PAUL WETTENGEL,

Plaintiff-Appellant,

v.

ASA DESIGN BUILD, LLC; RIDGEDALE AVENUE DEVELOPMENT, LLC; JOHN DOE #1-10 AND ABC CORP. #1-10,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-002118-22T4

CIVIL ACTION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – ESSEX COUNTY
DOCKET NO.: ESX-L-6156-19

Sat Below:
Hon. Cynthia D. Santomauro, J.S.C.

PLAINTIFF-APPELLANT'S AMENDED BRIEF IN SUPPORT OF APPEAL

Garrity, Graham, Murphy, Garofalo & Flinn, P.C.
Attorneys for Plaintiff-Appellant
Paul Wettengel
425 Eagle Rock Avenue, Suite 202
Roseland, NJ 07068
(973) 509-7500

On the Brief:
Francis X. Garrity, Esq.
Attorney ID #: 009471973
E-Mail: fxg@garritygraham.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes:

Rules:

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

PRELIMINARY STATEMENT

The issue on appeal before this Court is whether the trial court erred in granting summary judgment to the defendants, general contractor and property owner, in the face of circumstantial evidence from which a jury could conclude there was a reasonable probability that the plaintiff's fall and injuries were caused by the defendants' negligence. Plaintiff offered evidence of a hidden hazard at the defendants' construction site that precipitated his fall and resulting injuries. Entitled to the facts and inferences viewed most favorably to him, plaintiff contends that the evidence was sufficient to warrant the submission to the jury of the issue of defendants' negligence as the proximate cause of plaintiff's accident and injuries.

PROCEDURAL HISTORY

Plaintiff Paul Wettengel ("Wettengel") commenced this action by the filing of a Complaint in the Superior Court of New Jersey, Law Division on August 21, 2019. (Pa26) Identified as defendants were ASA Contractors, LLC, John Hand and SAJ Properties, LLC. (Pa26) Pursuant to the Order dated March 4, 2020 of the Hon. Stephen L. Petrillo, J.S.C. plaintiff was granted leave to file an Amended Complaint. (Pa54) By way of Amended Complaint, the defendants were identified as ASA Design Build, LLC, Ridgedale Avenue Development, LLC and John Hand. (Pa43)

Wettengel alleged that on February 21, 2019 he was working on a construction site in Madison, New Jersey when he was caused to fall sustaining bodily injury. (Pa43) He alleged negligence in failing to provide him with a safe place to work on the part of the general contractor, ASA Design Build, LLC ("ASA Design"), and the property owner, Ridgedale Avenue Development, LLC ("Ridgedale") and its principal, John Hand. (Pa43)

On October 30, 2019 Ridgedale filed an Answer to the Complaint. (Pa38) On September 3, 2020 ASA Design filed an Answer to the Complaint. (Pa69) No Answer was filed on behalf of defendant John Hand. On May 1, 2021 the Court issued a Dismissal Order for Lack of Prosecution against the defendant, John Hand. (Pa80)

On November 17, 2022 defendant Ridgedale moved for summary judgment pursuant to R. 4:46-2. (Pa81) On December 2, 2022 ASA Design moved for summary judgment pursuant to R. 4:46-2. (Pa191)

On December 2, 2022 plaintiff Wettengel filed a letter with the Court opposing defendant Ridgedale's motion for summary judgment. (Pa190) On December 27, 2022 plaintiff Wettengel filed his opposition to the motion for summary judgment filed on behalf of defendant ASA Design. (Pa245, 261, 279)

On January 6, 2023, oral argument was heard before the Hon. Cynthia D. Santomauro, J.S.C. Following oral argument, Judge Santomauro issued her Opinion (1T34:24 to 1T44:18)[1] and entered Orders dated January 6, 2023 granting summary judgment in favor of defendants ASA Design and Ridgedale dismissing the Amended Complaint. (Pa21 and Pa22)

On January 11, 2023 plaintiff Wettengel filed a Motion for Reconsideration of the trial court's Orders dated January 6, 2023 granting summary judgment to the defendants. (Pa388) Opposition was filed by defendant Ridgedale on January 25, 2023 (Pa496). Defendant ASA Design filed a Letter Brief only in Opposition on January 26, 2023. Oral argument was heard on February 10, 2023 before the Hon. Cynthia D. Santomauro, J.S.C. and after oral argument, Judge Santomauro entered

[1] "1T" – Transcript of January 6, 2023 oral argument of defendants, ASA Designs' and Ridgedale's Motions for Summary Judgment before the Hon. Cynthia D. Santomauro.

an Order on February 10, 2023 denying the plaintiff's Motion for Reconsideration. (Pa23)[2]

On March 20, 2023 plaintiff Wettengel filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division (Pa1), Civil Case Information Statement (Pa12) and Court Transcript Request for the January 6, 2023 oral argument of the Motions for Summary Judgment filed by defendants. (Pa17)

On March 23, 2023 plaintiff Wettengel filed an Amended Notice of Appeal with the Superior Court of New Jersey, Appellate Division. (Pa7)

On July 21, 2023 plaintiff Wettengel filed a Court Transcript Request for the February 10, 2023 oral argument of the Motion for Reconsideration. (Pa18)

---

[2] "2T" – Transcript of February 10, 2023 oral argument of plaintiff's Motion for Reconsideration before the Hon. Cynthia D. Santomauro.

STATEMENT OF FACTS

Paul Wettengel sustained bodily injury at a construction site in Madison, New Jersey on February 21, 2019. (Pa94, 245)[3] At the time of the accident, Mr. Wettengel was employed by Woodworks Flooring Company ("Woodworks") and was in the process of installing hardwood floors at a residential home under renovation. (Pa94) Woodworks was hired by John Hand, principal of the property owner, Ridgedale, to perform the work under the direction of the general contractor, ASA Design. (Pa206-207)

Wettengel began working at the site installing flooring in December of 2018. (Pa94) When he first arrived, the site was in a "sloppy condition" and Mr. Wettengel complained to the general contractor, ASA Design. (Pa94) Wettengel received "pushback" from ASA Design regarding the issue prompting him to call Mr. Hand of Ridgedale who took care of the issue when he arrived the next day. (Pa94) When Wettengel arrived for work on February 21, 2019, the worksite was again cluttered and messy. (Pa94) There was snow present on the exterior of the property. (Pa100, 100) After commencing work at approximately 10:30 a.m., Wettengel walked from the interior of the house to the exterior to throw debris into the dumpster located on the driveway in front of the house. (Pa94) He recalled walking toward the dumpster,

[3] Wettengel was unsure as to whether his accident occurred on February 20 or 21, 2019. For purpose of this brief, the February 21, 2019 date will be used.

and his next recollection was awakening lying flat on his back on top of a piece of plywood covered with snow on the driveway near the dumpster. (Pa94) He was disoriented when he awoke and attempted to stand but kept slipping on the plywood. (Pa94, 99, 116) Unbeknownst to him he had suffered a severe laceration and trauma to the rear of his head. (Pa95) Ultimately, he crawled off of the plywood to the porch of the home, went inside and laid down in one of the closets. (Pa94) After waking up some hours later, he noted that his pants were wet from the fall. (Pa94) He returned to his van and again fell asleep. (Pa94) His vehicle was blocking another contractor's van and Wettengel awakened to tapping on the window to move the vehicle. (Pa94) He then drove home. (Pa94) Upon returning to his home, Mr. Wettengel went to bed early, and when his wife checked on him, she observed bleeding on his head. (Pa95) Wettengel's wife drove him to Morristown Medical Center where he underwent a brain CT-Scan which revealed extensive subarachnoid hemorrhage on the left side. (Pa95) He was hospitalized for fourteen (14) days from February 21, 2019 to March 6, 2019. (Pa96)

Three or four days after the incident, Mrs. Wettengel went to the jobsite and took photographs of the site of the fall which demonstrated debris in and around the dumpster including the plywood referenced by Wettengel. (Pa198, 283 to-290)

On February 25, 2019 Wettengel underwent a speech language cognitive evaluation and was noted to be disoriented, have difficulties with short and long term

memory, problem solving, cognitive organization, sequencing, reasoning, and safety awareness. (Pa95) He was found to have expressive aphasia. (Pa95) On February 27–28, 2019 an EEG monitoring study was abnormal due to focal asymmetric slowing over the left hemisphere and rhythmic deltas activity. (Pa95) After discharge from Morristown Medical Center, Wettengel was treated at Kessler Institute for Rehabilitation from March 12, 2019 to April 29, 2019. (Pa95)

Plaintiff could not expressly identify the cause for his fall and the defendants, Ridgedale and ASA Design, moved for summary judgment on the asserted basis that plaintiff could not prove that any negligence on their part was the proximate cause of his accident and injuries. (Pa88, 197)

In opposition to the defendants' motions, plaintiff offered Ridgedale's Answers to plaintiff's Supplemental Interrogatories wherein it conceded that there was no site safety person or site safety officer on the jobsite on the day of the accident and that no safety backgrounds were performed for the contractors on the jobsite. (Pa292, 293) ASA Design acted as general contractor on the project. (Pa132) ASA Design contended that Ridgedale hired subcontractors to the jobsite, including the plaintiff's employer, Woodworks, and were "co-general contractors" on the jobsite. (Pa309) When confronted by the accident site photographs, Ridgedale's principal, John Hand, testified that he believed ASA Design should have directed the clearing of the jobsite every day. (Pa133, 134) Plaintiff offered the expert report and opinion

of William Mizel, CSP who stated that the general contractor, ASA Design, failed to meet OSHA standards in permitting the construction site to have hazards. (Pa154, 161)

LEGAL ARGUMENT

THE TRIAL COURT ERRONEOUSLY DISMISSED PLAINTIFF'S CASE AS CIRCUMSTANTIAL EVIDENCE WAS SUFFICIENT PROOF THAT THE DEFENDANTS' NEGLIGENCE WAS THE PROXIMATE CAUSE OF PLAINTIFF'S ACCIDENT AND INJURIES (T34:24 to T44:18)

Introduction

The issue presented on this appeal is straightforward. Did plaintiff offer sufficient proof that his fall and resulting injuries were proximately caused by the defendants' negligence? The trial court accepted the defendants' argument that Wettengel's inability to identify what caused him to fall precluded his recovery. Indeed, Wettengel sustained a severe blow to his head in the fall and could not articulate what precipitated his accident. Nevertheless, plaintiff maintained that the circumstances surrounding his accident gave rise to an inference that his fall was probably caused by his either slipping or tripping on a discarded piece of plywood at the construction site.[4]

[4] Because both defendants moved for summary judgment solely on the basis of proximate cause and because the trial court's decision was based solely upon the asserted failure on the part of the plaintiff to establish that his fall and injuries were proximately caused by the defendants' negligence, plaintiff will address the issue of proximate cause herein.

Scope of Appellate Review

In reviewing a motion for summary judgment granted by the trial court pursuant to R. 4:46-2, the appellate court must determine whether the evidence, along with the inferences, could have sustained a judgment in favor of the party opposing the motion. Thus, the appellate court applies the same standard as the trial court in respect of the motion record, i.e. *de novo*. R. 2:10-2; Allen v. Cape May Cty, 246 N.J. 275 (2021). That standard requires the court to review the evidence in the light most favorable to the non-moving party, here plaintiff Wettengel. Id. at 289.

The Trial Court's Error

To sustain a cause of action for negligence, a plaintiff must prove four elements: (1) a duty of care; (2) a breach of that duty; (3) proximate cause; and (4) actual damages. Townsend v. Pierre, 221 N.J. 36, 51 (2015).

General contractors owe a non-delegable safety duty to subcontractors on jobsites. Wolczak v. National Electric Products Corp., 66 N.J. Super. 64, 70 (App. Div. 1961); New Jersey Construction Safety Act, N.J.S.A. 34:5-166, *et seq.* Indisputably, defendant ASA Design acted as general contractor on the subject construction site, and as such, was responsible for execution of all permitted work and for ensuring the safety of the subcontractors on the jobsite, including housekeeping. Thus, ASA Design was unequivocally responsible for subcontractor

safety on the jobsite, including keeping a safe worksite free of slip/trip hazards -- a duty that was owed to Wettengel as a subcontractor at the site. Likewise, Ridgedale had a like duty as a "co-general contractor."

Mr. Wettengel provided more than enough evidence/testimony from which a reasonable trier of fact/jury could conclude that the jobsite was (a) poorly maintained from the date Wettengel first arrived at the jobsite, (b) was in disarray on the date of the accident, and (c) that the hazardous nature of the jobsite caused the accident.

When Wettengel arrived at the construction site on the morning of February 21, 2019 he parked his van behind another contractor's van and entered the home to continue laying hardwood flooring. After entering the home, he determined to dispose of some material and walked from the house to the dumpster in the driveway. His next recall was waking lying face up on a snow-covered piece of plywood near the dumpster. Unbeknownst to Wettengel, he had a severe laceration to the rear of his head and trauma to his brain. He observed that in attempting to stand up on the plywood he kept slipping and therefore had to crawl to the front porch of the home. Wettengel made his way to a closet inside the house and fell asleep for several hours. When he awoke, he noticed that his pants were wet. He left the house, climbed into his van, but again fell asleep. He was awakened by the contractor whose van Wettengel was blocking. Wettengel then drove home. There, he informed his wife that he wanted to go to bed, which he did, and his wife sometime thereafter noted

blood on the pillow. She drove him to Morristown Medical Center where he remained for fourteen (14) days. Three or four days later, Mrs. Wettengel drove to the construction site and took photographs of the exterior including the area near the dumpster. The strewn plywood on which Wettengel lay after his fall is apparent from the photographs.

Plaintiff's contention is that the defendants were negligent in failing to maintain the construction site in such condition as to provide for his safety. Specifically, plaintiff asserted that he was caused to fall as a result of coming into contact with a discarded piece of plywood covered by snow creating a hidden tripping hazard. The fact of the presence of the plywood covered by snow at or near the dumpster at the site is undisputed. The photographs of the site, taken by the plaintiff's wife, clearly show the plywood. The fact that the plaintiff fell at the location of the plywood is also undisputed as plaintiff testified to waking up on top of the plywood and discovered that his pants were wet. The fact that the plywood covered in snow was slippery is undisputed as plaintiff testified that he crawled off of the plywood because he could not stand due to slipping on it. Plaintiff walked from the house under renovation carrying waste material to deposit into the dumpster without incident. At or about the time he attempted to deposit the material in the dumpster, plaintiff was caused to fall. He could not identify what caused him to fall, but after walking to the dumpster his next sensation was awakening on his back on

top of the plywood. Thus, indisputably, he went from an upright position to a prone position, i.e. suffered a fall and a serious head injury in the process.

Plaintiff's position before the trial court was that the circumstances of the accident render a rational inference, i.e. a presumption grounded in a preponderance of probabilities, that he either slipped on the snow covered plywood or tripped on the plywood precipitating his fall and head injury. Either circumstance would be evidence from which a jury could reasonably deduce that his fall and resulting injuries were due to the negligence of the defendants.

Plaintiff is not required to prove proximate cause by direct, indisputable proof. Bergquist v. Penterman, 46 N.J. Super. 74, 88 (App. Div. 1957), *certif. denied* 22 N.J. 55 (1957). Similarly, he need not adduce evidence with the quality of certainty but rather a mere preponderance of probabilities. Kita v. Borough of Lindenwold, 305 N.J. Super. 43, 51 (App. Div. 1997). The trial court correctly identified the circumstantial evidence offered by the plaintiff in opposition to the defendants' motions, and recognized that the court was required to determine if the evidence offered was sufficient to create a question of fact such as to defeat the defendants' motions. The question was straightforward: Would the evidence offered cause fair-minded men to differ as to whether there was a reasonable probable relation of cause and effect between the defendants' negligence and the plaintiff's accident such as to require the submission of the issue to the jury? Vadurro v. Yellow Cab Co. of

Camden, 6 N.J. 102, 106 (1950). The trial court answered the question in the negative suggesting that the jury would be speculating. (T31:24 to T44:18). The decision is in error.

Here, plaintiff, because of his head injury, may not be able to say with certainty what caused him to fall, but based upon the evidence presented, a jury could reasonably have concluded that the defendants' negligence, i.e. failure to see to the construction site being properly maintained for safety, caused plaintiff's fall and injuries. In point of fact, there is virtually no other conclusion a jury could reach given the undisputed evidence. Under normal circumstances, persons walking do not fall unless they come into contact with some obstruction. Here, the only obstruction with which Wettengel could have come into contact was the plywood strewn in front of the dumpster. It was slippery because of the snow covering it and a jury could logically conclude that Wettengel slipped on the plywood as he was discarding debris in the dumpster. On the other hand, he could have tripped over the plywood in disposing of the debris. Under either circumstance, the evidence supports plaintiff's assertion of a reasonable probability that the defendants were negligent with respect to maintenance of the construction site and caused the accident and injuries.

The trial judge recognized the evidence offered by the plaintiff as precipitating his fall. She noted:

> Um, Plaintiff has alleged -- and I don't think there's really much of a dispute, really, and I am going to take as factual for the purpose of this motion the jobsite was not kept really well. It was messy, um, there's photographs showing how it was kept.

(T36:16-20)

The trial court went on:

> I think we can all again accept he was carrying things to the dumpster, uh, so we have to understand that it must have been debris, you're not going to throw out anything but debris into a dumpster.

(T37:15-18)

The trial court went further:

> . . . Um, at some point while outside he claims that he woke up on the ground, and I think we -- we for the purpose of this motion again, we are accepting as true that the Plaintiff, um, fell at some point for -- and -- and putting aside what the cause may have been -- fell and sustained an injury, hit his head. There's no doubt there was a gash on his head and that he sustained a significant injury because he went to the hospital where he had a hematoma, you know. He had a significant injury as a result of this fall.

(T37:19-25; T38:1-4)

The trial court concluded:

> Um, so, I think these are all facts that we must take as true. Now, he does not recall -- there is no question he does not recall the specific thing that caused him to end up on the ground. He -- *** He may very well have slipped on cardboard, slipped on -- on the plywood, hit his head on

> the plywood and fell, or, um, there could be a myriad of other ways in which he could have fallen.

(T38:5-25; T39:1-6)

Indeed, the trial court correctly identified the relevant factual circumstances from which an inference could be reached by the jury as to what probably caused plaintiff to fall -- slipping or tripping on the plywood. Nevertheless, the trial court erred when it failed to recognize that the factual circumstances were sufficient for a jury to reach the conclusion that the plaintiff's fall and resulting injuries were probably caused by the negligence of the defendants. (T34:24 to T44:18) The circumstances surrounding the plaintiff's fall overwhelmingly suggest that his fall was due to his foot coming into contact with the plywood, whether slipping on or tripping over it.

Use of circumstantial evidence to prove proximate cause is well established under New Jersey law. As indicated, a plaintiff in a civil suit is not obliged to establish proximate cause by direct and indisputable evidence. Bergquist, *supra*, 46 N.J. Super. at 88. Instead, the matter may rest upon legitimate inference, so long as the proof will justify a reasonable and logical inference as distinguished from mere speculation. Id. In order to establish a *prima facie* case based upon circumstantial evidence, the conclusion to be reached from the evidence must be as probable or more probable than the alternative possible conclusions. Yormack v. Farmers' Cooperative Ass'n, 11 N.J. Super. 416 (App. Div. 1951). Similarly, it is sufficient

in civil cases that the circumstantial evidence is of such a nature as to afford a fair and reasonable presumption of the facts inferred. In the final analysis, probability, and not the ultimate degree of certainty, is the test. Ocasio v. Amtrak, 299 N.J. Super. 139, 153 (App. Div. 1997). Thus, where fairminded men may honestly differ as to the conclusion to be reached from the evidence, controverted or uncontroverted, the case must be submitted to the jury. Yormack, *supra*, 11 N.J. Super. at 425. A plaintiff must satisfy his burden to proffer competent evidence that reduces the likelihood of other causes so that the greater probability of fault lies at the defendants' door. Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 545 (App. Div.), *certif. denied,* 145 N.J. 374 (1996).

In Bergquist, *supra*, 46 N.J. Super. at 74, plaintiff sued for personal injuries and wrongful death that occurred when the decedent was performing plumbing work at defendant's premises. At the same time the decedent was performing his work, another contractor was at the property performing floor finishing work that involved the use of highly flammable lacquer. The accident occurred as the decedent was using an open flame torch which ignited the flammable lacquer fumes which caused the explosion that resulted in his death. On the defendant's motion for summary judgment, the court considered whether plaintiff met her burden of proving proximate cause, even by circumstantial evidence. The question before the court was whether there was sufficient proof to establish that the open flame torch ignited

the lacquer fumes that resulted in the explosion that caused the decedent's death. Finding there was sufficient circumstantial evidence in the record to prove proximate cause, the court held:

> The facts here logically and legitimately permitted an inference by the jury that the lacquer fumes were caused to explode by the open flame [being used] near the cellar beams. Defendant suggests that the explosion may have been caused by the painter or the floor finisher's smoking, although there is no testimony they were smoking while lacquering work was going on. There is also a suggestion that the fumes might have been sparked by an electrical connection, although the testimony indicates the cables of the sanding machines had been disconnected at the time. **But all this was for the jury**, and before it could grant an award it had to be satisfied by the preponderance of the evidence that the hypothesis of causal connection advanced by plaintiff. . . [the torch flame being ignited by the lacquer fumes] was more reasonably probable than any other hypothesis [smoking or electrical spark] as to cause.

Id. at 89. (Emphasis supplied)

In Ocasio v. Amtrak, 299 N.J. Super. 139 (App. Div. 1997), the plaintiff was struck by defendant's train as he walked along the railroad tracks. The theory of plaintiff's case was that the defendant negligently failed to prevent pedestrians from gaining access to the tracks by means of stairways at the Newark South Street Station, which had been closed for almost forty (40) years. Plaintiff's evidence showed that one staircase provided unrestricted access to the tracks, while another had only 3.5 feet-high railing that could easily be stepped over. After the jury returned a verdict in plaintiff's favor, defendant appealed on the ground that the

plaintiff did not present sufficient evidence to demonstrate that the decedent gained access to the tracks by means of any of the abandoned stairways and thus failed to show a proximate causal relationship between defendant's alleged negligence in safeguarding the stairway and the accident. The Appellate Division rejected that argument and noted that in a negligence action, the proof required to establish proximate cause need not be absolute; it is sufficient that the evidence establish the probability or likelihood of the event occurring in the manner alleged. Quoting the decision in Mazzietelle v. Belleville Nutley Buick Co., 46 N.J. Super. 410 (App. Div. 1957), the Ocasio Court held the circumstantial evidence on proximate cause must provide a reasonable probability, as distinguished from a mere possibility, that the accident occurred in the manner alleged. Thus, the court noted:

> Plaintiffs were unable to present direct evidence of the route Ocasio used to obtain access to the tracks, because he was alone on the night of the accident and is now comatose. However, plaintiffs presented evidence that Ocasio lived on one side of the tracks in the general vicinity of the station, that he had friends and relatives who lived on the other side of the tracks, and that he generally walked when he visited those friends and relatives. Although the precise location of the accident is unclear, plaintiffs presented evidence from which the jury could have found that Ocasio was only 100 feet from the top of one of the stairways leading to the station when the accident occurred. Plaintiffs also presented evidence that the nearest other means of access to the tracks, located at Penn Station and in the area of Hunter Tower, were approximately a mile from the site of the accident. Therefore, plaintiffs presented adequate circumstantial evidence from which the jury reasonably could have

> inferred that Ocasio gained access to the tracks by climbing one of the stairways to the abandoned South Street Station.

Id. at 153-154.

Bergquist was a wrongful death case and the injured plaintiff in Ocasio was comatose. There was no direct evidence offered in either case to establish proximate cause. Nonetheless, the courts permitted the jury to draw inferences from the circumstantial evidence to establish proximate cause. Wettengel is in a similar position. There were no eyewitnesses and because of his head injury he had no recollection of exactly what precipitated this fall. Nonetheless, there was evidence from which a jury could conclude that plaintiff probably fell as a result of the negligence of the defendants. The trial court recognized all of the circumstantial evidence from which a jury could conclude that he either slipped or tripped on the strewn plywood. Instead of permitting a jury to draw inferences from the evidence of the probable cause for the plaintiff's fall, the court concluded that such evidence was insufficient and would require the jury to speculate. To the contrary, the evidence was sufficient for the jury to make a determination that his fall was probably caused by the defendants' negligence and so should have been presented to the jury.

CONCLUSION

For the foregoing reasons, it is respectfully urged by the plaintiff that this Court reverse the holding of the Hon. Cynthia D. Santomauro, J.S.C. From the factual circumstances of the accident, a jury should have been permitted to assess whether the probability was that the plaintiff either slipped or tripped on the plywood strewn in front of the dumpster causing his fall and resulting injuries.

Respectfully submitted,
GARRITY GRAHAM MURPHY
GAROFALO & FLINN, P.C.
Attorneys for Plaintiff-Appellant

/s/ Francis X. Garrity

Dated: September 19, 2023 Francis X. Garrity

PAUL WETTENGEL, Plaintiff–Appellant, v. ASA DESIGN BUILD, LLC; RIDGEDALE AVENUE DEVELOPMENT, LLC; JOHN DOE #1–10 AND ABC CORP. #1–10, Defendants–Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A–002118–22T4 CIVIL ACTION SUPERIOR COURT OF NEW JERSEY LAW DIVISION – ESSEX COUNTY DOCKET NO.: ESX–L–6156–19 Sat Below: Hon. Cynthia D. Santomauro, J.S.C.

BRIEF OF DEFENDANT–RESPONDENT ASA DESIGN BUILD, LLC IN OPPOSITION TO APPELLANT–PLAINTIFF'S APPEAL OF THE GRANT OF SUMMARY JUDGMENT IN ASA'S FAVOR AND DENIAL OF APPELLANT–PLAINTIFF'S MOTION FOR RECONSIDERATION

Robert B. Nussbaum, Esq.
(Bar No. 025651987)
SAIBER LLC
18 Columbia Turnpike, Suite 200
Florham Park, New Jersey 07932
(973) 622–3333
rnussbaum@saiber.com
Attorneys for Defendant/Respondent ASA Design Build, LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

PRELIMINARY STATEMENT

Defendant ASA Design Build, LLC ("ASA") submits this opposition to Plaintiff Paul Wettengel's appeal of the trial court's decision granting summary judgment in favor of ASA dismissing Plaintiff's Amended Complaint and the denial of Plaintiff's motion for reconsideration. Plaintiff's appeal though is procedurally defective. As will be set forth more fully herein, Plaintiff purports to appeal the trial court's January 6, 2023 Order granting summary judgment in favor of ASA (the "January 6 Order"), but, as set forth in Plaintiff's Notice of Appeal, Amended Notice of Appeal and Civil Case Information Statement ("CIS"), Plaintiff did not appeal from the trial court's January 6, 2023 Order. Rather, Plaintiff only appealed from the trial court's Order denying his motion for reconsideration on February 10, 2023 (the "February 10 Order").

ASA respectfully submits that Plaintiff's appeal should be limited to sole issue raised in the Amended Notice of Appeal – whether the trial court erred in denying Plaintiff's motion for reconsideration. ASA nevertheless will also address the issue raised in Plaintiff's appellate brief, i.e., whether the trial court erred in granting ASA's motion for summary judgment.

In both of its decisions, the trial court correctly held that Plaintiff, who allegedly sustained personal injuries after falling, could not establish his single claim for negligence

against ASA because Plaintiff was unable to show what caused him to allegedly fall – a required element on which Plaintiff bears the burden of proof.

The trial court correctly found that the evidentiary record and, notably, Wettengel's inability to present any competent evidence to demonstrate why he allegedly fell belied his claim that ASA's negligence proximately caused his alleged injuries. Wettengel's own deposition testimony unequivocally and repeatedly demonstrated that he could not point to the reason for his alleged fall. Wettengel was not even certain that he did, in fact, fall. Plaintiff's inability to point to the cause of the accident or to recall whether he actually fell was further buttressed by medical records produced in discovery – records which state, by way of example, that Plaintiff "has no recollection of what happened" to him.

The trial court granted summary judgment in favor of ASA finding that Plaintiff's claim of negligence was not based on competent evidence, but rather speculation about why he allegedly fell. The trial court correctly found that all of the purported evidence Plaintiff presented relating to the alleged cause of the purported incident was purely speculative. Accordingly, because Plaintiff could not demonstrate one of the requisite elements of a negligence claim – proximate cause – the trial court granted summary judgment in favor of ASA and

dismissed the Amended Complaint. The trial court reaffirmed that decision when it subsequently denied Plaintiff's motion for reconsideration.

Plaintiff appealed only from the order denying reconsideration and did not appeal the order granting summary judgment in favor of ASA. On appeal, Plaintiff asserts that the trial court erred because it did not consider circumstantial evidence even though the circumstantial evidence argument was considered by the trial court – and soundly rejected. In granting ASA's motion for summary judgment, the trial court correctly determined that the proffered circumstantial evidence was speculative, could not establish causation on the part of ASA, and should not be submitted to a jury. The trial court reaffirmed its ruling when it denied Plaintiff's motion for reconsideration.

Because no basis exists to disturb these rulings, and Plaintiff's appeal is procedurally flawed, the trial court's orders granting ASA summary judgment and denying Plaintiff's motion for reconsideration should be affirmed.

PROCEDURAL HISTORY

On April 29, 2020, Plaintiff filed a single count Amended Complaint sounding in negligence against ASA and Ridgedale.

(Pa43).[1] On December 2, 2022, ASA moved for summary judgment (Pa191), which the trial court granted on January 6, 2023 following extensive oral argument. (Pa21). Plaintiff moved for reconsideration on January 11, 2023. (Pa388). On February 10, 2023, the trial court denied Plaintiff's motion for reconsideration following extensive oral argument. (Pa24).

Plaintiff filed a Notice of Appeal on March 20, 2023 (Pa1) and an Amended Notice of Appeal (to correct the date of the order appealed from) on March 23, 2023 (Pa7). As made clear in both the Notice of Appeal and Amended Notice of Appeal (as well as Plaintiff's Civil Case Information Statement (Pa12)), Plaintiff appeals only from the February 10 Order which denied Plaintiff's motion for reconsideration. (Pa7). Plaintiff did not appeal the trial court's January 6 Order granting summary judgment in favor of ASA. (Pa21).

COUNTERSTATEMENT OF FACTS

On February 21, 2019, the date of the incident described in the Amended Complaint (Pa43), Plaintiff Paul Wettengel was employed by the company he operated, Woodworks Floor Company, which was in the business of sanding and finishing wood

[1] "Pa" refers to Plaintiff's Appendices. Because all of the documents relied upon by ASA in opposing the appeal are included in Plaintiff's Appendices, ASA has not submitted an Appendix of its own.

flooring. (Pa204–205). The incident allegedly occurred at 165 Ridgedale Avenue, Madison, New Jersey (the "premises") (Pa43) where Wettengel was installing new flooring in different areas of the premises. (Pa206). Wettengel was hired to perform the flooring work by John Hand, one of the people affiliated with Ridgedale, the owner of the premises. (Pa206–207; Pa236–237).

ASA and John Hand both hired the subcontractors who worked at the premises. Hand hired Plaintiff Wettengel (the flooring contractor) and was also responsible for hiring the snow removal contractor for the premises at times. (Pa237).

The February 21, 2019 Incident

Plaintiff was initially hired to install new flooring in certain rooms at the premises, i.e., on the third floor, second floor and possibly in the kitchen on the first floor. (Pa208). Plaintiff could not exactly remember the exact time that he began the work, but he believed it was in the "middle of December." (Pa209). Thereafter, in January, he returned to the premises to do additional flooring work in two other rooms at the premises. (Pa210; Pa211). He was asked to return to the premises again in February to do additional flooring work in another room. (Pa211–212). Wettengel began the latest work on February 18. (Pa214–215).

On the date of the alleged incident, February 21, 2019, Plaintiff believed he arrived at the premises at "10:30 in the

morning." (Pa216; Pa217). With regard to the work he performed on the date of the alleged incident, Wettengel testified as follows:

> Q. So you proceeded to do your work on the 21st?
>
> A. I don't think so, no, I don't think I did any actual floor work. I don't even think I installed one piece of flooring.
>
> Q. And why is that?
>
> A. Because I was bringing garbage, a bag of garbage out to the dumpster and that's when I fell and woke up some time later.
>
> Q. When you say that you were bringing out a bag of garbage to the dumpster, do you have a recollection of what time of the day that was?
>
> A. No, I'm not even sure what time I got there.

(Pa217–218). Wettengel then contradicted his own testimony, admitting that he actually had no idea what he was doing at the time he allegedly fell, stating he could not recall if he was or was not bringing out a bag of garbage. He testified as follows: "I was carrying out garbage, I'm not sure if it was a bag or not. I'm not sure if it was a bag, if it was contained in a bag or bringing out – – I don't know." (Pa219).

In fact, Wettengel could not even recall actually getting to the dumpster:

> Q. Well, do you recall actually getting to the dumpster?

> A. Not really, no. I don't remember the trip out as much, I don't remember the, you know, as far as getting to the dumpster, no.

(Pa220).

Nor did Wettengel recall actually falling:

> Q. Do you recall having a fall?
>
> A. I do not remember falling, no. I still don't.

(Pa220; Pa221)

Plaintiff Cannot Explain Why He Purportedly Fell

Plaintiff could not state why he fell – if, in fact, he did fall. For example, after the alleged incident, when Plaintiff got up, he did not inspect the area. As Wettengel testified:

> Q ...you didn't do any kind of inspection of the area where you were when you got up. Is that so?
>
> A. Not per se, no.

(Pa222).

Wettengel stated that there was snow on the ground at the premises, but he could not state if there was snow on the ground by the dumpster. He testified as follows:

> Q. When you went out to the dumpster, do you have a recollection of snow on the ground at that time?
>
> A. I couldn't say. I don't know if, when I went out to the dumpster, I don't know if there was snow on the ground.

(Pa223).

Later, after Plaintiff went to the hospital, he similarly could not identify the cause of the alleged incident. He testified as follows during his deposition:

> Q. Do you recall if you were asked questions in the hospital about if you had had a fall or how the fall occurred?
>
> A. No, no, I don't know if I ever answered any kind of question, received any kind of question like that or answered it.
>
> Q. So if the hospital chart says that you don't recall falling, you wouldn't have any dispute with that, I mean that's basically what you're telling us today, that you don't have any recollection of falling?
>
> A. Correct.

(Pa225-226).

Plaintiff's testimony regarding his inability to explain how he fell is confirmed by what he told his treating doctors as reflected in medical records produced in discovery by Plaintiff. The records from Atlantic Health System contain statements like:

- "Plaintiff does not recall falling." (ECa3)[2]
- "The patient is AAOx upon arrival but amnestic to how he sustained the laceration to his scalp." (ECa3)
- "Patient presented as full trauma after Fall, unknown mechanism because the patient does not remember the surrounding events." (ECa4)

---

[2] "ECa" refers to the Exhibit/Confidential Appendix (Volume IV) which was filed under seal by Plaintiff.

- "He has no recollection of what happened and has no recollection of trauma." (ECa5)
- "He is amnesic to the events surrounding his presumed fall." (ECa6)
- "He was unable to recall the events of his fall." (ECa7)

All Plaintiff can say with any certainty is that when he regained consciousness, he was lying on top of a piece of plywood. (Pa230). See also Pa94. And, although Plaintiff's answer to Supplemental Interrogatory No. 3 (Pa99) states the alleged incident was caused by Plaintiff falling "on a piece of plywood covered by snow," this is not consistent with Plaintiff's extensive deposition testimony. Wettengel never testified that "a piece of plywood" caused the alleged incident. He merely stated that he woke up on top of a piece of plywood.

Plaintiff's Liability Expert Report

During discovery, Plaintiff submitted a liability expert report prepared by William Mizel, CSP of Risk Management Services. (Pa154). Mr. Mizel's report, however, failed to rely on competent facts to reach his conclusion. The facts he relied upon were based purely on speculation because, if Plaintiff could not state what caused his alleged fall, Mr. Mizel, who did not witness the alleged incident, also cannot state what caused the incident.

In sum, Plaintiff presented the trial court with no competent evidence to demonstrate that anything ASA did

proximately caused the alleged incident.

POINT I

PLAINTIFF IS PRECLUDED FROM CHALLENGING THE TRIAL COURT'S ORDER GRANTING ASA SUMMARY JUDGMENT

Although Plaintiff's brief asserts that the trial court erred in granting ASA's motion for summary judgment, Plaintiff is procedurally precluded from seeking review of the trial court's January 6 Order which granted summary judgment in favor of ASA. (Pa21)

It is well settled that an appellate court may review "only the judgment or orders designated in the notice of appeal." 1266 Apartment Corp. v. New Horizon Deli, Inc., 368 N.J. Super. 456, 459 (App. Div. 2004); see also R. 2:5-1(f)(ii). In other words, appeals from orders or judgments not identified in the notice of appeal fall outside the scope of appellate jurisdiction and are thus not reviewable. See Pressler & Verniero, Current N.J. Court Rules, cmt.5.1 on R. 2:5-1. ("Courts have concluded that only the judgments, orders or parts thereof designated in the notice of appeal are subject to the appellate process and review.").

Here, the trial court entered an order on January 6, 2023 granting ASA's motion for summary judgment. (Pa21). Plaintiff's Amended Notice of Appeal (as well as the original Notice of Appeal), however, only appealed from the trial court's February

10 Order denying Plaintiff's motion for reconsideration. (Pa1; Pa7; Pa24). Plaintiff did not appeal from the January 6 Order. (Pa21). Nor did Plaintiff identify the January 6 Order in his CIS. (Pa12; Pa13). See Silviera-Francisco v. Bd. of Educ. of Elizabeth, 224 N.J. 126, 142 (2016) (stating an order "clearly identified . . . in [a] Case Information Statement submitted with [a] Notice of Appeal" is deemed properly before the court for review). See also Fusco v. Board of Educ. of City of Newark, 349 N.J. Super. 455, 460-62 (App. Div. 2002) (agreeing with defendant's procedural argument that plaintiff's appeal was limited to the sole issue raised in his notice of appeal, i.e., the trial court's denial of Plaintiff's motion for reconsideration, and finding that the "order granting summary judgment is not before us for review").

In Fusco, the court stated as follows:

> An appellant, however, proceeds at his or her peril by insufficiently completing the notice of appeal or CIS. The appellant should explicitly designate all judgments, orders and issues on appeal in order to assure preservation of their rights on appeal. R. 2:5-1(f).

Fusco, 349 N.J. Super. 455, 461 n.1. Fusco is directly on point here where Plaintiff insufficiently completed both the Notice and Amended Notice of Appeal (Pa1; Pa7) and CIS (Pa12) by appealing only from the February 10 Order (Pa24) denying his motion for reconsideration.

Accordingly, despite attempts now to appeal from the January 6 Order (Pa21) granting ASA's summary judgment motion, Plaintiff's non-compliance has effectively waived his ability to challenge the January 6 Order. See Campagna ex rel. Greco v. Am. Cyanamid Co., 337 N.J. Super. 530, 550 (App. Div. 2001) (refusing to consider order not listed in notice of appeal).

Plaintiff's attempt to appeal the January 6 Order granting summary judgment in favor of ASA must therefore be rejected.

POINT II

RECONSIDERATION WAS PROPERLY DENIED BY THE TRIAL COURT

Plaintiff fails to meet the standard of review of motions for reconsideration on appeal or the stringent legal standard that is applied to such motions in the trial court.

The standard of review on appeal of a denial of a motion for reconsideration is abuse of discretion, which arises only when a trial court's decision is made without a rational explanation, inexplicably departs from established policies, or rests upon an impermissible basis. Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002); Cummings v. Bahr, 295 N.J. Super. 374, 388 (App. Div. 1996). See also State v. Brown, 170 N.J. 138, 147 (2001) ("[A]n appellate court should not substitute its own judgment for that of the trial court, unless the trial court's ruling was so wide of the mark that a manifest

denial of justice resulted.")(quotation marks and citations omitted). Plaintiff has failed to meet this standard.

At the trial court level, motions for reconsideration should be granted only where a litigant can provide "a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred[.]" R. 4:49-2. Reconsideration is granted only where "(1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." Matter of Belleville Educ. Ass'n., 455 N.J. Super. 387, 405 (App. Div. 2018)(quoting Cummings, 295 N.J. Super. at 384 (alterations in original).

Plaintiff must demonstrate that the trial court's alleged error is a "game-changer"; otherwise, reconsideration is inappropriate. Palombi v. Palombi, 414 N.J. Super. 274, 289 (App. Div. 2010). The moving party must demonstrate that the court acted in an "arbitrary, capricious, or unreasonable manner," which is the "least demanding form of judicial review." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Parties may not, as Plaintiff did here, simply re-argue the motion he previously lost. See Capital Fin. Co. of Del. Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008) ("A litigant should not seek reconsideration merely because of

dissatisfaction with a decision . . . .") (quoting D'Atria, 242 N.J. Super. at 401).

Plaintiff argues on appeal that the trial court erred in holding that the circumstantial evidence Plaintiff proffered in opposing summary judgment was insufficient proof of proximate cause. (Pb8). Plaintiff is wrong. The trial court properly considered and rejected Plaintiff's claim that the circumstantial evidence offered was sufficient proof that ASA's alleged negligence was the proximate cause of Plaintiff's accident and injuries. Indeed, the trial court noted at length that there was no evidence at all to explain what caused Plaintiff to fall. In summarizing the Plaintiff's own testimony, the trial court stated:

> Now, he does not recall - - there is no question he does not recall the specific thing that caused him to end up on the ground. He - - has not testified that my foot - - all I know is before I fell, I, uh, hit - - my toe hit the edge of something, I don't know what it was, but it hit something. . . . Um, nothing like that. I don't know what caused me to fall, I have absolutely no recollection of what caused me to fall. . . . He may very well have slipped on cardboard, slipped on - - on the plywood, hit his foot on the plywood and fell, or, um, there could be a myriad of other ways in which he could have fallen. Maybe there was something else on the ground that had fallen from the dumpster or - - we don't know.

1T38-6 to 1T39-8 (emph. added).

The trial court specifically discussed the question of

whether Plaintiff had adduced sufficient competent evidence to establish one of the four requisite elements of a negligence claim – proximate cause. In holding he had not, the trial court stated as follows:

> The question is was there proximate cause? In – – in this case, um, the Court finds that Plaintiff has failed to produce any evidence suggesting that, um, something – – whatever – – what it was that caused him to fall. We have lots of conjecture, lots of things. It could have been the snow, it could have been the cardboard, it could have been the plywood, it could have been – – that's not enough. We don't allow juries to speculate and to say, okay, you know what, we think it was – – we think it was – – we don't allow that. There is not enough facts in this case – – most unfortunately – – to go to the jury.

1T41-8 to 19.

On reconsideration, Plaintiff took a second, impermissible bite of the apple, by re-arguing the same point – that the circumstantial evidence he offered was sufficient to establish proximate cause. The trial court, however, again confirmed that Plaintiff's re-hashed argument did not change the court's original decision on summary judgment. Indeed, before the trial court delivered its decision on the motion for reconsideration, the court reiterated its original holding that Plaintiff presented no evidence to establish proximate cause, repeating the earlier conclusion that Plaintiff himself did not know what caused him to fall or if he even fell. 2T15-24 to 2T16-2. The

trial court stated, "But the bottom line is that we don't know and we will never know if something or anything caused him to fall." 2T16-4 to 6.

In ruling on the motion for reconsideration, the trial court acknowledged that it reviewed decisions cited by Plaintiff on reconsideration which had not been submitted to the court previously because the trial court wanted to be sure that its decisions "are appropriate and just." 2T16-17 to 2T17-2. The trial court then re-affirmed its original holding on summary judgment that the evidence presented by Plaintiff (and Plaintiff's expert) was insufficient to establish proximate cause:

> It's speculative. It's so far afield from what we need here that no way do I find that there's any possible way that someone could meet the standards to prove a negligence case. Number one, did negligence cause his injury? We don't know that. We know that there was negligence at the site. But we don't know that there was negligence that was - - that there was negligence, A, and B, that it was the proximate cause of his injury.

2T19-24 to 2T20-7.

In summarizing the specific finding which rejected Plaintiff's circumstantial evidence argument, the trial court stated as follows:

> And the Court believes circumstantial evidence could be sufficient to submit to a jury. But we don't even have that here. We don't have that next step. Was there negligence and was

> it the proximate cause? Yeah. Just because it was negligence on the job site has nothing to do with this particular case. At least there's no evidence of that sufficient to go to a jury.

2T24-17 to 24

Thus, even after considering cases not cited in the original opposition to ASA's motion for summary judgment, the trial court still ruled that Plaintiff had not satisfied the standard for reconsideration.

The trial court did not abuse its discretion in rejecting the speculative evidence offered by Plaintiff and no basis exists to disturb this ruling on appeal.

POINT III

EVEN IF CONSIDERED, THE TRIAL COURT PROPERLY GRANTED ASA'S MOTION FOR SUMMARY JUDGMENT

A. The Standard of Review

Because Plaintiff did not appeal from the January 6, 2023 Order granting summary judgment in favor of ASA (Pa21), ASA respectfully submits that order is not part of this appeal. However, even if the order granting summary judgment is considered, the trial court properly granted summary judgment in favor of ASA and Plaintiff's appeal should be denied.

In reviewing summary judgment motions, appellate courts review an order granting summary judgment in accordance with the same standard as the trial court. Bhagat v. Bhagat, 217 N.J.

22, 38 (2014). Thus, on appeal of a summary judgment motion, this Court must first review the "competent evidential materials submitted by the parties to identify whether there are genuine issues of material facts and, if not, whether the moving party is entitled to summary judgment as a matter of law." Id. (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); R. 4:46-2(c)). "In conducting this review, the Court must keep in mind that 'an issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Id. (citing R. 4:46-2(c)). "If there is no genuine issue of material fact, [this Court] must 'decide whether the trial court correctly interpreted the law.'" DepoLink Ct. Rep. & Litig. Support Servs. V. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs. Inc., 396 N.J. Super. 486, 494 (App. Div. 2007)).

Motions for summary judgment require trial and appellate courts to review the motion record against "the elements of the cause of action, [and] the evidential standard governing that cause of action." Bhagat, 217 N.J. at 38. As set forth below, the trial court correctly applied the foregoing standard to the undisputed material facts and concluded ASA was entitled to

summary judgment as a matter of law. As a result, this Court should affirm the trial court's grant of summary judgment in favor of ASA.

A party cannot defeat summary judgment by merely making conclusory, self-serving statements. Puder v. Buechal, 183 N.J. 428, 440-41 (2005) ("conclusory and self-serving assertions" do not defeat summary judgment); Triffin v. Somerset Valley Bank, 343 N.J. Super. 73, 87 (App. Div. 2001) ("self-interested and conclusory" statements do not create genuine dispute of material fact). Nor can summary judgment be defeated where the non-moving party offers "only facts which are immaterial or of an insubstantial nature, . . . [f]anciful, frivolous, gauzy or merely suspicious." Brill, 142 N.J. at 529 (internal quotes and citation omitted). Likewise, a plaintiff's speculation does not meet the evidentiary standard for summary judgment. See Merchs. Exp. Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div. 2005); Mandel v. UBS/PaineWebber Inc., 373 N.J. Super. 55, 79 (App. Div. 2004) (neither perception, speculation or suspicion can support a cause of action). As the trial court correctly recognized, Plaintiff's opposition to ASA's motion for summary judgment consisted of pure speculation concerning the cause of Plaintiff's alleged slip and fall.

Here, in opposing ASA's motion for summary judgment, Plaintiff could not produce *any* competent evidence that ASA was

negligent regarding the alleged incident because there is no evidence at all to show anything done by ASA proximately caused plaintiff's alleged injuries. Plaintiff's speculation, as well as his expert's speculation, regarding causation, is not competent evidence. Accordingly, as the trial court correctly ruled, summary judgment in favor of ASA was warranted.

B. ASA Was Entitled To Summary Judgment As A Matter Of Law Because Plaintiff Could Not Establish That ASA Proximately Caused His Injuries

In opposing ASA's summary judgment motion, Plaintiff failed to produce any evidence of negligence on ASA's part that proximately caused his alleged injuries.

It is fundamental that "negligence must be proved and will never be presumed, that indeed there is a presumption against it, and that the burden of proving negligence is on the plaintiff. Buckelew v. Grossbard, 87 N.J. 512, 525 (1981), citing Hansen v. Eagle-Picher Lead Co., 8 N.J. 133, 139 (1951). The plaintiff bears not only the burden of proving the defendant's negligence, but also "that such negligence was a proximate cause of plaintiff's injury." Dziedzic v. St. John's Cleaners and Shirt Launderers, Inc., 53 N.J. 157, 161 (1969).

In order to establish a cause of action for negligence, a plaintiff must establish that (1) defendant owed a duty of care to the plaintiff; (2) defendant breached that duty; (3) proximate cause; and (4) actual damages. Townsend v.

Pierre, 221 N.J. 36, 51 (2015). In Germann v. Matriss, 55 N.J. 193, 205 (1970), the court expanded the proof of negligence to include evidence or reasonable inferences therefrom showing a proximate causal relation between the defendant's negligence and the resulting injury. However, the inferences "can be drawn only from proven facts and cannot be based upon a foundation of pure conjecture, speculation and guess." Rivera v. Columbus Cadet Corps. of America, 59 N.J. Super. 445, 449 (App. Div. 1960), certif. denied, 32 N.J. 349 (1960).

The plaintiff bears not only the burden of proving defendant's negligence, but also "that such negligence was a proximate cause of plaintiff's injury." Dziedzic, 53 N.J. at 161. In Hansen, the court stated:

> It is well settled that the existence of a possibility of a defendant's responsibility for a plaintiff's injuries is insufficient to impose liability. "In the absence of direct evidence, it is incumbent upon the plaintiff to prove not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant and would exclude the idea that it was due to a cause with which defendant was unconnected. While proof of certainty is not required, the evidence must be such as to justify an inference or probability as distinguished from the mere possibility of negligence on the part of defendant."

8 N.J. at 141, quoting Callahan v. National Lead Co., Titanium Division, 4 N.J. 150, 154-55 (1950).

Negligence is a fact which must be proved and will never be presumed. Nor will the mere proof of the occurrence of an accident raise a presumption of negligence. Nelson v. Fruehauf Trailer Co., 11 N.J. 413, 416 (1953). "It is well-settled law that a recovery for damages cannot be had merely upon proof of the happening of an accident. Negligence is never presumed; it, or the circumstantial basis for the inference of it, must be established by competent proof presented by the Plaintiff." Mockler v. Russman, 102 N.J. Super. 582, 588 (App. Div. 1968).

Here, as the trial court correctly held, Plaintiff had not – and could not – produce any competent, non-speculative evidence to show that anything ASA did caused the alleged incident. All Plaintiff and his expert were able to say is that there was plywood and snow in the area where Plaintiff claims he fell. Neither Plaintiff nor his expert were able to say that Plaintiff tripped on or slipped on the plywood. Indeed, as Plaintiff's deposition testimony and medical records make clear, Plaintiff has no idea why he fell.

There was simply no genuine issue of material fact in dispute. Plaintiff was unable to establish proximate cause – one of the necessary elements he must demonstrate to find that ASA was negligent with regard to the alleged incident. Therefore, summary judgment was properly granted in favor of ASA by the trial court.

1. Plaintiff's Proffered Evidence Was Insufficient To Defeat Summary Judgment

The Supreme Court of New Jersey has held that a plaintiff bears the burden of establishing proximate cause to sustain a cause of action for negligence. See Townsend v. Pierre, 221 N.J. 36, 61 (2015). In meeting this burden, plaintiffs must

> introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

Id. at 60–61 (quoting Davidson v. Slater, 189 N.J. 166, 185 (2007)).

A plaintiff though must do more than simply demonstrate that defendants owed a duty of care to the plaintiff. "Plaintiffs must prove by a preponderance of the evidence that the defendants' alleged negligence was a proximate cause" of the plaintiff's damages. Townsend, 221 N.J. at 52.

In Townsend, a case involving a fatal collision at an intersection between a motorcycle and automobile, plaintiffs sued the owners and lessee of property on a corner of the intersection where the accident occurred. Plaintiffs claimed these defendants negligently maintained overgrown shrubbery on their property which blocked the view of oncoming traffic at the

intersection. Id. at 42. The evidence obtained in discovery, however, showed that the driver's view of oncoming traffic was unimpeded by the shrubbery. Id. at 43. On summary judgment, the trial court held that the overgrown shrubbery on the property was "not a factor in this case." Id. at 49.

The Supreme Court held that "no facts in the record support plaintiff's contention that the shrubbery on this Property was a proximate cause of the fatal collision." Id. at 61. Thus, there was "no evidence in the record that would support a factfinder's determination in plaintiff's favor on the crucial element of proximate cause." Id. In other words, the Court found that the shrubbery may have been overgrown, but that overgrowth did not proximately cause the fatal accident.

The Supreme Court explained the proximate cause-of-injury principles a plaintiff must meet in Reynolds v. Gonzalez, 172 N.J. 266 (2002). There, the Court stated as follows:

> One of the underlying principles of tort law is that "an actor's conduct must not only be tortious in character but it must also be a legal cause of the invasion of another's interest." Restatement (Second) of Torts § 9 cmt. a (1965) (Restatement). It follows from that principle that the issue of a defendant's liability cannot be presented to the jury simply because there is some evidence of negligence. "There must be evidence or reasonable inferences therefrom showing a proximate causal relation between defendant's negligence, if found by the jury," and the resulting injury.

> Similarly, *Prosser and Keeton on the Law of Torts* states that
>
> > [t]he plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

Reynolds, 172 N.J. at 284 (citations omitted).

Here, Plaintiff, who cannot even state why or if he fell, nevertheless argues that a messy jobsite alone provided sufficient circumstantial evidence for a jury to conclude that he slipped and fell because of the conditions of the jobsite. However, no evidence was offered by Plaintiff to show that he fell because of a messy jobsite. Plaintiff never testified to that effect at his deposition.

Thus, as in Townsend, 221 N.J. at 49, where there was no evidence in the record that would support a fact-finder's determination that the overgrown shrubbery caused the fatal accident, there is no evidence in the record here to support a determination that a merely messy jobsite caused Plaintiff to fall. As the trial court stated when granting ASA's motion for

summary judgment, "we don't know" why Plaintiff fell. 1T39-4 to 8.

The Court should not be distracted by Plaintiff's baseless arguments suggesting that there was sufficient circumstantial evidence presented to establish that Plaintiff fell because of a messy jobsite. In fact, there was no evidence – circumstantial or otherwise – to explain what caused Plaintiff to fall. While the circumstantial evidence cases cited by Plaintiff do correctly recognize that circumstantial evidence can be considered under certain circumstances to establish proximate cause, the facts in the matter sub judice is not one of them.

The cases cited by Plaintiff are inapposite. In these cases, which differ from the facts here, there was at least some evidence to show what caused the plaintiff's injuries. For example, in Bergquist v. Penterman, 46 N.J. Super. 74, 77 (App. Div. 1957), the decedent was fatally burned as the result of an explosion which occurred as he was doing floor finishing work. Similarly in Ocasio v. Amtrak, 299 N.J. Super. 139, 143 (App. Div. 1997), the plaintiff was injured when he was struck by a train while walking on railroad tracks. In each case cited by Plaintiff, there was no doubt as to how the plaintiffs were injured. Here, there is no evidence to explain what happened to Wettengel without speculating as to the cause of his alleged

fall. Neither Plaintiff nor anyone else can explain what caused Plaintiff to fall.

Numerous courts have held that a plaintiff must introduce evidence which affords a reasonable basis to conclude that it is more likely than not that the conduct of the defendant was a "cause in fact" of the alleged injury. A mere possibility of such causation is not enough and, where the matter remains one of pure speculation or conjecture, the court must direct a verdict in favor of the defendant. See Davidson v. Slater, 189 N.J. 166, 185 (2007); see also Vizzoni v. B.M.D., 459 N.J. Super. 554, 575-576 (App. Div. 2019); Bergquist v. Penterman, 46 N.J. Super. 74, 88 (App. Div. 1957); Beyer v. White, 22 N.J. Super. 137, 144 (App. Div. 1952).

Here, the trial court considered all of the evidence presented by Plaintiff, including his proffered circumstantial evidence, but each time properly found such evidence consisted of pure speculation or conjecture, which should not go to the jury:

> "We have lots of conjecture, lots of things. It could have been the snow, it could have been the cardboard, it could have been the plywood, it could have been - - that's not enough. We don't allow juries to say, okay, you know what, we think it was - - we think it was - - we don't allow that." (1T41-12 to 17)
>
> "I agree completely with this, the

> jury should not be allowed to speculate, um about the cause of the accident." (1T43-1 to 3)
>
> "I can speculate, I can guess, maybe there were like six or seven different things that could have caused him to fall, including his own negligence. Maybe he tripped because he wasn't looking, but I don't have the - - but again, that's pure conjecture on my part." (1T43-24 to 1T44-4)
>
> "So we're all going to speculate? Was the wet from - - then who was responsible for removal of the snow and ice? It's so speculative. It's so far afield from what we need here that no way do I find that there's any possible way that someone could meet the standards to prove a negligence case. Number one, did negligence cause his injury? We don't know that." (2T19-22 to 2T20-3)
>
> "What's relevant to this motion is that we can't have juries engaging in speculation." (2T1 to 2)

The trial court clearly considered all of the evidence submitted by Plaintiff but found it was based on speculation and conjecture. See Hoffman v. Asseenontv.com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (defeating summary judgment requires "'competent evidential material' beyond mere 'speculation' and 'fanciful arguments'" (citations omitted)). Accordingly, ASA was entitled to summary judgment and the trial court's Orders granting summary judgment (Pa21) and denying reconsideration (Pa24) should be affirmed.

2. Plaintiff's Expert Report Was Based On Speculative Facts And Cannot Establish Proximate Cause

New Jersey Rule of Evidence 703 sets forth the criteria for determining when an expert's opinion can be admitted into evidence. The Rule provides as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the proceeding. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

By its express terms, the Rule requires that expert conclusions be founded in "facts or data." See Harte v. Hand, 433 N.J. Super. 457, 464 (App. Div. 2013). As stated in Harte, "An expert must 'give the why and the wherefore' that supports his or her opinion in order for a court to consider the expert's report." Id. at 464-65. The opinion must be more than "a mere conclusion" and the "net opinion rule is succinctly defined as 'a prohibition against speculative testimony." Id. (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div.), certif. denied, 154 N.J. 607 (1998). See also Riley v. Keenan, 406 N.J. Super. 281, 296-97 (App. Div. 2009) ("To support a causal connection between the act complained of and the resulting injury or damage, experts must be able to identify the factual bases for their conclusions"; Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 542-43 (App. Div. 1996) (striking expert's

testimony as a net opinion where expert "conceded he could only speculate as to what actually occurred" to cause plaintiff's injuries and could not specify any conduct of a defendant which caused the incident).

Here, Wettengel's deposition testimony demonstrated that Plaintiff could not state what caused his alleged fall. In fact, Plaintiff testified that he did not even remember if he did fall. See Pa220; Pa221. All Plaintiff could state was that when he awoke from being allegedly unconscious, he was lying on top of a piece of plywood at the premises. Pa230. Plaintiff never stated he tripped or slipped on the plywood – just that he was lying on top of it.

If Plaintiff could not state what caused the alleged incident, then his expert, who was not an eyewitness to the incident, could only be speculating when he concluded that materials shown in photographs taken a day after the alleged incident caused Wettengel to fall. See Pa159; Pa161. There is, however, no competent evidence to prove what caused the alleged incident and the expert's attempt to fabricate facts from pure speculation cannot, as the trial court held, provide a basis for establishing proximate cause in this matter.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for reconsideration was properly denied and the trial court's

February 10, 2023 Order denying reconsideration should be affirmed. Likewise, and to the extent considered by this Court, defendant ASA Design Build, LLC was entitled to summary judgment and the trial court's January 6, 2023 Order granting ASA's motion for summary judgment should also be affirmed.

Respectfully submitted,

SAIBER LLC
Attorneys for Defendant
ASA Design Build, LLC

By: s/ Robert B. Nussbaum
Robert B. Nussbaum
(025651987)

Dated: October 25, 2023

PAUL WETTENGEL, Plaintiff-Appellant, v. ASA DESIGN BUILD, LLC; RIDGEDALE AVENUE DEVELOPMENT, LLC; JOHN DOE #1-10 AND ABC CORP. #1-10, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002118-22T4 CIVIL ACTION SUPERIOR COURT OF NEW JERSEY LAW DIVISION – ESSEX COUNTY DOCKET NO.: ESX-L-6156-19 Sat Below: Hon. Cynthia D. Santomauro, J.S.C.

PLAINTIFF-APPELLANT'S REPLY BRIEF IN FURTHER SUPPORT OF APPEAL

Garrity, Graham, Murphy, Garofalo & Flinn, P.C.
Attorneys for Plaintiff-Appellant
Paul Wettengel
425 Eagle Rock Avenue, Suite 202
Roseland, NJ 07068
(973) 509-7500

On the Brief:
Francis X. Garrity, Esq.
Attorney ID #: 009471973
E-Mail: fxg@garritygraham.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

PRELIMINARY STATEMENT

On this appeal, plaintiff Paul Wettengel seeks reversal of the decision of the trial court granting summary judgment to the defendants, ASA Design Build, LLC ("ASA Design"), the general contractor, and Ridgedale Avenue Development, LLC ("Ridgedale"), the property owner. Both defendants moved for summary judgment contending that plaintiff could not establish a *prima facie* case of negligence because he could not establish proximate cause. Plaintiff contended that based upon the circumstantial evidence, and the inferences that could be drawn from that evidence, sufficient proof was established to support plaintiff's case.

Alternatively, Ridgedale, as property owner, asserts that it had no duty to the plaintiff because the construction site was in the control of ASA Design as general contractor. Plaintiff contends that there was proof of an element of control retained by Ridgedale and therefore, a jury question existed with respect to Ridgedale's liability. ASA Design contends that plaintiff only appealed the trial court's denial of his Motion for Reconsideration of the grant of summary judgment in favor of ASA Design. Plaintiff will address this argument below, however, the position being advanced by ASA Design is not born out by the plaintiff's Notice of Appeal, Civil Case Information Statement ("CIS") and Amended Notice of Appeal filed with the Superior Court of New Jersey, Appellate Division. Those pleadings clearly

reflect plaintiff's appeal as to the initial Order for Summary Judgment and the Order denying Reconsideration entered by the trial court.

RESPONSE TO "PROCEDURAL HISTORY" OF ASA DESIGN BUILD, LLC

Defendant ASA Design refers to plaintiff's Notice of Appeal filed on March 20, 2023 (Pa1) and an Amended Notice of Appeal filed on March 23, 2023 (Pa7). Defendant suggests that both the Notice of Appeal and Amended Notice of Appeal provide that plaintiff was only appealing from the February 10, 2023 Order denying his Motion for Reconsideration and was not appealing from the trial court's initial Order of January 6, 2023 granting summary judgment in favor of the defendants. The March 20, 2023 CIS under the heading captioned "Give Date and Summary of Judgment, Order or Decision Being Appealed and Attach a Copy" reads:

> Plaintiff-Appellant Paul Wettengel is appealing the lower court's February 10, 2023 decision to grant summary judgment and deny reconsideration on liability as to the Defendant-Respondents Ridgedale Avenue Development, LLC, ASA Design build, LLC. (Pa12)

Under the CIS heading captioned "Give a Brief Statement of the Facts and Procedural History," the plaintiff's response read:

> This matter arises out of a February 20, 2019 construction site accident wherein Plaintiff-Appellant Paul Wettengel fell while removing debris from the cluttered job site when he slipped and fell and struck his head, awaking surrounded by construction debris. Following the close of discovery, the defendant-respondents moved for summary judgment on

> January 6 2023, relying on Mr. Wettengel's head injury and his inability to recall the exact details of his fall. The lower court found this persuasive, finding that no negligence or proximate cause could be attributable to the defendants, despite fact testimony establishing that the defendant-respondents laid out cardboard on the ground on the job site, Mr. Wettengel's testimony that he came to after the accident on the ground surrounded and on top of construction debris, and photographic evidence taken by Mr. Wettengel's wife shortly after the accident showing construction debris on the ground in the area of the fall. Mr. Wettengel subsequently moved for reconsideration, which was denied on February 10, 2023. (Pa13)

In ASA Design's Civil Case Information Statement, filed with the Appellate Division, under the heading "Give a Brief Statement of the Facts and Procedural History," ASA Design wrote:

> Plaintiff-Appellant Paul Wettengel's amended complaint alleged that on February 20, 2019 he fell and sustained personal injuries while working as a floor installation subcontractor at a home in Madison, New Jersey owned by Defendant-Respondent Ridgedale Avenue Development, LLC ("Ridgedale") and where Defendant Respondent ASA Design Build LLC ("ASA") was the general contractor. Wettengel asserted a single claim of negligence against Ridgedale and ASA based on the alleged incident.
>
> On January 6, 2023, the Honorable Cynthia D. Santomauro, J.S.C. granted ASA's motion for summary judgment and dismissed the amended complaint as to ASA with prejudice. Judge Santomauro determined that plaintiff had failed to establish an essential element of a negligence claim with competent evidence. The trial court specifically found that plaintiff was unable to come forward with any non-speculative evidence to demonstrate actual and proximate causation on the part of ASA for Wettengel's alleged

> accident. (Judge Santomauro also granted Ridgedale's motion for summary judgment on January 6, 2023.)
>
> Plaintiff moved for reconsideration, which was denied by Judge Santomauro on February 10, 2023.

Plaintiff's Notice of Appeal, Amended Notice of Appeal, and CIS filed with the Appellate Division all support plaintiff's position that he is appealing both the substantive grant of summary judgment to the defendants as well as the denial of his motion for reconsideration.

RESPONSE TO "STATEMENT OF FACTS" OF RIDGEDALE AVENUE DEVELOPMENT, LLC

In Ridgedale's Brief (Ridgedale's B13), counsel wrote:

> Furthermore, Ridgedale medical expert Aaron Rabin concluded in his supplemental report that there is no evidence that appellant fell. However, he suffered from a medical-cardiologic disease. (Ridgedale Da118).

Dr. Rabin in his report never said "there is no evidence that appellant fell." On the contrary, Dr. Rabin wrote:

> In this setting, and in the absence of a history of his having truly suffered a trip-and-fall, Mr. Wettengel had a reasonable medical-cardiologic risk factor for syncope as being the substrata for, and/or cause of, an alleged fall on 2/20/19. (Ridgedale Da118)

While referencing Mr. Wettengel having a "risk factor" for syncope, there was no suggestion in Dr. Rabin's report that Mr. Wettengel actually suffered syncope as a cause for his fall, much less did Dr. Rabin offer an opinion within a reasonable degree of medical certainty. In point of fact, Dr. Rabin's report is nothing more than a net opinion without factual basis.

LEGAL ARGUMENT

POINT I

CIRCUMSTANTIAL EVIDENCE SUPPORTS PLAINTIFF'S PRIMA FACIE PROOF OF PROXIMATE CAUSE

Both defendants contend that plaintiff failed to adduce evidence before the trial court establishing that their negligence was the proximate cause of plaintiff's injury. Defendant ASA Design contends that there was no evidence – circumstantial or otherwise – to explain what caused plaintiff to fall (ASA Design B26). Defendant Ridgedale cites the purported "opinion" of a medical expert that there is no evidence that Wettengel even fell (Ridgedale B4). Both defendants cite Wettengel's own admission that he did not know what caused him to fall (Ridgedale B10; ASA Design B6). Neither defendant addresses plaintiff's argument that the factual circumstances support the conclusion that it was more probable than not that plaintiff either slipped on the plywood strewn in front of the dumpster or tripped on the plywood causing him to fall.

The defendants maintain their position that plaintiff failed to prove by a preponderance of evidence that he fell as a result of their negligence, specifically, failure to maintain a safe place for the plaintiff to work. Indeed, plaintiff did testify at his deposition that he did not know what caused him to fall. But, indisputably, plaintiff fell and struck his head suffering a severe laceration to the rear of his head resulting in a subarachnoid hemorrhage. A subarachnoid hemorrhage, according to

Cleveland Clinic, is most often caused by head trauma such as from a serious fall or vehicle accident. (https://my.clevelandclinic.org/health/diseases/17871-subarachnoid-hemorrhage-sah)

Plaintiff's position before the trial court and on appeal is that consideration of the circumstances surrounding Wettengel's fall support the conclusion that he fell as a result of the discarded plywood at the site requiring the issue of proximate cause to be presented to the jury. Wettengel had just arrived at the site, had entered the house, and determined to throw some debris into the dumpster before starting to lay new hardwood flooring. He walked without incident from the interior of the house to the exterior porch. In walking, he was in an upright position. As he walked toward the dumpster, he was still upright. His next recall was awakening on his back on top of a piece of plywood covered with snow. He was disoriented when he woke and attempted to stand but kept slipping on the plywood. Ultimately, he crawled off of the plywood, got to the porch and went inside and laid down.

Yes, Wettengel could not testify as to what caused him to fall. But, indisputably, he walked in an upright position from the interior of the house to the exterior without incident. His next recollection was awakening on his back on the snow covered plywood. The trial court concluded that to permit the jury to assess what caused Wettengel to fall would constitute speculation. But, for certain, the plaintiff fell. He was walking upright and then he was on his back. The issue is: did

he fall as a result of the snow covered plywood? He testified that he was on top of the plywood on his back. So, a jury could conclude that the plywood was involved in his fall. He testified that it was slippery as he had difficulty trying to get off of it. Certainly, a jury could infer that he had stepped on the plywood, and slipped causing his fall. A jury, likewise, could conclude that he tripped on the plywood. Commonly, human beings walk without falling unless one or the other of their feet meet an obstruction precipitating a fall.

Defendants offer no alternative theory as to what precipitated Wettengel's fall. They just assert that he could not testify to what caused his fall. Defendant Ridgedale offers the opinion of Dr. Aaron Rabin who reviewed Wettengel's medical records and suggested that he had a "risk factor" for syncope but offered no opinion as to syncope causing the fall (Ridgedale Da118). In any event, the trial court dismissed out of hand any consideration of Wettengel suffering a medical incident before the accident (1T38:18 to 39:21). The trial court concluded that Wettengel could have slipped on the plywood, but concluded "there could be a myriad of other ways in which he could have fallen." (1T39:2-8) Significantly, the trial court could offer not one of this "myriad" of potential other causes. The fact that neither the defendants nor the trial court could offer any reason for the fall contrary to the plaintiff's assertion of coming into contact with the plywood, suggests that it is more

probable than not that that is what occurred and why the case should have been presented to the jury.

POINT II

PLAINTIFF'S APPEAL FROM BOTH THE ORDER GRANTING SUMMARY JUDGMENT AND THE DENIAL OF THE MOTION FOR RECONSIDERATION IS SUPPORTED BY THE CASE INFORMATION STATEMENTS BEFORE THE APPELLATE DIVISION

Defendant ASA Design asserts that plaintiff appealed only the February 10, 2023 Order denying his motion for reconsideration, not the January 6, 2023 Order granting summary judgment to the defendants. As such, ASA Design asserts that this Court should only address the trial court's denial of the plaintiff's motion for reconsideration. The argument is classic "form over substance" as it is apparent from plaintiff-appellant's Civil Case Information Statement (CIS) and Amended Notice of Appeal, as well as ASA Design's CIS, that Wettengel appealed from both the granting of the defendants' motions for summary judgment and the denial of his motion for reconsideration.

Defendant ASA Design relies upon the Appellate Division's decision in Fusco v. Board of Educ. of City of Newark, 349 N.J. Super., 455 (App. Div. 2002) to support its position that Wettengel is precluded from arguing on appeal that the trial court erred in granting summary judgment to the defendants in the first instance. Defendant Ridgedale quotes from Fusco wherein the Court held that an appellant

"proceeds at his or her peril by insufficiently completing the Notice of Appeal or CIS." (ASA Design B11). But, the plaintiff in Fusco appealed the denial of a motion for reconsideration filed more than four weeks after the Court had granted summary judgment to the defendant. In support of the motion for reconsideration, the plaintiff proffered additional evidence of a Notice of Determination by the New Jersey Department of Labor Unemployment and Disability Insurance Services that had not been before the Court on the summary judgment motion. The trial court denied the motion and the plaintiff appealed the Order denying the motion for reconsideration. Since the plaintiff's Notice of Appeal and Case Information Statement referenced only the motion for reconsideration, the Court held that it would address only the motion for reconsideration. Id. at 461.

Importantly, the Court in Fusco recognized that it is critical to address the substantive issues raised in an appellant's Case Information Statement to determine whether an appeal from the denial of a motion for reconsideration could implicate the issues involved in the initial grant of summary judgment. The court stated:

> We are mindful of the fact that in some cases a motion for reconsideration may implicate [***8] the substantive issues in the case and the basis for the motion judge's ruling on the summary judgment and reconsideration motions may be the same. In such cases, an appeal solely from the grant of summary judgment or from the denial of reconsideration may be sufficient for an appellate review of the merits of the case, particularly where those issues are raised in the CIS.

Id. at 461.

Here, plaintiff's Case Information Statement (CIS) referenced both the trial court's grant of summary judgment in favor of the defendants as well as the denial of his motion for reconsideration (Pa13). Further, plaintiff's CIS referenced "Point I" as a challenge to the trial court's grant of summary judgment (Pa13). Certainly, there could be no confusion on the part of either the Court or the defendants as to the Orders from which Wettengel was appealing. Even if the Order of January 6, 2023 is not explicitly referenced, both determinations by the trial court are referenced in the CIS (Pa13). ASA Design itself referenced the trial court's grant of summary judgment in its own CIS. Accordingly, this Court properly should consider the plaintiff's appeal from the grant of summary judgment in favor of the defendants.

POINT III

A FACT QUESTION EXISTS AS TO RIDGEDALE'S CONTROL OF THE CONSTRUCTION SITE

Defendant Ridgedale maintains that inasmuch as it employed defendant ASA Design as general contractor, it had no duty to provide for the safety of the plaintiff. As a general legal proposition, Ridgedale's position is correct so long as it rendered to the general contractor exclusive control. Slack v. Whalen, 327 N.J. Super. 186, 194 (App. Div. 2000) Here, Wettengel's firm, Woodworks Flooring Co. ("Woodworks") was engaged by Ridgedale to install hardwood flooring at the residence under renovation (Pa94). Woodwork's contractual obligation did not

include safety at the site. Ridgedale's principal, John Hand, hired Woodworks (Pa206-207). When Wettengel first arrived at the construction site in December of 2018, he complained of the "sloppy condition" to the general contractor, ASA Design (Pa94). When he received no satisfaction, he communicated directly to Mr. Hand of Ridgedale, who took care of the issue when Wettengel arrived at the site the next day (Pa94). In Ridgedale's Answers to Interrogatories, it conceded that there was no site safety person or site safety officer on the jobsite on the day of the accident and that no safety backgrounds were performed for contractors on the jobsite (Pa292-293). ASA Design contended that Ridgedale hired subcontractors to the jobsite, including Woodworks, and described Ridgedale as "co-general contractor" on the jobsite (Pa309).

Plaintiff submits that Ridgedale as owner was not "hands off" leaving exclusive control of the worksite to ASA Design. On the contrary, Ridgedale was involved in hiring contractors and responding to Wettengel's complaint as to jobsite safety. A fact question was presented as to Ridgedale's control of the site in conjunction with ASA Design.

CONCLUSION

The trial court erred in granting defendants' motions for summary judgment on the basis that plaintiff had not established a *prima facie* case of negligence due to his failure to establish that his injuries were proximately caused by the negligence of the defendants. On the contrary, sufficient evidence was offered as to the circumstances surrounding the plaintiff's accident from which a jury could logically conclude that it was more probable than not that his fall was caused by plywood strewn at the site contrary to construction safety standards. The Order for summary judgment in favor of the defendants should be reversed and the matter remanded to the Law Division for trial.

Respectfully submitted,
GARRITY GRAHAM MURPHY
GAROFALO & FLINN, P.C.
Attorneys for Plaintiff-Appellant

/s/ *Francis X. Garrity*
Francis X. Garrity

Dated: November 2, 2023

PAUL WETTENGEL Plaintiff, V. ASA DESIGN BUILD, LLC, RIDGEDALE AVENUE DEVELOPMENT, LLC, JOHN DOE #1-10 AND ABC CORP #1-10 Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002118-22T4 Civil Action SUPERIOR COURT OF NEW JERSEY LAW DIVISION – ESSEX COUNTY DOCKET NO.: ESX-L-6156-19 Sat Below: Hon. Cynthia D. Santomauro, J.D.S.

RESPONDANT/DEFENDANT RIDGEDALE AVENUE DEVELOPMENT, LLC'S AMENDED BRIEF IN OPPOSITION TO APPELLANT/PLAINTIFF'S BRIEF IN SUPPORT OF APPEAL

METHFESSEL & WERBEL, ESQS.
2025 Lincoln Highway, Suite 200
PO Box 3012
Edison, New Jersey 08818
(732) 248-4200
1(732) 248-2355
kaplan@methwerb.com
Attorneys for Ridgedale Avenue Development, LLC
Our File No. 89155 GKA

Gerald Kaplan - ID #198051963

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

PROCEDURAL HISTORY

Appellant Paul Wettengel commenced this action by the filing of a Complaint in the Superior Court of New Jersey, Law Division on August 21, 2019. (Da1). Appellant named ASA Contractors, LLC ("ASA"), John Hand and SAJ Properties, LLC as defendants. (Pa26). Pursuant to the Order dated March 4, 2020 of the Honorable Stephen L. Petrillo, J.S.C., appellant was granted leave to file an Amended Complaint. (Pa54). By way of Amended Complaint, the defendants were identified as ASA Design Build, LLC, Ridgedale Avenue Development, LLC ("Ridgedale"), and John Hand. (Pa54).

Ridgedale filed an Answer to the Amended Complaint on October 30, 2019. (Da25). On May 1, 2021, the Court issued a dismissal Order for lack of prosecution against John Hand. (Pa55).

On November 17, 2022, Ridgedale moved for Summary Judgment. (Pa81). On December 2, 2022, ASA moved for Summary Judgment. (Pa191). On December 2, 2022, appellant opposed Ridgedale's Motion for Summary Judgment. (Pa190).

On January 6, 2023, oral argument was heard before the Honorable Cynthia D. Santomauro, J.S.C. Following oral argument, Judge Santomauro issued her Opinion and entered Orders dated January 6, 2023 granting Summary Judgment in favor of ASA and Ridgedale dismissing the Amended Complaint. (Pa21-22).

On January 11, 2023, appellant filed a Motion for Reconsideration of the Trial Court's Orders dated January 6, 2023 granting Summary Judgment to

ASA and Ridgedale. (Pa388). Opposition was filed by Ridgedale on January 25, 2023. (Pa496). Oral argument was heard on February 10, 2023 before the Honorable Cynthia D. Santomauro, J.S.C. and after oral argument, Judge Santomauro entered an Order on February 10, 2023 denying appellant's Motion for Reconsideration. (Pa24).

On March 20, 2023, appellant filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division for the January 6, 2023 Orders granting respondents' Motions for Summary Judgment. (Pa1).

On March 23, 2023, appellant filed an Amended Notice of Appeal with the Superior Court of New Jersey, Appellate Division. (Pa7).

On July 21, 2023, appellant filed a court transcript request for the February 10, 2023 oral argument of the Motion for Reconsideration. (Pa16).

COUNTERSTATEMENT OF FACTS

Appellant Paul Wettengel alleges that on February 20, 2019, he was in the course of his employment with his company, Woodwork Floor Co. (with offices at 428 River Road East Hanover New Jersey) at a residential construction site located at 165 Ridgedale Avenue, Madison, New Jersey ("Property"). (Pa206).

At all relevant times herein, Ridgedale Avenue Development Corp. ("Ridgedale") was the owner of the Property. (Pa130-132). At all relevant times herein, ASA Contractors (ASA) was the general contractor of the project at the Property. (Pa138). ASA being the general contractor of project at the Property was confirmed throughout various deposition testimony, as well as appellant's expert report. (Pa494). Some of the job duties of ASA as general contractor was to manage projects and oversee the project to make sure that subcontractors were performing their work correctly. (Pa141-142).

Appellant began working at the Property installing floors in December of 2018. Appellant then returned to the Property on January 15, 2019 to work on two additional rooms, and then on February 19, 2019 to work in another room. (Pa209-212; Pa214-215). Appellant alleges that the Property was cluttered and messy. On February 20, 2019, appellant arrived at the Property at 10:30 am. (Pa216-217). There was snow present on the exterior of the property. (Pa233).

At some point, appellant went outside to throw something out in the dumpster. By appellant's own admission he does not recall the precise time

nor does he recall what he went to throw out. (Pa219). However, at some point while outside, appellant alleges he woke up on the ground. Appellant cannot recall what caused him to end up on the ground, however, appellant believes he fell, causing him to go unconscious. The only evidence that appellant has that supports his allegation of falling is that when he woke up from being unconscious, he was lying on top of a piece of plywood on the driveway. (Pa230)

Ridgedale provided an expert report from Preston Quick, who concluded "There is insufficient evidence to conclude to a reasonable degree of engineering certainty that plaintiff [appellant] experienced a slip and/or trip and fall incident…" (Pa178). Furthermore, Ridgedale medical expert Aaron Rabin concluded in his supplemental report that there is no evidence that appellant fell. However, he suffered from a medical-cardiologic disease. (Pa178).

Appellant's own liability expert, William Mizel CSP, would not commit to concluding how appellant fell. Rather, concluded that ASA failed to meet OSHA standards in permitting the construction site to have hazards. Nowhere in Mr. Mizel's report did he conclude (1) what caused appellant to fall and (2) Ridgedale was negligent. (Pa154).

SCOPE OF APPELLATE REVIEW

In reviewing a motion for summary judgment granted by the trial court pursuant to R. 4:46-2, the appellate court must determine whether the evidence, along with inferences, could have sustained a judgment in favor of the party opposing the motion. Thus, the appellate court applies the same standard as the trial court in respect of the motion record, de novo. R. 2:10-2. Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice a plain error not brought to the attention of the trial or appellate court. Id. In reviewing summary judgment orders, the propriety of the trial court's order is legal, not factual question. Fernandez v. Nationwide Mut. Ins., 402 N.J. Super. 166, 170 (App. Div. 2008), *aff'd o.b.,* 199 N.J. 591 (200).

LEGAL BRIEF

POINT I

As Appellant Cannot Establish Ridgedale Owed Appellant a Duty as Property Owner, the Trial Court Correctly Granted Ridgedale's Motion for Summary Judgment

As an initial matter, appellant argues that the Trial Court's January 6, 2023 Order/Ridgedale's argument was limited to there being a lack of evidence to establish proximate cause. However, this is wrong. Ridgedale also argued as Property owner of 165 Ridgedale Avenue, no duty was owed to

Wettengel as he was employee of Woodworks at the worksite. The Trial Court agreed and based part of its January 6, 2023 decision to grant Summary Judgment as to Ridgedale on that undisputed fact.

It is well settled law of the State of New Jersey that ordinary negligence must be proven and will never be presumed; indeed, there is a presumption against it, and the burden of proving negligence is on the plaintiffs. Buckelew v. Grossbard, 87 N.J. 512, 525 (1981); Hansen v. Eagle Picher Lead Co., 8 N.J. 133, 139 (1951). To establish negligence, plaintiff must prove (1) defendant owed plaintiff a duty of care, (2) defendant breached that duty, (3) the breach of duty (negligence) was a proximate cause of the injury, and (4) actual damages were suffered by the plaintiff. Anderson v. Sammy Redd & Associates, 278 N.J. Super. 50 (App. Div.), cert. denied, 139 N.J. 441 (1994).

As a general rule, a landowner has a "nondelegable duty to use reasonable care to protect invitees against known discoverable dangers." Moore v. Schering Plough Inc., 328 N.J. Super. 300, 305 (App. Div. 2000)(quoting Rigatti v. Reddy, 318 N.J. Super. 537, 541 (App. Div. 1999). Notwithstanding this non delegable duty, "the landowner '[i]s under no duty to protect an employee of an independent contractor from the very hazard created by doing the contract work.'" Rigatti, 318 N.J. Super. at 514-42 (quoting Dawson v. Bunker Hill Plaza Assocs., 289 N.J. Super. 309, 318 (App. Div. 1996)).[1]

[1] In the present matter, it must be stressed that appellant has failed to provide any evidence of a hazard. However, the case law demonstrates a property owner owes no duty for a hazard when established.

"This exception is carved out of the landowner's general duty to protect his invitees because the landowner may assume that the independent contract and [its] employees are sufficiently skilled to recognize the dangers associated with their task and adjust their methods accordingly to ensure their own safety." Accardi v. Enviro-Pak Sys. Co., 317 N.J. Super. 457, 463 (App. Div. 1999).

The exception does not apply (1) when 'the landowner retains control over the manner and means'" of the independent contractor's work; (2) when the landowner hires an incompetent contractor; or (3) when the activity constitutes a "nuisance per se". Ibid. (quoting Dawson, 289 N.J. Super. at 318); see also, Majestic Realty Assocs., Inc. v. Toti Contracting Co., 30 N.J. 425, 431 (1959); Tarabokia v. Structure Tone, 429 N.J. Super. 103, 113 (App. Div. 2012)."

In the present matter, the Trial Court correctly determined that Ridgedale was merely the owner of the Property, not the general contractor, and therefore owed no duty to Wettengel. The Trial Court further correctly concluded that ASA was the general contractor at the Property. (T35:25-T36:8). Therefore, the Trial Court ruled it was ASA, as general contractor, who owed a duty to Wettengel, to ensure that the site was kept clean and that construction debris were properly stowed or thrown away. (T35:25-T36:8).

During the January 6, 2023 oral argument, Judge Santomauro concluded;

> "Be that as it may, it was a residential construction site, 165 Ridgedale Avenue in Madison. Ridgedale Avenue,

> the moving party to the first motion, Ridgedale Avenue Development Corporation was the owner of the property.
>
> Um, ASA Contractors had been retained as the, uh – the general contractor of the property. And it's also my understanding that ASA was obligated to maintain cleanliness and order at the – at the job site.
>
> Um, and again, as noted, um, the job of ASA was to manage the projects, oversee the project, to make sure the subs were performing their – their jobs appropriately."
>
> (T35:20-T36:8).

Judge Santomauro continued as to her Honor's basis for granting Summary Judgment as to Ridgedale;

> "And – and as, um – as Counsel stated previously to establish negligence, there's four things you must prove; that Defendant owed Plaintiff a duty of care. I think that the answer to that question is certainly with regard to ASA, yes. They owed – that Defendant owed Plaintiff a duty of care."
>
> **"But with regard to Ridgedale, it – it's much simpler, uh, to grant a summary judgment and I don't think anybody really doubts that with regard to Ridgedale as the property owner alone, uh, that the property owner in this particular case would not have that liability**."
>
> (T40:9-14, T42:11-16) [emphasis added].

It is hard to argue against the Trial Court's reasoning to granting summary judgment in favor Ridgedale on this basis. Specifically, appellant's own liability expert, William Mizel, confirmed that ASA was the general contractor of the project in his expert report. Specifically, in Page 2 of Mr. Mizel's report, he concludes;

> "Woodwork Floor was hired by Ridgedale Avenue Developers, LLC ("Ridgedale) who was the owner of this project. The general contractor for this project was ASA Design Build LLC (ASA").
>
> (Pa155).

Appellant even relies upon the conclusion of Mr. Mizel in his statement of facts for this appeal by arguing "Plaintiff offered the expert report and opinion of William Mizel, CSP who stated that the general contractor, ASA Design, failed to meet OSHA standards in permitting the construction site to have hazards."

Therefore, as Ridgedale was merely a property owner, the Trial Court correctly determined Ridgedale owed no duty to appellant at the subject worksite.

POINT II

As Wettengel Was Unable to Establish Proximate Cause Against Ridgedale, The Trial Court Correctly Granted Ridgedale's Motion for Summary Judgment

Even *assuming arguendo* that Ridgedale did breach a duty to the appellant (which the Trial Court correctly ruled that as property owner, they did not), the Trial Court correctly granted Summary Judgment as appellant failed to establish Ridgedale's breach of an owed duty caused his injuries. The appellant is appealing the January 6, 2023 trial court's decision based on the argument that sufficient circumstantial evidence as to the cause of Wettengel's fall was submitted. However, the Trial Court correctly concluded no evidence as to the cause of Wettengel's fall was submitted.

As previously provided, it is well settled law of the State of New Jersey that ordinary negligence must be proven and will never be presumed; indeed, there is a presumption against it, and the burden of proving negligence is on the plaintiffs. Buckelew v. Grossbard, 87 N.J. 512, 525 (1981); Hansen v. Eagle Picher Lead Co., 8 N.J. 133, 139 (1951). To establish negligence, plaintiff must prove (1) defendant owed plaintiff a duty of care, (2) defendant breached that duty, (3) the breach of duty (negligence) was a proximate cause of the injury, and (4) actual damages were suffered by the plaintiff. Anderson v. Sammy Redd & Associates, 278 N.J. Super. 50 (App. Div.), cert. denied, 139 N.J. 441 (1994).

By Wettengel's own admission, he unaware of what caused his alleged fall, or, if he fell. (Pa222, Pa225-226). The only evidence that appellant has submitted to support his allegation is that when he woke up from being unconscious, he was lying on top of a piece of plywood on the driveway. (Pa230). In fact, in appellants own brief for this appeal, appellant provides "he [Wettengel] could not identify what caused him to fall, but after walking to the dumpster his next sensation was awakening on his back on top of the plywood."

During the January 6, 2023 oral argument, appellant admitted the lack of evidence/proofs submitted as to the cause of his fall.

> "And Judge, all I can – the only thing I can add- uh, the only thing I can prove in this case is that my client, uh – my client's position is that he slipped and fell and struct his head when he was going to throw something out in the dumpster. Uh, and he – since he woke up laying on a piece of plywood, he believes that's what

> caused him to fall. And because he had trouble getting into the building and he had difficulty standing up, he repeatedly tried to on his way to get into the house, and he kept slipping because there was more debris going right up into the stairs, that's all- that these things contributed to causing him to fall."
>
> (T30:22-T31:9).

Appellant argues the circumstances surrounding his accident gave rise to an inference that his fall was probably caused by his either slipping or tripping on a discarded piece of plywood at the construction site. Appellant argues that the fact of the presence of plywood covered by snow at or near the dumpster is sufficient proof that he fell on the plywood. As the Trial Court correctly determined, this lack of evidence would lead to the members of a jury to improperly speculate as to the cause of appellant's fall. (T41:8-T41:19). In fact, appellant's own OSHA expert, Mr. Mizel after reviewing the entire factual record could not provide an exact cause as to how appellant was caused to fall. Asking the untrained members of a jury to do so would be entirely speculatory.

Appellant's entire argument has been that from the circumstantial evidence, "there is virtually no other conclusion a jury could reach given the undisputed evidence". However, the Trial Court addressed this exact argument during the January 6, 2023 oral argument, and immediately came up with multiple potential scenarios that could have caused Wettengel to fall during the January 6, 2023 oral argument.

> THE COURT: "I – the problem I have here – and I'm struggling with, uh, is that, um, we don't know at all. It – you know, it could have been, quite frankly, and – and

> again, tell me how I get past this, because um – how about, we don't know whether he wasn't – he was carrying a bunch of things in his arms, maybe he was carry – he was carry debris to the – he said – I think that's a fact issue, right? Isn't that a fact? He was carrying –
>
> MR. RATKOWITZ: Well, he – well, we don't know whether he threw it out yet or whether he was holding onto it or –
>
> THE COURT: Oh, I thought he said he was going towards the – he was going towards the dumpster, he had –
>
> MR. RATKOWITZ: -- right.
>
> THE COURT: -- debris in his arms, and maybe, -- we don't know, I'm not – again, he was –he didn't look down, uh, you know, didn't see there was a log on the ground or the plywood on the – that – those are the situations where a jury can, um, determine was it his carrying of the logs that caused him not to look, or was it the – the fact that he tripped over the plywood? Because he said he tripped on the plywood. That's not what we have here.
>
> So, they determine what was really the proximate cause of this? Was it he –
>
> MR. RATKOWITZ: Well, and he –
>
> THE COURT: -- (indiscernible) down or the lighting was poor, or – that's when we – when juries are entitled to determine proximate cause. Really what was the cause? In this case, what was the cause? You tell me what caused him to fall, you tell them what caused him to fall.
>
> (T28:11-T29:25).

Furthermore, defense medical expert Aaron Rabin concluded in his supplemental report that there is no evidence that Wettengel actually fell.

Rather, he suffered from medical-cardiologic disease. While the trial court did not accept this argument, it just demonstrates the number of potential scenarios/factors that a jury would have to speculate on due to appellant's lack of evidence. (T39:2-T40:2).

The case law relied upon appellant supports the Trial Court's decision actually goes against appellant's argument. Appellant argues that he is not required to prove proximate cause by direct, indisputable proof. Berquist v. Penterman, 46 N.J. Super. 74, 88 (App. Div. 1957), *certif. denied* 22 N.J. 55 (1957). Instead, to establish a *prima facie* case based upon circumstantial evidence, the conclusion to be reached from the evidence must be as probable or more probable than the alternative possible conclusions. Yormack v. Farmers' Cooperative Ass'n, 11, N.J. Super. 416 (App. Div. 1951). This is accurate. However, as the Trial Court correctly concluded, appellant was unable to provide any evidence as to the cause of his fall. Merely waking up on a piece of plywood is vastly deficient proof to submit to a jury.

In fact, Berquist, a case relied upon by appellant, supports the Trial Court's opinion. In Berquist, there was ample evidence introduced by the plaintiff to establish that the lacquer fumes were caused to explode by the open flame at the job site. In Berquist, the Appellate Division held "there was enough in the case, both at the close of plaintiff's proofs and at the close of all the evidence, from which a jury could have concluded that Kivimage's torch ignited the lacquer fumes." 46 N.J. Super. 74 at 88 (App. Div. 1957). The Appellate Division went on to opine that the proofs need to justify a

reasonable logical inference, as distinguished from mere speculation." Id. 88-89 (citing Beyer v. White, 22 N.J. Super. 137, 144 (App. Div. 1952).

Ocasio v. Amtrak can also be easily distinguished. 299 N.J. Super. 139 (App. Div. 1997). Similarly to Berquist, in Ocasio, the Appellate Division held plaintiff provided sufficient circumstantial evidence to support their theory of Amtrak's negligence. Specifically, plaintiff presented evidence that Ocasio lived on one side of the tracks in the general vicinity of the station. Also, plaintiff's presented evidence that a jury could conclude Ocasio was only 100 feet from the top of the stairways leading to the station when the accident occurred. Plaintiff also presented evidence that the nearest other means of access to the tracks, located at Penn Station and in the area of Hunter Tower, were approximately a mile from the site of the accident. Id. at 153-154. Plaintiff also presented evidence that twenty-four reports were filed with Amtrak during the two-year period preceding the accident of trespassing in the area where Ocasio's accident occurred. Id. at 144. While the merit of the evidence could certainly be argued, there was clearly ample circumstantial evidence to support plaintiff's claims.

The present case can be distinguished from Berquist as Wettengel as appellant has simply provided no evidence detailing the cause of his fall. Rather, he argues he woke up on a piece of plywood. Members of a jury are not accident reconstructionists. There is simply too much speculation they would be asked to undertake. The well-established case law requires more than a mere possibility as to the cause of an incident, which is all appellant

is able to provide. Mazzietelle, supra, 46 N.J. Super. 410, 417. A strong argument can be made that appellant has not even established a possibility as to the cause of his fall. In this instance, the members of a jury would be speculating as to the cause of Wettengel's fall. This is prohibited by the well-established case law.

POINT III

As There Remained No Issues of Material Fact, the January 6, 2023 Trial Court Order Granting Summary Judgment to Ridgedale Must Be Affirmed

In deciding a motion for summary judgment, the court must determine whether there is a genuine issue of a material fact. "A dispute of fact is genuine if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom, could sustain a judgment in favor of the non-moving party." Brill v. The Guardian Life Insurance Co. of America, et al., 142 N.J. 520, 538 (1995). This decision falls within the guidelines of Rule 4:46-2, which states that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

Here, no material facts were in dispute as appellant failure to establish a prima facie case of negligence against Ridgedale. The undisputed evidence established Ridgedale was only the property owner at the subject project,

eliminating any duty owed to appellant. Moreover, even assuming a duty was owed by Ridgedale, appellant has provided no evidence establishing the cause of his fall.

Therefore, the Trial Court's January 6, 2023 Order must be affirmed.

Conclusion

Therefore, it is respectfully requested that the Appellate Division uphold the Trial Court's January 6, 2023 Order granting Ridgedale's Motion for Summary Judgment.

Respectfully submitted,

METHFESSEL & WERBEL, ESQS.
Attorneys for Ridgedale Avenue Development, LLC

By:_____
Gerald Kaplan

DATED: November 6, 2023