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ELISA KEEFRIDER, ET AL Plaintiffs, v. MR. AND MRS. LEROY KNUPP, IRISH SHOP, IRELAND IMPORT, IRISH IMPORT, SHAMROCK SHOE REPAIR, CITY OF OCEAN CITY, ET AL. Defendants.	: SUPERIOR COURT OF NEW JERSEY : CAPE MAY COUNTY : LAW DIVISION : : : DOCKET NO. CPM-L-312-03 : : **Civil Action** : : **BRIEF IN SUPPORT OF DEFENDANT** : **CITY OF OCEAN CITY'S MOTION** : **FOR SUMMARY JUDGMENT** :

STATEMENT OF MATERIAL FACTS

1. This matter arises from an alleged trip and fall accident which occurred on June 25, 2001 on the sidewalk adjacent to the commercial real property known as 709-711 Asbury Avenue in the City of Ocean City, County of Cape May, State of New Jersey. *See Plaintiff, Elisa Keefrider's Answers to Interrogatories attached hereto as* ***Exhibit "A".***

2. On June 25, 2001, in mid-morning, while walking with her husband, the Plaintiff, who was carrying rolls in her left hand and a purse over her right shoulder, alleges that she tripped and fell due to "broken sidewalk" in front of the Irish Shop located at 709-711 Asbury Avenue, Ocean City, New Jersey. *See pages 11-12 of Plaintiff's deposition testimony attached hereto as* ***Exhibit "B".***

3. Prior to tripping, the Plaintiff, Elisa Keefrider, was not looking at the sidewalk "because people were coming toward" her. *See page 55 of Plaintiff's deposition testimony attached hereto as* ***Exhibit "B".***

4. Plaintiff testified at her deposition that if she had looked down, she would have noticed the "broken sidewalk". *See page 55 of Plaintiff's deposition testimony attached hereto as* ***Exhibit "B".***

5. The "broken sidewalk" was located in front of the property located at 709-711 Asbury Avenue, Ocean City, New Jersey. *See copy of photos of "broken sidewalk" attached hereto as* ***Exhibit "C".***

6. At the time of the accident, the property at 709-711 Asbury Avenue, Ocean City, New Jersey was being operated as a retail store by Janet Kreci, pursuant to a Business Lease dated November 1, 1998. *See copy of Business Lease dated November 1, 1998 attached hereto as* ***Exhibit "D".***

7. On June 25, 2001, the property located at 709-711 Asbury Avenue, Ocean City, New Jersey was owned by the Defendants, Leroy Knupp and Rhoda Knupp. *See copy of Deeds to the property located at 709 and 711 Asbury Avenue, Ocean City, New Jersey attached hereto as* ***Exhibit "E".***

8. It was not until after the accident that the Defendant, City of Ocean City, was notified of the "broken sidewalk". *See copy of Code Compliance Complaint dated July 1, 2001 of the City of Ocean City attached hereto as* ***Exhibit "F".***

9. On July 1, 2001, after this accident, the Defendant, City of Ocean City, cited the Defendants, Leroy Knupp and Rhoda Knupp, for violating Ordinance No. 17-2.8 of the City of Ocean City entitled Repair and Replacement of Missing or Deteriorated Curb and Sidewalk. *See*

copy of Code Compliance Complaint dated July 1, 2001 of the City of Ocean City attached hereto as ***Exhibit "F".***

10. Thereafter, on September 27, 2001, three (3) months post accident, the Defendants, Leroy Knupp and Rhoda Knupp, made application to the Defendant, City of Ocean City, for grant approval to have construction work performed to the sidewalk in question in accordance with the Downtown Sidewalk Grant Program. *See copy of Grant Application dated September 27, 2001 attached hereto as* ***Exhibit "G".***

11. The testimony of the tenant, Ms. Janet Kreci a/k/a Janet Sellers, indicates that the property was being operated as a retail store on June 25, 2001 in accordance with a Business Lease. *See copy of Business Lease dated November 1, 1998 attached hereto as* ***Exhibit "D".***

12. According to the deposition testimony of Janet Kreci a/k/a Janet Sellers, she did not have any obligation to maintain the sidewalk of that property. *See copy of page 7 of the deposition transcript of Janet Kreci a/k/a Janet Sellers attached hereto as* ***Exhibit "H"***

13. Ms. Kreci testified that on June 25, 2001, it was apparent to her that the sidewalk located out front of the property needed repair. *See copy of page 11 of the deposition transcript of Janet Kreci a/k/a Janet Sellers attached hereto as* ***Exhibit "H".***

14. Moreover, Ms. Kreci testified that in the past, at least two (2) people, on separate occasions, had come into the store and advised that they had fallen due to the sidewalk. *See copy of page 22 of the deposition transcript of Janet Kreci a/k/a Janet Sellers attached hereto as* ***Exhibit "H".***

15. There is no evidence that the Defendant, City of Ocean City, prior to this accident, had received any notice whatsoever as to the condition of the sidewalk in question.

16. After the fall, the Plaintiff was taken by ambulance to Shore Memorial Hospital's Emergency Room where the Plaintiff complained of pain in the left knee and right elbow. At the Hospital, the Plaintiff was diagnosed with an abrasion to her right elbow and a laceration on her left knee was sutured closed. *See copy of the Complaint of Plaintiff, Elisa Keefrider, et al, attached hereto as* ***Exhibit "I".***

17. X-rays performed at the Hospital of the left knee revealed no evidence of fracture or dislocation of the left knee, small joint effusion and soft tissue swelling overlying the patella and patellar tendon. The Plaintiff was discharged from the Hospital with instructions to follow up with her family physician within ten days to have the sutures removed. *See copy of Shore Memorial Hospital records attached hereto as* ***Exhibit "J".***

18. Thereafter, in accordance with the aforementioned instructions, the Plaintiff saw her family physician, Dr. James Judd, to have the sutures removed. *See pages 17 of Plaintiff's deposition testimony attached hereto as* ***Exhibit "B".***

19. After the accident, the Plaintiff did not seek any treatment for her right elbow and the injury to the right elbow resolved. *See page 26 of Plaintiff's deposition testimony attached hereto as* ***Exhibit "B".***

20. After the sutures were removed, the Plaintiff visited with her family physician, Dr. James Judd, on several occasions complaining about pain in her left knee.

21. Prior to the underlying accident, the Plaintiff had been seeing Dr. Judd on a regular basis for symptoms unrelated to the underlying accident.

22. Due to the Plaintiff's continued pain in the left knee, Dr. Judd recommended the Plaintiff undergo an MRI of the left knee. *See copy of MRI report dated October 30, 2001 from Parlee & Tatem Radiological Associates attached hereto as* ***Exhibit "K".***

23. The MRI revealed a horizontal tear involving the posterior horn and a small portion of the body of the lateral meniscus, extending to the inferior surface. *See copy of MRI report dated October 30, 2001 from Parlee & Tatem Radiological Associates attached hereto as* ***Exhibit "K".***

24. Based on these results, the Plaintiff visited the Doylestown Surgery Center with regard to the pain in her left knee. Upon being further evaluated by Dr. Kieran Cody of the Doylestown Surgery Center, on December 5, 2001, the Plaintiff underwent left knee arthroscopy and partial medial meniscectomy. *See copy of report dated December 5, 2001 of Dr. Kieran Cody attached hereto as* ***Exhibit "L".***

25. Thereafter, the Plaintiff underwent several weeks of therapy to strengthen her knee. *See page 21 of Plaintiff's deposition testimony attached hereto as* ***Exhibit "B".***

26. Prior to the underlying surgery, the Plaintiff had been treating with Hatboro Medical Associates for sinus and dry syndrome. However, during these visits, it is noted that the Plaintiff would complain about pain in the knee, ultimately resulting in the initial visit to the Doylestown Surgery Center. *See copy of reports from Hatboro Medical Associates dated May 23, 2001 though August 13, 2002 attached hereto* ***as Exhibit "M".***

27. In April of 2002, due to continued pain in her knee, the Plaintiff underwent a steroid injection. Thereafter, the Plaintiff visited with the Orthopedic Specialty Center complaining of left knee pain. As a result, she began a course of treatment at the Center. The Plaintiff was treated conservatively between October 24, 2002 and November 12, 2002.

28. On October 24, 2002, the Plaintiff returned to the Doylestown Hospital for a second MRI of the left knee. *See copy of MRI report from the Doylestown Hospital dated October 24, 2002 attached hereto as* ***Exhibit "N".***

29. The second MRI revealed new bone bruising and edema of the medial tibial plateau and medial femoral condyle, increased joint effusion, edema, possible partial tear of the ACL, and grade three signal abnormality of the posterior horm of the medial meniscus suggesting a tear. *See copy of MRI report from the Doylestown Hospital dated October 24, 2002 attached hereto as* ***Exhibit "N".***

30. Between November and December of 2002, the Plaintiff underwent three (3) synvisc injections for pain in her knee and in January of 2003, the Plaintiff was seen by Dr. Cody, who recommended Zostrix cream or Lidoderm patches for the pain in her knee.

31. On February 25, 2003, the Plaintiff visited with Dr. Jeffrey T. Kummery regarding her left knee pain. After being evaluated, Dr. Kummery felt "this was mainly bony edema allowing the pain in her knee to persist." He recommended conservative treatment modalities with continued aquatic therapy, anti-inflammatory medication, and cortisone injection. *See copy of report dated February 25, 2003 of Dr. Jeffrey T. Kummery attached hereto as* ***Exhibit "O".***

32. On June 17, 2003, the Plaintiff returned to Dr. Kummery. After evaluation, Dr. Kummery opined that "Mrs. Keefrider's arthritis had advanced", as a result, she was advised to see Dr. Pritchard of the Rheumatology Specialty Center. *See copy of report dated June 17, 2003 of Dr. Jeffrey T. Kummery attached hereto as* ***Exhibit "P".***

33. On September 9, 2003, the Plaintiff visited with Dr. Charles B. Burrows, who advised that the Plaintiff may need a full knee replacement at sometime in the future; however, the Plaintiff wished to continue treating conservatively prior to any further surgery. *See copy of report dated September 9, 2003 of Dr. Charles B. Burrows attached hereto as* ***Exhibit "Q".***

34. In January of 2004, the Plaintiff returned to Dr. Burrows for injections for the pain. *See copy of reports of Dr. Charles B. Burrows dated January 9, 2004, January 16, 2004 and January 23, 2004 attached hereto as* ***Exhibit "R".***

35. On March 2, 2004, the Plaintiff visited with Dr. Burrows who provided Plaintiff with information regarding a full knee replacement. *See copy of report dated March 2, 2004 of Dr. Charles B. Burrows attached hereto as* ***Exhibit "S".***

36. To date, the Plaintiff has not undergone the aforementioned knee replacement nor is any such surgery scheduled. The Plaintiff contends that she visits Dr. Burrow or Dr. Starr every two (2) to four (4) months for an evaluation regarding her left knee pain.

LEGAL ARGUMENT

I. THE DEFENDANT, CITY OF OCEAN CITY, WAS NOT RESPONSIBLE FOR THE CARE AND MAINTENANCE OF THE SIDEWALK LOCATED IN FRONT OF THE PROPOERTY KNOWN AS 709-711 ASBURY AVENUE, OCEAN CITY, NEW JERSEY ON JUNE 25, 2001.

The owners of commercial property are responsible for maintaining sidewalks in reasonably good condition and are liable to pedestrians injured as a result of the negligent failure to do so. *Stewart v. 104 Wallace St., 87 N.J. 146, 157 (1981); Christmas v. City of Newark, 216 N.J.Super. 393, 399-402 (App. Div. 1987).* The Plaintiff, Elisa Keefrider, alleges that the accident in this matter occurred directly in front of a commercial property in Ocean City, New Jersey. The alleged reason for the fall was due to "broken sidewalk" illustrated in the photos, *attached hereto as* ***Exhibit "C",*** and described in detail throughout the Plaintiff's deposition testimony. Since the property located at 709-711 Asbury Avenue, Ocean City, New Jersey was owned for investment or business purposes it is undeniable that on June 25, 2001, the property was being operated as a commercial property and was owned by the Defendants, Leroy Knupp and Rhoda Knupp. *Dupree v. City of Clifton, 351 N.J. Super, 798 A.2d. 105 (App. Div. 2002).* As indicated in the Business Lease dated November 1, 1998 and the testimony of the tenant, Ms. Janet Kreci a/k/a Janet Sellers, the property was being operated as a retail store on June 25, 2001. *See copy of Business Lease dated November 1, 1998 attached hereto as* ***Exhibit "D".*** According to the attached Business Lease and deposition testimony of Janet Kreci a/k/a Janet Sellers, she did not have any obligation to maintain the sidewalk of that property. *See copy of page 7 of the deposition transcript of Janet Kreci a/k/a Janet Sellers attached hereto as* ***Exhibit "H".*** In addition, Ms. Kreci testified that on June 25, 2001, it was apparent to her that the sidewalk located out front of the property needed repair. *See copy of page 11 of the deposition transcript*

of Janet Kreci a/k/a Janet Sellers attached hereto as ***Exhibit "H".*** Moreover, Ms. Kreci testified that in the past, at least two (2) people, on separate occasions, had come into the store and advised that they had fallen due to the sidewalk. *See copy of page 22 of the deposition transcript of Janet Kreci a/k/a Janet Sellers attached hereto as* ***Exhibit "H".***

As a commercial property owner, Mr. and Mrs. Knupp are responsible to maintain the sidewalks in a reasonably safe condition, and if they fail to exercise that duty, they are liable to the injured pedestrian. *Stewart v. 104 Wallace St., 87 N.J. 146, 157 (1981); Christmas v. City of Newark, 216 N.J.Super. 393, 399-402 (App. Div. 1987).* Defendant, City of Ocean City, is not responsible for the care and maintenance of the property where Plaintiff alleges that she fell due to the existence of a commercial enterprise at that location. The objective in creating the commercial property rule was to impose liability upon the party in a better position to bear the cost associated with that imposition. Commercial landowners have that ability, as well as the ability to distribute those costs. *Stewart v. 104 Wallace St., 87 N.J. 146, 157 (1981); Christmas v. City of Newark, 216 N.J.Super. 393, 399-402 (App. Div. 1987).* Therefore, since it is undeniable that the area where the Plaintiff fell was a commercial property, Summary Judgment must be granted in favor of the Defendant, City of Ocean City.

In addition, even if the Court was to conclude that the Defendant, City of Ocean City, was responsible for the maintenance and repair of the underlying "sidewalk area" in question, the Plaintiff must overcome additional immunities afforded to the Defendant, City of Ocean City, through common law and the Tort Claims Act. As a Municipal Entity, the Defendant, City of Ocean City, is presumed to be immune from tortuous liability under the Tort Claims Act. *N.J.S.A. 59:2-1* provides that "[e]xcept as otherwise provided by this act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity, or a

public employee or any other person." In matters where a Plaintiff alleges the existence of a dangerous condition, *N.J.S.A. 59:4-2* sets forth the requirements that Plaintiff must satisfy before a municipality is held liable for damages; however, under the Tort Claims Act, Municipal Entities are conceivably immune from liability for negligently maintained sidewalks for which it is otherwise responsible by virtue of the common law immunity accorded municipalities. *Norris v. Borough of Leonia, 160 N.J. 427, 734 A.2d. 762 (1999).* In *Mitchell v. City of Trenton, 163 N.J. Super, 394 A.2d 886 (App. Div. 1978),* the Court emphasized that a plaintiff's claim for damages were subject not only to common law immunity continued by the Tort Claims Act, "but also to any defenses available to a private person at common law." *Mitchell v. City of Trenton, 163 N.J. Super, 394 A.2d 886 (App. Div. 1978),* Therefore, pursuant to common law immunities contained in the Tort Claims Act, as well as the aforementioned "commercial liability exception", the Defendant, City of Ocean City's Notice of Motion for Summary Judgment must be granted.

II. THE DEFENDANT, CITY OF OCEAN CITY, IS IMMUNE FROM LIABILITY FOR THE PLAINTIFF, ELISA KEEFRIDER'S INJURIES BECAUSE SHE HAS FAILED TO SATISFY THE REQUIREMENTS OF *N.J.S.A. 59:4-1 et seq.*

The Defendant, City of Ocean City, is a public entity. As such, claims against it are governed by *N.J.S.A. 59:1-1 et seq.*, the New Jersey Tort Claims Act. This Act defines the parameters within which recovery for tortious injuries may be had against public entities and public employees. The approach of the Act is to broadly limit public entity liability, *Manna v. State, 129 N.J. 341, 346 (1992)*, string citation omitted, and it is intended to be strictly construed to effectuate its purpose. *Hawes v. New Jersey Department of Transportation, 232 N.J. Super. 160 (Law Div.) aff'd o.b. 232 N.J. Super. 159 (app. Div. 1988).* Courts are instructed to find entity immunity unless there is a specific provision for liability, *Pico v. State, 116 N.J. 55, 59 (1989)*, and courts should be cautious sanctioning novel causes of action. *Ayers v. Jackson Tp, 106 N.J. 557, (1987).*

1.) The Plaintiff, Elisa Keefrider, fails to satisfy the requirements of *N.J.S.A. 59:4-2* regarding the existence of a dangerous condition for which Defendant, City of Ocean City, would be liable.

N.J.S.A. 59:4-2, provides that the Plaintiff, Elisa Keefrider, as claimant, must prove:

> (1) that a dangerous condition existed on the public property at the time of the injury;
>
> (2) that the dangerous condition proximately caused the injury;
>
> (3) that the dangerous condition created a foreseeable risk of the kind of injury incurred; and
>
> (4) 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 in sufficient time prior to the injury to have protected against the condition; and

(5) that the action or inaction of the public entity in respect of its effort to protect against the condition was palpably unreasonable.

a.) <u>The "sidewalk area" in question was not on public property which was owned or controlled by the Defendant, City of Ocean City.</u>

Before liability can be imposed against a public entity, the Plaintiff must show that the sidewalk was public property. Public property is defined as real or personal property owned or control by a public entity, but does not include easements, encroachments and other property that is located on the property of the public entity but is not owned or controlled by the public entity. *N.J.S.A. 59:4-1 (c)*. Property "controlled" does not simply mean any property within a city's limits. *<u>Christmas v. City of Newark</u>, 216 N.J. Super 393 (App. 1987).* "Public property" has been held not to include sidewalks abutting commercial property. *<u>Stewart v. 104 Wallace Street Inc.</u>, 87 N.J. 146 (1981)*. As illustrated throughout the record, the underlying "sidewalk area" in question was owned by the Defendants, Mr. and Mrs. Leroy Knupp, and operated as a commercial retail store on June 25, 2001. Furthermore, the property was subject to a Business Lease clearly outlining the Defendants, Mr. and Mrs. Leroy Knupp's obligation regarding the maintenance of the property. *See copy of Business Lease dated November 1, 1998 attached hereto as* ***Exhibit "D".*** Similar to *<u>Christmas</u>*, the Plaintiff, Elisa Keefrider, has not presented any evidence whatsoever that the sidewalk or any adjoining property was owned by the Defendant City of Ocean City. To the contrary, the record is clear that on June 25, 2001, the Defendants, Mr. and Mrs. Leroy Knupp, were the owners of the property and that the use was undeniably for a commercial purpose. Since the Defendant, City of Ocean City, did not own or

have control over the "sidewalk area" abutting the commercial property in question on June 25, 2001, Summary Judgment must be granted in favor of the Defendant, City of Ocean City.

b.) The "sidewalk area" in question was not a dangerous condition.

Should the Court determine that the "sidewalk area" in question was public property owned or controlled by the Defendant, City of Ocean City, this is only one (1) element of the Plaintiff, Elisa Keefrider's cause of action. As such, the inquiry under *N.J.S.A. 59:4-2* must continue. A dangerous condition is defined as a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used. *N.J.S.A. 59:4-1 (a)*. Courts interpreting *N.J.S.A. 59:4-1 (a)* have defined "substantial risk" as risk which is neither minor, trivial nor insignificant. It has also been held that the alleged condition will fail to meet the requirements of the definition if the object or circumstance which makes it dangerous could be avoided by "due care." *Johnson v. Township of Southampton, 157 N.J.Super. 518 (App. Div.), certif. den. 77 N.J. 485 (1978).* It must be remembered that the existence of a dangerous condition is only one of the essential elements to a cause of action against the public entity. It is not the cause of action itself. *Robinson v. City of Jersey City, 284 N.J. Super. 596, 599 (App. Div. 1995).*

In *Polyard v. Terry, 160 N.J. Super. 497 (App. Div. 1978), aff'd o.b., 79 N.J. 547 (1979)*, the Court noted that "not every defect in a highway, even if caused by negligent maintenance, is actionable," and that to qualify as a dangerous condition the defect must create substantial risk of injury when the road is used with due care. The Court continued its analysis by stating that travelers on highways must expect some declivities and some areas of imperfect surfaces. *Id. at 509*. Although the "sidewalk area" in question was not a highway, the area is undeniably a well traveled area with "some declivities and some area of imperfect surfaces."

In the unpublished Opinion, *Hopkins v. Camden County*, the Appellate Division affirmed the Trial Court's decision, which held that the evidence was insufficient to establish that a pothole constituted a dangerous condition within the meaning of the statute. *See copy of Hopkins v. Camden County attached hereto as* ***Exhibit "T".*** In *Hopkins*, the Plaintiff was walking across Broadway, a county road in the City of Camden, when she tripped and fell due to an indentation in the road described as a "pothole." The incident occurred on a busy commercial area in Camden. The Appellate Division agreed with the Trial Court that the Plaintiff did not satisfy the stringent burden, *Polyard, supra, 160 N.J. Super. at 510*, of establishing that the pothole created a substantial risk of injury. The Appellate Division reasoned that the pothole in question was visible against the light gray concrete surface as an obvious defect. In addition, the defect was not large, and easily could have been avoided by any pedestrian by stepping around the delineated area.

Prior to tripping, the Plaintiff, Elisa Keefrider, was not looking at the sidewalk "because people were coming toward" her. *See page 55 of Plaintiff's deposition testimony attached hereto as* ***Exhibit "B".*** Furthermore, Plaintiff testified at her deposition that if she had looked down she would have noticed the "broken sidewalk". *See page 55 of Plaintiff's deposition testimony attached hereto as* ***Exhibit "B".*** Similar to the holding in *Hopkins*, the area in question should not be considered a dangerous condition. Testimony of the Plaintiff, Elisa Keefrider, and the photos of the sidewalk in front of the property located at 709-711 Asbury Avenue, Ocean City, New Jersey illustrate that the sidewalk was in need of maintenance and repair. However, the protrusions created by the "broken sidewalk" were clearly visible, and easily avoided.

N.J.S.A. 59:4-2 considers a condition dangerous only when it poses a substantial risk of injury when such property is used with due care in the manner in which it is reasonably

foreseeable that it will be used. *Garrison v. Township of Middleton, 154 N.J. 282, 286 (1998).* Therefore, in the within matter, the Court must find that the state of the sidewalk in front of the property at the time of the incident created substantial risk of injury to a Plaintiff who exercises due care. The public recognizes that sidewalks are not perfect and certain non-conformities should be expected by those persons using them.

There is evidence that a condition did exist at the location where Plaintiff, Elisa Keefrider fell. However, Plaintiff, Elisa Keefrider failed to exercise due care in avoiding the condition. Therefore, the Defendant, City of Ocean City, should be immune from any liability in accordance with the aforementioned reasoning.

c.) An employee of Defendant, City of Ocean City, did not create the condition existing at the property located at 709-711 Asbury Avenue, Ocean City, New Jersey.

Should the Court be so inclined to find that the Defendant, City of Ocean City, was responsible to maintain the "sidewalk area" in question; that a dangerous condition did in fact exist; that such dangerous condition proximately caused the Plaintiff's injuries; and that the Plaintiff, Elisa Keefrider, exercised "due care", these are only four (4) elements of the Plaintiff, Elisa Keefrider's cause of action. As such, the inquiry under *N.J.S.A. 59:4-2* must continue.

In addition to failing to prove that the Defendant, City of Ocean City, was responsible to maintain the "sidewalk area" in question, that a dangerous condition was present at the time of the accident and that the Plaintiff, Elisa Keefrider, used "due care" at the time of her fall, the Plaintiff has also failed to establish that a public employee created the dangerous condition, as required by *N.J.S.A. 59:4-2(4)(a).* In keeping with the Act's approach of broadly limiting public entity liability, Courts have refused to make public entities responsible for the acts of non-employee third parties. *See Comment to N.J.S.A. 59:2-1.* The Plaintiff, Elisa Keefrider, has

failed to show that a public employee of the Defendant, City of Ocean City, created the alleged dangerous condition. It was not until after the accident that the Defendant, City of Ocean City, had any knowledge or involvement of or with the "broken sidewalk". In fact, the Plaintiff, Elisa Keefrider, has failed to provide any evidence whatsoever at all to indicate who, when, and/or how the condition was created.

Based on the foregoing, it is asserted that the Plaintiff, Elisa Keefrider, has failed to satisfy the first requirement of *N.J.S.A. 59:4-2(4)(a)*, that a public employee created the alleged dangerous condition

d.) Defendant, City of Ocean City, had no actual or constructive notice of the condition and the actions taken by the City of Ocean City with respect to its efforts to protect against the condition were not palpably unreasonable.

In order for a Claimant to prevail against a public entity on the ground that it failed to protect against a dangerous condition pursuant to the notice requirement of *N.J.S.A. 59:4-2(4)(b)*, the Claimant must establish that the entity had actual knowledge of the existence of the condition and knew or should have known of its dangerous character, or, alternatively, that the public entity had constructive notice of the condition in question.

According to *N.J.S.A. 59:4-3(a)*, a public entity shall be deemed to have "actual notice" of a dangerous condition within the meaning of *N.J.S.A. 59:4-2(4)(b)* if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character. The Plaintiff, Elisa Keefrider, has failed to provide any evidence that the Defendant, City of Ocean City, had actual notice of the condition of the sidewalk located in front of 709-711 Asbury Avenue, Ocean City, New Jersey. It was not until after the accident that the Defendant, City of Ocean City, was notified of the "broken sidewalk". *See copy of Code Compliance Complaint*

dated July 1, 2001 of the City of Ocean City attached hereto as ***Exhibit "F".*** In fact, it was not until September 27, 2001, three (3) months post accident, that the Defendants, Leroy Knupp and Rhoda Knupp, made application to the Defendant, City of Ocean City, for grant approval to have construction work performed to the underlying sidewalk in accordance with the Downtown Sidewalk Grant Program. *See copy of Grant Application dated September 27, 2001 attached hereto as* ***Exhibit "G".***

Plaintiff has not provided any evidence that the Defendant, City of Ocean City, ever received notice of the condition prior to July 1, 2001. Although there had been testimony that at least two (2) prior persons had fallen at the site, prior to this accident, no evidence in the record shows those incidents were ever reported to any representatives of the Defendant, City of Ocean City. Based on the foregoing, it is respectfully asserted that the Plaintiff, Elisa Keefrider, has failed to prove that the Defendant, City of Ocean City, had any actual notice of the sidewalk in question.

According to *N.J.S.A. 59:4-3(b)*, a public entity shall be deemed to have "constructive notice" of a dangerous condition within the meaning of *N.J.S.A. 59:4-2(4)(b)* 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. Nowhere in the record has the Plaintiff provided any proofs and/or evidence to support such an allegation. Although the Plaintiff testified that she had "been on the Avenue before years ago", she has not provided any evidence or proof of its condition in the past. *See page 9 of Plaintiff's deposition testimony attached hereto as* ***Exhibit "B".*** There is no evidence indicating when the condition was created. In fact, the Defendant, City of Ocean City, has no records or reports of any accidents occurring at or near the area in question prior to the

within accident. The only information that the Defendant, City of Ocean City, has been provided is the grant application three (3) months post accident.

Because the Plaintiff, Elisa Keefrider, must prove that the Defendant, City of Ocean City, was palpably unreasonable, the doctrine of res ipsa loquiter is not applicable. *Rocco v. N.J. Transit Rail Operations, 330 N.J. Super. 320 (App. Div. 2000).* The Supreme Court of New Jersey in *Kolitch v. Lindedahl, 100 N.J. 485 (1985),* had determined the term "palpably unreasonable" to imply "behavior that is patently unacceptable under any given circumstance." *Kolitch v. Lindedahl, 100 N.J. 485 (1985),* Furthermore, *Kolitch* quoted *Polyard* in finding "it must be manifest and obvious that no prudent person would approve of its course of action or inaction." *Kolitch v. Lindedahl, 100 N.J. 485 (1985).* As previously outlined, the actions of the Plaintiff have failed to establish any action or inaction of the Defendant, City of Ocean City, or that its employees were unreasonable. Therefore, the actions or inactions of the Defendant, City of Ocean City, can not be deemed to be palpably unreasonable with respect to its efforts to protect against the alleged dangerous condition.

Construing the facts in the light most favorable to the Plaintiff, Elisa Keefrider, it is respectfully asserted that she has failed to satisfy the requirement of constructive notice of a dangerous condition, as well as the requirement that the efforts of the Defendant and/or its employees must be palpably unreasonable. As previously stated, even if the Court finds that the Defendant, City of Ocean City, was responsible for the maintenance and repair of the "sidewalk area" in question, the record is clear that the Defendant, City of Ocean City, was unaware of the alleged condition of a "broken sidewalk" on the property located at 709-711 Asbury Avenue, Ocean City, New Jersey where the within accident occurred and acted reasonable in its efforts to prevent any alleged dangerous condition. As such, it is respectfully asserted that the Plaintiff,

Elisa Keefrider, has failed to present any evidence to establish that prior to the within incident, the Defendant, City of Ocean City, had any actual and/or constructive notice concerning the area in question.

Since the Plaintiff, Elisa Keefrider, has not met the burden imposed upon her by *N.J.S.A. 59:4-2* that the area in question was "public property"; that a dangerous condition existed; that the dangerous condition proximately caused the Plaintiff, Elisa Keefrider's alleged injuries; that a public employee created the condition or that the Defendant, City of Ocean City, had either actual and/or constructive notice of the condition, the Defendant, City of Ocean City, is entitled to immunity from the Plaintiff's suit, and therefore, Summary Judgment should be granted in favor of the Defendant, City of Ocean City.

III. THE DEFENDANT, CITY OF OCEAN CITY, IS IMMUNE FROM THE PAIN AND SUFFERING DAMAGES OF THE PLAINTIFF, ELISA KEEFRIDER, BECAUSE HER INJURIES DO NOT SATISFY THE THRESHOLD REQUIREMENTS OF *N.J.S.A. 59:9-2(d).*

Public entities are immune from liability for personal injuries, except under the conditions and circumstances detailed in the Tort Claims Act. *Schwarz v. Port Authority Transit Corp. Div. of Delaware Port Auth.*, 305 *N.J.Super. 581, 593 (App.Div.1997) certif. denied, 153 N.J. 214 (1998)*. The Act provides in *N.J.S.A. 59:1-2* "[I]t is hereby declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this Act and in accordance with the fair and uniform principles established herein. All of the provisions of this Act should be construed with a view to carry out the above legislative declaration." The Act also directs in *N.J.S.A. 59:2-1(a)* that:

> "Except as otherwise provided by this Act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person."

The legislative goal of the Act is "to re-establish immunity for all governmental bodies within its definition of 'public entity.' Immunity is all-inclusive within that definition except as otherwise provided by the Act." *English v. Newark Housing Auth., 138 N.J.Super. 425, 428-429 (App.Div.1976).*

According to *N.J.S.A. 59:9-2(d)*, "No damages shall be awarded against a public entity or public employee for pain and suffering resulting from an injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of

permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $1,000.00. *Peterson v. Edison Tp. Bd. of Ed., 137 N.J. Super. 56 (App.Div. 1975), (the threshold expense qualification was subsequently amended by L. 2000 c. 126, §32 to increase the dollar threshold to increase the dollar threshold to $3,600.00 from $1,000.00).* Failure to meet this threshold bars recovery for pain and suffering, which includes damages allegedly sustained as a result of anguish, fear, anger, apprehension and humiliation. *Avers v. Jackson Tp., 106 N.J. 557 (1987).*

For an injury to be considered permanent within the meaning of *N.J.S.A. 59:9-2(d)*, an injury must constitute an objective impairment, such as a fracture. *Thorpe v. Cohen, 258 N.J. Super. 523 (App. Div. 1992).* Without such objective abnormality, there is no claim. A claimant may not maintain an action for personal injuries without first satisfying the threshold of *N.J.S.A. 59:9-2(d).*

The permanent loss and disfigurement categories of N.J.S.A. 59:9-2(d) preclude recovery for pain and suffering for injuries based on subjective evidence or minor incidents. Collins v. Union County Jail, 150 N.J. 407,413 (1997). As such, the evidence required to pierce the Tort Claims Act threshold must be objective. *Brooks v. Odom, 150 N.J. 395*, (1997).

The primary case interpreting the aforementioned threshold requirement is the decision articulated in *Brooks v. Odom*. In *Brooks*, the Supreme Court concluded that in order to satisfy the requirements *N.J.S.A. 59:9-2(d)*, the claimant must sustain a permanent loss of the use of a bodily function that is substantial. In *Brooks*, the Plaintiff was entering a vehicle in Newark when a New Jersey Transit bus struck the vehicle door that the Plaintiff was attempting to enter, thereafter causing the Plaintiff to be knocked into the vehicle. *Brooks at 398.* The Plaintiff was taken by ambulance to the local hospital. Subsequently, the Plaintiff's x-rays proved normal, and

she was prescribed medicine, fitted with a cervical collar and released from the hospital. *Brooks at 398.*

Upon being released from the hospital, the Plaintiff treated with several health care professionals complaining of headaches; dizziness; blurred vision; pain and stiffness in her neck and upper and lower back; pain radiating in her left shoulder, and increased discomfort due to changes in the weather. *Brooks at 398.* X-rays revealed small marginal spurs in the upper lumbar vertebra and disc space narrowing at C5-C6 and C6-C7. *Brooks at 398.* A thermograph also revealed L4 and L5 fiber irritation and pelvic lean. *Brooks at 399.* The Plaintiff also had a mild flattening of the spinal curve, tenderness and decreased motion, as well as muscle spasms. *Brooks at 399.* The Plaintiff, was diagnosed with a significant and permanent loss of function with respect to her back, as well as with chronic pain that was exacerbated by the usual activities of daily living. *Brooks at 400.*

As a result of the accident, the Plaintiff missed eight (8) days from work and stayed home for two (2) weeks. *Brooks at 400.* The Plaintiff then returned to work as a teacher's aid, but continued to complain of headaches, dizziness, and severe low back pain which radiated into her left leg preventing her from sitting or standing for a prolonged period of time. *Brooks at 400.* The Plaintiff also claimed that she had great difficulty performing household chores, including vacuuming, carrying groceries and other activities that requires lifting or bending. *Brooks at 400.*

Based upon all of the above, the Law Division granted Defendant's motion to dismiss the Plaintiff's claim for pain and suffering damages under the Tort Claims Act. *Brooks at 398.* The Law Division found that the Tort Claims Act has a stricter standard than the verbal threshold of the No-Fault Law. *Brooks at 401.* The Appellate Division, however, reversed, finding that the

evidence of muscle spasms, loss of spinal curvature and marginal spurs constituted objective evidence of injury. *Brooks at 401.* The Appellate Division took notice of the fact that the Plaintiff was unable to sit or stand for long periods of time without pain, and that she experienced pain in performing anything that required lifting or bending. *Brooks at 402.*

The New Jersey Supreme Court reversed the Appellate Division and reinstated the ruling by the Law Division with respect to the Defendant's motion. *Brooks at 398.* In doing this, the Court emphasized that the general purpose of the Tort Claims Act is to establish immunity for public entities given the affect of broad liability on public coffers. *Brooks at 403.* Consequently, pain and suffering damages are only permitted against public entities and public employees in aggravated circumstances. *Brooks at 409.*

Based on the aforementioned, the New Jersey Supreme Court held that to recover pain and suffering damages under the Tort Claims Act, a claimant must sustain a permanent loss of use of a bodily function that is "substantial." Temporary injuries, no matter how painful and debilitating do not suffice, neither do mere subjective feelings of discomfort, nor does a claim where the claimant can still function in his or her employment. *Brooks at 409.* Thus, in *Brooks*, after accepting Plaintiff's case with respect to her pain and permanent limitation of motion in her neck and back, the New Jersey Supreme Court held that she had failed to state a claim for pain and suffering damages under the Tort Claims Act. *Brooks at 409.* To hurdle the "pain and suffering" threshold of the Tort Claims Act, the Plaintiff must satisfy a two-pronged test by proving (1) an objective permanent injury and (2) a permanent loss of a bodily function that is substantial. *Gilhooley v. County of Union, 164 N.J. 533, 540-541 (2000).*

As analyzed in *Rocco v. N.J. Transit Rail Operations, 330 N.J. Super. 320 (App. Div. 2000)* the Court held that a lacerated and broken thumb that had healed by the time of trial was

not a permanent injury sufficient to support a pain and suffering claim under the Tort Claim Act. It is important to note in Rocco, that there existed no objective evidence of a permanent injury and Plaintiff's subjective complaints alone could not satisfy the Tort Claims threshold. Furthermore, in *Hammer v. Township of Livingston,* the Plaintiff's injuries of lacerations and fractures to her left side were not enough to survive the Township's Motion for Summary Judgment. The Court reasoned that because the Plaintiff's injuries did not restrict her motion; a permanent loss of a bodily function had not occurred. Furthermore, since plaintiff's complaints were purely subjective, they could not overcome the threshold set forth in the Tort Claims Act. *Hammer v. Township of Livingston, 318 N.J. Super 298, 308 (App Div. 1999).*

Applying these decisions to the present case, it is clear that the Plaintiff's injuries of bruising and a left knee medial meniscal tear do not satisfy the Tort Claims Act Threshold. On June 25, 2001, the Plaintiff, Elisa Keefrider, was involved in a slip and fall accident while walking in the vicinity of 709-711 Asbury Avenue, Ocean City, New Jersey. *See copy of the Complaint of Plaintiff, Elisa Keefrider, et al, attached hereto as* ***Exhibit "I".*** Plaintiff alleges that as a result of this accident, she sustained a permanent injury to her left knee.

After the fall, the Plaintiff was taken by ambulance to Shore Memorial Hospital's Emergency Room. *See copy of Plaintiff, Elisa Keefrider's Answers to Interrogatories, attached hereto as* ***Exhibit "B".*** While at the Emergency Room, the Plaintiff complained of pain in the left knee and right elbow. At the Hospital, the Plaintiff was diagnosed with an abrasion to her right elbow and the laceration on her left knee was sutured closed. X-rays performed at the Hospital of the left knee revealed no evidence of fracture or dislocation of the left knee, small joint effusion and soft tissue swelling overlying the patella and patellar tendon. The Plaintiff was discharged from the Hospital with instructions to follow up with her family physician within ten

days to have the sutures removed. *See copy of Shore Memorial Hospital records attached hereto as* ***Exhibit "J".*** Thereafter, in accordance with the aforementioned instructions, the Plaintiff saw her family physician, Dr. James Judd, to have the sutures removed. *See pages 17 of Plaintiff's deposition testimony attached hereto as* ***Exhibit "B".*** After the accident, the Plaintiff did not seek any treatment for her right elbow and the injury to the right elbow resolved. *See page 26 of Plaintiff's deposition testimony attached hereto as* ***Exhibit "B".***

After the sutures were removed, the Plaintiff visited with her family physician, Dr. James Judd, on several occasions complaining about pain in her left knee. Prior to the underlying accident, the Plaintiff had been seeing Dr. Judd on a regular basis for symptoms unrelated to the underlying accident. Due to the Plaintiff's continued pain in the left knee, Dr. Judd recommended the Plaintiff undergo an MRI of the left knee. *See copy of MRI report dated October 30, 2001 from Parlee & Tatem Radiological Associates attached hereto as* ***Exhibit "K".*** The MRI revealed a horizontal tear involving the posterior horn and a small portion of the body of the lateral meniscus, extending to the inferior surface. *See copy of MRI report dated October 30, 2001 from Parlee & Tatem Radiological Associates attached hereto as* ***Exhibit "K".*** Based on these results, the Plaintiff visited the Doylestown Surgery Center with regard to the pain in her left knee. Upon being further evaluated by Dr. Kieran Cody of the Doylestown Surgery Center, on December 5, 2001, the Plaintiff underwent left knee arthroscopy and partial medial meniscectomy. *See copy of report dated December 5, 2001 of Dr. Kieran Cody attached hereto as* ***Exhibit "L".*** Thereafter, the Plaintiff underwent several weeks of therapy to strengthen her knee. *See page 21 of Plaintiff's deposition testimony attached hereto as* ***Exhibit "B".*** Prior to the underlying surgery, the Plaintiff had been treating with the Hatboro Medical Associates for sinus and dry syndrome. However, during these visits, it is noted that the Plaintiff would

complain about pain in the knee, ultimately resulting in the initial visit to the Doylestown Surgery Center. *See copy of reports from Hatboro Medical Associates dated May 23, 2001 though August 13, 2002 attached hereto* ***as Exhibit "M".*** In April of 2002, due to continued pain in her knee, the Plaintiff underwent a steroid injection. Thereafter, the Plaintiff visited with the Orthopedic Specialty Center complaining of left knee pain. As a result, she began a course of treatment at the Center. The Plaintiff was treated conservatively between October 24, 2002 and November 12, 2002. On October 24, 2002, the Plaintiff returned to the Doylestown Hospital for a second MRI of the left knee. *See copy of MRI report from the Doylestown Hospital dated October 24, 2002 attached hereto as* ***Exhibit "N".*** The second MRI revealed new bone bruising and edema of the medial tibial plateau and medial femoral condyle, increased joint effusion, edema, possible partial tear of the ACL, and grade three signal abnormality of the posterior horm of the medial meniscus suggesting a tear. *See copy of MRI report from the Doylestown Hospital dated October 24, 2002 attached hereto as* ***Exhibit "N".*** Between November and December of 2002, the Plaintiff underwent three (3) synvisc injections for pain in her knee and in January of 2003, the Plaintiff was seen by Dr. Cody, who recommended Zostrix cream or Lidoderm patches for the pain in her knee.

On February 25, 2003, the Plaintiff visited with Dr. Jeffrey T. Kummery regarding her left knee pain. After being evaluated, Dr. Kummery felt "this was mainly bony edema allowing the pain in her knee to persist." He recommended conservative treatment modalities with continued aquatic therapy, anti-inflammatory medication, and cortisone injection. *See copy of report dated February 25, 2003 of Dr. Jeffrey T. Kummery attached hereto as* ***Exhibit "O".***

On June 17, 2003, the Plaintiff returned to Dr. Kummery. After evaluation, Dr. Kummery opined that "Mrs. Keefrider's arthritis had advanced", as a result, she was advised to

see Dr. Pritchard of the Rheumatology Specialty Center. *See copy of report dated June 17, 2003 of Dr. Jeffrey T. Kummery attached hereto as* ***Exhibit "P".***

On September 9, 2003, the Plaintiff visited with Dr. Charles B. Burrows, who advised that the Plaintiff may need a full knee replacement at sometime in the future; however, the Plaintiff wished to continue treating conservatively prior to any further surgery. *See copy of report dated September 9, 2003 of Dr. Charles B. Burrows attached hereto as* ***Exhibit "Q".***

In January of 2004, the Plaintiff returned to Dr. Burrows for injections for the pain. *See copy of reports of Dr. Charles B. Burrows dated January 9, 2004, January 16, 2004 and January 23, 2004 attached hereto as* ***Exhibit "R".*** On March 2, 2004, the Plaintiff visited with Dr. Burrows who provided Plaintiff with information regarding a full knee replacement. *See copy of report dated March 2, 2004 of Dr. Charles B. Burrows attached hereto as* ***Exhibit "S".*** To date, the Plaintiff has not undergone any the aforementioned knee replacement nor is any such surgery scheduled. The Plaintiff contends that she visits Dr. Burrow or Dr. Starr every two (2) to four (4) months for an evaluation regarding her left knee pain.

In order to assist the Court in determining whether the Plaintiff, Elisa Keefrider's, injuries satisfy the threshold requirement established in Tort Claims Act, this Court should first focus on the injuries sustained by the Plaintiff in *Brooks*. As discussed above, the Plaintiff in *Brooks* had been injured when a New Jersey Transit Bus struck her car door as she was entering her vehicle. X-rays of Ms. Brooks' back revealed small marginal spurs in the upper lumbar vertebra and disc space narrowing at C5-C6 and C6-C7. *Brooks at 398*. A thermograph also revealed L4 and L5 fiber irritation and pelvic lean. *Brooks at 399*. Ms. Brooks also had a mild flattening of the spinal curve, tenderness and decreased motion, as well as muscle spasms. *Brooks at 399*. Ms. Brooks, was also diagnosed with a significant and permanent loss of

function with respect to her back, as well as with chronic pain that was exacerbated by the usual activities of daily living. *Brooks at 400.*

As a result of the accident, Ms. Brooks missed eight (8) days from work and stayed home for two (2) weeks. *Brooks at 400.* Although Ms. Brooks continued to work as a teacher's aide, she continued to complain of headaches, dizziness, and severe low back pain which radiated into her left leg preventing her from sitting or standing for a prolonged period of time. *Brooks at 400.* Contrary to the Plaintiff in *Brooks*, Mrs. Keefrider was unemployed at the time of this accident and is not contending that the accident has effected her employment nor has she claimed any loss wages as a result of this incident. In addition, in *Ponte v Overeem, 171 N.J. 46, 791 A.2d 1002 (2002)*, the Court held that there must be a "physical manifestation of a claim that an injury is permanent and substantial." *Ponte v. Overeem, 171 N.J. 46, 791 A.2d 1002 (2002).* An injury causing lingering pain, resulting in lessened ability to perform certain tasks because of the pain will not suffice because "a plaintiff may not recover under the Tort Claims Act for mere subjective feelings of discomfort. *Gilhooley v. County of Union, 164 N.J. 533, 753 A.2d 1137 (2000).*

The decisions in *Brooks* and *Ponte* were in large part, based upon the Plaintiffs' ability to return to their daily activities, in that, "although painful, were not substantially precluded by their injuries." *Ponte v. Overeem, 171 N.J. 46, 791 A.2d 1002 (2002), Brooks v. Odom, 150 N.J. 395,* (1997). As previously stated, in *Brooks* the plaintiff sustained soft tissue injuries which resulted in pain; however, the injuries were not based on medically objective proofs such as a fracture. *Brooks v. Odom, 150 N.J. 395,* (1997). In *Ponte*, although the plaintiff suffered a derangement of the knee, which was supported by objective medical proofs, he was able to return to his

former athletic activities and hobbies, "albeit with some restrictions." *Ponte v. Overeem, 171 N.J. 46, 791 A.2d 1002 (2002).*

In further support, the Court in *Newsham v. Cumberland Regional High School,* held that although the Plaintiff suffered a fracture of the thoracic vertebra, the fracture was well healed within two (2) years. *Newsham v. Cumberland Regional High School, 531 N.J. Super. 186 (App. Div. 2002).* The Plaintiff, although unable to sit for long periods of time, could only lift minimal weight, could not exercise as much as she once did, and took medicine and frequent breaks during her work shift, she was able to perform well in school, and work while attending school. *Newsham v. Cumberland Regional High School, 531 N.J. Super. 186 (App. Div. 2002).* As such the Court held the Plaintiff did not pierce the Tort Claims Act threshold. *Newsham v. Cumberland Regional High School, 531 N.J. Super. 186 (App. Div. 2002).*

In the within matter, on November 2, 2004, at the Plaintiff's deposition, the Plaintiff, Elisa Keefrider, gave sworn testimony regarding the underlying accident. At the deposition, the Plaintiff continued to complain of pain in her left knee. In addition, as previously stated, the Plaintiff testified at her deposition that at the time of the accident and currently she was unemployed. *See copy of Plaintiff, Eliza Keefrider's Deposition Transcript page 9 attached hereto as* ***Exhibit "A".***

With regard to the Plaintiff's hobbies and daily activities, the Plaintiff testified that prior to the accident she was a big walker. Furthermore, she testified that she played tennis approximately six (6) times a year, went bowling three (3) or four (4) times a year and would roller skate approximately once a year. Lastly, the Plaintiff testified that prior to the accident she would take walks on the Ocean City Beach approximately fourteen (14) or fifteen (15) times a year. As a result of the accident, the Plaintiff contends that she can no longer enjoy any of these

activities. However, the Plaintiff now rides the stationary bike for ten (10) minutes every day and water walks at the gym for approximately twenty (20) minutes every other day. The Plaintiff continues to be involved in her prior activities; however, at a limited or restricted pace. The Plaintiff continues to go to the food store with her husband, visit her mother, mother-in-law and grandchildren, as well as go to church, the park and the gym. *See page 38 of Plaintiff's deposition testimony attached hereto as* ***Exhibit "B".***

In comparing the injuries that Ms. Brooks sustained to those of this Plaintiff, it is clear that the Plaintiff does not satisfy the threshold requirement as no objective proof has been produced to show the Plaintiff suffers from a permanent loss of a bodily function which is casually related to the underlying accident. In addition, subjectively, the Plaintiff can still perform much of her daily activities. Subsequent to the *Brooks* decision, the Appellate Division has consistently held that there must be a substantial showing and various aggravating circumstances, above and beyond the discomfort and undiagnosed pains that exist in this case. Thus, a simple review of the Appellate Division decisions subsequent to Brooks, further solidifies the fact that the Plaintiff, does not meet the threshold requirement of *N.J.S.A. 59:9-2(d)*.

In the case of *Faulkner v. New Jersey Transit Bus Operations, Inc., (A-2807-96T3)*, (Decided May 26, 1998) the Appellate Division affirmed the Trial Court's determination that the Appellant had not met the threshold requirements of *N.J.S.A. 59:9-2(d)*. On December 19, 1992, the Plaintiff in *Faulkner* was a passenger on a New Jersey Transit Bus. When the bus arrived at the Plaintiff's destination, the driver stopped the bus and the Plaintiff prepared to step down. The Plaintiff informed the driver that the street curb was to far away for her alight safely and asked the driver to lower the hydrologic step so that she could step down from the bus. The driver

either did not hear her or simply refused to request. Plaintiff stepped from the bus to the curb and fell thereafter sustaining injuries to her back and right knee.

Plaintiff was taken to the emergency room of Greenville Hospital where an x-ray showed no fracture or dislocation in Plaintiff's lumbar spine or right knee, but disclosed minimal hypertrophic changes in the patella, with soft tissues that were described as unremarkable. Plaintiff's treating physician, Dr. Arthur Taubman, an orthopedic surgeon, provided a report dated May 17, 1993, which diagnosed Plaintiff with sprains of the right knee and lumbar region, with internal derangement to the right knee, and a resolved knee contusion. The report also stated that Plaintiff suffered from a decrease range in mobility by fifteen (15) degrees in the lumbar area, and mildly decreased extension in her right knee.

A subsequent report dated December 1, 1994, after MRI's had been taken, re-stated much of that which was contained in the first report. It added, however, that as of November, 1994 Plaintiff continued to have pain in her right knee and back area. The doctor's final diagnosis of the patient included degenerative disc disease at L5-S1, bulging disc at L4-LS, lumbar sprain, and right knee lateral meniscus tear. The doctor concluded:

> "In my opinion, the Plaintiff's medical condition is attributable to her injuries sustained when she fell on a bus on December 19, 1992. She has repeatedly complained of pain in her back and right knee. The overall prognosis for significant recovery is poor since injuries of this type are frequently precursors to traumatic arthritis in the regions involved. Based upon the above objective orthopedic examination, the Plaintiff has sustained a severe and permanent orthopedic injury. In all probability, the patient will have repeated episodes and exacerbations in the future and will never regain full use of these areas of the body".

MRI's taken on November 8th and 9th , 1994, offered some support for the conclusion that Plaintiff suffered from a tear of the lateral medial meniscus and a bulging disc at L4-L5. However, a subsequent operative report, prepared by Newark Beth Israel Medical Center in connection with Plaintiff's orthopedic surgery, showed that there actually was no lateral meniscus tear, but rather a tear of the anterior horn free edge. During Plaintiff's operative inspection, the tear to the horn free edge was repaired by meniscectomy and a chondroplasty was performed on the medial femoral condyle.

As a result of her injuries, the Plaintiff stated that she required a cane to walk and continued to suffer from back pain and right knee pain and instability. Plaintiff's most recent medical reports suggested that her post-operative condition is steadily improving. The Court in *Faulkner*, relying on the rational in *Brooks*, held that the only impact on bodily functions to which the record points is that the Plaintiff suffers from back pain, requires a cane to walk, and has decreased flexibility and mobility in her lumbar region and in her right knee. The Court further stated "even accepting Plaintiff's medical reports is true and giving her the benefit of all favorable inferences, it does not appear that Plaintiff has established the substantial or permanent loss of bodily function that *Brooks* requires". Rather, here as in *Brooks*, the record reflects an arguably substantial limitation on a bodily function that does not appear to be permanent after Plaintiff's corrective orthopedic surgery. Although said injury would satisfy the no-fault law, *N.J.S.A.* 39:6-8(a), it does not satisfy the Tort Claims Act, *N.J.S.A.* 59:9-2(d).

In the decided case of *Santiago v. Newark Housing Authority, A-3436-96T1*, (Decided November 20, 1997), the Appellate Division affirmed the Trial Court's determination that the Appellant had not met the threshold requirements of *N.J.S.A. 59:9-2(d)*. On January 12, 1993. Plaintiff, Rosa Santiago, fell on a premises owned and controlled by the defendant, Newark

Housing Authority. She suffered non-displaced fractures of the 2nd, 3rd, and 4th metatarsal bones of her left foot. She was examined at University Hospital, and a cast was applied. She began a course of treatment which extended until July 1993. When she was discharged in July 1993 from treatment, she still had complaints of pain. She used crutches for the first six months after the accident and a cane for six months after that. In the Plaintiff's deposition she complained that she was experiencing continuing pain, that she was unable to wear high heels and that she was unable to go out for a walk or dance and swim as she had before.

The Court in *Santiago*, cited to *Brooks v. Odom, 150 N.J. 395*, (1997) where New Jersey Supreme Court concluded that in order to satisfy the requirements *N.J.S.A. 59:9-2(d)*, the claimant must sustain a permanent loss of the use of a bodily function that is substantial. The Court in Santiago then held that the Plaintiff, whose non-displaced metatarsal fractures had healed completely, had not established such a "substantial" loss of a bodily function even though she was unable to perform some of the activities she was able to perform prior to the accident. (See also *Jones v. Passaic County Board of Social Services, A-2155-96T5*, decided November 19, 1997; *Hardy v. Max Murphy, et al, A-7101-95-T1*, decided November 20, 1997; and *Stancavicz v. State of New Jersey, et al.*, decided December 16, 1997, which all relied on the New Jersey Supreme Court decision of *Brooks v. Odom, 150 N.J. 395*, (1997) to render its decision regarding *N.J.S.A. 59:9-2(d)*.

In the unpublished opinion of *Hill v. Board of Education of the City of Newark, et al, A-6973-95T1, rev'd on other grounds,* the Appellate Division affirmed the Trial Court's determination that the Appellant had not met the threshold requirements of *N.J.S.A. 59:9-2(d)*. In *Hill*, the Plaintiff submitted only two documents to establish satisfaction of the threshold requirements, a report from his treating physician who stated that the Plaintiff's fracture had

healed completely with good alignment and Plaintiff's own Certification that stated only the Plaintiff's subjective complaints. The Appellate Division found that these two (2) documents taken together did not establish "objective medical evidence of a permanent loss of a body function" and the Court barred the Plaintiff's claim for pain and suffering damages.

In addition to the *Hill case,* in the case of *Romano v. Lawrence, et al., A-7396-95T2* (opinion not approved for publication), the Appellate Division affirmed the Trial Court's determination that the Appellant had not met the threshold requirements of *N.J.S.A. 59:9-2(d)*. In *Romano*, the Plaintiff was diagnosed as suffering from a herniated disc at L4-5 and a small hernia at L5-S1. In addition, an orthopedic surgeon determined that the Plaintiff suffered soft tissue damage that was directly related to the accident. The doctor concluded that the Plaintiff's prognosis remained quite guarded. However, the Appellate Division determined that the evidence submitted by the Plaintiff failed to show that the injuries he sustained resulted in a disability that can be characterized as a "permanent loss of a bodily function" as required by the Act. In short, the Appellate Division determined that the loss was not "substantial" because although the Plaintiff suffered from soft tissue damage, the injuries could be resolved with conservative treatment and the Plaintiff did not suffer from any neurological deficit.

The Plaintiff, Elisa Keefrider, still enjoys activities such as bike riding, water walking and traveling. In addition, although she suffers from subjective pain in her left knee, pain alone will not hurdle the threshold of the Tort Claims Act.

Here, the Plaintiff had a horizontal tear involving the posterior horn and a small portion of the body of the lateral meniscus which after corrective surgery and conservative treatment and medication has reached maximum improvement without undergoing a full knee replacement. As previously stated, the full knee replacement surgery has not been scheduled. Clearly, the

Plaintiff, Elisa Keefrider, has not suffered a permanent loss of a bodily function that is substantial. The Plaintiff, Elisa Keefrider, has failed to produce any objective, medical evidence that she suffers from a permanent loss of a bodily function that is substantial which resulted from the underlying accident. Thus, applying the *Brooks*, *Santiago*, *Faulkner*, and *Hill's* holdings to the case before the Court, it is clear that the Plaintiff, Elisa Keefrider's, alleged injuries do not rise to the level entitled to compensation under *N.J.S.A. 59:9-2(d).*

According to the rational set forth in *Brooks*, coupled with the myriad of Appellate Division cases that followed *Brooks*, it is clear that the Plaintiff's injuries do not rise to the level entitled to compensation under *N.J.S.A. 59:9-2(d).* In the present case, the facts are uncontroverted that the Plaintiff, Elisa Keefrider, does not satisfy the threshold requirement set forth in *N.J.S.A. 59: 9-2(d).* This case is exactly the type of case that the New Jersey Courts intended to be subject to the Tort Claims Act threshold statute, and as such, the Defendant, City of Ocean City, is not liable to the Plaintiff, Keefrider, for non-economic damages.

IV. SUMMARY JUDGMENT MUST BE GRANTED WHEN THERE EXISTS NO GENUINE ISSUE OF MATERIAL FACT.

Summary Judgment must be granted if the pleadings, depositions, answers to Interrogatories and admissions on file, together with Affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to Judgment as a matter of law. *Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67 (1954); R. 4:46-2.* Summary Judgment is a procedure which pierces the mere allegations of pleadings to show the facts are otherwise than alleged. *Rankin v. Sowinski, 119 N.J.Super. 393 (App. Div. 1972); Eisen v. Kostakos, 116 N.J.Super. 358 (App. Div. 1971); Solokay v. Edlin, 65 N.J.Super. 112 (App. Div. 1961).*

Once the movant has demonstrated that there is no genuine issue of fact, the burden of going forward with the evidence shifts to the opponent of the Motion. The opponent must show uncontroversial facts, not merely ipsie dixit representations or allegations in pleadings without Affidavit or other evidentiary support. The opponent must "establish clearly the existence of a genuine issue of material fact." Failure to do so entitles the movant to the relief sought. *Judson, Supra at 75; James Talcott, Inc. v. Sculman, 82 N.J.Super. 438, 443 (App. Div. 1964).* Judge Cardozo, (later Justice), in *Richard v. Credit Suisse, 242 N.Y.3rd 46, 152 N.E. 110 (CT. APP. N.Y. 1926),* stated:

> "The very object of a Motion for Summary Judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of trial."

In *Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995),* the Supreme Court clarified that a determination as to whether or not there exists a genuine issue of material fact requires the motion judge to consider whether the competent evidential materials present, when

viewed in a 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. 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 the motion. *Brill at 540.*

On June 16, 2003, the Plaintiff, Elisa Keefrider, filed a Seven (7) Count Complaint against the Defendants listed in the above caption. However, according to the undisputed facts in this case, the Defendant, City of Ocean City, is immune from liability based on the Plaintiffs' failure to satisfy the requirements of at common law as well as *N.J.S.A. 59:2-1* and *59:4-2*. It is clear that on the issue of liability, Summary Judgment is appropriate and it is equally clear that when the facts are viewed in the light most favorable to the Plaintiff, Elisa Keefrider, she has not satisfied the threshold requirements of *N.J.S.A. 59:9-2* and as such, the Defendant, City of Ocean City, is immune from any pain and suffering damages.

Based upon the foregoing, it is respectfully submitted that as a matter of law, the Defendant, City of Ocean City, is entitled to the entry of Summary Judgment.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Motion for Summary Judgment, filed on behalf of the Defendant, City of Ocean City, must, as a matter of law, be granted.

STAGLIANO & DEWEESE, P.A.

By: _____
David S. DeWeese, Esquire
Attorney for Defendant, City of Ocean City

Date: January 6, 2004