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PETER GOLDER and NANCY GOLDER, h/w Plaintiffs, vs. CITY OF OCEAN CITY and JOHN DOE RESPONSIBLE PARTY(S), Defendants.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAPE MAY COUNTY DOCKET NO. CPM-L-315-13 **ORDER**

THIS MATTER having been opened to the Court by Robert P. Merenich, Esquire of the Law Firm of Gemmel, Todd & Merenich, P.A., attorneys for Defendant, City of Ocean City, and the Court having considered the moving papers and any opposition thereto, and for good cause shown;

IT IS on this 1st day of April, 2015, **ORDERED AND ADJUDGED** that Summary Judgment, be and the same is hereby granted in favor of the Defendant, City of Ocean City, and the Plaintiffs' Complaint against Defendant, City of Ocean City, be and the same is hereby dismissed with prejudice.

J. Christopher Gibson, J.S.C.

MEMORANDUM OF DECISION IS ATTACHED

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

TO: **Robert P.Merenich, Esquire**
GEMMEL TODD MERENICH
767 Shore Road
P.O. Box 296
Linwood, NJ 08821

CASE: **Peter Golder et al v City of Ocean City et al**
DOCKET NO. **CPM L 315-13**

NATURE OF APPLICATION: DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

MEMORANDUM OF DECISION ON MOTION

NATURE AND BACKGROUND OF MOTION

The complaint in this matter was filed on July 9, 2013. The discovery end date was November 27, 2014. Trial is scheduled in this matter for June 1, 2015. Defendant City of Ocean City now moves for summary judgment dismissing Plaintiffs' claims with prejudice.

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

LEGAL ANALYSIS

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

> the judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together

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

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

Additionally, R. 4:46-5 provides, in pertinent part, that

> when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:42-2(b), setting forth specific fact showing there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered, unless it appears from the affidavits submitted, for reasons therein stated, that the party was unable to present by affidavit facts essential to justify opposition, in which case the court may deny the motion, may order a continuance to permit additional affidavits to be obtained, depositions to be taken or discovery to be

had, or may make such order as may be appropriate.

In determining whether a genuine issue of material fact exists, the motion judge must "engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 533. This weighing process "requires the court to be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a 'genuine' issue of material fact." Id. at 533-34. In short, the motion judge must determine "whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

MOVANT'S POSITION

Defendant provides that Plaintiff was riding his bicycle at 6th Street and the Boardwalk in Ocean City on August 1, 2011 when the front wheel of his bike came into contact with the vertical slats of the boardwalk causing his injuries. Plaintiff was in the surrey lane of the Boardwalk and not the bicycle lane at the time of this accident. See Plaintiff's Dep. 71:9-16 attached as Defendant's Exhibit "B." Defendant maintains that it is not liable for Plaintiff's injuries because Plaintiffs have failed to satisfy the requirements

of N.J.S.A. § 59:4-1, et seq. Defendant contends that unless Plaintiffs can satisfy the elements set forth in the statute, they do not have a basis for recovery. Vincitore v. N.J. Sports & Exposition Auth., 169 N.J. 119, 124-25 (2001).

I. Defendant's contention that it is entitled to summary judgment because of Plaintiff's failure to satisfy N.J.S.A. § 59:4-1 et seq.

Initially, Defendant argues that Plaintiff has not demonstrated that the condition is dangerous condition of public property. Defendant provides that N.J.S.A. § 59:4-1 defines "dangerous condition" as "a condition or property that creates a substantial risk of injury when such property is used with due care in a manner in which is reasonably foreseeable that it will be used." Therefore, if "it can be shown that the property is safe when used with due care, and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not dangerous." Garrison v. Twp. of Middletown, 154 N.J. 282, 290 (1998).

Defendant asserts that the question is whether the alleged boardwalk gap created a "substantial risk of injury" when used in a reasonably foreseeable manner and with due care. Defendant notes that not every injury-causing defects trigger liability and the Appellate Division instructs that "not every defect in a highway, even if caused by negligent maintenance, is actionable." Polyard v. Terry, 160 N.J. Super. 497, 508 (App. Div. 1978).

Defendant concedes that there are gaps between the boards of the boardwalk because the wooden boards expand and contract. However,

Defendant asserts that the owners' manual of Plaintiff's bicycle provides that Plaintiff should not have been riding his racing bike with a ¾ inch tire on an unpaved surface with gaps. Defendant maintains that Plaintiff has not demonstrated that the boardwalk created a substantial risk of injury for someone using a racing bike on a surface upon which a ¾ inch tire would repeatedly lose contact.

Next, Defendant argues that it had no actual or constructive notice of the alleged dangerous condition. Defendant notes that N.J.S.A. § 59:4-2(4)(b) requires the claimant to establish that the entity had actual or constructive notice of the dangerous condition. Defendant contends that it did not have actual knowledge of the alleged defect and there is no evidence of knowledge of previous accidents occurring at the location as a result of the alleged dangerous condition.

Defendant provides that a public entity may be on constructive notice pursuant to N.J.S.A. § 59:4-3(b) only if the plaintiff establishes that the condition existed for such a period of time and was of such an obvious nature that the public entity in the exercise of due care should have discovered the condition and its dangerous character. Defendant maintains that Plaintiff cannot argue that one may infer how long a condition existed from its size. Polzo v. Cnty of Essex, 196 N.J. 596, 581 (2008) (purportedly holding that "the mere existence of an alleged dangerous condition is not constructive notice of it").

Defendant contends that there is no evidence as to how long the condition existed as of the time of the accident. Additionally, Defendant purports that there are no prior complaints concerning the alleged dangerous condition as well as no evidence or expert testimony to establish constructive notice.

Defendant also argues that Plaintiff has not established whether any action or inaction taken by Defendant were palpably unreasonable. Defendant contends that our Supreme Court explained that "palpably unreasonable" implies "'behavior that is patently unacceptable under any circumstance' and that It must be manifest and obvious that no prudent person would approve of its course of action or inaction." Holloway v. State, 125 N.J. 386, 403 (1991), quoting Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985). Defendant provides that in Maslo v. City of Jersey City, 346 N.J. Super. 346, 350-51 (App. Div. 2002), the Appellate Division held that the city's alleged failure to repair a one inch difference in elevation between sidewalks was not palpably unreasonable.

Defendant maintains that Plaintiff fails to satisfy the requirement of a showing of palpable unreasonableness. Defendant asserts that the record shows that it inspects and repairs the boardwalk and the burden of establishing palpable unreasonable is so high and the presumption against liability in favor of immunity directs that Plaintiff should not recover.

II. Defendant's contention that it is entitled to Design Immunity.

Defendant asserts that it is entitled to plan or designed immunity pursuant to N.J.S.A. § 59:4-6. Defendant contends that the immunity provided by this section prevails over the liability provisions of N.J.S.A. § 59:4-2. See Weiss v. New Jersey Transit, 128 N.J. 376 (1992). Defendant contends that N.J.S.A. § 59:4-6 grants public entities immunity for injuries resulting from dangerous conditions produced by a plan or design of public property when such plan or design has been officially approved by an authorized person or body. See Kolitch v. Lindedahl, 100 N.J. 485, 497 (1985). Additionally, the approved feature must sufficiently address the condition that is the subject of the claim in order to demonstrate official discretionary approval. See Thompson v. Newark Housing Auth., 108 N.J. 525, 536-37 (1987). Defendant notes that it is necessary to show that the design feature was contained in the construction plans which were approved by the public entity and the construction was undertaken in accordance with the plans. See Manna v. State, 129 N.J. 341, 354 (1992).

Defendant notes that in Levin v. Cnty. of Salem, 133 N.J. 35, 39 (1993), the plaintiff was injured when he suffered paralyzing injuries after jumping from a county bridge into shallow tidal waters. Defendant provides that our Supreme Court held that "if the dangerous condition of the property were an omission of a chain link fence from the original design on the bridge, that omission would be insulated from liability by the plan or design immunity granted under N.J.S.A. § 59:4-6." Id. at 43.

Defendant contends that it's expert sets forth that the surrey lanes of the boardwalk deliberately run parallel because of the underlying support structure of the boardwalk. By contrast, newer recently replaced sections of the boardwalk have an understructure which results in boards being placed perpendicular to the boardwalk. Defendant maintains that to the extent that Plaintiff relies on any theory that the surrey lane boards should have run perpendicular to the beach, the underlying base structure compelled such placement.

III. Defendant' contention that Plaintiff is precluded from receiving damages for pain and suffering.

Finally, Defendant argues that in order to recover damages for pain and suffering, the claimant must first meet the threshold of N.J.S.A. § 59:9-2(d). Defendant asserts that this requires a showing of "(1) an objective permanent injury, and (2) a permanent loss of a bodily function that is substantial." Brooks v. Odom, 150 N.J. 395, 402-03 (1997).

Defendant contends that the issue of whether a plaintiff sustained a permanent loss of a bodily function that is substantial "depends on a fact-sensitive analysis." Knowles v. Mantua Twp. Soccer A'ssn., 176 N.J. 324, 331 (2003).

Defendant maintains that Plaintiff's injuries in this matter are similar to the following cases wherein the Plaintiff was found to have pierced the tort claims threshold. Defendant provides that in Brooks 150 N.J. at 406 and Ponte v. Overeem, 171 N.J. 46, 54 (2002), the plaintiffs complained that their

injuries left them unable to perform certain tasks without pain but the injuries were not severe enough or verifiable enough to constitute a "permanent loss of a bodily function." Additionally, the court in Hennan v. Greene, 355 N.J. Super. 162, 163-64 (App. Div. 2002) purportedly held that the plaintiff failed to fulfill the second prong because although she was required to change to a less strenuous job "[s]he did not miss a day of work" and could do household chores but not "in an uninterrupted fashion" and began to play sports with "frequent breaks."

Defendant contends that Plaintiff's doctor in this matter indicated that Plaintiff has made a full recovery with regard to his injuries with no permanent injury.

With regard to any claimed facial mar or scar, Defendant directs the Court's attention to Hammer v. Twp. of Livingston, 318 N.J. Super. 298, 309-10 (App. Div. 1999) wherein the court purportedly examined the factors to be considered in determining whether a scar constitutes a disfigurement. Defendant asserts that the scar must impair or injure "the beauty, symmetry, or appearance of a person." Id. at 308. Defendant asserts that to qualify as a disfigurement under the pre-AICRA threshold requirements, the plaintiff must demonstrate that "a scar . . . [is] 'objectively significantly disfiguring.'" Id. at 309-10. Defendant submits that although Plaintiff has a subjective response to a mark under his nose, which may be seen upon close examination, Plaintiff's injuries do not evidence any significant disfigurement.

Defendant requests that the Court dismiss the complaint in its entirety as Plaintiff's injuries are not substantial and Plaintiff does not have a significant disfigurement.

OPPOSITION

Plaintiffs provide that the subject boardwalk has eight lanes, seven of which have boards that run perpendicular to the beach including the bike lane. Only the "Surrey lane" has boards that run parallel to the beach and in the same direction as traffic. Plaintiffs assert that parallel boards because of their propensity to expand and contract develop gaps between them resulting in a dangerous condition for tires of bikes to lodge in the gaps. See Fisher report attached as Plaintiff's Exhibit "D." Plaintiffs provide that gaps of ¾ inches were admitted by Defendant's expert to be a problem and unsafe. See McLarnon Dep. 43:11-25, 44:1-10, 45:19-25 attached as Plaintiff's Exhibit "C."

Plaintiff also contends that Defendant has no regulations or warnings suggesting that bikes with ¾ inch diameter wheels are inappropriate or should not be used on the boardwalk. Plaintiff asserts that Defendant's expert admitted that such a bike on the boardwalk was foreseeable. See McLarnon Dep. 40-47 attached as Plaintiff's Exhibit "C." Plaintiff notes that the City's Joint Insurance Fund ("JIF") report prior to the accident suggested that Ocean City should focus on gaps between boards and on inspection and repairs on the Surrey Lane in the area of 5th and 6th Streets where the

accident occurred. See McLarnon Dep. 13:15-23, 14:6-24 attached as Plaintiff's Exhibit "C."

Plaintiff asserts that for some time prior to and since the accident, all work done by Ocean City to the Surrey Lane has concentrated on converting the board configuration from parallel to perpendicular to the beach and traffic. See McLarnon Dep. 30:4-15, 33:6-10, 40:12-24 attached as Plaintiff's Exhibit "C." Plaintiff provides that in repairing the substructure, they removed the parallel boards and reinstalled them after the repairs were finished in the same parallel basis. See McLarnon Dep. 16:12-24, 19:5-9, 20:4-10 attached as Plaintiff's Exhibit "C."

Plaintiff maintains that the foregoing could form a reasonable basis for a jury to find that Defendant's conduct was unreasonable and it has already been established that it could have been palpable or obvious. Plaintiff asserts that his testimony, the report from Plaintiff's expert, and the photos of the subject boardwalk, provide uncontroverted evidence of the existence of a dangerous condition. Plaintiff asserts that discovery has produced evidence that because of the boards propensity to expand, contract, and wear out that parallel boards develop gaps between them leading to a dangerous condition indicating that Defendant Ocean City had actual or constructive notice of the condition.

Plaintiff contends that Mr. Berenato, Defendant's employee in charge of boardwalk inspections, either did not find it necessary to employ any reasonable objective standard for inspecting gaps between the boards to

identify reasonably, foreseeable dangerous conditions or adopted an arbitrary protocol with an unwritten, subjective standard based on visual review only. See Berenato Dep. 15:2-6, 17:17-25, 25:1-20 attached as Plaintiff's Exhibit "D"; McLarnon Dep. 27:10-14, 40:19-25, 42:17-24, 43:11-19 attached as Plaintiff's Exhibit "C."

Plaintiff asserts that the inspectors were without any guidance in determining whether a gap is to be considered dangerous. Additionally, Plaintiff contends that it can be assumed that the summer inspectors who inspected daily were not well informed on safety measures and/or only engaged in a temporary job. See Berenato Dep. 13:3-20 attached as Plaintiff's Exhibit "D." Plaintiff maintains that in the absence of objective criteria or technique to determine whether a danger existed left the inspectors disarmed to do any kind of credible inspection to identify hazards for bike riders.

Plaintiff contends that the palpable unreasonable standard may be interpreted through acts that are capricious, arbitrary or outrageous. Plaintiff provides that the three alternatively interpreted standards are subjective which one would assume are strictly questions for a jury. Plaintiff asserts that in Bradford v. Kupper Assocs., 283 N.J. Super. 556, 578 (App. Div. 1995) the court further defined palpably unreasonable as "obviously without reason or reasonable basis."

Plaintiff maintains that in this matter, the issue is either the complete and intentional disregard for establishing procedures for the discovery of known risks or the intentional adoption of procedures without any reasonable

basis and with no chance of avoiding the known risks. Consequently, Plaintiff contends that Defendant's negligent conduct could be found to be palpably unreasonable by a jury.

REPLY

Initially, Defendant responds to Plaintiff's statement of facts by indicating that Mr. McLarnon testified that such a gap would "possibly" be unsafe. See McLarnon Dep. 46:22-25. Additionally, Defendant asserts that it did have regulations which indicate that bikes were required to be utilized in the bike lanes as opposed to the Surrey lane and that as a matter of common sense it was inappropriate to ride a racing bike on the Surrey lane. See McLarnon Dep. 45:5-16. Defendant also contends that it is unknown whether the JIF report was generated prior to the accident and that Mr. McLarnon did not testify that a JIF report suggested that the City focus its inspection on repairs on the Surrey lane in the area of 5th and 6th Streets.

Defendant maintains that Plaintiff must establish that a ¾ inch gap on the boardwalk presents 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. Defendant contends that Plaintiff's use of a racing bike on a surface with any gap is not using the property with due care. Defendant asserts that Plaintiff was not riding in the designated bike lane when the accident occurred and therefore failed to use due care by using a racing bike on an entirely inappropriate surface.

Next, Defendant also notes that Plaintiff must prove notice of the alleged dangerous condition and that "[t]he mere '[e]xistence of an alleged dangerous condition is not constructive notice of it.'" Polzo v. Cnty. of Essex, 196 N.J. 569, 581 (2008), quoting, Sims v. city of Newark, 244 N.J. Super. 32, 42 (Law Div. 1990). Defendant provides that Plaintiff must establish the "fundamental requirement of constructive notice under N.J.S.A. § 59:4-3(b), namely that the condition have existed for such a period of time that the public entity should have discovered it." Carroll v. N.J. Transit, 366 N.J. Super. 380, 388 (App. Div. 2004). Defendant notes that a reference generally to a dangerous condition in the Surrey lane cannot function to confer notice. Defendant cites our Supreme Court which found that in a situation where a neighbor across the street from the plaintiff complained about the sidewalk curb in front of his house was in poor condition did not give the defendant municipality either actual or constructive notice. Norris v. Borough of Leonia, 160 N.J. 427, 447-48 (1999).

Defendant asserts that Plaintiff's expert does not opine how long the gap existed at the time of the accident. Additionally, three years of JIF reports from prior to the accident, discussed in Dr. Nolte's expert report, contain no reference to any gap issue in the surrey lane. See JIF Reports attached to Defendant's reply as Exhibit "B." Defendant maintains that there is no evidence for a jury to conclude that Defendant was on constructive notice of the alleged condition in this matter.

Next, Defendant contends that Plaintiff misconstrues the law by asserting that Defendant's inspection was deficient and palpably unreasonable and therefore constitutes Defendant's notice of the alleged condition. Defendant cites our Supreme Court which rejected such an approach premised on the conclusion that a negligent inspection of a roadway for dangerous conditions either created the alleged dangerous condition or presumptively placed that municipality on constructive notice. Polzo v. Cnty. of Essex, 209 N.J. 51, 67-68 (2012).

Consequently, Defendant requests that the Court enter summary judgment dismissing Plaintiff's complaint with prejudice.

DISCUSSION

The Court finds that Defendant is entitled to the relief requested pursuant to R. 4:46-2 and N.J.S.A. § 59:4-2.

The Court notes the following facts which are undisputed and are pertinent to the within motion for summary judgment. On August 1, 2011, Plaintiff was riding his bicycle at 6th Street and the Boardwalk in Ocean City. Plaintiff was riding in the "Surrey" lane of the boardwalk and not the bicycle lane at the time of this accident. See Plaintiff's Dep. 71:9-16 attached as Defendant's Exhibit "B." Plaintiff's front wheel purportedly became lodged in a gap between the boards causing his injuries. See Complaint attached as Defendant's Exhibit "A." The boards in the surrey lane run parallel to the beach, and run perpendicular in all other areas. See Complaint attached as Defendant's Exhibit "A."

I. Tort Claims Act.

Defendant argues that Plaintiff fails to establish that (1) that the boardwalk was in a dangerous condition because of Plaintiff's improper use of the boardwalk; (2) that Defendant had actual or constructive notice of the gaps in the boardwalk, and (3) that Defendant acted in a palpably unreasonable manner with regard to the gaps in the boardwalk.

N.J.S.A. § 59:4-2 provides the following:

> 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.

Pursuant to N.J.S.A. § 59:4-2, Plaintiff must prove by a preponderance of the evidence that: (1) at the time of the injury the public entity's property was in a dangerous condition, (2) the dangerous condition created a foreseeable risk of the kind of injury that occurred, (3) the condition

proximately caused the injury (4) the entity had actual or constructive notice of the condition, and (5) the action the entity took to protect against the dangerous condition or the failure to take action was palpably unreasonable. Garrison v. Twp. of Middletown, 154 N.J. 282, 286 (1998).

A dangerous condition is defined by the statute 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). Therefore, "the [Tort Claims] Act explicitly requires that a dangerous condition can be found to exist only when the public entity's property 'is used with due care.'" Garrison, 154 N.J. at 287. The Court notes, however, that although a lack of due care on the part of the claimant may preclude a finding of liability, "a plaintiff's contributory negligence will not ordinarily immunize a public entity from liability." Ibid.

> For instance, let us assume that a county constructs a straight road which abruptly, without warning signs or indicia, veers at a 45 degree angle. That condition could be said to create a substantial risk of injury when used in the darkness with due care by drivers generally in a manner reasonably foreseeable that it will be used. However, the individual driver who traverses such a road at an excessive rate of speed while embracing a companion may still be found culpable of contributory negligence by a jury.

Speziale v. Newark Housing Authority, 193 N.J. Super. 413, 419 (App. Div. 1984).

Notice, for purposes of the Tort Claims Act,

> is established when a public entity actually knows of a . . . defect and "should have known of its dangerous character," it is on actual notice. N.J.S.A. 59:4-3(a). And when a dangerous condition is "obvious" and has existed "for such a period of time" that the public entity should have discovered it through the exercise of reasonable care, the public entity is on constructive notice. N.J.S.A. 59:4-3(b).

Polzo v. Cnty. of Essex, 209 N.J. 51, 67 (2012). A public entity's failing to discover a dangerous condition is not "the equivalent of creating a dangerous defect" and whether a public entity is on "notice of a dangerous condition is measured by the standards set forth in N.J.S.A. § 59:4-3(a) and (b), not by whether 'a routine inspection program' . . . would have discovered the condition." Id. at 68.

"Palpable unreasonableness" is "conduct that is patently unacceptable under any given circumstances." Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985). This has been further defined as requiring the public entity's act or omission "'must be manifest and obvious that no prudent person would approve of its course of action or inaction.'" Ibid, quoting, Polyard v. Terry, 148 N.J. Super. 202, 216 (Law Div. 1977), rev'd on other grounds, 160 N.J. Super. 497 (App. Div. 1978), aff'd o.b., 79 N.J. 547 (1979). This standard "implies a more obvious and manifest breach of duty" than that of negligence "and imposes a more onerous burden on the plaintiff." Williams v. Phillipsburg, 171 N.J. Super. 278, 286 (App. Div. 1979).

The Court finds that Plaintiff fails to establish whether Defendant's conduct was palpably unreasonable. The engineering report of Wayne F. Nolte, Ph.D., P.E. attached as Defendant's Exhibit "I" provides detailed photographs of the boardwalk area where Plaintiff's injury occurred. The photographs show that the designated bike lane boards run perpendicular to traffic and the only lane which contains boards parallel to the beach, and therefore parallel to Plaintiff's bicycle tires, are the Surrey lanes. See Exhibit "I." Consequently, it is difficult for the Court to determine, taking all facts in favor of the non-movant, that Defendant acted with the requisite palpable unreasonableness required for Plaintiff to sustain his case. Defendant designated certain paths for certain types of travel which are clearly marked and obvious from the pictures taken of the subject boardwalk. The only portion of the subject area which contains the alleged dangerous condition was the Surrey lane and not the bike lane. See Garrison, 154 N.J. at 287 (holding that "[i]f a public entity's property is dangerous only when used without due care, the property is not in a 'dangerous condition'").

In accordance with Garrison, Plaintiff must also show that use of the property was done with due care to establish a dangerous condition. There may exist factual issues as to whether his traversing between lanes was foreseeable. Specifically, Defendant's expert stated that such a gap would possibly be unsafe and that it was possible that a road bike like Plaintiff's would be used on the boardwalk. See McLarnon Dep. 46:22-25; 47:1-6. However, the alleged "dangerous condition" is only dangerous because of

Plaintiff's failure to exercise due care. Plaintiff's use of his bicycle in the Surrey lane when there is a designated bike lane which contains boards that are perpendicular evidences Plaintiff's failure to exercise due care.

With regard to the issue of notice, it is undisputed that the boards on the boardwalk expand and contract with the weather resulting in gaps between gaps. However, the Court is hard pressed to determine that Defendant was on actual or constructive notice of the specifically alleged dangerous condition because inspections of the boardwalk Surrey lane would be inspected for Surrey use and not bike use. Additionally, Plaintiff's argument that the inspectors hired by Defendant were not equipped to discover the dangerous condition or their inattentiveness created the dangerous condition is not persuasive. Our Supreme Court in Polzo explicitly rejected such an argument. See Polzo v. Cnty. of Essex, 209 N.J. 51, 67 (2012).

Consequently, even if the Court were to determine that a reasonable juror could find that a dangerous condition existed and that Defendant was on notice, a reasonable juror could not find that Defendant acted with palpable unreasonableness. Defendant's act of creating a designated bike lane with perpendicular boards and use of a parallel boards in the Surrey lane was reasonable as it relates to the alleged injury in this matter. Plaintiff cannot show that the action taken by Defendant to protect against the alleged dangerous condition or the failure to take action was palpably unreasonable in light of Plaintiff's use. See Garrison, 154 N.J. at 286.

Accordingly, the Court does not reach the balance of Defendant's arguments, design immunity pursuant to N.J.S.A. § 59:4-6(a) and limitations on pain and suffering damages pursuant to N.J.S.A. § 59:9-2(d), because Plaintiff cannot establish that Defendant actions or inactions were palpably unreasonable. Defendant's motion for summary judgment dismissing the complaint with prejudice is granted.

CONCLUSION

The motion is opposed. N.J.S.A. § 59:4-2, requires plaintiff to show (1) at the time of the injury the public entity's property was in a dangerous condition, (2) the dangerous condition created a foreseeable risk of the kind of injury that occurred, (3) the condition proximately caused the injury (4) the entity had actual or constructive notice of the condition, and (5) the action the entity took to protect against the dangerous condition or the failure to take action was palpably unreasonable. Garrison v. Twp. of Middletown, 154 N.J. 282, 286 (1998). The Court finds that Plaintiff cannot show that the action or inaction taken by Defendant was palpably unreasonable. Defendant's motion for summary judgment dismissing the complaint with prejudice is granted.

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

April 1, 2015

J. Christopher Gibson, J.S.C.