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**Powell, Birchmeier & Powell**  
Counselors At Law  
1891 State Highway 50, P.O. Box 582  
Tuckahoe, NJ. 08250  
(609) 628-3414  
Attorneys for Defendant, City of Ocean City

Plaintiff(s), JOHN F. LYNCH, ADMINISTRATOR AD PROS OF THE ESTATE OF ANNE MARIE LYNCH v.  Defendant(s), RONALD THORWART, SHAUN GARRITY, CITY OF OCEAN CITY, j/s/a	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAPE MAY COUNTY  DOCKET NO. CPM-L-370-08  CIVIL ACTION  BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
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### **INTRODUCTION**

The within matter arises out of a fatal accident involving the operation of a personal watercraft (jet ski) that occurred in the 17<sup>th</sup> Street Lagoon in Ocean City, New Jersey. On July 20, 2006, Anne Marie Lynch was fatally injured when the jet ski she was operating collided with a dock in the 17<sup>th</sup> Street Lagoon, Ocean City, New Jersey. Lynch's uncle, Ronald Thorwart, borrowed the jet ski from a friend. He paid the necessary fees to launch the jet ski to a boat ramp operator employed by the City of Ocean City. He launched the jet ski from the Tennessee Avenue boat ramp, which was controlled and operated by the City of Ocean City. Ocean City had a municipal ordinance requiring jet ski operators to have in their possession a certification of completion of an approved boating safety course prior to operating in Ocean City waters. Neither Thorwart nor Lynch had taken or completed the required safety course. Lynch operated the jet ski from the Tennessee boat ramp to the accident site.

Defendant, City of Ocean City, now moves for summary judgment as it is immune from suit pursuant to the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq.

### **PROCEDURAL HISTORY**

On or about September 3, 2008, prior counsel for the City of Ocean City, James Savio, filed a motion for summary judgment on behalf of the City of Ocean City. This motion, filed before any substantive discovery took place, argued that the City of Ocean City did not have any legal duty and/or obligation to investigate the competency of each and every individual who may potential operate a vessel in the waters adjacent to the City of Ocean City. The plaintiffs filed opposition arguing, in part, that additional discovery needed to be completed before the issue of liability could be determined. In addition, while the plaintiffs' opposition contained a CV of a proposed liability expert, no written report had been produced at the time the City's initial motion was returnable. By way of Order dated October 10, 2008, the Court denied the City's motion for summary judgment without prejudice. (See Order filed on October 10, 2008 attached as Exhibit "E")

At this stage discovery is complete and the plaintiffs and defendant have exchanged liability expert reports. Accordingly, it is the position of the City of Ocean City that this case is now ripe for summary judgment.

The Court should also be aware that a Stipulation of Dismissal with prejudice has been executed and filed with respect to the plaintiffs' claims asserted against the defendant Ronald Thorwart. (See Stipulation of Dismissal with prejudice as to defendant Ronald Thorwart only attached as Exhibit "F")

Pursuant to R:4:46-2(a), below are a Statement of Material Facts which the movant contends there are no genuine issues:

## **STATEMENT OF FACTS**

1. On July 20, 2006, Ann Marie Lynch, deceased, was operating a jet ski in the 17<sup>th</sup> Street Lagoon, in the City of Ocean City, New Jersey, when she was fatally injured when the jet ski she was operating collided with a dock. (See copy of police report attached as Exhibit "A")

2. The City of Ocean City enacted boating regulations regarding the operation limits on personal watercraft. Municipal ordinance 18-7.2 requires, in part:

- h. A person shall not operate a personal watercraft on the tidal waters within the jurisdiction of the City of Ocean City without having successfully completed a boat safety course approved by the Superintendent of the State Police in the Department of Law and Public Safety, or a written test pursuant to Section 17 of Public Law 1995, c.401 . . .

(See City of Ocean City municipal ordinance 18-7.2(h) attached as Exhibit "B")

3. Plaintiff's liability expert, Marjorie Murtagh Cooke, completed an expert's preliminary report dated January 13, 2009, as well as a supplement report to the preliminary report that was dated March 25, 2009. In her preliminary report, Ms. Cooke stated that the City of Ocean City acknowledged that at the time the jet ski was launched, their Tennessee boat ramp employee was obliged to collect a \$10.00 fee for launching the jet ski from the boat ramp and to ensure that any vessel being launched from the boat ramp was registered. Although the registration requirement was mandated by the State of New Jersey, there was no comparable requirement on the part of the municipality itself. (See expert's preliminary report, p.4, attached as Exhibit "C")

4. In addition, the City of Ocean City had an expectation of the performance of the boat ramp employees that extended beyond visually verifying written proof of compliance. The employees were expected to notify the Marine Police if they suspected a violation such as obvious intoxication or wake zone infractions. (Exhibit "C", pp.4-5)

5. The City of Ocean City prepared and adopted municipal ordinance 18-7, that required both the completion of an approved boating safety course and personal carriage of a certificate of completion of the boat safety training course. This local ordinance was adopted by the City of Ocean City in addition to the state law. (Exhibit "C", p.5)

6. The decedent had not taken a boat safety course. Decedent's uncle, Thorwart, had neither taken or completed a boat safety course either. (Exhibit "C", p.6)

7. There was no evidence suggesting the employee assigned to the Tennessee Avenue boat ramp at the time the jet ski was launched made inquiry of the defendant Thorwart with respect to his training, experience, competency, or licensing to operate a jet ski. (Exhibit "C", p.6)

8. According to Ms. Cooke's report, the City of Ocean City failed to maintain their standard of safety at their Tennessee Avenue boat ramp by not insuring that operators launching jet skis at their boat ramp successfully completed a boat safety course as required by both the State and their own municipal ordinance. (Exhibit "C", p.7)

9. It was the further opinion of plaintiff's liability expert that the City of Ocean City not only had an obligation to ask potential ramp users whether they possessed the required safety certificate, as stated in both state law and in their local ordinance, but to train their employees to notify the Marine Police if the necessary papers could not be produced as required. (See copy of plaintiff's expert's supplement report, p.2, attached as Exhibit "D")

10. Within the bounds of reasonable certainty, it was Marjorie Murtagh Cooke's professional opinion that the City of Ocean City failed to adequately enforce their requirement for possession of a boating safety certificate by specifically choosing not to adequately train their employees to notify their patrons, request the necessary certificate and follow up with the Marine Police as necessary. (Exhibit "D", p.3) (emphasis supplied)

## **LEGAL ARGUMENT**

### **DEFENDANT, CITY OF OCEAN CITY, IS ENTITLED TO SUMMARY JUDGMENT AS IT IS IMMUNE LIABILITY PURSUANT TO N.J.S.A. 59:2-4.**

The New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq., was designed to re-establish the immunity of public entities while relieving some of the harsh results of the doctrine of sovereign immunity. N.J.S.A. 59:1-2. Consistent with this purpose, the Act provides for immunity as the general rule, with liability the exception. Collins v. Union County Jail, 150 N.J. 407 (1997). Defendant, City of Ocean City, is entitled to the defenses and immunities contained under the New Jersey Tort Claims Act. Specifically, in this lawsuit, defendant, City of Ocean City, is entitled to the immunity under N.J.S.A. 59:2-4.

N.J.S.A. 59:2-4 entitled adoption or failure to adopt or enforce a law provides as follows:

A public entity is not liable for any injury caused by adopting or failing to adopt a law or by failing to enforce any law.

Pursuant to this statute, a public entity is not liable for failure to enforce safety ordinances, regulations, or the law generally. Levin v. County of Salem, 133 N.J. 35 (1993). In Levin, plaintiff dove from a county bridge into shallow tidal waters, suffering a paralyzing injury. The Supreme Court held that the public entity's failure to enforce anti-recreational ordinances with regard to a low bridge over shallow water could not create liability for this diving accident. Id. at 43. In a similar case, Burroughs v. City of Atlantic City, 234 N.J. Super. 208 (App. Div. 1989), the Court sua sponte noted the existence of a no-diving ordinance and found that the public entity was immunized from liability for failing to enforce it to protect a diver left paralyzed when he dove from the boardwalk into shallow water. Id. at 220.

In her preliminary report, plaintiff's liability expert stated that the City of Ocean City failed to maintain their standard of safety at their Tennessee Avenue boat ramp by not insuring that operators launching their jet skis at this boat ramp successfully completed a boat safety course as required by both state law and their own municipal ordinance. If the boat ramp operators had checked both the deceased and Thorwart to see if they had successfully completed the boat safety course, then permission to launch the jet ski would not have been granted. The deceased would not have been able to operate the jet ski from the boat ramp to the accident scene and this tragic accident would not have occurred.

Ms. Cooke's preliminary report certainly criticizes the actions of the City of Ocean City for not ensuring that operators of pwc's successfully completed a boat safety course. However, if there was any doubt as to Ms. Cooke's opinion, one only need to look at her supplement dated March 25, 2009. (Exhibit "D") Under the "Findings" section of this report, Ms. Cooke specifically opined:

. . . It is my professional opinion that the City of Ocean City failed to adequately enforce their requirement for possession of a boating safety certificate . . . (emphasis supplied) (See Exhibit "D", p.3)

There does not appear to be any clear case of immunity under the New Jersey Tort Claims Act. N.J.S.A. 59:2-4 provides immunities to public entities, including the City of Ocean City in this particular case, for the identical claims contained in the plaintiffs' liability expert report. Stated a different way, the City of Ocean City is immune from liability for failing to enforce a requirement for possession of a boating safety certificate. Accordingly, summary judgment, dismissing the plaintiffs' Complaint as to the City of Ocean City, with prejudice, is appropriate.

### **CONCLUSION**

Based on the foregoing facts and authorities, and under the summary judgment standards stated by our Supreme Court in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995), defendant, City of Ocean City, respectfully requests this Court to grant summary judgment, and to dismiss plaintiff's complaint with prejudice.

Respectfully submitted,

**Powell, Birchmeier & Powell**

BY:

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James R. Birchmeier, Esq.  
Attorneys for Defendant, City of Ocean City

Date: September 10, 2009