PREPARED BY THE COURT

FRANCES PASQUARELLA and FRANK PASQUARELLA, her husband, Plaintiffs, v. **CITY OF CAPE MAY, et al.,** Defendants.	SUPERIOR COURT OF NEW JERSEY CIVIL DIVISION - LAW CAPE MAY COUNTY CPM-L-375-21 Civil Action **ORDER**

THIS MATTER having been brought before the court on Defendant's Motion for Summary Judgment, which was filed on January 23, 2023, and the court having heard oral argument on March 3, 2023, via Zoom, at which time Robert S. Sandman, Esq. appeared for Plaintiffs, and Erin Thompson, Esq. appeared for Defendant, and for reasons stated on the record,

IT IS ON THIS 19th DAY OF APRIL, 2023, ORDERED that:

1. Defendant's Motion for Summary Judgment is GRANTED.
2. This Order or Judgment shall be deemed automatically served upon all counsel of record simultaneously with its online posting in eCourts; otherwise, all other parties shall be served by the party obtaining this Order or Judgment within seven (7) days of its entry. See Rule 1:5-1(a).

James H. Pickering Jr, J.S.C.

(X) Opposed

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

JAMES H. PICKERING, JR., J.S.C.

9 North Main Street
Cape May Court House, NJ 08210
609-402-0100 ext. 47730

MEMORANDUM OF DECISION PURSUANT TO RULE 1:6-2(f)

CASE:	**FRANCES PASQUARELLA and FRANK PASQUARELLA, her husband v. CITY OF CAPE MAY, et al.**
DOCKET #:	**CPM-L-375-21**
RETURN DATE:	**March 3, 2023**
MOTION:	**Summary Judgment**
MOVANT:	**Defendant City of Cape May**

I. FINDINGS OF FACT

On January 4, 2020, Plaintiff Frances Pasquarella ("Pasquarella") went roller-skating at the Cape May City Convention Center ("Convention Center").

Pasquarella entered the Convention Center, paid a fee, and rented skates.

There was a birthday party being held at the far end of the rink.

There were two skate guards on the rink.

There were 20 to 25 people skating, and "they were mostly children."

The children were all ages, from 3 to 12 years old.

If a child fell, the skate guards would help them up.

Pasquarella was concerned about the number of children at the roller-skating rink.

Pasquarella skated approximately 30-45 minutes, then took a break.

Pasquarella and her husband went to the snack stand.

After being with her husband at the snack stand, Pasquarella returned to the rink and skated.

Pasquarella was skating past her husband around a corner. She decided it was going to be her last lap around the rink. She was getting nervous that there were all these little kids falling all over the place, and she thought it was dangerous. She was turning a corner close to the wall, when a little boy fell and ran right into her and knocked her down.

The young boy lost his balance, lost control, and fell into Pasquarella and knocked her over.

Pasquarella does not remember seeing the boy before the accident.

The young boy got up and skated away.

The boy was between five and ten years old.

Pasquarella suffered an injury to her ankle.

Cape May City ("Cape May") employee Mariah Kennedy testified that on a typical January day roughly seven (7) employees worked at the Convention Center during the roller-skating events.

Cape May employees included skate guards, who skated around the rink to keep order and improve safety.

Mark Gittle was a skate guard; he testified that the duties of skate guards are to keep skaters' speeds down, help individuals who fall to the ground, and attempt to keep anyone from carrying food, phones, or cameras on the skating rink itself.

Posted signs around the rink state: "Skate at Your Own Risk" and "You can fall when you make contact with another skater. You can fall when you lose your balance due to your own inability to skate. You can fall due to other skaters' inability to skate. It is the nature of this recreation that people fall down or run into one another on occasion."

The skate rules are posted on the doors, skate room walls, the front desk and by the snack stand.

Pasquarella heard an announcement over the PA System (loud speaker) that minor children were to be accompanied by an adult.

Pasquarella heard the announcement a second time.

Mr. Pasquarella testified that the PA System announced: "all minor children have to be accompanied by an adult." He heard it twice.

Mr. Pasquarella took a videotape of his wife roller-skating.

Most of the children were on the skate floor by themselves; there was not a parent immediately next to each child.

The videotape does not show "the vast number of unattended children on the skate floor" as is asserted by Plaintiffs. There were approximately 20 children on the skate floor, and the majority did not have an adult (parent) immediately next to them, holding their hand.

Mr. Pasquarella testified: "it was – particularly towards the end when she got hit, it was chaos out there, believe me."

Mariah Kennedy testified that while adult supervision was required, that did not mean that an adult or parent had to accompany their children into the rink if their child was an adequate skater. Parents had to be in the building with minor children under the age of 18 but could let their child skate freely if the child was adept enough at skating.

II. PROCEDURAL HISTORY

Plaintiffs' Complaint was filed on September 9, 2021.

Cape May filed this Motion for Summary Judgment on January 23, 2023.

Plaintiffs filed Opposition on February 17, 2023.

Cape May filed a Reply on February 17, 2023.

Plaintiffs filed a Reply on February 21, 2023.

Oral argument was held via zoom on March 3, 2023.

III. DEFENDANT'S ARGUMENT

Cape May argues that it is entitled to Summary Judgment pursuant to the The Roller Skating Safety and Fair Liability Act. N.J.S.A. 5:14-1 et. seq.. Cape May asserts that the Plaintiff was injured due to incidental contact with another skater, and because it was incidental contact, she is barred from pursuing this claim.

Additionally, Cape May argues that it is entitled to Summary Judgment based on the Tort Claims Act. Cape May asserts that it did not create a dangerous condition on the property and is therefore not liable pursuant to the protections afforded it by the Tort Claims Act. Defendant further argues that, even if a dangerous condition did exist at the time Plaintiff fell, that it did not have actual and/or constructive notice of the dangerous condition. Defendant also contends that any action on its part was not palpably unreasonable considering the circumstances surrounding the accident.

Defendant cites to the unpublished Appellate Division case of Deane v. Winding River Park Ice Skating Rink, 2012 N.J. Super. Unpub. LEXIS 2491 (App. Div. 2012). In Deane, the

plaintiff sustained an injury from a fall at the Winding River Park Ice Skating Rink, which was owned and operated by the Township of Toms River. The plaintiff, a regular skater since 1990 who considered herself adept on the ice, was skating at the Township rink on December 21, 2008. An event called "Santa Skate" was taking place; Santa Claus and two elves skated with the other patrons. Id. at 1-2.

After more than a half-hour, the plaintiff noticed for the first time that one of the elves started to give out candy to the children on the rink, when two small children abruptly skated in front of her toward the elf. To avoid the children, the plaintiff pivoted quickly to her left, lost her balance, and fell; she broke her arm. Id. at 2.

The rink had large signs posted in the rink that prohibited anyone from bringing food or drinks on the ice. If anyone did, the employees were instructed to order the patron to leave the ice; this applied even during sponsored events. The rink manager denied any knowledge that the elf was going to distribute candy during the Santa Skate.

The trial court granted summary judgment to the municipality. It found that the elf giving out candy was not a dangerous condition, and that if that was a dangerous condition the municipality did not have notice of the dangerous condition.

The Appellate Division determined "that a fact issue exists regarding whether the elf distributing candy and causing children to congregate suddenly and without warning to the other skaters could have created a dangerous condition that posed a substantial risk of harm." Id. at 11. It then held that there was no evidence that the municipality had notice that the Santa Skate included the distribution of candy. "We are satisfied that, when a dangerous condition is created within seconds of the accident, no reasonable jury could find that the Township had actual or constructive notice of the condition." Id. at 13. The court did not address the issue of whether

the municipality's response to the dangerous condition was palpably unreasonable because it determined the municipality did not have notice of the dangerous condition.

The court affirmed the grant of summary judgment in favor of the municipality.

IV. PLAINTIFFS' ARGUMENT

Plaintiffs argue that Cape May created a dangerous condition as evidenced by the fact that it did have a rule that required children under 18 years of age to be accompanied by an adult, and then allegedly failed to enforce that rule. Plaintiffs have provided a video to the court which they have described as showing the skating rink allowed children to be unaccompanied by an adult. Plaintiffs say that the video demonstrates "the vast number of children that were unattended on the skating rink at the time Plaintiff fell and was injured. It also depicts the location of two skate guards who were certainly in a position to observe the number of children and the fact that they were unattended."

V. LAW AND ANAYLSIS

A. Summary Judgment Standard

Summary judgment is proper "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 judgment or order as a matter of law." R. 4:46-2(c). The Court stated in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995):

> By its plain language, Rule 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a "genuine issue as to any material fact challenged." That means a non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute.

Relatedly, a judge does not act as the fact-finder when deciding a Motion for Summary Judgment. Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73 (1954).

Pursuant to Rule 4:46-2(c), the moving party must "show that there is no genuine issue as to any material fact challenged." In Brill, 142 N.J. at 540, the Court stated:

> 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 fact finder to resolve the alleged disputed issue in favor of the nonmoving 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." Brill supra. 142 N.J. at 540, (alteration in original) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 214 (1986).

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

In determining whether a genuine issue of material fact exists, the motion judge must "engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, 142 N.J. at 533. This balancing process "requires the court to be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a 'genuine' issue of

material fact." Id. at 533-34. In short, the motion judge must determine "whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540. Where the evidence presented "is so one-sided that one party must prevail as a matter of law," courts should not hesitate to grant Summary Judgment. Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016); Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995)).

B. The Roller Skating Safety and Fair Liability Act

The operator of a commercial recreational facility has a general duty to exercise reasonable care for the safety of its patrons. Hojnowski v. Vans Skate Park, 187 N.J. 323, 335 (2006) (holding that "business owners owe to invitees a duty of reasonable or due care to provide a safe environment for doing that which is in the scope of the invitation"); McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 303-04 (1970). The measure of that duty is "'due care under all the circumstances.'" Schneider v. American Hockey and Ice Skating Center, Inc., 342 N.J. Super. 527, 534 (App. Div. 2001) (quoting Clohesy v. Food Circus Supermarkets, 149 N.J. 496, 506 (1997); Butler v. Acme Mkts., Inc., 89 N.J. 270, 276 (1982)).

Some activities, due to their very nature, require the participant to assume some risk because injury is a common and inherent aspect of the activity. Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 307 (2010) ("When it comes to physical activities in the nature of sports--physical exertion associated with physical training, exercise, and the like--injuries are not an unexpected, unforeseeable result of such strenuous activity."); Crawn v. Campo, 136 N.J. 494, 500 (1994). Thus, if "the evidence so clearly shows the injury-producing risk was a normal

incident of skating, the issue may be resolved against plaintiff as a matter of law." Calhanas v. South Amboy Roller Rink, 292 N.J.Super. 513, 521 (App. Div. 1996).

The Roller Skating Safety and Fair Liability Act states:

> a. The Legislature finds and declares that the recreational sport of roller skating is practiced by a large number of citizens of this State; provides a wholesome and healthy family activity which should be encouraged, and attracts to this State a large number of nonresidents, significantly contributing to the economy of this State. Therefore, the allocation of the risks and costs of roller skating is an important matter of public policy.
>
> b. The Legislature finds and declares that roller skating rink owners face great difficulty in obtaining liability insurance coverage, and that when such insurance coverage is available, drastic increases in the cost of the insurance have taken place and many roller skating rink owners are no longer able to afford it.
>
> This lack of insurance coverage adversely affects not only the roller skating rink owners themselves, but also patrons who may suffer personal injury and property damage as a result of accidents which occur on the premises of the roller skating rink.
>
> In order to make it economically feasible for insurance companies to provide coverage to roller skating rinks, the incidence of liability should be more predictable. That predictability may be achieved by defining the limits of the liabilities of roller skating rink operators in order to encourage the development and implementation of risk reduction techniques.
>
> N.J.S.A. 5:14-2.

The statute defines "Operator" as "a person or entity who owns, manages, controls or directs or who has operational responsibility for a roller skating rink." N.J.S.A. 5:14-3a. The statute defines "Roller skating rink" as "a building, facility or premises which provides an area specifically designed to be used by the public for recreational or competitive roller skating." N.J.S.A. 5:14-3c. Cape May was clearly an Operator, and the Convention Center roller skating rink is clearly a roller skating rink pursuant to the statute.

The statute also defines a "roller skater" as "a person wearing roller skates while in a roller skating rink for the purpose of recreational or competitive roller skating." Pasquarella was clearly a roller skater pursuant to the statute.

The statute places responsibilities on the operator of a roller skating rink. Two are pertinent to this case. The operator must post the duties of roller skaters in at least three conspicuous places. N.J.S.A. 5:14-4a. Cape May did that.

The operator must have at least one floor guard on duty for every approximately 200 skaters. Here, Cape May had two floor guards for approximately 20 to 25 skaters. N.J.S.A. 5:14-4c.

The statute also acknowledges the risks of roller skating: "Roller skaters and spectators are deemed to have knowledge of and to assume the inherent risks of roller skating, insofar as those risks are obvious and necessary." Such risks include "injuries which result from incidental contact with other roller skaters or spectators, injuries which result from falls caused by loss of balance, ..." N.J.S.A. 5:14-6. The assumption of risk set forth in the statute is a complete bar to suit:

> The assumption of risk set forth in section 6 of this act shall be a complete bar of suit and shall serve as a complete defense to a suit against an operator by a roller skater or spectator for injuries resulting from the assumed risks, notwithstanding the provisions of [N.J.S.A. 2A:15-5.1 et. seq.], relating to comparative negligence, unless an operator has violated his duties or responsibilities under this act, in which case the provision of [the Comparative Negligence Act] shall apply. Failure to adhere to the duties set out in sections 5 and 6 of this act shall bar suit against an operator to compensate for injuries resulting from roller skating activities, where such failure is found to be a contributory factor in the resulting injury, unless the operator has violated his duties or responsibilities under the act, in which case the provisions of [the Comparative Negligence Act] shall apply.
>
> N.J.S.A. 5:14-7.

The Appellate Division reviewed the Roller Skating Safety and Fair Liability Act in the case of Calhanas v. S. Amboy Roller Rink, 292 N.J. Super 513 (App. Div. 1996). In Calhanas, the plaintiff asserted that he was injured when a young roller-skater collided into him while he was skating with his daughter, leading to the fracture of his leg. Id. at 517. The facts are important. Plaintiff was injured during a couples' skate. He was skating with his young daughter. "[T]here was a small kid going, crossing the rink, going a little wild, skating by himself." Plaintiff said that "as I was riding with my daughter, the kid comes from the left side, cutting across towards the center of the rink and hit me on my left-hand side. I lost my balance and fell and that's when I broke my leg . . . in two places." Before the accident, the rink had announced the slower-paced couples skate. As he skated with his daughter around the rink two to three times, he observed the young skater: "He was just going by himself, crossing, you know, in front of people." Dina Calhanas, presumably Plaintiff's daughter, observed the child skating improperly during the prior all-skate session: "he was going fast and he kept crossing in front of people" – "I mean he keep, you know, zig zagging, riding in front of people . . . " – "he was going too fast for what he was supposed to go" – "he was going faster than anybody else."

Plaintiff filed suit alleging that the rink operator was negligent because it failed to provide adequate supervision and because it failed to enforce its own rules. Posted rink rules state no fast skating, no cutting across the floor, no weaving in and out, and no skating against the crowd. Plaintiff alleged that the skate guards should have enforced the rules.

Defendant moved for summary judgment. The trial court granted summary judgment in favor of the Defendant rink operator. Plaintiff appealed.

The Appellate Division held that the trial judge had to determine that the Plaintiff's injuries were caused by "incidental contact", the language used in the Act. It noted that the

phrase, "incidental contact", is not defined in the Act. It determined that it meant that the collision was an inherent, obvious risk, of roller skating. Id. at 521. The court determined that on the facts before it, which was only the Plaintiff's version of events, that as a matter of law the collision was an inherent and necessary risk of roller-skating. The Appellate Division reversed the grant of summary judgment. It found that the evidence indicated that the boy who ran into the Plaintiff had been skating in an obviously reckless manner for minutes before the collision. He was skating fast, no one was accompanying him, he was weaving in and out of other skaters, cutting across the rink and not proceeding in a circular fashion. Because of that evidence, the jury could not find that the collision that caused the Plaintiff's injuries was a normal incident of roller-skating.

The Appellate Division stressed, however, that there are circumstances where summary judgment could be granted: "It might be appropriate for the judge to conclude as a matter of law that the contact was incidental to skating if, for example, the proofs clearly showed that the child was skating in safe and unremarkable fashion, and simply lost control and struck the plaintiff." Id. at 522.

Here, in this case, this court's role is to ascertain whether there is sufficient evidence to enable a jury reasonably to decide that the collision between Pasquarella and the unknown child was not a normal incident of skating. Id. at 523. There is not any evidence that the boy in this case was skating recklessly. There is not any evidence that the boy was skating fast, that he was weaving in and out of other skaters, that he cut across the rink or did not skate in a circular fashion. In fact, Pasquarella testified that she had not seen the boy at any point previous to the collision. The evidence indicates that this was incidental contact that is a part of roller skating, the risk of which is assumed by every skater.

Because this was incidental contact, Pasquarella and her husband put all of their emphasis on the rink operator's rule that all children under the age of 18 must be accompanied by an adult or a parent. Pasquarella and her husband allege that the boy should have been accompanied by a parent or adult in accordance with the rules.

This court finds that the rink operator's rule that a person under the age of 18 must be accompanied by a parent or other adult must be read reasonably. The rule does mean that a minor cannot enter the facility by themselves. It does mean that while a minor is in the facility that a parent or other adult must also be in the facility. In other words, parents cannot just drop off their children and treat the roller-skating event as a free baby-sitting service.

This court rejects Plaintiffs' assertion that a parent must be on the rink with any and every minor at all times. Plaintiffs' testimony was that the loud speaker announcement stated that children must be accompanied by a parent or adult; it did not state that a minor must be accompanied by a parent or adult while on the rink skating. Plaintiffs provided a flyer that they found advertising a skating event. Plaintiffs argue the advertising flyer "was posted after the incident involving the Plaintiff but it embodies the safety rule that was announced over the PA system on the day of the incident." The flyer reads that "ALL CHILDREN UNDER 18 MUST BE ACCOMPANIED BY AN ADULT AT ALL TIMES." [Emphasis added by Plaintiffs in their Reply Brief.] The flyer is not persuasive as it was issued after Plaintiff was injured, presumably for the following season, and there is no evidence that the same flyer or a flyer with the same language was used for the season when Plaintiff was injured. In fact, neither Plaintiff testified that the words "at all times" were ever stated on the PA system, and those words are not included on any of the signs posted at the rink. Further, this court does not find that the words

"at all times" means even while on the rink, but simply means that a parent or adult must be at the facility with the child.

No reasonable person can conclude that requiring a minor to be accompanied by a parent or adult means that the parent or adult must be on roller skates in the rink with each minor. Enforcement of such a rule would apply to a minor who is a two-year old on skates for the first time, or a seventeen-year-old who is able to skate confidently. The statute describes roller-skating as a family activity; however, it will not be a family activity if a parent or adult must be on skates and in the rink with each child at all times.

Plaintiffs argue that the failure of Cape May to enforce its rule and require a parent or adult to be in the rink with the child caused the collision. There is no evidence to support that. There is not any evidence that this particular boy was not accompanied by a parent or adult on the rink. If the presence of a parent or adult were to prevent the collision, it would mean that the parent or adult would have to be physically in control of the minor. This would mean physical proximity, even holding or restraining a minor. Plaintiff's argument is really that a parent or adult was required to be with a minor on the rink, and holding or restraining that minor so as to prevent a collision with another skater.

One of the purposes of the statute was to keep roller skating rinks open. The emphasis stated in the statute was on the cost of purchasing insurance. Additionally, however, if a standard was approved by this court that required each and every minor to be accompanied on the rink by a parent or adult on skates, and then also a parent or adult who was holding or restraining each child, surely skating rinks would go out of business because the number of skaters would be substantially limited by the number of parents or adults who will get on skates. This would defeat the purpose of the statute.

Additionally, examples prove the unreasonableness of Plaintiffs' argument. Surely there are situations where a child is a better skater than a parent. Having a parent or adult on the rink could present more danger to other skaters than allowing the child to skate alone. The court notes that Plaintiffs' argument also requires one-to-one on the rink supervision. If a parent has more than one child, that could be nearly impossible, and likely dangerous if attempted. If there is only one parent or adult, and more than one child, and if the parent must skate with one child at a time, that conceivably could leave other children unsupervised off the rink.

Common sense and common experience also show that the Plaintiffs' argument is not reasonable. Many parents have taken their children to a birthday party at a roller skating rink. Some parents stay, but many do not. Almost none put on skates and skate with the children. Plaintiffs' argument would eliminate the roller skating birthday party. This too would make it harder for roller rinks to stay open.

It is just a fact of human nature and the human condition that as people get older they are less likely to get on roller skates. It is a child's activity, observed by parents and adults, but rarely participated in by parents and adults. Falling is inherent to the activity, and no one wants to break a hip. It was clearly not the intent of the statute that there could only be as many children on the roller rink as there were parents or adults to accompany them on the rink.

This court therefore rejects Plaintiffs' argument that the Cape May roller skating rink's rule required that an adult had to be on the rink with a child.

Plaintiffs argue the videotape shows "chaos" on the skate rink. That is simply not an accurate representation of the videotape. To the contrary, the videotape shows a family activity, controlled by skate guards. It shows a number of children of different skill levels, and the skate guards assisting those children, and keeping control of the skate rink. Generally, except for an

area where the most inexperienced skaters were located, the other skaters moved in a general counterclockwise circle. There were children on the skate rink that did not have a parent or adult in immediate proximity to them, but as the court finds above, the rule did not require that be a parent or adult in immediate proximity to each child.

Mr. Pasquarella testified that when his wife was skating her last lap that there was chaos on the floor. The implication is that the boy who hit Pasquarella was moving in a chaotic and unpredictable manner. The court understands that the video was taken some time before the accident, but there is nothing in the video to support the assertion of chaos. Further, even if there was chaos, there is nothing to support a finding that the boy who hit Pasquarella was skating in a chaotic manner.

Additionally, Plaintiffs' argument lacks a rational connection to the cause of the accident. It appears, Plaintiffs argue that, had a parent been on skates and in the rink with the boy, the boy would not have fallen and would not have caused Pasquarella to fall. There is no evidence to support that at all.

This court therefore finds that as a matter of law the contact between the unidentified boy and Plaintiff was incidental to skating. The only evidence is that the child was skating in a safe and unremarkable fashion, he lost control and struck the plaintiff. The court therefore grants summary judgment to the Defendant.

C. Tort Claims Act

1/ Dangerous Condition

Defendant also has filed for Summary Judgment based on the Tort Claims Act. The Torts Claims Act, N.J.S.A. 59:4-2, states:

> 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.

Plaintiff must therefore establish the following:

> (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,
> (4) 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, and
> (5) the action the entity took to protect against the condition or the failure to take such action was palpably unreasonable

Vincitore v. N.J. Sports & Exposition Auth., 169 N.J. 119, 124 (2001).

The term "dangerous condition" as referenced in the Torts Claims Act involves the physical condition of the property in question, not activities taking place on the property. Sharra v. City of Atlantic City, 199 N.J. Super. 535 (App. Div. 1985). A "dangerous condition" is "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).

Here, Plaintiffs contend that Cape May created the dangerous condition by not enforcing its rule that any minor be accompanied by a parent or adult on the rink and somehow controlled or restrained by the parent or adult.. A dangerous condition must create a substantial risk of injury. N.J.S.A. 59:4-1. A substantial risk cannot be minor, trivial, or insignificant. Polyard v. Terry, 160 N.J.Super. 497, 509 (App. Div. 1978), aff'd o.b., 79 N.J. 547 (1979). Looking at all the facts in the light most favorable to the Plaintiff, this court cannot conclude that the failure to require that each and every minor child on the rink be accompanied by a parent or adult created a dangerous condition. As stated above, this court finds that is not what the rule requires.

Further, a roller skating rink that has children on it who are not accompanied by a parent or adult within a distance where that parent or adult can exercise control or restraint on the child does not create a substantial risk of injury. Most unrestrained minor children on a skating rink present no risk to others; they follow the rules and they have fun and skate. Plaintiffs have not shown any evidence that an unaccompanied minor presents a substantial risk to others. This court cannot find that there was a dangerous condition, and summary judgment is granted to Cape May.

2/ Actual and/or Constructive Notice of a Dangerous Condition

As a basic rule, Title 59 requires that plaintiffs prove that the public entity had actual or constructive knowledge of the alleged dangerous condition.

The Torts Claims Act, N.J.S.A. 59:4-3(a-b), defines actual and constructive notice as follows:

> A public entity shall be deemed to have actual notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.

> A public entity shall be deemed to have constructive notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character.

A history of similar complaints or incidents may be sufficient to satisfy the actual notice standard. Carroll v. New Jersey Transit, 366 N.J. Super 380, 389 (App. Div. 2004).

In the present case, Plaintiffs can point to no history of complaints or incidents for Cape May to look upon as indicators of actual notice. There is no evidence that this one boy presented as a substantial risk to anyone. Actual notice does not exist.

The defendant may have constructive notice, however, if the plaintiff establishes that the dangerous "condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." N.J.S.A. 59:4-3(b).

Plaintiffs contend that Cape May had constructive notice because it knew that children on the rink were not accompanied by a parent or adult. Plaintiffs contend that the video shows that the skate guards were aware that children were not accompanied by an adult on the rink. As stated above, however, that is not a dangerous condition, and therefore Cape May could not have notice of a dangerous condition that does not exist.

Additionally, there is no evidence that this particular boy presented as a substantial risk to anyone. This case is not like the Calhanas case; there is no indication that the boy who hit Pasquarella had been skating in an uncontrolled or reckless fashion before the collision. To the contrary, Pasquarella testified that she had not seen the boy at any time before the collision. Furthermore, nothing in the record suggests that any of Defendant's employees were aware that the young boy was about to collide with Pasquarella. This "condition," if one could call it that,

was created in the fleeting moments before the collision; it did not exist for such a period of time and was not obvious enough to be deemed discoverable. This court finds that Cape May did not have notice of the alleged dangerous condition.

3/ Defendant's Conduct Was Not Palpably Unreasonable

"Although ordinarily the 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 v. County of Essex, 209 N.J. 51, 75 (2012). See also Maslo v. City of Jersey City, 346 N.J. Super. 346, 350-51 (App. Div. 2002). "Like any question of fact, the determination of palpable unreasonableness is subject to a preliminary assessment by the court as to whether it can reasonably be made by a fact-finder considering the evidence." Charney v. City of Wildwood, 732 F.Supp. 2d 448, 457 (D.N.J. 2010) (citing Black v. Borough of Atlantic Highlands, 263 N.J. Super. 445, 451-52 (App. Div. 1993).

To establish palpably unreasonable behavior, a plaintiff must prove "more than ordinary negligence." Coyne v. State Dep't of Transp., 182 N.J. 481, 493 (2005). In Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985), our Supreme Court wrote:

> We have no doubt that the duty of ordinary care, the breach of which is termed negligence, differs in degree from the duty to refrain from palpably unreasonable conduct. The latter standard implies a more obvious and manifest breach of duty and imposes a more onerous burden on the plaintiff.
> Id., quoting Williams v. Phillipsburg, 171 N.J. Super. 278, 286 (App. Div. 1979).

"Palpably unreasonable" conduct implies behavior that is unacceptable under any circumstance and must be so obvious that no prudent person would approve of the public entity's course of action or inaction. Holloway v. State, 125 N.J. 386, 403-04 (1991).

For 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." Ibid. (quoting Polyard v. Terry, 148 N.J. Super. 202, 216 (Law Div. 1977)). The Appellate Division has stated that "[t]he test requires consideration of what the [public entity] did in the face of all of the attendant circumstances, including, of course, the extent of the known danger and what it considered to be the need for urgency." Schwartz v. Jordan, 337 N.J. Super. 550, 555 (App. Div. 2001). An analysis of whether a public entity's behavior is palpably unreasonable involves "not only what was done" but also the entity's "motivating concerns." Id. at 563. "Simply put, the greater the risk of danger known by the [public entity] and sought to be remedied, the greater the need for urgency." Ibid.

Cape May's actions cannot be considered palpably unreasonable. Cape May hired skate guards to watch and control the rink and to enforce the rules of the rink. The number far exceeded the number required by the statute. The video shows that the skate guards did their jobs as Cape May described their jobs. Cape May posted signs that clearly stated the rules of the rink. As the court has found above, the rule cited by Plaintiffs did not require that a parent or adult be on the rink with each minor close enough to exercise control or restraint. Cape May's actions were not palpably unreasonable.

VI. CONCLUSION

Based on the foregoing, Cape May's Motion for Summary Judgment is Granted. First, Cape May is entitled to summary judgment pursuant to the protections afforded to it by the Roller Skating Safety and Fair Liability Act. Second, Cape May is entitled to summary

judgment pursuant to the protections afforded to it by the Tort Claims Act. Judgment is entered in favor of Cape May and against Plaintiffs.

James H. Pickering Jr, J.S.C.

Dated: April 19, 2023