12,213E/cg
POWELL, BIRCHMEIER & POWELL
ATTORNEYS AT LAW
1891 STATE HIGHWAY 50
POST OFFICE BOX 582
TUCKAHOE, NEW JERSEY 08250-0582
(609) 628-3414
ATTORNEYS FOR Defendant, City of Wildwood

CERTIFIED TO BE A TRUE COPY

FILED
JUN 21 2013
CIVIL DIVISION
SUPERIOR COURT-CAPE MAY COUNTY

Plaintiff(s) ANNUNZIATA "Nancy" IPPOLITI and NICHOLAS IPPOLITI, Wife & Husband vs. Defendant(s) 1. CITY OF WILDWOOD; 2. JOHN DOE(s), Responsible for maintaining and/or guarding or blocking off the dangerous condition of the Boardwalk	SUPERIOR COURT OF NEW JERSEY CAPE MAY COUNTY LAW DIVISION DOCKET NO. CPM-L – 529-11 CIVIL ACTION **ORDER**

THIS MATTER having been brought before the Court by Powell, Birchmeier & Powell, attorneys for defendant, City of Wildwood;

AND GOOD CAUSE having been shown;

IT IS on this 21st day of June 2013, **ORDERED** that the defendant City of Wildwood's Motion For Summary Judgment is Denied ~~**GRANTED** dismissing any and claims against it with prejudice.~~

IT IS FURTHER ORDERED that a copy of this Order be served upon all parties within seven days.

J. Christopher Gibson, J.A.C.

Memorandum of Decision is attached.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

TO: **Erin R. Thompson, Esquire**
POWELL BIRCHMEIER POWELL
1891 State Highway 50
P.O. Box 582
Tuckahoe, NJ 08250

CASE: **Annunziata "Nancy" Ippolitto et al v City of Wildwood et als**

DOCKET NO. **CPM L 509-11**

NATURE OF APPLICATION: **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

MEMORANDUM OF DECISION ON MOTION

The Complaint was filed on August 2, 2011. The discovery end date was November 12, 2012. Arbitration is scheduled for January 17, 2013. The discovery end date has been extended twice before.

The court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion.

Factual Background

This matter arises out of personal injuries allegedly sustained by Plaintiff on the Wildwood Boardwalk when Plaintiff fell off her bike on June 26, 2010. Plaintiff alleges that her bicycle tire got caught in a discrepancy between the tram car pathway and the boards.

Legal Analysis

R. 4:46-2(c), governing motions for summary judgment, provides, in pertinent part, that

> the judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

A genuine issue of material fact must be of a substantial, as opposed to being of an insubstantial nature. Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995). "Substantial" means "[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or, "having real existence, not imaginary[;] firmly based, a substantial argument." Id. (citations omitted). Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Id. (citations omitted).

In determining whether a genuine issue of material fact exists, the motion judge must "engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 533. This weighing process "requires the court to be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—

that would apply at the trial on the merits when deciding whether there exists a 'genuine' issue of material fact." Id. at 533-34. In short, the motion judge must determine "whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

Movant's Position

Defendant maintains it is entitled to summary judgment. Defendant argues that Defendant, as a public entity, is governed by the New Jersey Tort Claims Act ("TCA"), N.J.S.A. 59:1-1 *et seq.* Defendant submits that a public entity is only liable for an injury arising "out of an act or omission of the public entity or a public employee or any other person as provided by the TCA." Essentially, Defendant argues that Plaintiff has failed to satisfy the requirements of N.J.S.A. 59:1-1 *et seq.* as a matter of law. Specifically, Defendant argues that Plaintiff has failed to comply with the notice requirements of N.J.S.A. 59:4-1. In the alternative, Defendant argues that any action or inaction taken by Defendant was not palpably unreasonable and therefore, summary judgment is appropriate.

I. Defendant is entitled to summary judgment because there has been no compliance with the notice requirements of N.J.S.A. 59:4-1.

Defendant maintains that as a general rule, Title 59 requires that a Plaintiff show how the public entity had actual or constructive notice of an alleged dangerous condition. As to actual notice, Defendant acknowledges that in June of 2010, the Wildwood Boardwalk was inspected on a daily basis several times a day. Defendant argues that the Construction Department assigned a crew

to patrol the Boardwalk from 7:00 a.m. until 2:00 p.m. daily and that said department provided carpenters with materials to make any defects on the Boardwalk immediately. Defendant explains that the carpenters worked on the Boardwalk Monday through Friday and that Plaintiff was involved in her fall on a Saturday morning at 10:30 A.M. As such, Defendant argues that there was no actual and/or constructive notice shown of a dangerous condition.

II. Any action or inaction on the part of the City of Wildwood concerning the alleged dangerous condition was not "palpably unreasonable."

Defendant argues that even if a dangerous condition existed, Defendant's actions or inactions were not palpably unreasonable. Defendant notes that the Boardwalk was inspected on a daily basis. Defendant stresses that is not liable for failure to make inspections or for negligent inspections of any property. Defendant reiterates that inspections were made several times a day in June of 2010, when the subject incident occurred. Defendant maintains that given Defendant's inspection and repair of the boardwalk, no prudent fact finder could conclude that Defendant's actions or inactions were patently unacceptable under the circumstances.

Plaintiff's Opposition

Plaintiff opposes the instant motion and argues that there are genuine issues of material fact that preclude the grant of summary judgment. Specifically, Plaintiff maintains that Defendant had notice, that a dangerous condition exsited and Plaintiff' use was foreseeable, and that Defendant's conduct was palpably unreasonable.

I. Defendant had notice.

Plaintiff argues that the condition of the Boardwalk meets the requirements under N.J.S.A. 59:4-3(b) in that the condition for the Boardwalk as such that it had to have existed for a long period of time and was so obvious that Defendant should have discovered it during its daily inspections. Plaintiff points to the deposition testimony of DCR Robert Anderson in support. Plaintiff submits that Mr. Anderson admitted that said condition should have been repaired "within 24 hours." Plaintiff further points to the report of the investigating police officer which reflects a 1-1/2 to 2" depressed wooden section of the Boardwalk and eyewitness statements, contending that this was a "common problem" in this area of the Boardwalk.

Plaintiff points to the following evidence of record in further support of its contention that Defendant was on notice: the Public Works Supervisor's testimony that the shims underneath the Boardwalk had become dislodged and opinion of Plaintiff's expert that the Boardwalk shims over a 15 to 20 foot section of Boardwalk do not realistically become dislodged overnight and that it took at least five years or more for them to become dislodged. As such, Plaintiff argues that the obviously visible deterioration and rotting of both the visible-walked-on boards above and the shims below the Boardwalk causing the shims to dislodge took place over such a long period that Plaintiff's burden of showing constructive notice has been met.

II. Plaintiff has established that a "dangerous condition" existed and the use was foreseeable.

Here, Plaintiff notes that there was a 1-1/2 to 2 inch drop where the wood planks of the Boardwalk met the cement tramcar pathway. Plaintiff submits that

this is a per se dangerous drop creating a hazard for bicyclists: a use both expected and foreseeable.

III. Plaintiff has established "palpably unreasonable" and grossly negligent inspections and maintenance by Defendant.

Plaintiff submits that she has proven that the lack of action to respond to the dangerous condition by correcting, repairing, or remedying said condition was palpably unreasonable.

In support, Plaintiff points to its expert builder, Dean Adams, who has opined that it was grossly negligent and palpably unreasonable for City inspectors and employees to have missed this dangerous condition in their inspection and regular concrete tramway painting and regular shim-board maintenance. Plaintiff notes that Mr. Adams further opined that it was obvious from his own inspection and the photos taken at his inspection that no one from Defendant was concerned with the splintered wood or raised boards nor were they concerned with the nailing or screwing down of the ends of the wooden boards about the concrete tramway. Finally, Plaintiff notes Adam's opinion that the condition could have been quickly and inexpensively corrected by one or two carpenters in less than an hour. As such, Plaintiff contends that the facts and Plaintiff's expert establish that a reasonable trier of fact could find that Defendant's actions were palpably unreasonable within the meaning of the statute under these circumstances.

Accordingly, Plaintiff requests this Court deny Defendant's motion for summary judgment.

Discussion

Because Defendant is a public entity, the instant action is governed by the New Jersey Tort Claims Act ("TCA"), N.J.S.A. 59:1-1 *et seq.* Defendant now moves for summary judgment contending that Plaintiff cannot present a valid claim under the New Jersey Tort Claims Act, N.J.S.A. §59:4-2.

N.J.S.A. §59:4-2 provides that:

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

Pursuant to the Tort Claims Act and N.J.S.A. § 59:4-2, Plaintiff must prove by a preponderance of the evidence that: (1) at the time of the injury the public entity's property was in a dangerous condition, (2) the dangerous condition created a foreseeable risk of the kind of injury that occurred, (3) the condition proximately caused the injury (4) the entity had actual or constructive notice of the condition, and (5) the action the entity took to protect against the dangerous condition or the failure to take action was palpably unreasonable. Garrison v.

Township of Middletown, 154 N.J. 282, 286 (1998). "Palpable unreasonableness" is "conduct that is patently unacceptable under any given circumstances." Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985). See also Johnson v. Essex County, 223 N.J. Super. 239, 257 (Law Div. 1987).

Permitting Plaintiff every reasonable inference, Plaintiff has presented sufficient evidence to raise a genuine issue of material fact as to whether a dangerous condition existed at the time of her injury. In accordance with the TCA and N.J.S.A. § 59:4-2, Plaintiff has shown by a preponderance of the evidence that: (1) at the time of the injury the public entity's property was in a dangerous condition, (2) the dangerous condition created a foreseeable risk of the kind of injury that occurred, (3) the condition proximately caused the injury (4) the entity had actual or constructive notice of the condition, and (5) the action the entity took to protect against the dangerous condition or the failure to take action was palpably unreasonable. Garrison v. Township of Middletown, 154 N.J. 282, 286 (1998).

The record reflects that the following facts are undisputed: On June 26, 2010, Plaintiff was riding her bike on the Wildwood Boardwalk when "something seem[ed] to grab and stop [her] front bicycle tire" causing her to fall and sustain injuries; following Plaintiff's fall, Robert Anderson, Assistant Superintendent of the Public Works Department for the City arrived at the area and placed yellow cones from the back of his truck in the vicinity of where Plaintiff fell; at that time, Mr. Anderson noted that there was a 1 ½ to 2 inch drop between the concrete and the Boardwalk; on Monday following Plaintiff's fall, two carpenters employed by the City of Wildwood went out to the area where Plaintiff fell and after looking

underneath the Boardwalk, informed Anderson that the shims became dislodged from underneath the Boardwalk causing the boards to drop; and thereafter, new shims were installed underneath the Boardwalk in order to level the Boardwalk with the tram car pathway.

The Court finds that Plaintiff has put forth sufficient evidence to support a finding of a dangerous condition in accordance with the TCA. N.J.S.A. § 59:4-1 defines a dangerous condition as "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."

Moreover, the Court finds Atalese v. Long Beach Tp., 365 N.J. Super. 1 (App.Div. 2003) instructive. There, the court emphasized that a defect cannot be viewed in a vacuum. Id. at 5. Instead, it must be considered together with the anticipated use of the property to determine whether the condition creates a substantial risk of injury and, therefore, qualifies under the statute as dangerous. Ibid. The Atalese Court held that a three-quarter inch difference in the level of the pavement occupying a significant portion of a bike lane and spanning an entire block could be accepted by a jury as creating a substantial risk of injury and hence a dangerous condition under the Tort Claims Act. Ibid. Here, Plaintiff alleges that the approximate 15 foot section of concrete tram car tracks on the west side of the Boardwalk having a 1 ½ to 2 inch drop between the concrete and the Boardwalk constitutes a dangerous condition. Here, Plaintiff was riding her bicycle on the boardwalk. Such is a foreseeable usage which is permitted by the City of Wildwood during specified times. A determination was made that the discrepancy in the surface was caused, in whole or in part, by dislodged shims

located underneath the boardwalk. As such, the condition is similar to the surface unevenness in Atalese which spanned an entire block. Moreover, bicycling is a reasonably foreseeable usage of the boardwalk, and a 1 ½ to 2 inch differential spanning approximately 15 feet creates a substantial risk of injury to a bicyclist.

Plaintiff has likewise presented sufficient evidence showing that Defendant had actual or constructive knowledge of said dangerous condition. A public entity shall be deemed to have actual notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character. See N.J.S.A. § 59:4-3. N.J.S.A. § 59:4-3 further states that a public entity shall be deemed to have constructive notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character.

Plaintiff here proffers expert testimony in support of her contention that the condition existed for such a period of time that Defendant should have discovered and remediated the condition. Specifically, Dean Adams has rendered an opinion that "it is highly probable that it took at least five years or more for the shims to become dislodged and thereby allow the boards to drop down along with the many years of deterioration and the rot of the board themselves." Plaintiff also points to the deposition testimony of Defendant's DCR Robert Anderson in further support. When asked for a fair estimate of how long it would take for one of the subject boards to get into its present condition, Mr. Anderson

acknowledged that it was more than a season and could have been "five, ten years." Pg. 139, L. 13-22. Mr. Anderson further agreed in deposition after review of photos of the subject location that the board in the middle has "an irregular surface that could trip people." Pg. 133, L. 11-13. The Court further takes into consideration that the alleged dangerous condition spans approximately 15 feet in length and as such, is not a minute defect but one which could have been detected in the exercise of due care and during Defendant's daily inspections. At this stage, and despite the TCA, Plaintiff has presented sufficient evidence as to Defendant's constructive knowledge to survive a motion for summary judgment.

Finally, the court will address Defendant's argument that even if a dangerous condition existed, Defendant's conduct was not palpably unreasonable.

"Palpable unreasonableness" is "conduct that is patently unacceptable under any given circumstances." Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985). See also Johnson v. Essex County, 223 N.J. Super. 239, 257 (Law Div. 1987). This means that the public entity acted or failed to act under circumstances which make it manifest and obvious that no prudent person would approve of its course of action or inaction. Holloway v. State, 125 N.J. 386, 403-04, 593 A.2d 716 (1991). And, as noted in Polyard "the application of general principles of jury trials makes it clear that it is a jury question of whether or not the State's actions were 'palpably unreasonable' . . . except in cases where reasonable men could not differ." 148 N.J. Super. at 218. See also Shuttleworth v. Conti Constr. Co., Inc., 193 N.J. Super. 469, 474 (App.Div.1984).

Although the record reflects that Defendant exercised due care in its Monday through Friday inspections of the boardwalk, reasonable minds can differ as to whether Defendant's failure to remediate the span of boardwalk at issue, knowing that bicycling is a foreseeable use of same, constitutes palpably unreasonable conduct. The evidence presents a sufficient divergence such that resolution should be by a jury. While this Court is cognizant of the judicial predisposition of affording legislative immunity to public entities in line with the legislative objective of the TCA, we find the evidence sufficient to satisfy Plaintiff's requisite showing. Defendant's motion for summary judgment is therefore denied.

Conclusion

The motion is opposed. Defendant has not demonstrated it is entitled to the relief sought pursuant to N.J.S.A. §59:4-2, R. 4:46-2(c), and the standards enunciated in Brill. The motion for summary judgment is denied.

A settlement conference is scheduled for August 21, 2013.

Trial is scheduled for September 30, 2013.

An appropriate form of Order has been executed. Conformed copies of that Order will accompany this Memorandum of Decision.

June 21, 2013

J. Christopher Gibson, J.S.C.