, and fell

on a sidewalk in a multi-tenant shopping center. 244 N.J. Super. at 146. The court held absent a contractual obligation to do so or exclusive control over the area of the fall, a tenant in multi-tenant shopping center had no duty to clear the sidewalks. Id. at 148.

Similarly, in Holmes, a customer of a tenant in a multi-tenant shopping center slipped and fell on ice and/or snow in the parking lot as he was walking to his car. 598 F. 3d at 116. The plaintiff had been shopping in a store leased by defendant Lowe's. Pursuant to the terms of the lease between Lowe's and the landlord, the landlord was responsible for maintaining the common areas of the center. Id. at 116-17. Arguing that it owed no duty to maintain the common areas, Lowe's moved for summary judgment. The District Court granted summary judgment in favor of Lowe's holding that "New Jersey would not impose a duty on a tenant for maintenance of a multi-tenant parking lot." Id. at 118. The plaintiff appealed.

In affirming the order granting summary judgment to Lowe's, the Court of Appeals for the Third Circuit determined that an individual tenant in a multi-tenant

shopping center had no duty to maintain common areas of a multi-tenant shopping center where the landlord retained control and exercised responsibility for that duty. Id. at 123-25. The court reasoned that to find an individual tenant responsible for maintenance of common areas when the landlord retained such obligation would cause confusion, increase costs with little added benefit, and result in duplicative efforts. Id. at 123-24.

In Spano, the Appellate Division reached the same conclusion. Spano v. SuperValu, Inc., A-2361-14T3 (App. Div. July 22, 2016). There, SuperValu d/b/a Acme Markets, was an anchor store in a multi-tenant shopping center. Similar to this case, under the terms of the lease, the landlord was contractually obligated to maintain the common areas of the center, including the area where the plaintiff fell. The landlord entered into a contract with a third-party vendor to perform snow and ice removal. Relying on the holdings in Kandrac and Holmes, the court once again held that where the landlord retained control of maintenance of the common areas, a tenant in a multi-tenant shopping center did not have a

duty to the plaintiff to remove snow and address icy conditions in a common area of the center. Id. at 6.

Here, the record clearly demonstrates that plaintiff fell in a common area of a multi-use parking lot. It is also undisputed that the lease between NATC and the Township obligated the Township to maintain the common areas of the center, including the area where plaintiff fell. The Township has, in fact, acknowledged that duty in that it not only maintained, but also inspected and controlled the parking lot.

NATC neither created the condition that plaintiff alleges caused her to fall nor was it contractually obligated to maintain or repair that area. To impose a duty on NATC under the facts of this case would be arbitrary and against the precedent discussed herein.

Because the parking lot was available not only to customers of NATC, but all local shoppers and the visitors to the Township buildings, imposing a duty on each tenant to maintain only an undefined portion of the common areas would create confusion, be counter-productive, result in duplicative efforts, and interfere

with the Township's maintenance program. Kandrac, 429 N.J. Super at 90.

Because the condition alleged to have caused plaintiff to fall was within the common area of the parking lot available for use by patrons of all of the local stores and Township business, the landlord and its public works department were in the best position to remedy the situation; otherwise, it would be performed piecemeal. To the contrary, if liability is imposed against NATC, it would then have to pay for injuries caused by the failure of the landlord to fulfill its contractual obligation. Fairness and equity weighs in favor of granting the motion.

Because NATC had no duty to maintain the area where plaintiff fell, the Trial's Court's rationale for granting summary judgment is sound and its order and judgment should be affirmed.

POINT II

NATC DID NOT HAVE NOTICE OF ANY DANGEROUS CONDITION (Pa27-28)

Plaintiff's claim against NATC is based on negligence. To establish a *prima facie* case of negligence, a plaintiff must establish that a defendant owed the plaintiff a duty, breached that duty, which proximately caused the accident, resulting in injury to the plaintiff. Brunson v. Affinity Fed. Cred. Union, 199 N.J. 381, 400 (2009); Brown v. Racquet Club of Bricktown, 95 N.J. 280, 288 (1984); Endre v. Arnold, 300 N.J. Super. 136, 142 (App. Div. 1997). Under New Jersey law, a plaintiff has the burden of proving each element of negligence. Khan v. Singh, 200 N.J. 82, 91 (2009); Brunson, 199 N.J. at 400. Long, 35 N.J. at 54; Saks v. Ng, 383 N.J. Super. 76, 89 (App. Div. 2006); Anderson v. Sammy Redd & Assocs., 278 N.J. Super. 50, 56 (App. Div. 1994).

A business establishment owes a duty of care to its business invitees to provide a reasonably safe place to do what is within the scope of the invitation. Butler v. Acme Markets, Inc., 89 N.J. 270, 275 (1982).

Consistent with that obligation, a business owner owes a duty to its patrons to warn and protect them against dangerous conditions on the premises that it knew about or should have discovered through a reasonable inspection. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 433, (1993); Brown, 94 N.J. at 290-91. "In any case founded upon negligence, proofs ultimately must establish that the defendant breached a duty of reasonable care which constituted a proximate cause of the plaintiff's injuries." Id. at 288. To prevail, a plaintiff must prove that the defendant had actual or constructive notice of the dangerous condition that caused the accident. Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003). Where a plaintiff cannot establish that a defendant breached a duty of care, the complaint must be dismissed. Smith v. Whitaker, 160 N.J. 221, 235 (1999).

In this matter, the Trial Court had previously found in the Township of Union's motion for summary judgment as a matter of law that no "dangerous condition" existed. While the Trial Court made the determination that no dangerous condition existed in the context of a Tort

Claims Act cause of action, the definition of a "dangerous condition" under the Tort Claims Act is substantially similar to a tort claim. As the Trial Court states, under the Tort Claims Act, a dangerous condition is "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." Pa28 (quoting N.J.S.A. 59:4-1(a)). Likewise, in a premises liability case, a "dangerous condition" of property similarly involves "an unreasonable risk of harm." Longo v. Aprile, 374 N.J. Super. 469, 474 (App. Div. 2005) (citing Restatement (Second) of Torts §§ 342 and 343).

As the law of the case is that there was no dangerous condition in the parking lot where plaintiff claims to have fallen, defendants did not breach any duty to plaintiff. The law of the case doctrine requires that a legal decision made in a particular matter "should be respected by all other lower or equal courts during the pendency of that case." Lanzet v. Greenberg, 126 N.J. 168, 192 (1991) (citing State v. Reldan, 100 N.J. 187, 203 (1985); State v. Hale, 127 N.J. Super. 407, 410-11

(App. Div. 1974)). It is a rule intended to "prevent relitigation of a previously resolved issue." In re Estate of Stockdale, 196 N.J. 275, 311 (2008) (citing Pressler, Current N.J. Court Rules, comment 4 on R. 1:36-3 (2008)).

Specifically, "the [law of the case] doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." Arizona v. California, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983). "This rule of practice promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988) (quoting another source). "The law of the case doctrine limits the extent to which an issue will be reconsidered once the court has made a ruling on it." Fagan v. City of Vineland, 22 F.3d 1283, 1290 (3d Cir. 1994).

Under the law-of-the-case doctrine, once an issue is decided, it will not be relitigated in the same case, except in unusual circumstances. "A court has the power

to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loath to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" Christianson, 486 U.S. at 817 (quoting Arizona, 460 U.S. at 618 n.8).

The Court examined the evidence in the light most favorable to plaintiff, finding that the record failed to demonstrate that a dangerous condition existed. Pa8. Examining the photos and other exhibits, the Court found nothing "more than small cracks or uneven surfaces in the parking lot." Ibid. In assessing the evidence and submissions already in this case, the Court has previously found in this matter that, "the record demonstrates that the condition of the parking lot was not such any finder of fact could conclude a dangerous condition existed within the lot." Pa9. As the Court concluded, since a dangerous condition did not exist, defendants could not have either constructive or actual notice of it. Pa11.

The Court reasoned that:

> [I]n reviewing the record in the light most favorable to the Plaintiff, the record does not demonstrate that the Defendant Township had either actual or constructive notice of the alleged condition. As a preliminary matter and as previously discussed, the record does not demonstrate that a dangerous condition existed. It follows then that Defendant Township could not have actual or constructive notice of a condition that did not exist.
>
> [Ibid.].

Likewise, if a dangerous condition did not exist, defendant NATC could not have either actual or constructive notice. To find to the contrary would result in an inconsistent verdict that would improperly require NATC to indemnify the Township for its own negligence. McKenney v. Jersey City Med. Ctr., 167 N.J. 359, 365, 373 (2001). Following the principles set forth in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995), no reasonable jury could find that the plaintiff's injuries were proximately caused by the conditions of the property. Accordingly, the lack of notice is an independent reason for affirming the grant of summary judgment to NATC.

POINT III

PLAINTIFF CANNOT PROVE HER PRIMA FACIE CASE WITHOUT A LIABILITY EXPERT (Pa368-70)

Although expert testimony is generally permissive, N.J.R.E. 702, there are situations where expert testimony must be presented. Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997). To establish premises liability, a plaintiff bears the burden to establish that the premises owner breached the duty of care owed to her. Jerista v. Murray, 185 N.J. 175, 191 (2005). Where the issue of whether the premises owner breached the duty of care is "so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of a party was reasonable," expert testimony is indispensable to establish that a breach of duty occurred. In such cases, the "jury is not competent to supply the standard by which to measure the defendant's conduct," Sanzari v. Rosenfeld, 34 N.J. 128, 134-35, and the plaintiff must instead "establish the requisite standard of care and [the defendant's] deviation from that standard" by "present[ing] reliable expert testimony on the subject." Giantonnio v. Taccard, 291 N.J. Super.

31, 42 (App. Div. 1996); Mullarney v. Bd. Of Review, 343 N.J. Super. 401, 408 (App. Div. 2001).

In Turkowski v. Stanbery Hamilton, LLC, A-2907-12T2 (App. Div. March 31, 2014)[2], the plaintiff tripped on or near a metal cleanout cover in the floor of a shoe store and fell, sustaining personal injury. Pa396-97. The plaintiff alleged that a height deviation between the floor and the cover constituted a dangerous and unsafe condition. Pa398. The plaintiff retained an engineer to establish liability. After inspecting the premises, the engineer offered an opinion that the cover was not installed in accordance with the architectural plans for the premises and that deviation caused the accident. Ibid.

At the close of discovery, the defendant moved for summary judgment arguing that the engineer's opinions were net opinions and that without expert testimony the plaintiff could not establish a *prima facie* case. Pa399. The motion judge granted the motion holding that the opinions offered by plaintiff's liability expert were

[2] A true and accurate copy of Turkowski v. Stanbery Hamilton, LLC, A-2907-12T2 (App. Div. March 31, 2014) is attached to Plaintiffs' Appendix as Pa395-408. Pursuant to Rule 1:36-3, no adverse unpublished opinions are known to counsel.

inadmissible as net opinion and that without expert testimony the plaintiff could not establish that the store owner was negligent. Pa399-400.

On appeal, the Appellate Division affirmed the order granting summary judgment. Pa407. The court held that whether the height deviation created a hazard "sufficient to constitute an unreasonably dangerous condition" required expert testimony. Ibid. It further held that because the motion judge properly excluded the plaintiff's liability expert testimony as net opinion, a reasonable jury could not find that the store owner was negligent. Ibid.

Here, plaintiff has no liability expert to opine that the condition in the parking lot, albeit controlled and maintained by the Township, posed a dangerous condition. To the contrary, the Court already found that, as law of the case, that "the condition of the parking lot was not such that any finder of fact could conclude a dangerous condition existed within the lot." Pa9. Without expert testimony to opine on the objective industry standard to support a finding that the premises constitute an

unreasonably dangerous condition, plaintiff cannot establish that NATC was negligent.

POINT IV

UNDER THE LEGAL STANDARD, THE COURT SHOULD AFFIRM THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT TO NATC (Pa22-23)

This was a proper case for summary judgment under Rule 4:46-2. Even when the Court accepted as true all evidence that supported plaintiff's claim and accorded her all legitimate inferences that can be deduced therefrom, plaintiff could not establish that a material dispute of fact exists or that NATC was negligent. See Brill, 142 N.J. at 540 (holding that determination of whether a genuine issue of material fact exists requires a judge to assess whether the evidential materials, when viewed in a light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party). Where the evidence is so "utterly one-sided" that a rational fact finder could not resolve the dispute in favor of the non-moving party, summary

judgment is appropriate. Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

Indeed, the evidence established that NATC had no contractual obligation to maintain the common areas of the parking lot, which were available for use for numerous purposes other than patronizing NATC. The area where plaintiff fell was controlled, inspected, and maintained by the Township, not NATC. The Lease between NATC and the Township stated that the landlord was responsible for maintaining the common areas, which included the area where plaintiff fell. Those facts were undisputed. Furthermore, the Court had already found that no dangerous condition existed, and plaintiff failed to retain a liability expert. As such, defendant NATC could not have had either actual or constructive notice of a dangerous condition. Accordingly, NATC was entitled to summary judgment as a matter of law and respectfully requests that the Court affirm that Trial Court's judgment.

CONCLUSION

Plaintiffs have shown no basis to reverse the grant of summary judgment to NATC below. As a matter of law, NATC had no duty as a tenant in a multi-use parking lot to plaintiffs/appellants to maintain the common areas. The owner of the parking lot, The Township of Union, not NATC, had the duty to maintain and inspect the parking lot. In the absence of a duty of care, NATC can have no liability for this loss. Furthermore, plaintiffs cannot show that NATC had notice of a dangerous condition. The Court should therefore affirm the grant of summary judgment to NATC.

Respectfully submitted,
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***Via* eCourts Appellate**
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Re: Figueredo, et al. v. Township of Union, et al.
Docket No.: A-002749-22 (UNN-L-2808-20)

Dear Ms. Koval:

This Firm represents Defendant-Respondent, Township of Union, in the above-referenced matter. In that connection, enclosed for filing are: (i) Brief on Behalf of Defendant-Respondent Township of Union; and (ii) Proof of Service (electronically generated).

Please charge our firm's Superior Court Account No. 146154 for any applicable fees.

Very truly yours,

Gregory D. Emond

Encl.
GDE/mas
cc: Tiana Gimbrone, Esq. (*via* eCourts Appellate)
Adam M. Maurer, Esq. (*via* eCourts Appellate)

Superior Court of New Jersey
Appellate Division

Docket No. A-002749-22

MADELYNE FIGUEREDO, EDUARDO FIGUEREDO (HUSBDAND), *Plaintiffs-Appellants,* v. TOWNSHIP OF UNION, NATC DONUTS INC. d/b/a DUNKIN' DONUTS, JOHN DOE 1-10 (a fictitious name), RICHARD ROE 1-10 (a fictitious name), ABC CORPORATION 1-10 (a fictitious corporation), XYZ CORPORATION 1-10 (a fictitious corporation), *Defendants-Appellants*.	CIVIL ACTION On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION, UNION COUNTY Docket No. UNN-L-2808-20 Sat Below: Hon. Daniel R. Lindemann, J.S.C. Date of Submission: December 8, 2023

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT TOWNSHIP OF UNION

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PRELIMINARY STATEMENT

This appeal arises out of an Order entered by the Superior Court of New Jersey granting Defendant-Respondent Township of Union's (the "Township") Motion for Summary Judgment and dismissing Plaintiff's Complaint with Prejudice as to the Township. Therein, the trial court correctly determined Plaintiff failed to vault the stringent threshold requirements to impose liability on a public entity pursuant to New Jersey's Tort Claims Act (the "TCA"), N.J.S.A. 59:4-1 to -10.

The trial court was correct in determining, while affording Plaintiff all reasonable inferences, dismissal of Plaintiff's Complaint as to the Township was **required** given (i) no dangerous condition existed; (ii) the Township had no actual or constructive notice of any purportedly dangerous condition; (iii) the Township did not act palpably unreasonable; and (iv) Plaintiff did not suffer a permanent injury or a substantial loss of bodily function. The trial court properly determined, given Plaintiff's failure to demonstrate even a single one of the necessary elements of the TCA, Plaintiff's Complaint must be dismissed.

Further, the trial court also properly dismissed Plaintiff's loss of consortium claim in light of Plaintiff's blatant failure to offer any evidence whatsoever in support thereof. Moreover, Plaintiff's improper sham affidavit

submitted in a late attempt to create issues of fact to defeat summary judgment was appropriately not considered by the trial court.

Accordingly, in affording Plaintiffs all reasonable inferences from the factual record, there is no genuine issue of material fact demonstrating the Township's liability for Plaintiff's alleged injuries. Plaintiff failed to surmount the immunities and stringent requirements of the TCA and Plaintiff's Complaint was properly dismissed. Therefore, and for the reasons established herein, it is respectfully submitted the Appellate Division should affirm the trial court's decision in its entirety.

PROCEDURAL HISTORY

On August 31, 2020, Plaintiff commenced this action by filing a Complaint in the Superior Court of New Jersey, Union Vicinage, bearing docket number UNN-L-2808-20. [Pa35-Pa47]. On October 13, 2020, Dunkin' Donuts filed an Answer and Crossclaim. [Pa48-Pa63]. The Township filed a Motion for Summary Judgment on November 4, 2020, which was withdrawn on April 20, 2021. On November 6, 2020, in lieu of an Answer, the Township filed a second Motion for Summary Judgment, which was denied by the trial court on December 18, 2020. On March 19, 2021, the Township filed a Motion for Partial Summary Judgment, which was denied by the trial court on April 30, 2021. On May 10, 2021, the Township filed an Answer and Crossclaim. [Pa278-Pa295].

On September 9, 2022, the Township filed a Motion for Summary Judgment (the "Motion"). [Pa64-Pa227]. On September 27, 2022, Dunkin' Donuts filed a Cross-Motion for Summary Judgment (the "First Cross-Motion"). On October 11, 2022, Plaintiff filed Opposition to the Motion and the First Cross-Motion. On October 17, 2023, the Township filed a Reply Brief in further support of the Motion. On October 21, 2022, the trial court held oral argument on the Motion and the First Cross-Motion. On November 16, 2022, the trial court entered an Order granting the Township's Motion in part and denying the Township's Motion in part and denying Dunkin' Donuts' First Cross-Motion.

On January 20, 2023, Plaintiff filed a Motion for Partial Summary Judgment ("Plaintiff's Motion"). On February 7, 2023, Dunkin' Donuts filed a second Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion (the "Second Cross-Motion"). On March 13, 2023, Plaintiff filed a Reply Brief in further support of Plaintiff's Motion and in opposition to the Second Cross-Motion. On March 17, 2023, the trial court held oral argument on Plaintiff's Motion and the Second Cross-Motion. On March 28, 2023, the trial court entered an Order denying Plaintiff's Motion and granting the Second Cross-Motion.

Thereafter, Plaintiff appealed the trial court's rulings by filing a Notice of Appeal in the Superior Court, Appellate Division, on May 12, 2023.

COUNTER-STATEMENT OF FACTS

On September 6, 2018, Plaintiff was in the parking lot connected to 1982 Morris Avenue, in front of the Union Township Municipal Building (the "Subject Property"), to patronize Dunkin' Donuts as a business invitee. [Pa66]. Upon arrival, Plaintiff parked in a Dunkin' Donuts-assigned parking spot. [Pa67]. Plaintiff was walking towards Dunkin' Donuts to "get some coffee and a bagel." [Pa67]. Plaintiff testified as she approached Dunkin' Donuts that her foot got stuck in a pothole located in the lot, causing her fall. [Pa67].

Plaintiff submitted an affidavit and photographs showing the location of Plaintiff's fall and the condition of the area Plaintiff alleges to have fallen. [Pa68]. In Plaintiff's affidavit, Plaintiff declares the first two photographs "fairly and accurately depict the condition" where the incident occurred. [Pa68]. The referenced photographs do not show a pothole but clearly show a crack in the pavement which was circled by Plaintiff. [Pa68]. Moreover, Plaintiff avers the two photographs "accurately depict the general location where the incident occurred." [Pa68]. Those photographs show Plaintiff pointing to an ostensibly smooth spot on the ground where no pothole, defect, nor condition of any kind is visible. [Pa68].

At Plaintiff's deposition, Plaintiff was presented with a screenshot of the area, as it was at the time of Plaintiff's fall, previously identified in Plaintiff's

affidavit. [Pa68]. However, Plaintiff could not locate or in any way identify the alleged pothole which purportedly caused her fall. [Pa68]. Plaintiff was similarly unable to recall the dimensions, depth, or otherwise describe what Plaintiff initially claimed was a pothole. [Pa69]. Plaintiff failed to describe the pothole which she alleges caused her fall. [Pa69]. Ultimately, Plaintiff admitted there was no pothole but in fact cracks in the pavement. [Pa69]. Plaintiff subsequently contradicted herself regarding the existence of a pothole. [Pa69].

Similarly, Officer Argast, the officer who responded to Plaintiff's fall, stated in his Investigation Report that he observed no pothole in the subject lot. [Pa69]. Louis Ulrich, the Township's Director of Public Works, found no safety hazard existed at the Subject Property at the time of the incident. [Pa69].

The Township did not have actual or constructive notice of any alleged condition on the Subject Property at any time prior to the alleged incident. [Pa71]. Plaintiff testified she never, prior or subsequent to September 6, 2018, informed the Township of the alleged condition. [Pa71]. Similarly, Dunkin' Donuts never complained to the Township about any purportedly dangerous condition. [Pa71]. While the Township had previously received three reports of concern regarding the parking lot at issue, all previous reports of conditions on the Subject Property were marked as completed by the Township, meaning each report was reviewed and, if necessary, repairs were completed. [Pa71]. The

Township did not receive any other notices, reports, and/or complaints relative to any alleged condition on the Subject Property prior to September 6, 2018. [Pa72].

Subsequent to Plaintiff's alleged fall, Plaintiff underwent arthroscopic surgery to her left ankle on September 5, 2019. [Pa72]. Plaintiff testified that since getting the surgery she only experiences "very quick" pain in her ankle and that it "locks up." [Pa72]. Plaintiff also testified that she gets a "dull pain" when going up the stairs, but that "[s]ome days I don't have it, others I do." [Pa72]. Plaintiff further testified that her foot gets "swollen" and she "no longer wear[s] heels." [Pa72]. Despite claiming a permanent injury, Plaintiff testified that she last saw a doctor for her injuries nearly three years ago on October 17, 2019. [Pa72].

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

The standard of review for a summary judgment motion is, "de novo, employing the same standard used by the trial court." Tarabokia v. Structure Tone, 429 N.J. Super. 103, 106 (App.Div.2012) (citing Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998), certif. denied, 154 N.J. 608 (1998)). Under this standard, a party against whom a claim is made may move for summary judgment in its favor before the case is tried. R. 4:46-1.

Pursuant to R. 4:46-2, a party is entitled to summary judgment where "there is no genuine issue as to any material fact . . . and . . . the moving party is entitled to a judgment or order as a matter of law." The movant bears the "burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact" regarding the claims asserted. Judson v. Peoples Bank and Trust, 17 N.J. 67, 74 (1954) (citation omitted).

The Supreme Court has cautioned that "a court should deny a summary judgment motion **only** where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting R. 4:46-2(c)) (emphasis added). "That means a non-moving party cannot defeat

a motion for summary judgment merely by pointing to any fact in dispute." Ibid. Moreover, "when the evidence is so one-sided that one party must prevail as a matter of law the trial court should not hesitate to grant summary judgment." Id. at 540 (quotations omitted).

Additionally, summary judgment is mandated after:

> adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is entitled to a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.
>
> [Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986) (internal quotations omitted).

The standard for such a determination is "whether the competent materials presented . . . are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 529 (1995) (quoting R. 4:46-2). Immaterial or frivolous evidence is insufficient to defeat a motion for summary judgment. Ibid. Moreover, an issue that has only "a single, unavoidable resolution" is not "genuine" under R. 4:46-2. Id. at 540.

II. PLAINTIFF WAIVED CERTAIN ISSUES DECIDED BY THE TRIAL COURT BY FAILING TO BRIEF SAME.

Plaintiff's failure to brief certain issues on appeal constitutes Plaintiff's waiver of same and the trial court's findings should be upheld. Despite seemingly appealing the entirety of the trial court's November 16, 2022, Order, Plaintiff has failed to brief certain issues and findings of the trial court. As such, New Jersey law is well-settled that "[a]n issue not briefed on appeal is deemed waived." Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) (citations omitted); Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2023) ("It is, of course, clear that an issue not briefed is deemed waived."); State v. Amboy Nat. Bank, 447 N.J. Super. 142, 148 n.1 (App. Div.), certif. denied 288 N.J. 249 (2016) (issue addressed for first time in reply brief deemed waived); 539 Absecon Boulevard, L.L.C. v. Shan Enters. Ltd. P'ship, 406 N.J. Super. 242, 272 n.10 (App. Div. 2009) (noting claims not briefed are deemed abandoned).

As such, Plaintiff has waived the following issues as a matter of law: (i) the trial court's determination Plaintiff's October 11, 2022, affidavit was a sham; (ii) the trial court's determination the Township had no actual nor constructive notice of any allegedly dangerous condition; (iii) the trial court's determination the Township did not act palpably unreasonable; (iv) and the trial

court's determination Plaintiff failed to demonstrate a valid loss of consortium claim.[1]

III. PLAINTIFF'S WAIVER OF NECESSARY ELEMENTS OF THE TORT CLAIMS ACT RENDERS THE APPEAL MOOT.

Plaintiff's waiver of the previously stated necessary elements of the New Jersey Tort Claims Act (the "TCA") renders the Plaintiff's appeal moot on its face. As such, and based on same, the dismissal as to the Township cannot be disturbed. As part of the trial court's November 16, 2022, Order granting summary judgment to the Township, the trial court explicitly determined (i) the Township had no notice of any allegedly dangerous condition and (ii) the Township did not act in a palpably unreasonable manner. However, and as set forth above, Plaintiff's failure to brief such issues on appeal constitutes Plaintiff's waiver of same. See, Sklodowsky, 417 N.J. Super. at 657; R. 2:6-2, cmt. 5.

Even assuming *arguendo* the Appellate Division finds with Plaintiff as to the issues of dangerous condition and permanent injury, Plaintiff has waived its opportunity to appeal the requisite notice and palpable unreasonable elements of the TCA. As such, given Plaintiff has waived critical requisite elements of

[1] Despite Plaintiff's waiver of these issues, same are discussed herein for the sake of completeness.

the TCA, which the trial court found in favor of the Township's dismissal. Therefore, it logically follows Plaintiff's appeal as to the Township's dismissal is moot.

It is well-settled New Jersey law that to recover against a public entity, the plaintiff must overcome the immunities set forth in the TCA. See, Muhammad v. N.J. Transit, 176 N.J. 185, 194 (2003) When applying N.J.S.A. 59:4-2, the court "must start" from the "guiding principle . . . that **immunity from tort liability is the general rule and liability is the exception**." Polzo v. Cty. of Essex, 196 N.J. 569, 579 (2007) ("Polzo I") (emphasis added). As well, "several elements must coalesce before a public entity will be held liable." Ibid. In other words, the requirements of N.J.S.A. 59:4-2 are "accretive" in that, if any single one or more of the elements are not satisfied, a claim against a public entity must fail. Id. at 586-87. As such, unless Plaintiff proves **all five** (5) of the following criteria, the public entity cannot be held liable. Ibid.

In order for liability to attach to a public entity for a "dangerous condition," of property, N.J.S.A. 59:4-2 mandates Plaintiff to prove that the property was in fact "public property" and: (1) a dangerous condition existed at the time of injury; (2) the dangerous condition proximately caused the injury; (3) the dangerous condition created a foreseeable risk of injury of the kind incurred; (4) that either: (a) a negligent or wrongful act or omission of a public

employee created the dangerous condition, or (b) that the public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have protected against the condition; and (5) the action or inaction of the public entity with respect to its effort to protect against the condition was palpably unreasonable. If Plaintiffs fail **any one** of the above elements, then Plaintiffs' claims against the public entity **must fail**.

In this matter, the trial court explicitly determined Plaintiff was unable to prove these necessary elements of the TCA and the uncontroverted facts demonstrated: (i) the alleged defect was not a dangerous condition [Pa7-Pa9]; (ii) the Township has no actual or constructive notice of any dangerous condition [Pa9-Pa11]; (iii) the Township did not act in a palpably unreasonable manner [Pa11-Pa12]; and Plaintiff did not suffer a permanent loss of bodily function that is substantial [Pa12-Pa13]. Given Plaintiff's failure to brief and subsequent waiver of the trial court's second and third findings, Plaintiff's appeal cannot succeed as to the dismissal of the Township and is moot on its face.

IV. THE TRIAL COURT'S ORDER PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE TOWNSHIP AND SHOULD BE AFFIRMED IN ITS ENTIRETY. [Pa1-Pa19]

A. Plaintiff's Certification in Opposition to the Township's Motion for Summary Judgment is a Belated, Self-Serving "Sham" Affidavit. [Pa4-Pa6]

The trial court properly concluded Plaintiff's October 11, 2022, Certification ("Plaintiff's Sham Certification") breached the sham affidavit doctrine. As an initial matter, and as more fully set forth above, Plaintiff's failure to brief whether the trial court erred in its finding as to Plaintiff's sham affidavit constitutes Plaintiff's waiver of same. See, R. 2:6-2, cmt. 5. Notwithstanding Plaintiff's waiver, in holding Plaintiff's Sham Certification violated the sham affidavit doctrine, the trial court found, Plaintiff's Sham Certification was "submitted directly in contradiction to her testimony."

The Sham Affidavit Doctrine "calls for rejection of the affidavit where the contradiction is unexplained and unqualified by the affiant." Shelcusky v. Garjulo, 172 N.J. 185, 194 (2002). Where, like here, a party submits an "offsetting affidavit in opposition to a motion for summary judgment when the affidavit contradicts the affiant's prior deposition testimony." Ibid. "In such circumstances, the alleged factual issue in dispute can be perceived as a sham, and as such it is not an impediment to a grant of summary judgment." Ibid.

Further, the trial court performed the requisite "evaluative function that is

consistent with" Brill. Shelcusky, 172 N.J. at 201. A review of the trial court's Order reveals the trial court thoroughly contrasted Plaintiff's earlier deposition testimony with the contradictory statements in Plaintiff's Sham Certification.

B. The Trial Court Properly Determined No Dangerous Condition Existed and the Decision Should be Affirmed. [Pa7-Pa9]

The trial court correctly found no dangerous condition existed as defined by the TCA. As set forth by the trial court, to establish a dangerous condition under the TCA, Plaintiff is required to demonstrate: (i) a dangerous condition exists; (ii) such condition created a foreseeable risk of injury that occurred; and (iii) such dangerous condition proximately caused the injury." Garrison v. Twp. of Middletown, 154 N.J. 282, 286 (1998). In this matter, the trial court correctly applied the relevant case law in concluding no dangerous condition existed as a matter of law.

The TCA defines a "dangerous condition" of public property as "a condition of property that creates a **substantial risk** of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." N.J.S.A. 59:4-1(a) (emphasis added). The Appellate Division has noted that for a condition to present a "substantial risk of injury" it cannot be "minor, trivial or insignificant." Atalease v. Long Branch Twp., 365 N.J. Super. 1, 6 (App. Div. 2003). Whether property is in a dangerous condition

is generally a question for the finder of fact to decide. Vincitore v. Sports & Expo. Auth., 169 N.J. 119, 123 (2001). Thus, "the standard is whether any member of the general public who foreseeably may use the property would be exposed to the risk created by the alleged dangerous condition." Id. at 125.

Here, even affording Plaintiff all reasonable inferences, the trial court found no dangerous condition existed. At her deposition, Plaintiff was unable to identify or describe the alleged defect that Plaintiff alleges caused her to fall. When presented with a picture of the Subject Property taken at approximately the same time as Plaintiff's fall, in September 2018, Plaintiff was unable to locate or otherwise identify the pothole which allegedly caused her fall. Specifically, Plaintiff testified:

> Q. Are you able to point out the pothole based on this picture from September 2018, in which you fell?
>
> A. I -- not really.
>
> [Pa68, ¶ 15].

Similarly, Plaintiff was unable to even provide a basic description as to dimensions, depth, or other features of what Plaintiff initially claimed was a pothole. As Plaintiff testified:

> Q: Could you describe the pothole, its dimensions, or any other description that you could come up with of it?
>
> A: No, I -- I can't.

[Pa69, ¶ 17].

Ultimately, Plaintiff testified that there was no pothole that caused her fall:

> Q. So Miss Figueredo, this is September of 2018, and I do not see a pothole.
>
> A. **No**, but there are **several cracks**, I could clearly see them.

[Pa69, ¶ 18].

Plaintiff subsequently contradicted herself regarding the existence of a pothole:

> Q. [Y]ou said you saw the pothole?
>
> A. I -- when I smashed down to the ground, I saw -- I saw a hole.

[Pa69, ¶ 19].

As a matter of law, the Township cannot be held liable for a "dangerous" condition that Plaintiff cannot identify or describe and is unsure of the existence of **after** claiming to have been injured by it. See, Sawruk v. Twp. of Lacey, Docket No. A-0636-11T1, 2012 WL 1948648 at *3 (N.J. App. Div. May 30, 2012) (finding no dangerous condition where "plaintiff was unable to identify the cause of his fall and that any purported connection between an alleged "depression in the landing and his fall was "mere speculation").

On appeal, Plaintiff contends the trial court failed to properly consider the photographs appended to Plaintiff's January 26, 2021, affidavit. Plaintiff argues such photograph show the alleged pothole and Plaintiff circled same on the photograph, thus Plaintiff was able to identify the alleged condition. However, despite Plaintiff's contention, the trial court reviewed such photographs and was "unable to find within the photographs anything more than small cracks or uneven surfaces in the parking lot." [Pa9].

In support of this position, Plaintiff cites an unpublished Appellate Division case with no precedential effect on this court. See, Scheps v. Twp. of Delran, Docket No. A-0142-18T3, 2019 N.J. Super. Unpub. LEXIS 18111 (App. Div. Aug. 23, 2019), certif. denied, 240 N.J. 544 (2020). Specifically, Plaintiff cites to this matter for the proposition that "it was up to the jury to determine whether the pothole was a dangerous condition." Pl. Brief, p. 9. Notably, the plaintiff's liability expert in Scheps opined the pothole violated the standards of the American Society of Testing Materials and the New Jersey Department of Transportation. Scheps, 2019 N.J. Super. Unpub. LEXIS 18111 at *3. However, applicable to Plaintiff here are the standards enunciated by the TCA, which all record evidence demonstrates Plaintiff failed to do.

Moreover, it is well-settled the question of whether a dangerous condition exists in certain circumstances "must be resolved by the courts as a matter of

law, in order that the 'legislatively-decreed restrictive approach to liability is enforced.'" McCarthy v. Twp. of Verona, Docket No. A-2210-99T2, 2001 WL 1917169 at *2 (N.J. App. Div. 2001) (citing Cordy v. Sherwin Williams Co., 975 F.Supp 639, 643 (D.N.J. 1997)).

Plaintiff also alleges the trial court's finding of "cracks and uneven surfaces in the parking lot . . . created a material question of fact as to the dangerousness of such condition of the parking lot." Pl. Brief, p. 10. Explicitly, the trial court, reviewing all competent record evidence and affording Plaintiff all reasonable inferences, was "unable to find within the photographs anything more than small cracks or uneven surfaces in the parking lot." [Pa9]. Further, the trial court stated the pictures produced by Plaintiff merely "indicate a few cracks without significant dips into the surface and, at best, indicate select areas of the parking lot that had uneven surfaces." [Pa9].

However, as held by the trial court, it is well-established that common or usual defects in a walkway or roadway that are commonly encountered do not satisfy the "substantial risk" requirement as a matter of law as required of a dangerous condition. See, Polyard v. Terry, 160 N.J. Super. 497, 509 (App. Div. 1978) aff'd o.b. 79 N.J. 547 (1979) (holding that a three-eighths of an inch differential at the point where a roadway met a bridge did not create a substantial risk of injury because highway travelers must expect some uneven surfaces and

depressions); see also, Charney v. City of Wildwood, 732 F.Supp.2d 448, 456 (D.N.J. 2010) (holding that a hole "measuring one and one-half inch deep, and one and one-quarter inch wide *at its largest point*, is the kind of minor defect that does not qualify as a dangerous condition under the Tort Claims Act" and "while it is true that the Polyard case involved a vehicular roadway, and not a pedestrian walkway, the underlying reasoning of that case – that not every defect is actionable, and that some areas of imperfection must be expected – applies to pedestrian walkway surfaces as well"); Cordy, 975 F.Supp. at 639. This is because "pedestrians must expect some areas of imperfection on walkway surfaces, and not every defect in a walkway surface is actionable." Polyard, 160 N.J. Super. at 509. Because travelers should expect them, the risk associated with common defects is deemed not "substantial" as a matter of law. Ibid.

The trial court properly determined the alleged condition at issue is precisely the sort of "common or usual defect" which courts have consistently found insufficient to impose liability on a public entity under the TCA. As testified by Louis Ulrich, the Township's Director of Public Works, the alleged defect in the parking lot amounts to nothing more than superficial surface markings that do not impact the functionality or safety of the parking lot.

Clearly, Plaintiff cannot describe or even express what exactly the alleged defect was that caused Plaintiff to fall; Plaintiff presents photographs pointing

to an area where the alleged defect existed. However, in Plaintiff's deposition, when shown a picture of the lot in the condition it was at around the time when Plaintiff was injured, Plaintiff admitted that only cracks/veins were present in the area Plaintiff alleges caused Plaintiff to fall and conceded that it may have been said cracks/veins which caused Plaintiff's fall. [Pa69, ¶ 18].

Similarly, in the course of discovery Plaintiff disclosed photographs which Plaintiff avered "fairly and accurately depict the condition" of the lot when the incident occurred which show nothing more than surface cracks in the pavement and no pothole. [Pa68, ¶ 10-11]. Additional photographs which Plaintiff declared "accurately depict the general location where the incident occurred" do not show a pothole or defect of any kind. [Pa68, ¶ 12-13]. Rather, Plaintiff is seen pointing to a smooth area of pavement. [Pa68, ¶ 13]. Moreover, the responding police officer reported that he observed no pothole in the subject lot. [Pa69, ¶ 20]. The trial court properly reviewed all competent evidence of record, including Plaintiff's own testimony and photographs submitted, and correctly determined no dangerous condition existed.

Finally, Plaintiff argues the Township is no longer subject to the TCA immunities because it "acted as a private party as they entered into a lease with a private party." Plaintiff cites to no authority and such contention is baseless and entirely without merit. Were the court to determine that a public entity

pierced the veil of immunity by entering into a contract with a private entity, it would have a chilling effect on the operation of public entities. Specifically, contracting with private parties is essential to the efficient operation of municipal governments, state agencies, and other public entities. Public entities routinely and frequently contract with law firms, engineering firms, accounting firms, architectural firms, sanitation companies, planning firms, construction companies, and others in order to provide residents with necessary government services. If Plaintiff's baseless assertion would true, it would create a chilling effect on public entities entering into such contracts and impede the proper operation of government.

Given the foregoing, it is clear the trial court, considering all competent evidence of record and affording Plaintiff all reasonable inferences, determined no dangerous condition existed. Thus, Plaintiff is unable to vault the strict requirements of the TCA and the trial court properly dismissed Plaintiff's Complaint with prejudice as to the Township. Therefore, it is respectfully submitted the Appellate Division should affirm the trial court's Order in its entirety.

C. The Trial Court Correctly Determined Plaintiff Did Not Suffer a Permanent Injury and that Determination Should be Affirmed. [Pa12-Pa13]

All record evidence clearly demonstrates Plaintiff did not suffer a permanent injury, as correctly determined by the trial court. For Plaintiff to recover pursuant to the TCA, she must show "(1) an objective permanent injury, and (2) a permanent loss of a bodily function that is substantial." Knowles v. Mantua Twp. Soccer Ass'n, 176 N.J. 324, 329 (2003) (citing Gilhooley v. Cty. of Union, 164 N.J. 533, 540-41 (2000)). In that regard, New Jersey Courts have found that a plaintiff meets the permanent injury requirement when a plaintiff provides "objective medical evidence of a permanent injury." Knowles, 176 N.J. at 330. "An injury causing lingering pain, resulting in a lessened ability to perform certain tasks because of the pain, will not suffice because '[a] plaintiff may not recover under the Tort Claims Act for mere subjective feelings of discomfort." Id. (citing Gilhooley, 164 N.J. at 540).

In this case, Plaintiff's claims for damages are for merely lingering pain and general allegations of a lessened ability to perform certain tasks due to such pain. To rectify Plaintiff's lingering ankle issues, she underwent surgery on September 5, 2019, to remove an anterolateral ankle mass. [Pa72, ¶ 33]. By Plaintiff's own testimony, she merely gets "very quick" dull pain in her ankle and that it "locks up." [Pa72, ¶ 34-35]. Similarly, Plaintiff's foot gets "swollen,"

and Plaintiff no longer wears heels. [Pa72, ¶ 36]. Given that Plaintiff has no permanent injury, she cannot recover against the Township as a matter of law.

Now on appeal, Plaintiff raises the same arguments the trial court disagreed with in deciding the Township's Motion for Summary Judgment. Namely, Plaintiff argues the expert report of Dr. Bellapianta, Plaintiff's former treating physician, shows substantial loss of bodily function. Additionally, Plaintiff argues that Plaintiff's own testimony, including Plaintiff having a sharp pain in her ankle, her ankle being stiff and locking up, and Plaintiff's inability to use stairs without holding a railing, shows Plaintiff has a substantial loss of bodily function. However, as succinctly stated by the trial court, "the record does not demonstrate that Plaintiff has suffered a permanent loss of bodily function that is substantial." [Pa13].

Even if it were determined the Plaintiff's alleged injuries are permanent, Plaintiff's alleged injuries are not a substantial loss of a bodily function and, as such, Plaintiff cannot recover pursuant to the TCA. With regard to a permanent loss of a bodily function that is substantial, New Jersey Courts have held that there is no permanent loss when "plaintiff's daily activities, although painful, [are] not substantially precluded by [the] injuries[,]…" and plaintiffs are "…able to return to [their] former … activities … albeit with some restrictions" Knowles, 176 N.J. at 333 (citing Brooks v. Odom, 150 N.J. 395 (1997)); Ponte

v. Overeem, 171 N.J. 46, 50-51 (2002). Based on that standard, and as a matter of law, the trial court correctly determined Plaintiff has failed to show a permanent loss of a bodily function that is substantial.

Based on the record in this case, it is clear Plaintiff, at best, is merely making complaints of "subjective feelings of discomfort" for which she is unable to recover. Brooks, 150 N.J. at 402-03; see also Hammer v. Twp. of Livingston, 318 N.J. Super. 298, 305 (App. Div. 1999) (finding that subjective complaints of pain coupled with fully healed fracture did not amount to permanent impairment). By Plaintiff's own admission, her only lingering ailments include "very quick" ankle pain that locks up, an occasional "dull pain" when she goes up the stairs, and an inability to wear heels. [Pa72, ¶ 34-36]. Despite Plaintiff's complaints of same, Plaintiff testified she last sought medical treatment almost three years ago in October 2019. [Pa72, ¶ 37].

As such, there is no record evidence that shows Plaintiff suffered a loss of a bodily function that is substantial, and given Plaintiff's deposition testimony, the trial court, properly found no reasonable trier of fact could find in the Plaintiff suffered a loss of a bodily function that is substantial. Therefore, Plaintiff cannot overcome the stringent requirements of the TCA and it is respectfully submitted the Appellate Division should affirm the trial court's Order in its entirety.

D. The Trial Court Properly Found the Township Had No Notice, Actual or Constructive, and that Determination Should be Affirmed. [Pa9-Pa11]

As correctly determined by the trial court, the Township had no actual or constructive notice of any alleged condition prior to Plaintiff's alleged injury. As such, Plaintiff was unable to meet the required "notice" element of the TCA and the trial court properly dismissed Plaintiff's claims as to the Township.

As an initial matter, and as more fully set forth above, Plaintiff has waived any argument as to the trial court's notice finding by failing to brief same. Sklodowsky, 417 N.J. Super. at 657; R. 2:6-2, cmt. 5 ("It is, of course, clear that an issue not briefed is deemed waived."). Plaintiff's only reference on appeal is a single sentencing opining the court's notice determination was based on the argued improper determination of no dangerous condition and this matter should be remanded. However, Plaintiff's failure to brief the issue of notice constitutes waiver of the trial court's determination of same.

For Plaintiff to recover pursuant to the TCA, there must be proof the Township possessed either actual or constructive notice of the alleged dangerous condition which caused Plaintiff's injuries. The TCA defines "actual" and "constructive" notice as follows:

> a. A public entity shall be deemed to have actual notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 if it had actual knowledge of the existence of the condition and knew

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

In other words, to prove actual notice, a plaintiff must demonstrate not only that the public entity had actual knowledge of the existence of the condition, but also that the entity **knew or should have known** of its dangerous character. N.J.S.A. 59:4-3(a). "Whether a public entity is on actual or constructive notice of a dangerous condition is measured by the standards set forth in N.J.S.A. 59:4–3(a) and (b), not by whether [for example] 'a routine inspection program' by the [public entity] . . . would have discovered the condition." Polzo v. Cty. of Essex, 209 N.J. 51, 68 (2012) ("Polzo II"); see also Cherry v. City of Newark, Docket No. A-4162-14T1, 2017 WL 2152749 (N.J. App. Div. May 17, 2017) (where plaintiff's reliance on photographs taken after the accident and an alleged history of work permits and complaints pertaining only to the surrounding area established neither actual nor constructive notice of the alleged dangerous condition). In Cherry, the Appellate Division found the plaintiff had presented no competent evidence, much less expert proof, as to the

length of time the alleged condition existed. 2017 WL 2152749 at *3.

As to actual notice, there is no dispute Plaintiff is unable to demonstrate the Township had actual knowledge of any alleged condition at the subject property. In fact, Plaintiff has made no claim the Township had actual notice on appeal nor in opposition to the Township's Motion for Summary Judgment. By the parties' own admissions, neither Plaintiff nor Dunkin' Donuts complained of the alleged condition to the Township or otherwise requested it be repaired. [Pa71, ¶ 28-29]. This fact alone is sufficient to overcome the actual notice requirement of N.J.S.A. 59:4-3(a).

In the absence of actual notice, Plaintiff must establish proof as to whether the public entity had constructive notice of a dangerous condition to withstand summary judgment. Polzo I, 196 N.J. at 580-86. Constructive notice is provable "**only if** the plaintiff establishes that the condition had **existed for such a period of time** and **was of such an obvious nature** that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." N.J.S.A. 59:4-3(b) (emphasis added); see also Cherry, 2017 WL 2152749.

It is Plaintiff's absolute burden to establish the condition "existed for such a period of time and was of such an obvious nature the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. Id. (internal quotations omitted). Further, the Court in Sims v. City of

Newark, 244 N.J. Super. 32, 47 (1990), aptly explained: "[e]xistence of an alleged dangerous condition is not constructive notice of it." However, concepts of reasonable care and negligence are pertinent to the consideration of whether the public entity had notice under N.J.S.A. 59:4-3(b). See, Williams v. Phillipsburg, 171 N.J. Super. 278 (App. Div. 1979). Additionally, prior accidents at the same location of the dangerous condition can create an issue of fact as to constructive notice. Wymbs v. Twp. of Wayne, 163 N.J. 523, 536 (2000).

All competent evidence of record demonstrated the Township had no constructive notice of any alleged condition. The trial court explicitly stated, "the record does not demonstrate that the Defendant Township had either actual or constructive notice of the alleged condition." Plaintiff asserted no proofs as to any extent of time the condition existed. Moreover, Plaintiff cannot even present competent proof as to what the actual defect was that is alleged to be a dangerous condition. As such, it is impossible for Plaintiff to demonstrate any alleged defect to be of such an obvious nature.

The record is wholly devoid of any evidence illustrating the Township had any notice of the condition prior to Plaintiff's incident. Plaintiff testified that at no point, prior or subsequent to September 6, 2018, did Plaintiff inform the Township of the alleged condition. [Pa71, ¶ 28]. Similarly, all previous reports

of conditions on the Subject Property were reviewed and marked as completed, meaning any necessary repairs were performed. [Pa71, ¶ 30-31]. Further, the undisputed material facts demonstrate no similar incidents that occurred at the site of the subject accident. The Township received no written or verbal notice prior to the incident of any outstanding issue in the parking lot. [Pa71, ¶ 30]. Therefore, the trial court properly concluded the Township had no notice, actual or constructive, of the alleged condition and it is respectfully submitted this matter should be affirmed as Plaintiff failed to overcome the stringent requirements of the TCA.

E. The Trial Court's Holding that the Township Did Not Act Palpably Unreasonable Should Be Affirmed. [Pa11-Pa12]

The trial court's determination the Township did not act palpably unreasonable should be affirmed. Given Plaintiff's failure to meet this requirement of the TCA, the trial court properly dismissed Plaintiff's claims as to the Township. First, and as more fully set forth above, Plaintiff has waived any argument as to the trial court's notice finding by failing to brief same. Sklodowsky, 417 N.J. Super. at 657; R. 2:6-2, cmt. 5 ("It is, of course, clear that an issue not briefed is deemed waived."). As with the notice requirement above, Plaintiff's only reference on appeal is a single sentencing opining the court's notice determination was based on the argued improper determination of no

dangerous condition and this matter should be remanded. However, Plaintiff's failure to brief the issue of notice constitutes waiver of the trial court's determination of same.

A "plaintiff bears the burden of proving that defendant acted in a palpably unreasonable manner." Coyne v. State, Dep't of Transp., 182 N.J. 481, 493 (2005) (citing Muhammad, 176 N.J. 185). "The term palpably unreasonable implies behavior that is patently unacceptable under any given circumstances and it must be manifest and obvious that no prudent person would approve of its course of action or inaction." Coyne, 182 N.J. at 493 (citing Kolitch v. Lindedahl, 100 N.J. 485 (1985)) (internal quotations omitted). The Third Circuit has explained that to be "palpably unreasonable" under New Jersey law, actions must be the result of "capricious, arbitrary, whimsical or outrageous decisions of public servants." Waldorf v. Shuta, 896 F.2d 723, 738 (3d Cir. 1990).

This creates a substantial barrier for Plaintiff to overcome even if they can prove the existence of all four (4) previous requirements to impose TCA liability under N.J.S.A. 59:4-2; which, Plaintiff cannot. It is well-established precedent a plaintiff will fail in their proofs if they cannot establish the public entity's failure to protect against the dangerous condition was "palpably unreasonable." See, Muhammad, 176 N.J. at 194; Maslo v. City of Jersey City, 346 N.J. Super. 346, 349 (App. Div. 2002); Black v. Borough of Atlantic Highlands, 263 N.J.

Super. 445 (App. Div. 1993); Berends v. City of Atlantic City, 263 N.J. Super. 66 (App. Div. 1993); Lopez v. City of Elizabeth, 245 N.J. Super. 153 (App. Div. 1991).

In this matter, the trial court appropriately held, "the record fails to demonstrate that Defendant Township acted in a palpably unreasonable manner." [Pa12]. Further, the trial court found, "the issue of palpable unreasonableness can reasonably be made under the circumstances where no dangerous condition existed." This is consistent with the relevant case law, which provides the issue of whether a defendant acted palpably unreasonable may be decided by the court as a matter of law upon application for summary judgment. See, Polzo II, 209 N.J. at 75 n. 12 ("Although ordinarily the question of whether a public entity acted in a palpably unreasonable manner is a matter for the jury, in appropriate circumstances, the issue is ripe for a court to decide on summary judgment"); Carroll, 366 N.J. Super. at 390-91 (holding there was no proof of palpable unreasonableness warranting jury consideration and affirming entry of summary judgment in favor of the public entity); Maslo, 346 N.J. Super. at 350-51 (affirming grant of summary judgment to public entity because plaintiff failed to sufficiently show that a rational factfinder could resolve the issue of palpable unreasonableness in plaintiff's favor); Black, 263 N.J. Super. at 452 (holding that a palpably unreasonable determination finding,

"like any other fact question before a jury, is subject to the court's assessment whether it can reasonably be made under the evidence presented").

Here, the trial court properly determined Plaintiff failed to satisfy the strenuous burden of proof required to prove the Township acted palpably unreasonable. The competent evidence of record is entirely devoid of any evidence as to specific or general behavior by the Township that can be considered palpably unreasonable. As more fully described above, the Township had no notice, whether actual or constructive, of the alleged condition prior to Plaintiff's incident. [Pa71-Pa72, ¶ 27-32]. The Township cannot be held to have acted palpably unreasonably as to a condition it did not know existed.

However, even assuming *arguendo* the Township had notice of an allegedly dangerous condition, there has been no action or inaction by the Township that may be considered palpably unreasonable. Due to the excessive number of sidewalks, it is unreasonable for the Township to conduct regular inspections of all sidewalks to determine whether any dangerous condition existed or maintenance is required. The Township has a finite number of resources and cannot be expected to continuously inspect and maintain all municipal property within the Township.

Furthermore, "pedestrians must expect some areas of imperfection on walkway surfaces, and not every defect in a walkway surface is actionable."

See, Charney, 732 F.Supp.2d at 456. Given the foregoing, the trial court properly determined the Township did not act in a palpably unreasonable manner and Plaintiff failed to satisfy the TCA requirements necessary to impose liability on the Township. reasonable trier of fact could determine that the Township acted in a palpably unreasonable manner with respect to the alleged condition. Therefore, it is respectfully submitted the Appellate Division should affirm the trial court's determination.

F. The Trial Court's Finding that Plaintiff Failed to Establish a Loss of Consortium Should Be Affirmed. [Pa13-Pa14].

Plaintiffs wholly failed to set forth a loss of consortium claim and the trial court properly determined Plaintiff failed to demonstrate otherwise. As an initial matter, and as more fully set forth above, Plaintiff has waived any argument as to the trial court's notice finding by failing to brief same. Sklodowsky, 417 N.J. Super. at 657; R. 2:6-2, cmt. 5 ("It is, of course, clear that an issue not briefed is deemed waived.").

"A loss of consortium . . . claim is intended to compensate a person for the loss of a spouse's 'society, companionship and services due to the fault of another.'" Kibble v. Weeks Dredging & Constr. Co., 161 N.J. 178, 190 (1999) (citation omitted). "New Jersey has long recognized a spouse's derivative claim for loss of consortium when there is an underlying claim for negligence."

Friedman v. Klazmer, 315 N.J. Super. 467, 469 (1998).

For the court to make an award on a loss of consortium claim, a spouse must make a showing "of several factors including a strong emotional reliance on each other, a relationship of long duration, and a high degree of mutual dependence." Anderson v. A.J. Friedman Supply Co., Inc., 416 N.J. Super. 46, 71 (App. Div. 2010) (citing Dunphy v. Gregor, 136 N.J. 99, 112 (N.J. 1994)). "The severity of the loss is dependent on the quality of the pre-injury relationship. Impairment of the consortium includes not only the loss of the injured spouse's services but also its reciprocal burdening of the other spouse." Thalman v. Owens–Corning Fiberglas Corp., 290 N.J. Super. 676, 684 (App. Div. 1996) (internal citation omitted).

In this matter, Plaintiffs failed to set forth any support for the claim of loss of consortium. As stated by the trial court, "Plaintiff makes no effort to demonstrate the factors involved in a loss of consortium claim including a strong motional reliance and high degree of mutual dependence." [Pa14]. Therefore, in light of Plaintiff's waiver of this issue on appeal and "the record fails to demonstrate a claim for loss of consortium" [Pa14], the trial court's proper dismissal of the loss of consortium should be affirmed.

CONCLUSION

Based upon the foregoing, Respondent respectfully submits the Superior Court's decision must be upheld.

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MADELYNE FIGUEREDO, EDUARDO FIGUEREDO (husband), Appellants, v. TOWNSHIP OF UNION; NATC DONUTS INC. d/b/a DUNKIN' DONUTS; JOHN DOE 1-10 (a fictitious name), RICHARD ROE 1-10 (a fictitious name), ABC CORPORATION 1-10 (a fictitious corporation), XYZ CORPORATION 1-10 (a fictitious corporation) Respondents.	SUPERIOR COURT OF NEW JERSEY UNION COUNTY, LAW DIVISION Docket No.: A-002749-22 Civil Action **REPLY BRIEF BY APPELLANTS IN SUPPORT OF APPEAL** Sat Below: Hon. Daniel R. Lindemann, J.S.C. Docket No.: UNN-L-2808-20

REPLY BRIEF ON BEHALF ON APPELLANTS, MADELYNE FIGUEREDO AND EDUARDO FIGUEREDO, IN SUPPORT OF THE APPEAL FROM THE ORDERS DATED NOVEMBER 4, 2022 AND MARCH 28, 2023 OF HONORABLE DANIEL R. LINDEMANN, J.S.C.

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PRELIMINARY STATEMENT

This reply brief shall encompass reply arguments to both the response briefs of Respondent Township and of Respondent NATC. Appellant has not failed to brief the necessary elements of the torts claim act (TCA) as the erroneous determination of the Court as to the dangerous condition was the basis for the findings in several other elements. The other TCA elements, specifically actual or constructive notice and palpable unreasonableness were determined based upon the merits of the case, they were only determined to be denied because a dangerous condition was not found by the Court. (Pa11-12) As such, Appellant's briefing of the dangerous condition and request to remand the remaining elements of actual or constructive notice and palpable unreasonableness is appropriate and sufficient to appeal these matters.

Respondent Township fails to acknowledge the fact that the trial Court did not address Dr. Bellapianta's, Appellant's treating doctor, report nor any of the findings contained therein in making their determination as to permanent injury and that they have no expert to dispute the findings of Dr. Bellapianta.

Respondent NATC repeatedly states in their response brief that there is no dispute that the lease states the landlord was responsible for maintaining common areas, which they allege includes the area where Appellant fell, however these allegations have been disputed repeatedly by Appellant.

Nowhere in the lease does it state anything about the maintenance of the parking lot, however it does state that the maintenance of the leased premises is the responsibility of the tenant. As such, Respondent NATC owed a duty to Appellant and the public interest does not outweigh the non-delegable contractual duty set forth by the lease.

In short, the trial Court's rulings should be reversed.

LEGAL ARGUMENT

POINT I

APPELLANT DID NOT FAIL TO BRIEF THE NECESSARY ELEMENTS OF THE TORTS CLAIM ACT AND THEREFORE THOSE ISSUES WERE NOT WAIVED

Although Respondent Township argues that issues that are not briefed are deemed waived, Appellant did actually address all of the issues in the brief and did not need to brief the underlying arguments set forth in their oppositions as the trial Court did not make a determination as to actual or constructive notice and palpable unreasonableness based upon the merits of the case, they were only determined to be denied because a dangerous condition was not found by the trial Court. (Pa11-12, Pa296-320, Pa420-435)

Respondent Township states in their brief that if one element of the TCA fails, then all claims must fail, which is also how the Court outlined their Order and reasoning. (Pa1-19) The trial Court did not adjudicate the actual or constructive notice element and the palpably unreasonable element on the merits of the facts, they simply stated that without the finding of a dangerous condition that those other elements could not be found. Therefore, by addressing the dangerous condition element in Appellant's brief, and the fact that the other elements were based upon the determination of the dangerous condition element and not on the merits, requesting they be remanded for a determination if the dangerous condition element is reversed is a proper way to address the issues in the appeal.

The cases that Respondent Township base their argument on, Sklodowsky, State and 539 Absecon Boulevard LLC, regarding waiver of issues are cases where they either did not address an issue at all, where they didn't address an issue until the reply brief, or cases where there was no brief filed at all. In the case at bar, all the relevant issues were addressed in Appellant's filed brief and therefore the cited cases do not apply in this matter.

As stated herein above, and in Appellant's brief, Appellant does argue that she suffered a permanent loss of bodily function that is substantial. Appellant’s treating doctor, Dr. Bellapianta, performed the surgery on her

ankle, and also provided an expert report. Dr. Bellapianta's report outlines Appellant's injuries, including the surgery to her ankle, and he specifically opines in his expert report that those injuries are permanent in nature and are directly and causally related to Appellant's fall of September 6, 2018. (Pa314-320) Dr. Bellapianta's report also states that Appellant's body parts have failed to return to normal function, nor will they return to normal function with continued care and treatment. (Pa314-320) Respondent Township failed to acknowledge that the trial Court did not properly take into account the report of Dr. Bellapianta nor the fact that Respondent Township did not have any expert that disputed or contradicted Dr. Bellapianta's findings. Based on these facts herein and the arguments set forth in Appellant's brief, Appellant respectfully requests this Court find that there is a permanent loss of bodily function that is substantial.

Respondent Township makes numerous arguments regarding the dangerous condition element, and Appellant will not repeat the arguments already set forth in the initial brief. However, Appellant would like to point out that in Respondent Township's brief [Pg21, 2], they state that Plaintiff referenced photographs which showed a smooth area of pavement. It should be noted that those photographs referenced by Respondent Township are photographs that were taken after the subject parking lot was repaved and were

simply provided to show the general location where the incident occurred, not the condition of the parking lot at the time of the incident. There were other photographs that were provided from prior to the repaving of the parking lot which Appellant had marked and those photographs were not the photographs used when Respondent Township questioned Appellant about the pothole. Instead, they used a Google maps image which was an image that was much farther away from the parking lot than the Appellant's photographs in an attempt to confuse Appellant and make it difficult for her to identify the area when she had already marked same on other photographs.

Therefore, based on the arguments set forth herein and in Appellant's brief, Appellant respectfully requests this Court find that the determination of the trial Court should be reversed.

POINT II

THE ERRONEOUS DETERMINATION OF THE COURT THAT THERE WAS NO DANGEROUS CONDITION ONLY APPLIED TO THE TORT CLAIMS ACT AND DOES NOT PRECLUDE A FINDING OF NEGLIGENCE AS TO RESPONDENT NATC

(2T, Pa20-34)

Respondent NATC argues in their brief that since the trial Court found that there was no dangerous condition in the November 16, 2022 Order

and Reasoning, that Appellant cannot prove negligence against Respondent NATC. (Pa1-19) First, the trial Court found that the determination as to a dangerous condition was only applicable to Respondent Township. (Pa20-34) In the Order dated March 28, 2023, the trial Court states, "This Court found in its November 16, 2022, Order and Statement of Reasons that the record demonstrated that the parking lot defects alleged by Plaintiff were "minor, trivial or insignificant" and were not a dangerous condition under the TCA. Such finding was applicable to Defendant Township only as appropriate under the TCA." (Pa28) Second, a dangerous condition is an element of the TCA, not a requirement to prove a duty owed by Respondent NATC.

As such, it is very clear from the record that the trial Court did not make a determination as to a dangerous condition with regard to the claims against Respondent NATC, nor is it an essential element of proving duty owed by Respondent NATC.

POINT III

RESPONDENT NATC IS RESPONSIBLE FOR THE MAINTENANCE OF THE LEASED PREMISES, WHICH INCLUDES THE DESIGNATED PARKING SPOTS, AND THEREFORE THEY OWE A DUTY TO APPELLANT

(2T, Pa20-34)

Contrary to the allegations of Respondent NATC in their brief, the subject lease does not clearly place the obligation to maintain the common area

of the premises on the landlord. (Pa206-225) In fact, Respondent does not point to any part in the lease to support their allegation because there is nowhere in the lease that designates such responsibility. The trial Court in the March 28, 2023 Order even states that "Here, the Lease between Defendant Township and Defendant NATC does not assign express responsibilities as to the duty to maintain the parking lot." (Pa31) The lease does state that the maintenance of the lease premises, which includes 10 specifically allocated parking spots for Respondent NATC, is the tenant's responsibility. And Mr. D'Amore, owner of the subject Dunkin' Donuts, testified during his deposition that when the lease was entered into, Respondent NATC was responsible for the maintenance of those spots that were designated as Dunkin' Donuts spots in the lease as they were responsible for maintaining everything inside of the shaded area. (Pa543; Pa542) There has not been any determination as to whether the area Appellant fell was an area designated as part of the lease premises or a common area and therefore, it should be a question for a jury.

All of the cases cited by Respondent NACT have one major different to the case as bar. The cases of Kandrac, Holmes and Spano all had contracts where the landlord was contractually obligated to maintain the common areas of the center and there were no specific spaces or areas that were designated as areas for the use of a specific tenant and the tenant's business invitees. Here,

this case can be easily distinguished because the lease does not state who is responsible for maintenance of the common areas, but it does state that the responsibility for the maintenance of the lease premises is on the tenant. (Pa206-225) It is not just a multi-use parking lot, it also has bargained for and designated parking spots for Respondent NATC which makes it a completely different situation than any of the cases relied upon by Respondent NATC in their brief.

It is not Appellant's fault, nor responsibility, that the maintenance set forth in the lease contract and the maintenance of the rest of the parking lot may overlap. That should not give immunity to Respondent NATC for the maintenance that it is contractually obligated to perform nor the duty that it owes to Appellant. Since the lease is clear on the responsibility of the maintenance of the leased premises, the trial Court's determination as to duty should be reversed.

POINT IV

PUBLIC INTEREST DOES NOT OUTWEIGH IMPOSITION OF A NON-DELEGABLE CONTRACTUAL OBLIGATION (1T, 2T, Pa1-34)

As discussed herein above and in Appellant's initial brief, the lease sets forth the duty of maintenance by the tenant for the lease premises. Public

interest does not outweigh the imposition of a non-delegable contractual obligation of Respondent NATC. (Pa206-225) Although a Respondent Township representative may have testified that they are responsible for the maintenance of the parking lot, that does not negate the fact that it is contradictory to what is in the lease. To then find that Respondent Township is required to maintain some of the lease premises is completely contradictory to the purpose and function of this lease contract.

The fact that Respondent Township and Respondent NATC negotiated the lease, specified parking spaces, specified certain maintenance and now Respondent Township says they are responsible should not be allowed to control this case. There is a non-delegable duty set forth by the lease contract. The parties to a contract should know what their lease says and be required to abide by that contract. Respondent Township may voluntarily have taken on the same duty of maintenance as Respondent NATC by agreeing to maintain their lease common area, but the TCA does not protect private businesses and volunteering such maintenance by Respondent Township does not absolve Respondent NATC from its duty owed to Appellant as set forth in the lease nor would it be in the public interest to allow same to occur as it would go against the whole reason for contracts and leases.

Public interest should not outweigh a contractual obligation and a non-delegable duty in this case. The trial Court's determination should be reversed.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the trial Court's decisions granting summary judgment be reversed in their entirety.

Respectfully submitted,
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