FILED, Clerk of the Appellate Division, June 30, 2023, **A-001830-22**

--------------------------------x

IVAN TYMIV and
OKSANA TYMIV,

Plaintiffs,

vs.

LOWE'S HOME CENTERS, LLC,
AHMED HASSAN, and JOHN DOES 1
through 100 (fictitious names),

Defendants.

--------------------------------x

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-001830-22

On Appeal From:
Superior Court/Middlesex
Sat Below:
Jury trial before
Hon. Alberto Rivas

CIVIL ACTION

BRIEF OF PLAINTIFFS/APPELLANTS

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PRELIMINARY STATEMENT

This is a personal injury case in which the plaintiff, Ivan Tymiv, claims to have suffered permanent injuries after being struck in the head by an employee of Lowe's Home Centers, LLC ("Lowe's") at a Lowe's store while shopping for grout. The defendants are Lowe's and its former employee, Ahmed Hassan ("Hassan"). This is the second time this case comes before this Court. The first time, this Court reversed separate trial court orders granting each of the two defendants summary judgment, and remanded the case for trial (Pa7). Then, at trial, evidence which had been ruled inadmissible was let in through the "back door," highly prejudicial damages evidence was admitted into the liability phase of this trial, which had been bifurcated, *sua sponte*, by the trial judge, the jury was given improper instructions, and errors were made in ruling concerning argument of counsel. Unsurprisingly, the jury returned a verdict in favor of the defendants on liability. (Pa71). Plaintiffs now appeal, claiming that the trial judge abused his discretion, and they were deprived of a fair trial which resulted in a manifest denial of justice. Plaintiffs ask this Court to correct the improper rulings below, once again remand this case for trial, and direct that it be held before a different trial judge.

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PROCEDURAL HISTORY [1]

The aforementioned altercation between plaintiff and Hassan took place on May 13, 2017 at the Lowe's store on Route 9 in Morganville, New Jersey after words were exchanged between plaintiff and Hassan over the use of grout. It was undisputed that at the starting point of the encounter, Hassan was on duty and was attempting to serve his employer when he approached the plaintiff to ask if he could be of assistance. (4T191:21-193:17; 8T201:9-204:6). According to the trial testimony of the plaintiff, after words were exchanged, Hassan used a profanity, announced that he had a PhD in history and didn't need to know about grout, and then walked away. (7T58:23-62:20). The plaintiff followed, asking Hassan for his name. (7T63:3-65:17). Suddenly, according to plaintiff, Hassan turned, got in the plaintiff's face and struck him in the left temple with his right fist while holding a broomstick. (7T67:15-70:6). This was confirmed in the testimony of an eyewitness, Serge Oganov ("Oganov"). (4T191:21-200:16). The plaintiff was removed from Lowe's on a stretcher (7T25:15-22), and had emergency spinal fusion surgery days later, followed by a second surgery in 2018. (Pa361).

[1] Transcripts are designated as follows:

1T… Jan. 9, 2023
2T… Jan. 10, 2023
3T… Jan. 11, 2023
4T… Jan. 12, 2023
5T… Jan. 13, 2023
6T… Jan. 17, 2023
7T… Jan. 18, 2023
8T… Jan. 19, 2023
9T… Jan. 23, 2023
10T… Jan. 24, 2023
11T… Jan. 25, 2023

Plaintiffs filed a Complaint against Lowe's and Hassan on November 3, 2017 alleging negligence as against Lowe's for improper training and supervision of Mr. Hassan, as well as vicarious liability based upon the doctrine of *respondeat superior* (Pa70) for the acts of its employee, Hassan. Plaintiffs also alleged negligence and battery against Mr. Hassan for the alleged assault, and sought punitive damages. (Pa39; Pa54).

On March 20, 2020, the Hon. Thomas J. Buck, J.S.C. granted Lowe's summary judgment on the grounds that plaintiffs had not established that any negligent training of Mr. Hassan was a proximate cause of the assault on the plaintiff, and Mr. Hassan was not acting in the scope of his employment at the time of the assault. These rulings were later reversed. Only the claims of negligence and battery against Hassan then remained.

On June 5, 2020 the Hon. Alberto Rivas, J.S.C., who would ultimately preside over the trial, granted Hassan summary judgment on the negligence count on the grounds that store employees have no duty "to not commit assaults on customers." (Pa91; Pa31, n. 8). With only the battery and punitive damages counts remaining against defendant Hassan, plaintiff agreed to dismiss those counts in order to appeal the summary judgment rulings as to negligence. (Pa95).

In an Opinion dated July 30, 2021, this Court reversed both summary judgment rulings and remanded the case for trial.

(Pa7). Concerning the allegations of direct negligence against Lowe's, the Court stated that "it was for the jury, not the judge, to determine whether Lowe's failed to train and supervise Hassan properly, and, if so, whether that failure was a substantial factor in causing the harm at issue in this case." (Pa26-27).

Significantly for purposes of this appeal, this Court also stated that Lowe's could also be held vicariously liable for Hassan's actions even if they were intentional. Citing Vosough v. Kierce, 437 N.J. Super. 218, 236 (A.D. 2014), this Court stated that conduct which is "intentional and wrongful does not in itself take it outside the scope of his employment." (Pa28-29). Whether Hassan's actions constituted "'an independent course of conduct' outside the scope of his employment, see Restatement (Third) of Agency § 7.07 cmt. c, or whether his actions were unexpectable by Lowe's under the circumstances," was a jury question. (Pa30).

This Court also reversed Judge Rivas's decision to grant Hassan summary judgment. (Pa30-31). As for the judge's finding that Hassan had no duty to not assault customers, the Court stated that "at a minimum a store employee has an obligation not to assault the store's customers." (Pa31, n.8).

INTERREGNUM

A. Trial Scheduling

Upon remand, plaintiffs' counsel requested that the clerk set a trial date. Experience in Middlesex and other counties

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indicates that the trial calendar is called before the assignment judge in the county of venue. The assignment judge then randomly assigns those cases out to the various trial judges for conference and trial. In this case, the presiding judge, Hon. Michael V. Cresitello, P.J.S.C., had entered an order setting a firm trial date of January 9, 2023. (Pa96). Then, as to be expected, the clerk sent notices to counsel on September 2, 2022 stating that the parties were to appear before the Middlesex County assignment judge, Hon. Michael A. Toto, J.S.C., in courtroom 201 on January 9, 2023 for trial. (Pa97).

In this case, however, no appearance was made before the assignment judge as noticed. As indicated above, Judge Rivas was the pre-trial motion judge assigned to this case and had previously granted Hassan's motion for summary judgment, (Pa91), since reversed. (Pa7). He also bifurcated the trial, *sua sponte*. (Pa93). Subsequently, in a motion hearing concerning a set of admissions Lowe's served on the plaintiffs, held on October 21, 2022, Judge Rivas stated "[l]ooking forward to seeing you guys in January." (Pa108[2]). Then, on January 5, 2023, the clerk uploaded a message to Ecourts requiring the parties to appear for trial before Judge Rivas (Pa98), not the assignment judge as had been previously noticed. (Pa97).

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[2] References to "Mr. Czuba" between pages 5 and 9 of the motion transcript should read "Mr. Vrhovc."

B. Natasha Sahr's Evidence

After the firm trial date of January 9, 2023 was set, a witness whose name had never come up before came forward and claimed to have knowledge that the plaintiff Ivan Tymiv assisted in renovating her house, and was riding dirt bikes and going fishing, despite his claims to have been permanently disabled. The witness, Natasha Sahr, was the former fiancé of plaintiff Oksana Tymiv's brother, Artem Samsonov. Mr. Samsonov and she had broken off their engagement to each other on October 23, 2022, just days before the latter decided to insert herself into this litigation (Pa116/24:7-25). Ms. Sahr cold-called the Lowe's attorneys (after first calling plaintiff's attorney by mistake) on October 28, 2022, and received a warm reception. (Pa123/52:17-53:16).

She was deposed on November 21, 2022 (Pa110) and December 2, 2022. (Pa185). At her first deposition, Ms. Sahr testified that the plaintiff and her former fiancé were like "brothers." (Pa144/136:24-137:4). She gave Lowe's counsel items which, though relevant only to the damages issue, were later admitted into evidence during the liability phase of the trial over plaintiff's objection (1T138:13-148:18; 3T21:5-26:24). These included a text message from October 13, 2022 with an alleged estimate to renovate a bathroom (7T142:18-143:12; (Pa233)), and a number of family snapshots taken in 2021 or 2022 that showed the plaintiff with

some dirt bikes (7T151:8; Pa238), on an ATV (7T155:9; Pa239; 7T159:18; Pa243), holding a ladder (7T156:24; Pa240), and using a chainsaw (7T158:17; Pa241-242). The trial judge ruled that the plaintiff could be questioned about Ms. Sahr's texts and photos in the liability phase of the trial on credibility grounds, even though this evidence related only to damages. (2T8:16-24).

During her deposition, Ms. Sahr admitted that she and Mr. Samsonov had filed cross complaints against each other for domestic violence which were then pending, but that she was nevertheless willing to proceed with her deposition without counsel (Pa112/6:15-7:10). Later, plaintiff's counsel confronted Ms. Sahr with an email she claimed to have written to herself on November 12, 2022 and saved to the Drafts folder of a joint email account she shared with Mr. Samsonov, in which she stated "Case for Vanya[3] I don't want to be helping with this case but I have been subpoenaed. I don't have a choice to testify. . . . I still want to marry [Artem] because I love him and at least being married would allow me not to testify against Vanya, or Artem, or anything else." (Pa244; Pa250).

When Ms. Sahr was confronted with this email, counsel for Lowe's stood up, walked over to the plaintiff's attorney, and unilaterally stopped the deposition, and refused to allow Ms. Sahr to take any more questions about it (Pa178/273:9-295:11).

[3] "Vanya" is plaintiff Ivan Tymiv's nick-name. (Pa116; 22:18-24)

When Ms. Sahr's deposition resumed two weeks later, she refused to answer any questions about the email because, she now claimed, it "violates attorney client privilege." (Pa187/304:4-307:1).

Ms. Sahr did not testify in the liability phase of the trial, but the evidence she brought forth was introduced through the plaintiff on cross over plaintiff's objection (1T138:13-148:25; 3T21:5-26:20), even though it related only to damages. The plaintiff testified that the text message with the bathroom estimate was from a contractor he had introduced Ms. Sahr to, and that he was simply relaying the estimate for him. (7T144:1-147:6; 8T6:3-7:24; Pa233). He denied working, and stated that the photos of him on the ATV showed that he was still trying to live his life (8T18:17-19:6) several years after the incident at Lowe's. He testified that the photos with the ladder and chain saw were taken in 2021 and were an effort by him to try to impress his then future in-laws by helping them to take down a tree on their property (8T8:17-10:24). He testified that he is able to perform small projects with short periods of exertion (8T9:23-10:25), but that he has not worked since the incident at Lowe's (7T142:15-17).

FACTS ADDUCED AT TRIAL

On May 13, 2017 the plaintiff Ivan Tymiv was a self-employed home improvement contractor in the midst of a project in which he was renovating a single family home in Marlboro Township owned by his client, Serge Oganov. (4T184:7-185:9; 7T50:16-52:9).

On the date in question both the plaintiff and Mr. Oganov drove to the Lowe's store on Route 9 to purchase materials for the project (4T189:3-16; 7T55:21-56:12).

While Mr. Oganov and Mr. Tymiv were in aisle 42 looking at grout, Mr. Hassan approached and asked if he could help. (4T191:21-192:8; 8T202:1-25). Mr. Hassan had been hired 9 days earlier (5T39:7-8; Pa279) and was still in training. (5T31:3-12; 8T214:11-15). Although Hassan's supervisor, George Craig, testified at trial that there was another employee in the flooring department at the time (9T64:2-65:10), Hassan himself testified[4] that he was "alone in the department" (8T210:21-24), and both the plaintiff (7T63:25-65:5) and Mr. Oganov testified that they saw no other employees in the area. (4T201:5-8). Hassan was not wearing the Lowe's uniform, which was a red vest (5T30:23-31:12) and, according to the police officer who arrived later, he was wearing a blue Lowe's name tag that was attached to the bottom of his untucked t-shirt facing to the right. (4T104:1-21; Pa252). He was pushing a broom, sweeping the floors. (4T191:25-192:8; 7T58:23-59:6).

Mr. Tymiv knew he needed unsanded grout because the tiles on which he was to be working had a joint of less than one-eighth inch. (7T59:13-21). While plaintiff was holding a 10 pound bag of grout and trying to determine if it was sanded or unsanded,

[4] Hassan did not testify at trial despite being noticed to appear by plaintiffs; his video recorded discovery deposition (redacted) was played for the jury.

he responded to Mr. Hassan's offer of assistance by asking whether it was "sanded or unsanded." (7T61:6-20). According to Mr. Oganov, Hassan replied "you should figure out what you need before you come to the store, and you should learn about grout before you start buying it." (4T193:8-17). Both Oganov (4T193:12) and the plaintiff testified that Hassan did not give them an answer to the question about sanded or unsanded grout, so plaintiff told Hassan he should learn about grout applications. (4T96:21-97:5; 7T142:1-10).

Plaintiff testified that with that, Hassan "flipped out," and "[h]e said F word, you learn it, I have PhD in history, I don't have to learn this. And I don't have to learn this shit. And he's like almost immediately turn around and start leaving." (7T62:8-12). Still holding the bag of grout, the plaintiff followed behind Hassan asking for his name so he could report him to the manager. (4T193:18-194:4; 7T63:3-65:9).

After turning into the next aisle, still sweeping, the plaintiff testified that Hassan suddenly turned around, got in his face, and said "what are you going to do?" and called the plaintiff a "filthy Russian." (7T67:25-68:10; 4T197:23-198:2). Then, plaintiff testified that Hassan knocked the bag of grout up from plaintiff's hands so that it struck the rack and burst, raining grout down on Hassan's back and head. (7T68:17-69:23). Then, without warning, Hassan took his right hand, holding the

broom, and struck the plaintiff in the left temple (7T69:18-23) and then ran away.

After being struck in the head by Hassan, plaintiff testified that he yelled that he was going to call the police on him (7T76:5-11). Another Lowe's employee, Heidi Rappleyea, who was a few aisles away, confirmed that the plaintiff said he was going to call the police at the same time she saw Hassan walking away "mumbling." (6T101:23-102:20). According to the police officer and the police report, the plaintiff did in fact call the police. (4T89:1-3; Pa254).

The three responding police officers had body cameras which recorded some of their interactions with the persons involved (4T89:4-19), and redacted versions were played for the jury. (4T90:23-151:14). In his first interview with Cpl. DeMiceli, the plaintiff described that occurred, but that initial conversation lasted only about 45 seconds (4T94:11-97:8) before the officer left and went to a separate room to hear Hassan's version of what happened (4T97:17-21). At trial, the officer admitted to having observed a bump on the plaintiff's head both at the time of the interview and in the video played for the jury. (4T97:10-15).

Hassan told the officer that after some words about sanded versus unsanded grout he walked away from the plaintiff and the plaintiff followed him asking for his name and then threw the bag of grout at him and the bag of grout hit him in the back.

(4T101:6-17; 8T224:1-23). Hassan also testified that the first thing the bag of grout hit was him. (Ibid.). In emails to his HR manager Hassan stated "[t]he bag of power grout landed on my shoulder, neck and head." (Pa259). The police observed grout on Hassan's back and head (4T161:15-18) and same is also visible in the police body cam footage. (Pa261). At his deposition, played for the jury, Hassan denied using profanity with plaintiff and stated he was very "professional, kind" to plaintiff (9T13:4-13), but could not say why the plaintiff would want to get his name so bad. (8T222:19-223:13).

When asked by Cpl. DeMiceli whether he was wearing a name tag in his interactions with the plaintiff, Hassan looked down to his right side where his tag was affixed to the bottom of his untucked t-shirt. (4T46:1-7). Cpl. DeMiceli acknowledged that that was where Hassan had been wearing his blue name tag when he interviewed him. (4T104:1-21; Pa252). In his deposition, however, Hassan stated that he had been wearing his name tag on his chest area, clipped to the collar of a different shirt than what was shown in the photos. (8T173:11-175:19). Hassan testified that "you're not allowed to just wear a tee-shirt just like that. It's unprofessional and disrespectful to the customers as well." (8T174:4-14). However, Lowe's assistant store manager, Ryan Madden, who also was on duty that day, testified that Hassan was in fact wearing his name tag at the bottom of his t-shirt

(6T259:11-261:6), and that he was wearing the t-shirt shown in the photos on the date in question, and that he did not see Hassan wearing any shirt other than the shirt shown in the photos. (6T104:21-105:4).

At Lowe's on the day of the incident, the plaintiff told Sgt. Garguillo, whose body cam footage was played for the jury, that Hassan said during their encounter "I have a major in history [he] doesn't have to learn about grout." (4T91:12-92:9). This also appears in the police report written by Cpl. DeMiceli and approved by Sgt. Garguillo. (Pa253; 4T157:12-19). The eyewitness, Serge Oganov, also recalled Hassan telling them that he had a Phd. (4T194:21-195:16). However, Hassan denied having told the plaintiff that he had a Phd in history, and he also denied having said anything about his educational achievements. (8T215:3-8).

According to Hassan's testimony, he really does have a degree in history. (8T144:8-153:24). According to the HR manager at Lowe's, Hassan stated in his job applications to Lowe's that he had bachelor's degrees in history and social science from Boston University, an MBA from Barry University, and a doctorate from Barry University. (5T47:3-13; Pa265-266). Yet, when questioned about whether he had ever attended Barry University, Hassan first asked how to spell it and then asked where it was, and then testified that he would have to check his records before he could answer the question of whether he ever attended that school.

(8T152:7-153:16).

Both plaintiff (4T209:18-25) and Hassan (4T130:22-131:2) told Cpl. DeMiceli that they wanted to press charges against the other and both were advised of their right to do that at the municipal court. (Id.). Plaintiff did try to press charges against Hassan but was rebuffed at the municipal court. (7T96:25-98:24). Cpl. DeMiceli was unaware of any attempt by Hassan to press charges against plaintiff (4T130:22-131:1), and, per plaintiff, he never had to answer to any such charges. (7T96:25-97:4).

Lowe's HR manager, Christine Jennings, testified that Mr. Hassan never came back to work after that day, and was ultimately terminated for job abandonment. (5T41:1-20; Pa280-281). Hassan testified that he never went back to work because he was "physically incapable" of doing so, and that he was still, at the time of his deposition, on January 7, 2018, one and a half years after the incident, incapable of working because of this incident. (9T28:23-29:8); he testified that he moved to Florida and never told Lowe's because he "was still processing [his] emotions". (9T31:25-32:4).

Lowe's produced the testimony of a biomechanical expert, Jacob Fisher, who testified that his opinion was that the bag of grout was thrown (9T208:2-10), and it hit the stanchion and burst on the stanchion, and that it did *not* hit Hassan first like Hassan says. (9T215:1-18). Dr. Fisher testified that the impact point for when

the grout landed, whoever threw it, was on the stanchion (shelves) (9T156:9-21; Pa297-299), but he was unable to say how far the bag traveled before it hit the stanchion and burst. (9T215:14-18).

In analyzing the plaintiff's version of events on cross, Dr. Fisher agreed that the angle of Hassan's forearms at the time they impacted the grout bag would determine where that grout bag is going to go. (9T196:18-201:25). He conceded that if the parties were nose to nose and the plaintiff was holding the bag of grout at his chest level and Hassan struck the bag of grout at a time when his (Hassan's) forearms are angled towards Hassan, then the bag of grout could fly slightly towards him and impact the shelves if Hassan hit the bag with his right hand. (9T200:17-201:25).

Plaintiffs presented the opinion of Alex Balian as a liability expert in the field of retail operations. (8T29:22-140:5). Mr. Balian has many years' experience in owning and operating large retail stores and implementing retail store training policies (8T:32:5-36:21), including as director of training at a large supermarket chain. (8T39:5-39:24). As a retail consultant since 1988, Mr. Balian testified that he has rendered over 2,000 opinions, for both sides, in retail cases, most of which pertained to training and supervision. (8T42:2-43:18). He has seen the training policies of numerous retail chains throughout his career, including nationwide chains of big box stores like Walmart and Target. (8T44:7-45:8).

Mr. Balian testified that accepted practice in the retail industry, and at Lowe's, is for a new hire to be trained off the sales floor initially and then to undergo on the job training ("OJT") by being paired with a mentor. (8T64:6-68:24). Mr. Balian testified that "you never turn a person loose on the sales floor I don't care how much training they have until they're ready." (8T69:9-11). Inasmuch as he was still in training and not ready to be "turned loose" on the sales floor by himself, Hassan should have been paired with an experienced employee at the time of the altercation with plaintiff, according to Mr. Balian's testimony. (8T87:20-24). Lowe's failure to make sure Hassan was ready before turning him loose on the sales floor by himself constituted a breach of the standard of care in the retail industry for training and supervision, and was a cause of the incident between Hassan and plaintiff. (8T87:25-90:23; 8T133:16-22).

Despite two trial court rulings from Judge Buck (Pa76 and Pa82), and this Court's opinion affirming same (Pa37-38), all of which precluded the police officers' opinions and conclusions from being introduced at trial, Judge Rivas permitted the following testimony in the cross-examination of Mr. Balian to be shown to the jury:

> "MR. HUBERT: All right, sir, you have Exhibit D008 [(Pa302)] in front of you. It's a line from Corporal Demeglio's deposition testimony. At page 21, line 8 the question is 'but what I'm understanding you're saying is that you came

> to the conclusion that the grout was thrown at Mr. Hassan. Answer: Yes.' Did I read that accurately?
>
> MR. BALIAN: Yes.
>
> MR. HUBERT: Then the question at line twelve is 'because you observed the grout on Mr. Hassan's back and the back of his head.' And in the second paragraph beginning at line 18 Officer or Corporal Demeglio says 'and then when we saw this kid he had it on the back of his head and down his back and <u>there's only one way that could happen is if your back was towards him</u> and the way it was globbed on him, it didn't poof up any air and powder down, it was chunky on the back of his head and down his back.' Did I read that accurately?
>
> MR. BALIAN: Yes you did." (8T102:16-103:9; Pa302-303).

The following testimony was also admitted through Mr. Balian:

> MR. HUBERT: Jeremy, could you hand the witness D007 [(Pa300-301)] please. Now Mr. Balian, this is a slide of Corporal DeMecili's [*sic*] deposition testimony beginning at page 56, line 19. The question was 'did you ever accuse him of anything, Mr. Tymiv? Answer: Accuse him? I wouldn't say so much as accusing him, but as far as the grout being on the back of Mr. Hassan I said, <u>you would have had to have thrown that at him for it to be on the back of him</u>, so if he thought of that as an accusation, I guess I did accuse him of throwing grout at Mr. Hassan.' Did I read that accurately?
>
> MR. BALIAN: You did.
>
> MR. HUBERT: And nowhere in your report did you mention the conclusion of Corporal DeMecili, correct?
>
> MR. BALIAN: Correct.
>
> MR. HUBERT: And you testified under oath a your deposition that you only take cases where you feel the case is valid, correct?
>
> MR. BALIAN: Correct." (8T104:1-21).

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LEGAL ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING THE POLICE OFFICERS' OPINIONS AND CONCLUSIONS INTO EVIDENCE BECAUSE SUCH EVIDENCE HAD BEEN PRECLUDED, WAS IMPROPER IMPEACHMENT MATERIAL, AND WAS UNDULY PREJUDICIAL. (1T53:4-62:21)

A. STANDARD OF REVIEW (Not raised below)

When a trial court admits or excludes evidence, its determination is "entitled to deference absent a showing of an abuse of discretion, *i.e.*, [that] there has been a clear error of judgment." Griffin v. City of E. Orange, 225 N.J. 400, 413 (2016). An evidentiary ruling should be reversed only if it "'was so wide off the mark that a manifest denial of justice resulted.'" Ibid., *citing* Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999).

Here, the trial court abused its discretion in admitting evidence of the police officers' opinions and conclusions because that evidence had been previously barred in three separate rulings prior to trial, and because that evidence was not proper impeachment material, and because the probative value of that evidence was far outweighed by its prejudicial effect on the jury, resulting in a manifest denial of justice.

B. THE LAW OF THE CASE DOCTRINE PRECLUDED THE POLICE OPINIONS (1T55:1-3; 1T60:21-24)

Prior to trial, the plaintiffs moved to bar evidence of the police officers' opinions and conclusions from the trial on the

grounds that the officers had not witnessed the encounter and admitting their opinions and conclusions would invade the fact-finding province of the jury. On February 6, 2020 Judge Thomas J. Buck, J.S.C. entered an order precluding the police officers from offering their opinions and conclusions about what had occurred between plaintiff and defendant, but permitted them to testify as to what they observed. (Pa76; Pa80-81).

Lowe's then filed a motion to reconsider, which was denied by Judge Buck, in an order dated March 20, 2020, on the grounds that "Rule 701 of 704 [sic] does not allow the officers to testify as to their opinion about who with what. This is a jury question." (Pa82; Pa86-88).

Lowe's then appealed that ruling to this Court, which affirmed the ruling below. (Pa37-38) This Court stated "[t]he police officers did not witness the altercation between plaintiff and Hassan. To allow them to opine as to how the altercation occurred would be a clear invasion of the jury's factfinding province." (Pa38).

The "law of the case" doctrine means that a decision of law made in a particular case is to be respected by all other lower or equal courts during the pendency of that case, as long as the issue at stake has been litigated and decided. <u>State v. Reldan</u>, 100 N.J. 187, 203 (1985). "A hallmark of the law of the case doctrine is its discretionary nature, calling upon the deciding

judge to balance the value of judicial deference for the rulings . . . against those 'factors that bear on the pursuit of justice and, particularly, the search for truth.'" Hart v. City of Jersey City, 308 N.J.Super. 487, 498 (A.D. 1998).

Nevertheless, the defendants sought and obtained leave from the trial judge to admit the police officers' opinions and conclusions through the "back door" by way of the cross examination of plaintiff's retail expert, Alex Balian ("Balan"), over plaintiffs' objection. (1T53:4-62:21).

However, under the law of the case doctrine, such evidence should have been precluded because that issue had already been decided, three times, on solid grounds: that the police officers did not witness the encounter and therefore allowing their opinions and conclusions into evidence would invade the jury's factfinding province.

C. THE QUESTIONS WHICH QUOTED THE POLICE OFFICERS' OPINIONS WERE NOT VALID IMPEACHMENT MATERIAL. (1T62:5-21)

On March 5, 2020 plaintiffs had filed a motion *in limine* to redact that part of Balian's *de bene esse* deposition based on the prior trial court order dated February 6, 2020.[5] Lowe's opposed that motion on the grounds that such evidence should be admitted

[5] Inasmuch as there was no ruling on plaintiff's 2020 application to redact prior to the summary judgment rulings, the application was later renewed just prior to trial years later with Lowe's again submitting opposition.

to impeach Balian and would also be admissible as lay opinion. Judge Buck's order denying reconsideration, and this Court's opinion, both of which rejected the latter argument, would come later.

Lowe's written argument in response to plaintiffs' motion *in limine* was that the police opinions and conclusions were admissible based on their contention that Balian testified that "he only takes cases where he agrees with the theory of the case" and therefore he is biased. (Pa310). Balian did testify in his discovery (Pa310) and *de bene esse* depositions that he takes cases where he agrees with the theory of the case (8T100:21-102:3), or if the case was "valid." (8T104:17-20). If the questioning was so limited, that would have been perfectly legitimate cross examination.

But the fact that Mr. Balian agrees with the theory of the case, or thinks that the case is valid, has nothing to do with the police officers' opinions and conclusions. He is testifying about retail store policies and procedures, not about what occurred between plaintiff and Hassan. In fact, Mr. Balian volunteered that "I received police depositions that were taken. I looked at them but they were not relevant to the opinion that I was going to give but I was presented them." (8T52:18-21). He stated: "I wasn't going to render opinions as to the altercations and who did what to who" regarding the incident. (8T102:6-7).

In arguing the motion before the trial judge, counsel for Lowe's told the trial judge: "Mr. Balian reviewed this information [the police depositions], testified at his discovery dep that he only takes cases where he feels they have merit, and after I showed him these police statements that he reviewed, I said 'And you said at your discovery dep that you only take cases where you feel the case is legitimate.' . . I'm allowed to show his bias that he's not taking the cases he feels have merit, he's taking the cases where he's getting paid." (1T55:4-18).

Even assuming that the police officers' opinions and conclusions are probative on the issue of whether this case has any merit from the perspective of a retail expert, which they are not, Mr. Balian never testified that he only takes cases where he thinks they have merit, or are "legitimate;" he testified that he takes cases where he agrees with the theory of the case. (Pa310; 8T100:21-24). The police officers' opinions have no bearing on the theory of the case, which was that Lowe's put an untrained employee on the sales floor by himself before he was ready. Thus, the questions put to Balian which quoted the officers' opinions were not proper impeachment material in the first place.

Under NJRE 607, extrinsic evidence may be used to impair the credibility of a witness, but only if that evidence is relevant to credibility in the first place. Green v. New Jersey M'frs., 160 N.J. 480, 495 (1999). Mr. Balian's review of the deposition

testimony of the police officers prior to rendering his opinion does not show bias on his part because it did not affect his opinion one way or the other. And the fact that the police officers believed Hassan is not inconsistent with Mr. Balian's opinion that Lowe's breached the standard of care. "The more attenuated and the less probative the evidence, the more appropriate it is for a judge to exclude it." State v. Medina, 201 N.J.Super. 565, 580 (A.D.), *cert. den.*, 102 N.J. 298 (1985).

Moreover, no jury instruction would have been sufficient to cure the affect this hearsay testimony had on the jury. "A curative instruction must be immediate and specific in order to alleviate potential prejudice from inadmissible evidence and its substance must be adequate. State v. Vallejo, 198 N.J. 122, 134-35 (2009). This jury was given the following instruction six days later at the end of the case:

> "During the video testimony of plaintiff's expert Alex Balion [*sic*], you heard hearsay deposition testimony of the police witnesses. I hereby instruct you that you're not to consider the hearsay deposition testimony for its truth because you are the judges of the facts here, not the police." (11T160:23-161:4)

This jury was faced with the task of determining which of these two parties was telling the truth. The fact that two professional investigators, one of whom (Cpl. Meglio) did not even testify, concluded that the plaintiff threw the bag of grout at Hassan, would, and it is submitted, did, impact their

deliberations and prejudice them against the plaintiff. Even though the plaintiff testified that he felt that the police were accusing him of assault (7T115:16-19), now the jury would hear that the professional investigators both testified that they not only blamed the plaintiff, but also that there's only one way Hassan could have gotten grout on his back, and that's if the plaintiff threw it at him.

First, they heard that Cpl. Meglio stated that "we saw this kid he had it on the back of his head and down his back and there's only one way that could happen is if your back was towards him." Emphasis added. (8T103:4-6). Then they heard that Cpl. DeMiceli testified that "as far as the grout being on the back of Mr. Hassan I said, you would have had to have thrown that at him for it to be on the back of him." Emphasis added. (8T104:1-12).

D. EVEN IF THE POLICE OFFICERS' OPINIONS WERE VALID IMPEACHMENT MATERIAL, THEY SHOULD HAVE BEEN EXCLUDED UNDER NJRE 403 AS BEING UNDULY PREJUDICIAL. (1T62:5-11)

NJRE 403 provides that relevant evidence may be excluded if "its probative value is substantially outweighed by the risk of [] undue prejudice." For the reasons stated above, evidence that the police disbelieved the plaintiff's version of events was not relevant to the issue of the expert's bias because he testified that the officers' opinions did not impact his opinion. (8T52:18-20). However, even if relevant, such evidence should have been excluded as being unduly prejudicial. Here, the trial judge erred

on both counts: first, by ruling that the evidence was relevant as to bias and, second, that its probative value outweighed the risk of undue prejudice. (1T61:1-9).

The admission of the hearsay testimony of the officers had the effect of distracting the jury from the true import of Mr. Balian's testimony, which was that Lowe's breached the standard of care. It was an abuse of discretion for the trial judge to admit this evidence because it had the potential to, and, it is submitted, did, "divert jurors from a reasonable and fair evaluation of the basic issue," State v. Moore, 122 N.J. 420, 467 (1991), which was whether Lowe's breached its duty.

Accordingly, it is requested that a new trial be granted before a different trial judge and the police officers' opinion testimony be redacted from Mr. Balian's *de bene esse* deposition.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING NATASHA SAHR'S DAMAGES EVIDENCE DURING THE LIABILITY PHASE. (1T138:13-148:19)

A. STANDARD OF REVIEW. (Not raised below)

The trial court's admission of damages evidence during the liability phase of the trial is subject to the same standard of review as stated above regarding the police officers' opinions and conclusions: abuse of discretion. Griffin, *supra*. Here, the trial judge abused his discretion in admitting highly prejudicial damages evidence during the liability phase of the trial, which

that same judge had previously bifurcated, *sua sponte*. (Pa93).

B. DAMAGES EVIDENCE WAS IRRELEVANT IN THE LIABILITY PHASE OF THE TRIAL AND UNDULY PREJUDICIAL. (1T141:1-18)

On June 5, 2020, Judge Rivas granted Hassan summary judgment (Pa91) and barred plaintiff's economist and life care planner from using their stated measure of calculating plaintiff's damages. (Pa93). Both of those rulings were later reversed. (Pa7). In the same order as that which pertained to the experts, the judge *sua sponte* bifurcated the trial, as is permitted under Rule 4:38-2. (Pa93).

Then, after the witness Natasha Sahr came forward with family snapshots and text messages which appeared to show the plaintiff doing various activities four and five years after the incident complained of, Judge Rivas put the trials back together, and allowed the plaintiff to be cross-examined about Ms. Sahr's evidence during the liability phase of the trial. (1T138:14-148:18)

The reasoning put forward by counsel for Lowe's was because they did not want the jury, having found in favor of plaintiff on liability, to "regret" that they had found in plaintiff's favor after seeing the snapshots and texts. (1T142:17-24). The judge, after first informing counsel that in such an event the jury could still award plaintiff "zilch" (1T142:11-1433:3), decided to admit that evidence on credibility grounds, stating "if he lied about

his physical abilities, that's an issue. . . in liability." (1T148:14-15).

Plaintiffs argued that allowing Ms. Sahr's evidence in during the liability phase of the trial would deprive the plaintiff of a fair shake with the jury, just as, we contend, he was deprived of a fair shake with the police on the day in question. (1T141:1-18). Counsel for plaintiffs informed the judge that he would not put forth any evidence of the plaintiff's injuries in the liability phase of the trial, and that "the story ends" once plaintiff left Lowe's that day. (Ibid.). Nevertheless, the trial judge allowed that evidence in (7T142:11-160:2) over the objections of plaintiff's attorney. (1T138:18-148:18; 3T21:5-26:18; 7T150:14-19; and 7T158:17-25).

Relevant evidence is defined as evidence that has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." State v. Darby, 174 N.J. 509, 519 (2002). In the liability phase of this trial the extent of plaintiff's injuries and ability to work was not a fact of consequence to the determination of that part of the action. Only the liability of the defendants was a fact of consequence in that part of the case. If the evidence on liability and damages were going to overlap, which they do not, then the trial should not have been bifurcated in the first place. But, having previously bifurcated the trial, the trial judge should not have permitted

evidence of the latter to be admitted in the trial of the former, as doing so caused undue prejudice to the plaintiff and confused the issues in contravention of NJRE 403.

Rule 4:38-2 permits the court to order separate trials for the convenience of the parties or "to combat prejudice." Defendants often request bifurcation of the liability and damages portions of personal injury cases in order to avoid sympathy that jurors may feel towards plaintiffs with severe injuries. Diodato v. Rogers, 321 N.J.Super. 326 (N.J. Super. 1998), *citing* Lis v. Robert Packer Hospital, 579 F.2d 819, 824 (3rd Cir.1978).

Here, the opposite happened. Having succeeded through no effort of their own (because this was a *sua sponte* order) in avoiding any potential sympathy for the plaintiff that could have resulted from a recitation of the plaintiff's permanent nerve damage, inability to hold a job, constant pain, two surgical procedures, and inability to use the first fingers of his right (dominant) hand, the defendants turned the tables and unduly prejudiced the jury *against* the plaintiff by being able to show that the plaintiff is able to do certain activities four and five years after the incident.

Thus, the jury heard that plaintiff can ride an ATV and go fishing and climb a ladder, but they did not hear (from his vocational expert, (Pa320)) that his condition renders him unable to obtain and keep competitive employment; they did not hear (from

his medical expert (Pa360)) that he sustained a disc herniation, spinal cord compression, and nerve root compression from the events of May 13, 2017 requiring emergency surgery; and they did not hear (from his physiatrist (Pa368)) that he will need future significant future medical treatment, possibly even additional surgeries.

The evidence which was used against the plaintiff in this regard were photographs taken in 2021 or 2022 (Pa238-243), and text messages sent in October 2022 (Pa233), four and five years after the incident which caused the plaintiff's injuries. They were put before the jury in the cross examination of plaintiff, and counsel was also permitted to show them (4T68:19-71:5) and comment on them in his opening statement (Ibid.; 4T37:10-38:10) and closing argument (11T46:23-48:5). Even if these exhibits accurately depicted the plaintiff's physical condition at the time they were created, they have no relevance to his condition between the date of the injury and the four years thereafter prior to their creation, nor to the permanency of the injuries.

Even if Natasha Sahr's evidence was relevant to credibility, it should have been precluded as unduly prejudicial under NJRE 403. The defense had enough fodder for cross examination in what they claim were prior inconsistent statements of the plaintiff concerning the altercation itself; and which were relevant in the liability phase. There was no need to delve into plaintiff's

physical activities. In any event, the fact that plaintiff can ride an ATV and climb a ladder is not necessarily inconsistent with his inability to work in a competitive job market, and the defense offered no expert testimony to say otherwise.

In Redvanly v. ADP, Inc., 407 N.J.Super. 395 (A.D. 2009), *cert. denied*, 200 N.J. 367, this Court ordered a new trial after a defense verdict because evidence relevant only to damages but impacting plaintiff's credibility, and which could have unduly prejudiced the plaintiff, should only have been admitted in the damages phase of a bifurcated trial:

> "The after-acquired evidence is relevant and admissible only on the issue of damages. Here, evidence of the 'NYNEX issue' was admitted before the jury determined defendants' liability. This was improper because the impact of such evidence could have unduly prejudiced the jury against Redvanly. N.J.R.E. 403. Therefore, we hold that, due to the prejudicial nature of the NYNEX issue, and its limited purpose for admissibility, the failure to bifurcate the trial and admit this evidence only at the damages phase constitutes an abuse of discretion. For that reason, we reverse the judgment and remand for a new trial, which shall be bifurcated into a liability phase followed by a damages phase. . . . In the liability phase, there should be no proof, or even mention, of the" damages evidence.

Redvanly, at 402.

Similarly in Johnson v. Dobrosky, 187 N.J. 594 (2006) a new trial was warranted as the admission of character evidence relevant only to damages may have unduly prejudiced the plaintiff in the eyes of the jury. See also Diaz v. City of Anaheim, 840 F.3d 592 (9th Cir. 2016), where evidence that the plaintiff was in

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a gang should not have been admitted unless the trial had been bifurcated and the gang evidence used only in the damages phase.

Accordingly, it is requested that a new trial be granted before a different trial judge and if evidence of the plaintiff's physical condition after the incident is to be admitted, it be admitted only in the damages phase of a bifurcated trial.

III. A NEW TRIAL IS REQUIRED BECAUSE THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY IMPROPERLY INSTRUCTING THE JURY. (11T152:12-186:13)

Plaintiffs maintain that the trial court committed reversible error with regard to the following improper jury instructions: (1) *respondeat superior*, (2) instructing the jury that they must find that Lowe's was either directly liable for negligent training and supervision or vicariously liable, but not both; (3) and refusing to charge the jury on the Restatement (Second) of Torts 317.

A. STANDARD OF REVIEW. (Not raised below)

The trial court's instructions to the jury "must correctly state the applicable law and instruct the jury how to apply the law to the facts." Finderne Mgmt. Co. v. Barrett, 402 N.J. Super. 546, 576 (A.D. 2008), *certif. denied*, 199 N.J. 542 (2009). Erroneous jury instructions constitute reversible error only if the jury could have come to a different result had it been correctly instructed. Velazquez ex rel. Velazquez v. Portadin, 163 N.J. 677, 688 (2000). Erroneous instructions on a material part of the charge are presumed to be reversible. McClelland v.

Tucker, 273 N.J.Super. 410, 417 (A.D. 1994).

B. IMPROPER JURY INSTRUCTIONS

1. Respondeat Superior (10T29:23-38:9; 61:1-66:7)

a) The Jury was Improperly Instructed that Lowe's Could Only be Liable if Hassan Acted Negligently in Self-Defense. (11T169:20-170:1)

From the outset of this case the plaintiffs have maintained that defendant Hassan, while acting within the scope of his employment with Lowe's, struck the plaintiff in the head causing plaintiff to sustain severe injuries. Lowe's disputed that Hassan acted as alleged and argued that, even if he did, Hassan's actions did not occur within the scope of his employment. The trial court agreed and granted Lowe's summary judgment. This Court reversed that ruling. (Pa7).

This Court, in sending the case back for trial, held that "'[t]he fact that the employee's conduct is intentional and wrongful does not in itself take it outside the scope of his employment.'" (Pa28-29), citing Vosough v. Kierce, 437 N.J.Super. 218, 236 (A.D. 2014). Thus, even if Hassan struck the plaintiff like the plaintiff said he did, under this Court's ruling it is feasible that a jury could find that Hassan was acting within the scope of his employment. This Court, citing the Restatement (Third) of Agency, §7.07 cmt. c (Am. Law Inst. 2006), stated "[w]hen an employee's assigned duties place the employee in

situations in which physical consequences may follow in an uninterrupted sequence from verbal exchanges with third parties[,] . . . [i]t is a question of fact what motivated an employee's conduct as verbal exchanges escalate or when an employee's use of physical force becomes more pronounced. . . . Whether that escalation transformed Hassan's actions into 'an independent course of conduct' outside the scope of his employment, or whether his actions were unexpectable by Lowe's under the circumstances, Davis [v. Devereax Found., 209 N.J. 269, 303 (2012)] was for a jury to decide." (Pa29-30)

As will be shown, the trial court's instructions to the jury on *respondeat superior* (11T168:17-170:1) reflect a serious misreading of this Court's opinion. The trial court instructed the jury that in order for Lowe's to be vicariously liable for Hassan's actions, Hassan must have been acting negligently in self-defense while defending himself from an attack by the plaintiff! The improper instruction was as follows:

> "Negligence is a matter of law charged through the principal laws [sic], but only if you find that Hassan acted negligently in self-defense while in the scope of his duties or authorities. If you so find, the defendant Lowe's will be deemed negligent for the wrongdoing to the same extent as the officer, employee, or agent." (11T169:20-170:1).

Thus, even if the jury believed the plaintiff's version of the events, and even if they believed that Hassan was acting within the scope of his employment at the time, they could not have ruled

in plaintiff's favor on *respondeat superior* with these instructions, which were sent into the jury room with them. (11T186:19-21). Therefore, this was reversible error because they could have come to a different result if they had been properly instructed. Velazquez, *supra*.

Plaintiff's counsel argued this exact point to the trial judge: "If plaintiff's version is believed by the jury there's no self-defense here," (10T32:7-9) and "you've got to give them the option of finding him negligent even if they believe my guy, which this kind of excludes my guy's whole version of the events." (10T33:5-8). Plaintiff's counsel provided the trial judge with a proposed instruction that tracked Model Jury Charge 5.10H. (Pa315). In the alternative, he asked the trial judge to get rid of the words "self-defense" in the charge (10T30:7-9), but that was refused. The trial judge even refused plaintiff's counsel's request to insert the word "or" in between negligently and self-defense so that the charge would have read: "but only if you find that Hassan acted negligently **OR** negligently in self-defense while in the scope of his duties." (10T32:11-15; 10T36:1-2).

b) The Trial Court Improperly Altered the Instructions As Set Forth In Davis v. Devereaux. (11T169:12-19)

In its earlier opinion in this case, this Court cited the Davis case, *supra*, at 303, and stated "[a]s our Supreme Court Supreme Court recognized in Davis, '[w]hen the employee's conduct - however aggressive or misguided - originated in [an] effort to

fulfill an assigned task, the act has been held to be within the scope of employment.'" (Pa28). But the trial judge here changed that language around at the request of Lowe's, substituting "intentional or wrongful" for "aggressive or misguided" so as to accommodate Lowe's request and sidelining plaintiff's version. (11T169:12-19).

In arguing that the "aggressive or misguided" language should be replaced with something else, counsel for Lowe's revisited his erroneous self-defense argument and stated "I think there's an issue there because plaintiff can only recover his negligence claim if Mr. Hassan was using self-defense improperly." (10T62:14-25). Plaintiff's counsel argued that the "aggressive and misguided" language should remain because that was the language used in this Court's opinion, and in Davis. (10T63:20-64:15).

The trial judge went with Lowe's version of that part of the instruction too, leaving out "aggressive and misguided," which is the law as set forth in the cases.

2. The Jury Was Improperly Instructed That They Could NOT Find that Lowe's was *Both* Vicariously Liable and Directly Liable for Negligent Training or Supervision. (11T179:3-8)

The jury in this case was asked to determine whether Lowe's was vicariously liable for the negligence of Hassan or, if not, whether Lowe's was liable for direct negligence in its training or supervision of Hassan. In both the instructions (11T179:3-8) and

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in the verdict sheets (Pa71-75), and in opening and closing argument from Lowe's, they were erroneously informed that it cannot be both; that it's either or. This was erroneous and constitutes reversible error. A new trial should be ordered before a different trial judge in which this instruction and argument are prohibited.

All along throughout the case Lowe's kept making this faulty argument and it ended up being incorporated into the jury instructions and verdict sheets. In their opening statement: "I want to correct one thing that plaintiff said. Only one of these -- plaintiff's counsel said. Only one of these claims can apply, not both. You're going to have to pick which one is applicable." (4T57:10-13). In argument about jury instructions: "No, the law is clear. The only way you get to negligent training and supervision is if the employee is outside the scope of employment." (10T46:20-22). In closing argument: "We have two sets of verdict sheets, really. One's going to be for what's called vicarious liability, and another one for negligent training and/or supervision, because they're the two separate claims, and only one can apply." (11T56:10-14).

Lowe's attorneys were called on this by plaintiff's counsel and were asked at one point where they came up with the idea that its either vicarious liability or direct liability, not both.

This was the exchange:

> "MR. CRINO: Negligent training and supervision only is permitted if he's outside the scope of his employment.
> THE COURT: Right.
> MR. VRHOVC: I don't see that. I don't know where you get that.
> MR. HUBERT: It's from the New Jersey Supreme Court.
> THE COURT: Which case?
> MR. HUBERT: Well I think it might be mentioned in the Mavrikidis (phonetic) case." (10T72:6-73:3).

In fact, however, the court in the case of Mavrikidis v. Petullo, 153 N.J. 117, at 137 (1998) specifically stated that plaintiffs "may include causes of action for both direct and vicarious liability", for example, in cases where a defendant engages an incompetent subcontractor. See also Alloway v. Bradlees, Inc., 157 N.J. 221 (1999) (facts could support both vicarious and direct liability against Pat Pavers); McQueen v. Green, 202 N.E.3d 268, 280 (IL Supr. Ct. 2022) (held "that a plaintiff may proceed with both a direct negligence action against an employer and an action under a theory of vicarious liability.")

Under the facts adduced at trial, this jury should have been given the option to find Lowe's both vicariously and directly liable. The jury was entitled to believe that Hassan was acting within the scope of his employment AND Lowe's was negligent in its training and supervision of Hassan. For example, if Lowe's had failed to train Hassan such that he was not ready to be on the sales floor alone (negligent training), and/or failed to supervise

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supervision), and he nevertheless approached customers by himself because that was what he was told to do as part of his job, and did something negligent (vicarious liability), then there could be both direct and vicarious liability. See, *e.g.*, Mavrkidis, Alloway, and McQueen, *supra*.

3. The Trial Judge Committed Reversible Error in Refusing to Instruct the Jury In Accordance With the Restatement of Torts, Section 317 (10T40:5-42:6)

The plaintiff here submitted a proposed jury instruction (Pa316) to the trial judge asking him to instruct the jury on the Restatement of Torts, (2d), §317, which states:

> "A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them if:
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant . . . and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control."

The trial judge refused to so instruct the jury, apparently agreeing with Lowe's argument that §317 "is not the current state

of New Jersey law." (10T40:15-16).

In fact, it is the current state of New Jersey law. The New Jersey Supreme Court adopted §317 in DiCosala v. Kay, 91 N.J. 159, 171-172 (1982), and confirmed its adoption of that provision 16 years later in Mavrikidis, *supra*, at 133, where the court stated "as one of the principal bases for that decision [DiCosala], we cited section 317 of the Restatement (Second) of Torts (1963)."

This Court, in Doe v. XYC Corp., 382 N.J.Super. 122 (A.D. 2005, *citing* DiCosala, supra, reversed a summary judgment ruling and applied the Restatement (Second) of Torts §317 to a case where the employer knew its employee was looking at pornography on his work computer but failed to act and the employee went on to take naked pictures of a 10 year old girl off site.

This instruction should have been read to the jury because the evidence at trial showed that Hassan was (a) on the premises of Lowe's; and (b) Lowe's knew it had the ability to control him because he was working at the time, and (c) knew of the necessity and opportunity to control him because evidence showed that Lowe's was aware that its new employees (like Hassan) could feel "too much pressure" when being approached by customers (6T77:9-78:13). This is evidenced by the testimony (Ibid.), and by the training video which Lowe's made that tells trainees (but not Hassan because he did not see it) (8T63:12-20)) that "[y]ou will have the

dedicated training time to better understand your department, practice selling skills, and shadow experienced employees <u>before working by yourself</u>." (Pa305/2:20-23) (8T64:6-22). The evidence at trial showed that putting an employee on the sales floor who was "alone in the department" (8T210:21-24), and who could not answer questions because he was not properly trained, rendered Hassan "unable to deal with the situation that arose" and "created the frustration" on Hassan's part causing the incident. (8T88:19-89:12).

Accordingly, this matter should be remanded for a new trial before a different trial judge and the jury instructed as to §317 of the Restatement of Torts (2d).

IV. <u>THE TRIAL JUDGE ERRED IN RULINGS ON ARGUMENT OF COUNSEL</u>. (11T4:19-5:7) (10T16:18-20:11)

A. STANDARD OF REVIEW. (Not raised below)

At the trial of this matter, the trial judge made significant errors concerning what the attorneys were permitted to argue in opening statements and in closing arguments. Lowe's was permitted to argue that the plaintiff was NOT suing Hassan for assault, and plaintiffs were precluded from even mentioning the fact that Hassan failed to appear and testify live. Such trial court decisions should be reversed when they are "clearly capable of producing an unjust result." R. 2:10-2. If there is "some degree of possibility that [the error] led to an unjust result" a new

trial should be ordered. State v. R.B., 183 N.J. 308, 330, (2005).

B. LOWE'S SHOULD HAVE BEEN PRECLUDED FROM ARGUING THAT PLAINTIFF WAS NOT SUING HASSAN FOR ASSAULT. (11T4:19-5:7)

The trial judge erred in permitting counsel for Lowe's to tell the jury in his closing argument that plaintiff was NOT suing Hassan for assault and battery, because the only allegation at trial against Hassan was negligence. (11T4:19-5:7). In his closing argument counsel said:

> "You may be surprised -- you may have been surprised to learn that the plaintiff in this case is not alleging an assault and battery. We have had all this testimony, right? All this back and forth about who punched who, and who caused the fight. And the plaintiff isn't seeking to recover for an assault and battery by Mr. Hassan. What he's seeking to recover is negligence, right? Acting unreasonably. And so that negligence of Mr. Hassan is alleged improper self-defense. . . . the only legal remedy that plaintiff has in this case is for you to believe that the self-defense was improper." (11T59:1-24).

The trial judge's ruling permitting this argument (11T4:19) was exactly at odds with his ruling earlier in the case where the colloquy went as follows:

> "MR. HUBERT: Can I then say there is a tort claim known as "battery" that is not being brought?
> MR. VRHOVC: It's not before them.
> THE COURT: No.
> MR. HUBERT: So leave it at the "he's only bringing a negligence claim."
> THE COURT: He's only bringing a negligence claim."
> (3T18:13-20).

Compounding the error, counsel also improperly used his

closing argument to once again erroneously argue that plaintiff could only recover if Hassan negligently defended himself. See section III(B)(1), above. (11T59:1-24).

Allowing counsel to compare assault and negligence in referring to plaintiff's allegations against Hassan in this manner was "clearly capable of producing an unjust result." Rule 2:10-2. If Hassan acted as plaintiff claimed, by hitting him in the head, then the jury was entitled to conclude that Hassan was negligent, regardless of whether such conduct also constituted the intentional tort of assault and battery. The only count then pending against Hassan was negligence and the trial judge should have stuck to his original ruling because plaintiff was "only bringing a negligence claim." (3T18:13-20).

Negligence is defined as "failure to exercise, in the given circumstances, that degree of care for the safety of others which a person of ordinary prudence would exercise under similar circumstances." Model Jury Charge 5.10A(1). Plaintiff's version of the events, which the jury was entitled to believe, was that Hassan was walking away while plaintiff was asking for his name, at which time Hassan suddenly wheeled around and hit him in the head with a broom. This conduct was something that a person of ordinary prudence under similar circumstances would not have done, and was therefore negligent.

To prove negligence, "a plaintiff must establish the following

elements: (1) duty of care, (2) breach of that duty, (3) proximate cause, and (4) damages." Conklin v. Hannoch Weisman, 145 N.J. 395, 416, (1996). In reversing the trial judge's earlier finding that Hassan had no duty to not assault Lowe's customers, this Court stated that "at a minimum a store employee has an obligation not to assault the store's customer." (Pa31).

In prosecuting his negligence action the plaintiff only needed to prove that Hassan acted unreasonably, without the subjective intent to harm required for an assault and battery claim. Model Jury Charge 3.10A. Under negligence, liability may be imposed for the same conduct as assault, however without the intent. Abrams v. General Star Indem., 67 P.3d 931, 935 (Or.Sup.Ct. 2003). "Willfulness is not a defense to a charge of negligence." Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 390 (1970); N.J. Mfrs. V. Vizcaino, 392 N.J.Super. 366, 370 (A.D. 2007).

C. PLAINTIFFS SHOULD HAVE BEEN PERMITTED TO COMMENT ON HASSAN'S ABSENCE. (10T19:9-20:11).

Prior to trial, the plaintiffs served Notices to Produce pursuant to Rule 1:9-1 upon counsel for Mr. Hassan for Hassan to testify at trial. (Pa311-314). At no time prior to trial did counsel for Hassan inform plaintiffs that Hassan would not appear. At trial, however, counsel for Hassan informed us for the first time that "[w]e have been unable to locate Mr. Hassan." (1Pa117:14-118:18). As a result, plaintiffs asked for a missing

witness charge with an adverse inference under Model Jury Charge 1.18A before the trial began and at the charging conference, and a proposed charge was submitted to the trial judge. (Pa317; 1Pa117:22-24; 10T16:18-20:13). The trial judge not only refused to give the charge, but he also refused to permit plaintiff's counsel from even commenting on Hassan's absence in his closing argument, saying "[y]ou can't do it." (10T19:9-20:11).

Here, the trial judge erred in refusing to permit plaintiff's counsel to comment on Hassan's absence at trial. Counsel should have been permitted to comment on the failure of Hassan to testify under Nisivoccia v. Ademhill Assoc., 286 N.J.Super. 419 (A.D. 1996). In Nisivoccia the issue was whether counsel's comments in closing argument that the adversary failed to call a witness had required that attorney to first seek a missing witness charge and permission from the trial judge. The Nisivoccia court ruled that there was no requirement to do either. Ibid., at 429.

While there is a requirement that the party asking for an adverse inference charge notify the court and the adversary before the parties rest of his intention to seek such a charge, State v. Hill, 199 N.J. 545, 560-561 (2009), the purpose of the notification requirement is so that the adversary may yet call the witness to avoid the adverse inference. Nisivoccia, at 430.

This Court in Nisivoccia noted the difference between criminal

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civil trials (see 3T30:21-25), and ruled that there was no advance notice requirement in civil cases, stating that "[a]ll attorneys in civil cases are charged with knowledge that an adversary may focus on the failure to call a witness." Ibid., at 430. Moreover, the defense in this case became well aware that plaintiffs wanted and expected Hassan to testify when they received the Notice to Produce. This was reinforced when counsel requested the missing witness charge with an adverse inference both before trial and at the charging conference. Therefore, counsel should have been permitted to comment in closing arguments on Hassan's failure to testify at trial.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this matter be remanded for a new trial before a different trial judge and that: (a) the police officers' opinions and conclusions be redacted from the *de bene esse* testimony of Alex Balian; (b) evidence relevant to damages, including Natasha Sahr's texts and family snap-shots, not be used nor even mentioned in the liability phase of the trial; (c) that the defendants' liability not be limited to Hassan acting negligently in self-defense, and the jury instructions and argument of counsel exclude any mention that the defendants are liable only if Hassan acted negligently in self-defense; (d) that Lowe's may be both directly and vicariously liable; (e) that the jury be instructed as to the Restatement (2d)

of Torts, §317; (f) that evidence and argument that plaintiff did not allege assault and battery against Hassan be precluded; and (g) if Hassan once again fails to appear after being noticed to do so, plaintiffs may comment on his absence.

Dated: 6/29, 2023

Richard A. Vrhovc
Attorney for Plaintiffs

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IVAN TYMIV and OKSANA TYMIV,	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
Plaintiffs-Appellants/	:	Docket No. A-001830-22
Cross-Respondents,	:	
	:	**Civil Action**
vs.	:	
	:	On Appeal from Order of the Superior
LOWE'S HOME CENTERS, LLC,	:	Court of New Jersey, Law Division,
	:	Middlesex County
Defendant-Respondent/	:	
Cross-Appellant	:	Docket No. MID-L-6536-17
	:	
and	:	Sat Below:
	:	Jury trial before Hon. Alberto Rivas
AHMED HASSAN	:	
	:	
Defendant-Respondent	:	
	:	

BRIEF OF DEFENDANT-RESPONDENT/CROSS-APPELLANT LOWE'S HOME CENTERS, LLC

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Date of Ruling: January 24, 2023

Oral opinion (10T 4:1 – 6:23)

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PRELIMINARY STATEMENT

Six years after filing suit, three years after having his case dismissed on summary judgment, and two years after having his case reinstated, Plaintiffs Ivan and Oksana Tymiv presented their case to a jury of their peers that a Lowe's employee assaulted Ivan (hereafter "Tymiv") due to Lowe's alleged negligent training and supervision. And when he finally presented his claim, his version of events were resoundingly refuted and disproven by (1) objective, physical evidence; (2) his own witnesses; (3) his own testimony; and (4) scientific evidence.

The primary factual dispute at trial concerned whether Ahmed Hassan, the Lowe's employee, assaulted Tymiv or whether Tymiv initially assaulted Hassan by throwing a bag of grout while his back was turned, requiring Hassan to defend himself. It is undisputed Hassan walked away from Tymiv prior to the altercation. Objective, physical evidence established Tymiv threw the bag of grout. For example, (a) a significant amount of grout was located on the back of Hassan's head and neck; (b) a significant amount of grout was located on the shelving unit, indicating an impact point between the bag of grout and the shelving; (c) no grout was located on Tymiv other than near his left hand which he used to hold the grout; and (d) no grout was located on Plaintiff's witness, Sergei Oganov, who was allegedly standing next to Tymiv and Hassan when Hassan allegedly broke the bag of grout by punching the bottom of the bag. Hassan then allegedly punched Tymiv.

The evidence established that Tymiv and Oganov were far away from Hassan when the bag of grout broke; not next to him. The lack of grout on both Tymiv and Oganov refuted their testimony that they were covered in grout after the incident. Oganov even admitted he could not explain why there was no grout on him upon reviewing the police bodycam video which captured Oganov in the store minutes after the incident. When confronted with the fact that his trial testimony regarding the incident contradicted multiple other prior statements, Tymiv dramatically blurted out "it took us awhile to finally figure out what actually happened, for me to understand exactly what happened."

Dr. Fisher, Lowe's biomechanical expert, testified that Tymiv's version of events was contradicted by the physical, scientific evidence. Fisher concluded that had Tymiv been next to Hassan when the bag broke he would have been covered in grout. Further, Dr. Fisher opined it was impossible for Hassan's alleged strike to the bag to lift the bag upward into the shelving. Such force would have caused the bag to break upon impact, spilling the grout onto the front of both Hassan and Tymiv. Plaintiffs presented no expert testimony to rebut Dr. Fisher and were left to argue that Hassan could have grabbed the bottom of the bag and flung it onto the shelving, a position unsupported by the record.

The jury concluded Hassan's conduct was outside the scope of his assigned duties, precluding a finding of vicarious liability. The jury's conclusion was

supported by ample, credible evidence given that Hassan's intentional conduct – whether a battery or proper self-defense, was not within the scope of his job duties and was not expected by Lowe's. The jury next concluded Hassan's conduct was not negligent. Without evidence of improper conduct by Hassan, Plaintiffs could not sustain a negligent training and supervision claim against Lowe's.

Against this backdrop, Plaintiffs allege a variety of evidential errors and improper jury charges to request a new trial. Plaintiffs' legal arguments are unfounded, focus on the vicarious liability charge despite the jury's conclusion this claim was inapplicable, and ignore the substantial evidence presented at trial which established Tymiv assaulted Hassan. Even assuming a legal error occurred, none is significant enough individually or cumulatively, to require reversal and a new trial given the evidence on record.

Based on the jury's factual determination negating the vicarious liability claim, Lowe's' cross-appeal arguing Plaintiffs failed to establish a *prima facie* negligent training and supervision claim, is dispositive. Plaintiffs presented no evidence establishing Hassan was incompetent, unskilled or dangerous. Instead, the record established he was an experienced Lowe's employee who was skilled in dealing with customers and had no history of complaints. Lowe's therefore requests that the Court uphold the jury's verdict and dismiss Plaintiffs' appeal.

STATEMENT OF FACTS

The statement of facts is divided into four sections for the reader's convenience: (1) background facts; (2) facts relevant to Lowe's cross-appeal; (3) facts relevant to establishing Tymiv assaulted Hassan; and (4) facts relevant to Plaintiffs' claimed legal errors.

I. Background.

This case arises out of a physical altercation that occurred in Aisle 43 of the Lowe's Home Improvement Store located in Marlboro, New Jersey at approximately 10:10 a.m. on May 13, 2017, between Ivan Tymiv, a Lowe's customer, and Ahmed Hassan, a Lowe's employee. Hassan was hired as a Customer Sales Associate ("CSA") in the Flooring Department on May 4, 2017. [6T 24:7-11, 251:22-23]. At the time of the incident, Hassan was still in training and working to become a Red-Vested employee. [6T 95:16-23, 196:8-15]. Hassan had been working at this Lowe's location since being hired on May 4, 2017, had completed more than sixteen hours of training over the course of two days, and was wearing his name tag on his chest as required by Lowe's' internal policy. [8T 167:10-21, 171:16-172:19]. Hassan had worked at this Lowe's location on two prior occasions – the summers of 2014 and 2015 - as a cashier. [6T 24:1-6, 68:4-10; 8T 162:24-163:1].

A. According to Tymiv, Hassan Assaulted Him.

The parties presented conflicting accounts of the incident at trial. Tymiv contends Hassan intentionally assaulted him following a verbal exchange. Specifically, Tymiv testified that he and his client, Sergei Oganov went to the Marlboro Lowe's to purchase supplies for a home remodeling project. [7T 55:10-56:12]. At some point, he observed Hassan and Oganov discussing grout. [7T 58:6-59:19]. According to Tymiv, he needed grout that could be used on joints that were less than one eighth of an inch, so he believed he needed unsanded grout. [7T 59:12-61:5]. Tymiv asked Hassan, who was holding a push-broom, whether a particular bag of grout could be used for his project. [7T 59:20-61:20]. In his police statement and answers to interrogatories, the relevant portions of which were read to the jury, Tymiv stated that Hassan told him "the grout was good I should use it." [7T 122:4-123:11, 129:9-130:5].[1] Tymiv disagreed with the advice Hassan gave him and told Hassan to learn more information before helping customers. [7T 61:21-62:7]. Hassan allegedly responded by getting angry and stating "I have a PhD in history, I don't have to learn this." [7T 62:7-12]. Hassan then walked away from Tymiv, down the aisle towards the back of the store, pushing the broom. [7T 62:24-63:10, 165:17:166:6].

[1] Tymiv's trial testimony did not mention whether Hassan told him the grout was appropriate to use. [See 7T 61:6-62:20].

Tymiv became upset over this interaction and, while carrying a ten-pound bag of grout, followed Hassan into the neighboring aisle, repeatedly requesting his name so that he could report it to a manager. [7T 62:18-65:9, 66:18-67:9, 161:23-24, 164:18-166:25]. Tymiv alleges that he followed Hassan approximately ten-to-fifteen feet down the adjacent aisle, maintaining a distance of approximately four feet, and continuing to demand his name. [7T 66:18-67:23]. Tymiv claims that at this point Hassan, who had been sweeping the aisle with the push broom as he walked away from Tymiv with his back turned, suddenly turned around and walked towards Tymiv with the broom stick in hand, until his chest was touching the bag of grout Tymiv was holding against his chest. [7T 67:24-68:16]. According to Tymiv, Hassan then struck the bag of grout: "he's standing close to me and like with his right he hits the grout bag out of my hand knocking down in the air." [7T 68:17-22]. The ten-pound bag of grout then supposedly flew up into the air, behind Hassan, and hit a shelving rack, spilling grout on Hassan's back. [7T 68:22-69:13, 75:2-24]. Tymiv testified that he smirked at Hassan after seeing him covered in grout and "I was like kind of like you see what you did?" [7T 69:12-18]. Tymiv alleges that Hassan then punched him in the left temple while holding the broom stick in his hand. [7T 69:17-21].

B. Hassan Testified He Struck Tymiv in Self Defense.

Hassan's account of the incident confirmed that he observed Tymiv in the Flooring Department and approached to see if he needed assistance selecting grout. [8T 202:2-10]. Tymiv asked Hassan about the difference between sanded and unsanded grout. [8T 202:9-10]. Hassan testified that he began to explain the different types of jobs each variety of grout could be used for, when Tymiv suddenly grew agitated and told him he should learn more about the products before answering customer questions. [8T 202:10-20]. Hassan then attempted to explain that he was still in training. [8T 202:20-22]. Sensing that Tymiv had gone "from zero to one hundred angry" in the short time they had been interacting, Hassan testified that he attempted to defuse the situation by walking away. [8T 202:25-203:16]. Hassan resumed sweeping the floor with a push broom he had been holding during the exchange and walked down the aisle towards the rear of the store with his back to Tymiv. [8T 203:15-18]. Tymiv followed Hassan, yelled at him, and repeatedly demanded his name. [8T 203:15-204:6]. Tymiv stalked Hassan down the next aisle, as Hassan continued to sweep with his back turned to Tymiv. [8T 203:15-204:6]. About midway down the aisle, Hassan glanced behind him and observed Tymiv approximately ten feet away, approaching, with one fist clenched, and holding a bag of grout in his other arm. [8T 204:13-19, 223:17-25]. Hassan glanced back a second time, and observed Tymiv had closed the distance and was now only three to five feet behind him. [8T 205:8-12, 223:17-25]. Immediately thereafter, Hassan felt the

bag of grout strike the back of his neck, head, and shoulders. [8T 205:12-19, 206:9-14]. Hassan then turned around and used the broom stick he was holding to block a punch from Tymiv, and in doing so he struck Tymiv in the head. [8T 205:20-206:19; 9T 17:23-19:23].

II. Facts Relevant to Lowe's' Cross-Appeal.

A. Hassan's Supervisors Confirmed that He was Experienced, Good with Customers, Knowledgeable about the Store's Products, and Actually Provided Tymiv with Accurate Information about the Grout in Question.

The jury heard testimony from Hassan's immediate supervisor, store manager, and HR manager, who stated that he was adequately trained and amicable in dealing with customers and that there was nothing in his employment history to suggest he would attack a customer. In particular, Christine Jennings, Hassan's HR manager, testified that the training Hassan completed after being hired to work in the Flooring Department was merely a formality, since he had already completed CSA training twice, each time he was hired as a cashier. [6T 45:24-47:6]. Accordingly, in her opinion, Hassan was trained and knowledgeable in the essential skills of his position at the time of the incident. [6T 29:8-12]. She also confirmed that it was Lowe's policy to allow employees who had not completed their training to interact with customers without supervision. [5T 56:11-19, 57:3-8, 68:24-69:4; 6T 58:8-25].

Ryan Madden, an assistant manager at the Marlboro Lowe's who supervised Hassan in each of his three stints of employment, testified that Hassan had significant

experience dealing with Lowe's' customers. [6T 142:6-18]. He described Hassan as respectful and courteous and denied receiving any complaints about Hassan or hearing reports of any altercation between Hassan and a customer prior to the incident with Tymiv. [6T 136:3-138:18]. Madden also confirmed that employees in training were "encouraged" to assist customers even when they were not being supervised by a Red-Vest employee. [6T 200:24-202:4].

Finally, Hassan's Flooring Department supervisor, George Craig, testified that he had actually provided Hassan training on Lowe's grout products prior to the incident. [9T 52:10-54:4]. Craig also confirmed that the information Hassan provided Tymiv about the grout in question was accurate. The bag of grout was marked as an exhibit and introduced as evidence. [9T 52:24-53:5]. Craig testified that it contained "universal" grout that could be used in applications that required unsanded grout. [9T 53:6-22, 78:9-22]. In addition, Craig stated that the grout was appropriate to use on joints measuring less than one-eighth of an inch. [9T 78:9-14].

Craig also testified he personally observed Hassan interacting with customers on his own in the Flooring Department; he described Hassan as courteous and respectful with customers, and noted that he would routinely seek out senior employees for assistance with customer questions he did not know the answer to. [9T 72:9-24]. Craig never encountered any issues with Hassan and was unaware of any complaints about Hassan's demeanor or conduct. [9T 72:16-73:5].

Accordingly, Craig testified he was comfortable with Hassan interacting with customers in the Flooring Department without supervision. [9T 73:18-22].

Plaintiffs did not present any evidence at trial contradicting the above testimony regarding Hassan's experience, skills, and demeanor.

B. Plaintiffs' Expert in Retail Operations was Unable to Establish that Lowe's Deviated from Internal Policies or that Hassan Actually Demonstrated a Lack of Supervision or Training in his Interaction with Tymiv.

Plaintiffs' expert Alex Balian, proffered as a safety and operations expert in retail store operations, rendered an opinion as to the adequacy of Lowe's' policies and procedures related to employee training and supervision. [8T at 30:2-55:12]. Balian concluded that Lowe's' failure to adhere to industry standards in the training and supervision of Hassan caused the May 13, 2017 altercation with Tymiv. [8T 87:25-90:23] Specifically, Balian testified that Lowe's failed to implement its training procedure and allowed Hassan on the sales floor alone, without the supervision of a trained Red-Vest employee, before he had completed Flooring Department sales training. Ibid. Balian posited that this deviation caused the altercation because it "presented . . . a situation where there was a level of frustration." [8T 90:11-20].

Nevertheless, Balian made a series of concessions that undermined this conclusion. He testified that retail chains, including Lowe's, effectively dictate their own "industry" standards when they promulgate internal policies, and that Lowe's

was entitled to interpret their own policies to determine what they mandated. [8T 94:1-12, 122:9-123:23, 129:8-12]. Confronted with the testimony of Lowe's' corporate representative on the issue of employee training, Balian then had to concede that Lowe's interprets their policies as permitting employees to approach customers on the floor even if they are still in training. [8T 128:25-129:5].

Moreover, Balian was unable to conclude that Hassan lacked adequate training to discuss various types of grout with Tymiv on the date in question. As an initial matter, Balian agreed that it was appropriate for Hassan to approach Tymiv and inquire about the project he was doing with grout. [8T 116:21-117:1]. In addition, he could not dispute the evidence that Hassan had actually received training from Lowe's on how to interact with customers prior to the altercation with Tymiv. [8T 109:3-114:5]. Indeed, when confronted with Hassan's testimony about the difference between sanded and unsanded grout, Balian conceded that Hassan's knowledge about grout may have come from training he received from Lowe's. [8T 117:2-7]. Balian then conceded he lacked sufficient knowledge to evaluate whether Hassan had actually provided Tymiv with incorrect or misleading information. [8T 119:1-13].

III. Facts Relevant to Establishing Tymiv Assaulted Hassan.

A. Based on the Physical Evidence at the Scene, Police Officers Were Skeptical of Tymiv's Version of Events.

The police officers responding to the incident, Corporal Dennis Demiceli and Corporal Joseph Meglio, interviewed Tymiv, Hassan, and other store employees when they arrived. [See 4T 86:17-138:4, 146:21-151:13]. Demiceli noted that no grout appeared on Tymiv but that he saw significant evidence of grout present on the back of Hassan's body, including his neck and back. [4T 160:25-162:13]. Bodycam footage played for the jury showed Corporal Demiceli, audibly frustrated, confront Tymiv after he observed the grout on Hassan's back: "

> CPL. DEMICELI: Why is this guy covered in grout on the back of him?
>
> . . . .
>
> CPL. DEMICELI: Did he dump the down the back of his shirt or did you throw the grout at the back of him?
>
> . . . .
>
> CPL. DEMICELI: Okay. So I'm going to ask my question again. Why is the back side of him covered in grout?"
>
> MR. TYMIV: Because it went up.
>
> CPL. DEMICELI: It went up so there's nothing in the front of him. There nothing on –
>
> . . . . .

> CPL. DEMICELI: . . . . the front of this kid. It's on the back of him. So it miraculously just went to the back of him. Give me the ID. I'm not going to ask you again. Why is this guy covered in grout on the back of him?
>
> MR. TYMIV: Why are you yelling?
>
> CPL. DEMICELI: Because you're not listening to me.
>
> MR. TYMIV: I am.
>
> CPL. DEMICELI: Why is the back side of this kid covered in grout?
>
> MR. TYMIV: I have no idea.

[7T 84:3-86:5].[2]

When asked about the responding officers' demeanor, Tymiv testified that he felt that they did not believe his account of what transpired. [7T 90:16-96:5, 115:16-19].

[2] The same exchange is included in the bodycam footage that was entered into evidence at trial and included in the record on appeal. Portions of the bodycam footage is part of the appendix and is being provided via cd. A copy of the transcript of the bodycam is also included in the appendix. See [DLa 41-42] for the above exchange. Further, the transcript contains markings for deletions, but those were Plaintiffs' initial suggestions and not the final agreement of the parties or ruling of the trial court. Interactions between the police and the parties were agreed to be admissible while excluding any opinions by the officers as to blame made during those interactions, consistent with the prior panel's ruling. [1T85:17 – 86:22].

B. Tymiv Provided Multiple Inconsistent Statements Throughout the Litigation.

When initially asked to explain what occurred, Tymiv failed to mention that Hassan walked away, and did not claim the bag of grout went into the air. Instead, he alleged that the bag of grout ripped in his hands after Hassan pushed him. [DLa 35-36]. After Demiceli spoke with Hassan, Tymiv provided several contradictory accounts. First, he maintained to Demiceli that the bag ripped after being pushed, but then claimed the bag went up when asked why the back of Hassan was covered in grout. [DLa 40]. Tymiv admitted that he smiled when he told police Hassan "pushed me, and it ripped the grout That's what happened." [DLa 40]; [7T 114:15 – 115:4]. Second, when asked why the back side of Hassan was covered in grout, Tymiv claimed "because [the] grout went up." [DLa 40]. He then retracted that statement by claiming he had no idea how the grout came to be on Hassan's back. [7T86:3-5; DLa 41].

Tymiv provided a typewritten statement to the police on May 23, 2017, ten days after the incident. The statement contains no allegation that the bag went into the air or that Hassan punched Tymiv because he smiled at Hassan and mocked him after the grout landed on Hassan. [DLa 023]. Nor does it contain any statement alleging Hassan used profanity or a racial epithet while speaking with Tymiv. [DLa 023; 7T 123:18-23]. When asked to admit that his police statement contradicted his trial testimony, Tymiv responded, while looking at his lawyer, "[i]t took us awhile

to finally figure out what actually happened, for me to understand exactly what happened." [7T 124:7-14].

Plaintiffs' complaint alleged that the bag of grout spilled on the ground while he was holding it after being punched by Hassan. [7T 126:13-17]. The complaint contains no allegations of profanity, racial epithets, or that Hassan punched Tymiv after Tymiv insulted him following the grout landing on the back of Hassan. [Pa39-48].

Tymiv's interrogatory answers do not state that the bag of grout went into the air. [7T 129:9 – 131:18; DLa 020 - 022]. Nor do they state that Tymiv smirked after seeing the grout land on Hassan. [7T 131:23-132:1; DLa 020 - 022].

Tymiv testified at his deposition he did not see how the bag burst open. [7T 132:16 – 133:5]. He also admitted at his deposition he did not see the grout go on Hassan, contradicting his trial testimony that he smirked at Hassan after seeing the grout land on him. [7T 133:11-22]. He further claimed that grout was everywhere on him following the incident. [7T134:14-24.]. He testified it was apparent from reviewing the bodycam video that you could see grout on him and Oganov. [7T 134:25 – 135:10].

Yet Tymiv admitted at trial that he did not see any grout on Oganov in the bodycam video. [7T 135:11-36:1; 8T 25:18-27:12; DLa 004 - 013]. He also

admitted he could see grout on the back of Hassan's neck and head. [7T 138:5-8; DLa 004 - 013].

During the trial, the only body part Tymiv positively identified as having grout on it was his left cuff. [7T 81:2-5]. Tymiv's counsel produced a blow up photo of the bodycam video to illustrate the grout on his left cuff. Despite several minutes of bodycam footage of Tymiv at Lowe's post-incident, this was the only photo counsel blew up for the jury. During closing argument, Lowe's told the jury that Plaintiffs could have blown up any image from the extensive bodycam videos but the trace amount of grout on his left cuff was the best they could do to support Tymiv's allegation that he was covered in grout. [11T 54:21-55:14].

C. Oganov Admitted He Could not Explain Why the Bodycam did not Show any Grout on Him.

Oganov testified he was in between Hassan and Tymiv when the physical altercation began as he tried to separate them. [4T 198:3-6]. He commented on the silliness of fighting over grout, by telling both parties "guys what are we doing?" [4T 198:3-5]. He claimed Hassan struck the bag causing grout to go flying straight up[3], and "it all kinda came down on – well, it came down on me for sure, but it came down on them as well because it went everywhere." [4T 198:7-12]. He "recall[ed] grout being all over me. It was on my upper and lower body, because I had a jacket

[3] At his deposition, Oganov testified the bag of grout ripped in Tymiv's hands and he did not believe the bag left Tymiv's hands. [5T 11:4-20].

and pants or shorts on, and it was on me." [4T 204:3-12]. He further testified that his clothes became a mess when he went outside because it was raining. [4T 205:8-20].

But Oganov admitted he did not observe any grout on him when he reviewed the video, something which he could not explain. [4T 205:1-7]. Nor could he recall observing any grout on Tymiv. [4T 204:3-9; 5T 12:6-9].

D. Oganov admitted Hassan's conduct was not aggressive.

Oganov admitted that during the initial verbal encounter between Tymiv and Hassan, Hassan asked to be left alone and walked away. [5T8:18-9:9]. Oganov admitted that he did not perceive Hassan's conduct as being aggressive; instead he viewed the situation as funny. [5T 9:7-23]. He then confirmed Hassan left and walked away into the adjacent aisle, at which point Oganov lost sight of both Hassan and Tymiv momentarily. [5T 9:24-10:14].

E. Plaintiffs' Counsel Prepared Oganov for His Trial Testimony.

Oganov admitted to meeting with Plaintiffs' counsel and watching the bodycam video with him over the weekend prior to his trial testimony. [4T 216:6-218:8]. He admitted Plaintiffs' counsel paused the video at certain points so that counsel could point things out to him. [4T 218:8-16].

F. Dr. Fisher Provided Unrebutted Scientific Testimony Explaining the Significance of the Physical, Objective Evidence.

Dr. Fisher concluded Tymiv threw the bag of grout at Hassan while his back was turned, initially striking the shelving, causing the bag to burst and grout to spew out, covering the floor and shelving with grout. [9T 156:2-25]. The bag burst behind where Hassan was standing, resulting in grout falling "down onto his right shoulder, right neck, and right back of his head, you know, on the back side of his body." [9T 157:1-6]. Dr. Fisher came to these conclusions by analyzing the dispersion of grout on the shelving, aisle, Hassan, and the lack of grout on Tymiv. [9T 157:6 – 158:15].

For example, Dr. Fisher pointed out to the jury that the grout on the back of Hassan's head was concentrated on the right side of his head with little to no grout on the left side of his head. [9T 169:10-161:15; DLa 033]. This occurred because Hassan's right side was closest to the aisle as he was walking away from Tymiv. [9T 169:10-163:4].

Dr. Fisher ruled out Tymiv's version of events, because in that scenario Hassan is "facing back up the aisle" with his left side closest to the shelves. [9T 164:10-18]. He further explained that in Tymiv's version of events he is within an arm's reach of the shelving, and in that scenario we would expect him to be covered in grout, most likely on his right side. [9T 165:17-166:22]. Dr. Fisher testified he did not observe any significant amounts of grout on Tymiv despite the fact he is wearing black clothing. [9T 166:5-22].

Dr. Fisher was shown trial testimony wherein Tymiv claimed – in a shallow attempt to explain why the video inaccurately depicted him with no grout on his body – that it would be impossible for grout to not be on someone unless he was more than ten feet away. Dr. Fisher opined that he agreed with Tymiv's assessment and concluded that Tymiv was therefore more than ten feet away when Hassan became covered in grout. [9T 171:9-172:11].

Further, Dr. Fisher explained the trace amount of grout on the left cuff of Tymiv, and possibly on his left shoulder, was consistent with Hassan's version of events. First, carrying the bag of grout can cause grout to seep out of the bag; therefore grout could have leaked onto his cuff and/or shoulder while Tymiv was carrying the bag. [9T 170:15-25]. In addition, Dr. Fisher opined that grout likely transferred from the right side of Hassan's body to the left side of Tymiv's body during when Hassan, covered in grout, struck Tymiv while attempting to block a blow from Tymiv's left fist. [9T 170:1-8].

Finally, Dr. Fisher opined that Tymiv's claim that Hassan punched the bag of grout, causing it to fly up in the air and behind Hassan is physically impossible. Rather, according to Fisher, striking the bag with sufficient force to cause it to leave Tymiv's grasp and ascend through the air would have caused the bag to break on impact. [9T 173:7-174:1]. Dr. Fisher also noted that Tymiv never described Hassan as flinging or throwing the bag into the air; Tymiv always described Hassan's

conduct as impacting the bag with a strike or a punch.[4] [9T 174:10-175:8, 216:23-218:4].

IV. Facts Relevant to Plaintiffs' alleged legal errors.

A. Tymiv Testified the Police Blamed Him for the Accident.

Tymiv testified on direct and cross-examination that he believed the police were accusing him of assault. [7T 91:4-11, 95:5-11, 115:16-19]. Tymiv strategically discussed this fact during his direct-examination because he admitted to it at his deposition. [1T 55:20-24]. On direct, the jury was shown portions of the police bodycam footage where Tymiv stated he believed he was being accused of assault. [7T 93:6-24].

B. Balian Did Not Consider Hassan's Version of Events.

Balian's report summarizes the incident from only Tymiv's perspective. [8T 101:4-15]. He did not provide Hassan's version of events. [8T 101:16-19]. He testified that his factual summary was "my understanding of what happened." [8T 101:74-15]. He did not mention in his report that Hassan walked away from Tymiv or that Hassan alleged Tymiv threw a bag of grout at him. [8T 101:20-25]. He

[4] Plaintiffs' counsel cross-examined Dr. Fisher and attempted to undermine his opinion as to how the bag struck the shelving by asking Dr. Fisher to assume the bag was thrown by Hassan. Of course, under that scenario the bag would not break immediately, but no evidence supports that hypothetical. [9T 206:24-208:13].

claimed Hassan's version of events were not "relevant" despite opining Lowe's' negligence caused Hassan to be involved in a physical altercation. [8T 102:1-7].

When confronted with the deposition transcripts of the police officers, which he reviewed in coming to his conclusions, Balian admitted he did not document the police officers' statements in his report, nor did he document that their testimony contradicted Tymiv's version of events. [8T 102:8-104:16]. Balian also reviewed the bodycam footage, but could not recall if the footage showed any grout on Tymiv or Oganov. [8T 105:29 – 106:11].

C. Plaintiffs successfully precluded Lowe's from telling the jury that Tymiv dismissed his battery claim against Hassan.

Plaintiffs moved *in limine* to bar evidence that Tymiv dismissed his battery claim against Hassan. [1T 87:5-12]. Lowe's argued it was improper for Plaintiffs to argue Hassan committed battery because "what plaintiff is trying to do is say it doesn't matter whether I plead battery or negligence, I can dismiss the battery claims and I can still prove a battery . . . ." [1T 88:15-21]. If the trial court allowed Tymiv to introduce evidence of a battery, Lowe's requested it should have been be allowed to tell the jury Tymiv was not seeking to recover against Hassan for battery. [1T 93:20-93:2; 100:20-101:12]. Specifically, Lowe's argued that the voluntary dismissal of the battery claim was relevant to impeach Tymiv's credibility because it would establish that Tymiv did not seek to recover a judgment against Hassan for his alleged battery, but only as to Lowe's in an attempt to selectively recover against

a large corporation. Had the jury found Hassan was liable for battery, no judgment could have been entered against him because Plaintiffs had dismissed that claim against Hassan. [3T 18:21-19:11]. The court denied Lowe's' request. [3T 10:10-20; 19:12-15]. Instead, the trial judge allowed Lowe's to argue that Plaintiffs were only seeking to recover damages for negligence. [3T 17:21 – 18:10].

D. Plaintiffs Were Allowed to Argue That an Intentional Battery Can Support a Negligence Claim.

Plaintiffs' counsel admitted "[b]attery is not even in the case." [3T 16:1; 10T 13:24-14:13]. He then proceeded to explain Tymiv's version of events on opening, describing a battery. [4T 25:5-21]. However, he characterized Hassan's conduct as negligence. [4T 31:1-22; 32:9-22]. "An ordinary person would not have done what Mr. Hassan did in hitting Ivan in this case." [4T 31:20-22].

At the charge conference, the judge did not charge battery against Hassan, but in describing how Tymiv could recover under his version of events, explained "the negligence [of Hassan] is he's got a duty of care toward Mr. Tymiv not to harm him or cause him injury. So the traditional elements of negligence are going to apply here." [10T 16:5-11].

On closing, Plaintiffs' counsel argued Hassan's intentional punch was negligence and argued the lack of a battery charge was immaterial to the jury's deliberations on vicarious liability. [11T 131:11-133:2].

E. Tymiv Admitted He Failed to Disclose the Pictures and Texts Pertaining to His Work and Physical Abilities. Further, He Admitted He Lied in the Text Messages.

Tymiv admitted he did not provide to Lowe's the text messages which undermined his claim that he could not work. [7T 143:3-9]. The texts and photographs of Tymiv were provided by Dr. Sahr. He admitted he was obligated to provide Lowe's with all relevant information to the lawsuit and that he had an ongoing obligation to do so. [7T 143:13-25].

Tymiv provided a work estimate to Dr. Sahr, but claimed he lied in the text when he informed her he would do the work after he was done completing other projects. [7T 147:7-150:8]. Had Tymiv admitted he did work for Dr. Sahr, he would have perjured himself because his position in the litigation is that he cannot work. [7T 142:11-17].

PROCEDURAL HISTORY

Plaintiffs Ivan and Oksana Tymiv commenced this action in November 2017 against Lowe's and Hassan. [Pa39]. Plaintiffs' Amended Complaint alleges that Lowe's was negligent in hiring, training and supervising Hassan during his employment, including on May 13, 2017, while he was working as a Customer Sales Associate ("CSA") in the Flooring Department at Lowe's' Marlboro, New Jersey location, and that such negligence was a proximate cause of the incident. [Pa54-61]. The Amended Complaint also asserts theories of negligence and battery against

Hassan. Ibid. After filing their Amended Complaint, Plaintiffs amended their interrogatories to assert a claim of vicarious liability against Lowe's based on Hassan's negligence while acting within the scope of his employment. [Pa70].

After the close of discovery, Lowe's moved for summary judgment on two grounds: (1) that Plaintiffs cannot establish that Lowe's was negligent in hiring, training or supervising Hassan because they did not establish the applicable standard of care or show that such standard was breached; and (2) that Lowe's is not vicariously liable for the alleged assault by Hassan because Hassan's acts were not within the scope of his employment with Lowe's. [Pa17] The trial court granted Lowe's' motion and dismissed the claims against Lowe's, finding that: (1) the Incident was caused by Hassan's assault of Tymiv; (2) Plaintiffs failed to show Lowe's' alleged negligent conduct was the proximate cause of Hassan's actions; and (3) Lowe's was not vicariously liable for Hassan's conduct outside the scope of his employment. Ibid.

After the trial court granted Lowe's' motion for summary judgment, in May 2020, Hassan moved for summary judgment to dismiss Plaintiffs' negligence claims against him. [Pa19]. The trial court granted Hassan's motion, leaving Plaintiffs to pursue their battery claim against Hassan. [Pa19-20]. However, rather than proceed to trial on their claim that Hassan intentionally assaulted Tymiv, Plaintiffs voluntarily dismissed the remaining claim for battery with prejudice so that they

could appeal the trial court's dismissal of the claims for negligence against Lowe's and Hassan. [Pa 20].

In an unpublished opinion, the Appellate Division reversed dismissal of the claims for negligence against Lowe's and Hassan. [Pa7-38]. In particular, the panel determined there were genuine issues of material fact as to whether 1) Hassan intentionally assaulted Tymiv; 2) Hassan acted within the scope of his employment with Lowe's; and 3) whether the incident was caused by Lowe's failure to properly train and supervise Hassan. [Pa25-31].[5] Plaintiffs' claims for negligence against Hassan, and claims against Lowe's for negligent hiring, training and supervision and *respondeat superior* were reinstated and the case was remanded back to the trial court. [Pa38].

Thereafter, Lowe's moved to dismiss Plaintiffs' claim for negligent hiring on the basis that Plaintiff's vocational expert, Alex Balian, never criticized the hiring of Hassan, and even acknowledged that Lowe's acted appropriately in doing so. The trial court granted this motion and dismissed the claim for negligent hiring via Order dated September 13, 2022. [DLa 069]

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[5] Also at issue in the first appeal was the trial court's order precluding portions of the testimony of Plaintiffs' vocational and economic experts, precluding police testimony as to how the incident occurred, and permitting testimony of Lowe's' biomechanical engineering expert. The Appellate Division reversed the trial court's limitation on testimony of Plaintiffs' vocational and economic experts and otherwise affirmed the trial court's evidentiary rulings. [Pa31-38].

The case proceeded to trial on Plaintiffs' claims for negligence against Hassan, and negligent training and supervision and *respondeat superior* against Lowe's.[6] At the close of Plaintiffs' case-in-chief, Lowe's moved for involuntary dismissal of the negligent training and supervision claims pursuant to Rules 4:37-2(b) and 4:40-1. [9T 109:12-16]. Specifically, Lowe's argued that Plaintiffs' claims must fail as a matter of law, because there was no evidence Hassan was ever unfit, incompetent, or possessed any dangerous attributes that created a foreseeable risk of harm in the absence of additional supervision or training. [9T 109:19-111:20]. The trial court accepted this premise at oral argument. [9T 113:1-126:24]. Specifically, the court noted that the Supreme Court defines the risk of harm as the employee's "incompetence or dangerous characteristics[,]" which, to be found liable, the employer must have had knowledge of. [9T 118:11-20, 120:8-16].

Moreover, Plaintiffs' counsel admitted that there had been no evidence of Hassan's potentially dangerous qualities:

> THE COURT: Mr. Vrhovc, the Supreme Court talks about unfitness and dangerous characteristics. What are the dangerous characteristics of Hassan that have been testified to in this case?
>
> MR. VRHOVC: Well that, there's nothing, Judge.

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[6] Via Order date June 5, 2020, the trial was bifurcated so that liability and damages issues would be determined separately. Plaintiffs did not appeal the June 5, 2020 order. [Pa93-94].

[9T 116:12-17]. Despite this admission, the motion was denied. [10T 4:1-6:23]. In an oral opinion, the trial court ruled there were factual issues requiring determination by the factfinder due to Plaintiffs' claiming Lowe's allowed Hassan to interact with customers on his own and by having a supposed lack of ID. [10T 6:10-21]. After the defense rested, the jury returned a defense verdict, finding Hassan's conduct was outside the scope of his employment and that he was not negligent.[7] [Pa71-73].

In its cross-appeal, Lowe's contends that the trial court erred in denying its motion for involuntary dismissal of Plaintiffs' negligent supervision and training claims. Opposing counsel conceded there is no evidence Hassan was unfit or dangerous. In denying the motion, the trial court ignored precedent requiring such evidence in order to sustain a claim for negligent supervision and training.

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING LOWE'S' MOTION FOR A DIRECTED VERDICT ON PLAINTIFFS' CLAIMS FOR NEGLIGENT TRAINING AND SUPERVISION. (9T 109:12 – 130:18)

A. THE STANDARD OF REVIEW IS DE NOVO.

Appellate review of a motion for involuntary dismissal under Rules 4:37-2(b) and 4:40-1 is de novo. Smith v. Millville Rescue Squad, 225 N.J. 373, 397 (2016); ADS Assocs. Grp. v. Oritani Sav. Bank, 219 N.J. 496, 511 (2014); Frugis v. Bracigliano, 177 N.J. 250, 269 (2020). Appeal of an order denying a motion for

[7] Lowe's did not renew their motion pursuant to Rule 4:40-2.

involuntary dismissal is governed by the same evidential standard as applied by the trial court: "If, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inference which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied . . . ." Verdicchio v. Ricca, 179 N.J. 1, 30 (2004) (quoting Estate of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000)). The motion should be granted if "no rational juror could conclude that the plaintiff marshaled sufficient evidence to satisfy each *prima facie* element of a cause of action." Smith, 225 N.J. at 397 (quoting Godfrey v. Princeton Theological Seminary, 196 N.J. 178, 197 (2008)). In this case, the motion for involuntary dismissal should have been granted because no rational juror could have concluded that Lowe's had reason to know that Hassan posed a risk of danger to customers without additional supervision or training.

B. THE TRIAL COURT ERRED BECAUSE THERE WAS NO EVIDENCE FROM WHICH A REASONABLE JUROR COULD CONCLUDE THAT HASSAN POSSESSED ANY ATTRIBUTE THAT POSED A RISK OF HARM TO CUSTOMERS.

The claims for negligent training and supervision should have been dismissed at the close of Plaintiffs' case-in-chief, because there was no evidence that Lowe's had reason to know that Mr. Hassan was unfit, incompetent, or posed a danger to customers in the absence of additional training or supervision. Negligent hiring,

training and supervision claims are not forms of vicarious liability, but rather are based on the direct fault of an employer. G.A.H. v. K.G.G., 238 N.J. 401, 415 (2019). To establish a claim for negligent hiring, the plaintiff must show

> (1) that the employer "knew or had reason to know of the particular unfitness, incompetence or dangerous attributes of the employee and could reasonably have foreseen that such qualities created a risk of harm to other person" and (2) "that, through the negligence of the employer in hiring the employee, the latter's incompetence, unfitness or dangerous characteristics proximately caused the injury."

Id. at 416 (quoting Di Cosala v. Kay, 91 N.J. 159, 173 (1982)). The elements of a claim for negligent training and supervision are "essentially the same" as the elements of a negligent hiring claim, "but framed in terms of supervision or training." Ibid. An employer may be liable for negligent training or supervision (1) if it knew or had reason to know that the failure to supervise or train an employee in a certain way would create a risk of harm, and; (2) that risk of harm materialized and caused the plaintiff's damages. Ibid.

The torts of negligent hiring, training and supervision are founded on principles of negligence and foreseeability. Di Cosala, 91 N.J. at 171. They arise from the concept that an employee's character, skill, or attributes may create a foreseeable risk of harm. "The principal may be negligent because he has reason to know that the servant or other agent, *because of his qualities*, is likely to harm others in view of the work or instrumentalities entrusted to him." Ibid. (emphasis added) (quoting Restatement (Second) of Agency, § 213, cmt. d) (quoted in Model Civil

Jury Charge § 5.76 "Negligent Hiring" at fn. 3).[8] Accordingly, the torts of negligent training and supervision depend on the attributes of the employee: "An employer will only be held responsible for the torts of its employees beyond the scope of the employment where it knew or had reason to know of the *particular unfitness, incompetence or dangerous attributes* of the employee and could reasonably have foreseen that such qualities created a risk of harm to other persons." Id. at 173 (emphasis added); see also Model Civil Jury Charge § 5.76 at fn. 6 ("An employer may not be held responsible under a theory of negligent hiring, supervision, or retention for criminal or other wrongful acts of its employee if, in the exercise of reasonable care and diligence, a reasonable employer would not have ascertained the employee's incompetence, unfitness, or dangerous propensities.").

Our courts have endorsed two categories of foreseeably dangerous attributes, one dependent on external factors pertaining to the nature of the assigned work and the other on the dangerous traits of the employee. First, an employee may pose a risk of harm to others due to their lack of skill or incompetence in performing the assigned work: "The dangerous quality in the [employee] may consist of his incompetence or unskillfulness due to his youth or his lack of experience considered

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[8] There is no separate Model Civil Jury Charge that explicitly covers claims of negligent training or supervision; however, § 5.76 "Negligent Hiring" defines liability for an employer's negligence for "the manner in which the employer hired, supervised, or retained an inappropriate or unfit employee."

with reference to the act to be performed." Di Cosala 91 N.J. at 171 (alteration in original) (quoting Restatement (Second) of Agency, § 213, cmt. d) (quoted in Model Civil Jury Charge § 5.76 at fn. 4). For example, an employee may pose a danger due to inexperience or incompetence to perform tasks requiring specialized skills. Someone who directs an employee to perform roofing or tree removal without ensuring that they have the requisite experience or training to ensure that others are not harmed may be found liable for an injury caused by the employee's lack of skill. See Mavrikidis v. Petullo, 153 N.J. 117, 137 (1998) (finding no evidence of negligent hiring of contractors who were skilled and experienced in performing the type of work asked of them); Di Cosala, 91 N.J. at 169-70 (citing Nivins v. Sievers Hauling Corp., 424 F.Supp. 82 (D.N.J. 1976), which found evidence of a crane operator's lack of training admissible to support a claim for negligent hiring).

Alternatively, an employee, "although otherwise competent, may be incompetent because of his reckless or vicious disposition[.]" Di Cosala, 91 N.J. at 171 (quoting Restatement (Second) of Agency, § 213, cmt. d) (quoted in Model Civil Jury Charge § 5.76 at fn. 4). Thus, an employer may be liable for harm caused by an employee's propensity for violence or crime. In Lingar v. Live-In Companions, Inc., 300 N.J. Super. 22 (App. Div. 1997), the plaintiff sued an employer retained to provide home care for her disabled husband. The employer assigned an individual with prior convictions for drug distribution and receiving stolen property, who then

proceeded to neglect the patient and steal the couple's car and other personal property. This Court reversed summary judgment, finding there was sufficient evidence that the employer could have obtained information of the employee's prior convictions. Id. at 32-33.

Accordingly, the plaintiff must present evidence of an employee's particular attribute – whether relative to the work assigned or a product of innate character – that gives rise to a foreseeable risk of harm to third parties in the absence of adequate supervision or training. The question for the jury is whether the employer acted reasonably given what it knew or had reason to know about its employee's potentially harmful characteristics. To establish a *prima facie* claim requires proof of a risk of harm to third parties. "The focus . . . is on the risk the employer created by exposing members of the public to a potentially dangerous individual." Di Cosala, 91 N.J. at 172.

Claims for negligent training and supervision should have been dismissed at trial because Plaintiffs did not present any evidence of incompetence, lack of specialized skill, or of a disposition or trait that Lowe's had reason to know posed a danger to customers. There was no evidence indicating that Hassan was unfit to interact with customers due to some innate disposition or trait that Lowe's could have discovered through reasonable investigation. There was no evidence of prior convictions, or anything suggesting unfitness or a propensity towards violence.

There was no aspect of Hassan's background or his previous experience as a Lowe's employee that would have put Lowe's on notice that he posed a danger to customers.

Nor was there evidence that Hassan posed a physical danger to customers because he was unskilled or incompetent. It was undisputed that Hassan approached Tymiv to ask whether he needed assistance selecting grout. To the extent the task of selecting grout required specialized knowledge or training, the testimony established 1) that Hassan had experience and training in dealing with Lowe's customers; 2) that he had received training on grout in particular, and; 3) that he provided accurate information in response to Tymiv's questions. He was not a roofer assigned to interact with customers; he was a customer sales associate experienced in providing customer service due to his prior training and employment as a cashier.

Specifically, jurors heard testimony that Hassan had completed training to be a Lowe's cashier twice prior to the incident with Tymiv. When he was hired a third time to work in the Flooring Department, he was once again trained on how to interact with customers. [8T 109:10-22, 110:2-5, 111:3-25]. His superiors testified that he routinely interacted with customers during the two summers he previously worked at Lowe's, that he was "always very polite and professional . . . willing to help customers out," and that he had a "[v]ery good" ability to interact with customers. [6T 137:5-25]. They confirmed that there were no complaints regarding

Hassan's dealings with customers prior to his run-in with Tymiv, and that Lowe's never had cause to discipline him. [6T 138:1-18; 9T 72:16-73:5].

Hassan's immediate supervisor, George Craig, testified that he was responsible for training Hassan on the products in the Flooring Department. [9T 43:6-10]. Craig confirmed that he personally trained Hassan on Lowe's grout products prior to the incident: "I told him what you could use for walls, what you could use for floors, what sanded was, what unsanded was, what power grout was . . . . I told him about grout because that's – that's an important thing you need to know in flooring." [9T 5214-19]. When shown the bag of grout that Tymiv and Hassan were discussing prior to the altercation, Craig confirmed that it was "universal grout," appropriate for applications that required unsanded grout and for joints measuring less than one eighth of an inch. [9T 78:9-14]. According to Tymiv, this was the question he posed to Hassan, [7T 141:21-25], and which, according to Tymiv's police statement and answers to interrogatories, Hassan answered by informing Tymiv that the bag of grout he was holding was appropriate for that application. [7T 122:4-123:11, 129:24-130:5]. In other words, Craig confirmed that Hassan was trained in grout and provided accurate information to Tymiv.

Accordingly, there was no evidence Hassan posed a risk of harm because he was incompetent or unskilled in assisting customers and/or selecting grout. Plaintiffs' expert, Alex Balian, even acknowledged he was unable to evaluate this

question. He testified that he did not know if what Hassan said regarding grout was accurate, because he does not know the difference between sanded and unsanded grout. [8T 119:1-13]. Therefore, Balian had to concede that he did not know if Hassan's question to Tymiv about the type of tile being used with the grout was appropriate. [8T 119:17:21].

Balian was similarly unable to challenge the testimony that Hassan had received training on interacting with customers, and in particular, on grout:

> Q: And you have no evidence or documents that would contradict Mr. Craig's deposition testimony that he trained Mr. Hassan on how to interact with customers, correct?
>
> A: Correct.
>
> . . . .
>
> Q: When we just read Mr. Hassan's deposition testimony where he explained the difference between sanded and unsanded grout where did he get that knowledge from?
>
> A: It could have been he was trained.

[8T 109:18-22, 117:2-6]. As a result, Balian's testimony does not support the inference that Hassan posed a danger to Tymiv because he was incompetent or lacking in any specialized skill. Instead, the evidence established that there was nothing unique about Hassan's interaction with Tymiv which required specialized training or supervision to avoid physical violence. Balian implicitly agreed with this

proposition by conceding it is "common sense" that "no one should start a fight just because they disagree with the other person about the application of grout." [8T 92:14-93:3]. As did Tymiv. [7T 105:11-24].

Ultimately, Plaintiffs' position presumes that a fully-trained Red-Vest employee would always be able to avoid a violent confrontation when answering a customer question, regardless of that employee's personal knowledge, characteristics, attributes, or general disposition towards others. On Plaintiffs' theory of the case, Lowe's should have foreseen that Hassan was dangerous because he might not be able to assist a customer with a question about a flooring product; yet, if a Red-Vested employee had trouble with a question, or became frustrated by an interaction with a customer, it would not have been foreseeable that a fight would break out. This theory cannot sustain a claim for negligent training and supervision because Hassan's status as a trainee or a Red-Vest employee has nothing to do with his specific qualities or disposition, or knowledge of grout and ability to interact with customers. Indeed, the jury heard uncontroverted evidence that Hassan was trained on grout and that he actually provided Tymiv with accurate information in response to his questions, despite not being a Red-Vest employee. Nor was there any evidence that Hassan possessed a reckless or vicious disposition.

C. THE TRIAL COURT'S REASONING WAS FLAWED BECAUSE IT ASSUMED THERE WAS EVIDENCE HASSAN WAS POTENTIALLY DANGEROUS TO CUSTOMERS.

The trial court erred by overlooking the lack of evidence that Hassan possessed any quality that made him potentially dangerous to Tymiv or any other Lowe's customer. At oral argument, the trial court agreed that the risk of harm addressed by a claim for negligent training and supervision "is defined by the [employee's] incompetence or dangerous characteristic." [9T 118:15-16]. Yet in denying Lowe's' motion for a directed verdict, the trial court reasoned that:

> Plaintiff's theory of the case is that Lowe's, in the course of conducting its training of Mr. Hassan, did not adequately train him or failed to abide by its training standards in . . . letting him approach customers on the floor. . . . Because those claims all involve credibility issues as to the Lowe's position that they did not violate Plaintiff's rights as they adequately trained Mr. Hassan, that's a question of fact that should properly be reserved for the jury.

[10T 6:9-21]. The trial court erred because it assumed that a rational juror could have concluded that Lowe's had reason to know that Hassan possessed some quality that posed a danger to customers he approached. There was no evidence cited to support this inference. On the other hand, witnesses confirmed that Hassan was experienced and capable of assisting customers on his own, and that he had done so countless times without complaint, and certainly without violence.

In similar fashion, the trial court relied on Plaintiffs' allegation that Hassan's ID badge was not properly displayed and/or did not properly designate him as a trainee. [<u>See</u> 10T 6:13-15] ("Plaintiff bases also [sic] on a supposed lack of ID or

ID that said training and the nature or extent of the training . . . ."). This reasoning is also flawed because there was no evidence to suggest that the status of Hassan' ID badge made him unfit, incompetent, or dangerous to Lowe's customers in a manner that would have foreseeably resulted in a physical altercation. The placement of Hassan's ID badge is not suggestive of his disposition interacting with customers or his knowledge of the products in the flooring department. There is no evidence that Lowe's had reason to know Hassan posed a foreseeable danger to customers because he affixed his ID badge anywhere other than on his chest.

D. LOWE'S' CROSS-APPEAL IS DISPOSITIVE.

For the foregoing reasons, Plaintiffs' appeal should be dismissed. The evidence at trial was so one-sided that Plaintiffs could not sustain the claim for negligent training and supervision. Because the jury properly found that Hassan acted outside the scope of his employment, granting Lowe's' cross-appeal moots the relief sought in Plaintiffs' appeal.

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING PRIOR TESTIMONY OF THE RESPONDING OFFICERS.

A. STANDARD OF REVIEW.

An appellate court defers to a trial court's evidentiary ruling absent an abuse of discretion. Rowe v. Bell & Gossett, Co., 239 N.J. 531, 551 (2019). "Evidentiary decisions are reviewed under the abuse of discretion standard because, from its

genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion.'" Est. of Hanges v. Metropolitan Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010). The trial court abuses its discretion if its decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 572 (2002). Thus, an appellate court "will not substitute [its] judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" State v. Garcia, 245 N.J. 412, 430 (2021) (quoting State v. Medina, 242 N.J. 397, 412 (2020)).

B. THE TRIAL COURT' RELIANCE ON N.J.R.E. 105 AND CASE LAW WAS PROPER IN ADMITTING THE OFFICERS' OPINIONS WITH A LIMITING INSTRUCTION FOR THE PURPOSE OF IMPEACHING BALIAN.

This Court's prior ruling that the responding officers' lay opinions as to how the incident occurred were inadmissible pursuant to N.J.R.E. 701, does not preclude admissibility for another purpose. Evidence may be admissible for one purpose, but inadmissible for another. N.J.R.E. 105 provides that "[w]hen evidence is admitted . . . for one purpose but is not admissible . . . for another purpose, the judge, upon request shall restrict the evidence to its proper scope and shall instruct the jury accordingly . . . ." Relying on N.J.R.E. 105, as well as the Appellate Division's recent decisions in Hassan v. Williams, 467 N.J. Super. 190, 207-08 (App. Div. 2021) and Parker v. Poole, 440 N.J. Super. 7, 18-20 (App. Div. 2015), Lowe's

successfully argued this point to the trial judge, who agreed the officers' opinions were admissible to show bias on the part of Plaintiffs' liability expert Alex Balian, provided there was a limiting instruction.[9] [1T 55:4-60:0]. Notably, both cases cited at oral argument allowed a party's admission that otherwise would have been excluded as lay opinion under N.J.R.E. 701. See Hassan, 467 N.J. Super. at 207-08 (citing Parker, 440 N.J. Super. at 19-20).

Lowe's' counsel then used the officers' opinions to impeach Balian's credibility. See N.J.R.E. 611(b). Specifically, Balian testified that he only takes cases if he agrees with the theory of the case. [8T 100:21-24]. Balian further acknowledged that he did not consider Hassan's version of events in forming his opinions. [101:20-102:7]. He did not because Balian's causation theory was premised upon Hassan becoming frustrated (pursuant to Tymiv's version), an opinion that is undermined if Hassan calmly walked away and only responded after being attacked while his back was turned. [8T 90:11-20]; See State v. Wakefield, 190 N.J. 397, 452 (2007) ("[I]n respect of the cross-examination of an expert witness, we have held that an expert witness is always subject to searching cross-

[9] While a limiting instruction was given following the cross-examination of Balian, Plaintiffs' counsel was so unconcerned by the actual effect of the testimony that he did not request the instruction until the issue was raised by Lowe's' counsel on the next day of trial. [9T 5:13]. And even then, counsel stated that he did not need the limiting instruction unless Lowe's intended to refer to officers' statements in closing. [9T 5:14-7:4].

examination as the basis of his opinion."). To determine the credibility, weight and probative value of an expert's opinion, one must question the facts and reasoning on which it is based. Johnson v. Salem Corp., 97 N.J. 78, 91 (1984).

Because the evidence at the scene was so one-sided as to cause the officers to question Tymiv's accusations against Hassan, their opinions that Tymiv threw the bag of grout was relevant to the jury's evaluation of Balian's credibility and bias in testifying that he believed in the merits of Plaintiffs' case, and by extension, that Tymiv was credible.

C. THE JURY WOULD HAVE, AND DID HEAR EVIDENCE OF THE OFFICERS' OPINIONS DURING TYMIV'S TESTIMONY.

In addition, at oral argument counsel for Lowe's noted that the jury would hear evidence of the officers' opinions from Tymiv, because he was going to testify that the police accused him of throwing the bag of grout at Hassan. [1T 55:20-24]. See N.J.R.E. 803(b)(1). This is precisely what happened at trial: before Plaintiffs called Balian to the stand, counsel played portions of the bodycam video to Tymiv on direct, showing a tense exchange in which Officer Demiceli repeatedly asks Tymiv why Hassan had grout all over his back, and in which Tymiv accuses the police of railroading him. [7T 84:3-86:6, 90:16-96:5, 115:16-19. Among other things, the jury heard Tymiv tell the police "I'm getting accused of assault . . . . You couldn't make simple police report. You have to accuse me? . . . You gotta accuse me with it?" [7T 93:8-24]. After the bodycam footage was played, Tymiv testified

that the police "ke[pt] telling me that I throw the bag of grout in the back of the guy head," that the police accused him of assaulting Hassan, and that Oganov, who observed the exchange, told him he thought they were going to be arrested. [7T 95:8-11, 115:16-117:7]. This testimony, which was initially elicited at Tymiv's deposition, was always admissible regardless of N.J.R.E. 701.

For these reasons, the trial court did not abuse its discretion, because its decision to allow the officers' opinions with a limiting instruction for the purpose of demonstrating bias was reasonably based on sound legal principle. Moreover, even if it was error to allow the officer's opinions as to who threw the bag of grout, the error was harmless, because Tymiv had already testified at his deposition that he believed that the officers blamed him for the incident and were accusing him of throwing the bag of grout at Hassan. This testimony would have come out on cross-examination even if counsel avoided the issue on direct.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING TEXTS AND PHOTOGRAPHS CONTRADICTING TYMIV'S POSITION THAT HE IS UNABLE TO WORK.

A. STANDARD OF REVIEW.

Because Plaintiffs challenge the propriety of the trial court's evidentiary ruling, the standard of review is the same as set forth in Section II(A), above.

B. THE TEXTS AND PHOTOGRAPHS WERE HIGHLY RELEVANT TO IMPEACH TYMIV'S CREDIBILITY IN THE LIABILITY

PHASE OF TRIAL IN LIGHT OF THE FALSE IN ONE, FALSE IN ALL CHARGE.

The trial court did not abuse its discretion in admitting photographs and texts demonstrating Tymiv's physical capacity to work following the incident because this evidence was highly probative of Tymiv's credibility in all matters, including his version of the altercation with Hassan. At the close of trial, jurors were instructed they could disregard Tymiv's version of the incident at Lowe's if they believed that Tymiv deliberately lied about a material fact. "If you believe that a witness deliberately lied to you on any fact significant to your decision on this case, you have the right to reject all of the witness's testimony." [11T 162:3-6] (quoting Model Jury Charge § 1.12M, "False in One – False in All." Lowe's was entitled present this evidence to the jury because the photographs and texts demonstrated that Tymiv was being dishonest about his injuries and inability to work. See Cappell v. Capell, 358 N.J. Super. 107, 111 fn. 1 (App. Div. 2003) (stating that the "false in one, false in all" rule is appropriate where a witness intentionally gives false testimony about a material fact.).

The photographs and texts were properly admitted to show that Tymiv was lying about his physical condition to advance his interests in litigation, and therefore was also lying about Hassan being the aggressor. At trial, Tymiv confirmed that he was asserting he has been unable to work due to his injuries. [7T 142:11-14]. He was then confronted with pictures of him using a ladder and chainsaw for tree

removal and operating ATVs and dirt bikes, as well as text messages in which he provided work estimates for a home remodeling project and indicated that he was performing labor for a contractor. [7T 142:15-160:19]. This evidence was highly relevant to Tymiv's dishonesty about a material fact – his claimed injuries and inability to work – and, under the "false in one, false in all" rule, it was also highly relevant to Tymiv's credibility as to how the incident occurred.

The trial court did not abuse its discretion in adopting this reasoning. At oral argument, the trial judge noted that Tymiv's injuries were an element of his claims for negligence; therefore, evidence of his dishonesty about his injuries did not have to be relegated to the damages phase of trial. [1T 147:20-148:11]. The trial judge also correctly reasoned that Tymiv's credibility was a relevant issue in both phases, meaning that admissible damages evidence was not automatically excluded from the liability phase. [1T 146:8-14, 147:16-19, 148:11-17]. The trial judge's findings are supported by the law.

It is well-established that evidence is admissible during the first stage of a bifurcated trial if it is relevant to a witness's credibility or any other issue to be decided by the jury, even if the same evidence goes to the ultimate issue in the second stage of trial. In a criminal trial bifurcated for the purpose of trying counts of weapons possession and weapons possession by a convicted felon separately, evidence of a defendant's prior convictions can be introduced to impeach his

credibility during the first stage of trial even though it is determinative of the ultimate issue in the second stage of trial. State v. Jones, 364 N.J. Super. 376 (App. Div. 2003); State v. Wray, 336 N.J. Super. 205 (App. Div. 2001).

Similarly, the Supreme Court held that altered medical records could be introduced as statements against interest during the first phase of trial on medical negligence that was to be followed by a second trial on claims for spoliation and fraudulent concealment. Rosenblit v. Zimmerman, 166 N.J. 391 (2001). The Court reasoned "a jury could infer from Dr. Zimmerman's behavior that he believed that Rosenblit's medical records would prejudice his position in the [medical negligence] litigation." Ibid. The Court held that it was reversible error to limit their admissibility for impeachment purposes only[10] and remanded for a new trial on the malpractice count. Ibid.

Rosenblit, Jones, and Wray each demonstrate evidence that is relevant, if not dispositive of the latter phase of a bifurcated trial, is admissible for either impeachment, or as substantive evidence, even if it is prejudicial to the objecting party. Rosenblit in particular further demonstrates that evidence *must* be admitted in the initial phase of trial if it has the potential to influence the outcome. Here is no

[10] The trial court only allowed the records in the first phase of the trial for impeachment purposes if the defendant testified. The defendant did not testify and therefore the altered records were never introduced in the first phase of the trial, which resulted in a defense verdict.

different. During the liability phase of trial, jurors were asked to consider two opposing narratives of the cause of Tymiv's injuries; they had to either believe that Hassan "sucker punched" Tymiv or that Tymiv followed Hassan through the store and assaulted him. The trial court did not abuse its discretion in admitting evidence that Tymiv was capable of physical labor because it was not only relevant to impeach his credibility, but also probative of whether he was lying about the altercation.

Meanwhile, the cases Plaintiffs cite are inapposite.[11] In Redvanly v. ADP, 407 N.J. 395, 402 (App. Div. 2009), the Appellate Division barred evidence from the liability phase of trial that it found to be "relevant and admissible only on the issue of damages." Redvanly is also distinguishable because the underlying facts brought into evidence were indeterminable. There, the defendants introduced evidence of the plaintiff's termination by a former employer to establish that she had lied on her job application. However, the panel emphasized that the plaintiff had settled a wrongful termination claim against her former employer, therefore "we do not know the crucial fact of whether Redvanly was rightfully or wrongfully terminated." Id. at 402. As a result, the panel was unable to evaluate the plaintiff's

[11] Johnson v. Dobrosky held that character evidence is not relevant to damages recoverable under the Wrongful Death Act, an issue that is not before this Court. 187 N.J. 594, 598 (2006). Similarly, the Ninth Circuit held in Diaz v. City of Anaheim that the evidence was highly prejudicial and irrelevant to any liability issue, 840 F.3d 592, 601-02 (9th Cir. 2016); whereas, in this case the evidence of Tymiv's dishonesty about his injuries was relevant to the jury's determination as to whether he was telling the truth about the altercation.

argument that she had answered truthfully on her employment application as well as the defendant's argument that she had made inconsistent statements about the circumstances of her termination. See id. at 400-401. Here, however, there is no such ambiguity. The texts and photographs speak for themselves and were authenticated by Tymiv during his trial testimony.

IV. THE JURY INSTRUCTIONS DO NOT WARRANT A NEW TRIAL.

A. STANDARD OF REVIEW.

The trial court's instructions to the jury must "set forth the issues, correctly state the applicable law in understandable language, and plainly spell out how the jury should apply the legal principles to the facts as it may find them . . . ." Komlodi v. Picciano, 217 N.J. 387, 409 (2014) (quoting Jurman v. Samuel Braen, Inc., 47 N.J. 586, 591-92 (1966)). Instructions on the applicable law should be tailored to the theories and facts presented at trial. Ibid. (citing Reynolds v. Gonzalez, 172 N.J. 266, 288-89 (2002). Accordingly, the jury charges must provide a "comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find." State v. Galicia, 210 N.J. 364, 386 (2012). "A jury instruction that has no basis in the evidence is unsupportable, as it tends to mislead the jury." Dynasty, Inc. v. Princeton Ins. Co., 165 N.J. 1, 13-14 (2000).

Not every improper jury charge warrants reversal and a new trial. Prioleau v. Ky. Fried Chicken, Inc., 223 N.J. 245, 257 (2015). "As a general matter, [appellate courts] will not reverse if an erroneous jury instruction was incapable of producing an unjust result or prejudicing substantial rights." Ibid. (alteration in original). Under Rule 2:10-2, an error in the jury instructions requires reversal only if there is reasonable doubt that the jury was led to a verdict that it otherwise might not have reached. State v. Galicia, 210 N.J. at 388. Otherwise, plain error requires demonstration of "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." State v. Montalvo, 229 N.J. 300, 321 (2017) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)).

The jury charge must be read as a whole, and not just the challenged portion, to determine its overall effect. State v. Garrison, 228 N.J. 182, 201 (2017). "The test to be applied . . . is whether the charge as a whole is misleading, or sets forth accurately and fairly the controlling principles of law." State v. Baum, 224 N.J. 147, 159 (2016). Instructions given in accordance with the model jury charge, or which closely track the model jury charge, are generally not considered erroneous. Mogull v. CB Com. Real Est. Grp., Inc., 162 N.J. 449-466 (2000). In addition, plain error is mitigated by the overall strength of the respondent's case. See State v. Galicia,

210 N.J.at 388 ("The error must be considered in light of the entire charge and must be evaluated in light of the overall strength of the State's case.").

The same standard applies to appellate review of purported defects in the verdict sheet. Ibid. However, any error in the verdict sheet may be rendered harmless by the trial court's jury instruction. "When there is an error in a verdict sheet but the trial court's charge has clarified the legal standard for the jury to follow, the error may be deemed harmless." Id. at 387.

B. THE JURY INSTRUCTIONS ON *RESPONDEAT SUPERIOR* DO NOT WARRANT A NEW TRIAL.

Plaintiffs argue that the jury was improperly instructed that Lowe's could only be found vicariously liable if it found that Hassan acted negligently in self-defense. Even assuming the jury instructions on *respondeat superior* were improper, the error was harmless, because an employer is only liable under a theory of *respondeat superior* when the employee acts within the scope of employment, and the jury found that Hassan was acting outside the scope of employment. Regardless, the jury instructions were proper, because if the jury believed Tymiv's account they could only find Hassan liable for negligence since Plaintiffs dismissed the battery claim against Hassan.

i. An improper instruction on vicarious liability is harmless where the jury found that Hassan was acting outside the scope of his employment.

Any error in instructing the jury on Lowe's vicarious liability for the conduct of Hassan is necessarily harmless because the jury was properly instructed on how to determine whether Hassan's conduct was inside or outside the scope of his employment and because the jury concluded Hassan acted outside the scope before determining his liability. At the charge conference, Lowe's' counsel requested an instruction on the scope of employment based on the four-part test set forth in the Restatement (Second) of Agency, § 228(1) (1958) and endorsed by the Supreme Court in Davis v. Devereaux Foundation, 209 N.J. 269, 303 (2012).[12] [10T 33:16-7] In deciding the prior appeal, this Court cited the same standard when reversing summary judgment on Plaintiffs' vicarious liability claim. [Pa 27-28]. Accordingly, the jury was properly instructed as follows:

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[12] Restatement § 228(1) describes four factors that collectively support a finding that an employee's act is within the scope of his or her employment:

> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master; and
>
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Davis, 209 N.J. at 303.

> You may consider the following factors to determine whether Hassan was within the scope of employment at the time of the incident. All four factors must be satisfied in order to find that Hassan was within the scope of employment. One, is it the kind he is . . . employed to perform? Does it occur substantially within the authorized time and space limits? Is it actuated, at least in part by purpose to serve the employer, and if force is intentionally used by the employee against another, the use of that force is not unexpected by the employer.
>
> When an employee's conduct, however intentional and wrongful, originated in his effort to fulfill an assigned task, then he's acting within the scope of his employment. Thus, if you find at the time of the incident with the plaintiff Mr. Hassan was attempting to serve his employer, then defendant Lowe's will be deemed negligent for the wrongdoing to the same extent as the employee Hassan.

[11T 168:25-169:19]. After deliberations, the jury found that Hassan was acting outside the scope of employment. [Pa71-72].

The crux of Plaintiffs' argument is that "the trial court instructed the jury that in order for Lowe's to be vicariously liable for Hassan's actions, Hassan must have been acting negligently in self-defense . . . ." [Pb33]. Thus, Plaintiffs claim error because the jury charge precluded the jury from imposing vicarious liability on Lowe's if it believed Plaintiffs' version of events: "[E]ven if the jury believed [Tymiv's] version of the events, and even if they believed that Hassan was acting within the scope of his employment at the time, they could not have ruled in Plaintiff's favor on *respondeat superior* with these instructions . . . ." [Pb33-34].

But Plaintiffs do not dispute that Lowe's cannot be vicariously liable for Hassan's conduct that was outside the scope of his employment. See Model Civil Jury Charge § 5.10H(B) (instructing that an employer is vicariously liable for an employee's negligence while acting within the scope of their duties); see also Carter v. Reynolds, 175 N.J. 402, 408 (2003).

Plaintiffs overlook the fact that the jury determined that Hassan was acting outside the scope of employment. This was the threshold question that the jury was directed to answer before determining liability. [Pa71]. Therefore, any error in instructing the jury on *respondeat superior* was harmless, because the jury never reached that question. Even if the jury was instructed that Lowe's could have been vicariously liable for an intentional assault committed by Hassan, they would not have reached a different outcome, because they determined that Hassan was acting outside the scope of his employment first, which precluded a determination on vicarious liability.[13]

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[13] Plaintiffs do not challenge the jury charge on negligent training and supervision, which was the applicable charge. That charge did allow Plaintiffs to recover for assault. "The plaintiff further claims that as a result of Lowe's negligence, [Ivan Tymiv] was exposed to [Ahmed Hassan], an untrained and unsupervised individual, who ultimately assaulted the plaintiff." [11T 170:5-9]. When a party does not object to a jury charge "there is a presumption that the charge was not error and was unlikely to prejudice [the party's] case." State v. Cotto, 471 N.J. Super. 489, 544 (App. Div. 2022).

ii. The alleged improper instruction on vicarious liability is harmless because it could not have led to an unjust result since the physical, objective evidence disproved Tymiv's version of events.

The evidence produced at trial disproved Tymiv's theory of liability and the claimed error in the charge is mitigated by the overall strength of the respondent's case. Galicia, 210 N.J. at 388. Thus, any error arguing the charge improperly limited Tymiv's theory of liability is harmless, because Tymiv's version of events was only supported by his subjective belief that he and Oganov were covered in grout. The bodycam video contradicted Tymiv's account and simultaneously corroborated Hassan's version of events. Likewise, Oganov did not see any grout on him and could not explain why. Further, Dr. Fisher testified the incident could not have occurred the way Tymiv claimed unless he was covered in grout. Subjective self-serving statements that are disproven by objective, physical evidence are not the type of evidence that could lead to an unjust result requiring reversal.

iii. The trial court did not err in instructing the jury on negligent self-defense because the claim for battery was dismissed before trial.

Notwithstanding the above, the trial court did not err in instructing the jury that Hassan could only be negligent if the jury found that he was acting in self-defense. Despite alleging that Hassan intentionally assaulted Tymiv, Plaintiffs made a tactical decision to voluntarily dismiss their claim for battery in order to appeal summary judgment on the remaining claims against Hassan and Lowe's. Plaintiffs

then proceeded to make the faulty argument that they could recover on a theory of negligence based on Hassan's intentional conduct. [4T 31:15-23, 11T 132:15-133:1].[14]

Plaintiffs' trial strategy was to equate negligence with battery to improve the odds that Hassan's conduct would be found within the scope of employment. Such a finding would permit recovery against Lowe's for the liability apportioned to Hassan. If Plaintiffs received a verdict against Hassan and Lowe's, but Hassan was outside the scope of his employment, Lowe's would not be responsible for the liability apportioned to Hassan, and Hassan's ability to pay a large judgment is unlikely.

For example, Tymiv testified on direct that he was battered, and his attorney argued on opening and closing that such conduct constituted negligence without being rebuked by the trial judge. Part of this trial strategy also included precluding Lowe's from cross-examining Tymiv on the fact that he dismissed the battery claim against Hassan, while still seeking to recover against Lowe's for Hassan's battery. This line of questioning would have highlighted to the jury the inconsistency in Plaintiffs' trial position and would have undermined Plaintiffs' credibility. Plaintiffs succeeded on this point too, despite the legal maxim that cross-examination is "the

[14] The trial judge never directly instructed the jury that Plaintiffs' argument was incorrect.

greatest legal engine ever invented for the discovery of truth." See State v. Benitez, 360 N.J. Super. 101, 125 (App. Div. 2003).

Plaintiffs were permitted to present this theory at trial, though it has no basis in law. "Negligence and willfulness are mutually exclusive terms implying radically different states of mind." Wegiel v. Hogan, 28 N.J. Super. 144, 152-53 (App. Div. 1953). "'Negligence' and 'intentional' are contradictory; 'negligence excludes design.'" Price v. Phillips, 90 N.J. Super. 480, 485-86 (App. Div. 1966) (quoting LoRocco v. N.J.M. Ind. Ins. Co., 82 N.J. Super. 323, 329 (App. Div. 1964) and citing 65 C.J.S., Negligence, § 1(a), p. 315). Indeed, Price held that the trial court erred in submitting negligence to the jury after it ruled that the evidence established as a matter of law that the plaintiff's injuries were caused by intentional conduct. 90 N.J. Super. at 485.

Thus, it was proper to instruct the jury that Hassan's negligence was limited to self-defense. Otherwise, the jury may have been misled to believe that it could find Hassan liable for negligence based on his intentional conduct. Furthermore, the trial court's instruction was consistent with this Court's prior decision, which framed the fact issue as either an assault or negligent self-defense:

> Genuine issues of material fact clearly exist based on plaintiff's and Hassan's differing views of the altercation and what led to the altercation. The record contains sufficient evidence to support a jury finding that Hassan intentionally assaulted plaintiff. The record also contains sufficient evidence – including Hassan's own testimony –

> to support a jury finding that Hassan acted negligently in inadvertently striking plaintiff while attempting to block plaintiff's punch. Accordingly, whether Hassan's actions constitute negligence or an intentional act should be decided by a jury[.]

[Pa31]. Notably, the panel did not contemplate that Plaintiffs could recover against Hassan for an intentional assault based on a theory of negligence. Instead, the panel framed the question as an either/or proposition, and reasoned that Hassan could be found negligent only if the jury believed that he struck Tymiv in self-defense.

The trial court's instruction on negligence properly followed the law of the case. Had counsel's suggested charge been read, the trial court would have committed reversible error because the jury would have been misled to believe they could find Hassan negligent for intentional conduct. By clarifying that negligence required a finding that Hassan struck Tymiv in self-defense, the trial court remedied the prejudicial effect of counsel's position in opening and closing arguments and followed the Appellate Division's guidance in framing the fact issue to be decided on remand.

iv. The charge on "intentional and wrongful" as opposed to "aggressive and misguided" conduct within the scope of employment was proper and not capable of producing an unjust result.

The trial court properly instructed the jury: "When an employee's conduct, however intentional and wrongful, originated in his effort to fulfill an assigned task, then he's acting within the scope of his employment." [11T 169:12-19]. Plaintiffs

contend it was error to use the words "intentional and wrongful" as opposed to "aggressive and misguided," and rely on that phrase's use in Davis v. Devereaux, 209 N.J. at 303, as cited by this Court for the proposition that intentional harmful conduct may, in limited circumstances, fall within the scope of employment. [Pa28]. However, Plaintiffs fail to explain how the charge that was read to the jury could possibly have led to a different outcome.

Indeed, at the charge conference Plaintiffs' counsel relied on the fact that the Appellate Division, citing Davis, had used the phrase "aggressive and misguided." [10T 62:14-64:15]. Notably, however, Plaintiffs preferred language and the language selected by the trial court are both cited by the Appellate Division, verbatim, in the same paragraph for the same proposition:

> An employee's intentional or reckless action may be considered within the scope of employment. As our Supreme Court recognized in Davis, "[w]hen the employees conduct – however aggressive or misguided – originated in [an] effort to fulfill an assigned task, the act has been held to be within the scope of employment." "The fact that the employee's conduct is intentional and wrongful does not in itself take it outside the scope of his employment." Vosough, 437 N.J. Super. at 236.

[Pa 28-29] (alterations in original) (citations omitted). In choosing "intentional and wrongful" in lieu of "aggressive or misguided," the trial court stated that it was "us[ing] the Appellate Division words which are in the last sentence" of the paragraph quoted above. [10T 64:16-22]. There was nothing improper about this.

Nor could the purported error have made any difference. Plaintiffs cannot demonstrate that the phrase "aggressive and misguided" is semantically distinct from "intentional and wrongful" in the context of the trial court's charge on intentional conduct that falls within the scope of employment. Both phrases connote to the jury that an employee's improper conduct, which is technically outside of the employee's job duties, will be found to be within the scope of employment if the employee "was attempting to serve his employer" at the time. [11T 169:12-17.] This is why the prior panel used both phrases to illustrate the same point. Further, reading the entire paragraph where this language occurs in the charge makes this point clear.

> When an employer's conduct, however intentional [aggressive] and wrongful [misguided], originated in his effort to fulfill an assigned task, then he's acting within the scope of his employment. Thus, if you find at the time of the incident with the plaintiff Mr. Hassan was attempting to serve his employer, then defendant Lowe's will be deemed negligent for the wrongdoing to the same extent as the employee Mr. Hassan.
>
> [Ibid.]

Moreover, the charge was tailored in a manner which benefitted Plaintiffs. Lowe's argued Hassan's conduct was outside the scope because his conduct was intentional and this intentional conduct was outside his job duties and not expected by Lowe's. He either intentionally assaulted Plaintiff or intentionally used self-defense against Plaintiff. But the word "intentional" in the charge allowed Plaintiffs

to rebut Lowe's argument by arguing Hassan's intentional assault or self-defense originated from his effort to fulfill an assigned task and serve his employer.

C. THE JURY INSTRUCTION LIMITING NEGLIGENT TRAINING AND SUPERVISION TO CONDUCT OUTSIDE THE SCOPE OF EMPLOYMENT WAS CORRECT.

Plaintiffs also contend that the trial court erred by failing to instruct the jury that they could find Lowe's both vicariously liable and directly liable for negligent training and supervision if they determined Hassan was acting within the scope of his employment. More specifically, Plaintiffs argue that "[t]he jury was entitled to believe that Hassan was acting within the scope of his employment AND that Lowe's was negligent in its training and supervision of Hassan." [Pb37]. This is irrelevant and incorrect. This instruction could not have been harmful error because the jury was asked to determine the scope of employment question first, before proceeding to any question of Hassan or Lowe's' liability for negligence, vicarious liability, or negligent training and supervision. See Section IV(B)(i), above. The jury's conclusion that Hassan was outside the scope of his employment, moots Plaintiffs' argument.

Second, the trial court did not err in instructing the jury that they could only find Lowe's liable for negligent training and supervision if they first determined that he was acting outside the scope of his employment. Liability for negligent training and supervision is limited to conduct that is outside the scope of employment. As

both the Appellate Division and Supreme Court have observed, the tort of negligent training and supervision is not applicable when the employer's liability can be established under *respondeat superior*:

> the concept of negligent training, supervision, and retention generally has no significance where, as here, the injury is alleged to have been caused by an employee's negligence in the performance of his or her duties. Hoag v. Brown, 397 N.J. Super. 34, 54, (App. Div. 2007). That is so because an employer is vicariously responsible for the negligent acts of an employee acting within the scope of his or her employment "under standard agency principles" even if the employer was diligent in hiring, training, supervising and retaining the employees. See Mavrikidis v. Petullo, 153 N.J. 117, 133-34 (1998) (*observing that the tort is not applicable when the employer's liability can be established under the principle of respondeat superior*).

Wilson ex rel. Manzano v. City of Jersey City, 415 N.J. Super. 138, 167 (App. Div. 1998), overruled on other grounds, Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558 (2012)[15] (emphasis added). Wilson held "the concept of negligent training, supervision, and retention generally has no significance where, as here, the injury is alleged to have been caused by an employee's negligence in the performance of his or her duties." Ibid. Instead, liability attaches when there is conduct outside the scope of employment: "On the other hand, the employer's

[15] The plaintiff did not appeal dismissal of negligent hiring, training, and supervision claims before the Supreme Court. Wilson, 209 N.J. at 570 n.8.

negligence with respect to selection, retention, and supervision of employees is important when the employee is acting outside the scope of employment." Id. at 168 (citing Di Cosala, 91 N.J. at 173).

Thus, while a plaintiff may simultaneously plead theories of vicarious liability and negligent training and supervision, the latter becomes redundant once the employee's conduct is determined to fall within the scope of employment. See Mavrikidis, 153 N.J. at 133-34 ("If the employee were acting within the scope of his employment, then the master may be vicariously liable under standard agency principles."). Model Civil Jury Charge § 5.76, which was incorporated into the trial court's jury instruction, similarly conditions direct and vicarious liability based on whether the employee's conduct fall inside or outside the scope of employment. "Generally, an employer is not liable for an employee's criminal or tortious act, whether negligent or intentional, unless the act was committed during the course of, and within the scope of, employment"; however, the tort of negligent hiring provides an exception where "[a]n employer may be held responsible for the criminal or wrongful acts of the employee, even if those acts occur outside the scope of employment, if the employer was negligent in the manner in which the employer hired, supervised, or retained an inappropriate or unfit employee." Ibid. Therefore, it was not error to present both theories to the jury but conditioned on the preliminary finding of whether Hassan acted inside/outside the scope of employment. The trial

court properly instructed the jury that it could find Lowe's vicariously liable for Hassan's conduct that was inside the scope of his employment, or alternatively, that Lowe's could be directly liable for negligent training and supervision if Hassan was acting outside the scope of his employment.[16] [11T 169:12-170:25].

D. THE OMISSION OF A JURY INSTRUCTION ON RESTATEMENT (SECOND) OF TORTS § 317 DOES NOT WARRANT A NEW TRIAL.

The trial court properly instructed the jury on the elements of a claim for negligent training and supervision based on Supreme Court precedent and the Model Jury Charge. By contrast, Restatement (Second) of Torts § 317 defines a different legal standard arising from an employer's duty to police its premises and prevent misuse of its property. A charge on the Restatement standard arguably would have prejudiced Plaintiffs, resulting in plain error, because it was undisputed that Hassan was on-duty when the incident occurred, and because there was no evidence that Hassan had ever engaged in dangerous misconduct prior to the incident. Thus, even if it was error not to charge the jury with § 317, the error was harmless, because that standard is narrower than the one adopted by the Supreme Court and articulated in the Model Jury Charge. Unlike the common law tort of negligent training and supervision defined in our case law, the Restatement merely defines a duty to (a)

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[16] This jury instruction is substantially the same as the Model Jury Charge § 5.76 "Negligent Hiring."

prevent misuse of property, (b) protect the public from dangerous conduct of employees that is strictly defined as being outside the scope of employment, and (c) terminate an employee who is known to have engaged in misconduct. Since none of these conditions apply to the evidence presented at trial, the Restatement standard would have yielded the same outcome.

i. The trial court charged the jury with the correct legal standard for negligent training and supervision.

During the charge conference, the trial court noted that the Supreme Court recently clarified the legal standard for negligent training and supervision without reference to Restatement § 317. [10T 41:12-16]. In particular, the Court stated that the elements of a claim for negligent supervision or training are "essentially the same" as negligent hiring, "but framed in terms of supervision or training." G.A.H. v. K.G.G., 238 N.J. 401, 416 (2019). See section I(b), above, for elements of negligent training and supervision.

The instruction on negligent training and supervision accurately reflects the current state of New Jersey law. Plaintiffs incorrectly assert that § 317 of the Restatement is the correct legal standard because it is cited "as one of the principal bases" for the Supreme Court's recognition of the tort of negligent hiring in Di Cosala v. Kay. See [Pb 39] (citing Mavrikidis v. Petullo, 153 N.J. 117, 133 (1998)). Notably, however, Di Cosala and Mavrikidis cite Restatement § 317 exclusively for the proposition that the tort of negligent hiring, training, or supervision is limited to

conduct outside the scope of employment.[17] 91 N.J. at 172; 153 N.J. at 134 (both citing comment a of § 317, which expressly provides that the standard "is applicable only when the servant is acting outside the scope of his employment. If the servant is acting within the scope of his employment, the master may be vicariously liable under the principles of the law of Agency."). Indeed, the Model Jury Charge, which cites Di Cosala extensively, does not reference Restatement § 317. Rather, Di Cosala primarily relied on § 213 of the Restatement (Second) of Agency in defining the tort, and it is those portions of the opinion that are cited in the Model Jury Charge. See Model Jury Charge § 5.76 at fns. 3-4. By recognizing the tort of negligent hiring, training, or supervision, our courts did not intend to adopt § 317 of the Restatement wholesale.

Furthermore, in contrast to the tort of negligent training and supervision, which has been developed in the common law since Di Cosala to address foreseeable harms arising from the potentially dangerous characteristics of an employee, § 317 of the Restatement describes a theory of premises liability based on an employer's duty to police its premises and prevent harmful misuse of its property. See cmt. b to § 317 ("A master is required to police his own premises . . . to the extent of using reasonable care to exercise his authority as a master to prevent his servant from doing

[17] Thus to the extent the tort of negligent hiring, training, or supervision reflects the Supreme Court's adoption of § 317, the Restatement standard undermines the arguments set forth in Section III(B)(2) of Plaintiffs brief [Pb 35-38].

harm to others. . . . Thus, a factory owner is required to exercise his authority as master to prevent his servants, while in the factory yard during the lunch hour, from indulging in games involving an unreasonable risk of harm to persons outside the factory premises.").

In addition, § 317 outlines a duty to terminate an employee that is *known* to have engaged in misconduct. See cmt. c to § 317 ("Thus a railroad company which knows that the crews of its coal trains are in the habit of throwing coal from the cars as they pass along tracks laid through city street, to the danger of travelers, is subject to liability if he retains the delinquents in its employment.").

The duties described in § 317 are inapposite to this case. First, it was undisputed that Hassan was on-duty when he interacted with Tymiv. Second, neither Plaintiffs nor Hassan allege Tymiv's injuries were caused by a misuse of Lowe's' property. Third, there was no evidence presented at trial that supported the inference that Hassan had ever engaged in misconduct prior to the incident. Lowe's witnesses described Hassan as a model employee who was always courteous and respectful and who was never disciplined or reprimanded.

Unlike the elements of negligent training and supervision set forth in G.A.H., the Restatement standard is intended to establish a duty to prevent harm caused by dangerous conduct of employees when they are on the employer's premises but off-duty, see cmt. b to § 317, or to prevent an ongoing, continuous harm which the

employer has knowledge of and occurs while the employee is working. See cmt. c to § 317.

Alternatively, § 317 may apply where the employee misuses the employer's property for his or her own purposes; i.e., outside the scope of employment. Thus, in Doe v. XYC Corp, the Appellate Division applied § 317 and reversed summary judgment because there was evidence that the employer knew that its employee had used the company's computers to access child pornography. 382 N.J. Super. 122, 140-143 (App. Div. 2005). Noting that child pornography is defined as dangerous to third parties by criminal statute, the panel reasoned that the employer could be found liable under § 317 because the harm arose from the employee's misuse of company property in a manner that fell outside the scope of his employment:

> Returning to § 317, all of the requirements for liability in that section are present here. The servant was "using the chattel of the master" and the master both "knows or has reason to know that he has the ability to control his servant" and "knows or should know of the necessity and opportunity for exercising such control." Under these circumstances, a risk of harm to others was "reasonably within the [master's] range of apprehension."

Id. at 142.

The facts of this case are distinguishable from Doe because there was no evidence of prior conduct by Hassan that was both dangerous to third parties and outside the scope of his employment. In this sense, § 317 is retrospective, because it requires the dangerous propensity to have actually manifested in some form of

misconduct before the harm occurs. In Doe, the viewing of child pornography with company computers preceded the molestation of the plaintiff, just as comment c of the Restatement describes liability based on the failure to act with knowledge of the employee's prior misconduct in throwing coal off a train. On the other hand, the doctrine of negligent training and supervision that has actually been adopted by our courts is prospective, in the sense that an employer may be liable based on constructive knowledge of an employee's incompetence or dangerous disposition, even if the harmful conduct never actually manifested prior to the plaintiff's injury.

Thus, an employer may be liable for the criminal acts of an employee if it had reason to know of a prior conviction for a prior different crime. See Lingar v. Live-In Companions, Inc., 300 N.J. Super. 22 (App. Div. 1997) (finding evidence of constructive knowledge of prior convictions for drug distribution and receiving stolen property could support a claim for negligent hiring based on neglect and car theft). Alternatively, liability could attach where an untrained, inexperienced, and/or unsupervised employee causes harm in the course of carrying out a task that the employee had never previously attempted. See Di Cosala, 91 N.J. at 171 Di Cosala 91 N.J. at 171 (alteration in original) (quoting Restatement (Second) of Agency, § 213, cmt. d) (quoted in Model Civil Jury Charge § 5.76 at fn. 4) ("The dangerous quality of the [employee] may consist of his incompetence or unskillfulness due to

his youth or his lack of experience considered with reference to the act to be performed.”).

For these reasons, the jury charge on negligent training and supervision accurately stated the law. It would have been error to charge the jury on § 317 of the Restatement because that standard would have precluded a finding of liability unless the jury found that Hassan was off-duty, misusing company property, or had otherwise misconducted himself on Lowe’s’ premises prior to the incident. Since there was no evidence to support any of these findings, Plaintiffs would have been prejudiced if the trial court had applied this legal standard.

V. THE TRIAL COURT’S RULINGS ON ARGUMENT OF COUNSEL DO NOT WARRANT A NEW TRIAL.

A. STANDARD OF REVIEW.

Trial court decisions on the appropriate scope of opening and closing arguments are subject to deference. “The abuse of discretion standard applies to the trial court’s rulings during counsel’s summation.” Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 392-93 (2009). Therefore, the trial court errs in permitting or excluding comments in opening and summation only if the decision is “made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.” Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 572 (2002).

If no objection was made to the comments, they are reviewed for plain error. Rule 2:10-1. The plain error standard requires a determination of: "(1) whether there was error; and (2) whether that error was clearly capable of producing an unjust result; that is, whether there is a reasonable doubt . . . as to whether the error led the jury to a result it otherwise might not have reached." State v. Dunbrack, 245 N.J. 531, 544 (2021) (quotations and citations omitted). "Relief under the plain error rule . . . at least in civil cases, is discretionary and should be sparingly employed." Baker v. Nat'l State Bank, 161 N.J. 220, 226 (1999).

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING COMMENT ON THE LACK OF A BATTERY CLAIM IN CLOSING ARGUMENT BECAUSE PLAINTIFFS COULD NOT HAVE RECOVERED FOR NEGLIGENCE BASED ON AN INTENTIONAL ASSAULT.

Prior to summation, counsel for Lowe's requested that he be able to reference the lack of a battery claim against Hassan, and there was no objection. Specifically, counsel noted that Plaintiffs were alleging that Hassan intentionally punched Tymiv, whereas the jury had not been instructed that they could find Hassan liable for battery. [11T 4:19 – 5:7]. Plaintiffs' counsel did not voice an objection, and the trial court agreed that Lowe's could address the absence of a battery claim in closing. [11T 4:19 – 5:7]. Counsel then told the jury that Tymiv was not alleging a battery by Hassan, but merely that Hassan was negligent. [11T 58:24-59:8]. Counsel for Lowe's did not state that Tymiv initially pled battery and dismissed the claim.

Plaintiffs' counsel did not voice an objection during or after the summation. [11T 58:24-59:18, 86:24-87:24]. Therefore, Plaintiffs need to establish plain error.

However, the trial court did not err in permitting these comments on summation. "The trial court has broad discretion in the conduct of the trial, including the scope of counsel's summation." Litton Indus., 200 N.J. 372, 392 (2009). It was proper to allow counsel to highlight the lack of a battery claim against Hassan, which was totally incongruous with Tymiv's allegation that Hassan was the aggressor, because otherwise jurors would have been misled to believe that Hassan could be personally liable for an intentional assault. See Price v. Phillips, 90 N.J. Super. 480, 485-86 (App. Div. 1966); Wegiel v. Hogan, 28 N.J. Super. 144, 152-53 (App. Div. 1953). In civil law, as opposed to criminal law, negligence is not an element of battery that is treated like a lesser-included offense.

Plaintiffs cite several cases in their brief for the proposition that "negligence may be imposed for the same conduct as assault, but without the intent." [Pb43]. This statement is misleading. Firing a shotgun may be a battery if the shooter intended to strike the victim. Alternatively, it may be negligence if the shooter intended to fire the shotgun, but had no intent to injure the victim. That exact scenario is discussed in Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 390 (1970), a case relied upon by Plaintiffs. Burd and the other cases cited by Plaintiffs do not stand for the proposition that the shooter may be held liable for battery if the

evidence establishes he had no intent to strike the victim, nor does Burd allow the victim to recover in negligence if the evidence establishes the shooter intended to strike the victim. To the contrary, Burd recognized the two theories of recovery were at odds with another, since the plaintiff pled negligence and intentional conduct in the alternative and the insurer's coverage excluded intentional acts. See Price, 90 N.J. Super. at 485.[18]

Applying that rationale here establishes Tymiv cannot recover for negligence under his version of events, because Tymiv claims Hassan intentionally punched him after he laughed at Hassan. As the Appellate Division and trial court both ruled, this theory has no basis in law.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PRECLUDING COMMENT ON HASSAN'S ABSENCE DURING SUMMATION BECAUSE THE JURY HEARD HIS TESTIMONY.

The trial court did not err in precluding comment on Hassan's absence at trial during closing argument. Our courts apply a four-factor test to determine whether a party may comment upon the non-production of a witness at trial. Nisivoccia v. Adamhill Assocs., 286 N.J. Super. 419, 428 (App. Div. 1996). This standard

[18] Under Plaintiffs' interpretation of the law, a plaintiff may succeed on a negligence theory for any intentional act without the need to prove intent. But "negligence excludes design" and Hassan's conduct – as described by Tymiv – was by design. Price, 90 N.J. Super. at 485-86.

requires that the testimony of the missing witness appear "to be superior to that already utilized in respect to the fact to be proven." Ibid. Thus, comments about a witness' absence at trial are improper if their testimony would have been cumulative. See id. at 426-27 (discussing Hickman v. Pace, 82 N.J. Super. 483 (App. Div. 1964)).

During the jury charge conference, Plaintiffs were properly denied an adverse inference based on Hassan's absence and precluded from commenting on it in summation because the jury did hear his videotaped deposition testimony. [10T 17:21-19:23]. Not only did the jury hear Hassan's testimony under questioning from Plaintiffs' counsel, there is also no indication that his live testimony would have been superior to the videotaped deposition testimony that was presented at trial. See State v. Hill, 199 N.J. 545, 561 (2009) (stating that the party seeking the inference must establish that the witness "have superior knowledge of relevant facts."). Rather, Hassan's live testimony would have been cumulative of his videotaped deposition testimony played for the jury.

The charge is appropriate only when there is no alternative explanation for the witness's failure to appear, and here the record reflected Hassan's attorney could not locate him and it was unknown if Hassan had notice of the trial. Id. at 354 (quoting State v. Clawans, 38 N.J. 162, 170-71 (1962)); See also [Pb43]; [10T 17:15-21].

Finally, even if it was error to preclude comment on Hassan's absence, the error was harmless because the trial court allowed an adverse inference related to

the contents of a missing internal incident report Hassan testified he submitted to Lowe's. [10T 20:15-25:25]. Thus, the jury was allowed to infer that the incident report was favorable to Plaintiffs and Hassan could not explain the statement's contents at trial. This adverse inference charge negated any prejudicial effect that may have resulted from precluding comment about Hassan's absence at trial.

CONCLUSION

For the reasons stated herein, Lowes requests that the Court grant its cross-appeal and dismiss Plaintiffs' appeal.

Respectfully submitted,

GOLDBERG SEGALLA LLP

By: ______________________________
Attorneys for Defendant-Respondent/
Cross-Appellant,
Lowe's Home Centers, LLC

Dated: August 2, 2023

37267204.v1

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001830-22

Plaintiff/Appellant, IVAN TYMIV and OKSANA TYMIV vs. *Defendants/Respondents*, LOWE'S HOME CENTERS, LLC and AHMED HASSAN	On Appeal From Final Judgment Entered in the Superior Court, Law Division, Middlesex County *Sat Below:* Honorable ALBERTO RIVAS, J.S.C. Middlesex County Superior Court Docket No. MID-L-6536-17

AMENDED APPELLATE BRIEF ON BEHALF OF DEFENDANT-RESPONDENT, AHMED HASSAN

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PRELIMINARY STATEMENT

Defendant/Respondent, Ahmed Hassan hereby adopts, relies upon and incorporates herein, as if set forth at length Defendant/Respondent, Lowe's Home Center, LLC's preliminary statement.

STATEMENT OF FACTS

Defendant/Respondent, Ahmed Hassan hereby adopts, relies upon and incorporates herein, as if set forth at length Defendant/Respondent, Lowe's Home Center, LLC's statement of facts.

PROCEDURAL HISTORY

Defendant/Respondent, Ahmed Hassan hereby adopts, relies upon and incorporates herein, as if set forth at length Defendant/Respondent, Lowe's Home Center, LLC's procedural history.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING TESTIMONY OF THE INVESTIGATING OFFICERS FOR THE PURPOSE OF IMPEACHING THE CREDIBILITY OF PLAINTIFF'S EXPERT, ALEX BALIAN

It has been a longstanding rule of law that an appellate court defers to a trial court's evidentiary rulings absent an abuse of discretion. Rowe v. Bell & Gossett, Co., 239 N.J. 531, 551 (2019). "Evidentiary decisions are reviewed under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion.'" Est. of Hanges v. Metropolitan Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010). Thus, an appellate court "will not substitute [its] judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" State v. Garcia, 245 N.J. 412, 430 (2021) (quoting State v. Medina, 242 N.J. 397, 412 (2020)).

In the matter at bar the trial court by no means abused its discretion when admitting prior testimony of the investigating police officers, because the jury did in fact hear the investigating officer's opinions during plaintiff's own case in chief. As the trial transcript bear out, counsel for the plaintiff, during plaintiff's own testimony on direct examination played selected

portions of the bodycam videos of the investigating officers to Tymiv on direct examination. These videos played by plaintiff's counsel demonstrated tense exchanges between Tymiv and Officer DeMiceli, in which Officer DeMiceli repeatedly asked Tymiv why Hassan had grout all over his back, and in which Tymiv accuses the police of railroading him. [7T84:3-86:6, 7T90:16-96:5, 7T115:16-19] The jury further heard Tymiv tell the police "I'm getting accused of assault . . . . You couldn't make simple police report. You have to accuse me? . . . You gotta accuse me with it?" [7T93:8-24]. After plaintiff's counsel played the police bodycam footage for the jury, Tymiv upon plaintiff's counsel's questioning testified that the police "ke[pt] telling me that I throw the bag of grout in the back of the guy head," that the police accused him of assaulting Hassan, and that Oganov, who observed the exchange, told him he thought they were going to be arrested. [7T95:8-11, 7T115:16-117:7]. Through Tymiv's own testimony it became obvious what the investigating offer's opinions were. This testimony, which was initially elicited at Tymiv's deposition, was always admissible regardless of N.J.R.E. 701. This testimony put before the jury by plaintiff's counsel on direct examination of Tymiv placed the opinions of the investigating officers into evidence in the first place. Plaintiff can not now legitimately claim that the Court abused its discretion

when permitting the officer's opinion with a limiting instruction to impeach plaintiff's expert.

The trial court's reliance on N.J.R.E. 105 and pertinent case law was proper when admitting the investigating officer's opinions with a limiting instruction for purpose of Lowe's counsel's impeachment of plaintiff's expert. The Court's prior ruling that the responding officers' lay opinions as to how the incident occurred were inadmissible pursuant to N.J.R.E. 701, does not preclude admissibility for another purpose. Evidence may be admissible for one purpose, but inadmissible for another.

N.J.R.E. 105 provides that "[w]hen evidence is admitted as to one party or for one purpose but is not admissible as to another party or for another purpose, the court, upon request shall restrict the evidence to its proper scope and shall instruct the jury accordingly, but may permit a party to waive a limiting instruction." Relying on N.J.R.E. 105, as well as the Appellate Division's recent decisions in Hassan v. Williams, 467 N.J. Super. 190, 207-08 (App. Div. 2021) and Parker v. Poole, 440 N.J. Super. 7, 18-20 (App. Div. 2015), Counsel for Lowe's successfully argued this point to the trial judge, who agreed the officers' opinions were admissible to show bias on the part of Plaintiffs' liability expert Alex Balian, provided there was a limiting instruction. [1T 55:4-60:0].

Lowe's counsel then used the investigating officers' opinions to impeach Balian's credibility. See N.J.R.E. 611(b). The credibility of a witness is always at issue. Specifically, Balian testified that he only takes cases if he agrees with the theory of the case. [8T100:21-24]. Balian further acknowledged that he did not consider Hassan's version of events in forming his opinions. [8T101:20-102:7]. He did not because Balian's causation theory was premised upon Hassan becoming frustrated (pursuant to Tymiv's version), an opinion that is undermined if Hassan calmly walked away and only responded after being attacked while his back was turned. [8T90:11-20]; See State v. Wakefield, 190 N.J. 397, 452 (2007) ("[I]n respect of the cross-examination of an expert witness, we have held that an expert witness is always subject to searching cross-examination as the basis of his opinion."). To determine the credibility, weight and probative value of an expert's opinion, one must question the facts and reasoning on which it is based. Johnson v. Salem Corp., 97 N.J. 78, 91 (1984).

Because the evidence at the scene was so one-sided as to cause the officers to question Tymiv's accusations against Hassan, their opinions that Tymiv threw the bag of grout was relevant to the jury's evaluation of Balian's credibility and bias in testifying that he believed in the merits of Plaintiffs' case, and by extension, that Tymiv was credible.

The trial court did not abuse its discretion, because its decision to allow the officers' opinions with a limiting instruction for the purpose of demonstrating the bias of plaintiff's expert was reasonably based on sound legal principle. Even if this court were to determine that it was error to allow the officer's opinions as to who threw the bag of grout, the error was harmless, because Tymiv had already testified at his deposition and in his own case in chief that he believed that the officers blamed him for the incident and were accusing him of throwing the bag of grout at Hassan.

POINT II

THE TRIAL COURT APPROPRIATELY ADMITTED EVIDENCE OF TEXTS AND PHOTOGRAPHS THAT CONTRADICTED TYMIV'S CLAIM THAT HE IS UNABLE TO WORK

The standard of review against which the trial court's evidentiary rulings are reviewed is the abuse of discretion standard. As set forth above, an appellate court defers to a trial court's evidentiary ruling absent an abuse of discretion. Rowe v. Bell & Gossett, Co., 239 N.J. 531, 551 (2019). An appellate court "will not substitute [its] judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" State v. Garcia, 245 N.J. 412, 430 (2021) (quoting State v. Medina, 242 N.J. 397, 412 (2020)).

The trial court did not abuse its discretion in admitting photographs and texts demonstrating Tymiv's physical capacity to work following the incident because this evidence was highly probative of Tymiv's credibility in all matters, including his version of the altercation with Hassan.

N.J.R.E. 607 provides that for the purpose of attacking or supporting the credibility of a witness, any party may examine the witness and introduce extrinsic evidence relevant to the issue of credibility. N.J.R.E. 607 embodies the right to cross examination which has been referred to as the "greatest legal engine ever invented for the discovery of truth." State v. Silva, 131 NJ 438, 444 (1993) Any witness may be cross examined "with a view of demonstrating the improbability or even fabrication of his testimony." State v. Silva, 131 NJ at 445. The issue of a witness' credibility transcends whether the credibility is related to liability or damages.

Although this matter was bifurcated for the purposes of trial the jury during plaintiff's case in chief was apprised of plaintiff's damages claims. Testimony demonstrated that plaintiff was alleging injury to his neck for which he underwent two (2) surgeries; that he has not worked since the incident at Lowe's and that it is his position in this litigation that he cannot work because of the injuries from the incident at Lowe's. With this testimony from plaintiff, the defense was well within its right to cross examine plaintiff

with extrinsic evidence of his ability to work and his ability to engage in strenuous physical activity.

At the close of trial, by virtue of the "False in One-False in All" charge, jurors were instructed they could disregard Tymiv's version of the incident at Lowe's if they believed that Tymiv deliberately lied about a material fact. "If you believe that a witness deliberately lied to you on any fact significant to your decision on this case, you have the right to reject all of the witness's testimony." [11T162:3-6] (quoting Model Jury Charge § 1.12M, "False in One – False in All." Lowe's was entitled present this evidence to the jury because the photographs and texts demonstrated that Tymiv was being dishonest about his injuries and inability to work. See Cappell v. Capell, 358 N.J. Super. 107, 111 fn. 1 (App. Div. 2003) (stating that the "false in one, false in all" rule is appropriate where a witness intentionally gives false testimony about a material fact.).

The photographs and texts were properly admitted to show that Tymiv was lying about his physical condition to advance his interests in litigation, and therefore was also lying about Hassan being the aggressor. At trial, Tymiv confirmed that he was asserting he has been unable to work due to his injuries. [7T142:11-14]. He was then confronted with pictures of him using a ladder and chainsaw for tree removal and operating ATVs and dirt bikes, as well as

text messages in which he provided work estimates for a home remodeling project and indicated that he was performing labor for a contractor. [7T142:15-160:19]. This evidence was highly relevant to Tymiv's dishonesty about a material fact – his claimed injuries and inability to work – and, under the "false in one, false in all" rule, it was also highly relevant to Tymiv's credibility as to how the incident occurred.

The trial court did not abuse its discretion in adopting this reasoning. At oral argument, the trial judge noted that Tymiv's injuries were an element of his claims for negligence; therefore, evidence of his dishonesty about his injuries did not have to be relegated to the damages phase of trial. [1T147:20-148:11]. The trial judge also correctly reasoned that Tymiv's credibility was a relevant issue in both phases, meaning that admissible damages evidence was not automatically excluded from the liability phase. [1T146:8-14, 1T147:16-19, 1T148:11-17]. The trial judge's findings are supported by the law.

It is well-established that evidence is admissible during the first stage of a bifurcated trial if it is relevant to a witness's credibility or any other issue to be decided by the jury, even if the same evidence goes to the ultimate issue in the second stage of trial. In a criminal trial bifurcated for the purpose of trying counts of weapons possession and weapons possession by a convicted felon separately, evidence of a defendant's prior convictions can be introduced to

impeach his credibility during the first stage of trial even though it is determinative of the ultimate issue in the second stage of trial. State v. Jones, 364 N.J. Super. 376 (App. Div. 2003); State v. Wray, 336 N.J. Super. 205 (App. Div. 2001).

Similarly, the Supreme Court held that altered medical records could be introduced as statements against interest during the first phase of trial on medical negligence that was to be followed by a second trial on claims for spoliation and fraudulent concealment. Rosenblit v. Zimmerman, 166 N.J. 391 (2001). The Court reasoned "a jury could infer from Dr. Zimmerman's behavior that he believed that Rosenblit's medical records would prejudice his position in the [medical negligence] litigation." Ibid. The Court held that it was reversible error to limit their admissibility for impeachment purposes only and remanded for a new trial on the malpractice count. Ibid.

Rosenblit, Jones, and Wray each demonstrate evidence that is relevant, if not dispositive of the latter phase of a bifurcated trial, is admissible for either impeachment, or as substantive evidence, even if it is prejudicial to the objecting party. Rosenblit in particular further demonstrates that evidence must be admitted in the initial phase of trial if it has the potential to influence the outcome. Here is no different. During the liability phase of trial, jurors were asked to consider two opposing narratives of the cause of Tymiv's injuries;

they had to either believe that Hassan "sucker punched" Tymiv or that Tymiv followed Hassan through the store and assaulted him. The trial court did not abuse its discretion in admitting evidence that Tymiv was capable of physical labor because it was not only relevant to impeach his credibility, but also probative of whether he was lying about the altercation.

Meanwhile, the cases Plaintiffs cite are inapposite. In Redvanly v. ADP, 407 N.J. 395, 402 (App. Div. 2009), the Appellate Division barred evidence from the liability phase of trial that it found to be "relevant and admissible only on the issue of damages." Redvanly is also distinguishable because the underlying facts brought into evidence were indeterminable. There, the defendants introduced evidence of the plaintiff's termination by a former employer to establish that she had lied on her job application. However, the panel emphasized that the plaintiff had settled a wrongful termination claim against her former employer, therefore "we do not know the crucial fact of whether Redvanly was rightfully or wrongfully terminated." Id. at 402. As a result, the panel was unable to evaluate the plaintiff's argument that she had answered truthfully on her employment application as well as the defendant's argument that she had made inconsistent statements about the circumstances of her termination. See id. at 400-401. Here, however, there is no such ambiguity.

The texts and photographs speak for themselves and were authenticated by Tymiv during his trial testimony.

POINT III

THE TRIAL COURT APPROPRIATELY EXERCISED ITS DISCRETION WHEN IT PRECLUDED PLAINTIFF'S COUNSEL FROM COMMENTING ON HASSAN'S ABSENCE DURING TRIAL AND WHEN IT DENIED PLAINTIFF'S REQUEST FOR AN ADVERSE INFERENCE CHARGE

Once again, the standard of review against which the trial court's evidentiary rulings are reviewed is the abuse of discretion standard. "Evidentiary decisions are reviewed under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion.'" Est. of Hanges v. Metropolitan Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010). An appellate court "will not substitute [its] judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" State v. Garcia, 245 N.J. 412, 430 (2021) (quoting State v. Medina, 242 N.J. 397, 412 (2020)).

During the jury charge conference plaintiffs were appropriately denied an adverse inference charge based upon Hassan's absence at trial and was precluded from in commenting on his absence during closing arguments, because the jury already heard Hassan's testimony by way of videotaped deposition. During plaintiff's case in chief, counsel for the plaintiff subject

only to certain limited redactions for evidentiary rulings effectively played almost the entirety of the videotaped deposition of Defendant, Ahmed Hassan. As a result, the jury heard detailed testimony from Hassan, upon plaintiff's counsel's own questioning, as to how the incident at the Lowe's store occurred; Hassan's employment history with Lowe's and the training that Hassan had undergone with Lowe's immediately prior to the date of the incident and in the past when he had worked for Lowe's on two (2) prior occasions and testimony regarding a number of other issues. The jury via was able to assess Hassan's demeanor and credibility, just as if he was in court. Hassan's testimony would have been no different if he was in court testifying live before the jury.

Where a party-witness has been deposed in the case, an adverse inference charge is not warranted. Torres v. Pabon, 225 N.J. 167, 181-184 (2016). In Torres, the New Jersey Supreme Court found that the trial court improperly issued a jury charge pursuant to State v. Clawans, 38 N.J. 162 (1962) directly to the jury to consider drawing an adverse inference against Defendant, Pabon, from Pabon's failure to testify after plaintiff presented Pabon's deposition testimony to the jury.

In Torres, plaintiff during trial was permitted to read portions of the defendant's testimony into evidence. In the matter at bar, plaintiff was

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permitted and in fact did play almost the entire video taped deposition testimony of Defendant, Hassan in his case in chief. Therefore, the trial court in the instant matter did not abuse its discretion when denying plaintiff's request for an adverse inference charge and when precluding plaintiff's counsel from commenting on Hassan's absence during closing arguments. A decision otherwise would have been inappropriate.

CONCLUSION

For the reasons set forth above and for the reasons expressed in the Brief submitted on behalf of Defendant/Respondent Lowe's Home Centers, LLC., Defendant/Respondent, Ahmed Hassan hereby requests that this court deny Plaintiff/Appellant's appeal in its entirety and affirm the trial court's decision in this matter.

Respectfully submitted,

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By: /s/ Jeffrey J. Czuba
Jeffrey J. Czuba

Dated: September 28, 2023

FILED, Clerk of the Appellate Division, October 16, 2023, **A-001830-22**

IVAN TYMIV and OKSANA TYMIV, Plaintiffs, vs. LOWE'S HOME CENTERS, LLC, AHMED HASSAN, and JOHN DOES 1 through 100 (fictitious names), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-001830-22 On Appeal From: Superior Court/Middlesex Sat Below: Jury trial before Hon. Alberto Rivas CIVIL ACTION

PLAINTIFFS/APPELLANTS/CROSS RESPONDENTS' BRIEF IN OPPOSITION TO CROSS APPEAL AND IN REPLY

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PRELIMINARY STATEMENT

Plaintiffs submit the within brief in opposition to the cross-appeal filed by Lowe's, and in reply to the briefs in opposition to plaintiffs' appeal which were submitted by defendants Lowe's and Ahmed Hassan.

Lowe's cross-appeals the trial court's denial of its motion to dismiss the cause of action alleging Lowe's negligently trained and supervised Hassan. That motion was made at the close of plaintiff's case pursuant to Rule 4:37-2(b). Lowe's bases its protective cross-appeal on what it claims to have been a lack of evidence at trial that the defendant Hassan had any particularized "dangerous attributes." (9T109:12-130:18).

Counsel for Lowe's has claimed that the case of G.A.-H. v. K.G.G., 238 N.J. 401 (2019) stands for the proposition that negligent training and supervision requires a showing of the dangerous characteristics of the employee. Inasmuch as the holding in G.A.-H. does not require such a showing, and because this Court has already determined that a jury should decide whether negligent training and supervision was a substantial factor in causing this incident (Pa26), the cross appeal should be denied. As will be shown, the trial judge properly denied the motion (10T4:1-6:23), and its decision in that regard

should be affirmed.

ADDITIONAL FACTS RELEVANT TO CROSS-APPEAL

The incident at issue occurred on May 13, 2017. Nine days earlier, on May 4, 2017, Lowe's hired defendant Hassan as a part-time seasonal Customer Service Associate ("CSA") in the flooring department. (Pa279). The flooring department sold products such as carpeting, tile, grout and flooring. (5T52:3-10). The Lowe's Job Description for CSAs states that a CSA's "Essential Knowledge/Skills" include "Understand and respond appropriately to basic customer and employee inquiries" and [a]"Ability to operate/demonstrate/explain" merchandise in assigned area." (Pra001; 5T27:19-29:2).

Prior to being hired by Lowe's in 2017, Mr. Hassan had previously worked there, but only as a seasonal cashier, not as a CSA on the sales floor. (Pa264-278; 8T162:5-163:4). He again applied for a job as a cashier in 2017, but the human resources manager in the Marlboro store, Christine Jennings, urged him to apply for the flooring department instead because there were openings there. (8T163:22-165:6). Prior to being so hired, defendant Hassan had no experience in the Lowe's flooring department (5T38:8-16), and no knowledge of any of the products in that department. (8T165:10-14). He also had no prior experience in flooring with any other employers. (8T164:5-12).

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Hassan's direct supervisor, George "Roth" Craig, testified that Hassan "didn't know much" and was still in training at the time of the incident. (9T42:10-20). Nevertheless, Lowe's left Mr. Hassan "alone in the department" on the morning of the incident (8T210:21-24), on a busy Saturday. (9T62:15-63:4).

Lowe's employees who are still in training, such as Mr. Hassan, have not yet "earned," and do not wear, the Lowe's uniform, which is a red vest. (9T91:23-92:15). Hassan himself was not wearing the red vest at the time of the incident because he was still in training. (9T41:17-22).

According to Alyssa Stokes, the Lowe's corporate representative in charge of training for the region, trainees do not receive the red vest during training "[b]ecause they are not familiar with customer service standards and customer service levels in the store." (9T95:4-96:2). According to the Human Resource manager at the store in question, Christine Jennings, new hires are not given the red vest right away so as "[t]o give them the opportunity to learn the department, not just put them on the floor the first day and they have customers approaching them on the very first day and not knowing their co-workers, getting to learn the department with their co-workers, and gradually getting them comfortable in the position." (5T56:20-57:2).

Testimony at the trial was that Lowe's employees who wear the red vest get approached by customers more than those without the red vest (6T77:16-78:13),and that Lowe's did not provide its trainees with the red vest because it did not want them to feel "too much pressure" by being approached by customers. (Ibid.)

Lowe's was aware of the need to protect its employees from customer interactions on the sales floor during the training period. Its "Becoming Red Vest Ready" training video, which was played for the jury (the transcript of this training Video is at Pra003; 5T61:18-66:2), states in part: "You will have the dedicated training time to better understand your department, practice selling skills, and shadow experienced employees before working by yourself." (Emphasis added). (Pra004) In addition, the Lowe's New Associate Resource Guide (Pra007; 5T69:9-70:21) states on page 16: "After completing your New Associate Orientation, you will begin Red Vest Ready training. This training provides you with three to five days of 'protected time' from customer interactions on the sales floor, to be used for additional observation, training and preparation." (Pra22) (Emphasis added).

However, the corporate executive in charge of training testified that this "red vest ready" training usually takes 7 to 14 days to complete. (9T93:2-5). The assistant store manager,

Ryan Madden, testified that the training before earning the red vest typically lasts a week but "it could take longer." (6T196:2-7). There was also testimony that the training could last "three weeks and a month." (6T220:6:-10). Hassan had been hired nine days before the incident, but by then he had actually only worked seven days at most. (Pra27; Pra30).

Rather than "protecting" Hassan from customer interactions on the sales floor, and rather than providing him the "dedicated training time to better understand [his] department, practice selling skills, and shadow experienced employees before working by" himself, this particular Lowe's store actually encouraged Hassan to approach customers by himself during training. (9T100:21-25; 6T121:2-21). This practice was in contravention of its own corporate policy and standard practice in the retail industry. (8T68:3-17).

The Lowe's Training Manual for the flooring department (Pra42) is 90 pages long. On page 4 (Pra47) it summarizes the process a new flooring employee is supposed to go through before he is "red vest ready." Prior to getting his red vest, the new employee is supposed to go through various forms of training, including "Meet My Mentor," "Learning and Talent Center," "Shadow My Mentor," "Test Your Knowledge," and "Manager Touch Point." Only after all of that training takes place, and the

employee passes the testing, is the employee deemed "red vest ready" and given the red vest. (Ibid.; 6T195:21-196:10; 6T235:10-24).

Mr. Hassan's training log (Pra134) indicates that the only computer-based training he received was: "he had the power stocker lifter, credit at Lowe's, credit compliance, introduction of flooring, introduction to carpet, understanding equal employment opportunities probably, spill clean-up, inspecting top stock, and [] power stock lifter knowledge." (5T36:17-37:6).

On "Day One" of the training, the new employee is supposed to watch the aforementioned "Becoming Red Vest Ready" training video where it says that he "will have the dedicated training time to better understand your department, practice selling skills, and shadow experienced employees before working by yourself." Mr. Hassan's training log (Pra134) shows that he never saw that video (9T105:2-5), not even in his prior stints of employment, so he did not know that it said he was supposed to complete his training before working by himself. Plaintiff's expert so testified at trial, and this was unrefuted. (8T63:1-11).

There were also computerized training modules about how to deal with customers, such as "Customer Experience," "Impacting

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the Customer," "Selling at Lowe's," "Workplace Violence," "Our Purpose/My Promise," and "Sales/Service/Culture" (Pra135), none of which Mr. Hassan received. (Pra134; 8T84:7-85:5). There was even a training module on how to deal with an "upset customer," but Mr. Hassan did not receive that training either. (Ibid.; Pra135;).

The Training Manual for the flooring department includes "Ebriefs," or "Ecourses," which consist of computerized training in product knowledge, including tile, grout and other flooring products. This training includes "Introduction to Flooring," "How to Sell Flooring," "Introduction to Tile," "Introduction to Laminate," "Introduction to Hardwood," all of which are supposed to be followed by "Shadowing Experience," where the trainee is supposed to "shadow" experienced employees to observe. (Pra40-133). Normal procedure would have required Mr. Hassan to take various assessments and tests along the way, certain milestones, to test his knowledge, which would be reflected in his training log. (6T218:13-219:12). At the conclusion of the training, after having absorbed the 90 page flooring manual, there would be another test at the end before getting the red vest. (Pra120; 6T207:15-23; 6T218:13-219:12; 8T61:5-12; 9T84:17-20). But Mr. Hassan was not tested on anything; not along the way and not at what would have been, but was not, the

"end." (8T85:6-10).

Additionally, the testimony at trial from the Lowe's corporate executive was that Lowe's issued name tags to its trainees that said "In Training" on them. (9T86:7-87:4). The name tag is supposed to be worn on the chest so that it is visible from the front. (Ibid.) However, Christine Jennings, the HR manager who urged Mr. Hassan to apply for the flooring department, issued Mr. Hassan a regular name tag that did not say "In Training." (Pra138). Instead of wearing his name tag on his chest facing the front, Hassan wore his name tag at the bottom of his untucked t-shirt, at hip-level, facing to the right. (Pa252; 4T104:1-21).

Despite not having completed his training, not having earned his red vest, not wearing a red vest, not wearing a name tag that said "In Training," and not wearing a name tag in a place where a customer could actually see it, Hassan was "alone in the department" on a busy Saturday. (8T210:21-24). As a result, the plaintiff did not see the name tag (7T62:21-23) and had to ask Hassan for his name, repeatedly, so as to report him to the manager for the way he had "cursed out" the plaintiff and the plaintiff's client. (7T64:2-65:5; 7T63:3-24; 7T65:18-25; 7T67:3-68:10).

The incident happened at approximately 10:00 a.m. (Pa253),

but Mr. Hassan's direct supervisor, George "Roth" Craig, was not scheduled to work that day until 1:30 p.m. (Pra36), and Mr. Hassan did not see him in the store from the time he [Hassan] arrived that day until the police finished their investigation and left. (8T:194:20-196:6).

Mr. Hassan never came back to work after that day. (Pa280-281; 5T41:6-8).

The plaintiffs' liability expert, Alex Balian, has been employed in the retail industry for 60 years. (8T35:3-25). He started as a box-boy in his family's chain of grocery stores and after graduating from UCLA in 1965 managed those stores and directed the training of employees. (Ibid.) He subsequently worked as the director of a chain of big box stores in California called Irvine Ranch Farmers Market, where he also was in charge of the training of employees and instituted training policies and procedures for those stores. (8T37:1-39:20). Since 1988 Mr. Balian has been a consultant in the retail industry and has testified as an expert witness for both sides in numerous cases involving allegations of negligent training and supervision in retail. (8T41:16-43:23).

Mr. Balian's opinion was that while the corporate policy of Lowe's itself was adequate, Lowe's management at the store level in this case failed to implement its policy and standard

industry practice for training and supervision and therefore breached the standard of care. (8T72:4-74:10). He testified that it is "consistent throughout the industry including big box stores like Lowe's that the person has to be trained in his department before he's set loose alone on the sales floor". (8T135:10-136:18). According to Mr. Balian, the failure of Lowe's to ensure that Hassan completed his training before setting him loose on the sales floor by himself constituted a breach of the standard of care in the retail industry. (8T133:16-22).

Mr. Balian further testified that the failure of Lowe's to adequately train and supervise Mr. Hassan was the cause of this incident because it "made him unable to deal with the situation that arose." (8T88:19-90:23). The failure to adequately train Hassan "created the frustration" that arose between he and plaintiff, and Hassan should have been supervised at the time of the incident by "an experienced red vest employee," he testified. (Ibid.; 8T87:20-24). Mr. Hassan never came back to work after the incident and he was terminated for job abandonment. (5T41:6-8; Pa280).

The defendants did not call a liability expert at trial.

LEGAL ARGUMENT

OPPOSITION TO CROSS APPEAL

I. NEGLIGENT TRAINING AND SUPERVISION DOES NOT REQUIRE A SHOWING OF DANGEROUS CHARACTERISTICS (9T109:12-130:18; 10T4:1-6:23)

This Court was previously asked to weigh in on whether plaintiffs' claim of negligent training and supervision should go to a jury and the answer was yes. This Court's decision reversing the trial court's summary judgment ruling in favor of Lowe's on this issue (Pa7) stated in part:

> "It was for the jury, not the judge, to determine whether Lowe's failed to train and supervise Hassan properly, and, if so, whether that failure was a substantial factor in causing the harm at issue in this case."

(Pa26). Since then, nothing has changed.

This Court actually quoted the G.A.-H. opinion and stated that "to prove negligent supervision or training, a plaintiff 'must prove that (1) an employer knew or had reason to know that the failure to supervise or train an employee in a certain way would create a risk of harm and (2) that that risk of harm materializes and causes the plaintiff's damages.'" (Pa25, citing G.A.-H., *supra*, at 415).

G.A.-H. actually distinguishes negligent hiring from negligent training and supervision and specifies the elements needed to establish each. Under G.A.-H., only negligent hiring

requires a showing of dangerous attributes of which the employer should have been aware. Ibid., at 416. By contrast, negligent training and supervision requires an examination of the training and supervision which the employer provided. Ibid. This Court recognized this distinction in its opinion the last time.

There is nothing in this Court's earlier ruling that requires a showing of dangerous attributes. Negligent hiring and dangerous attributes were not even addressed. In sending the case back for trial, this Court stated:

> "Viewing the facts in a light most favorable to plaintiffs, a reasonable factfinder could conclude Lowe's knew of the importance of training new customer service associates to interact with customers, including unhappy customers questioning whether the customer service associate knew what he was doing, to ensure a 'positive customer experience' and of pairing a new customer service associate with an experienced associate while still in training. Yet, despite that, and contrary to industry standards, Lowe's assigned Hassan to work alone and unsupervised in the department before he had completed his training. It was for the jury, not the judge, to determine whether Lowe's failed to train and supervise Hassan properly, and, if so, whether that failure was a substantial factor in causing the harm in this case." (Pa26-27).

Both claims require some level of foreseeability to be shown: For negligent hiring, that the employee had dangerous attributes; for negligent training and supervision, that the employer knew or should have known that the lack of training or supervision could lead to a risk of harm.

Moreover, there is no requirement that Lowe's should have foreseen the "exact harm" that its failure to train and supervise Hassan would result in. Only that it was "in the realm of foreseeability that some harm might occur." Model Jury Charge 5.10B. Our courts recognize that "a party may be liable to persons who fall normally and generally within a zone of risk created by the particular tortious conduct." Di Cosala v. Kay, 91 N.J. 159, 175 (N.J. 1982).

Here, it was perfectly within the realm of foreseeability that when Lowe's put an inexperienced trainee on the sales floor by himself before he was ready, before he had even come close to completing his departmental training, without a uniform, without a visible name tag, whom they knew could feel "too much pressure" when dealing with customers who want answers, and encouraged him to approach those customers on his own, on a busy Saturday, that things could go bad. Lowe's placed this employee in a situation "'in which physical consequences may follow in an uninterrupted sequence from verbal exchanges with third parties'". (See this Court's opinion at Pa29, *citing* Restatement (Third) of Agency § 7.07 cmt. c (Am. Law Inst. 2006)). The trial court therefore properly denied the motion to dismiss at the close of plaintiffs' case. (10T4:1-6:23).

REPLY BRIEF

II. ADMISSION OF THE POLICE OFFICERS' OPINIONS AND CONCLUSIONS. (1T53:4-62:21)

A. Lowe's Fails to Explain How the Police Officers' Opinions and Conclusions Impeach Plaintiffs' Expert.

Plaintiffs have appealed that portion of the trial judge's rulings which admitted the police officers' opinions and conclusions through the cross-examination of plaintiffs' expert, Alex Balian. (Pb18; 1T53:4-62:21). In opposition, Lowe's claims, as does Hassan, at times using identical language, that the hearsay evidence of the police officers' opinions and conclusions was properly admitted to impeach plaintiff's liability expert, Alex Balian. (Db40). They claim, first, that Mr. Balian's opinion is impeached by that evidence because he "only takes cases if he agrees with the theory of the case." (Ibid.). Yet they fail to explain how Mr. Balian's opinion on negligent training and supervision is impacted one way or the other by what the police think. Regardless of who the police believed, Mr. Balian's opinion would be the same because, as he testified, the police testimony was "not relevant to the opinion that I was going to give." (8T52:19-20) He stated: "I wasn't going to render opinions as to the altercations and who did what." (8T102:6-7).

Lowe's claims, second, that Mr. Balian is impeached by evidence of the police opinions and conclusions because he "acknowledged that he did not consider Hassan's version of events in forming his opinions" (Db40), citing Mr. Balian's testimony at 8T101:20-102:7. Yet, if one were to actually look to the record at that location, one sees that Mr. Balian acknowledged no such thing. In fact, he states the opposite: "I saw two different points of view after I reviewed the material, yes." (101:23-25). Thus, rather than testifying that he did not consider Hassan's version, in fact he testified that he DID consider it (because he "saw two different points of view"), only that it is not in his report because it is not relevant.

B. Lowe's Fails to Address the Issues of Prejudice and The Officers' Unqualified Expert Opinions.

Plaintiffs argue that the admission of the officers' hearsay opinion testimony, even if valid impeachment material, should have been excluded under NJRE 403 because it was overly prejudicial to the plaintiff. (Pb24). The prejudicial nature of the officers' deposition testimony was not addressed by Lowe's in its brief except insofar as to say that the plaintiff thought the police were blaming him. (Db40-41).

However, it was not only the officers' opinions and conclusions of who did what which were elicited through Mr. Balian; it was also their "expert" opinions and conclusions that

the only way Hassan could have gotten grout on his back was if the plaintiff threw it at him. Both officers' testimony in that regard was let into evidence through Mr. Balian. (8T103:4-6; 8T104:1-12). Neither one of the officers were qualified by counsel for Lowe's as an accident reconstruction expert. This was another of plaintiffs' arguments which Lowe's did not address in its brief.

III. EVIDENCE RELEVANT ONLY TO DAMAGES SHOULD NOT HAVE BEEN ADMITTED IN THE LIABILITY PHASE OF THE TRIAL. (1T138:13-148:19)

Those portion of Lowe's and Hassan's opposition briefs[1] concerning damages evidence ("Natasha Sahr's evidence") only warrant a reply to the extent that the cases they cite need to be highlighted. Lowe's claims that the cases allow for evidence relevant only in the second stage of a bifurcated trial to be admitted in the first phase even if prejudicial. In fact, however, two of the cases cited by Lowe's arguably stand for the exact opposite.

Lowe's cites, for instance, State v. Jones, 364 N.J.Super. 376 (A.D. 2003), where the defendant was charged with possession of a weapon and possession of a weapon by a convicted felon. Lowe's argues that in Jones the court permitted evidence that the defendant was a convicted felon into the trial. What Lowe's

[1] Large parts of the defendants' briefs are identical to one another.

fails to tell the Court is that the Jones trial was initially bifurcated so as to sever the possession of a weapon by a convicted felon count (the fifth count) from the main part of the case for obvious reasons and in compliance with the bifurcation *requirement* set forth in State v. Ragland, 105 N.J. 189, 192 (1986). The only reason it was allowed in, however, was because the defendant later decided to testify and a hearing on the admissibility of his convictions for impeachment purposes under State v. Sands, 76 N.J. 127 (1978) revealed that the jury was going to hear about the prior conviction anyway (see NJRE 609), and the trial judge told the defendant even before he took the stand that he was going to reconstitute the trial. And in fact, the trial court decided not to bifurcate the trial after all.

The situation in State v. Wray, 336 N.J.Super. 205 (A.D. 2001), also cited by Lowe's, was nearly identical to Jones. In Wray, the charges were the same and the trial had also been bifurcated initially as required under Ragland. The only difference was that the trial judge did not tell the defendant until *after* he testified that the trial was going to be reconstituted, and for that reason the Appellate Division reversed the conviction. AND, it ordered bifurcated trials! Wray, at 213.

Finally, Lowe's cites the case of Rosenblit v. Zimmerman, 166 N.J. 391 (2001), but that case is inapposite to our situation. In Rosenblit, the Supreme Court held that when a doctor alters medical records in a malpractice case, the fact that he did so constitutes a "verbal act," or a statement against interest and indicates his "'appreciation that the evidence would or might be hurtful to ... his position.'" Rosenblit, at 409, *citing* State v. Council, Div. of Resource Dev., 60 N.J. 199, 202 (1972). The Rosenblit Court thus determined that the doctor's alteration of the records was directly relevant to the underlying malpractice allegation, and held that evidence of the doctor having altered the records should have been admitted in the malpractice trial.

Here, however, there is no "verbal act" of the plaintiff which goes directly to the underlying incident and what happened on that fateful day. Nowhere in the texts or photos does the plaintiff make a statement against interest that he lied about how the underlying incident happened. The plaintiff using a ladder or relaying a quote to renovate a bathroom does not have anything to do with who is telling the truth about what happened at the store four years earlier. The evidence is only relevant to damages and since the trial was bifurcated, it should only have been admitted, if at all, in the damages phase of the

trial. Redvanly v. ADP, Inc., 407 N.J.Super. 395 (A.D. 2009), *cert denied,* 200 N.J. 367 (2009).

IV. THE JURY INSTRUCTIONS WERE IMPROPER.

A. Respondeat Superior (10T29:23-38:9; 61:1-66:7)

1. The Jury Instruction Was Not Harmless Error.

Plaintiffs maintain that the trial court's instructions on respondeat superior were improper because they told the jury that the "only" way (the word "only" was actually used by the trial court) Hassan could be acting within the scope of his employment was if he acted in self-defense when he hit the plaintiff. This was the instruction:

> "Negligence is a matter of law charged through the principal laws [*sic*-probably should read "Lowe's"], but only if you find that Ahmed Hassan acted negligently in self-defense while in the scope of his duties or authorities." (11T169:20-23)

Thus, if the jury believed the plaintiff when he said that Hassan attacked him, they could not have found that Hassan was acting within the scope of his employment on these instructions because they were just told that Hassan must necessarily have been acting in self-defense for that to be the case.

Lowe's nearly concedes that this instruction was improper (Db49), but claims that it doesn't matter because the jury found in question one on the verdict sheet (Pa71) that Hassan was acting outside the scope of his employment. (Db49). This

argument fails because, unfortunately, the instructions on respondeat superior had just been infected by the "negligently in self-defense" canard. "Negligently in self-defense" appears in the same section and even in one of the same paragraphs as the rest of the instructions on respondeat superior. (11T168:17-170:1). The trial court starts out at 11T168:17 by saying: "Respondeat superior." Period. Then he goes on to give the instructions on respondeat superior, including the "negligently in self-defense" part, ending at 11T170:1.[2] Then, on the next line, 11T170:2, he says: "Negligent training and supervision." Period. And, on from there the jury was instructed on negligent training and supervision.

This jury's verdict on respondeat superior cannot be redeemed because the only question on the first verdict sheet asked whether Hassan was acting within the scope of his employment. (Pa54). Their answer to that question was infected by the improper instruction they just received that told them that Hassan could only be within the scope if he acted "negligently in self-defense." (11T169:20-23).

2. Dismissal of the Battery Claim Against Hassan Hassan Has No Bearing on the Impropriety of the Jury Instruction on Respondeat Superior

[2] Lowe's conveniently leaves out the "negligently in self-defense" part of the quotation of the instruction provided in its brief, stopping at line 19 of page 169, when the canard starts immediately thereafter at line 20. (Db51).

Lowe's claims that because the plaintiffs made a tactical decision to dismiss the battery claim against Hassan, intentional conduct on Hassan's part was not in the case and therefore the respondeat superior instruction was proper. (Db56). Lowe's claims that this Court, in its earlier ruling, "did not contemplate that Plaintiffs could recover against Hassan for an intentional assault based on a theory of negligence." (Db56).

However, this Court *did* contemplate that plaintiffs could recover against *Lowe's* for an intentional assault by Hassan because it stated that "[a]n employee's intentional or reckless action may be considered within the scope of employment." (Pa28, *citing* Vosough v. Kierce, 437 N.J.Super. 218, 236 (A.D. 2014)). This Court also stated that the "'fact that the employee's conduct is intentional and wrongful does not in itself take it outside the scope of his employment.'" (Pa29, *citing* Vosough v. Kierce, 437 N.J.Super. 218, 236 (A.D. 2014)).

The jury was entitled to believe the plaintiff's version of the events. If they did, the trial judge's instructions precluded them from finding in plaintiffs' favor on respondeat superior.

B. The Jury Should Have Been Given the Option to Find Lowe's Both Directly and Vicariously Liable.

Plaintiffs claim that the jury should have been allowed to

consider whether Lowe's was BOTH vicariously and directly liable for plaintiffs' injuries. (Pb35). Instead, the jury was told it was either/or, not both, and the verdict sheets reflected this. (Pa71-75; 11T178:14-179:8). They were given three verdict sheets, with the first one listing one question: "Was defendant Ahmed Hassan within the scope of his employment with Lowe's when the altercation with plaintiff Ivan Tymiv occurred?" (Pa71). Depending on their answer to that question, they were instructed to move on to one of the other two verdict sheets: "Within the Scope of Employment" (Pa74), and "Outside the Scope of Employment." (Pa72). They were specifically told by the judge: "You don't do them both." (11T179:7). This was erroneous.

All causes of action should have been submitted to the jury. "'Where fair-minded men might honestly differ as to the conclusions to be drawn from the proofs, the questions at issue should be submitted to the jury.'" Burney v. Washington Nat. Ins. Co., 68 N.J.Super. 373 (A.D. 1961), *citing* Scarano v. Lindale, 121 N.J.L. 549, 550 (E. & A. 1938).

In this case, the proofs at trial could support verdicts of both vicarious and direct liability on the part of Lowe's. Hassan's actions began with him attempting to serve his employer by approaching plaintiff, a customer. As this Court recognized

earlier, Hassan's duties placed him in situations where "physical consequences may follow in an uninterrupted sequence from verbal exchanges with third parties," and thus could be found to be within the scope of his employment. (Pa29).

Simultaneously, the proofs could have supported a verdict holding Lowe's directly liable. It was shown through the testimony of plaintiffs' expert that Lowe's violated the retail industry standard for the training and supervision of employees.

Lowe's claims that submitting both theories to the jury would be redundant because once a verdict is rendered on, say, vicarious liability, the question on direct liability could become unnecessary. (Db61). From a practical standpoint that may be true, but experience shows that the jury's input on all issues should be elicited while they are there, because a verdict supporting either theory could be subject to attack.

C. Lowe's Does Not Dispute that Section 317 of the Restatement of Torts is Current Law in New Jersey

Contrary to the arguments advanced by Lowe's at trial (10T40:15-16), which were adopted by the trial Judge (10T42:5-6), it now appears that Lowe's agrees that Section 317 of the Restatement of Torts (2d) is current New Jersey law. However, Lowe's argues that Section 317 requires a showing that Hassan was misusing company property at the time of the incident.

Additionally, just as they did with regard to negligent training and supervision, Lowe's attempts to impose a new requirement that Hassan had "dangerous attributes." Inasmuch as Section 317 does not impose either of these elements, their argument must fail.

The Restatement of Torts, (2d), §317 states:

> "A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them if:
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant . . . and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control."

This Court sent the case back for a trial on the issues of whether Hassan was acting within the scope of his employment (Pa29-30), and/or whether Lowe's was negligent in its training and supervision of Hassan (Pa26-27). If the jury were to determine that Hassan was acting outside the scope of employment and that he intentionally attacked the plaintiff, then Section 317 would apply.

Subsection (a)(i) of 317 is satisfied because Hassan was on the premises of Lowe's. Since he was on duty at the time, subsection (b)(i) is also satisfied because Lowe's certainly had the ability to control an employee who was working in their store. The second half of subsection (b)(ii) is satisfied because Lowe's certainly had the "opportunity" to control Hassan because he was in their store working. The only remaining question is whether Lowe's knew or had reason to know of the necessity for exercising control. A reasonable person could conclude that by putting an inexperienced trainee like Hassan on the sales floor by himself before he was ready, before he had even come close to completing his departmental training, without a uniform, without a visible name tag, whom they knew could feel "too much pressure" when dealing with customers who want answers, and encouraged him to approach those customers on his own, on a busy Saturday, meant that Lowe's should have known of the necessity of controlling Hassan under such circumstances.

Lowe's exercising of "control" in this case could have been something as simple as assigning Hassan to shadow an experienced employee, or work only at times when his supervisor, George Craig, was also working, or assigning him to do computer training in the training room when no one else was around. Yet, Lowe's did none of these things, and therefore the jury

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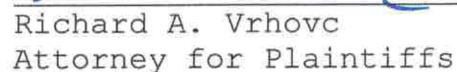
should have been instructed on Section 317.

CONCLUSION

For the foregoing reasons, it is respectfully requested that Lowe's protective cross-appeal be denied and this matter be remanded for a new trial before a different trial judge and that: (a) the police officers' opinions and conclusions be precluded and redacted from the *de bene esse* testimony of Alex Balian; (b) evidence relevant to damages, including Natasha Sahr's texts and family snap-shots, not be used nor even mentioned in the liability phase of the trial; (c) that the defendants' liability not be limited to Hassan acting negligently in self-defense, and the jury instructions and argument of counsel exclude any mention that the defendants are liable only if Hassan acted negligently in self-defense; (d) that Lowe's may be both directly and vicariously liable; (e) that the jury be instructed as to the Restatement (2d) of Torts, §317; (f) that evidence and argument that plaintiff did not allege assault and battery against Hassan be precluded; and (g) if Hassan once again fails to appear after being noticed to do so, plaintiffs may comment on his absence.

Dated: 10/12, 2023



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IVAN TYMIV and OKSANA TYMIV, Plaintiffs-Appellants/ Cross-Respondents, vs. LOWE'S HOME CENTERS, LLC, Defendant-Respondent/ Cross-Appellant and AHMED HASSAN Defendant-Respondent	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-001830-22 **Civil Action** On Appeal from Order of the Superior Court of New Jersey, Law Division, Middlesex County Docket No. MID-L-6536-17 Sat Below: Jury trial before Hon. Alberto Rivas

DEFENDANT/RESPONDENT/CROSS-APPELLANT'S BRIEF IN RESPONSE TO PLAINTIFF/APPELLANTS OPPOSITION TO CROSS APPEAL

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PRELIMINARY STATEMENT

In their opposition to Lowe's' cross-appeal, Plaintiffs do not cite to any evidence in the record which shows that Lowe's knew or had reason to know that Hassan was unfit or incompetent to interact with customers or answer questions regarding the application of grout. Nor do Plaintiffs cite to any evidence that shows that Hassan posed a danger to customers. That is because during the trial it was established that Hassan (1) had experience interacting with customers in a polite and professional manner, (2) was trained on the purpose and applications of grout, and (3) provided accurate information to Mr. Tymiv regarding the use and application of the bag of grout Mr. Tymiv was holding on the day of the incident.

Negligent training and supervision claims are premised upon the employer's knowledge that the employee's personal, specific attributes create a risk of harm, and that the employer then fails to mitigate that risk of harm with training or supervision of the employee. Thus, when the known risk of harm manifests and causes an injury, the injury is foreseeable to the employer, and the employer is liable.

In this case, Plaintiffs' opposition confirms that their argument is based upon a flawed premise, i.e., that a trainee cannot interact and approach a customer on his or her own while in training even though Lowe's witnesses testified that trainees are allowed to interact with customers on their own, and Plaintiffs' liability expert admitted at trial that Lowe's has the right to interpret its own training policies.

Plaintiffs' argument completely ignores the elements of a negligent training or supervision claim and instead focuses only on the employee's job status as a trainee or red vest employee. Plaintiffs incorrectly assume that all trainees lack the knowledge and ability to interact with customers on their own until they complete their training and become a red vest employee. If Plaintiffs argument is accepted, an employer would always be liable for harm caused by a trainee simply because the trainee was in training regardless of whether or not the employer knew or had reason to know that the trainee posed a risk of harm to customers.

Plaintiffs also attempt to distinguish negligent hiring claims from negligent training and supervision claims by incorrectly arguing that only negligent hiring requires evidence of knowledge of a dangerous attribute of the employee. Yet Plaintiffs concede that in order for the employer to be liable under a theory of negligent training or supervision, the employer must at least know "that the lack of training or supervision could lead to a risk of harm." See Pb12. This foreseeability of harm element of a negligent training or supervision claim depends on the employee's job duties and whether the training and supervision provided by the employer is reasonable in light of the employee's fitness, skill level and competence (i.e., the employee's personal attributes) to ensure that the employee performs their job duties without creating a risk of harm to others. Thus, foreseeability in the context of a negligent training or supervision claim relates to the employee's actual

ability and knowledge, not his status as a trainee. In this case, Hassan had an exemplary record of employment, prior experience in dealing with customers as a cashier, prior experience in dealing with customers as a customer service associate trainee, and he had received specific training on grout. There was nothing about Hassan that should have put Lowe's on notice that he would engage in a physical altercation with Mr. Tymiv (as alleged by Plaintiffs) over a bag of grout.

Finally, Plaintiffs' argument that Lowe's cross-appeal should be denied because the prior appellate panel reversed Lowe's' summary judgment and ordered a trial on the issue of negligent training and supervision is without merit. The reversal of summary judgment is not determinative of whether or not a directed verdict is appropriate after the Plaintiffs rest their case. Summary judgment is decided upon proofs generated in discovery while a directed verdict is determined based upon evidence presented at trial. And the evidence presented at trial in this case does not support a claim for negligent training or supervision.

I. PLAINTIFFS' OPPOSITION CONFIRMS THAT THERE WAS NO EVIDENCE ADDUCED AT TRIAL TO SHOW THAT HASSAN WAS UNSKILLED, INCOMPETENT, UNFIT OR DANGEROUS.

Lowe's' initial brief cited testimony from Hassan's supervisors which established the following: (1) Hassan previously completed customer service training on two occasions; (2) Hassan was experienced in dealing with customers on his own; (3) Hassan was courteous and respectful with customers; (4) Hassan knew

to seek out senior employees if he did not know the answer to a customer's questions; (5) that there were no complaints from customers regarding Hassan's conduct or job performance; and (6) that Hassan was trained and knowledgeable in the essential skills of his position. See Db at 8-10.

Additionally, Lowe's cited to trial testimony from Alex Balian, Plaintiffs' retail expert, establishing that (1) Lowe's was entitled to interpret their own policies to determine what they mandated; (2) Balian conceded that Lowe's interprets its policies as permitting trainees to approach customers; (3) Balian was unable to conclude that Hassan lacked adequate training to discuss grout with Tymiv; (4) Balian could not dispute that Hassan received training from Lowe's on how to interact with customers; and (5) Balian conceded that he lacked sufficient knowledge to evaluate whether Hassan had actually provided Tymiv with incorrect or misleading information. See Db at 10-11.

Plaintiffs' opposition does not refute, rebut or otherwise argue that this evidence is inaccurate or misleading. Plaintiffs do not supplement the record with additional testimony from these witnesses or other witnesses to refute or rebut the above evidence. Thus, there is no evidence that Hassan was unskilled, unfit, incompetent, or dangerous.

II. PLAINTIFFS CANNOT ESTABLISH THAT IT WAS FORESEEABLE TO LOWE'S THAT HASSAN'S INTERACTIONS WITH CUSTOMERS WHILE A TRAINEE WOULD CREATE A RISK OF HARM.

In order to succeed on a negligent training or supervision claim, establishing the unfitness of the employee is the first step in proving foreseeability. It is the employee's abilities (or lack thereof) or disposition that informs the employer a risk of harm exists and what must be done in terms of supervision or training to eliminate or minimize that risk. Without evidence that Hassan's abilities or characteristics were insufficient for the tasks he was assigned to perform, there is no evidence that shows that "the failure to supervise or train [Hassan] in a certain way [such as allowing him to interact with customers on his own prior to completing the red vest ready program] would create a risk of harm and (2) that risk of harm materializes and causes the plaintiff's damages." G.A.H. v. K.G.G., 238 N.J. 401, 416 (2019). Therefore, Plaintiffs' failure to identify any inabilities or characteristics of Hassan that would make a risk of harm foreseeable to Lowe's requires dismissal of the negligent training and supervision claim.

Instead of providing evidence of Hassan's specific inabilities or characteristics, Plaintiffs argue that Hassan's status as a trainee establishes that it was foreseeable to Lowe's that Hassan posed a risk of harm to customers. The flaw in this argument is that it presumes that all trainees pose a risk of harm to Lowe's' customers because they would harm a customer if the trainee answers a question

wrong and the customer becomes unhappy. This theory of liability is not recognized by the New Jersey Supreme Court in its discussion of the elements of a negligent training and supervision claim, nor is it recognized by Model Jury Charge 5.76. See Db at 29-32. To the contrary, the Model Jury Charge requires that the employer knew of "the *particular* unfitness, incompetence, or dangerous attribute *of the employee*," and that the employer "could have reasonably foreseen that hiring [or training or supervising] *a person with the employee's attributes created a risk of harm* to others . . . ." Ibid. (Emphasis added). Accordingly, Plaintiffs have no evidence that proves that Lowe's knew or had reason to know that Hassan posed a risk of harm to customers.

III. PLAINTIFFS' ATTEMPT TO DISTINGUISH NEGLIGENT HIRING CLAIMS FROM NEGLIGENT SUPERVISION AND TRAINING CLAIMS IS IMMATERIAL AND ILLUSTRATES THE FLAW IN PLAINTIFFS' ARGUMENT.

Plaintiffs argue they do not need to provide evidence of a dangerous characteristic of Hassan to establish negligent training and supervision because these claims are subject to a different standard than a negligent hiring claim. This is incorrect. The New Jersey Supreme Court held that negligent training and supervision claims have "essentially the same standard" as negligent hiring claims, a fact the Plaintiffs completely overlook. See G.A.H., supra, at 416. The Supreme Court in G.A.H. did not exempt Plaintiffs from proving that the employee possessed

a dangerous attribute in negligent training and supervision claims. To the contrary, this Court interpreted G.A.H. to require proof of a dangerous trait in a negligent supervision case. See E.S. for G.S. v. Brunswick Inv. Ltd. Partnership, 469 N.J. Super. 279, 296-97 (App. Div. 2021) (citing G.A.H., and explaining "[t]he motion record is devoid of any facts demonstrating that the defendant knew or should have reasonably known that Fred posed a risk to any tenant. Plaintiff's negligent supervision cause of action, therefore, was properly dismissed. No evidence suggested that when defendants authorized Fred to make repairs and improvements as requested by plaintiff's family, it was foreseeable that Fred would engage in criminal conduct.").

Plaintiffs also concede that the employer must know or have reason to know that the lack of training or supervision could lead to a risk of harm. See Pb 12. But lack of training or supervision is not enough on its own to establish a claim for negligent training or supervision. The factfinder must also determine that it was foreseeable that the employee would harm others if he/she did not receive additional training or supervision. The knowledge, experience, and attributes of the employee are critical in determining whether or not the employer knew or should have known that a risk of harm existed.[1]

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[1] Balian's testimony likewise undermines Plaintiffs' argument, because he opined the employee should be trained so that he can provide accurate product knowledge. 8T 116:2-5; 118:22-25. Balian even conceded that a trainee who misses a training

Lowe's' arguments in its cross-appeal are not inconsistent with the prior appellate panel's analysis. The prior panel's comments explaining that Lowe's – when viewed in the light most favorable to Plaintiffs – knew of the importance of training new customer service associates to interact with customers, including unhappy customers, to ensure a positive customer experience, implicitly acknowledges that if the specific trainee is without the appropriate knowledge and skill, a harm could arise while dealing with an unhappy or frustrated customer. See Pa26.

But here, the evidence at trial established that Hassan did know about grout; did know how to interact with customers; and that he did provide correct information to Tymiv about the grout. That is why Plaintiffs urge this Court to find that any trainee, regardless of his or her knowledge or skill, is a risk of harm to customers. However, Plaintiffs' position is not supported by the law.

In addition, even if it were assumed that Lowe's violated its policy by allowing a trainee to interact with a customer on his own (which would be contrary to Balian's trial testimony), the factfinder must still determine whether the employee's knowledge, skill, or attributes created a risk of harm. Because some

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video or other procedure might still have proper knowledge. 8T 125:8-25. Thus, the employee's specific traits determine whether the employer's conduct is reasonable and if it was foreseeable to the employer that a risk of harm existed. Whether the employee completed his training is not determinative of foreseeability.

trainees possess more knowledge and experience than others, allowing a particular trainee to interact with customers would not necessarily create a risk of harm. Further, at some point before officially becoming a red vest employee, the trainee meets the requirements to become a red vest employee. Thus, the argument that all trainees, regardless of their experience and qualifications, are not qualified to interact with customers on their own is flawed.

In Hassan's case, he was overqualified when it came to interacting with and handling customers due to his prior experience as a cashier. In fact, Christine Jennings, Lowe's corporate representative at trial, testified that Hassan's training for customer sales associate position was a mere "formality." See Db at 8.

Further, because Hassan was trained about the applications of grout, gave correct information to Mr. Tymiv about the grout, and because Hassan's conduct was appropriate and professional, Lowe's' decision to allow him to interact with customers cannot be said to be a proximate cause of Mr. Tymiv's injuries. Tymiv – despite his ignorance on the particular bag of grout in question – disagreed with the information Hassan gave him about the grout, insulted Hassan, and then followed Hassan into the next aisle after Hassan walked away to defuse the situation.

IV. REVERSAL OF SUMMARY JUDGMENT DOES NOT PRECLUDE A DIRECTED VERDICT AT TRIAL, PARTICULARLY WHEN NEW EVIDENCE IS PRODUCED AT TRIAL.

Plaintiffs argue that the prior panel's reversal of Lowe's summary judgment likewise requires the denial of Lowe's' cross appeal. Pb1. This argument lacks merit. Nothing in the text of Rule 4:46 prohibits a party from bringing a motion for an involuntary dismissal pursuant to Rule 4:37-2 or 4:40-1, if summary judgment is denied. Nor do Rules 4:37-2 and 4:40-1 allow the trial judge to deny the involuntary dismissal motion simply because summary judgment was earlier denied. This is because our courts recognize that facts and issues may be clarified at trial, new information may be presented at trial, and some evidence analyzed at the summary judgment stage may be inadmissible or otherwise limited at trial. The trial judge is required to simply weigh the evidence at trial when analyzing Rule 4:37-2 or 4:40-1, and nothing more. The prior denial of summary judgment is simply irrelevant. In this case, when the evidence established at trial is weighed, no rationale factfinder could conclude that Plaintiffs provided evidence of a *prima facie* negligent training or supervision claim. See Pitts v. Newark Bd. of Educ., 337 N.J. Super. 331, 340 (App. Div. 2001).

Further, the rationale of the prior panel does not compel denial of Lowe's' cross-appeal because as discussed above, (1) the evidence produced at trial established that involuntary dismissal was proper; and (2) additional information

was produced at trial that established that Hassan did have proper training regarding grout. At trial, George Craig testified that the bag of grout in question was appropriate for applications requiring unsanded grout. See Db at 9. This testimony was not in his deposition. Moreover, Mr. Craig was presented with the bag of grout on the witness stand and confirmed that it was appropriate for the application Mr. Tymiv was inquiring about. The bag of grout was subsequently admitted into evidence. Thus, Mr. Craig established at trial that (1) the bag of grout was appropriate for Tymiv's project; and (2) that the information Hassan provided to Mr. Tymiv about the uses of the bag of grout at issue was correct.

Mr. Craig's testimony is important because he is the only witness who verified that Hassan's knowledge of grout and his recommendation that the bag of grout at issue was appropriate for the application Mr. Tymiv was inquiring about, was correct. Mr. Craig's unrebutted testimony proves that Hassan was skilled and knowledgeable about the applications of grout, and not unskilled or incompetent. Plaintiffs' expert, Balian, also admitted that he is not knowledgeable on grout, and could not evaluate whether Hassan had actually provided Tymiv with incorrect or misleading information. See Db at 11.

CONCLUSION

For all of the foregoing reasons, Lowe's respectfully requests that the Court grant its cross-appeal.

Respectfully submitted,

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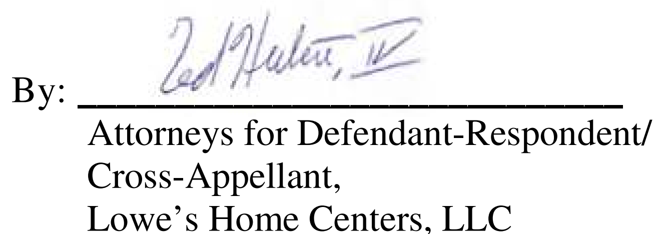

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Dated: October 27, 2023