Erin R. Thompson, Esquire #018371990
12,711E/cg
BIRCHMEIER & POWELL LLC
ATTORNEYS AT LAW
1891 State Highway 50, PO Box 582
Tuckahoe, NJ 08250
(609) 628-3414
Attorneys for Defendant City of Wildwood

Plaintiff DEBORAH DeRITA and RALPH DeRITA, h/w v. Defendants STATE OF NEW JERSEY, COUNTY OF CAPE MAY, CITY OF WILDWOOD, JOHN DOE 1-5 (a fictitious name) and ABC CORPORATION 1-5 (a fictitious corporation), i/j/s/a	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAPE MAY COUNTY DOCKET NO. CPM-L-264-14 CIVIL ACTION ORDER

THIS MATTER having been brought before the Court on a Motion For Summary Judgment and the Court having considered the matter and good cause appearing;

It is on this 3rd day of November 2015, **ORDERED** that defendant City of Wildwood's Motion is **GRANTED** dismissing any and all claims against it with prejudice.

It is **FURTHER ORDERED** that a copy of this Order shall be served upon all parties within seven (7) days of the date of receipt of same.

J. Christopher Gibson, J.S.C.

MEMORANDUM OF DECISION
IS ATTACHED

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

TO: **Erin R. Thompson, Esquire**
BIRCHMEIER POWELL
1891 State Highway 50
P.O. Box 582
Tuckahoe, NJ 08250

CASE: **Deborah DeRita v City of Wildwood et al**
DOCKET NO. **CPM L 264-14**

NATURE OF APPLICATION: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

MEMORANDUM OF DECISION ON MOTION

NATURE AND BACKGROUND OF MOTION

The complaint in this matter was filed on June 12, 2014. The discovery end date is September 8, 2015. There were two previous extensions of discovery for a total of 420 days of discovery. Arbitration was scheduled for October 15, 2015. Defendant, the City of Wildwood, moves for summary judgment pursuant to R. 4:46-2 to dismiss any and all claims against it with prejudice.

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

LEGAL ANALYSIS

R. 4:42-9(a)(6) provides that no fees for legal services shall be allowed in the taxed costs or otherwise except for in an action upon a liability or indemnity policy of insurance, in favor of a successful claimant.

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, the City of Wildwood, moves for summary judgment as a matter of law on the basis that Plaintiff failed to establish that a dangerous condition existed, Defendant had no notice of the alleged dangerous condition, and that Defendant's actions were not palpably unreasonable. Defendant notes the following facts as pertinent to its request.

On June 16, 2012, Plaintiff, Deborah DeRita, was in Wildwood, New Jersey, when she was walking on the boardwalk and tripped over a raised board which caused her to fall forward landing partially on the boards and partially on the cement tramway. See Exhibit A attached to Defendant's Brief. Plaintiff testified that she was wearing capris and an exercise flip flop at the time of her fall. See Exhibit B attached to Defendant's Brief. Plaintiff further testified that she did not at look to the ground to see what caused her fall until after the ambulance driver came. See Exhibit B attached to Defendant's Brief. At that point, she testified that she saw a raised board. Wherein her son took photographs of the area and of the board. See Exhibit C attached to Defendant's Brief.

However, Defendant maintains that the City of Wildwood inspects the boardwalk on a daily basis from 7:00 a.m. until approximately 2:00 p.m. each day. Specifically, Defendants submits that the construction crew inspects the boardwalk for any defects and immediately effectuates repairs. See Exhibit H

attached to Defendant's Brief. More so, Defendant maintains that it has no personal knowledge of Plaintiff's fall on June 16, 2012.

Accordingly, Defendant requests that this Court find that it is entitled to summary judgment as a matter of law pursuant to R. 4:46-2. Defendant sets forth the following contentions to support its request.

I. Defendant contends that Plaintiff failed to establish that there was a dangerous condition in the area where she allegedly fell.

Defendant asserts that it is entitled to summary judgment as a matter of law as Plaintiff cannot establish a dangerous condition existed as defined by N.J.S.A. §59:4-2. The statute states in pertinent part,

> 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.

The Tort Claims Act N.J.S.A. §59:1-1 sets forth that a public entity is immune from liability unless there is a specific provision of the Act that imposes it. More so, Defendant references the case of Sharra v. City of Atlantic City, 199 N.J. Super. 535, 540 (App. Div. 1985), wherein the

appellate court affirmed the trial court's finding that there was no merit to Plaintiff's claim that the city was negligent for failure to supervise activities on the boardwalk. Specifically, the court explained, "the term 'dangerous condition' as defined in N.J.S.A. §59:4-1 refers to the physical condition of the property itself and not to activities on the property." Further, our highest court noted that public entities may be liable for creating a dangerous condition, but the issue of whether a dangerous condition exists is a question for the jury. See Posey v. Bordentown Sewerage Auth., 171 N.J. 172, 188 (2002).

Defendant asserts that Plaintiff cannot establish a dangerous condition within the meaning of the Tort Claims Act. Specifically, Defendant acknowledges that Plaintiff believes she tripped on a raised board, but Defendant notes that she did not immediately see what caused her fall. See Exhibit B attached to Defendant's Brief. She testified that it was not until after the emergency personnel arrived that she looked at the boardwalk and noticed that she must have fell on a raised portion of it. See Exhibit B attached to Defendant's Brief. Thereafter Plaintiff's son took photographs of the area where she allegedly fell. See Exhibit C attached to Defendant's Brief.

Defendant further provides that the City of Wildwood inspects the boardwalk from 7:00 a.m. until approximately 2:00 p.m. on a daily basis. See Exhibit H attached to Defendant's Brief. Specifically, Defendant notes that Robert Anderson, who is the supervisor of Public Works for the City of

Wildwood, testified that the construction crew inspects the boardwalk and reports any defects on it they see. See Exhibit H attached to Defendant's Brief. Specifically, Anderson testified that the crew's procedure for inspecting the boardwalk is to take it section by section. See Exhibit H attached to Defendant's Brief.

Therefore, based on the above facts, Defendant maintains that Plaintiff cannot establish a dangerous condition existed under N.J.S.A. §59:4-2.

II. Defendant contends that Plaintiff failed to comply with the notice requirements pursuant to N.J.S.A. §59:4-3.

Defendant asserts that it had no actual or construction notice of a dangerous condition on the boardwalk prior to the injury in order to take protective measures. Defendant notes that N.J.S.A. §59:4-3 defines actual and constructive notice as follows:

> a. 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.*
>
> b. 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.*

(emphasis added).

Accordingly, Defendant acknowledges that in June of 2012 the boardwalk was inspected on a daily basis, several times a day. See Exhibit H

attached to Defendant's Brief. More so, Defendant notes that the construction department assigned a crew to patrol the boardwalk from 7:00 a.m. until 2:00 p.m. each day. See Exhibit H attached to Defendant's Brief. Specifically, the construction department would walk the boardwalk, inspect it for any defects, and repair the boardwalk replacing any boards they saw fit. See Exhibit H attached to Defendant's Brief.

Thus, Defendant contends that the area where Plaintiff allegedly fell did not constitute a dangerous condition, as there was no showing of actual or constructive notice of any dangerous condition.

III. Defendant contends that any actions or inaction on its part were not "palpably unreasonable."

As Defendant maintains that it did not have actual or constructive notice of a dangerous condition, Defendant also asserts that its inspection of the boardwalk was not palpably unreasonable. Specifically, Defendant cites N.J.S.A. §59:2-6, which states in pertinent part,

> 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 of any property; provided, however, that nothing in this section shall exonerate a public entity from liability for negligence during the course of, but outside the scope of, any inspection conducted by it, nor shall this section exonerate a public entity from liability for failure to protect against a dangerous condition as provided in chapter 4.

More so, Defendant references the case of Holloway v. State, 125 N.J. 386, 404 (1991), wherein our Supreme Court stated in pertinent part, "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."

Specifically, Defendant maintains that the construction crew inspects the boardwalk on a daily basis from 7:00 a.m. to 2:00 p.m. and makes repairs immediately. Therefore, Defendant contends that its actions are not palpably unreasonable. See Exhibit H attached to Defendant's Brief.

OPPOSITION

Plaintiff contends that summary judgment is inappropriate as there are genuine issues of material fact as to Defendant's liability.

I. Plaintiff sets forth the following as her counter-statement of facts.

Specifically, Plaintiff maintains that this matter arises from her fall that took place on June 16, 2012. See Exhibit E attached to Plaintiff's Opposition Brief. She asserts that she fell due to a raised board on the boardwalk. See Exhibit E attached to Plaintiff's Opposition Brief. Thereafter, she received numerous injuries including a fracture of her proximal humerus of the right shoulder. See Exhibit E attached to Plaintiff's Opposition Brief. On the day of the fall, Plaintiff notes that she went to the Wildwood boardwalk to visit her son who as working at Mariner's Pier and then go to lunch. See Exhibit A attached to Plaintiff's Opposition Brief. Plaintiff submits that her friend, Andrea McPherson, and her daughter, Janna McPherson, accompanied her. See Exhibit A attached to Plaintiff's Opposition Brief.

Plaintiff purports that just prior to her fall she was looking forward in the direction of Sam's pizza when she was "immediately caught and went down like a tree." See Exhibit A attached to Plaintiff's Opposition Brief. Plaintiff testified that she fell on the boards of the boardwalk and landed partially on the concrete section that is used by the tram cars. See Exhibit A attached to Plaintiff's Opposition Brief. More so, Plaintiff provides that she could not get up on her own, but after the ambulance personnel helped turn her so she could get on a stretcher, she was able to see the raised board. See Exhibit A attached to Plaintiff's Opposition Brief. Specifically, Plaintiff noted that when emergency personnel were turning her around, she noticed that the board was about 2-2 ½ inches raised and a little bit in front of her foot. See Exhibit A attached to Plaintiff's Opposition Brief. Additionally, Plaintiff provides that on the same day as her fall, her son took photographs of the raised board that caused her fall. See Exhibit B attached to Plaintiff's Opposition Brief.

As to Defendant's alleged negligence, Plaintiff maintains that the City of Wildwood was the owner and operator of the boardwalk. See Exhibit F attached to Plaintiff's Opposition Brief. Moreover, Plaintiff notes that Mr. Anderson testified that there were three employees in the construction department who inspected and repaired the boardwalk in 2012. See Exhibit C attached to Plaintiff's Opposition Brief. Further, Plaintiff provides that Mr. Anderson testified that raised boards on the boardwalk are caused "99% of the time" by vehicles or bicycles. See Exhibit C attached to Plaintiff's

Opposition Brief. In response to how long it takes for a board to raise up, Mr. Anderson testified that he has seen them lift right up when a vehicle drives over it. See Exhibit C attached to Plaintiff's Opposition Brief. More so, Mr. Anderson testified that the tram cars sometimes do not stay on the concrete portion and sometimes go on the boardwalk, which breaks the board. See Exhibit D attached to Plaintiff's Opposition Brief. Mr. Anderson also noted that the last two cars of a tram car may swerve and come of the cement onto the wood of the boardwalk, wherein it was common to find broken boards up against the concrete. See Exhibit G attached to Plaintiff's Opposition Brief. Plaintiff submits that Mr. Anderson testified that during the summer half of the boardwalk may be inspected on a daily basis if there aren't too many problems. See Exhibit C attached to Plaintiff's Opposition Brief.

As to the raised board in the pictures taken by Plaintiff's son, Mr. Anderson testified that the raised board depicted would require maintenance and should be screwed down if it was noticed by individuals conducting inspection. See Exhibit C attached to Plaintiff's Opposition Brief. Plaintiff maintains that she fell on June 16, 2012, which was a Saturday and there were no inspections of the boardwalk on that day. See Exhibit C attached to Plaintiff's Opposition Brief. Also, Mr. Anderson testified that he did not recall what area of the boardwalk was last inspected before the date of Plaintiff's fall. See Exhibit C attached to Plaintiff's Opposition Brief. Specifically, Plaintiff submits that Mr. Anderson noted there was no indication in the work log for the week prior to Plaintiff's fall of any inspection of the

boardwalk near the area of Pine Avenue and the boardwalk, which is the area where Plaintiff allegedly fell. See Exhibit C attached to Plaintiff's Opposition Brief.

Accordingly, Plaintiff contends that she suffered injuries as a direct result of Defendant's negligence, wherein she dislocated her right shoulder, suffered a proximal humerus fracture to her right shoulder, and incurred a wage loss of approximately $71,000.00. See Exhibits I and J attached to Plaintiff's Opposition Brief.

II. Plaintiff contends that the raised board that caused her fall is a "dangerous condition."

Plaintiff asserts that under the Tort Claims Act, the board in question constitutes a dangerous condition that creates a substantial risk of injury and it was reasonably foreseeable. Specifically, Plaintiff notes that she did not observe the board prior to her fall, that the board in question was raised 2 – 2 ½ inches, and that Mr. Anderson admitted that the raised board depicted represented a tripping hazard to pedestrians on the boardwalk. Plaintiff references the case of Atlaese v. Long Beach Twp., 365 N.J. Super. 1, 5 (App. Div. 2003) to support her assertion that the board in question did not invite enhanced caution as one would not expect to find such a condition located on the boardwalk.

Thus, Plaintiff purports that the raised board constitutes a dangerous condition.

III. Plaintiff contends that her injury as proximately caused by the raised board.

Plaintiff maintains that it is an undisputed material fact that she fell on the boardwalk due to the raised board in question, and as a direct result she suffered serious injuries. More so, her orthopedic doctor, Dr. Deluca, opined that Plaintiff suffered a permanent injury of her right shoulder as a result of the fall. See Exhibit I attached to Plaintiff's Opposition Brief.

IV. Plaintiff contends that the raised board created a reasonably foreseeable risk of the kind of injury that was incurred.

Plaintiff provides that Mr. Anderson testified that the raised board depicted in the photographs represented a hazard for pedestrians on the boardwalk. See Exhibit C attached to Plaintiff's Opposition Brief. Thus, Plaintiff asserts that the presence of the raised board in a high pedestrian traffic area in the summertime clearly create a foreseeable risk of a fall injury.

V. Plaintiff contends that by allowing vehicles to travel on the boardwalk Defendant created the hazardous condition pursuant to N.J.S.A. §59:4-2(a).

Plaintiff maintains that Defendant had the ability to control the presence of vehicles on the boardwalk, but took no action to prevent or limit the number of vehicles traveling on the boardwalk. Thus, as the raised board

was adjacent to the concrete section where tram cars routinely cause damage to boards, by allowing such constant traffic Defendant create the raised board that caused Plaintiff's fall.

Plaintiff references the case of Atalese to support the assertion that the notice provisions of N.J.S.A. §59:4-3 are not triggered, rather the construction crew of the City of Wildwood created the dangerous condition by negligently permitting the presence of vehicles on the boardwalk.

VI. Plaintiff contends that, in the alternative, Defendant had constructive notice of the raised board pursuant to N.J.S.A. §59:4-3(b).

Plaintiff maintains that Defendant was aware of the constant traffic of tram cars and vehicles on the boardwalk. More so, Plaintiff purports that raised boards were a daily occurrence on the boardwalk and represented a "dangerous conditions." As Plaintiff fell on a Saturday when there were no inspections and did not provide evidence that the area where Plaintiff fell was inspected in the week prior to Plaintiff's fall, Defendant failed to exercise due care that would have revealed the raised board in question. Thus, Defendant had constructive notice of the dangerous condition and failed to repair it.

VII. Plaintiff contends that the actions and/or inactions of Defendant were palpably unreasonable.

Plaintiff submits that Defendant had the ability to control whether vehicles were permitted on the boardwalk, the number of them, and the

frequency of them. Thus, Defendant permitted constant traffic of tram cars and vehicles that resulted in raised boards at a time when thousands of pedestrians were using the boardwalk. Further, Plaintiff maintains that Defendant failed to provide any evidence that the area where Plaintiff fell was inspected prior to her fall or that inspection procedures were followed. Thus, Plaintiff asserts that Defendant could have limited the number of vehicles and tram car activities, which would have taken minimal effort on part of Defendant. As such, Plaintiff provides that Defendant's actions and/or inactions in this matter were palpably unreasonable.

DISCUSSION

This Court finds that summary judgment is appropriate as there are no genuine issues of material fact.

I. This Court finds that Plaintiff can establish that there was a dangerous condition on the boardwalk.

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 that it will be used." Defendant asserts that Plaintiff cannot establish a dangerous condition within the meaning of the Tort Claims Act. Specifically, Defendant provides that Plaintiff believes she tripped on a raised board, but she testified that she did not immediately see what caused her fall. See Exhibit B attached to Defendant's Brief. On the other hand, Plaintiff testified that she fell on the boards of the boardwalk and landed partially on the concrete section that is

used by the tram cars. See Exhibit A attached to Plaintiff's Opposition Brief. More so, Plaintiff provides that she could not get up on her own, but after the ambulance personnel helped turn her so she could get on a stretcher, she was able to see the raised board. See Exhibit A attached to Plaintiff's Opposition Brief. Specifically, Plaintiff noted that when emergency personnel were turning her around, she noticed that the board was about 2-2 ½ inches raised and a little bit in front of her foot. See Exhibit A attached to Plaintiff's Opposition Brief. Additionally, Plaintiff provides that on the same day as her fall, her son took photographs of the raised board that caused her fall. See Exhibit B attached to Plaintiff's Opposition Brief. Plaintiff further provides that Mr. Anderson testified that the raised board depicted in the photographs represented a hazard for pedestrians on the boardwalk. See Exhibit C attached to Plaintiff's Opposition Brief.

Thus, pursuant to the Tort Claims Act N.J.S.A. §59:4-1, Plaintiff can establish that a dangerous condition existed at the time of her fall. Specifically, this Court finds that relevant to the statute, Plaintiff testified that she observed the board was raised about 2-2 ½ inches and further that Robert Anderson, who is the supervisor of Public Works for the City of Wildwood, testified that the raised board depicted in the photographs taken by Plaintiff's son represented a hazard for pedestrians. See Exhibit C attached to Plaintiff's Opposition Brief. More so, this Court notes that Mr. Anderson testified that the raised board depicted would require maintenance

and should be screwed down if it was noticed by individuals conducting inspection. See Exhibit C attached to Plaintiff's Opposition Brief.

Thus, the Tort Claims Act N.J.S.A. §59:1-1 sets forth that the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done. See Polzo v. Cnt'y of Essex, 209 N.J. 51, 65 (2010). The Legislature confined the scope of a public entity's liability for negligence to the prescriptions in the Torts Claim Act. Id. In the case of Polzo, our Supreme Court explained in pertinent part,

> [There is a] distinction between N.J.S.A. §59:4-2(a), which speaks of a public employee's negligent act or omission that affirmatively creates a dangerous condition, and N.J.S.A. §59:4-2(b), which speaks of a public entity that is on notice of a dangerous condition either actually or constructively and fails to protect against it. A dangerous condition of property may be created if, for example, a public entity's snow plow creates a pothole or the entity's paving of a roadway is negligently performed.
>
> *But a public entity does not create a dangerous condition merely because it should have discovered and repaired it within a reasonable time before an accident.* The fact that the public entity did not create a dangerous condition does not render it unaccountable under the TCA. *Public-entity liability may also be based on the entity's actual or constructive notice of a dangerous condition if its failure to protect against the danger is palpably unreasonable.*

209 N.J. at 66-67 (emphasis added).

Consequently, this Court finds that Plaintiff can establish a dangerous condition existed pursuant to N.J.S.A. §59:4-1, but such a determination alone does not establish liability against Defendant. This Court also

distinguishes the case of Atlaese v. Long Beach Twp., 365 N.J. Super. 1, 5 (App. Div. 2003), wherein the appellate court explained,

> [T]o be considered a 'substantial risk of injury' a condition of property cannot be minor, trivial, or insignificant. However, the defect cannot be viewed in a vacuum. Instead, it must be considered together with the anticipated use of the property to determine whether the condition creates a substantial risk of injury and, therefore, qualifies under the statute as dangerous.

Based on that interoperation of the statute, the appellate court found the following:

> [T]he differential in pavement was on an area of the roadway designated for pedestrians and bicyclists. As such, the reasonably foreseeable users include walkers, runners, and all types of bicyclists. Given these anticipated uses, we conclude that a three-quarter inch difference in the level of the pavement occupying a significant portion of a bike lane *and spanning an entire block* could be accepted by a jury as creating a substantial risk of injury and hence a dangerous condition under the Tort Claims Act.

Id. at 6 (emphasis added).

Unlike Atalese, the instant matter pertains to a dangerous condition established from a board raised 2-2 ½ inches that did not span the entire block. However, as Mr. Anderson testified that it was common to find raised boards adjacent to the concrete as the last two cars of the tram car swerve sometimes from the concrete onto the boards of the boardwalk, the board in question constitutes a dangerous condition that created a substantial risk of injury and was reasonably foreseeable in the exercise of due care. See Exhibit G attached to Plaintiff's Opposition Brief.

II. This Court finds that Defendant did not create a hazardous condition.

N.J.S.A. §59:4-2 defines the liability to a public entity under the Tort Claims Act as follows,

> 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.

Our Supreme Court explained in the case of Polzo v. Cnt'y of Essex, 209 N.J. 51, 68 (2012),

> A dangerous condition of property may be created if, for example, a public entity's snow plow creates a pothole or the entity's paving of a roadway is negligently performed. But a public entity does not create a dangerous condition merely because it should have discovered and repaired it within a reasonable time before an accident.

Plaintiff contends that Defendant allowed vehicles to travel on the boardwalk, which created the hazardous condition pursuant to N.J.S.A. §59:4-2(a). However, this Court finds that the instant matter differs from Polzo as Defendant did not create a hazardous condition, rather the tram car sometimes swerves from the concrete area where it is supposed to ride onto

the boardwalk. This Court determines that no evidence has established this actually occured, rather Mr. Anderson proposes it based on his experience. See Exhibit G attached to Plaintiff's Opposition Brief. More so, Plaintiff did not establish that Defendant owns or controls the tram car that allegedly created the dangerous condition.

III. This Court finds that Defendant did not have actual or constructive notice of the dangerous condition.

N.J.S.A. §59:4-3 defines actual and constructive notice as follows:

> a. 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.*
>
> b. 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.*

(emphasis added).

Defendant acknowledges that in June of 2012 the boardwalk was inspected on a daily basis, several times a day. See Exhibit H attached to Defendant's Brief. More so, Defendant notes that the construction department assigned a crew to patrol the boardwalk from 7:00 a.m. until 2:00 p.m. each day. See Exhibit H attached to Defendant's Brief. Specifically, the construction department would walk the boardwalk, inspect it for any defects, and repair the boardwalk replacing any boards they determined were in need of repair.

See Exhibit H attached to Defendant's Brief. Thus, Defendant contends that the area where Plaintiff allegedly fell did not constitute a dangerous condition, as there was no showing of actual or constructive notice of any dangerous condition.

This Court finds that Defendant did not have actual notice of a dangerous condition as there was no evidence presented in this matter that Defendant or its construction crew was aware of the specific raised board, which allegedly caused Plaintiff's fall. Further, this Court determines that the work logs in which the construction crew documents repairs made no mention of the board in question. See Exhibit C attached to Plaintiff's Opposition Brief. Thus, Defendant did not have personal knowledge where it knew or should have known of the board in question pursuant to N.J.S.A. §59:4-3.

Additionally, this Court finds that Defendant did not have constructive notice of a dangerous condition as Plaintiff failed to establish that the raised board existed for such a period of time that Defendant should have discovered it through the exercise of reasonable care. This Court finds that the instant matter is similar to Polzo v. Cnt'y of Essex, 209 N.J. 51, 68 (2012), wherein our Supreme Court explained that "[w]hether a public entity is on actual or constructive 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 by the County -- as suggested by plaintiff -- would have discovered the condition." The Court noted in pertinent part,

> [T]he County *did* appear to have a proactive program, even if it was less than ideal. The County did more than just respond to pothole complaints received by telephone. The County inspected roads based both on the date of the last overlay and a known history of pavement problems. Additionally, County workers repairing a complained-of pothole would inspect other portions of a roadway for defects and make necessary repairs. Plaintiff's expert has not shown that his conception of a routine road inspection program would have resulted in a more timely review of the roadway than the one done here five weeks before the accident.

Id. at 69.

Accordingly, in the instant matter, this Court finds that Defendant did have an inspection procedure established wherein the construction crew inspected the boardwalk for any defects and immediately effectuated repairs. See Exhibit H attached to Defendant's Brief. Mr. Anderson testified that the crew's procedure for inspecting the boardwalk is to take it section by section. See Exhibit H attached to Defendant's Brief. He further testified that the construction department assigned a crew to patrol the boardwalk from 7:00 a.m. until 2:00 p.m. each day. See Exhibit H attached to Defendant's Brief. Specifically, the construction department would walk the boardwalk, inspect it for any defects, and repair the boardwalk replacing any boards they saw fit. See Exhibit H attached to Defendant's Brief. Although, Plaintiff submits that Mr. Anderson testified that there were only three employees in the construction department who inspected and repaired the boardwalk in 2012, this Court finds that Plaintiff has not shown that more than three employees performing inspections at a time would have resulted in a more timely review of the boardwalk than the one done before the accident. See Polzo v. Cnt'y of

Essex, 209 N.J. 51, 69 (2012). Additionally, this Court notes that Mr. Anderson testified that the boardwalk was inspected on Monday as well as Friday of the week Plaintiff allegedly fell as such inspections were logged by the crew members. See Exhibit C attached to Plaintiff's Opposition Brief. Although Defendant did not prove that it inspected the specific area of the boardwalk where Plaintiff allegedly fell prior to the fall, nor did Defendant show when that specific area was previously inspected, such a lack of information does render Defendant liable because Defendant did establish that inspections of the boardwalk were being conducted at that time.

Consequently, Plaintiff failed to establish that Defendant had actual or constructive notice of the raised board that allegedly caused Plaintiff's fall.

IV. This Court finds that Defendant did not act palpably unreasonable.

The term "palpably unreasonable" is set forth in N.J.S.A. §59:2-3(d), which states in pertinent part,

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

Our Supreme Court explained that the term "palpably unreasonable" under the statute implies behavior that is patently unacceptable under any given circumstance. Polzo v. Cnt'y of Essex, 209 N.J. 51, 75-76 (2012). The

Court reasoned that "[w]hen a public entity acts in a palpably unreasonable manner, it should be obvious that no prudent person would approve of its course of action or inaction." Id. at 76. Further, the Court in Polzo noted that 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.

In the instant matter Defendant is responsible for maintaining the boardwalk. Defendant has a procedure in place to inspect the boardwalk and immediately effectuate repairs. This Court notes that the boardwalk is about 28 blocks with approximately 29,000 boards. See Exhibit H attached to Defendant's Brief. Under the procedure in place, the construction crew takes a section of the boardwalk, inspects it for broken boards, raised boards, raised screws, nails, among other things. See Exhibit H attached to Defendant's Brief. The inspection takes place between the hours of 7:00 a.m. and 2:00 p.m. Monday through Friday. See Exhibit H attached to Defendant's Brief. Then, the inspections are logged in a daily work log. See Exhibit H attached to Defendant's Brief. Thus, this Court finds that it is fair to say that in view of Defendant's considerable responsibility and inspection procedures in place, Defendant did not act palpably unreasonable by failing to remedy the raised board before Plaintiff's fall.

This Court notes that the standard originated in the case of Paternoster v. New Jersey Dep't of Transp., 190 N.J. Super. 11, 18 (App. Div. 1983), wherein the Court stated,

> The Comment [to N.J.S.A. §59:2-3(d)] provides...this subsection incorporates the thesis that once resources have been provided a public entity may be liable for its determination of priorities in the application of such resources if that determination is palpably unreasonable.

Under this standard, the Court found that whether the conduct of the public entities was palpably unreasonable was a question for the jury as,

> The record was susceptible to the inference that the activities of defendants, the state and the county, constituted palpably unreasonable conduct, in that they were aware of the dangerous situation at the intersection involving the piles of snow.

Id. at 19.

More so, the Court noted that the record showed that the roadway at the intersection was under the control of the State and County; that they were well aware of the dangerous situation that existed at the intersection; they attempted to take remedial or corrective measures; and that neither contended that they did not have the necessary equipment or qualified manpower to do the job properly. Id. Thus, the Court there found summary judgment inappropriate.

Unlike Paternoster, this Court notes that Defendant did not attempt to take remedial measures as Defendant did not have notice to remedy the condition before Plaintiff's fall nor created the dangerous condition. Although Plaintiff contends that Defendant had the ability to control whether vehicles were permitted on the boardwalk, the number of them, and the frequency of them, this Court finds that Plaintiff failed to establish that such a reduction would result in a more timely review of the boardwalk than the one

conducted the week of Plaintiff's fall. This Court further notes that Defendant did not prove that it inspected the specific area of the boardwalk where Plaintiff allegedly fell prior to the fall nor did Defendant show when that specific area was previously inspected. However, this Court finds that the absence of such information does not render Defendant liable as Defendant did prove that inspections procedures were being conducted at the time of Plaintiff's fall, but they took place at different sections of the boardwalk.

Thus, Plaintiff failed to show that a reduction in the number of vehicles of the boardwalk would have resulted in a more timely review of the boardwalk to prevent Plaintiff's accident. Plaintiff did not offer any expert opinion as to cause of the raised board, the duration of the condition or the failure to address the condition. The case law demonstrates that an issue for the jury as to palpably unreasonable conduct exists when the defendant knew of the condition, sought to remedy it, and failed to do so, which differs from the facts at hand.

CONCLUSION

The motion is opposed. Defendant's motion for summary judgment pursuant to R. 4:46-2 is granted.

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

November 3, 2015

J. Christopher Gibson, J.S.C.