ALFRED H. BURR AND ALYSSA BURR, H/W, Plaintiffs-Appellants, -vs- NEW JERSEY TURNPIKE AUTHORITY; MIDLANTIC CONSTRUCTION, LLC; C.J. HESSE, INC.; THE HESSE COMPANIES; JACOBS ENGINEERING GROUP, INC.; URBAN ENGINEERS INC.; Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-002866-22 T2 Civil Action ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION - ATLANTIC COUNTY DOCKET NO: ATL-L-1997-16 SAT BELOW: HONORABLE JAMES H. PICKERING, JR.

BRIEF OF PLAINTIFFS-APPELLANTS ALFRED H. BURR AND ALYSSA BURR, H/W,

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I. Preliminary Statement

This appeal respectfully asks that this Court re-open the courthouse doors which were unjustly closed on Plaintiffs' legal rights when the Trial Court granted Defendants' Summary Judgment motions. Simply stated, the Trial Court committed reversible error by improperly weighing the evidence and then resolving crucial disputed material facts and the reasonable inferences taken therefrom in the favor of the movants.

Although acknowledging the summary judgment standards (i.e., accepting the non-movant's version of the facts, including the favorable inferences that they may reasonably include), the Trial Court chose to do the opposite. In other words, the Court instead embraced the movants' version of the facts and hand-picked facts from the record in ways designed to support that version. Having done so, the Court's factual conclusions then generated a cascade of legal rulings, all of which were supported only by a foundation of conclusions taken from genuine issues of material fact that favored the movants. Had the Court properly complied with the summary judgment standards and accepted Plaintiff's version of the facts, including their fair inferences, the Court would not have dismissed Plaintiff's case.

By way of background, this matter arises from a motorcycle accident that occurred on September 12, 2015 on the Garden State Parkway. On that date,

Plaintiff Alfred Burr was operating his motorcycle in the southbound left lane when his motorcycle encountered uneven pavement/elevation change caused by settlement in the roadway at the northern abutment joint to the Rt. 30 overpass (a.k.a. Structure 40). As a result of the impact between the Plaintiff's motorcycle and the settlement at the abutment joint, Plaintiff was caused to lose control and crash into the center median/"jersey barrier" and become injured.

After being released from the hospital, Plaintiff returned to the scene and took a video of the condition. From that video, a screenshot was created of the expansion joint that Plaintiff hit. Plaintiff's expert, who spent 27-years as an engineer for the New Jersey Department of Transportation, explained that the settlement in the southbound left lane at the northern most abutment joint of the Rt. 30 overpass identified by Plaintiff was a dangerous condition. Also, when the New Jersey Turnpike Authority's ("NJTA") Construction Engineer was shown the image, he agreed that settlement at the bridge joint would be dangerous to users of the roadway. Shortly after Plaintiff's video was taken, emergency paving was performed to correct the settlement that existed at the bridge abutment in the southbound left lane in order bring the roadway back to proper grade.

At all relevant times, the section of the Garden State Parkway at the Rt. 30 overpass was under construction. Discovery revealed that as a result in their

participation in the construction project each of the Defendants had an independent duty for the maintenance and protection of traffic. Defendants' responsibilities included daily inspections, fixing conditions, and/or warning the traveling public against conditions that may affect their safety.

Discovery also revealed that for months prior to Plaintiff's accident, each Defendant either knew or should have known of the settlement condition that caused Plaintiff's crash and that the condition was dangerous. Despite knowing of the condition, Defendants failed to either fix it or warn the public against it.

Rather than accepting the above as true, the Trial Court ignored the most fundamental aspect of the summary judgment standard. That is, that all facts and the reasonable inferences that may be attached to them must be resolved in the favor of the non-movant. However, here, and without conducting oral argument, the Trial Court did the opposite and instead issued a written decision which dismissed Plaintiff's claims against all four Defendants. This appeal respectfully requests that this Court correct the errors committed by the Trial Court.

II. Procedural History

This matter arises out of a motorcycle accident that occurred on September 12, 2015. On that date, Plaintiff Alfred H. Burr was the operator of a motorcycle that was traveling southbound on the Garden State Parkway in Galloway

Township, Atlantic County, New Jersey. As Plaintiff was traveling in the left-hand lane between approximately mile marker 39.9 and 40.1, he came to a defect in the roadway which caused him to lose control of his motorcycle and caused him to crash into the concrete barrier. (Pa1).

The Complaint in this matter was filed on September 7, 2016 against the New Jersey Turnpike Authority ("NJTA") and Pierson South-State, Inc. (Pa1550).

Defendant NJTA filed an Answer on September 30, 2016. (Pa1559).

Defendant Pierson South-State, Inc. filed an Answer on December 7, 2016. (Pa1567).

Plaintiff filed a First Amended Complaint on March 10, 2017 adding Midlantic Construction, LLC ("Midlantic") as a Defendant. (Pa1576).

On March 29, 2017, Defendant Pierson South-State, Inc. was dismissed without prejudice by Stipulation of Dismissal. (Pa1584).

Defendant Midlantic Construction, LLC filed their Answer on or about April 7, 2017. (Pa1592).

On or about March 24, 2017 Defendant NJTA filed their Answer to the Amended Complaint. (Pa1585).

On December 22, 2017, Defendant Midlantic filed a Third-Party Complaint against C.J. Hesse Inc. (Pa1606).

Plaintiff filed a Second Amended Complaint on January 9, 2018 adding C.J. Hesse Inc. and the Hesse Companies (Hesse Defendants) as Defendants in this matter. (Pa1613).

Defendant Midlantic filed an Answer to the Second Amended Complaint on January 10, 2018. (Pa1619).

Defendant NJTA filed an Answer to the Second Amended complaint on January 15, 2018. (Pa1633).

The Hesse Defendants filed their Answer to the Third-Party Complaint and Plaintiffs' Second Amended Complaint on February 9, 2018. (Pa1639, Pa1644).

Plaintiff filed a Third Amended Complaint on December 7, 2018 adding Jacobs Engineering Group ("Jacobs") as a Defendant. (Pa1650).

Defendant Midlantic filed their Answer to the Third Amended Complaint on December 11, 2018. (Pa1658).

Defendant NJTA filed their Answer to the Third Amended Complaint on December 12, 2018. (Pa1668).

The Hesse Defendants filed their Answer to the Third Amended Complaint on January 8, 2019. (Pa1674).

Jacobs Engineering Group filed their Answer on February 21, 2019. (Pa1683).

Plaintiffs filed a Fourth Amended Complaint on May 17, 2019 adding Defendant Urban Engineers, Inc. ("Urban") (Pa1698).

Defendant Midlantic filed their Answer to the Fourth Amended Complaint on May 17, 2019. (Pa1706).

The Hesse Defendants filed their Answer to the Fourth Amended Complaint on May 17, 2019. (Pa1717).

Defendant Urban filed their Answer to the Amended Complaint on July 1, 2019. (Pa1727).

Defendant NJTA filed their Answer to the Fourth Amended complaint on August 19, 2019. (Pa1739).

On August 29, 2019, Defendant Urban filed a Motion for Summary Judgment. (Pa1745).

Plaintiffs filed their Opposition on September 17, 2019. (Pa1756).

Defendant Urban filed a Reply Brief on September 23, 2019.

Oral argument was conducted (Pa1811).[1] The court denied Defendant's motion on September 27, 2019. (Pa1826).

On November 22, 2019, the Hesse Defendants filed an Amended Answer to Plaintiffs' Fourth Amended Complaint. (Pa1828).

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[1] Oral argument on Defendant Urban's Motion for Summary Judgment was held before the Honorable Joseph L. Marczyk, J.S.C. on 9/27/19 (Transcript 1T).

Defendant Urban filed a Motion for Summary Judgment on January 7, 2022. (Pa1841).

Defendant Jacobs filed a Motion for Summary Judgment on January 7, 2022. (Pa1881).

Defendant NJTA filed a Motion for Summary Judgment on January 21, 2022. (Pa1887).

On February 8, 2022 Defendant Midlantic filed a Cross-Motion for Summary Judgment. (Pa1934).

On February 8, 2022, Plaintiffs filed their Opposition to Urban's Summary Judgment motion. (Pa1948).

On February 8, 2022, Plaintiffs filed their Opposition to Jacobs' Summary Judgment motion. (Pa1960).

On February 8, 2022, Plaintiffs filed their Opposition to NJTA's Summary Judgment motion. (Pa1968).

On February 22, 2022, Plaintiffs filed their Opposition to Midlantic's Summary Judgment motion. (Pa1978).

On February 28, 2022, Defendant Jacobs filed their Reply Brief. (Pa2000).

On February 28, 2022, Defendant Midlantic filed their Reply Brief. (Pa2003).

On February 28, 2022, Defendant Urban filed their Reply Brief. (Pa2009).

On March 1, 2022, Defendant NJTA filed their Reply Brief. (Pa2015).

Defendants CJ Hesse Inc. and the Hesse Companies were dismissed without prejudice via Stipulation of Dismissal by all parties filed with the Court on March 21, 2022. (Pa2022).

On March 24, 2022, Judge Winkelstein (J.S.C.*ret'd*) denied Defendants' Motions and Ordered a Rule 104 Hearing. (Pa2025).[2]

The Rule 104 Hearing took place on May 9, 2022 before the Honorable James Pickering Jr., J.S.C. (Pa1422).[3]

On June 14, 2022, Defendant Jacobs submitted their post-hearing supplemental brief. (Pa2027).

On June 14, 2022, Defendant Urban submitted their post-hearing supplemental brief. (Pa2037).

On June 14, 2022, Defendant Midlantic submitted their post-hearing supplemental brief. (Pa2069).

On June 14, 2022, Defendant NJTA submitted their post-hearing supplemental brief. (Pa2085).

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[2] Oral argument on Defendants' Summary Judgment was held before The Honorable Michael Winkelstein, J.A.D. on March 28, 2022 (Transcript 2T).

[3] The Rule 104 Hearing was held before The Honorable James H. Pickering, Jr., J.S.C. on May 9, 2022 (Transcript 3T).

On June 14, 2022, Plaintiffs submitted their post-hearing supplemental brief. (Pa2087)

On September 27, 2022, Mediation was held between the parties with the Honorable Marc Baldwin, J.S.C. (ret.)

Nine months later, on April 10, 2023, The Honorable James Pickering, J.S.C., granted Defendants' Motions for Summary Judgement and issued a written ruling relating to the same. (Pa2113).

On June 14, 2023, The Honorable James Pickering, J.S.C., signed an amended order granting Defendants' Motions for Summary Judgment and dismissing the case as to all parties with prejudice. (Pa2171).

On May 24, 2023, Plaintiffs filed a Notice of Appeal. (Pa2174).

III. Statement of Facts

Had the Trial Court properly adhered to the summary judgment standards and viewed the facts in the light most favorable to the Plaintiff, including all reasonable inference arising from those facts, the Trial Court would have accepted the following facts:

A. The Accident

Plaintiff's motorcycle accident occurred on September 12, 2015 on the Garden State Parkway (hereinafter "GSP") in the southbound left lane at

northern most approach to the overpass of Route 30 at or near milepost 39.9. (Pa1).

When the Plaintiff reached the northern abutment joint where the highway road meets the overpass, his motorcycle encountered uneven pavement caused by settlement in the left lane where the roadway abutted the bridge joint. He testified as follows:

> **Q:** And just describe to me to your best recollection how the accident happened?
>
> **A:** We were traveling southbound. Nice day. Cruising along with traffic. As I approached that overpass, almost like leading edge of the overpass, that's when I felt a severe smack in the back of the bike…
>
> (Pa380 at 17:6-12).
>
> **Q:** And the area of the road where you say you hit something, is that in the threshold between the roadway and the bridge overpass heading south?
>
> Ms. King: Objection to the form.
>
> **Q:** You can answer.
>
> **A:** Yes. I believe that was where the bridge met the highway.
>
> (Pa471 at Line 19 – Pa472 at Line 1).

After being released from the hospital, Plaintiff returned to the scene and took video of the condition. From that video, a "snapshot" was created. (Pa521 at 1- Pa523 at 6). As Plaintiff explained during his deposition:

Q: Looking at NJTA-1, what do you believe that your motorcycle impacted?

A: This, to me, appears like an expansion joint in the bridge.

(Pa523 at 18-21).

Q: Why did you provide that still (picture) at that location?

A: Because I felt like that's what I hit.

(Pa522 at 16-19).

B. Defendants' Duty to Maintain and Protect Traffic

1) The New Jersey Turnpike Authority

At all relevant times, the GSP was owned by New Jersey Turnpike Authority. (Pa1202). As the owner of the GSP, the NJTA had maintenance responsibility for the roadway. (Pa797 at 12:13-17). NJTA's maintenance responsibility continued during the subject construction project. (Pa797 at 12:4-17 and Pa800 at 21:13-22:1-4). In furtherance of its responsibility, NJTA maintenance patrols the roads every morning. (Pa808 at 55:2-9).

2) Midlantic Construction

In May 2014, prior to the accident, the NJTA entered into a construction services contract with Defendant Midlantic Construction to widen portions of the GSP, including but not limited to the subject area of Rt. 30. (Pa1202). According to the contract between the NJTA and Midlantic, during the construction, Midlantic was responsible for safety measures for the protection

of all persons and property on and adjacent to the work site. (Pa1208-1209). That contractual responsibility included, among other things, the following:

a. The protection of the traveling public; including maintenance of traffic control devices. (Pa1214, Pa2226, Pa2227).

b. Perform daily inspections, including weekends and holidays and at night to ensure compliance with the Traffic Control Plan and other approved Standards. (Pa1214).

c. Install and maintain signs in accordance with the Manual for Uniform Traffic Control ("MUTCD"). (Pa1225).

d. Correction of deficiencies of traffic control devices within 2 hours of discovery or notification by the engineer. (Pa1214).

3. Jacobs Engineering Group, Inc.

On October 1, 2014, the NJTA also entered into a contract with Defendant Jacobs for the supervision of construction services related to the contract between the NJTA and Midlantic/Contractor. (Pa2184). According to the Contract with the NJTA, Jacobs' "scope of services" included the maintenance and protection of traffic and compliance with the MUTCD. (Pa2187, Pa2205). Jacobs Chief Inspector, Jeffrey Rudenjack, testified that part of that responsibility was to identify the type of condition that caused Plaintiff's accident. He testified to the following:

> **Q**: Do you as the chief inspector yourself perform periodic inspections of the structure that's being worked on and in this case the Route 30 overpass?

A: Yes.

Q: Can you share with me what's involved in that inspection process?

A: Well, you're looking for general deficiencies, anything that might—might be involved with possible safety issues, something like that. Aside from what you're inspecting on the plans and specifications for the project, things like that.

Q: Did your inspection process include the travel surface of the Garden State Parkway?

A: Yes.

Q: And what types of deficiencies would you be looking for on the travel surface?

A: Potholes, things of that nature, ridability issues, anything that might be in the roadway, might be obstructions, that type of thing. I don't know how much more to say than that.

Q: You mentioned potholes, ridability issues. Is roadway settlement in that category?

A: Yes, that would be a category.

(Pa656 at 20:16 to Pa657 at 21:15).

4) Urban Engineering, Inc.

On October 8, 2014, Jacobs then entered into a Sub-Consultant Agreement with Urban Engineering, Inc. for the Supervision of Construction Services. (Pa1235). At all relevant times, Urban was also responsible for the maintenance of the protection of traffic. (Pa1271). According to Urban's Construction Safety

Manual, "safe movement of traffic and pedestrians…is the single most important aspect of the project. (Pa1337). Urban's resident engineer Jordan Wood conceded that Urban had responsibility for the maintenance and protection of traffic and to identify the type of condition that caused Plaintiff's accident. (Pa674). He testified as follows:

> **Q**: Did Urban have any responsibility with respect to inspecting or monitoring conditions on the roadway surface, the travel surface?
>
> **A**: Yes.
>
> **Q**: Was that a contractual responsibility or is that a responsibility that developed during the project?
>
> Mr. Ciampoli: Objection. You can answer.
>
> **A**: Safety is an overall, the responsibility of the contractor. If there's an immediate safety concern, its kind of a team approach from everybody involved to identify areas ranging from us, to Jacobs, to our inspection staff who's different companies, to the state police to turnpike maintenance, other personnel.
>
> (Pa678 at 19:5-20)
>
> **Q**: Okay. So with respect to physical conditions on the roadway, would that be things like potholes?
>
> **A**: Yes.
>
> **Q**: Elevation issues?
>
> **A**: Yes.
>
> **Q**: Settlement in the roadway?

A: Yes.

(Pa678 at 20:25 – Pa679 at 21:7).

C. Facts Related to "Dangerous Condition"

Prior to the accident, on April 22, 2015, a Biennial Bridge Inspection was performed on behalf of the NJTA on the Rt. 30 bridge overpass where Plaintiff ultimately had his accident. (Pa1343). The inspection identified settlement in the southbound left lane at the north abutment joint. (Pa1351 and Pa1367). The settlement condition was described as "[r]amped up and deteriorated in the left shoulder and left lane" with settlement up to 2 inches at the southbound north approach roadway. (Pa1349, Pa1351, Pa1367)(Emphasis Added). The engineering group that performed the Biennial Bridge Inspection recommended that the abutment joint be repaired. (Pa1350).

Also prior to the accident, a subsequent inspection of the Rt. 30 overpass took place on June 24, 2015. On June 26, 2015 an inspection memo was prepared which indicated, among other things, that the inspection revealed "significant settlement" in the pavement at the north approach and recommended immediate repair and testing. (Pa1191)(Emphasis Added).

When NJTA Senior Construction Engineer Joe Johnson was shown the "snapshot" from a video taken by Plaintiff of the condition that caused his

accident. Johnson agreed that settlement at that location would be dangerous to users of the roadway. (Pa801 at 28:3-16 and Pa1421).

According to Plaintiff's Expert Richard Balgowan, P.E., based on the evidence available to him, a dangerous condition existed at the abutment joint identified by Plaintiff due to settlement and corrosion in the left lane of travel. (Pa20). As Plaintiff's expert explained in his report, pavement surface quality has a greater effect on motorcycles and their handling and stability. (Pa21). Mr. Balgowan also referred to the Guidelines on Motorcycle and Bicycle Workzone Safety which explains that motorcycles have difficulty crossing uneven lanes that differ as little as 1 inch. (Pa21 and Pa1398). In fact, Defense expert, David W. Kasserkert, P.E. agreed that pavement elevation changes can cause operational problems for motorcycles. (Pa625).

On November 17, 2015, emergency paving was performed in the southbound left lane at the subject abutment joint in order to correct the pavement settlement and bring to proper grade. (Pa1396).

Due to the November 17, 2015 repairs and ultimately the completion of the Parkway construction project, none of the experts in this case could perform an inspection or take their own measurements of the settlement/elevation change.

D. Facts Related to Actual Notice

1) New Jersey Turnpike Authority

Nearly five months prior to the subject accident, as previously referenced, on April 22, 2015, a Biennial Bridge Inspection was performed at the subject bridge overpass located over Rt. 30 on behalf of the NTJA. (Pa1343). The inspection identified settlement at the southbound north abutment joint. The condition was described as "ramped up and deteriorated in the left shoulder and left lane" with roadway settlement up to 2 inches. (Pa1349, Pa1350, Pa1351 and Pa1367)(Emphasis Added). The Biennial Bridge Inspection report recommended that the abutment joint in the southbound left lane be repaired. (Pa1350).

Approximately two and a half months prior to the accident, another inspection of the Rt. 30 bridge was performed on June 24, 2015. On July 2, 2015, the results and recommendations from the inspection were sent to the NJTA. The inspection memo indicated that "significant settlement" in the pavement was found at the north approach. (PA1200). As a result of this inspection, it was recommended for immediate repair and testing. Id. (Emphasis Added).

2) Midlantic, Jacobs, and Urban

At all relevant times, Midlantic was under contract to perform the construction work on the widening project for the Garden State Parkway. (Pa1202). Midlantic employee Frank Lippit was on site daily. (Pa788 at 16:8-10). Frank Lippit and Urban Engineering employee Jordan Wood communicated daily. (Pa789 at 17:10-15). On June 22, 2015, Jordan Wood sent an email to Jacob's employee, Ernie Dobbs, and NJTA engineer Joe Johnson. (Pa1187). This email explained that that Frank uncovered a problem with the bridge deck. (Pa1187). As a result of identifying this problem with the bridge, an onsite inspection was performed on June 24, 2015. (Pa1192). The inspection revealed "significant settlement" in the pavement at the north approach and it was recommended for immediate repairs and testing. (Pa1193) (Emphasis Added). In other words each Defendant had actual notice of the settlement issue on the bridge deck.

E) Facts Related to Constructive Notice

All Defendants

Both the April 22, 2015 inspection and the June 24, 2015 inspection identified settlement at the southbound northern most abutment joint of the Rt. 30 overpass. Although both inspections were performed by entities other than the Defendants, since both of these inspections took place during the

construction project, Defendants all would have known about the inspections at the Rt. 30 bridge. (Pa597 at 37:7-11 and 38:5-19, Pa600 at 49:23-25 through 50:1-4). Further, since both inspections identified the settlement at the north approach, the condition was there to be identified by the Defendants.

As indicated above, each Defendant performed its own daily inspections in an effort to identify problem in the roadway such as settlement and elevation changes. (Pa1214), (Pa808 at 55:2-9) (Pa678 at 19:5-8), (Pa678 at 19:22 to Pa679 at 21:7), and (Pa654 at 12:6-13, Pa656 at 16 through Pa657 at 21:7). Plus, "everybody speaks on a daily basis at these projects." (Pa789 at 17:10-15). Since the April 22, 2015 and June 24, 2015 inspections both revealed the settlement, the Defendants should have also identified the defect.

F. Facts Related to Defendants Duty Fix and/or Warn

As stated above, each Defendant was responsible for the maintenance and protection of traffic which included warning users of the roadway pursuant to the Manual Uniform Traffic Control Devices (hereinafter referred to as "MUTCD") and the Traffic Control Detail (hereinafter referred to as "TCC"). (Pa1225, PA2205, PA1271). The MUTCD calls for, among other things, the use of warning signs when such a condition exists. MUTCD Section 2C.01 addresses the use of warning signs. (Pa1418)(Emphasis Added).

According to the MUTCD, warning signs call attention to unexpected conditions of or adjacent to a highway, street, or private roads open to public travel ad to situations that might not be readily apparent to road users. Id. Warning signs alert road users to conditions that might call for a reduction in speed or an action in the interest of safety and efficient traffic operations. (Pa1418). According to the MUTCD, a "Bump" sign should be uses to give warning to a sharp rise in the profile of the road. (Pa1419). Additionally, the Traffic Control Detail required that uneven pavement signs were to be used whenever such a condition existed. (Pa1419 and Pa1186)(Emphasis Added).

The June 26, 2015 inspection memo identified "significant settlement" in the pavement at the north approach. The memo recommended "immediate repairs/testing." (Pa1191).

The subject defect should have been dealt with "immediately"; that means within 24 hours, no matter who identified it. (Pa799 at 19:2-16).

G. Defendants' Failure to Act and Breach of Duty

Between the Biennial Bridge Inspection on April 22, 2015 and the subject accident, there is no record of any maintenance being performed by any Defendant to fix the dangerous condition; nor is there any evidence of warning signs being installed in order to warn motorists of the dangerous condition.

Between the June 24, 2015 inspection, which identified "significant settlement" at the north approach that was in need of "immediate repairs", and the time of the subject accident, there were no records of any maintenance performed by any Defendant to fix the dangerous condition nor is there any evidence of warning signs being installed to warn motorists of the dangerous condition.

IV. Legal Argument

A. The Trial Court Erred When it did not Hold Oral Argument

(Not Raised Below)

On April 10, 2023, without conducting oral argument, the Trial Court issued a written decision dismissing Plaintiffs' case against all parties.

R. 1:6-2(d) states the following:

> Except as otherwise provided by R. 5:5-4 (family actions), no motion shall be listed for oral argument unless a party requests oral argument in the moving papers or in timely-filed answering or reply papers, or unless the court directs. A party requesting oral argument may, however, condition the request on the motion being contested. If the motion involves pretrial discovery or is directly addressed to the calendar, the request shall be considered only if accompanied by a statement of reasons and shall be deemed denied unless the court otherwise advises counsel prior to the return day. As to all other motions, the request shall be granted as of right.

In the recent mater, Delgado v. Yourman-Helbig, No. A-3633-20, 2022 N.J. Super. Unpub. LEXIS 1266, at *14-16 (Super. Ct. App. Div. July 13, 2022), the Court reinforced the importance of granting and conducting oral argument when it reversed the Trial Court. As noted, the Appellate Division, indicated that "requests for oral argument 'shall be granted as of right.'" R. 1:6-2(d). Similarly, here, all parties requested oral argument but it was not entertained by the Trial Court. As the Delgado Court indicated:

> If the motion judge did in fact deny the request for oral argument because he deemed it frivolous, the judge should have provided a basis

> for its denial and placed it on the record. See Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J. Super. at 498 ("No basis is set forth in the record for a relaxation of [*Rule* 1:6-2(d)] and we perceive none.")
>
> Ibid. at Pa2220. (Opinion attached).

Here, all movants requested that the Trial Court conduct oral argument. However, oral argument on the summary judgment motions never took place. By not conducting oral argument, the Trial Court deprived Plaintiff with a fundamental right. As described in more detail below, the court then compounded this error by violating another fundamental summary judgment standard when it viewed crucial disputed facts in the light most favorable to the movant rather than the Plaintiff.

Accordingly, the Trial Court's decision to grant summary judgment should be reversed on this alone.

B. The Trial Court Erred in its Analysis of the Tort Claims Act

(Raised below, Pa2142, Pa2152)

1) Plaintiffs' Claims Against the NJTA are Subject to an Ordinary Negligence Standard for the Failure Warn or Repair a known condition

(Raised below Pa2146, PA2152)

In its decision, the Trial Court mistakenly states that Plaintiff argued that the Tort Claims Act does not apply because road maintenance is a ministerial act. (Pa2146). This is not an accurate representation of Plaintiffs' position. At

the trial level, Plaintiff argued that the conduct of the NJTA in failing to warn or repair of known roadway hazard should be evaluated based on an ordinary negligence standard as roadway maintenance and the failure to warn are ministerial in nature.

When the NJTA filed its motion for summary judgment, one of its arguments was that it was entitled to absolute immunity as its' decision to contract away the inspection and safety responsibilities during the construction project was a "discretionary" decision. However, as articulated in opposition to the NJTA's motion, Plaintiff argued that, although the NJTA contractually included the Defendants in the responsibility to inspect and maintain the roadway, as owner of the Parkway, the NJTA could not absolve itself of its own duties; as the NJTA's duty to inspect and maintain the roadway was non-delegable. Plaintiff also argued that the NJTA's duty to perform maintenance to repair or at least warn against a known hazard should be considered "ministerial" and, as result, an ordinary negligence standard should be applied.

The Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 59:12-3, provides protection for public entities involved in tort claims. Generally, immunity prevails over liability to the extent that immunity has become the rule and liability is the exception. The standard for liability under the TCA depends on whether the conduct of individuals acting on behalf of the public entity was

ministerial or discretionary. See Henebema v. South Jersey Transportation Authority, 219 N.J. 481 (2014).

If the action was ministerial, liability for the public entity is evaluated based on an ordinary negligence standard. However, a more difficult threshold must be overcome in order for a public entity to be liable for an individual's discretionary acts. A public employee remains liable for ordinary negligence in the performance of ministerial acts unless such acts are covered by specific sections of the Act declaring non-liability. Id.

A "ministerial act" has been defined as "one which public officers are required to perform upon a given state of facts in a prescribed manner, in obedience to the mandate of legal authority and without regard to their own judgment or opinion concerning the propriety or impropriety of the act to be performed." Ritter v. Castellini, 173 N.J. Super. 509, 513-514 (Law Div. 1980) (sheriff required to safekeep property levied upon). It has also been defined as synonymous with "mandatory." Marley v Palmyra Bor., 193 N.J. Super. 271, 289 (Law Div. 1983). See discussions in Morey v. Palmer, 232 N.J. Super. 144 (App. Div. 1989); Flodmand v Institution & Agencies Dep't., 175 N.J. Super. 503 (App Div. 1980); Sutphen v. Benthian, 165 N.J. Super. 79 (App. Div. 1979); Evans v. Elizabeth Police Dept., 190 N.J. Super. 633, 636 (Law Div.) *rev'd on other grounds* 236 N.J. Super. 115 (App. Div. 1983).

Maintenance of the roadway has specifically been found to be a ministerial act. See, *e.g.*, Coyne v. State Dept. of Transp. 182 N.J. 481, 487 (2005); Costa v. Josey, 160 N.J. Super. 1 (App. Div. 1978) *aff'd* 79 N.J. 535 (1979), *rev'd* 83 *N.J.* 49 (1980); Schriger v. Abraham, 83 N.J. 46 (1980); Brown v. Brown, 86 N.J. 565 (1981); and Furey v. County of Ocean, 273 N.J. Super. 300 (App. Div.) (*certif. den.* 138 N.J. 272 (1994) – court finding failure to maintain roadway in safe condition a ministerial act.) Additionally, the failure to warn or protect has also been found by the court to be a ministerial act. Danow v. Penn Central Transportation Co., 153 N.J. Super. 597 (Law Div. 1977).

Although, for the reasons articulated in more detail below, it is Plaintiff's position that the claims against the NJTA survive even if analyzed under N.J.S.A. 59:4-2, on this record the NJTA's conduct should be analyzed under an ordinary negligence standard for its failure to warn or repair a known hazard.

Here, although the NJTA did present the argument that its conduct was discretionary and in the face of "competing demands", on this record, the NJTA has not actually produced any evidence to support that notion. That is, other than the simple fact that the construction of portions of the Parkway had been contracted out to third parties there is no evidence of "competing demands" and the resources for the construction project had already been allocated. The record here shows that the NJTA failed to appropriately and safely maintain its roadway

when it failed to repair or warn motorists of a known settlement defect in the roadway. Even though the subject construction project was underway, the NJTA still maintained a level of responsibility for roadway maintenance and safety.(Pa800 at 21:13-22:1-4). Additionally, NJTA Senior Construction Engineer Joe was shown the "snapshot" of the condition that caused his accident and Johnson agreed that settlement at that location would be dangerous to users of the roadway. (Pa801 at 28:3-16 and Pa1421).

It was recommended to the NJTA on two separate occasions that the settlement condition at the abutment joint should be repaired; the first time was following the April 22, 2015 inspection and the second time following the June 24, 2015 inspection. (Pa1343, Pa1191). Following the second inspection, it was recommended that the settlement undergo "immediate repair/testing". (Pa1191). According to NJTA engineer Joe Johnson, that means within 24 hours. (Pa799 at 19:2-16). However, despite being told to repair the condition, there is absolutely no evidence of the settlement being repaired until November 17, 2015, almost seven months after first being told to repair it. On November 17, 2015, shortly following the subject accident, temporary paving was performed in the left lane at the north approach of the Rt. 30 bridge in order to correct the pavement settlement and return the roadway to proper grade. (Pa1396).

a) The Trial Court Erred When It Failed to Consider Subsequent Paving Records as Evidence of the Existence of the "Dangerous Condition"

(Raised below, Pa2146)

The Court then made another error here when it decided not to consider the subsequent paving records as evidence of either the dangerous character of the settlement or that the condition itself existed as described; both permissible exceptions to N.J.R.E. 407. The Trial Court refused to consider subsequent paving because, in its view, repairs were not done because of Plaintiff's accident. (Pa2146). However, that is not the test. A subsequent remedial measure is admissible to prove, among other things, the existence of a defective condition at a particular point in time. See Perry v. Levy, 87 N.J.L. 670, (E.&A. 1915). Since the Defendants have argued that the settlement at the abutment joint at issue was not dangerous, the emergency paving records are admissible to prove the defect did exist in the location identified by the Plaintiff and that it was dangerous. See N.J.R.E. 407; *e.g.*, Perry v. Levy, *supra*, 87 N.J.L. 670 (E&A 1915) and Brown v. Brown, 86 N.J. 565, (1981).

Giving every favorable inference to the Plaintiff as required by the Rules of Court, the Trial Court should have concluded that the condition of the roadway was dangerous at the time of Mr. Burr's accident, that the NJTA had

been on notice of the condition for five months prior to Plaintiff's crash, and that the NJTA was recommended on two separate occasions to repair it but did nothing.

For these reasons a jury could reasonably conclude that after being told to repair the settlement, the NJTA's responsibility to repair or warn of it was ministerial in nature. Therefore, NJTA's failure to repair or warn of a known danger should be subject to the ordinary negligence standard.

2. Plaintiffs have Satisfied the Elements Necessary to Establish Liability for Damages against the New Jersey Turnpike Authority Under the Tort Claims Act 59:4-2.

(Raised below, Pa2142, Pa2152)

Appellate review of a summary judgment order is *de novo*. Memorial Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 524 (2012). In deciding a motion for summary judgment, this court is "required to engage in same type of evaluation, analysis or sifting of evidential materials as required by R. 4:37-2(b) [motions for involuntary dismissal] in light of the burden of persuasion that applies if the matter goes to trial." Most importantly, the court must determine whether the competent evidential materials, 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. However, if

the summary judgment simply turns on a question of law, or if further factual development is unnecessary in light of the issues presented, then summary judgment need not be delayed. United Savings Bank v. State, 360 N.J. Super. 520, 525 (App. Div. 2002).

The governing statute for the liability of a public entity such as the NJTA is the New Jersey's Tort Claims Act is N.J.S.A. 59:4-2, which states:

> A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> > a. a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
> >
> > b. a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.
>
> Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.

See N.J.S.A. 59:4-2.

Here, the trial court erred by resolving a variety of contested factual issues in the movant's favor and determined as a matter of law that (a) the settlement at the abutment joint was not a "dangerous condition"; (b) the NJTA did not

have notice of a "dangerous condition"; and (c) the NJTA's conduct was not "palpably unreasonable."

In order to impose liability upon a public entity under N.J.S.A. 59:4-2, a property must have been in a "dangerous condition at the time of injury." To establish a dangerous condition of public property, a plaintiff must prove that "a condition of the property" created "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). Thus, a plaintiff must prove that: (1) there was a defect in the property; (2) the defect was so severe as to create a "substantial risk of injury"; and (3) the property was being used with due care at the time of the injury. See Levin v. County of Salem, 133 N.J. 35, 44-46 (1993); Garrison v Township of Middletown, 154 N.J. 282, 294 (1998). However, the due care standard does not refer to the actual behavior of the parties but is instead focused on whether a reasonable person using the property with due care would face a substantial risk of injury. Garrison v Township of Middletown, 154 N.J. 282, 292 (1998); Furey v. County of Ocean, 273 N.J. Super. 300, 311-312 (App. Div.) *certify. denied.* 138 N.J. 272 (1994).

In evaluating the trial judge's rulings, this court must begin with the fundamental principal that, whether or not the property was in a dangerous condition is generally a question for the finder of fact. Vincitore v. Sports &

Expo. Authority, 169 N.J. 119, 123 (2001) (Emphasis Added). Thus, there is a threshold determination of whether a reasonable factfinder could conclude from the evidence presented by the plaintiff that the property was in dangerous condition. Id. at 124. In this case, however, that determination need not include an analysis of whether the Plaintiff was using the property with due care at the time of the accident, as no Defendant makes that argument.

a) Whether the Settlement/Elevation Change at the Abutment Joint was in a "Dangerous Condition" is a Question for the Jury

(Raised below, Pa2145, Pa2152)

Here, despite significant evidence that suggested otherwise, the Trial Court made a critical error by determining as a matter of law that the settlement at the abutment joint that caused Plaintiff's accident was not in a "dangerous condition." This decision by the Trial Court was the first domino in a series of factual conclusions which improperly favored the movants. Once the Court decided that the settlement at the abutment joint was, as a matter of law, not dangerous, it then generated a cascade of legal rulings which all went against the Plaintiff. As the record reveals, however, when viewing the facts in the light most favorable to the Plaintiff, a genuine issue of material fact exists as to whether or not the condition was in a "dangerous condition".

For example, months before Plaintiff's accident, there were two separate inspections that identified the settlement on the Garden State Parkway at the southbound north abutment joint of the Rt. 30 overpass. First, on April 22, 2015, the Biennial Bridge Inspection was performed on behalf of the NJTA on the Rt. 30 (a.k.a. Structure 40) overpass bridge. (Pa1343). The inspection identified settlement in the southbound left lane at the north abutment joint. (Pa1351 and Pa1367). The settlement condition was described as "[r]amped up and deteriorated in the left shoulder and left lane" with settlement up to 2 inches at the southbound north approach roadway. (Pa1349, Pa1351 and Pa1367)(Emphasis Added). Arora and Associates, the engineering group that performed the inspection, recommended that the abutment joint be repaired. (Pa1350).

A second inspection was of the Rt. 30 bridge was performed on June 24, 2015, after concerns related to the deck quality arose during the construction. (Pa1187). As a result of that inspection, T&M Associates prepared a memo dated June 26, 2015 which was sent to the NJTA under cover letter of July 2, 2015. (PA1191). The memo revealed that the pavement at the north approach to the overpass exhibited "significant settlement". (Pa1192). The memo also included a recommendation for immediate repairs and testing. (Pa1193)(Emphasis Added).

If these facts, including the fair inferences, were resolved in Plaintiff's favor then the results of these two inspections not only support Plaintiff's claim that the NJTA was on notice, but also that the condition was severe enough to qualify as a "dangerous condition." The fact that the settlement was identified and that it needed to be repaired "immediately" certainly permits a fact finder to reasonably conclude that the condition was a "dangerous condition." At a minimum, isn't that not at least one of the inferences that can be drawn in favor of the Plaintiff from a directive to perform "immediate repair"?

Although it is anticipated that the defense will argue that after the results of second inspection were circulated, there was a follow-up email which indicated that the settlement referred to in the memo was actually at the south end and not the north end of the bridge where Plaintiff was caused to lose control and crash. (Pa1198). However, this argument has no merit, at least in this setting, as the person that sent that email, which allegedly corrects the location of the settlement, was not the person that actually wrote the memo. (Pa1191, Pa1192). The memo was prepared by James A. Buczek of T&M Associates but the email was sent by Robert Matthews of Gannett Fleming, Inc. (Pa1192) and (Pa1191). In other words, there is nothing that conclusively established the accuracy of that email and that email could simply be incorrect. A factual dispute clearly exists.

Further, as additional support for the fact that the location of the settlement in the memo was accurate as originally stated, "emergency paving" records confirm the location of the settlement at the north abutment joint in the left lane. (Pa1396 and Pa1397). These emergency paving records specifically identify that emergency paving was performed in the southbound left lane at the north approach to correct settlement and return to proper grade. (Pa1396 and Pa1397). After all, as the resident engineer on the project conceded, if the settlement in the southbound north approach at abutment was not causing a problem for the traveling public then it would not have needed to be corrected. (Pa698 at 100:5-13).

As this Court is aware, although subsequent remedial measures are not admissible to prove negligence, as pointed out earlier, a subsequent remedial measure is admissible to prove, among other things, the existence of a defective condition at a particular point in time. See Perry v. Levy, 87 N.J.L. 670, (E. & A. 1915). Since the Defendants have argued that the condition at the abutment joint at issue was not dangerous, the emergency paving records are admissible to prove the defect did exist in the location identified by the Plaintiff and that it was dangerous.

Accordingly, for the purposes of a summary judgment motion, the Trial Court was required to view the facts in the light most favorable to the Plaintiff.

Had the court done so, then the court was required to accept as true that the "significant settlement" that required "immediate repair and testing" was in the left lane of southbound travel at the north approach abutment joint.

Next, when looking beyond the inspection records and the emergency paving records, additional factual support exists for the conclusion that the settlement and abutment joint at issue was a "dangerous condition." As outlined in Plaintiff's Statement of Facts, shortly following the accident, Plaintiff returned to the location of the accident and took a video of the bridge joint that he hit. (Pa521 at 8-10). He then provided a "still" image from the video to show the settlement at the expansion joint that his bike hit. (Pa523 at 18-21 and Pa522 at 16-19). NJTA Senior Construction Engineer Joe Johnson was shown the "snapshot" of the condition that caused his accident and Johnson agreed that settlement at that location would be dangerous to users of the roadway. (Pa801 at 28:3-16 and Pa1421). In the setting of a summary judgment motion, this concession should have been accepted as further support for Plaintiff's claim that the condition was dangerous.

Also, Plaintiff's expert, Richard Balgowan, P.E., 27 year veteran of the New Jersey Department of Transportation, with specialized training and certifications in areas such as "Pavement Maintenance Management," "Traffic Control," "Bridge Inspection," "Work Zone Traffic Control for Safety and

Mobility" and "Motorcycle Crashes: Understanding the Controlling Contributing Factors and Injury Severity" (Pa1053), reviewed the available discovery and concluded that the settlement/elevation change in the road created a dangerous condition. (Pa25). Mr. Balgowan went on to explain that this type of condition is particularly dangerous to motorcycles because the pavement surface quality has a greater effect on their handling and stability. (Pa21).

Accordingly, when viewing the facts in the light most favorable to the non-movant, including all inferences, it must be assumed that the pavement on the approach to the bridge overpass in the left lane at the abutment joint that Plaintiff's motorcycle struck had settled, and that change in the pavement elevation created a "dangerous condition," and further that it was severe enough to create a substantial risk of injury that it required an "immediate" repair.

b) The NJTA had Notice of the "Dangerous Condition"
(Raised below, Pa2148, Pa2152)

N.J.S.A. 59:4-3 provides:

> a. A public entity shall be deemed to have actual notice of a dangerous condition . . . 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 . . . 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.

However, since "the mere '[e]xistence of an alleged dangerous condition is not constructive notice of it.'" Polzo v. County of Essex, 196 N.J. 569, 581 (2008) (*quoting* Sims v. City of Newark, 244 N.J. Super. 32, 42, (Law Div. 1990) it follows that absent actual or constructive notice, the public entity cannot have acted in a palpably unreasonable manner. Maslo v. City of Jersey City, 346 N.J. Super. 346, 350-51, (App. Div. 2002).

In this case, however, and as set forth more fully below the NJTA had both actual and constructive notice of the dangerous condition.

1) The NJTA had Actual Notice

(Raised below, Pa2148, Pa2152)

Nearly 5 months prior to the accident, on April 22, 2015, the settlement issue in the left lane of the GSP at northern abutment joint of the Rt. 30 overpass was identified during a Biennial Bridge Inspection which was performed on behalf of the NJTA. According to the inspection report, the settlement issue was located in the southbound north abutment joint in the left-hand shoulder and left lane and was described as "**ramped** up and deteriorated" and measured 2 inches. (Pa1367, Pa1351)(Emphasis Added). As a consequence, it was recommended that maintenance be performed to fix the abutment joint and 2-inch settlement in the left lane. (Pa1350).

In addition, independently from the Biennial Bridge Inspection, an onsite inspection was performed on June 24, 2015 at the subject location. As a result of that inspection, a memo dated June 26, 2015 was prepared, which in relevant part indicated that "the pavement at the north approach exhibited significant settlement." (Pa1193). Due to the observations made during this inspection, it was recommended that "immediate repairs/testing" be performed. Id. On July 2, 2015, the results on the inspection and the recommendations were sent directly to the NJTA. (Pa1191).

Accordingly, for the purposes of a summary judgment motion, the court was required to view the facts in the light most favorable to the Plaintiff. Had the court done so, then the court was required to accept as true that the NJTA was on actual notice of a "dangerous condition" in the south bound left-hand lane at the northern abutment joint of the Rt. 30 overpass as early as April 22, 2015, approximately five months prior to Plaintiff's crash.

2) NJTA had Constructive Notice

(Raised below, Pa2149, Pa2152)

Although it is submitted that this prong of the analysis has already been met since the NJTA had actual notice of the dangerous condition that caused the accident, in further support of this argument it is also submitted that the NJTA had constructive notice as well.

A public entity is considered to have constructive notice if the condition existed for such a long period of time and was of so obvious a nature that the public entity, exercising due care, should have discovered the dangerous condition and its dangerous character or if an employee performing his/her job with reasonable care should have discovered the dangerous condition and its dangerous character, then the public entity is assumed to have had constructive notice of the condition. See State of New Jersey Model Jury Charge 5.20A.

In this case, on the facts before the court, for the reasons stated above, not only did the "dangerous condition" exist but it existed for such a significant period of time (approximately 5 months) before Plaintiff's accident that it should have been identified by the NJTA during routine inspections.

Based on the Biennial Bridge Inspection, the settlement issue at the north abutment joint existed as early as April 22, 2015. (Pa1343). On November 17, 2015, emergency paving was performed in the southbound left lane at the north approach to the bridge in order to correct the settlement and return the pavement to proper grade. (Pa1396, Pa1397). Between the time of the April inspection and the November corrective paving, there are no records that have been produced which indicated that any measures were taken by any Defendant to fix or warn users of the roadway of the settlement condition. In other words, the dangerous condition existed in the travel lane for approximately seven months.

Although construction on the bridge had already begun, the NJTA still maintained a level of responsibility for roadway maintenance and safety. (Pa797 at 12:4-17 and Pa800 at 21:13-22:1-4). In fact, maintenance patrolled the roads every morning looking for defects. (Pa808 at 55:2-9). Accordingly, this settlement condition existed for such a significant time that the NJTA maintenance department should have independently identified it.

Accordingly, for the purposes of this motion, the defect was in the travel portion of the roadway from April 22, 2015 through November 17, 2015 when it was finally fixed. The maintenance department of the NJTA patrolled the road every morning looking for defects. The NJTA knew or should have known of the subject condition and failed to fix it or warn against it.

c) Whether or Not the NJTA's Conduct was "Palpably Unreasonable" is for the Jury

(Raised below, Pa2149, 2152)

To begin with, whether the conduct of a public entity is palpably unreasonable is a fact question for the jury. See Vincitore v. Sports & Expo. Auth. 169 N.J. 119, 130 (2001). It is true that "palpably unreasonable" conduct contemplates more than mere negligence. Coyne v. DOT, 182 N.J. 481, 493 (2005). It is also true that this concept "imposes a steep burden on a plaintiff," and "implies behavior that is patently unacceptable under any given

circumstances[,]" as well as behavior from which "it must be manifest and obvious that no prudent person would approve of its course of action or inaction." Ibid. (quoting Kolitch v. Lindedahl, 100 N.J. 485, 493 (App. Div.1985)).

In the instant case, however, when the trial court analyzed whether or not the NJTA's actions or its failure to act were "palpably unreasonable," the Trial Court incorrectly focused on the reasonableness of the NJTA's inspection procedures instead of focusing on the NJTA's duty to repair or warn of the condition. On this record, there is competent evidence that not only was the settlement a "dangerous condition" but also that the NJTA had been informed of the existence of the condition on two separate occasions. In fact, on both occasions, the NJTA was told to repair it. In other words, the NJTA's inspection procedures are irrelevant. Given the NJTA's awareness of the "dangerous condition", the Court's focus should have been on whether or not the NJTA's failure to repair or warn of the condition was "palpably unreasonable".

Here, what makes the NJTA's failure to act so egregious is not only the fact that they were told to repair it as far back as April 22, 2015, but also that on July 2, 2015 the NJTA was told to fix it "immediately." (Pa1193). According to NJTA engineer Joe Johnson, that means within 24 hours. (Pa799 at 19:2-16).

However, despite being told to fix it immediately, no one took any measure to fix the condition or even warn against it.

Although the **palpably unreasonableness of entity conduct is a fact question for the jury,** see Vincitore v. Sports & Expo. Auth., 169 N.J. 119, 130 (2001) [Emphasis Added], the NJTA's failure to act and protect the users of the roadway from the dangerous condition for almost 7 months is "patently unacceptable under any circumstances." See Kolitich v. Lindedahl, 100 N.J. 485, 493 (1985). Accordingly, a reasonable jury could conclude the NJTA's conduct was "palpably unreasonable."

C. The Trial Court Abused Its Discretion by Improperly Determining That the Opinions of Plaintiffs' Expert are "Net Opinions" and Barring His Testimony

(Raised below, Pa2160, Pa2170)

The New Jersey Rules of Evidence govern the admissibility of expert testimony at trial. Testimony from a qualified expert is admissible to assist the jury, provided there is a factual and scientific basis for an expert's opinion. N.J.R.E. 702; Rubanick v. Witco Chemincal Corp., 242 N.J. Super. 36, 45 (App. Div. 1990), *modified on other grounds*, 125 N.J. 421 (1991). Similarly, the facts or data relied upon by the expert may be inadmissible so long as they are of a type "reasonably relied upon by experts" in the field. N.J.R.E. 703. On the other

hand, an opinion lacking in foundation is worthless. See Stanley Co. of America v. Hercules Powder Co., 16 N.J. 295, 305 (1954). Further, an expert's bare conclusion unsupported by factual evidence is an inadmissible "net opinion." Matter of Yaccarino, 117 N.J. 175, 196 (1989). Accordingly, an expert witness must give the "why and wherefore" of his expert opinion, not just a mere conclusion. Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002) (quoting Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div. 1996)). When there is a "net opinion" claim, the focus is on the alleged failure of the expert to explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981).

In this case, when one considers the content of the Plaintiff's expert report, the extensive explanations which he provided during his two days of deposition testimony and finally the testimony he gave during the Rule 104 Hearing, there should be little doubt that the expert provided the "why and wherefore" necessary to support his opinion. See Jimenez v. GNOC. Corp., *supra*. Thus, it is respectfully submitted that the Trial Court erred when it abused its discretion by isolating limited portions of the testimony from Plaintiff's expert, then making improper credibility determinations regarding the persuasiveness of

certain testimony, while at the same time overlooking and ignoring other positive aspect, of the testimony.

That said, at the outset, it is important to note that the Trial Court did not question Mr. Balgowan's qualifications. The Trial Court also determined that Mr. Balgowan's opinion that each Defendant had a duty to inspect, maintain and repair was supported by the record. (Pa2162). Nevertheless, the Trial Court ultimately determined as a matter of law that Balgowan's opinions are "net opinions" since, as the Trial Court viewed it, (1) he does not offer any opinion as to the standard of care for inspections, (2) he changed his theory about the condition at the "eleventh hour", and (3) the issue of causation requires an accident reconstructionist. (Pa2169).

(1) The Trial Court's Focus on the Standard of Care for a Reasonable Inspection is Misplaced

(Raised below, Pa2162, Pa2170)

The Trial Court's initial criticism of the opinions of Plaintiff's expert, Richard Balgowan, P.E., is that, in the Trial Court's view, Plaintiff's Expert "never offers any statement as to how a daily inspection should be performed." (Pa2162). The Trial Court's focus on the "standard of care" for a reasonable inspection is not only misplaced but it once again underscores the problem that

was created by the Trial Court's failure to adhere to the summary judgment rules and to view the facts in the light most favorable to the Plaintiffs.

Here, when the facts are viewed in the light most favorable to the Plaintiff, the roadway settlement/elevation change at issue had already been identified during two separate inspections and the Defendants were aware that the condition needed to be repaired. Accordingly, whether or not Plaintiff's expert addressed "how a daily inspection should be performed" is irrelevant; the condition had already been identified.

Nevertheless, even though under our facts this is not necessary for the reasons mentioned above, Mr. Balgowan did address the "standard of care" for daily inspections and the "standard of care" for what is to be done when a condition is found that could affect the safety of users of the roadway.

In his report and during his testimony, Balgowan explains that the contracts outline the obligations for the maintenance and protection of traffic which included daily inspections of the travel surface of the roadway. (Pa20). In fact, as listed in Plaintiff's Statement of Facts, the NJTA contract required daily inspections, that traffic control deficiencies be corrected within 2 hours, and compliance with the MUTCD (Pa1214, Pa1225) and the relevant Traffic Control Detail. (Pa1225, Pa2205, Pa1271).

Additionally, the agreement between Jacobs and Urban, the engineering professionals onsite, were required to "exercise that degree of care and skill ordinarily exercised under similar circumstances by members of its profession performing the kind of services hereunder and practicing in the same or similar locality at the same time." (Pa1302). Plaintiff's expert addressed how this plays out in a practical setting during the Rule 104 Hearing. He explained that as an engineer in New Jersey the primary focus is public safety. By way of example, he used the facts of this case and explained that when you find "settlement anywhere, tells us that something is going on that we need to look at it. That means I look at the whole bridge even if it is just a walk around. And if I do that, that jumps right out at me. When I see barrier curb where there's a settlement, on section settled over a asphaltic plug joint and the other end isn't, something is going on". (2T171-7 – 18)Pa1507 at 171:7-18). Afterall, the "safe movement of traffic and pedestrians...is the single most important aspect of the project". (Pa1337). Balgowan explained in his report and during his testimony that the Defendants should have adhered to their contractual responsibilities and either initiated temporary repairs or installed temporary traffic control to warn users of the roadway.(Pa21).

However, one need not simply rely on Mr. Balgowan's 46 years as a professional engineer, 27 of which was spent as an engineer for the New Jersey

Department of Transportation, or the additional training and certifications that he has obtained in the areas such as "Pavement Maintenance Management," "Traffic Control," "Bridge Inspection," "Work Zone Traffic Control for Safety and Mobility" or his training in "Motorcycle Crashes: Understanding the Controlling Contributing Factors and Injury Severity" in order understand the basis for his opinions. Rather, the Trial Court could have focused on the "standards of care" outlined in the available discovery; including but not limited to the contract documents and inspection procedures addressed by the defense witnesses during depositions. (Pa1225, Pa2205, Pa1271, Pa808 at 55:2-9, Pa656 at 20:16 to Pa657 at 21: 15, Pa678 at 20:25 to Pa679 at 21:7). That is, that the Defendants were to perform daily inspections to identify defects in the roadway that may affect the safety of the traveling public and when such defects were identified, to adhere to the MUTCD and Traffic Control Detail.

For example, when conditions such as "bumps" or "uneven pavement" exists, then warning signs should be used pursuant to the MUTCD and the Traffic Control Detail. The MUTCD calls for, among other things, the use of warning signs when such a condition exists. MUTCD Section 2C.01 specifically addresses the use of warning signs. (Pa1418). According to the MUTCD, warning signs call attention to unexpected conditions of or adjacent to a highway, street, or private roads open to public travel and to situations that

might not be readily apparent to road users. Ibid. Warning signs also alert road users to conditions that might call for a reduction in speed or an action in the interest of safety and efficient traffic operations. Ibid. According to the MUTCD, a "Bump" sign should be uses to give warning to a sharp rise in the profile of the road. (Pa1419) More specifically, according to the Traffic Control Detail, **uneven pavement signs were to be used whenever such a condition existed**. (Pa1186).

Since the Trial Court did not view the facts in the light most favorable to the Plaintiff, it failed to recognize that the settlement in the roadway had already been identified and the Defendants knew or should have known that it was dangerous. Under the facts of our case, the inspection procedure is not relevant because the settlement had already been identified. Therefore, the focus of the analysis should have shifted the "standard of care" to how the Defendants should have responded once on notice of the settlement problem. On June 26, 2015, the T&M memo recommend that the settlement should undergo immediate repair. (Pa1191). According to NJTA engineer Joe Johnson, that is within 24 hours. (Pa799 at 19:2-16). As Plaintiff's expert explained in his report, under the facts of this case facts, the Defendant's should have made immediate temporary repairs or provided advanced warning of the condition as per the MUTCD and the Traffic Control Detail. (Pa21 to Pa24).

(2) Plaintiff's Expert did not Change his Theory or Opinions Regarding the Dangerous Condition or the Cause of the Accident

(Raised below, Pa2163, Pa2170)

As an initial matter, neither the Defendants nor the Trial Court questioned Mr. Balgowan's qualifications. Nevertheless, it is worth noting again that Mr. Balgowan has 46 years of professional engineering experience; 27 of those years as engineer with the New Jersey Department of Transportation. (Pa1053). As for his so-called inconsistencies, a thorough review of the motion record reveals that Balgowan did not change his opinions let alone change them at the "eleventh hour" as the Trial Court found. Throughout his report, his two separate days of deposition and the hours that he spent subject to cross-examination at the Rule 104 Hearing, Balgowan has always maintained that the roadway settlement/elevation change created a dangerous condition that caused Plaintiff's crash. (Pa25). However, despite the consistency with Balgowan's opinions, the Trial Court went out of its way to nitpick certain answers and explanations provided by Mr. Balgowan in what appears to be a designed effort to reach the conclusion that the expert's opinions were "net opinions."

First, the Trial Court takes exception to Mr. Balgowan's use of the term "hole" in his report. To be clear, this word only appears twice in Balgowan's report whereas he uses the word "settlement" twelve times. Also, a fair review of the record will reveal that the Trial Court's focus on Balgowan's use of the

word "hole" does not represent a change in his opinion but rather, when read in context, it is used to describe the practical effect of the settlement/elevation change which abuts the bridge joint. In fact, on page 22 of his report, Mr. Balgowan specifically states in the section titled "Findings" that "[t]he depth, width and location of the settlement/elevation change created a dangerous condition that caused Alfred Burr to lose control of his motorcycle and crash." (Pa25).

Next, the trial court isolates small portions of testimony where Balgowan explains the reasons why the settlement/elevation change in the roadway was dangerous and improperly categorizes the explanations as a change to his theory. More specifically, the Trial Court compared testimony from the first day of Balgowan's deposition where he uses descriptive terms such as "immediate" and/or "abrupt" when describing the settlement/elevation change to testimony that he provided on the second day of his deposition when he is shown a photograph that Balgowan describes as showing an "inadequate taper." However, when read in context with his testimony as a whole, whether settlement/elevation change was "abrupt," "immediate," or it had an "inadequate taper" is a simple a matter of degree. As Balgowan explained:

> **Q:** Is one more dangerous than the other?
>
> **A:** They're both dangerous. Is one more dangerous than the other? If the hazard is larger and covers a greater distance, then there is

> going to be a greater risk that the hazard is going to be exposed. It's going to be exposed to the traveling public and there could be crashes as a result of that.
>
> It doesn't change the fact that whether it's one little spot that has a two-inch [select], and then it's tapered out and there's, it's still dangerous, period. It's in the travel lane.
>
> (Pa126 at 3-17).

The Trial Court continues this attack on Plaintiff's expert when it criticizes Mr. Balgowan's response to a question about one of the photographs that he was shown on the second day of his deposition. In its decision, the Trial Court isolates a portion of the transcript that involves questions (over Plaintiff's objection) regarding a photograph that had been admittedly altered from the original. According to defense counsel, the photo that was used for the questioning was taken from photos received in response to a subpoena sent to Arora and Associates; the engineering consultants that performed the Biennial Bridge Inspection for the NJTA. However, the photo that was used for the questioning was not the original photo received from the subpoena. Rather, defense counsel represented that the photo he was using for the purposes of his questions was a "zoomed in" snapshot that he created from one of the original photos. (Pa281:21 to Pa282:10).

However, Plaintiff objected to the "zoomed in" photo because, unlike the original photos from Arora, this photo did not include any location identifiers; in other words, the new photo that Balgowan was shown could have been a photo

of anywhere along the roadway. Additionally, by zooming the photo in, it visually distorted scale and perspective of the image. Therefore, as an initial matter, the question and answer should not have been considered by the Trial Court at all; particularly when the obvious purpose for manipulating the photo was to create ambiguity in any response given.

Although the dialogue between Mr. Balgowan and counsel regarding photographs goes on for approximately 10 transcript pages, the Trial Court isolates a single response by Mr. Balgowan as support for its Trial conclusion that he was "changing his theory." As described in the Court's decision, when "confronted" with a photograph "Balgowan conceded that the photograph does not show an abrupt 2-inch change in elevation, then immediately and abruptly changed his opinion claiming the defect was inadequate tapering." (Pa2164). In support for this conclusion, the Court carves out only a portion of one of Balgowan's several answers regarding the photographs and quotes:

> ("I mean, it looks like it happens very, very quickly, but there's no visual abrupt edge like the edge of the deck, the concrete deck, that you cannot see, so something is up there butted up against it. This would not meet any standards for tapers, asphalt tapers.")
>
> (Pa2164).

However, for reasons that that cannot be explained, the Trial Court appears to intentionally omit a very important portion of Balgowan's testimony;

the initial sentence in response to the question. The question Balgowan is asked is the following leading question:

> **Q**: But just so we are on the same page, there is not a two-inch immediate elevation change, correct?

Balgowan's complete answer begins, "I cannot say that." However, this sentence is completely left out by the Court. When quoted correctly and the read in context along with the rest of Balgowan's testimony, he is explaining that based on the distorted and zoomed-in photo he cannot say that the elevation change is "exactly 2 inches" and if does depict a taper, then that taper would be inadequate. (Pa283).

Ironically, the original photo at issue was taken by Arora during the inspection and it was used by Arora in its' report to document the location of the settlement condition that they were recommending be repaired. The detail of the settlement condition and the basis for the recommendation to fix the condition are actually contained in the various descriptions of the condition provided throughout the report. (Pa16-5, 16-7, and 16-23). When viewing the facts in the light most favorable to the Plaintiff, information in the report and the recommendation to repair the condition, at a minimum, creates the inference that it was dangerous. Nevertheless, the Trial Court ignored all of that other evidence contained in the report in favor of its subjective interpretation of a single photo.

The Trial Court's surgical excision of Mr. Balgowan testimony does not stop there. The Court goes on to criticize the reliability of Balgowan's opinions and state the following:

> "Other factors also indicate that his opinions are not reliable because that are not any facts to support the opinion. Balgowan never inspected the roadway. Balgowan never took any measurements of the depth of the whole, of the abrupt elevation change, or the tapering."
>
> (Pa2166).

One the things that seems to have been lost on the Trial Court is the simple fact that none of the experts in this case, Plaintiffs' or Defendants', were able to inspect the condition after the accident because shortly after the accident emergency paving was performed in order to correct the settlement in the pavement and to bring it to proper grade. (Pa1396, Pa1397). The fact is, the only measurements and the only photos of the settlement came from the Arora engineers that performed the April 22, 2015 Biennial Bridge Inspection and recommended that it be fixed. Whether or not the court or defense counsel agree factually that the photos taken during the April 22, 2015 inspection show a "dangerous condition" is not the test. What the Trial Court was required to accept, including the favorable inferences, was that those who performed that inspection took measurements and took photos and based on the findings

recommended that the abutment be repaired. Further, Plaintiff's expert is permitted to rely on this information.

Despite the Trial Court's insistence, there is no requirement that someone actually label the condition as "dangerous" in order to defeat the motions. The settlement at the abutment joint had been well documented and it was recommended that it be repaired twice. A reasonable inference from the information contained in the two inspection reports at issue is that settlement at the north approach abutment should be repaired "immediately" because it was "dangerous." To this point, this exact condition was fixed on November 17, 2015, albeit too late, for the very reasons that were first outlined in the April 22, 2015 Biennial Bridge Report and reinforced by the June 26, 2015 memo. (Pa1343) and (Pa1191).

Finally, it is important to note that the Trial Court's reliance on Stewart v. New Jersey Transit Authority, 249 N.J. 642 (2022) is misplaced. Although some of the facts from the case appear to be similar to the case at hand, there are critical differences between the procedural posture in Stewart that distinguish it from this case. Unlike here, in Stewart, it was Plaintiff's counsel, not the expert, that for the first time introduced a new theory during oral argument on a summary judgment motion. Here, as an initial matter, the parties were never granted oral argument. Also, in this case, the testimony cited by the

Trial Court are not changes to Mr. Balgowan's theory but rather explanations in response to various questions on cross-examination as to why the settlement itself was dangerous. However, even assuming *arguendo* they were changes in Balgowan's "theory," those alleged "changes" would have been made during his deposition while discovery was still open. Accordingly, the Stewart case is distinguishable from the case before this Court.

(3) Defect and Cause Does NOT Require an Accident Reconstructionist

(Raised below, Pa2169, Pa2170)

When addressing facts related to the dangerousness of the condition and the cause of Plaintiff's accident, the Trial Court again appears to go out of its way to resolve all facts in the movants' favor. In fact, the Trial Court goes as far as saying that "as to Balgowan's conclusion that the defect caused Burr's accident there is no evidence at all." (Pa2168). Although Balgowan did not take his own measurements or inspect the condition, no expert in this case was able to inspect the settlement since it was repaired shortly after Plaintiff's crash. Nevertheless, those measurements had already been taken during the Biennial Bridge Inspection. That said, in reaching his conclusions, Mr. Balgowan did utilize the evidence available to all parties and the recognized negative effects that these type of roadway conditions have on motorcycles as well as the video, photo and description of the accident and its location provided by Plaintiff.

An expert's proposed testimony should not be excluded merely "'because it fails to account for some particular condition or fact which the adversary considers relevant.'" Creanga v. Jardal, 185 N.J. 345, 360 (2005) (quoting State v. Freeman, 223 N.J. Super. 92, 116 (App. Div. 1988), *certif. denied*, 114 N.J. 525 (1989)). The expert's failure "to give weight to a factor thought important by an adverse party does not reduce his testimony to an inadmissible net opinion if he otherwise offers sufficient reasons which logically support his opinion." Rosenberg v. Tavorath, 352 N.J. Super. 385, 402 (App. Div. 2002) (citing State v. Freeman, 223 N.J. Super. at 115-16). Such perceived omissions may be "a proper 'subject of exploration and cross-examination at a trial.'" Rosenberg v. Tavorath, 352 N.J. Super. at 402 (quoting Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 55 (App. Div. 1990), *modified on other grounds*, 125 N.J. 421 (1991)); see also State v. Harvey, 151 N.J. 117, 277 (1997) ("'[A]n expert witness is always subject to searching cross-examination as to the basis of his opinion.'" (quoting State v. Martini, 131 N.J. 176, 264 (1993)).

If reasonably relied upon by experts in the field, an expert may base his opinions or inferences on facts or data which he perceived, or which were made known to him at or before the hearing. N.J.R.E. 703. Further, as this Court is aware, here, Mr. Balgowan is "permitted to testify as to the logical predicates for and conclusions from statements made in the report." Conrad v. Robbi, 341

N.J. Super. at 441 (quoting Velazquez ex rel. Velazquez v. Portadin, 321 N.J. Super. at 576).

Despite all of that, the Trial Court concluded that the absence of a reconstruction expert to address the issue of causation was fatal to Plaintiff's case. Fundamentally, had the Trial Court accepted plaintiff's version of the facts, including their fair inferences, then this would not be an issue. In this case there were multiple facts which, when pieced together in a manner that favors the non-movant, provide the necessary links relating to what caused this accident. Simply put, the Plaintiff testified at his deposition that his bike hit the expansion joint and caused him to lose control and crash. (Pa522 16-19, Pa523 at 18-21). He even returned to the scene to video the area to confirm what his bike hit. (Pa521:1 to Pa523:6). Mr. Balgowan was entitled to accept this version of the accident and so should have the Trial Court.

In reviewing the evidence, as noted above, Plaintiff's expert was permitted to accept that factual claim in reaching his conclusions. This fact, as well as his lengthy experience with this type of condition, would have provided a jury with more than enough evidence to reach a reasonable conclusion supporting Plaintiff's description of the happening of the accident. On this record, testimony exists describing the condition that caused the accident. Accordingly, an accident reconstructionist is not necessary. (Pa2169).

(4) Alternatively, the Common Knowledge Exception Applies and The Case Does Not Require Expert Opinion

(Raised below, Pa2169-2170)

Although it is Plaintiffs' position that Mr. Balgowan has supported his expert opinions is this case, as Plaintiff argued at the trial level, when viewing the facts in the light most favorable to the Plaintiff, expert opinion may not be required. Although claims against the professional engineering defendants typically require expert testimony, there are exceptions. In this case, even in the absence of expert testimony, a jury could reasonably conclude that the settlement at the abutment joint caused Plaintiff's accident, that each Defendant knew or had reason to know that the defect exited, that it was a dangerous condition and the Defendants breached their duty in failing to fix or warn of it.

The common knowledge exception has been found in a variety of contexts as our courts recognize that basic principles of negligence law routinely call for lay jurors to evaluate if a defendant's conduct was unreasonable. Those basic notions of reasonable behavior do not inexorably require an expert witness to testify about standards of care, particularly in cases that do not involve suit against a licensed professional covered by the New Jersey Affidavit of Merit statute, N.J.S.A. 2A:53A-26 to 2A:53A-29. See Hubbard v. Reed, 168 N.J. 387 (2001). Where the common knowledge exception was applicable to a dentist that

pulled the wrong tooth from a patient's mouth. Palanque v. Lambert-Woolley, 168 N.J. 398, 400 (2001) (common knowledge exception applicable where defendant doctor misread plaintiff's pregnancy test results); Estate of Chin v. Saint Barnabas Medical Center 160 N.J. 454, 460 (1999), (common knowledge applied where a patient died from an air embolism during a diagnostic hysteroscopy, during which someone accidentally connected a gas line rather than a fluid line to the patient's uterus)).

In Jacobs v. Jersey Cent. Power & Light Co., 452 N.J. Super 494 (App. Div. 2017), a plaintiff sued defendant utility for creating and then failing to timely repair a dangerous condition. The jury found defendant primarily at fault in causing the accident and awarded plaintiff damages, after hearing this evidence. The underlying event occurred when a streetlight fell on the corner of plaintiff's property, defendant's employee removed the light pole, pushed the wires into a hole in the ground, covered the hole with dirt, placed over the hole an orange safety cone, which disappeared, and white markings painted by the hole faded; nearly two months later, plaintiff inadvertently stepped into the hole and injured herself. See Jacobs, 452 N.J. Super. 494, 497.

The Jacobs Court held that the plaintiff was not required to present an expert witness on liability opining about industry standards because whether defendant acted reasonably was a subject within the common knowledge of

laypersons and was capable of being decided by the jury without expert opinion. Id. at 507-508. Generally, it is "the function of the jury to determine the condition of the property and a reasonableness of defendant's care" in preventing unsafe conditions. Filipowicz v. Dilletto, 350 N.J. Super. 552, 561 (App. Div. 2002).

As Rule 702 makes clear it is "permissive," and "[i]n the broadest of terms, if an issue to be decided by the trier of fact is of ***such a specialized nature*** that the trial court determines that the proposed expert testimony would assist the trier of fact in making its determination, then the testimony **may** be admitted." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 1 on N.J.R.E. 702 (2017) (Emphasis Added). Simply put, expert testimony is not necessary when the jury can understand the concepts in a case "utilizing common judgment and experience." Campbell v. Hastings, 348 N.J. Super. 264, 270 (App. Div. 2002) (citation omitted). See also Mayer v. Once Upon A Rose, Inc., 429 N.J. Super. 365, 376-77 (App. Div. 2013) (holding that a liability expert on glass was not needed to opine about the inherent nature of glass to shatter if held too tightly).

When viewing the facts in the light most favorable to the Plaintiff, here, the matter before the court qualifies as a common knowledge case similar to Jacobs, *supra*. In this case, while the moving Defendants Urban and Jacobs

were served with an Affidavit of Merit, the facts of our particular accident and the record before the court evidence that the reasonableness of the Defendants' conduct may be determined by the jury absent expert testimony.

Here, the facts that a jury would need to consider are either outlined in the contracts, admitted during depositions, or are a reasonable inference taken from those facts. The facts at issue are not so esoteric to require explanation by an expert. The Defendants knew or should have known of the dangerous condition that caused Plaintiff's accident months prior to the accident. The Defendants' duties and responsibilities related to the maintenance and protection of the travel portions of the Garden State Parkway are set forth in their contracts and were thoroughly reinforced during depositions, i.e. they either fix the condition within 24 hours or warn against it within 2 hours. (Pa799 at 19:2-16) Unfortunately, the dangerous condition went unaddressed and left without warning as the public continued to travel along the roadway until the emergency repairs of November 17, 2017. (Pa1396). Had the Defendants adhered to their duties, Plaintiff's crash would have been avoided.

Accordingly, a jury, without the benefit of expert testimony, could find that each of the Defendants in this case acted unreasonably and breached each of their respective duties to users of the roadway; including but not limited to the Plaintiff. For the foregoing reasons, when viewing the facts in the light most

favorable to the Plaintiff, the Trial Court could have found that expert testimony is not required in this case. In other words, given our facts, any arguable deficiencies in the opinions of Plaintiff's expert opinions would not be fatal to Plaintiff's cause of action.

V. Conclusion

For all these reasons, the Plaintiff respectfully requests that this Court correct the errors made by the trial court and reverse the decision below to dismiss Plaintiffs' case against all Defendants.

By: Michael A. Gibson

Michael A. Gibson, Esquire

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002866-22 T2

ALFRED H. BURR and ALYSSA BURR, H/W, Appellants/Plaintiffs, v. NEW JERSEY TURNPIKE AUTHORITY; MIDLANTIC CONSTRUCTION, LLC; C.J. HESSE, INC.; THE HESSE COMPANIES; JACOBS ENGINERING GROUP, INC.; URBAN ENGINEERS, INC.; JOHN DOE, MARY DOE, ABC BUSINESS ENTITIES AND XYZ CORPORATIONS, Respondents/Defendants.	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION ATLANTIC COUNTY DOCKET NO. ATL-L-1997-16 CIVIL ACTION SAT BELOW: Hon. James H. Pickering, Jr., J.S.C. Hon. Joseph L. Marczyk, P.J.Cv.

RESPONDENT/DEFENDANT, URBAN ENGINEERING, INC. BRIEF IN OPPOSITION TO APPEAL AND IN SUPPORT OF CROSS-APPEAL

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October 12, 2023

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INTRODUCTION

This matter concerns a personal injury claim arising out of a motorcycle accident on the Garden State Parkway that occurred in September 2015. At the time of the accident, plaintiff Alfred Burr was traveling southbound in the left-hand lane of the roadway. Plaintiff alleges that he was caused to lose control of his motorcycle upon encountering roadway settlement located in the area of the bridge joint at the north abutment of the bridge traversing Route 30 in Absecon, NJ. The accident occurred within the physical perimeter of a road widening project that had been initiated prior to the date of the accident.

It is undisputed that the subject roadway condition, described as an "up to 2 inch settlement", pre-existed the road widening project. It is also undisputed that there is no evidence of any project-related work being performed in the area of the accident prior to the date of the accident. Finally, no opinion has been provided that the subject roadway condition was exacerbated by the performance of any work associated with the roadway project.

Plaintiff ultimately prosecuted professional malpractice claims against Urban Engineers, Inc. ("Urban"), which served as the resident engineer for the road widening project, and Jacobs Engineering Group, Inc. ("Jacobs"), which served as the project's chief inspector. Plaintiff also brought negligence claims against the project's general contractor, Midlantic Construction, LLC

("Midlantic") and the owner/operator of the Garden State Parkway, the New Jersey Turnpike Authority ("NJTA").

As resident engineer, Urban administered the project and oversaw the coordination and procedural requirements inherent to the construction activities. Plaintiff has relied upon liability expert Richard Balgowan, P.E. to establish multiple positions essential to plaintiff's prima facie case of professional malpractice against Urban related to Urban's provision of services as resident engineer: 1) the standard of care governing the provision of Urban's professional services required Urban to identify the subject roadway condition and facilitate its remediation prior to the date of plaintiff's accident; 2) the subject roadway condition presented as a dangerous condition; and, 3) the subject roadway condition caused plaintiff's accident.

Through service of a narrative expert report, two days of deposition testimony and another full day of testimony provided by way of a Rule 104 hearing, Balgowan has been unable to provide plaintiff with the foundation necessary to articulate a prima facie case of professional malpractice against Urban. More specifically, Balgowan has failed to identify any contractual obligation or any other documentary support for the position that Urban was obligated to identify and remediate the pre-existing roadway condition. Balgowan has also failed to provide any support for the contention that Urban

was on actual or construction notice of the pre-existing condition or that the condition was dangerous and caused plaintiff's accident. Balgowan's opinions have been limited to broad assertions and easily distinguished conclusory positions. During the course of his testimony, he has repeatedly recognized the deficiencies associated with these positions and has conceded the irrelevance of numerous factual assertions upon which plaintiff continues to rely.

In light of Balgowan's inability to sufficiently ground plaintiff's malpractice claim against Urban, plaintiff's complaint against Urban, as well as against all other named defendants, were dismissed with prejudice. As a respondent, Urban submits the trial court's opinion granting the dismissal of plaintiff's claim against Urban was well-reasoned and should be affirmed. As a cross-appellant, Urban articulates an independent basis for the dismissal of plaintiff's malpractice action. More specifically, plaintiff initiated suit against Urban well beyond the applicable two-year statute of limitations. Directly subsequent to Urban filing its answer, however, plaintiff's malpractice claim against Urban was salvaged by the trial court's misapplication of the court rule governing fictitious party pleading practice. This brief details the deficiencies associated with plaintiff's manner of pleading that resulted in Urban defending against a time-barred claim.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

This matter was initiated via complaint filed on behalf of plaintiff Alfred H. Burr dated September 7, 2016. (Pa1550). Plaintiff's Complaint provided that on September 12, 2015, plaintiff Alfred H. Burr was the operator of a motorcycle traveling southbound on the Garden State Parkway near mile marker 39.9 when his vehicle was impacted by a defect in the roadway causing his rear tire to blow out and for him to crash into the adjacent concrete barrier. (Pa1550). Plaintiff's Complaint named NJTA as a defendant citing NJTA's ownership of the roadway and responsibility for the road's maintenance, inspection and repair. (Pa1550).

Plaintiff's initial complaint also included a fictitious party pleading count that provided in relevant part as follows:

> The Plaintiff alleges that an insufficient amount of time has passed within which to determine the identity of any other individuals or business entities who may be responsible, in whole or in part, for the causation of the aforesaid accident. For the purposes of the within Complaint, said individuals and business entities have been nominated as John Doe; Jane Doe; ABC Business Entities and XYZ Corporations. The Plaintiff, pursuant to the Rules of Court for the State of New Jersey, reserves the right to amend the within Complaint relative to the additional Defendants when and if the identity of said individuals or business entities becomes known.

[1] Given the intertwined nature of the substantive facts associated with this appeal and the procedural history of the litigation, the statement of facts and procedural history are presented jointly.

(Pa1552).

Plaintiff subsequently filed a First Amended Complaint on March 10, 2017 naming general contractor Midlantic as a defendant. (Pa1576). Plaintiff's First Amended Complaint included a fictitious party pleading count identical to the fictitious party pleading count included with plaintiff's initially filed complaint. (Pa1578 and Pa1579).

On January 9, 2018, plaintiff filed a Second Amended Complaint adding contractor C.J. Hesse as a defendant. (Pa1613). On December 7, 2018, plaintiff filed a Third Amended Complaint adding Jacobs Engineering Group as a defendant. (Pa1650). Finally, on May 17, 2019, nearly 44 months post-accident, plaintiff filed a Fourth Amended Complaint naming Urban as a defendant. (Pa1698). On July 1, 2019, Urban filed an answer to plaintiff's Fourth Amended Complaint. (Pa1727).

Substantively, plaintiff's Fourth-Amended Complaint generally asserted that Urban, by way of a subconsultant agreement with Jacobs, was obligated to perform unspecified "work" on the Garden State Parkway in the area of plaintiff's accident. (Pa1699). Plaintiff's pleading did not include any independent factual allegations associated with any act or omission of Urban or any of the defendants independently. Rather, plaintiff's Fourth-Amended

Complaint asserted that the defendants were negligent as a group for the following reasons:

- Failure to inspect and maintain the subject location and/or caused the defect that led to plaintiff's accident;
- Knew or should have known that the defect in the roadway was dangerous and could cause accidents and/or collisions;
- Actual and/or constructive knowledge of the dangerous condition that existed at the subject location;
- Failure to exercise reasonable care and diligence by failing to conduct reasonable and timely inspections of the roadway at the aforesaid location; and,
- Failure to exercise reasonable care and diligence by failing to correct the dangerous condition that existed at the subject location.

(Pa1699 and Pa1700).

Plaintiff further asserted within the pleadings the defendants' negligence was the cause of his accident and resulting physical injuries. (Pa1700).

Urban's Contractual Obligations

Urban entered into a Subconsultant Agreement with Jacobs dated October 8, 2014. (Pa1265). Urban's Subconsultant Agreement with Jacobs defined Urban's scope of services as follows: Resident Engineering and Construction

Inspection Testing Services related to a road widening project covering mileposts 38.0 to 41.0 on the Garden State Parkway ("Project"). (Pa1271-Pa1274). Urban's scope of services involved one of three road widening projects for which Jacobs was to provide Supervision of Construction Services pursuant to Jacobs' contract with the NJTA dated October 1, 2014. The other two road widening projects concerned mileposts 35.0 to 38.0 and mileposts 42.3 to 48.0 on the Garden State Parkway. Neither of these other two projects are associated with the current litigation. (Pa1265).

Per Urban's Subconsultant Agreement with Jacobs, Urban was obligated to serve as both the resident engineer and chief inspector with respect to the Project. (Pa1265). It is undisputed, however, that the role of Chief Inspector associated with the Project was ultimately supplied by Jacobs. (Pa569 and Pa573).

Urban's Subconsultant Agreement detailed its contractual obligations associated with the Project by way of a 23-item recitation of responsibilities identified as points A through W. (Pa1272 and Pa1273). The itemized contractual obligations set forth within Urban's Subconsultant Agreement did not include an obligation to identify pre-existing roadway defects. (Pa1272 and Pa1273). Rather, a review of Urban's contractual obligations indicates a focus

on the coordination and procedural requirements inherent to the construction activities associated with the Project. (Pa1265).

Plaintiff's Expert Richard Balgowan, P.E. – Narrative Report

In support of his claims, plaintiff has relied upon the December 3, 2020 report prepared by plaintiff's retained engineering expert Richard Balgowan, P.E. (Pa0004). On page 5 of his report, Balgowan provided the following description of the accident giving rise to this litigation:

> On September 12, 2015, around 1:00pm, Alfred Burr was riding a Harley Davidson motorcycle southbound on the Garden State Parkway (GSP) MP 40.0, bridge over U.S. Route 30, Galloway Twp., Atlantic County, NJ (see figure 1 below). The road and bridge were being reconstructed and were at various stages of construction completion. Burr was riding on the left edge of the left lane southbound on the GSP. The road had been patched, however, there was a difference in elevation between the surface pavement at the southern deck approach joint at the north abutment. A difference in elevation of approximately 2 inches is noted in the photos and on the adjacent barrier curb joint over the deck joint. There is also subsidence and or settlement in the joint itself particularly on the eastern most part in the path of the incident motorcycle.

(Pa0008).

On page 17 of his report, Balgowan communicated his opinion that the southbound northern bridge abutment was in a dangerous condition on the day of the crash and caused plaintiff's accident. (Pa0020). Balgowan thereafter opined with his report that Urban, along with the other named defendants, had

an affirmative obligation to identify and remediate this roadway defect, which, as per Balgowan, caused plaintiff's accident. (Pa0025 and Pa0026).

The list of material omissions within Balgowan's report is lengthy and includes the following:

- No opinion that the allegedly dangerous condition was caused or exacerbated by the performance of the subject road widening project.

- No discussion of the contractual obligations of Urban or any other party with respect to the Project.

- No identification of the independent responsibilities of each defendant as they relate to the alleged cause(s) of plaintiff's accident.

- No articulation of the standard of care governing Urban's provision of professional services associated with the Project or any deviation therefrom.

- No support for the position that Urban had any level of awareness, actual or constructive, of the pre-existing roadway condition prior to the date of the plaintiff's accident.

- No discussion of the status of the Project at the time of plaintiff's accident or analysis as to whether any pre-accident work had been performed at or anywhere near the asserted location of plaintiff's accident.

(Pa004).

Deposition Testimony of Richard Balgowan, P.E.

Plaintiff's expert Richard Balgowan was deposed over two days, October 20, and November 24, 2021. (Pa0027 and Pa0239). During the initial day of his deposition, Balgowan conceded that he was not relying on any of the following sources of information in support of his opinion that Urban, as the Project's resident engineer, had an affirmative obligation to identify pre-existing roadway defects:

- Urban's contractual obligations;
- Any standards promulgated for NJTA projects;
- The contents of any Standard or Special Provisions associated with NJTA projects;
- Any ethical standards applicable to the professional engineering community; or
- Any regulatory authority, statute or case law.

(Pa0155-Pa0157 at 129:8-131:18).

Balgowan further conceded that his report does not discuss the standard of care generally or define the standard of care as requiring Urban to affirmatively identify pre-existing roadway defects. (Pa0155 – Pa0157 at 129:23-131:4). With further regard to the standard of care, Balgowan also acknowledged that the content of his report does not distinguish between the Project-related responsibilities of Urban and the other defendants, including the general contractor Midlantic, as related to the identification of pre-existing roadway defects. (Pa0157; Pa0158; Pa0163; and Pa0164 at p. 131:25-132:6; 137:25-138:21). When pushed for support for his opinion that Urban, as the resident engineer, had an affirmative obligation to identify pre-existing roadway defects, Balgowan testified that he would supply written authority in advance of the second day of his deposition. (Pa0162 and Pa0163 at 136:3-137:19).

With respect to causation, Balgowan acknowledged that he could not testify to a reasonable degree of engineering certainty that the road widening project exacerbated a previously existing roadway condition. (Pa0190 and Pa0191 at 164:20-165:13). Balgowan admitted that he is not an expert in the field of accident reconstruction. (Pa0086; Pa0201; and Pa0216 at 60:22; 175:1-4; 175:15-17; and 190:10-20). Balgowan also acknowledged that he possesses no information memorializing any prior accidents in the alleged area of

plaintiff's accident. (Pa0074 – Pa0080 at 48:22-54:9). Balgowan recognized that he did not perform any calculations concerning the physical forces associated with the accident. (Pa0064 at 38:22-25). Balgowan conceded that he never inspected plaintiff's motorcycle following the accident. (Pa0065 and Pa0066 at 39:6-40:22). Finally, Balgowan explicitly testified that his opinion a dangerous roadway condition caused plaintiff's accident is predicated upon his understanding that an abrupt 2" change in roadway elevation existed at the location of plaintiff's accident involving no tapering of the roadway surface. (Pa0186 and Pa0187 at 160:25-161:18).

By way of follow-up to the initial day of Balgowan's deposition, Urban directed an email to plaintiff's counsel articulating document demands associated with the initial day of Balgowan's deposition testimony. (Pa1858). The referenced November 4th email specifically requested Balgowan's production of any and all documents supporting his opinion that Urban as the resident engineer had a proactive duty to identify pre-existing roadway defects. (Pa1858).

Second Day of Balgowan's Deposition

Prior to the second day of Balgowan's deposition, plaintiff's counsel forwarded a series of documents responsive to the described November 4th email. At the outset of the second day of his deposition, Balgowan was asked to

describe the purpose behind the production of each document. (Pa0245 – Pa0248 at 7:2-10:9). Balgowan testified that he provided just a single document in response to the request for documents supportive of the position that Urban had an affirmative obligation to identify pre-existing roadway defects. The lone responsive document was an excerpt from the New Jersey Department of Transportation's Standard Specifications for Road and Bridge Construction – 2007. (Pa1379).

Rather than providing direction to resident engineers similarly positioned to Urban, however, the specification section produced by Balgowan, titled "159.03.01 Traffic Control Coordinator", pertained to the assignment of an on-site Traffic Control Coordinator ("TCC") by the general contractor and the associated responsibilities of the TCC. (Pa1379). Accordingly, over the course of his two days of deposition testimony, Balgowan was unable to identify a single documentary source supporting his opinion that resident engineer Urban had an affirmative obligation on a NJTA project to identify pre-existing roadway defects. (Pa0027 and Pa0239).

Later during the course of the second day of his deposition, Balgowan provided testimony regarding the nature of the subject pre-existing condition that materially diverged from his testimony provided on the initial day of his deposition. Specially, Balgowan testified during the initial day of his deposition

the roadway condition that allegedly caused plaintiff's accident involved an abrupt change in elevation of up to 2" with no tapering of the roadway surface. (Pa0187 at 161:12-18). However, during the second day of his deposition, when shown a close-up of the allegedly dangerous condition, (Pa1861), Balgowan conceded that the roadway area in question did incorporate some level of tapering and did not involve an abrupt 2" change in elevation. (Pa0285 at 47:14-16).[2] Balgowan then revised his opinion to contend that the subject roadway condition was a dangerous condition because it involved an insufficient degree of tapering of the roadway surface. (Pa0285 at 47:5-12).

Balgowan predicated his opinion of inadequate tapering on an NJDOT standard design detail pertaining to paving operations. (Pa1186). Note number 16 included within the referenced NJDOT Traffic Control Details provides as follows:

> Bitumonous concrete placed during the various construction stages shall be transitioned over a minimum 20 horizontal to 1 vertical slope to meet the adjacent existing grade at the longitudinal and transverse limits of the stage construction areas unless otherwise noted on the stage construction plans.

(Pa1186).

[2] During the second day of his deposition, Balgowan was methodically taken through a detailed line of questioning that ultimately resulted in Balgowan acknowledging that the close-up photograph referenced herein was an accurate representation of the roadway condition at issue. (Pa0281 at 40:9 – 44:21)

Upon questioning, Balgowan conceded that the produced detail does not concern the identification of pre-existing roadway defects. (Pa0260 at 22:5-15). Balgowan further conceded that the subject litigation does not concern a paving operation. (Pa0260 at 22:16-21). Further, in an effort to establish the general applicability of the referenced NJDOT Traffic Control tapering detail, Balgowan referenced an independent document titled "Practices and Guidelines for Temporary Transverse HMA (Hot Mix Asphalt) Tapers" published by the Caltrans Division of Research and Innovation. (Pa1862). This Caltrans publication memorializes the existence of tapering standards associated with paving operations promulgated by regulatory authorities throughout the country. (Pa1862 and Pa0247 at 9:2-16). Significantly, however, qualifying language contained within the Caltrans publication directly undercuts Balgowan's reliance on the document as authority for the position that tapering standards are relevant to the identification of preexisting roadway defects. Specifically, under a heading entitled "Gaps in Findings" on page 2 of the document, the following language is provided:

> The lack of research on temporary transverse HMA tapers is apparent. With little documented justification behind the wide spectrum of state practices, it is unclear which, if any, represents a best practice. <u>In addition, our investigation did not reveal the scope of the possible safety issues related to vehicle impacts caused by abrupt temporary NMA tapers, such as personal injury,</u>

> vehicle accidents, pavement damage and possible related legal issues.

(Pa1863, underline added).

An additional concession by Balgowan during the second day of his deposition was that Urban had no actual notice of the subject roadway condition prior to the date of plaintiff's accident. (Pa0349 and Pa0350 at 111:20-112:5).

Further, Balgowan admitted during the second day of his deposition that he has no concept of the status of construction associated with the Project as of the date of plaintiff's accident and was specifically unaware as to whether any work had been performed in the vicinity of plaintiff's accident prior to the date of the accident. (Pa0291 – Pa0293 at 53:9- 55:12).

Rule 104 Hearing

At the conclusion of discovery, each defendant moved for summary judgment arguing that expert Balgowan failed to supply admissible expert testimony in support of his foundational opinions. By way of a series of orders dated March 24, 2022 independently addressing each filed summary judgment motion, the Hon. Michael Winkelstein, J.A.D. (retired and temporarily assigned on recall) directed that a Rule 104 hearing be conducted to provide the Court with an opportunity to evaluate whether expert Balgowan had supplied admissible opinions concerning the threshold issues. (Pa2025) The Hon. James H. Pickering, J.S.C. conducted the Rule 104 hearing on May 9, 2022. (3T).

During the course of the Rule 104 hearing, the bases for Balgowan's core opinions were explored at length. Consistent with the substance of his deposition testimony, Balgowan repeatedly identified and acknowledged deficiencies undermining his opinions.

Hearing Testimony Concerning Balgowan's Report

When questioned about the lone narrative report he issued in this matter dated December 3, 2020, Balgowan acknowledged the following points:

- The report does not reference or discuss Urban's project-related contractual obligations. (3T157:12-159:6);
- The report does not reference any standards promulgated by the New Jersey Department of Transportation ("NJDOT") or New Jersey Turnpike Authority ("NJTA") relevant to Urban's project-related responsibilities (3T159:7-23);
- The report does not reference any project specifications relevant to Urban's project-related responsibilities (3T159:24-160:5); and,
- The report does not articulate the standard of care governing Urban's project-related services or even use the phrase "standard of care" (p.160:6-14).

Hearing Testimony Concerning the Characteristics of the Subject Roadway Condition

Balgowan acknowledged during the course of his hearing testimony that the subject roadway condition pre-existed the beginning of construction on the road widening project and that he is unable to testify to a reasonable degree of engineering certainty that the condition was worsened by Project-related

activities. (3T152:22-154:17). Further, Balgowan could not identify any work that had been performed prior to the date of plaintiff's accident in the area where plaintiff's accident allegedly occurred. (3T240:8-241:18).

Hearing Testimony Concerning Other Accidents / Investigation

Balgowan testified that he is unaware of any other accidents that occurred in the area where plaintiff's accident allegedly occurred and conceded that the Garden State Parkway is a highly traveled roadway. (3T121:21-122:20).

Hearing Testimony Concerning Urban's Contract for the Project

During the course of his testimony on direct examination, Balgowan was shown the contract between Urban and Jacobs by which Urban agreed to serve as the resident engineer for the subject portion of the Project. (3T58:23-59:8). Balgowan testified that the language contained within page 1 of 3 of Attachment B of Urban's contract provided that Urban's scope of services included the maintenance and protection of traffic. (3T59:2-24 and Pa1271). Balgowan then testified that as per page 2 of Attachment B to the contract, Urban's scope of services included the responsibility to attend and/or conduct a pre-construction meeting and to inspect construct activities to ensure quality of workmanship (item (f)). (3T60:25-62:2 and Pa1271). Balgowan did not testify that the term "construction activities" as used within Urban's contract included the maintenance and protection of traffic as part of the contract. (3T62:3-13).

Balgowan's also opined that item (g) listed within page 2 of Attachment B to Urban's contract obligated Urban to provide full-time construction supervision services during all phases of construction, including unanticipated emergency repair work as directed by the field project manager. (3T62:15-24 and Pa1271)).

Balgowan did not testify on direct examination that Urban's contract required Urban to identify any conditions that pre-existed the performance of the project-related work or any condition that was outside the area where project-related work was being performed.

On cross-examination, Balgowan was again questioned about Attachment B to Urban's contract. Specifically, Balgowan was questioned regarding language found within page 1 of Attachment B providing that Urban's construction administration services under the contract were to be provided consistent with the NJTA's Construction Manual. (3T186:17-187:19 and Pa1271). Materially, Balgowan conceded that he never referred to the NJTA's Construction Manual in developing his opinions related to whether Urban's services satisfied the governing standard of care. (3T187:20-189:15).

By way of follow-up questioning, Balgowan testified that Urban's role as the resident engineer was to take steps to ensure that the general contractor, Midlantic, satisfied the project specifications. (3T190:1-5). Balgowan

conceded, however, that in developing his standard of care opinion he did not evaluate the manner by which Urban performed its construction management services. Balgowan in fact specifically recognized that he paid no attention to the process by which Urban effectuated its construction management services during the course of the Project. (3T190:6-16).

Hearing Testimony Concerning Post-Accident Video

During his opening statement, plaintiff's counsel played for the Court a video taken by his client at some point following his accident. Counsel represented to the Court that plaintiff's intention in taking the video was to ride a vehicle over the same location he encountered on the day of his accident to memorialize its existence. (3T20:4-10). Plaintiff's counsel represented to the Court that the video depicted the location of the roadway condition that allegedly caused plaintiff's accident. Counsel further represented that the video demonstrated the roadway condition's physical impact on the vehicle depicted in the video. (3T20:4-15). Although the subject roadway condition is not visible in the video, Balgowan testified that the physical "jolt" that the vehicle experienced when encountering the condition indicated the presence of a dangerous roadway condition associated with an abrupt elevation change. (3T141:14-142:12).

Critically, however, on cross-examination, Balgowan twice conceded that there is no way to know whether the vehicle in the video traveled over the same ground as plaintiff's motorcycle on the day of plaintiff's accident. (3T142:15-143:2; p.161:5-12; 162:4-165:17).

Hearing Testimony Concerning the Arora Report

During his opening statement at the hearing, plaintiff's counsel referenced an April 22, 2015 Bridge Inspection Report as purportedly evidencing the defendants' knowledge of a dangerous condition months before the date of plaintiff's accident. (3T22:17-23:5).

This report was then identified during Balgowan's testimony as the 2015 Biennial Bridge Inspection Report prepared by the engineering firm Arora and Associates, P.C. ("Arora") for the NJTA. (Pa1343 and Da2). On direct examination, Balgowan testified that on page 16-7 of the report, Arora noted settlement in the southbound roadway at the north bridge approach and that the same condition is memorialized by Photo 14 on page 16-23 of the report. (3T69:8-73:19, Pa1343, and Da2). Balgowan then testified that on page 16-6 of the same report, Arora made a repair recommendation to address the described condition. Balgowan testified that this repair recommendation supported his conclusion that a dangerous condition existed as of the date of the report. (3T73:20-75:8); (Pa1343 and Da2). Balgowan did not testify on direct

examination as to Arora's evaluation of the significance of the roadway condition identified within its report.

On cross-examination, Balgowan made multiple material concessions concerning the content of Arora's report. As an initial matter, Balgowan acknowledged that he had no basis to opine that Urban was provided with Arora's 2015 bridge inspection report or had any knowledge of the report at any point prior to the date of plaintiff's accident in September 2015. (3T160:15-161:4). Balgowan also acknowledged that within its report Arora assessed the subject roadway condition as "fair" rather than "poor" or dangerous or a condition in need of emergency repair. (3T135:13-137:8; 177:22-178:24). Further, Balgowan recognized that Arora recommended a maintenance repair, as opposed to an emergency repair, to address the subject roadway condition. (3T139:2-5). Balgowan further conceded that Arora's description of the roadway condition as involving settlement of "up to 2 inches" allowed for the possibility that the actual settlement measured less than 2 inches. (3T175:13-176:16).

Hearing Testimony Concerning the T&M Memo

Within his opening statement, counsel for plaintiff referenced a site inspection that occurred during the course of the subject road widening project but prior to the date of plaintiff's accident. According to plaintiff's counsel, this

site inspection included the identification of significant settlement at the north approach of the bridge where plaintiff's accident allegedly occurred. (3T23:6-16).

On direct examination, Balgowan discussed a June 26, 2015 memo prepared by the engineering firm T&M Associates (Pa1191) following the site inspection referenced in plaintiff's opening statement. As per Balgowan, the memo memorialized the existence of significant roadway settlement at the north approach of the bridge in the southbound direction. (3T79:9-84:2). Balgowan went on to testify that based on the T&M memo, the defendants knew "without a doubt" about settlement at the north approach of the bridge in the southbound direction of travel where plaintiff's accident allegedly occurred. (3T91:8-20).

On cross-examination, however, Balgowan materially changed his testimony. Balgowan was presented with a July 7, 2015 email prepared by Robert Matthews, the project design engineer with Gannett-Fleming, directed to multiple recipients discussing the content of the T&M memo. (3T166:11-168:15). Within the subject email, project engineer Matthews expressly corrected the content of the T&M memo with respect to the location of the observed settlement. As per Matthews, the settlement existed along the south abutment as opposed to the north abutment as noted in the memo. (3T168:16-25). Balgowan recognized at the hearing, as he had previously done at his

deposition, that he has no basis to challenge the veracity of the clarifying memo communicating that settlement had been observed at the south rather than the north abutment. (3T169:20-170:10).

Hearing Testimony Concerning Manual for Uniform Traffic Control Devices

Balgowan's direct examination involved a discussion of the Manual for Uniform Traffic Control Devices (2009 Ed.) ("MUTCD") (Pa1417). Balgowan testified that multiple sections of the manual required the use of warning signs in the presence of transverse roadway bumps, which, as per Balgowan, are problematic for motorcycles. (3T64:4-69:7). Balgowan did not testify that the manual obligated Urban to identify conditions that pre-existed the performance of the project-related work or any condition located was beyond the area where project-related work has been performed. On cross-examination, Balgowan agreed with multiple pertinent points associated with the inapplicability of the MUTCD with regard to the purported obligation to identify the subject roadway condition. He agreed that the document does not provide any guidance in determining whether a dangerous condition exists in any specific setting. (3T195:-196:5). Balgowan also acknowledged that the relevance of the MUTCD is predicated upon the existence of a dangerous condition about which the public needs to be warned. Stated differently, the MUTCD pre-supposes the existence of a dangerous condition. (3T196:6-197:15).

Hearing Testimony Concerning Post-Accident Paving Records

Balgowan next addressed paving records generated approximately two months post-accident. The records concerned the north approach to the subject bridge in the southbound direction. Balgowan testified that he considered the paving records as evidence that a dangerous condition existed in the area where plaintiff's accident allegedly occurred. (3T95:18-99:15). On cross-examination, Balgowan was shown a November 12, 2015 email from resident engineer Jordan Wood, P.E. directed to general contractor Midlantic regarding the post-accident paving. (3T179:23-180:3 and Pa2012). Balgowan agreed that as the email directed Midlantic to utilize the paving subcontractor C.J. Hesse, Inc. to perform the paving that the process certainly involved significant mobilization costs. (3T180:4-15). Balgowan further agreed that by way of the email, Jordan Wood directed Midlantic to pave four areas of the southbound Parkway other than the portion of the roadway where plaintiff's accident allegedly occurred. (3T180:16-181:11). Balgowan also agreed that Jordan Wood's email provided that "if time permits" the approaches to the bridge should also be paved. Balgowan agreed that "if time permits" is not language typically associated with remediating a dangerous emergent condition. (3T181:12-19).

Balgowan also agreed that Jordan Wood communicated a reasonable position when Wood testified at his deposition that Wood included the bridge

approaches in the paving scope on an "if time permits" basis. Balgowan agreed that it made sense to pave the approaches "if time permits" as the cost of mobilization would have already been incurred in connection with paving the other locations identified by Wood as appropriate for paving. (3T181:20-182:16).

Hearing Testimony Concerning Traffic Control Coordinator Specification

On cross-examination, Balgowan was again questioned regarding the standard specification issued by the NJDOT for Road and Bridge Construction (Pa1859). The specification is titled "159.03.01 Traffic Control Coordinator". (3T198:13-199:3). Balgowan agreed that the document was produced following the initial day of his deposition in support of his opinion that Urban, as the resident engineer for the road widening project, was obligated to proactively look for the type of pre-existing condition that allegedly caused plaintiff's accident. (3T191:16-22; 193:4-17; and 98:13-99:3). Balgowan agreed that the standard specification is directed to the project general contractor rather than the resident engineer as the general contractor and not the resident engineer is responsible for assigning the TCC. (3T200:24-201:11).

As per Balgowan it is the resident engineer's responsibility to make sure that a TCC is assigned and performs his job correctly. (3T201:12-18). Balgowan, however, was unable to identify any provision within the NJDOT

standard specification that Urban, as the resident engineer, failed to satisfy related the general contractor's compliance. (3T202:3-209:19).

Balgowan was then questioned about requirement No. 9 within the specification, which he identified as having particular relevance to his opinion during his deposition. That requirement for the general contractor provides as follows:

> Ensuring that excavation and lateral drop-offs greater than 2 inches in depth are eliminated or protected by barrier or emergency escape ramps during non-working periods.

(3T209:22-210:9) (underline added).

On cross-examination, Balgowan conceded that the subject settlement that caused plaintiff's accident was not longitudinal (a lateral drop-off) as included within requirement No. 9 but was rather transverse or perpendicular to the direction of travel. (3T210:13-211:24). With further regard to requirement No. 9, Balgowan conceded that he is unaware of any support for the position that the roadway condition at issue involved a settlement of greater than 2 inches. (3T211:25-212:12).

The Absence of Hearing Testimony Concerning the Deposition Testimony of Urban Engineer Jordan Wood, P.E.

During the course of the evidentiary hearing, Balgowan did not predicate his standard of care opinions on the deposition testimony provided by plaintiff's engineer Jordan Wood, P.E. Accordingly, Urban did not have an opportunity to cross-examine Balgowan concerning Wood's testimony. During his deposition testimony, Wood had generally testified that he had responsibility for monitoring the condition of the roadway. He further testified that elevation changes were included within the scope of the items he monitored. (Pa678-79 at 20:25-21:7). Significantly, Wood never testified Urban had an obligation to identify pre-existing roadway conditions as opposed to conditions created or exacerbated by the Project work. Balgowan acknowledge this fact during the second day of his deposition. (Pa0354 at 116:4-6).

Wood also provided specific deposition testimony illustrating that the scope of his roadway monitoring role concerned areas where work had been performed:

> Q. At any point during your work with Urban on structure 40, pursuant to this contract, did you ever become aware that there was some settlement on the approach of the southbound abutment of structure 40?
> A. Yes. Separate from this.
> Q. Right. When did you first learn of it?
> A. The settlement that I was aware of that was corrected?
> Q. Yes.
> A. That would be post our sheeting driving ad we repaired settlement on

multiple bridges in multiple locations due to construction activities.

Q. Okay.

A. All of which were in the right lane.

(Pa683 at 37:15).

It is undisputed that the subject accident occurred in the left lane of the roadway and that Balgowan has never attempted to address the scope of Wood's Project-related monitoring activities.

Hearing Testimony Concerning Causation

Balgowan acknowledged that he made no effort to reconstruct the subject accident in this matter. (3T215:18-216:19). Balgowan acknowledged that in developing his opinions he did not consider the potential that had plaintiff lost control of his motorcycle due to his motorcycle coming into contact with the median. Balgowan recognized, however, that an operator could lose control of his or her motorcycle in the absence of a roadway defect. (3T221:7-23).

Judicial Rulings At Issue

On April 10, 2023, Judge Pickering issued an order granting summary judgment in favor of each defendant, including Urban. The order was accompanied by a 55-page opinion providing the bases for the Court's rulings. Encompassed within the rulings, were the following specific findings:

1) Balgowan failed to articulate the standard of care governing Urban's project-related services;

2) Balgowan's opinions about the alleged defect at issue are unreliable as they changed throughout the course of the litigation;
3) Balgowan failed to provide any support for the position that the roadway condition was dangerous and caused plaintiff's accident;
4) Plaintiff's post-accident video is not a reliable piece of evidence upon which Balgowan could support his opinions;
5) It is material that Balgowan could not identify any other accidents that occurred at the subject location; and,
6) It is material that Balgowan did not perform an accident reconstruction as the facts available for that analysis were available.

(Pa2113).

Given the foregoing findings, Judge Pickering concluded that Balgowan had presented a net opinion insufficient to substantiate a professional malpractice claim against Urban and granted Urban's motion for summary judgment.

With respect to Urban's cross-appeal, Urban filed a motion for summary judgment soon after filing its answer to plaintiff's Fourth-Amended Complaint on August 19, 2019. (Pa1745). By way of the motion, Urban argued that plaintiff's malpractice claim was precluded by the governing two-year statute of limitations. Urban further argued that the fictitious party language utilized by

plaintiff in his pleadings was insufficient to preserve the claim against Urban. On September 27, 2019, the Hon. Joseph L. Marczyk, J.S.C. heard oral argument on the motion. (1T). At the conclusion of oral argument, Judge Joseph L. Marczyk, J.S.C. denied Urban's motion predicated upon findings that plaintiff's fictitious party pleading language was sufficiently particularized and that plaintiff exercised due diligence in identifying Urban as an entity to be named as a party. Urban submits that both of these findings were made by the trial court in error and that Urban should have been granted summary judgment soon after the filing of plaintiff's Fourth-Amended Complaint.

LEGAL ARGUMENT

I. AS THE COURT CONDUCTED AN EXTENSIVE EVIDENTIARY HEARING, THERE WAS NO NEED TO CONDUCT ORAL ARGUMENT PRIOR TO GRANTING SUMMARY JUDGMENT.

Plaintiff's argument on this issue completely ignores the unique procedural history associated with this matter. It is true that each party requested oral argument upon filing for summary judgment in March of 2022. Upon receipt of the motions, the Hon. Michael Winkelstein declined to hear oral argument. Judge Winkelstein held that as the motions largely concerned the issue of whether the opinions provided by plaintiff's liability expert were

admissible, an evidentiary hearing was required. In so holding, the Court relied upon Kemp v. State, 174 N.J. 412 (2002).

Thereafter, the Hon. James Pickering, on May 9, 2022, conducted a full-day evidentiary hearing during which the bases for expert Balgowan's opinions were extensive explored. The parties then submitted Findings of Facts and Conclusions of Law for Judge Pickering's consideration. Ultimately, on April 10, 2023, Judge Pickering issued an order dismissing plaintiff's complaint as to each party. With particular relevance to Urban, Judge Pickering held that Balgowan failed to provide admissible expert opinions necessary to support a prima facie malpractice claim. Given the trial court's considered ruling, the need for oral argument was mooted. Summary judgment is clearly warranted in the absence of expert opinion supporting the basic elements of plaintiff's malpractice claim. The hearing conducted by the trial court and the post-hearing papers submitted for the Court's consideration afforded plaintiff with a substantially greater opportunity to support the asserted admissibility of Balgowan's testimony than would have provided by way of oral argument on the filed summary judgment motions. Accordingly, this matter is ripe for this Court's consideration.

II. THE TRIAL COURT CORRECTLY RULED THAT PLAINTIFF'S CLAIM FOR PROFESSIONAL MALPRACTICE AGAINST URBAN MUST BE SUPPORTED WITH AN EXPERT OPINION AS TO THE GOVERNING STANDARD OF CARE.

In an action against a professional, New Jersey law requires expert testimony from a member of that professional's community in order to establish a deviation from the standard of care. See Rosenberg v. Cahill, 99 N.J. 318, 325 (1985); F. G. v. McDonnell, 291 N.J. Super. 262, 272 (App. Div. 1996), aff'd. in part and rev'd. in part, 150 N.J. 550 (1997); State v. Frost, 242 N.J. Super. 601, 615 (App. Div. 1990); Walker Rogge, Inc. v Chelsea Title & Guarantee Co., 222 N.J. Super. 363, 376 (App. Div. 1988), rev'd. on other grounds, 116 N.J. 517 (1989). This is so because a jury should not be allowed to speculate, without expert testimony, in an area where lay persons have insufficient knowledge or experience. Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997). Without such evidence, a plaintiff cannot sustain the burden of establishing a prima facie case of negligence against a professional.

The requirement of predicating claims against a professional with standard of care expert testimony is memorialized within the New Jersey Model Civil Jury Charge governing professional liability claims. New Jersey Model Jury Charge 5.52B provides as follows:

> Negligence is conduct that falls below a standard of care required by law for the protection of persons or property from foreseeable risks of harm.

> In a suit against an engineer, jurors normally are not qualified to supply the standard of care by which to measure the defendant's conduct. Based upon their common knowledge alone, without technical training, jurors usually cannot know what conduct constitutes standard engineering practice. Therefore, ordinarily, when an engineer is charged with negligence, the standard of practice by which his/her conduct is to be judged must be furnished by expert testimony; that is to say, by the testimony of persons who by knowledge, training or experience are deemed qualified to testify and to express their opinions on standard engineering practice.
>
> As jurors, you should not speculate or guess about the standards which the average engineer should follow. In a case such as this, you as jurors must determine what is standard engineering practice from the testimony of the expert witnesses who have been heard in this case. After hearing such testimony and deciding what standard engineering practice is in the circumstances of this case, you as jurors must then determine whether the defendant has complied with or whether defendant has departed from that standard of care. If you find that the defendant has complied with this standard, he/she is not liable to the plaintiff, regardless of the result of his/her work. On the other hand, if you find that the defendant has departed from this standard of care, and that such departure has resulted in injury or damage, then you should find the defendant liable for his/her negligence.

(underline added).

Accordingly, in the present matter, the trial court correctly concluded that plaintiff cannot establish a prima facie case of professional malpractice against

Urban in the absence of an expert opinion articulating the standard of care governing Urban's provision of services and a deviation from that standard.

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT PLAINTIFF'S LIABILITY EXPERT FAILED TO ARTICULATE AN ADMISSIBLE OPINION REGARDING THE STANDARD OF CARE GOVERNING URBAN'S PROVISION OF ITS PROFESSIONAL SERVICES OR ANY ASSERTED DEVIATION THEREFROM.

Opinion testimony "must relate to generally accepted standards, not merely to standards personal to the witness." Taylor v. DeLosso, 319 N.J.Super. 174, 180 (App. Div. 1999). In other words, a plaintiff must produce expert testimony upon which the jury could find that the consensus of the particular profession involved recognized the existence of the standard defined by the expert. Id. It is insufficient for plaintiff's expert simply to follow slavishly an "accepted practice" formula; there must be some evidential support offered by the expert establishing the existence of the standard. Id. A standard which is personal to the expert is equivalent to a net opinion. Id.

"Qualified expert opinion is admissible to assist the jury, N.J.R.E. 702, but there must be factual and scientific basis for an expert's opinion." Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div.) certif. den'd 145 N.J. 374 (1996). New Jersey Rule of Evidence 703, which governs the basis of expert opinion, states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Based on this Rule of Evidence, "[a]n opinion lacking in foundation is worthless." Jiminez, 286 N.J. Super. at 540. "An expert opinion that is not factually supported is a net opinion or mere hypothesis to which no weight need be accorded." Nextel of N.Y., Inc. v. Borough of Englewood Cliffs Bd. of Adj., 361 N.J. Super. 22, 43 (App. Div. 2003). "The net opinion rule is a prohibition against speculative testimony." Grzanka v. Pfeifer, 301 N.J. Super. 563 (App. Div. 1997) certif. den'd 154 N.J. 607 (1998). The rule renders inadmissible an expert's conclusion unsupported by factual evidence or other data. Polzo v. County of Essex, 196 N.J. 569, 583 (2008). "Under this doctrine, expert testimony is excluded if it is based merely upon unfounded speculation and unquantified possibilities." Grzanka v. Pfeifer, 301 N.J. Super. at 580.

The net opinion rule also "focuses upon the failure of the expert to explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom." Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 102 (App. Div. 2001). The doctrine is "a mere restatement of the established rule than expert's bare conclusions, unsupported by factual

evidence, [are] inadmissible." Buckelew v. Grossband, 87 N.J. 512, 524 (1981). Courts have consistently instructed that expert testimony and reports will be stricken as net opinions where they fail to "give the why and wherefore" of their opinion, and have provided a "mere conclusion." Jiminez, 286 N.J. Super. at 540.

In the matter Taylor v. DeLosso, plaintiff's expert witness testified that the defendant architect deviated from accepted standards of architectural practice by failing to make a site inspection of plaintiff's property to verify the location of a maple tree before preparing the site plan. 319 N.J.Super. 174, 180 (App. Div. 1999). Plaintiff's expert testified that when a plan involves a small site, a "prudent architect would go to the site and make sure that he knows where that tree is, because all his work is going to revolve around that tree." Id. The Taylor Court explained that the problem with this testimony was that plaintiff's expert "presented no authority supporting his opinion. No reference was made to any written document, or even unwritten custom or practice indicating that the consensus of the architectural community recognizes a duty to make a site inspection for 'small sites.'" Id. In this regard, the Court was concerned by the "the total absence in [plaintiff's expert's] testimony of reference to any textbook, treatise, standard, custom or recognized practice, other than his personal view." Id. at 182. The Taylor Court therefore concluded that the expert's testimony

constituted a net opinion and the defendants were therefore entitled to a judgment of dismissal as a matter of law. Id. at 184.

In the present matter, plaintiff's liability expert Richard Balgowan has supplied an inadmissible net opinion that Urban, as the road widening project's resident engineer, had an affirmative obligation to identify and facilitate the remediation of the subject pre-existing roadway defect. As was case with the plaintiff's expert in Taylor, Balgowan has been unable to point to a single document in support of his threshold opinion. During the initial day of his deposition, Balgowan readily conceded that the articulation of his opinion is not predicated upon any of the following sources of information:

- Urban's contractual obligations;
- Any standards promulgated for NJTA projects;
- The contents of any Standard or Special Provisions associated with NJTA projects;
- Any ethical standards applicable to the professional engineering community; or
- Any regulatory authority, statute or case law.

(Pa0155 – Pa0157 at 129:8-131:18).

A. Balgowan's Opinion Completely Ignores Urban's Contractual Obligations.

During the course of his evidentiary hearing testimony on direct examination, Balgowan testified concerning multiple provisions within Urban's contract that he considered relevant to his standard of care analysis. He testified that the language contained within page 1 of 3 of Attachment B of Urban's contract provided that Urban's scope of services included the maintenance and protection of traffic. (3T59:2-24 and Pa1271-72). According to Balgowan, multiple sections within Attachment B obligated Urban to identify the subject pre-existing roadway condition prior to the date of plaintiff's accident.

On cross-examination, however, Balgowan made a series of extraordinary concessions directly undermining his previously communicated positions regarding Urban's contractual obligations. Specifically, Balgowan was questioned regarding language found within page 1 of Attachment B providing that Urban's construction administration services under the contract were to be provided consistent with the NJTA's Construction Manual. (3T186:17-187:19 and Pa1271-72). Balgowan conceded that he never referred to the NJTA's Construction Manual in developing his opinions related to whether Urban's services satisfied the governing standard of care. (3T187:20-189:15 and Pa1265). By way of follow-up questioning, Balgowan testified that Urban's role as the resident engineer was to take steps to ensure that the general contractor, Midlantic, satisfied the project specifications. (3T190:1-5).

Balgowan conceded, however, that in developing his standard of care opinion he did not evaluate the manner by which Urban performed its construction management services. Balgowan in fact specifically recognized that he paid no attention to the process by which Urban effectuated its construction management services during the course of the project. (3T190:6-16). Accordingly, Balgowan provided no analysis as to the express contractual standard for the performance of construction administration services nor any details associated with the manner by which Urban performed its Project-related services.

Similarly, Balgowan has also acknowledged he has taken no steps to differentiate between the responsibilities of Urban and the other defendants, including the general contractor Midlantic, as related to the alleged obligation to identify pre-existing roadway defects. (Pa0157; Pa0158; Pa0163; and Pa0164 at 131:25-132:6; 137:25-138:21). This concession is significant in light of plaintiff's obligation in prosecuting a professional malpractice claim is to perform an individualized evaluation of the obligations of the professional defendant. As per Balgowan's liability analysis, or lack thereof, the project's owner/operator, general contractor, subcontractor, resident engineer and chief inspector have identical and interchangeable obligations to identify pre-existing roadway conditions. This complete absence of substantive analysis cannot form the basis of an admissible expert opinion.

Balgowan's complete unfamiliarity with the status of construction as of the date of plaintiff's accident is also a major red flag. Balgowan specifically admitted that he was unaware as to whether any work had been performed in the direct vicinity of plaintiff's accident prior to the date of the accident. (Pa0291 – Pa0293 at 53:9-55:12). This concession dovetails with Balgowan's recognition that Urban had no actual notice of the subject roadway condition prior to the date of plaintiff's accident. (Pa0349 and Pa0350 at 111:20-112:5). Collectively, this complete lack of substantive awareness and analysis resulted in an inadmissible net opinion.

B. <u>Balgowan's Opinion Lacks any Documentary Support</u>.

When pushed for documentary support for his opinion that Urban, as the Project's resident engineer, had an affirmative obligation to identify pre-existing roadway defects, Balgowan testified that he would supply written authority in advance of the second day of his deposition. (Pa0162 and Pa0163 at 136:3-137:19). The lone purportedly relevant document produced by Balgowan prior to his second day of testimony, however, was an excerpt from the New Jersey Department of Transportation's Standard Specifications for Road and Bridge Construction – 2007. (Pa1379). Rather than providing direction to the Resident Engineer, the produced specification section, entitled "159.03.01 Traffic Control Coordinator", pertains to the assignment of an on-site TCC by the

general contractor and the associated responsibilities of the TCC. (Pa1379). Accordingly, over the course of his two days of deposition testimony, Balgowan was unable to identify a single authoritative source supporting his opinion that a resident engineer on a NJTA project, such as Urban, has an affirmative obligation to identify pre-existing roadway conditions. This failure is particularly noteworthy as Balgowan expressly testified that such written authority exists.

On this topic, Balgowan presented similar testimony during the Rule 104 evidentiary hearing. Balgowan agreed the referenced NJDOT standard specification is directed to the project general contractor rather than the resident engineer as the general contractor and not the resident engineer is responsible for assigning the TCC. (3T200:24-201:11). Upon making this concession, Balgowan attempted to justify his reliance on the standard specification by testifying that it is the resident engineer's responsibility to make sure that a Traffic Control Coordinator is assigned and performs his job correctly. (3T201:12-18). Balgowan, however, was unable to provide any facts in support of the conclusion that Urban failed to satisfy this obligation. (3T202:3-209:19). He simply had never investigated the issue.

Balgowan then testified about requirement No. 9 within the same standard specification, which he identified as having particular relevance to his opinion. That requirement for the general contractor provides as follows:

> Ensuring that excavation and lateral drop-offs greater than 2 inches in depth are eliminated or protected by barrier or emergency escape ramps during non-working periods.

(3T209:22-210:9) (underline added).

On cross-examination, Balgowan conceded that the subject settlement that caused plaintiff's accident was not longitudinal as included within requirement No. 9 but was rather transverse or perpendicular to the direction of travel. (3T210:13-211:24). With further regard to requirement No. 9, Balgowan conceded that he is unaware of any support for the position that the roadway condition at issue involved a settlement of greater than 2 inches. (3T211:25-212:12).

Further, after considerable testimony concerning the substance of the MUTCD on direct examination, Balgowan appropriately recognized on cross-examination that the document does not provide any guidance in determining whether a dangerous condition exists in any specific setting. As this is the core standard of care issue in this litigation, the MUTCD does not contribute to Balgowan's standard of care opinion as related to Urban. Accordingly, Balgowan was compelled to recognize that he was unable to identify any documentary support for his standard of care opinion.

C. Balgowan's has Acknowledged that Urban was not on Notice of the Condition Prior to the Date of Plaintiff's Accident.

On appeal, plaintiff spends considerable energy focusing on the contention that the defendants, including Urban, were on actual and/or constructive notice of the subject roadway condition prior to the date of plaintiff's accident. With respect to Urban, and as recognized by Balgowan, this argument is completely inaccurate.

On direct examination at the hearing, Balgowan discussed the 2015 Arora report, which predated plaintiff's accident. Balgowan testified that on page 16-7 of the report, Arora noted settlement in the southbound roadway at the north bridge approach and that the same condition is memorialized by Photo 14 on page 16-23 of the report. (3T69:8-73:19 and Da2). Balgowan then testified that on page 16-6 of the same report, Arora made a repair recommendation to address the described condition. Balgowan testified that this repair recommendation supported his conclusion that a dangerous condition existed as of the date of the report. (3T73:20-75:8 and Da2). Balgowan did not testify on direct examination as to Arora's evaluation of the significance of the roadway condition identified within its report.

On cross-examination, Balgowan made multiple material concessions concerning the content of Arora's report. As an initial matter, Balgowan acknowledged that he has no basis to opine that Urban was provided with Arora's

2015 bridge inspection report at any point prior to the date of plaintiff's accident in September 2015. (3T160:15-161:4). Balgowan also acknowledged that within its report Arora assessed the subject roadway condition as "fair" rather than "poor" or dangerous or a condition in need of emergency repair. (3T135:13-137:8; 177:22-178:24). Further, Balgowan recognized that Arora recommended a maintenance repair, as opposed to an emergency repair, to address the subject roadway condition. (3T139:2-5). Balgowan further conceded that Arora's description of the roadway condition as involving settlement of "up to 2 inches" allowed for the possibility that the actual settlement measured less than 2 inches. (3T175:13-176:16). In sum, no support exists to support the contention that Urban was on timely notice of the Arora report or that the report describes a dangerous roadway condition about which Urban would have reasonably been on notice.

Similarly, Balgowan's standard of care opinion related to Urban's services garners no support from the memo prepared by the engineering firm T&M. On direct examination, Balgowan boldly testified that the T&M memo expressly identified the existence of significant settlement at the north bridge approach. Based on the content of the memo, Balgowan testified that "without a doubt" that the defendants, presumably including Urban, were aware of the existence of settlement in this area, which plaintiff asserts was the location of his accident. On cross-examination,

Balgowan was forced to recognize the existence of a clarifying email prepared by the design engineer communicating that the settlement observed on-site involved the south approach to the bridge rather than the north approach. Candidly, Balgowan conceded that he was without a basis to challenge the veracity of the clarifying email. Accordingly, the T&M memo provides no support for Balgowan's standard of care opinion. Plaintiff, however, continues to rely upon the document within his brief.

IV. THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFF'S LIABILITY EXPERT HAS FAILED TO PROVIDE AN ADMISSIBLE OPINION THAT A DANGEROUS ROADWAY CONDITION EXISTED ON THE DATE OF PLAINTIFF'S ACCIDENT.

The opinion articulated by plaintiff's liability expert Balgowan that the subject roadway condition was inherently dangerous similarly lacks foundational support and presents as an inadmissible net opinion. On the initial day of his deposition, Balgowan testified that the roadway condition that purportedly caused plaintiff's accident involved an abrupt change in elevation of up to 2" with no tapering of the roadway surface. (Pa0188 at 161:12-18). However, during the second day of his deposition, when shown a close-up of the allegedly dangerous condition (Pa1861; Da42), Balgowan conceded that the roadway area in question did incorporate some level of tapering and did not involve an abrupt 2" change in elevation. (Pa0285, p. 47:14-16). Upon making this concession, Balgowan revised his dangerous condition opinion by testifying

that the subject roadway condition was dangerous as it involved an insufficient degree of tapering of the roadway surface. (Pa0285, p. 47:5-12).

Balgowan predicated his opinion of inadequate tapering on an NJDOT standard design detail pertaining to paving operations. (See NJDOT Traffic Control Details, Pa1186). Note number 16 included within the referenced NJDOT Traffic Control Details provides as follows:

> Bitumonous concrete placed during the various construction stages shall be transitioned over a minimum 20 horizontal to 1 vertical slope to meet the adjacent existing grade at the longitudinal and transverse limits of the stage construction areas unless otherwise noted on the stage construction plans.

(Pa1186).

Upon questioning, Balgowan conceded that the produced detail does not concern the identification of a pre-existing roadway defect. (Pa0260, p. 22:5-15). Balgowan further conceded that the subject litigation does not concern a paving operation. (Pa0260 at 22:16-21).

Further, in an effort to establish the general applicability of the referenced NJDOT standard detail, Balgowan referenced an independent document entitled "Practices and Guidelines for Temporary Transverse HMA (Hot Mix Asphalt) Tapers" published by the Caltrans Division of Research and Innovation. (Pa1862). This Caltrans publication memorializes the existence of tapering standards associated with paving operations promulgated by regulatory

authorities throughout the country. (Pa1862). Significantly, however, qualifying language contained within the Caltrans publication directly undercuts Balgowan's reliance on the document as authority for the position that tapering standards are relevant to the identification of pre-existing roadway defects. Specifically, under a heading entitled "Gaps in Findings" on page 2 of the document, the following language is provided:

> The lack of research on temporary transverse HMA tapers is apparent. With little documented justification behind the wide spectrum of state practices, it is unclear which, if any, represents a best practice.
>
> In addition, our investigation did not reveal the scope of the possible safety issues related to vehicle impacts caused by abrupt temporary HMA tapers, such as personal injury, vehicle accidents, pavement damage and possible related legal issues.

(Pa1862, underline added).

Within its papers, plaintiff contends that the trial court improperly permitted reference to a close-up photograph of the subject roadway condition. (Pa1861 and Da42). The contention is that the close-up photograph is not an accurate representation of the condition. Balgowan's testimony during the second day of his deposition, however, completely undermines this position. More specifically, Balgowan agreed that the close-up photograph was a magnification of a photograph secured by plaintiff during discovery by way of a subpoena issued to Arora. As produced, the photograph was in a JPEG format,

which allowed for it to be magnified. At deposition, Balgowan was methodically walked through the source photograph and its relationship to the close-out photograph. Balgowan ultimately agreed that the close-up photograph was an accurate representation of the subject roadway condition. Accordingly, while plaintiff is understandably somewhat uncomfortable with the content of the close-up photograph as it clearly demonstrates the routine nature of the purportedly dangerous roadway condition, plaintiff cannot successfully dispute that plaintiff's own expert acknowledges its relevance.

During the course of the evidentiary hearing, Balgowan provided testimony that undermined two additional purported predicates for the assertion that the subject roadway condition was dangerous. First, during his opening statement, plaintiff's counsel played for the Court a video taken by his client at some point following his accident. Counsel represented to the Court that plaintiff's intention in taking the video was to ride a vehicle over the same location he encountered on the day of his accident to memorialize its existence. (3T20:4-10). Plaintiff's counsel represented to the Court that the video depicted the location of the roadway condition that allegedly caused plaintiff's accident. Counsel further represented that the video demonstrated the roadway condition's physical impact on the vehicle depicted in the video. (3T20:4-15). Although the subject roadway condition is not visible in the video, Balgowan

testified that the physical "jolt" that the vehicle experienced when encountering the condition indicated the presence of a dangerous roadway condition associated with an abrupt elevation change. (3T141:14-142:12).

Critically, however, on cross-examination, Balgowan twice conceded that there is no way to know whether the vehicle in the video traveled over the same ground as plaintiff's motorcycle on the day of plaintiff's accident. (3T142:15-143:2; p.161:5-12; 162:4-165:17).

Balgowan also addressed paving records generated approximately two months post-accident. The records concern the north approach to the subject bridge in the southbound direction. Balgowan testified that he considered the paving records as evidence that a dangerous condition existed in the area where plaintiff's accident allegedly occurred[3]. (3T95:18-99:15). On cross-examination, Balgowan was shown a November 12, 2015 email from resident engineer Jordan Wood, P.E. directed to general contractor Midlantic regarding the post-accident paving. (3T179:23-180:3). Balgowan agreed that as the email

[3] Plaintiff correctly notes the trial court ruled that the admission of the post-accident paving records was precluded by N.J.R.E. 407. Plaintiff, however, asserts that the trial court misinterpreted the governing rule in making its ruling. The court rule is clearly applicable as it bars evidence of remedial measures performed after an event to prove an event was caused by negligence or culpable conduct. Plaintiff has asserted that the subject condition was dangerous and was permitted to exist as a result of the defendants' negligence. Accordingly, despite plaintiff's contentions to the contrary, plaintiff wants to use the snow removal records to show that the condition existed at the time of plaintiff's accident. As per plaintiff's allegations, such a showing would be sufficient to establish negligence. Plaintiff's proposed interpretation of the rule would therefore render the rule meaningless. Plaintiff's cited cases are not to the contrary as they concern viable other purposes for the admission of remedial measures. Brown v. Brown, 86 N.J. 565 (1981) (relevant to showing whether a project delay in scheduling was palpably unreasonable and whether the work was essentially design rather than maintenance); Perry v. Levy, 87 N.J.L. 670 (E&A. 1915) (all parties knew of the dangerous condition at all relevant times, relevant to establish possession of property).

directed Midlantic to utilize the paving subcontractor C.J. Hesse, Inc. to perform the paving that the process certainly involved significant mobilization costs. (3T180:4-15). Balgowan further agreed that by way of the email, Jordan Wood directed Midlantic to pave four areas of the southbound Parkway other than the portion of the roadway where plaintiff's accident allegedly occurred. (3T180:16-181:11). Balgowan also agreed that Jordan Wood's email provided that "if time permits" the approaches to the bridge should also be paved. Balgowan agreed that "if time permits" is not language typically associated with remediating a dangerous emergent condition. (3T181:12-19).

Balgowan also agreed that Jordan Wood communicated a reasonable position when Wood testified at his deposition that he included the bridge approaches in the paving scope on an "if time permits" basis. Balgowan agreed that it made sense to pave the approaches "if time permits" as the cost of mobilization would have already been incurred in connection with paving the other locations identified by Wood as appropriate for paving. (3T181:20-182:16). Accordingly, Balgowan expressly recognized the irrelevance of multiple documents upon which plaintiff continues to rely.

Finally, plaintiff's liability expert Richard Balgowan has completely failed to provide an admissible expert opinion supporting the position that the subject alleged roadway condition actually caused plaintiff's accident.

Balgowan's opinion on this issue does not involve any level of evaluation supplemental to his dangerous condition analysis. In a nutshell, Balgowan has provided the circular opinion that the existence of the allegedly dangerous condition proves that plaintiff's accident was caused by the condition.

Once again, Balgowan's opinion is not predicated on any meaningful support or analysis. This is despite the fact that Balgowan, or any other expert retained by plaintiff, has always had access to all of the information necessary to perform a causation analysis. More specifically, the following information is known to plaintiff:

- The size and weight of plaintiff;
- The size and weight of the motorcycle operated by plaintiff on the day of the accident;
- The speed of the motorcycle at the time of the accident;
- The opportunity to physically inspection the motorcycle post-accident; and
- The magnitude of the roadway defect (close-up photo – Pa1861 and Da42).

Plaintiff therefore has always had every piece of information at available to perform a causation analysis and educate the jury as to whether plaintiff was actually caused to lose control of his vehicle upon encountering the subject

roadway condition. Balgowan, however, is clearly not qualified to perform such an analysis as he has conceded that he is not an expert in the field of accident reconstruction. (Pa0086; Pa0201; and Pa0216 at 60:22; 175:1-4; 175:15-17; and 190:10-20). Unsurprisingly, Balgowan also admitted that he did not perform any calculations concerning the physical forces associated with the accident (Pa0064 at 38:22-25) and that he never inspected plaintiff's motorcycle following the accident. (Pa0065 and Pa0066 at 39:6-40:22).

In sum, plaintiff has failed to provide the trier of fact with any basis to evaluate the assertion that the subject roadway condition caused plaintiff to lose control of his motorcycle.

V. THE TRIAL COURT CORRECTLY HELD THAT THE COMMON KNOWLEDGE EXCEPTION IS INAPPLICABLE TO THE PRESENT MATTER.

Given the clear difficulties associated with Balgowan's deposition testimony, plaintiff contends that expert testimony is not required to establish that Urban's Project-related services breached the governing standard of care. In so doing, plaintiff reaches for the common knowledge exception to the Affidavit of Merit statute. Plaintiff predominantly relied upon Jacobs v. Jersey Cent. Power & Light Co. where a homeowner brought a claim after tripping over a hole that was left following the removal of a fallen streetlight. 452 N.J. Super 494 (App. Div. 2017). In arguing for the applicability of the common knowledge exception, plaintiff

contends that "[d]efendants (including Urban) inspected and were aware of the settlement problem at the north approach" and that this 'dangerous condition' went unaddressed. Of course, plaintiff fails to acknowledge that the assertion of actual notice has been expressly abandoned by plaintiff's own expert.

Further, it is simply preposterous to contend that it is with the ken of the average juror to not only appreciate the obligations typically undertaken by a resident engineer associated with a sophisticated road widening project but to also possess a knowledge base applicable to Urban's Project-based obligations in the present matter. In light of the foregoing, the trial court correctly held that plaintiff's common knowledge argument is meritless.

VI. AS PLAINTIFF FAILED TO INITIATE SUIT AGAINST URBAN WITHIN TWO YEARS OF THE DATE OF THE ACCIDENT GIVING RISE TO THIS LITIGATION, PLAINTIFF'S PERSONAL INJURY CLAIM AGAINST URBAN IS TIME-BARRED.

Under New Jersey law, "[e]very action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this State shall be commenced within two years next after the cause of any such action shall have accrued." N.J.S.A. 2A:14-2. In a personal injury context, the cause of action accrues when the accident occurs. See Burd v. New Jersey Telephone Co., 149 N.J.Super. 20, 30 (App. Div. 1977). Thus, plaintiff's cause of action against Urban in this matter accrued on the date the accident giving rise to this

litigation occurred, September 12, 2015. Plaintiff therefore had until September 12, 2017 to initiate suit against Urban. As plaintiff did not initiate suit against Urban until May 17, 2019, which was nearly 44 months subsequent to the accident, plaintiff's personal injury claim against Urban is unsustainable. Plaintiff's complaint against Urban should have therefore be dismissed with prejudice upon filing its initial motion for summary judgment.

VII. PLAINTIFF'S FICTITIOUS PARTY COUNT INCLUDED WITHIN HIS ORIGINALLY FILED COMPLAINT AND FIRST AMENDED COMPLAINT DOES NOT PRESERVE PLAINTIFF'S CLAIM AGAINST URBAN.

The court rule governing fictitiously named parties provides in relevant part as follows:

> In any action other than an action governed by R. 4:4-5 (affecting specific property or a res), if the defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient for identification. Plaintiff shall on motion prior to judgment, amend the complaint to state the defendant's true name, such motion to be accompanied by an affidavit stating the manner by which the information was obtained…

R. 4:26-4 (underline added).

The rule will not protect a plaintiff who had ample time to discover the unknown defendant's identity before the running of the statute of limitations. Matynska v. Fried, 175 N.J. 51, 53 (2002). Application of the fictious pleading

rule requires a plaintiff to demonstrate two phases of due diligence: 1) before filing the original complaint naming John Doe parties, plaintiff must exercise due diligence in attempting to identify responsible defendants; and, 2) plaintiff must act with due diligence in ascertaining defendant's true name and substituting it upon learning defendant's identity. Baez v. Paulo, 453 N.J. 422, 439 (App. Div. 2018).

The purpose of the rule is to render timely the complaint filed by a diligent plaintiff, who is aware of a cause of action against an identified defendant but does not know the defendant's name. Gallagher v. Burdette-Tomlin Hosp., 318 N.J. Super. 485, 492, (App.Div.1999), aff'd, 163 N.J. 38 (2000). The rule will not protect a plaintiff who had ample time to discover the unknown defendant's identity before the running of the statute of limitations. See Matynska v. Fried, 175 N.J. 51, 53 (2002). It is only through the imposition of a continuing requirement of diligence upon the plaintiff to identify the fictitious defendant that the twin purposes of the statute of limitations are achieved: penalizing a dilatory plaintiff and affording repose to a defendant. Younger v. Cracke, 236 N.J. Super. 595, 602-03 (Law Div. 1989).

The procedural facts associated with this matter clearly establish that plaintiff has failed to satisfy the requirements of R. 4:26-4 and its interpreting case law. It is conceded that plaintiff's original complaint and First Amended

Complaint were both filed before the expiration of the running of the two-year statute of limitations. Both pleadings include an identical fictitious pleading count. This count, however, provides absolutely no description that could in any way be construed as relating to an engineering firm providing the scope of service provided by Urban with respect to the subject road widening project. Rather, plaintiff's fictious party count is wholly generic in nature and provides in relevant part as follows:

> The Plaintiff alleges that an insufficient amount of time has passed within which to determine the identity of any other individuals or business entities who may be responsible, in whole or in part, for the causation of the aforesaid accident. For the purposes of the within Complaint, said individuals and business entities have been nominated as John Doe; Jane Doe; ASB Business Entities and XYZ Corporations. The Plaintiff, pursuant to the Rules of Court for the State of New Jersey, reserves the right to amend the within Complaint relative to the additional Defendants when and if the identity of said individuals or business entities becomes known.

(Pa1578), Second Count, Par. 2.

The absence of any description completely undermines any reliance upon R. 4:26-4. The rule provides a specific condition that must be satisfied in order to preserve a claim beyond the running of the statute of limitations. To interpret the language utilized in plaintiff's complaint as "an adequate description sufficient for identification" would essentially read the condition entirely out of

the rule. Plaintiff clearly had a burden, at a bare minimum, to anticipate a professional firm such as Urban as a potential defendant. A more meaningful reading of the "adequate description" requirement would necessitate language that anticipated the provision of professional services during the course of construction. Plaintiff's complaint, however, provides no description at all other than to state that unidentified parties may include both individuals and business entities. That generic language cannot be sufficient to satisfy an explicit condition underpinning the use of R. 4:26-4 to defeat the statute of limitations.

New Jersey case law supports the significance of the "adequate description requirement" of R. 4:26-4. In Rutkowski v. Liberty Mutual Insurance Company, 209 N.J. Super. 140, 143 (App. Div. 1986), the Appellate Division denied plaintiff's pleading of a fictitious description naming defendants, "who had designed, manufactured, sold … or were otherwise responsible for the allegedly defective machine." The Rutkowski Court concluded that it could not imagine how this "quoted phrase would have indicated to even the most thorough reader that plaintiff intended to make a claim for negligent safety inspections." Id. Moreover, the court was unmoved even by the fact that the proposed defendant was aware of the lawsuit before the statute of limitations had expired. When compared to the fictitious party pleading language at issue in the present matter, Rutkowski clearly weighs

heavily in Urban's favor as the language at issue in Rutkowski was substantially more specific than the language utilized by plaintiff here.

Plaintiff's failure to provide any descriptive fictitious pleading language also speaks to the second issue associated with R. 4:26-4 – the failure to exercise an appropriate level of due diligence. Plaintiff was on notice well prior to the passage of the two-year statute of limitations period that NJTA was performing a road widening project in the area where plaintiff's accident occurred. In fact, the initial two iterations of plaintiff's complaint, which were timely filed, reference the Project and relate it to plaintiff's accident. Plaintiff, however, apparently took no steps to identify any professional firms associated with the Project despite the fact that this was a public project with contracts available to the public upon request. Urban should not be prejudiced and sued nearly 44 months following the date of the incident simply because available steps were not taken to identify Urban in a timely manner.

The rationale of the Rutkowski Court's holding is as follows:

> Plaintiff's allegation here cannot be so construed. To permit such a general description of the fictitious defendant as the one before us (one "otherwise responsible") would emasculate even our liberal pleading rules. See R. 4:5-2. A plaintiff could file a complaint on the last day before the statute of limitations would run alleging merely that he was injured in a particular situation and that "John Does(s) were negligent and responsible for plaintiff's loss." He

> could later amend to include both the defendants' names and the bases of responsibility. We realize that with a long enough list of bases for liability, the "John Doe" practice can now approximate this result, but we cannot permit the complete frustration of the principle that a complaint must generally state the facts showing that the pleader is entitled to relief. (citation omitted).

Id. at 147-48.

In protecting plaintiff's claim from summary judgment, the trial court effectively adopted the very interpretation of the governing court rule that the Rutkowski Court sought to avoid. The trial court's application of an overly-expansive interpretation of R. 4:26-4 essentially swallows the rule whole.

Even if this Court determined that plaintiff's fictious party pleading somehow satisfied the requirements of R. 4:26-4, plaintiff has failed to establish that an adequate level of due diligence was exercised in order to identify the identity of Urban or Jacobs, the NJTA's contract partner, prior to the running of the statute of limitation. It stands to reason that if plaintiff had made the effort to identify Jacobs, the engineering entity responsible via a publicly available contract for providing professional services during the course of construction, that plaintiff would have identified Urban prior to the passage of the two-year statute of limitations. No such effort, however, was undertaken by plaintiff.

As a final matter, plaintiff's is not entitled to a relaxation of the application of R. 4:26-4 in the interest of justice pursuant to R. 1:1-2. "[T]he

relaxation provision should be sparingly resorted to, particularly when a reasonable interpretation of the complex of directly applicable rules meets the problem at hand." Robertelli v. Office of Atty. Ethics, 224 N.J. 470, 483 (2016). In the present matter, one single rule exists which speaks directly to disputed issue in this matter. Rule 4:26-4 provides a specific roadmap for the use of fictitious party practice. No ambiguity supports the relaxation of its application. Notably, the claimant in Rutkowski also contended that the relaxation of the R. 4:26-4 was warranted in that matter and the argument was specifically rejected. Rutkowski, 209 N.J.Super at 146-47.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's order granting Urban summary judgment predicated upon the net opinions articulated by plaintiff's liability expert, or, in the alternative, reverse the trial court's prior order denying Urban's motion for summary judgement predicated upon an improper application of fictitious party pleading practice.

Respectfully submitted,

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By: /s/ Joseph T. Ciampoli
Joseph T. Ciampoli, Esquire

Dated: October 12, 2023

ALFRED H. BURR AND ALYSSA BURR, H/W, Plaintiffs-Appellants, -vs- NEW JERSEY TURNPIKE AUTHORITY; MIDLANTIC CONSTRUCTION, LLC; C.J. HESSE, INC.; THE HESSE COMPANIES; JACOBS ENGINEERING GROUP, INC.; URBAN ENGINEERS INC.; Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-002866-22 T2 Civil Action ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION - ATLANTIC COUNTY DOCKET NO: ATL-L-1997-16 SAT BELOW: HONORABLE JAMES H. PICKERING, JR.

REPLY AND OPPOSITION TO CROSS-APPEAL BRIEF OF PLAINTIFFS-APPELLANTS ALFRED H. BURR AND ALYSSA BURR, H/W

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I. Preliminary Statement

The trial court committed reversible error when it ignored the most fundamental aspects of the summary judgment standards; viewing the facts in the light most favorable to the non-movant and failing to conduct oral argument. In doing so, the trial court made improper evidentiary rulings and hand-picked facts and testimony which favored the movants. Those decisions led to a ruling that contradicted the record and now, respectfully, requires correction.

As an initial matter, it's worth summarizing some of the facts, and favorable inferences, which Plaintiffs' expert was permitted to rely on in formulating his opinions and that also independently substantiate Plaintiffs' claims against the Defendants. Importantly, in the context of a summary judgment motion, the Trial Court was required to accept these facts as true.

As owner of the Parkway, the NJTA had a non-delegable duty for the maintenance and protection of traffic on the roadway. N.J.S.A. 27:23-3(A). At all relevant times, NJTA was under contract with Midlantic in order to expand and widen the area of the Parkway where the settlement condition existed. (Pa1202). According to that contract, Midlantic agreed to be responsible for the maintenance and protection of traffic on the Parkway in the area that work was being performed. (Pa1379);(Pa1381). That responsibility included providing temporary repair

solutions for traffic protection and/or installing warning signs when necessary. (Pa1214);(Pa1225); (Pa0689 at 63:18-64:1-7).

The NJTA also entered into contract with Jacobs for construction supervision and inspection services. (Pa1296). Jacobs in turn entered into a subcontract with Urban. (Pa1265). Based on those contracts, both Jacobs and Urban were required to ensure that Midlantic complied with its' contractual responsibilities. (Pa2202); (Pa1271);(Pa1272). In furtherance of that duty, Jacobs and Urban had a responsibility to inspect for and identify roadway hazards such as the one that caused Plaintiff's accident. (Pa0656 at 20:16-Pa0657 at 1-18); (Pa0678 at 20:25-Pa0679 at 21:1-7). In the event that settlement was identified, Jacobs and Urban were responsible to ensure temporary measures were implemented to protect the traveling public. Those temporary measures include paving and/or using warning signs. (Pa0599); (Pa0689 at 63:18-64:1-7); (Pa1337).

Defendants knew or should have known of the settlement that caused Plaintiff's accident. Prior to Plaintiff's crash, on April 22, 2015, a bridge inspection identified roadway settlement at the abutment joint and it was recommended that the NJTA fix it. (Pa1349);(Pa1350). Approximately two months later, another inspection took place. That inspection also identified "significant settlement" at the same location and recommended that it be repaired "immediately". (Pa1193).

The settlement constituted a dangerous condition. In fact, the NJTA's Chief Engineer Joe Johnson agreed that the settlement that Plaintiff identified would be dangerous to users of the roadway. (Pa801 at 28:3-16). In addition to that admission, the recommendation to fix the condition contained in both the Biennial Inspection and the T&M inspection creates the inference it was unsafe.

Defects in the travel lanes should be fixed immediately; no matter who identified it. (Pa0799 at 19:1-16). The settlement at the abutment joint should have been milled and repaved. (Pa0599). At a minimum, warning signs should have been used pursuant to the MUTCD. (Pa1337). Here, the record is void of any evidence to suggest that warning signs were used or that the condition was fixed until November 17, 2015. (Pa1396).

On September 12, 2015, Plaintiff while traveling south on the Garden State Parkway was caused to lose control of his motorcycle and crash when he encountered settlement in the left-lane of the road where it abutted the expansion joint located at the northern side of the Rt. 30 overpass. (Pa0471 at 108:19-25 to Pa472 109:1);(Pa522 at 1-25 to Pa523 at 1 at 1-21).

Please accept this reply brief in further support of Appellant/Cross-Respondent's original appeal and in opposition to Respondent/Cross-Appellant's cross-motion.

II. Plaintiffs' Reply to Defendant's Shared Arguments

A. Pursuant to Rule 1:6-2(d), Oral Argument Must have been Conducted

Requests for oral argument "shall be granted as of right." R. 1:6-2(d).

> Except as otherwise provided by R. 5:5-4 (family actions), no motion shall be listed for oral argument unless a party requests oral argument in the moving papers or in timely-filed answering or reply papers, or unless the court directs. A party requesting oral argument may, however, condition the request on the motion being contested. If the motion involves pretrial discovery or is directly addressed to the calendar, the request shall be considered only if accompanied by a statement of reasons and shall be deemed denied unless the court otherwise advises counsel prior to the return day. As to all other motions, the request shall be granted as of right.

Id.

By failing to conduct oral argument, the Trial Court deprived Plaintiff of a fundamental right. Additionally, as described in more detail in the other section of this brief, the court then compounded this error by violating another fundamental summary judgment standard when it viewed genuine issues of material facts in the light most favorable to the movants.

Here, despite acknowledging that all parties requested oral argument, Defendants collectively argue that the need for oral argument was rendered moot by virtue of the Rule 104 Hearing. However, in attempting to rationalize the trial court's failure to conduct oral argument, Defendants ignore the fundamental difference between the purpose of a Rule 104 Hearing and the purpose of a summary judgment motion. The purpose behind a N.J.R.E. 104 is to determine the

qualifications of a witness, the existence of privilege, and/or the admissibility of certain expert testimony but it is not meant to be used to substantiate the entirety of Plaintiffs' proofs. N.J.R.E. 104; R. 4:46-1, *et seq*.

The only issue addressed during the Rule 104 Hearing was the admissibility of the testimony of Plaintiffs' expert. Therefore, the presentation of evidence and any argument presented in connection therewith was limited to issues relevant to that testimony. Accordingly, Plaintiffs were deprived of the opportunity to present other evidence that was not necessary for the purpose of the Rule 104 Hearing and which would have helped provide the court with an independent basis to deny Defendants' summary judgment motions.

Although the decisions as to the admissibility of the testimony of Plaintiffs' expert made by the trial court as a result of a Rule 104 hearing may have an effect on the evidence to be considered when addressing a summary judgment motion, the Rule 104 Hearing is not a substitute for oral argument. Ultimately, the trial court's failure to conduct oral argument as well as failing to adhere to the standards required by Rule 4:46-2 amounts to reversible error that, respectfully, must be corrected.

B. Dangerous Condition and Proximate Cause

Defendants collectively argue that Plaintiff is unable to prove that a dangerous condition existed or that the condition caused Plaintiff's accident. The Defendants are wrong. First and foremost, whether the property is in a "dangerous condition"

is a question for the fact-finder. Vincitore v. Sports & Expo. Auth., 169 N.J. 119, 123 (2001). Thus, the decision by the Trial Court that, as a matter of law, the subject condition was not dangerous was a critical error. Not only did the court's decision that the settlement was not a dangerous condition ignore and contradict the facts but it also acted as a spring-board for the court's remaining errors.

Had the trial court viewed the facts and favorable inferences in the light most favorable to the Plaintiff, as it was required to do, then the court would have recognized that there is overwhelming evidence that independently provides a basis to establish that the settlement at the subject expansion joint was a dangerous condition. First, NJTA Engineer Johnson agreed that settlement along the abutment joint would be a dangerous condition to users of the roadway. (Pa0801 at 28:3-16). Second, the recommendation from the Biennial Bridge Inspection that the settlement area at the abutment joint be fixed creates the inference that the condition was a hazard and dangerous. (Pa1350). (Pa1367). Third, the T&M Inspection Memo which identified the condition as "significant settlement" and recommended that it be "repaired immediately" creates the inference that the condition was dangerous (Pa1191). Fourth, defense expert, David W. Kasserkert, P.E, agreed in his report that pavement elevation changes in the roadway are recognized as causing operational problems for motorcycle operators. (Pa0625). Fifth, the paving records confirm that the settlement identified by Plaintiff required temporary paving is admissible as

evidence that a dangerous condition existed at that location. (Pa1396); (Pa1397). Sixth, Urban engineer Jordan Wood conceded that if the settlement at issue was not causing a problem for the traveling public then it would not have needed to be repaved. (Pa0698 at 100:5-13). Finally, Plaintiffs' expert, who reviewed and relied upon these reports, documents, testimony, as well as his own experience, concluded that the subject condition was a dangerous condition. (Pa0020).

Here, not only did the trial court error by determining that the Balgowan's opinions as to the dangerousness of the subject condition were inadmissible "net opinions", but that error was exacerbated when the court chose to view the facts in the light most favorable to the Defendants. When viewing the facts and evidence in the light most favorable to Plaintiffs, not only do the aforementioned facts provide the "why and wherefore" for the opinions of Plaintiffs' expert, but these facts also provide an independent basis from which a reasonable jury could conclude, without the assistance of expert testimony, that the condition was dangerous.

(1) Midlantic- Dangerous Condition & Proximate Cause

Midlantic contends that Plaintiffs cannot prove that the subject roadway settlement at the abutment joint was a dangerous condition or that it was a proximate cause of the accident. As support for its' position, Midlantic argues that opinions of Plaintiffs expert are speculative because he did not consider things such as other

causes of the crash, inspect the roadway, or reconstruct the accident. For the reasons stated above and below, Midlantic is wrong.

Simply put, Defendant's arguments are red-herrings. Plaintiffs' expert's opinions are supported by the core evidence in the record. Here, the record established that settlement existed in the southbound left lane at the abutment joint on the northern side of the Rt. 30 overpass. This settlement was identified during two different inspections. (Pa1343); (Pa1191). The record also reflects that the settlement was dangerous. The fact that both Jacobs and Urban were hired to pro-actively identify settlement in the travel lanes so that the condition, if identified could be corrected, creates the inference that settlement in the roadway is dangerous. (Pa0656);(Pa0657); (Pa0678); (Pa0679). Also, and perhaps most obvious, NJTA engineer Joe Johnson was shown a picture of the area of the settlement and testified that settlement in that area would be dangerous. (Pa801). Finally, the settlement was re-paved in order to return the road to proper grade. (Pa1396); (Pa1397).

Next, Midlantic argues that Plaintiffs require an accident reconstructionist in order to prove that the condition caused the accident. However, an accident reconstructionist is not necessary here because the Plaintiff will testify about how the accident happened. In fact, Plaintiff testified that he lost control and crashed after his motorcycle hit the expansion joint which connects the road and the overpass. (Pa0523 at 18-21);(Pa0522 at 16-19). Not only is Plaintiff's testimony

admissible under N.J.R.E. 601 and N.J.R.E. 701, but it must be accepted as true pursuant to Rule 4:46-2. Plaintiffs should not be required to utilize an accident reconstructionist expert when the Plaintiff himself can testify as to the cause of his accident; particularly in light of the fact that there is no other evidence that the accident happened another way. Stated differently, this is Plaintiff's version of the accident which in this setting must be accepted.

Finally, Midlantic criticizes Plaintiffs' expert for not inspecting the condition. However, none of the liability experts had the opportunity to inspect the condition because it was re-paved in order to correct the settlement issue. (Pa1396); (Pa1397). Nevertheless, the condition was inspected by two different groups of engineers on two separate occasions and both groups identified the settlement and recommended that it be fixed. (Pa1193); (Pa1350). The recommendation to fix the settlement creates the inference that it was dangerous. In fact, ultimately the settlement was fixed. (Pa1396);(Pa1397). The fact that it needed to be fixed is also evidence that it was dangerous. Otherwise, one may ask rhetorically, why did it need to be fixed? Is it not a fair inference, if not a compelling one, that the settlement needed to be fixed because it posed a danger to the traveling public? As Urban engineer Jordan Wood said, if it was not causing a problem for the traveling public then it would not have needed to be fixed. (Pa0698 at 100:5-13). Again, Plaintiffs' expert was permitted to rely on this evidence in support of his opinions. (Pa0004).

(2) Jacobs – Dangerous Condition and Proximate Cause

As it did at the trial level, Jacobs argues that Plaintiffs did not offer any credible evidence to establish that the settlement in the roadway at the abutment joint was in a dangerous condition. Specifically, Jacobs argues that the video provided by Plaintiffs, the T&M Memo, the Biennial Bridge Inspection, and Plaintiffs' expert's report and testimony are all unreliable. Jacobs also suggests that Plaintiff's deposition testimony is unreliable, however, it does not actually articulate a basis for its position on that issue.

As discussed above, in the context of a summary judgment motion where the facts, including all favorable inferences that arise from those facts, are to be viewed in the light most favorable to the Plaintiffs, Jacobs suggestion that the aforementioned evidence lacks reliability is disingenuous at best. Nevertheless, Plaintiffs' response to each argument presented in Jacobs opposition is below.

(1) The Video: Jacobs argues the video taken by Plaintiff is meaningless because Plaintiffs' expert agreed that there was no way for him to know if the truck that was driven at the time that the video was shot actually drove over the "exact" same part of the settlement that the Plaintiff drove over with his motorcycle. This is a red-herring. The evidence in this case supports that the settlement existed for the entire width of the southbound left lane at the abutment joint. For example, the entire lane was repaved to correct the issue; not just a small patch in the road. (Pa1396);

(Pa1397). Plus, the Plaintiff will testify that both the video and the still frame from that video were provided as support that the truck which Plaintiff was a passenger in when he shot the video did in fact drive over the same settlement.

In addition, the video is also helpful because it supports the consistency between various evidence regarding the location of the settlement. For example, there is evidence of settlement that is visible in the jersey barrier adjacent to the abutment joint which can be seen in the video. (Pa1549). The visible displacement between the two median barrier sections is also apparent in the still photo provided by Plaintiff and in the photo used in the Biennial Bridge Inspection report to highlight the location of the settlement and the issue with the abutment joint. (Pa1549); (Pa1367). As Balgowan described, this height differential in the two connecting sections of the median barrier is a "visual cue" that provides consistency in the location of the settlement and also of the existence of the settlement. (Pa0339); (Pa1549);(Pa0020);(Pa1367). This "visual cue" was initially addressed in Balgowan's report. (Pa0020).

(2) T&M Memo: Jacobs argues that the T&M Memo was not credible due to a subsequent email that was circulated after the memo was drafted. As explained in Plaintiffs' original brief, this email does not amount to a correction in the location of the settlement. To begin with, the person that sent that email, which allegedly corrects the location of the settlement, was not the same person that wrote the

memo. (Pa1191); (Pa1192). The memo was prepared by James A. Buczek of T&M Associates but the email was sent by Robert Matthews of Gannett Fleming, Inc. (Pa1191); (Pa1192). Simply put, the memo says what it says; that the pavement at the north approach exhibited "significant settlement." (Pa1193). In fact, the November 17, 2017 paving records reinforce that the location of the settlement described in the memo was accurate. Those paving records state that paving was performed to correct the settlement at the southbound approach to the bridge in the left lane. (Pa1396); (Pa1397). At best, the subsequent email merely creates an inconsistency and therefore a genuine issue of material fact, however, it does not make the memo inaccurate as a matter of law.

(3) The Aurora Report: The Biennial Bridge Inspection report is not hearsay. It is admissible as business record. N.J.R.E. 803(c)(6). Further, Jacobs' representation to this Court that the engineer that prepared the report concluded that it was not dangerous is wholly inaccurate. The fact that the report does not use the specific word "dangerous" does not mean that the condition was not dangerous or that it did not pose a risk to users of the roadway. The author of the report described the settlement as "ramped up and deteriorated in the left shoulder and left lane." (Pa1367). The report recommended that the settlement condition be repaired. (Pa1349); (Pa1350); (Pa1367). At the very least, the recommendation to repair it creates the inference that the condition should be fixed because it was dangerous.

(4) Photographic Evidence: Jacobs next cherry picks small portions of Plaintiffs' expert's testimony and inaccurately argues that Balgowan changed his theory. First, the cited reference to the transcript of the Rule 104 hearing are not even supportive of its argument. Instead, the testimony referenced was offered in response to specific questions regarding a single photo. Although Balgowan did use descriptive terms such as "immediate" and/or "abrupt" when describing the settlement/elevation change, when read in context with his testimony as a whole, whether settlement/elevation change was "abrupt," "immediate," or it had an "inadequate taper" is a simple a matter of degree. As Balgowan explained, no matter what description is used, they're both dangerous:

> **Q:** Is one more dangerous than the other?
>
> **A:** They're both dangerous. Is one more dangerous than the other? If the hazard is larger and covers a greater distance, then there is going to be a greater risk that the hazard is going to be exposed. It's going to be exposed to the traveling public and there could be crashes as a result of that.
>
> It doesn't change the fact that whether it's one little spot that has a two-inch [select], and then it's tapered out and there's, it's still dangerous, period. It's in the travel lane.
>
> It's a dangerous condition, period.
>
> (Pa0126).

Either way, these questions and answers do not negate that other photos and evidence establish the settlement was dangerous.

(3) Urban – Dangerous Condition & Proximate Cause

Similarly, Urban argues that Balgowan's opinions lack foundation. For all the reasons already mentioned above, Urban is wrong. Urban ignores the core evidence that supports Balgowan's opinions. Rather than addressing the evidence that supports Balgowan's opinions, Urban attempts to distract this Court with other documents provided by Balgowan at Urban's request. Urban then isolates portions of Balgowan's responses during cross-examination in an attempt to show that these additional documents do not support that the condition was dangerous. However, even if Urban feels it "gained points" during cross-examination, there is nothing in Urban's opposition that changes the fact that Balgowan's opinions are supported by the core evidence in the record.

For example, Urban had a responsibility to inspect and identify settlement and elevation changes in the travel portion of the Parkway. (Pa0678 at 20:15 to Pa0679 21:1-7). The fact that the Defendants were actively looking for these types of conditions in order to fix them or warn against them creates the inference that these types conditions, if left uncorrected, are dangerous to users of the roadway. Also, both the Biennial Bridge inspection and the T&M memo establish that the condition existed in the southbound left lane of travel at the northern bridge abutment joint and that the condition needed to be fixed. (Pa1343); (Pa1191). The fair inference here is that, since the settlement was flagged for repair, the settlement was dangerous to

users of the roadway. Finally, and perhaps the most obvious example, NJTA engineer Johnson looked at the picture of the condition provided by Plaintiff and testified that it would have been dangerous to users of the roadway. (Pa0801).

Accordingly, for Urban to suggest that other documents or a limited portion of Balgowan's testimony on cross-examination, somehow negates the credibility of all the other evidence, ignores the requirements that apply to summary judgment motions. Nevertheless, even without Balgowan's testimony, the aforementioned evidence provides an independent basis for Plaintiffs to prove that the condition that caused Plaintiff's accident was dangerous.

(4) NJTA – Dangerous Condition and Proximate Cause

For all the reasons previously mentioned, NJTA's arguments that the trial court correctly found that Plaintiffs expert opinions as to dangerous condition and proximate cause are 'net opinions' requires that the summary judgment standards and the record as a whole be ignored. Similar to the other Defendants, the NJTA argues that Balgowan's failure to inspect the roadway and to reconstruct the accident renders his opinions unreliable. NJTA is wrong.

The failure of an expert to give weight to a factor thought important by an adverse party does not reduce his testimony to an inadmissible net opinion if he otherwise offers sufficient reasons which logically support his opinion." Rosenberg v. Tavorath, 352 N.J. Super. 385, 402 (App. Div. 2002)

(citing State v. Freeman, 223 N.J. Super. 92, 115-16 (App. Div. 1988), *certif. denied*, 114 N.J. 525 (1989)). Rather, such an omission merely becomes a proper "subject of exploration and cross-examination at a trial." Rubanick v. Witco Chemical Corp., 242 N.J. Super. at 55.

Here, Balgowan's opinions as to dangerous condition and proximate cause are firmly grounded by facts in the record. Specifically, in reaching his conclusions, Balgowan reviewed and relied on the two inspection reports, the photos, the testimony of the witnesses, and his extensive experience in roadway construction projects and concluded the subject condition was dangerous. Additionally, with respect the proximate cause, Balgowan based his opinion, in part, on Plaintiff's testimony that the settlement at the abutment joint is what he hit and caused him to lose control. Anything beyond that which Defendants feel that Balgowan should have done or considered in formulating his opinions merely becomes a proper "subject of exploration and cross-examination at a trial." Rubanick v. Witco Chemical Corp., 242 N.J. Super. at 55.

C. Defendants Standard of Care and/or Duty

Next, Defendants collectively argue that the Trial Court did not error in finding that (1) Balgowan did not address Defendants standard of care/duty and (2) without expert testimony to address each Defendants standard of care/duty then Plaintiffs cannot prove their cause of action against any of the Defendants.

Although Plaintiffs strongly disagree that Plaintiffs' expert failed to address Defendants duties, under the facts of the case, expert testimony is not required to address each Defendants' duties. Each of the Defendants duties are outlined by contract and described by Defendants' own witnesses. The facts related to standard of care/duty will not require that a jury to be presented with expert testimony in order to evaluate evidence that is "so esoteric that jurors of common judgment and experience cannot form a valid judgment". Butler v. Acme Markets, Inc. 89 N.J. 270, 283 (1982). Rather, this case involves whether or not the Defendants violated their respective statutory and/or contractual duties for the maintenance and protection of traffic.

As the engineering Defendants correctly point out, New Jersey Model Civil Jury Charge 5.52B indicates that a suit against a professional engineer "normally" requires expert testimony regarding the standard of care. However, as Charge 5.52C also explains, expert testimony is not always required. For example, with the appropriate facts a jury may determine, without expert testimony, a professional defendant's duty and breach of that duty based on their common knowledge and experience.

By way of summary, as stated above, the NJTA as owner of the roadway, had a duty to protect the traveling public from dangerous conditions on its property. N.J.S.A. 27:23-3(A). The general contractor, Midlantic, had a

contractual duty for the maintenance and protection of traffic. (Pa1379); (Pa1381). That obligation required that it perform miscellaneous repair work and install warning signs pursuant MUTCD. (Pa1379); (Pa1381). Jacobs and Urban each had the duty to ensure the general contractor adhered to its' responsibilities under the contract. (Pa2202);(Pa1271). Part of their duties included inspecting the travel portions of the roadway for conditions like those that caused Plaintiff's accident. (Pa0656); (Pa0657); (Pa0678); (PA0679). Defendants duty also included implementing temporary solutions such as paving or warning signs. (Pa0689).

Here, when viewing the facts in the light most favorable to the Plaintiffs, each Defendant already knew, and/or had reasons to know, of the subject condition and that it was dangerous. Armed with such knowledge, the Defendants had a duty and responsibility to respond and protect users of the Parkway. As the contracts and the witnesses describe, those duties required that they fix the condition or warn against it. Nevertheless, each of Defendants arguments will be addressed in turn.

(1) Urban – Standard of Care/Duty

Urban raises three points in opposition to Plaintiffs' brief: (a) Balgowan ignored Urban's contractual obligations; (b) Balgowan's opinions lack documentary support; and (c) Urban was not on notice of a dangerous condition.

(a) Balgowan's Opinions Are Supported by the Contracts and the Testimony

Urban's initial criticism is that Balgowan did not consider Urban's contractual obligations in formulating his opinion that Urban had a responsibility for the maintenance and protection of traffic. Ironically, in an effort to prove that point, Urban begins by highlighting Balgowan's use of the Urban contract's "Scope and Services". As Balgowan explained, Attachment B: Scope of Service spells it out the sub-consultant's responsibilities. (3T189:3-15). The scope of services included performing inspections to ensure the maintenance and protection of traffic. (Pa1271). Moreover, Urban's resident engineer, Jordan Wood, admitted during his deposition that it was part of Urban's responsibility to inspect the travel surface of the Parkway. (Pa0678); (Pa0679). Woods also admitted that it was also Urban's responsibility to implement safety measures to ensure the safety of the traveling public such as temporary paving or warning signs. (Pa0678 at 20:25-Pa0679 at 21:1-7).

Next, Urban criticizes Balgowan's failure to provide an individualized evaluation of the obligations of each Defendant. However, Defendant has not offered any basis to assert that such an analysis is even required. The fact is that, here, each defendant shared a common contractual obligation and/or statutory duty in this setting. In fact, Defendant's own engineer testified that safety concerns are a team approach. (Pa0678 at 19:9-20).

Urban goes on to criticize Balgowan by claiming, incorrectly, that he was unfamiliar with the particular status of the project on the date of the accident and identifies that as a "major red flag". Interestingly, however, not only does Urban not explain why it is a "red-flag" but it is also complete misrepresentation of Balgowan's testimony. Balgowan's actual response to the question referenced by Urban was that he did not recall the "exact phase" of the project. (Pa0292).

Finally, Defendant highlights that during cross-examination at the Rule 104 Hearing, Balgowan conceded that Defendant did not have "actual notice" of the condition. This argument ignores Balgowan's testimony as a whole. Plus, shortly after testimony referenced by Urban, Balgowan testified that Urban's receipt of the T&M memo established actual notice. (Pa0350);(Pa0352).

(b) Urban's Argument that Balgowan's Opinion Lacks Support Requires that the Record and the Summary Judgment Rules be Ignored

In furtherance of Urban's contract, it was responsible for ensuring that Midlantic adhered to its contractual responsibilities for the maintenance and protection of traffic. (Pa1271). In fact, Urban's resident engineer testified that Urban had a proactive duty to inspect and identity things such as settlement in the travel portion of the road. (Pa0678 at 20:25 to Pa0679 at 21:1-7). In the event that settlement was identified, Urban had a responsibility to ensure that either temporary paving take place and/or warning signs were used. (Pa0689 at 63:18 to Pa0690 at 64:1-7).

When viewing that facts in the light most favorable to the Plaintiffs, the T&M memo placed Urban on notice of the settlement that caused Plaintiff's accident. (Pa1187); (Pa1191). Urban also knew, or should have known, that it was dangerous. The T&M memo described the settlement as being so significant that it was recommend to be fixed "immediately". (Pa1193). Therefore, Urban had a duty to act and to protect the traveling public. Plaintiffs' expert reviewed and relied upon Urban's contract, Jordan Wood's testimony, and the T&M memo in support of its opinions.

(c) Urban was on Actual and Constructive Notice of the Dangerous Condition

Urban's final argument of this section suggests that Urban was not on notice of the condition. This argument has no merit.

As stated in more detail in Plaintiffs' original brief and above, the T&M memo established that Urban was on actual notice of the condition and was aware that it was recommended to undergo "immediate repairs". (Pa1193). Although Urban argues that the settlement location as identified in the memo was "corrected" by a subsequent email, that is a disputed fact and, for the reasons stated above, the accuracy of that email that allegedly corrects the location of the settlement is for the trier of fact to decide. If anything, that email saved Defendants from having summary judgement entered against them. Without the subsequent email, the T&M memo would provide undisputed evidence that the

defendants were aware of the dangerous condition that caused Plaintiff's crash and were told to repair it immediately. Nevertheless, in the summary judgement setting, this must be resolved in Plaintiffs favor.

Additionally, the paving records are evidence of the fact that the location of the settlement as described in the memo was accurate. These paving records specifically identify that emergency paving was performed in the southbound left lane at the north approach to the bridge in order to correct settlement issue and return it to proper grade. (Pa1396); (Pa1397). Although the paving records post-date the accident and are inadmissible as proof of Defendants negligence, the records are admissible to prove, among other things, that a dangerous condition existed at the particular location. Perry v. Levy, 87 N.J.L. 670, (E. & A. 1915). Afterall, as the resident engineer on the project conceded that if the settlement was not causing a problem for the traveling public then it would not have needed to be corrected. (Pa0698 at 100:5-13).

Finally, with respect to constructive notice, Urban admitted that it had a duty to inspect and identify conditions such as the one that caused Plaintiff's crash. (Pa0678 at 20:25 to Pa0679 at 21:1-7). When viewing the facts in the light most favorable to the Plaintiffs, the condition existed and was identified during two different inspections. (Pa1343);(Pa1191). Had Urban been doing its' job, Urban should have also identified the defect.

(2) Jacobs – Standard of Care/Duty

Similar to Urban's opposition, Jacobs also argues that the Plaintiffs failed to establish a standard of care applicable to Jacobs as the Inspector. Jacobs presents three arguments: (a) Plaintiffs failed to establish a standard of care applicable to Jacobs; (b) Jacobs did not have a contractual duty to inspect for "pre-existing" conditions; and (c) the MUTCD does not provide a standard of care applicable to Jacobs.

(a) The Contracts and Deposition Testimony Establish Jacobs' Duty to Ensure the Maintenance and Protection of Traffic

Jacobs, like Urban, had a contractual duty to ensure the protection of the traveling public on the parkway. (Pa1381);(Pa2205). Jacobs employee Jeffrey Rudenjack was the Chief Inspector on the project. (Pa1296). Rudenjack, testified that Jacobs was responsible to inspect and identify roadway settlement and elevation changes. (Pa0656 at 20:7-28 to Pa0657 at 21:1-15). The record reflects that settlement at the southbound north abutment joint was known to the Defendants. (Pa1343);(Pa1191). As explained by Jacobs field project supervisor on the project, if settlement existed in the roadway, Defendants had a duty ensure that the settlement was re-paved settlement to correct the issue. (Pa0599). At a minimum, the Jacobs should have ensured that warning signs were installed per the contract requirements to adhere to the MUTCD. (Pa1337);(Pa2205).

(b) Jacobs had a Duty to Identify Conditions in the Roadway

Next, Jacobs argues that they were not contractually obligated to inspect for "pre-existing" conditions. Jacobs attempt to qualify the type of condition it was responsible to inspect and identify is wholly unsupported by the record. Jacobs position as Chief Inspector required them in inspect and maintain the travel portion of the Parkway for protection of the traveling public.(Pa1381). As mentioned above, Jacobs' chief inspector, testified that it was part of his duties. (Pa0656 at 20:7-28 to Pa0657 at 21:1-15).

Nevertheless, on this record, when viewing the facts in the light most favorable to Plaintiffs, Jacobs was already aware of the condition that caused Plaintiff's accident prior to Plaintiff's accident. In other words, whether or not Jacobs had an obligation to identify these types of conditions is irrelevant because the condition had already been identified and flagged for "immediate repair". (Pa1193). At this point, Jacobs had a contractual responsibility to ensure temporary repairs were performed and/or to install warning signs for motorists per the MUTCD. As Jacobs project manager described, settlement in the road that presents a safety issue should have been milled and re-paved. (Pa0599). As NJTA engineer Joseph Johnson described, a defect should be repaired immediately, within 24 hours, no matter who found it. (Pa0799). Jacobs failed to comply with its contractual and admitted duties.

(c) The Contract and Construction Documents Required that all Comply with the MUTCD.

Jacobs final argument that it was not required to ensure that the MUTCD was followed contradicts the contracts and the construction documents. As has already been addressed, if a condition existed in the travel portion of the roadway that required the condition to either be fixed or warned against then Jacobs was to ensure that it happened. (Pa0599). The construction inspection manual specifically outlines that everyone working on the project was required to ensure that the MUTCD was followed. (Pa1337).

Afterall, Jacobs was the NJTA's "eyes and ears" on the project. (Pa0798 at 16:8-11). The settlement was recommended for "immediate repair". (Pa1193). Given the settlement in the roadway, the section of roadway should have been re-paved. (Pa0599). However, Jacobs should have also ensured that warning signs were used pursuant to the MUTCD. (Pa1337). Ironically, Jacobs acknowledges that the MUTCD is to be followed after a dangerous condition has been identified. (Db25). Just as Jacobs brief indicates, MUTCD provides support for the uses of warning signs "where there exists some known identifiable road condition". (Db28). When viewing the facts in the light most favorable to the Plaintiffs, the dangerous condition that caused Plaintiff's accident had been identified and was known to Jacobs and the other Defendants.

Jacobs was responsible to ensure that the appropriate measures were taken to ensure the protection of the traveling public.

(3) Midlantic– Standard of Care/Duty

In opposition to Plaintiffs' appeal, Midlantic argues that the trial court correctly found that Midlantic's responsibility for the maintenance and protection of traffic is not as broad as Plaintiffs suggest. However, in its brief Midlantic concedes it was responsible to ensure the "smooth and constant flow of traffic" and to use proper traffic signs. (Db21).

Despite Midlantic's arguments, here, the contract between the NJTA and Midlantic specifically provided for the maintenance and protection of traffic. (Pa1379); (Pa1381). In fact, the contract specifies that "[f]ull responsibility for the adequate safety measures for the protection of all persons and property on and adjacent to the work site shall rest with the contractor." (Pa1208); (Pa1209). In furtherance of that obligation, Midlantic's was responsible to perform miscellaneous repairs and to install traffic protection devices as necessary. (Pa1381). Traffic control devices must be used pursuant to the MUTCD. (Pa1337); (Pa1225). Although Jacobs and Urban were hired to help ensure that Midlantic complied with these contractual obligations, their involvement did not relieve Midlantic from its' contractual duties. (Pa1208); (Pa1209).

Midlantic's contract specifically required that they assign a traffic control coordinator. (Pa1214). That traffic controller was to, among other things, perform daily inspections to ensure compliance with the Traffic Control Plan and other approved Standards and to correct deficiencies of traffic control devices within 2 hours of discovery or notification by the engineer. (Pa1214). Although, when viewing the facts most favorable to the Plaintiffs, the record reflects that Midlantic was aware of the dangerous condition, at a minimum, Midlantic should have been aware of it. "Full responsibility for the adequate safety measures for the protection of all persons and property on and adjacent to the work site shall rest with the contractor." (Pa1208); (Pa1209).

Plaintiffs' do not contend, as Midlantic suggests, that the duties and responsibility of the NJTA were completely transferred to Midlantic. However, Plaintiffs do submit, and the record reflects, that Midlantic's contract with the NJTA required them to ensure the maintenance and protection of traveling public on the Parkway in their construction area. (Pa1381); (Pa1208); (Pa1209).

D. A Reasonable Jury using their Common Knowledge can Determine Defendants' Negligence

As the original complaint and each of the Amended Complaints thereafter describes, Plaintiffs' claims as to all Defendants are grounded in ordinary negligence. Despite the persistence of counsel for Urban and Jacobs, simply because those two defendants are engineering companies, does not mean that their respective

duties and/or their failure to adhere to those duties requires expert testimony on all issues. Even though it is Plaintiffs' position that Balgowan's testimony regarding their breach of a professional obligation is supported by the record, and that his testimony should not have been barred (and certainly not in its' entirety), on this record, each element of Plaintiffs' claim against the Defendant can be independently supported by the records and the testimony provided during the depositions.

Contrary to the Defendant contentions, this is not a case where the jury will be asked to determine some esoteric deviation from an engineering standard of care such as the appropriate load capacity for the bridge overpass or the appropriateness of any engineering design or plan. Rather, when viewing the facts in the light most favorable to the Plaintiffs, this is a case where a known dangerous condition existed in the travel portion of the Parkway and each Defendant either had a statutory or contractual responsibility to ensure that the condition was fixed or warned against, and the Defendants collectively failed to adhere to those duties. As a result, while riding his motorcycle southbound on the Parkway in the left lane, Plaintiff hit the settlement in the roadway located at the abutment joint northern side of the Rt. 30 overpass and was caused to lose control, crash, and become injured. These facts are within the ken of the average jury. Afterall, as outlined in Urban's Construction Inspection Manual, when assessing the maintenance and protection of traffic, "common sense is the best barometer". (Pa1337).

III. Jacobs is NOT Entitled to Derivative Immunity

Jacobs' opposition brief also include one additional argument that is not adopted by the rest of the Defendants, that it is entitled to derivative immunity based on the Trial Court finding that the NJTA was immune from responsibility under a theory of "plan or design immunity". Defendant is wrong.

First, the Trial Court did not dismiss Plaintiffs' claims against the NJTA because it found that the NJTA enjoyed sovereign plan or design immunity. Rather, Plaintiffs' claims against the NJTA were dismissed because the court incorrectly determined that Plaintiff could not establish liability for a dangerous condition of public property under chapter N.J.S.A. 59:4-2. (Pa2152).

Second, a "public contractors' derivative immunity under the Tort Claims Act is an affirmative defense. A party seeking this immunity bears not only the burden of pleading it but also the burden of persuasion . . . . ". Vanchieri v. New Jersey Sports and Exposition Auth., 104 N.J. 80, 87, (1986).

Finally, even if the case dealt with allegations of improper or inadequate design, which it does not, in order to the meet its burden of proof, Jacobs needed to demonstrate that it actually followed the public entities plan; it is not enough that the public entity had power to provide such a plan nor that it did so provide. Vanchieri v. New Jersey Sports and Exposition, 104 N.J. 80, 87 (1986).

Here, Jacobs never plead derivative immunity in any of its' Answers to Plaintiffs' complaints. (Pa1683). In fact, the first, and only time Jacobs raised this issue was in its reply brief to its original summary judgment motion. Since the first time that Jacobs raised this argument was in its' reply brief, Plaintiffs were deprived of their opportunity to address it because the court failed to hold oral argument. This argument by Jacobs actually underscores another reason why oral argument is important.

Finally, Jacobs cannot have it both ways. They cannot, on the one hand, argue that any negligence on its' part was the result of a plan or design but then, on the other hand, argue that it was not part of the plan to identify, fix, or warn users of the Parkway of dangerous conditions. In other words, in order to meet their burden of proof for derivative immunity, Defendants would have to concede that it was "part of the plan" to identify, fix, or warn of roadway conditions. Nevertheless, Jacobs does not even attempt to support the argument.

IV. The Requirements for Liability Against the NJTA have been Met

In its opposition, the NJTA argues that the trial court correctly held that the NJTA's failure to fix the settlement in the roadway was not ministerial in nature and that the Plaintiffs failed to meet the requirements to establish liability under N.J.S.A. 59:4-2. However, under either analysis the Plaintiffs prevail.

A) Under N.J.S.A. 59:2-2(a), the NJTA is Liable for Injury Proximately Caused by the Act or Omission of an Employee just as a Private Individual

Defendants argue that N.J.S.A. 59:2-3 provides immunity in this case because the NJTA's actions were discretionary in nature. However, the NJTA's argument is fundamentally flawed. A public entity is liable for an injury which is proximately caused by the act or omission of an employee in the same manner as a private individual. N.J.S.A. 59:2-2a. Simply put, the NJTA was told to fix the condition; twice. (Pa1350); (Pa1193). Accordingly, Defendant's actions in failing to fix a known roadway hazard should be viewed under the ordinary negligence standard. Fitzgerald v. Palmer, 47 N.J. 106, 109 (1996). However, even assuming *arguendo* that there is a basis to argue that Defendant's actions may be considered discretionary versus ministerial in nature, **that dispute unquestionably is one for a jury.** Henebema v. South Jersey Transportation Auth., 430 N.J. Super. 485, 506 (App Div. 2013), *aff'd*, 219 N.J. 481 (2014).

The Tort Claims Act ("TCA"), N.J.S.A. §§ 59:1-1 to 59:12-3, provides protection for public entities involved in tort claims. The standard for liability under the TCA depends on whether the conduct of individuals acting on behalf of the public entity was ministerial or discretionary. Henebema v. South Jersey Transportation Authority, 219 N.J. 481 (2014). The Act creates two standards for

immunity based on whether the public entity's action in allocating resources was ministerial or discretionary. Id. at 490.

If the action was ministerial, liability for the public entity is evaluated based on an ordinary negligence standard. However, a more difficult threshold must be overcome in order for a public entity to be liable for an individual's discretionary acts. A public employee remains liable for ordinary negligence in the performance of *ministerial* acts unless such acts are covered by specific sections of the Act declaring non-liability. Id.

A "ministerial act" has been defined as "one which public officers are required to perform upon a given state of facts in a prescribed manner, in obedience to the mandate of legal authority and without regard to their own judgment or opinion concerning the propriety or impropriety of the act to be performed." Ritter v. Castellini, 173 N.J. Super. 509,513-514 (Law Div. 1980) (sheriff required to safekeep property levied upon). It has also been defined as synonymous with "mandatory." Marley v Palmyra Bor., 193 N.J. Super. 271, 289 (Law Div. 1983). See discussions in Morey v. Palmer, 232 N.J. Super. 144 (App. Div. 1989); Flodmand v Institution & Agencies Dep't., 175 N.J. Super. 503 (App. Div. 1980); Sutphen v Benthian, 165 N.J. Super. 79 (App. Div. 1979).

On the other hand, the discretionary action the Legislature intended to immunize under N.J.S.A. 59:2-3(a) are high level policy decisions. In Costa v. Jozey, 83 N.J. 49, 59 (1980), our Supreme Court explained:

> the exemption contemplated under N.J.S.A. 59:2-3(a) concerns the exercise of judgment on discretion in making basic policy - the type made at the planning, rather than the operational level of decision making. Moreover, immunity is contingent upon proof that discretion was actually exercised at that level by an official, who, faced with alternative approaches, weighed the competing policy considerations and made a conscious choice.
>
> Ibid.

Maintenance of the roadway has specifically been found to be a ministerial act. See Coyne v. State Dept. of Transp. 182 N.J. 481, 487 (2005) - holding that DOT work detail could be held liable for failure to properly divert traffic around cleanup activities where DOT safety manual delegated ultimate authority for such operations to the road crew); Furey v. County of Ocean, 273 N.J. Super. 300 (App. Div.) *certif. den*. 138 N.J. 272 (1994) – court finding failure to maintain roadway in safe condition a ministerial.) Failure to warn or protect has also been found by the court to be a ministerial act. Danow v. Penn Central Transportation Co., 153 N.J. Super. 597 (1977). Here, the NJTA was told to twice to fix the condition and failed to do so. That failure to perform ministerial roadway maintenance should be viewed under an ordinary negligence standard.

Finally, the NJTA's attempt to argue that its' failure to fix the known condition was the result of resource allocation is disingenuous. First, the burden of proof is on the Defendant in raising the affirmative defense of resource allocation. The Defense's burden is to prove that a resource allocation decision was **actually made**. Brown v. Brown 86 N.J. 565, 578-579 (1981). The Court in Brown dealt with a highway maintenance decision, wherein the court held: "[i]t was the State's burden to actually demonstrate that the items given higher priority were more critical…". Id. In the instant case, the NJTA provides no proof of actual resource allocation or high-level decision making.

Second, under our facts the resources were already allocated to ensure maintenance was performed. The NJTA has a maintenance department responsible for these tasks. Also, the section of the Parkway where the condition existed was already under contract repairs; including incidental and miscellaneous repairs. (Pa2227). Simply, the NJTA was told to fix the condition that caused Plaintiff's crash months prior to the crash and failed to do so without explanation.

B) Alternatively, Even Under the Heightened Standards of N.J.S.A. 59:4-2 the Plaintiffs have Met their Burden

In order to establish liability under N.J.S.A. 59:4-2, Plaintiffs must establish the following; (1) public property was in a dangerous condition at the time of the injury; (2) the dangerous condition caused Plaintiff's accident; (3) the dangerous

condition created a foreseeable risk of injury; (4) the either (a) a negligent act or omission of a public employee created the condition, or (b) the public entity had actual or constructive notice of the condition with sufficient time to protect against the condition; and (5) the action or inaction with respect to protecting against the condition was palpably unreasonable. Posey ex rel. v. Bordentown Sewage Auth., 171 N.J. 172, 188 (2002).

(1) The Parkway was in a Dangerous Condition at the Time of the Injury

To impose liability upon a public entity under N.J.S.A. 59:4-2, a property must have been in a "dangerous condition at the time of injury." To establish a dangerous condition of public property, a plaintiff must prove that "a condition of the property" created "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). Thus, a plaintiff must prove that: (a) there was a defect in the property; (b) the defect was so severe as to create a "substantial risk of injury"; and (c) the property was being used with due care at the time of the injury. See Levin v. County of Salem, 133 N.J. 35, 44-46 (1993); Garrison v Township of Middletown, 154 N.J. 282, 294 (1998). This due care standard does not refer to the actual behavior of the parties but is instead focused on whether a reasonable person using the property with due care would face a substantial risk of injury. Garrison v

Township of Middletown, 154 N.J. 282, 292 (1998); Furey v. County of Ocean, 273 N.J. Super. 300, 311-312 (App. Div. 1994); *certify. den.* 138 N.J. 272 (1994).

Whether a property is in a dangerous condition is generally a question for the finder of fact. Vincitore v. Sports & Expo. Authority, 169 N.J. 119, 123 (2001)(Emphasis Added). There is a threshold determination of whether a reasonable factfinder could conclude from the evidence presented by the plaintiff that the property was in dangerous condition. Id. at 124.

(a) A Defect Existed in the Roadway

On April 22, 2015, a bridge inspection was performed on behalf of the NJTA for the subject roadway. (Pa1343). As a result of that inspection, a 2-inch settlement deficiency was identified and the deficiency was recommended for repair. (Pa1350);(Pa1351);(Pa1367). In addition, independently from the Biennial Bridge Inspection, an additional onsite inspection was performed on June 24, 2015 at the subject location. As a result of that inspection it was determined that "the pavement at the north approach exhibited significant settlement". (Pa1193). It was recommended that the settlement be repaired immediately. (Pa1193). In fact, NJTA's own engineer, Joe Johnson, was shown a photo provided by Plaintiff and agreed that an elevation change along the abutment joint would be a dangerous condition to users of the roadway.

In other words, the facts support that the settlement in the road at that location was dangerous condition to users of the roadway. The evidence also supports that the condition was still dangerous on September 12, 2015 when Plaintiff had his accident because the condition was not fixed until November 17, 2015. (Pa1396); (Pa1397).

(b) The Defect Create a "Substantial Risk of Injury"

The same facts and inferences that support that a dangerous condition existed also support the fact that the settlement also created a "substantial risk of injury." For example, the NJTA was so concerned with this type of condition on the travel surface of the roadway that Jacobs and Urban were hired to inspect the roadway in order to identify and correct these conditions. (Pa1296);(Pa1296). As explained in Plaintiffs' expert report, pavement deficiencies have a greater effect on motorcycles and their handling and stability. (Pa0021). The Guidelines on Motorcycle and Bicycle Workzone Safety, as cited in Plaintiffs' expert report, explains that motorcycles have difficulty elevation changes in lanes that differ as little as 1 inch. (Pa0021). In fact, Defense expert, David W. Kasserkert, P.E., agreed that because of the way a motorcycle steers pavement elevation changes cause operational problems. (Pa0625).

Here, the uneven pavement caused by the settlement issue created a substantial risk of injury to unsuspecting users of the roadway; especially those users of the roadway that were operating motorcycles.

(c) The Property was Being Used with Due Care at the Time of the Injury

The record before the Court is entirely void of any suggestion that Plaintiff was not using the road way with due care. Plaintiff testified that just prior to hitting the defect and being caused to lose control of his motorcycle that he was simply cruising along with traffic. (Pa0380). Here, there is no evidence in the record that suggests that the Plaintiff was operating his motorcycle without due care at the time of the accident.

(2) The Dangerous Condition Caused Plaintiff's Accident

As the Court is aware, proximate cause is a fact issue and thus, **"proximate cause is generally an issue for the jury."** Miller v. Estate of Sperling, 166 N.J. 370, 386, 766 A.2d 738 (2001); accord Winstock v. Galasso, 430 N.J. Super. 391, 418, (App. Div.), *certif. denied*, 215 N.J. 487, 73 (2013). (Emphasis Added).

As stated above, and in more detail in Plaintiffs' original brief, this case does not require an accident reconstructionist. Plaintiff testified at his deposition that he returned to the scene and provided a picture of the settlement at expansion joint that caused his accident. (Pa0521);(Pa0523);(Pa0522).

(3) The Dangerous Condition Created a Foreseeable Risk of Injury

As stated above in more detail, a dangerous condition existed in the left-hand lane of the southbound Parkway. These types of settlement and elevation changes in the roadway create a substantial risk of injury. In fact, NJTA was so concerned with this type of condition on the travel surface of the roadway that Jacobs and Urban were hired to inspect the roadway to identify a correct these conditions. (Pa1296); (Pa1265). The T&M memo recommended that the settlement be fixed immediately which creates the inference that it created a foreseeable risk of injury if left uncorrected. (Pa1193).

(4)The NJTA was on Actual Notice of the Condition

Despite the NJTA's arguments, it was on actual notice of the settlement at the abutment joint that caused Plaintiff's accident. Both the Biennial Bridge Inspection and the T&M memo were sent directly to the NJTA and confirm that the NJTA was aware of the settlement in the roadway approach to the overpass and that they were told to fix. (Pa1343); (Pa1191).

(5) The Failure to fix the Condition for Almost 7 Months was "Palpably Unreasonable"

"Palpably unreasonable" conduct contemplates more than mere negligence. Coyne v. DOT, 182 N.J. 481, 493 (2005). The concept "imposes a steep burden on a plaintiff," and "implies behavior that is patently unacceptable under any given circumstances[,]" as well as behavior from which "it must be manifest and obvious

that no prudent person would approve of its course of action or inaction." Ibid. (quoting Kolitch v. Lindedahl, 100 N.J. 485, 493 (App. Div. 1985)).

Here, as of April 22, 2015, the NJTA was aware of a defect in the roadway which needed to be fixed. (Pa1343). According to NJTA engineer Joseph Johnson it should have been fixed within 24hrs. (Pa0799). However, as the record has revealed, it was not fixed until November 17, 2015; approximately 7 months later. (Pa1396). Although the **palpably unreasonableness of entities conduct is a fact question for the jury**, the seven month delay in responding is patently unacceptable under any circumstances. See Vincitore v. Sports & Expo. Auth., 169 N.J. 119, 130 (2001)(Emphasis Added); Kolitich v. Lindedahl, 100 N.J. 485, 493 (1985).

For all these reasons, Plaintiffs have met the requirements to establish liability under N.J.S.A. 59:4-2.

V. Plaintiffs' Opposition to Urban's Cross-Appeal

A. Procedural History and Counter Statement of Facts

On September 7, 2016 Plaintiffs filed the initial complaint Defendants NJTA and Pierson. (Pa1550). At all times material hereto the defendant, NJTA, was the owner of this roadway and responsible for its maintenance, inspection and repair. N.J.S.A. 27:23-3(A). Based on correspondence from the NJTA's claims management company, Plaintiff's counsel was originally told that Defendant NJTA

had a contract with Defendant Pierson South-State, Inc. to perform work on the Garden State Parkway in the area of Plaintiff's incident. (Pa1760). Accordingly, when the initial complaint was filed the Complaint in this matter was filed on September 7, 2016 against the NJTA and Pierson South-State, Inc. (Pa1550).

On or about February 1, 2017, Plaintiffs received correspondence from counsel for the NJTA advising that the contractor working in the area at the time of the accident was Midlantic and not Pierson as originally communicated. On February, 14, 2017, Plaintiffs promptly filed a motion to Amend to add Midlantic as a defendant in this matter. On March 3, 2017 the motion was granted and Plaintiffs filed the First Amended Complaint on March 10, 2017. (Pa1576)

On November 29, 2017 Midlantic Construction provided a contract which showed that paving work in the area of Plaintiff's accident was performed pursuant to a sub-contract with Defendant Hesse defendants (Previously dismissed). Accordingly, Plaintiffs filed a motion for leave to file a Second Amended Complaint adding CJ Hesse and The Hesse Companies as named defendants. That motion was granted by the Court on January 8, 2018. In turn, Plaintiffs filed the Second Amended Complaint on January 9, 2018. (Pa1613).

On October 19, 2018, during the deposition of NJTA Engineer Joseph Johnson, he testified that the NJTA also had a contract with Jacobs to supervise the work and to be their "eyes and ears in the field". (Pa795)**.** Accordingly, on November

13, 2018, Plaintiffs sought leave of court to file a Third Amended Complaint adding Jacobs as a Defendant. That motion was granted on November 30, 2018 and the Third Amended Complaint was filed on December 7, 2018. (Pa1650).

On April 18, 2019, Defendant Jacobs, provided documentation which for the first time identified a sub-consulting contract with Urban to serve as resident engineer during the subject work on the Garden State Parkway. (Pa1763). Despite two and a half years of paper discovery, Urban had not previously been mentioned or identified.

In light of this new information, on April 23, 2019, Plaintiffs moved to add Urban as a Defendant. On May 16, 2019, Plaintiffs' motion was granted and Plaintiff's Fourth Amended complaint was filed on May 17, 2019. (Pa1698).

On July 1, 2019, Defendant Urban filed its' Answer. (Pa1727). On August 19, 2019, Defendant Urban moved before the Honorable Joseph Marczyk, J.S.C., for summary judgement seeking that Plaintiffs' complaint be dismissed as being filed after the statute of limitations. (Pa1745). On September 17, 2019, Plaintiffs opposed Urban's Motion for Summary Judgment. (Pa1756). On September 27, 2019, following oral argument, the Court denied Urban's motion. (Pa1826).

B. Legal Argument

Appellate review of a summary judgment order is *de novo*. Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 524 (2012). In deciding a motion for summary

judgment, the court must determine whether the competent evidential materials, 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. However, if the summary judgment turns on a question of law, or if further factual development is unnecessary in light of the issues presented, then summary judgment need not be delayed. United Savings Bank v. State, 360 N.J. Super. 520, 525 (App. Div. 2002).

(1) The Honorable Judge Marczyk Correctly Permitted Plaintiffs to File a Fourth Amended Complaint in order to add Urban as a named Defendant

Under N.J.S.A. 2A:14-2, a personal injury action must be filed "within 2 years next after the cause of any such action shall have accrued." Viviano v. CBS, Inc., 101 N.J. 538 (1986). To relieve the hardship that might otherwise ensue from the mechanical application of a statute of limitations, courts have devised an equitable principle known as the "discovery rule." Id. Under that rule, a cause of action does not accrue "until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." See Lopez v. Swyer, 62 N.J. 267, 272 (1973).

Further, if counsel is uncertain about the identity of the culpable party, he or she may resort to the fictitious-name procedure in Rule 4:26-4, which provides:

> In any action, irrespective of the amount in controversy, other than an action governed by R. 4:4-5 (affecting specific property or a res), if the

> defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient to identify him. Plaintiff shall on motion, prior to judgment, amend his complaint to state defendant's true name, such motion to be accompanied by his affidavit stating the manner in which he obtained that information.

See Viviano v. CBS, Inc., 101 N.J. 538, 548 (1986).

In fact, the Viviano Court, *supra*, described Rule 4:26-4 to be construed to permit a plaintiff who institutes a timely action against a fictitious defendant to amend the complaint after the expiration of the statute of limitations to identify the true defendant. In construing the Rule, the Viviano Court stated that "we recognized that an amended complaint identifying the defendant by its true name relates back to the time of filing of the original complaint, thereby permitting the plaintiff to maintain an action that, but for the fictitious-party practice, would be time-barred." Id.; See also Farrell v. Votator Div. of Chemetron Corp., 62 N.J. 111, 120-23 (1973).

Here, on November 5, 2015, Plaintiffs filed the appropriate notice pursuant to Title-59. Plaintiffs' pre-suit investigation revealed that the NJTA had entered into a contract with Pierson for construction services related to the subject project on the Garden State Parkway. Accordingly, Plaintiffs' initial complaint was filed against NJTA and Pierson for, among other things, their failure to inspect, maintain, and repair dangerous conditions on the roadway. The initial complaint also identified fictitious parties in the original complaint pursuant to Rule 4:26-4.

Plaintiffs' fictitious party count specifically incorporated by reference each of the previous paragraphs and previous Counts which identified the existence of the construction project and the defendants' responsibility to inspect, maintain, and correct dangerous conditions on the Garden State Parkway. (Pa1550).

Further, Plaintiffs' exercise of due diligence is evident in the record. Upon receiving Defendants' Answers, Plaintiff promptly requested and reviewed voluminous amounts of discovery provided by the initial defendants. As discovery was received and depositions were taken, Plaintiffs learned of new entities with responsibility for the inspection, maintenance and repair of the subject area of the Parkway. Consequently, Plaintiffs moved to add defendants Midlantic, Hesse, and Jacobs. However, none of the discovery responses served by those defendants included any reference to Urban at all. In fact, it was not until April 18, 2019, that Plaintiff was informed, for the first time, that Jacob's had a sub-contract with Urban. (Pa1763). Accordingly, on April 23, 2019, Plaintiffs filed a motion in order to file a Fourth Amended Complaint. Plaintiffs' Fourth Amended Complaint was filed on May, 17, 2019. (Pa 1698).

As the trial court determined, Urban's criticism of Plaintiffs use of the fictitious party rule and Plaintiffs' diligence is unfounded. Further, Urban has not and at the trial level failed to articulate any prejudice that resulted it their ability to

adequately defend Plaintiff's allegations against them. For all these reasons, Defendant's cross-appeal must be denied. Plaintiffs' complaint properly adhered to Rule 4:26-4.

(2) Plaintiffs' Fictitious Party Pleading Preserved the Claim Against Urban

As the trial court agreed, Defendant's reliance on is Rutkowski v. Liberty Mutual Insurance Company, 209 N.J. Super. 140, 143 (App. Div. 1986) is misplaced. In Rutkowsky, that Court's decision was largely based on its' criticism that the Plaintiff's in that case used a reference for the unidentified defendants that was entirely too general. In that case, the complaint only referred to fictitious defendants as those defendants that might be "otherwise responsible". Unlike the Plaintiff in Rutkowski, here, not only does Plaintiffs' Complaint properly plead fictitious parties pursuant to Rule 4:26-4 but it also properly identifies the fictitious defendants and their potential role for being responsible for the inspection, maintenance, and correction of dangerous conditions in the roadway. (Pa1550).

A review of the first count of Plaintiffs' Complaint reveals that Plaintiff suffered injuries as a result of the dangerous condition in the roadway. The Plaintiffs' Complaint expressly identified that construction was being performed in the subject area at this time and such construction may have contributed to the Plaintiff's accident. Plaintiffs' original and amended pleadings contemplates and

identifies the unknown parties potentially involved in the construction and potentially responsible for the inspection, maintenance and correction of dangerous conditions. Urban, as the engineering sub-contractor on the project, are properly identified by the original Complaint. (Pa1550).

Defendant's suggestion that Plaintiffs should have engaged pre-suit discovery or made an Open Public Records Act ("OPRA") request for documents to identity Defendant's relationship as a subcontractor of Jacobs. However, not only are Plaintiffs not required to conduct pre-suit discovery but, as addressed at oral argument and conceded by defense counsel, an OPRA request would have likely only identified the NJTA's contract with Jacobs. (Pa1T 11:20-25). Here, Plaintiffs appropriately identified fictitious parties and engaged in diligent discovery in order to, among other things, identify potential defendants.

Further, Rule 1:1-2 mandates that "[u]nless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice." Compliance with the Rules of Practice is essential for an orderly legal system, but our goal is not so much rigid compliance with the letter of the Rules as it is the attainment of substantial justice. The Rules of Practice are not an end unto themselves, but a means of serving the ends of justice. See Sattelberger v. Telep, 14 N.J. 353, 363 (1954).

C. Conclusion

Plaintiffs submits that the Trial Court properly held that Plaintiff's fictitious party pleading did properly preserve their claim against Urban and that the Plaintiff diligently sought to ascertain the identity of all responsible parties and therefore, this Court should deny Urban's Cross-Appeal.

VI. Overall Conclusion

This Appeal respectfully asks that this Court re-open the courthouse doors which were unjustly closed on Plaintiffs' legal rights when the Trial Court granted Defendants' Summary Judgment motions. The Trial Court committed reversible error by improperly resolving crucial disputed material facts and the reasonable inferences taken therefrom in the favor of the movants. Having done so, the Court's factual conclusions then generated a cascade of legal rulings all of which were supported only by a foundation of conclusions that favored the movants. Had the Court properly complied with the summary judgment standards and accepted Plaintiffs' version of the facts, including their fair inferences, the Court could not have dismissed Plaintiffs' case.

For all of these reasons, and in the interests of justice, the Trial Court's decision to dismiss Plaintiffs' case against all Defendants, respectfully, must be overturned.

By: Michael A. Gibson, Esquire

SUPERIOR COURT OF NEW JERSEY

ALFRED H. BURR AND ALYSSA BURR, H/W, Plaintiffs-Appellants, vs. NEW JERSEY TURNPIKE AUTHORITY; MIDATLANTIC CONSTRUCTION, LLC; C.J. HESSE, INC.; THE HESSE COMPANIES; JACOBS ENGINEERING GROUP, INC.; URBAN ENGINEERS INC., Defendants-Respondents.	APPELLATE DIVISION DOCKET NO. A-002666-22 T2 CIVIL ACTION ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY LAW DIVISION – ATLANTIC COUNTY DOCKET NO: ATL-L-1997-16 SAT BELOW: HONORABLE JAMES H. PICKERING, JR.

BRIEF OF DEFENDANT-RESPONDENT JACOBS ENGINEERING GROUP, INC.

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PRELIMINARY STATEMENT

Plaintiffs' claims against Jacobs Engineering Group Inc. ("Jacobs") are based entirely upon the net opinions of Plaintiffs' sole liability expert -- Richard Balgowan, P.E. The trial court correctly found that Balgowan's opinions on Jacobs's liability were unreliable, not supported by objective evidence, and, therefore, inadmissible at trial. Without expert testimony, Plaintiffs could not prove their claims and thus the trial court properly granted summary judgment. Plaintiffs fail to identify any error justifying the reversal of the trial court's judgment.

On September 12, 2015, Alfred Burr crashed his motorcycle in the leftmost lane of the southbound Garden State Parkway. At that time, there was active construction in the southbound shoulder and the right, west-most lane of that portion of the Parkway ("Project"). Through their expert, Balgowan, Plaintiffs allege that the cause of Mr. Burr's accident was a pre-existing, dangerous condition on the roadway surface.

Jacobs's only connection to the alleged accident location was a single construction inspector assigned to the Project; he was not on site on the day of the accident. The inspector was a professional engineer acting in that capacity

at all relevant times. This inspector's only task was to confirm that the contractors were following the construction plans. When Jacobs's inspector was on-site, he did not actively inspect the alleged accident location as it was not part of the Project.

Despite Jacobs's tenuous connection to the Project and the accident site, Plaintiffs allege that Jacobs had a universal, affirmative duty to inspect the entire roadway for pre-existing conditions, and failed to properly exercise this duty.

To prevail against Jacobs, Plaintiffs needed to establish -- by competent admissible, expert testimony -- that: (1) Jacobs, in its capacity as construction inspector, owed Plaintiffs a duty of care; (2) the duty of care required Jacobs's inspector to identify and remedy the alleged dangerous condition; (3) a dangerous condition actually existed; (4) Jacobs breached this duty; and (5) Jacobs's breach was the proximate cause of Mr. Burr's injury.

Plaintiffs did not establish any of these elements. In his written report, Plaintiffs' expert broadly opined that all defendants, including Jacobs, had some vague obligation to continuously inspect the entire roadway for pre-existing conditions. Balgowan did not explain or analyze any of the defendants' distinct professional or contractual duties. Rather, he made the

bald assertion that all participants on a construction project -- regardless of role -- have a duty to continuously inspect the roadway for pre-existing, dangerous conditions. At his deposition and the Rule 104 hearing, he did not provide any independent, objective support for this opinion despite repeated requests from defense counsel. Instead, Balgowan relied only on his own "experience" and opinion.

Critically, Plaintiffs' expert could not explain the nature of the dangerous condition he claims Jacobs should have identified. Rather, he only speculated about conditions he believed may have existed. He also frequently contradicted himself and drastically changed his positions. In the end, as noted by the trial court, Balgowan's opinion was a circular assertion -- simply because an accident occurred, there must have been a dangerous condition in the roadway, Jacobs must have failed to identify it, and therefore Jacobs was responsible for the accident.

Accordingly, Plaintiffs' sole liability expert, rendered a net opinion. His opinion was unreliable and properly ruled inadmissible. Without Balgowan's opinion, Plaintiffs could not establish the core elements of their cause of action against Jacobs. Jacobs was properly granted summary judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. THE PROJECT AND JACOBS'S ROLE AS CONSTRUCTION INSPECTOR

In 2014, Defendant New Jersey Turnpike Authority ("NJTA") undertook a project to widen a portion of the Garden State Parkway ("Project"), which runs through Atlantic County, between mile markers 36 and 48. (Pa1266 at p. 1). This portion of the Parkway consists of three northbound lanes and three southbound lanes. The northbound and southbound sides of the road are separated by concrete "Jersey" barriers. (Da 29-30). The Project area included a bridge near mile marker 40 ("Structure 40 Bridge") that runs over State Route 30 in Galloway Township. (Pa1265, Pa594 at T26:4-20).

On or about October 1, 2014, NJTA entered into a construction services supervision contract with Defendant Jacobs Engineering Group Inc. ("Jacobs"). (Pa1266, Pa592 at T17:12-16). Among its contractual responsibilities, Jacobs was to oversee work performed by Defendant Midlantic Construction LLC ("Midlantic"), who was the prime contractor for the Project. (Pa1699 at ¶¶ 4 and 6, Pa592 at T17:20-24). Jacobs subcontracted with Defendant Urban Engineers, Inc. ("Urban") to fulfill Jacobs's oversight responsibilities for the segment of the Project between mile markers 38.0 and

[1] The facts and procedurally history are intertwined such that a combined statement improves readability and avoids duplication.

41.0 -- where the accident at issue allegedly occurred. (Pa1699 at ¶7, Pa592 at T17:17-19, and Pa678 at T18-8-14).

Urban contractually assumed all of Jacob's oversight responsibilities for this portion of the Parkway. (Pa678 at 18:8-13, Pa1266). This obligated Urban to provide construction inspectors to ensure that Midlantic followed NJTA's design plans. (Id.; Pa655 at T14:2-16).

Urban was also contractually obligated to provide a chief construction inspector to supervise its other inspectors. (Pa1270). Shortly before the Project began, however, Urban's chief inspector became unavailable. Rather than delay the Project or substitute someone else, Jacobs lent Urban one of its own chief inspectors, Jeffrey Rudenjak.

Site mobilization on the project commenced in October 2014. At the time of the accident, in September 2015, construction activity was taking place in the southbound shoulder of the Parkway and in the right, west-most lane. The left travel lane, where the accident occurred, was not under construction at the time of the accident. (Pa659 at T29:8-11).

Mr. Rudenjak was on-site most days, though not the day of the accident, and testified that he did not observe any dangerous conditions in the road adjacent to the construction site and was never made aware of any such

dangerous conditions. (Pa655 at T13:18-22; Pa659 at T32:13-24). He further testified that, like all Project participants, he operated on a "see something, say something" basis; if he saw a pothole, change in elevation, or other issue, he would report it. (Pa657 at T23:4-24). There is no evidence that contradicts Mr. Rudenjak's testimony. Rather, Plaintiffs rely exclusively on their sole liability expert's opinion that Mr. Rudenjack should have seen a dangerous condition, which must have caused Plaintiff Alfred Burr's accident

B. THE ACCIDENT

According to the Complaint, on September 12, 2015, at approximately 1:00 P.M., Plaintiff was traveling on his motorcycle on the southbound side of the Parkway when he approached the Structure 40 Bridge at mile marker 40.0. (Pa1698 at ¶1; Pa5; Pa8). As Mr. Burr began crossing the bridge, he lost control of his motorcycle. (Pa380 at T17:8-21). He veered towards and made contact with the concrete Jersey barrier separating the north- and southbound lanes, which caused his left leg to be pinned between the motorcycle and the barrier. (Pa380 at T13:6 - Pa385 at 22:13). Mr. Burr has no understanding of how or why he lost control of his motorcycle. (Pa378 at 15:25 – Pa379 at 16:17).

Moreover, none of the firsthand witnesses, including Mr. Burr's wife, his friend riding nearby, and the responding police officer, could identify the

cause of the accident or any dangerous conditions in the roadway. (Pa378 at T15:25 – Pa379 at T16:17; Pa564 at T12:13-23; Pa860 at T23:19 – Pa861 at T24:6; Pa885 at T14:2-8; Pa908 at 19:4-20; Pa909 at T20:7-9).

C. PLAINTIFFS' LAWSUIT AND CLAIMS AGAINST JACOBS

On September 7, 2016, Plaintiffs filed their complaint with the Law Division in Atlantic County. (Pa1550 at ¶ 14). Jacobs was not a party to this action until nearly two years later when Plaintiffs filed their December 7, 2018, third amended complaint, joining Jacobs as a defendant. (Pa1650 at ¶ 15). On May 17, 2019, Plaintiffs amended their complaint a fourth time to add Urban as a defendant. (Pa1698).

In their fourth amended complaint, Plaintiffs assert claims against Jacobs for professional negligence, loss of consortium, and negligent infliction of emotional distress. (Pa1650). Specifically, Plaintiffs allege that Jacobs failed to exercise reasonable care, breaching the standard of care applicable to construction inspectors by failing to:

- "inspect and maintain the subject location and/or caused the defect" that caused Mr. Burr to lose control of his motorcycle;
- "conduct reasonable and timely inspections of the roadway"; and
- "correct the dangerous condition" where the accident occurred.

(Pa1651-52 at ¶¶ 7, 10, 11).

Plaintiffs maintain that Jacobs's breach was the proximate cause of Mr. Burr's motorcycle accident and resulting injuries. (Pa1652 at ¶ 13). Plaintiffs served an affidavit of merit supporting their professional negligence claim against Jacobs. (Pa362).

D. PLAINTIFFS' EXPERT REPORT AND EXPERT TESTIMONY REGARDING STANDARD OF CARE

On or around December 4, 2020, Plaintiffs served Defendants with the December 3, 2020, expert report of Richard M. Balgowan, PE, PP, CPM, CPWM, PWLF ("Expert Report"), of RM Balgowan Forensic & Engineering Services, LLC. (at ¶ 17 and Ex. C). Plaintiffs' expert opined that:

- While Mr. Burr was riding his motorcycle across the Structure 40 Bridge, he "struck" an abrupt 2-inch change in grade in the southbound approach to the bridge; (Pa1 et seq).
- The change in grade was a dangerous condition that likely caused Mr. Burr to lose control of his motorcycle and crash (Pa18-Pa20, Pa25);
- Had the change in grade been repaired, it "would not have been a cause" of Mr. Burr's accident (Pa25);
- All defendants should have "immediately inspected and analyzed" the condition of the Structure 40 Bridge approach and should have timely performed emergency repairs (Pa21, Pa25);
- All defendants were responsible for "appropriate advance warning signs installed for at least grooved pavement and bumps" and "[m]otorcycle specific signs." (Pa22-23).

In his report, Balgowan lumps all defendants together and never specifically addresses or analyzes their distinct contractual roles on the Project, their individual professional duties, or the individual professional standards that they allegedly failed to maintain. (Pa157-58). He never inspected the 2" change in grade that he claims to have been a dangerous condition. (Pa89 at T64:13 – Pa90 at T65:10). Rather, he just assumes that it existed on the day of the accident. He bases his assumption primarily on a bridge inspection report that was prepared for NJTA in April of 2015 by non-party Arora Engineering ("Arora Report"). This report was not provided to Jacobs until after Jacobs was added to this litigation.

The Arora Report is ambiguous at best, and Balgowan's reliance on it proves, to the extent there was any dangerous condition, it was a pre-existing condition already known to the NJTA. In other words, the condition that Balgowan describes did not arise during construction and was not something Jacobs would have known about during the course of its performance on the Project. Mr. Balgowan admitted the same during his deposition. (Pa341 at T103:18 – Pa342 at T104:12 (Mr. Balgowan explaining that the engineers on the project had a "proactive responsibility" to identify "pre-existing conditions" not related to construction)).

Noticeably missing from Plaintiffs' Expert Report is any explanation of Jacobs's role on the Project and any citation to a written standard or generally accepted practice in the engineering industry. (Pa 4, generally). Put differently, Mr. Balgowan never gives the why and wherefore of his opinion that Jacobs, as a construction inspector, was responsible for recognizing, identifying, and remedying pre-existing, dangerous conditions that did not arise out of the Project. Mr. Balgowan's explanation is not much more helpful than "because I said so."

Mr. Balgowan was deposed for two days on October 20, 2021, and November 24, 2021. On the first day of his deposition, Mr. Balgowan was asked to provide support for his opinion that Jacobs and the other engineers on the Project had an affirmative duty to proactively inspect the road surface for preexisting, dangerous conditions. (Pa158 at T132:16 - Pa163 at T137:18). He could not provide such support but insisted that there were "documents" and other evidence supporting his opinion. Id. The deposing attorneys requested that Mr. Balgowan produce such evidence. (Pa158 at T132:22 – Pa162 at T136:24). A little more than a month later, Mr. Balgowan managed to produce one document -- a New Jersey Department of Transportation "traffic control detail" that governed traffic control coordinators. In addition to being from a different agency (the Project at issue is for the NJTA), the

document did not actually support Mr. Balgowan's opinion. (Pa269, Pa1186). On the second day of his deposition, when asked about this document, Mr. Balgowan admitted that it only applied to the prime contractor, not the project engineers like Jacobs. (Pa268 at T30:25 – Pa270 at T32:16).

Mr. Balgowan was also asked to explain why he believed that Jacobs had an affirmative duty to identify pre-existing, dangerous conditions in the roadway. First, Mr. Balgowan was not aware if there was any construction ongoing in the southbound, leftmost lane (where the accident occurred). (Pat T54:12 – Pa293 at T55:2). He further testified that the presence of construction had no bearing on his opinion -- despite the fact that Jacobs's only role was to inspect construction. (Pa293 at 55:3-12). When asked whether he could offer anything else to support his opinion, Mr. Balgowan only opined further, referring broadly to unspecified contracts (none of which he ever identified or produced). (Pa295 at T57:15 – Pa296 at T58:10).

E. PLAINTIFFS' CHANGING EXPERT TESTIMONY REGARDING THE EXISTENCE AND NATURE OF THE ALLEGED DANGEROUS CONDITION

Balgowan offered shifting testimony about the nature and existence of the dangerous condition. In his report and early deposition testimony, Mr. Balgowan was adamant that the dangerous condition consisted of an "abrupt," "immediate" change in elevation without any tapering:

> Q. Your position is that the elevation change in this matter was an immediate elevation change with no taper, correct?
>
> A. Correct.
>
> (Pa129 at T103:1-10, Pa274 at T36:22-25).

He based this testimony on a photograph from the Arora report, which he believes to depict a dangerous condition that caused Mr. Burr's accident (Pa283-84). The photograph does not show an abrupt change in elevation, but Mr. Balgowan insisted that he could perceive the change based on something he noticed about the Jersey barriers in the background of the photo. (T132:20-T133:16).

On the second day of his deposition, Balgowan was confronted with high-resolution photographs of the subject bridge joint. After reviewing this evidence, he completely changed his opinion -- and, importantly, Plaintiffs' entire theory of the case. -- and for the first time, Balgowan opined that the alleged dangerous condition was mere "insufficient tapering." (Pa284 at T46:5-14).

"I mean, it looks like it happens very, very quickly, but there's no visual abrupt edge like the edge of the deck, the concrete deck, that you cannot see, so something is up there butted up against it. This would not meet any standard for tapers, asphalt tapers." (Pa284 at T46:5-14).

This new "insufficient tapering" theory was neither pled in the Complaint nor mentioned in the expert report. Balgowan also failed to provide any documents, citations, or references to support this newfound technical opinion.

F. DEFENDANTS' SUMMARY JUDGMENT MOTIONS AND THE RULE 104 HEARING

On January 10, 2022, Jacobs moved for summary judgment, arguing that Plaintiffs' expert -- necessary to their theory of the case -- rendered an inadmissible net opinion. (Pa1881). Specifically, Jacobs argued that Plaintiffs' expert did not: (1) establish any duty of care owed by Jacobs to Plaintiffs; (2) establish that Jacobs breached its duty; (3) offer any credible evidence of a dangerous condition; or (4) establish any credible theory of causation. Jacobs also argued that it was immune from suit under the New Jersey Tort Claims Act.

Defendants Urban, Midlantic, and NJTA also moved for summary judgment on similar grounds. (Pa1934, Pa1887).

On March 18, 2022, the Hon. Michael Winkelstein heard oral argument on all of the summary judgment motions. At the outset, Judge Winkelstein advised the parties that he had reviewed all of their motion papers and

concluded that he could not rule on the motions without first holding a Rule 104 hearing to evaluate Balgowan. (Pa2026 at ¶ 2).

On May 9, 2022, the Hon. James Pickering conducted the Rule 104 hearing. (Pa1422). All attorneys gave opening statements. Mr. Balgowan's testimony echoed his deposition testimony.

After the hearing, Judge Pickering invited post-hearing briefs. Plaintiffs' counsel objected to any such submissions, arguing that the matter had already been adequately briefed. (T242-244). Judge Pickering ordered the parties to submit post-hearing briefs, if desired, within 15 days. All parties made post-hearing submissions. Id. Further, at the request of counsel, Judge Pickering delayed his decision on the motions for summary judgment to permit the parties to mediate the matter. Mediation was unsuccessful.

On April 10, 2023, Judge Pickering entered summary judgment in favor of Jacobs for the reasons set forth in his written opinion of the same date. (Pa2113.).

LEGAL ARGUMENT

I. THE TRIAL COURT CORRECTLY EXCLUDED BALGOWAN'S TESTIMONY REGARDING THE STANDARD OF CARE APPLICABLE TO JACOBS.

Plaintiffs' cause of action against Jacobs is for professional negligence in Jacobs's capacity as a professional engineer.[2] To prevail on this claim, Plaintiffs were required to offer competent expert testimony establishing:

a. a duty extending from Jacobs to Plaintiffs as an engineering construction inspector;
b. an act or omission by Jacobs that breached this standard;
c. that the breach was the proximate cause of Plaintiff Burr's accident;
d. Plaintiffs were injured thereby; and
e. Plaintiffs suffered damages a result.

See Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 274 N.J. Super. 405, 413 (App. Div. 1994); Polzo v. Cty. of Essex, 196 N.J. 569, 584 (2008). See also Model Jury Instruction 5.52(b) (explaining why expert testimony is necessary to establish these elements in a professional engineering negligence case).

[2] Plaintiffs' loss of consortium and negligent infliction of emotional distress claims are derivative of their negligence claim and therefore immaterial to this appeal. See Alberts v. Gaeckler, 446 N.J. Super. 551, 565 (Law. Div. 2014) and Tichenor v. Santillo, 218 N.J. Super. 165, 173, (App. Div. 1987).

A. PLAINTIFFS' EXPERT FAILED TO ESTABLISH A STANDARD OF CARE APPLICABLE TO JACOBS AS A CONSTRUCTION INSPECTOR.

In determining whether expert testimony is admissible, a trial judge applies New Jersey Rule of Evidence 703, which requires that:

> an expert's testimony be based on facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts in forming opinions on the same subject, . . ."
>
> [Davis, 219 N.J. at 410 (quoting Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 1 on N.J.R.E. 703 (2014))]

A corollary of N.J.R.E. 703 is the "net opinion" rule: an expert's bare conclusions, unsupported by factual evidence, are inadmissible and may not be considered. Ibid. at 410. As explained by the New Jersey Supreme Court, "a trial court may not rely on expert testimony that lacks an appropriate factual foundation and fails to establish the existence of any standard about which the expert testified." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 373 (2011).

Opinion testimony "must relate to generally accepted . . . standards, not merely to standards personal to the witness." Taylor v. DeLosso, 319 N.J. Super. 174, 180 (App. Div. 1999). In other words, a plaintiff must produce expert testimony upon which a jury could find that the consensus of the particular profession involved recognized the existence of the standard defined by the expert. "It is insufficient for plaintiff's expert simply to follow slavishly an 'accepted practice' formula; there must be some evidential support offered by the expert establishing the existence of the standard." Id. "A standard which is personal to the expert is equivalent to a net opinion." Id.

The New Jersey Supreme Court addressed this issue extensively in Davis. That case, like the present matter, involved an expert's inability to establish a standard of care applicable to an inspector. The plaintiffs in Davis asserted that defendants (professional fire inspectors) negligently failed to inform a hotel manager of the need to install a sprinkler in a storage closet. Id. at 402. The plaintiffs' expert asserted that a reasonable sprinkler inspector would have informed the owner of the hotel about the need for an additional sprinkler. Id. at 410. While the plaintiffs' expert referenced several National Fire Protection Association standards in his report, the Supreme Court found that none of the cited sources directly supported the expert's conclusions. Id. at 412. Rather, the expert relied primarily on his personal opinion. Id. at 413.

The Court ruled that the plaintiffs' expert's opinion as to the applicable standard of care was therefore an inadmissible net opinion that "lacked any factual foundation." Id. at 414.

Here, the trial court accurately applied Rule 703 and the reasoning of the Davis and Taylor opinions. Just like the expert in Davis, Balgowan's report and testimony regarding Jacobs's liability is not supported by anything other than his own opinion.

Plaintiffs provide no basis to overturn the trial court's well-reasoned decision. Plaintiffs argue that the trial court erred by focusing its analysis of Balgowan's proffered testimony on the standard of care applicable to Jacobs and the other defendants. Plaintiffs urge that the trial court should have either:

1) Concluded, against all evidence in the record, that all of the defendants had actual knowledge of a dangerous condition on the road surface and simply failed to do anything about it; or
2) presumed an ethereal standard of care required Jacobs to inspect the entire road for pre-existing conditions such as by having a construction inspector identify "inadequate tapering."

(PB at *43-44).

Plaintiffs' first argument, that Jacobs had actual knowledge of a dangerous condition, contradicts the record and should not have been included in Plaintiffs' brief to this court. As the trial court noted in detail, the record is devoid of any evidence that Jacobs, or any other defendant except perhaps the NJTA, had any knowledge of the purported road condition claimed by Plaintiffs' expert. (May 24, 2023 Opinion of the Court at *10-14). Plaintiffs base their allegation of advanced, actual knowledge entirely on the Arora Report. In reality, the Arora Report gave notice to NJTA alone of "settlement" in the roadway at best. Critically, this report was not shared with Jacobs until after Jacobs was added to this litigation in 2018. (Pa659 at T30:8 – 31:23; Pa597 at T39:21-40:8). The Arora Report therefore could not have provided Jacobs with advanced knowledge and cannot be used to prove the same.

Moreover, even if Jacobs could be charged with knowledge of the Arora Report, it still provides no basis to conclude that the condition identified therein was dangerous. The report identifies the subject portion of the roadway as being in "fair" condition. (Pa111-12, Pa1343). It does not describe it as dangerous or requiring immediate repair. Id. Even Balgowan conceded that "fair" condition is not indicative of a "dangerous" condition. (Pa111-112, Pa1343). Accordingly, Plaintiffs are wrong to ask that the Court charge Jacobs with actual knowledge of a dangerous condition.

Plaintiffs second argument asks this court to disregard black letter law and undermines the whole premise of a Certificate of Merit in a professional negligence lawsuit. Plaintiffs argue that the trial court should have assumed that a standard of care for Jacobs's work existed, and then determine whether Balgowan's testimony comported with that standard. But this turns the inquiry on its head -- the purpose of expert engineering testimony in a professional negligence action is to establish the standard of care applicable to the defendant engineer and explain how that engineer breached this standard. See Davis, 219 N.J. at 404-407. Balgowan wholly failed to satisfy this burden of proof.

Indeed, the trial court carefully analyzed Balogwan's Expert Report, deposition testimony, and Rule 104 hearing testimony. Nowhere did Balgowan articulate support for a standard of care applicable to Jacobs, let alone how Jacobs's conduct breached that standard.

Rather, Plaintiffs' expert merely opines that some unspecified inspection of the roadway would have identified some dangerous condition that must have went unnoticed by myriad firsthand witnesses, first responders, and several engineering and construction professionals.

In his written report Balgowan states only that Jacobs "should have been looking for these sort of issues." (Pa20). He does not explain why or how Jacobs "should have been looking for these sort of issues." Nor does he identify what type of inspection should have been performed, or when it should have been performed. Plaintiffs' expert further failed to opine on whether this type of inspection even falls within the purview of a construction inspector whose sole role it is to confirm that the contractor is building to specification.

Importantly, Balgowan fails to explain how and when Jacobs breached this amorphous duty. Instead, he offers only the bare conclusion that Jacobs should have identified a dangerous condition and that its failure to do so must have caused Burr's accident. He offers no independent support for this opinion. Thus, Plaintiffs' expert opinion is no different from those rejected in Davis and Taylor. See Davis,219 N.J at 406**;** Taylor, 319 N.J. Super. at 180-84 (holding expert testimony to be an inadmissible net opinion where the expert "presented no authority supporting his opinion [and made] [n]o reference . . . to any written document, or even unwritten custom or practice"). See also Abas v. Evans Architects**,** 2020 WL 2047967 (A-2274-18T2 App. Div. April 29, 2020) at *3-5 (plaintiff's expert opinion was barred as net because expert provided no authority to support his conclusion that the "design

plan fell below the level of competence required by the general safety statute" and the expert failed to support his conclusion with reference to any written document, code violations, violations of applicable federal, state, county, or municipal statutes, regulations or ordinances, or violations of generally accepted standards).[3]

Accordingly, Balgowan's opinion that Jacobs "should have been looking for these sorts of issues" is a classic, unsubstantiated net opinion and was properly excluded by the trial court.

B. THE TRIAL COURT CORRECTLY FOUND JACOBS DID NOT HAVE A CONTRACTUAL DUTY TO INSPECT THE GARDEN STATE PARKWAY FOR PRE-EXISTING CONDITIONS

Plaintiffs argue that Jacobs was contractually obligated to inspect the entire road surface for pre-existing conditions. They are wrong. As explained by the trial court, there is no evidence of this contractual obligation. (May 24, 2023 Opinion of the Court at *42). Rather, Plaintiffs' expert claims to have distilled this obligation from the penumbras of various "contracts" between the parties. When questioned about this opinion during his deposition, Mr. Balgowan could offer only unsubstantiated rhetoric and vague references to "inspections" and "contracts":

[3] A copy of this unpublished opinion is attached in accordance with R. 1:36-3.

> Q. What about this contract, though? Jacobs had a contract with the New Jersey Turnpike Authority. Where in that contract was it within Jacobs's scope of work as a chief inspector to go out and do an inspection of all of the road surfaces at structure 40 to look for preexisting problems?
>
> A. They're the inspector. They're the inspecting contractor. They're the consultant hired to do the inspection work. It's their job. That's their contract. That whole work area is the responsibility by contract of Jacobs to do the inspection work.
>
> Q. Is there anything in the project documents that you reviewed in preparing your report that specifically required Jacobs as a chief inspector to go out and identify preexisting dangerous conditions on structure 40?
>
> A. I would have to look at Jacobs's contract, their actual contract, which spells out what their duties were. Again, just based on my own personal experience, there is likely language in the contract. I just can't remember it.
>
> (Pa295 at T57:15 – Pa296 at T58:1.)

Rather than "look at Jacobs's contract," Mr. Balgowan clarified his response, admitting that Jacobs had no contractual obligation to inspect the entire roadway surface for pre-existing conditions.

> A. I want to clarify what you're asking for. There may not be specific language in the contract that tells them that, for example, the resident engineer and the inspectors were required to go out and inspect the entire job for preexisting conditions. However, there clearly will be language in the contract, and I will provide this, that's going to tell, state that Jacobs is responsible for providing the inspection services for the entire project. That would be from beginning of the work area to the end of the work area.

(Pa296 at T58:2 – T59:6).

Balgowan never provided this information. Without more, his testimony has no bearing on the issue of Jacobs's negligence. Jacobs does not dispute that it provided an engineer to serve as construction inspector for the Project. Nor does Jacobs contest that that its inspector was to provide construction inspection services. But that is not enough for Plaintiffs to survive summary judgment. Plaintiffs needed to provide competent expert testimony that the applicable standard of care imposes an affirmative duty to identify preexisting, dangerous conditions. That duty, as Mr. Balgowan cautiously admitted, was not set forth anywhere other than in his own opinion.[4] In fact, even after his deposition, when given an additional opportunity to produce evidence to support his otherwise unsubstantiated position, Mr. Balgowan was unable to do so.

> MR. RANDAZZO: I'm going to make a specific request, Michael, that he identify where in any of the contract documents Jacobs was required or any chief inspector was required to go out and inspect the travel surface for preexisting dangerous conditions.

[4] It is important to note that the contract between NJTPA and Jacobs, and the contract between Urban and Jacobs, both set forth the precise duties of a construction inspector. General safety inspection is nowhere amongst those duties – let alone a specific requirement that a construction inspector assume a duty to identify unrelated, pre-existing roadway defects. (Pa1266).

(Pa296 at T58:11-16; Pa1858-59 (follow up email from Jacobs's Counsel to Plaintiffs' counsel dated November 29, 2021, again asking Mr. Balgowan to provide supporting evidence)).

C. NEITHER THE MANUAL OF UNIFORM TRAFFIC CONTROL DEVICES NOR THE TRAFFIC CONTROL DETAIL ESTABLISH EVIDENCE OF A STANDARD APPLICABLE TO JACOBS

Plaintiffs argue that the trial court did not give sufficient weight to two documents discussed by Balgowan: the Federal Manual on Uniform Traffic Control Devices ("MUTCD") and a New Jersey Department of Transportation "Traffic Control Detail." Plaintiffs' reference to these documents is a classic red herring.

First, these documents only provide guidance on the type of traffic controls, such as signage, that might be implemented after a dangerous condition has been identified. They do not provide any support or information that establishes the standard of care which requires construction inspectors to identify dangerous pre-existing road conditions. Accordingly, they cannot support Balgowan's (net) opinion that Jacobs had an affirmative duty to inspect the entirety of the road surface for pre-existing conditions.

Second, even if Balgowan had established the existence of a dangerous condition, he would still have needed objective support for his opinion that

Jacobs had a duty to identify and remedy that condition. Neither the MUTCD nor the Traffic Control Detail provide that support. Indeed, Mr. Balgowan admitted during his deposition that the Traffic Control Detail was applicable only to contractors -- not engineers, let alone engineers engaged solely in construction inspection. For this reason alone, the standards articulated in the Traffic Control Detail did not apply to Jacobs.

Plaintiffs also allege that the MUTCD supports Balgowan's opinions that "[t]here should have been appropriate advance warning signs installed for at least grooved pavement and bumps," that "[m]otorcycle specific signs should have also been used," and that the "contractor should have provided advance warning signs ahead of the hazard in accordance with the MUTCD." (Report at Pa22-23). Plaintiffs are wrong. The MUTCD does not support Balgowan's opinion. For example, Balgowan relies on Section 2C.33 of the MUTCD. (Pa22-23). Not only does Plaintiffs' argument assume that there existed some alleged dangerous condition, which no one -- even Mr. Balgowan -- can identify, but Section 2C.33 does not set forth a standard regarding appropriate signage. Rather, it sets forth "support" and an "option":

Section 2C.33 Warning Signs and Plaques for Motorcyclists (W8-15, W8-15P, and W8-16)

Support:

01 The signs and plaques described in this Section are intended to give motorcyclists advance notice of surface conditions that might adversely affect their ability to maintain control of their motorcycle under wet or dry conditions. The use of some of the advance surface condition warning signs described in Section 2C.32, such as Slippery When Wet, LOOSE GRAVEL, or ROUGH ROAD, can also be helpful to motorcyclists if those conditions exist.

Option:

02 If a portion of a street or highway features a roadway pavement surface that is grooved or textured instead of smooth, such as a grooved skid resistance treatment for a horizontal curve or a brick pavement surface, a GROOVED PAVEMENT (W8-15) sign (see Figure 2C-6) may be used to provide advance warning of this condition to motorcyclists, bicyclists, and other road users. Alternate legends such as TEXTURED PAVEMENT or BRICK PAVEMENT may also be used on the W8-15 sign.

03 If a bridge or a portion of a bridge includes a metal or grated surface, a METAL BRIDGE DECK (W8-16) sign (see Figure 2C-6) may be used to provide advance warning of this condition to motorcyclists, bicyclists, and other road users.

04 A Motorcycle (W8-15P) plaque (see Figure 2C-6) may be mounted below or above a W8-15 or W8-16 sign if the warning is intended to be directed primarily to motorcyclists.

See Section 2C.33 MUTCD, at p. 123 available at https://mutcd.fhwa.dot.gov/pdfs/2009r1r2/mutcd2009r1r2edition.pdf . (emphasis added).

As defined by Section 1A.13 of the MUTCD, "support" and "options" are not standards:

Section 1A.13 Definitions of Headings, Words, and Phrases in this Manual

Standard:

01 **When used in this Manual, the text headings of Standard, Guidance, Option, and Support shall be defined as follows:**

- **A. Standard—a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device. All Standard statements are labeled, and the text appears in bold type. The verb "shall" is typically used. The verbs "should" and "may" are not used in Standard statements. Standard statements are sometimes modified by Options.**
- **B. Guidance—a statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate. All Guidance statements are labeled, and the text appears in unbold type. The verb "should" is typically used. The verbs "shall" and "may" are not used in Guidance statements. Guidance statements are sometimes modified by Options.**
- **C. Option—a statement of practice that is a permissive condition and carries no requirement or recommendation. Option statements sometime contain allowable modifications to a Standard or Guidance statement. All Option statements are labeled, and the text appears in unbold type. The verb "may" is typically used. The verbs "shall" and "should" are not used in Option statements.**
- **D. Support—an informational statement that does not convey any degree of mandate, recommendation, authorization, prohibition, or enforceable condition. Support statements are labeled, and the text appears in unbold type. The verbs "shall," "should," and "may" are not used in Support statements.**

Section 1A.13 of MUTCD at p. 10.

Accordingly, Section 2C.33 does not set forth a mandatory standard for signage. Instead, it provides an "option" that "carries no requirement or recommendation." Section 2C.33 also provides "support," which "does not convey any degree of mandate [or] recommendation." Indeed, the MUTCD "option" and "support" address situations where there exists some known and identifiable road condition such as grooved or textured street or highway, which do not exist here. Consequently, Plaintiffs' expert provides no support for the argument that Section 2C.33 -- or even the MUTCD -- sets forth a generally accepted standard of care for construction inspectors or engineers under similar circumstances.

II. THE TRIAL COURT CORRECTLY FOUND THAT THERE EXISTED NO RELIABLE EVIDENCE OF A DANGEROUS CONDITION

Even if Plaintiffs had established a standard of care applicable to Jacobs, they still must prove that a dangerous condition actually existed in the roadway. The trial court correctly found, however, that Plaintiffs failed to offer any credible evidence of such a condition.

First, as noted by the trial court in detail,[5] the type and severity of the supposed dangerous condition has been a moving target throughout this litigation. Plaintiffs commenced this action with the vague allegation that Alfred Burr encountered a "defect" in the roadway. Plaintiffs failed to offer any direct testimony or other evidence to corroborate this allegation. Instead, they presented only the opinion of their liability expert, Balgowan.

In his Expert Report and during his first day of deposition, Balgowan opined, "to a degree of engineering certainty," that the dangerous condition was a "sudden" or "abrupt" change in elevation at a bridge joint of at least two inches, without any tapering. (Pa129 at T103:5-11; Pa132 at T106:13-24; Pa186 at T160:25 – Pa187 at T161:11 ("I don't believe there was any taper at all."); Pa274 T36:22-25 ("Q. Your position is that the elevation change in this matter was an immediate elevation change with no taper, correct? A. Correct.")).

On the second day of his deposition, Balgowan was confronted with high-resolution photographs of the subject bridge joint. After seeing the photographs, he completely changed his opinion (and Plaintiffs theory of the case), by opining -- for the first time in this litigation -- that the alleged

[5] May 24, 2022 Opinion of the Court at *47-48.

dangerous condition was merely "insufficient tapering." (Pa284 at T46:5-14 ("I mean, it looks like it happens very, very quickly, but there's no visual abrupt edge like the edge of the deck, the concrete deck, that you cannot see, so something is up there butted up against it. This would not meet any standard for tapers, asphalt tapers.")). This drastic change in position, as the trial court held, is sufficient to deem Balgowan's opinion unreliable and therefore inadmissible pursuant to N.J.R.E. 703.

Second, even Balgowan admits that the "evidence" offered in support of his opinion is unreliable. During the Rule 104 hearing and his deposition, Mr. Balgowan repeatedly testified that he concluded a dangerous condition exited based upon: (1) a video the Plaintiff recorded of the general area of the accident; (2) a memo prepared by project consultant T&M that mistakenly identified "settlement" on the southbound side of the Garden State Parkway; (3) the deposition testimony of Plaintiff Alfred Bur; (4) the Arora bridge inspection report prepared for NJTPA; and (5) a photograph in that bridge report showing the allegedly defective bridge joint. (Transcript of May 9, 2022 Hearing, T133:9-T133:16). None of these items are credible evidence of a dangerous condition .

The Video. Echoing his deposition testimony, Mr. Balgowan admitted at the Rule 104 hearing that the video was meaningless. Specifically, he testified that it was impossible for anyone, including him, to know whether the condition seen in the video was the same condition encountered by Plaintiff Burr on the date of his accident. (T161:5-161:16 and T142:10-142:25). Balgowan also admitted that he did not know the model or year of the truck in the video; what the condition it was in; what the condition of the vehicle's shocks and struts were; or what condition the vehicle's tires were at the time of the recording. (T143:3-144:10). He further testified that he had no knowledge of what type of camera was used to record the video or whether it was hand-held or dash mounted. (T144:11-144:18).

Based on Plaintiffs' expert testimony, the trial court properly concluded that the video was not credible evidence of a dangerous condition.

The T&M Memo. The T&M memo was prepared during construction by a third-party consultant. The consultant mistakenly identified settlement on the southbound Garden State Parkway. As Mr. Balgowan testified during his deposition and the Rule 104 hearing, the memo was contemporaneously corrected to identify settlement on the northbound side of the Parkway and was

therefore useless in assessing road conditions in the area of Mr. Burr's accident. (T166:19-170:10).

Here again, the trial court properly concluded that the T&M memo was not a reliable source of support for Mr. Balgowan's opinion.

The Arora Report. Mr. Balgowan also admitted that the Arora bridge inspection report did not identify any dangerous condition at the subject bridge joint, but rather ranked the joint as being in fair condition. (T135:7-139:5). The court concluded that the bridge inspection report was also not a reliable source of support for Mr. Balgowan's opinion. In addition, the report is hearsay opinion of another expert -- the Arora bridge inspector -- who himself concluded the bridge was not in a dangerous condition.

Photographic Evidence. Finally, at his deposition and the Rule 104 hearing, Mr. Balgowan admitted that there was not a sudden change in elevation "without any tapering." Rather, he testified that the best photographic evidence of the subject bridge joint showed a degree of tapering and that he was relying solely on a photo of the barriers in the background to conclude that there was a change in elevation. (T139:6-140:2). When challenged on this conclusion, (i.e., asked how he could differentiate between

a sudden change and a tapered change), Mr. Balgowan deflected and failed to answer the question. (T129:7-133:16).

Accordingly, neither Plaintiffs nor their expert offered credible evidence of a dangerous condition in the roadway on the date of Mr. Burr's accident. The trial court thus properly held a reasonable fact finder could not conclude that such a condition existed.

II. SUMMARY JUDGMENT WAS PROPERLY GRANTED

New Jersey's Court Rules require that summary judgment be granted when the record demonstrates that "there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 529 (1995). The non-moving party "cannot defeat a motion for summary judgment merely by pointing to any fact in dispute" but, instead, must establish that the dispute concerns material facts. Brill, 142 N.J. at 529.

When applying this standard, courts should consider that summary judgment "can effectively eliminate from crowded court calendars cases in which a trial would serve no useful purpose." Id. at 541 (quoting Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 77 (1954)). Further, the

standard is intended "to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Id. Indeed, "[t]o send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless,' and will 'serve no useful purpose.'" Id.

Summary judgment should be granted in a negligence action where a plaintiff is required to establish the standard of care through expert opinion, but the plaintiff's expert fails to offer any evidential support to establish a standard of care. See, e.g., Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 414 (2014).

Plaintiffs' cause of action against Jacobs is for professional negligence in Jacobs's capacity as a professional engineer. Plaintiffs were required to establish Jacobs's liability through competent expert testimony.

The testimony of Plaintiffs' sole liability expert was properly excluded and thus summary judgment in favor of Jacobs was appropriate.

III. PLAINTIFFS' CLAIM THAT IT WAS DENIED ORAL ARGUMENT HAS NO MERIT

Plaintiffs assert that they were denied oral argument and that this denial amounts to a reversible error. (PB at *12). First, Plaintiffs were not denied oral argument. Indeed, they were given oral argument on all motions for summary judgement. During that argument, despite the fact that there had been full briefing by the parties, the court withheld a decision and gave

Plaintiffs the additional procedural protection of a Rule 104 hearing. Id. at T7:2-16. During the Rule 104 hearing, Plaintiffs presented their liability expert, who was subject to cross examination. Judge Pickering, considered pre-hearing statements and invited post-hearing argument. He also received post hearing briefs. (T10-38). Significantly, Plaintiffs did not raise the issue of needing additional oral argument at any time prior to filing this appeal.

Second, even if Plaintiffs were entitled to additional argument, this is not a basis for reversal. True, Rule 1:6-2(d) provides that absent an exception, (none apply here),[6] requests for oral argument "shall be granted as of right." But Plaintiffs are wrong to argue that the trial court's departure from R. 1:6-2(d) alone is sufficient for reversal. And in telling manner, they do not cite a single binding authority for this proposition.

Instead, Plaintiffs rely on Delgado v. Yourman-Helbig, an unpublished opinion. No. A-3633-20, 2022 N.J. Super. Unpub. LEXIS 1266 (Super. Ct. App. Div. July 13, 2022).[7] This Court is not bound by Delgado. See R. 1:36-3. And even if it were, the case is easily distinguished.

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[6] For example, Rule 1:6-2(d) provides that other than in family actions, motions will not be listed for oral argument unless a party requests such argument in the papers or is directed by the court. The rule also directs that motions involving pretrial discovery or "addressed to the calendar" will only be considered if accompanied by a statement of reasons. Id.

[7] A copy of this unpublished opinion was submitted with Plaintiffs' brief.

Delgado concerned a motion to enforce an attorney's lien. Id. at *4. The judge denied the motion on the papers despite requests for oral argument. Id. at *5. Although the Appellate Division found "merit" in the argument that it should remand because the motion judge "impermissibly denied oral argument," the court noted that the case involved highly contested facts and that the trial court lacked "a proper basis" to make fact findings since it relied only on uncertified and contested representations. Id. at *11, *14. The Appellate Division remanded to allow the parties to "submit affidavits and certifications in support of their factual representations." Id. at *14. Ultimately, the trial court's decision in Delgado was substantively flawed, which independently called for a remand, in addition to deviating from R. 1:6-2(d).

In contrast, a wealth of published authority indicates that the failure to conduct requested oral argument is harmless. For example, in Finderne Heights Condominium Ass'n v. Rabinowitz, the Appellate Division affirmed the trial court's grant of a motion to dismiss on the papers. 390 N.J. Super. 154, 16 (App. Div. 2007). This was despite the Appellate Division's conclusion that the appellant had "every expectation" of oral argument and that the trial court was not justified in failing to hold such argument. 390 N.J. Super. 154, 16 (App. Div. 2007). The Appellate Division reasoned that there

was "no prejudice under the circumstances." Ibid. Likewise, in Spina Asphalt Paving v. Fairview, the Appellate Division, despite finding "no justification" for the trial court to deny oral argument on the parties' motions, held that there was "no prejudice" in its failure to comply with Rule 1:6-2(d). 304 N.J. Super. 425, 427 n.1 (App. Div. 1997).

These cases -- and others -- establish that noncompliance with R. 1:6-2(d) is not a per se reason to remand as Appellant suggests. See also Triffin v. American Intern., 372 N.J. Super. 517, 524 (App. Div. 2004) ("we have no explanation from the motion judge as to why plaintiff's request for oral argument was denied . . . [h]owever, under these circumstances, we are convinced that [she] nevertheless arrived at the proper result . . . [and] her refusal to entertain oral argument is insufficient to require our intervention."); Cobra Products v. Federal Ins. Co., 317 N.J. Super. 392, 396 (App. Div. 1998), certif. den. 160 N.J. 89 (1999) (affirming grant of summary judgment where the motion judge, "for some unknown reason, denied the parties' requests for oral argument and decided the matter on the briefs.").

And this is not a case where the court haphazardly dispensed with oral argument. Rather, the motion judge, seeking to ensure that the parties had a chance to build a record, ordered a Rule 104 hearing. Although a Rule 104 hearing is different from oral argument on a motion for summary judgment,

that distinction is narrow and academic. Here, it was Plaintiffs' burden to prove duty, breach, and causation. To do so, they produced a single liability expert. After the Rule 104 hearing and post-hearing submissions, the court ruled that Plaintiffs' expert and sole proof of liability was unreliable. Plaintiffs' ability to prove duty, breach, and causation, and thus their ability to win at trial, hinged on this now discredited liability expert.

Plaintiffs may not have had oral argument in form, but they certainly had it in substance. Plaintiffs' briefing does not even describe what oral argument would have changed. In sum, Plaintiff complains of a technicality without much elaboration, relies exclusively on unpublished authority, and ignores the published caselaw that contradicts his argument. Plaintiffs just want a second bite at the apple and have not shown that they are entitled to it.

IV. JACOBS ENJOYS DESIGN OR PLAN IMMUNITY

The trial court correctly found that the New Jersey Turnpike Authority enjoys sovereign plan or design immunity. Jacobs, as a consulting contractor, has derivative immunity under the Tort Claims Act. Although the trial court did not reach this issue as it granted judgment as a matter of law on the independent grounds discussed above, Jacobs raised it on summary judgment and it provides an independent basis for this Court to affirm the decision of the trial court. Jacobs is entitled to plan or design immunity under the plain text

of the statute. Moreover, granting Jacobs such immunity is consistent with the underlying public policy of such immunity and New Jersey Supreme Court authority. Weiss v. New Jersey Transit, 128 N.J. 376, 380 (1992). Thompson v. Newark Housing Authority, 108 N.J. 525, 534 (1987); Ellison v. Housing Authority of South Amboy, 162 N.J. 347, 351 (1978)

CONCLUSION

For all the foregoing reasons, the judgment of the trial court should be affirmed.

Respectfully submitted,

RIKER DANZIG LLP

Attorneys for Jacobs Engineering Group, Inc.

By: /s/ Stuart Lederman
Stuart M. Lederman

Date: November 13, 2023

4862-7978-5102, v. 16

Opinion

DOCKET NO. A-2274-18T2

04-29-2020

AFRIDITA ABAS and ZIKO ABAS, Plaintiffs-Appellants, v. ARIMINAS BAGELS, LLC, d/b/a BAGEL HUT, JOANN P. MONTERO, AIA, and WINTERS DESIGN, LLC, Defendants, and EVANS ARCHITECTS, AIA, JOHN EVANS, and MATTHEW EVANS, Defendants-Respondents.

Richard D. Picini argued the cause for appellants (Caruso Smith Picini, PC, attorneys; Richard D. Picini, of counsel and on the briefs). Lawrence P. Powers argued the cause for respondents (Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys; Lawrence P. Powers, of counsel and on the brief; Peter K. Oliver, on the brief).

PER CURIAM

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3. Before Judges Koblitz, Whipple and Gooden Brown. On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3454-15. Richard D. Picini argued the cause for appellants (Caruso Smith Picini, PC, attorneys; Richard D. Picini, of counsel and on the briefs). Lawrence P. Powers argued the cause for respondents (Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys; Lawrence P. Powers, of counsel and on the brief; Peter K. Oliver, on the brief). PER CURIAM

Plaintiffs Afridita and Ziko Abas appeal from the trial court's January 2, 2019 orders granting summary judgment to defendants Evans Architects, AIA, John Evans and Matthew Evans (the Evans defendants) and denying plaintiffs' cross-motion for summary judgment. After reviewing the record in light of the contentions advanced on appeal, we affirm.

We derive the following facts from the evidence submitted by the parties in support of, and in opposition to, the summary judgment motion, viewed in the light most favorable to plaintiffs, who opposed the entry of summary judgment. Elazar v. Macrietta Cleaners, Inc., 230 N.J. 123, 135 (2017).

On September 16, 2013, plaintiff Afridita Abas was working at the Bagel Hut, in Aberdeen, where she slipped on a wet floor, on her way back to the kitchen area of the store, causing her left arm to land in a bagel kettle filled with hot water. She suffered first-degree burns to the left

side of her face, neck and chest, and second-degree burns to her left flank, forearm, and armpit, as well as visible scarring.

Plaintiff's husband Ziko asserts a per quod claim. --------

The Evans defendants designed the original architectural plans for Bagel Hut in 2006. The 2006 design located the bagel kettle near a corridor used by employees to traverse from the front counter area of the store to the back-kitchen area. The 2006 design showed the kettle was shielded and separated from the corridor by two walls. In a 2007 revision to the original design, the Evans defendants changed the location of the kettle by placing it along the corridor and removing the two protective walls which shielded the kettle from passing employees. The 2007 design shows a partition wall extending from the rear kitchen wall towards the kettle, perpendicular to the kettle.

In 2012, defendants Winters Design, LLC, and JoAnn P. Montero, the architect of record, designed architectural plans for Bagel Hut's renovation and expansion. The partition wall extending towards the kettle was demolished as part of the renovation, so at the time of plaintiff's accident, the kettle did not have any wall shielding it.

On September 15, 2015, plaintiff filed a complaint against multiple entities including the Evans defendants, JoAnn Montero and Winters. Plaintiff alleged defendants breached their professional duty of care in negligently designing the layout of Bagel Hut regarding the placement, design, and installation of the bagel kettle.

Plaintiffs' expert William Martin, a licensed professional architect with a background in designing commercial kitchens, visited Bagel Hut in April 2017, to review the premises and observe the site of Afridita's accident. Martin also reviewed multiple layout and construction plans including the 2006 plan, 2007 plan, and the 2012 plan provided to the Aberdeen building department. Martin compiled his observations in a report dated June 28, 2017.

In his report, Martin noted that in the 2006 plan "the bagel kettle [was] located adjacent to the bagel oven and [was] shielded by [two] walls . . . . [T]he layout designer's decision to place the kettle in a location protected by walls acknowledges the proper and safe functioning of this kitchen." In the 2007 plan "[t]he bagel kettle [and oven] [was] now along the travel path for employees to reach the back[-]kitchen work area." Martin noted that in the 2007 plan the kettle "[was] shielded by a single wall . . . [and the] designer's decision to place the kettle . . . along a travel path . . . is potentially a safety issue, however the single wall . . . provide[s] some protection for employees . . . ." In the 2012 plan, Martin found the "walls around the bagel kettle have been removed . . . . This is potentially a safety issue for this kitchen design layout. The layout designer's decision to remove all walls from around the kettle removes any protective shielding preventing accidental contact with the bagel kettle."

Martin's report listed four central observations which, in his professional opinion, compromised the safety of the Bagel Hut facility:

1. Plan layout issues.

2. Bagel kettle equipment located with insufficient clearances and protections for persons.

3. Floor finish materials that contribute to potential slip hazards for persons.

4. Lighting levels that are insufficient for employees to perform their duties in a safe manner.

In his expert report and deposition testimony, Martin asserted that in designing the layout of Bagel Hut with these safety hazards, defendants breached their duty to "recognize the primary obligation to protect the health, safety, and welfare of the public in [their] performance of professional duties, and . . . act with reasonable care and competence."

The Evans defendants moved for summary judgment arguing, among other things, Martin's conclusions constituted impermissible net opinions, and thus, plaintiffs' claims against them should be dismissed with prejudice. Defendants Joan P. Montero and Winters Design also moved for summary judgment.

Subsequently, the Evans defendants filed another motion for summary judgment arguing that there is no causal connection between their alleged negligence and Afridita's injuries. Plaintiffs opposed the motions and filed a cross-motion for summary judgment on the issue of superseding cause.

Oral argument on all motions for summary judgment were heard in November 2018. At that time, plaintiffs withdrew their opposition to defendants Montero and Winters Design motions for summary judgment and conceded that the Evans defendants did not breach their duty of care in designing the 2006 plan, since the plan depicted the kettle being shielded by two walls. Instead, plaintiff contended the professional negligence claim is tied to the 2007 plan which changed the location of the kettle to an area along a travel path without a wall providing enough protection for employees passing by the kettle.

The court granted summary judgment and issued a written decision finding the Evans defendants were entitled to summary judgment as a matter of law because Martin's opinions addressed no specific custom, practice, or standard with which defendants had not complied. The judge concluded defendants violated no professional duty of care, and therefore, Martin's report was a net opinion. The court issued an order granting the Evans defendants' motion for summary judgment and denying plaintiffs' cross-motion for summary judgment.

This appeal followed.

We review a ruling on a motion for summary judgment de novo, applying the same standard governing the trial court. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014) (citations omitted). Thus, we consider, as the motion judge did, "'whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.'" Id. at 406 (citation omitted). If there is no genuine issue of material fact, we must then "'decide whether the trial court correctly interpreted the law.'" DepoLink Court

Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citation omitted).

On appeal, plaintiffs argue the trial judge erred in rejecting Martin's report as a net opinion and granting summary judgment in favor of the Evans defendants. Plaintiffs also contend the court erred in failing to grant their cross-motion for summary judgment. Since a trial court, when "'confronted with an evidence determination precedent to ruling on a summary judgment motion . . . must address the evidence decision first,'" we review the trial court's decision in that sequence. Townsend v. Pierre, 221 N.J. 36, 53 (2015).

Plaintiffs argue the trial court erred finding Martin did not identify an industry standard the Evans defendants violated when they placed the bagel kettle next to a pathway employees used to access the back-kitchen. Martin's opinion relied on the standard set forth in N.J.A.C. 13:27-5.1(a):

An architect shall at all times recognize the primary obligation to protect the health, safety and welfare of the public in the performance of professional duties, shall act with reasonable care and competence, and shall apply the technical knowledge and skill which are ordinarily applied by architects of good standing, practicing in the same locality.

Plaintiffs argue that Martin's reliance on N.J.A.C. 13:27-5.1(a) does not establish the duty of care, but addresses the overall competence of the 2007 plan, which moved the bagel kettle from its shielded position leaving it adjacent to a pathway to the kitchen, deviating from an accepted architectural duty of care and creating an unnecessary hazard for employees. Plaintiff asserts Martin is highly qualified as he is a licensed architect who designed at least sixteen commercial kitchens and was informed by the recommended kitchen layout published by a bagel kettle manufacturer and the Evans defendants 2006 plan.

Plaintiff also asserts that while N.J.A.C. 13:27-5.1(b) requires compliance with all applicable statutes, regulations, and building codes, and the code prohibits the knowing violation of the same, there is nothing in the code which limits an architect's obligations to mere compliance with the applicable statutes, regulations and building codes. Plaintiff further asserts that an experienced architect should not be precluded from offering an opinion on a deviation from the accepted architectural practice because the complained of conduct did not violate a building code.

"'[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.'" Davis, 219 N.J. at 406 (citation omitted). In most negligence cases, plaintiffs need not prove the standard of conduct violated by the defendant because it "is sufficient for [a] plaintiff to show what the defendant did and what the circumstances were," Sanzari v. Rosenfield, 34 N.J. 128, 134 (1961), and these cases include facts where "'a lay person's common knowledge is sufficient to permit a jury to find that the duty of care [had] been breached . . . .'" Davis, 219 N.J. at 407 (quoting Giantonnio v. Taccard, 291 N.J. Super. 31, 43 (App. Div. 1996)).

In professional negligence cases, however, the standard of care must normally be established by expert testimony, because a jury should not be permitted to speculate, without an expert's

guidance, on issues where lay persons have insufficient knowledge or experience. See Rosenberg v. Cahill, 99 N.J. 318, 325 (1985); see also Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. 1997) (finding juries should not be permitted to speculate, without expert testimony, in areas where lay persons are not expected to have sufficient knowledge.). In these cases, a "plaintiff must produce expert testimony upon which the jury could find that the consensus of the particular profession involved[,] recognized the existence of the standard defined by the expert." Taylor v. DeLosso, 319 N.J. Super. 174, 180 (App. Div. 1999).

Since a jury may give substantial weight to an expert's testimony, "expert[s] may not provide an opinion at trial that constitutes [a] 'mere net opinion.'" See Davis, 291 N.J. at 410 (citation omitted); see also Townsend 221 N.J. at 55. The net opinion rule renders an expert's report inadmissible if the expert's conclusions "lacks an appropriate factual foundation and fails to establish the existence of any standard about which the expert testified." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 373 (2011) (citation omitted). If an expert cannot offer objective support for his or her opinions, but offers only a standard that is "personal," the opinion is a mere net opinion. Ibid. Experts cannot provide conclusions based solely on "'unfounded speculation,'" Townsend, 221 N.J. at 55 (citation omitted), but instead, must bring forth the "why and wherefore" of their expert opinion to be admissible, Pomerantz, 207 N.J. at 372 (citation omitted).

A regulatory code or standard can be "evidence of due care but is not conclusive on the subject." Black v. Public Serv. Elec. & Gas Co., 56 N.J. 63, 77 (1970). In Davis, 219 N.J. at 401, the Court found that plaintiffs, whose children were killed in a hotel fire, did not establish the necessary requirements of their negligence claim because their expert's report was an inadmissible net opinion. There, plaintiffs sued the defendant fire inspectors for negligently failing to inform the hotel manager of the need to install a sprinkler in a storage closet. Id. at 402. Plaintiff's expert asserted in both his report and deposition that a reasonable sprinkler inspector would have informed the owner of the hotel about the need for an additional sprinkler in the closet. Id. at 410. While the Court noted that plaintiff's expert referenced several National Fire Protection Association standards in his report and provided a brief discussion of a few fatal fires that may have been fueled by the storage of combustible materials in stairwells, the Court found none of the sources lent support to the expert's conclusions regarding the actions a reasonable inspector would have taken. Id. at 411-13. Because plaintiff's expert provided no reference to any written document, or even unwritten custom or practice, his personal view was an inadmissible net opinion. Id. at 413-14; see Taylor, 319 N.J. Super. at 184 (holding plaintiff's expert rendered a net opinion because he presented no authority to support his opinion that an architect had a duty to make a site inspection for small sites.).

Here, Martin's opinion did not support the conclusion that the Evans defendants breached their professional standard of care in the 2007 plan. Martin made no reference to a written document, or an unwritten custom or practice, and did not buttress his opinion with any applicable regulations, codes or customs that illustrate that the Evans defendants breached their standard of care in designing the 2007 plan.

Martin asserted the Evans defendants did not meet the standard of care required under N.J.A.C. 13:27-5.1(a) because the 2007 decision to place the bagel kettle along the travel path created a

potentially dangerous condition for employees. However, he provided no authority to support the conclusion that the design plan fell below the level of competence required by the general safety statute, N.J.A.C. 13:27-5.1. Martin found no specific code violation and conceded he found no federal, state, county, or municipal statutes, regulations or ordinances regarding the spacing around a bagel kettle. Instead, Martin premised his opinions on his experience as an architect and his background in designing commercial kitchens, the Evans defendants 2006 plan, and the recommended kitchen layout published by a bagel kettle manufacturer. The lack of a specific code violation is not dispositive of the issue of whether the Evans defendants complied with the applicable standard of care, but Martin provided insufficient reasons to demonstrate his conclusions were not based on his personal view of N.J.A.C. 13:27-5.1.

Martin provided no violations of generally accepted standards, practices or customs, to illustrate that the deviation from the 2006 plan design fell below standards of care. Martin's reliance on the recommended kitchen layout published by a bagel kettle manufacturer is not supported by evidence that it is an industry standard rather than a suggestion by a manufacturer.

Thus, we discern no error in the court's determination to grant summary judgment because plaintiffs' expert's opinions are barred as net opinions. Since plaintiff has failed to satisfy the elements of their negligence claims, we need not reach plaintiffs' additional arguments.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

ALFRED H. BURR AND ALYSSA BURR, H/W, **Plaintiffs-Appellants,** **vs.** **NEW JERSEY TURNPIKE AUTHORITY; MIDATLANTIC CONSTRUCTION, LLC; C.J. HESSE INC.' THE HESSE COMPANIES; JACOBS ENGINEERING GROUP, INC.; URBAN ENGINEERS, INC.; JOHN DOE, MARY DOE, ABC BUSINESS ENTITIES AND XYZ CORPORATIONS,** **Defendants-Respondents.**	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002866-22 T2 **CIVIL ACTION** On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION, ATLANTIC COUNTY DOCKET NO.: ATL-L-1997-16 Sat Below: Hon. James H. Pickering, Jr., J.S.C. Hon. Joseph L. Marczyk, P.J.Cv. Date Submitted: December 13, 2023

BRIEF OF DEFENDANT-RESPONDENT NEW JERSEY TURNPIKE AUTHORITY

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PRELIMINARY STATEMENT

Defendant-Respondent, New Jersey Turnpike Authority (the "Authority") submits this brief in opposition to plaintiffs-appellants Alfred H. Burr (individually "Plaintiff") and his wife Alyssa Burr's (collectively "Plaintiffs") appeal from the order and judgement of the trial court dated April 10, 2023 and June 14, 2023 which granted summary judgment to the Authority and dismissed the Complaint based on Plaintiffs' failure to meet the requirements under the New Jersey Tort Claims Act.

This personal injury claim arises out of a September 2015 motorcycle accident which occurred on the Garden State Parkway. Plaintiff was traveling southbound in the left-hand lane of the roadway. As Plaintiff approached a bridge, he lost control of his motorcycle and crashed into the concrete median barrier. Plaintiff alleges that the accident occurred due to a dangerous condition -- a change in elevation in the roadway at the abutment joint between the pavement and bridge. At the time of the accident, a road widening project was ongoing, with multiple construction and engineering contractors on site. None of the eyewitnesses to the event, including Plaintiff, were able to identify a dangerous condition in the roadway that caused Plaintiff's motorcycle to lose control. Plaintiff's expert, Richard Balgowan, PE speculated that an elevation change resulted in the accident despite no other accidents having occurred in the area and no prior complaints

having been submitted to the Authority. Plaintiff's expert did not conduct an examination of the roadway, the motorcycle, nor did he perform any tests to reconstruct the accident.

The trial court found for the Authority on summary judgment and determined that Plaintiff failed to satisfy the elements of a cause of action under the New Jersey Tort Claim Act, N.J.S.A. 59:4-2. Plaintiff claims that the trial court committed reversable error: 1) in its analysis and application of the TCA; 2) by not holding oral argument; and 3) in barring the net opinion testimony of Plaintiff's expert, Mr. Balgowan. The exhaustive procedural history, including submission of legal briefs, a full-day evidentiary hearing, and post-hearing submissions, amply establishes that the trial court's application of the TCA was based on a detailed analysis of the roadway condition at issue and thorough exploration of the basis of the opinions set forth by Mr. Balgowan.

It is undisputed that five months prior to the accident, a non-party engineering firm inspected the abutment joint at issue, took note of an elevation change and did not indicate it was a dangerous condition in need of emergent repair. In fact, the engineering firm rated the roadway and bridge as being in "satisfactory" condition and the approach was in "fair" condition. Furthermore, there were no prior complaints or accidents in the area. Moreover, Plaintiff, Plaintiff's wife, Plaintiff's friend, and the New Jersey State Trooper who

responded to the accident, were unable to identify any roadway condition that caused the accident. Additionally, none of the Authority contractors who were working in the area reported any roadway conditions requiring emergent repair.

Based on its thorough review of all the evidence and testimony, the trial court correctly concluded: 1) the elevation change was not a "dangerous condition" and did not give rise to a claim under the TCA; 2) the Authority was not provided actual or constructive notice of a dangerous condition in the area of the accident; 3) Plaintiff failed to establish that the elevation change caused the accident; and 4) the Authority's conduct was not palpably unreasonable.

After a full-day 104 Hearing, the trial court appropriately determined that Mr. Balgowan expressed inadmissible net opinions that were not based on any engineering or scientific data. Mr. Balgowan conceded he is not an expert in the field of accident reconstruction and that he did not perform any calculations concerning the subject condition or the physical forces associated with the incident. Furthermore, he conceded that because the photographs he reviewed were not three-dimensional, he was unable to determine how significant the elevation change was that plaintiff encountered. Consequently, the trial court did not commit reversable error in its analysis of the TCA and its determination that plaintiff failed to establish all the elements required by the TCA to maintain a cause of action against the Authority.

PROCEDURAL HISTORY

This matter arises out of a motorcycle accident that occurred on September 12, 2015. On that date, Plaintiff Alfred H. Burr was the operator of a motorcycle that was traveling southbound on the Garden State Parkway in Galloway Township, Atlantic County, New Jersey. As Plaintiff was traveling in the left-hand lane between approximately mile marker 39.9 and 40.1, he came to a declivity in the roadway and lost control of his motorcycle which caused him to crash into the concrete barrier. (**Pa000l**).

On September 7, 2016, the Complaint was filed against the Authority. (**Pa1550**).

On September 30, 2016, the Authority filed an Answer. (**Pal559**).

The Complaint was amended four times. (**Pa1576, Pa1613, Pa1650, Pa1698)**

On January 7, 2022, Defendants Urban Engineers, Inc. and Jacobs Engineering Group, Inc. filed Motions for Summary Judgment. (**Pa1881, Pa1841**)

On January 21, 2022, the Authority filed a Motion for Summary Judgment. (**Pa1887**)

On February 8, 2022, Plaintiff filed Opposition to the Summary Judgment motions. (**Pa1948, Pal960, Pa1968**).

On February 8, 2022, Midlantic Construction, LLC filed a Motion for Summary Judgment. (**Pa1934**).

On February 22, 2022, Plaintiff filed Opposition to Midlantic's Summary Judgment motion. (**Pa1978**).

On February 28, 2022, Reply Briefs were filed on behalf of Jacobs, Urban and Midlantic. (**Pa2000, Pa2009, Pa2003**)

On March 1, 2022, the Authority filed a Reply Brief. (**Pa2015**).

On March 24, 2022, Defendants Motions were denied without prejudice pending the outcome of a Rule 104 Hearing. (**Pa2025**).

On May 9, 2022, the Rule 104 Hearing took place before the Honorable James Pickering Jr., J.S.C. (**Pa1422**).

On June 14, 2022, all parties submitted post-hearing briefs. (**Pa2027, Pa2037, Pa2069, Pa2085, Pa2087**).

On April 10, 2023, Judge Pickering entered an Order and Opinion granting Defendants' Motions for Summary Judgement. (**Pa2113**).

On June 14, 2023, Judge Pickering signed an amended Order granting Defendants' Motions for Summary Judgment and dismissing the case. (**Pa2171**).

On May 24, 2023, Plaintiffs filed a Notice of Appeal. (**Pa2174**).

STATEMENT OF MATERIAL FACTS

a. **The accident and condition of the roadway**

1. On September 12, 2015, at approximately 1:00 p.m., Plaintiff, Appellant, Alfred H. Burr, was traveling on his motorcycle in the left travel lane of south bound side of the Garden State Parkway (the "Parkway") when he approached a bridge at mile marker 40.0 of the Parkway (the "Structure 40 Bridge"). (See **Pa0001; Pa1698**).

2. As Plaintiff began to cross the Structure 40 Bridge, his back tire failed, he lost control of his motorcycle, and he veered toward the guardrail pinning his left leg between the motorcycle and the guardrail. (See **Pa0001; Pa1698**).

3. Plaintiff alleges that Defendants were negligent in that they failed to inspect and maintain the subject location and/or caused the defect that led to the accident. (See **Pa1698**).

4. Plaintiff does not know why he lost control of his motorcycle nor did he see any roadway defect, but does remember the area being under construction. (See **Pa0001; Pa0378-00379 at 15:25-16:1-17; Pa0384-00385 at 21:23-22:6).**

5. Prior to the accident, Plaintiff had ridden his motorcycle 20-25 times on this section of the Parkway. (See **Pa0378 at 15:7-9**).

6. Plaintiff's front tire did not jump prior to his back tire failing. (See **Pa0519 at 35:11-15**).

7. Plaintiff testified that he could not state that the defect in the roadway was the expansion joint which separated the approach from the bridge. (See **Pa0524-0528 at 40:7-43:24**).

8. Plaintiff testified that he never saw any defect, debris, or pothole in the roadway. After the accident, he went back to the area and recorded a video depicting the roadway in question for his "peace of mind," but again did not see anything in the road. (See **Pa0001; Pa0378 at 15:25- Pa0379 at -16:17; Pa0397 at 34:3-12; Pa0526 at 42:20-25)**

9. Plaintiff's wife, Alyssa Burr, and his friend, Douglas Ferrera, who were traveling in separate vehicles alongside Plaintiff on the date of the accident, testified that they did not see a condition in the road they believed was dangerous. (See **Pa0564 at 10:13-19; Pa0564 at 13:1-9; Pa0859 at 22:2-10, Pa0860 at 23:19 - Pa0861 at 24:9)**

10. New Jersey State Police Trooper Jones ("Trooper Jones"), who responded to the accident, did not see any debris or pothole on the road that was significant and stated that if there was anything of significance, it would have been noted in the report. (See **Pa0001; Pa0899 at 10:7 - Pa0901 at 12:12**; **Pa0908 at 19:4-20; Pa0909 at 20:7-9; Pa0885 at 14:2-8)**

11.One aspect of Trooper Jones' job is to identify roadway defects. He did not recall any sort of uneven elevation or anything. (See **Pa0911 at 22:17-22; Pa0913 at 24:3-7**)

12.Trooper Jones testified that he traveled the area frequently and if there was something obvious he would have seen it. (See **Pa0908 at 19:8-12**)

13.A Biennial Bridge Inspection Report prepared by Arora and Associates, P.C. dated April 22, 2015 states there is "settlement at the southbound north abutment joint up to 2". Small in the southbound north approach roadway." The appraisal of the approach was "Fair (5)" and it was stated at the top of the Conclusions and Recommendations section that "the overall condition of Structure 40.0 is satisfactory." (See **Pa1343, Pa1349**).

14.Plaintiff attempted to establish that the north abutment needed repair by introducing a memo prepared by the engineering firm T&M Associates. Initially the T&M memo referenced settlement in the north abutment. However, Robert Matthews, the project design engineer for Gannett Fleming, sent a follow-up email on July 7, 2015 discussing the content of the T&M Memo. Within the email, project engineer Matthews expressly corrected the content of the T&M memo with respect to the location of the observed settlement. As per Matthews, the settlement existed along the south abutment as opposed to the north abutment as noted in the memo. (See **Pa1191-1200**)

15.Mr. Balgowan testified he had no reason to question the veracity of the Matthews email. (**3T at 168:9-170:10**)

16.At the time of the accident, the area in question was under construction pursuant to Contract P200.254. The contractors were required to make the roadway safe for travel in addition to the roadway maintenance and modification under the contract. (See **Pa1202**)

17.The responsibility of the contractors to inspect the roadway and keep it safe was echoed by Mr. Wood of Urban Engineers, Mr. Murray of Midlantic, and Mr. Johnson from the Authority during their respective depositions. **(**See **Pa0725; Pa0785; Pa0795; Pa0674).**

18.Jacobs had a sub-consulting contract with Defendant Urban for Urban to supervise the work being performed by Midlantic on the GSP. (See **Pa1265**).

19.The Authority was never put on notice of a dangerous condition requiring emergent repair by any of its contractors.

b. Plaintiffs Liability Expert Report and Testimony

20.In support of Plaintiff's claims, Plaintiff served the December 3, 2020 expert report of Richard M. Balgowan, P.E. (See **Pa0004**).

21.In his report, Mr. Balgowan opines that:

a. the incident crash occurred when Alfred Burr, riding a motorcycle, encountered a two-inch change in grade, in the left lane, that was perpendicular to the center line of the roadway. (See **Pa025-0026**).

b. the depth, width and location of the settlement/elevation change created a dangerous condition that caused Alfred Burr to lose control of his motorcycle and crash. (See **Pa0025-0026**).

c. had the defect been repaired properly (even temporarily), constructed with proper slope and compaction, the motorcycle's tires would not have hit such a drastic defect and would not have been a cause of Alfred Burr's injuries. (See **Pa0025-0026**).

d. the failure to abate the incident pavement defect was improper, created a dangerous condition and was a cause of the Alfred Burr incident. (See **Pa0025-0026**).

22. Plaintiff's expert Richard Balgowan was deposed over the course of two days. October 20, 2021 and November 24, 2021. He also provided testimony with respect to his opinions at a 104 Hearing on May 9, 2022. (See **Pa0027; Pa0239; 3T**).

23. Mr. Balgowan testified that he possessed no information memorializing any prior accidents in the area of Plaintiff's accident; he did not perform any calculations concerning the physical forces associated with the accident, nor did he

inspect the motorcycle following the accident. Moreover, Mr. Balgowan testified that he is not an expert in the field of accident reconstruction. **(**See **Pa0074-0080 at 48:22-54:9; Pa 86-87 at 60:11-61:2; Pa0201 at 175:1-17; Pa0216 at 190:10-20; Pa0276-78 at 38:22-25, 39:6-40:22).**

24.Mr. Balgowan also testified at the 104 Hearing that the Biannual Bridge Inspection Report did not state the condition was dangerous or in need of repair. **(3T at 231:1-4**).

25.On the first day of his deposition, Mr. Balgowan testified that his opinion that a dangerous roadway condition caused Plaintiff's accident is predicated upon his understanding that an ***abrupt*** 2" change in roadway elevation existed at the location of Plaintiff's accident involving ***no*** tapering of the roadway surface. **(**See **Pa0186-0087 at 160:25-161:18).**

26.On the second day of his deposition, Mr. Balgowan's testimony regarding the nature of the condition that allegedly caused Plaintiff's accident materially changed. When shown a close-up photograph of the subject condition, Mr. Balgowan conceded that there was some level of tapering. **(Pa0285 at 47:14-16; Pa1918).**

27.Mr. Balgowan testified that he never physically saw the change in elevation and that all he could go by were the photographs. Furthermore, he testified that

because the pictures were not three dimensional, he could not tell how significant or dangerous it was. (**3T at 225:5-226:7**).

28. Additionally, Mr. Balgowan was unaware of any other accidents that occurred in the subject area and recognized the Garden State Parkway is a highly traveled roadway. (**3T at 121:21-122:20**).

29. As to the video taken by Plaintiff, Mr. Balgowan conceded that there was no way to know if the truck in the video traveled over the same ground as Plaintiff did on his motorcycle on the date of the accident. Mr. Balgowan admitted that it is impossible to know whether the bump observed in the video was caused by the same condition that allegedly caused Burr's accident. Mr. Balgowan testified "nobody could know" if the motorcycle Burr was riding went over the same ground as the truck during the video recording. (**3T at 32:18-33:17, 76:17-78:25, 114:6-14, 141:14-143:2, 160:10-161:17**)

30. During his 104 Hearing, Mr. Balgowan agreed that the use of warning signs should be kept at a minimum because unnecessary use of warning signs breeds disrespect for all signs. (**3T at 214:1-7**).

STANDARD OF REVIEW

When evaluating whether summary judgment was proper a de novo standard of review is applied. Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558, 564 (2012). This is the same standard as is used for review of conclusions of law.

Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 385 (2010). As such, "[i]n reviewing a trial court's evidential ruling, an appellate court is limited to examining the decision for abuse of discretion[,]" Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008). The Court must first decide if there is a genuine issue of material fact, and if none exists, whether the moving party is entitled to judgment as a matter of law. Brill v. The Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995). In Brill, the New Jersey Supreme Court held that a motion for 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 nonmoving party… If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2. The import of our holding is that 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.

Brill, *supra*, 142 N.J. at 540. The Court must not "ignore the elements of the cause of action or evidential standard governing the cause of action." Stewart v. New Jersey Turnpike Authority, 249 N.J. 642, 655 (2021), citing Bhagat v. Bhagat, 217 N.J. 22, 38 (2014).

Furthermore, evidentiary rulings, such as the trial court's decision that the Balgowan report constituted an inadmissible net opinion, are reviewed for abuse of

discretion. State v. Erazo, 126 N.J. 112, 131 (1991). To the extent that the award or denial of summary judgment turns "on the admissibility of evidence, an appellate court reviews the trial court's underlying evidentiary determination for an abuse of discretion." State v. Garcia, 245 N.J. 412, 430 (2021). This standard applies to a trial judge's ruling that an expert's report constitutes an inadmissible net opinion. Pomerantz Paper Corp. v. New Community Corp., 207 N.J. 344, 371 (2011); Riley v. Keenan, 406 N.J. Super. 281, 295 (App. Div.), *cert. den'd* 200 N.J. 207 (2009). A decision to admit or exclude evidence "must stand unless it can be shown that the trial court palpably abused its discretion" and entered an order "so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY APPLIED THE STATUTORY REQUIREMENTS AS SET FORTH IN THE NEW JERSEY TORT CLAIMS ACT IN GRANTING SUMMARY JUDGMENT

The Legislature passed the TCA after the New Jersey Supreme Court abolished the common law doctrine of sovereign immunity in Willis v. Department of Conservation & Economic Development, 55 N.J. 534, 540-41 (1970). Vincitore ex rel. Vincitore v. N.J. Sports & Exposition Auth., 169 N.J. 119, 124 (2001). In doing so, the Legislature provided that public entities could only be held liable for

negligence "within the limitations of [the TCA]." N.J.S.A. 59:1-2. Application of the summary judgment standard must therefore account for the fact that under the TCA, "immunity [of public entities] from tort liability is the general rule and liability is the exception." Coyne v. Dep't of Transp., 182 N.J. 481, 488 (2005) (quoting Garrison v. Township of Middletown, 154 N.J. 282 (1998)); see N.J.S.A. 59:1-2. Thus, "[w]hen both liability and immunity appear to exist, the latter trumps the former." Tice v. Cramer, 133 N.J. 347, 356 (1993).

Pursuant to the TCA, N.J.S.A. 59:4-2, a public entity may be held liable for an "injury caused by a condition of its property" if (but, only if) the plaintiff establishes each of the following elements:

1) the property was in a "dangerous condition" at the time of the injury;

2) that the injury was proximately caused by the dangerous condition;

3) the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred;

4) the dangerous condition was either created by "a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment," or the "public entity had actual or constructive notice of the dangerous condition … a sufficient time prior to the injury to have taken measures to protect" against the dangerous condition; and

5) the conduct of the entity in acting "to protect against the condition" or in failing "to take such action" was "palpably unreasonable."

These elements are "accretive; if one or more of the elements is not satisfied, a plaintiff's claim against a public entity alleging that such entity is liable due to the condition of public property must fail." Polzo v. County of Essex, 196 N.J. 569, 585 (2008).

a. The trial court correctly held that plaintiff failed to establish that the elevation change was a "dangerous condition" under the Tort Claims Act.

The trial court correctly found that Plaintiff failed to establish a "dangerous condition" as defined by the TCA. The Tort Claims Act, N.J.S.A. 59:4-1(a) defines a "dangerous condition" as "a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." A substantial risk is "one that is not minor, trivial or insignificant," and presents a more stringent burden than that of mere negligence. Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985) (quoting Polyard v. Terry, 160 N.J. Super. 497, 509 (App. Div. 1978), *aff'd o.b.*, 79 N.J. 547 (1979)).

The Supreme Court has recognized that, while "[p]otholes and depressions are a common feature of our roadways… 'not every defect in a highway, even if caused by negligent maintenance, is actionable.'" Polzo v. County of Essex, 209 N.J. 51, 64 (2012) (quoting Polyard v. Terry, 160 N.J. Super. 497, 508 (App. Div. 1978), *aff'd o.b.,* 79 N.J. 547 (1979)). The focus is on whether a reasonable person

using the property with due care could fact substantial risk of injury. Garrison v. Township of Middletown, 154 N.J. 282, 292 (1998). With respect to a surface irregularity, a substantial risk is a risk that is neither minor, trivial, nor insignificant. Polyard v. Terry, 160 N.J. Super. at 509. The determination of a dangerous condition is subject to the court's preliminary assessment of whether a reasonable factfinder could conclude from the evidence presented by plaintiff that the property was in a dangerous condition. Vincitore v. Sports & Expo. Auth., 169 N.J. 119, 123 (2001).

In this case, Plaintiff claims that the dangerous condition that caused the incident at issue was a 2" elevation change between the surface pavement at a southern deck approach joint at the north abutment of a bridge located between mile marker 39.9 and 40.1 on the southbound Garden State Parkway. (See **Pa 1; 1550**). In performing its analysis and rendering its decision, the trial court conducted an extensive review of all discovery obtained during litigation including: 1) testimony of the parties, 2) photographs and video depicting the condition at issue, 3) Plaintiff's expert opinion and testimony regarding same, and 4) engineering inspection reports and memos. (**Pa2119 – Pa2139**). The trial court correctly observed that this matter was analogous to Polyard v. Terry, *supra*, where the Appellate Division held that a declivity in the road between a bridge and an

adjoining highway was not a "dangerous condition" within the meaning of N.J.S.A. 59:4-1. Id. at 501-510.

i. Testimony of Plaintiff, his wife, his friend and investigating officer fails to provide evidence of dangerous condition.

In reviewing the deposition testimony, the trial court correctly observed that Plaintiff had difficulty describing the condition with any precision. (**Pa2144**) (**Pa2119-Pa2123; Pa2168**). Plaintiff testified that he never saw anything in the road, no defect, debris, or pothole and had no idea what caused the accident. (See **Pa0378-0079 at 15:25-16:17; Pa0517 at 33:14 - Pa0518 at 34:12)**. Furthermore, when Plaintiff went back and reviewed video he took of the roadway, he steadfastly testified that he did not know what caused him to lose control. (**Pa2121; Pa2168**) (**See Pa0378 at 15:25 - Pa0379 at 16:17; Pa0517 at 33:14 - Pa0518 at 34:12).** The trial court also cited to the testimony of Plaintiff's wife and friend who were riding alongside plaintiff and did not see anything in the roadway and still do not know exactly what Plaintiff hit. (**Pa2121-2123; Pa2168**) (**See Pa0859, Pa0861 at 4:8-9**; **Pa0870 at 33:19-24**). The trial court also noted that the New Jersey State Police report and testimony of the investigating State Police Trooper did not indicate that any debris or condition of the road contributed to or cause the subject accident. (**Pa2123, Pa2168**). In fact, Trooper Jones testified that he patrols the area multiple times a day; he had to travel south prior to arriving at the accident; he did not recall see any debris or potholes in the road; and if he had

seen anything of significance, he would have noted it in his report. (**Pa2124**; **Pa0911, Pa0914 at 19:3-15 - Pa0915 at 22:10-23**).

Based in part on eyewitness testimony, the trial court correctly found that Mr. Burr, his wife, his friend and the investigating officer, did not observe a dangerous condition in need of emergent repair.

ii. The Arora Biennial Bridge Inspection Report fails to provide evidence of a dangerous condition.

In reviewing the Arora Biennial Bridge Inspection Report dated April 22, 2015, the trial court correctly found that there was no indication of a dangerous condition requiring emergent repair. Specifically, the Arora report stated there was, "settlement at the southbound north abutment joint up to 2". Small in the southbound north approach roadway." The appraisal of the approach was, "Fair (5)". The Conclusions and Recommendations section states that "the overall condition of Structure 40.0 is satisfactory." The Maintenance Repair and Recommendations section states as item number 2: "Repair joints at abutments and pier. See photos 11, 12, and 14." Photograph 14 is described as: "Southbound north abutment joint looking east. Ramped up and deteriorated in the left shoulder and left lane. Small pothole in the north approach roadway." (**Pa2123**) (**See Pa1202; 1343**; **1349; 1358**). The trial court found that there was nothing in the Arora report that would allow anyone to reasonably conclude that there was a defect in the road so severe or so dangerous that immediate action was required. To the contrary, the

report stated that the repairs should be made as part of regular maintenance. (**See Pa2145; Pa2166; Pa2168**).

Based in part on the Arora report, the trial court correctly found that the roadway was in satisfactory condition and there was no indication that there was a dangerous condition in need of emergent repair.

iii. The photographs of the road elevation fail to establish a dangerous condition.

The trial court reviewed the photographs of the roadway and condition at issue and correctly found that they do not depict a dangerous condition. (**See Pa2145**) Specifically, the court noted that the Arora report and photographs only vaguely described the condition. (**See Pa2146**). The photographs do not show a hole or an abrupt 2" elevation change or defect. (**See Da042; Da030; Pa2166; Pa2167**). None of the photographs can lead any reasonable person to conclude that the condition was a dangerous condition that should have been identified on routine inspections. (**See Pa2168**). Based in part on its review of the photographs, the trial court correctly found that there were insufficient information to create an inference of a dangerous condition.

iv. The opinions and testimony of Plaintiff's expert Richard Balgowan, PE fail to establish dangerous condition.

The trial court performed a thorough review Mr. Balgowan's opinions by reviewing his report as well as his deposition and 104 Hearing testimony. In

reviewing Mr. Balgowan's deposition testimony, the trial court noted the following: Mr. Balgowan repeatedly stated that it was difficult to state with any accuracy the dimensions of the alleged dangerous condition because the photographs were not three-dimensional. (**See Pa2144**). Mr. Balgowan did not perform any calculations concerning the physical forces associated with the incident. (**See Pa2166**). He never inspected Burr's motorcycle following the accident. (**See Pa2125**). He is not an expert in the field of accident reconstruction. He didn't make any attempt to reconstruct the crash. (**See Pa2125**).

In reviewing Mr. Balgowan's 104 Hearing testimony, the trial court noted the following: Mr. Balgowan did not believe that every bump in the road required a sign. (**See Pa2123**). He agreed that the use of warning signs should be kept to a minimum, as the unnecessary use of warning signs tends to breed disrespect for all signs. (**See Pa2123**). He agreed that nothing in the Arora Biennieal Bridge Inspection Report stated the condition was dangerous or in need of repair. (**See Pa2123**). He had no reason to dispute that a memo from T&M that initially referenced settlement at the north abutment was corrected in an email from Gannett Fleming to reflect settlement observed at the south abutment. (**See Pa2133**). Mr. Balgowan testified that he never physically saw the change in elevation. (**See Pa2138).** He did not know how bad it was. He cannot tell from any picture. (**See Pa2138).** He sees an elevation change but cannot tell how significant

it was or how dangerous it was. (**See Pa2138).** He does not know if a motorcycle could go over the condition without crashing. (**See Pa2138**).

Additionally, the trial court noted that Mr. Balgowan conceded that there is no way to know if the truck in the video traveled over the same ground as Plaintiff's motorcycle on the date of the accident (**See Pa2134; Pa2167**); he conceded that it is impossible to know whether the bump observed in the video was caused by the same condition that allegedly caused Plaintiff's accident (**See Pa2134; Pa2167**); and he testified "nobody could know" if the motorcycle Plaintiff was riding went over the same ground as the truck during the video recording. (**See Pa2134; 3T at 32:18-33:17, 76:17-77:17, 141:14-143:2, 114:6-14, 160:10-161:17**).

Based in part on a thorough examination of Mr. Balgowan's opinions, the trial court correctly determined that Mr. Balgowan did not provide any reliable information that supported Plaintiff's contention that there was dangerous condition.

As such, it is respectfully submitted that plaintiff failed to establish a dangerous condition in the roadway so severe that it created a substantial risk of injury.

b. The trial court correctly held that plaintiff failed to establish that a dangerous condition caused the accident.

The trial court correctly held that plaintiff failed to establish that the alleged dangerous condition was the proximate cause of the accident as required by N.J.S.A. 59:4-2. As Plaintiff, and the eyewitnesses to the accident were unable to identify the condition that caused the motorcycle to lose control, Plaintiff sought the expert opinion of Mr. Balgowan to establish causation. The court noted that Mr. Balgowan's opinion regarding the dangerous condition that caused the accident changed throughout the litigation and was unreliable. (**See Pa2165**). Mr. Balgowan testified that he did not inspect the roadway and based his opinion on: (1) a video the Plaintiff recorded of the general area of the accident; (2) a memo prepared by project consultant T&M that mistakenly identified "settlement" on the southbound side of the Garden State Parkway; (3) the deposition testimony of Plaintiff Alfred Bur; (4) the Arora bridge inspection report prepared for NJTPA; and (5) a photograph in that bridge report showing the allegedly defective bridge joint. (**3T133:9-16**).

The trial court noted several issues with the video taken by Plaintiff while he was traveling in his friends truck several weeks after the accident. Mr. Balgowan conceded he did not know if the condition that caused the jolt in the truck as shown in the video was the same condition that allegedly caused Plaintiff's accident. (**Pa2167**). Furthermore, Mr. Balgowan conceded that he did know the condition of

the truck, and whether the camera was handheld or not. (**Pa2133-Pa2134; Pa2167**; **3T142:15-143:2; 3T161:5-12; 3T162:4-165:17**). As such, the trial court appropriately found that the Plaintiff's video provides no factual basis for Mr. Balgowan to conclude that settlement at the abutment joint created a dangerous condition that caused the accident.

The trial court noted that the Arora Bridge Inspection report reflected that the approach was "fair" and the roadway was in "satisfactory" condition. (**Pa2166; Pa2168**). Moreover, the court noted that although Mr. Balgowan seeks to utilize the Arora report to establish a dangerous condition, there is nothing in the report that notified NJTA that there was a dangerous condition requiring immediate attention. Furthermore, Mr. Balgowan testified that nowhere in the Arora report is the condition identified as dangerous or requiring emergent repair. (**Pa2133; Pa2148**). As such, the trial court appropriately found that the Arora Bridge Inspection report provided no factual basis for Mr. Balgowan to conclude that settlement at the abutment joint created a dangerous condition that caused the accident.

The trial court noted that the T&M memo prepared by project consultant initially referenced settlement at the north abutment; however, the project engineer for Gannett Fleming, Robert Matthews, followed up with an email that stated it was not the north approach but the south approach. The court further noted that

Mr. Balgowan testified that he had no reason to question the veracity of the Matthews email. (**Pa2133**). Moreover, Mr. Balgowan testified that as to settlement at the north abutment, the T&M report does not provide any support. (**Pa2133**). As such, the trial court appropriately found that the T&M memo did not provide a factual basis for Mr. Balgowan to conclude that settlement at the abutment joint created a dangerous condition that cause the accident.

The trial court noted that Plaintiff, his wife, his friend and NJ State Trooper were unable to identify what caused the accident. (**Pa2169**). As such, the trial court appropriately found that Plaintiff's testimony did not provide sufficient detail of the condition to establish an inference of a dangerous condition that could have caused the accident.

The trial court noted that the photographs of the condition at issue do not show an abrupt 2" elevation change at the abutment joint and that once Mr. Balgowan became aware of this, he changed his opinion and testified that the dangerous condition and accident was caused by a lack of tapering. (**Pa2164**). The trial court appropriately found that photographs only vaguely describe the condition and do not establish an inference of a dangerous condition that caused the accident. (**Pa2146**).

The trial court also found it significance that there were no prior accidents at this location, nor was there evidence of any prior complaints. (**Pa2166**). When

combined with the fact that Plaintiff, his wife, friend, investigating officer and contractors on site were unable to identify a dangerous condition, the trial court was correct in its determination that an accident reconstruction expert was necessary to establish causation. (**Pa2169**).

The trial court correctly found that a reconstruction expert was necessary to review the photograph that shows a tapered elevation change, determine the elevation change, determine the weight of the motorcycle with Plaintiff on it and with any other items on it, determine the length of the taper, the speed of the motorcycle, and consider other variables, and then determine if the elevation change on a short taper would be sufficient to cause Plaintiff's motorcycle to go up into the air as described by the eyewitnesses. This type of analysis was required to establish that the alleged defect caused the accident. (**See Pa2169**). Additionally, it is undisputed that Mr. Balgowan lacked the qualifications necessary to offer an opinion on causation. (**Pa2138**; **Pa2169**) The trial court correctly found that without having produced a reconstruction expert analysis, a jury would be left to speculate as to what caused the accident.

As such, it is respectfully submitted that plaintiff failed to establish causation and therefore summary judgment was appropriate and the trial court's order and judgment should be affirmed.

c. The trial court correctly held that plaintiff failed to establish that the Authority had notice of a dangerous condition.

The trial court correctly held that plaintiff failed to establish that the Authority had notice of a dangerous condition that created a substantial risk of injury. (**Pa2148**). The record is devoid of evidence that the Authority had any actual notice of a problem with the alleged dangerous condition. There is no evidence of complaints of the alleged hazardous condition or evidence any accidents had occurred in the area in question as a result of the alleged condition. The private entities with which the Authority had contracted to perform construction on the roadway in question and who were contractually bound to inspect the area for safety never informed the Authority of any dangerous hazards in the subject area requiring emergent repair despite multiple inspections of the area. **(Pa0725; Pa0795; Pa0674; Pa1202)**. Additionally, the Biennial Inspection report dated April 22, 2015, clearly states the condition was satisfactory. **(Pa1343).**

Plaintiff attempts to establish that a "dangerous condition" was identified by citing a July 2, 2015 memo of a June 24, 2015 field visit, the "T&M memo" described above. Plaintiff however, fails to acknowledge a critical element of the memo; that it mistakenly refers to the north approach instead of the south approach that needed repair. **Pa1191; Pa1192**. This was corrected in a July 7, 2015 email by the author of the memo, Robert Matthews. **Pa1191; Pa1192**. Mr. Balgowan has also testified the T&M report does not provide any support for the north abutment

at issue. (**Pa1191-1200; 3T at 168:9 - 170:10; 3T at 171:19-22**). Plaintiff's counsel is aware of this mistake and their multiple attempts to create an issue of fact by relying on this error is improper. As further evidence of no notice, T&M memo created for Contract P200.254 provided recommendations for actions to be taken in the Phase B of the Contract which did not recommend that the Authority make immediate repairs. **(Pa1191-Pa1200)**. The memo included price quotes for addition construction under P200.254 **(Pa0627)**. Moreover, the recommendations listed in the memo were not for settlement repair specifically, but to replace the approach slabs and re-deck the bridge. **(Pa0627)**. The memo in no way put the Authority on notice of a dangerous condition needing immediate repair.

The depositions of James Murray of Jacobs Engineers and Mr. Balgowan solidify that there were multiple inspections and work were completed in the area prior to the accident and no indication was made that the 2" settlement was a dangerous roadway condition. Mr. Murray was on site at least once a week and testified that if he noticed something dangerous, he would "notify somebody at the Turnpike Authority." **(Pa0761 at 37:14 - 38:18; Pa0764 at 39:3-7)**. Aside from Mr. Murry, there was a representative from Midlantic on site during construction. **(Pa0761 at 37:14 - 38:18).** Even with inspection and monitoring prior to the accident, no notice was provided to the Authority that the subject condition was

dangerous and posed a substantial risk of reasonably foreseeable injury to the public.

The Appellate Division has explicitly recognized that a Appellant's own failure to report a purported dangerous condition, despite familiarity with the area, weighs heavily against a finding of constructive notice. Gaskill v. Active Environmental Technologies, Inc., 360 N.J. Super. 530, 537 (App. Div. 2003) (the fact that the Appellant frequently walked past an allegedly dangerous condition yet never reported it to the township, weighed against finding that the township had constructive notice). Here, Plaintiff was unable to identify the dangerous condition at the time of the accident and when he went back to the area he still could not discern a dangerous condition. Furthermore, Plaintiff never noticed the condition during the prior 20-25 times he drove over the bridge. (See **Pa0001; Pa0378 at 15:25 - Pa0379 at 16:17; Pa0443 at 80:19 - 81:8).** Additionally, none of the eyewitnesses including Trooper Jones, Plaintiff's wife, Plaintiff's friend, Mr. Ferrera, or any of the contractors on site observed a dangerous roadway condition. **(See Pa0001; Pa0899 at 10:21 – Pa0900 at 11:1; Pa0859; Pa0861 at 4:8-9**; **Pa0564 at 10:13-19; Pa0561**).

Given the lack of notice to the Authority, Plaintiff's dangerous condition claim fails as a matter of law, and the trial court was correct in its findings. Maslo v. City of Jersey, 346 N.J. Super. 346 (App. Div. 2002); Polzo, 209 N.J. at 75

(summary judgment was warranted where Appellant could not show "that the shoulder depression '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'").

As such, it is respectfully submitted that the trial court correctly determined that Plaintiff failed to establish that the Authority had notice of the alleged dangerous condition and therefore summary judgment was appropriate and the trial court's Order and judgment be affirmed.

d. The trial court correctly found that Plaintiff failed to establish that the Authority's conduct was palpably unreasonable.

The trial court correctly found that Plaintiff failed to establish that the Authority's conduct was palpably unreasonable. (**Pa2152**). The court noted that the Authority is responsible for maintaining an extensive network (literally hundreds of miles) of highways, which include numerous bridges and overpasses. (**Pa2152**). There were not any previous complaints of the condition of the area where Burr lost control of the motorcycle. (**Pa2152**). There were not any previous accidents in that area. (**Pa2152**). Further, there was a regular and routine inspection of the bridge every two years. (**Pa2152**). Moreover, the Authority's maintenance personnel patrol the roads every morning looking for defects. (**Pa2152**).

In such circumstances, no rational finding of "palpably unreasonable" conduct can be made. See Penny v. Bor. of Wildwood Crest, 28 Fed. Appx 137,

140 (3d Cir. 2002)("no reasonable jury could find that the failure to repair such surface declivity in a crosswalk having a depth of one inch to one and five eighth inches amount to anything more than ordinary negligence, especially since the plaintiffs had not proffered evidence of any prior complaints or accidents"); see also Polzo, 196 at 569 (a public entity's actions or failure to act cannot be deemed palpably unreasonable where there is an absence of notice).

As stated in Wilson v. Jacobs, 334 N.J. Super. 640, 648 (App. Div. 2000), "the mere happening of an accident on public property is insufficient to impose liability upon a public entity." For a public entity to be liable, its conduct must have been more than negligent; the public entity must have acted in a "manifestly" or "obviously" unreasonable fashion. Williams v. Town of Phillipsburg, 171 N.J. Super. 278 at 286. (App. Div. 1979). The record here establishes, beyond any material or genuine dispute, that the Authority did not act with the requisite egregiousness, and its motion for summary judgment should, therefore, be granted. Brill.

As such, the trial court correctly found that Plaintiff did not establish that the conduct of the Authority was palpably unreasonable as required by N.J.S.A. 59:4-2.

Based on plaintiff's failure to meet the statutory requirements set forth under N.J.S.A. 59:4-2, it is respectfully submitted that summary judgment was appropriate, and the trial court's Order and judgment should be affirmed.

POINT II

THE TRIAL COURT CORRECTLY BARRED BALGOWAN'S TESTIMONY AS IT WAS AN INADMISSABLE NET OPINION

The trial court correctly barred Mr. Balgowan's testimony as it was an inadmissible net opinion. New Jersey Courts have found that New Jersey Rule of Evidence 703 requires:

> an expert's testimony "may be based on facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts in forming opinions on the same subject. See Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 410 (2014)

An expert's bare conclusions, unsupported by factual evidence, are inadmissible and may not be considered. Id. at 410. "A trial court may not rely on expert testimony that lacks an appropriate factual foundation and fails to establish the existence of any standard about which the expert testified." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 373 (2011); see also Nextel of N.Y., Inc. v. Borough of Englewood Cliffs Bd. of Adj., 361 N.J. Super. 22, 43 (App. Div. 2003) (finding "an expert opinion that is not factually supported is a net opinion or mere hypothesis to which no weight need be accorded."). Additionally,

> plaintiff must produce expert testimony upon which the jury could find that the consensus of the particular profession involved recognized the existence of the standard defined by the expert. It is insufficient for plaintiff's expert simply to follow slavishly an "accepted practice" formula; there must be some evidential support offered by the expert establishing the existence of the standard. A standard which is personal to the expert is equivalent to a net opinion. Taylor v. DeLosso, 319 N.J. Super. 174, 180 (App. Div. 1999)

"The net opinion rule is a prohibition against speculative testimony." Grzanka v. Pfeifer, 301 N.J. Super. 563 (App. Div. 1997) *certif. den'd* 154 N.J. 607 (1998). "Under this doctrine, expert testimony is excluded if it is based merely upon unfounded speculation and unquantified possibilities." Id. at 580. Additionally, the net opinion rule "focuses upon the failure of the expert to explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom." Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 102 (App. Div. 2001). Courts have consistently instructed that expert testimony and reports will be stricken as net opinions where they fail to "give the why and wherefore" of their opinion, providing only "mere conclusion." Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div. 1996).

Here, the trial court found Mr. Balgowan opinions to be unreliable for a multitude of reasons. Mr. Balgowan did not provide a factual or scientific foundation for plaintiffs' claim that a dangerous condition existed at the site of the accident. Mr. Balgowan is not an accident reconstructionist **(Pa2138)**.

Mr. Balgowan did not know if the front wheel of plaintiff's motorcycle struck the alleged change in elevation. Mr. Balgowan did not know if the front wheel of plaintiff's motorcycle crossed over or missed the same alleged hazard that supposedly caused a blowout of the rear tire **(Pa2137)**. Mr. Balgowan had no knowledge of other accidents at the location of plaintiff's crash. Mr. Balgowan was uncertain whether the difference in elevation was two or three inches and said there was no pothole at the abutment **(Pa2136)**. Mr. Balgowan noted that the alleged change in elevation was "up to two inches" in the Arora Bridge Report and conditions there were "fair", not poor or dangerous **(Pa2137)**. Mr. Balgowan had no idea as to the weight or width of the motorcycle **(Pa2138)**. Mr. Balgowan never inspected the roadway, never took or obtained measurements of it or the alleged condition that supposedly caused the accident. Mr. Balgowan presumed, without a factual basis, that a "jolt" encountered by plaintiff when he drove over the area in a truck weeks after the accident was the same as the condition his motorcycle encountered. Mr. Balgowan could only speculate that settlement seen in the barriers meant that the roadway was uneven and hazardous. Mr. Balgowan provided no scientific analysis or data to support his conclusions that a dangerous condition existed in the roadway that caused plaintiff's accident.

As such, because Mr. Balgowan's opinions were speculative and not supported by the record, or any scientific analysis, the trial court correctly barred

Mr. Balgowan's testimony as inadmissible net opinions. Therefore, it is respectfully submitted that the trial court's Order be affirmed.

POINT III

THE FULL-DAY HEARING CONDUCTED BY JUDGE PICKERING PURSUANT TO N.J. RULE OF EVIDENCE 104 FOCUSED COMPLETELY ON WHETHER PLAINTIFFS CAN ESTABLISH A CAUSE OF ACTION AND VITIATED ANY NEED FOR THE COURT TO RECONVENE FOR ORAL ARGUMENT ON RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT

The full-day 104 hearing conducted by Judge Pickering vitiated any need for the court to reconvene for oral argument. Courts in New Jersey have found oral argument, though encouraged, is not required, and if summary judgment was appropriate there is no reason to remand the case for oral argument. Plaintiff fails show how the lack of oral argument prejudiced the Plaintiff or impacted their rights or the outcome of the motion which must be shown on appeal. The record supports the opinion of the trial court and without the necessary proof, Plaintiffs arguments are insufficient and must be denied.

The failure to conduct requested oral argument is **not** automatic grounds for remand. In Finderne Heights Condominium Ass'n v. Rabinowitz, the Appellate Division affirmed the trial court's grant of a motion to dismiss on the papers because there was "no prejudice under the circumstances" despite the Appellate Division's conclusion that the Plaintiff had "every expectation" of oral argument

and that the trial court was not justified in failing to hold such argument. 390 N.J. Super. 154, 16 (App. Div. 2007). Likewise, in Spina Asphalt Paving v. Fairview, the Appellate Division, despite finding "no justification" for the trial court to deny oral argument on the parties' motions, held that there was "no prejudice" in its failure to comply with Rule 1:6-2(d). Spina, 304 N.J. Super. 425, 427 n.1 (App. Div. 1997).

In Triffin v. American Intern., 372 N.J. Super. 517, 524 (App. Div. 2004), the Court held that although there was no explanation from the motion judge as to why plaintiff's request for oral argument was denied…under these circumstances, the Court was convinced that [the trial court] nevertheless arrived at the proper result . . . [and] her refusal to entertain oral argument was insufficient to require our intervention.").

Other non-binding opinions follow the similar analysis. In Caprio v. Nutley Park ShopRite Inc, 2022 WL 4361326, (App. Div. September 21, 2021), the Court found that Plaintiff neither specified what additional information or legal contention he would have proffered during oral arguments, nor did he suggest that holding arguments could have resulted in a different outcome . . . [thus] plaintiff suffered no prejudice from the failure to hold oral argument. In Brown v. City of Jersey City, 2021 WL 2326382, *5 (App. Div. June 8, 2021), the Court found that despite the failure to explain why the motion was resolved without oral argument,

there was no value in remanding the matter for the sole purpose of conducting oral argument when it is clear that the court properly decided plaintiff's motion." (citations omitted).

Plaintiff's citation to the unpublished opinion in Delgado v. Yourman-Helbig, 2022 N.J. Super. Unpub. LEXIS 1266 (App. Div. 2022), is ineffective and distinguishable from this matter. The decision reviewed in Delgado was reversed because it offered no explanation for the judge's failure to hear the parties and there was no assurance that the parties had received adequate judicial consideration of their positions. That is not the case here. In this matter the Court conducted a full-day 104 hearing, reviewed all submissions and rendered a 55-page opinion detailing the testimony of Mr. Balgowan and all evidentiary documentation produced at the 104 Hearing in support of Plaintiff's claim. In its opinion, the trial court provided a thorough analysis of the New Jersey Tort Claims Act and the relevant case law in its application to the facts of this case in a light most favorable to Plaintiff. Plaintiff has failed to establish that oral argument would have revealed additional information not considered by the trial court.

As such, it is respectfully submitted that there is no value in remanding this matter for oral argument as the trial court properly considered all arguments submitted by the parties and provided a detailed opinion more than sufficient for Appellate review.

POINT IV

THE TRIAL COURT CORRECTLY DENIED PLAINTIFF'S CONTENTION THAT MAINTANANCE OF THE ROADWAY WAS A MINISTERIAL ACT NOT COVERED UNDER THE TORT CLAIMS ACT

The trial court correctly determined that road maintenance is not a "ministerial" task. As the trial court noted, if Plaintiff's theory that road maintenance was ministerial and the TCA did not provide immunity, there would not be cases such as Polzo v. County of Essex, 196 N.J. 569, 585 (2008), Atalese v. Long Beach Township, 365 N.J. Super. 1 (App. Div. 2003), Polyard, supra., and Stewart v. New Jersey Turnpike Authority, 249 N.J. 642 (2022), and a host of other cases that discuss the condition of roadways and roadway maintenance in the context of the TCA. (**Pa2146**). Plaintiff's theory regarding roadway maintenance and the condition at issue in this matter does not comport with what is clearly stated in the N.J.S.A. 59:4-2 and the Court's application of the statute in similar cases.

The Authority has a limited amount of resources for its capital improvements budget. That amount must be allocated to all types of capital improvement projects necessitated by the operational needs of a busy transportation system. Contracts are made for the roadway repair or improvements. These contracts involve high level decisions including what is to be repaired or

improved and what area of roadway the contract covers. Conversely, the decisions on how to actually complete the contract work and the timeframe said work will be completed is left to the contractors or subcontractors. This would include inspection and repair of roadway conditions, as necessary.

Pursuant to N.J.S.A. 59:2-3(d), a public entity is not liable for the exercise of discretion when, in the face of competing demands, it determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public entity was palpably unreasonable. As noted by the trial court, there was no evidence of a dangerous condition which created a substantial risk of injury to traveling motorists. Furthermore, the Arora Bridge Inspection report noted the approach as in fair condition and that the roadway was satisfactory. There was never a finding that the roadway was dangerous or required emergent repair. The Authority reasonably relied upon its contractors to inspect the bridge and advise of any dangerous conditions needing emergent repair. As there was no indication of a dangerous condition, it was appropriate for the Authority to rely on its contractors to resolve the settlement issue in due course. There is no evidence that the Authority's conduct was palpably unreasonable in this regard. As such, the Authority made high-level decisions for the allocation of resources pursuant to Contract P200.254 and is also afforded immunity under N.J.S.A. 59:2-3.

CONCLUSION

For the foregoing reasons, and for those laid out in the briefs of Midlantic, Jacobs, and Urban, defendant-respondent New Jersey Turnpike Authority respectfully requests that this Court affirm the Order granting respondents summary judgment and the judgment dismissing the fourth amended complaint.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002866-22 T2

ALFRED H. BURR and ALYSSA BURR, H/W, Appellants/Plaintiffs, v. NEW JERSEY TURNPIKE AUTHORITY; MIDLANTIC CONSTRUCTION, LLC; C.J. HESSE, INC.; THE HESSE COMPANIES; JACOBS ENGINERING GROUP, INC.; URBAN ENGINEERS, INC.; JOHN DOE, MARY DOE, ABC BUSINESS ENTITIES AND XYZ CORPORATIONS, Respondents/Defendants.	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION ATLANTIC COUNTY DOCKET NO. ATL-L-1997-16 CIVIL ACTION SAT BELOW: Hon. James H. Pickering, Jr., J.S.C. Hon. Joseph L. Marczyk, P.J.Cv.

CROSS-APPELLANT/DEFENDANT, URBAN ENGINEERING, INC. REPLY BRIEF IN FURTHER SUPPORT OF CROSS-APPEAL

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January 10, 2024

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PLAINTIFF'S FICTITIOUS PARTY COUNT INCLUDED WITHIN THE ORIGINALLY FILED COMPLAINT AND FIRST AMENDED COMPLAINT DID NOT PRESERVE PLAINTIFF'S CLAIM AGAINST URBAN ENGINEERS, LLC.

The Discovery Rule is Inapplicable to Plaintiff's Claims against Urban Engineers, LLC.

The Discovery Rule provides that "a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." Lopez v. Swyer, 62 N.J. 267, 272 (1973). The discovery rule applies where a plaintiff is either unaware of his or her injury, or, where the injury is apparent, the plaintiff was "unable to attribute the cause to another." Henry v. New Jersey Dept. of Human Services, 204 N.J. 320, 336 (2010).

Here, this discovery rule is inapplicable as the nature of plaintiff's accident and injuries are such that anyone exercising reasonable diligence and intelligence would recognize the potential for a cause of action immediately after the accident and injuries occurred. Plaintiff clearly understood that he had sustained personal injuries on the day of the subject accident. Further, the alleged condition that caused the accident, as per plaintiff's contentions, was an open and obvious condition. As such, the statute of limitations period began to run on the day plaintiff was injured. Plaintiff's reliance on the discovery rule is therefore unsupported.

Plaintiff's Pleadings Against Fictitious Defendants are Insufficiently Specific.

Plaintiff's pleadings were inadequately specific to permit the addition of Urban Engineers, LLC (hereinafter referred to as "Urban") as a defendant beyond the expiration of the statute of limitations. Plaintiff's reliance on Viviano in support of his position is misplaced as the facts of Viviano are clearly distinguishable from the present case. See Viviano v. CBS, Inc., 101 N.J. 538, 544-548 (1986). As an initial matter, the plaintiff in Viviano identified the fictious defendants with more specificity in the pleadings than plaintiff in the present action. Id. at 542. In Viviano, the plaintiff's pleadings included fictitious defendants and their potential roles in the creation and delivery of machinery that caused plaintiff's injuries, categorizing them as the manufacturer, installer, and distributor of the machinery. Id. Here, in plaintiff's complaint, plaintiff referred to fictitious defendants generally as "individuals or business entities who may be responsible, in whole or in part, for the causation of the aforesaid accident." Pa1552. Plaintiff made absolutely no attempt to provide any level of specifics associated with their identity. Plaintiff therefore garners no support from Viviano on this issue.

Further, Viviano represents an exceptional interpretation of R. 4:26-4. Viviano, 101 N.J. at 556. The Court found "that the interests of justice require that we relax R. 4:26-4 . . ." as a result of the fact that "[e]ither intentionally or

unintentionally, [the defendant] misled plaintiff about the cause of the accident and then compounded the deception with undue delay." Id. at 546, 544. More specifically, the defendant in Viviano failed to properly produce a memorandum stating the cause of the malfunction causing the plaintiff's injuries, provided answers to interrogatories that contradicted the documents in defendant's possession and utilized other strategies intended to delay or prejudice plaintiff's claims. Id. at 544, 556. These circumstances do not even remotely exist in the present matter. As such, Viviano is clearly distinguishable and is an exceptional interpretation of the fictitious pleading rule with no relevant impact.

Despite plaintiff's contentions to the contrary, Rutkowski controls the interpretation of R. 4:26-4 on this appeal. See Rutkowski v. Liberty Mutual Insurance Company, 209 N.J. Super. 140, 147 (App. Div. 1986). In Rutowski, the plaintiff alleged that the named and fictitious defendants were those that had "designed, manufactured, sold, distributed, repaired, modified, renovated, or were otherwise responsible for the allegedly defective machine." Id. at 143. Because the plaintiff in Rutkowski sought to amend the complaint to include a defendant that only conducted safety inspections, the court only interpreted the catch-all provision as potentially applicable to its consideration of the fictitious party pleading rule. Id. at 144.

In the present matter, plaintiff generally asserts that the negligent conduct of both named and fictitious parties resulted in plaintiff's injuries. Pa1550-51. This generalized assertion is analogous to the statement that such fictitious defendants are "otherwise responsible" for plaintiff's injuries, which the Rutkowski Court held was inadequate to preserve plaintiff's claim. Rutkowski, 209 N.J. Super. at 147. By failing to describe the fictitious defendants with any level of detail, plaintiff in this matter has failed to meet the requirement of the fictitious pleading rule to include "an adequate description sufficient for identification". Plaintiff has therefore failed to avail himself of the benefits of this rule. A contrary interpretation of the rule would effectively render it moot.

Plaintiff Failed to Diligently Discover the True Identities of the Fictitious Defendants.

Plaintiff failed to act with the required due diligence to satisfy R. 4:26-4. "In determining whether a plaintiff has acted with due diligence in substituting the true name of a fictitiously identified defendant, a crucial factor is whether the defendant has been prejudiced by the delay in its identification . . ." Claypotch v. Heller, Inc., 360 N.J. Super. 472, 480 (App. Div. 2003).

Urban was not joined to the action until May 17, 2019, nearly four years after plaintiff's accident occurred. Plaintiff has not supplied any rational basis for this delay, which practically doubled the time permitted pursuant to the governing two-year statute of limitations. As a result, Urban was not given the

opportunity to develop the evidence surrounding plaintiff's claim in a timely manner and only had the opportunity to do so well after the statute of limitations expired. During the same time frame, plaintiff had the opportunity to develop its case, including his factual investigation of the underlying events and causes in addition to his legal arguments. Additionally, and most significantly, Urban is litigating this issue years after the improper denial of its motion for summary judgment and is still incurring substantial costs as a result.

The Procedural Requirements of the Fictitious Pleading Rule Should Not Be Relaxed Under Rule 1:1-2.

R. 1:1-2 provides that the New Jersey Court Rules "shall be construed to secure a just determination, simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay. . ." R. 1:1-2. The invocation of the rule in this matter would swallow the fictitious party pleading rule whole. Given that Urban has been litigating this issue for years after the accident occurred and was joined after the statute of limitations had expired, Urban has been subject to significant delays and incurred significant expense. Further, relaxation of the requirements of the fictitious pleading rule would enable future plaintiffs to join any potential defendant well beyond the expiration of the statute of limitations by broadly including them in their complaint as those generally responsible for plaintiff's damages.

"Rule 1:1-2 is not meant as a safe harbor for the dilatory; its "catch-all" nature is not intended to serve as cure-all. Proponents seeking relief under the relaxation provisions of Rule 1:1-2 bear a heavy burden . . ." Romagnola v. Gillespie, Inc., 194 N.J. 596, 606 (2008). Plaintiff seeks to invoke the rule as cure-all to their procedural deficits but have not met the heavy burden necessary to justify invocation of this rule. Plaintiff failure to properly plead their cause of action is a result of solely their own actions and is not a sufficient justification for the relaxation of procedural requirements. Plaintiff has not shown that Urban has engaged in any bad faith or other tactics to delay or hinder plaintiff's litigation of this matter. Further, the relaxation of the requirements of R. 4:26-4 would only provide future litigants with occasion to ignore the requirements of R. 4:26-4 and undermine the intent of having a statute of limitations altogether.

For the foregoing reasons, this Court should reverse the trial court's prior order denying Urban's motion for summary judgment predicated upon an improper application of fictitious party pleading practice.

Respectfully submitted,

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