SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1104-16T2

LEONICE M. WURST and
ANDREW WURST, husband
and wife,

Plaintiffs-Appellants,

v.

CITY OF OCEAN CITY, CITY
OF OCEAN CITY ENGINEERING
DEPARTMENT,

Defendants-Respondents,

and

NEW JERSEY AMERICAN WATER COMPANY,

Defendant/Third-Party Plaintiff,

v.

LAFAYETTE UTILITY CONSTRUCTION
CO., INC.,

Defendant/Third-Party Defendant.

Argued March 20, 2018 – Decided May 10, 2018

Before Judges Yannotti, Carroll and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Cape May County, Docket No. L-0274-14.

Vincent F. Reilly argued the cause for appellants (Reilly, Janiczek, McDevitt, Henrich & Cholden, PC, attorneys; Vincent F. Reilly and Michelle B. Cappuccio, on the briefs).

Robert P. Merenich argued the cause for respondents (Gemmel, Todd & Merenich, PA, attorneys; Robert P. Merenich, on the brief).

PER CURIAM

Plaintiffs Leonice Wurst and her spouse Andrew Wurst appeal from an order dated August 16, 2016, which granted summary judgment in favor of defendants City of Ocean City (City) and City of Ocean City Engineering Department (Engineering Department), and dismissed plaintiffs' complaint with prejudice. Plaintiffs also appeal from an order dated October 27, 2016, which denied their motion for reconsideration of the August 16, 2016 order. We affirm.

I.

Plaintiffs allege that on August 18, 2013, Ms. Wurst was riding a bicycle on Wesley Road in Ocean City. She claims she fell from her bicycle when its tire encountered an uneven raised area of the roadway, where the concrete section joins a section paved with asphalt. Ms. Wurst allegedly suffered severe injuries in the fall. Plaintiffs filed a lawsuit, in which Ms. Wurst asserted claims for the injuries she sustained in the fall. Mr. Wurst

asserted a claim for the loss of his spouse's care, society, companionship, and consortium.

Plaintiffs named the City, the Engineering Department, and New Jersey American Water Works (NJAWW) as defendants. They later dismissed their claims against NJAWW, and amended the complaint to add Lafayette Utility Construction (Lafayette) and New Jersey American Water Company (NJAWC) as defendants. In May 2016, the trial court granted motions for summary judgment by Lafayette and NJAWC.

In June 2016, the City and the Engineering Department filed a motion for summary judgment pursuant to the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3, arguing that plaintiffs could not establish a cause of action against them based on the alleged dangerous condition of Wesley Road. Plaintiffs opposed the motion.

We briefly summarize the evidence presented to the trial court on the motion. Photographs of the section of the road where Ms. Wurst allegedly fell show the center of the road is paved with concrete, and the parts of the road from the concrete area to the curbs are paved with asphalt. The asphalt sections extend approximately two feet beyond vehicles parked at the curbs. In one area, where an asphalt section meets the concrete section, there is a height differential of approximately one and one-half inches.

On the morning of August 18, 2013, Ms. Wurst and her daughter, L.A., were riding their bicycles to a church on Second Street and Atlantic Avenue, which is roughly one mile from the plaintiffs' home.[1] They traveled southbound on Wesley Road, crossing Battersea Road, with Ms. Wurst riding in front of L.A.

At her deposition, Ms. Wurst testified that she was riding on the asphalt in close proximity to the concrete-paved section of the road because she does not like to ride her bicycle close to the parked cars, out of fear that someone will open a car door into her lane of travel. She believed that at the time she fell, she was looking at the road surface in front of her bicycle.

Ms. Wurst said she fell off her bicycle because its tire struck the height differential between the asphalt and the concrete paved part of the roadway. Ms. Wurst returned to the subject area the following day. She was unable to determine the exact location where she fell, but identified the approximate location. She also could not recall if at the time of the incident, there were any cars parked to her right. She testified, however, that normally cars are parked along Wesley Road.

L.A. testified that at the time of the incident, she was not watching the tires on her mother's bicycle and she did not see

[1] In this opinion, we use initials to identify certain individuals to assure their privacy.

what the tire may have hit. She testified, however, that she saw her mother go over the front of her handlebars and hit her head. She could not recall whether any portion of Ms. Wurst's body touched the concrete roadway when she fell, and she claimed her mother's bicycle was traveling straight at the time the incident occurred.

L.A. also could not recall whether there were cars parked in the subject area on the day of the incident, and she did not remember seeing any holes or potholes on the concrete roadway or asphalt section of the road in that location. After her mother fell, L.A. inspected the area to see what may have caused her mother to fall, but she did not remember what she observed.

When L.A. returned to the area some time later, she recalled seeing a height differential in the road. L.A. did not measure the differential, and she did not recall her mother ever telling her she had fallen due to a height differential in the road. L.A. was unsure of the exact location where her mother fell, and she could only approximate the location.

Ocean City Police Officer J. Scott Ruch was called to the scene of the accident. Ms. Wurst told the officer she had been biking on the asphalt section of the road and not the concrete section. Ruch testified that Ms. Wurst did not point out a specific location where she fell. Instead, she explained she was planning

to make a left turn onto Laurel Road and fell on a little crater with stones and debris in it. Ruch said Ms. Wurst did not indicate whether the height differential in the road caused her fall.

Ruch stated that several neighbors came out and told him that numerous bicyclists have fallen in this section of Wesley Road "due to the uneven roadway which is concrete, and the shoulder which is pebble blacktop." However, none of the neighbors told Ruch they had called the City's public works department regarding the condition of the road. Ruch noted that no one reported witnessing the accident.

K.L., a resident on Wesley Road, testified that she was aware there was a "difference" between the asphalt shoulder and the concrete section of the roadway. She testified that she heard, but did not see, Ms. Wurst fall. She recalled that at the time of the accident, she spoke with Ruch about people falling in that area, but K.L. could not recall whether before the incident, she or her husband ever called the City regarding the road surface or the falls. K.L. also did not remember actually seeing anyone fall on the roadway.

T.P.V., another resident on Wesley Road, also did not witness Ms. Wurst's fall, and he did not know what caused her to fall. T.P.V. testified that he had recalled seeing people riding bicycles and falling on Wesley Road in the vicinity of his home. However,

he did not know if he had ever complained to the City about the height differential between the asphalt and concrete sections of Wesley Road. He did not know whether any of his neighbors had reported that condition to the City.

J.F., who also resides on Wesley Road, testified that she has never seen anyone fall off a bicycle on the road in the subject area, and she has never called the City with regard to the condition of the roadway. J.F. testified that most of the people she has seen riding bicycles on Wesley Road ride on the concrete section of the roadway and not on the asphalt section. She did not see Ms. Wurst fall off of her bicycle.

Arthur Chew testified that in 2013 he was the City's only engineer. Chew developed and used a road-rating system to assess and evaluate the condition of the City's roads, and in November 2009 and August 2012, he assessed and evaluated Wesley Road and other roads. He focused primarily on the concrete roadways.

Chew considered the road surface on Wesley Road to be appropriate and safe. He did not have any concerns about the use of the concrete and asphalt sections of the road. He stated that the resurfacing of Wesley Road, including the part of the road where Ms. Wurst claimed she fell, was not part of the City's five-year capital plan as a result of the road-ratings performed in 2012.

Chew testified the location where Ms. Wurst allegedly fell was one in which she was required to ride on the concrete roadway, and that section of the road was not a designated bicycle route. Until after Mrs. Wurst's fall, Chew was unaware of the height differential that existed where the concrete section meets the asphalt section on Wesley Road.

Joseph Berenato, III, the City's general supervisor of public works, testified that he was familiar with the subject area and that he was not aware of a height differential between the concrete and asphalt sections of the roadway. He said the City inspects its roads three or four times a year.

Fran Inacio, the City's supervisor of streets, testified that his duties include overseeing the inspection and repair of potholes, concrete, and asphalt. He said the City has ninety-three miles of streets and thirty-three miles of alleys to inspect and repair. Inacio said the City inspects the roads three or four times each year. He indicated the location where Ms. Wurst allegedly fell has concrete and asphalt surfaces, and he noted that this condition has existed for approximately fifty years.

Inacio further testified that he observed a height differential between the concrete and asphalt sections of the road. He stated, however, that he inspected this location in 2013 and did not perceive the height differential to be unsafe to

persons riding bicycles. He said these individuals should be cycling on the concrete-paved section and not the asphalt section of the road.

Roger McLarnon, the Director of Community Operations for the City, also testified that the City inspects its roads three or four times a year. He said individuals are permitted to ride their bicycles on any street in the City so long as they ride as close to the shoulder as possible. McLarnon was familiar with the location where Ms. Wurst allegedly fell, and he said the condition of the road there was "probably not the most desirable."

Wayne Blizzard, an engineering aide for the City, testified that while the subject area could be classified as hazardous, he explained that there are different degrees of hazardousness. He could not, however, clearly state the degree of hazardousness that would warrant action by the City.

Joseph B. Mills, P.E., prepared an engineering report dated October 1, 2015, on behalf of plaintiffs. In his report, Mills indicated that Ms. Wurst was riding her bicycle in the southbound shoulder on Wesley Road when her front tire struck a height differential between the shoulder and the roadway, causing her to lose her balance and fall. Mills opined to a reasonable degree of engineering certainty that the height differential was an "egregiously hazardous and unsafe" condition and the City either

knew or should have known about the regularity of bicycle incidents along that section of the road.

Wayne F. Nolte, Ph.D., P.E., prepared an engineering report dated February 25, 2016, on behalf of defendants. Nolte opined to a reasonable degree of engineering certainty that the City made a reasonable assessment of its roads, including Wesley Road in and about the area where Ms. Wurst allegedly fell. Nolte stated that bicyclists are required to ride on the concrete section of the road, and it was in a safe condition.

Nolte identified the height differential between the concrete and asphalt sections of the roadway. He described the height differential as "clearly defined" and "open and obvious." He stated that Ms. Wurst had been traveling on the asphalt shoulder. She had a reasonable opportunity to see the height differential and recognize that unless she crossed it at a severe angle or perpendicular to the height differential, she was creating a hazard for herself.

Mills prepared a supplemental engineering report on March 18, 2016, in which he opined that N.J.S.A. 39:4-14.2 and 39:4-10.11 "in no way indicate[] that bicyclists shall or must ride on the roadway. [The statutes] only stipulate[] that if [bicyclists] do ride on the roadway, they shall ride as far right as possible."

Nolte prepared a supplemental report dated March 31, 2016. He opined that N.J.S.A. 39:4-14.2 and 39:4-10.11, clearly state that a bicyclist must travel on the roadway and not in the shoulder of a road.

II.

After hearing oral argument, the motion judge filed a written opinion. The judge noted that in order to assert claims against the public entity defendants based on an alleged dangerous condition of public property, plaintiffs had to meet the requirements of the TCA. The judge determined that Ms. Wurst was not operating her bicycle in the manner reasonably foreseeable because she was riding the bicycle on the shoulder of the road, rather than the concrete-paved section of the road.

The judge concluded, however, that regardless of whether she was operating the bicycle on the shoulder of the road, plaintiffs had not established that the City or the Engineering Department had actual or constructive notice of the alleged dangerous condition on Wesley Road, which was required to impose liability under the TCA. The judge further found that even if plaintiffs had established that defendants had actual or constructive notice of the alleged dangerous condition, a reasonable jury could not find that the City's failure to take action to protect against that condition was "palpably unreasonable."

Accordingly, the judge filed an order dated August 16, 2016, granting defendants' motion. The judge dismissed plaintiffs' claims and any cross-claims against these defendants. As we noted previously, plaintiffs filed a motion for reconsideration of the August 16, 2016 order. They argued there was a genuine issue of material fact as to whether Ms. Wurst was riding her bicycle lawfully on the shoulder of the road. They also argued that the motion judge failed to give sufficient consideration to Mills' expert report. In addition, they submitted new evidence consisting of photos of signage, which plaintiffs claimed showed that the City had actual or constructive notice that bicyclists travel from curb to curb on the City's streets and potentially on the sidewalks.

The judge heard oral argument on the motion and filed a written opinion, in which the judge concluded there was no reason to reconsider the August 16, 2016 order. The judge found there was no need to determine whether Ms. Wurst had been operating her bicycle on the shoulder of the roadway.

The judge again found that plaintiffs had not established all of the elements of their claim under the TCA based on the alleged dangerous condition of Wesley Road. The judge determined that Mills' report did not show that the public entity defendants had actual or constructive notice of the alleged dangerous condition.

In addition, the judge noted that the photographs submitted by plaintiffs were not new evidence and could not be considered on a motion for reconsideration. The judge nevertheless stated that the photographs had been taken months after the subject accident, and they could not be considered because they depicted a subsequent remedial measure. The judge also pointed out that the photos were taken on Gardens Parkway, which was more than a half-mile away from the area on Wesley Road, where Ms. Wurst allegedly fell.

The judge entered an order dated October 27, 2016, denying plaintiffs' motion for reconsideration. This appeal followed.

III.

On appeal, plaintiffs argue: (1) there is a genuine issue of material fact as to whether Ms. Wurst was riding her bicycle on the shoulder of Wesley Road at the time of the accident; (2) the trial court erred by relying upon Polzo v. Cty. of Essex, 209 N.J. 51 (2012) (Polzo II), in finding that plaintiffs failed to establish that the City had notice of the alleged dangerous condition; (3) the height differential between the roadway and the shoulder was a dangerous condition; (4) defendants had actual and constructive notice of the condition; and (5) plaintiffs proved that defendants' failure to take action to correct the alleged dangerous condition was palpably unreasonable.

Summary judgment must be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. R. 4:46-2(c). "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." Ibid.

"On appeal, we accord no special deference to a trial judge's assessment of the documentary record, and instead review the summary judgment ruling de novo as a question of law." Davidovich v. Israel Ice Skating Fed'n, 446 N.J. Super. 127, 159 (App. Div. 2016) (citations omitted). In determining whether the trial court erred by granting summary judgment, we apply the same standard that the trial court must apply in ruling on the motion. Conley v. Guerrero, 228 N.J. 339, 346 (2017) (citing Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016)).

As we noted previously, the City and the Engineering Department are public entities and therefore, claims against these defendants are governed by the TCA. To establish liability against a public entity under the TCA for an injury allegedly due to a dangerous condition of property, the plaintiff must show:

> 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 [N.J.S.A.] 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.
>
> [N.J.S.A. 59:4-2.]

These elements are "accretive," which means that "if one or more of the elements is not satisfied, a plaintiff's claim against a public entity alleging that such entity is liable due to the condition of public property must fail." Polzo v. Cty. of Essex, 196 N.J. 569, 585 (2008) (Polzo I).

IV.

On appeal, plaintiffs argue that the motion judge erred by granting summary judgment because there was a genuine issue of material fact as to whether Ms. Wurst was riding her bicycle on

the shoulder of Wesley Road when she fell. Plaintiffs contend the court erroneously assumed the dangerous condition was in the shoulder and therefore it was reasonable for defendants to give less priority to that condition.

The judge found, however, that defendants were entitled to summary judgment regardless of whether Ms. Wurst was riding on the shoulder of the road because plaintiffs had not established all of the elements for liability under N.J.S.A. 59:4-2. In any event, the record before the trial court did not raise a genuine issue of material fact as to whether Ms. Wurst was riding her bicycle on the shoulder of Wesley Road at the time she allegedly struck the height differential in the roadway and fell.

Under New Jersey law, a "roadway" is defined as "that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm or shoulder." N.J.S.A. 39:1-1. The "shoulder" is defined as "that portion of the highway, exclusive of and bordering the roadway, designed for emergency use but not ordinarily to be used for vehicular travel." Ibid. The "berm" is that portion of the highway "bordering the shoulder but not to be used for vehicular travel." Ibid.

Furthermore, an individual riding a bicycle on roadways has all of the "rights" and "duties applicable to the driver of a vehicle." N.J.S.A. 39:4-14.1. A person riding a bicycle must,

however, "ride as near to the right side of the roadway as practicable." N.J.S.A. 39:4-14.2. "Bicyclists do not have special privileges on a roadway's shoulder. Indeed, a bicycle rider is directed to ride on the furthest right hand side of the roadway, not on the roadway's shoulder." Polzo II, 209 N.J. at 71.

In this case, the evidence before the trial court establishes that Ms. Wurst was riding her bicycle in the asphalt section of Wesley Road, which is considered to be the shoulder of the road under New Jersey law. The photos of Wesley Road indicate that the concrete-paved portion of the roadway is the section of the road that is "ordinarily used for vehicular travel." N.J.S.A. 39:1-1. The asphalt section abuts the concrete section of the road. It extends beyond the portion of the road where vehicles are parked, but there is no evidence this part of the road is "ordinarily used for vehicular travel." Ibid. Moreover, Ms. Wurst and L.A. both testified that at the time of the accident they were riding on the shoulder of Wesley Road.

In addition, Ruch testified that when he spoke with Ms. Wurst, she indicated that before she fell, she had been biking in the asphalt shoulder of the roadway and not the concrete area of the roadway. Finally, Mills and Nolte both indicated in their reports that Ms. Wurst was riding her bicycle in the asphalt shoulder of Wesley Road at the time of the accident.

Plaintiffs argue that the lack of "a painted line of any kind to designate the start of the shoulder and the end of the roadway," coupled with L.A.'s lack of "understand[ing] what the term 'shoulder' meant" creates a genuine issue of material fact as to whether Ms. Wurst was riding her bicycle on the shoulder of Wesley Road. Plaintiffs further argue that Ms. Wurst was riding closer to the roadway than to the curb at the time of the accident.

These factual assertions are, however, insufficient to create a genuine issue of material fact as to whether Ms. Wurst was traveling on the shoulder when she allegedly fell. Plaintiffs cannot defeat a motion for summary judgment "merely by pointing to any fact in dispute." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 530 (1995). Indeed, "conclusory assertions, without factual support in the record, will not defeat a meritorious application for summary judgment." Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32 (2012) (citing Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999)).

We conclude the evidence presented to the trial court conclusively establishes that at the time of the accident, Ms. Wurst was riding her bicycle on the asphalt section of the roadway, not the part of the road paved with concrete. The evidence shows that the concrete section is the roadway and that the asphalt section is the shoulder.

Based on the motion record, "there exists a single, unavoidable resolution of the alleged disputed issue of fact." Brill, 142 N.J. at 540. Therefore, the issue of whether Ms. Wurst was riding on the shoulder of Wesley Road cannot be considered a genuine issue of material fact for purposes of Rule 4:46-2(c). Ibid.

V.

Next, plaintiffs argue that the motion judge erred by finding they failed to establish all of the elements under the TCA of a cause of action against the public entity defendants based on the alleged dangerous condition of public property. Again, we disagree.

A. Dangerous Condition

Plaintiffs assert that they presented sufficient evidence to show that the height differential between the concrete and asphalt sections of Wesley Road constituted a dangerous condition for purposes of the TCA. The term "dangerous condition" is defined 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.

"[M]any bicyclists may be inclined to ride on a roadway's shoulder to stay clear of vehicular traffic," but "[r]oadways generally are intended for and used by operators of vehicles."

Polzo II, 209 N.J. at 71. Thus, "the generally intended use of a roadway is for vehicles." Id. at 73.

Here, plaintiffs allege that there was a condition in the roadway that presented a danger to bicyclists. However, bicyclists are not intended users of roadways, and

> inherent dangers confront bicyclists who travel on roadways that are not faced by operators of motor vehicles. A tree branch, a stone, and even a pothole or depression might destabilize a bicycle that a car would harmlessly pass over. Public entities do not have the ability or resources to remove all dangers peculiar to bicycles. Roadways cannot possibly be made or maintained completely risk-free for bicyclists.
>
> [Id. at 71.]

Thus, the height differential on Wesley Road does not constitute a dangerous condition, as that term is defined in N.J.S.A. 59:4-1. The intended use of a roadway is for motor vehicles, not bicycles, and the height differential did not "create[] a substantial risk of injury" to motorists. N.J.S.A. 59:4-1. Moreover, Ms. Wurst was not riding her bicycle in the roadway; she was on the shoulder. Thus, Ms. Wurst was not using the roadway "with due care in a manner in which it [was] reasonably foreseeable that it [would] be used." Ibid.

B. Actual or Constructive Notice

Even were we to conclude the height differential on Wesley Road was a dangerous condition as that term is defined in N.J.S.A. 59:4-1, plaintiffs failed to establish that the City had either actual or constructive notice of the condition. As the motion judge found, plaintiffs failed to present any evidence showing that the City had actual notice of the condition. The City had not received any reports of injuries related to this condition.

Plaintiffs argue, however, the City received a complaint about the alleged dangerous condition. They point to a record of a telephone call to the Engineering Department, apparently made on January 13, 2012. According to this document, which was prepared by Arthur Chew, a caller living at 11 Wesley Road called to complain about the condition of the road. The document states:

> Homeowner complained about the number of road openings at the intersection of North Street and Wesley Road. I advised that we would inspect and get back to her.
>
> Homeowner also complained about the concrete road surface. I advised that the road is still in relatively good condition. She requested that asphalt be added between the concrete sections. I advised that we would inspect and repair if necessary

Notwithstanding plaintiffs' arguments to the contrary, this complaint did not provide the City with actual notice of a dangerous condition on Wesley Road, which allegedly caused Ms.

Wurst's injuries. She did not fall due to a road opening at the intersection of North Street and Wesley Road. Moreover, the complaint was about the concrete road surface, not any height differential between the concrete and asphalt road surfaces.

Plaintiffs also failed to establish that the City had constructive notice of the alleged dangerous condition. The mere "[e]xistence of an alleged dangerous condition is not constructive notice of [that condition]." Polzo I, 196 N.J. at 581 (quoting Sims v. City of Newark, 244 N.J. Super. 32, 42 (Law Div. 1990)). To establish constructive notice of an alleged dangerous condition, the plaintiff must show 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." Polzo II, 209 N.J. at 67 (quoting N.J.S.A. 59:4-3).

Here, an alleged dangerous condition did not present a risk of injury to motorists, the intended users of the roadway. The condition did not present an obvious danger to bicyclists, using the roadway with due care. As we have explained, the City received no prior complaints or reports of injuries to bicyclists attributable to the height differential in the road surface. Plaintiffs cite the testimony of certain residents on Wesley Road, who recalled bicyclists falling on Wesley Road. There is, however,

no evidence that these individuals witnessed the bicyclists fall, observed the cause of their falls, or reported such incidents to the City.

Plaintiffs further argue that the condition existed for fifty years and the City had constructive notice of the condition. We disagree. The evidence indicates that the City paved Wesley Road with concrete and asphalt about fifty years before Ms. Wurst's fall, but there is no evidence indicating when the height differential came into existence.

C. Were the City's Actions Palpably Unreasonable?

Even were we to conclude plaintiffs established all of the other criteria for asserting a cause of action under the TCA against defendants for the alleged dangerous condition, plaintiffs failed to present sufficient evidence to show that the City's failure to "protect against" the dangerous condition was "palpably unreasonable." N.J.S.A. 59:4-2.

As used in N.J.S.A. 59:4-2, "palpably unreasonable' means "behavior that is patently unacceptable under any given circumstance." Polzo II, 209 N.J. at 75 (quoting Muhammad v. N.J. Transit, 176 N.J. 185, 195–96 (2003)). When a public entity acts in a palpably unreasonable manner, it should be "obvious that no prudent person would approve of its course of action or inaction." Id. at 76 (citing Muhammad, 176 N.J. at 195-96). Based on the

evidence before the trial court on the motion, a reasonable jury could not find that defendants' failure to take action to protect against the alleged dangerous condition of Wesley Road was "palpably unreasonable."

As we stated previously, the shoulder of a roadway is generally intended for emergency use, not ordinary travel. Polzo II, 209 N.J. at 77. Consequently, when considering whether to make repairs to the roadway, a public entity "might reasonably give lesser priority to the shoulder." Ibid. In addition, as stated previously, the City had received no prior reports of injuries resulting from the height differential between the concrete roadway and the asphalt shoulder on Wesley Road.

Furthermore, the record shows the City is responsible for maintaining ninety-three miles of streets and thirty-three miles of alleyways. Assuming the City had notice of the condition, the City reasonably would not have given high priority to repairing the depression on Wesley Road, particularly in light of its extensive responsibility for road maintenance, and the limited resources available to public entities. Ibid.

Affirmed.

SUPERIOR COURT OF NEW JERSEY
CAPE MAY-LAW DIVISION

Leonice Wurst,	**Civil Action**
Plaintiff	**DOCKET NO.: CPM L 274-14**
v.	**Order**
City of Ocean City et als	
Defendants	

THIS MATTER having come before the Court on motion filed by Defendant's City of Ocean City Engineering Department for summary judgment; and the Court having considered the papers submitted; and for good cause shown;

IT IS ON THIS 16th day of August, 2016 ORDERED that

1. Defendant's, City of Ocean City and City of Ocean City Engineering Department, motion for summary judgment pursuant to R. 4:46-2 to dismiss Plaintiff's complaint with prejudice and dismiss co-defendant's cross claims with prejudice is granted.
2. FURTHER ORDERED that a copy of this Order be served on all parties within five (5) days.

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 08221

CASE: **Leonice M. Wurst et al v City of Ocean City et al**
DOCKET NO. **CPM L 274-14**

NATURE OF APPLICATION: DEFENDANT'S, CITY OF OCEAN CITY AND CITY OF OCEAN CITY ENGINEERING DEPARTMENT, MOTION FOR SUMMARY JUDGMENT PURSUANT TO R. 4:46-2

MEMORANDUM OF DECISION ON MOTION

BACKGROUND AND NATURE OF MOTION

The complaint in this matter was filed on June 19, 2014. The discovery end date was March 30, 2016. There were four previous extensions of discovery for a total of 579 days of discovery. Trial is scheduled for August 22, 2016. Defendant, City of Ocean City and City of Ocean City Engineering Department, now moves for summary judgment pursuant to R. 4:46-2 to dismiss Plaintiff's complaint with prejudice and dismiss co-defendant's cross claims with prejudice.

This Court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion, including Opposition Briefs, Reply Briefs, and Sur-Reply Briefs.

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.

MOVANTS' POSITION

Defendant, City of Ocean City and City of Ocean City Engineering Department, requests this Court grant summary judgment pursuant to R. 4:46-2 to dismiss Plaintiff's complaint with prejudice and dismiss co-defendant's cross claims with prejudice.

I. Defendant contends that Plaintiff fails to satisfy the requirements of N.J.S.A. §59:4-1.

Defendant sets forth 167 material facts and maintains that the City of Ocean City is a public entity and therefore, claims against it are governed by N.J.S.A. §59:1-1, the New Jersey Tort Claims Act. Defendant asserts that Plaintiffs cannot, as a matter of law, demonstrate that: (1) the alleged dangerous condition is a dangerous condition as defined by the statute; (2) that the City had actual or constructive notice of the alleged dangerous condition; or (3) that the City's actions were palpably unreasonable with regard to failing to take any action to protect against the alleged dangerous condition.

Defendant references the case of Polzo v. County of Essex, 209 N.J. 51, 70-71 (2012), wherein the New Jersey Supreme Court stated in pertinent part,

The "roadway" is "that portion of a highway . . . ordinarily used for vehicular travel," whereas the "shoulder" is "that portion of the highway, exclusive of and bordering the roadway, designed for emergency use but not ordinarily to be used for vehicular travel." N.J.S.A. 39:1-1 (emphasis added); see also Hochberger v. G.R. Wood, Inc., 124 N.J.L. 518, 520 (E. & A.1940) ("The shoulder is not designed nor constructed for general traffic uses but is rather for emergency uses such as parking of vehicles disabled or otherwise."); Sharp v. Cresson, 63 N.J. Super. 215, 221 (App.Div.1960) ("It is clear that the Legislature did not intend that the shoulder of a road be used for ordinary travel."). A "vehicle" is defined as "every device in, upon or by which a person or property is or may be transported upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks or motorized bicycles." N.J.S.A. 39:1-1 (emphasis added). By the Motor Vehicle Code's plain terms, roadways generally are built and maintained for cars, trucks, and motorcycles -- not bicycles. Even the Pothole Primer -- relied on by plaintiff -- defines a pothole as a "pavement defect" that will "cause significant noticeable impact on vehicle tires and vehicle handling." Pothole Primer, supra, at 6 (emphasis added).

A bicycle rider on a roadway is vested with all the "rights" and "duties applicable to the driver of a vehicle" under Title 39, chapter four of our Motor Vehicle Code. N.J.S.A. 39:4-14.1. Under the Motor Vehicle Code, "[e]very person operating a bicycle upon a roadway [is required to] ride as near to the right side of the roadway as practicable." N.J.S.A. 39:4-14.2. Bicyclists do not have special privileges on a roadway's shoulder. Indeed, a bicycle rider is directed to ride on the furthest right hand side of the roadway, not on the roadway's shoulder. The Motor Vehicle Code does not designate the roadway's shoulder as a bicycle lane.

We understand that many bicyclists may be inclined to ride on a roadway's shoulder to stay clear of vehicular traffic and out of concern for their safety. Nevertheless, inherent dangers confront bicyclists who travel on roadways that are not faced by operators of motor vehicles. A tree branch, a stone, and even a pothole or depression might destabilize a bicycle that a car would harmlessly pass over. Public entities do not have the ability or

> resources to remove all dangers peculiar to bicycles. Roadways cannot possibly be made or maintained completely risk-free for bicyclists.

Thus, Defendant submits that in the instant matter, Mrs. Wurst was operating her bicycle illegally on the shoulder at the time of the incident as the City of Ocean City has not designated the shoulder of the roadway in the area of Plaintiff's fall for cyclists.

Moreover, Defendant asserts that Plaintiff has not demonstrated that the condition is a dangerous condition of public property pursuant to N.J.S.A. §59:4-1. The statute defines "dangerous condition" as "a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." In addition, N.J.S.A. §59:4-2 sets forth liability for a public entity and sets forth that the Plaintiff must establish,

> 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.

Thus, as Plaintiff was riding her bicycle illegally in an area designated for emergency motor vehicle use, she did not exercise due care and therefore she cannot allege that the condition was dangerous when the area she was riding was not designated for bicycle travel.

Furthermore, Defendant purports that Plaintiff fails to establish that the City of Ocean City had actual or constructive notice as there is no public record or testimony of any reported accident. Specifically, Defendant references N.J.S.A. §59:4-3, which provides,

> 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.

Thus, Defendant submits that Plaintiffs failed to provide any evidence that the City of Ocean City had actual notice of the differential as well as its "dangerous character" that is assumed by Plaintiff to have caused her fall. To the extent that Plaintiff argues negligent or deficient inspection scheme somehow created a dangerous condition. Defendant references Polzo v. County of Essex, wherein the New Jersey Supreme Court rejected any

approach to evaluating municipal liability under the Tort Claims Act premised on the conclusion that a negligent inspection of a roadway for dangerous conditions either created the alleged dangerous condition at issue, or presumptively placed that municipality on constructive notice of that dangerous condition. See 209 N.J. at 67-68.

Lastly, Defendant purports that Plaintiffs failed to establish any palpably unreasonable actions or inaction by the City of Ocean City. Defendant notes that the record shows that Ocean City maintains ninety-three (93) miles of streets and thirty-three (33) miles of alley ways, which are subject to periodic review by its engineer. Following an evaluation of the road in question in both 2009 and 2012, the City's engineer, testified that he was aware of the concrete roadway and asphalt shoulder and considered the dual surface safe and appropriate. The City's engineer, Wayne Nolte, prepared an engineering report dated February 25, 2016 that opined that Plaintiff was required to operate her bike on the roadway/travelway or concrete surface of Wesley Road and Plaintiff failed to act in a reasonable manner in the operating of her vehicle. See Exhibit M attached to Defendant's Brief. Further, Mr. Nolte opined to a reasonable degree of engineering certainty that the City of Ocean City made a reasonable assessment of its roads, including Wesley Road in and about the area where the alleged incident

occurred, and that the concrete roadway where bicyclists were required to ride was in a safe condition. See Exhibit M attached to Defendant's Brief.

As the City of Ocean City expressly determined not to resurface the road following two (2) road ratings in 2009 and 2012 and Plaintiff was biking on the shoulder of the roadway where she was not permitted to travel as a matter of law, Plaintiff fails to establish palpably unreasonable conduct by the City.

Defendant also requests that this Court determine that Plaintiffs' expert has rendered a net opinion as Mr. Mills' opinion provides no guidance to a jury. Specifically, Defendant notes that Mr. Mill's opinion is based upon two conclusions being that: (1) Mrs. Wurst was entitled to ride her bicycle on a shoulder meant for emergency motor vehicular use and parked vehicles; and (2) that Ocean City had a duty to maintain that shoulder to a higher standard of road maintenance for bicycles than motor vehicles. However, the City maintains that the opinion imposes a duty that is adverse to the New Jersey Motor Vehicle Code and New Jersey Supreme Court precedent.

Thus, Defendant requests that this Court grant summary judgment in its favor pursuant to R. 4:46-2 to dismiss any and all claims against it with prejudice.

OPPOSITION

Plaintiff opposes Defendant's motion and submits as follows. Specifically, Plaintiff maintains that the height differential or lip that caused Plaintiff's accident was a dangerous condition. More so, Plaintiff submits that there is a question of material fact as to whether Plaintiff was riding her bicycle in the "shoulder" of Wesley Road at the time of her accident. Plaintiff confirmed at deposition that there were no lines painted on Wesley Road in the area of her fall at the time of the accident. See Exhibit A attached to Plaintiff's Opposition Brief. More so, Plaintiff testified that she was riding "closer to the roadway" than the curb at the time of the accident because she does not like to travel close to the parked cars out of fear that someone would open their door into her lane of travel. See Exhibit A attached to Plaintiff's Opposition Brief.

Moreover, Plaintiff maintains that she was permitted to ride a bicycle in the shoulder of Wesley Road at the time of her accident and Ocean City anticipated that people would ride bicycles in the shoulder of the road. Plaintiff distinguishes the case of Polzo v. County of Essex, 209 N.J. 51 (2012) by stating that although Polzo held that the generally intended use of the roadway is for vehicles and the shoulder of a highway is generally intended for emergency use, that does not foreclose the inquiry into whether the defect in the shoulder was a dangerous condition under the Tort Claims Act.

Herein, Plaintiff submits that proof was provided that the City was well aware that shoulders of the roads in Ocean City are routinely used by bicycles and that the City has an ongoing goal to make the shoulders on all roads safe for bicycles. Plaintiff references the testimony of Roger McLarnon, the Director of Community Operations for Ocean City; Fran Inacio, the Public Works Supervisor of Streets for the City; and Arthur Chew, an engineer for the City, to support the assertion that the City was aware that bicycle riders use the entire travel way, including the shoulders. Specifically, Mr. McLarnon acknowledged that he is aware that people frequently ride their bikes on the shoulders in Ocean City to keep away from traffic. See Exhibit B attached to Plaintiff's Opposition Brief. Mr. Inacio testified that because Ocean City is a resort beach town he understands that many people go there for activities such as biking and therefore he trains City employees to identify any area that might constitute a hazard to bicyclists. See Exhibit C attached to Plaintiff's Opposition Brief. Mr. Chew testified that even if a road is not designated as a bike lane/route, he still endeavors to make sure that the route is safe for bicyclists. See Exhibit D attached to Plaintiff's Opposition Brief.

Furthermore, Plaintiff purports that there is a height differential or lip in the area where Ms. Wurst fell and therefore, at minimum, there is a genuine issue of material fact. Plaintiff relies on her liability expert, Joseph

Mills, who opined that the presence of an elevation differential greater than ¼ inch is not permitted and is considered unsafe by the governing standards. In addition, Mr. McLarnon testified that in August of 2013 there was an elevation difference or lip between the concrete roadway and asphalt shoulder running down approximately ninety-five (95%) of Wesley Road from Battersea to North. More so, Plaintiff purports that Mr. Mills' conclusion that the differential of up to two (2) inches took years to develop is properly founded in his review of the photographs taken by Officer Ruch of the day of the accident. Plaintiff also asserts that multiple residents of Wesley Road testified that they recalled seeing other bicyclists fall due to the dangerous height differential where the concrete roadway and asphalt shoulder meet.

Accordingly, Plaintiff requests that this Court deny Defendant's motion as genuine issues of material fact exist.

REPLY

Defendant submits that Mrs. Wurst was riding illegally on the shoulder of the roadway at the time of the incident. Specifically, Plaintiff's daughter testified that at the time of the accident she and her mother were traveling in the shoulder of the roadway on Wesley and they were not driving on the cement road on Wesley. Plaintiff testified that at the time of the accident she was riding in the asphalt shoulder closer to the concrete roadway than the curb that was to her right. In addition, Plaintiff's husband

testified that it was the practice of the Wurst family to ride on the shoulder of the roadway when they rode their bikes to church. Officer Ruch testified that Plaintiff had told him that prior to her fall she had been biking in the shoulder of the roadway and not the concrete area. Thus, as a matter of law, it was not palpably unreasonable for the City of Ocean City to repair a shoulder for the convenience or benefit of cyclists who will inevitably confront a shoulder's inherent dangers.

Defendant further contends that Plaintiff inaccurately states that multiple residents of Wesley Road testified that they recalled seeing other bicyclists fall due to the dangerous height differential as Ms. Lucey testified that she did not remember actually ever seeing anyone fall; Mr. Vivarelli testified that in the three or four falls off a bike, he had not witnessed the actual fall two to three times; and Ms. Foster testified that she had never actually seen anyone riding a bike fall off the bike on Wesley in the vicinity of her home.

Thus, Defendant maintains that there being no prior reported accidents; no designation of the Wesley Avenue shoulder as a bicycle lane; multiple decisions not to resurface the roadway; and a choice by Mrs. Wurst to improperly use the shoulder as a lane of travel, Plaintiffs cannot establish that Ocean City was palpably unreasonable to correct the alleged dangerous condition as a matter of law.

DISCUSSION

Defendant, City of Ocean City and City of Ocean City Engineering Department, is entitled to summary judgment pursuant to R. 4:46-2 to dismiss Plaintiff's complaint with prejudice and dismiss co-defendant's cross claims with prejudice.

R. 4:46-2(c), governs motions for summary judgment and 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.

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.

I. Defendant is entitled to summary judgment as a matter of law pursuant to R. 4:46-2 as Plaintiff fails to satisfy the requirements of N.J.S.A. §59:4-1.

This Court finds that the City of Ocean City is a public entity and therefore, claims against it are governed by N.J.S.A. §59:1-1, the New Jersey Tort Claims Act. This Court further finds that Plaintiff fails to establish a

prima facie case of negligence against the City pursuant to the New Jersey Tort Claims Act.

Specifically, N.J.S.A. §59:4-1 defines "dangerous condition" as "a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." Herein, Scott Ruch, the investigating officer, documented Plaintiff's incident between 58 and 60 Wesley Road and the photographs taken by Officer Ruch on the day of Plaintiff's incident depict a height differential or lip.

However, in order to establish liability against the City of Ocean City, N.J.S.A. §59:4-2 governs and sets forth liability for a public entity as follows,

> 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.

Here, Plaintiff fails to establish liability against the City of Ocean City under N.J.S.A. §59:4-2(b). Specifically, N.J.S.A. §59:4-3, governs and provides,

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.

Where, herein, the record shows that Ocean City maintains ninety-three (93) miles of streets and thirty-three (33) miles of alley ways, which are subject to periodic review by its engineer. Following an evaluation of the road in question in both 2009 and 2012, the City's engineer, Wayne Nolte, testified that he was aware of the concrete roadway and asphalt shoulder and considered the dual surface safe and appropriate. Mr. Nolte prepared an engineering report dated February 25, 2016, wherein he opined that Plaintiff was required to operate her bike on the roadway/travelway or concrete surface of Wesley Road and Plaintiff ailed to act in a reasonable manner in the operating of her vehicle. See Exhibit M attached to Defendant's Brief. Further, Mr. Nolte opined to a reasonable degree of engineering certainty that the City of Ocean City made a reasonable assessment of its roads, including Wesley Road in and about the area where the alleged incident

occurred, and that the concrete roadway where bicyclists were required to ride was in a safe condition. See Exhibit M attached to Defendant's Brief.

Thus, regardless of whether Mrs. Wurst was illegally riding the shoulder of the road, Plaintiff fails to establish notice of a dangerous condition. This determination is further supported by the case of Polzo v. County of Essex, 209 N.J. 51, 68 (2012), wherein the New Jersey Supreme Court stated in pertinent part,

> We understand that many bicyclists may be inclined to ride on a roadway's shoulder to stay clear of vehicular traffic and out of concern for their safety. Nevertheless, inherent dangers confront bicyclists who travel on roadways that are not faced by operators of motor vehicles. A tree branch, a stone, and even a pothole or depression might destabilize a bicycle that a car would harmlessly pass over. Public entities do not have the ability or resources to remove all dangers peculiar to bicycles. Roadways cannot possibly be made or maintained completely risk-free for bicyclists.

Although Plaintiff submits the testimony of municipal officers and residents on Wesley Road to support the assertion that the City was well aware that shoulders of the roads in Ocean City are routinely used by bicycles and the City's failure to act was palpably unreasonable, this Court finds that Plaintiffs failed to provide any evidence that the City of Ocean City had constructive notice of the height differential. Specifically, there were no prior complaints or reports of injuries from the height differential of the roadway's shoulder.

Moreover, in the case of Polzo v. County of Essex, the New Jersey Supreme Court rejected any approach to evaluate municipal liability under the Tort Claims Act premised on the conclusion that a negligent inspection of a roadway for dangerous conditions either created the alleged dangerous condition at issue, or presumptively placed that municipality on constructive notice of that dangerous condition. The Court stated in pertinent part, "[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." See 209 N.J. at 67-68.

Again, as the record shows that Ocean City maintains ninety-three (93) miles of streets and thirty-three (33) miles of alley ways, which are subject to periodic review by its engineer. The City's engineer, Mr. Nolte, opined to a reasonable degree of engineering certainty that the City of Ocean City made a reasonable assessment of its roads, including Wesley Road in and about the area where the alleged incident occurred, and that the concrete roadway where bicyclists were required to ride was in a safe condition. See Exhibit M attached to Defendant's Brief. Furthermore, "[p]ublic entities do not have the ability or resources to remove all dangers peculiar to bicycles.

Roadways cannot possibly be made or maintained completely risk-free for bicyclists." See Polzo, 209 N.J. at 71.

As to acting in a palpably unreasonable manner, this Court finds that even if Plaintiff could show that the City was on actual or constructive notice that height differential between the road and the on the roadway's shoulder was a dangerous condition of property, a reasonable jury could not find under these circumstances that the failure to take action to "protect against" the condition was "palpably unreasonable." There were no prior reports or complaints of injuries from the height differential between the roadway and the roadway's shoulder. As that portion of the roadway is ordinarily used for vehicular travel, a public entity may reasonably give less priority to the shoulder. See Polzo, 209 N.J. at 77. When a public entity acts in a palpably unreasonable manner, it should be obvious that no prudent person would approve of its course of action or inaction. Id. at 76. Thus, the City did not act in a palpably unreasonable manner by failing to protect against the height differential before Plaintiff's incident.

Accordingly, Defendant, the City of Ocean City and City of Ocean City and City of Ocean City Engineering Department, is entitled to summary judgment pursuant to R. 4:46-2 to dismiss Plaintiff's complaint with prejudice and dismiss co-defendant's cross claims with prejudice.

CONCLUSION

The motion is opposed. Defendant's, City of Ocean City and City of Ocean City Engineering Department, motion for summary judgment pursuant to R. 4:46-2 to dismiss Plaintiff's complaint with prejudice and dismiss co-defendant's cross claims with prejudice is granted.

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

August 16, 2016

J. Christopher Gibson, J.S.C.