LUZI BARTSCH; CHARLES BARTSCH (Her Husband),	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION**
Plaintiff/Respondent,	**Docket No.: A-000489-18 (AM-000723-17)**
v.	**Civil Action**
CITY OF NEWARK; NEWARK PUBLIC SCHOOLS; EAST SIDE HIGH SCHOOL; STATE OF NEW JERSEY; JOHN DOE(S) 1-5; and ABC CORP(S) 1-5;	**ON APPEAL FROM:** **SUPERIOR COURT OF NEW JERSEY ESSEX COUNTY- LAW DIVISION**
Defendants/Appellants.	**Docket No.: ESX-L-456-18**
	Sat Below: **The Honorable Thomas R. Vena, J.S.C. and The Honorable Stephanie A. Mitterhoff, J.S.C.**

BRIEF OF PLAINTIFFS/RESPONDENTS LUZI BARTSCH AND CHARLES BARTSCH

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PRELIMINARY STATEMENT AND SYLLABUS

This is a sidewalk fall down injury matter. On November 22, 2016 at about 12 noon, Plaintiff/Respondent Luzi Bartsch tripped and fell on a cut down sign post that was sticking up about three inches out of a newly constructed sidewalk on Pulaski Street in the Ironbound section of Newark. (Pa59 to 74) This happened in front of East Side High School, which is the only public school on Pulaski Street. Pulaski Street runs from Elm Street to South Street and is a total of .56 miles long, just over a half mile. On the day of the incident Luzi was working at the school as a substitute teacher and was on her way to lunch. It is expected discovery below will show that the incident was reported to the school the same day.

Twenty-seven days after the incident plaintiff filed its first Tort Claim Notice with the appellant/defendants City of Newark and three Newark public school entities- the Newark Public Schools, the Newark Public Schools Superintendent, the Newark Public Schools General Counsel and the Newark Board of Education (collectively referred to as "Newark Public Schools" or "NPS"). The notice stated plaintiff tripped on an obstruction on the sidewalk. (Pa8 to 15). At that time, a simple look at the Pulaski street sidewalk abutting the only public school on the street would have shown a newly constructed sidewalk with the obvious cut sign, tripping obstruction at issue. (Pa59 to 74). Consistent with the

provisions of *N.J.S.A.* 59:8-4, the Notice gave (a) the contact information of the claimant, (b) the contact information of her attorney, (c) the date, place and circumstances of the occurrence, (d) a general description of the injuries, (e) the names of the public entities allegedly at fault and, (f) a statement as to damages. (Pa8 to 15).

On January 3, 2017, the City of Newark sent a letter enclosing their own tort claim form. (Pa25 to 34). This was completed and returned by plaintiff on January 20, 2017. (Pa35 to 43). On January 24, 2017, the City of Newark ("Newark") sent two separate letters. One appears to be a form letter generally acknowledging receipt of the tort claims notice. (Pa54) The other stated the file was incomplete and requested six items: 1) medical authorization, 2) police report, 3) the exact location of the incident, 4) scene photos, 5) itemized medical bills and records, 6) certification about medical insurance. (Pa56). At the time of that letter, plaintiff did not have the medical records or bills and she had her own medical insurance[1]. However, a complete list of the medical providers, together with authorizations to obtain all their records, had already been provided to Newark on January 20, 2017. (Pa39) Also, it was stated in the second notice of claim of January 20, 2017 that no police responded to the scene, and

[1] All of which was readily obtainable directly from the medical charts from the providers utilizing the medical authorizations previously provided, including medical insurance information.

therefore there was no applicable police report. (Pa38).

At no point after sending the January 24, 2017 request for more information, did Newark in any way follow up with plaintiff's counsel. At no point, did Newark in any way claim they were unable to investigate the matter with the substantial information they were provided.

The complaint was filed in January, 2018. Newark filed a motion to dismiss on February 28, 2018, for the first time claiming they were unable to investigate the matter, relying on their request for more information of January 24, 2017. In response to the motion to dismiss, on March 5, 2018, plaintiff responded to the January 24, 2017 letter. In that response, Plaintiff/Respondent provided Newark with itemized medical bills (all of which were received after January 24, 2017) and provided more detail about, and photographs showing, the incident location. (Pa57 to 74).

Defendants erroneously rely upon *Wood v. Cty of Burlington*, 302 N.J. Super. 371 (App. Div. 1997), which stands for the proposition that when a public entity requests further claim information, it has to be provided within 90 days of the incident, regardless of when that supplemental request was served. But as the Court noted in *Newberry v. Township of Pemberton*, 319 N.J. Super. 671 (App.Div. 1999), *Wood* is bad law. Instead, any supplemental information should be provided within a "reasonable time." *Newberry*, at 675-679.

Given the totality of the circumstances here, including the

substantial information provided within 90 days, including a complete list of medical providers with signed blank authorizations, Newark's only follow up being its motion to dismiss, and plaintiff providing the additional information (scene photographs and medical bills) almost immediately in response to that "follow up," the time period at issue here should be deemed reasonable. Furthermore, Newark has not and cannot demonstrate any real prejudice; "sweeping generalizations are not enough." *Lebron v. Sanchez*, 407 N.J. Super. 204, 220 (App.Div. 2009).

In response to the December 19, 2016 tort claims notice, Newark Public Schools ("NPS") sent a letter to plaintiff's counsel dated December 20, 2016 enclosing their individualized claim form. (Pa16 to 24). It was completed and returned on January 20, 2017. (Pa44 to 53). At no point did NPS request any further information whatsoever. "The Act's notice requirement is not intended as a trap for the unwary." *Lebron v. Sanchez*, 407 N.J. Super. 204, 215 (App.Div. 2009). At no point below did NPS take any action or claim the tort claim notice was somehow insufficient or that they were somehow prejudiced or unable to investigate the matter. Not until this appeal- over 2 years after having first received notice- did NPS ever claim the notice forms were somehow deficient. And this makes sense because all parties know the sidewalk abutting the only public school on Pulaski Street was newly constructed with an obvious tripping obstruction sticking up out of the concrete. (Pa64) All this was readily apparent from even the most

rudimentary, minimal investigation. (Pa59 to 74).

Despite three failed motions below, the record is devoid of any "evidence to support a claim of prejudice by the [claimed] lack of detail in the [2016] notice. More than a sweeping generalization is necessary." *Lebron*, 407 N.J. Super. at 220. Newark has not and can not demonstrate an inability to investigate this matter, an inability to remove the tripping hazard[2], nor an inability to attempt to settle the case.

They claim they could not, for example, investigate damages. Yet well within 90 days both defendants were provided a complete list of her medical providers with medical authorizations. They claim they could not investigate liability, despite having been served four tort claim notices within 90 days, and neither defendant at any time bothering to pick up the phone to call plaintiff's counsel.[3]

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[2] It is expected discovery will show defendants created the tripping obstruction hazard by cutting the sign as part of a sidewalk resurfacing project, and removed it shortly after receiving the tort claim notices.

[3] In sweeping and unsupported hyperbole, Newark claims plaintiff has made a "mockery" of the tort claim notice provisions. (Newark Db30). The reality is Newark is attempting to make a mockery of the "inability to investigate" concept, among other things, by having in hand a complete list of medical providers and authorizations, but claiming to this Court a total inability to investigate damages. Indeed, in the same vein, basic investigatory prudence would dictate at a minimum a follow up phone call to plaintiff's counsel, particularly where the cover letter serving the notice of claim states, "Should you have any questions, please do not hesitate to contact me." (Pa9) (underline added).

They also claim the case should be thrown out because the tort claim notices do not include a per quod claim. But the law is clear there does not need to be a separate tort claim notice for per quod claims, particularly where the claim forms do not ask the marital status of the injured party. *Milacci v. Mato Realty Co.*, 217 N.J.Super. 297 (App.Div. 1987).

Plaintiff would have nothing to gain by hiding either the location of the obstruction nor her damages. **Judge Vena's comments suggesting plaintiff would not provide photos until ordered by the court were mistaken because those incident photos and a more detailed description were provided on March 5, 2018, several months earlier and before any court orders**. (Pa57-Pa74) Indeed, a review of the actual record shows there has been no "gamesmanship" nor "refusal" "strategy" to provide information. There has been substantial and reasonable compliance with the notice requirements, consistent with the law. Indeed, two judges on three separate occasions denied defendant's motions to the contrary. (Pa1 to 6). This Court too should so find, reject defendants' request for a draconian ruling, and permit this case to proceed on the merits.

PROCEDURAL HISTORY

This fall down incident occurred on November 22, 2016. On December 19, 2016 Respondent/Plaintiff sent appellants City of Newark and Newark Public Schools a Tort Claims Notice. (Pa8 to 15). On January 20, 2017 Respondent provided City of Newark with the City's Tort Claims Notice Questionnaire. (Pa35 to 43). On January 19, 2018 Respondent and her husband (per quod claim) filed the Complaint. (Pa75 to 79). On January 26, 2018, appellant City of Newark and Newark Public Schools were served with Summons and Complaint. (Pa80 to 81). On February 28, 2018, appellant filed a Motion to Dismiss the Complaint for Respondents' alleged failure to comply with the Tort Claims Act. On March 5, 2018, Respondent provided the City with more specific responses to its January 24, 2017 letter. (Pa57 to 58). The motion to dismiss was denied by the trial court on March 16, 2018. (Pa1 to 2). On March 29, 2018, Newark filed a Motion for Reconsideration. On April 27, 2018, the trial court again denied Newark's motion. (Pa3 to 4). On June 28, 2018 Newark filed a second Motion for Reconsideration. On July 20, 2018, the trial court, once-again, denied Newark's second Motion for Reconsideration. (Pa5 to 6). On August 9, 2018, appellant filed a Motion for Leave to File Interlocutory Appeal, which this Court granted. (Pa7).

STATEMENT OF FACTS

On November 22, 2016 at about 12:00 noon, Plaintiff/Respondent Luzi Bartsch was caused to trip and fall on Pulaski Street in the Ironbound section of Newark, due to a cut down signpost that was left protruding up about 3 inches. The sidewalk abuts the only public school on Pulaski Street, East Side High School. Pulaski Street is a total of 0.56 miles long and the section at issue had been newly constructed. (Pa57-74) On the day of the incident, Luzi Bartsch was working at East Side High School as a substitute teacher; she was on her way to lunch when the incident took place. Her initial injuries were to her arm and knee. (Pa8 to 15).

The Court can take judicial notice, including from a simple Google maps search, that Pulaski Street runs for approximately 0.56 miles. It starts at South Street and ends at Elm Street. Walking at an average pace (15-20 minutes per mile) it would have taken an investigator 3 minutes to walk the 0.2 miles from Elm Street to reach the obvious obstruction at the school sidewalk. An investigator would have taken 8 minutes to walk the 0.4 miles to reach the incident site had they began walking on South Street. Given the tort claim notice includes three Newark Public School entities, had they started at the only public school on that short street, they would have immediately seen the obstruction. (Pa57-74)

Twenty-seven days after the incident (December 19, 2016), Plaintiff/Respondent sent the Superintendent of the Newark Public Schools, the General Counsel for the Newark Public Schools, the

Newark Board of Education (NPS Defendants) and the City of Newark a Tort Claims Notice as set forth by New Jersey statute. Indeed, three of the six noticed entities were Newark Public School entities. (Pa10-11). In the cover letter to the notice of claim, Plaintiff's counsel wrote, "should you have any questions, please do not hesitate to contact me." (Pa9) (underline added).

With regard to "date, place and other circumstances of the occurrence," in said notice, Plaintiff's counsel stated "On November 22, 2016, at approximately 12:00 p.m., Claimant, Luzi Bartsch, was walking on Pulaski Street, Newark, New Jersey, when she tripped due to an obstruction on and/or condition of the sidewalk..." (Pa11). With regard to damages, the notice stated, among other things, "Claimant was initially diagnosed with an injury to her right arm and knee. Claimant reserves the right to amend and supplement this response **as her medical treatment is ongoing**. Claimant reserves the right to amend the aforementioned response throughout the course of discovery." (Pa12) (emphasis added). With regard to amount of damages, the notice advised "to be determined and provided. Claimant reserves the right to amend the aforementioned response throughout the course of discovery." (Pa13).

On January 3, 2017, the City of Newark sent Plaintiff Newark's Notice of Claim Form. (Pa25 to 34). Merely 16 days later, on January 20, 2017 and just 59 days after the incident, Plaintiff/Respondent responded to Newark's Tort Claim Notice

Questionnaire. The cover letter stated "Please be advised Claimant reserves the right to supplement and/or amend the information provided as Claimant is under active medical care." (Pa35 to 43) (underline added). In said notice, Plaintiff/Respondent provided, among other things: (1) claimant's name, (2) claimant's date of birth, (3) claimant's address, (4) claimant's social security number, (5) attorney's name and address, (6) date of the incident, (7) location of incident, (8) description of how the incident occurred ("on November 22, 2016, at approximately 12:00 p.m., Claimant Luzi Bartsch...tripped due to an obstruction on...the sidewalk causing her to fall to the ground sustaining permanent and severe injuries"), (9) advised that the names of City employees at fault would be supplied throughout discovery, if applicable, (10) the negligence and wrongful acts of the City ("the entities who owned ...or controlled the location where the incident occurred are responsible...") (11) advised that no police officers arrived at the scene and thus no applicable police report, (12) that Claimant sustained injuries to her right arm and knee, however, she reserves the right to amend and supplement her response as her medical treatment is ongoing, (13) the names and addresses for each hospital, doctor or medical practitioner that rendered treatment, or examined Claimant (Saint Michael's Medical Center, Dr. Mark Rodrigues, D.C.,and Dr. Saurabh C. Patel, M.D.), (14) advised that claimant made a claim against the Newark Public Schools, Newark Board of Education, County of Essex and State of New Jersey, and

(15) provided the names and addresses of persons against whom claims were made (Newark Public Schools and Newark Board of Education), and (16) Plaintiff/Respondent provided blank medical authorizations allowing the City to obtain her medical records from any provider they chose. (Pa35 to 43).

In response to the Dec. 19, 2016 tort claims notice, Newark Public Schools (NPS) sent a letter on December 20, 2016 enclosing their claim form. (Pa16 to 24). It was completed and returned on January 20, 2017, 30 days before expiration of the 90 day notice of claim period. In said notice, Plaintiff/Respondent advised in both the cover letter and notice that she reserves her right to supplement and/or amend the information provided as she is under active medical care. (Pa44; Pa46).

Additionally, Plaintiff/Respondent advised of (1) claimant's name, (2) claimant's address, (3) name and address of claimant's attorney, (4) date and time of occurrence (11/22/16 12:00 p.m (approximately)), (5) description of the incident, (6) names of entities that caused damage, (7) statement of negligence or wrongful acts of the public entity that caused damages, (8) the negligence and wrongful acts of the public entity that caused damages, (9) advised that the names and addresses of the witnesses to the incident would be supplied throughout discovery, if applicable, (10) a description of claimant's injuries (right arm and right knee), (11) advised that claimant claims permanent loss of bodily function resulting from this injury, and claimant's

statement that she reserves her right to amend her response as her medical treatment is ongoing, (12) names of doctors and dates of treatment with a note that Claimant will supply medical records upon receiving same, (13) advised that statement of anticipated expenses for treatment would be supplied throughout discovery, if applicable, and (14) authorizations to obtain medical records. (Pa44 to 53).

On January 24, 2017, Newark sent another letter largely requesting information they already had, could have gotten with minimal effort from what was already provided, or knew did not exist, including medical authorizations, police incident report, "exact" location of incident on Pulaski Street, photographs, itemized bills and records, and information about medical insurance. (Pa56). However, on January 20, 2017, a complete list of the providers together with authorizations to obtain all their records had already been provided to Newark. Newark failed to follow-up with Plaintiff's counsel; Newark made no phone call, sent no email, fax nor letter. (Pa54 to 56). At no point did Newark claim they were unable to investigate the matter with the substantial information they had already been provided.

The Complaint was filed in January, 2018. (Pa75 to 79). Newark filed a motion to dismiss for the first time claiming that they were not provided with sufficient information about the incident. In response, Plaintiff/Respondent responded to Newark's January 24, 2017 letter on March 5, 2018. (Pa57 to 58).

Plaintiff/Respondent wrote that (1) its request for medical authorizations was previously provided, (2) again stated there was no police report as no police responded, (3) a more detailed location of the incident near the intersection of Pulaski Street and Warwick, (4) photographs showing the location of the incident (5) forwarded itemized medical bills and records obtained since the prior tort claim notices, and (6) advised that medical bills were covered by plaintiff's personal health insurance- all of which in any event would have been readily obtainable by defendants with the medical authorizations they had been provided within 90 days. (Pa57 to 58).

LEGAL DISCUSSION

I. THE TRIAL COURT APPROPRIATELY DENIED THE CITY OF NEWARK'S MOTION TO DISMISS (Pa1 to 6)

A. Plaintiff has Acted in Diligent Good Faith and More than Substantially Complied with the Tort Claim Act Notice Provisions

The trial court's three decisions to deny the City of Newark's motion to dismiss were correct. (Pa1 to 6). The New Jersey Tort Claims Act (*N.J.S.* 59:1-1 et seq.) (hereinafter "The Act") defines the parameters within which recovery for tortious injury may be obtained against public entities. The Act requires the claimant to file a notice of claim within 90 days of the incident act. *N.J.S.A* 59:8-8. The claim shall include:

> a. the name and post office address of the claimant;
>
> b. the post-office address to which the person presenting the claim desires notices to be sent;
>
> c. the date, place and other circumstances of the occurrence which gave rise to the claim asserted;
>
> d. a general description of the injury, damage or loss incurred so far as it may be known at the time of presentation of the claim;
>
> e. the name or names of the public entity, employee or employees causing the injury, damage or loss, if known; and
>
> f. the amount claimed as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed.

(*N.J.S.A.* 59:8-4).

A public entity receiving a notice of claim may request additional information from the claimant. *N.J.S.A.* 59:8-6; *Guerrero v. City of Newark,* 216 N.J. Super. 66, 69 (1987). Giving notice to a public entity of potential liability for an accident or injury is designed to achieve the following goals: (1) to allow the public entity 6 months for administrative review with the opportunity to settle meritorious claims prior to the bringing of suit, (2) to provide the public entity with prompt notification of a claim in order to adequately investigate the facts and prepare a defense, (3) to afford the public entity a chance to correct the condition which gave rise to the claim, and (4) to inform the State in advance as to the indebtedness or liability that it may be expected to meet. *Velez v. City of Jersey City,* 180 N.J. 284, 290 (2004).

However, the Act's notice requirement is not intended as a "trap for the unwary." *Lowe v. Zarghami,* 158 N.J. 606 (1999). In fact, the Court has observed the "notice of claim" is really a misnomer, and is "more properly denominated as a notice of injury or loss." *Beauchamp v. Amedio*, 164 N.J. 111, 121 (2000). Thus, substantial rather than strict compliance with the notice requirements of the Act is all that is needed to meet the statute's mandates. *Tuckey v. Harlesville Ins. Co.*, 236 *N.J. Super.* 221, 225 (1989) ("substantial compliance with the requirements of *N.J.S.*A. 59:8-4 is all that is required in order to perfect a claim."); *McGrath v. N.J. Dist. Water Supply Comm.,* 224 N.J. Super. 563

(1988) (finding substantial compliance despite a lack of detail and specificity in notice and additional information sought by the supplemental forms was not supplied until after litigation began.); *Murray v. Brown,* 259 *N.J. Super.* 360, 365 (Law Div. 1991) (substantial compliance with *N.J.S.* 59:8-4 even though specialized claim form was not completely responded to.); *see also Newberry v. Township of Pemberton,* 319 N.J. Super. 671, 679 (App.Div. 1999)

Courts have frequently invoked the equitable doctrine of substantial compliance to prevent barring legitimate claims due to technical defects. The remedy "tempters the draconian results" wrought by a dismissal with prejudice resulting from "an inflexible application of the statute." *Ferreira v. Rancocas Orthopedic Assocs.,* 178 N.J. 144 (2003). To put it another way, substantial compliance means that the notice has been given in a way which though technically defective, substantially satisfies the purposes for which notices of claims are required. *Lameiro v. W. N.Y. Bd. Of Educ.,* 136 N.J. Super. 585 (1975).

The doctrine of substantial compliance serves the purpose of alleviating the hardship and unjust consequences which attend technical defects of otherwise valid claims. *Anske v. Borough of Palisades Park,* 139 N.J. Super. 342, 347 (App. Div. 1976). In *Anske*, the plaintiff orally reported his injury to the Borough Clerk's office shortly after the incident. The Court found that the information that plaintiff provided (date, time, place of incident and nature of injury) satisfied the Act's statutory

requirements. In *Anske*, the clerk advised plaintiff "not to worry about it" and that it would be "taken care of by the insurance company." *Anske v. Borough of Palisades Park,* 139 N.J. Super. 342, 348 (App. Div. 1976). Here, similarly, Plaintiff/Respondent provided the date, time, place of incident and nature of injury. Moreover, Plaintiff/Respondent provided medical authorizations allowing appellants to obtain Plaintiff's medical records, bills and insurance information. (Pa8 to 15) (Pa43) (Pa51).

The doctrine of substantial compliance requires the moving party to show (1) the lack of prejudice to the defending party, (2) a series of steps taken to comply with the statute involved, (3) a general compliance with the purpose of the statute, (4) a reasonable notice of petitioner's claim, and (5) a reasonable explanation why there was not strict compliance with the statute. In determining whether prejudice exists courts are primarily concerned whether the delay will impair defendant's liberty interest to "defend on the merits." *State v. One 1986 Subaru,* 120 N.J. 310, 315 (1990). Moreover, "substantial prejudice" means substantial prejudice in maintaining one's defense, and generally that implies inability to defend because of such things as loss of evidence. *Mitchell v. Charles P. Procini, D.D.S., P.A.,* 331 N.J. Super 445, 454 (App. Div. 2000).

Here, Plaintiff provided Defendants four tort claim notices all well within the 90 day notice of claim period. These included, among other things, a complete list of plaintiff's medical

providers together with signed blank medical authorizations to obtain the actual records from the providers. A mere 27 days after the incident, Plaintiff/Respondent provided the City of Newark with a written notice of claim/injury on December 19, 2016. In the cover letter to the notice, plaintiff's counsel stated **"should you have any questions, please do not hesitate to contact me."** (Pa9) (emphasis added). As required by the Act said notification contained:

> (a) plaintiff's name and address: Luzi Bartsch and attorney address to send all notices to;
> (b) attorney's address: Clark Law Firm, PC, 811 Sixteenth Avenue, Belmar, New Jersey 07717;
> (c) date, place and circumstances of the incident: "On November 22, 2016, at approximately 12:00 p.m., Claimant Luzi Bartsch, **was walking on Pulaski Street, Newark, New Jersey, when she tripped due to an obstruction** on and/or condition of the sidewalk causing her to fall to the ground sustaining permanent and severe injuries..." **Additionally, notice advised that "claimant reserves the right to amend the aforementioned response throughout the course of discovery."**
> (d) a general description of the plaintiff's injuries: "Claimant was initially diagnosed with an injury to her right arm and knee. Claimant reserves the right to amend and supplement this response as her medical treatment is ongoing." **Additionally, notice advised that "claimant reserves the right to amend the aforementioned response throughout the course of discovery."**
> (e) names of the public entities that are responsible: City of Newark, Newark Public Schools, Newark Board of Education, County of Essex, State of New Jersey. **Additionally, notice advised that "claimant reserves the right to amend the aforementioned response throughout the course of discovery."**

(Pa8 to 15) (emphasis added).

On January 3, 2017, the City of Newark sent Plaintiff its individualized notice of claim form.[4] (Pa25 to 34). Merely 16 days later, on January 20, 2017 and just 59 days after the incident, Plaintiff/Respondent responded to Newark's Tort Claim Notice. In the cover letter, Plaintiff/Respondent stated **"Please be advised Claimant reserves the right to supplement and/or amend the information provided as Claimant is under active medical care."** (Pa35). The response included, among other things:

> (1) claimant's name,
> (2) claimant's date of birth,
> (3) claimant's address,
> (4) claimant's social security number,
> (5) attorney's name and address,
> (6) date of the incident,
> (7) location of incident,
> (8) description of how the incident occurred (on November 22, 2016, at approximately 12:00 p.m., Claimant Luzi Bartsch...tripped due to an obstruction on...the sidewalk causing her to fall to the ground sustaining permanent and severe injuries,
> (9) advised that the names of City employees at fault would be supplied throughout discovery, if applicable,
> (10) the negligence and wrongful acts of the City (the entities who owned ...or controlled the location where the incident occurred are responsible...)
> (11) advised that no police officers arrived at the scene and there was no applicable police report,
> (12) that Claimant sustained injuries to her right arm and knee, however, she reserves the right to amend and supplement her response as her medical

[4]Of note, Newark's cover letter to its notice of claim form misleadingly cites bad law when it states "pursuant to...*Wood v County of Burlington,* 302 N.J. Super. 371 (App. Div. 1992), please be advised the City of Newark has adopted its own Notice of Claim form which must be completed and returned." (Pa25). *Wood* was rendered bad law by *Newberry,* 319 N.J. Super. at 679 (App.Div. 1999) ("we are of the view that *Wood*...substantially deviates from our prior jurisprudence.")

> treatment is ongoing,
> (13) the names and addresses for each hospital, doctor or medical practitioner that rendered treatment, or examined Claimant (Saint Michael's Medical Center, Dr. Mark Rodrigues, D.C.,and Dr. Saurabh C. Patel, M.D.),
> (14) advised that claimant made a claim against the Newark Public Schools, Newark Board of Education, County of Essex and State of New Jersey, and
> (15) the names and addresses of persons against whom claims were made (Newark Public Schools and Newark Board of Education), and
> (16) signed blank medical authorizations allowing the City to obtain her medical records from any provider.

(Pa35 to 43) (underline added).

Plaintiff/Respondent also wrote to the City of Newark on March 5, 2018 that (1) its request for medical authorizations was previously provided, (2) there was no police report (which they already knew as of January 20, 2017) (Pa38), (3) the location of the incident occurred near the intersection of Pulaski Street and Warwick, (4) photographs showing the location of the incident (5) itemized medical bills and records received since the prior notices, and (6) advised that medical bills were covered by plaintiff's personal health insurance- all of which was in any event readily obtainable by Newark from the medical authorizations they had already been provided within 90 days. (Pa57 to 58).

B. Defendants Should Not be Permitted to Sit on the Substantial Information Provided and Manufacture a Claim of Insufficiency

Newark erroneously claims that "during the claim stage, Plaintiff failed to tell Newark what she tripped over or even where the purported dangerous condition of public property was located, save for merely identifying an eleven-block long City street." (Newark Db7) They are incorrect. Even a minimal review of the substantial information provided and a simple investigation would have revealed the obvious defect on the sidewalk abutting the only public school on the .56 mile long Pulaski Street. Newark again erroneously alleges that the Tort Claims Act requires that claimant identify "the exact location" of the incident. (Newark Db26). The law does not require the "exact location;" it requires that the claimant identify "the date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted." *N.J.S.A* 59:8-4.

Further, Pulaski street runs for approximately .56 miles. The Court can take judicial notice (such as from a simple Google or other public maps search), that if two investigators would have walked on each side of the street beginning on Elm Street (one end of Pulaski Street) at an average pace, they would have reached the incident location in 3 minutes (.2 miles). Had they started on South Street (the other end of Pulaski Street) they would have reached the incident location in 8 minutes (.4 miles). Knowing three of the six entities noticed were Newark Public School

entities, and that East Side High School is the only public school on the street, had they started there they would have immediately noticed the obvious obstruction. (Pa64) Surely the Newark Law Department is aware of basic New Jersey sidewalk liability law about the responsibility of an adjacent property owner to maintain a safe sidewalk. *Luchejko v. City of Hoboken*, 207 N.J. 191 (2011) (adjacent property owner has duty to maintain sidewalk in safe condition); *Christmas v. City of Newark*, 216 N.J. Super. 393 (App. Div. 1987) (same).

It is expected discovery will show the incident was reported to the school, where plaintiff worked, the same day. Further, the school system was served two tort claim notices and not until this appeal did they in any way ever claim the notices were somehow so insufficient the case should be thrown out of court.

Newark erroneously argues that the trial court "ratified gamesmanship on the part of the Plaintiff." (Newark Db 8). Newark's statement is unsupported hyperbole. There has been no gamesmanship. While it is true that the description of the incident location could have been more detailed in the original notices, "the date, place and other circumstances of the occurrence which gave rise to the claim asserted" was substantially set forth in all four notices of claim in accordance with *N.J.S.A.* 59:8-4, as Judge Mitterhoff found on 2 occasions. Indeed, it is expected discovery will show defendants created the dangerous condition and had it removed after receiving the tort claim notices. Plaintiff

has no incentive and nothing to gain by somehow trying to "hide" the incident or its location. East Side High School is the only public school abutting the .56 mile short Pulaski Street sidewalk.

A public entity cannot sit on the notice of claim information they are provided, do nothing by way of investigation, and later claim the notice provisions were not satisfied. *See, e.g. Anske v. Borough of Palisades Park,* 139 N.J.Super. 342 (App.Div. 1976). They cannot receive a complete list of the medical providers and authorizations they asked for, do nothing with those, and then later claim in court they were hamstrung in their ability to investigate her injuries. *Id.*

They cannot receive four claim notices, multiple statements by counsel to "contact me if you have any questions," not contact plaintiff's counsel by way of investigation or otherwise, and then claim they could not conduct the investigation they apparently chose not to conduct. At no point did anyone pick up the phone or short a quick email to plaintiff's counsel. While it is true they sent a letter on January 24, 2017 purportedly seeking more information, the record shows that information had already been provided (like medical authorizations), or they could have obtained it with minimal effort (like medical insurance information) or they were previously told the information did not exist (like a police report). *Lebron v. Sanchez*, 407 N.J.Super. 204, 215 (App.Div. 2009) (notice of claim provisions are to place the entity on notice of a potential claim to allow an investigation. It is not a "trap for

the unwary" and substantial compliance is all that is needed).

Newark in any event did not follow up with that letter and otherwise made no attempt to contact plaintiff's counsel. Certainly a basic investigation would at a minimum have called for Newark to contact their own public schools arm where the plaintiff worked and which was clearly on the original notice of claim. (Pa 8 to 15).

C. No Follow Up by Newark

Newark wants to establish a new precedent that essentially says it can sit on the claim information provided, conduct no real investigation, and then claim statutory non-compliance. But the law only requires the plaintiff to put the public entity on notice so it can conduct its own investigation; not that the plaintiff must conduct the investigation for the entity. Plaintiff/Respondent made several good faith attempts to comply with the statute and provided Newark with substantial information, including signed blank medical authorizations. Further, as seen by Plaintiff's notice of claims, she promptly responded to all requests. It was actually Newark who failed in any way to follow up on their January 24, 2017 letter which largely sought information they already had, could have obtained with minimal effort, or they knew did not exist. Certainly under the totality of the circumstances, this case should not be thrown out of court.

Certainly, given the January 24, 2017 letter asked for several things which were already provided or they could have obtained with

minimal effort, or Newark knew or should have known did not exist, and given there was no follow up by Newark until the motion to dismiss, this is part of a reasonable explanation for there not being an earlier response to the letter. Under the totality of the circumstances, there was substantial and reasonable compliance. *Lebron*, 407 N.J. Super. at 215-217 (App.Div. 2009). Contrary to defendants' hyperbole, there was no "refusal" or "strategy"[5] to not provide information. Similarly, there were not "multiple attempts" by Newark to get allegedly missing information. The nature of the January 24, 2017 as set forth above, coupled with total silence from Newark thereafter, reasonably lead counsel to believe Newark had sufficient information to do whatever it chose to do. Regardless, after the March 5, 2018 further response, there could no longer be any question and under the totality of the circumstances, this is a "reasonable" time. *Newberry v. Township of Pemberton*, 319 N.J. Super. 671 (App.Div. 1999).

Instead Newark filed a motion to dismiss claiming they had no ability to investigate the claim, relying on their January 24, 2017 letter. In response to the February 28, 2018 motion to dismiss, counsel quickly provided a detailed response to that letter on March 5, 2018. Newark erroneously claims they first learned of the exact location and cause of plaintiff's fall on March 19, 2018

[5] Defendants absurdly suggest it was plaintiff's "strategy" to not provide information on damages, yet attempt to get the defendants to pay settlement money on those non-disclosed damages.

"upon receipt of Plaintiff's opposition to the State's motion to dismiss." (Newark Db13). This is wrong. So too is the statement at Newark Db14 that the information was not provided until "discovery." Newark was provided with the photographs and a more detailed statement as to location, in the March 5, 2018 letter. (Pa57-74).

Given the totality of the circumstances here, including Newark's request for information they already had or knew did not exist, and no follow up (phone call, email or otherwise), that is a "reasonable" time. *Newberry v. Township of Pemberton*, 319 N.J. Super. 671, 675-679 (App. Div. 1999). Indeed, in this regard Newark relies on *Wood v. Cty of Burlington*, 302 N.J. Super. 371 (App. Div. 1997), which stands for the proposition that requests for further information have to be provided within 90 days of the incident, even if those requests come on the 89th day. *Wood* is of course bad law. The information is to be provided within a "reasonable time." *Newberry*, 319 N.J. Super. at 675-679. Here this is critical because given the totality of the circumstances, including the substantial information provided within 90 days including a complete list of medical providers with blank authorizations, Newark's only follow up being its motion to dismiss, and plaintiff providing the additional information (scene photographs and medical bills) almost immediately in response to that follow up, the time period at issue here should be deemed reasonable. Furthermore, Newark is unable to demonstrate any real

prejudice.

In response to the December 19, 2016 tort claims notice, Newark Public Schools ("NPS") sent a letter to plaintiff's counsel dated December 20, 2016 enclosing their claim form. (Pa16 to 24). It was completed and returned on January 20, 2017. (Pa44 to 53). At no point did NPS request any further information whatsoever. "The Act's notice requirement is not intended as a trap for the unwary." *Lebron v. Sanchez*, 407 N.J. Super. 204, 215 (App.Div. 2009).

D. Defendants' Unreasonable Claims about Damages Should be Rejected and there is No Prejudice

Moreover, Newark erroneously argues that "Plaintiff initially only reported injuries to her right arm and right knee in her TCA notice, her answers to interrogatories now reported a closed head injury, a tear of the lateral humeral epicondyle tendon, cervical disc herniations, lumbar disc bulging and radioculopathy." (Newark Db15). However, the law only requires a "**general description** of the injury, damage or loss incurred so far as it may be known **at the time of presentation of the claim.**" *N.J.S.A.* 59:8-4 (emphasis added). A general description of personal injuries is sufficient to satisfy the statute. *Guerrero v. Newark,* 216 N.J Super. 66 (1987). *Murray v. Brown,* 259 N.J. Super. 360 (1991). Furthermore, the "humeral tendon" is in the arm. The neck and back injuries did not develop and were not so diagnosed until after the 90 day claim period, as is often the case with these kinds of injuries.

In *Guerrero*, the plaintiff gave the city notice of his claim after a car accident caused by an inoperative traffic light. Plaintiff's notice included all information that was requested on the city's claim form, except the names and addresses of police officers who investigated the accident, the dates on which the plaintiff was treated by his physician and the amount of medical expenses and property damage. Plaintiff also failed to present copies of itemized bills and other items relating to damage as requested by the city. Nonetheless, the Appellate Division affirmed the trial judge's ruling that plaintiff substantially complied with notice provisions; the court found that even dismissal without prejudice was improvident as being a waste of time and resources. Here Plaintiff/Respondent provided far more information than in *Guerrero*. (Pa35 to 43).

Further, it is of utmost importance that Plaintiff/Respondent's initial Tort Claims Notice was provided to Newark merely 27 days after the incident; the second notice of claim/injury was provided merely 59 days after the incident. It is unreasonable to expect for Plaintiff to know the full extent of her injuries within days of the incident. That is no doubt among the reasons why defendants requested, and Plaintiff/Respondent provided Newark with blank medical authorizations to allow Newark to investigate and learn the full extent of claimant's injuries, which by their nature are fluid and developing. (Pa51 to 52). Indeed, it is quite common for neck and back injuries to develop many

months after trauma. And in any event, defendants no doubt will hire a defense examiner who will no doubt say there is no spine pathology and /or any pathology is not from the fall. And again, on multiple occasions within the 90 days plaintiff's counsel advised "that claimant reserves the right to supplement and/or amend the information provided as **Claimant is under active medical care.**" (Pa35) (emphasis added).

Also, Newark erroneously argues that Plaintiff/Respondent has a responsibility to state whether there is a lost wage claim. (Newark Db22). However, the statute is devoid of this alleged requirement. *N.J.S.A* 59:8-4. Additionally, claimant, many times throughout the notice of claim states that claimant reserves the right to supplement said information throughout discovery. (Pa8 to 15). Indeed, plaintiff could not know whether she had any real wage loss claim until time went on. Indeed, she only missed a day of work within the 90 days and it is not until the full extent of the injury develops that she could possibly know about any real wage loss claim. Defendants' positions are unreasonable and attempt to erect barriers that do not exist in the statute. Indeed, in this regard they rely on *Wood v. Cty of Burlington*, which is outmoded and in any event does not support their position. *Newberry,* 319 N.J. Super. at 679 (App.Div. 1999) ("we are of the view that *Wood*...substantially deviates from our prior jurisprudence.").

Moreover, Newark alleges it was somehow prejudiced, without

ever articulating how. It has no certification or any other evidence to support its sweeping generalization. (Newark Db33). In determining whether prejudice exists, courts are primarily concerned whether the delay will impair defendant's ability to "defend on the merits." *State v. One 1986 Subaru*, 120 N.J. 310, 315 (1990). Moreover, "substantial prejudice" means substantial prejudice in maintaining one's defense, and generally that implies inability to defend because of such things as loss of evidence. *See, e.g. Mitchell v. Charles P. Procini, D.D.S.,P.A.,* 331 N.J. Super. 445, 454 (App. Div. 2000). Here, Newark fails to otherwise demonstrate any real prejudice. "More than a sweeping generalization is necessary." *Lebron v. Sanchez*, 407 N.J. Super. at 220.

Defendants claim they could not investigate damages, despite having, among other things, the provider list and medical authorizations. The record is devoid of any steps, for example, it took to actually obtain those medical records. Indeed, there is nothing in the record about any steps defendants attempted to take to investigate, but were unable due to non-compliance. The law does not require plaintiff to conduct the investigation for the defendant. It only requires notice of a potential claim so that they can conduct their own investigation. *N.J.S.A. 59:8-4.* The record and common sense shows substantial compliance and defendants had sufficient information to conduct an investigation.

E. It Is Expected Discovery Will Further Show Defendants' Claims Are a Ruse and Judge Vena's Comments Were Based on a Mistaken Paper Trail

There has been no discovery below on these issues about investigation or the lack thereof. In fact there has been no discovery at all from defendants. As such, the facts very well may be that defendants knew the location, created the condition and fixed it after receiving the claim notices. The school wrote in its brief that plaintiff "reports that she was walking to work at the time of the incident." (NPS Db13). But that is nowhere in the record and suggests NPS has reports about the incident, which would make sense given we do not expect the school to dispute it was reported to it the same day, and scene photos provided to the school principal the next. Discovery will show even more that the unsupported statements in defendants' briefs about being totally in the dark are a ruse. The fact of the matter is defendants received four notices of claim well within the 90 days. There has been substantial compliance and further information was provided within a reasonable time. The record is devoid of any demonstrated prejudice. *Newberry v. Township of Pemberton,* 319 N.J. Super. 671 (App.Div. 1999); *Lebron v. Sanchez*, 407 N.J. Super. at 220 ("sweeping generalizations [about prejudice] are not enough.")

Newark argues that Judge Vena stated that had he been in the Appellate Division he would have overturned Judge Mitterhoff's ruling. (Newark Db33). However, it is important to note that Judge Vena did not consider most of the facts and law set forth

herein, including but not limited to the following:

1. That the law only requires the date, place and other circumstances of the occurrence which gave rise to the claim asserted. *N.J.S.A.* 59:8-4(c), it does not require an "exact location";

2. That the law only requires the claimant to provide the amount claimed as of the date of presentation of the claim, including the estimated amount of any prospective injury insofar as it may be known at the time of the presentation of the claim. *N.J.S.A.* 59:8-4 (f) clearly in personal injury cases the amount of the claim cannot be known within 90 days or even by the time the complaint is filed. Indeed, the Rules do not even permit damage amounts in complaints. *Rule* 4:5-2;

3. That a mere 27 days after the incident, Plaintiff/Respondent provided the City of Newark with a written notice of claim. In the cover letter to the notice, plaintiff's counsel said "**should you have any questions, please do not hesitate to contact me.**" (Pa8 to 15). The claim provided substantial information substantially complying with the Act. (Pa8 to 15).

4. On January 20, 2017 and just 59 days after the incident, Plaintiff/Respondent responded to Newark's individualized tort claim form. In the cover letter to said response, Plaintiff/Respondent stated "**Please be advised Claimant reserves the right to supplement and/or amend the**

information provided as Claimant is under active medical care.” (Pa35). In said notice, Plaintiff/Respondent in good faith provided further substantial information. (Pa35 to 43)

5. On March 5, 2018, Plaintiff/Respondent specifically responded to the Jan. 24, 2017 letter of Newark (1) that its request for medical authorizations was previously provided, (2) again stating that there was no police report which they already knew from the Jan., 2017 notices, (3) a more specific location of the incident occurred near the intersection of Pulaski Street and Warwick, (4) photographs showing the location of the incident (5) itemized medical bills and records even though they had the list of providers and authorizations for over a year and could have gotten them directly from the providers with even a minimal investigation, and (6) advised that medical bills were covered by plaintiff’s personal health insurance, which also would have been evident directly from the providers’ charts with the medical authorizations. (Pa57 to 58).

Indeed, Judge Vena misconstrued the record at Newark Db17-18 and Tr. 17, 18 when he states at oral argument on July 30, 2018 plaintiff said, “we’re not even gonna tell the City of Newark unless you make us.” and “you weren’t going to give it to them till somebody told you to.” Plaintiff’s counsel is partly at fault for this because of a misstatement in an April 13, 2018 brief that indicated we would provide the photos if ordered by the Court.

(Da91). However, this was a mistake; those photos and a more detailed description of the incident location had already been provided to Newark over a month earlier, on March 5, 2018, long before any court orders were issued in the matter. (Pa57-Pa74)

The record reflects plaintiff timely provided the information set forth, without the need for any court orders. As of March 5, 2018, well before any motions were decided, there was no longer any legitimate question Newark was provided all the information at issue. NPS should not dispute it had scene photos directly from its employee within days of the incident, and counsel provided photos and a more detailed description of the location to Newark as of March 5, 2018. (Pa57-74)

While the young attorney assigned this matter, Lazaro Berenguer[6], may not have been as "quick on his feet" in response to what defendants characterize as a "grilling" by the lower court, or as versed in the paper trail as he is now, the paper record is clear there was no gamesmanship. Counsel promptly responded to the inquires as set forth herein. There was no follow up by Newark to its January 24 letter, not even a simple phone call or email to counsel by way of investigation or otherwise. (Pa57 to 58). The information provided substantially and reasonably complied with the notice provisions. Defendants had sufficient information to place them on notice and enable them to conduct an investigation.

[6]The undersigned first became involved in this matter on this appeal.

Instead they apparently sat on this information (or at least are not telling us what they found out), to manufacture a claim of non-compliance. This should be rejected, as it was three times below.

Additionally, Newark erroneously cites *Navarro v. Rodriguez*, 202 N.J. Super 520 (1984) to support its claim that a claimant must provide the information requested in the public entity's specialized form. (Newark Db27). In *Navarro*, claimant refused to return medical authorizations to the public entity. Here, unlike *Navarro*, both Newark and NPS received signed blank medical authorization forms well within 90 days of the incident. (Pa43, 51)

Defendants have never claimed any kind of defect with those medical authorization forms. They have also never told the court what they did with them. They have only made the sweeping and unsupported generalization that they could not conduct any injury investigation, despite having those forms and a complete list of the medical providers. It is defendants who are attempting to make a mockery of the Tort Claim Act notice provisions into something far removed from anything the Legislature ever intended.

Moreover, Newark's reliance on the unpublished decision of *Aguilar v. Essex County Dep't of Parks & Rec.*, 2009 N.J. Super. Unpub. LEXIS 1790 (2009) is misplaced. (Newark Db28). *Rule* 1:36-3, states that "no unpublished opinion shall constitute precedent or be binding upon any court." *Badiali v. New Jersey Mfrs. Ins.*, 220 N.J. 544, 559 (2015). *Sciarotta v. Global Spectrum*, 194 N.J. 345, 353 n.5 (2008) (declining to address an argument based on an

unpublished Appellate Division opinion). *In re Alleged Improper Practice*, 194 N.J. 314, 330 n.10 (2008) ("we underscore that no unpublished opinion shall constitute precedent or be binding upon any court and that no unpublished opinion shall be cited by any court").

Furthermore, in *Aguilar*, the claimant gave the wrong location to the defendant. Here, unlike in *Aguilar*, plaintiff did not in anyway misidentify the location. At no time did plaintiff say it happened somewhere where it did not. Pulaski Street is only .56 miles long, the Newark Public Schools were clearly on the original notice of claim, and East Side High School is the only public school on the street. A simple look at that new sidewalk shows an obvious tripping obstruction. (Pa61) Newark could have gone to the exact location with the information provided. The school should not dispute the rather immediate information it received about the incident, and they <u>never</u> claimed insufficient notice.

Therefore, this Court should affirm the trial court's rulings and find that Plaintiff/Respondent substantially complied with the Act's notice requirement. This case should not be thrown out of court.

II. NEWARK PUBLIC SCHOOLS NEVER MOVED FOR DISMISSAL BELOW AND THEIR ARGUMENTS SHOULD IN ANY EVENT BE REJECTED (not raised below).

A. NPS' Claims are Tenuous at Best

Here, a mere 27 days after the incident, Plaintiff/Respondent provided the Newark Public Schools with a written notice of claim/injury on December 19, 2016. In the cover letter to the notice, plaintiff's counsel said "**should you have any questions, please do not hesitate to contact me.**" (Pa8 to 15). As required by the Act said notification contained:

> (a) plaintiff's name and address: Luzi Bartsch and attorney address to send all notices to;
> (b) attorney's address: Clark Law Firm, PC, 811 Sixteenth Avenue, Belmar, New Jersey 07717;
> (c) date, place and circumstances of the incident: "On November 22, 2016, at approximately 12:00 p.m., Claimant Luzi Bartsch, **was walking on Pulaski Street, Newark, New Jersey, when she tripped due to an obstruction** on and/or condition of the sidewalk causing her to fall to the ground sustaining permanent and severe injuries..." **Additionally, notice advised that "claimant reserves the right to amend the aforementioned response throughout the course of discovery."**
> (d) a general description of the plaintiff's injuries: "Claimant was initially diagnosed with an injury to her right arm and knee. Claimant reserves the right to amend and supplement this response as her medical treatment is ongoing." **Additionally, notice advised that "claimant reserves the right to amend the aforementioned response throughout the course of discovery."**
> (e) names of the public entities that are responsible: City of Newark, Newark Public Schools, Newark Board of Education, County of Essex, State of New Jersey. **Additionally, notice advised that "claimant reserves the right to amend the aforementioned response throughout the course of discovery."**

(Pa8 to 15).

On January 20, 2017, just 59 days after the incident, Plaintiff/Respondent responded to the Newark Public School's Tort Claim Notice Questionnaire. In the cover letter to said response, Plaintiff/Respondent stated **"Please be advised Claimant reserves the right to supplement and/or amend the information provided as Claimant is under active medical care."** (Pa44 to 53). In said notice, Plaintiff/Respondent provided the following information:

> (1) claimant's name,
> (2) claimant's date of birth,
> (3) claimant's address,
> (4) claimant's social security number,
> (5) attorney's name and address,
> (6) date of the incident,
> (7) location of incident,
> (8) description of how the incident occurred (on November 22, 2016, at approximately 12:00 p.m., Claimant Luzi Bartsch...tripped due to an obstruction on...the sidewalk causing her to fall to the ground sustaining permanent and severe injuries,
> (9) advised that the names of City employees at fault would be supplied throughout discovery, if applicable,
> (10) the negligence and wrongful acts of the City (the entities who owned ...or controlled the location where the incident occurred are responsible...)
> (11) advised that no police officers arrived at the scene,
> (12) that Claimant sustained injuries to her right arm and knee, however, she reserves the right to amend and supplement her response as her medical treatment is ongoing,
> (13) the names and addresses for each hospital, doctor or medical practitioner that rendered treatment, or examined Claimant (Saint Michael's Medical Center, Dr. Mark Rodrigues, D.C.,and Dr. Saurabh C. Patel, M.D.),
> (14) advised that claimant made a claim against the Newark Public Schools, Newark Board of Education, County of Essex and State of New Jersey, and

> (15) provided the names and addresses of persons against whom claims were made (Newark Public Schools and Newark Board of Education), and
> (16) Plaintiff/Respondent provided blank medical authorizations allowing the City to obtain her medical records from any provider.

(Pa44 to 53).

Newark Public Schools erroneously claims that "Plaintiff's refusal to elaborate on the details of their claim, thwarted" their attempt to investigate this case. (NPS Db7). But there is nothing in the record to support that conclusion. There is nothing as to what they did with the substantial information they received. Not once after Plaintiff/Respondent's January 20, 2017 letter did the Newark Public Schools request any additional information or claim insufficiency.

NPS claims plaintiff was not diligent and that its case should therefore be dismissed.[7] But NPS waited some 5 months to file an answer to the complaint and filed no motion below. (Pa81). (Pa1 to 6). Yet it wants a dismissal on this appeal. This should be rejected.

[7] Newark Public Schools states that Plaintiff/Respondent did not oppose Newark's first motion to dismiss Plaintiff's Complaint. (Newark Db8). This was due to a staff member's mis-calendering the return date of said motion. Said staff member was subsequently terminated for this kind of thing.

B. The Arguments about Details of the Incident, a Damages Dollar Amount and a Per Quod Claim Typify Defendants' Unreasonable and Incorrect Positions

Newark Public Schools states that Plaintiff/Respondent's Complaint should be dismissed because Plaintiff's Notice of Claim stated that the incident occurred at 12:00 p.m., while the Complaint states that it occurred at 6:45 a.m. Newark Public Schools has no law to support this extreme position. The law does not state that the time has to be provided to the public entity. *N.J.S.A.* 59:8-4. Nonetheless, Plaintiff provided the correct time (12:00 p.m.). Additionally, the time in the Complaint is merely an allegation (and a typographical error). Moreover, the Newark Public Schools knew the time and place of the incident because, as NPS stated in their brief, Plaintiff/Respondent works there, and reported it to them the same day; indeed she was hurt on her way back from her lunch break. NPS never before claimed insufficient notice.

Newark Public School claims that Plaintiff/Respondent (1) did not provide the name and post office address of the claimant, (2) the date, place and other circumstances of the occurrence, (3) a general description of the injury, or (4) the estimated amount of Plaintiff's injury (as best can be known). This is false and otherwise no basis to dismiss the case. As the record shows, Plaintiff/Respondent provided all this information and more in its December 19, 2016 Notice of Claim and in its January 20, 2017

Notice. (Pa8 to 15). (Pa44 to 53). Furthermore, the statute only requires that the claim should set forth "the amount claimed as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount thereof." *N.J.S.A.* 59:8-4(f). The claimant need not specify damages if the amount is unknown at the time the claim is filed. *Dambro v. Union County Park Com.,* 130 N.J. Super. 450 (1974). *McGrath v. N.J. Dist. Water Supply Comm.,* 224 N.J. Super. 563 (1988) (claims by over 1,200 flood victims were held sufficient under *N.J.S.A.* 59:8-4 even though claims did not include complete breakdown of damages.).

NPS erroneously claims that this Court should dismiss Plaintiff's Complaint because Mr. Bartsch (Plaintiff's husband) was not named as a potential claimant. (NPS Db12). There is no support in the law for NPS's request. The law is clear such need not be in a notice of claim, particularly where a per quod claim is a derivative claim and the form does not ask for details about it, as is the case here. (Pa16 to 24). *Milacci v. Mato Realty Co., Inc.*, 217 N.J. Super. 297, 306 (App. Div. 1987). Defendants' baseless position that the case should be dismissed because the per quod claim was not mentioned in the tort claim notice typifies their presentation to this Court.

NPS also states that Ms. Bartsch worked at East Side High

School and was obviously familiar with the area. (NPS Db13) Similarly, there should be no dispute she reported to them the same day and provided scene photos. Apparently NPS is working off an internal report of the incident, yet they claim ignorance and a complete inability to investigate, with no supporting certification or other evidence. Their position should be rejected.

Moreover, NPS argues this Court should dismiss Plaintiff/Respondent's claim because she did not advise them of her neck injury. (NPS Db15). There is no support in the law that requires that Plaintiff/Respondent provide the exact injury so early on in her medical treatment, before any such injury has been diagnosed or developed. The law only requires "a general description of the injury, damage or loss incurred so far as it may be known at the time of presentation of the claim. *N.J.S.A.* 59:8-4(d). A general description of personal injuries is sufficient to satisfy the statute. *Guerrero v. Newark,* 216 *N.J. Super.* 66 (1987). *Murray v. Brown,* 259 *N.J. Super.* 360 (1991). Despite being provided a complete list of the medical providers and authorizations, there is nothing in the record as to what they did or tried to do with that information. (Pa51 to 52). Incredibly defendants claim they were unable to investigate damages and are surprised.[8] Yet they say it is the plaintiff who has engaged in

[8] For example, at NPS DB15, they claim plaintiff sustained a "head injury" but hid that information from the tort claim notice and otherwise did not provide a "complete list" of injuries. This is

"gamesmanship" and has somehow not been up-front. There has been substantial compliance and Defendants' position should be rejected.

Additionally, NPS claims Plaintiff failed to provide the dollar amount claimed pursuant to the Act. (NPS Db15). NPS erroneously cites *Beauchamp v. Amedio*, 164 N.J. 111 (2000) (where Plaintiff's counsel filed a late notice of claim, 9 months after the incident). Unlike *Beauchamp,* the instant matter is not a late notice of claim case. To the contrary, defendants here received four tort claim notices within 90 days. The statute requires the claim should set forth "the amount claimed as of the date of presentation of the claim..." *N.J.S.A.* 59:8-4(f). The claimant need not specify damages if the amount is unknown at the time the claim is filed. *Dambro v. Union County Park Com.,* 130 N.J. Super. 450 (1974). Defendants' attempt to change the law into a bizarre realm of unreasonableness, far from what the Legislature ever intended, should be rejected. *Id.*

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absurd. Plaintiff would have absolutely no reason to downplay her injuries. The fact of the matter is, the CT scan at the initial emergency room visit was negative. Personal injuries are often fluid and evolving, which is why the law does not require precision within 90 days. A person typically does not know the extent of injuries within 90 days. Defendants, who had the medical authorization for the hospital, either got the records and knew this, or simply chose to do nothing with them. We don't know, they will not tell us.

C. There Has Been Good Faith, Substantial Compliance and The Draconian Result of Dismissal is Not Warranted as to any Defendant

Compliance with *N.J.S.A.* 59:8-4 is all that is necessary to protect a claimant's right of action, even where there is an adopted form which is deemed supplemental in nature. *Tuckey v. Harlesville Ins. Co.*, 236 *N.J. Super.* 221, 225 (1989) ("substantial compliance with the requirements of *N.J.S.*A. 59:8-4 is all that is required in order to perfect a claim."). The doctrine of substantial compliance is applicable to the 59:8-4 notice requirements. In *McGrath v. N.J. Dist. Water Supply Comm.*, 224 N.J. Super. 563 (1988) the court found that there was substantial compliance with the statute despite a lack of detail and specificity and even though additional information sought by the supplemental forms was not supplied until after litigation began.

Similar to the instant matter, the public entity in *McGrath* sought dismissal of the complaint, contending the notices filed within the 90 day period did not supply the information required by *N.J.S.A.* 59:8-4 by (1) failing to provide a description of the injury, damage or loss alleged; (2) failing to adequately quantify the claim and to provide a basis of computation of the amount claimed. The public entities in *McGrath* contended that plaintiffs failed to supply the information sought in their supplemental notice forms. Nonetheless, the Court concluded that the legislative purposes and goals of the statute had been satisfied

and rejected dismissal.

Moreover, in *Murray v. Brown*, 259 *N.J. Super.* 360, 365 (Law Div. 1991), the trial court noted that "the claim notification provisions of the act were not intended to serve as a trap for the unwary," held that the claim was perfected by the timely filing of a notice substantially complying with *N.J.S.* 59:8-4 even though the specialized claim form was not completely responded to. (underlined for emphasis); *see also Newberry*, 319 N.J. Super. 671, 679 (App.Div. 1999).

Further, the Newark Public Schools erroneously cites *Speer v. Armstrong*, 168 N.J. Super. 251, 255-56 (App. Div. 1979), where plaintiff fell on an irregular patch of sidewalk and filed a notice of claim about one year after the incident. Unlike *Speer* the instant matter is not a late notice of claim issue; it is a substantial compliance issue.

Further, the Newark Public Schools erroneously states that this Court should dismiss Plaintiff/Respondent's claim because Plaintiff did not provide the name of a witness in the tort claim notice. But there is also no support in the law for this draconian request.

The Newark Public Schools says it was not provided "sufficient information to notify defendants of the potential claim." The record shows this is far from reality. (NPS Db20). The Newark Public Schools was provided with substantial information, both in

person and in the two notices of claim it was provided. It never claimed a lack of information, has demonstrated no prejudice and filed no motion below. Its appeal should be denied.

CONCLUSION

For all these reasons, respondents respectfully request this Court affirm the three trial court rulings which found substantial compliance with the Tort Claim Act notice provisions and denied the motion to dismiss and the two related motions for reconsideration. It should also be noted there has been no discovery from defendants below and the record is devoid of any basis to find either defendant was prejudiced in any way. Furthermore, the complaint includes various fictitious parties pursuant to *Rule* 4:26-4. Plaintiff has had no opportunity to discover the identities of those parties, which may include contractors or other non-public entities which may have been involved in creating the condition at issue.

Respectfully submitted,
Clark Law Firm, PC

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Appeal Brief8- redacted.wpd