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Attorneys for Defendant, Borough of Wildwood Crest
File No. 7381-JPS

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| LEWIS MOREY AND FRANCES MOREY,<br><br>Plaintiff,<br><br>vs.<br><br>BOROUGH OF WILDWOOD CREST, A MUNICIPALITY OF THE STATE OF NEW JERSEY AND JOHN DOES 1-10,<br><br>Defendant. | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION<br>CAPE MAY COUNTY<br>DOCKET NO. CPM-L-288-03<br><br>CIVIL ACTION<br><br>**BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF THE DEFENDANT, BOROUGH OF WILDWOOD CREST** |

## STATEMENT OF PROCEDURE HISTORY

On June 2, 2003, plaintiff filed suit against the Borough of Wildwood Crest claiming that he was entitled to monetary compensation for injuries that he suffered on July 19, 2002 near the Wildwood Crest little league field located on Aster Road in Wildwood Crest. On August 6, 2003, the defendant filed an Answer to the plaintiff's Complaint denying the plaintiff's allegations and raising a number of affirmative defenses. Management Conferences were conducted on January 2, 2004, March 30, 2004, June 1, 2004, October 8, 2004, and finally on December 14, 2004. On December 14, 2004 the Court ordered that the defendant was required to serve it's liability expert report no later than December 10, 2004 and the discovery depositions of the liability expert witnesses were to be completed by February 1, 2005. The plaintiff's liability

expert, Mark I. Marpet was deposed on February 1, 2005 and the defense liability expert, George P. Widas was deposed on February 11, 2005.

As is evident from a review of the Management Order of December 14, 2004, there is an outstanding issue with respect to whether or not certain of the plaintiff's medical problems are related to the fall of July 19, 2002. In addition, there is an issue with respect to whether or not the plaintiff will require surgery in the future because of the events that transpired on June 19, 2002. However, none of the remaining outstanding issues have any implications with respect to the Motion for Summary Judgment which is based upon the plaintiff's alleged failure to satisfy the requirements of N.J.S.A. 59:4-1 et seq. with respect to making a claim against a public entity based upon the condition of public property.

## STATEMENT OF FACTS

On June 19, 2002, Lewis J. Morey, Jr. was coaching a little league baseball team called "Raging Waters" at the little league baseball field in Wildwood Crest, New Jersey, (See Exhibit "A" deposition of Lewis Morey, June 3, 2004, page 33). Mr. Morey had been a coach of Raging Waters for approximately eight years prior to June 19, 2002. He was on the field twice per week during the Spring months for practice with the other little league coaches. (Exhibit "A" at page 33).

Approximately two months before June 19, 2004, Mr. Morey had hip replacement surgery performed by Dr. Alvin Ong of the Rothman Institute. The hip replacement surgery was done on April 19, 2002 (Exhibit "A" at page 8). Mr. Morey testified that

although he used crutches for a period of time after the hip replacement surgery, the crutches were discarded after his 6-week checkup. (See Exhibit "A" at page 10).[1]

Mr. Morey, and Gary M. Hans decided to smoke a cigarette while the little league baseball was proceeding. Morey and Hans had been in the dugout near the Third base side of the field and they walked out of the dugout to an area near Aster Road, but outside the ball field. (See Exhibit "A" at page 7; Exhibit "B" deposition of Gary Hans at pages 24 and 25).

According to Mr. Morey's Interrogatory answers, at approximately 9:00 p.m., he was "walking in the area of the dugout" when he "caught his foot on the concrete sidewalk and fell". (See Exhibit "C" Morey interrogatory answer #2). Mr. Morey testified that the fall occurred around 9:00 p.m. and it was just starting to become dark at that time. (See Exhibit "A" at page 38).[2]

Mr. Morey's son, Matthew Morey, came up to bat at home plate while Morey and Hans were smoking a cigarette. As Morey and Hans were smoking a cigarette outside the cyclone fence that surrounded the field, Matthew Morey hit a home run over the left centerfield fence. Morey heard his son hit the ball and watched the ball sail over the left centerfield fence. (See Exhibit "A" at page 41).

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1 Karen Morey was deposed on September 24, 2004. Ms. Morey indicated in her deposition that after Mr. Morey fell, she noticed a crutch that was used along with a baseball helmet to make Morey more comfortable. (See Exhibit "D" Karen Morey's deposition, September 24, 2004 at page 6).

2 Gary Hans testified at his deposition that Morey fell between 5:30 p.m. and 6:00 p.m. (See Exhibit "B" at page 32). The hospital record indicates that Mr. Morey arrived at the Burdette Tomlin Memorial Hospital at approximately 8:42 p.m., and therefore, it is assumed for purposes of this Motion that the fall occurred somewhere between 7:45 p.m. and 8:15 p.m. and that both Morey and Hans are incorrect in their recollection of the time of the fall.

When Morey saw his son hit the home run, Morey decided that he would return to the baseball field "so he could give him (Michael Morey) five as he rounded third". (See Exhibit "A" at page 7).

As Morey attempted to enter the ball field to congratulate his son on hitting the home run, Morey tripped on the concrete sidewalk. There was a difference in elevation between the slab of concrete closest to the cyclone fence and the sidewalk pathway of approximately 1/2 of one inch.[3]

Clearly, in order to recover against the Borough of Wildwood Crest, Mr. Morey must establish all the elements of N.J.S.A. 59:4-2, including establishing evidence that the Borough of Wildwood Crest had actual or constructive notice of a dangerous condition in sufficient time prior to the injury to have taken measures to protect against it. Plaintiff's expert, Mr. Marpet acknowledges that there is no written evidence of actual notice of a dangerous condition. (See Exhibit "E" deposition of Mark Marpet at page 30) Mr. Morey testified at his deposition that he spoke to Gary Hans, who was then employed by Wildwood Crest, and Gary Hans told Morey that "kids were getting hurt" - "kids would always get there". (See Exhibit "A" at page 39). Gary Hans testified that prior to the incident he reported that the area needed to be repaired because he saw little kids falling and saw ladies trip over it. (See Exhibit "B" at page 40).

After the fall, Hans terminated his position with the Borough of Wildwood Crest and became employed by J. Minch Builders. (See Exhibit "B" at page 11). Mr. Morey is a partner in J. Minch Builders. (See Exhibit "A" at pages 5 and 6). Mr. Morey is the

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3 Although Karen Morey testified that Morey was wearing sandals and carrying a soda, it can be assumed that Morey was wearing Docksiders and not carrying a soda, (See Exhibit "D" at page 5; Exhibit "A" at page 12).

person responsible for paying Hans for his services for Minch Builders. (See Exhibit "B" at page 48).

Robert Little, the landscaping supervisor for the Borough of Wildwood Crest, testified at his deposition on June 4, 2004 that approximately 10 days after the incident, Hans approached him and indicated that the area outside the third base dugout was a bad area and that he and seen people trip before. (See Exhibit "F" Little deposition at page 67). Mr. Little specifically denied that either of the two Borough of Wildwood Crest employees who he supervised, that is Mr. Hans or his other employee, ever made any comment about the condition of the sidewalk outside the Little League field before Morey fell. (See Exhibit "F" at pages 65 and 66).

Plaintiff retained the services of Mark I. Marpet to review the case from a liability perspective. Mr. Marpet is of the opinion that if there is a difference in elevation between two slabs of concrete of ¼ inch, no remedial action is necessary. If the difference in elevation is greater than ¼ inch but less than ¾ inch, grinding and beveling was required. If the difference in elevation is greater than ¾ of an inch, a ramp is required. (See Exhibit "E" at page 33).

In order to recover against the Borough of Wildwood Crest, the plaintiff must prove each of the elements required under N.J.S.A. 59:4-2. Clearly, the Borough of Wildwood Crest is a public entity, and therefore, the immunities under the Tort Claims Act would apply to any claim brought against the Borough of Wildwood Crest.

The plaintiff must establish that the property was in a dangerous condition at the time of the fall. N.J.S.A. 59:4-2. A dangerous condition, according to the New Jersey Tort Claims Act, is a:

> "Condition of the property that creates a substantial risk of injury when such property is used with due care in a manner which it is reasonably foreseeable that it will be used".

First of all, it is respectfully submitted that a 1/2 of an inch to one-inch difference in elevation in an area that is not used exclusively for pedestrian traffic does not create a substantial risk of injury. However, even assuming that the difference in elevation creates a substantial risk of injury, it is respectfully submitted that as a matter of law, Lewis J. Morey, Jr. was not using the property with due care. Even if the Court completely discounts the testimony of Karen Morey, it is respectfully submitted that Lewis Morey's own testimony establishes that he was familiar with the area around the dugout and the concrete area outside the dugout by virtue of the fact he had been a Little League coach on the field for approximately eight years before the incident. He was at the ball field approximately two nights a week. Mr. Morey knew that two months before the incident he had hip replacement surgery, and therefore, it is respectfully submitted that his obligation to carefully watch where he walks and to protect himself from a tripping hazard and his obligation to watch where he is walking is heightened when compared to that of a person who did not have recent hip replacement surgery. Moreover, according to Mr. Morey's own testimony, he knew prior to June 19, 2002, that "kids were getting hurt" when they tripped where Morey allegedly tripped. (See Exhibit "A" at page 39). In other words, Morey admits he knew before the incident that there was a defect in the area where he fell and he knew that kids had actually fallen in that area.

However, even if Mr. Morey establishes that he was using the property with due care, and assuming, as the Court must for purposes of this motion, that Hans' testimony

about reporting the incident to Little before the event occurred is accurate, it is respectfully submitted that as a matter of law, the difference in elevation between the height of the sidewalk and the height of the slab where Mr. Morey tripped is not sufficient to establish that the Borough of Wildwood Crest's failure to take corrective action was "palpably unreasonable". Clearly, the burden of demonstrating that the Borough of Wildwood Crest acted in a palpably unreasonable fashion lies with the plaintiff. Palpably, unreasonable behavior, is behavior that "...patently unacceptable under any circumstances, and it must manifest and obvious that no prudent person would approve of the public entities' course of action or inaction". Maslo vs. City of Jersey City, 346 N.J. Super. 346, 349 (App. Div. 2002); Holloway vs. State 125 N.J. 386, 403, 404 (1991). The Court may, in appropriate case, decide the issue of palpably unreasonableness, as a matter of law. Maslo, supra. at 350; see also Black vs. Borough of Atlantic Highlands, 263 N.J. Super. 445, 451, 452 (App. Div. 1993).

It is respectfully submitted that as a matter of law, the plaintiff cannot establish that the elevation and the Borough of Wildwood Crest's failure to correct the same, even assuming the Borough of Wildwood Crest knew of the problem, is palpably unreasonable.

In Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954) then New Jersey Supreme Court Justice William Brennan described the test to be employed by the Trial Court in evaluating whether the Trial Court should grant or deny a Motion for Summary Judgment filed pursuant to R. 4:46-2. Justice Brennan observed that the Summary Judgment procedure

> "...is designed to provide a prompt, business like and inexpensive method of disposing of any cause which a discriminating search of the merits

> and pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at trial...The Summary Judgment procedure aims at the swift uncovering of the merits and either their effective disposition or their advancement towards prompt resolution by trial. Judson at 74.

The standard in Judson remained an accurate statement of the law of the State of New Jersey until 1995, when the New Jersey Supreme Court re-examined the issue. In Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995). In Brill, the Supreme Court instructs the Trial Bench to "...consider whether the competent evidence viewed in a light most favorable to the non-moving party, would allow a rational fact finder to resolve the dispute in favor of the non-moving party." Brill at 523.

Mere assertions and allegations in pleadings are insufficient to defeat a Motion for Summary Judgment, even under the standard as enunciated by Mr. Justice Brennan in Judson. Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369 (App. Div. 1960).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that Summary Judgment should be entered in favor of the Borough of Wildwood Crest and against the plaintiff and the plaintiff's Complaint against the Borough of Wildwood Crest should be dismissed with prejudice and without costs.

James P. Savio, Esquire
Attorney for Defendant,
Borough of Wildwood Crest

Dated: May 14, 2013

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| LEWIS MOREY AND FRANCES MOREY,<br><br>Plaintiff,<br><br>vs.<br><br>BOROUGH OF WILDWOOD CREST, A MUNICIPALITY OF THE STATE OF NEW JERSEY AND JOHN DOES 1-10,<br><br>Defendant. | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION<br>CAPE MAY COUNTY<br>DOCKET NO. CPM-L-288-03<br><br>CIVIL ACTION<br><br>**NOTICE OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF THE DEFENDANT, BOROUGH OF WILDWOOD CREST** |

TO: Stephen W. Barry, Esquire
***BARRY, CORRADO, GRASSI & GIBSON***
2700 Pacific Avenue
Wildwood, NJ 08260
Attorney for Lewis & Frances Morey

**PLEASE TAKE NOTICE** that the undersigned attorney for the defendant, Borough of Wildwood Crest, hereby makes application before the Superior Court of New Jersey, Law Division, Cape May County at the Cape May County Courthouse 9 North Main Street, Cape May Court House, New Jersey on Friday, **April 15, 2005** at 9:00 AM in the forenoon or as soon thereafter as counsel may be heard for an Order entering Summary Judgment in favor of the defendant, the Borough of Wildwood Crest, and against the plaintiffs, Lewis Morey and Frances Morey, and dismissing the plaintiffs'

Complaint and all cross-claims against the Borough of Wildwood Crest with prejudice and without cost.

**RELIANCE** will be placed upon R.4: 46-2 the attached brief of counsel.

**TAKE FURTHER NOTICE** that the undersigned is making this application pursuant to R. 1:6-2(c) and a copy of the proposed Order is annexed hereto. In the event there is opposition to this Motion, the defendant hereby requests oral argument.

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James P. Savio, Esquire
Attorney for the Defendant,
Borough of Wildwood Crest

Dated: May 14, 2013

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**THIS MATTER** having been opened to the Court by James P. Savio, Esquire, of the Law Offices of James P. Savio, attorney for the defendant, Borough of Wildwood Crest; and

The Brief of Counsel having been considered and examined and no good cause being shown to the contrary;

**IT IS** on this ____ day of _____ 2005, **ORDERED AND ADJUDGED** that Summary Judgment shall be and hereby is entered in favor of the defendant, the Borough of Wildwood Crest, and against the plaintiffs, Lewis Morey and Frances Morey, and in favor of the Borough of Wildwood Crest and the plaintiffs' Complaint as well as any cross claim against the defendant, the Borough of Wildwood Crest, shall be and hereby is dismissed with prejudice and without cost against any party; and it is further

**ORDERED** that a copy of this Order shall be serve upon all counsel of record within the next seven days.

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Joseph C. Visalli, J.S.C.

( ) Opposed

( ) Unopposed

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1. On May 14, 2013, I, the undersigned, caused to be mailed via ordinary mail at the United States Post Office, Margate, New Jersey, an original of the within Notice of Motion, proposed Order, Brief in Support of Motion, Statement of Undisputed Facts and Proof of Mailing to Direct Filing - Law Division, Superior Court of New Jersey, Cape May, 9 North Main Street, Cape May Court House, NJ 08210.

2. On May 14, 2013, I, the undersigned, caused to be mailed via ordinary mail one copy of the within Notice of Motion, Brief in Support of Motion, Statement of Undisputed Facts and Proposed Order and Proof of Mailing to Stephen W. Barry, Esquire, ***BARRY, CORRADO, GRASSI & GIBSON,*** 2700 Pacific Avenue, Wildwood, NJ 08260.

3. Pursuant to R. 1:4-4 (b), I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

James P. Savio, Esquire

Dated: May 14, 2013

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1. On April 19, 2002, Lewis Morey had hip replacement surgery.
2. On June 19, 2002, Lewis Morey tripped and fell near the Little League Baseball Field in Wildwood Crest, NJ.
3. On June 19, 2002, Lewis Morey was one of the coaches for a little league baseball team called "Raging Waters"
4. Matthew Morey is Lewis Morey's son.
5. Matthew Morey was a player on the little league baseball team called "Raging Waters".
6. Immediately before the plaintiff fell, he was smoking a cigarette in the vicinity of the Third Base Side of the Little League Baseball field near Aster Avenue.
7. On June 19, 2002, while the plaintiff was smoking a cigarette, Matthew Morey came up to bat.

8. Matthew Morey hit a home run over the left center field fence while Lewis Morey was smoking a cigarette.
9. Lewis Morey watched his son Matthew hit the baseball and watched the ball cross the outfield fence in left center field.
10. As Lewis Morey saw the ball go over the fence, Lewis Morey walked towards the baseball field so he could give his son Matthew a "high five" as he rounded third base.
11. As Lewis Morey was approaching the field to give his son a "high five", he tripped and fell suffering the injuries that are the subject of the plaintiffs' Complaint.
12. On June 19, 2002 there were three parallel ribbons of concrete between the Little League Baseball Field and Aster Avenue that ran generally parallel to Aster Avenue.
13. The three ribbons of concrete were poured at three different times.
14. All three ribbons were next to and touching the other.
15. All three ribbons ran generally in an east and west direction (Bay to Ocean and vice versa)
16. One ribbon of concrete between the baseball field and Aster Avenue was located between the curb and the sidewalk and was about 28 inches in width.
17. The second ribbon of concrete was the sidewalk and the sidewalk ran parallel to Aster Avenue.

18. The third ribbon of concrete ran between the sidewalk and the little league field.
19. On the south side of the third ribbon was a cyclone fence that ran parallel to Aster Avenue formed the border of the little league field.
20. There was a difference in elevation between the second and third ribbon of concrete at the time of the plaintiff's fall.
21. The maximum difference in elevation between the second and third ribbon of concrete was one inch at one location.
22. At some locations, the difference in elevation was ¼ of an inch.
23. The average difference in elevation between the second and third ribbon of concrete was about ½ inch.
24. The plaintiff tripped when his toe caught the difference in elevation between the second and third ribbon of concrete.