SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001136-23T4

PAULINE JELKEN,

Plaintiff-Appellant,

v.

PUBLIC STORAGE AND
ABC (FICTITIOUS NAME),

Defendants-Respondents.

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT, LAW DIVISION
MORRIS COUNTY

Honorable Noah Franzblau, J.S.C.
Sat Below

BRIEF AND APPENDIX
FOR
APPELLANT, PAULINE JELKEN

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PRELIMINARY STATEMENT

Plaintiff-Appellant, Pauline Jelken, a retired public school teacher aged 70, on July 4, 2018, suffered permanent debilitating injuries when she slipped and fell in a pool of standing water that had accumulated as a result of the day's rain storm in the defendant's commercial storage facility property's lobby. The incident was witnessed by Ms. Jelken's long-term friend, Arlene Castello, who had accompanied her to the facility. Both Ms. Jelken and Ms. Castello testified at trial, as well as Ms. Jelken's treating neuro-surgeon, Mohammed Khan, M.D.

At trial the defense challenged the nature and seriousness of Ms. Jelken's injuries and how she fell, maintaining that there could not have been any liability on its part since it was not possible to slip on defendant's concrete floor. In support of that assertion, the defense relied on the expert testimony of a forensic engineer, David Behnken.

A fundamental element in plaintiff-appellant's burden to prove the respondent's negligence (Question 1 of the Verdict Sheet) (Pa49 - Pa50), was to establish the hazardous conditions that existed at the time and location of her fall. The testimony from appellant and Ms. Castello as to the fall, pictures of the scene and the bruises to her body, (Pa22 - Pa30), and the testimony of her treating physician, Dr. Khan, as to the cause and nature of her injuries, were consistent with

the fact that she slipped in a pool of water, falling hard on a concrete floor. In addition there was substantial other evidence in plaintiff's possession that the court would not permit to be introduced.

Plaintiff-Appellant acquired in response to her request of defendant-respondent for Answers to Interrogatories, two photographs taken by the respondent immediately after the fall depicting the result of its attempt to mop the area, the prominent placement of a bright yellow sign specifically warning of a slip and fall hazard, as well as the defendant-respondent's Incident Report that confirmed important details about the incident as testified to by the appellant and her friend, Ms. Castello. (Pa33 - Pa37).

The plaintiff-appellant was denied the opportunity to introduce through the testimony of Ms. Jelken and Ms. Castello the actions of the defendant-respondent's on-site manager, Heather McLaughlin, who immediately after plaintiff's fall mopped the area and placed the warning sign, evidencing the respondent's belief that the high-traffic area floor was indeed slippery and dangerous when wet. The trial court ruled that the actions constituted subsequent remedial measures by the defendant-respondent under Evid. R. 407, prejudicial to the defense under Evid. R. 403, and the court was not satisfied that there was a sufficient basis to allow the evidence in or to be commented upon in any manner at trial in plaintiff's case in chief or in cross-examination of the defendant's engineering expert. Similarly

excluded, were the two color photographs that Ms. McLaughlin had taken moments after plaintiff-appellant's fall and which were provided in discovery and depicted the mopped area and the warning sign. The significance of these rulings and the prejudice to appellant's case caused by the exclusion of this evidence cannot be overstated. (See Legal Argument, Point I).

Further limiting plaintiff's proofs, the trial court also ruled that the respondent's incident report, prepared by the respondent's agent, Heather McLaughlin, and provided and certified to in its Answers to Interrogatories, could not be used or admitted into evidence without a defense witness being called by the plaintiff-appellant at trial to authenticate it. (See Legal Argument, Point II).

It is respectfully submitted that the trial court's rulings were so egregious and contrary to established case law, the Rules of Evidence, and the NJ Court Rules, and precluded the admission of truthful, highly relevant and important evidence, that the rulings struck at the heart of the Plaintiff's case and were "clearly capable of producing an unjust result" (R. 2:10-2) requiring that the judgment be set aside and a new trial ordered.

PROCEDURAL HISTORY

The within action was filed June 24, 2020, and thereafter the action was tried before the Honorable Noah Franzblau, J.S.C. and a Jury on October 10, 11, 12 and 13, 2023,[1] whereupon the jury rendered a verdict that the plaintiff had not proven defendant's negligence, and the court entered Judgment dismissing the action. Plaintiff-Appellant moved for a New Trial pursuant to R. 4:49-1. (Pa52 - Pa99). The court denied the application.[2] (Pa100 - Pa101). Plaintiff-Appellant filed a timely Notice of Appeal December 13, 2023. (Pa102 - Pa105).

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[1] 1T refers to trial transcript of October 10, 2023
2T refers to trial transcript of October 11, 2023
3T refers to trial transcript of October 12, 2023
4T refers to trial transcript of October 13, 2023

[2] 5T refers to transcript of new trial motion of December 1, 2023

STATEMENT OF FACTS

The trial testimony lasted two days. (2T and 3T). Plaintiff-Appellant called three witnesses, herself, her friend, Arlene Castello and the videotaped testimony of Mohammed Khan, M.D., Ms. Jelken's treating neuro-surgeon. The defense also called three witnesses at trial: the videotaped testimony of Dover Township Police Officer Samuel Berthoud, a forensic engineer, David Behnken, offered as an expert witness as to liability, and the video taped testimony of Kent Lerner, M.D., an orthopedic surgeon offered as the defense medical expert.

On July 4, 2018, at approximately 3:00 o'clock in the afternoon, Pauline Jelken, then aged 70, was picked up by her friend, Arlene Castello, and driven to Public Storage where Ms. Jelken had for some time rented a storage unit. It had been raining heavily that day, and continued as they arrived at the defendant-respondent's facility. (2T78-18; 2T82-15 to 21). Ms. Castello parked close to the entry door of the lobby which led to the area where Ms. Jelken's unit was located. Ms. Jelken took "only maybe" four steps into the lobby when both of her feet slipped out from under her causing her to fall hard onto the concrete floor. Ms. Castello who had been to plaintiff-appellant's right, helped lift Ms. Jelken up from the floor. Ms. Jelken used her cell phone to call the on-site facility's manager, Heather McLaughlin, to report the accident and asked her to come if possible to the location of the fall. While they waited for Ms. McLaughlin, Ms. Jelken used her

cell phone to take pictures of the area. Ms. McLaughlin arrived shortly after the call, observed the floor and Ms. Jelken. (2T51-24 to 55-9; 2T82-17 to 85-16).

Ms. Jelken and her friend proceeded through another door at the rear of the lobby that led to Ms. Jelken's storage unit. Ms. Jelken was in the process of emptying her unit and terminating her rental. They removed some items from the unit to be given to Ms. Castello, and placed them on a cart. As they exited the facility, they again observed Ms. McLaughlin who told them that she would meet them in the main lobby to prepare a report when she was done showing a storage unit to the two potential customers who were with her. (2T55-19 to 58-1; 2T2T86-9 to 23).

At these points in the plaintiff's case, counsel had intended to elicit from Ms. Castello and Ms. Jelken testimony that Ms. McLaughlin had attempted to mop up some of the standing pools of water and had placed a bright yellow cautionary slip-hazard sign. The trial court, however, had previously ruled that since these actions were subsequent remedial measures by the defendant-respondent, (See Legal Argument, Point I), that such evidence was inadmissible and could not be presented. Similarly, the trial court had ruled that plaintiff could not introduce nor mention two color photographs taken by Ms. McLaughlin and provided in the defendant's Answers to Interrogatories. (Pa36 - Pa37). These photographs

depicted the condition of the scene after Ms. McLaughlin had mopped and placed the hazard warning sign. (1T8-13 to 13-6; 1T17-8 to 28-9).

Ms. McLaughlin asked Ms. Jelken and Ms. Castello to wait for her at the main office and said that once she had completed showing a unit to her potential customers she would meet them there to complete an incident report. Ms. Jelken and Ms. Castello drove to the front of the facility where the main office was located, and waited there for Ms. McLaughlin. After the on-site manager arrived, she sat with the plaintiff and Ms. Castello and elicited information from them as she entered the information into her computer to prepare her report. Once completed, Ms. McLaughlin refused Ms. Jelken's request for a copy of the report she had prepared, (Pa33 - Pa35), and Ms. Jelken telephoned the police to have an independent report of the fall and to request medical assistance. Officer Samuel Berthoud responded to the scene to assist the emergency medical services which had also responded. (2T58-3 to 61-13; 2T87-18 to 88-18).

Ms. Jelken was taken from the defendant's facility by ambulance to St. Clare's Hospital where she was treated and released from the Emergency Department. Ms. Castello, who had followed the ambulance in her car, waited and drove her friend home from the hospital. Ms. Jelken identified five photographs which were admitted into evidence taken a couple of days after the incident that depicted the extensive bruising to her buttocks and legs as a result of

the fall. (Pa26 - Pa30). Plaintiff testified as to the extensive continuing and disabling impact on her health. (2T61-14 to 65-3; 2T88-19 to 89-25). She had been a public school teacher for thirty years, was divorced and lived alone. Since her retirement she had experienced a number of health challenges, but had always been able to live an independent, active, rewarding life. In 2015 she had undergone arthroscopic back surgery, and had also been treated for heart disease and rheumatoid arthritis. She acknowledged having suffered four separate falling incidents during an approximately ten year period prior to her fall at Public Storage, none of which she testified had ever caused her any serious or permanent injury. Along with her friend, Arlene Castello, and other friends she enjoyed an active social life, vacationing, seeing plays and movies, and eating at restaurants. All of that had changed since this accident. Her lack of mobility and ever-increasing pain and discomfort to her lower back was life altering. She now depends on the assistance of others, and often requires a walker to get around. (2T65-10 to 71-1; 2T78-12 to 82-9).

Following the accident, she initially consulted her regular physician and other specialists. As her condition worsened, she returned to the offices of the neuro-surgeon, Patrick Roth, M.D., who had performed the arthroscopic surgery of her back in 2015. Following the surgery she had been under the care of Mohammed Khan, M.D., a colleague of Dr. Roth. The *di bene esse* video

testimony of Dr. Khan was admitted at trial. Dr. Khan is a board-certified neurosurgeon who specialized in complex spine disorders. He is a practicing neuro-surgeon who is also a Residency Director for the Neurosurgeon Residency Program in conjunction with the Westchester Medical Center. In addition, he teaches a neurosurgery board certification course specifically relating to the spine. (2T140-6 to 25). He is affiliated with multiple (8 – 10) local hospitals, and actively performs 200 – 300 surgeries yearly at these facilities. He estimates that 85 per cent of these surgeries are spine, and 15 per cent are cranial. He was accepted as an expert in neurosurgery without defense questions or objection. (2T142-17 to 143-8).

Dr. Khan began seeing Ms. Jelken in July, 2016, approximately 18 months after Dr. Roth had performed a lumbar decompression surgery on her. At the time, she was experiencing some back and leg pain which he explained generally came from the nerves that go into the legs. (2T143-13 to 146-23). He prescribed physical therapy and steroid injections, neither of which was helping her. When her pain and discomfort worsened, Dr. Khan suggested a stabilization surgery procedure which was scheduled for April, 2017. Shortly before the scheduled surgery, her symptoms had improved so significantly that the surgery was cancelled and no further treatment was needed. (2T151-2 to 12).

Ms. Jelken returned to Dr. Khan in July, 2019, explaining that her back pain had returned and was getting progressively worse. She described the fall of July 4, 2018, and explained that she was feeling pain free prior to the fall, but the pain had returned and worsened after the fall. (2T151-15 to 152-9). The doctor reviewed four photographs of the area of the fall (Pa22 to Pa25), and also photographs taken of Ms. Jelken's bruising. (Pa26 to Pa30). Because he felt that the bruises were the result of a "hard fall," the chances were that the nerves could be bruised in a way that led to a more permanent damage to the nerves. Dr. Khan considered the possibility of surgery which might provide some relief of Ms. Jelken's symptoms and prevent a further deterioration. He felt, however, that the surgery posed significant risks, especially in light of Ms. Jelken's then current co-morbidities (i.e., osteoporosis, rheumatoid arthritis, thyroid and cardiac issues). He believed Ms. Jelken was not a candidate for corrective surgery, and would ultimately face the certain prospect of worsening pain and almost complete immobility, being bedridden, and in complete reliance on the assistance of others. Dr. Khan concluded that while it sounds heartless, he needed to convey to plaintiff the reality of her situation is the worsening of the ongoing compression of the nerves, that her pain will not get better, and her symptoms are going to unfortunately persist. Dr. Khan further concluded:

> Q Are - - are her symptoms consistent with having difficulty, current difficulty, standing?

A If the spinal cord is affected, it will affect her ability to stand, so - -

Q Does it - - I'm sorry.

A the nerves that go into the legs, the nerves that go into the arms, the nerves that go into your overall stability of your body that are all connected to the spinal cord and the nerves that are compressed in her case. So she will have trouble with her legs. She will have trouble with her balance. She will have trouble walking, controlling her bowel, her bladder, her ability to use her arms.

All of this is linked because the spinal cord which comes right here in the neck controls everything. The lumbar spine that goes into the leg controls everything with regards to the lower extremities.

Q Is it fair to say that it will affect virtually every aspect of her daily activities?

A Unfortunately, yes, that is the case with spinal compression.

Q Do you anticipate, Doctor, with a reasonable degree of medical certainty that she will require in the future assistance of others and, perhaps, the need for certain physical aides including a wheelchair, for example? Do you anticipate that these might very well be factors in her future?

A Unfortunately, I believe that is where things are heading right now. I - - I would hate to wish that on her, but I'm deeply concerned that that is what ultimately is going to happen. It's the degree of compression and the issues are well above and beyond something that is going to be tolerable and put her in a functional capacity. And I believe things will progress.

Q Incidentally, Doctor, as current - - well, you can - - you can tell me, but her - - her current treatment, if you will, plan is pain management. Is - - is that correct, Doctor?

> A If he's she's unable to undergo surgery which appears to be the case from all her medical issues, she has no choice, but taking it easy, pain management, and waiting it out. (2T168-6 to 169-23).

Following the conclusion of Dr. Khan's testimony, the plaintiff rested her case and the defense called its first witness, via videotaped deposition. Dover Township Police Officer, Samuel Berthoud, responded to the Public Storage facility answering a medical assistance call. His assignment was not to investigate the incident, but to assist medical responders who had also been dispatched. Officer Berthoud stated (over plaintiff's objection) "according to my report, it says she advised she slipped and fell . . . And that she was more concerned about getting a report than her own health." The report also noted that Ms. Jelken was transported to Dover St. Clare's Hospital by Dover Fire Department. (3T18-20 to 21-14). When pressed by defense counsel to provide other details about his exchange with Ms. Jelken, the officer responded: "Sorry . . . it's a slip and fall from 5 years ago. My recollection of . . . we go to 15 of these calls a day." (3T21-15 to 22-10).

The defense introduced the expert testimony of forensic engineer, David Behnken. He had been retained to conduct tests on the concrete floor in the lobby where Ms. Jelken's fall occurred. The purpose of the tests was to determine the floor's slip resistance, or co-efficient of friction. Mr. Behnken explained the use of

a machine, a tribometer, and how it "will give you a number." (3T38-21 to 42-15). On January 14, 2022, some three and one-half years after the plaintiff's fall, Mr. Behnken conducted his tests in the lobby of Public Storage. For the preparation of his report the defense had provided various materials to Mr. Behnken including the Summons/Complaint, Ms. Jelken's Deposition, each side's Answers to Interrogatories (which included the defendant's Incident Report and two color photographs), the Dover Police Incident Report, and color photographs. (3T54-2 to 24). He conducted three wet and dry tests of the concrete floor, and concluded "[t]he concrete floor along which Ms. Jelken was allegedly caused to fall was slip-resistant under wet conditions in accordance with standard custom and practice." (3T60-6 to 61-10; Pa38 - Pa48). On cross-examination, after stating "Nothing is slip-proof[,]" (3T83-12 to 16), he denied ever telling the defense attorneys (as stated by defense counsel in its opening at 2T34-19 to 37-6) that "it's impossible to slip on that floor." (3T90-2 to 5). However, when asked "Can you slip on this floor when it's wet?", he answered, "It's very, very, low probability. I mean, can you? Realistically, no." (3T60-6 to 61-4). He later added, "there's always a one in a billion chance" while stating that "nothing is slip-proof." (3T83-12 to 23).

Despite the fact that the defense expert witness had been provided with the defendant's incident report and the two color photographs depicting the mopped up floor and the slip hazard sign, the plaintiff was precluded from cross-examining the

defense expert witness on these vital areas by the trial court's ruling that these areas could not be referenced as subsequent remedial measures under Evid. R. 407 and the report could not be properly authenticated without plaintiff having called a representative of defendant to testify at trial. (1T8-13 to 28-9; 2T41-14 to 46-18).

On cross-examination Mr. Behnken acknowledged that in his report he stated that "Had Ms. Jelken made reasonable observations along her intended path of travel, her claimed accident, in all probability, would not have occurred." Further, he stated that he had not been provided with ". . . any information that this accident occurred other than by slipping and falling." (3T87-17 to 90-12).

Ms. Jelken was examined by Kent Lerner, M.D., a Board Certified Orthopaedic Surgeon on June 8, 2021. He was retained by the defense to conduct an independent medical examination and to prepare a report relating to injuries alleged by Ms. Jelken that resulted from her accident of July 4, 2018. He was provided with records of her medical history as well as materials relating to the accident. He noted her extensive history of medical ailments that included having "very weak bones" and a history of prior compression fractures and concluded that ". . . as a result of my review of the records and the history and the physical examination, it was my opinion that she did not sustain any permanent injury as a result of the accident of July 4, 2018." (3T103-9 to 108-14).

On cross-examination, Dr. Lerner stated that his physical examination of Ms. Jelken "could have been ten minutes" and qualified that by adding ". . . the history and exam was probably more like twenty minutes." (3T112-10 to 18). He was referred to his *curriculum vitae* which indicated extensive experience in the treatment of sports injuries including fractures of the knee, hip, wrist, elbow and shoulder. Little mention is made of any training or treatment relating specifically to the spine. (3T139-12 to 153-25). In response to questioning about his experience in spine surgery, he stated he had done "a couple" in the last year, and ten in the past five years. (3T132-1 to 5). He agreed that "it's possible" that Ms. Jelken could have aggravated some nerve issues in her back as a result of her fall on concrete on July 4, 2018, but opined that she did not sustain a permanent injury. (3T136-4 to 23).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN PRECLUDING EVIDENCE OF DEFENDANT MOPPING UP WATER AND PLACING A SLIP-HAZARD SIGN, ACTIONS WHICH THE COURT DEEMED TO BE REMEDIAL MEASURES UNDER EVID. R. 407 AND TO BE INADMISSIBLE (1T22-24 to 23-2; 1T26-18 to 28-5; 2T42-6 to 46-16; 5T24-18 to 28-10)

A. Plaintiff-Appellant Should Have Been Permitted Through the Testimony of the Plaintiff and Plaintiff's Witness, Arlene Castello, to Introduce Evidence in Her Case in Chief as to the Defendant's Actions to Mop and Place a Hazard Sign at the Location of Plaintiff's Fall Immediately After Plaintiff's Fall but While Plaintiff Remained on the Defendant's Premises and Where to Exit the Premises She Needed to Traverse the Exact Location She Had Just Fallen. (1T22-24 to 23-2; 1T26-18 to 28-5; 2T42-6 to 44-15; 5T24-18 to 28-10)

Prior to counsel's opening statements the court referred to the plaintiff's Notice to Defendant in Lieu of Subpoena directing the defendant to produce at trial the original documents (defendant's Incident Report and two photographs of the scene taken by the defendant after having mopped the area) and physical evidence (a slip-hazard sign) placed by the defendant at the location of plaintiff's fall immediately after the plaintiff's fall had occurred. (Pa31 – Pa32). Plaintiff intended to introduce evidence of her and Ms. Castello's interactions with the defendant's on-site manager, Heather McLaughlin, moments after plaintiff's fall which plaintiff would use to prove that the wet floor where she had fallen was slippery and dangerous, and had caused her to slip and fall. The plaintiff and Ms.

Castello could identify the defendant's photographs depicting the mopped floor and the slip hazard sign, (Pa36 – Pa37), and describe the defendant's actions. Counsel indicated that he wanted to "give the court a heads up" and to enlighten the court of counsel's concern of a possible objection under Evid. R. 407 (Subsequent Remedial Measures) to the use of this evidence. (1T8-10 to 10-17). Evid. R. 407 states:

> Evidence of remedial measures taken after an event is not admissible to prove that the event was caused by negligence or culpable conduct. However, evidence of such subsequent remedial conduct may be admitted as to other issues.

The defendant's photographs depicting the scene after having placed the slip-hazard sign and the condition of the floor after the defendant's attempt to mop the water had been attached to a three page Incident Report provided by the defendant in its Certified Answers to Interrogatories. (Pa33 – Pa35). At that point in the proceedings, when asked for a response by the court, defense counsel stated that "I - - I - - Judge, I don't know quite what I am responding to, but as far as a report with the photos, they can submit the report with the photos. No objection." (1T11-1 to 15).

Following completion of jury selection, the court again addressed the issue of the admissibility of the measures taken by defendant's agent, Ms. McLauglin. The significance to plaintiff's case in chief cannot be overemphasized. In response

to plaintiff's telephone call, Ms. McLauglin had come to the lobby. She had immediately recognized the hazardous, slippery conditions and taken steps to make certain that no one would be permitted to enter the lobby until she was able to ameliorate the danger. She mopped the floor and took the added precaution of placing a bright yellow sign with a specific depiction warning that the area was a slip-hazard. It was only after these tasks had been completed that plaintiff and Ms. Castello as well as Ms. McLauglin and two prospective customers were permitted to safely traverse the lobby. Importantly, these actions were not taken by just anyone, but rather by the defendant's on site manager in furtherance of her responsibilities to make certain that the facility was safe and that due to the conditions customers and others persons would not be placed in jeopardy.

It is submitted that Ms. McLaughlin's measures manifested a valid lay opinion that the rain puddle covered concrete lobby floor was slippery and posed a substantial risk of injury if traversed. The site manager's actions and lay opinion should have not have been kept from the jury and should have been allowed to be considered by the jury in its deliberation of the case.

The trial court ruled Heather McLaughlin's actions inadmissible, initially questioning the relevancy of the information since it came after plaintiff's fall (1T22-24 to 23-2), and eventually concluding that in any event it was remedial and not admissible under Evid. R. 407 and pursuant to Evid. R. 403 its "prejudicial

value would clearly outweigh any probative value." (1T26-18 to 28-5; 2T44-8 to 45-16; 5T27-22 to 28-10). The court's conclusion with respect to Evid. R. 403 was stated without ever having engaged in a weighing process considering whether the probative value of the acts by defendant's agent would be "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." Evid R. 403.[3] While "[t]he burden is clearly on the party urging the exclusion of evidence to convince the court that the [Evid. R.] 403 considerations should control[,]" (See Parker v. Poole, 440 N.J. Super. 7, 21 (App. Div. 2015), citing Rosenblit v. Zimmerman, 166 N.J. 391, 410 (2001); citation and internal quotation marks omitted), defense counsel at first expressed confusion as to the purpose of the evidence, but soon followed the court's lead in opposing any mention of Heather McLaughlin's actions. (1T23-20 to 25-6). (For the complete colloquy on the subject, See 1T17-11 to 28-5).

The court's refusal to permit this testimony relying on Evid. Rule 407 precluding the admission of evidence of remedial measures to prove negligence

[3] Indeed, even at the return date of the plaintiff's Motion for a New Trial, the court's entire analysis as to Evid. R. 403 consisted of the following: "That defendant mopped or placed a caution sign in a lobby following plaintiff's fall does not establish that the floor was slippery or dangerous but the jury might jump to that conclusion based upon the post incident remedial actions." (5T27-22 to 28-6).

or culpable conduct, failed to consider the long established exceptions allowing such evidence as to other issues.

Plaintiff argued that the proffered evidence fell within the exception to Evid. Rule 407 which allows such evidence to prove "the condition existing at the time of the accident." See Harris v. Peridot Chem. (NJ), Inc., 313 N.J. Super. 257, 293 (App. Div. 1998), citing Lanvin v. Fauci, 170 N.J. Super. 403, 407, (App. Div. 1979) (citing Millman v. United States Mortgage & Title Guar. Co. of New Jersey, 121 N.J.L. 28, 34-35 (Sup.Ct. 1938); See Jerolamon v. Town of Belleville, 90 N.J.L. 206, 207-08 (E. & A. 1917); Perry v. Levy, 87 N.J.L. 670, 672 (E. & A. 1915). "In Perry v. Levy, 897 N.J.L. 670, 94 A. 569, for example, the plaintiff brought suit against the defendant, her landlord, for injuries sustained due to a falling ceiling. At trial, a witness was permitted to testify that the landlord had the ceiling repaired after the accident. Id. At 672, 94 A. 569. On appeal from a judgment against him, the defendant argued that the trial court committed error by admitting the evidence of subsequent repairs. "The Court of Errors and Appeals held that 'the evidence was competent … to show' that the roof was in a defective condition at the time of the accident. Ibid." This is analogous to the situation presented in plaintiff's case and plaintiff should have been allowed to introduce such evidence to show that the floor was in a defective (i.e., slippery) state at the time of her fall.

Where evidence is excludable for one purpose, but admissible for another, the proper course is not to exclude the evidence, but for the trial court to provide an adequate, cautionary instruction. See Millman v. U.S. Mortgage Title Guaranty Co., supra, at 35-36, citing Trenton Passenger Railway Co. v. Cooper, 60 N.J.L. 219, Court of Errors and Appeals, June 28, 1897. The plaintiff's proffer fell squarely within the aforesaid exception to the exclusion, and its preclusion by the trial court denied the plaintiff the opportunity to present highly relevant, truthful information that properly should have been available for the jury's consideration.

Following counsels' openings, based upon defense counsel's statements informing the jury that they would hear from the defendant's expert that it is impossible to slip and fall as Ms. Jelken claimed, plaintiff requested to revisit the issue of introduction of defendant's remedial measures in mopping the area and placing the slip hazard sign, arguing that such actions evidenced the defendant's own belief and lay opinion that the floor was indeed slippery, and supported the plaintiff's allegations that the puddles where she had fallen created a dangerous slip hazard resulting in her accident.

In defense counsel's opening statement to the jury, he stated

> **Let me talk to you about liability, the first setting. That floor, that floor that she claims to have slipped on, you cannot slip on it, can't slip on it**. Public Storage, the company that has one employee there, that floor is slip-resistant.
>
> You will hear from an engineer that he went out there. It's called - - he went out there and he tested the floor for the coefficient

of friction. I never knew what that was until I started doing cases like this. It's fancy. It's called a coefficient of friction.

Listen carefully when he's here. I think it's gonna be tomorrow. He's an engineer. It's science. You cannot slip on that floor when it's wet. He has poured water on that floor and he will explain it. I'm not the engineer, the professional engineer, he is.

And Public Storage made that floor for that reason. They're well aware that water gets brought in, hence, **they make a floor you cannot slip on it.** That is why Public Storage is here today trying this case after five years. **The expert will tell you it's not possible. You can pour all the water you want on that floor, you cannot slip**. (2T34-19 to 35-16; emphasis added).

* * * * *

So, liability, there is no liability. You cannot slip on the floor. Public Storage, you heard 10, 15 minutes, they have a duty. They have a duty. They have a duty. They make money. They make money. They make money. That's correct. **They're well aware of what goes on at a Public Storage facility, water gets brought in sometimes, hence, the floor is created, so you cannot slip to prevent this.** (2T36-10 to 17; emphasis added).

* * * * *

. . . Both of her feet flew out from under her. **Listen to the expert. It's science, it's not possible. You can't slip**. You can't fall. You can fall, mind you. Let me take that back. Anyone can fall, but you can't slip on that floor. (2T37-2 to 6; emphasis added).

* * * * *

. . . Did she fall? I don't know whether she fell on July 4th, 2018. But the evidence will certainly show she did not fall and slip. **That's just not possible, ladies and gentlemen**. That's what the evidence will show and that is why the big, bad Public Storage is here today trying this case. **It's just not possible**. (2T40-15 to

21; emphasis added).[4]

Immediately following the defense opening, plaintiff's counsel asked to be heard by the Court out of the presence of the jury.

> MR. GLAZER: Judge, I just want to revisit the issue of the remedial, Judge, based upon what Mr. Hackett has presented to the jury. He's presented to the jury that this floor is perfect in many ways as far as slip and fall. Absolutely, it cannot happen. Well, that wasn't the opinion - - that wasn't the opinion of their employee, Heather, who came to the floor at the time it happened. She wasn't asked to mop it up. She wasn't asked to put up a sign that said be careful, this is slippery. On her own, Heather mopped up the floor, put a sign there that said - - (2T41-14 to 24).

The Court responded to plaintiff's request:

> THE COURT: I understand - - I understand what your - - what your indication is. You want me to revisit the issue yesterday with respect to the remedial efforts because their expert is going to testify that the slip proof - - that the floors were slip proof, yet, yet, the employee mopped the floor for some purpose.
>
> MR. GLAZER: And put up a sign saying this is a slippery - - this is a slipper slope here. That's why I wanted the sign here.
>
> THE COURT: Okay.
>
> MR. HACKETT: We, - - Judge it's a subsequent remedial measure and the sign does not say this is a slipper floor, watch out here.
>
> THE COURT: Okay. Counsel, I - - I was fairly clear on the record yesterday. I do find it to be a subsequent remedial

[4] Indeed, the defense argument that it is just not possible to fall on the floor undermines both the court and defense counsel's position that defendant's actions in mopping the puddles and placing the slip hazard sign are actually remedial measures under Evid. Rule 407.

measure. You certainly had an opportunity to call an expert in this matter to contest the expert opinion rendered by the defendant to indicate that the floor was not slip proof.

The actions of an employee presumably - - I forget her name, Heather, she's an employee presumably with no expert knowledge with respect to the make up, context of the floor. You can certainly explore that, but I - - I don't think - - [5]

MR. GLAZER: How do I - -

THE COURT: You had - - you had an opportunity to have an expert to contest the issue of whether the floor was slip proof.[6] This is a subsequent remedial measure and it - -

MR. GLAZER: This is - -

THE COURT: - - in my mind it is the - - it is - -

MR. GLAZER: It's for another purpose, though, Judge. The rules - -

THE COURT: What is the - - I asked you yesterday specifically what the other purpose is and your answer yesterday was the completeness of the testimony. That was insufficient.

MR. GLAZER: I didn't know that this is what they - - they intended to do, Judge. I don't think - - I don't - -

THE COURT: Did they - - did they provide you with an

---

[5] Plaintiff was under no obligation to call an expert to challenge the defense expert, nor to call an expert to prove that the floor constituted a slip hazard. Compare Hassan v. Williams, 467 N.J. Super. 190 (App. Div. 2021) and Parmenter v. Jarvis Drug Store, Inc., 48 N.J. Super. 507 (App. Div. 1957), and the actions of the defendant's agent demonstrating her opinion of the slip hazard was admissible as a lay opinion. Evid. R. 701.

[6] The trial court, likely based upon the defense counsel's statements in opening, was under the mistaken belief that defendant's expert would testify that the floor was slip proof, not slip resistant. In fact, the expert had stated in his report "[t]he concrete floor along which Ms. Jelken was allegedly caused to fall was slip-resistant under wet conditions in accordance with standard custom and practice." (Pa43).

expert report?

MR. GLAZER: Yes, Judge. I - - my - -

THE COURT: Then you were aware of their - - of their indication to you that they would go down this road to demonstrate that the - - that the floor - -

MR. GLAZER: If that - - I'm not - - I don't think it's so crystal clear that that's what their expert is saying, Judge. But, regardless, what's the harm if I raised it then or if I raise it now?

THE COURT: Okay. Mr. Glazer, I've ruled on this issue and I don't find that the perspective (sic) testimony from the expert with respect to the slip-proof floor opens the door to demonstrating that there was mopping. Essentially, you're trying to cross-examine it. You're trying to present some type of cross-examination by the fact that the water was removed without an expert, so - -

MR. GLAZER: Well, would there be any problem, Judge, with me questioning their expert that the employee put up a sign there, that the employee mopped it up with their expert on the stand, Judge? Contemporaneous with it?

THE COURT: Yes, there would. Yes, there would because you're attempting to get facts into evidence based upon question for the jury to basically assume. You can ask him about his analysis of - - of the floor and why the analysis is incorrect and could she have possibly slipped on the floor. The fact that an employee with no knowledge of the floor took some remedial action afterward to get that before the jury.

MR. GLAZER: It's - -

THE COURT: A subsequent remedial action does not undermine the report. So that is the Court's ruling. Mr. Glazer - -

MR. GLAZER: If - - if - -

THE COURT: - - I'm gonna step off the bench at this point.

You've heard my ruling.

MR. GLAZER: Just - -

THE COURT: I understand that - - I understand that you don't like it, but I find it to be crystal clear based upon Rule 407 and the - - and the case law surrounding that as well as Rule 403 which I indicated yesterday.

MR. GLAZER: I would just point out the perimeter (sic) case, Judge, when - - when - - all you need is a lay opinion. On something like this, a lay opinion is valid as well in the perimeter (sic) case where they didn't have an expert at all. There was - - there was on the - - on the - - on the floor. And the Court ruled that you don't need an expert to say that that's a slippery surface. He's got an expert. You can have a lay opinion, Judge, and that really is a the lay opinion of - - of the employee saying the floor is wet, of course it's slippery.[7]

THE COURT: The lay opinion would come from your client that she stepped in the puddle and she slipped. The person who you're talk - - now wasn't even present didn't see it, didn't know where she fell. So she couldn't testify with respect to that. Your client could certainly testify and perhaps her friend can testify and the Court would be okay with that a lay person's statement or opinion that I slipped as a result of the puddle. They can do that.

MR. GLAZER: Well, the employee did - - was there, Judge. She knew where it happened.

THE COURT: The employee - - the employee did - - was not - - did not witness it. The employee did not witness it. (2T42-6 to 46-16).

---

[7] It is submitted that the actions of the defendant's agent were based upon her perceptions, and should have been admitted, since as such they constituted admissions tantamount to lay opinion testimony, and contrary to the trial court's conclusion, the defendant's actions indeed undermined the defense expert's testimony that the floor was not slippery when wet. Denying the plaintiff the use of such evidence struck at the heart of plaintiff's case. See Evid. R. 803(b)(4). Hearsay Exception. Statement by Party-Opponent. Compare Evid. R. 701. Opinion Testimony of Lay Witnesses.

Plaintiff respectfully submits that the plaintiff should have been permitted to introduce testimony and evidence of the actions of defendant's employee, Heather McLaughlin, whose actions were based upon her observations and perceptions of the conditions of the lobby at the time of the plaintiff's fall. Her actions constituted a highly relevant and reliable lay opinion that the wet lobby floor constituted a slip hazard. Proving the slippery nature of the wet floor was critical to the plaintiff's case. As such, this evidence would have aided the triers of fact in considering and weighing both the plaintiff and defense testimony, and in reaching a just verdict. See generally, State v. Labrutto, 114 N.J. 187, 198 (1989); Hassan v. Williams, 467 N.J. Super. 190 (App. Div. 2021); Parmenter v. Jarvis Drug Store, Inc., 48 N.J. Super. 507 (App. Div. 1957); Evid. R. 701. Opinion Testimony of Lay Witnesses, and following Comment.

Additionally, assuming *arguendo* that the acts of Heather McLaughlin were properly deemed to be subsequent remedial measures subject to Evid. R. 407, her actions in mopping the floor and placing the hazard sign clearly evidenced her belief that the floor was indeed slippery, and should have been admissible as her actions bore on the Defendant's "... liability, not [its] negligence." See Harris v.

Peridot Chem. (NJ), Inc., 313 N.J. Super. 257, 293 (App. Div. 1998), citing Perry v. Levy, 87 N.J.L. 670, 672 (E. & A. 1915). See also Evid. Rule 407.[8]

B. Plaintiff Should Have Been Permitted to Use Evidence of the Defendant's Actions to Mop the Location of Plaintiff's Fall and to Place a Hazard Sign in Cross Examination of the Defense Expert Witness, David Behnken, to Impeach the Credibility of the Defendant's Expert Witness and to Challenge the Witness' Opinion. (2T44-16 to 46-16; 5T24-18 to 28-10)

The foundation of the defense case as to liability, i.e., whether indeed the wet floor constituted a slip hazard, centered upon the testimony of its forensic engineer, David Behnken, who conducted an inspection of the scene three and one-half years after the plaintiff's fall. While plaintiff presented her testimony and that of her friend who had accompanied her at the time of her fall and photographs of condition of the floor at the time she fell, other highly relevant and critical evidence coming directly from the defendant was available to the plaintiff as to the condition of the floor, but was erroneously excluded by the court. Contrary to the

[8] In denying the plaintiff-appellant's Motion for a New Trial, and rejecting plaintiff's request to introduce lay opinion testimony through the actions of the defendant's agent, Heather McLaughlin, the trial court stated: "...plaintiff argues that the photos and mopping should have been admitted because they reflect the condition existing at the time of the accident. That was also again in arguing here today. The Court rejects that argument because at the time of the accident the floor had not been mopped and there were not caution signs." (5T27-2 to 8); "[t]hat defendant mopped or placed a caution sign in a lobby following plaintiff's fall does not establish that the floor was slippery or dangerous but the jury might jump to that conclusion based upon post incident remedial actions." (5T28-2 to 6). It is respectfully submitted that these statements by the court demonstrate the court's misunderstandings and faulty reasoning, and highlight the significant errors that resulted in a manifest denial of justice.

defense statements and the court's mistaken belief that the floor was indeed slip-proof, (see Footnotes 1-3, supra), the defense witness confirmed on cross-examination

> MR. GLAZER: . . . Mr. - - Mr. Behnken, I believe you testified that the floor is slip resistant. Is that right?
>
> A That is correct, yes.
>
> Q Is it - - is it slip-proof?
>
> A Define slip-proof. Nothing is slip-proof.
>
> Q Nothing is slip-proof.
>
> A Correct (3T83-12 to 16).
>
> * * * * *
>
> BY MR. GLAZER:
>
> Q Did you ever indicate to Mr. Hackett or anybody from his office that it's impossible to slip on that floor?
>
> A No. (3T90-3 to 6).

Clearly, the defense expert witness' testimony was not quite "so scientific" as defense counsel had argued, nor could it only be rebutted by plaintiff through the use of her own expert witness. By denying the plaintiff the opportunity to challenge the defense expert's opinion through the use of the lay opinion of the defendant's agent, Heather McLaughlin, as demonstrated by her actions at the

scene of plaintiff's fall, the trial court effectively foreclosed the introduction of a critical element of the plaintiff's case.

In cross examining the witness, the plaintiff intended to impeach his credibility and counter his opinion that the floor did not pose a safety hazard by questioning the witness as to conduct of the site manager, Heather McLaughlin, following the plaintiff's fall in mopping the puddles and placing the slip hazard sign, conduct that demonstrated the defendant's belief that the floor was slippery and "in a defective condition" at the time of the plaintiff's fall. See Harris v. Peridot Chem. (NJ), Inc., supra. at 293. The trial court refused to allow the line of questioning by the plaintiff, stating that it had yesterday already ruled on the issue (precluding the admission of evidence of defendant's remedial measures). (2T44-8 to 46-16).

The Court's refusal to allow the use of this evidence in cross examination of the defense expert witness was contrary to the long established and recognized rule that such evidence when used to affect the credibility of a witness is admissible. Hansson v. Catalytic Construction Co., 43 N.J. Super. 23, 27 (App. Div. 1956) citing Lombardi v. Yulinsky, 98 N.J.L. 332 (Sup. Ct. 1923). See also Millman v. U.S. Mortgage Title Guaranty Co. of New Jersey, supra, at 34-35, where, as here, the defendant denied the existence of the pleaded defect. There, the plaintiff's proofs of remedial repairs was held admissible with respect to the cross-

examination of the defendant's engineer witness specifically to challenge the engineer's testimony that the conditions that existed did not require the type of remedial repairs that had in fact been made. It is often said that a trial is a search for the truth. It bears noting as well that "[c]ross-examination is the greatest legal engine ever invented for the discovery of truth." State v. Silva, 131 N.J. 438, 444 (1993).

There can be little doubt that the defense expert's testimony was the centerpiece of the defendant's case, and the Court's refusal to allow the use of this evidence in cross examination of the defense expert witness was a momentous error that deprived plaintiff of a fair trial, constituted a manifest denial of justice, and requires reversal and that a new trial be ordered.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE PLAINTIFF'S REQUEST TO ADMIT THE DEFENDANT'S INCIDENT REPORT INTO EVIDENCE UNDER RULE 4:17-8 (2T102-23 to 113-7; 5T28-14 to 34-5)

Plaintiff sought to introduce the defendant's Incident Report which had been provided by the defense to the plaintiff in defendant's certified Answers to Interrogatories. While plaintiff maintained that these documents were plainly admissible since provided in certified Answers to Interrogatories, (Pa72 – Pa86; 2T104-10 to 12; 2T112-17) and as such constituted admissions by the Defendant,

the trial court refused to permit the introduction of this evidence, ruling that the plaintiff was required to authenticate it as a "business record."[9] (2T102-23 to 113-7).

NJ Court Rule 4:17-8(a) provides that "Answers to Interrogatories may be used to the same extent as provided by R. 4:16-1(a) and R. 4:16-1(b) for the use of the deposition of a party." The provisions of R. 4:16-1(b) permit the use of any deposition by an adverse party for any purpose. Eden v. Conrail, 175 N.J. Super. 263, 283 (App. Div. 1980). Counsel's intention was to offer into evidence the defendant's Incident Report and then have plaintiff, Pauline Jelken, read aloud relevant portions of the Incident Report.

The court refused to allow the Incident Report to be admitted into evidence or the reading of its content by the plaintiff. Significantly, the Incident Report, created by the defendant's agent, Heather McLaughlin, included, *inter alia*, the following statement which constituted highly relevant and important substantive evidence,[10] which was improperly excluded from the jury's consideration:

> We had thunderstorm and it was raining when customer arrived to our property. This being

---

[9] The purpose of the business records exception is to broaden the area of admissibility of relevant evidence so long as there is sufficient trustworthiness of the document. Where, as here, the defendant provided the Incident Report as a certified answer to interrogatories, the trustworthiness of the document is admitted. See Evid. Rule 803(c)(6), and following Commentary.

[10] Here too it is must be noted that the Incident Report had been provided to the defense forensic engineering expert and that it had been reviewed and considered by him in formulating his opinion. (3T68-24 to 69-14).

> our main lobby with high traffic there was water (puddles) that came inside the lobby. Customer did mention that slipped on water and fell on her right side (backside). Customer is in a lot of pain but did refuse to call a ambulance.[11]

and all of which counsel should have been permitted to elicit as admissions by a party, pursuant to Evid. R. 803(b)(1). See also Skibinski v. Smith, 206 N.J. Super. 349, 353 (App. Div. 1985). To be sure, the court's decision severely undercut the plaintiff's ability to present admissible compelling evidence in support of her case. In short, the court's ruling was not harmless, but rather "was clearly capable of producing an unjust result." R. 2:10-2.

The issue was re-visited by the plaintiff's counsel and the court in plaintiff's Notice of Motion for a New Trial and supporting documents. (Pa52 – Pa99). At the return date of the Motion, (5T), counsel sought to refer the trial court to the specific interrogatories that supported plaintiff's position as to the clear admissibility, relevance and significant import to the plaintiff's case of the defendant's Incident Report and photographs taken by the defendant's on-site manager. Once again highlighting the trial court's misunderstanding and error as to the controlling law, the court and counsel had the following exchange:

> MR. GLAZER: Yeah, plaintiff had evidence in this case that went beyond those three witnesses. Critical,

[11] In fact, an ambulance was summoned to the scene and did transport the plaintiff to St. Clare's Hospital, Denville, Emergency Department.

essential, which really went to the heart of what Mr. Hackett was saying through his witnesses. That you couldn't you could not slip and what was the basis of that evidence?

That evidence came from the party defendant, the representative, came from Heather. Heather was at the scene. She is the defendant. … (5T7-17 to 25).

* * * * *

… she mopped it, she put the sign up. She believed this was a dangerous, hazardous, slippery condition which we were never able to present to this jury.

The - - the second piece of evidence, Judge, with respect to the - - the incident report. Once again, Judge, it was my intention as I said before, Judge, I don't know how, even though they offered it, they said they were going to offer it in their case in chief, in their - - in their pretrial submission, I still wonder how did he intend to think that he could get it in. I think I could get it in because it is an admission, and **it has been authenticated**. **They swore to the truth of it**.

The party defendant on the answers to interrogatories swore to it by saying everything here is truthful … (5T14-25 to 15-16; emphasis added).

* * * * *

… Judge, the interrogatories that we attached to the to our Motion papers, Judge. There is form C and form C-2. On form C question number two describe in detail your version of the accident or occurrence setting forth the date, location, time and weather".

Answer: "This defendant was not present at the time of plaintiff's alleged incident and therefore does not have a version of events based on personal knowledge. **See attached incident damage report bate stamped number Jelken 0001 through 3**." That's the incident report, Bates number 1 through 3. (5T15-17 to 16-4; emphasis added).

* * * * *

> … Question number 9, if any - - this is on C, "If any photographs, video tapes, audio tapes or other forms of electronic recording, sketches, reproductions, charts, or maps were made with respect to anything that is relevant to the subject matter of the complaint describe, (a) the number of each, (b) what each shows or contains, (c) the state taken or made, (d) the names and addresses of the persons who made them, … "Answer: "See attached photographs taken by Public Storage employee Heather McLaughlin on the date of the subject incident Bate stamps 4 through 5." That - - that's the photographs.
>
> Identify - - number 14; "Identify all documents that relate to this action and attach copies of each such document."
>
> Answer - - this is 14, "See attached Bates 4 - - 1 through 5." Again, which is the three-page incident and two-page Photographs. **This was certified**.
>
> Then you have to go to start - - answers from C-2 interrogatories. Three, number 3, "If you were not present … Answer: "The defendant employee Heather McLaughlin was present at the subject premises at the time of plaintiff's alleged fall. Ms. McLaughlin interacted with plaintiff after she called the office to notify of the alleged fall, see attached incident report Bates stamped numbers Jelken 1 through 3.", the same incident report.
>
> And number 7, "Do you or does any person on your behalf have any report concerning the occurrence of plaintiff's injury? Yes, or no?" "Yes." "If answer is yes state the full name, …
>
> Answer: "See attached incident report, Bates stamped numbers 1 through 3." **I mean what more authentication do we need, Judge?** … (5T16-24 to 19-2; emphasis added).

Notably, the defense did not ever in any way challenge the *bona fides* of the defense Incident Report the plaintiff sought to use at trial. Indeed, as previously noted, before the trial court raised the issue, defense counsel affirmed that defendant had no objection to the introduction of the Incident Report and defendant's two photographs. (1T11-1 to 15). It is respectfully submitted that the

trial court should have accepted the plaintiff's proffer, admitted the defendant's Incident Report and permitted it to be used to the same extent and in the same manner as if a deposition under Rule 4:17-8 (as the court did in the defense case with regard to the reading by counsel of portions of the plaintiff's deposition). (3T177-13 to 178-5).

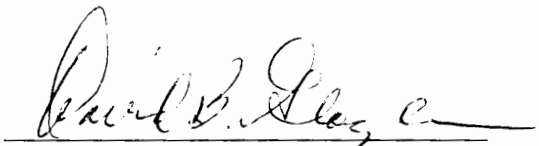
It is beyond cavil that the plaintiff was entitled to introduce the defendant's Incident Report (having been "authenticated" by inclusion in defendant's certified Answers to Interrogatories) (Pa72 – Pa86), (See R. 4:17-1 and R. 4:17-4(a)), into evidence, and to utilize the same in both her case in chief by referring to same during plaintiff's testimony and the testimony of plaintiff's witness, Arlene Castello, as well as in the cross-examination of the defendant's expert witness. It should be well noted that the record is devoid of any indication that the defendant's Incident Report was in any way suspect nor that any additional authentication would be needed to establish its *bona fides*. Indeed, as noted previously, the document was provided by the defense in its certified Answers to Interrogatories and the defense itself initially stated that it had no objection to it being introduced into evidence by the plaintiff. (1T11-1 to 15).

The court's refusal to permit the plaintiff this use was highly prejudicial to the plaintiff, denied the plaintiff a fair trial and resulted in a miscarriage of justice.

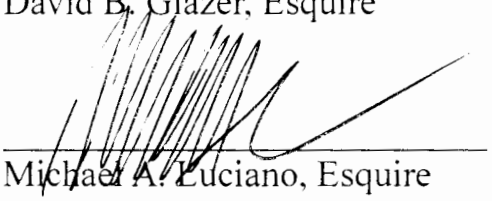
CONCLUSION

It is respectfully submitted that the erroneous rulings of the trial court were so prejudicial against the Plaintiff as to result in a verdict that was a "miscarriage of justice," requiring that the Judgment be vacated and that a new trial be ordered. (See Dolson v. Anastasia, 55 N.J. 2 (1969); R. 2:10-2 and R. 4:49-1).

Respectfully submitted,



David B. Glazer, Esquire



Michael A. Luciano, Esquire

Dated: March 14, 2024

PAULINE JELKEN, Plaintiff/Appellant, -vs- PUBLIC STORAGE AND ABC (fictitious name), Defendant/Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001136-23T4 On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION MORRIS COUNTY DOCKET NO: MRS-L-001306-20 Sat Below: Noah Franzblau, J.S.C.

RESPONDENT PUBLIC STORAGE'S MEMORANDUM OF LAW AND APPENDIX IN SUPPORT OF THEIR OPPOSITION TO PLAINTIFF'S/APPELLANT'S APPEAL

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PROCEDURAL HISTORY

Respondent-Defendant Public Storage adopts Plaintiff-Appellant's Procedural History with one addition. On July 30, 2020, Respondent filed its Answer with the Court. Pa8.

STANDARD OF REVIEW

The Appellate Division will not interfere with the exercise of a trial court's discretion "unless it appears that an injustice has been done." St. James AME Dev. Corp. v. City of Jersey City, 403 N.J. Super. 480, 484 (App. Div. 2008) (quoting Cooper v. Consol. Rail Corp., 391 N.J. Super. 17, 23 (App. Div. 2007). "[An] abuse of discretion only arises on demonstration of 'manifest error or injustice[,]'" Hisenaj v. Kuehner, 194 N.J. 6, 20 (2008) (quoting State v. Torres, 183 N.J. 554, 572 (2005)), and occurs when the trial judge's "decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Milne v. Goldenberg, 428 N.J. Super., 184, 197 (App. Div. 2012) (quoting Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002); see also Citizens to Preserve Overton Park, Inc. v. Vople, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) (An abuse of discretion is manifest if a challenger can show the decision of the court below was (a) not premised upon a consideration of all relevant factors; (b) was based upon a consideration of irrelevant or inappropriate factors; or (c) amounted to a clear error in judgment).

In conducting its review of the trial court's exercise of its discretion, the Appellate Division will not "decide whether the trial court took the wisest course, or even the better course, since to do so would merely be to substitute [its] judgment for that of the lower court. The question is only whether the trial judge pursued a manifestly unjust course." Gittleman v. Cent. Jersey Bank & Tr. Co., 103 N.J. Super. 175, 179 (App. Div. 1967), rev'd on other grounds, 52 N.J. 503 (1968); see also Serenity Contracting v. Fort Lee, 306 N.J. Super. 151, 157 (App. Div. 1997) ("A trial court's exercise of discretion is "entitled to respectful review under an abuse of discretion standard[.]".

PRELIMINARY STATEMENT

There was no injustice whatsoever in the trial of this matter. Rather, justice was served. This matter arises from a slip and fall incident which took place on July 4, 2018 at a Public Storage facility located in Dover, New Jersey wherein Plaintiff-Appellant Pauline Jelken (hereinafter "Plaintiff") alleges she suffered injury. As a result, Plaintiff filed a Complaint against Defendant-Respondent Public Storage (hereinafter "Defendant") on June 24, 2020. Defendant filed an Answer on July 30, 2020. **Pa8.**

The matter was tried to a Jury before the Honorable Noah Franzblau, J.S.C. from October 10, 2023 through October 13, 2023. During the trial Judge Franzblau properly ruled in prohibiting Plaintiff from introducing evidence that is in

contravention of the New Jersey Rules of Evidence. Specifically, Judge Franzblau properly excluded evidence pursuant to N.J.R.E. 407 a subsequent remedial measure. Additionally, Judge Franzblau properly ruled pursuant to N.J.R.E. 901 in excluding unauthenticated evidence.

At the end of trial, a seven-person jury returned a unanimous "no cause" verdict in a mere forty-two minutes. The Jury unanimously responded "NO" to the first question of the verdict sheet: "Did Plaintiff Jelken prove that Defendant Public Storage was negligent?" The first question posed was simple, clear and conformed to Plaintiffs' claim and the evidence put forth at trial. The first question clearly and correctly set forth the first issue for the Jury to decide. The negligence charge provided by the Court adequately conveyed the law for the jury to apply when deciding the first question.

Plaintiff now appeals the verdict on the basis that the Trial Court improperly denied admitting evidence of subsequent remedial measures and hearsay evidence that did not fall into an exception. Plaintiff argues – without citing to any legal authority whatsoever – that the Tial Court erred in not allowing this evidence.

The Trial Court, however, correctly denied Plaintiff's motion for a new trial and in precluding Plaintiff from introducing inadmissible evidence. For the reasons stated at trial by the Honorable Noah Franzblau and for the reasons set forth herein, Plaintiff's appeal should likewise be denied

STATEMENT OF FACTS

During the trial of the matter was tried to a Jury before the Honorable Noah Franzblau, J.S.C. on October 10, 2023 through October 13, 2023. During the trial Judge Franzblau properly ruled in prohibiting Plaintiff from introducing evidence that is in contravention of the New Jersey Rules of Evidence. Specifically, Judge Franzblau properly ruled pursuant to N.J.R.E. 407 in excluding evidence of subsequent remedial measures:

> THE COURT: -- I will make a ruling. I am trying to understand what the intention of the plaintiff is. I am trying to understand, and I am giving you an opportunity to tell me for what other purposes than remedial action is it being offered. You indicate merely for the completeness of testimony so the jury understands how she was able to walk out . . . I don't -- I don't believe that it is admissible under 4:07, New Jersey Rule of Evidence 4:07. This is -- I'm -- I'm seeking the intent for which you are providing the document. It does – it just seems to be completeness of testimony. In this case it goes more to the remedial measures that were taken by the defendant after the plaintiff's accident. She can certainly testify as to the condition. They are pictures of the condition of the floor at the time of the accident.
> I find it also to not be admissible under Rule 4:03. I think that it is prejudicial value would clearly outweigh any probative value on her exiting and how the condition was different, and I think that in light of the jury charge 5:20(f)(8), the critical components for the jury to find are whether there was actual notice of the period of time before the plaintiff's injury to permit the owner to in the exercise of reasonable care to condition or constructive notice. What the condition was after her fall do not go to either actual or constructive notice for the purpose of establishing the defendant's

negligence. **(See T1:27-28)**.

Additionally, Judge Franzblau properly ruled pursuant to N.J.R.E. 901 in excluding unauthenticated evidence – in this case, an incident report authored by a Public Storage representative. A party is required to lay a foundation showing that a business record is authentic before a trial court will allow it into evidence. The party seeking to offer evidence has the burden of laying a proper foundation for its admission. Here, Plaintiff called no witness to authenticate the report and therefore the report was properly not admitted.

The question for this Court is only whether the Trial Court pursued a manifestly unjust course. The Trial Court's decisions were not wrong, let alone manifestly unjust. Judge Franzblau's reasoning was proper under the rules of evidence. Simply, there is no basis for Plaintiff's appeal, respectfully, it must be denied.

LEGAL ARGUMENT

I. THE TRIAL COURT APPROPRIATELY PROHIBITED EVIDENCE OF SUBSEQUENT REMEDIAL MEASURES BY DEFENDANT

N.J.R.E. 407 provides "[e]vidence of remedial measures taken after an event is not admissible to prove that the event was caused by negligence or culpable conduct." The rule was "designed to encourage remedial measures to be taken in order to avoid the occurrence of similar accidents." Dixon v. Jacobsen Mfg. Co.,

270 N.J. Super.569, 587, 637 A.2d 915 (App. Div.) *certif. denied*, 136 N.J. 295, 642 A.2d 1004 (1994).

A. Excluding The Testimony Of Arlene Castello Was Proper Under N.J.R.E. 407 And N.J.R.E. 403

Plaintiff argues that Arlene Castello should have been permitted to testify that Defendant mopped the wet floor and placed a hazard sign down, after Plaintiff's slip-and-fall incident. Plaintiff argues that evidence of such subsequent remedial measures is admissible as to "other issues" besides negligence of Defendant. Plaintiff, however, failed at the time of trial and presently, to set forth the "other issues" of substance or merit related to the trial the testimony was being offered.

N.J.R.E. 403 provides as follows:

> Except as otherwise provided by these rules or other law, 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.

Testimony already in evidence is considered to be cumulative under the Rule. *See* Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 495, 734 A.2d 1147 (1999). The burden lies with the party seeking exclusion of the evidence to show that the probative value is substantially outweighed by one or more of the factors listed in Rule 403. McLean v. Liberty Health System, 430 N.J. Super. 156 (App. Div.

2013) 167 *citing* State v. Morton, 155 N.J. 383, 453, 715 A.2d 228 (1998).

Here, Plaintiff herself *and* Plaintiff's witness, Arlene Castello, testified regarding the condition of the floor being wet. Plaintiff now argues that Castello should have been permitted to state that, after Plaintiff's incident, Defendant mopped and placed a hazard sign in the area. To admit this evidence would have been highly improper as it is both evidence of a subsequent remedial measure (See N.J.R.E. 407, *supra*), and would confuse the jury as to the issue at bar under N.J.R.E. 403. Moreover, that the floor was wet, was never at issue in the case.

The only issue was whether Defendant was on notice of the wet conditions and whether it was if one could even slip and fall as alleged by Plaintiff if the floor was wet. Castello's testimony only shows that subsequent remedial measures took place. Even if, *arguendo*, the evidence of Public Storage's conduct was relevant to some fact in issue other than negligence, the evidence would still have been excluded under N.J.R.E. 403 as the probative value would have been substantially outweighed by the prejudicial effect to Defendant.

For these reasons, the Trial Court properly excluded the testimony regarding the subsequent remedial measures. Plaintiff has failed to show on appeal how the Trial Court's ruling was manifestly unjust.

B. Use Of Subsequent Remedial Measures And Lay Witness Testimony For Impeachment Of Expert Witness Was Properly Excluded

Plaintiff argues that she should have been permitted to use evidence of Defendant's subsequent remedial measures to impeach the credibility of Defendant's liability expert David Behnken. At trial Mr. Behnken testified that the possibility of slipping on water given the type of floor present within the Public Storage facility was "one in a billion". The fact that water was on the floor was never contested by Defendant or Mr. Behnken.

Plaintiff argues that evidence of Public Storage placing a cautionary sign evidenced Plaintiff's belief and *lay opinion* that a "defective condition" existed. This is, again, evidence of a subsequent remedial measure and is not evidence that Defendant was on notice of any conditions.

Plaintiff's Counsel was able to cross-examine Mr. Benken at trial. *See* **Plaintiff's Br. at pg. 29**. Plaintiff argues that Mr. Benken's testimony was "not scientific," without citing to any law to support this claim. Plaintiff baselessly argues that lay witness opinion testimony should have been admitted to impeach Mr. Benken's credibility and that the Trial Court "foreclosed the introduction of critical evidence." Plaintiff seeks again to introduce subsequent remedial measures - *inadmissible* evidence of the conduct of mopping the floor and placing a sign where the incident occurred. Plaintiff has no argument, valid or otherwise, as to why the

Trial Court should have admitted this evidence.

Introduction of subsequent remedial measures for the purpose of impeaching credibility is only permissible under a narrow exception – where sworn testimony such as interrogatory answers or deposition testimony is used to impeach a witness who contradicts himself on the stand. See, eg, Torres v. Sumrein, 2017 N.J. Super. Unpub. LEXIS 3020, *15-16[1] where the Appellate Division held the Trial Court did not misapply its discretion in denying defendants' motion in limine under *N.J.R.E.* 407, and in allowing plaintiff to present evidence of subsequent remedial measures for the limited purpose of witness impeachment because such impeachment falls within a recognized exception under *Rule* 407 due to the fact defendants had an obligation to answer form interrogatories honestly and forthrightly. *R.* 4:17-4(a); *R.* 4:17-1. There, a witness' certified interrogatory answer — attesting that "no" post-accident repairs were made to the premises — was fair game for plaintiff to impeach, by showing the incredibility of his contention that the subsequent measures had "nothing" to do with safety.

C. Excluding All Evidence Of Floor Mopping And Hazard Signs Was Proper Pursuant To N.J.R.E. 407

The Court ruled properly in prohibiting Plaintiff to present the jury with testimony regarding the conduct of Public Storage employee Heather McLaughlin's

[1] A copy of this unpublished decision is annexed hereto.

acts of mopping the floor and placing a wet floor sign near the area where Plaintiff alleges to have fell. Testimony regarding Ms. McLaughlin's conduct is the exact evidence N.J.R.E. 407 seeks to exclude.

Plaintiff argues that evidence that the floor was mopped by Ms. McLaughlin and placement of a wet floor sign should have been admissible and the Court committed reversible error by denying this. On the contrary - Ms. McLaughlin's mopping the floor and placement of the sign was properly excluded from evidence at trial to prevent this evidence from being used to prove culpable conduct or causation.

The subsequent remedial measures here are wholly unrelated to any fact in controversy. Defendant did not dispute or deny the condition – water on the floor -- as it existed during the time of the alleged accident. Plaintiff has failed to meet her burden here of showing how the Trial Court's rulings were improper, let alone how they were manifestly unjust. For these reasons, Plaintiff's appeal must be denied.

II. THE COURT PROPERLY PROHIBITING INTRODUCTION OF DEFENDANT'S INCIDENT REPORT

The New Jersey Rules of Evidence require evidence to be authenticated for it to be admissible as evidence at trial. N.J.R.E. 901 provides, "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must present evidence sufficient to support a finding that the item is what its proponent claims." The requirement of authentication or identification as a condition precedent

to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims.

A. THE INCIDENT REPORT WAS NOT AUTHENTICATED AND THEREFORE WAS INADMISSIBLE

The Trial Court ruled properly prohibited Plaintiff presenting the jury with an incident report because it was not authenticated by a witness. Plaintiff seems to argue, on appeal, that a business record such as an incident report can be authenticated by interrogatories, citing to Eden v. Conrail, 175 N.J. Super. 263 (App. Div. 1980). The Eden case was, if anything, partly about reading interrogatories into evidence at a trial, not about authenticating a business record. "It is difficult to know the basis of exclusion by the trial judge of some of the several interrogatories concerning which admission was sought by plaintiff." Eden at 282.

Plaintiff erroneously asserts that the Court improperly prohibited Plaintiff from *reading into evidence* an incident report and photographs relating to Plaintiff's accident. First, this would be hearsay. An exception to the hearsay rule is a record kept in the ordinary course of business. N.J.R.E. 803 reads:

> Records of Regularly Conducted Activity. — A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make such writing or other record.

In order to qualify under the business record exception to the hearsay rule, the proponent must satisfy three conditions: "First, the writing must be made in the regular course of business. Second, it must be prepared within a short time of the act, condition or event being described. Finally, the source of the information and the method and circumstances of the preparation of the writing must justify allowing it into evidence." State v. Sweet, 195 N.J. 357, 370, 949 A.2d 809 (2008) (quoting State v. Matulewicz, 101 N.J. 27, 29, 499 A.2d 1363 (1985)), *cert. denied*, 557 U.S. 934, 129 S. Ct. 2858, 174 L. Ed. 2d 601 (2009).] *See also* New Century Financial Services, Inc. v. Oughla, 437 N.J. Super. 299, 326 (App. Div. 2014). However, such a record cannot be submitted into evidence at trial without any testimony establishing its *authenticity*:

> The Appellate Division reversed the decision removing Corbo from the UCPD, holding that the ALJ erred when she admitted the hospital records into evidence without first requiring the City to lay foundational testimony to satisfy the requirements of the business records hearsay exception.

Matter of Corbo, 238 N.J. 246, 247 (2019).

A party is required to lay a foundation showing that the documents are what they purport to be. Certifying an interrogatory is not the same as a witness at a trial laying the proper foundation. Here, Plaintiff seems to argue this would suffice. The incident report and photographs were prepared by Ms. McLaughlin, whereas the interrogatories are certified by a corporate representative of Public Storage. Plaintiff

failed to serve a Notice in Lieu of a Subpoena for Ms. McLaughlin or any other representative to authenticate the incident report as an exception to the hearsay rule at trial – but that is Plaintiff's duty, not the Trial Court and not the Defendant. As such, there was no vehicle in which Plaintiff could have authenticated the evidence she sought to admit. Plaintiff's argument that since these documents and photographs were produced in discovery allows Plaintiff to introduce the documents at trial and have them read by Plaintiff is utterly nonsensical and meritless. Indeed, Plaintiff again fails to cite to any authority to support this myth. The Court's exclusion of the evidence was proper and Plaintiff's appeal must be denied.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S REQUEST FOR A NEW TRIAL

In the case Hisenaj v. Kuehner, the New Jersey Supreme Court was tasked with determining whether the Appellate Division properly restricted itself to the findings of the trial court when granting plaintiff a new trial. 194 N.J. 6, 10 (2008). The issue on appeal arose out of the trial of a personal-injury action for injuries sustained in an automobile accident. Id. The jury's verdict was largely in favor of Defendant, and plaintiff appealed. Id. A panel of the Appellate Division reversed and held that plaintiff was entitled to a new trial because the trial court erred in admitting expert testimony from Defendant's biomechanical engineer. Id. citing Hisenaj v. Kuehner, 387 N.J. Super. 262, 277, 903 A.2d 1068 (App. Div. 2006). The Supreme Court granted Defendant's petition for certification, 189 N.J.

427, 915 A.2d 1050 (2007), and reversed the Appellate Court, holding, "based on the record and arguments presented to the trial court, and applying the abuse-of-discretion standard, we hold that the trial court's evidential ruling was within the range of sustainable trial determinations that the reviewing court should have affirmed." 194 N.J. 6, 10 (2008). The Court held:

> The narrow issue in this appeal is whether the Appellate Division overstepped its bounds when reviewing the trial court's admission of Dr. Alexander's expert testimony. In reviewing a trial court's evidential ruling, an appellate court is limited to examining the decision for **abuse of discretion**. See Brenman v. Demello, 191 N.J. 18, 31, 921 A.2d 1110 (2007). A reviewing court is not permitted to create anew the record on which the trial court's admissibility determination was based. See ibid. Defendant claims that instead of adhering to the proper scope of review, the Appellate Division essentially undertook its own examination of the foundation for Dr. Alexander's testimony and erroneously substituted its judgment for that of the trial court. And, further, in doing so, the panel effectively allowed plaintiff to create a whole new case against the admissibility of Dr. Alexander's testimony than that which was presented to the trial court.

Hisenaj v. Kuehner, 194 N.J. 6, 12-13. [**emphasis added**]

Abuse of discretion amounts to a manifest error resulting in an injustice. Although the ordinary "abuse of discretion" standard defies precise definition, it arises when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005), quoting Flagg v. Essex County

Prosecutor, 171 N.J. 561, 571, 796 A.2d 182 (2002). In other words, a functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue. Abuse of discretion may be "arbitrary, capricious, whimsical, or manifestly unreasonable judgment." Ibid.

Here, the question for this Court is only whether the trial judge pursued a manifestly unjust course. See Gittleman v. Cent. Jersey Bank & Tr. Co., *supra*. Plaintiffs' brief fails to cite one instance where the opinions of the Trial Court were arbitrary, capricious, whimsical, or manifestly unreasonable. Plaintiffs instead only reiterate the same arguments made in Plaintiffs' motion for a new trial. However, not once does Plaintiffs' brief argue that the Court abused its discretion in denying Plaintiffs' motion for a new trial, or in its evidentiary rulings. This is because the Court's reasoning was reasonable, and based on the Rules of Evidence.

CONCLUSION

Based on the foregoing, Defendant/Respondent respectfully requests the Court deny Plaintiff's appeal

Respectfully Submitted,

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By: *Colin P. Hackett*
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Dated: April 17, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001136-23T4

PAULINE JELKEN,

Plaintiff-Appellant,

v.

PUBLIC STORAGE AND
ABC (FICTITIOUS NAME),

Defendants-Respondents.

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT, LAW DIVISION
MORRIS COUNTY

Honorable Noah Franzblau, J.S.C.
Sat Below

REPLY BRIEF
FOR
APPELLANT, PAULINE JELKEN

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PRELIMINARY STATEMENT

Defendant-Respondent's Brief is replete with bold, baseless, and conclusory statements without factual or legal support. The Plaintiff-Appellant, while a business invitee of Defendant, slipped and fell in a puddle on a concrete floor, sustaining a spinal compression injury that her treating physician described as persistent and progressive, and which will affect virtually every aspect of her daily activities, causing her to have trouble with her legs, her balance, walking, control of her bowel and bladder, and the use of her arms.

The trial court's erroneous evidentiary rulings precluded the Plaintiff from presenting evidence that would have substantiated the testimony of the three Plaintiff witnesses that Plaintiff's injuries were caused when she slipped and fell on Defendant's puddled, slippery, concrete floor. While the Defendant conceded that the Defendant's lobby floor was indeed wet, the Defendant argued and the trial Court accepted that the wet floor was "slip proof."

Plaintiff maintains that had the trial Court not abused its discretion and erroneously precluded her introduction of critical evidence of Defendant's admissions via both the actions of the Defendant's agent, the on-sight manager, Heather McLaughlin, and her statements as well as other corroborative statements as contained within the Defendant's Certified Answers to Interrogatories, and the

testimony of Plaintiff and her witness, Arlene Castello, describing McLaughlin's actions mopping and placing the slip hazard sign immediately after Plaintiff's fall, the jury would not have been misled resulting in an egregious miscarriage of justice and the jury's mistaken verdict.

PROCEDURAL HISTORY & STATEMENT OF FACTS

Plaintiff relies on the procedural history and statement of facts set forth in her initial Brief and Appendix.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN PROHIBITING EVIDENCE OF SUBSEQUENT REMEDIAL MEASURES BY DEFENDANT

Plaintiff, in her case in chief, was prepared to offer uncontroverted evidence that only moments after she had fallen, the Defendant's agent, the on-sight manager of the facility, Heather McLaughlin, mopped the floor where she had fallen and placed a bright yellow warning sign of the slip hazard. The Defendant, by omission, misstates Evid. R. 407, which, in its entirety reads:

> Evidence of remedial measures taken after an event is not admissible to prove that the event was caused by negligence or culpable conduct. **However, evidence of such subsequent remedial conduct may be admitted as to other issues.** (emphasis added).

Defendant's reliance on Dixon v. Jacobsen Mfg. Co., 270 N.J. Super. 569, 587, 637 A.2d 915 (App. Div.) *certif. denied*, 136 N.J. 295, 642 A.2d 1004 (1994), is misplaced. While this case discusses the general social policy reasons to exclude remedial measures as evidence of negligence or culpable conduct, it is wholly inapplicable to the issues in the case at bar. There is well-established case law providing for the permissible exceptions to the Rule's initial prohibition for admitting such evidence. The Defendant's sole defense to the Plaintiff's case relied upon it seeking to establish that its floor, when wet, was not slippery and therefore did not cause the Plaintiff to fall. The trial Court's erroneous rulings permitted the defense to mislead the jury with impunity on this critical issue.

A. EXCLUDING THE TESTIMONY OF ARLENE CASTELLO WAS IMPROPER UNDER EVID. R. 407 AND EVID. R. 403

Plaintiff's witness, Arlene Castello, observed the Defendant's agent mop the floor and place a slip hazard warning sign just moments after the Plaintiff's fall. Her testimony as to these observations, precluded by the trial Court, citing Evid. R. 407 and Evid R. 403, should have been allowed for the reasons set forth by Plaintiff at trial and in her initial Brief.[1]

Defendant in its Brief[2] states that the Plaintiff failed at time of trial and now, on appeal, to set forth the "other issues" that support the admission of evidence of

[1] Pb refers to Plaintiff's Appellate Brief filed March 18, 2024
[2] Db refers to Defendant's Appellate Brief filed April 17, 2024.

Defendant's subsequent remedial repairs. (See Db, page 6). Defendant either misreads or ignores the Plaintiff's arguments as clearly delineated and set forth within Plaintiff's initial Brief. (See Pb, pages 20-28). To highlight just a few of the exceptions which solidly support the *bona fides* of the Plaintiff's appeal requiring this Court's reversal and entry of an order for a new trial, see:

(1) Perry v. Levy, 87 N.J.L. 670, 672 (E. & A. 1915), discussing the exception to the exclusion for evidence of "the condition existing at the time of the accident."

(2) Harris v. Peridot Chem. (NJ), Inc., 313 N.J. 257, 293 (App. Div. 1998), discussing the admissibility of subsequent remedial measures evidence where it bears on the Defendant's "... liability, not [its] negligence."

(3) Where the use of such evidence is for the purpose of affecting the credibility of a defense witness on cross examination. Hansson v. Catalytic Construction Co., 43 N.J. Super. 23, 27 (App. Div. 1956) citing Lombardi v. Yulinsky, 98 N.J.L. 332 (Sup. Ct. 1923). The facts in Millman v. U.S. Mortgage Title Guaranty Co. of New Jersey, 121 N.J.L. 28 (Sup. Ct. 1938), where the evidence was determined to be properly admissible are almost identical to the within case. There, as here, the Defendant denied the existence of the pleaded defect (there the structural defect of a stairway, here the slippery nature of the Defendant's wet floor), and the Defendant's engineering expert witness testified

that the conditions that existed at the time of the accident did not require the type of remedial repairs that had been made.

Defendant's alternate reliance on Evid. R. 403 that the probative value of evidence of Defendant's subsequent remedial measures would have been substantially outweighed by the prejudice to the Defendant is also misplaced. (See Db, page 7). There was no weighing analysis conducted below. Indeed, while the trial Court would have been entitled to this Court's deference had the trial Court done so before making its ruling, such a determination adverse to the admissibility of the evidence of Defendant's remedial actions in the case at bar, which constituted significant probative value on determining the issue of whether the Defendant's floor was slippery when wet would have been a "clear error of judgment." See Hassan v. Williams, 467 N.J. Super. 190, 214 (App. Div. 2021). To be sure, any perceived prejudice to the defense would have been appropriately addressed by the Court's charge as to the use of the evidence. Ryan v. Port of New York Authority, 116 N.J. Super. 211, 219 (App. Div. 1971).

B. USE OF SUBSEQUENT REMEDIAL MEASURES AND LAY WITNESS TESTIMONY FOR IMPEACHMENT OF EXPERT WITNESS WAS IMPROPERLY EXCLUDED

Defendant incorrectly argues the Torres v. Sumrein, 2017 N.J. Super. Unpub. LEXIS 3020, case, (See Appendix to Db), supports its position that the use of subsequent remedial measures to impeach credibility is only permissible "under the

narrow exception" where sworn testimony is used to impeach a witness who contradicts himself on the stand. The argument is specious.

As set forth in detail in Plaintiff's initial Brief (See Pb, pages 30-31), the admissibility of evidence of subsequent remedial repairs to challenge credibility has been long established and recognized. See Hansson v. Catalytic Construction Co., supra., at 27. See also Millman v. U.S. Mortgage Title Co. of New Jersey, supra., at 34-35, where that defendant also denied the existence of the pleaded defect.

That the defense expert's testimony was critical to the Defendant's case cannot be overstated, and the harm caused to the Plaintiff by precluding the use of the Defendant's actions that evidenced its belief that the floor was slippery to cross-examine and impeach the defense expert witness was fatal to the Plaintiff's ability to prove her case. The jury's swift return from deliberations and verdict against the Plaintiff on the first question contained within the Verdict Sheet evidences the prejudice caused to the Plaintiff by the trial Court's erroneous rulings.

C. EXCLUDING ALL EVIDENCE OF FLOOR MOPPING AND HAZARD SIGNS WAS IMPROPER PURSUANT TO EVID. R. 407

Again, while not challenging that the floor was wet, the Defendant's case relied upon it seeking to establish that its wet floor was not slippery. Demonstrating the slippery nature of the wet floor was indeed directly related to the subsequent remedial measures the trial Court erroneously excluded, allowing the jury to be misled on this critical issue. In sum, the excluded evidence went

directly to establishing Defendant's "liability, not [its] negligence," and should have been allowed. Harris v. Peridot Chem. (NJ), Inc., supra., at 292.

POINT II

THE COURT IMPROPERLY PROHIBITED INTRODUCTION OF DEFENDANT'S INCIDENT REPORT

Plaintiff respectfully submits that the Defendant's Incident Report having been provided by the defense to the Plaintiff in its certified Answers to Interrogatories constitutes *prima facie* evidence of its genuineness, and is accordingly satisfactory proof of authentication. See, generally, State v. Hannah, 448 N.J. Super. 78, 89 (App. Div. 2016) and Konop v. Rosen, 425 N.J. Super. 391, 411 (App. Div. 2012).

Evid. R. 901 provides:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims.

See also Evid. R. 1007, which provides:

> The contents of writings or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

See also Evid. R. 803, which provides:

> The following statements are not excluded by the hearsay rule:

* * * * *

(b) Statement by Party-Opponent. The statement is offered against a party-opponent and is:
(1) the party -opponent's own statement, made either in an individual or in a representative capacity; or
(2) a statement whose content the party-opponent has adopted by word or conduct or in whose truth the party has manifested belief; or
(3) a statement by a person authorized by the party-opponent to make a statement concerning the subject; or
(4) a statement by the party-opponent's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

* * * * *

(c) Statements Not Dependent on Declarant's Availability. The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
(1) Present Sense Impression. A statement describing or explaining an event or condition made while or immediately after the declarant perceived it and without opportunity to deliberate or fabricate.

Defendant's Incident Report and photographs of the scene as it appeared after the Plaintiff's fall and the Defendant's "repairs," should have been admitted and Plaintiff should have been permitted to testify regarding them and their content. The preclusion by the trial Court severely prejudiced the Plaintiff's ability to prove her case, and this Court should rule that the trial Court's rulings constituted a manifest denial of justice, and a new trial should be ordered.

A. THE INCIDENT REPORT WAS AUTHENTICATED AND THEREFORE ADMISSIBLE

With the Defendant's own authentication of the Incident Report as admissions of a party opponent, the Incident Report properly should have been admitted for all purposes. See NJ Court Rules 4:17-8(a) and 4:16-1(a) and (b). The Defendant's insistence that the Plaintiff was somehow required to authenticate the Report as a "Business Record" is without merit and immaterial to the issue. In conclusion, the Defendant's argument to exclude the Incident Report represents nothing more than a complete disregard of established Rules of Evidence, and is an assault on common sense.

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S REQUEST FOR A NEW TRIAL

For all of the reasons stated above, the Plaintiff respectfully submits that the trial Court abused its discretion amounting to a manifest error resulting in a denial of justice. The rulings of the trial Court denying the Plaintiff the use of the Defendant's Incident Report and photographs, and the Court's preclusion of testimony regarding the Defendant's subsequent remedial measures, were "made without a rational explanation, inexplicably departed from established policies" and deprived the jury of its right to hear truthful, compelling evidence, thereby depriving the Plaintiff of a fair trial. See Masone v. Levine, 382 N.J. Super. 181,

193 (App. Div. 2005), quoting Flagg v. Essex County Prosecutor, 171 N.J. 561, 571 (2002).

CONCLUSION

It is respectfully submitted that the miscarriage of justice below requires that the Judgment be vacated and that a new trial be ordered.

Respectfully submitted,

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Michael A. Luciano, Esquire

Dated: May 01, 2024