NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0028-14T2

PATRICIA SHILINSKY and
RICHARD SHILINSKY,

Plaintiffs-Appellants,

v.

BOROUGH OF RIDGEFIELD,

Defendant-Respondent.

Argued December 15, 2015 – Decided April 26, 2016

Before Judges Reisner and Leone.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-6537-12.

David J. Pierguidi argued the cause for appellants (Cerussi & Gunn, attorneys; Mr. Pierguidi, on the briefs).

James M. McCreedy argued the cause for respondent (Wiley Malehorn Sirota & Raynes, attorneys; Mr. McCreedy, of counsel and on the brief; Lauren M. Derasmo, on the brief).

PER CURIAM

Plaintiffs Patricia Shilinsky and her husband Richard Shilinsky appeal from a July 25, 2014 order granting summary judgment on their claims against defendant Borough of Ridgefield

(Ridgefield) under the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3. We affirm.

I.

We derive the following facts from the documents and deposition transcripts attached to the motions for summary judgment, read in the light most favorable to plaintiffs.[1] At about 6 p.m. on December 11, 2011, plaintiff went to visit her son Sean at his home on Abbott Avenue in Ridgefield. Plaintiff parked her car across the street from Sean's house. As plaintiff was jaywalking across the street, she tripped and fell on a depression in the middle of the roadway. Plaintiff was accompanied by Sylvia Koenigsberg, who also tripped on the depression.

As the responding police officer noted, the depression ran "almost the entire length of the block." The portion of the depression on which plaintiff tripped was at least twenty-eight inches long, at least eight inches wide, and three inches deep.[2] Sean testified that in 2008, he had complained by telephone to

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[1] For ease of reference, when we refer to the Shilinskys individually we will refer to Patricia Shilinsky as "plaintiff," and use the first names of her husband, who asserts loss of consortium and other claims, and her son.

[2] Plaintiffs' liability expert reported that other areas of Abbott Avenue were only depressed by between one half and one inch.

Ridgefield's Department of Public Works (DPW) about the unevenness of the roadway.

Plaintiffs presented evidence that the depression had existed in 2009, and was likely seen by DPW Superintendent Nicholas Gambardella before 2011.[3] Gambardella and Brian Conroy, Ridgefield's civil engineer, testified that the depression in the middle of the street would be hazardous to pedestrians crossing the street in that area. Gambardella and Linda Silvestri, Ridgefield's clerk, testified that it was common for homeowners and visitors to park on the street, causing them to have to walk on the street.

After plaintiff fell, she was transported to the hospital where she was diagnosed with a fractured left wrist and an injury to her right knee. Plaintiff underwent surgery to repair her wrist and knee. Following surgery, plaintiff received physical therapy for approximately six months. Plaintiff continued to experience numbness and discomfort in both her wrist and knee.

In August 2012, plaintiffs filed a complaint in the Law Division alleging Ridgefield negligently failed to maintain and repair the area of Abbott Avenue that allegedly caused

[3] Gambardella described the depression as a "crack" or "a seam that opened up."

plaintiff's fall. Ridgefield denied plaintiffs' allegations and asserted their claims were barred by the TCA.

Ridgefield filed a motion for summary judgment, attaching the deposition testimonies, an expert report from a forensic engineer, Paul Stephens, and a certification from its Chief Financial Officer and Qualified Purchasing Agent, Erik Lenander. In February 2014, plaintiffs cross-moved for partial summary judgment on the basis that there was no genuine issue of material fact as to Ridgefield's liability under the TCA. Plaintiffs' cross-motion attached a 2009 grant application in which Ridgefield requested State funds to facilitate repairs to Abbott Avenue, and plaintiffs' expert report from Len McCuen, a civil engineer. After hearing oral argument, Judge John J. Langan, Jr., granted Ridgefield's motion for summary judgment, and denied plaintiffs' cross-motion.

II.

Plaintiffs appeal the grant of Ridgefield's motion for summary judgment and the denial of their cross-motion. Summary judgment must be granted if the court determines "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." R. 4:46-2(c). The court must "consider whether the competent evidential 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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). As "appellate courts 'employ the same standard that governs the trial court,'" we review these determinations de novo, and the "trial court rulings 'are not entitled to any special deference.'" Henry v. N.J. Dept. of Human Servs., 204 N.J. 320, 330 (2010) (citation omitted). We must hew to that standard of review.

III.

In deciding this appeal, "we begin with some basic principles of law governing our roadways." Polzo v. Cty. of Essex, 209 N.J. 51, 70 (2012) [hereinafter "Polzo II"]. "At intersections where traffic is directed by a police officer or traffic signal, no pedestrian shall enter upon or cross the highway at a point other than a crosswalk." N.J.S.A. 39:4-33. "Where traffic is not controlled and directed either by a police officer or a traffic control signal, pedestrians shall cross the roadway within a crosswalk[.]" N.J.S.A. 39:4-34. "[T]hese two sections are aimed at preventing the conduct commonly known as 'jaywalking[.]'" Abad v. Gagliardi, 378 N.J. Super. 503, 507 (App. Div.), certif. denied, 185 N.J. 295 (2005). They "require

pedestrians to walk to an available crosswalk rather than crossing in the middle of a block." Id. at 508.

Here, the alleged injury occurred as plaintiff was jaywalking across the roadway in the middle of the block. Deposition testimony showed that there was a crosswalk about eighty feet away. Plaintiff's illegal jaywalking across the roadway forms the background for our consideration of the TCA.

In 1972, the Legislature adopted the TCA, "which reestablished the rule of immunity for public entities and public employees, with certain limited exceptions." Marcinczyk v. State Police Training Comm'n, 203 N.J. 586, 594-95 (2010); see L. 1972, c. 45. The TCA "declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein." N.J.S.A. 59:1-2. "Public entity" includes any "district, public authority, public agency, and any other political subdivision or public body in the State," such as Ridgefield. N.J.S.A. 59:1-3. Under the TCA, "immunity for public entities is the general rule and liability is the exception." Kemp by Wright v. State, 147 N.J. 294, 299 (1997); accord D.D. v. Univ. of Med. & Dentistry of N.J., 213 N.J. 130, 134 (2013) (describing that rule as "the 'guiding principle' of

the" TCA). The TCA recognizes that "the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done." N.J.S.A. 59:1-2. "Accordingly, the Legislature confined the scope of a public entity's liability for negligence to the prescriptions in the TCA." Polzo II, supra, 209 N.J. at 65.

"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." Ibid. (quoting N.J.S.A. 59:2-1(a)). "In other words, a public entity is 'immune from tort liability unless there is a specific statutory provision' that makes it answerable for the negligent act or omission." Ibid. (quoting Kahrar v. Borough of Wallington, 171 N.J. 3, 10 (2002)).

"The relevant statutory provision here is N.J.S.A. 59:4-2, which addresses a dangerous condition of public property." Ibid. That section provides:

> A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in a 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 subsection 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.
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> [N.J.S.A. 59:4-2 (emphasis added).]

Thus, under the TCA, plaintiff was required, first, to prove that she suffered an injury meeting the threshold set by the TCA, that her injury was caused by the condition of the roadway, that it was a dangerous condition as defined by the TCA,[4] that it created a reasonably foreseeable risk of that kind of injury, and that Ridgefield had actual or constructive notice with sufficient time to protect against it. Polzo II, supra,

[4] "'Dangerous condition' means 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." N.J.S.A. 59:4-1(a).

209 N.J. at 66.[5] "Even if plaintiff has met all of these elements, the public entity still will not be liable unless the public entity's failure to protect against the dangerous condition can be deemed 'palpably unreasonable.'" Ibid. (quoting N.J.S.A. 59:4-2). "Plaintiff bears the burden of proving that [Ridgefield] acted in a palpably unreasonable manner." Muhammad v. N.J. Transit, 176 N.J. 185, 195 (2003).

Here, the trial court ruled "that Ridgefield's failure to take action to repair the Abbott Avenue roadway for pedestrians crossing in the middle of the roadway, not in a crosswalk, was not palpably unreasonable" under N.J.S.A. 59:4-2. The court also ruled that the depression on Abbott Avenue was not a dangerous condition as a matter of law, because plaintiff was not crossing at a cross-walk. The court also ruled "that the injuries claimed by the plaintiff do not qualify for relief in accordance with" N.J.S.A. 59:9-2, and that Richard had not provided evidence to support his claim for damages.

We need not reach whether the depression on Abbott Avenue was a dangerous condition, whether Ridgefield had actual or

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[5] Plaintiffs do not contend that "a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition." N.J.S.A. 59:4-2(a); see Polzo II, supra, 209 N.J. at 67 ("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").

constructive notice of that alleged dangerous condition, or whether it proximately caused plaintiff's alleged injuries or Richard's alleged damages.[6] The TCA

> makes clear that, even if the public entity's property constituted a "dangerous condition;" even if that dangerous condition proximately caused the injury alleged; even if it was reasonably foreseeable that the dangerous condition could cause the kind of injury claimed to have been suffered; and even if the public entity was on notice of that dangerous condition; no liability will be imposed "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."
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> [Polzo v. Cty. of Essex, 196 N.J. 569, 585 (2008) (quoting N.J.S.A. 59:4-2).]

We agree with the trial court that Ridgefield's inaction in repairing Abbott Avenue was not palpably unreasonable. "'Palpably unreasonable'" "'implies behavior that is patently unacceptable under any given circumstance.'" Muhammad, supra, 176 N.J. at 195 (citation omitted). "'[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."'" Id. at 195-96 (citation omitted). "Although ordinarily the

[6] "[T]he viability of [Richard's claim] is subject to the survival of [his wife's] claim." Sciarrotta v. Global Spectrum, 194 N.J. 345, 350 n.3 (2008).

question of whether a public entity acted in a palpably unreasonable manner is a matter for the jury, in appropriate circumstances, the issue is ripe for a court to decide on summary judgment." Polzo II, supra, 209 N.J. at 75 n.12; see also Black v. Borough of Atlantic Highlands, 263 N.J. Super. 445, 452 (App. Div. 1993).

Here, viewing the evidence in the light most favorable to plaintiffs, it is not "'"manifest and obvious that no prudent person would approve of [Ridgefield's] course of . . . inaction."'" Muhammad, supra, 176 N.J. at 195-96 (citation omitted). In reaching this conclusion, we are guided by our Supreme Court's decision in Polzo II, supra. There, the Court held that "a county [could not] be held liable for a fatal accident that occurred when a person lost control of her bicycle while riding across a two-foot wide, one-and-one-half inch depression on the shoulder of a county roadway." 209 N.J. at 55. The Court ruled "that the County's failure to correct this depression before the tragic accident was [not] 'palpably unreasonable.'" Id. at 56. We find the Polzo II Court's analysis of liability for a bicyclist's use of the shoulder, which is not designed or legal for such use, id. at 70-71, to be equally applicable here to a pedestrian illegally jaywalking across the roadway in the middle of the block.

In Polzo II, our Supreme Court emphasized the "'roadway' is 'that portion of a highway . . . ordinarily used for vehicular travel.'" Id. at 70 (citation omitted). "By the Motor Vehicle Code's plain terms, roadways generally are built and maintained for cars, trucks, and motorcycles," not pedestrians. Id. at 71. Moreover, "[p]otholes and depressions are a common feature of our roadways. However, 'not every defect in a highway, even if caused by negligent maintenance, is actionable.'" Id. at 64 (citation omitted).

The Court in Polzo II, recognized "that many bicyclists may be inclined to ride on a roadway's shoulder to stay clear of vehicular traffic and out of concern for their safety." 209 N.J. at 71. We similarly recognize that many pedestrians may be inclined to jaywalk because it is convenient or because the road happens to be free of vehicular traffic. Jaywalking may be particularly tempting where a person is exiting from the driver's side of a parked car and seeks to cross the street. Nonetheless, "inherent dangers confront [pedestrians who jaywalk] on roadways that are not faced by operators of motor vehicles." Ibid. A "depression . . . that a car would harmlessly pass over" might trip a pedestrian. Ibid.

Plaintiffs failed to show Ridgefield was palpably unreasonable because it did not allocate its limited resources

for the repair of a depression in the middle of the street and of the block so it would be safer for pedestrians to cross there. "Roadways generally are intended for and used by operators of vehicles." Ibid. Thus, it was not palpably unreasonable for Ridgefield to not repair a depression "that a car would harmlessly pass over," to prevent the tripping of a pedestrian who legally could not cross there. "Public entities do not have the ability or resources to remove all [roadway] dangers peculiar to" pedestrians. Ibid. Moreover, "[r]oadways cannot possibly be made or maintained completely risk-free for" pedestrians. Ibid. "Because the roadway is 'that portion of a highway . . . ordinarily used for vehicular travel,' a public entity – in choosing when and what repairs are necessary – might reasonably give lesser priority to" fixing roadway depressions harmless to vehicles. Id. at 77 (quoting N.J.S.A. 39:1-1).

N.J.S.A. 59:4-2 "recognizes the difficulties inherent in a public entity's responsibility for maintaining its vast amounts of public property," and its "discretionary decisions to act or not to act in the face of competing demands should generally be free from the second guessing of a coordinate branch of Government." Id. at 76 (quoting Harry A. Margolis & Robert Novack, Claims Against Public Entities, 1972 Attorney General's

Task Force on Sovereign Immunity, comment on N.J.S.A. 59:4-2 (Gann 2011)).

In its motion for summary judgment, Ridgefield proffered that its failure to fix the depression on Abbott Avenue was the result of allocating limited resources to other high-need areas prior to plaintiff's December 11, 2011 fall. Ridgefield attached a certification of its Assistant Chief Financial Officer and Qualified Purchasing Agent, Erik Lenander. Lenander certified that Ridgefield is "a small municipality of 2.8 square miles, with approximately 11,000 residents." Lenander further certified that Ridgefield was only able to "allocate $150,000 annually to the operating budget of the Department of Public Works in the fiscal years 2010 and 2011," and $148,000 in fiscal year 2012. This operating budget "must cover roadway repair, tree removal, snow and ice removal, and winter preparations among a host of other expenses." For example, "[o]ut of the DPW operating budget, [Ridgefield] designated $25,000 for roadway repair for fiscal year 2012"; however, "[t]he actual amount spent on roadway repair was $45,000."

Conroy testified that Ridgefield has approximately twenty-seven miles worth of roadway. Lenander certified that "it is [Ridgefield's] goal to repair one mile of roadway" annually; however, "the budget and grant money allows only for

approximately one-half mile to be paved" and that it would be "prohibitively expensive" to "repair all roadways as the need arises." As a result, Lenander certified that "[i]n light of these competing demands, [Ridgefield] exercised its discretion in its decision to allocate road repair funds to the most dangerous or high traffic areas," which did not include Abbott Avenue. Lenander's assertions were undisputed in the trial court.

Furthermore, Lenander certified that Ridgefield "depends almost entirely on Community Development and State Local Aid grants for major roadwork projects, such as milling and paving roads." In 2009, Ridgefield applied to the New Jersey Department of Transportation (NJDOT) for a $260,000 grant of State funds to finance the roadway repair of Abbott Avenue.[7] In its grant application, Ridgefield offered to contribute $65,000 to the repair of Abbott Avenue. NJDOT denied Ridgefield's grant application because under all NJDOT's "local funding programs, need far exceeds available funds."

[7] Ridgefield's grant application stated that the roadway was "in poor condition and in need of a resurfacing. The road has many cracks, patches, depressions, utility trench repairs and areas of pavement failure." The application sought "[r]oadway [r]econstruction," including repair of the roadway base if required, asphalt milling, and resurfacing with hot mix asphalt.

Plaintiffs note that the 2009 grant application stated that Abbott Avenue was a "heavily traveled local collector road" and that Ridgefield's expert's report stated that "heavily traveled roads" in need of repair should be "prioritized." However, plaintiffs have not shown that Abbott Avenue was the highest repair priority among the heavily-traveled roads in Ridgefield, or that Ridgefield had sufficient funds to repair Abbott Avenue given the denial of its grant application.

Plaintiffs argue the depression on Abbott Avenue on the block in front of Sean's house could have been repaired with a half-ton of asphalt for $35, or with a single bag of "cold patch" for $50.[8] However, other than eliciting from Gambardella how much those materials cost, plaintiffs presented no evidence that those materials would have been adequate to patch the depression. Moreover, plaintiffs' estimate omits the cost of labor and other materials needed to patch the depression. Further, plaintiffs did not show that patching this one depression was the appropriate response to the paving problems on all of Abbott Avenue.

Plaintiffs point to Ridgefield's actions after the accident, when it applied asphalt or cold patches to the

[8] "Cold patch" refers to the specific type of asphalt needed to patch potholes during the winter months.

depression on Abbott Avenue. However, plaintiffs' expert criticized Ridgefield's post-accident repairs because "only spot patches were made at the worst points."

> The main problem of the affected band of paving being seriously lower than the normal roadway surface has still not been resolved. Spot patching can be an acceptable method of repair for isolated potholing . . . . However, the extent of the deterioration at issue here requires a full-scale repaving job, at least of the depressed band, for a significant portion of this block.

Ridgefield's grant application similarly asserted that the appropriate response was to mill down and repave Abbott Avenue.

In any event, courts do "not have the authority or expertise to dictate to public entities the ideal form of road inspection [and repair] program, particularly given the limited resources available to them." Polzo II, supra, 209 N.J. at 69. "It is fair to say that in view of [Ridgefield's] considerable responsibility for road maintenance in a world of limited public resources, the depression here . . . might not have been deemed a high priority." Id. at 78-79. This is especially true because, "[e]ven if the . . . road was routinely being used as a [pedestrian crossing], no reports of accidents — other than the one here — were recorded as a result of the depression." Id. at 74. Ultimately, Ridgefield had the discretion to allocate its limited road repair funds to projects that were of higher

priority, or that those funds could actually complete. It was not manifest and obvious that no prudent person would approve of that decision.

Plaintiffs failed to proffer evidence to carry "the heavy burden of establishing that [Ridgefield's] conduct was palpably unreasonable." Russo Farms v. Vineland Bd. of Educ., 144 N.J. 84, 106 (1996). Therefore, the trial court properly granted Ridgefield's motion for summary judgement and denied plaintiffs' request for summary judgment on the issue of liability.

IV.

The trial court also ruled that Ridgefield was "immune from liability pursuant to N.J.S.A. 59:2-3(d)." That section states:

> A public entity is not liable for the exercise of discretion when, in the face of competing demands, it determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public entity was palpably unreasonable. Nothing in this section shall exonerate a public entity for negligence arising out of acts or omissions of its employees in carrying out their ministerial functions.
>
> [N.J.S.A. 59:2-3(d) (emphasis added).]

Under N.J.S.A. 59:2-3(d), "palpably unreasonable" has the same meaning as under N.J.S.A. 59:4-2. Coyne v. Dep't of Transp., 182 N.J. 481, 493 (2005). Under N.J.S.A. 59:2-3(d), as under N.J.S.A. 59:4-2, "'[p]alpably unreasonable' means more

than ordinary negligence, and imposes a steep burden on a plaintiff." Ibid. Here too, a "plaintiff bears the burden of proving that defendant acted in a palpably unreasonable manner." Ibid.

"N.J.S.A. 59:2-3(d) prescribes the circumstances when a public entity can be found liable in instances where the public entity allocates resources." Henebema v. S. Jersey Transp. Auth., 219 N.J. 481, 490 (2014). "[T]he Legislature has recognized that public entities cannot be held liable for their discretionary determinations about allocation of limited resources for duties such as road maintenance." Civalier by Civalier v. Estate of Trancucci, 138 N.J. 52, 69 (1994).

The trial court ruled that "[i]n light of competing demands for the funds that Ridgefield allocates for road repair, tree removal, snow and ice removal, winter preparations, and other expenses," plaintiffs could not show that "Ridgefield's discretionary decision not to repair the road in front of [Sean's home on] Abbott Avenue" was palpably unreasonable. We agree for the reasons set forth above.

The trial court ruled that Ridgefield's decision "was made at the planning-level and discretionary rather than ministerial." Our Supreme Court has characterized "decisions [of] 'whether to utilize the Department's resources and expend

funds for the maintenance of [a] road; whether to repair the road by patching or resurfacing; [and] what roads should be repaired,'" as "discretionary determinations." Coyne, supra, 182 N.J. at 490 (citation omitted). Plaintiffs have not argued otherwise. In any event, "[o]ur conclusion that plaintiff has failed to present a claim under N.J.S.A. 59:4-2" renders Ridgefield immune regardless of whether N.J.S.A. 59:2-3(d) "otherwise immunize[s] [Ridgefield] from liability." Norris v. Borough of Leonia, 160 N.J. 427, 448 (1999); see also Seals v. Cty. of Morris, 210 N.J. 157, 179 (2012).

Affirmed.

James M. McCreedy-- 020821991
WILEY MALEHORN SIROTA & RAYNES
250 MADISON AVENUE
MORRISTOWN, NEW JERSEY 07960
(973) 539-1313
Attorneys for Defendant,
Borough of Ridgefield

FILED

JUL 25 2014

JOHN J. LANGAN, JR.
J.S.C.

PATRICIA SHILINSKY and RICHARD SHILINSKY, Plaintiffs, vs. BOROUGH OF RIDGEFIELD; ABC CORPORATIONS 1-10 (Fictitious Defendants); and JOHN DOES 1-10 (Fictitious Defendants) Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – BERGEN COUNTY DOCKET NO.: BER-L-6537-12 Civil Action **ORDER**

This matter having been opened to the Court by Wiley Malehorn Sirota & Raynes, attorneys for Defendant, Borough of Ridgefield, for an Order granting Defendant's Motion for Summary Judgment, and the Court having read the papers submitted and for good cause shown;

IT IS on this 25 day of July, 2014:

ORDERED that the Defendant's Summary Judgment Motion is granted and the Plaintiff's Complaint is dismissed with prejudice; and it is

FURTHER ORDERED that a copy of this Order shall be served upon all counsel within 5 days from ~~the date hereof~~ receipt of this ORDER

John Langan Jr.
Hon. John J. Langan, J.S.C.

X opposed

____ unopposed

See Memo attached hereto and made part hereof

Prepared by the Court

PATRICIA SHILINSKY and RICHARD SHILINSKY **Plaintiff,** v. **BOROUGH OF RIDGEFIELD; ABC COPORATION 1-10 (Fictitious Defendants) and JOHN DOES 1-10 (Fictitious Defendants)**

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY
DOCKET NO. BER-L-6537-12

Civil Action

Rider to Order
for Motions for Summary Judgment

THIS MATTER has been brought before the Court on a motion by James M. McCreedy, Esq., of Wiley Malehorn Sirota Raynes. attorney for Defendant Borough of Ridgefield, for summary judgment dismissing the plaintiff's complaint. David J. Pierguidi, of Cerussi & Gunn, P.C., attorney for the Plaintiff, brought a cross motion for partial summary judgment on liability.

At approximately 6:00-6:10 p.m., Plaintiff Patricia Shilinsky tripped and fell on December 11, 2011 on a road defect in front of 764 Abbott Avenue in the Borough of Ridgefield. 764 Abbot Avenue is a house where her son had been residing since 2005. Plaintiff parked her car on the Abbott Avenue across the street from her son's house. It was dark outside, but not pitch-black dark. Plaintiff noted that on the night of the alleged injury, she could sufficiently see where she was walking. Upon parking her car, Ms. Shilinsky walked across Abott Avenue to her son's house looking straight ahead. Ms. Shilinsky tripped over a road defect causing her to fall and hit the road with her body. As a result of the accident, Plaintiff suffered a fractured left wrist and a knee injury. There

were no warning cones or signage in this area concerning the alleged road defect at the time of the accident.

Plaintiff's liability expert, Len McCuen, a civil engineer, investigated the road defect in front of 764 Abbott Avenue on January 27, 2012. McCuen reported a deteriorated depressed portion of nearly the entire length of the 700 block of Abbott Avenue. Within this deterioration in front of 764 Abbott Avenue was a strip measuring 139 inches which was further depressed by a half of an inch to one inch. Within this depressed strip, there were (3) depressions or holes measuring thirty (30) inches long by ten (10) inches wide, sixteen (16) inches long by ten (10) inches long, and twenty-eight (28) inches long by eight (8) inches wide, measuring at least three (3) inches in depth for all three (3) depressions/holes.

Residents of Ridgefield are able to make complaints about the roadways directly to the DPW. A list, referred to as a "Pothole List," documents these complaints. In 2008, Plaintiff's son claims that he complained to the Ridgefield Department of Public Works by telephone about the unevenness of the road in front of 764 Abbott Avenue. The Borough claims that the DPW did not receive a complaint regarding the defect in the street. Moreover, in an attempt to repair the entirety of Abbott Avenue, the Borough requested a grant from the New Jersey Department of Transportation. Which application was denied.

The roadways in the Borough of Ridgefield are essentially maintained by the Ridgefield Department of Public Works. Some other roadways are maintained by county or state entities. The Borough of Ridgefield allocated $150,000 annually to the operating budget of the DPW in the fiscal year 2011. The operating budget for the DPW covered

road repair, tree removal, snow and ice removal, and winter preparation among many other expenses. It costs between $360,000 and $400,000 to mill and repave one mile of roadway in the Borough. The DPW prioritizes road repair projects based on the highest needs and the highest traffic areas. The Borough claims that the area in front of 764 Abbott Avenue is not considered a high traffic area.

A party seeking summary judgment must show that there are no genuine issue of material fact exists. R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 535 (1995). When the plaintiff fails to present evidence sufficient to carry the burden of proof or to support his factual claims and contentions, then summary judgment should be granted. *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Similarly, when it is clear that a rational jury could reach only one conclusion and a trial will serve no useful purpose, summary judgment should be granted. Brill, 142 U.S. at 541.

"[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment, the requirement is that there be no genuine issue material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986). While the determination of whether there exists a genuine issue of material fact should be viewed in a light most favorable to nonmoving party, where such party points only to disputed issues of fact that are "of an insubstantial nature," the proper disposition of the matter is summary judgment. Brill, 142 N.J. at 529. As the Appellate Division noted in Swarts v Sherwin-Williams Co., 244 N.J. Super. 170, 178 (App. Div. 1990), "[o]f particular...is the word "genuine." An opponent to a summary judgment motion cannot defeat the motion by raising a misguided subjective belief, without more, to create a genuine issue of material fact." Id. at 178.

Pursuant to N.J.S.A. 59:2-1(a), "except 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 public employee of any other person." A public entity is similarly not liable for any injury "resulting from an act or omission of public employee where the public employee is not liable." N.J.S.A. 59:3-1(b).

The Borough of Ridgefield is a public entity as defined under N.J.S.A. 59:1-3 and as such, is not liable for any injury unless it falls under a statutory exception to immunity. *See* D'Eustachio v. Beverly, 177 N.J. Super. 566, 573 (Law Div. 1979). Under the New Jersey Tort Claims Act, a public entity is liable for injury caused by a condition of its property if it is established that: (1) the property was in dangerous condition at the time of the injury; (2) the injury was proximately caused by the dangerous condition; (3) the dangerous condition created a reasonably foreseeable risk of the kind of injury which as incurred, (4) the public entity had actual or constructive of the dangerous condition sufficient time prior to the injury to have taken measures to protect against the dangerous condition; and (5) the failure to take action was palpably unreasonable. N.J.S.A. 59:4-2.

While the burden is on the municipality to prove its immunity under the Tort Claims Act, "once a moving party has met that burden, summary judgment is warranted and, indeed, desirable, as a matter of judicial economy." Kolitich v. Lindedahl, 100 N.J. 485, 497 (1985). N.J.S.A. 59:4-2 is the statutory provision that governs a public entity's liability for injuries caused by a dangerous condition on public property. Under N.J.S.A. 59:4-2, plaintiff must prove-all-of the following elements to prevail against a public entity for injuries proximately caused by a dangerous condition of its property: (1) that the property is public property; 2) that there was a dangerous condition on the

property at the time of the injury; 3) that the dangerous condition proximately caused the injury; 4) that the dangerous condition created a foreseeable risk of the kind of injury sustained; 5) that the public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have protected against it; and 6) that the action or inaction of the public entity to protect against the dangerous condition was palpably unreasonable. (which element was previously addressed herein)Simply put, if a plaintiff cannot prove one of these elements, its claim fails. Polzo v. County of Essex, 209 N.J. at 66. A dangerous condition means 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. N.J.S.A. 59:4-1. In order to pose a "substantial risk of injury" the condition of property cannot be minor, trivial, or insignificant. Atalese v. Long Beach Township, 365 N.J. Super 1, 5 (App. Div. 2003). The movant contends that the plaintiff is unable to establish that Village property was a dangerous condition therefore the plaintiff's negligence claim must be dismissed as the claim cannot be sustained. They also submit that the plaintiff has presented no evidence other than a purported self-serving phone call in 2001 from the plaintiffs about the Abbot roadway to establish notice to the defendant.

Ridgefield submits liability may not be imposed on a public entity if a plaintiff fails to prove any one of the statutory elements of N.J.S.A. 59:4-2. See Norris v. Borough of Leonia, 160 N.J. 427, 446 (1999) (summary judgment affirmed because plaintiff failed to show actual or constructive notice of the conditions); Grzanka v. Pfeifer, 301 N.J. Super 563 (App. Div. 1997) certif. denied, 154 N.J. 607 (1998) (Summary judgment affirmed where all elements were shown except notice.) Here, the defense contends that

the plaintiff is unable to establish the notice element of N.J.S.A. 59:4-2and, as such, their claim of a dangerous condition on the Borough property must fail. The term "palpably unreasonable" as used in N.J.S.A. 59:4-2 implies behavior that is patently unacceptable under any given circumstance. Muhammad v. N.J. Transit, 176 N.J. 185, 195-96 (2003).

The TCA has been held to adopt a test commonly applied by the Courts that public entities are liable for negligence in the performance of ministerial actions. See Task Force Commentary to N.J.S.A. 59:2-3. The dichotomy exists under the TCA between ministerial actions, for which negligent conduct may impose liability on a governmental entity, and discretionary actions, for which the basic rule does not apply. A ministerial act is defined as one upon which a public entity is required to perform upon a given stated fact in a prescribed manner, in obedience of mandated legal authority and without regard to judgment or opinion concerning the propriety of the action. It has also been defined as being synonymous with "mandatory." See Ritter v. Castellini, 173 N.J. Super. 509, 513-14 (Law Div. 1980); Marley v. Palmyra Borough, 193 N.J. Super. 271, 289 (Law Div. 1983).

When a government official or entity makes a conscious choice after weighing competing policy considerations, only high level discretionary determinations are entitled to immunity. See Costa v. Josey, 83 N.J. 49, 59 (1980). This is because there is a judicial recognition in the plaintiff's opinion that virtually every single government action includes some measure of discretion. See Rochinsky v. State Dept. of Transportation, 110 N.J. 399 (1988). High level policy decisions are classified as discretionary and involve planning and, as such, they are distinct from ministerial acts which pertained merely to operations. See Dix Brothers v. State, 182 N.J. Super. 268,

271 (Law Div. 1981). As such, the plaintiff argues that the dichotomy starts to emerge, comparing operational negligence versus effectively high level policy decisions. The plaintiff contends that while high level policy decisions warrant some measure of immunity, operational negligence does not. When a decision has been made to act, then a public entity must not act (or not act in the face of a duty to act as the case may be) in a manner short of ordinary prudence, otherwise it would be subject to liability in the same manner as a private party. See Fitzgerald v. Palmer, 47. N.J. 106 (1966). The statute 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." N.J.S.A. 59:4-1(a). In this instance, a pedestrian was walking in the middle of a vehicular roadway after parking her car and crossing the street to her son's house when the crosswalk was 80 feet away therefore she walked in the roadway as opposed to a designated walkway. The plaintiff argues that the defendant should have anticipated that individuals will walk in the street therefore the street should be free of defects that caused the plaintiff to trip even though it was the middle of a roadway.

Public entity liability is controlled by the New Jersey Tort Claims Act ("TCA"), N.J.S.A. 59:1-1 et seq. the TCA imposes liability on public entities only under limited circumstances. See Polzo v. County of Essex, 209 N.J. 51, 65 (2012). . As set forth in Polzo v.Essex County A "dangerous condition" means 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." N.J.S.A. 59:4–1. In order to pose a "substantial risk of injury" the condition of property "cannot be minor,

trivial, or insignificant" as set forth in Atalese v. Long Beach Twp., 365 N.J. Super. 1, 5 (AppDiv.2003). of Essex, 209 N.J. at 66. The term "palpably unreasonable"—as used in N.J.S.A. 59:4-2—"implies behavior that is patently unacceptable under any given circumstance." Muhammad v. N.J. Transit, 176 N.J. 185, 195-96 (2003). When a public entity acts in a palpably unreasonable manner, it should be "obvious that no prudent person would approve of its course of action or inaction." Such is not the case before this Court. Where the duty to refrain from palpably unreasonable conduct differs in degree from the ordinary duty of care that is owed under the negligence standard. The Borough has a plan in place to try and repair as many roadways as financially plausible. Nowhere in the record before this Court can it be established that the Borough acted in a palpably unreasonable manner to warrant this case moving forward versus the Borough of Ridgefield.

In rendering this opinion granting the Borough of Ridgefield's motion, the Court was mindful of Polzo v. County of Essex, 209 N.J. 51. In Polzo, the Supreme Court found that there was no credible evidence that the County's failure to have a routine inspection program in place proximately caused by the resulting accident. Essex County submitted that they did have such a program. In our immediate case, the Borough of Ridgefield has a plan in place to repair their roadways as funds are made available for these repairs. In Polzo, the Court did note potholes and depressions are common features of our roadways in New Jersey where the Court has found that not every defect in a highway or in a sewer line even caused by negligent maintenance is actionable, Polyard v. Terry, 160 N.J. Super 497, 508. This Court finds the facts herein to be similar to Essex County in Polzo if not identical to the situation confronting the Borough of Ridgefield

regarding their repairs to Abbot Avenue. The Court went on further in Polzo to find that not all actions are actionable which requires an understanding of both the general purpose of the Tort Claims Act N.J.S.A. 59:1-1 to 12-3 and a particular provision detailing a public entities liability for a dangerous condition of public property, N.J.S.A. 59:4-2. The Tort Claims Act was passed in response to this Court's abrogation of the common-law doctrine of sovereign immunity. See Willis v. Dept of Conservation & Econ. Dev., 55 N.J. 534, 540-41, 264 A.2d 34 (1970).The legislature recognized that "the area within which the government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done." N.J.S.A. 59:1-2. Accordingly, the legislature confined the scope of a public entities liability for negligence to the prescriptions in the TCA. 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. N.J.S.A. 59:2-1(a). In other words, a public entity is immune from tort liability unless there is a specific statutory provision that makes it answerable for a negligent act or omission. Kahrar v. Borough of Wallington, 171 N.J. 3, 10 (citing Collins v. Union County Jail, 150 N.J. 407, 413 (1997)). ID. 25.

The relevant statutory provision here in N.J.S.A. 59:4-2 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.

This Court finds that Ridgefield's failure to take action to repair the Abbot Avenue roadway for pedestrians crossing in the middle of a roadway not in a crosswalk was not palpably unreasonable. The defendant argues that the plaintiff cannot establish a *prima facie* case for liability as she cannot establish (1) that a dangerous condition existed; or (2) that the Borough's actions or failure to take action was palpably unreasonable as a matter of law.

The Act defines "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." N.J.S.A. § 59:4-1(a) (emphasis added). The question of whether a dangerous condition exists "must be resolved by the court as a matter of law, in order to ensure that the 'legislatively decreed restrictive approach to liability' is enforced." Cordy v. Sherwin Williams Co., 975 F. Supp. 639, 643 (D.N.J. 1997), quoting Polyard v. Terry, 160 N.J. Super. 497, 507 (App. Div.) aff'd o.b., 79 N.J. 547 (1979).

The condition of the property must present "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." N.J.S.A. § 59:4-1(a) (emphasis added). The defendant argues that a seam crack in a roadway that is not on a sidewalk, crosswalk, or walking path does not constitute a "dangerous" condition such that it creates a substantial risk of injury. See Plaintiff's Exhibit A, photographs. These types of cracks are "simply the kind of minor imperfections in the roadway surface that may be seen on many roads in every municipality in the State." Cortese v. City Of Asbury Park.A 3585-04T3, 2005 WL 391325 (App. Div.)

In Charney v. City of Wildwood, 732 F.Supp.2d 448 (D.N.J. 2010), the district court judge held that a 1 ½" deep by 1 ¼" wide triangular hole was a minor defect along the same lines as the elevated, gapping sidewalk slabs in McCarthy. Id. at 456. The Court reviewed several state court cases including McCarthy and the Court concluded that "[w]hile it is difficult to precisely define what, exactly, may constitute a dangerous condition, the cases that consider small holes, voids, or height deviations in walkways or roadway surfaces generally hold that such defects are not dangerous conditions as defined by the Tort Claims Act." ID.

The Charney Court emphasized that "pedestrians must expect some areas of imperfection on walkway surfaces, and not every defect in a walkway surface is actionable." Here, we have a roadway being used as a walkway. The defendant argues that the standards referred to by the plaintiff to support their claim concerning the repairs to Abbott Avenue are the codes which impose standards on sidewalks and walkways which have no bearing on streets or roadways as involved in this case. The defendant submits that the plaintiff has not produced any evidence demonstrating the standards applicable to roadway surfaces used for vehicular traffic versus foot traffic and this Court

so finds. The plaintiff was not walking on a sidewalk or in a crosswalk; she was crossing in the middle of a street. The movant argues that the plaintiffs own testimony belies any claim that she used due care when traversing a roadway not a sidewalk where she was walking at night with a history of falling. Id. at 16:13-16:16. There were no incident reports or complaints received by the defendant regarding any falls of other residents caused by the road seam in question. The defendant submits that because Plaintiff is unable to demonstrate that the seam crack in the street presented a substantial risk of injury or a dangerous condition therefore her claim fails as a matter of law.

The defendant notes that even if the plaintiff is able to prove every other element of § 59:4-2:

> [T]he Tort Claims Act makes clear that, even if the public entity's property constituted a "dangerous condition;" even if that dangerous condition proximately caused the injury alleged; even if it was reasonably foreseeable that the dangerous condition could cause the kind of injury claimed to have been suffered; and even if the public entity was on notice of that dangerous condition; no liability will be imposed "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." Polzo v. County of Essex, 196 N.J. 569, 585 (2008)(emphasis added)

The defendant contends that the plaintiff will not be able to establish that the defendant acted in a palpably unreasonable fashion which this Court so finds.

Even if the Court views all facts or inferences in favor of the nonmoving party, and the property was found in a dangerous condition, though it was not as found herein, nevertheless this Court holds that the Defendant is immune from liability pursuant to N.J.S.A. §59:2-3(d). which states:

> A public entity is not liable for the exercise of discretion when, in the face of competing demands, it determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public entity was palpably unreasonable. Nothing in this section shall exonerate a public entity for negligence arising out of acts or omissions of its employees in carrying out their ministerial functions.

A decision made at the planning-level is considered discretionary as opposed to ministerial, and is generally entitled to immunity. Kolitch v. Lindedhal, 100 N.J. 485, 495 (1985). "A discretionary act calls for the exercise of personal deliberations and judgment, which in turn entails examining the facts, reaching reasoned conclusions and acting on them in a way not specifically directed." Id. In order to demonstrate that a public entity's action or failure to act was palpably unreasonable, a plaintiff must show that the action or failure to act was "manifest and obvious [such] that no prudent person would approve of its course of action or inaction." Id. at 493. The question of palpable unreasonableness can be determined as a matter of law. Muhammad v. New Jersey Transit, 176 N.J. 185, 195 (2003).

The Appellate Division affirmed a trial court's decision that the public entity was entitled to immunity as a matter of law. Asper v. State, 2009 WL 2778052 at *3 (App. Div. 2009). The plaintiff in Asper was involved in a car accident and argued on appeal that the State was aware that a particular stretch of roadway accumulated rainwater, thereby constituting a dangerous condition. Id. at *2. Moreover, the plaintiff argued that despite the State's knowledge of the roadway's condition, the State failed to repair the

road or post warning signals of the condition. Id. The plaintiff claimed the circumstances presented an issue of fact as to the State's immunity defense under N.J.S.A. §59:2-3. Id. at *1. "A Department of Transportation consultant completed a deficiency/constructability analysis," which "confirmed the [disputed] pavement was in need of rehabilitation or reconstruction.'" Id. at *3. Moreover, "after the design process was completed, construction could be expected to follow...dependent upon available funding." Id. The Appellate Division held that "in light of competing demands for limited resources, we are satisfied that the DOT's discretionary determination was not palpably unreasonable as a matter of law under N.J.S.A. 59:2-3(d)." Id. at 4.

In this case, Ridgefield's discretionary determination is similar to the determination in Asper. In light of competing demands for the funds that Ridgefield allocates for road repair, tree removal, snow and ice removal, winter preparations, and other expenses, this Court is satisfied with Ridgefield's discretionary determination not to repair the road in front of 764 Abbot Avenue. Using an operating budget of $150,000, the DPW prioritizes road repair projects based on the highest needs and the highest traffic areas. To help prioritize road repair projects, residents are able to make complaints about the roadways directly to the DPW. A list, referred to as a "Pothole List," documents these complaints. Finally, in an attempt to repair the entirety of Abbott Avenue, the Borough requested a grant from the New Jersey Department of Transportation. However their application was denied by the State. Because these measures were taken, Ridgefield's inactions were not palpably unreasonable. Thus, even when viewing the facts in a light most favorable to the Plaintiff, Ridgefield is entitled to immunity from liability pursuant to N.J.S.A. 59:2-3(d).

When a public entity acts in a palpably unreasonable manner, it should be "obvious that no prudent person would approve of its course of action or inaction. Id. The duty to refrain from palpably unreasonable conduct differs in degree from the ordinary duty of care that is owed under the negligence standard. The Court does find based on the facts before it that the plaintiff has not nor can it establish that the actions of Ridgefield were palpably unreasonable pursuant to N.J.S.A. 59:2-3(d) to prevail on its claims of negligence and public nuisance therefore the summary judgment will be granted in favor of the Borough of Ridgefield.

The movant Borough of Ridgefield also argues that pursuant to the Tort Claims Act, Plaintiff can only recover for pain and suffering if she: (1) suffered an objective permanent injury; (2) suffered a permanent loss of a bodily function; and (3) exceeded a monetary threshold of $3,600. Plaintiff is not entitled to pain and suffering damages unless she meets the verbal threshold provision of the Act. See N.J.S.A. 59:9-2(d).). The purpose of the verbal threshold is to bar recovery for "mere 'subjective feelings of discomfort.'" Randall v. State of New Jersey, 277 N.J. Super. 192, 196 (App. Div. 1994) (citing Ayers v. Twp. Of Jackson, 106 N.J. 557, 571 (1987)).

Under N.J.S.A. § 59:9-2:

> No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any 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 $ 3,600.00.

N.J.S.A. 59:9-2(d).

The New Jersey Supreme Court has held that in order to be entitled to an award of pain and suffering damages, it was the intent of the Legislature to require a plaintiff to demonstrate "(1) an objective permanent injury, and (2) a permanent loss of a bodily function that is substantial." Knowles v. Mantua Twp. Soccer Ass'n., 176 N.J. 324, 329 (2003) (citing Gilhooley v. County of Union, 164 N.J. 533, 540-41 (2000). .) The New Jersey Supreme Court has issued words of warning to personal injury plaintiffs alleging claims of permanent injury to the same body part for which it is shown that he or she has a pre-existing injury:

> We presume that defendants routinely will inquire during discovery about a plaintiff's prior injuries. In respect of the element of causation specifically, a plaintiff will risk dismissal on summary judgment if the defendant can show that no reasonable fact-finder could conclude that the defendant's negligence caused plaintiff's alleged permanent injury.

Davidson v. Slater, 189 N.J. 166, 187 (2007). Plaintiff had fractured her right patella. Id. Plaintiff underwent two separate surgeries for this injury, and had hardware both inserted and removed. Id. Plaintiff herein alleges the same complaints, pains, and injuries from the prior accident to the alleged incident that is the subject of the instant matter. She provided no objective evidence in the defendants opinion that the alleged injury to her knee was causally related to this incident rather than her previous injury.

The plaintiff had previously fractured her right patella. Plaintiff underwent two separate surgeries for this injury, and had hardware both inserted and removed. Id. The defendant submits that the plaintiff claims the same complaints of pains, and injuries from the prior accident to the alleged incident that is the subject of this case. The defendant contends that the plaintiff has provided no objective evidence that the alleged injury to her knee was causally related to this incident rather than her previous injury.

Plaintiff must also prove by "objective medical evidence that the injury is permanent." Brooks v. Odom., 150 N.J. 395, 402-03 (1997). Plaintiff's doctor, Dr. John Katona, notes in his report that she is "doing well." Furthermore, the range of motion of her knee was "nearly full" and later "good." He also noted that the range of motion in her wrist was "good" and that her symptoms were improving. A "plaintiff may not recover under the Tort Claims Act for mere subjective feelings of discomfort." Brooks v. Odom, 150 N.J. at 403. The defendant submits that the plaintiff has regained significant range of motion, her knee shows no evidence of instability and her minor subjective complaints are not substantiated by her medical evaluations even if Plaintiff's injury was found to be permanent, however, she must still demonstrate a substantial loss of a bodily function. The Brooks court acknowledged that the plaintiff still experienced pain in her neck and back, which limited her range of motion nevertheless, she was still able to function in her employment and as a homemaker, these limitations did not rise to the level of a permanent loss of bodily function. Id. @ 406.

The defendant contends that the plaintiff's minor difficulties are no more than that experienced by the plaintiff in Brooks. Plaintiff is still able to retain her employment as a realtor. Dr. Egan found that a full range of motion existed for her left wrist and the plaintiff's right knee revealed a full range of motion and that "There was no loss of mobility or function of the right knee." The Brooks court acknowledged that the plaintiff still experienced pain in her neck and back, which limited her range of motion. Brooks, supra, 150 N.J. at 406 but she was still able to function in her employment and as a homemaker, these limitations did not rise to the level of a permanent loss of bodily function. Id. Here, Plaintiff's minor difficulties are no more than that experienced by the

plaintiff in Brooks. Plaintiff admitted that she is still able to perform her responsibilities at work and that she is able to do other physical activities including work out at the gym. Dr. Egan's report for the defendant indicates that Plaintiff's recovery has been successful. He states, "Physical examination fails to reveal any significant loss of mobility or function, or any other objective physical findings that would support her subjective complaints of discomfort. She has undergone excellent care with a very successful clinical result." See Report of Dr. Egan at Page 6.

It was noted that the plaintiff did undergo surgery to her wrist which includes hardware, this hardware is not permanent, as required by Gilhooley. Id. at 541-542. Plaintiff stated that her doctor recommended surgery to remove the hardware in her wrist but that she is too nervous to undergo this surgery therefore the holding in Gilhooley has no bearing on this case.

Conclusion

Plaintiff, a resident of the Borough of Ridgefield, allegedly tripped and fell on a seam crack on Abbott Avenue within the Borough of Ridgefield. The Borough submits that this slight defect in a roadway not a walkway did not constitute a dangerous condition because it did not present a substantial risk of injury when traversed with the requisite degree of care furthermore, the roadway was fit for its intended use being the movement of cars upon it and this Court so finds that to be a fact. The Borough contends that the Court should not second-guess a public entity's decision on how to allocate scarce resources for repairs or to prioritize its list of community projects. This Court concurs with the movants position and finds no basis in this record to find that the Borough acted unreasonably in their fiscal determinations especially considering that the

area where the plaintiff fell was not a sidewalk, crosswalk, or designated pedestrian area and did not present an immediate problem furthermore the defendant was denied a state grant for road repairs. This Court finds that the Township has acted reasonably under the circumstances set forth in the record concerning any repairs, if any, to Abbott Avenue within their Borough. The Court having found that the plaintiff cannot establish all the elements necessary to prevail on injuries which they claim were proximately caused by a dangerous condition of property nor can they establish that the Borough acted unreasonably in accordance with N.J.S.A. 59:4-2 therefore the Court denies the plaintiffs request for a partial summary judgment finding the defendant Borough liable in accordance with the Tort Claims Act.

The defendant submits that summary judgment is only appropriate when the evidence is so one-sided that one party must prevail as a matter of law and where no reasonable juror could return a verdict in that opposing party's favor. R. 4:46-2. The defendants contend that the plaintiffs have not shown an objective permanent injury nor demonstrated that a dangerous condition existed causing this injury as required by N.J.S.A. § 59:4-1(a) and this Court so finds. The defendant also argues that the plaintiffs have additionally not shown that the decision by the Borough to prioritize repairs was palpably unreasonable. Id.; Lopez v. City of Elizabeth, 245 N.J. Super. 153, 164 (App. Div. 1991) and this Court so finds.

New Jersey courts have held that the issue of palpable unreasonableness can be decided by the court as a matter of law. Muhammad v. New Jersey Transit, 176 N.J. 185, 195 (2003); Garrison v. Township of Middletown, 154 N.J. 282, 311 (1998); Black v. Borough of Atl. Highlands, 263 N.J. Super. 445, 452 (App. Div. 1993). The term

"implies behavior that is patently unacceptable under any given circumstance...it must be manifest and obvious that no prudent person would approve of [the public entity's] course of action or inaction.'" Muhammad, 176 N.J. at 195-196; Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985)(internal citations omitted); Holloway v. State, 125 N.J. 386, 403-04 (1991). The Borough had a reporting procedure in place, by which residents could notify the Borough of any complaints that they had so that the Borough could weigh its options and prioritize its capital projects which is a fact considered by this Court in rendering their opinion herein.

N.J.S.A. § 59:2-3(d) protects a public entity confronted with competing demands when it exercises its discretion in determining "whether and how to utilize or apply existing resources." Id; Lopez, 245 N.J. Super. at 164. A decision made herein by the Borough was made at the planning-level and discretionary as opposed to ministerial, and is entitled to immunity. Kolitch v. Lindedahl, supra, 100 N.J. at 495. "A discretionary act...calls for the exercise of personal deliberations and judgment, which in turn entails examining the facts, reaching reasoned conclusions and acting on them in a way not specifically directed." Id. The immunity provisions governing a public entity's resource allocation decisions "recogniz[e] and protect[] government's dilemma" and "are intended to operate in its favor, and not to enhance an injured person's case that arises from imperfect governmental choice." Id. Thus, "operational governmental decisions to devote existing resources to one activity at the expense of another are immune unless palpably unreasonable." This Court cannot find that based on the record before it that the actions of the defendant Borough of Ridgefield were palpably unreasonable. This Court finds that the decision-making of the Borough was not palpably unreasonable as regards

the road seam on Abbott Avenue in the instant matter. The Court therefore finds that a dangerous condition did not exist in accordance with N.J.S.A. 59:4-2 nor did the Borough act in a palpably unreasonable fashion to deprive them of the immunities provided pursuant to N.J.S.A. 59:2-3 (d) and grants them the summary judgment being sought dismissing the plaintiffs' claims herein.

The defendant movant also contends that if the Court found a dangerous condition as required by the Tort Claim Act nevertheless, the plaintiffs injuries fail to meet the tort claims act threshold. The New Jersey Supreme Court has held that in order to be entitled to an award of pain and suffering damages, it was the intent of the Legislature to require a plaintiff to demonstrate "(1) an objective permanent injury, and (2) a permanent loss of a bodily function that is substantial." Knowles v. Mantua Twp. Soccer Ass'n., 176 N.J. 324, 329 (2003) (citing Gilhooley v. County of Union, 164 N.J. 533, 540-41 (2000) (citation omitted)); See N.J.S.A. 59:9-2(d). This two-part test was first set forth in Brooks v. Odom, 150 N.J. 395 (1997). The purpose of the verbal threshold is to bar recovery for "mere 'subjective feelings of discomfort.'" Randall v. State of New Jersey, 277 N.J. Super. 192, 196 (App. Div. 1994) (citing Ayers v. Twp. Of Jackson, 106 N.J. 557, 571 (1987)). "Temporary injuries, no matter how painful and debilitating, are not recoverable." Brooks v. Odom, 150 N.J. 395, 402-03 (1997). Plaintiff must prove by "objective medical evidence that the injury is permanent." Id. at 403(emphasis added.) A "plaintiff may not recover under the Tort Claims Act for mere subjective feelings of discomfort." Brooks v. Odom, 150 N.J. , the Brooks Court requires an "objective abnormality" and absent that, "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." Id. No objective proof to support her loss of strength or inability to grab and lift objects was presented by the plaintiff.

The defend contends that the plaintiff has regained significant range of motion, her wrist and knee shows no evidence of instability and her minor subjective complaints are not substantiated by the objective medical evaluations in the record. Furthermore, the defendant contends that the plaintiff fails to demonstrate that she suffered a substantial loss of a bodily function. The Court finds that the Borough is entitled to the relief being sought in accordance with N.J.S.A. 59:2-d that the injuries claimed by the plaintiff do not qualify for relief in accordance with the Tort Claims Act therefore summary judgment is hereby granted to the defendant Borough of Ridgefield.

As to the A *per quod* claim "is intended to compensate a person for the loss of a spouse's 'society, companionship and services due to the fault of another.'" Kibble v. Weeks Dredging & Const. Co., 161 N.J. 178, 190 (1999). The defendant contends that the plaintiff Richard Shilinsky has not provided evidence of any alleged loss of his wife's society, services or consortium nor any expenses related to the care of Mrs. Shilinsky that would cause Mr. Shilinsky to expend any more money for the household than he usually would. The Court finds that the plaintiff has failed to present any evidence sufficient to carry the burden of proof or to support his factual claims and contentions, then summary judgment should be granted. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

The Court will therefore grant the defendant Borough of Ridgefield's motion of summary judgment as to Plaintiff Richard Shilinsky's claim for loss of services.