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ELYCE REDELHEIM and DANIEL REDELHEIM, h/w *Plaintiffs* vs. CITY OF MARGATE, PERNA FINNEGAN, INC., JOHN DOE 1-5 and JOHN DOE, INC., 1-5 *Defendants*	SUPERIOR COURT OF NEW JERSEY ATLANTIC COUNTY LAW DIVISION DOCKET NO: ATL-L-2150-10 Civil Action **ORDER GRANTING SUMMARY JUDGMENT**

THIS MATTER, having been opened to the Court by way of notice of motion filed by Thomas G. Smith, Esquire, Of Counsel to the Law Offices of Neil Stackhouse, PC, counsel for the defendant, City of Margate; and

THE COURT having considered same, and for good cause having been shown;

IT IS on this 3rd day of May, 2013 *ORDERED AND ADJUDGED* that summary judgment is granted to the defendant, City of Margate, and the Complaint of plaintiff, as well as any cross claims, is hereby dismissed, with prejudice based upon plaintiff's failure to meet the threshold requirements of the Tort Claims Act.

IT IS FURTHER ORDERED AND ADJUDGED that a copy of the within Order shall be supplied to all counsel of record within seven days of entry herein.

Honorable James E. Isman, J.S.C.

✓ Notice of Motion

✓ Movant's Certification

✓ Answering Brief

✓ Cross-Motion

Movant's Reply

Answering Brief of Co-Defendant(s)

Cross-Motion of Co-Defendant(s)

Movant's Reply

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

JAMES E. ISMAN, J.T.C. t/a

1201 Bacharach Boulevard
Atlantic City, NJ 08401-4527
609-594-3386

MEMORANDUM OF DECISION

Case: Redelheim v. City of Margate, et al.

Docket #: ATL-L-2150-10

Date: May 9, 2013

Motion: Summary Judgment

HAVING CAREFULLY REVIEWED THE PAPERS SUBMITTED CONCERNING THE ABOVE CAPTIONED MOTION, I HAVE RULED AS FOLLOWS:

Nature and Background of Motion:

Defendant, City of Margate (hereinafter "Margate"), brings this motion pursuant to R. 4:46-2(c) for summary judgment on the grounds that Plaintiff, Elyce Redelheim[1], cannot meet the threshold requirements of the New Jersey Torts Claims Act. This motion is opposed by Plaintiff.

Co-Defendant, Perna Finnegan, Inc. (hereinafter "Perna"), has also moved for summary judgment. Plaintiff's counsel has not opposed Perna's motion. It is soundly established that where the movant demonstrates a prima facie right to summary judgment, the opponent of the motion is required to show by competent evidential material that a genuine issue of material fact exists. New Jersey Mortgage & Investment

[1]Daniel Redelheim, Elyce Redelheim's husband, is also named as a Plaintiff in this action. However, because he advances only a per quod claim, "the viability of which is subject to the survival of plaintiff's claim," this court will only address Mrs. Redelheim's claim. Sciarrotta v. Global Spectrum, 194 N.J. 345, 350 (N.J. 2008).

Corp. v. United Aluminum Products, Inc., 68 N.J. Super. 18, 32 (App. Div. 1961) (citing Robbins v. Jersey City, 23 N.J. 229, 241 (1957)); See also R. 4:46-2 (b). Here, the Plaintiff has not opposed the motion and therefore has not demonstrated by competent evidential material that a genuine issue of material fact exists. Accordingly, the motion is granted

Relevant Facts:

The Plaintiff alleges that on Saturday, August 8, 2009, she was walking on Washington Avenue in the City of Margate, New Jersey, and was caused to fall due to a "sinkhole," at or near the intersection with Ventnor Avenue and, as a result, sustained injury. The sinkhole was approximately four (4) inches in depth by approximately twenty-seven (27) inches in diameter.

On the date of the incident, Plaintiff was taken to Shore Memorial Hospital, where Plaintiff was x-rayed and an Aircast was applied. The x-ray revealed that Plaintiff suffered an oblique mildly displaced fracture of the distal fibula. The X-Ray report further indicates that there was "adjacent severe soft tissue swelling," and that the tibia appeared intact. According to the X-Ray report, there was no dislocation. On August 10, 20109, Plaintiff presented to Dr. Glenn Zuck for an evaluation. At that time, Dr. Zuck diagnosed Plaintiff as having sustained a distal fibular fracture, and noted that the Plaintiff was suffering from pain and swelling in the right ankle. On September 14, 2009, an x-ray of Plaintiff's ankle revealed "continued satisfactory alignment of her fracture." Thereafter, Dr. Zuck removed Plaintiff's cast, and placed her foot in an ankle brace. Dr. Zuck's examination report from that visit indicates that Plaintiff's "x-ray looks super out of the cast, minimal swelling, no significant pain." In October 2009, Plaintiff underwent

Physical Therapy at Ivy Rehab Network. Plaintiff chief complaint at the time was pain, with severity of 9/10 at its worst. On October 5, 2009, Plaintiff's physical therapist noted that the Plaintiff's range of motion in the right ankle was limited.

On October 7, 2009, Plaintiff was re-evaluated by Dr. Zuck. In Dr. Zuck's report from that evaluation he notes that the Plaintiff's e-rays look "super" and that the Plaintiff has "no pain" and is "full weight bearing with an open AFO." However, according to Plaintiff's Physical Therapy records, on October 15, 2009, she still had "limited range of motion" and "some pain."

Between November 2009, and September 2011, Plaintiff did not seek nor receive any medical treatments with any doctors for her ankle, she did not use any orthopedic device such as an ankle brace or boot and she did not take any prescribed pain medication for her injury. However, more than two years after the subject fall, on September 21, 2011, Plaintiff returned to Dr. Zuck complaining of pain and swelling in her ankle, particularly with any prolonged walking or standing, (emphasis added). Additionally, Dr. Zuck notes that the Plaintiff reported having some "barometric sensitivity which reproduced pain in the ankle when any sudden changes in the temperature or whether." According to Dr. Zuck, the Plaintiff "noted mild tenderness to palpation over the anterior talofibular ligament with no instability of the ankle." (emphasis added). An x-ray was taken which revealed that the Plaintiff's ankle was "well healed, however, changes in the distal fibula in the fracture site were clearly noted."

Based on his examination of September 21, 2011, Dr. Zuck opines that the Plaintiff's "symptoms of pain with extended period of walking and standing are permanent and, in addition, sudden changes in the weather will continue to produce

barometric sensitivity and ankle pain." On November 17, 2012, Plaintiff submitted to an independent medical examination with Dr. John A. Cristini. In his report, Dr. Cristini opines that no permanent orthopedic impairment or disability exists as a result of the subject fall.

Legal Analysis

Summary Judgment Standard

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.

Tort Claims Act

When a plaintiff's negligence claim arises against a government entity, the New Jersey Tort Claims Act (hereinafter "TCA"), codified as N.J.S.A. 59:9-1, *et seq.*, governs the claim. N.J.S.A. 59:1-3 defines a "public entity" to include "...any...public authority, public agency or any other political subdivision or public body in the state." It is not disputed that Plaintiff's claim against Defendant is governed by the TCA, as the Defendant, City of Margate, is a public entity within the meaning the statute. Therefore, any tort claim against Margate is limited by the provisions of the TCA. Knowles v. Mantua Twp. Soccer Ass'n, 176 N.J. 324, 329 (N.J. 2003).

The dominant theme of the TCA was to reestablish the immunity of all governmental bodies in New Jersey, subject only to the TCA's specific liability provisions. Garrison v. Tp. of Middletown, 154 N.J. 282, 286, (1998); Rochinsky v. State, Dep't of Transp., 110 NJ 399, 407-408 (1988). As such, "[t]he requirements of the Tort Claims Act are 'stringent' and place a 'heavy burden' on plaintiffs seeking to establish public entity liability." Charney v. City of Wildwood, 732 F.Supp.2d 448, 452-

53 (D.N.J. 2010) (quoting Bligen v. Jersey City Hous. Auth., 131 N.J. 124, 136,(1993)), appeal docketed, No. 10-3739 (3d Cir. Sept. 16, 2010). Indeed, our Supreme Court has recognized that the "guiding principle" of the TCA is "that 'immunity from tort liability is the general rule and liability is the exception.'" Coyne v. State Dep't of Transp., 182 N.J. 481, 488 (2005) (quoting Garrison v. Twp. of Middletown, 154 N.J. 282, 286 (1998)).

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."

Discussion

The Defendant, City of Margate, contends that the plaintiff fails to satisfy the requirements imposed by the TCA, N.J.S.A. 59:1-1 *et seq.*, which bar any recovery. Specifically, the defendant brings two separate motions arguing (1) the Plaintiff cannot satisfy the requirements of N.J.S.A. 59:4-2 because the evidence fails to establish a dangerous condition of public property creating a substantial risk of injury, and (2) all of the medical records provided by plaintiff are insufficient as a matter of law for the plaintiff to cross the threshold under the New Jersey TCA, N.J.S.A. 59:9-2(d). Each issue will now be addressed.

I. **Dangerous Condition**

In order to impose liability under the TCA for an alleged dangerous condition, Plaintiff must satisfy each element enumerated in N.J.S.A. 59:4-2, which provides

> "A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

> a. a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition;or
>
> b. a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.
>
> Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable."

Unless plaintiff in this case can satisfy the elements of a cause of action set forth in N.J.S.A. 59:4-2, he does not have a basis for a recovery. Polzo v. County of Essex, 209 N.J. 51 (2012) citing Vincitore v. N.J. Sports & Exposition Auth., 169 N.J. 119 (2001).[2] For purposes of this motion, and based on the present record, we accept that Plaintiff's accident was caused by a "sinkhole" on Washington Avenue. Id. The issue becomes whether the sinkhole was a "dangerous condition" that created "a reasonably foreseeable risk of the kind of injury which was incurred." N.J.S.A. 59:4-2. "Only if plaintiff can prove this element do we turn to the next step: whether the public entity -- by the act or omission of one of its employees -- created the dangerous condition, N.J.S.A. 59:4-2(a), or whether the 'public entity had actual or constructive notice of the dangerous condition' within 'a sufficient time' before the accident that it could 'have taken measures to protect against [it].'" Id. (quoting N.J.S.A. 59:4-2(b)). Furthermore, even if plaintiff has met all of these elements, the public entity still will not be liable unless the public entity's failure

[2] Model Civil Jury Charge 5.20A identifies the five factors required under N.J.S.A. 59:4-2 as follows: (1) That the property was in a dangerous condition at the time of the injury; (2) That the injury was proximately caused by the dangerous condition; (3) That the dangerous condition created a foreseeable risk of the kind of injury which was incurred; (4) That the public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to protect against the dangerous condition, or that an employee of the public entity acting within the scope of his/her employment either created the dangerous condition or, by his/her inaction, allowed the dangerous condition to be created; (5) That any measures taken by the public entity, or its failure to take any measures, were palpably unreasonable.

to protect against the dangerous condition can be deemed "palpably unreasonable." Polzo, supra, 209 N.J. at 66.

Therefore, this Court must first determine whether the condition of the property, i.e. the sinkhole, at the time of the incident complained of, constituted a dangerous condition as defined by the TCA. Although the existence of a dangerous condition is usually a question of fact for the jury, "the trial judge is required to make a preliminary determination as to whether the alleged condition is in fact a dangerous one within the meaning of the statute. Otherwise the legislatively-decreed restrictive approach to liability would be illusory." Burroughs v. City of Atl. City, 234 N.J. Super. 208, 213 (App. Div.) (quoting Polyard v. Terry, 160 N.J. Super. 497, 508 (App. Div. 1978), aff'd o.b. 79 N.J. 547 (1979)), certif. denied, 117 N.J. 647 (1989).

N.J.S.A. 59:4-1(a) defines a "dangerous condition" as a "condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." The pertinent inquiry on a motion for summary judgment is whether reasonable minds could differ as to whether condition was indeed "dangerous" as defined by Act. Id. A "dangerous condition" on public entity's property refers to the physical condition of the property itself and not to activities on the property. Wymbs ex rel. Wymbs v. Township of Wayne, 163 N.J. 523 (2000). However, "not every defect in a highway, even if caused by negligent maintenance, is actionable." DeBonis v. Orange Quarry Co., 233 N.J. Super. 156, 166 (App. Div. 1989). Similarly, a public entity does not create a dangerous condition merely because it should have discovered and repaired it within a reasonable time before an accident. Polzo v. County of Essex, 209 N.J. 51 (2012). See also Speziale

v. Newark Housing Authority, 193 N.J. Super. 413, 416 (App. Div. 1984) (holding that "not every defect in a public roadway, even where caused by negligent maintenance, will be found actionable").

Here, the Defendant argues that the Plaintiff cannot establish that a dangerous condition existed on the street. Defendant argues that the sinkhole was not a condition of 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. Garrison v. Township of Middletown, 154 N.J. 282 (1998) (stating that one consideration in determining whether a "dangerous condition" exists is "whether the property creates a substantial risk of injury "to persons generally" who would use the property with due care in a foreseeable manner). (emphasis added). Defendant argues that it is clear from Plaintiff's testimony that the Plaintiff was not acting "with due care." Specifically, Plaintiff testified that (1) she was not in the crosswalk when she was crossing the street and fell; (2) the sinkhole was outside the crosswalk; and (3) there was nothing blocking her view when she fell.

Defense counsel cites to Piren v. City of Trenton, 2009 N.J. Super. Unpub. LEXIS 2861, 2009 WL 2168319, at *3 (App. Div. July 22, 2009)) where the Appellate Court affirmed the Trial Court's grant of summary judgment in favor of the Defendant where 1) the plaintiff was not in a crosswalk when she was injured; (2) the pothole was not a dangerous condition for the purposes a street is typically used; and (3) while it is foreseeable that pedestrians would cross at a crosswalk, it is "less foreseeable that they cross where they wish, and where the plaintiff fell." Id. However, pursuant to R. 1:36-3, the Piren decision is not binding on this court.

Plaintiff, in opposition, argues that she was using due care in crossing the street, particularly in light of the heavy foot-traffic walking in the opposite direction and the fact that the sinkhole was difficult to see. This court need not determine whether the sinkhole did, in fact, create a dangerous condition. Rather, for purposes of this motion, Plaintiff need only establish that reasonable minds could differ as to whether the condition was indeed "dangerous" as defined by Act.

The Court is satisfied that there is a factual issue with respect to whether the twenty-seven (27) inch sinkhole created a dangerous condition. There is a substantial risk of injury created by a sinkhole of that size. Although the plaintiff apparently did not see the sinkhole before she stepped on it, the court must assume for purposes of this summary judgment motion that a reasonable prudent person under similar circumstances (i.e. a crowded cross-walk) would not have detected the sinkhole. Furthermore, New Jersey courts have recognized potholes as dangerous conditions in certain circumstances. See Polzo, 209 N.J. at 55; Chatman v. Hall, 128 N.J. 394, 418 (1992); Whaley v. County of Hudson, 146 N.J. Super. 76 (Law Div. 1976). As such, this Court simply cannot conclude that the sinkhole did not create a dangerous condition as a matter of law.

However, in order to recover against the public entity, a plaintiff must demonstrate that some negligent act or the omission of the public entity created the dangerous condition that caused the plaintiff's injury or that the City of Margate had actual or constructive notice of the dangerous condition of its property. Here, Plaintiff does not allege that Margate created the dangerous condition. Additionally, Plaintiff concedes there is no evidence to establish that the Defendant had actual notice of the defect and no evidence from which any reasonable fact finder could determine how long

the condition existed before plaintiff fell. However, Plaintiff contends that Defendant, Margate, had constructive notice of the condition which caused Plaintiff's injury.

A public entity will be deemed to have actual notice of a dangerous condition within the meaning of N.J.S.A. 59:4-2(b) if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character. N.J.S.A. 59:4-3(a). A public entity will be deemed to have constructive notice of a dangerous condition within the meaning of N.J.S.A. 59:4-2(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. N.J.S.A. 59:4-3(b). It is well settled that "the mere existence of an alleged dangerous condition is not constructive knowledge of it." Polzo v. Cnty. of Essex, 196 N.J. 569, 581 (2008). Rather, a plaintiff must establish "the fundamental requirement of constructive notice under N.J.S.A. 59:4-3(b), namely that the condition could have existed for such a period of time that the public entity should have discovered it." Id. at 586. See also N.J.S.A. 59:4-3(b) (providing for constructive notice "only if the plaintiff establishes" statutory prerequisites).

On April 16, 2013, over two months after the discovery end date, Plaintiff submitted an expert report authored by John Posusney. In his report, Mr. Posusney opines that the sinkhole existed for a "protracted period of time." Specifically, Mr. Posusney opines that the "incident depression depicted in the August 15, 2009, photographs was a stumble, trip and fall hazard that existed for at least three months prior to the date of [Plaintiff's] accident." However, Mr. Posusney's report provides no basis in fact for his conclusion that the sinkhole had existed for three months. Such a net opinion alone is

insufficient to sustain a plaintiff's burden of establishing that the public entity was on constructive notice of a dangerous condition. See Pomerantz Paper Corp. v. New Community Corp., 207 N.J. 344, 372 (2011) (holding that "an expert's bare opinion that has no support in factual evidence or similar data is a mere net opinion which is not admissible and may not be considered"). See also N.J.R.E. 702; N.J.R.E. 703.

N.J.R.E. 703 requires that an expert's opinion be based on facts, data, or another expert's opinion, either perceived by or made known to the expert, at or before trial. Under the "net opinion" rule, "an opinion lacking in such foundation and consisting of bare conclusions unsupported by factual evidence is inadmissible." Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002).

Our Supreme Court addressed the admissibility of net opinions in Pomerantz Paper Corp. v. New Community Corp., 207 N.J. 344, 372 (2011). There, the Court explained that:

> [o]ur Rules have fixed, clear guidelines that govern the admissibility of expert opinions and against which trial courts must make their evaluations. *See N.J.R.E. 702, 703.* Expert testimony must be offered by one who is 'qualified as an expert by knowledge, skill, experience, training, or education' to offer a 'scientific, technical, or . . . specialized' opinion that will assist the trier of fact, see N.J.R.E. 702, and the opinion must be based on facts or data of the type identified by and found acceptable under N.J.R.E. 703... a court must ensure that the proffered expert does not offer a mere net opinion.
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> Id.

The Pomerantz Court further explained that "an expert's bare opinion that has no support in factual evidence or similar data is a mere net opinion which is not admissible and may not be considered." Id. The admissibility rule has been aptly described as requiring that the expert "give the why and wherefore" that supports the opinion, "rather

than a mere conclusion." Id. See also Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540, (App. Div.), certif. denied, 145 N.J. 374 (1996).

The Appellate Division recently reviewed a trial court's finding that the Plaintiff's expert's opinions, as expressed in his report and deposition, were net opinions under circumstances similar to this case in Wellinghorst v. Arnott, 2013 N.J. Super. Unpub. LEXIS 529, 9-10 (App. Div. Mar. 8, 2013). There, the plaintiff retained William Poznak, a professional engineer, with more than thirty years of experience as a civil engineer, as her expert. Id. at 2. Poznak conducted a site inspection over three years after the plaintiff was injured, during which he took measurements and made observations. Id. He also took photographs and made a diagram of the area in question. Id. The court, summarized the objective data upon which Poznak's opinion was based as:

> essentially limited to a visual inspection of the area three years following the accident and a review of photographs taken of the area of the fall three days after plaintiff's accident. He performed no tests, stating there were no tests he could perform to determine whether there was insufficient compaction of the trench because such tests would have had to have been performed at the time the trench was backfilled. He testified 'the patch was put in probably even with the road and then it started sinking. Maybe the first week or two it was an eighth of an inch and then maybe six months later it was down to three quarters of an inch.' Yet, he provided no facts to support these conclusions beyond his experience.
> Id. at 9.

The court concluded that "not only is there an absence of any reliable evidence identifying when the sinking commenced, there is also no reliable evidence addressing why the sinking occurred. In short, Poznak's expert opinion is flawed because it was not 'derived from a sound and well-founded methodology that is supported by some expert consensus in the appropriate field.' *Landrigan v. Celotex Corp., 127 N.J. 404, 417, 605 A.2d 1079 (1992).* By contrast, in Greenberg v. Pryszlak, 426 N.J. Super. 591, 607-608

(App. Div. 2012), the Appellate Division held that the trial judge was entitled to conclude that the expert report was not a net opinion because the report sufficiently explained the bases for the expert's opinions. (emphasis added). There, the expert "related the facts of the case to 'generally accepted practices within the law enforcement profession' and to specific sources of those practices, including the policies and practices of the State Police." Id.

Here, Mr. Posusney opines that the subject sinkhole "existed for at least three months prior to Plaintiff's fall," yet he provided no facts to support this conclusion. As such, the expert report submitted by Mr. Posusney is nothing more than a net opinion. Similar to the expert opinion in Wellinghorst, supra, Mr. Posusney's report is "flawed because it was not 'derived from a sound and well-founded methodology that is supported by some expert consensus in the appropriate field.'" Wellinghorst, supra, 2013 N.J. Super. Unpub. LEXIS at 9. (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 417, (1992)). As such, the Plaintiff has failed to provide any evidence sufficient to show constructive notice on the part of the City of Margate.

Moreover, Plaintiff argues that the defendant had constructive notice of the sinkhole because an inspection of the street should have revealed such a condition. Specifically, Plaintiff contends that because employees of Margate regularly inspected the area in question and because those employees had a duty to report sinkholes upon discovery, Margate knew or should have known of the subject sinkhole. However, our Supreme Court has recently declined to find a public entity had constructive notice of a dangerous condition where the Plaintiff's expert testified that the public entity's inadequate inspection methods caused the dangerous condition. Polzo v. County of

Essex, 209 N.J. 51 (2012). In Polzo, supra, the Court held that "[w]hether a public entity is on actual or constructive notice of a dangerous condition is measured by the standards set forth in N.J.S.A. 59:4-3(a) and (b), not by whether 'a routine inspection program' by the County -- as suggested by plaintiff -- would have discovered the condition." Id. at 68. There, the Court reasoned that Plaintiff's expert has not shown that his conception of a routine road inspection program would have resulted in a more timely review of the roadway than the one done here five weeks before the accident. Id. at 69. The Court went on to recognize that it "does not have the authority or expertise to dictate to public entities the ideal form of road inspection program, particularly given the limited resources available to them." Id. at 69.

Notwithstanding the above, viewing all evidence in the light most favorable to the plaintiff, and giving the Plaintiff the benefit of all favorable inferences, it is the view of the Court that the facts are sufficient to permit a rational factfinder to conclude that Margate had constructive notice of the subject sinkhole. This finding is based primarily on the fact that the sinkhole was approximately twenty-seven (27) inches and was located on the corner opposite Margate City Hall. See Chatman v. Hall, 128 N.J. 394, 418 (1992) (noting that the length of time a pothole existed as well as its alleged size may create a reasonable inference that the defendants had either actual or constructive notice) (emphasis added). Even without Plaintiff's expert report, Plaintiff may still be able to establish "constructive notice" because the facts and circumstances of this case, may not be beyond the ken of the average juror. In particular, a reasonable trier of fact could certainly conclude that someone working for the City of Margate either knew or should have discovered a sinkhole of this size given the fact that it was literally right outside of

city hall. The simple fact that the "dangerous condition" was merely feet away from City Hall could effectively be argued to constitute "constructive notice," particularly when giving the Plaintiff the benefit of all favorable inferences, as the Court must. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (holding that in deciding whether triable issues of fact exist, the Court must view the underlying facts and draw all reasonable inferences in favor of the non-moving party).

However, even if the Plaintiff could show that the City was on actual or constructive notice that the sinkhole was a dangerous condition of property, a reasonable jury could not find that - under the circumstances here - the failure to take action to "protect against" the condition was "palpably unreasonable." N.J.S.A. 59:4-2. Defendant argues, and this Court agrees, that the Plaintiff has not established that the Defendants' actions, or inactions, with regard to the alleged condition were palpably unreasonable. (emphasis added). N.J.S.A. 59:4-2 makes clear that a public entity can only be found liable for a a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was palpably unreasonable.

The question of whether an entity's action or inaction was "palpably unreasonable" is *generally* resolved by a jury. McCleary v. City of Wildwood, 2011 U.S. Dist. LEXIS 46298, 22-23 (D.N.J. Apr. 29, 2011) (citing Charney, 732 F.Supp.2d at 457). Of course, "[l]ike any other fact question before a jury, [such determination] is subject to the court's assessment whether it can reasonably be made under the evidence presented." Mendelsohn, 2004 U.S. Dist. LEXIS 20467, 2004 WL 2314819, at *6 (quoting Penny v. Borough of Wildwood Crest, 28 Fed. Appx. 137 (3d. Cir. 2002)).

Although the phrase "palpably unreasonable" is not defined in the TCA, our Supreme Court has defined the term as implying

> behavior that is patently unacceptable under any given circumstance. . . . [F]or a public entity to have acted or failed to act in a manner that is palpably unreasonable, it must be manifest and obvious that no prudent person would approve of its course of action or inaction. Moreover, the burden of proof with regard to the palpable unreasonableness of the State's action or inaction is on the plaintiff in a case of this type.
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> Ogborne v. Mercer Cemetery Corp., 197 N.J. 448, 459, (2009) (quoting Kolitch v. Lindedahl, 100 N.J. 485, 493, (1985)).

Thus, a public entity can only be said to have acted in a palpably unreasonable manner where it is "obvious that no prudent person would approve of its course of action or inaction." Ibid. The "palpably unreasonable" standard "connotes a 'more obvious and manifest breach of duty' than mere negligence." Gaskill v. Active Environmental Technologies, Inc., 360 N.J. Super. 530, 536-537 (App. Div. 2003) (citing Williams v. Phillipsburg, 171 N.J. Super. 278, 286 (App. Div. 1979)). The term "palpably unreasonable" was differentiated from ordinary negligence in Williams v. Phillipsburg, 171 N.J. Super. 278, 286 (App. Div. 1979). There, the court explained that:

> the legislative intention was to allow sufficient latitude for resourceful and imaginative management of public resources while affording relief to those injured because of capricious, arbitrary, whimsical or outrageous decisions of public servants. We have no doubt that the duty of ordinary care, the breach of which is termed negligence, differs in degree from the duty to refrain from palpably unreasonable conduct. The latter standard implies a more obvious and manifest breach of duty and imposes a more onerous burden on the plaintiff."
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> Id.

The Model Civil Jury Charge instructs that in order to establish "palpably unreasonable" conduct, "the plaintiff must prove that the action taken by the public entity, or the lack of action, to respond to the dangerous condition by either correcting,

repairing, remedying, safeguarding or warning was palpably unreasonable. Mere carelessness or thoughtlessness or forgetfulness or inefficiency is not enough. The action of the public entity must be more than that. To be palpably unreasonable, the action or inaction must be plainly and obviously without reason or a reasonable basis. It must be capricious, arbitrary or outrageous." Model Civil Jury Charge 5.20A.

Moreover, in McCleary, supra, the court identified several cases where the court found that a public entity's failure to repair surface defects was not "palpably unreasonable" as a matter of law. McCleary, supra, 2011 U.S. Dist. LEXIS at 22-23. Specifically, the court looked to:

> Mendelsohn, 2004 U.S. Dist. LEXIS 20467, 2004 WL 2314819, at *8 (city's maintenance of boardwalk was not palpably unreasonable); Baier v. East Brunswick Police Dept., 2010 N.J. Super. Unpub. LEXIS 1963, 2010 WL 4025791, at *5 (App. Div. Aug. 12, 2010) (failure to repair sidewalk was not palpably unreasonable where no other injuries were reported and plaintiff did not notice defect); Akili-Obika v. City of Trenton, 2010 N.J. Super. Unpub. LEXIS 1983, 2010 WL 3326718, at *5 (App. Div. Aug. 13, 2010) (**failure to repair sidewalk was not palpably unreasonable where city had policy of repairing sidewalk defects when reported**); Gaskill v. Envt'l Tech., Inc., 360 N.J. Super. 530, 537, (App. Div. 2003) (township's failure to repair grate prior to accident was not palpably unreasonable); Maslo v. City of Jersey City, 346 N.J. Super. 346, 350-51, (App. Div. 2002) (failure to repair one-inch difference in elevation between portions of city sidewalk was not palpably unreasonable).
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> McCleary v. City of Wildwood, 2011 U.S. Dist. LEXIS at 22-23.

Additionally, it must be emphasized that the burden of proof under this section with regard to the palpable unreasonableness of the entity's action or inaction is on the Plaintiff. Coyne v. State, Dept. of Transp., 182 N.J. 481, 493 (2005). (emphasis added). Based on Model Civil Jury Charge 5.20A and the cases cited by the court in McCleary, it is clear to this Court that the "palpably unreasonable" standard is not satisfied in this

case. Plaintiff contends that because Margate employees swept the streets on a weekly basis and they were responsible to identify and report defects such as sinkholes, Margate's "failure to follow their own established program of inspection and maintenance was palpably unreasonable." However, this argument is without merit and contrary to established case law. Accordingly, the Plaintiff cannot satisfy all of the requirements under N.J.S.A. 59:4-2, Defendant is therefore entitled to summary judgment. See Polzo, supra, 196 N.J. at 585 (noting that "if one or more of the elements is not satisfied, a plaintiff's claim against a public entity alleging that such entity is liable due to the condition of public property must fail"). However, this Court will still address the permanent injury argument for completeness purposes.

II. Permanent Injury

To recover non-economic losses from a public entity, a plaintiff must establish that the injury alleged constitutes a "permanent loss of a bodily function, permanent disfigurement or dismemberment" and that medical treatment expenses for injury have exceeded $3,600. N.J.S.A. 59:9-2(d) In Brooks v. Odom, 150 N.J. 395 (1997), the Supreme Court held, that in order to satisfy the injury threshold of the Act, the plaintiff must have sustained a "permanent loss of the use of a bodily function that is substantial." Id. at 406. Along these lines, a plaintiff must satisfy a two-prong standard by proving (1) an objective permanent injury, and (2) permanent loss of a bodily function that, even if not total, is substantial. Gilhooley v. County of Union, 164 N.J. 533 (2000). The Gilhooley court further held that whether a claimant has injuries sufficient to meet the threshold under the Act is fact sensitive.

In Brooks, supra, the plaintiff was struck by a bus and suffered from back pain, headaches, straightening of cervical curvature, cervical spasms, paravertebral spasms of the dorsal spine, and decreased flexion and range of motion. Brooks, 150 N.J. at 399. The plaintiff received a discharge diagnosis from her physician of "residuals of post-traumatic headaches, residuals of flexion/extension injury of the cervical dorsal and lumbar spine with post-traumatic myositis and fibromyositis." The doctor "concluded that plaintiff had sustained a significant and permanent loss of function with chronic pain that was exacerbated by the usual activities of daily living." Id. at 399-400. The Court found that, although it was accepted that the plaintiff's injury represented a permanent loss of motion, the plaintiff did not surmount the threshold precluding noneconomic damages for pain and suffering since N.J.S.A. 59:9-2(d) required the permanent loss of a bodily function to be "substantial." Id. at 406. The Court stated:

> Although the legislative intent in the Tort Claims Act is not completely clear, we believe that the Legislature intended that a plaintiff must sustain a permanent loss of the use of a bodily function that is substantial. A total permanent loss of use would qualify. We doubt, however, that the Legislature intended that a claimant could recover only for losses that were total. As the Workers' Compensation Act demonstrates, the Legislature is aware of the distinction between permanent injuries that are total and those that are partial. In the Tort Claims Act, however, the Legislature did not specify that the right to recover was limited to injuries that were total. We conclude that under that Act plaintiffs may recover if they sustain a loss that is substantial.
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> Id. (citation omitted).

Applying that standard to the facts before it, the Brooks Court concluded, as a matter of law, that the plaintiff did not suffer a "permanent loss of bodily function."

Ibid. The Brooks decision makes clear that a Plaintiff can only recover under the TCA where the Plaintiff suffers a substantial loss. (emphasis added).

In Gilhooley v. County of Union, 164 N.J. 533 (2000), the Court determined how the Brooks standard applied to a different type of injury. The Court, citing approvingly from Brooks, indicated that a plaintiff must demonstrate an objective permanent injury and permanent loss of a bodily function that is substantial. Gilhooley, 164 N.J. at 541. The plaintiff in Gilhooley suffered a fall and sustained a knee fracture that left her without "quadriceps power," and required the restructuring of her patella through a surgical procedure, an "open reduction internal fixation" which utilized two metal pins and a tension band wire. Id. at 536-37. The Court found that the plaintiff's injury, a fracture requiring the installation of hardware to restore function, was permanent and resulted in the substantial loss of a bodily function. Id. at 541-42. (emphasis added). The Court found that a permanent injury could be considered to result in the substantial loss of a bodily function even though modern medicine can supply replacement parts to mimic normal function. Id. at 542-43. The Court distinguished this from the case of a "completely healed fracture without any objective evidence of permanent substantial impairment." Id. at 541 (citing Hammer v. Township of Livingston, 318 N.J. Super. 298 (App Div. 1999)).

In Karbar v. Borough of Wallington, 171 N.J. 3 (2002), the plaintiff suffered injuries to her arm, shoulder, ankle and knee as the result of a fall in the roadway caused by a defective water valve junction lid which ineffectively covered a seven-and-a half inch diameter hole. Karbar, supra, 171 N.J. at 5-6. The Court applied the Brooks standard and found that the plaintiff's shoulder injury, a torn rotator cuff which was surgically

repaired but involved the shortening and reattachment of the tendon constituted a permanent injury resulting in the substantial loss of a bodily function since the injury resulted in a forty percent loss of the range of motion of the plaintiff's arm. Id. at 15-16.

The Court in Karhar reviewed two Appellate Division decisions dealing with "healed" fractures under the TCA limitation on noneconomic damages, one which satisfied the threshold and one that did not. The court stated:

> In *Hammer v. Township of Livingston, 318 N.J. Super. 298 (App. Div.1999)*, the Appellate Division ruled that a plaintiff whose fractures had healed did not demonstrate a permanent loss of a bodily function that was substantial. The sixty-four year old plaintiff was struck by a fire wagon and thrown into the air. She suffered severe lacerations to her knee, left elbow, right eye, nose and lip. She also sustained several fractures of her nose, elbow, and knee. Plaintiff underwent several operations, but her physician noted that within three months of the accident plaintiff was functioning well. Thereafter, plaintiff started to complain of pain in her right shoulder and was diagnosed with post-traumatic tendonitis. The court noted that plaintiff's gait was not limited by her injuries, and that plaintiff had acknowledged that her left fibula and left elbow had healed completely. ***On the issue of plaintiff's fractures, the court concluded that plaintiff had presented no objective medical evidence to satisfy the second prong of Brooks.***
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> In comparison, in *Gerber v. Springfield Board Of Education, 328 N.J. Super. 24, (2000)*, the Appellate Division ruled that a plaintiff diagnosed with nasal fractures had demonstrated a permanent loss of a bodily function that was substantial. There, plaintiff, a high school student, was attacked by a classmate. She sustained multiple nasal fractures and underwent surgery for a " 'closed reduction of nasal bone and septal fractures.' "After surgery, the plaintiff still had difficulty breathing through her nose. ***Her physicians concluded that her injuries were permanent, her symptomology would worsen, and that there was no possibility that she would ever breathe normally again. The court held that a "substantial loss of bodily function encompasses permanent and constant difficulty breathing."***
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> Id.

In Ponte v. Oyereem, 171 N.J. 46 (2002), the plaintiff was a motorist whose car had stalled in the right lane of a highway with no "shoulder" lane and was hit by a New Jersey Transit bus. The plaintiff suffered a cervical sprain and a contusion to his knee. Ponte, 171 N.J. at 47. Despite arthroscopic surgery, the plaintiff's knee injury caused the knee to occasionally "give out." This condition was diagnosed as possibly permanent in nature. Id. at 50. The Court found that the record was devoid of evidence which would support a finding of the substantial loss of a bodily function, such as loss of range of motion, impaired gait, or restricted ambulation. Id. at 54 (stating that "Plaintiff's evidence consists only of answers to interrogatories and numerous medical reports. Noticeably absent from the record, however, is any evidence that plaintiff's range of motion is limited, his gait impaired or his ability to ambulate restricted"). The Court concluded that the "plaintiff's allegations concerning the injury to his knee do not establish a loss of normal bodily function that is both permanent and substantial, but merely 'iterates a claim for pain and suffering.'" Id. (citing Brooks, supra, 150 N.J. at 403). The Court therefore granted Defendant's Motion for summary judgment reasoning that there was no genuine "issue of fact about whether plaintiff's knee injury constitutes a permanent loss of a bodily function that is substantial." Id.

In Knowles v. Mantua Tp. Soccer Ass'n, 176 N.J. 324 (2003), the plaintiff's automobile was struck by the large barricade metal gate at the exit of a park, crashing through plaintiff's windshield, striking him in the shoulder. Knowles, 176 N.J. at 326-27. The plaintiff suffered an L4-5 disc herniation and radiculopathy from the accident, which the Court found was 'an objective permanent injury," satisfying the first prong of the Brooks standard. Id. at 331. The Court, recognizing that plaintiff was able to continue

working as a teacher, held that the ability to work is not the test for recovery of pain and suffering damages under the TCA. Id. The Court reviewed the "continuum of cases" discussed above, and found that the plaintiff's "lack of feeling in his left leg and the inability to stand, sit, or walk comfortably for a substantial amount of time, engage in athletics, and complete household chores," id. at 333, were sufficient to withstand summary judgment with respect to the second prong of Brooks and raise a triable issue of fact as to whether the plaintiff suffered a substantial loss of a bodily function under the TCA[3]. The Court classified the following four categories of injuries:

> First, we have recognized that "injuries causing blindness, disabling tremors, paralysis and loss of taste and smell" satisfy the threshold because they are inherently "objectively permanent and implicate the substantial loss of a bodily function (e.g., sight, smell, taste, and muscle control)." Gilhooley, supra, 164 N.J. at 541 (citing Brooks, supra, 150 N.J. at 403). Second, we have held that when a plaintiff suffers an injury that permanently would render a bodily organ or limb substantially useless but for the ability of "modern medicine [to] supply replacement parts to mimic the natural function," that injury meets the threshold. 164 N.J. at 542-43. Third, we have concluded that there must be a "physical manifestation of [a] claim that [an] injury ... is permanent and substantial." Ponte, supra, 171 N.J. at 54. An injury causing lingering pain, resulting in a 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, supra, 164 N.J. at 540 (quoting Brooks[4], supra, 150 N.J. at 403 (citation omitted)). Finally, we have recognized that neither an absence of pain nor a plaintiff's ability to resume some of his or her normal activities is dispositive of whether he or she is entitled to pain and suffering damages under the TCA. Kahrar, supra, 171 N.J. at 15-16, 791 A.2d 197.

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[3] However, it must be noted that in Knowles, the Plaintiff's doctor expressly "concluded that the accident permanently damaged plaintiff's lumbar spine" Id. at 328.

[4] Brooks v. Odom, 150 N.J. 395, 402-403 (N.J. 1997)To recover under the Act for pain and suffering, a plaintiff must prove by objective medical evidence that the injury is permanent. Temporary injuries, no matter how painful and debilitating, are not recoverable. Further, a plaintiff may not recover under the Tort Claims Act for mere 'subjective feelings of discomfort.' Ayers v. Township of Jackson, 106 N.J. 557, 571, 525 A.2d 287 (1987). Judicial and secondary authority interpreting the phrase 'permanent loss of a bodily function' is scant. One recognized text states '[t]o be considered permanent within the meaning of the subsection, an injury must constitute an 'objective' impairment, such as a fracture.' Absent such an objective abnormality, a claim for permanent injury consisting of 'impairment of plaintiff's health and ability to participate in activities' merely iterates a claim for pain and suffering.

Knowles at 331-332.

Furthermore, the qualifications for a "**permanent loss of bodily function**" are defined in Model Charge 8.70, which provides:

> [t]he loss need not be total, but must be substantial. Mere limitation is insufficient, by that I mean the plaintiff must prove this loss by a demonstration of objective credible medical evidence of permanent injury, because damages for temporary injury are not recoverable. The proof must be both objective and credible. Objective means that the evidence must be verified by physical examination, diagnostic testing and/or observation. Credible means that the evidence is believable.

Defendants argue that there is no issue of material fact that would permit a trier of fact to conclude that Plaintiff has overcome the injury threshold provided in the TCA. Therefore, Defendants submit that they are entitled to summary judgment as a matter of law pursuant to the standard set forth in Brill, supra, 142 N.J. 520. Defense counsel highlights the following facts in support of its argument: (1) the Plaintiff has testified that she did not receive any medical treatments with any doctors for her ankle between November 2009 and September 2011; (2) Plaintiff did not use any orthopedic device such as an ankle brace or boot between November 2009 and September 2011; and (3) Plaintiff stopped taking prescribed pain medication for her injury approximately six weeks after the subject fall.

In opposition, Plaintiff's counsel argues that the Plaintiff has testified that she has pain in her ankle "at least weekly" and that, as a result of the subject fall, she cannot walk long distances, stand on her feet for a prolonged period, walk in heals, stand while cooking or kneel to get something out of a cabinet. Plaintiff highlights Dr. Zuck's expert report wherein he opines that the Plaintiff's "symptoms of pain with extended period of

walking and standing are permanent and, in addition, sudden changes in the weather will continue to produce barometric sensitivity and ankle pain."

However, even if a finder of fact were to accept all of these alleged "limitations," the Plaintiff nevertheless has failed to establish a "permanent loss of a bodily function." New Jersey case law is clear: only where the Plaintiff suffers a substantial loss of a bodily function can a public entity be liable. See Gilhooley, 164 N.J. at 541. (emphasis added). In Gilhooley the Court expressly held that a "completely healed fracture without any objective evidence of permanent substantial impairment." Id. An injury causing lingering pain, resulting in a 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.'" Id. at 540.

Here, the objective medical evidence indicates that the Plaintiff's ankle has completely healed. Additionally, Plaintiff has not presented anything more than her subjective complaints of "lingering pain, resulting in a lessened ability to perform certain tasks because of the pain." Id. It is inconceivable to this Court as to how the Plaintiff could possibly prove that she suffered a permanent loss of a bodily function when the uncontroverted evidence establishes that the Plaintiff, in essence, in no way treated her "injury" for almost two years. As such, Plaintiff cannot establish a permanent loss of a bodily function as required under the TCA.

Accordingly, Defendant's Motion for Summary Judgment on the grounds that the Plaintiff cannot satisfy the requirements of N.J.S.A. 59:4-2 because the evidence fails to establish a dangerous condition of public property creating a substantial risk of injury is GRANTED. Additionally, Defendant's Cross-Motion for Summary Judgment on the

grounds that the all of the medical records provided by plaintiff are insufficient as a matter of law for the plaintiff to cross the threshold under the New Jersey TCA, N.J.S.A. 59:9-2(d) is GRANTED. Finally, Co-Defendant, Perna's Motion for Summary Judgment is GRANTED. An appropriate Order has been entered. Conformed copies will accompany this Memorandum of Decision.

James E. Isman, J.T.C. t/a