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MICHELLE IRVINE and CHRISTOPHER CONNOLLY, INDIVIDUALLY AND AS CO-ADMINISTRATORS OF THE ESTATE OF GAVYN CONNOLLY, DECEASED Plaintiffs, v. STERLING B. KNIGHT, MARITZA GONZALEZ, TURNERSVILLE UE, LLC, VIVONA FAMILY ENTERTAINMENT CO., AMUSEMENTS OF AMERICAN, WASHINGTON TOWNSHIP PUBLIC SCHOOL DISTRICT, WASHINGTON TOWNSHIP HIGH SCHOOL, WASHINGTON TOWNSHIP 5TH QUARTER FOOTBALL CLUB, WASHINGTON TOWNSHIP, COUNTY OF GLOUCESTER, STATE OF NEW JERSEY, FRANK ALTAMURO, PAUL D. MENZ, JOHN DOE (1-10), JANE DOE (1-10), RICHARD ROE (1-10), XYZ CORP. (1-10), j/s/a Defendants	SUPERIOR COURT OF NEW JERSEY LAW DIVISION/GLOUCESTER COUNTY DOCKET NO.: GLO-L- 425-17 Civil Action **ORDER**

THIS MATTER having been brought before the Court by Jeffrey S. Craig, Esquire of the law firm of Craig Annin & Baxter, LLP, attorneys for Defendants, Washington Township and Frank Altamuro, for an Order granting Summary Judgment, and the Court having considered the matter and heard all arguments, if any, and for good cause shown;

IT IS ON THIS 18 day of November, 2020 **ORDERED** that summary judgment is hereby granted as to Defendants Washington Township and Frank

Altamuro and the Plaintiff's Amended Complaint against Defendants is dismissed with prejudice.

/s/ Samuel J. Ragonese
Honorable Samuel J. Ragonese, J.S.C.

MICHELLE IRVINE and CHRISTOPHER CONNOLLY, INDIVIDUALL AND AS CO-ADMINISTRATORS OF THE ESTATE OF GAVYN CONNOLLY, DECEASED, Plaintiffs, vs. STERLING B. KNIGHT, MARITZA GONZALEZ, TURNERSVILLE UE, LLC, VIVONA FAMILY ENTERTAINMETN CO., AMUSEMENTS OF AMERICA, WASHINGTON TOWNSHIP PUBLIC SCHOOL DISTRICT, WASHINGTON TONWSHIP HIGH SCHOOL, WASHINGTON TOWNSHIP 5TH QUARTER FOOTBALL CLUB, WASHINGTON TOWNSHIP, COUNTY OF GLOUCESTER, STATE OF NEW JERSEY, FRANK ALTAMURO, PAUL D. MENZ, JOHN DOE (1-10), JANE DOE (1-10), RICHARD ROE (1-10), XYZ CORP (1-10), j/s/a, LOIS CAMPANELLA, SANDRA MORRIS, JUDY COVINGTON, JAMES DOE(s), SUSAN ROE(s), Defendants,	:	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION – CIVIL PART** **GLOUCESTER COUNTY** **DOCKET NO.: L-425-17** **DEFENDANTS WASHINGTON TOWNSHIP AND FRANK ALTAMURO'S MOTION FOR SUMMARY JUDGMENT**

RELIEF REQUESTED

DEFENDANTS, Washington Township and Frank Altamuro, represented by Jeffrey S. Craig, Esquire, move for summary judgment.

PLAINTIFFS, Michelle Irvine and Christopher Connolly, individually and as co-administrators of the Estate of Gavyn Connolly, represented by Richard A. Stoloff, Esquire and James Waldenberger, Esq., oppose the motion.

FACTUAL BASIS

1. This case arises out of the death of Plaintiff's minor child, Gavyn Connolly ("Ms. Connolly"), resulting from a motor vehicle and pedestrian accident that occurred on April 23, 2016.

2. The accident occurred on the southbound shoulder of Route 42 South, approximately 150 feet north of the intersection with Greentree Road.
3. Prior to the accident, Ms. Connolly attended a carnival sponsored by Washington Township 5th Quarter Club ("Defendant-5th Quarter Club") being held in a parking lot located off of State Highway 42 in Washington Township, Gloucester County, New Jersey.
4. The carnival was owned and operated by Defendant Vivona Family Entertainment Co. d/b/a Amusements of America ("Defendant-Vivona").

LEGAL ARGUMENT

Defendants' (Washington Township and Frank Altamuro) Argument

New Jersey Tort Claims Act Immunity

Liability against a public entity is governed by the New Jersey Tort Claims Act ("NJTCA"). N.J.S.A. 59:1-1, et seq. A "public entity" includes "any county, municipality, district public authority, public agency, and any other political subdivision or public body in the State." N.J.S.A. 59:1-3. An employee of a public entity is also entitled to the same immunities as a public entity and is not liable for any injury where a public entity is immune from liability for that injury." N.J.S.A. 59:3-1(c). Therefore, any liability against Moving Defendants, as a public entity and as a public employee, must fall within the provisions of the NJTCA. In its analysis, the Court should keep in mind the intent of the Legislature when enacting Title 59, namely that public entities and public employees are presumed to be immune from liability. See N.J.S.A. 59:1-2. New Jersey Courts have consistently reiterated and reaffirmed this legislative declaration. See Pico v. State., 116 N.J. 55, 59 (1989); Kolitch v. Lindedahl, 100 N.J. 485, 492 (1985); and Ball v. N.J. Bell Telephone Co., 207 N.J. Super. 100, 107-08 (App. Div. 1986). The Legislature specifically reestablished governmental immunity in the State of New Jersey, stating that "[e]xcept as otherwise provided by this act, a public entity is not liable for any injury, whether such injury arises out of an act or omissions of the public entity or a public employee or any other person." N.J.S.A. 59:2-1(a).

The New Jersey Supreme Court noted that Title 59 "was clearly intended to reestablish a system in which immunity is the rule, and liability the exception." Bombace v. City of Newark, 125 N.J. 361, 372 (1991). Additionally, 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. 310 (2002). Further, public entities are not only protected by the specific immunity provisions of the NJTCA, but also by any and all defenses available to a private individual. See N.J.S.A. 59:2-1(b).

Generally, immunity for public entities is the rule, and liability is the exception. Fluehr v. City of Cape May, 159 N.J. 532, 599 (1999). Therefore, Plaintiff's claims against Moving Defendants should be assessed accordingly.

Moving Defendants Were Not Negligent

Moving Defendants breached no duty to Ms. Connolly or Plaintiffs, as there is nothing about the temporary fence or its placement in the median which was negligent, or which caused the accident. Moving Defendants did not organize, participate, monitor, and/or have any involvement in the April 2016 carnival. Defendant-WT applied for a permit with Defendant-State of New Jersey ("Defendant-NJ") to erect temporary fencing along the median of state highway, Route 42. Following State requirements, Defendant-WT erected a temporary orange plastic fence within the median of State Highway 42 for the days in which the carnival took place. There is uncontested evidence in Defendant-Altamuro's testimony that he inspected the fencing on a daily basis to ensure it remained in place.

The accident here occurred because Ms. Connolly chose to illegally cross Route 42 mid-block, disregarding the fencing, through stopped traffic where Ms. Connolly was struck and fatally injured by a vehicle illegally driven by Defendant-Knight.

Moving Defendants are entitled to summary judgment as a matter of law as they breached no duty to Ms. Connolly or Plaintiffs.

Moving Defendants Did Not Create a Dangerous Condition

N.J.S.A. 59:4-2 governs the liability of a public entity for dangerous condition of its property. There are four elements of proof, omission of any one being fatal, which a plaintiff must prove to establish liability under N.J.S.A. 59:4-2. These elements are (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 reasonably foreseeable risk of the kind of injury, which was incurred; and (4) that either 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 a public entity had actual or constructive notice of the dangerous condition at a sufficient time prior to the injury to have taken measures to protect against the dangerous condition, and the act or inaction of the public entity with regard to its effort to protect against the condition was palpably unreasonable. Plaintiffs are unable to prove any of these elements.

First, the thrust of N.J.S.A. 59:4-2 is that a public entity may be held liable only for a dangerous condition of its property, not for dangerous conditions on the property of others. Here, Moving Defendants neither owned nor maintained the parking lot or area where the carnival occurred, or the median or shoulder of Route 42 where the accident occurred.

Second, N.J.S.A. 59:4-1 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 the property will be used." In determining the existence of a "dangerous condition" the New Jersey Supreme Court instructed that "[t]he first consideration is whether the property poses a danger to the general public when used in the normal, foreseeable manner. The second is whether the nature of the plaintiff's activity is 'so objectively unreasonable' that the condition of the property cannot reasonably be said to have caused the injury. The answers to those two questions determine whether a plaintiff's claim satisfies the Act's 'due care' requirement." Vincitore v. N.J. Sports Exposition Auth., 169 N.J. 119, 126 (2003). Here, there is no description of a dangerous condition of the public property of Defendant-WT. The only

property of Defendant-WT in this case is the temporary fence erected pursuant to a permit authorized by the State. Further, there is no factual dispute that the express purpose of the temporary fence was to deter pedestrian crossing at that location. Plaintiffs fail, as a matter of law, to meet the first Vincitore requirement. There was nothing about the temporary fence, when used in its "normal, foreseeable manner" that was dangerous. Plaintiff cannot satisfy the second Vincitore requirement. Applying the "reasonable user requirement" as described in Daniel v. State Dept. of Transp., Plaintiff cannot show the facts of this case constitute "a reasonable use of public property." 239 N.J. Super. 563, 588 (App. Div.), certif. den. 122 N.J. 325 (1990); See also Garrison v. Township of Middletown, 154 N.J. 282 (1997).

Additionally, Ms. Connolly's actions must be assessed in the context of New Jersey law governing pedestrians. N.J.S.A. 36:4-34 makes it "unlawful for any pedestrian to cross any highway having roadways separated by a median barrier, except where provision is made for pedestrian crossing." Further, N.J.S.A. 39:4-33 provides that "[a]t 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 at a crosswalk." Here, it is undisputed that there was a controlled intersection visible from where Ms. Connolly crossed State Highway 42. It is also undisputed that Ms. Connolly's conduct violated New Jersey law and as such, constituted per se negligence. Schomp v. Wilkens, 206 N.J. Super. 95, 101 (App. Div. 1985). Because Ms. Connolly's actions violated the law, she cannot, as a matter of law, be deemed to have acted with "due care" and as an "objectively reasonable person" under Daniel and Garrison, therefore Plaintiffs cannot satisfy the second Vincitore requirement.

Moving Defendants are Entitled to Plan or Design Immunities

Moving Defendants are entitled to plan and design immunities under N.J.S.A. 59:4-6 for the choice and placement of the temporary fence. N.J.S.A. 59:4-6 establishes immunity for public entities and employees for the planning or design of public property or improvements. The Appellate Division in Cobb v. Waddington, upholding the trial court's grant of summary judgment, ruled that the selection of the type of barricade used by a road contractor to channel traffic reflected the exercise of judgment and discretion on the part of the public entity, which decision was entitled to broad plan and design immunity under the NJTCA. Under N.J.S.A. 59:4-6(a), the decision to use the temporary fencing was a discretionary design decision entitled to full immunity from liability as a matter of law.

Moving Defendants are Immune from any Alleged Failure to Enforce Laws

"A public entity is not liable for any injury caused by adopting or failing to adopt a law or by failing to enforce a law." N.J.S.A. 59:2-4. This immunity is also extended to the public employee. See N.J.S.A. 59:3-5. Plaintiffs allege Defendant-WT either failed to enforce traffic laws or failed to comply with the State issued permit, which Plaintiffs erroneously contend required Defendant-WT to supply traffic safety directors at the carnival. N.J.S.A. 59:2-4 and 59:3-5 bar Plaintiffs from recovering against Moving Defendants as a matter of law based on any such claim. See Lee v. Brown, 232 N.J. 114 (2018).

Moving Defendants are Immune from any Alleged Failure to Inspect the Temporary Fence

"A public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection. . ." N.J.S.A. 59:2-6. This immunity is extended to a public employee pursuant to N.J.S.A. 59:3-7. Here, there is no factual dispute to Defendant-Altamuro's testimony that he visually inspected the temporary fence each day the carnival operated during 2016, and that his inspections did not reveal any issues. There is no evidence that the fence was failing or sagging prior to the accident, or that such sagging should have been observed by Moving Defendants on the night of the accident.

Under N.J.S.A. 58:4-5, Moving Defendants cannot be liable for failure to provide ordinary traffic signals, signs, markings, or other similar devices.

Plaintiffs' allegations do not overcome the immunities afforded to the Moving Defendants under N.J.S.A. 59:2-6 and 59:3-7, therefore Plaintiffs' claims fail as a matter of law.

Plaintiffs' (Michelle Irvine and Christopher Connolly, individually and as co-administrators of the Estate of Gavyn Connolly) Argument

Plaintiffs assert that the cause of action against Moving Defendants is not precluded by immunities under the NJTCA. Plaintiffs are merely relying on the terms of N.J.S.A. 59:4-2 for an independent and factually supportable basis for liability on the part of Moving Defendants. As per N.J.S.A. 59:4-2, a public entity, such as Defendant-NJ, may be liable if a plaintiff can show (1) that a dangerous condition existed; (2) that the dangerous condition proximately caused the injury; (3) that the risk of injury was reasonably foreseeable; (4) that the employee or entity knew about this dangerous condition; and (5) that the conduct of the State and/or its employee was palpably unreasonable.

A Dangerous Condition Existed

To determine if a dangerous condition existed, one must look to what is a reasonably foreseeable use of the property while the carnival was present. Given the nature of the carnival, and that its sponsor was related to Washington Township High School, there was an enhanced expectation that teenagers and younger children would be present at the carnival, many of whom would be unattended. The risks and dangers of crossing Route 42 are self-evident, and become manifest when one places a carnival, mid-block along the roadway, where the main participants are teenagers and younger children.

The selection of location of the carnival in the parking lot enhanced the danger, as it was placed mid-block with no direct access to a controlled intersection. Additionally, there were no safe alternatives for crossing the highway due to lack of sidewalk. Neither of the two available intersections would provide a safe pathway for pedestrians, especially unsupervised children.

The dangers of this location and knowledge thereof were evident by the fact that a fence was requested. The roadway itself was dangerous, and Township acknowledged this was a dangerous situation by applying for the authority to have the fence placed in the median, only affecting access after persons attempting to cross had passed over half of the roadway. The presence of the fence did nothing to limit access to the roadway, it only limited access to half of the roadway.

To determine if a "dangerous condition" existed requires an analysis of what constitutes "used with due care." Vincitore v. N.J. Sports and Exposition Authority, 169 N.J. 119, 125. Such an analysis requires an objective reasonableness standard. Garrison v. Twp. of Middletown, 154 N.J. 282, 291 (1998). The Vincitore analysis of whether due care was shown required a determination of (1) whether the property poses a danger to the general public when used in the reasonably foreseeable manner; and (2) whether the general activity done was an objectively unreasonable use of the property under the circumstances. Here, the manner in which the property was being used, namely a carnival at this specific location directly across from eateries, made the crossing of the roadway mid-block normal and foreseeable. Testimony shows officials of both Township and State were aware that people crossed the roadway during the carnival. Additionally, in regard to the second prong, the general activity done here, crossing the median and road cannot be said to be so objectively unreasonable as to undermine the determination that the due care criterion was met. It was known by all involved that people regularly crossed the roadway during the carnival. This conduct cannot be construed as objectively unreasonable as people crossed in this area on numerous occasions during the carnival. If the act of crossing the median and road was so objectively unreasonable, there would not have been numerous people crossing the road on this night and at earlier carnivals, and there would have been no need nor concern to place a fence of any kind along the median.

The Vincitore court held that the actions undertaken by the plaintiff did constitute acting with due care at the time of the incident. 196 N.J. 119, 130. Further, the court held that a reasonable fact finder could have concluded that the incident "could have exposed an objectively reasonable member of the general public to a substantial risk of injury." Id. at 129. Here, the manner in which the incident took place does not constitute Ms. Connolly acting in an objectively unreasonable manner. It was reasonable and reasonably foreseeable for Ms. Connolly to have crossed, as numerous other people did. This provided her with examples of how the risk seemed minimal. It cannot be said that a reasonable fact finder could not conclude that the incident "could have exposed an objectively reasonable member of the general public to a substantial risk of injury." 196 N.J. at 129.

Moving Defendants misstate the issue by asserting that Plaintiffs must prove the fence was a dangerous condition. It is not the presence of the fence which must be considered, rather it is the whole of the risks in the scene as it was presented during the carnival that created the dangerous condition.

The Dangerous Condition Proximately Caused the Injury

Here, the dangerous condition, namely the carnival's location and the failure to provide an alternative for safe crossing of Route 42, was a substantial factor in causing this incident.

Plaintiffs incorporate the arguments above regarding the dangerous condition and the manner in which the incident occurred.

The conditions of the carnival led to the decision of Ms. Connolly to cross Route 42 and directly led to this incident. Additionally, the failure to provide uniformed traffic control officers, as was required of Washington Township and State approvals, directly led to the death of Ms. Connolly.

The Risk of Injury was Reasonably Foreseeable

The fact that Defendant-5th Quarter Club and Township requested the fencing be approved by Defendant-NJ to provide a barrier and/or impetus to not cross Route 42, accompanied with the State's approval of the permit to allow the fence in hopes that it would be an impediment to crossing, reflects that the risk of injury related to the crossing of the roadway was reasonably foreseeable.

The Employee or Entity Knew About this Dangerous Condition

Township was fully aware of this dangerous condition. Even if its employee Altamuro did not have actual knowledge of the dangerous condition, the application for the permit provided sufficient evidence of the reason for the request by indicating the fence was for pedestrian control.

The requirement under Vincitore is of either actual or constructive knowledge. Therefore, even if Moving Defendants did not have actual knowledge of this dangerous condition, Moving Defendants should have known about this dangerous condition. For many years, Township requested similar permits to place a fence in the median. Township cannot now credibly argue that it had neither actual nor constructive knowledge of the risks involved.

Moving Defendants cannot argue that they did not have at least prior constructive knowledge of the condition, the reason for the fence, and the dangers inherent in its property during the carnival.

The Conduct of Moving Defendants was Palpably Unreasonable

If a public entity acts in a palpably unreasonable manner in failing to protect against a dangerous condition, that public entity can be held liable for injuries or death caused in whole or in part by that condition. Ogborne v. Mercer Cemetery Corp., 197 N.J. 448, 459 (2007). The NJTCA does not protect the public entity in that situation. Id. The term "palpably unreasonable" in relation to behavior upon which immunity would be inapplicable is behavior which is patently unacceptable under any given circumstance. Wymbs v. Twp. of Wayne, 163 N.J. 523, 532 (2000). If a prudent, reasonable person would not approve of an action or inaction, the burden of the plaintiff is met to show palpably unreasonable behavior. Muhammad v. N.J. Transit, 176 N.J. 185, 821 (2003). A defendant's immunity from the consequences of palpably unreasonable behavior is neither absolute nor immutable. Kolitch v. Lindedahl, 100 N.J. 485 (1985).

The Court, viewing all of the factors in the light most favorable to Plaintiffs, must only determine whether there is sufficient evidence for a jury to determine that the acts of Defendants

were sufficient to override the otherwise applicable immunities on which Defendants base their defenses.

The sole issue before the Court is whether Plaintiffs can provide facts and opinions sufficient to support the argument that the Defendants acted in a patently unreasonable manner. Once the State approved the permit application filed by Altamuro, on behalf of Township, Altamuro became a public employee who was responsible for, and oversaw, the installation of the fence in the median which was intended as stated in the application, to attempt to prevent persons at the carnival from crossing Route 42. Defendant-Altamuro acknowledged that a safety risk existed because he considered it an important safety feature to stop people from crossing mid-block. Through Altamuro and employee Forchione, Township acknowledged the fencing was an attempt to prevent persons from crossing the roadway in the area it was intended to protect and that people at the carnival had crossed the road in the past. Therefore, Township cannot claim to have no knowledge of the dangerous condition. Township made no effort to change the type, size, or location of fence for the 2016 carnival, despite being aware that people crossed the road in the past despite the erection of a fence. Further, there was no alternative measures implementing to ensure the safety of pedestrians at the carnival. Altamuro believed this type of fence was an adequate mechanism.

Plaintiffs' expert, Carl Berkowitz, Ph.D., PE., was asked for his opinion regarding the causation of this incident and to comment upon the acts of the various defendants involved. Dr. Berkowitz's detailed review of the relationships between the parties involved in planning the carnival, the incident, and the increased risks encountered here due to the age of anticipated carnival clientele, included a review of the process by which the temporary fencing was approved. As to the conduct of Moving Defendants, Dr. Berkowitz references the failure to supply uniformed guards and monitors, inadequate placement of barriers, and in general to ensure pedestrian safety, despite the notice of dangerous conditions in the area of the carnival. Defendants did nothing to improve pedestrian safety and failed to protect pedestrians against these dangerous conditions identified in Dr. Berkowitz's report. Specifically, Dr. Berkowitz stated that "Choosing this location and failure to adequately consider and ensure pedestrian safety (through inspections, guards/monitors, and placement of barriers to prevent leaving the Carnival at this location) for its own event, which was catered to children, including teenagers, were palpably unreasonable and caused this incident." Report of Carl Berkowitz, Ph.D., PE, pp. 28-29.

Conclusion

In this case, Plaintiffs have shown that a reasonable jury could determine that the criteria for the applicability of N.J.S.A. 59:4-2 have been met. Plaintiffs have shown there is sufficient evidence to reflect that Defendants (1) knew that a dangerous condition was present during the three days of this carnival along Route 42; (2) that the dangerous condition proximately caused the injuries and death of Ms. Connolly; (3) that the risks of this incident occurring and the injuries leading to the death of Ms. Connolly were reasonably foreseeable; (4) that Township generally and vicariously knew and/or should have known of the dangers and risks; and (5) that the acts of Township and its employee Altamuro constituted palpably unreasonable conduct.

Moving Defendant's Reply

There are no material facts in dispute which would lead a reasonable factfinder to find that the placement of the temporary fence constituted a dangerous condition for which Defendants can be held liable as a matter of law. There is no fact or evidence that the fence itself was dangerous, that the fence injured Ms. Connolly in any way or that the fence caused or contributed to this accident.

Plaintiff relies on Dr. Berkowitz's "situs of event" theory, however it does not come close to satisfying the legal standard required to prove liability for "dangerous condition" of public property under N.J.S.A. 59:4-2. Plaintiffs' reliance on this expert opinion to create a material fact or to give an opinion on questions of law such as a "dangerous condition" or "causation" is improper and this Court must disregard it. See Boddy v. Cigna Prop. & Cas. Co., 334 N.J. Super. 649, 659 (App. Div. 2000). Dr. Berkowitz is wholly unqualified to offer his net opinion here.

Insofar as Plaintiffs cannot point to any fact in the record (1) that establishes the temporary fence erected by Defendant-WT was itself in a dangerous condition; (2) that the fence created the foreseeable risk that Ms. Connolly would jaywalk across a four lane highway at night and be struck by a vehicle traveling illegally on the shoulder of the road; (3) that the fence in any way caused injury to Ms. Connolly; and (4) that the statutory immunity to Moving Defendants somehow does not apply to this case, Plaintiffs' Complaint against Moving Defendants must be dismissed as a matter of law.

The combination of immunities afforded to Moving Defendants under the NJTCA should collectively, or individually, bar liability against them. The Plan and Design Immunity under N.J.S.A. 59:4-6 extends immunity to both Moving Defendants for any injury claimed to have been caused by the planning or design of public property or improvements thereto, including the erection or placement of the fence. See Cobb v. Washington, 154 N.J. Super. 11 (1974). The Immunity for Alleged Failure to Inspect or Negligent Inspection under N.J.S.A. 59:2-6 and 59:3-7, especially when Plaintiffs, as here, attempt to extend any cause of action of the incident to conditions on private property or property outside the jurisdiction of the public entity. See Sharra v. City of Atlantic City, 199 N.J. Super. 535 (App. Div. 1985); Diodato v. Camden County Park Comm'n, 162 N.J.Super. 275 (Law Div, 1978); and Macaluso v. Knowles, 341 N.J. Super. 112, 116-17 (App. Div. 2001). The Immunity for Permitting/Approval of Carnival Location under N.J.S.A. 59:2-5 and 59:3-7 immunizes Moving Defendants from liability for any role they had approving or permitting the carnival location and serves as an absolute defense to Plaintiffs' expert's novel "dangerous situs" theory of liability. See Malloy v. State, 76 N.J. 515, 521 (1978). The Immunity for Discretionary Decisions under N.J.S.A. 59:2-3 and 59:3-4 immunizes Moving Defendants exercise of judgment and their employment or use of resources and personnel related to their decision, or participation in the decision, to use the temporary fence as a deterrent. See Lopez v. City of Elizabeth, 245 N.J. 153, 164 (App. Div. 1991).

Plaintiffs ignore the statutory immunities, however the undeniable consequence of the application of these immunities to the facts here is that Moving Defendants are immune, from their decision, or participation in decisions (1) allowing the carnival to take place on private

property near a State roadway; (2) using temporary fencing in the median of the State roadway as approved by the State DOT in a Highway Occupancy Permit; (3) employing or not employing police officers or crossing guards on the State roadway; and (4) performing inspections or failing to inspect the temporary fencing 24/7 during the operation of the carnival.

Plaintiffs cannot prove a dangerous condition existed on the property. First, the "dangerous condition" as defined in N.J.S.A. 59:4-1(a) refers to the physical condition of the property itself and not the activities on or near the property. See Cogsville v. Trenton, 159 N.J. Super. 71, 74 (App. Div. 1978); Setrin v. Glassboro State College, 136 N.J. Super. 329, 334 (App. Div. 1975); Sharra v. City of Atlantic City, 199 N.J. Super. 535, 540 (App. Div. 1985).

The only property of Township even remotely involved in the accident was the temporary fence. N.J.S.A. 59:4-1(c) explicitly limits liability for dangerous conditions on public property to "real or personal property owned or controlled by the public entity." Because Township neither owned nor controlled the carnival location or roadway where the accident occurred, Plaintiffs cannot prove liability for a dangerous condition against Moving Defendants as a matter of law under N.J.S.A. 59:4-2.

It is agreed that the fence by itself, whether standing upright or sagging, was not dangerous or that it in anyway caused injury to Ms. Connolly. There is no "condition" of the fence itself that could be deemed dangerous under N.J.S.A. 59:4-1(a), so as to allow imposing liability on behalf of Moving Defendants under N.J.S.A. 59:4-2.

There is no dispute that Ms. Connolly ignored an intersection with a controlled crosswalk 250 feet away and jaywalked in violation of N.J.S.A. 39:3-44. The Appellate Division recently ruled that pedestrian's actions in improperly crossing roadways at night was not objectively reasonable, thus leading to grants of summary judgment in favor of public entities under N.J.S.A. 59:4-2. See Deravil v. Panaleone, 2019 N.J. Super. Unpub. LEXIS 2252 (App. Div. Nov. 1, 2019); and Mattos v. Hotalan, 2018 N.J. Super. Unpub. LEXIS 1968 (App. Div. Aug. 22, 2018). Plaintiffs rely on Vincitore, however, that case is easily distinguished from this case. First, the dangerous condition where the accident occurred in Vincitore was on State owned property. Here, the accident did not involve the fence or any Moving Defendants property. Second, in Vincitore, the decedent was doing what any reasonable driver would do in driving through open gates at an unmanned railroad crossing. He was not illegally crossing the tracks or circumventing the gates, as Ms. Connolly did here.

ANALYSIS

Relevant Governing Law

In Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995), the New Jersey Supreme Court explained the summary judgment standard as follows: "a determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to 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. The judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." It should be kept in mind that the mere existence of issues of fact does not preclude summary judgment unless a view of those facts most favorable to the opposing party adequately grounds some claim for relief. Bilotti v. Accurate Forming Corp., 39 N.J. 184 (1963).

In Brill, the Supreme Court of New Jersey adopted the standard for summary judgment used by the Federal Courts. The Brill Court instructed the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for 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 536. The Brill Court emphasized that the thrust of its decision is "to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Id. at 541.

Dangerous Condition

The Tort Claims Act 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." N.J.S.A. § 59:2-1(a). However, 59:4-2 provides an action may be maintained in cases regarding liability for dangerous conditions on a public property. That statute requires:

> 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 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**. N.J.S.A. § 59:4-2

Court's Analysis

Moving Defendants argue liability against them is precluded by various absolute immunities afforded to public entities and public employees under the NJTCA. Moving Defendants contend they are entitled to plan and design immunity, immunity for alleged failure to enforce the laws,

immunity for permitting the carnival location, and immunity from any alleged failure to inspect the fence.

Plaintiffs do not argue these immunities are inapplicable. Rather, that they can impose liability by providing evidence sufficient to satisfy N.J.S.A. 59:4-2. Plaintiffs argue the sole issue before the Court for this motion is whether Plaintiffs can show Township acted in a patently unacceptable manner. Plaintiffs must show the behavior of Township and Altamuro was palpably unreasonable, or patently unacceptable under any given circumstances. See Wymbs v. Twp. of Wayne, 463 N.J. 523, 532 (2000). Plaintiffs must show that a prudent, reasonable person would not approve of the actions or inactions of the Defendants. See Muhammad v. N.J. Transit, 176 N.J. 185, 195-96 (2003).

Even viewing the facts here in a light most favorable to Plaintiffs, as the non-moving party, the Court can find no property of the Township Defendants which can be argued as being in a dangerous condition. The only property the Township owned at issue was the personal property of the snow fence. Plaintiffs' expert's assertion that the event should have never been permitted at this location does not articulate a dangerous condition of public property over which Township or Altamuro had control and must be barred by the specific permitting immunity of N.J.S.A. 59:…...

As used in this chapter:

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.

To sustain their complaint, the plaintiffs are required to demonstrate a dangerous condition of property existed at the time of the injury. The only property at issue is the median of Route 42 owned by the State and not Township. Though there are descriptions of the absence of sidewalk and pedestrian controls in the area where Plaintiffs' daughter attempted to cross, the only condition that is alleged to be dangerous is the orange snow fence installed by Washington Township employees who obtained a permit from the State. The allegation is that the fence "sagged", however there is no engineering specification directing how the fence was to be erected. The fence is flexible and made of clothe like synthetic material and can reasonably be expected to sag. Plaintiffs do not contest that Washington Township is entitled to assert plan or design immunity under N.J.S.A. 59:4-6 which specifically provides-

> Neither the public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of public property, either in its original construction or any improvement thereto, where such plan or design has been approved in advance of the construction or improvement by the legislature or the governing body of a public entity or some other body or a public employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved.

Thus, there are two prongs that must be met in a motion for summary judgment by the public entity to assert such immunity: 1) its decision was part of a plan or design of public property, and 2) the plan or design was approved in advance of construction by a public employee exercising discretionary authority to give such approval. Ciambrone v. State DOT, 233 N.J. Super. 101 (App. Div.) certif. denied 117 N.J. 664 (1989). Here, there is no contest that the State's supervising engineer Menz received the request for the fence installation in the median from Washington Township's employee Altamuro who in turn was carrying out the request of his superiors. Like so many requests from prior years Menz reviewed the request and granted it and allowed the orange snow fence to be installed by the Township. There is no challenge to these facts. Specifically, there is immunity for the plan of an alleged poorly designed highway barrier entitling Township to immunity. Lee v. Brown, 232 N.J. 114 (2018). Schriger v. Abraham, 17r N.J. Super. 5 (App. Div. 1979) rev'd, 83 N.J. 46 (1980). It is important to note that Plaintiffs contend that the dangerous condition is the traffic on the highway and that the snow fence was an inadequate measure to restrict pedestrians from encountering it. Under N.J.S.A. 58:4-5, Township cannot be liable for failure to provide ordinary traffic signals, signs, markings, or other similar devices. Here, the Plaintiffs focus can only be discerned as a disagreement with the plan that was intended, i.e. the snow fence that was used and the overall safety plan for the carnival. Thus, plan or design immunity are at issue.

Township's approval by the State is protected by permit immunity. Both public entity defendants assert that their request for, or issuance of, a permit is a process entitling them to immunity under N.J.S.A. 59:2-5. "A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or public employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked." The TCA provides absolute immunity for public entities and their employees with respect to injuries arising out of the issuance of a permit whether based upon a discretionary or ministerial exercise of governmental authority. Pinkowski v. Township of Montclair, 299 N.J. Super. 557 (App. Div. 1997). Immunity granted by 59:2-5 applies to all phases of the licensing function. Vacirca v. Consol. Rail Corp., 192 N.J. Super. 412 (Law Div. 1983).

Therefore this court must find there is both design and plan immunity as well as permit immunity in the decision to allow the erection of the temporary orange snow fence, as there is no otherwise existing dangerous condition of property. Thus, no dangerous condition of property existing, there are only standing immunities to the plaintiffs suit against the State and Township defendants.

Finally, the Court concludes that Plaintiffs have not shown that reasonable minds could differ as to whether the Township's conduct was palpably unreasonable, taking into consideration the fact that the permit approved by the State had been granted for many years, the record lacks evidence

of prior similar pedestrian incidents, and the location of a controlled intersection within a few hundred feet of where the carnival took place. The court must find that the actions or inactions of the Township were not palpably unreasonable.

The Court must find that Plaintiffs have not shown reasonable minds could differ as to whether there was a dangerous condition of public property.

For all of the aforesaid reasons, the motion for summary judgment by Washington Township and Altamuro must be granted.