Superior Court of New Jersey

Appellate Division

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PAULA RUSSO, Plaintiffs/Respondents, vs. GARDEN COMMERCIAL PROPERTIES; GARDEN HOMES; C&M LANDSCAPE CONTRACTORS, INC., MULCH EXPRESS USA, LLC D/B/A XTREME SNOW PROS; J&A LANDSCAPE & SOW SERVICES; BERNARD PLAZA ASSOCIATES AND JOHN DOES 3-10 fictitious designations) Respondents/Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION **Docket No: A-000262-23T4** ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY LAW DIVISION MERCER COUNTY DOCKET NO. MER-L-0112-20

BRIEF OF DEFENDANTS/APPELLANTS C&M LANDSCAPE CONTRACTORS, INC.; MULCH EXPRESS USA, LLC D/B/A XTREME SNOW PROS; J&A LANDSCAPE AND SNOW SERVICES; AND BERNARD PLAZA ASSOCIATES

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PRELIMINARY STATEMENT

This appeal is taken, in large part but by no means exclusively, from a trial court's refusal to charge its jury on a landowner's duty to address accumulations of snow on its commercial property. As will be developed below, the Plaintiff herein alleged to have fallen in the immediate aftermath of a snow event of such magnitude as to trigger an Executive Order declaring a State of Emergency - which the trial court also refused to take notice- while walking through defendant's parking lot. The trial court's refusal to charge the jury with the appropriate charge was based upon an exceedingly narrow interpretation that such a charge would be limited to abutting sidewalks alone, and thus did not apply to other areas of the commercial property where pedestrian travel was to be anticipated, such as the parking lot in question.

Before the Court is a slip and fall alleged to have taken place on an icy condition on the morning of March 8, 2018. Approximately 14 inches of snow devastated the region, including the accident location, on March 7, 2018, triggering the State of New Jersey to issue an official State of Emergency. Plaintiff, Paula Russo, an underwriting assistant, was fully capable of working remotely, but instead chose travel to her office located at 403 King George Road (known as Dewy Meadow Village) in Basking Ridge, New Jersey. Upon arrival at the parking lot at approximately 7:30 AM - during which time snow removal

operations were apparently still ongoing – Plaintiff slipped and fell on ice. The subject premises was owned by defendant, Bernard Plaza Associates, who contracted with J&A Landscape & Snow Services for snow removal. J&A subcontracted with C&M Landscape Contractors (d/b/a Xtreme Snow Pros) for the 2017-2018 snow season. In anticipation of the storm, Xtreme Snow Pros had actually applied 'anti-icing" brine to the property in advance of the storm, and was actively engaged in the snow removal process and was still applying de-icing materials to this large commercial property when Plaintiff fell.

The trial court's errors commenced with the hearing of multiple motions in limine on July 19, 2023 wherein the lower court determined that Plaintiff could reference the snow removal contracts at trial, which had the effect of improperly expanding the Defendants' duty of care beyond what the common law required and allowed the contractual obligations to trump the common law duty of care. At that same in limine hearing, the trial court also erred by barring Defendants from referring to and otherwise failing to take judicial notice of the weather-related State of Emergency for the snow event of March 7, 2018, which lasted through the date of loss, and even a few days thereafter.

The errors continued to accrue and compound at the trial itself, which took place between July 24, 2023 to August 1, 2023. The trial court erred by failing to charge the jury with *Model Civil Jury Charge* 5.20B(2)(b) – Liability of

Owner of Commercial Property for Defects, Snow and Ice Accumulation and Other Dangerous Conditions in Abutting Sidewalks. Then, the trial court erred once again by precluding Defendants from referring to a photograph of the snow/ice condition and accident location, which was attached by Plaintiff herself to her answers to interrogatories. The next error occurred when the trial court permitted Plaintiff to question Defendants about a subsequent storm in April 2018, which was irrelevant to any triable issue.

These errors, particularly as to the expanded duty of care which allowed reference to the snow removal contract, barring reference to or failing to take judicial notice of the State of Emergency, and failing to charge the jury with the proper jury charge constitute reversible error. The remaining errors as to the excluded photograph and questioning on the subsequent storm, when considered in conjunction with the other errors mentioned above, amount to cumulative error which warrant a reversal as to the in limine orders on the contracts and State of Emergency, and a remand for a new trial on liability only.

PROCEDURAL HISTORY

On February 24, 2020, Plaintiff/Respondent, Paula Russo (hereinafter "Plaintiff" or "Respondent") filed an Amended Complaint in which she alleges that she sustained serious personal injuries as a result of a slip and fall she sustained on March 8, 2018 in the parking lot at 403 King Georges Road, Basking Ridge, NJ. (Da 20-24). Defendants/Appellants C&M Landscape Contractors, Inc.; Mulch Express USA, LLC d/b/a Xtreme Snow Pros; J&A Landscape and Snow Services, and Bernard Plaza Associates (hereinafter "Defendants" or "Appellants" collectively) filed an answer to plaintiff's amended complaint on April 28, 2020. (Da 25-35).

On November 29, 2022, Defendants initially filed a motion in limine requesting that the court take judicial notice of the weather-related State of Emergency issued on March 6, 2018 for the snow event of March 7, 2018. This State of Emergency was in effect at the time of the plaintiff's accident on March 8, 2018, and in fact was not terminated until March 13, 2018. (Da 36-41). Plaintiff opposed the motion on January 13, 2023. The trial court denied this initial motion in limine requesting judicial notice on the State of Emergency on February 17, 2023. (Da 42-43).

Then, on May 25, 2023, Plaintiff filed a separate motion in limine to bar reference to this weather-related State of Emergency. Defendants filed their opposition to this motion on May 30, 2023. At the same time, Defendants also filed a separate motion in limine seeking to bar reference to the terms of the snow removal contract,

sought relaxation of the court's earlier refusal to take judicial notice of the State of Emergency, and further sought to bar evidence regarding the non-renewal or termination of Xtreme Snow Pros after the 2018 season. On July 13, 2023, Plaintiff filed opposition to Defendants' motion in limine barring reference to the snow contract, requesting judicial notice of the State of Emergency, and barring reference to the subsequent termination of Xtreme Snow Pros. On July 18, 2023, Defendants filed a reply brief on this motion in limine.

The trial court entertained oral argument on the various motions in limine mentioned above on July 19, 2023. (1T). At that time, the court denied Defendants' motion seeking to bar reference to the terms of the snow removal contract, relax the court's earlier refusal to take judicial notice of the State of Emergency, and bar evidence regarding the non-renewal or termination of Xtreme Snow Pros after the 2018 season. (Da 3-5). In addition, the court addressed Plaintiff's separate motion in limine to bar reference to the State of Emergency which was granted. (Da 1-2).

Thereafter, trial of this matter commenced on July 24, 2023 and concluded on August 1, 2023. The jury returned a verdict finding that Bernard Plaza Associates was 20% negligent; that J&A Landscape and Snow Services was 27% negligent; that Xtreme Snow Pros was 41% negligent; and that Plaintiff was 12% negligent. (Da 6-8).

On September 29, 2023, Defendants filed an Amended Notice of Appeal and Appellate Civil Case Information Statement challenging the rulings in limine about judicial notice, the snow removal agreements and seeking a new trial on liability only. (Da 9-19).

STATEMENT OF FACTS

A. Plaintiff's accident

On March 8, 2018 at approximately 7:30 AM, plaintiff was walking in the parking lot of her workplace when she slipped and fell to the ground. (Da 45). Plaintiff admitted that it snowed overnight and that the parking lot had been plowed, but that it was still icy and had not been salted. (Da 45). This slip and fall occurred at 403 King Georges Road, Basking Ridge, NJ at a commercial property known as Dewy Meadow Village. (Da 20-24).

Plaintiff in her certified answers to interrogatories attached seven color photographs which, by plaintiff's own account, were taken on the date of loss by plaintiff herself on March 8, 2018 at 7:35 AM and reportedly showed the weather conditions on the date of loss. (Da 44-63).

B. **Weather Conditions**

Plaintiff's weather expert, Thomas Else, provided an expert report indicating that the snow began in Basking Ridge on March 7, 2018 near 2 AM and concluded at approximately 8:30 PM. During this time, 14 inches of heavy wet snow fell in the area. (Da 64-79).

Governor Philip D. Murphy issued a weather-related State of Emergency via Executive Order on March 6, 2018 due to massive snow storm of March 7,

2018. (Da 36-41). The State of Emergency Order anticipated that there would be hazardous travel conditions and that normal operations of both private and public entities would be impeded. (Da 36-41). The conditions giving rise to the weather-related State of Emergency did not abate or terminate until March 13, 2018 at 10 AM. (Da 36-41). Plaintiff's slip and fall occurred less than 12 hours after the snow abated in Basking Ridge, and after having accumulated a 14-inch snow fall total, and while the State of Emergency was in full effect.

C. Snow removal contracts

On October 25, 2017, defendant Bernard Plaza Associates, LLC (hereinafter "Bernard Plaza") entered into a snow removal contract with J&A Landscape and Snow Services (hereinafter "J&A"). (Da 80-95). Bernard Plaza is identified as the property owner and J&A is identified as the contractor. (Da 80-95). The Scope of Work stated that "SAFETY IS NOT TO BE COMPROMISED". (Da 89). In addition, the contract's Snow Removal Specifications provided that "[a]ll access roadways and walkways are to be cleared of snow prior to 6:00AM (4:00PM in the event of day storms) or as timely as possible on any given day, seven days week." (Da 94). The agreement further prohibited J&A from using subcontractors without the written consent of Bernard Plaza. (Da 85).

J&A then entered into a Subcontractor Agreement with Xtreme Snow Pros for the snow and ice removal work to be done at Dewy Meadow Village in Basking Ridge, NJ. (Da 96-109). This Subcontractor Agreement also contained the same 6 AM deadline for completion of the snow/ice removal as the underlying agreement between Bernard Plaza and J&A as set forth above. (Da 108).

D. Defendants' Services at Dewy Meadow Village

Dewy Meadow Village, as a property, had many commercial tenants at the time of this incident. Andrew Sutter, a property manager at Dewy Meadow, testified that there were multiple parking lots at this property. (4T 84:1-2; 92:15-17). Matthew Acar (of Bernard Plaza) testified at trial that tenants included a pizza place, Italian restaurant, a tae kwon do studio, Japanese restaurant, ice cream parlor, a Max Challenge fitness studio, Dunkin Donuts, and a vacant supermarket. (4T 24:22-25:11). Acar further stated that when 14 inches of snow comes down during the day, "it's not that easy to open up the parking lot in perfect condition." (4T 49:12-15). In preparation for this snow storm, Acar confirmed that the snow removal contractor (Xtreme) applied brine to the property in advance. (4T 57:7-17). Acar also confirmed that at the time of plaintiff's fall, the snow and ice removal by the contractor was still in progress and had not yet been completed. (4T 62:20-25). Acar admitted that the

magnitude of the snow event would affect whether the contractor could fulfill the goal of completing snow and ice removal by 6 AM. (4T 63:9-64:4). Snow removal at Dewy Meadow was also done in order of priority – Dunkin Donuts, the bagel shop, and daycare were first; then office tenants (such as plaintiff's job) were cleared after since their workers usually came in around 9AM. (4T 65:14-68:4).

Andrew Sutter arrived on site at approximately 10AM on the date of loss and observed between four to ten snow removal workers still actively engaged in snow removal at that time. (4T 95:5-22 to 96:22). Sutter had no concerns about the adequacy of the snow removal or the condition of the walkways on the morning of the incident and felt no need to text the contractor about their work since the contractor was still on site and still working. (4T 98:9-13; 104:19-23).

Chris Marino of Xtreme Snow Pros also testified that he had a dedicated team of workers and equipment for the Dewy Meadows site. (4T 127:4-21). Given the magnitude of this particular snow event, Xtreme in advance doubled the size of their team and workers to 150 people. (4T 174:12-18). Marino explained that given the enormous amount of square footage at Dewy Meadows and 14 inches of heavy wet snow, the actual clearing of the snow and ice took longer. (4T 193:24-194:2). In fact, Marino was unequivocal in his testimony wherein he stated Xtreme was still actively working and clearing snow and ice

at Dewy Meadows on the morning of the date of loss. (4T 204:2-21). In addition to the actual snow clearing, Xtreme pre-treated the property with brine on March 6, 2018 and did at least four applications of salt between March 7-9, 2018. (4T 209:7-11). Marino also confirmed that Xtreme was advised to prioritize the retail clients over the office tenants (such as plaintiff's employer) when performing snow and ice removal at Dewy Meadows. (4T 215:9-12).

E. Motion in Limine Hearing of July 19, 2023

On July 19, 2023, the trial court conducted oral argument on various motions in limine, including Plaintiff's motion in limine to bar reference to the State of Emergency and Defendants' separate motion in limine seeking to bar reference to the terms of the snow removal contract, seeking to relax the court's earlier refusal to take judicial notice of the State of Emergency, and further seeking to bar evidence regarding the non-renewal or termination of Xtreme Snow Pros after the 2018 season. (1T).

The court ruled that the State of Emergency could not be referred to at the time of trial and affirmed its prior ruling denying Defendants' previous motion seeking judicial notice of the State of Emergency. (Da 1-2) (1T 29:6-8). The lower court reasoned that while *Smith v. Costco*, 2023 WL 4307729 (App. Div. 2023) recognized the State of Emergency for this very same snow storm, the

case nevertheless was irrelevant and inapplicable since it dealt with the ongoing storm rule. (Da 139-142) (1T 29:6–30:2). The court further reasoned that the State of Emergency would not "impact" any decision by the jury since it would have photos and testimony about how significant the storm was and how high it was. (1T 30:3-10). The court concluded that the State of Emergency had no relevance and that the potential for confusion or prejudice would outweigh any probative value. (1T 30:12-19).

The lower court then went on to consider whether the snow removal contracts could be referenced at trial. More specifically, Defendants argued that the duty of care here was defined by common law and set forth in *Model Civil Jury Charge* 5.20B(2)(b) (commercial landowner's duty to remove snow and ice from adjacent walkways); and that it should not be expanded or heightened by contractual obligations in the snow removal agreement(s). (1T 33:11–34:18). Defendants further argued that it was improper for the jury to hear, particularly during Plaintiff's opening statement, that there was a contractual obligation for Defendants to have the area cleared of snow and ice by a certain time, and that it should be left to the jury to determine what was a reasonable period of time for the work to be completed given the snow storm in this instance. (1T 43:8-25). Additionally, Defendants argued that the time deadline for completion of snow and ice removal in the contract should not be referenced since the law did

not require the snow and ice removal to be completed by 6 AM and that Plaintiff was not the third party beneficiary of this snow removal contract. (1T 45:9-25).

The court ultimately denied Defendants' request to bar reference to the terms of the snow removal contract(s) and suggested that the jury should know the terms of the agreement in order to make an apportionment of liability among the defendants. (1T 37:13-19). The trial court also ruled that the snow contracts were relevant to the expectations of the various defendants. (1T 42:23-43:2). Similarly, the court determined that it would not bar the jury from hearing about the contractual time specifications for the completion of snow and ice removal and that the defendants could explain what they did in terms of the contract. (1T 46:3-11). Notably, the court did not make a ruling during this in limine hearing as to the proper jury charge, but suggested that, at the minimum, *Model Civil Jury Charge* 5.20F(7) (duty of owner to make place reasonably safe for an invitee) would apply. (1T 42:12-22).

The trial court then went on to consider that portion of Defendants' in limine motion seeking to bar reference to the subsequent termination of Xtreme after the 2018 season. The facts were clear insofar as J&A was dissatisfied with Xtreme's service after an April 2018 storm, not the snow storm for the date of loss. (1T 55:20-56:11). Thus, Defendants argued that Xtreme's termination had nothing to do with Xtreme's work from the date of loss, but stemmed from a

later snow event. Xtreme's work and/or quality of their work from this later snow event in April 2018 was irrelevant to the reasonableness of their efforts on the date of loss and not probative as to the adequacy of their services on the date of loss. (1T 56:17-57:6). The court ultimately granted this singular portion of Defendants' motion in limine and barred any evidence regarding the termination of Xtreme after the 2018 season and reasoned that Plaintiff could ask questions about the Defendants' performance on the date of loss without getting into Xtreme's later termination. (Da 3-5) (1T 58:11-18; 58:19-59:1). Yet, despite granting Defendants' motion in limine on this point, the court later permitted Plaintiff at trial to question Matthew Acar (of Bernard Plaza) and Giuseppe Iannuzzelli (of J&A) about a subsequent storm and whether J&A and/or the property owner (Bernard Plaza) were satisfied with Xtreme's performance in this later storm. (4T 45:4-14); (5T 89:15-90:8).

F. Trial Day 3

On Day 3 of the trial (July 26, 2023), testimony commenced with Matthew Acar, a representative of the defendant property owner, Bernard Plaza, who was called during Plaintiff's case in chief. (4T 4:2-82:8). At the outset of the questioning, Defendants objected to Plaintiff questioning Acar regarding the details of the snow removal contract – again renewing its argument that the contract does not set forth or define the defendants' duty of care. (4T 13:2-25).

Defendants also objected to Plaintiff presenting evidence about that portion of the snow removal contract prohibiting J&A from subcontracting the work out as that provision was irrelevant to the key issue – whether defendants acted reasonably under the circumstances. (Da 85) (4T 14:1-19). Defendants argued that the contractual provisions and whether defendants complied with the contractual provisions were irrelevant to the issue of whether or not defendants, within a reasonable period of time, undertook efforts to clear the lot of snow and ice. (4T 17:1-12). While Defendants insisted that evidence about the snow removal agreements would expand the duty of care beyond the common law, the court again ruled that the contract provisions and compliance with same were relevant and thus evidential. (4T 18:7-16).

Given the court's ruling, Plaintiff proceeded to question Matthew Acar about the snow removal contract between Bernard Plaza and J&A - more specifically, regarding: 1) the contract language stating "safety is not to be compromised" (4T 22:6-14); 2) the contract language stating the walkways are to be cleared by 6 AM (4T 22:19-23:23); 3) the contract language prohibiting J&A from subcontracting their work without pre approval (4T 40:19-41:14). In addition, the court permitted Plaintiff to question Matthew Acar about the snow removal services rendered in April 2018 which led to Acar testifying that he had issues with the contractor not showing up on time in April 2018. (4T 45:4-14).

This questioning was permitted despite the court's in limine ruling that no evidence about the Defendants' April 2018 services or the contractor's subsequent termination would be evidential. (Da 3-4) (1T 58:11-18; 58:19-59:1).

Christopher Marino, the owner of Xtreme Snow Pros, was also called by Plaintiff to testify at trial on July 26, 2023. (4T 112:5-226:2). As was the case with Acar, Plaintiff questioned Marino regarding various contractual provisions in the subcontract between J&A and Xtreme. For example, Marino was questioned about the time specification stating that all walkways were to be cleared by 6 AM (4T 121:1-25; 124:18-23)

G. Trial Day 4

July 27, 2023 was the fourth day of trial of this matter. On this day, Plaintiff called Giuseppe Iannuzzelli, an owner of defendant J&A. (5T 72:19-104:19). Similar to Acar and Marino, Iannuzzelli was also questioned about the snow removal contracts here, including the no subcontracting provision at length (5T 78:23-79:13; 81:5-24); and the contractual requirement that the snow removal services were to be completed by 6 AM (5T 80:4-21).

In addition, Plaintiff questioned Iannuzzelli, over Defendants' objection, as to whether J&A was satisfied with the work performed by Xtreme. Notably, this questioning was not limited to the Xtreme's services for the date of loss.

(5T 89:15-90:8). Defendants specifically objected to any testimony or evidence regarding the subsequent April 2018 service and J&A's dissatisfaction with Xtreme's later work, which Defendants pointed out again was completely irrelevant to the services provided on the date of loss and was prejudicial to Defendants. (5T 90:17-92:14). Again, this questioning was permitted despite the court's earlier in limine ruling that no evidence about the Defendants' subsequent termination related to their April 2018 services would be evidential. (Da 3-4) (1T 58:11-18; 58:19-59:1).

H. Trial Day 6

July 31, 2023 was the sixth day of trial (July 29-30, 2023 fell on a weekend and court was not in session). Adam Kestin, co-owner and partner at J&A, was called to testify by Plaintiff on this day. (7T 24:6-65:15). Like the other defendants questioned by plaintiff, Kestin was also questioned about the contractually stated 6 AM completion time for snow removal service, and the contractual prohibition against subcontracting their services out. (7T 30:7-32:22; 35:10-14).

During defense counsel's questioning of Kestin, counsel attempted to mark and show a photograph of the accident location to the witness, which was objected to Plaintiff. (7T 55:20-56:5) (Da 138). Plaintiff objected to using the photo as it was allegedly taken by Carolyn Mollo (plaintiff's co-worker and

boss), not Plaintiff, despite Plaintiff providing the photograph with her answers to interrogatories and representing in her certified answers to interrogatories that they were taken by Plaintiff at 7:35 AM on the date of loss and thus presumably depicted the conditions that led plaintiff to fall. (7T 56:6-23). According to plaintiff's counsel, Plaintiff at her deposition denied taking the photograph in question. (7T 56:6-23). Plaintiff further claimed without support that the photo was taken later - not on the date of loss; and that when Plaintiff was asked when the photo was taken at her deposition, she could not provide an answer. (7T 70:14-20; 71:10-19). Defendants renewed their request to admit this photograph into evidence arguing that Plaintiff had authenticated the photograph by representing she took it the on the morning of the accident; that the photograph was relevant because it gave context to the accident location, particularly by showing that it was difficult to remove snow by parked cars; that the question of who took the photograph was not material to whether it showed the conditions on the date of loss, and that the photograph should be admitted as undisputedly showing the conditions on the date of loss under *N.J.R.E* 101(a)(5). (7T 68:1-69:23; 70:2-13; 70:23-25). Ultimately, the court would not allow Defendants to use this photograph or to have it admitted into evidence at trial. (7T 57:12-16; 70:21-22).

By way of background, Plaintiff testified at deposition that she did not take the photographs marked as Marino-3 and Marino-4. (Da 124). (The excluded photograph is Marino-3). (Da 138). According to Plaintiff, her boss (Carolyn Mollo) took some of these photos. (Da 124 56:2-22). Notably, and contrary to her counsel's claim, Plaintiff was not asked at deposition when the photograph in question was taken or if she knew when it was taken. (Da 110-137).

At the conclusion of testimony, the court addressed which documents to move into evidence. The parties disagreed over whether the two snow removal agreements should be admitted – Plaintiff sought to move them into evidence, but Defendants objected. (7T 73:15-19). More specifically, Defendants objected to having the physical contracts submitted to the jury at deliberation and suggested that the jury should rely on its recollection of the testimony about these contracts. (7T 73:21-74:6). The trial court, however, determined that the jury should be permitted to see the actual contracts since the jury heard testimony on these contracts. (7T 73:14-18).

At the charge conference, there was significant discussion and argument regarding the proper jury instruction to charge. Defendants submitted that the court should, at the least, charge *Model Civil Jury Charge* 5.20B(2)(b) governing the commercial landowner's duty to remove snow and ice from public

walkways, or that the court could use a hybrid charge using 5.20B(2)(b) as well as the general charge governing the landowner's duty to invitees under *Model Civil Jury Charge* 5.20F(5). (7T 82:23-83:25). Defendants highlighted to the court that the commercial landowner's duty to remove snow and ice from its walkways was different than the general duty to maintain premises in a reasonably safe condition for invitees since 5.20B(2)(b) specifically deals with the duty to clear snow and ice within a reasonable period of time after the snow. (7T 82:23-83:25)(emphasis added). Defendants maintained that 5.20B(2)(b) would still apply even though there was no active or ongoing snow event at the time of plaintiff's fall since it specifically addresses the duty to remove snow and ice within a reasonable period of time thereafter. (7T 84:21-85:3). Defendants further argued that 5.20B(2)(b) would apply in this situation even though it occurred in a parking lot and not a public sidewalk. (7T 85:10-86:10).

Plaintiff, however, opposed the use of 5.20B(2)(b) claiming that this jury charge only applied to falls occurring during an active or ongoing snow event and that the charge was not "expanded" to instances when the fall occurred after a storm event, such as the case before the court (7T 87:15-88:18). In addition, Plaintiff claimed that 5.20B(2)(b) was not applicable because that jury charge only applies to cases involving a public sidewalk and not a fall in a parking lot. (7T 87:15-88:18).

After considering arguments, the court determined that as to the duty of care, the court would only charge 5.20F (duty to invitees) since it was "right on point" and since 5.20B(2)(b) was limited to active or ongoing storms and was limited to pedestrians on a sidewalk and not extended to invitees in a parking lot such as this case. (7T 90:9-91:14).

Upon entering this ruling on the jury charge, Defendants placed on the record that the entirety of the aforementioned rulings amounted to cumulative error by the trial court, which denied Defendants a fair trial. (7T 91:15-93:1). These errors included the court's failure to take notice or allow evidence regarding the State of Emergency, which was relevant to the significance of the storm event; the court permitting questioning regarding the Defendants' services in April 2018, which were irrelevant to the date of loss; and excluding the photograph which plaintiff admitted showed the conditions of the accident location on the date of loss. (7T 91:15-93:1).

In accordance with the court's ruling on the jury charge, the court instructed the jury on the duty of care using 5.20F (duty to invitee) on August 1, 2023. (8T 84:7-86:21).

LEGAL ARGUMENT

I. The lower court's refusal to charge the jury with Model Civil Jury Charge 5.20B(2)(b) was reversible error (7T 90:9-91:14).

It is axiomatic that clear and correct jury charges are essential to a fair trial, and the failure to provide them may constitute plain error. *State v. Robinson,* 165 N.J. 32, 40 1153 (2000). "A charge is a road map to guide the jury, and without an appropriate charge a jury can take a wrong turn in its deliberations.... [T]he court must explain the controlling legal principles and the questions the jury is to decide." *State v. Martin,* 119 N.J. 2, 15 (1990). Therefore, erroneous instructions are poor candidates for rehabilitation as harmless, and are ordinarily presumed to be reversible error." *State v. Afanador,* 151 N.J. 41, 54(1997); *Das v. Thani*, 171 N.J. 518, 527, (2002). To determine whether alleged defects in a jury charge rise to the level of such reversible error, we must consider those claims within the context of the charge as a whole, not in isolation. *State v. R.B.,* 183 N.J. 308, 325 (2005).

The question of the legal adequacy of a jury instruction is an issue of law reviewed de novo. *Fowler ex rel. Edenfield v. Akzo Nobel Chems., Inc.*, 251 N.J. 300, 323 (2022). A jury instruction that has no basis in the evidence is insupportable, as it tends to mislead the jury. *Prioleau v. Ky. Fried Chicken, Inc.,* 223 N.J. 245, 257 (2015).

In addition, a jury instruction must be tailored to the "theories and facts" that were presented in the case. *Velazquez v. Portadin*, 163 N.J. 677, 689. An instruction that is not so tailored can lead the jury to make improper decisions by applying inapplicable or incorrect law to the wrong set of facts and constitutes reversible error. *Id.* at 688-89. To be tailored to the theories and facts of the case, the jury charge must be based on the evidence presented at trial. *See, Komlodi v. Picciano,* 217 N.J. 387, 420 (2014). Moreover, Model Jury Charges must be adjusted, as necessary, to conform to the particular facts of a given case. *Torres v. Pabon*, 225 N.J. 167, 188 (2016).

Here, Appellants submit that the trial court erred by charging the jury *Model Civil Jury Charge* 5.20F(5) regarding the duty owed to invitees as it relates to the condition of premises. (7T 82:23-91:14). Defendants maintain that the proper jury charge for the facts presented was *Model Civil Jury Charge* 5.20B(2)(b) regarding the duty of commercial owners to remove snow and ice from adjacent walkways. (8T 84:7-85:13).

Model Civil Jury Charge 5.20F(5) provides:

> "An invitee is one who is permitted to enter or remain on land (or premises) for a purpose of the owner/occupier. The invitee enters by invitation, expressed or implied. The owner/occupier of the land (or premises) who by invitation, expressed or implied, induced persons to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for the purposes embraced in the invitation. Thus, the owner/occupier must exercise reasonable care for the invitee's safety. The owner/occupier must take such steps as are

> reasonable and prudent to correct or give warning of hazardous conditions or defects actually known to the owner/occupier (or the owner's/occupier's employees), and of hazardous conditions or defects which the owner/occupier (or the owner's/occupier's employees) by the exercise of reasonable care, could discover."

By comparison, *Model Civil Jury Charge* 5.20B(2)(b) provides in pertinent part:

> "A commercial property owner may have a duty to clear public sidewalks abutting their properties of snow and ice for the safe travel of pedestrians. Maintaining a public sidewalk in a reasonably good condition may require removal of snow or ice or reduction of the risk, depending upon the circumstances. The test is whether a reasonably prudent person, who knows or should have known of the condition, would have within a reasonable period of time thereafter caused the public sidewalk to be in reasonably safe condition." (emphasis added).

This model charge includes specific additional charge language for certain factual scenarios. For example, the charge explicitly states that:

> "when there is an ongoing storm, **add** the following language:
>
> > 'However, a commercial property owner does not have a duty to keep sidewalks on its property free form snow or ice during an ongoing storm.[1] A commercial property owner's duty to remove snow and ice hazards arises not during a storm, but rather within a reasonable time after the storm. There are two exceptions that may give rise to a duty before then. First, a commercial property owner may be liable if its actions increase the risk to pedestrians and invitees on their property. Second, a commercial

[1] *Pareja v. Princeton Int'l Props*, 246 *N.J.* 546, 549, *reconsideration den.*, 247 *N.J.* 406 (2021). This endnote is contained in the actual model charge.

> property owner may be liable where there was a pre-existing risk on the premises before the storm.'" (emphasis added).

Likewise, the charge notes that where the owner has taken some action with regard to the condition and the adequacy of the action is in question, then the following additional language should be added to the charge:

> "What actions must the owner of commercial property take with regard to defects/snow/ice accumulation/dangerous conditions? The action required by the law is action which a reasonably prudent person would take or should have taken in the circumstances present to correct the defect/snow/ice accumulation/ dangerous condition, to repair it/remove it or to take other actions to minimize the danger to pedestrians (for example, to give warning of it) within a reasonable period of time after notice thereof. The test is: did the commercial property owner take the action that a reasonably prudent person who knows or should have known of the condition would have taken in that circumstance? If the commercial property owner did, the commercial property owner is not negligent. If the commercial property owner did not, the commercial property owner is negligent." *Model Civil Jury Charge* 5.20B(2)(b).

In light of this model charge language and given the facts at hand, Defendants submit that the lower's court reasoning on the applicable jury charge was significantly flawed and constitutes reversible error. The court was wrong in assuming that the 5.20B(2)(b) only applies when the incident occurred during an active or ongoing snow storm as purportedly set forth in *Pareja v. Princeton Int'l Props*, 246 *N.J.* 546, 549 (2021), that the charge was not "expanded" to instances when the fall occurred after a

storm event, and that this charge applied only to cases involving a public sidewalk and not a fall in a parking lot. (7T 87:15-23; 90:9-91:14).

Initially, Appellants submit the lower's court narrow interpretation of *Model Civil Jury Charge* 5.20B(2)(b) is contrary to the plain language of the charge and contrary to our court's application of a commercial defendant's duty to remove snow and ice from adjacent walkways. First, Defendants must address the mistaken notion that this jury charge can only be used when the incident occurs during an active or ongoing snowstorm. Contrary to Plaintiff's assertion, this limitation is not found in *Pareja v. Princeton Int'l Props*, 246 *N.J.* 546, 549, *reconsideration den.*, 247 *N.J.* 406 (2021) nor does the actual charge language limit its application to ongoing storm events only. Notably, the *Pareja* case does not explicitly mention the model jury charge in question. Rather, the case represents our court's adopting the going storm doctrine. *Id*. It is the interplay between the ongoing storm rule and the model charge that should be explored.

The model charge language of 5.20B(2)(b) expresses the general rule on snow removal among commercial owners and/or its agents. This rule or duty is "whether a reasonably prudent person, who knows or should have known of the condition, would have within a reasonable period of

time thereafter caused the public sidewalk to be in reasonably safe condition." *Model Civil Jury Charge* 5.20B(2)(b) (emphasis added). This is the "general duty"[2] of commercial owners and clearly there is no language in this portion of the charge even suggesting that this duty only applies when there is an active snow storm. Rather, the charge is expanded upon if certain facts are implicated – whether there is an active snow storm, and whether the defendant attempted to remediate the condition, and the adequacy of these efforts is an issue. Under these circumstances, supplemental charge language is added to this general duty to address the ongoing or active storm and the reasonableness of the snow removal efforts. As set forth above, the charge explicitly requires the court to supplement the general charge language when the facts warrant same. Thus, when there is an active snow storm, it is appropriate to charge the general rule above in 5.20B(2)(b), but to also include the specific ongoing storm language. The instruction clearly requires the court to add the ongoing storm language on top of and in addition to the general duty. There is absolutely nothing in the charge or its notes and annotations suggesting that if there is an ongoing storm the general duty language

[2] Defendants refer to this as the commercial owner's "general duty" as to snow and ice removal for ease of reference only.

mentioned above is not applicable or otherwise not to be charged. Rather, the ongoing storm language is simply added on to the general duty language. Therefore, the model charge contemplates and governs the commercial owner's duty to remove snow generally and also adds an additional layer to that general duty when there is an active snow event. Similarly, when the facts suggest that defendants tried to remediate the snow/ice and the adequacy of these efforts is an issue, the additional language about the reasonableness of these efforts is also to be added to the general duty. What the model charge reveals is that the ongoing storm rule is added to the charge when the fall occurs during an active snow event and that reasonableness of the removal efforts language is added when defendants undertook some remediation. These facts dictate whether the model charge is supplemented. There is absolutely no basis by which this court could conclude that when there is an active snow event, then model charge does not apply.

Based upon the plain language of the charge, 5.20B(2)(b) applies whether or not there is an active snow storm, and the court must simply add this supplemental charge language if the facts show that the fall occurred during an active storm. Clearly, the court's adoption of Plaintiff's argument was wrong on its face. The upshot is that the court

simply should have charged the general duty here without adding on the ongoing storm language. Even without the ongoing storm language, the general duty set forth in 5.20B(2)(b) still applies and the court should have charged that component.

Moreover, the Plaintiff's suggestion that 5.20B(2)(b) does not apply to instances when the fall occurred after the snow event, or after the snow has ended, is also wrong. Again, the plain language of the charge explicitly contemplates snow removal within a reasonable time after notice thereof, along with a scenario where the defendant has made efforts to remediate the snow/ice and there is a question as to the adequacy of these efforts. This model charge provides a framework for examining whether a commercial defendant has a duty to remove snow and ice from its walkways regardless of when plaintiff fell. The mere fact that plaintiff here fell a few hours after the snow had ended does not render the charge inapplicable. Plaintiff's interpretation is entirely illogical and unreasonable. There is absolutely nothing in the charge language indicating that the charge is not applicable when plaintiff fell on snow/ice after the snow had ceased. Rather, this seems like the quintessential factual scenario warranting this model charge.

Moreover, the charge governs when there are efforts to remediate to snow and ice which naturally must happen after the snow storm ends since under *Pareja* there is no duty to remove snow and ice while a storm is actively happening. *Pareja v. Princeton Int'l Props*, 246 *N.J.* 546, 549 (2021) Thus, when the key issue is the adequacy of the defendant's snow/ice removal efforts, such as here, this 5.20B(2)(b) charge with the additional adequacy of removal language should apply. Plaintiff's extremely narrow interpretation of this charge only applying to active snow storms is unsupported by the plain language of the charge. Clearly, the facts of the case required the lower court to charge the jury with 5.20B(2)(b) – specifically the general duty, minus the ongoing storm language, but including the adequacy of removal language. This would have tailored the charge to the facts of the case here.

The lower court also erred by adopting Plaintiff's narrow interpretation of 5.20B(2)(b) by limiting its application only to public sidewalks. However, such a reading makes an arbitrary and unreasonable distinction between sidewalks that the public use to benefit a commercial defendant versus those parking lots that are adjacent to these same sidewalks that the public also use to benefit a commercial defendant. Moreover, the common law has evolved to suggest that public walkways,

at least with respect to a commercial defendant's duty to remove snow and ice, includes those parking lots that the public uses as well.

Generally, our courts have recognized the proposition that a parking area is an integral portion of a defendant's shopping center. *Bates v. Valley Fair Enterprises, Inc*., 86 N.J. Super. 1, 6 (App. Div. 1964). As such, a commercial defendant owes a duty to exercise reasonable care to maintain it in a reasonably safe condition and to keep it free of ice and snow. *Id.* Public walkways as contemplated in *Model Civil Jury Charge* 5.20B(2)(b) do not necessarily mean only publicly owned sidewalks. "It is axiomatic 'public walkways" are not synonymous with public property." *Smith v. Costco*, 2023 WL 4307729 (App. Div. 2023) (Da 141). For example, the *Pareja* court considered the commercial landowner's duty to remove snow and ice from public walkways, but did not limit to the sidewalk since the fall in that case occurred in a driveway apron (the area that connects the driveway to the public road) and not on the sidewalk. *Pareja, supra* at 549[3]. Similarly, a driveway apron was again

[3] On a side note, Defendants maintain that *Model Civil Jury Charge* 5.20B(2)(b) codifies and tracks the common law duty of a commercial landowner to clear snow and ice. The notes to this jury charge discuss the common law cases. In fact, the current *Model Civil Jury Charge* 5.20B(2)(b) has tracked this common law evolution. For example, the Model Civil Jury Charges were revised in November 2022 to include the aforementioned

deemed equivalent to the sidewalk for purposes of analyzing a commercial landowner's duty to remove snow and ice from its public walkways. *Greenstein v. Forsgate Industrial Complex*, 2021 WL 3084740 (App. Div. 2021) (Da 146). Additionally, the Appellate Division rejected plaintiff's attempt to confine the commercial defendant's duty to remove snow and ice from sidewalks only. *Sarro v. Vonage Holdings Corp*, 2023 WL 2566062 (App. Div. 2023). Rather, this common law duty to remove snow and ice from public walkways was extended to private parking lots. *Id.* (Da 149). Likewise, the Appellate Division again extended the common law duty to remove snow and ice from public walkways to a parking lot within a condominium complex. *Hanna v. Woodland Community Assoc.*, 2022 WL 16984707 (App. Div. 2022) (Da 153-158).

As set forth above, our courts have frequently extended the common law duty of commercial landowners and/or its agents to remove snow and ice from its adjacent sidewalk to driveway aprons and to adjoining parking lots. Here, it was foreseeable and entirely expected that invitees would use the parking lots at Dewy Meadow Village to access the commercial office tenants and retail shops – not just to park their vehicles but to also walk

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ongoing storm language that was supposed to be added onto 5.20B(2)(b) if factually warranted.

from the parking lot to the offices or store fronts. Since the common law duty is codified in the *Model Civil Jury Charge* 5.20B(2)(b), it follows that this jury charge also extends this same duty beyond the public sidewalks and to the commercial owner's parking lots as well. There is no reason why a commercial landowner's duty to remove snow and ice from its walkways would not extend to the adjoining parking lot when pedestrians or invitees are forced to walk through the parking lot to access the office and retail spaces owned and maintained by defendants. Any hard-line distinction between the sidewalk of Dewy Meadow Village and its parking lot is arbitrary and unreasonable, at least as it pertains to the duty to remove snow and ice.

For these reasons, the lower court's failure to charge *Model Civil Jury Charge* 5.20B(2)(b) was reversible error. This jury charge is not limited to falls occurring during an active snow storm, nor is it limited only to falls occurring on the sidewalk. Such an interpretation is contrary to the plain language of the jury charge. Moreover, the model charge simply codifies the common law duty of a commercial landowner to clear snow and ice from its walkways. As set forth above, the common law has extended this duty beyond sidewalks to parking lots or other adjoining

property (e.g driveway aprons) owned by the defendant that is foreseeably used by pedestrians when at the defendant's place of business.

Moreover, the lower court's failure to charge *Model Civil Jury Charge* 5.20B(2)(b) was reversible error because the charge was not tailored to the facts at hand, was misleading, and did not accurately set forth the controlling principles of law. *State v. Cotto*, 471 N.J. Super. 489, 543 (App. Div. 2022). Certainly, there is a significant difference between what was charged 5.20F (duty to invitees) and what Appellants claim should have been – 5.20B(2)(b) (duty of commercial landowner to remove snow and ice). The general duty to invitees is concerned about reasonable care for an invitee's safety whereas 5.20B(2)(b) explicitly states there is some reasonable period of time, after notice, for the defendant to make the walkway be in reasonably safe condition. The importance of this "within a reasonable period of time thereafter" is unique to this charge and cannot be understated. We are not dealing with a trip and fall over uneven pavement, but whether the snow removal efforts of Defendants were reasonable when: 1) the storm dropped 14 inches of snow; 2) the snow ended at 8:30PM the night before; 3) plaintiff fell at 7:30AM; 4) Defendants were to prioritize the retail tenants for snow removal over the office tenants; and 5) Defendants were still on site clearing snow from this large commercial property at the time of the fall. The question is was defendants' conduct and

action reasonable given the storm and timing of these facts as set forth above 5.20B(2)(b) explicitly requires the jury consider the progress of the snow removal in connection with when the snow finally stopped. The general duty to invitees does not contain this language nor does it compel such a consideration, at least not explicitly. Certainly, instructing the jury that defendants had a duty to clear snow and ice within a reasonable period of time thereafter is far more tailored to the facts of this case. The lower court's failure to do so is reversible error.

II. The lower court's denial of Defendants' motion in limine to bar reference to the snow removal agreements was an abuse of discretion and expanded the duty of care beyond what was required by common law (1T 37:13-19; 42:23-43:2; 46:3-11) (Da 3-4).

A motion in limine is a pretrial request that certain inadmissible evidence not be referred to or offered at trial. *Seoung Ouk Cho v. Trinitas Reg'l Med. Ctr.,* 443 N.J. Super. 461, 470 (App. Div. 2015). Thus, it is anticipated that, as a general rule, a motion in limine will not have a dispositive impact on a litigant's entire case. *Id.* Even when a limited issue is presented, our courts generally disfavor in limine rulings on evidence questions, because the trial provides a superior context for the consideration of such issues. *Id.* Although a trial judge retains the discretion, in appropriate cases, to rule on the admissibility of evidence pre-trial, New Jersey courts have cautioned that requests for such rulings should be granted only sparingly. *Id.*

Our courts apply the same standard of review to in limine motions as to applications regarding the admissibility of evidence. *Primmer v. Harrison*, 472 N.J. Super. 173, 187 (App. Div. 2022). The Appellate Division's review of the trial court's evidentiary rulings is limited to examining the decision for abuse of discretion. *Id.* Evidentiary decisions are reviewed under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion. *Est. of Hanges v.*

Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383–84 (2010); *Green v. N.J. Mfrs. Ins. Co.,* 160 *N.J.* 480, 492 (1999) (concluding that the trial court is granted broad discretion in determining both the relevance of the evidence to be presented and whether its probative value is substantially outweighed by its prejudicial nature). When a party challenges the admission of evidence, the question is not whether the challenged testimony will be prejudicial to the objecting party, "but whether it will be unfairly so." *Stigliano v. Connaught Labs., Inc.,* 140 *N.J.* 305, 317 (1995). Evidence claimed to be unduly prejudicial is excluded only when its probative value is so significantly outweighed by its inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the issues in the case. *Griffin v. City of E. Orange*, 225 N.J. 400, 421 (2016). The appellate court should uphold the trial court's evidence rulings if they are supported by adequate, substantial and credible evidence on the record. *Est. of Hanges v. Metro. Prop. & Cas. Ins. Co.*, 202 N.J. 369, 383–84 (2010). However, no deference is accorded when the court fails to properly analyze the admissibility of the proffered evidence. *E & H Steel Corp. v. PSEG Fossil, LLC*, 455 N.J. Super. 12, 25 (App. Div. 2018). In other words, when the trial court fails to apply the proper test in analyzing the admissibility of proffered evidence, the

appellate court's review is de novo. *Konop v. Rosen,* 425 N.J. Super. 391, 401 (App. Div. 2012).

As to relevance, relevant evidence means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action. *N.J.R.E.* 401. In determining whether evidence is relevant, the inquiry focuses upon "the logical connection between the proffered evidence and a fact in issue." *State v. Hutchins*, 241 N.J. Super. 353, 358 (App. Div. 1990). However, pursuant to *N.J.R.E.* 403, "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence."

Here, Defendants submit that the trial court abused its discretion by allowing evidence regarding the snow removal contracts and terms therein to be admissible since this evidence was irrelevant to the duty of care owed by Defendants and was unduly prejudicial. The underlying lawsuit is not a breach of contract claim, but a negligence action where the primary issue is whether Defendants within a reasonable period of time made the parking lot be in a reasonably safe condition. Nevertheless, the lower court permitted repeated questioning and evidence regarding the snow removal contracts which had absolutely no bearing on the Defendants' duty of care. In particular, Defendants

take issue with the evidence regarding the 6 AM completion time set forth in the contract, the contract language stating "SAFETY IS NOT TO BE COMPROMISED", and the contract language stating the agreement is not be subcontracted out. (Da 85, 89, 94, 108).

Defendants maintain that the snow removal contracts are irrelevant to the ultimate issue, that is, whether defendants breached their duty to remove snow and ice from the parking lot within a reasonable period of time. As set forth above in Point I, this duty of care upon commercial landowners is set forth by extensive common law and *Model Civil Jury Charge* 5.20B(2)(b) only. As such, the snow contracts have no bearing or relevance to same. Even as to the duty of Xtreme Snow Pros, the snow removal contractor here, any contractual obligations imposed on Xtreme is entirely separate from and irrelevant to the snow contractor's common law duty to perform snow removal in a careful and prudent manner. *See*, *Aronsohn v. Mandara*, 98 N.J. 92, 105-106 (1984); *Gonzalez v. Eastern Freightways*, 2010 WL 3720281 (App. Div. 2010) (Da 159-164). While the snow removal contracts are obviously relevant as to the duties owed by and between the parties to the contract, they are not relevant to the duty owed by a contractor to a third party. *Id.* ("Under well-established principles, a contractor has a duty to persons, other than the one with whom the contractor has made the contract, to carry out his undertaken work in a careful and prudent

manner, and he may be responsible to third persons for their personal injuries…proximately caused by its failure to exercise that care. This duty exists irrespective of privity."). Thus, the snow contractors' duty of care (J&A and Xtreme here) is not defined by the snow removal agreement, but the well-recognized duty of care to perform its snow removal in a careful and prudent manner. In fact, in the *Gonzalez* case, which also dealt with a slip and fall on snow/ice in a parking lot, the Appellate Division explicitly noted that the snow removal contractor had a duty to plaintiff "that was not defined by its contract" with Eastern (plaintiff's employer that hired the snow removal company). *Gonzalez v. Eastern Freightways*, 2010 WL 3720281 (App. Div. 2010) (Da 163).

Therefore, while the snow removal contracts are relevant to Xtreme's obligations to Bernard Plaza, they are not relevant to the duty owed by Bernard Plaza-the commercial landowner, who has a duty to remove snow and ice from its walkways. Nor are the contracts relevant to the duty owed by Xtreme, the snow removal contractor, who has a duty to perform snow removal in a careful and prudent manner. Clearly, there is a distinction under the law as to the contractual duty owed by and between parties to a contract versus the common law duty to remove snow and ice among landowners and snow removal contractors. For these reasons, the snow removal agreements are entirely irrelevant to the duty of care owed by Defendants and the lower court abused its

discretion in making these contracts evidential. Moreover, making the contracts evidential, particularly the 6 AM deadline for completion of snow and ice removal, was tantamount to expanding the common law duty of care since the common law duty makes no reference to a specific completion time for snow removal.

The lower reasoned that the contracts were needed to make an apportionment of liability among the defendants and as they were relevant to the expectations among the defendants. (1T 42:23-43:2; 46:3-11). Yet, the expectations by and between the Defendants who were parties to the agreements are not relevant as set forth above. What the defendants owed each other under the contract is not probative on whether they satisfied their duty to remove snow and ice within a reasonable period of time or whether their snow removal efforts were adequate under the circumstances. Moreover, liability could have been apportioned among the Defendants easily, especially when Defendants were willing to stipulate that Xtreme was the snow removal subcontractor (1T 37:2-6) and when the role of each defendant could have been ascertained in testimony without referencing the details of the snow agreements. Since the lower court's ruling essentially expanded the duty of care, the jury consequently applied the wrong substantive law, which means that no deference should be afforded to its ruling on the admissibility of the contracts.

Not only are the snow removal agreements irrelevant, but the repeated questioning on the agreements, particularly the 6 AM completion and the prohibition against subcontracting was especially inflammatory and unduly prejudicial to Defendants. The Statement of Facts above goes through in detail how plaintiff endlessly brought up these two contract provisions. Plaintiff's clear intention and suggestion was to highlight how Defendants violated these clauses. It is self-evident that repeatedly pointing out how Defendants breached the snow contract harmed the perception of Defendants among the jury, which easily misled the jury into conflating these contractual breaches with breaches of the common law duty of care as to snow and ice removal. These repeated references to Defendants' breach of the contracts prejudiced the jury against Defendants, which rendered the jury unable to assess the real issue fairly and impartially, that is, whether Defendants breached their duty of care as to snow and ice removal.

III. The lower court's denial of Defendant's motion in limine to take judicial notice of the weather related State of Emergency and converse grant of Plaintiff's motion in limine to bar any reference to the State of Emergency was harmful error and an abuse of discretion. (1T 29:6-30:19) (Da 1-2).

"The purpose of judicial notice is to save time and promote judicial economy by precluding the necessity of proving facts that cannot seriously be disputed and are either generally or universally known." *State v. Silva*, 394 N.J. Super. 270, 275 (App. Div. 2007). It may not be used to take notice of a contested fact or ultimate legal issue in dispute. *Id.*

The pertinent evidence rule dealing with judicial notice is *N.J.R.E.* 201. This rule permits judicial notice of laws, statutes, resolutions, regulations, and ordinances of states and their governmental agencies. *N.J.R.E.* 201(a). Part (b) of the rule also permits judicial notice of certain facts of universally known generalized knowledge, facts of common notoriety, specific facts that are capable of immediate determination by resort to accurate sources, and records of the state or federal court. *N.J.R.E.* 201(b). These judicially noticed facts cannot reasonably be questioned or disputed. *Id.*

Under *N.J.R.E.* 201(d), "[a] court shall take judicial notice if requested by a party on notice to all other parties and if supplied with the necessary information." (emphasis added). *N.J.R.E.* 201(e) requires that parties be given

an opportunity to be heard on the question of judicial notice. And finally, under *N.J.R.E.* 201(f), "[i]n determining the propriety of taking judicial notice of a matter ... the rules of evidence shall not apply except Rule 403 or a valid claim of privilege."

Notably, courts often take judicial notice of data such as weather conditions under *N.J.R.E.* 201(b)(2). *Hanna v. Woodland Cmty. Ass'n*, 2022 WL 16984707 (App. Div. 2022) (Da 157); *see also, Weiss v. Nicola Porchetta Co.,* 2015 WL 1540919 (App. Div. 2015) (allowing the court to take judicial notice of the fact that the Chief Justice closed the State's courts for weather related reasons) (Da 166).

Here, we are dealing with a weather-related State of Emergency issued by the Governor of the State of New Jersey. This is a quintessential example of a fact that must be judicially noticed since Defendants made an application for same and since this fact is undisputed. *See, Wisseman v. Rengifo*, 2016 WL 1618659 (App. Div. 2016) (Da 172) ("Indeed, we can take judicial notice of the fact that the Governor had declared a state of emergency on the morning of the accident").

The lower court excluded any reference to the State of Emergency since it would not "impact" any decision by the jury as it would have photos and testimony about how significant the storm was and how high it was (1T 30:3-

10) and since the potential for confusion or prejudice would outweigh any probative value. (1T 30:12-19). It is unclear what confusion would befall the jury or what prejudice would accrue to Plaintiff if the State of Emergency were referenced as the court did not explain same with any specificity. Here, the State of Emergency explicitly noted that there would be hazardous travel conditions and that the storm would impede the normal operations of public and private entities. (Da 36). The Declaration was not only relevant to amount of snow anticipated, but also to the ability of the defendant's to travel to and inspect the condition of the premises. Moreover, the State of Emergency remained in effect until March 13, 2018 - 5 days after plaintiff's accident. In fact, the order terminating the State of Emergency expressly referenced the severity of the conditions necessitating the declaration of a State of Emergency. (Da 41). These facts clearly relate to and demonstrate the severity of the snow storm and Defendants should have been allowed to reference same, especially when the entire theory of defense is premised on the reasonableness of the defendants' actions given the severity and significance of the snow storm. Even if these specific portions of the State of Emergency are not referenced (hazardous travel, severity of the conditions, and impeding the normal operations), the court should have taken judicial notice of the fact that the State of Emergency was issued in and of itself on March 6, 2018 and lasted through the morning of March 13,

2018. This fact alone, separate and apart from the terms of the orders, must be judicially taken as it is mandatory under *N.J.R.E.* 201(d).

While the State of Emergency may also relate to the wrangling or martialing of resources and agencies, this does not necessarily mean that the State of Emergency and its declaration as a matter of fact is rendered irrelevant in its entirety. The fact of the matter is that the State of Emergency was declared from March 6, 2018 through the date of loss and for several days thereafter. This is a neutral fact, not in dispute, and the court's wholesale exclusion of any reference to the State of Emergency was clearly overbroad. For these reasons, the lower court's refusal to take judicial notice of the State of Emergency was a clear abuse of discretion.

IV. **The lower court's permitting of Plaintiff to introduce evidence related Defendants' snow removal services provided in April 2018 for an unrelated and subsequent storm was harmful error (1T 58:11-59:1; 4T 45:4-14; 5T 89:15-90:8).**

Relevant evidence is defined as any evidence that has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." *N.J.R.E.* 401, *see also, State v. Williams,* 190 N.J. 114, 122–23 (2007). Evidence is deemed relevant if there exists a "logical connection between the proffered evidence and a fact in issue." *Furst v. Einstein Moomjy Inc.,* 182 N.J. 1, 15 (2004).

Here, plaintiff was permitted to repeatedly question Defendants (specifically, Matthew Acar of Bernard Plaza and Giuseppe Iannuzzelli of J&A) about Xtreme's snow services rendered in April 2018- an entirely different snow event from the date of loss. (4T 45:4-14; 5T 89:15-90:8). This was permitted even though the court had ruled in limine that plaintiff was not permitted to question defendants about their termination from the snow contract after the 2017-2018 season. (1T 58:11-18; 58:19-59:1) (Da 4). Nevertheless, plaintiff elicited testimony that J&A and Bernard Plaza were not happy with the snow removal services after the April 2018 storm. Such questioning clearly encroached upon impermissible questioning regarding Xtreme's termination or non-renewal in or around April 2018 since the facts suggested that J&A was dissatisfied with Xtreme's service after an April 2018 storm which inevitably led to their termination. (1T 55:20-56:11). Moreover, this questioning is not even relevant to the key issue for the jury – whether

Defendants within a reasonable period of time remediated the snow and ice conditions at Dewy Meadow Village on March 8, 2018. How Xtreme performed its snow removal for a subsequent April 2018 snow event and whether Bernard Plaza or J&A were unhappy with their services for this April 2018 snow event is entirely irrelevant to the issue at hand. *See e.g, Cavaliere v. Bridgewater Commons Mall*, 2009 WL 249104 (App. Div. 2009) (Da 173-179) (in a slip & fall on snow/ice case, the appellate court affirmed exclusion of photos taken by plaintiff of a later storm, not the date of loss, since the later storm was irrelevant and any probative value was outweighed by the potential for prejudice).

By permitting inquiry into the April 2018 storm and Bernard Plaza's and J&A's dissatisfaction with Xtreme following this subsequent storm, the court not only introduced irrelevant evidence, but caused undue prejudice to Xtreme since such evidence obviously emphasizes the subcontractor's less than ideal performance. Certainly, highlighting this dissatisfaction and sub-par performance prejudices the jury into thinking this was the pattern and practice of Xtreme. The suggestion is clear – Xtreme has repeatedly under performed its snow removal obligations. Such a suggestion only poisons the jury against Xtreme. For these reasons, permitting any evidence regarding the later April 2018 storm was an abuse of discretion.

V. The lower court's exclusion of a photograph depicting the accident location on the date of loss (Marino-3) was an abuse of discretion. (7T 57:12-16; 70:21-22).

Like any other evidence tendered at trial, photographs must be relevant; that is, they must have a tendency in reason to prove or disprove any fact of consequence to the determination of the action. *N.J.R.E.* 401. However, even if relevant, evidence nonetheless may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence. *N.J.R.E.* 403.

As to photographs specifically, the persuasive representational nature of photographs demands that the foundation for the admission of photographs must be properly laid. *Brenman v. Demello*, 191 N.J. 18, 30 (2007). New Jersey courts have stated the rule as follows: the authentication of photographic evidence prior to its admission seems to contemplate proof that the photograph is a substantially correct representation of the matters offered in evidence, and this includes an identification or statement as to what the photograph shows. *Brenman v. Demello*, 191 N.J. 18, 30 (2007). The authentication of photographic evidence prior to its admission seems to contemplate proof that the photograph is a substantially correct representation of the matters ... offered in evidence, and this includes an identification or statement as to what the photograph shows. *State v. Wilson*, 135 N.J. 4, 14–15 (1994). For

authentication, a witness must identify the persons, places, or things shown in the photograph or videotape. *Id.* Notably, however, the person testifying need not be the photographer, because the ultimate object of an authentication is to establish its accuracy or correctness. To that end, any person with the requisite knowledge of the facts represented in the photograph or videotape may authenticate it. *Id.* An authenticator need not even have been present at the time the photograph was taken, so long as the witness can verify that the photograph accurately represents its subject. *Id*.

Here, the court again abused its discretion by excluding a photograph (Da 138) which Plaintiff herself authenticated in her written discovery as being taken by Plaintiff on the date of loss at approximately 7:35AM. (Da 44-63). While Plaintiff attempted to disavow taking this photograph at her deposition, she did confirm that it was taken by her boss. As set forth above, it does not matter that plaintiff did not take this photograph. Plaintiff herself authenticated it by testifying that her boss took it. Moreover, Plaintiff's suggestion that the photo was taken after the date of loss is unsupported by the record. Contrary to counsel's assertion Plaintiff was not asked at deposition when the photograph was taken. (Da 110-137). If anything, the record suggests that the photograph was taken the date of loss when all the other photographs were taken. Even assuming that the photograph was not taken at 7:35AM, the record further

suggests it was taken closer to 9AM when plaintiff's boss, Carolyn Mollo, arrived at the office on the date of loss. (7T 10:14-15). Defendants maintain that the photograph is still probative and relevant as to the conditions on the date of loss. The photograph is particularly relevant as it relates to the state of snow removal on the date of loss, progress as to same, and shows that the snow removal was still in progress. Moreover, the photograph also shows the onerous task of trying to remove snow around parked vehicles. All of this is especially crucial to Defendants' entire theory of defense – that the snow removal was still ongoing and a work in progress at the time of the accident, which was entirely reasonable given the huge amount of snow that fell. The court's failure to admit same under a specious failure to authenticate argument was a clear abuse of discretion.

VI. **All of the lower court's errors as set forth above in Points I through V constitute cumulative error which denied Defendants a fair trial.**

An appellate court may reverse a trial court's judgment if the cumulative effect of a series of errors is so great as to deprive a defendant of a fair trial because the errors are so great as to work prejudice. *Pellicer v. Saint Barnabas Hosp.,* 200 N.J. 22, 53 (2009). Cumulative error analysis does not simply entail counting mistakes, because even a large number of errors, if inconsequential, may not operate to create an injustice." *Id.* at 55. Rather, "the predicate for relief for cumulative error must be that the probable effect of the cumulative error was to render the underlying trial unfair." *State v. Wakefield*, 190 N.J. 397, 538 (2007). "[I]f the combined effect of multiple errors deprives a party of a fair trial, an appellate court should order a new trial." *Torres v. Pabon*, 225 N.J. 167, 191 (2016); *State v. Burney*, 255 N.J. 1, 29 (2023).

When taken together, these numerous claims of error cannot be explained away as harmless. They are not simply a litany of minor or inconsequential matters of no substance or significance. Rather, they represent real and repeated errors that accumulated so as to unfairly tilt the balance in favor of plaintiffs and to deprive defendants of a fair trial. *Pellicer*, 200 N.J. at 56-57 (2009). Thus, when reviewing a claim of cumulative error, the court must consider the aggregate effect of the trial court's errors on the fairness of the trial. *Id.* When

assessing whether defendant has received a fair trial, we must consider the impact of trial error on defendant's ability fairly to present his defense. *State v. Jenewicz*, 193 N.J. 440, 473 (2008).

Here, it is submitted that the aggregate effect of all these errors deprived Defendants of a fair trial. Initially, the court's failure to charge *Model Civil Jury Charge* 5.20B(2)(b) (duty of commercial landowner to remove snow and ice from its walkways) and only charge the general duty to invitees under 5.20F was in and of itself reversible error. Again, the appropriate charge refers to a reasonable period of time thereafter for the defendant to make its walkways reasonably safe. The standard invitee charge makes no reference to the reasonable period of time for the snow remediation to be completed. The absence of this reasonable time frame to remove snow is a critical difference between the two charges. Failing to instruct the jury about this reasonable period of time essentially robbed Defendants of the ability to articulate its defense theory to the jury in a cogent manner. Defendants' entire case was premised upon the notion that it acted in a reasonable period of time in removing the snow at Dewy Meadow Village given the huge amount of snow, order in which snow removal was supposed to be completed, and given the fact that snow removal was still actively occurring on site. Certainly, telling the jury explicitly that it could consider what was a reasonable amount of time to clear the snow

and ice is a far more nuanced analysis based on the totality of circumstances rather than simply advising that defendants owed a duty to make the premises reasonably safe for invitees such as plaintiff. This erroneous charge alone is sufficient to warrant reversal, but its capacity to mislead the jury by having the jury apply the wrong standard also rendered the trial unfair to defendants.

In addition, the court's erroneous decision to permit the snow removal agreements into evidence also compounded the error. As set forth above, the duty of care here is defined by common law and codified by *Model Civil Jury Charge* 5.20B(2)(b). The common law duty of commercial land owners to remove snow and ice from its walkways makes no mention of any contractual obligations to invitees. The snow removal contracts are entirely irrelevant to this duty analysis. Plaintiff's repeated references to the snow removal contract terms, especially the 6 AM completion time and prohibition against subcontracting the work, only served to prejudice the jury against Defendants. Clearly, Plaintiff wanted the jury to infer that these contractual breaches inevitably reflected upon how Defendants actually performed the snow removal on the date of loss. By harping upon these contractual violations, the court misled the jury into believing that these contractual violations were equivalent to a breach of the duty of care. Obviously, this led the jury to apply the wrong law and standard of care, which rendered the trial unfair.

In addition, the court's refusal to take judicial notice of the State of Emergency - an undisputed fact - compounded the errors of the trial court. As discussed above, the failure to take judicial notice deprived Defendants of the ability to fully and fairly present its defense. Again, Defendants were presented with a massive snow storm dropping 14 inches of snow by the morning of the date of loss. The defense position was that they acted reasonably and within a reasonable period of time to remediate the snow and ice given the severity of the storm, amount of snow, order in which snow removal was to be completed, and the fact that snow removal was still in progress at the time of plaintiff's accident. Yet, the severity and significance of the storm could not be meaningfully presented without mentioning the State of Emergency. It is submitted that this deprived Defendants of the opportunity to fully and fairly present its defense and thus rendered the trial unfair.

Likewise, the court's permitting of Plaintiff to question Defendants regarding their April 2018 services and storm further compounded and amplified the aggregate effect of the court's errors. As mentioned above, this entire line of questioning was intended to only poison the jury against Xtreme since their handling of a later snow event had absolutely no bearing on how Xtreme performed on the date of loss. There is no probative value and Plaintiff simply wanted to impress upon the jury that both J&A and Bernard Plaza were

dissatisfied with Xtreme in hopes of having this pejorative view of Xtreme taint how the jury perceived Xtreme's performance on the date of loss. Obviously, poisoning a jury against Defendants makes it virtually impossible for the jury to be impartial, thus rendering the trial unfair.

Similarly, the court's exclusion of the photograph marked Marino-3 layered another error on top of the others mentioned above. This exclusion was not only an abuse of discretion, but also severely prejudiced Defendants by yet again barring Defendants from presenting a full and fair defense. Defendants argued that the photo was important because it not only showed the severity of the storm, but it also conveyed to the jury the difficult task of removing snow in parking lot when there are parked cars situated in the lot. In addition, even if the photograph was taken later on in the same day, the photo showed that snow removal was still ongoing at the time – whether that time was 7:30 AM or 9 AM. All of this was intended to convey to the jury the severity of the storm and the herculean task of trying to remove 14 inches of snow and ice within a reasonable period of time. By excluding this photo, the court removed necessary context and again deprived Defendants the opportunity to fully, fairly and cogently present its defense.

Meanwhile Plaintiff was permitted to present the narrative to the jury that there was a "system failure" among the defendants, that is, that the property

owner, contractor and subcontractor all failed to perform and all failed to uphold their obligations to one another. Fairness would dictate that Defendants should be allowed to martial and present those proofs that speak directly to the defense theory. Instead, the court stifled Defendants' ability to fairly present its defense by excluding crucial evidence. In addition, Defendants were deprived an impartial jury when the court allowed evidence about the supposed contractual violations and April 2018 storm to poison the jury's impression of Defendants. Lastly, the court deprived defendants a fair trial by allowing the jury to apply the wrong law and standard of care by giving the jury the wrong jury charge and allowing the jury to make the snow contract the relevant standard of care. The aggregate effect of all these errors in combination rendered the trial unfair to Defendants.

CONCLUSION

For all the reasons cited above, it is respectfully requested that this appeal be granted in its entirety, and that the trial court's denial of Defendant's motion to take judicial notice as to the State of Emergency be reversed, that the denial of Defendant's motion to bar reference to the snow removal agreements be reversed (minus the ruling as to Xtreme's subsequent termination), and that a new trial on liability only be ordered given the wrong jury charge and cumulative errors.

Respectfully submitted,

Daniel S. Jahnsen/s/

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Daniel S. Jahnsen, Esq,
Attorney for Defendants/Appellants
C&M LANDSCAPE CONTRACTORS, INC.; MULCH EXPRESS USA, LLC D/B/A XTREME SNOW PROS; J&A LANDSCAPE AND SNOW SERVICES; AND BERNARD PLAZA ASSOCIATES

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

PAULA E. RUSSO, Plaintiff-Respondent, vs. GARDEN COMMERCIAL PROPERTIES, GARDEN HOMES, C&M LANDSCAPE CONTRACTORS, INC., MULCH EXPRESS USA, LLC, d/b/a XTREME SNOW PROS, J&A LANDSCAPE AND SNOW SERVICES, BERNARD PLAZA ASSOCIATES AND JOHN DOES 3-50 (fictitious designations), Defendants-Appellants.	DOCKET No.: A-0262-23 ON APPEAL FROM AN ORDER AND DECISIONS OF THE SUPERIOR COURT, LAW DIVISION, MERCER COUNTY Docket No. L-0112-20 SAT BELOW: HON. DOUGHLAS HURD

BRIEF OF PLAINTIFF-RESPONDENT, PAULA RUSSO

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PRELIMINARY STATEMENT

Plaintiff-Respondent Paula Russo (hereinafter "Plaintiff") respectfully submits this instant brief in response to Defendants-Appellants (hereinafter "Defendants") appeal of multiple decisions made during Trial which concluded with an August 15, 2023 Order of Judgment, along with the July 19, 2023 Orders barring reference to the State of Emergency and denying Defendants' request to bar reference to the snow removal contract, and granting in part Defendants request to bar evidence of termination or nonrenewal of snow removal contracts. This litigation arises out of injuries Plaintiff, an invitee, suffered on March 8, 2018, when defendants, Garden Commercial Properties, Garden Homes, C&M Landscape Contractors, Inc., Mulch Express USA, LLC d/b/a Xtreme Snow Pros (collectively hereinafter "Xtreme"), J&A Landscape and Snow Services (hereinafter "J&A"), and Bernard Plaza Associates (hereinafter "Bernard Plaza") failed to properly keep Dewy Meadows reasonably safe and failed to properly inspect it, in order to discover dangerous and hazardous conditions, which caused Plaintiff to slip and fall and sustain serious injuries.

The trial court did not abuse its discretion and properly charged the jury with Model Jury Charge 5.20(F)(5) as it properly explained what duty was owed to Plaintiff as an invitee at Dewy Meadows, especially because the snow had stopped almost twelve hours before Plaintiff's fall. Moreover, whether there was a State of

Emergency during the time of Plaintiff's fall was not relevant to the facts of this case and could have been highly prejudicial as it could mislead and confuse the jury, and therefore, the trial court properly refused to take juridical notice and barred it from trial. Defendants failed to show how the State of Emergency was relevant and impacted their duty to keep the property safe.

Prior to trial, multiple statements were made by the respective Defendants that were against their interest in defending their respective positions in this matter, which put into question what work was actually done, if any, and whether Xtreme believed it was restricted in their ability to complete its services due to the contracts provided by J&A and Bernard Plaza. Accordingly, the snow removal contract was relevant as it dictates what the property owner expected the snow and ice removal contractors and subcontractors to do and when the work should have been completed. Therefore, the trial court did not abuse its discretion in allowing the snow removal agreements to be referenced at trial.

Similarly, as there was already testimony provided during discovery regarding dissatisfaction of work being done in the 2017/2018 snow season, with no specific reference to it being only related to the April 2018 snow event, the trial court granted Defendants' motion and restricted Plaintiff from asking regarding the termination or nonrenewal but properly gave Plaintiff the ability to ask about their satisfaction of the work. In accordance with the trial court's ruling, Plaintiff never asked about the

termination or nonrenewal of the contract and any testimony about the April 2018 snow event was first mentioned by testimony of a Defendant, not by Plaintiff's counsel.

Lastly, the trial court did not abuse its discretion when it determined not to admit a photograph that could not be authenticated under the rules of Evidence. Defendants failed to ask the person who took the photo any questions regarding the photo when given the opportunity. Moreover, as neither of the Defendants who were asked about the photo were present and had no personal knowledge regarding the conditions of the property at the time of Plaintiff's fall, Defendants were unable to authenticate what the photograph accurately depicted. As such, the trial court properly excluded the photograph from evidence.

The decisions the trial court made were not in error and surely does not rise to the level of cumulative error resulting in a new trial. However, if the Appellate Division were so persuaded to entertain Defendants' arguments, Plaintiff contends a new trial on all issues should be ordered, not simply on damages. Limiting the new trial to liability alone risks leaving in place a damages verdict that may have been improperly compromised or inadequately calculated based on decisions made by the jurors when considering liability. As such, the interests of justice require a fresh look at both issues, if necessary.

PROCEDURAL HISTORY

On February 24, 2020, Plaintiff filed an Amended Complaint for injuries she sustained on March 8, 2018, when defendants, Xtreme, J&A, and Bernard Plaza (collectively hereinafter "Defendants") failed to properly maintain a common area of high foot traffic, failed to provide proper notice to business invitees of a dangerous condition that existed, failed to correct a dangerous condition that they knew or should have known existed, and failed to properly inspect its property in order to discover dangerous and hazardous conditions which caused Paula to slip and fall. (Da90-94).

Defendants filed an Answer on April 28, 2020. (Da95-105). On November 29, 2022, Defendants filed a Motion in Limine requesting that the trial court take judicial notice of the weather-related State of Emergency issued on March 6, 2018. Plaintiff opposed the motion on January 13, 2023. The trial court denied this initial motion in limine requesting judicial notice on the State of Emergency on February 17, 2023.

On May 25, 2023, Plaintiff filed a Motion in Limine to bar Defendants from referencing the "State of Emergency" in effect at the time of Plaintiff's fall at the time of trial. Defendants filed opposition on May 30, 2023, and also filed a separate Motion in Limine seeking to bar many things. For the purpose of this Appeal, the only relevant things sought by Defendants were to bar Plaintiff from referencing the

terms of the snow removal contracts, to bar evidence regarding the nonrenewal or termination of defendant Xtreme after the 2018 snow season, and an improper motion for reconsideration, disguised as a motion in limine, to "relax" the Court's prior decision to not take judicial notice of the State of Emergency. Plaintiff filed her reply brief to her Motion to Bar on June 9, 2023. On July 13, 2023, Plaintiff filed her opposition to Defendants' motion in limine barring many things. Only July 10, 2023, Defendants supplemented Defendants' opposition to Plaintiff's Motion to Bar reference to the State of Emergency. In response to the supplemental opposition, Plaintiff submitted a reply brief on July 17, 2023. On July 18, 2023, Defendants filed a reply brief on its Motion in Limine to bar many things.

Oral Argument on all Motion in Limines was held on July 19, 2023. (IT). The trial court granted Plaintiff's Motion to Bar Referencing the State of Emergency at the time of trial. (1T). In addition, the Court denied Defendants' motion in limine in relevant part, seeking to bar reference to the terms of the snow removal contract. (1T). In addition, the trial court granted Defendant motion to bar evidence regarding the non-renewal or termination of Xtreme after the 2018 snow season but provided Plaintiff the ability to ask Defendants about the satisfaction of the services. (1T). Moreover, the trial court denied Defendants' untimely motion for reconsideration regarding the judicial notice of the State of Emergency. (1T).

Trial in this matter began on July 24, 2023, and concluded on August 1, 2023. The jury returned a verdict finding that defendant Bernard was 20% negligent; that defendant J&A was 27% negligent; that defendant Xtreme was 41% negligent; and that Plaintiff was 12% negligent. (Da76-78).

On September 29, 2023, Defendants filed a Notice of Appeal challenging the rulings in limine about judicial notice, the snow removal agreements and seeking a new trial on liability only, due to the alleged reversible errors that occurred. (Da79-89).

COUNTERSTATEMENT OF FACTS

Plaintiff's Slip & Fall

On March 8, 2018, plaintiff Paula Russo drove from Hamilton, New Jersey, to her office which was located at 403 King George Road Basking Ridge, New Jersey 07920. (6T15:20-16:3). Paula's drive is about forty-eight miles one way, which takes her anywhere from an hour and fifteen minutes to an hour and thirty minutes in the morning. (6T11:17-22). Paula was allowed to work from home on Wednesdays because of how long her commute was. (6T11:15-19). Prior to this fall, Paula and her boss had an agreement regarding any severe weather, which was if any part of Paula's drive became unsafe, she was able to turn around and go home. (6T69:8-12). On the morning of her fall, it was not snowing, Paula had no issue driving forty-eight miles to work, as the roads were clear. (6T16:21-24). Paula had

to begin working by 8:00 a.m. and for almost thirteen years she always got to work around 7:15-7:30 a.m. (6T17:10-21).

On March 8th, when she arrived at or around 7:30 a.m., Paula could tell the parking lot had already been plowed because there was no snow on the main driveway. (6T18:17-22). As she drove through the complex to her final destination, she did not see any plows, anyone shoveling, anyone with snow blowers, any Bobcats, anyone putting salt down, and she did not see any trucks with J&A landscaping or Xtreme Snow Pros on it. (6T18:20-19:25). As there were no spots cleared in front of her office building, Paula had to park away from the building near what was called the "swamp." (6T21:1-10). When Paula got out of her car and attempted to walk across the parking lot to her office, she realized that the parking lot was basically a sheet of ice. (6T23:17-20). There was no clear path for Paula to take from her car to get to her office, but she observed a small path from the parking lot to the building which was shoveled by a man from the bagel shop next door. (6T24:9-16). After driving over an hour and a half to work, and given she only had to walk across the parking lot which was an estimated 10-15 feet, she slowly and carefully attempted to walk toward the makeshift walkway, wearing her non-slip sneakers, but slipped and fell due to the ice and suffered serious injuries. (6T:26:10-28:5).

Immediately following her fall, Paula's boss asked her to take pictures of the conditions so she could send it to the landlord. (6T23:11-15). While it is accurate, with Plaintiff's answers to interrogatories that she provided six photographs which were related to the incident, Paula clarified at her deposition that she personally only took four of the pictures (three of which were marked in evidence), and it was her belief that her boss took the other two around the time she came to the office and therefore could not authenticate. (Da14, 22). Defendants, aware of this testimony, failed to depose or even ask Carol Mollo, who was named in Plaintiff's answers to interrogatories, and testified at trial, to authenticate what Defendants note as "Marino 3", prior to attempting to use it in Adam Kestin's direct. (7T). The Court refused to admit the photograph into evidence but did allow Defendants to mark it for identification. (7T70:20-22).

Weather Conditions:

At trial, the jury heard from Plaintiff's weather expert Thomas Else. (3T) The National Weather Service is the only government source that issue any winter storm watches, warnings, advisories, special weather statements for Basking Ridge. (3T53:23-54:1). In this case, the National Weather Service issued a winter storm warning, which began right after midnight. (3T54:1-3). He told the jury, that on March 7, 2018, in Basking Ridge, the rain transitioned over to light snow after 12 a.m. (3T53:10-12). Throughout the morning hours there was a light snowfall and the

temperature was about 32 or 33 degrees and since it was early March, the annual sun was still pretty high. (3T53:16-19). From 12:00 p.m. to 5:00 p.m., snow came down heavy, at least two inches per hour. (3T54:6-8). After 5:00 p.m., the snow began to wind down. (3T54:13-14). The storm began to pull away and the snow tapered off for good, meaning nothing was happening between 8:00 and 8:30 p.m. (3T54:14-16). At 8:50 p.m., on March 7, 2018, the National Weather Service cancelled the winter storm warning as the snowfall was done. (3T54:16-20). The last snowfall was almost 12 hours before Paula's fall. (3T:61:20-62)

Snow Removal Contracts:

Defendant Bernard Plaza entered into a snow removal contract with J&A. (Da150-165). The Scope of Work stated that "***SAFETY IS NOT TO BE COMPROMISED***." (Da159). In addition, the contract's Snow Removal Specifications provided that "[a]ll access roadways and walkways are to be cleared of snow prior to 6:00AM (4:00PM in the event of day storms) or as timely as possible on any given day, seven days week." (Da164). The agreement further prohibited J&A from using subcontractors without the written consent of Bernard Plaza. (Da 155).

Even though prohibited by its contract with Bernard Plaza, J&A entered into a Subcontractor Agreement with Xtreme for snow and ice removal work to be done at Dewy Meadow. (Da166-179). This agreement's Scope of Work stated "The

OWNER's primary objective is for the propert(ies) to be maintained in a safe manner which provides safe conditions for all those property(ies) at all times. ***SUBCONTRACTOR is responsible for ensuring all services are provided as required to ensure safe conditions for employees, tenants, and visitors. SAFETY IS NOT TO BE COMPROMISED****."* (Da174-75). Moreover, this agreement had same 6 a.m. deadline for completion of the snow/ice removal as the underlying agreement between Bernard Plaza and J&A as set forth above. (Da178).

Snow Removal Services Provided by Defendants:

At trial on behalf of Bernard Plaza, Matthew Acar testified Andrew Sutter from J&A was responsible for making sure snow and ice removal was completed at Dewy Meadow. (4T9:5-12). Mr. Acar testified that when he entered into the contract he did not expect it to be subcontracted, and that J&A needed the owner's approval to subcontract, which J&A did not have. (4T40:19-41:12). Mr. Acar's agreement with J&A had a provision first that states "Safety Must Not Be Compromised" and in addition another provision that stated all access roadways, walkways to be cleared of snow prior to 6:00 A.M. because some of the businesses were open during that time and it was so that the property could be safe for invitees coming on to the property for the business. (4T22:6-23:15).

Mr. Acar knew businesses like the bagel place, Dunkin Donuts, and even the daycare expected to be open as early as 6 a.m. (4T24:8-21). Mr. Acar was not

present on the day of Plaintiff's fall and did not believe Mr. Sutter was there. (4T28:16-20). Mr. Acar believed he spoke with Adam Kestin during the day on the 8th about working being done at Dewy Village, however he did not even know that day that J&A was not in fact servicing the property. (4T29:14-30:6). Mr. Acar did not know Plaintiff's schedule or what time her offices opened and had no control over it.

Mr. Acar had no personal knowledge as to what the property looked like when Plaintiff arrived, what snow removal efforts were made or not, how many people were out there and what was done and what was not done. (4T49:20-25). Mr. Acar admitted that he could have shut down or closed the commercial property if he were unable to keep it safe. (4T77:16-18). Within the court's ruling, Mr. Acar was simply asked whether he was happy with the services J&A provided with regard to the 2017-2018 season. (4T44:1-7). In response, Mr. Acar said "April, not March. April I had an issue with them." (4T44:6-7). Mr. Acar opened the door for the line of questioning which then took place, but at no point did any testimony regarding J&A being terminated, nonrenewal, or subsequent remedial measures was brought up.

Andrew Sutter, on behalf of Bernard Plaza, testified as the property manager of Dewy Meadow. (4T84:1-3). Mr. Sutter admitted he arrived at Dewy Meadows at 10 a.m. and was not on the property at the time Plaintiff fell. (4T87:5-7; 89:2-4). Mr.

Sutter believed that J&A was responsible to do snow and ice removal and did not know anything about Xtreme. (4T89:12-18).

Christopher Marino, as the owner of Xtreme, testified at trial (4T). Mr. Marino has never been to Dewy Meadow. (4T119:1-2). Mr. Marino had no personal knowledge as to what the property looked like when Plaintiff arrived, what snow removal efforts were made or not, how many people were out there, and what was done and what was not done. (4T182:11-15). Unlike his trial testimony, at his deposition, when Mr. Marino was shown photos depicting the conditions of Dewy Meadows when Plaintiff fell, Mr. Marino testified that what he saw in the photo was unacceptable but that he had a contract to follow that set out the terms of what he was and was not able to do, and that he felt held constrained in completely. (Pa5-9).

Giuseppe Iannuzzelli, one of two owners of J&A, testified at trial. (5T). Mr. Iannuzzelli admitted that J&A was at maximum capacity and would not have been able to manage the contract to service Dewy Meadows at the time it entered into the contract with Bernard Plaza. (5T76:13-19). However, Mr. Iannuzzelli did not tell Mr. Acar and Mr. Sutter that J&A would be subcontracting the contract out. Neither Mr. Iannuzelli nor his partner Adam Kestin, provided any oversight over Xtreme at Dewy Meadows on March 8th. (5T88:12-16). Mr. Iannuzelli claims that J&A made sure that they were there and that they had completed the services, but when asked when and how he made sure, he did not know, because he believed his partner was

did but was not sure. (5T100:12-101:7). Within the court's ruling, Plaintiff asked Mr. Iannuzelli how he felt Xtreme performed. Mr. Iannuzelli testified that "he's guessing they did a decent job." (89:17-18). This testimony conflicted with his prior deposition testimony which did not seem limited to the April 2018 storm. (Pa10-12)

Adam Kestin, the other owner of J&A, testified that J&A was not equipped to handle the contract for Dewy Meadows when it entered into with Bernard Plaza, which is why J&A subcontracted the contract to Xtreme. (7T27:6-12). Mr. Kestin had no personal knowledge as to what the property looked like from March 5th to the 15th, and whether there was snow, what efforts were made, or not made, how many people were working and what was done, and what was not done. (7T65:5-11).

Motion in Limine Hearing – July 19, 2023

On July 19, 2023, the trial court conducted oral arguments on multiple motions including Plaintiff's Motion In Limine to Bar Referencing the State of Emergency at trial and Defendants' Motion in Limine in relevant parts, seeking to bar reference to the terms of the snow removal contract, bar evidence regarding the non-renewal or termination of Xtreme after the 2018 snow season, and seeking the court to relax its prior refusal to take judicial notice of the State of Emergency. (1T).

Plaintiff argued that the State of Emergency had no impact of Defendants duty to keep its property safe for invitees. Moreover, the purpose of a state of emergency

Order is empower the New Jersey Office of Emergency Management to ***act on behalf of the Governor employ the resources and assets of the State, local and private agencies to provide immediate assistance to localities***. (emphasis added). (Pa1-4). State of Emergency declarations do not restrict a normal citizens movement or activities. (Id.) The State may limit access to areas of concern for public safety but will notify the public of these restrictions. (Id.) The main purpose of State of Emergency is to "employ the resources and assets of State, local and private agencies to provide immediate assistance to localities." (Id.) Plaintiff argued that even though Smith v . Costco Wholesale Corp., No. A-2592-21, 2023 WL 4307729 (Super. Ct. App. Div. July 3, 2023), dealt with the same snow event, the facts were not analogous, as the plaintiff went out in the middle of an ongoing snow event, slipped and fell, whereas we did not have an ongoing storm in this matter. (Da29-32).

The trial court ruled that the State of Emergency could not be referred to at the time of trial and affirmed its prior ruling denying Defendants' previous motion seeking judicial notice of the State of Emergency. (1T29:6-8). Further the trial court noted that the jury would hear about how significant of snowstorm it was from the weather expert and see photos of the incident scene depicting the weather conditions. (1T30:3-10). Accordingly, the trial court concluded the State of Emergency had no relevance and the potential for confusion or prejudice outweighed any probative value. (1T30:12-19).

With regard to whether snow removal agreements should be referenced at trial, it is important to note that the basis for Plaintiff's opposition was grounded in significant conflicting deposition testimony provided by Mr. Marino. Plaintiff argued that the snow removal agreements were important because there was an agreement between the property owner and the contractor, in which it stated that it is not allowed to subcontract out. (1T39:15-19). Plaintiff has always believed this case was a system failure between all three defendants in which safety was not put at the forefront. (1T39:19-21). All of the Defendants' responsibilities, the scope of the work that was supposed to be done, how much work was supposed to be done, how it was supposed, and when it was supposed to be done is all outlined in the agreements between the Defendants. (1T39:21-40:1; Da150-178).

Plaintiff did not attempt to expand the duty which Plaintiff believes is identified in 5.20(F)(5) but instead shared the relationships, expectations, and understandings between the parties, so a jury could carefully consider who, if anyone, to apportion liability to. Mr. Marino, at his deposition, noted Xtreme had to follow the agreement, despite at the time believing the contract created limitations on Xtreme which would limit its ability to complete work at Dewy Meadows. (1T40:8-16; Pa5-9). Plaintiff argued that the factfinders should hear this testimony as it went directly as to whether Mr. Marino even thought he was able to keep the property reasonably safe for invitees like Plaintiff. (Id.)

The trial court denied Defendants motion to bar reference to the snow removal contracts because it believed it was important for the factfinder to know the scope of what was expected of each defendant in order to consider apportionment, if any, of liability for the subject property. (1T42:4-43:2). Moreover, the trial court noted that in the case cited by defendants themselves Geringer v. Hartz Mountain Development Corp., 388 N.J. Super. 392, 404 (App. Div. 2006), the jury considered the fact that the landlord had no ongoing duty to perform inspections because the lease unambiguously placed the responsibilities on the tenant. (1T37:6-19).

With regard to whether to bar reference to the subsequent termination of Xtreme after the 2018 snow season, Plaintiff opposed the underlying motion based similarly the conflicting testimony provided by Defendants at their depositions. Mr. Marino stated he stopped working with the property owner and the property management company because he felt restricted by the service agreement and his inability to make the area safe. (1T57:11-15; Pa5-9). Whereas, during Mr. Iannuzelli's deposition, he stated that J&A determined that Xtreme Snow Pros were no longer fit for the 2018 season because they were not happy with the work they were able to do, they were not making the property safe. (1T57:16-20; Pa10-12) These statements were relevant to the credibility of the witnesses, especially once the testimony changed at the time of trial. (1T58:20-24). The trial court granted defendants' motion in part and barred any evidence regarding non-renewal or

termination, but stated under N.J.R.E. 701, Plaintiff was able to ask Defendants if were happy with the work. (1T582:2-24; 60:2-8).

Jury Charge

At the charge conference, there was significant discussion regarding using Model Jury Charge 5.20(B)(2)(b)- instead of Model Jury 5.20(F)(5)(Duty to Invitees). Plaintiff argued that Smith v. Costco Wholesale Corp., was not relevant to this matter as it dealt with an ongoing snowstorm, with which do not have here. (7T84:15-20; Da29-32). In fact, Plaintiff fell almost twelve hours after the snow ended. Plaintiff further argued that 5.20(b) has not been expanded to include commercial properties when the actual ongoing storm is over.(7T87:15-18). Pareja v. Princeton Intern. Props., 246 N.J. 546 (2021), had to deal with a driveway ingress, where a public pedestrian was walking to work, not related to the commercial property at all, was not an invitee on that property, and slipped and fell during the ongoing storm. (7T87:19-23). Similarly. in Smith v. Costco Wholesale Corp., there was an ongoing snowstorm and Plaintiff slipping and fell leaving Costco while the storm was going. (7T87:24-88:4). Here we do not have an ongoing storm. (7T88:4). The storm ended at 8:30p.m. on March 7, 2018. (7T88:5). Plaintiff arrived and subsequently fell at 7:30 a.m. on March 8, 2028. (Id.) Model Jury Charge 5.20(B)(2)(b) only speaks to liability for defects in public streets and sidewalks. (7T88:11-13). Then specifically, 5.20(B)(2)(b) deals with snow and ice abutting, and

it says liability of owner, commercial property for defects snow and ice accumulation, or other dangerous conditions in abutting sidewalks. (7T88:13-17). Plaintiff argued as she did not slip and fall in an abutting sidewalk; 5.20(B)(2)(b) should not be charged because the law has not been expanded to the duty for a commercial owner and his private parking lot, twelve hours after a storm. (1T88:17-22).

After further arguments, the trial court decided that it was going to charged 5.20(f). (90:17-91:1). Citing Hopkins v. Fox & Lazo Realtors, 132 N.J. 426 (1993), and the variation of duties depending on status, and as there is no dispute that Plaintiff is an invitee, the Court determined that 5.20(F)(5) sets forth the scope of the duty owed to Plaintiff. (1T91:2-6). The trial court determined that 5.20(B)(2)(b), Costco, and Pareja cases are all distinguishable because it deals with injuries that occurred during an ongoing storm. (1T91:6-9). Further, the trial court noted that when you read 5.20(B)(2)(b), it does not mention invitees, but instead speaks to pedestrians, on the sidewalk, which is not present in this case. (1T91:9-12). Here, Plaintiff was an invitee in the parking lot. (1T91:12-13). So therefore, the trial court charged Model Jury Charge 5.20(F)(5). (1T91:13-14.)

LEGAL ARGUMENT

POINT I: THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT CHARGED THE JURY WITH MODEL JURY CHARGE 5.20F(5) AS PLAINTIFF IS AFFORDED SPECIFIC PROTECTIONS AS AN INVITEE WHICH IS NOT PROVIDED IN MODEL JURY CHARGE 5.20(B)(2)(b). (7T:82-91:14)

It is fundamental that "[a]ppropriate and proper charges to a jury are essential for a fair trial." Velazquez v. Portadin, 163 N.J. 677, 688 (2000) (alteration in original) (quoting State v. Green, 86 N.J. 281, 287 (1981)). "A jury is entitled to an explanation of the applicable legal principles and how they are to be applied in light of the parties' contentions and the evidence produced in the case." Viscik v. Fowler Equip. Co., 173 N.J. 1, 18 (2002) (internal quotation marks omitted). The appellate court reviews a trial court's instruction on the law de novo. Fowler v. Akzo Nobel Chemicals, Inc., 251 N.J. 300, 323 (2022); State ex rel. Comm'r of Transp. v. Marlton Plaza Assocs., L.P., 426 N.J. Super. 337, 347 (App. Div. 2012). "Nonetheless, not every improper jury charge warrants reversal and a new trial. As a general matter, [appellate courts] will not reverse if an erroneous jury instruction was incapable of producing an unjust result or prejudicing substantial rights." Prioleau v. Ky. Fried Chicken, Inc., 223 N.J. 245, 257 (2015) (internal quotation marks omitted).

Defendants contend that the trial court should have charged the jury with Model Jury Charge 5.20(B)(2)(b)– Liability for Defects in Public Streets and

Sidewalks: (2) Snow and Ice (b) Liability of Owner of Commercial Property for Defects, Snow and Ice Accumulation and Other Dangerous Conditions in Abutting Sidewalks, which Defendants allege sets forth the duty of Defendants in this matter.

5.20(B)(2)(b) in relevant part states:

> A commercial property owner ***may have a duty to clear public sidewalks abutting their properties of snow and ice for the safe travel of pedestrians.*** Maintaining a ***public sidewalk*** in a reasonably good condition ***may require removal of snow or ice or reduction of the risk, depending upon the circumstances***. The test is whether a reasonably prudent person, who knows or should have known of the condition, would have within a reasonable period of time thereafter caused the public sidewalk to be in reasonably safe condition.

Even though 5.20(B)(2)(b) does reference snow and ice removal, in the reading of the plain language, it is clearly limited to Defects, Snow and Ice Accumulation and Other Dangerous Conditions in Abutting Sidewalks. In the notes section of the charge, it specifically cites to Stewart v. 104 Wallace St. Inc., 87 N.J. 146, 157 (1981), where the Court expanded a commercial property owner's duty to keep their property reasonably safe to abutting public sidewalks, as the landowner derived a commercial benefit. The purpose of such expansion as to public sidewalks was to provide a remedy for seriously injured plaintiffs and incentivize property owners to repair deteriorated sidewalks from which they derived a commercial benefit. Stewart, 87 N.J. at 157. This provides an explanation as to why this charge

is focused on pedestrians who are simply using the sidewalk abutting the commercial owner's property and makes no reference to how it would be different for an invitee.

Further, Defendants never cited to or argued the following cases before the trial court: Sarro v. Vonage Holdings Corp., No. A-1392-21, 2023 WL 2566062 (Super. Ct. App. Div. Mar. 20, 2023) (Da38-42); Greenstein v. Forsgate Industrial Complex, No. A-0947-19, 2021 WL 3084740 (App. Div. 2021) (Da33-37); and Hanna v. Woodland Community Assoc., No. A-0277-21, 2022 WL 16984707 (App. Div. 2022). Even so, Plaintiff addresses them in this brief as she believes Defendants reliance on the principles set forth in those cases are misplaced as they are not similar to the facts at hand.

In Sarro, an unpublished opinion, the plaintiff slipped and fell in a parking lot owned by her employer while walking to work ***during an ongoing snowstorm*** (Da38)(emphasis added). Accordingly, the court found that the defendants had ***no duty during to the storm*** to address hazardous conditions in the parking lot due to snow and ice. (Da41) (emphasis added). Citing the same principals already laid out in Stewart, the Court held the duty to remove snow and ice from a public sidewalk is in addition to a commercial property owner or contractor's duty to keep its commercial property safe, rather than a distinction or limitation of their duty to public sidewalks. (Da40-41). Here, plaintiff did not fall during an ongoing

snowstorm. She fell almost twelve hours later. Therefore, as we are not dealing with an ongoing snowstorm issue, Sarro is not applicable.

In Greenstein, another unpublished opinion, the plaintiff slipped a fell on an icy ***driveway apron*** leading from the street to Amazon's parking lot. (Da33). The dispute here was whether Amazon owed the plaintiff a duty to clear snow and ice from the driveway apron. Relying on the Pareja, which treated a ***similar driveway apron as part of the sidewalk,*** the court declined to differentiate between the sidewalk and driveway apron in determining Amazon's duty. (Da36-37). The court found the driveway apron was structurally integral to the sidewalk and intended for pedestrian use and it was found it was foreseeable pedestrians would use the apron. (Id.) Here, plaintiff did not fall in a driveway apron, and there is a clear difference between a driveway apron as part of a sidewalk and a parking lot in a private commercial complex. Therefore, as there is no dispute that defendants had a duty to clear snow and ice from the parking lot, Greenstein, is not applicable.

Lastly in Hanna, the plaintiff slipped and fell in his condo complex within an hour after the snow stopped. (Da43). Relying on Pareja, the court determined that an hour after the snow fall was not a reasonable time to complete snow removal activities. (Da47). Here, Plaintiff did not fall until close to twelve hours after the last snow fall, and over fourteen hours after the heavy snow fall had stopped. More importantly, unlike a condominium complex, here Mr. Acar could have closed Dewy

Meadows until it was safe for people to enter it but it was not. (4T77:16-18). Plaintiff could have been prevented from ever entering Dewy Meadows on March 8, 2018, until it was safe, but she was not.

While Defendants attempted to frame the facts and their defense to comply with the duty set forth in 5.20(B)(2)(b), that charge does not conform with the testimony and evidence presented at trial. Accordingly, the trial court's decision to charge the jury with Model Jury Charge 5.20(F)(5) was proper. There are significant differences between the charge Defendants wanted to use versus what the jury was charged, because 5.20(B)(2)(b) does not include any of the protections provided to an invitee as provided in 5.20(F)(5) as to what the landowner should have done to keep the land reasonably safe, including inspecting the land, and making sure it was safe for the Plaintiff upon her arrival. As Plaintiff was an invitee at Dewy Meadows at the time of her fall, she was owed the highest duty of care. Hopkins, 132 N.J. at 433.

"The duty owed by a premises owner . . . depends in general upon the application of well-established categories through which the status of the injured party is used to define both duty and foreseeability." Estate of Desir ex rel. Estiverne v. Vertus, 214 N.J. 303, 316 (2013). "When a person alleges that a landowner has acted negligently, the existence of a duty by a landowner to exercise reasonable care to third persons is generally governed by the status of the third person—guest,

invitee, or trespasser—particularly when the legal relationship is clearly defined." Robinson v. Vivirito, 217 N.J. 199, 209 (2014). Model Civil Jury Charge 5.20F(5) in pertinent part reads:

> The owner/occupier of the land (or premises) who by invitation, expressed or implied, induced persons to come upon his/her premises, is under a duty to exercise ordinary care to render the premises reasonably safe for the purposes embraced in the invitation. Thus, he/she must exercise reasonable care for the invitee's safety. ***He/she must take such steps as are reasonable and prudent to correct or give warning of hazardous conditions or defects actually known to him/her (or his/her employees), and of hazardous conditions or defects which he/she (or his/her employees) by the exercise of reasonable care, could discover.***

The owner or occupier of premises owes a duty to an invitee to ***provide a reasonably safe place to do that, which is within the scope of the invitation***. Butler v. Acme Mkts., Inc., 89 N.J. 270, 275 (1982) (emphasis added). To an invitee, like Plaintiff, a landowner owes a duty of reasonable care to guard against any dangerous conditions on its property that the owner either knows about or should have discovered. That standard of care encompasses the duty to conduct a reasonable inspection to discover latent dangerous conditions. Hopkins, 312 N.J. at 434.

In Pareja, the plaintiff slipped and fell on a sidewalk abutting Princeton International Properties, while walking to work in the early morning hours. 246 N.J. 546. The Supreme Court in Pareja adopted the ongoing storm rule and created a narrow holding stating that "a landowner does not have a duty to remove snow or

ice from public walkways until a reasonable time after the cessation of precipitation." Id. at 548." In Smith v. Costco Wholesale Corp., the plaintiff, on March 7, 2018, during a snowstorm, drove to Costco, parked in the parking lot, and went inside to shop. (Da29). As the plaintiff walked out to her vehicle, she slipped backwards and fell in the area between the entrance doors and red bollards prior to entering the parking lot, injuring herself. (Id.) The defendants moved for summary judgment, and in March 2022, the trial court granted the defendants' motion based on Pareja. The reason for the dismissal in Smith v. Costco Wholesale Corp., was because the defendants had no duty to remove the snow because the snowstorm was still ongoing. (Da30).

Here, we do not have this ongoing storm issue. As testified to at trial, the heavy snow fall ended around 5 p.m. with just light flurries falling which ended completely at 8:30 p.m. on March 7, 2018, and accordingly, the winter storm advisory was cancelled at 8:50 p.m. that night. (3T54:14-20). Almost 12 hours later, Plaintiff drove forty-eight miles, taking over an hour and a half, from Hamilton to Basking Ridge, with no issue. (6T16:21-24). She entered this private office complex, owned, and controlled by Defendants, unlike the property considered in Pareja. Defendants contend that they themselves prioritized the retail tenants for snow removal over the office tenants. However, there is no distinction or priority with

regard to retail tenants versus office tenants provided by the law or the snow removal contract when it comes to snow removal efforts. (Da150-178).

Defendants had close to twelve hours to clear a property and it could have prevented people from entering Dewy Meadows. (4T77:16-18) There is no dispute that there was sufficient time for the Defendants to make its property reasonably safe for Plaintiff and others. Defendants owed Plaintiff and others the duty to inspect and look for hazardous condition such as ice. Despite this, none of the Defendants did so. In fact, not one Defendant could tell the jury the condition of the property the morning Plaintiff fell. (4T49:20-25; 4T87:5-7; 4T89:2-4; 4T182:11-15; 5T88:12-16; 7T65:5-11).

There is a clear difference in the duty that is owed to an invitee under 5.20(F)(5) and 5.20(B)(2)(b), which provides no protections or make any distinction as to what is owed is to an invitee on the commercial owners' property versus a pedestrian on an abutting sidewalk. Accordingly, in the interest of justice, and providing a clear remedy for seriously injured invitees, such as Plaintiff, the trial court properly charged the jury with 5.20(F)(5) and did not commit reversible error.

POINT II: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING PLAINTIFF TO REFERENCE THE SNOW REMOVAL SERVICE AGREEMENTS NOR DID IT EXPAND THE DUTY OF CARE BECAUSE IT LAID OUT THE RESPONISBILITES AND EXPECTATIONS OF EACH PARTY AND HELPS A JURY APPORTION FAULT. (1T39:15-43:2)

Appellate review of the evidentiary rulings a trial court has made on a motion in limine is limited. "[A] trial court's evidentiary rulings are 'entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment.'" State v. Brown, 170 N.J. 138, 147 (2001) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)). As such, "an appellate court should not substitute its own judgment for that of the trial court, unless "the trial court's ruling 'was so wide of the mark that a manifest denial of justice resulted" Ibid.

The trial court properly permitted the snow removal agreements to be discussed at trial due to the conflicting deposition testimony of the three defendants regarding who was to provide snow removal services at the time of Plaintiff's fall. (1T39:15-40:1; Da150-178). In addition, Xtreme testified it was limited in performing its job because of the terms of the contract. (1T40:8-16; Pa5-9).

N.J.R.E. 401 defines relevant evidence as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." Here, the snow removal agreement is relevant evidence as its contents go directly to each defendants' responsibilities to each other, what services were to be provided and when. The snow removal agreements were ignored from the initial

execution which created a system failure that permitted poor standards to be kept which ultimately led to Plaintiff suffering a significant injury. (1T39:19-21). The landowner has "a non-delegable duty to use reasonable care to protect invitees against known or reasonably discoverable dangers" Rigatti v. Reddy, 318 N.J. Super. 537, 541 (App. Div. 1999) (quoting Kane v. Hartz Mountain Indus., Inc., 278 N.J. Super. 129, 140 (App. Div. 1994)).

During discovery in this matter, Defendants' positions as who was responsible for what when it came to Dewy Meadows, as well as the quality of work, were in conflict. The contents of the contracts were clear and unambiguous and detailed Defendants' knowledge and notice of specific requirements and expectations, for snow and ice removal services at Dewy Meadows. Xtreme blamed the contract for the conditions appearing as they did on March 8, 2028. (Pa5-9) Xtreme testified that the contract constrained its ability to keep Dewy Meadows safe, because he said he had contract to follow. (Pa5-9) Yet while defendant Bernard did not even know that Xtreme was doing the work. (4T28:16-20; 29:14-21).

As a result, due to the conflicting testimony of defendants, each blaming the other, Defendants made the entirety of both contracts relevant. It was the only source of credible information that Defendants could agree outlined their agreements, the scope of work, the dos and don'ts, and specific expectations of the owner, the

contractor, and the subcontractor. (Da150-179). As a result, these agreements were relevant at trial.

While there is no dispute that J&A violated its contract with Bernard Plaza when it subcontracted with Xtreme, Plaintiff has never argued that the violation of the contract was a breach of a legal duty to Plaintiff. This is a fabricated argument of Defendants that was never advanced by Plaintiff. Instead, Plaintiff discussed the fact that defendant Bernard Plaza was never given the chance to vet defendant Xtreme, nor did defendant Bernard know that J&A was not performing the work, thereby making oversight also equally difficult. (4T28:16-20; 29:14-21).

The agreements between the owner and subcontractor and contractor and subcontractor both have sections that state the following:

> A. The OWNER's primary objective is for the propert(ies) to be maintained in a safe manner which provides safe conditions for all those property(ies) at all times. **SUBCONTRACTOR is responsible for ensuring all services are provided as required to ensure safe conditions for employees, tenants, and visitors. SAFETY IS NOT TO BE COMPROMISED.**
>
> (Da159, Da174-75)
>
> The areas are to cleared during each event in the following order of priority; ***roads prior to 6:00 AM*** (4:00PM in the event of day storms); parking areas, fire hydrants, mailbox areas, storm sewers, sidewalks, utility meters, and dumpsters enclosures areas.
>
> (Da164, Da178)

The agreements clearly note an understanding of Defendants of the increased traffic at 6 a.m., wherein they specifically note snow services should be performed prior to, if possible. (Da164, Da178). Once again, Plaintiff has never advanced an argument that any party had a legal duty to clear the parking lot by 6 a.m., but the agreements between the defendants make clear they all know the importance of clearing the snow prior to 6 a.m. (Id.)

Defendants contend that the contracts in place between the property owner and the contractor, and the contractor and sub-contractor, do not define the duty of the defendants. Plaintiff agrees. However, Defendants' argument that allowing the agreements to be discussed at trial expanded the duty of defendants is simply wrong. The jury was only ever told of the proper duty to an invitee, Model Jury Charge 5.20(F)(5). As such, the argument that the agreements between Defendants expanded their legal duty is without merit.

This case is about the failure of three parties to take safety seriously. The failure started long before the storm which began and ended on March 7th, the day before Plaintiff fell. Bernard Plaza entered into a contract with J&A, despite J&A not being able to perform the contract and meet Bernard Plaza's expectations. (1T30:15-40:1). J&A, despite not being permitted to, and without Bernard Plaza's knowledge, or permission, hired Xtreme as a subcontractor, while never supervising the services being provided by Xtreme. (5T76:13-19; 5T88:12-16). The parties and

their testimony were, and are, all in conflict, but their expectations are clear and in contract. (Da150-179). To the extent the terms of the contract were followed, Bernard Plaza could have argued that Plaintiff would not have fallen. Therefore, the agreements in place were relevant for trial so the jury was aware of the knowledge and notice of each Defendant as related to Dewy Meadows prior to March 8, 2018, as well as to the expectations of each defendant as to who would perform what and when to make the property reasonably safe. (Da150-179).

The discussion of the snow removal contracts did not mislead the jury in any way, in fact, the snow removal contracts assisted the jury to understand Defendants' knowledge and notice of the expectations and requirements on each Defendant to make the property safe, assuming everyone performed their role. Despite the agreements, Defendants failed to keep Dewy Meadows safe which led to Plaintiff, an invitee, suffering a significant injury. Further the testimony of representatives from Bernard Plaza and J&A, were clear that they had no personal knowledge regarding the conditions of Dewy Meadows at the time of Plaintiff's fall and what snow removal services were even provided by Xtreme which directly goes to the duty all three parties had to Plaintiff, an invitee on the property provided by the jury charge.

The trial court did not abuse its discretion in allowing discussion regarding the snow removal contracts as it was relevant and could have been crucial in helping

a jury decide whether a property owner, contractor, and subcontractor fulfilled their duty of care, whether they took reasonable steps to keep the property safe, what was expected of each party, and therefore could have assisted the jury apportion liability between the property owner, contractor, and subcontractor.

POINT III: THE TRIAL COURT DID NOT COMMIT HARMFUL ERROR, NOR ABUSED ITS DISCRETION, WHEN IT REFUSED TO TAKE JUDICAL NOTICE OF THE STATE OF EMERGENCY AND BARRED ITS REFERENCE DURING TRIAL (1T29-30)

Under N.J.R.E. 201(b)(1), a judge ***may*** take judicial notice of facts so "certain and indisputable" that "everyone of average intelligence and knowledge . . . can be presumed to know [them]." State v. Flowers, 328 N.J. Super. 205, 214 (App. Div. 2000)(emphasis added). "[A] trial court's evidentiary rulings are entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment." State v. Nantambu, 221 N.J. 390, 402 (2015) (alteration in original) (quoting State v. Harris, 209 N.J. 431 (2012)). "Under that standard, an appellate court should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling 'was so wide of the mark that a manifest denial of justice resulted." Brown, 170 N.J. at 147 (quoting Marrero, 148 N.J. at 484). Accordingly, such rulings "are subject to limited appellate scrutiny," State v. Buda, 195 N.J. 278, 294 (2008), as trial judges are vested "with broad discretion in making evidence rulings," Harris, 209 N.J. at 439 (quoting State v. Muhammad, 359 N.J. Super. 361, 388 (App. Div. 2003)).

Relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence. N.J.R.E. 403. Stoelting v. Hauck, 32 N.J. 87, 103 (1960). If the evidence is deemed relevant, it is admissible, unless its probative value is substantially outweighed by the risk of undue prejudice or some other bar to its admission is properly interposed. State v. Jackson, 243 N.J. 52, 58 (2020). The trial court has broad discretion to exclude evidence as unduly prejudicial pursuant to N.J.R.E. 403. Ibid.

Here, the trial court did not abuse its discretion when it refused to take judicial notice of the State of Emergency and barred its reference at trial, as it was irrelevant to the crux of the claim, and even if it had any relevance, its probative value was outweighed by its prejudicial value as the only value of such evidence is its ability to inflame the prejudices and biases of jurors. (1T29:6-8; 30:3-10). The trial court originally denied Defendants request to take judicial notice of the State of Emergency on February 17, 2023.[1] Accordingly, Plaintiff filed a motion to bar reference to the State of Emergency because it was clear the defense was attempting to conflate the fact that there was a State of Emergency in effect at the time of Plaintiff's fall, and therefore, defendants' duty, and liability, was somehow

[1] This order was not subject of Defendants' appeal.

impacted, or reduced. Moreover, Defendants were trying to shift the blame onto Plaintiff for being injured due to conditions that she was allegedly warned of by the State of Emergency Order.

The purpose of a state of emergency Order is to empower the New Jersey Office of Emergency Management to ***act on behalf of the Governor employ the resources and assets of the State, local and private agencies to provide immediate assistance to localities***. (Pa1-4) (emphasis added). When the Governor declares a state of emergency, it does not generally restrict a citizen's movement or activities. (Id.) The State may limit access to affected areas due to concerns for public safety but will notify the public of these restrictions. (Id.)

Whether there was a State of Emergency in place during the time of Plaintiff's fall, is not at issue in this matter, nor is it in dispute in this case. Defendants never produced a single piece of evidence to support the notion that their duty of commercial property owners, general contractor, or sub-contractor to remove snow and ice, and keep their properties clean and safe, were either eliminated or laxed during a State of Emergency. (1T25:8-27:15). There was no evidence that any of the Defendants alerted business tenants that the property was closed due to the State of Emergency. (Id.) There was no testimony that Defendants' employees were snowed in and not allowed on the roadways. (Id.) There was never any testimony Defendants were providing their resources to the State and therefore could not fulfil their duty

at Dewy Meadow. (Id.) There was no testimony, nor any evidence, ever offered that the State of Emergency made them unable to maintain Dewy Meadows in a reasonably safe manner. . (Id.) Finally, and most importantly, Defendants failed to produce an expert to speak as to how a State of Emergency, and specifically this one, had any bearing on private snow removal companies like J&A and Xtreme, and their work on properties such as the Dewy Meadow. (Id.)

The only clear purpose of Defendants' request was to inflame and prejudice the jury against Plaintiff as the jury would be improperly invited to conclude or infer that Plaintiff did something wrong by driving to work during a State of Emergency on March 8, 2018. There is no law in New Jersey that requires a private employer to close or release employees from work due to a state of emergency being declared, nor did the State of New Jersey instruct private employers to close their businesses, due to the State of Emergency.

Defendants also attempted to argue that Plaintiff should have been on notice of the dangerous and hazardous roadways and complied with Governor Murphy's declarations and warnings to avoid travel. However, on March 8, 2018, Plaintiff drove forty-eight miles from Hamilton to work in Basking Ridge, New Jersey, without any accident or difficulty. (6T16:21-24). The so called "dangerous and hazardous roadways" that Defendants claim Plaintiff was warned about from the State of Emergency notice was not the cause of her injuries, it was Defendants'

failure to properly clear, treat, and inspect the area to prevent the icy condition that Plaintiff encountered when she fell in the parking lot of Dewy Meadows.

Defendants' reliance on Smith v. Costco Wholesale Corp., and Weiss v. Nicola Porchetta Co. of N.J., Docket No. A-3110-13T2, WL 1540919 (N.J. Super. Ct. Apr. 8, 2015) (Da55-59), is improper. Smith v. Costco Wholesale Corp., dealt with the same snowstorm, in which the plaintiff, on March 7, 2018, during the snowstorm, drove to Costco, parked in the parking lot, and went inside to shop. (Da29). As the plaintiff walked out to her vehicle, she slipped backwards and fell, injuring herself. (Id.) The defendants moved for summary judgment, and in March 2022, the trial court granted the defendants' motion based on Pareja. (Id.) The Court ***may*** have taken judicial notice of the State of Emergency, but it was not material to the Court's decision. (Da30-31). The Court made its decision because it found it unreasonable to hold the defendants responsible when the plaintiff went out in the middle of an ongoing storm and a reasonable amount of time had not passed for the defendants to clear the premises of the dangerous condition. (Id.)

Weiss is a case in which the defendants filed an appeal of the Chancery Division denying their motion to set aside a sheriff's sale because of inclement weather. (Da56). The defendants placed substantial weight on the fact that the Governor issued an executive order at 2:31 p.m. on January 21, 2014, declaring that a state of emergency existed. (Id.) The recitals of the executive order referred to

"impending weather conditions," and stated that New Jersey was "expected to experience a severe winter storm." (Id.) In making its decision, the trial court noted that "the Governor did not impose any travel bans, nor did he order the closing of State or other governmental offices. (Id.) He generally authorized emergency management and public safety officials to utilize emergency powers to respond to the snowstorm as needed. Those powers included the closing of roads." (Id.) In Weiss, the defendants failed to establish that the weather ***at the time of the sale*** was so severe, and traveling conditions so treacherous, as to demonstrate that the trial court mistakenly exercised its discretion in declining to disturb the sale. (Da56-57). (emphasis added). The Appellate Division affirmed the decision. In Weiss, the Appellate Division, stated that they "***may*** take judicial notice of the fact that the Chief Justice ordered the closing of the State's courts on January 22, 2014. See N.J.R.E. 201(b)(4); N.J.R.E. 202(b)." (Da55) (emphasis added)

Nothing in Weiss, was persuasive or authoritative in stating that the Court ***had*** to take judicial notice of a fact. Judicial notice is within the discretion of the Court, and the Court here has already spoken and has determined not to take judicial notice of the State of Emergency at time of Plaintiff's fall. As not everyone truly understands what a State of Emergency means, and what it actually entails, there is a clear a risk of undue prejudice, confusion of issues, and misleading the jury and accordingly, the trial court did not abuse its discretion in refusing to take judicial

notice of the State of Emergency and barring it for being referenced at the time of trial.

POINT IV: THE TRIAL COURT DID NOT COMMIT HARMFUL ERROR OR ABUSE ITS DISCRETION WHEN IT PERMITTED PLAINTIFF TO QUESTION DEFENDANTS ABOUT THE SATISFACTION OF SNOW REMOVAL SERVICES PROVIDED IN APRIL 2018 AS DEFENDANTS OPENED THE DOOR WITH THEIR TESTIMONY (1T582:2-24; 60:2-8).

Appellate review of the evidentiary rulings a trial court has made on a motion in limine is limited. "[A] trial court's evidentiary rulings are 'entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment.'" Brown, 170 N.J. at 147 (quoting Marrero, 148 N.J. 484 (1997)). As such, "an appellate court should not substitute its own judgment for that of the trial court, unless "the trial court's ruling 'was so wide of the mark that a manifest denial of justice resulted" Ibid.

Defendants have an inaccurate understanding of the trial court's decision. The trial court granted Defendants' motion in part and barred any evidence regarding non-renewal or termination of the contracts but stated under N.J.R.E. 701, Plaintiff was able to ask if Defendants were happy with the work performed. (1T582:2-24; 60:2-8). The trial court permitted this questioning because each of the Defendant's feelings on the services provided, and whether it acceptable or not, were in conflict with each other from testimony already given during their depositions. (1T57:16-60:8).

Within the court's ruling, Mr. Acar was simply asked whether he was happy with the services defendant J&A provided with regard to the 2017-2018 season. (4T:43-44:3). In response, it was Mr. Acar who stated, "April, not March. April I had an issue with them." (4T44:6-7). Mr. Acar opened the door for the remainder of the line of questioning that took place. It is important to note that at no point during the trial was any testimony elicited regarding J&A being terminated, or any subsequent remedial measures came up during his testimony.

Similarly, within the court's ruling, Plaintiff asked Mr. Iannuzelli how he felt Xtreme performed. Mr. Iannuzelli testified that "he's guessing they did a decent job." (89:17-18). This testimony conflicted with prior testimony where he never related his dissatisfaction specifically to the April storm. (1T90:12-92:16)

Defendants should have kept its answers focused solely on the March 2018 storm as Plaintiff did not ask about the April 2018 storm. Defendants' failure to follow the trial court's rulings and limitations should not be conflated and disguised as error committed by the trial court. Accordingly, the trial court did not commit harmful error or abuse its discretion in allowing the Plaintiff to ask if Bernard was satisfied with J&A services and if J&A was satisfied with Xtreme's services.

POINT V: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED A PHOTOGRAPH FROM EVIDENCE AS INSUFFICIENT TESTIMONY WAS PRESENTED TO AUTHENTICATE IT. (7T70:20-22).

A trial court's evidentiary rulings "are reviewed under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). "Under [the] deferential standard, [the Court] review[s] a trial court's evidentiary ruling only for a 'clear error in judgment.'" State v. Medina, 242 N.J. 397, 412 (2020) (quoting State v. Scott, 229 N.J. 469, 479 (2017)). A reviewing court will not substitute its "judgment for the trial court's unless," the trial court's determination "was so wide of the mark that a manifest denial of justice resulted." Ibid. (quoting Brown, 170 N.J. at 147).

The authentication of photographic evidence requires a witness to verify that it accurately reflects its subject, and to identify or state what the photograph shows. State v. Wilson, 135 N.J. 4, 14 (1994). Any person with knowledge of the facts represented in the photograph may authenticate it. Ibid. To authenticate a photograph, a witness's testimony must establish that:

> (1) the photograph is an accurate reproduction of what it purports to represent; and (2) the reproduction is of the scene at the time of the incident in question, or, in the alternative, the scene has not changed between the time of

> the incident in question and the time of the taking of the photograph.
>
> Id. at 15.

Here, the court did not abuse its abuse its discretion by excluding a what was marked at a deposition as "Marino-3". (Da28). While it is accurate that Plaintiff provided the photograph with a series of photographs with her written discovery, when she was asked about it during her deposition, she stated she did not in fact take the picture, but that she believed her boss, Carol Mollo, took it, but was not completely sure when, and therefore could not authenticate the photograph. (Da14, 22). Defendants knew Carol Mollo as she was named in discovery and even testified at trial. Yet Defendants failed to ask her a single question about the photograph. (7T)

The photograph was brought up during Mr. Acar's cross examination along with Mr. Kestin's cross examination by defense counsel in an attempt to show that the photograph somehow showed that the snow removal process was still in progress. Despite defense counsel's efforts, both parties testified that they were not present on the day of the incident and therefore had no personal knowledge as to what the conditions were at the time Plaintiff fell. Therefore, basic logic would prevent either Acar or Kestin from being able to testify truthfully about the conditions depicted in the photograph.

Accordingly, as no one was able to authenticate the contents of the photograph and specifically when it was taken in relation to Plaintiff's fall, the trial court did not abuse its discretion and it was not so wide of the mark to deny any justice to the defense.

POINT VI: THE TRIAL COURTS DECISIONS AS A WHOLE DO NOT RISE TO THE LEVEL OF CUMULATIVE ERROR JUSTIFYING A NEW TRIAL.

An appellate court may reverse a trial court's judgment if "the cumulative effect of small errors [is] so great as to work prejudice[.]" Pellicer v. St. Barnabas Hosp., 200 N.J. 22, 53 (2009). A cumulative error analysis does not "simply entail[] counting mistakes, because even a large number of errors, if inconsequential, may not operate to create an injustice." Id. at 55. When "legal errors are manifest that might individually not be of such magnitude to require reversal but which, considered in their aggregate, have caused [a party] to receive less than a fair trial," a new trial is warranted." Barber v. ShopRite of Englewood & Assocs., Inc., 406 N.J. Super. 32, 52-53, (App. Div. 2009)(quoting Eden v. Conrail, 175 N.J. Super. 263, 267 (App. Div. 1980), modified by 87 N.J. 467 (1981).

None of the trial courts decisions constitute an abuse of discretion, reversible error or harmful error, nor collectively rise to the level of cumulative error. The trial court properly charged the jury with Model Jury Charge 5.20(F)(5) as Plaintiff was an invitee, and as almost twelve hours had passed since the storm officially ended,

properly determined that the "the duty of an owner of land is to make the premises reasonably safe for the proper use of an invitee and requires the owner to make reasonable inspection of the land to discover hazardous conditions." The charge Defendants proposed failed to provide any protections for an invitee.

The trial court did not abuse its discretion as the snow removal contracts were relevant as they detailed Defendants' knowledge and notice of specific requirements and expectations, for snow and ice removal at Dewy Meadows. As there was conflicting testimony prior to trial amongst Defendants regarding the contracts, their terms, and the impact of the terms, the trial court was within its discretion in allowing the snow removal contracts to be discussed as their intentions were written out in the contracts themselves. Accordingly, the trial court was within its sound discretion, considering the facts before it, to allow the contracts to be discussed at trial.

The trial court did not abuse its discretion in barring reference to the State of Emergency during trial. There is no law that states that the trial court ***must*** take judicial notice of a fact, it simply says that the trial court ***may***. Here, it was irrelevant to the case, and had more prejudicial value than probative. Defendants failed to provide: 1) case law that required the court to take judicial notice of the State of Emergency; 2) case law that stood for the proposition that a State of Emergency Order reduced, laxed, or eliminated Defendants duty to keep its property reasonably

safe upon Plaintiff's arrival; 3) any expert report or testimony to speak to the impact a State of Emergency has on Defendants duty in this case; 4) any basis for relevance as there was no testimony prior to trial, that the State of Emergency somehow impacted Defendants ability to provide snow removal services; and 5) no testimony that Defendants were somehow providing its services to the State and that's why it was unable to make its premises reasonably safe for the Plaintiff.

The only reason Defendants wanted the State of Emergency to be allowed in was so they could use it to attribute negligence to the Plaintiff as the order warned of "dangerous and hazardous roadways," which was irrelevant to this case as Plaintiff's fall did not take place on the roadway. Plaintiff drove forty-eight miles on those roadways without any issues. It was not until she arrived at the parking lot of Dewy Meadows got out of her car and began walking that she was injured because Defendants failed to keep the area reasonably safe for her.

The trial court was also within its discretion in permitting questioning regarding defendants' satisfaction, or lack thereof, with each other's work. Any discussion regarding the April 2018 was introduced through Defendants testimony themselves. Importantly is that there was no discussion of either party being terminated or nonrenewed during this line of questioning. Accordingly, the trial court did not abuse its discretion in allowing this line of questioning.

Defendants could not authenticate Marino-3 (Da28) and the Trial Court properly barred it for that purpose. Neither Plaintiff, nor Mr. Acar or Mr. Kestin, could authenticate the contents as Plaintiff did not know specifically when the photo was taken, and Mr. Acar and Mr. Kestin admitted to not having any personal knowledge regarding the conditions of the premises when Plaintiff fell. Accordingly, the trial court did not abuse its discretion in barring a photo which could not be properly authenticated into evidence.

The trial court's decisions do not rise to the level of cumulative error requiring a new trial. However, if this Court were so persuaded in issuing a new trial, the new trial should be for both liability and damages, not simply liability alone as Defendants request.

Once a trial court determines a new trial is warranted, "[t]he scope of the new trial depends on the nature of the injustice." Fertile v. St. Michael's Med. Ctr., 169 N.J. 481, 490 (2001). Under New Jersey law, when the court orders a new trial due to trial errors or other problems impacting the liability verdict, the new trial should encompass both liability and damages issues. Id. at 490-91 (holding [w]here trial error affecting liability occurs, the new trial will encompass all issues). This is because errors affecting liability may result from a compromise verdict, where the jury compromises on liability in exchange for a certain damages award. Retrying

only liability in such cases would ignore the inherent connection between the liability and damages determinations.

Accordingly, if the Court were to decide a new trial was needed, the Court should order a new trial on both liability and damages in this case, as the liability and damages issues are not fairly separable. Limiting the new trial to liability alone risks leaving in place a damages verdict that may have been improperly compromised or inadequately calculated. The interests of justice would require a fresh look at both issues.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that Defendants' Appeal be denied in its entirety.

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Dated: February 23, 2024

Superior Court of New Jersey

Appellate Division

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PAULA RUSSO, Plaintiffs/Respondents, vs. GARDEN COMMERCIAL PROPERTIES; GARDEN HOMES; C&M LANDSCAPE CONTRACTORS, INC., MULCH EXPRESS USA, LLC D/B/A XTREME SNOW PROS; J&A LANDSCAPE & SOW SERVICES; BERNARD PLAZA ASSOCIATES AND JOHN DOES 3-10 fictitious designations) Respondents/Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION **Docket No: A-000262-23T4** ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY LAW DIVISION MERCER COUNTY DOCKET NO. MER-L-0112-20

REPLY BRIEF OF DEFENDANTS/APPELLANTS C&M LANDSCAPE CONTRACTORS, INC.; MULCH EXPRESS USA, LLC D/B/A XTREME SNOW PROS; J&A LANDSCAPE AND SNOW SERVICES; AND BERNARD PLAZA ASSOCIATES

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POINT I

Plaintiff's interpretation of Model Civil Jury Charge 5.20(B)(2)(b) is unduly narrow and restrictive.

Appellants submit that Model Civil Jury Charge 5.20(B)(2)(b) is not limited to public sidewalks abutting commercial property. Plaintiff claims that the jury charge with respect to snow and ice removal expressly cites to *Stewart v. 104 Wallace Street Inc.*, 87 N.J. 146, 157 (1981) which is the New Jersey case establishing sidewalk liability for commercial landowners. Thus, the jury charge codifies what is an extension of common law sidewalk liability to snow and ice. As such, a commercial landowner's duty to remove snow and ice derives from its duty to maintain its adjacent sidewalks since this would incentivize property owners to maintain their sidewalks, particularly as they derive a commercial benefit from people using the sidewalk.

The underlying rationale for sidewalk liability is that "the benefits of sidewalks to abutting commercial owners and the fact that such a rule would serve the dual purpose of providing recourse to innocent pedestrians and an incentive to abutting commercial owners to keep their sidewalk in good repair." *Bedell v. St. Joseph's Carpenter's Society*, 367 N.J. Super 515, 520 (App. Div. 2004). However, after *Stewart*, it has been recognized that a commercial landowner's liability may extend beyond the sidewalk for activities that directly benefit the landlord that involve crossing a public street or public way. *Kuzmicz*

v. Ivy Hill Park Apts., 147 N.J. 510, 518 (1997). "Critical to the imposition of liability is a direct economic benefit to the commercial landowner from the path taken by the injured party and the absence of an alternative route. *Id.* at 519. Therefore, if commercial landowners know that in providing a parking facility that customers or invitees will travel a definite route to reach their premises, the benefiting proprietor or landowner should not be permitted to cause or ignore an unsafe condition in that route which it might reasonably remedy, whether the path leads along a sidewalk or across the roadway. *Warrington v. Bird*, 204 N.J. Super 611, 617 (1985). In fact, our courts have recognized the proposition that a parking area is an integral portion of a defendant's shopping center. *Bates v. Valley Fair Enterprises, Inc.*, 86 N.J. Super. 1, 6 (App. Div. 1964). As such, a commercial defendant owes a duty to exercise reasonable care to maintain it in a reasonably safe condition and to keep it free of ice and snow. *Id.* Clearly, there is abundant case law extending a commercial landowner's duty beyond its abutting sidewalk to an adjacent parking lot if it directly benefits the commercial landowner and if customers need to use that route to reach the commercial defendant's premises. Such is the case in this instance.

Here, plaintiff does not dispute the fact that she had to use the parking lot in question to access her job at this location. This provides some commercial benefit to the commercial landowner since plaintiff was an employee of one of

the commercial tenants at this property, which included both retail and office space. Obviously, those who parked within the shopping center to either work or shop at the premises kept the tenants in business, supported the businesses, and thus provided a benefit to the commercial landowner. There is no reasonable basis for this court to draw a distinction between the sidewalk and parking lot, particularly when it is undisputed that the parking lot was owned and maintained by the same commercial landowner in charge of the sidewalk. The fact that the parking lot was owned and maintained by the same commercial landowner as the sidewalk is notable. This is not a scenario where the duty to maintain the parking lot is being extended to a tenant who was not responsible for common area maintenance. When the commercial landowner is responsible for maintaining the abutting sidewalk and their commercial parking lot, any attempt to create an arbitrary distinction between the sidewalk and parking lot in this case should be rejected by this court.

Plaintiff does not dispute that the landowning defendant, Bernard Plaza, had a duty to maintain the parking lot free from snow and ice. Yet, plaintiff argues that the jury charge governing a commercial landowner's duty to remove snow and ice only applies to abutting sidewalks and not abutting parking lots. This is clearly contrary to the common law. If there is a common law duty to remove snow and ice from the parking lot, there is no reason why the jury charge

would be limited to sidewalks, especially when the jury charge is intended to track the common law and when sidewalk liability has been extended to other property beyond the sidewalk. The underlying rationale of sidewalk liability is not undermined since the commercial defendants obtained a commercial benefit from plaintiff and other invitees using the parking lot.

In addition, plaintiff suggests that Model Civil Jury Charge 5.20(B)(2)(b) is limited only to pedestrians and not to an invitee such as plaintiff. According to plaintiff, her status as an invitee means she is owed a higher duty than what is set forth in 5.20(B)(2)(b). However, plaintiff's status as an invitee is not dispositive and does not automatically trigger the application of Model Civil Jury Charge 5.20F, at least to the exclusion of 5.20(B)(2)(b). Plaintiff's position essentially requires strict adherence to common law premises liability classifications. Yet, it is well established that there has been a shift away from common law status classifications and towards a more flexible approach to premises liability. *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 436-438 (1993). "The standard for imposition of a duty of commercial landowners has evolved from the common law methodology of premises liability to a more flexible approach based in and abiding sense of basic fairness under all of the circumstances in light of considerations of public policy." *Bedell v. St. Joseph's Carpenter Society*, 367 N.J. Super 515, 523 (App. Div. 2004). Therefore,

plaintiff's status as invitee is not dispositive here nor should it automatically mean that 5.20(B)(2)(b) is not applicable. The inquiry is not what common law classification most closely characterizes the relationship of the parties, but whether in light of the actual relationship of the parties, under all of the surrounding circumstances, it is fair and just to impose a duty of reasonable care in preventing foreseeable harm. *Hopkins*, 132 N.J. at 438.

Here, the fall down arises out of snow and/or ice that was not adequately cleared. Fundamental fairness in this case requires the duty to exercise reasonable care to take into account what is a reasonable period of time after notice of snow and ice to remediate same, particularly when the law recognizes that there is no duty to remove or clear snow and ice until after the cessation of a snow event. *Pareja v. Princeton Int'l Props*, 246 N.J. 546, 549 (2021). Without this "reasonable period of time" language, the jury could easily assume that the defendants had an ongoing and continuous duty to remove snow and ice during the storm, and consequently believe that the snow and ice removal should have been done sooner than it was completed in this instance. Ignoring this reasonable time component is clear error under these factual circumstances. Therefore, plaintiff's mere status as invitee should not automatically exclude the application of Model Civil Jury Charge 5.20(B)(2)(b). Just because plaintiff is an invitee does not automatically trigger the invitee charge nor does it

automatically exclude the commercial landowner's duty to remove snow and ice charge. Again, a jury instruction must be tailored to the "theories and facts" that were presented in the case. *Velazquez v. Portadin*, 163 N.J. 677, 689 (2000). The facts of this case and underlying policies regarding the common law duty to remove snow and ice after the cessation of a storm warrants the use of Model Civil Jury Charge 5.20(B)(2)(b).

Moreover, plaintiff's reliance upon the ongoing storm rule to discount Model Civil Jury Charge 5.20(B)(2)(b) is entirely misplaced. Appellants do not argue that plaintiff's fall down involved an ongoing storm. The bottom line is that this model civil jury charge provides a framework for examining whether the commercial landowning defendant has a duty to remove snow and ice from its walkways regardless of what time plaintiff fell. If plaintiff fell during an ongoing storm, then the ongoing storm language of this charge would be added to the jury instruction. If the adequacy of the defendant's snow removal efforts is an issue, then the separate language regarding the reasonableness of the defendants snow and ice removal efforts would also be charged.

Ultimately, this reasonable period of time for defendants to remove snow after the cessation of the storm event and the reasonableness of the defendants' snow removal efforts are key jury instructions and language which are not

included in the standard invitee charge. The importance of this reasonable period of time and the reasonableness of defendants' efforts cannot be understated. Again, here the storm dropped 14 inches of snow, the snow ended at 8:30 PM the night before, plaintiff fell at 7:30 AM, the defendants were advised to prioritize the retail tenants for snow removal over the office tenants, and defendants were still on site actively clearing snow from this large commercial property at the time of the fall. The requested jury charge would have explicitly permitted the jury to consider whether defendants' actions were reasonable given the significance of the storm, and the state of snow removal in light of when the snow stopped and plaintiff's fall occurred. Plaintiff's conclusory statement that "there is no dispute there was sufficient time for the defendants to make its property reasonably safe" is entirely self-serving and unsupported.

POINT II

The underlying snow removal contracts were not required to assess the expectation and responsibilities of the parties, and were not required to assist a jury in apportioning fault, but were irrelevant to the duty to care, expanded the duty of care and were unduly prejudicial to the defendants.

Plaintiff claims that the snow removal agreements had to be evidential as the defendants supposedly blamed each other and offered conflicting testimony. The conflicting testimony cited by plaintiff is not even conflicting testimony.

Xtreme Snow Pros supposedly stated at deposition that they felt constrained in their efforts and Bernard Plaza (owner) stated that they were unaware that Xtreme Snow Pros was actually doing the snow removal. The testimony between the subcontractor and owner are not conflicting and do not require the contracts to resolve the imagined conflict.

As set forth above and in the original appellant's brief, the duty of care upon commercial landowners is set forth by extensive common law and Model Civil Jury Charge 5.20B(2)(b) only. As such, the snow contracts have no bearing or relevance to same. Likewise, any contractual obligations imposed on Xtreme Snow Pros is entirely separate from and irrelevant to the snow contractor's common law duty to perform snow removal in a careful and prudent manner. *Aronsohn v. Mandara*, 98 N.J. 92, 105-106 (1984). If the court was guided by these overarching common law duties, then the contractual details are irrelevant. Even assuming that the defendants disagreed about their work and/or expectations of their work, this difference of expectations has no bearing upon these ultimate issues. The expectations of the snow removal contractor and property owner are not probative as to whether the commercial landowner within a reasonable period of time made the property safe or whether the snow removal contractor removed snow in a careful and prudent manner. Likewise, what the

defendants expected from each other as owner and contractor has absolutely no bearing upon the duty they owed to plaintiff, a third party.

Moreover, even if the defendants offered conflicting testimony as alleged by plaintiff, there has been no explanation showing that resolution of the conflict required evidence of the 6 AM deadline, prohibition against subcontracting, and language regarding "safety not being compromised". Plaintiff fails to explain how these specific contractual provisions clarify or resolved the supposed conflicts in testimony among defendants. The record does not show that the defendants had different ideas as to when snow removal was to be completed, that is, there has not been testimony from one defendant saying that believed they had a 6 AM deadline whereas another defendant understood there was an 8 AM deadline. Likewise, the record does not reveal any conflicting testimony suggesting that one defendant agreed that safety was not to be compromised, but that another defendant disagreed with that proposition. In the absence of explicit conflict on these issues there was no reason for the court to allow evidence of the 6 AM deadline, prohibition against subcontracting and language regarding "safety not being compromised". Plaintiff has failed to present any identifiable or specific conflict relating to these specific contractual provisions and failed to explain how the trial testimony somehow resolved this fictional conflict.

Rather, defendants maintain that allowing plaintiff to endlessly harp upon these contractual provisions and violations only poisoned and prejudiced the jury against the defendants, which permitted the jury to conflate a contractual violation with a violation of the defendants' common law duty to plaintiff. Defendants maintain that admission of such contractual provisions was an abuse of discretion.

POINT III

Courts routinely take judicial notice of a weather-related state of emergency and the lower court's failure to do so was an abuse of discretion.

Defendants submit that the probative value of the weather-related state of emergency outweighs any prejudice to plaintiff. Here, the state of emergency, particularly in its recitals, demonstrates the severity and significance of the storm by referencing hazardous travel, severity of the weather conditions, and the fact that it may impede normal operations of private and public entities. The defendants' entire theory of defense is premised upon the reasonableness of the defendants' actions given the severity and significance of the snow storm. Plus, even if the recitals of the Executive Order on the state of emergency were not referenced, the mere fact that one was entered on March 6, 2018 through March 13, 2018 should have been something that the court judicially noticed. The fact

that the state of emergency was ordered and lasted for more than six days is a fact that is undisputed and ordinarily judicially noticed.

Plaintiff has not presented any evidence showing that juries misconstrue a state of emergency or attribute additional meaning to it beyond what it entails. Likewise, plaintiff has not cited to any caselaw affirming the decision not to take judicial notice of a weather-related state of emergency in a snow related fall down case. In addition, had the court taken judicial notice of the state of emergency, presumably plaintiff could have questioned its weather expert regarding the exact meaning of a weather-related state of emergency. The fact that the court wholesale excluded any reference to the state of emergency was a clear abuse of discretion when such weather-related conditions and states of emergency are routinely noticed, an undisputed material fact, and particularly relevant to this matter.

POINT IV

Questioning regarding the subsequent April 2018 storm was impermissible and an abuse of discretion.

Plaintiff suggests that defendant opened the door on the line of questioning regarding a subsequent storm in April 2018 wherein J&A representative, Matthew Acar, testified that he had an issue with the contractor's service in April, not March. However, any questioning regarding the April 2018

storm should have ceased immediately once testimony went beyond the snow storm from the date of loss which occurred in March 2018. Likewise, this defendant specifically objected to plaintiff questioning Giuseppe Iannuzelli regarding the April 2018 storm as it was subsequent to the date of loss and a totally different snow event. (4T 89:24-92:18). Any questioning into the later April 2018 storm was inappropriate and impermissibly encroached upon evidence which the court had already deemed should not be presented to the jury, that is, evidence about the non-renewal or termination of the snow removal contractor. The fact that the plaintiff explored this later storm and that the court permitted it is not only prejudicial, but entirely irrelevant to whether the defendants complied with their duty on the date of loss.

Plaintiff's unfettered questioning is just another example of the court's abuse of discretion in permitting the jury to have access to irrelevant and prejudicial evidence.

POINT V

The photograph marked as Marino-3 should not have been excluded as it was adequately authenticated by plaintiff and the record, and as it was relevant insofar as it depicted the snow conditions on the date of loss.

Plaintiff suggests that the photograph in question could not be authenticated by plaintiff or by her boss, Carolyn Mollo. This is incorrect. Plaintiff testified that her boss, Carolyn Mollo, took the photo. Plaintiff

seemingly does not dispute this fact. The record further shows that Carolyn Mollo arrived at the office on the date of loss near 9 AM. (7T10:14-15), which leads to the reasonable inference that the photo was taken around 9 AM. Therefore, the photograph is adequately authenticated based upon plaintiff's testimony and Carolyn Mollo's testimony. An authenticator need not even have been present at the time the photograph was taken, so long as the witness can verify that the photograph accurately represents its subject. *State v. Wilson*, 135 N.J. 4, 14–15 (1994). Notably, plaintiff does not dispute the fact that the photograph depicts the state of snow removal on the date of loss and the fact that it was still in progress. The jury is entitled to see photographs of the parking lot and the challenges in removing snow and ice from a parking lot that had parked vehicles within it. Clearly, this photograph provides context as it shows not only the significant snowfall amounts, but also relates to the herculean task of trying to remove snow when there are parked vehicles in the parking lot.

POINT VI

All of the lower court's errors as forth in the appellant's brief and herein when taken together constitute cumulative error and warrants a new trial.

As set forth in appellants' brief, defendants were ultimately denied a fair and impartial trial which was the cumulative effect of the trial court errors. These errors worked to expand the duty of care, prejudiced the jury against

defendants, conflated contractual violations with violations of the common law duty of care, removed essential facts and context, and essentially deprived defendants of the full and fair opportunity to present a complete and thorough defense. Defendants' entire theory of the case is that defendants acted reasonably given the severity of the storm, the amount of snow that fell, the state of emergency, and given the fact that work was still ongoing at the time of plaintiff's fall down. It was entirely unfair to allow plaintiff to present the narrative that there was a "system failure" among the defendants, but bar defendants from presenting those proofs that speak particularly to the defense theory. The upshot was that the jury was poisoned against defendants (via the contractual references and violations and subsequent storm evidence) and were simultaneously deprived the full opportunity to adequately demonstrate the severity and significance of the storm (excluded photo, excluded state of emergency). These evidentiary failures when considered together and given the erroneous jury charge clearly amount to cumulative error.

Defendants also submit that re-trial should only be on liability. This court may limit the re-trial of a case to the issue to which the verdict was found to be wrong. *Falcone v. New Jersey Bell Tel. Co.*, 98 N.J. Super 138, 151-152 (App. Div. 1967). This means that if the error relates only to the issue of liability, then the re-trial may be limited to the question of liability only. *Id.* Here, the

prejudicial errors which form the basis of this appeal go to liability only. They deal exclusively with admissible evidence and jury charges. None of the issues on appeal implicate damages. Notably, plaintiff does not argue that the jury charges on damages were wrong and plaintiff has never argued that the damages verdict goes against the weight of the evidence which would now bar re-trial on same. *Ogborne v. Mercer Cemetery Corp.*, 197 N.J. 448, 462 (App. Div. 2009). It is well accepted that when the damages award is not tainted by the error in the liability portion of the case and is fairly separable, a re-trial need not include the issues of damages. *Id.* Here, the errors pertain to liability only and the damages are entirely separate from the liability issues raised. Any remand for new trial must be limited to liability only.

For these reasons, it is respectfully requested that defendants appeal be granted in its entirely and a new trial on liability only ordered.

Respectfully submitted,

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