LAW OFFICES OF NEIL STACKHOUSE, P.C.
2106 New Road, Suite E-8
Linwood, New Jersey 08221
Phone (609) 653-0800
Facsimile: (609) 653-1020
Attorneys for defendant, City of Ocean City

MARLYN GOLD, *Plaintiff,* vs. CITY OF OCEAN CITY; 750 ASBURY AVENUE ASSOC., LLC; WALLACE HARDWARED, INC.;TRUE VALUE; 8TH & ASBURY ENTERPRISES, LLC; COASTAL CHRISTIAN OCEAN CITY; CALVARY CHAPEL; John Does 1-5 and ABC Corps. 1-5. *Defendants.*	SUPERIOR COURT OF NEW JERSEY CAPE MAY COUNTY LAW DIVISION DOCKET NO: CPM-L-62-12 Civil Action **ORDER GRANTING SUMMARY JUDGMENT**

THIS MATTER, having been brought before the Court by way of Notice of Motion field by Thomas G. Smith, Esquire, "Of Counsel" to the Law Offices of Neil Stackhouse, PC, attorneys for the defendant, City of Ocean City; and

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

IT IS on this 21st day of March, 2014 ***ORDERED AND ADJUDGED*** that summary judgment is granted to defendant, City of Ocean City, and plaintiff's Complaint, as well as any cross-claims, are dismissed, with prejudice, as to defendant City of Ocean City.

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.

Memorandum of Decision is attached.

J. Christopher Gibson, J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

TO: **Thomas G. Smith, Esquire**
2106 New Road, Suite E-8
Linwood, NJ 08221

CASE: **Marlyn Gold v City of Ocean City et al**
DOCKET NO. **CPM L 62-12**

NATURE OF APPLICATION: DEFENDANT THE CITY OF OCEAN CITY'S MOTION FOR SUMMARY JUDGMENT

MEMORANDUM OF DECISION ON MOTION

NATURE AND BACKGROUND OF MOTION

The complaint in this matter was filed on February 2, 2012. The discovery end date was September 28, 2013. The discovery end date has been extended four (4) times before. Arbitration was conducted on November 21, 2013.

This personal injury matter arises from an accident resulting in a fracture of plaintiff's left shoulder. Plaintiff Marilyn Gold slipped and fell on snow and/or ice that had accumulated in the vicinity of a municipal alleyway and the sidewalk in Ocean City, New Jersey.

Defendant the City of Ocean City moves for summary judgment dismissing any and all claims against it with prejudice. The court has

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

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." Ibid. (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. Ibid. (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 fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

DEFENDANT THE CITY OF OCEAN CITY'S MOTION FOR SUMMARY JUDGMENT

Defendant the City of Ocean City moves for summary judgment dismissing any and all claims against it with prejudice.

I. TORT CLAIMS ACT

Defendant maintains that it is entitled to summary judgment under the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:4-1, *et seq.* The TCA provides, in pertinent part, 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."

N.J.S.A. 59:4-2.

To establish premises liability for a dangerous condition on public property, any real property owned or controlled by a public entity, a claimant must show: (1) a dangerous condition at the time of the accident; (2) proximate cause; (3) a reasonably foreseeable risk of the kind of injury that occurred; (4) actual or constructive notice; and (5) palpably unreasonable conduct. See Williams v. Phillipsburg, 171 N.J. Super. 278, 281 (App. Div. 1979). And recovery against a public entity may be had only where explicitly provided for by the TCA. See Manca v. Hopacong, 157 N.J. Super. 67, 72 (App. Div. 1978); Polyard v. Terry, 160 N.J. Super. 497, aff'd 79 N.J. 547 (1978).

A. PUBLIC PROPERTY

Defendant argues that plaintiff has not proved her accident occurred on public property. Defendant asserts the record demonstrates that plaintiff is not sure where she fell. Defendant provides that it is plaintiff's burden to satisfy every element of the TCA. Either plaintiff fell in a portion of the alleyway or plaintiff fell on the sidewalk in front of Cavalry Chapel. Defendant maintains plaintiff has not proved she fell on a portion of the

municipal alleyway. Defendant notes that if plaintiff fell on the sidewalk it would be the responsibility of the abutting commercial property owner to maintain the sidewalk.

As such, defendant requests that the court grant its motion for summary judgment dismissing any and all claims against it with prejudice.

B. PALPABLY UNREASONABLE CONDUCT

Assuming the accident occurred on public property, defendant argues that its conduct was not palpably unreasonable under N.J.S.A. 59:4-2. Defendant states that proof of palpably unreasonable conduct is part of a claimant's prima facie cause of action. Maslo v. City of Jersey City, 246 N.J. Super. 346, 349 (App. Div. 2002). And a claimant may demonstrate the first four (4) requirements of N.J.S.A. 59:4-2 and still fail to establish liability unless she establishes that the action or inaction of the public entity was palpably unreasonable. Kolitch v. Lindendahl, 100 N.J. 485, 492-93 (1985). Palpably unreasonable conduct is "behavior that is patently unacceptable under any given circumstances" and "it must be obvious that no prudent person would approve of [the government entity's conduct] course of action or inaction." Ibid. And the question of whether conduct qualifies as palpably unreasonable may be decided by the court as a matter of law. Muhammad v. N.J. Transit., 176 N.J. 185, 195 (2003).

Defendant provides that approximately sixteen (16) inches of snow had fallen within a twenty four (24) hour period in Ocean City prior to plaintiff's

accident. Defendant directs that its employees logged three hundred eighty three and a half (383.5) man hours for snow removal services. Based on the extreme weather conditions, defendant argues plaintiff cannot demonstrate that its conduct was palpably unreasonable. Additionally, plaintiff has not produced any evidence of a standard to which the court could contrast the actions of defendant to establish a deviation from the standard of care.

As such, defendant requests that the court grant its motion for summary judgment dismissing any and all claims against it with prejudice.

II. IMMUNITY UNDER THE TORT CLAIMS ACT AND COMMON LAW

Defendant maintains it is entitled to immunity because the accident allegedly occurred as a result of snow and/or ice accumulation. Assuming plaintiff can establish the injury occurred in the municipal alleyway, defendant directs that the issue becomes whether the fall resulted from improper snow removal or from an area of undisturbed snow and/or ice not impacted by snow removal services.

A. N.J.S.A. 59:4-7

Assuming that, as indicated by plaintiff at deposition, the snow that she fell on was not placed there by a plow or other snow removal services, defendant maintains that it is immune from liability under N.J.S.A. 59:4-7.

N.J.S.A. 59:4-7 states that:

> "Neither a public entity nor a public employee is liable for an injury caused solely by the effect on the use of streets and highways of weather conditions."

Defendant notes that the municipal alleyway constitutes a street. And the existence of undisturbed snow constitutes an undisturbed weather condition.

As such, defendant requests that the court grant its motion for summary judgment dismissing any and all claims against it with prejudice.

B. COMMON LAW IMMUNITY

Assuming that plaintiff's testimony is construed to refer to deficient snow removal services, defendant maintains that it is immune under the doctrine of common law immunity. See Miehl v. Darpino, 53 N.J. 49 (1968).

In Miehl, a pedestrian was struck by an automobile at an intersection and claimed that the public entity defendant had piled snow in a negligent manner. The Supreme Court of New Jersey held that the entity was immune from liability because the public benefit of snow removal services outweighed the risk of harm that accompanied such services. Id. at 53-54.

This common law immunity has survived the enactment of the TCA. Rochinsky v. State of N.J., Dept. of Transp., 110 N.J. 399 (1988). In Rochinsky, a major snowstorm deposited approximately sixteen (16) inches of snow in Essex County, New Jersey. The Court reasoned that snow removal activities by their very nature leave behind dangerous conditions and "no other governmental function [would] expose public entities to more litigation if this immunity were to be abrogated." Id. at 413.

To the extent any snow removal activities may have impacted the area where plaintiff fell, defendant maintains it is immune from liability under Miehl v. Darpino, supra.[1] As such, defendant requests that the court grant its motion for summary judgment dismissing any and all claims against it with prejudice.

III.THRESHOLD REQUIREMENT

Lastly, defendant argues that plaintiff has not met the threshold requirement of N.J.S.A. 59:9-2(d).

The TCA provides, with regard to the threshold for recovery of damages for pain and suffering, that:

> "No damages shall be awarded against a public entity or public employee for pain and suffering resulting from an injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of [three thousand six hundred dollars] $3,600.00."

N.J.S.A. 59:9-2(d). In order to show permanent loss of a bodily function, a claimant must demonstrate: (1) the existence of a permanent injury by objective medical evidence; and (2) the permanent loss of a substantial bodily function. Gilhooley v. Cnty. of Union, 164 N.J. 533, 541 (2000)(citing Brooks v. Odom, 150 N.J. 395, 402-06 (1997)).

[1] Defendant notes that our Supreme Court in Rochinsky v. State of N.J., Dept. of Transp., 110 N.J. 399 (1988) indicated a cause of action may exist for the failure to warn of a dangerous condition created by snow removal services, which is not readily apparent and is distinct from dangerous conditions related to snow or ice. Defendant asserts that no such allegations exist in this matter.

Defendant notes that our Supreme Court has determined complaints of dizziness, blurred vision, and general pain and stiffness of the neck and back did not constitute a permanent loss of bodily function. See Brooks v. Odom, 150 N.J. 395, 406 (1997). Arthroscopic knee surgery to repair a meniscus tear, resulting in restriction of physical activity and a permanent loss of joint mobility is likewise not sufficient to show the permanent loss of a bodily function that was substantial. Ponte v. Overeem, 171 N.J 46, 53-54 (2002). But open surgery to repair a rotator cuff tear and a resulting loss of mobility that significantly impaired everyday activities was sufficient to meet the threshold requirement. Kahrar v. Borough of Wallington, 171 N.J. 3, 7 (2002).

Defendant admits that plaintiff may be able to establish the existence of a permanent injury by objective medical evidence. Plaintiff suffered partial tears of her rotator cuff and biceps tendon, visible through MRI. But defendant submits that plaintiff cannot establish that she suffered a permanent loss of a substantial bodily function.

Defendant notes that Dr. McCloskey's report indicates a limitation of motion to plaintiff's left arm. However, defendant directs that plaintiff cannot show a substantial impact on her life. Plaintiff still goes grocery shopping, does her laundry, and completes other household activities. Furthermore, plaintiff has not undergone any treatment since November 24, 2010.

As such, defendant requests that the court grant its motion for summary judgment dismissing any and all claims against it with prejudice.

DISCUSSION

The court finds that defendant is entitled to the relief requested pursuant to R. 4:46-2(c), Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995), and Miehl v. Darpino, 53 N.J. 49 (1969).

Under the common law, public entities are entitled to immunity from liability for injuries arising out of snow-removal activities. Bligen v. Jersey City Hous. Auth., 131 N.J. 124, 131 (1993). This immunity is based on the unlimited liability that could be imposed on an entity, such as a state, county, or municipality that had the responsibility to clear all of its streets and roadways. Ibid. Immunity for snow removal activities was not abrogated by the TCA. Rochinsky v. State of New Jersey Dep't of Transp. 110 N.J. 399 (1988).

In Amelchenko v. Freehold Borough, 42 N.J. 541 (1964), our Supreme Court held that the state had a duty to use ordinary care to remove snow from a municipal parking lot within a reasonable time after a snow storm. Our Supreme Court stated "municipalities cannot be insurers of the public safety and the determination of priorities for snow removal 'is a matter of judgment committed under our system of government to the local authority and it should not be interfered with by the courts in a tort damage suit. Id. at 549.

There are limited exceptions to common law immunity from all weather related injuries. Courts should "assess the nature of the breach of duty by examining whether the municipality had used due care in light of the factual situation with which it was faced." Bligen v. Jersey City Hous. Auth., supra, 131 N.J. at 133 (citing Amelchenko, supra, at 551). In Bligen v. Jersey City Hous. Auth., supra, 131 N.J. at 134, our Supreme Court determined common law immunity did not apply based on the defendant's status as a public housing authority rather than a municipality. Therein, the Supreme Court noted the housing authority was not responsible for the removal of snow on a network of state and municipal roadways. Bligen, supra, at 134. Additionally, common law immunity may not where the conduct of the public entity amounted to a palpably unreasonable failure to warn of a dangerous condition unrelated to the snow removal activity). Rochinsky, supra, 110 N.J. at 415 n.7.

In the event plaintiff's accident occurred in the municipal alleyway, and therefore on public property, defendant would be entitled to common law immunity whether the fall resulted from the failure to plow the area in question from the creation of a snow bank or other potentially hazardous condition. In Amelchenko, the State Supreme Court stated that courts should not interfere with the judgment of local authorities with regard to the determination of priorities for snow removal. Id. at 549. Common law immunity applies whether the accident occurred from a condition resulting

from snow removal services or from a defendant's failure to address a particular area due to prioritizing other areas. See ibid.

This court recognizes that the results of this doctrine may be harsh. But it is supported by our state's public policy of encouraging snow removal services and the recognition that the imposition of liability for snow related injuries would require public entities to essentially "broom sweep" all areas traversed by the public and "[t]he high cost of such an undertaking could make the expense of any extensive program of snow removal prohibitive and could result in no program or in an inadequate partial program." Miehl v. Darpino, supra, 53 N.J. at 54. Even if plaintiff could demonstrate that she fell in the alleyway and the fall resulted from a dangerous condition of public property, defendant would be not be liable under the doctrine of common law immunity.

Accordingly, defendant's motion for summary judgment dismissing any and all claims against it with prejudice is granted.

CONCLUSION

The motion for summary judgment is unopposed. Defendant is entitled to the relief requested pursuant to R. 4:46-2(c), Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995), and Miehl v. Darpino, 53 N.J. 49 (1969). Defendant's motion for summary judgment dismissing any and all claims against it with prejudice is granted.

An appropriate form of order has been executed. Conformed copies of that order will accompany this memorandum of decision.

March 21, 2014

J. Christopher Gibson, J.S.C.