SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002256-23

	: ON APPEAL FROM:
SNEZANA SUMULIKOSKI and	:
SIME SUMULIKOSKI, her husband	: SUPERIOR COURT OF NEW JERSEY
	: LAW DIVISION: BERGEN COUNTY
Plaintiffs,	: DOCKET NO.: BER-L-2002-21
	:
-vs-	:
	: CIVIL ACTION
RESTAURANT DEPOT, MIGUEL	:
PEREZ-HERNANDEZ, VIDA CAFÉ,:	
INC. d/b/a MAMAJUANA CAFÉ	:
JOHN DOE 1-10; JANE DOE 1-10;	: Sat Below:
JOHN DOE CORP 1-10, fictitious	:
names,	: HONORABLE JOHN D. O'DWYER,
	: P.J.Cv.
Defendants.	:
	:

AMENDED BRIEF FILED ON BEHALF OF PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

This matter involves an incident that occurred on April 26, 2019, in which Plaintiff, Snezana Sumulikoski ("Plaintiff"), suffered serious and permanent injuries after being struck from behind by an overloaded industrial sized cart, known as a "U-boat," while she was a customer at Defendant, Restaurant Depot, LLC's ("Restaurant Depot") South Hackensack, New Jersey warehouse. The accident transpired as a result of co-Defendant, Miguel Perez-Hernandez's ("Perez-Hernandez") negligent operation of the Restaurant Depot supplied U-boat and its employees' failure to address and rectify said dangerous condition due to Restaurant Depot's lack of a formal policy in place to ensure the safety of its customers. Perez-Hernandez was a customer who shopped for co-Defendant Vida Café Inc. d/b/a Mamajuana Café ("Vida Café") and was paid for his services.

The instant action was filed by Plaintiff, and her husband, Sime Sumulikoski, against various defendants, including Restaurant Depot, Perez-Hernandez, and Vida Café. Defendants, Restaurant Depot and Vida Café, have since been granted summary judgment. Although deposed, Perez-Hernandez failed to answer, and after a proof hearing that took place before the Honorable John D. O'Dwyer, P.J.Cv. on February 27, 2024, an Order of Judgment by Default was entered by the Court against Perez-Hernandez on March 14, 2024 in the amount of $355,006.00.

As a result of the trial court's grant of summary judgment to Restaurant Depot and Vida Café, Plaintiffs have suffered the drastic consequence of being unable to present their meritorious personal injury action to a jury for resolution.

The trial court erroneously ordered Restaurant Depot summarily dismissed from the case because the trial court failed to appreciate the prejudicial effect Restaurant Depot's failure to preserve all available store surveillance footage on the date of Plaintiff's incident had on the ability for Plaintiffs to prove their case. Restaurant Depot was put on notice of Plaintiff's injuries, all of which were documented in an incident report, and therefore Restaurant Depot had a duty to retain footage of the events that led to Plaintiff's injuries. Such failure to preserve the surveillance video enabled Restaurant Depot to escape liability as a result of Restaurant Depot engaging in self-serving maneuvers to spoliate critical evidence that would have further assisted Plaintiffs in proving their theory of liability against Restaurant Depot. An expert could not be retained in this matter because Plaintiffs' potential expert was unable to view surveillance recordings resulting from Restaurant Depot's failure to retain the footage.

As a result of the failure of Restaurant Depot to maintain all surveillance footage from the calendar day of the incident up through and following the moment of impact**,** Plaintiffs are entitled to an adverse inference jury charge and a rebuttable presumption that the missing evidence would be unfavorable to Restaurant Depot.

Moreover, since Plaintiffs should be afforded an adverse inference charge at the time of trial to demonstrate that Restaurant Depot was presumptively negligent, Plaintiffs asserts that they can establish negligence on the part of Restaurant Depot without the need for expert testimony because Restaurant Depot owed Plaintiff a non-delegable duty to use reasonable care to protect Plaintiff against known or reasonably discoverable dangers and breached such a duty.

The trial court has also erroneously granted summary judgment in favor of Vida Café. Plaintiffs assert that the evidence reveals that Perez-Hernandez acted on Vida Café's behalf and that his actions were controlled by Vida Café. Thus, the trial court overlooked that genuine issues of fact exist for a jury to find Vida Café liable for Perez-Hernandez's negligent acts under the theory of agency or the borrowed-employee doctrine.

STATEMENT OF FACTS

On April 26, 2019, Plaintiff was shopping at Restaurant Depot's South Hackensack, New Jersey warehouse location, when Plaintiff stopped to consult with one of Restaurant Depot's employees in an aisle of the Meat Department after having been unable to find lamb. (Pa2; Pa25; Pa28) Plaintiff, who is between approximately 5 feet 2.5 inches and 5 feet 3 inches in height, was stopped at the end of the aisle at the time she consulted with one of Restaurant Depot's employees. (Pa2; Pa25) Subsequently, she was struck in the back, on the right side, by Perez-Hernandez, who

was pushing an overloaded industrialized sized cart ("U-boat") supplied by Restaurant Depot, and which was filled about six (6) feet high with boxes. (Pa2; Pa28; Pa34-Pa35; Pa42) Plaintiff testified that Perez-Hernandez's U-boat was filled to the top, to the point where one could not look over it. (Pa30)

Since 2018, Perez-Hernandez worked for Vida Café. (Dep. of Santos, at T.33:10-23; 34:18-24) At the time of the incident in 2019, he continued to shop for Vida Café at Restaurant Depot and was paid for his services. (Pa88-Pa89; Pa68-Pa69) Perez-Hernandez testified that generally speaking, if he bought products for Vida Café at Restaurant Depot, he would utilize a credit card that was given to him by Mamajuana Café and that at the time of the incident, he did not possess any other credit cards from any other companies. (Pa83) Victor Santos ("Santos"), who had been director of operations for Vida Café since 2018, testified that Vida Café relies on Perez-Hernandez and Restaurant Depot for essential products to prepare meals. (Pa64-Pa65) Additionally, Santos testified that Vida Café provided Perez-Hernandez with their Restaurant Depot membership card imprinted with the business name as "Mamajuana Cafe." (Pa69)

Upon striking Plaintiff, Perez-Hernandez pinned Plaintiff between his cart and the other boxes in the aisle, leaving Plaintiff stuck in the middle and the inability for her to move or get out. (Pa2) Plaintiff testified that the industrial cart operated by Perez-Hernandez was filled with all kinds of boxes, that it appeared to be six (6) feet

tall, and that it was filled to the top to the point where one could not look over it. (Pa30) According to Plaintiff, although her back was turned, she assumed that Perez-Hernandez was on the other side of the U-boat and pushing it; that after she was struck, Plaintiff could not see him because the industrial grade cart was filled too high; and, that based upon how high the U-boat was filled, there was no way he was able to see over it. (Pa30; Pa36) Moreover, Plaintiff recalled that prior to the incident, there were employees and customers "everywhere" throughout the store. (Pa27)

Plaintiff testified that following the incident, she suggested to a Restaurant Depot employee that they look at the cameras to ascertain what transpired; that she was brought to the manager's office and an employee was able to find Perez-Hernandez "coming around with the cart" making a turn from a different aisle to the aisle where Plaintiff was located; that she saw footage of Perez-Hernandez subsequently pushing his U-boat in the same aisle that she was standing in; that the employee "even made a comment [as to] how full the customer's cart [was];" that she saw Perez-Hernandez make his way from the end of the aisle until he reached her; and, that she was not visible on the surveillance footage because Perez-Hernandez's cart was so high. (Pa31-Pa32; Pa33-34; Pa36) However, according to Plaintiff, she was not shown a video capturing the moment of impact in which she was struck by the U-boat, she never saw herself on video footage, and that the

employee only looked at footage when Perez-Hernandez turned and went down the aisle to the point where the U-boat had eventually stopped. (Pa33-Pa34)

Michael Hidasi ("Hidasi"), who was assistant store manager at the Hackensack Restaurant Depot location from January 2018 until January 2020, including at the time of Plaintiff's accident, estimated that the Hackensack store had approximately 20 to 30 different surveillance camera locations throughout the store. (Pa94; Pa96) Hidasi testified that the surveillance videos could be watched in the manager's office and that in order to isolate or focus upon one particular camera view, one had the ability to utilize a mouse to double click on a camera view and enlarge the image. (Pa96) He further testified that the ability to preserve the video existed and that policies were in place for the preservation of surveillance footage, stating that "if there had been an incident such as theft or a customer accident or an employee accident, we would register the time code and the camera number and send it up to . . . corporate basically so that they can pull the video and save it." (Pa96)

Although Hidasi was the individual who reviewed the surveillance videos on the day of the incident in order to ascertain what was present on such footage (Pa97), according to Hidasi, he did not preserve any video from the date of the incident because he was unable to find a clear video of the moment Plaintiff was struck; as such, no surveillance footage of Perez-Hernandez maneuvering his U-boat around the store, or of Perez-Hernandez pushing the U-boat towards the Plaintiff, exists.

(Pa96-Pa98) Despite the fact that video footage was accessible in the store and by the corporate office, no surveillance footage from the date of Plaintiff's incident was preserved and retained by Restaurant Depot. (Pa116; Pa96; Pa137) Hidasi testified that he would not have looked for any video that would have shown the manner in which Perez-Hernandez had been operating the U-boat before the point of impact, but would have only looked for the camera angle that he would have assumed had the best view of the incident and that he would have scrolled through the footage looking for the point of impact. (Pa97)

According to Hidasi, if a situation arose where a customer was found pushing a U-boat with items that were obstructing the customer's view, he would try to avoid incidents at all costs. (Pa95) When asked if he could recall a situation in which he would help a customer separate a customer's oversized U-boat load onto two (2) separate U-boats, Mr. Hidasi testified "that would be something that could happen" and that because he was trained in safety, he was "trained to look out for things of that nature that could be unsafe . . ." (Pa95) However, he conceded that although he, in his role as manager, was provided some instruction as to how to push and maneuver the U-boats, no guidance was ever provided regarding the danger that an overloaded U-boat could pose. (Pa95)

Steven Kolomer ("Kolomer"), regional manager for Restaurant Depot, and who was regional manager for the Hackensack location at the time of Plaintiff's

accident, testified that a customer utilizing and pushing a U-boat should not stack a pile of merchandise on the U-boat high enough to the point where the customer is unable to see over the merchandise. (Pa113; Pa114-Pa115) When asked whether, in a situation where a customer was pushing a U-boat with product piled higher than that person could see over, Kolomer acknowledged that he would stop a customer and offer to bring that customer another U-boat, help them reduce their load, or instruct the customer to pull, rather than push, the U-boat in order for the customer to be able to see in front of them. (Pa114) Kolomer testified that he had made those suggestions in the past. (Pa114) Kolomer further admitted that if a customer is not looking around the side of the U-boat, but pushing a U-boat that is piled high with merchandise to the point where the customer cannot see over it, that this situation poses a danger to both fellow customers and Restaurant Depot's employees. (Pa115)

Despite Kolomer's admissions, he testified that Restaurant Depot does not provide any training to its employees to assist customers in reducing the load of an overloaded U-boat, nor was there a written policy in place prior to Plaintiff's accident establishing a policy for employees to inform customers with overloaded U-boats that they must reduce their load. (Pa114; Pa118) He further admitted that after Plaintiff's accident, he did not become involved in attempting to evaluate how to avoid, in the future, an incident similar to Plaintiff's incident. (Pa117)

Restaurant Depot was immediately put on notice of the accident when Plaintiff reported her injuries, as following the incident, Plaintiff filled out, signed, and dated a form entitled "Injured Party's Statement of Accident." (Pa157) Hidasi also completed a two-page "Accident Investigation Form," detailing the incident that occurred between Plaintiff and Perez-Hernandez and a form entitled "Investigator Statement for Customer Accidents." (Pa96; Pa153-Pa154) The "Accident Investigation Form" noted that Plaintiff was in the process of asking a Restaurant Depot employee a question when another customer with a full U-boat pushed against her back, pushing the cart past her and that Plaintiff's lower center/left side of her back was in pain. (Pa153-Pa154) The form asks whether any equipment was involved in the accident and Hidasi circled "yes," indicating that the accident involved a U-boat. (Pa153-Pa154) Hidasi also noted that Plaintiff planned on presenting to a physician on her own. (Pa153-Pa154) The "Investigator Statement for Customer Accidents" form, which was also completed and signed by Hidasi, noted that he was told by Plaintiff that Perez-Hernandez, who had a full U-boat and could not see Plaintiff, hit her lower back with the full U-boat, thereby injuring her. (Pa156) The form also indicates that she was provided an ice pack and that she claimed that every time she moved in the chair that she was seated in, she felt pain in her lower back, specifically the left side of the lower back. (Pa156) Restaurant Depot personnel also took photographs, including pictures of the following:

Plaintiff's black slip-on shoes, Plaintiff seated in a chair, Plaintiff's back while seated in a chair, and Perez-Hernandez's Restaurant Depot supplied U-boat, which was overloaded with merchandise. (Pa164-Pa178)

In order for Hidasi to have completed the incident report, Hidasi asked for Perez-Hernandez's membership card credentials so that he could take a picture of it and include it in the report. (Pa99) In response to such a request, Perez-Hernandez furnished his Mamajuana Café Restaurant Depot membership card. (Pa99) To Hidasi's understanding, when Perez-Hernandez furnished his Mamajuana Café Restaurant Depot membership card, Perez-Hernandez was representing Mamajuana/Vida Café on the date of the incident. (Pa102-Pa107) Hidasi also believed that Perez-Hernandez was a hired shopper for Mamajuana/Vida Café. (Pa107)

Although Plaintiff was struck on the right side of the back, Plaintiff testified that the middle and left side portion of her back were in pain immediately following the accident. (Pa39) At the time of the incident, Plaintiff was able to walk, but she experienced an increase in pain later that day and for three (3) days following the incident. (Pa38; Pa42) Plaintiff drove home, but later drove herself to The Valley Hospital to seek medical treatment with chief complaints of back pain. (Pa42-Pa43)

Although x-rays taken at The Valley Hospital revealed that nothing was broken, Plaintiff continued to treat with her primary care physician, who

recommended that Plaintiff undergo an MRI. (Pa43; Pa46-Pa47) The MRI revealed a bulging disc. (Pa47) Plaintiff also treated with orthopedists, where she received epidural injections, and with a neurosurgeon, and underwent physical therapy, acupuncture, and chiropractic treatments. (Pa47-Pa50) Despite seeking treatment, to this day, Plaintiff's pain, as a result of the accident, has plateaued, and she constantly experiences back pain every day. (Pa50-Pa52)

Plaintiff retained the undersigned to represent her in January 2020, approximately eight (8) months after the incident took place at Restaurant Depot's store. (Pa198-Pa200) Plaintiff, in her certified answers to interrogatories, states that Restaurant Depot had video of Perez-Hernandez's filled U-boat, though no video of the actual moment of contact. (Pa9) Restaurant Depot, in its certified answers to interrogatories, provided various documents, along with color photographs taken of Plaintiff and the overloaded U-boat on the date of incident, but failed to mention that video surveillance footage existed on the date of incident and that no efforts were made to retain and preserve such footage. (Pa143-Pa197) During the course of discovery, on September 2, 2022, the undersigned sent a letter to Pasqual Pontoriero, Esq., counsel for Restaurant Depot, informing him that Restaurant Depot's answers to interrogatories deny the existence of a surveillance tape regarding the incident, despite Plaintiff's deposition testimony refuting such claims. (Pa201) Plaintiffs requested that they be provided with a copy of the surveillance footage, but Plaintiffs

were subsequently informed that such surveillance footage had not been preserved. (Pa201)

PROCEDURAL HISTORY

On March 25, 2021, Plaintiff, and her husband, filed a Complaint against Restaurant Depot, John and Jane Does 1-10 and John Doe Corp. 1-10, alleging negligence in connection with the April 26, 2019 incident at Restaurant Depot's South Hackensack, New Jersey warehouse incident, where Plaintiff was struck by an overloaded U-boat by another customer identified as Perez-Hernandez. (Pa202-Pa208) On May 7, 2021, Plaintiffs filed an Amended Complaint naming Perez-Hernandez and Mamajuana Café as additional defendants and adding additional causes of action against them. (Pa209-Pa217) On June 2, 2021, Restaurant Depot filed its Answer to Plaintiffs' Amended Complaint. (Pa218-Pa228) On August 16, 2021, Plaintiffs filed a request to enter default as to Perez-Hernandez. (Pa229) Subsequently, on August 17, 2021, default was entered against Perez-Hernandez. (Pa230) On January 24, 2022, Plaintiffs filed a Second Amended Complaint to state Mamajuana Café's true name as Vida Café, Inc. d/b/a Mamajuana Café. (Pa231-Pa239) The Second Amended Complaint asserted the same causes of action set forth in the prior Amended Complaint. (Pa231-Pa239) On April 16, 2022, Vida Café filed its Answer to Plaintiffs' Second Amended Complaint. (Pa240-Pa254)

On June 7, 2023, Restaurant Depot moved to extend discovery. (Pa255-Pa256) On June 23, 2023, the Court denied Restaurant Depot's motion to extend discovery. (Pa257-Pa258) On July 12, 2023, Restaurant Depot filed a motion for summary judgment. (Pa259-Pa265) On July 19, 2023, Plaintiffs filed a motion to re-open discovery and extend discovery in order to appropriately seek efforts at obtaining a liability report. (Pa266-Pa267) On July 28, 2023, Vida Café filed its motion for summary judgment. (Pa268-Pa272) Oral argument was heard on both summary judgment motions and by Orders dated August 25, 2023, Restaurant Depot's motion for summary judgment, which Plaintiffs opposed, was denied, and Vida Café's motion for summary judgment, which Plaintiffs and Restaurant Depot also opposed, was granted.[1] (Pa273-Pa285; Pa286-Pa293; Pa294-Pa299; Pa300-Pa314; Pa315-Pa321; Pa322-Pa323; Pa324-Pa325) Also, by Order dated August 25, 2023, Plaintiffs' motion to re-open and extend discovery and to extend the time for the parties to serve expert reports was granted. (Pa326-Pa327) The Court found that Plaintiffs met the requisite showing for exceptional circumstances, which justified the re-opening and extension of discovery because Ryan McInerney, counsel for Restaurant Depot, retreated from his commitment to participate in mediation. (Pa326-Pa327) The new discovery end date was November 30, 2023, and Plaintiffs were to serve a liability report by September 30, 2023. (Pa326-Pa327)

[1] 1T. 8/25/23 Transcript of Oral Argument on Vida Café's Motion for Summary Judgment

On September 6, 2023, Restaurant Depot filed a motion for reconsideration of both August 25, 2023 Orders, but the Court denied same on September 22, 2023. (Pa328; Pa329; Pa330-Pa331) On October 11, 2023, Restaurant Depot filed a motion for leave to appeal, requesting that the Appellate Division grant its motion and reverse the Court's August 25, 2023 and September 22, 2023 Orders. (Pa332-Pa334) On October 30, 2023, Restaurant Depot's leave to appeal was denied. (Pa335) On December 1, 2023, Restaurant Depot filed a motion for summary judgment (Pa336-Pa344), which Plaintiffs opposed, and which was granted on January 19, 2024.[2] (Pa385-Pa386) Of the original defendants, Restaurant Depot and Vida Café have been summarily dismissed from the case. (Pa385-Pa386; Pa324-Pa325) Perez-Hernandez never answered and on January 18, 2024, Plaintiffs requested a proof hearing, before the Honorable John D. O'Dwyer, P.J.Cv. (Pa387)

Subsequently, on February 8, 2024, Plaintiffs filed a Motion for Leave to Appeal the trial court's January 19, 2024 Order granting Restaurant Depot summary judgment. (Pa388-Pa389) Plaintiffs moved for leave to file an interlocutory appeal because the order granting summary judgment as to Restaurant Depot was not a final order, as Perez-Hernandez, albeit a defaulted party, still remained in the case. (Pa388-Pa389) Plaintiffs asserted that interlocutory review was both necessary and justified because without a review of the trial court's grant of summary judgment in

[2] 2T. 1/19/24 Transcript of Oral Argument on Restaurant Depot's Motion for Summary Judgment

favor of Restaurant Depot, a gross injustice would occur, and Plaintiffs would suffer irreparable harm. (Pa388-Pa389) Specifically, Plaintiffs asserted that the trial court erred in granting summary judgment to Restaurant Depot because the trial court failed to appreciate the pivotal importance of Restaurant Depot's failure to preserve all available store surveillance footage on the date of Plaintiff's incident. (Pa388-Pa389) Accordingly, Plaintiffs contended that Restaurant Depot was able to escape liability simply as a result of Restaurant Depot engaging in self-serving maneuvers to spoliate evidence that would have further assisted Plaintiffs in proving their theory of liability against Restaurant Depot. (Pa388-Pa389) On February 21, 2024, Restaurant Depot opposed Plaintiffs' Motion for Leave to Appeal. (Pa390) On February 26, 2024, Plaintiffs' Motion for Leave to Appeal was denied. (Pa391)

At the request of Plaintiffs, a proof hearing as to Perez-Hernandez was scheduled for February 27, 2024 before Judge O'Dwyer (Pa392) and an Order of Judgment by Default was entered by the Court against Perez-Hernandez on March 14, 2024 in the amount of $355,006.00. (Pa393-Pa394) Subsequently, on March 28, 2024, Plaintiffs filed a notice of appeal. (Pa395-Pa398)

LEGAL ARGUMENT

STANDARD OF REVIEW

It is well-settled that decisions granting summary judgment are reviewed under a de novo standard. See Brill v. Guardian Life Ins. Co. of Amer., 142 N.J. 520, 540 (1995). Under the de novo standard, the reviewing court is not bound to defer

to the factual findings or legal conclusions of a trial court, but may decide the merits of an issue as if it were being presented for the first time. Baker v. National State Bank, 353 N.J. Super. 145, 153 (App. Div. 2002) ("De novo review means that a reviewing court may disagree with the lower court's findings and conclusions").

The reviewing court will therefore "employ the same standard that governs trial courts in reviewing summary judgment orders." Prudential Prop. Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998). That standard, set forth in R. 4:46-2(c), requires the court to first decide if there is a genuine issue of fact, and if none, whether the moving party is entitled to judgment as a matter of law.

Summary judgment is only appropriate where a "discriminating search of the merits in the pleadings, depositions, and admissions on file, together with the affidavits submitted on the motion, clearly shows not to be present any genuine issue of material fact requiring deposition at trial." Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954). The purpose of summary judgment is to avoid trials which would serve no useful purpose and to afford deserving litigants immediate relief. Kopp, Inc. v. United Techs., 223 N.J. Super. 548, 555 (App. Div. 1988). Summary judgment must be granted only if the papers pertinent to the motion show palpably the absence of any issue of material fact, although the allegations of the pleadings, standing alone, may raise such an issue. Rankin v. Sowinski, 119 N.J. Super. 393, 399-400 (App. Div. 1972); Brill, 142 N.J. at 529-30.

In Brill, the Supreme Court adopted the same standard used by the federal courts with respect to the determination of motions for summary judgment. 142 N.J. at 536. This determination rests on "whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law." Id. at 534 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). The Court continued that under the "new standard, the determination involves whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving parties, are sufficient to permit a rational fact finder to resolve the alleged disputed issues in favor of the non-moving parties." Id. at 540. The thrust of the Court's decision in Brill was to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves, and to eliminate any "encrustation of the Judson standard that obscured its essential import." Id. at 541. It is not the Court's function to weigh the evidence and determine the outcome but only decide if a material dispute of fact existed. Id. at 540.

For reasons that are articulated further below, the trial court overlooked the evidence and facts of this matter and improperly substituted its finding in the place of a jury, leading to the unwarranted dismissal of Plaintiffs' well-developed case as to both Restaurant Depot and Vida Café and unfairly depriving Plaintiffs of a jury trial.

Genuine issues of fact exist which should have compelled the trial court to have denied Restaurant Depot's summary judgment motion. The trial court improperly granted summary judgment because the trial court failed to recognize that Restaurant Depot had a duty to preserve all surveillance footage from the calendar day of the incident up through and following the moment of the incident in which Plaintiff was struck, and that Restaurant Depot's failure to do so affords Plaintiffs the ability to be awarded an adverse inference charge at the time of trial. Additionally, the trial court erroneously ruled that summary judgment was appropriate despite the fact that expert testimony is not needed for Plaintiffs to establish that Restaurant Depot owed Plaintiffs a non-delegable duty to use reasonable care to protect Plaintiff against known or reasonably discoverable dangers and that Restaurant Depot breached that duty. (2T.12:3-11; 14:17-15:4; 20:9-21:13)

In addition, the trial court erred in granting summary judgment to Vida Café because the court overlooked the evidentiary basis for finding that Perez-Hernandez was an agent of Vida Café and that therefore Vida Café should be held liable for his negligent acts under an agency theory. (1T.12:24-14:11)

POINT I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BY ITS FAILURE TO RECOGNIZE THAT RESTAURANT DEPOT HAD A DUTY TO PRESERVE ANY AND ALL SURVEILLANCE FOOTAGE SURROUNDING A REPORTED AND DOCUMENTED INCIDENT INVOLVING THE SAFETY AND WELFARE OF PLAINTIFF ON ITS PREMISES AND GIVEN THE LIKELIHOOD OF LITIGATION (2T.12:3-11; 20:19-21:13)

Plaintiffs assert that despite a duty for Restaurant Depot to preserve surveillance footage from the calendar day prior to the incident up through and following the moment of impact, Restaurant Depot spoliated such evidence. Spoliation is used to describe the hiding or destroying of evidence by an adverse party, resulting in the interference with the court's proper administration and disposition of the action. Hirsch v. General Motors Corp., 266 N.J. Super. 222, 234 (Law Div. 1993). In other words, spoliation refers to the concealment or destruction of evidence by one party to hinder the ability of another party to litigate a case. Jerista v. Murray, 185 N.J. 175, 201 (2005) (See Rosenblit v. Zimmerman, 166 N.J. 391, 400-01 (2001)). While "[t]he scope of the duty to preserve evidence is not boundless[,] [a] 'potential spoliator need do only what is reasonable under the circumstances,' " Id. at 251 (quoting Cty. of Solano v. Delancy, 264 Cal. Rptr. 721, 731 (Ct. App. 1989))

In this State, a duty to preserve evidence arises when there is: (1) pending or probable litigation; (2) knowledge by the party of the existence or likelihood of

litigation; (3) foreseeability of harm or prejudice to another party if the evidence were discarded; and (4) evidence relevant to the litigation. Id. at 250.

During the course of discovery, along with Plaintiff having been brought into the surveillance room after having been struck with a U-boat, Plaintiffs learned that surveillance video existed on the date of the incident in question, which was reviewed by Restaurant Depot personnel. Plaintiff testified that following the incident, she was brought to the manager's office, at which point she suggested to a Restaurant Depot employee that they look at the cameras to ascertain what transpired. (Pa31-Pa32) She further testified that the employee was able to find co-defendant Perez-Hernandez "coming around with the cart" making a turn from a different aisle to the aisle where Plaintiff was located, that she saw footage of Perez-Hernandez subsequently pushing his U-boat in the same aisle that she was standing in, that the employee "even made a comment [as to] how full the customer's cart [was]," that she saw Perez-Hernandez make his way from the end of the aisle until he reached her, and that she was not visible on the surveillance footage because Perez-Hernandez's cart was piled so high with merchandise. (Pa32-Pa34; Pa36)

While a duty to preserve is not boundless, Restaurant Depot, simply by virtue of the fact that an incident occurred involving injury to Plaintiff, certainly had an obligation to preserve all surveillance footage of that calendar day**.** This includes the footage leading up to the incident, along with any footage of the actual incident itself,

the latter of which may have been captured had Restaurant Depot further reviewed all recorded footage rather than relying upon Hidasi concluding on his own that no such footage existed. Even assuming arguendo that Hidasi's testimony that there was not a clear video that depicted the moment that Perez-Hernandez struck Plaintiff is entirely meritorious, Restaurant Depot should have retained footage from all available cameras up to and including the time the incident occurred that calendar day.

Restaurant Depot's duty to preserve the surveillance footage arose when store personnel became aware of the incident, creating the probability of litigation, and the affirmative steps that store personnel took for no other purpose than the anticipation for litigation. Specifically, Restaurant Depot personnel exhibited the requisite knowledge of the likelihood of litigation by bringing Plaintiff into management's office and even reviewing surveillance footage of Perez-Hernandez pushing his overloaded cart, and having her fill out and complete various forms, in addition to the various other Restaurant Depot documentation that was completed by personnel at the time of the incident. (Pa32; Pa153-Pa161) In addition, store personnel went so far as to take the time and effort to take various pictures of Plaintiff, including the shoes she wore on the date of the incident, and several photographs of Perez-Hernandez's overloaded U-boat (Pa164-Pa165), and yet, chose not to retain the most valuable piece of evidence – the video surveillance itself.

Additionally, since it was also foreseeable that discarding such footage would harm Plaintiff's potential claims and that the footage was clearly relevant to the incident, Restaurant Depot had a duty to retain such footage.

The fact that Plaintiff was injured and an incident report was completed certainly put Restaurant Depot on notice to preserve all available surveillance footage, up to and including the time the incident occurred that calendar day, due to probable litigation, and provided Restaurant Depot with the requisite knowledge that litigation was likely. While Restaurant Depot has argued that Plaintiff declined medical attention following the incident, Restaurant Depot's determination as to the severity of her injuries at the time that Plaintiff was struck by Perez-Hernandez's overloaded U-boat should not have been a consideration. Since Restaurant Depot was put on notice of Plaintiff's accident and injury, and since it was anticipated that litigation was likely and that Restaurant Depot would be a party to such a suit, Restaurant Depot should have retained such unique, relevant evidence that can now no longer be recovered, which would have been vital to Plaintiff proving her case. Clearly, Restaurant Depot's personnel should have been aware of the great prejudicial effect on Plaintiff if such critical evidence to probable litigation was, in fact, not preserved. By virtue of the fact that an incident occurred involving Plaintiff, a duty should be imposed upon Restaurant Depot to maintain video surveillance.

Restaurant Depot could have easily preserved footage from the approximately 20 to 30 cameras that Hidasi estimated were in place throughout the store, as Hidasi testified that if there had been an accident, such as a customer accident, store personnel would register the time code and the camera number and send the information to corporate so that corporate had the ability to pull and save the footage. (Pa96) Despite admitting to this simple procedure to preserve video, Hidasi failed to do so with regard to Plaintiff's incident. (Pa97)

Rather, notwithstanding the feasibility of preserving such video, Hidasi, having reviewed such video, under his own initiative and without consulting other corporate personnel, independently determined that the surveillance footage relating to Plaintiff's incident did not need to be preserved at all because the footage did not depict the precise moment the U-boat Perez-Hernandez was operating had struck Plaintiff in the back. (Pa96) In only searching for the camera angle that he would have assumed had the best view of the point of impact, Hidasi did not search for any video that would have depicted the manner in which Perez-Hernandez had been operating the U-boat prior to the point of impact. (Pa97) Thus, relying solely upon Hidasi's independent decision making that the camera angle did not depict the precise moment of impact, Restaurant Depot made a conscious decision not to preserve any of the surveillance footage pertaining to the accident.

Additionally, the foreseeability of harm or prejudice to Plaintiffs' potential claims if the evidence were discarded was also readily apparent to Restaurant Depot, as the footage was clearly relevant to the incident. The resulting inequity and prejudice to Plaintiffs as a result of Restaurant Depot's failure to perform the simple task of preserving video surveillance following an incident that occurred on its premises is such that Plaintiffs are now left with the inability to utilize and rely upon such video surveillance to substantiate Plaintiffs' liability claim. To avoid situations, as in this matter, where such surveillance videos have been spoliated, in-store surveillance must be preserved where a potential defendant is put on notice of the possibility of a claim due to an injury involving an invitee and can reasonably foresee that a claim would be made. Such video should be preserved until the statute of limitations has run. In the absence of imposing such a duty, despite remaining cognizant of a potential claim, and despite the feasibility of preserving such surveillance footage, potential defendants will remain disincentivized from retaining such footage.

Lastly, the fact that the issue surrounding this matter involves Perez-Hernandez's negligent operation of the U-boat and the failure on the part of Restaurant Depot's employees to remediate the risk of harm to other customers, any surveillance footage that should have been preserved by Restaurant Depot would

have been relevant and critical to this litigation. Such footage would also likely to have shown Perez-Hernandez passing various employees with an overloaded cart.

In short, consideration of the aforementioned factors, particularly the knowledge of Plaintiff's incident and the distinct possibility that litigation would result, should have immediately prompted Restaurant Depot to preserve all available footage so that such footage could be easily accessible in the future. Given the fact that Hidasi testified that this could have easily been accomplished by the store itself and the corporate office (Pa96), every effort should have been made by Restaurant Depot to preserve the footage in the event that a claim by Plaintiffs did ultimately arise.

A recent decision by the United States District Court in Nagy v. Outback Steakhouse, Civil Action No. 19-18277(MAS)(DEA), 2024 U.S. Dist. LEXIS 29288, *1-22 (D.N.J. Feb. 21, 2024) (Pa399-Pa407) is persuasive and directly addresses the issue of spoliation of evidence currently presented before this Court. In Nagy, plaintiff was a patron at defendant, Outback Steakhouse, when she slipped and fell on a "greasy substance" on the floor on her way to the restroom, fracturing her hip and femur. Id. at *2. Surveillance footage was recorded, which Outback had the ability to save and preserve. Id. at *3. Outback's manager on duty was tasked with saving clips of the underlying incident, but ultimately only preserved approximately 27 minutes in length—5 minutes and 36 seconds before plaintiff's

fall and approximately 22 minutes following her fall. Id. at *3-4. Plaintiff sought a finding of spoliation based upon Outback's failure to preserve more of the video footage from prior to plaintiff's fall. Id. at *5. The Court found a finding of spoliation on Outback's part and thereby concluded that plaintiff was entitled to an adverse inference jury instruction. Id. at *19.

In its analysis to determine whether spoliation occurred, the Court assessed whether additional video footage should have been preserved. Id. at *7. The Court reasoned that since litigation was foreseeable given that plaintiff was injured and its awareness of the importance of preserving evidence, there was a duty incumbent upon Outback to retain evidence that it knew, or reasonably should have known would likely be requested in that litigation. Id. at *8-9, *15. Additionally, because Outback was a sophisticated business entity and experienced litigant, the Court determined that it should have known, or reasonably should have known, that more than five (5) minutes of surveillance footage prior to plaintiff's fall was necessary to preserve. Id. at *9, 11

Similar to Outback Steakhouse, in Nagy, who spoliated a portion of the surveillance footage, Restaurant Depot also failed to retain footage. However, Restaurant Depot was even more remiss than Outback in its duties to preserve surveillance evidence by electing not to preserve any footage surrounding Plaintiff's incident. Moreover, despite the fact that similar to Outback, Restaurant Depot was

on notice that litigation was reasonably likely due to Plaintiff's injuries after having been struck by an industrial grade U-boat, and notwithstanding the fact that like Outback, Restaurant Depot is a sophisticated business entity, Restaurant Depot neglected to retain any footage whatsoever of the events preceding Plaintiff's incident and/or of the actual incident itself when Plaintiff sustained her injuries.

The Nagy Court further concluded that Outback was aware it had a duty to preserve relevant evidence because it is not an unsophisticated litigant. Id. at *11. Despite this awareness, Outback's restaurant manager was tasked with preserving the footage without obtaining any guidance from corporate as to how much video to preserve. Id. The Court noted that saving additional footage would not have been unduly burdensome. Id. at *12. Similarly, Restaurant Depot, like Outback, has had experience defending a myriad of suits, and should have possessed the requisite knowledge to retain all available surveillance footage from the calendar day of the incident up through the moment when Plaintiff was struck by the U-boat. Like Outback, despite Restaurant Depot's awareness of the need to preserve the video evidence and the simple process of retaining such footage, Restaurant Depot permitted its manager, Hidasi, to make his own independent determination as to whether video should be preserved. (Pa98) However, Restaurant Depot went even further than Outback, by failing to preserve any video evidence whatsoever even though Restaurant Depot had in place the technology that permitted and allowed for

easy surveillance preservation, exportation, and transfer. (Pa96) As Hidasi testified, "if there had been an incident such as theft or a customer accident or employee accident, we would register the time code and the camera number and send it up to . . . corporate basically so that they can pull the video and save it." (Pa96)

Under the circumstances, like Outback, it was incumbent upon Restaurant Depot to have preserved the surveillance footage. Surveillance footage is frequently the most accurate piece of evidence relating to the occurrence of an accident on a business entity's premises. Restaurant Depot should not be rewarded for its failure to preserve footage—footage which would have undoubtedly aided Plaintiffs' ability to prove Restaurant Depot's negligence. Even if Restaurant Depot chose, at a minimum, to only maintain the portion of the surveillance footage that Plaintiff viewed while in the manager's office, such video would have depicted Perez-Hernandez pushing down the aisle where Plaintiff was located, a Restaurant Depot supplied overloaded U-boat consisting of a variety of products from different parts of the store. Permitting Restaurant Depot to decide, on its own accord, not to retain such footage particularly after having already reviewed a portion of such footage, would set forth a dangerous precedent. Business owners, like Restaurant Depot, would be disincentivized from retaining critical video evidence despite having been put on notice of a potential claim due to physical injury of an invitee on its premises.

Additionally, Plaintiffs could not possibly have had the surveillance footage preserved because Plaintiffs are not attorneys and had no basis or knowledge to serve a preservation notice upon Restaurant Depot. By the time that Plaintiffs retained Britcher, Leone & Sergio, LLC to represent them in January 2020 for the injuries Plaintiff sustained as a result of Restaurant Depot's negligence, it was approximately eight (8) months subsequent to the April 26, 2019 incident, at which point in time such footage had already been spoliated by Restaurant Depot. (Pa198-Pa200) Furthermore, given the fact that an incident report was documented, along with various photographs (Pa152-Pa154; Pa164-Pa178), Plaintiffs would never have suspected that Restaurant Depot would make the decision to spoliate all recorded evidence surrounding the incident.

POINT II

THE TRIAL COURT ERRED BY FAILING TO RECOGNIZE THAT IN THE ABSENCE OF RESTAURANT DEPOT'S DUTY TO RETAIN ANY AND ALL SURVEILLANCE VIDEO SURROUNDING THE EVENTS LEADING UP TO PLAINTIFF'S INJURY, PLAINTIFFS ARE ENTITLED TO AN ADVERSE INFERENCE CHARGE THAT HAD RESTAURANT DEPOT RETAINED SUCH FOOTAGE, SUCH FOOTAGE WOULD HAVE DEPICTED THE FAILURE OF RESTAURANT DEPOT'S EMPLOYEES TO REMEDIATE THE DANGEROUS CONDITION CREATED BY PEREZ-HERNANDEZ'S OVERLOADED U-BOAT (2T.14:17-15:4; 20:19-21:13)

Since Restaurant Depot failed to preserve any and all of the video surveillance tapes and can no longer produce any of the footage capturing the events leading up to and including the moment Plaintiff was struck by Perez-Hernandez despite

Restaurant Depot having been aware of the reported incident and having knowledge that Plaintiff had been injured, Plaintiffs are now without proofs to support their claim. Specifically, Plaintiffs cannot rely upon surveillance footage that surely existed and which would have revealed Perez-Hernandez pushing the overloaded U-boat in the presence of Restaurant Depot employees, those of whom failed to address the dangerous situation that Perez-Hernandez created. Plaintiff's testimony supports this contention as, according to Plaintiff, as she walked throughout Restaurant Depot's warehouse, and prior to the accident happening, employees were positioned "everywhere." (Pa27)

Therefore, since Restaurant Depot breached its duty of preserving surveillance footage on the date of the Plaintiff's incident, the trial court failed to recognize that Plaintiffs are entitled to an adverse inference charge. Courts, ever since the seventeenth century, have followed the rule "omnia praesumuntur contra spoliatorem," which translates to "all things are presumed against the destroyer." Jerista, supra, 185 N.J. at 202 (quoting Rosenblit, supra, 166 N.J. at 401). As the Court explained in Rosenblit, "[t]he best known civil remedy that has been developed is the so-called spoliation inference that comes into play where a litigant is made aware of the destruction or concealment of evidence during the underlying litigation." 166 N.J. at 401. Courts utilize the spoliation inference during the underlying litigation to even the playing field when evidence has otherwise been

concealed or destroyed. Id. Therefore, a "spoliation inference may be utilized to address the intentional or negligent spoliation of evidence by a party to the suit." 27-35 Jackson Ave., LLC v. Samsung Fire & Marine Ins. Co., Ltd., 469 N.J. Super. 200, 210 (App. Div. 2021). The inference essentially permits a jury in the underlying case to presume that the evidence that the spoliator destroyed or concealed would have been unfavorable to the spoliator. Rosenblit, 166 N.J. at 401-02.

The trial court erred in its determination that Restaurant Depot did not have a duty to preserve the surveillance footage surrounding Plaintiff's incident, and in turn by not granting Plaintiffs an adverse inference charge (2T.14:17-15:4; 20:19-21:13), despite Restaurant Depot's inactions in failing to preserve surveillance footage notwithstanding the fact that Restaurant Depot had been put on notice of a potential claim by Plaintiffs. Therefore, Plaintiffs are entitled to an adverse inference jury charge and a rebuttable presumption that the missing evidence would be unfavorable to Restaurant Depot; that is, had Restaurant Depot maintained the surveillance videos, such footage would have shown the failure on the part of Restaurant Depot employees to remediate the dangerous condition posed by Perez-Hernandez's overloaded U-boat. Such an instruction was granted in Nagy, supra, whereby the Court determined that "the jury may be instructed that Outback intentionally failed to preserve the disputed video evidence and that the jury may presume that the lost video footage was unfavorable to Outback." 2024 U.S. Dist. LEXIS 29288, at *19.

POINT III

THE TRIAL COURT FAILED TO RECOGNIZE THAT EXPERT TESTIMONY IS NOT NEEDED BECAUSE PLAINTIFF CAN DEMONSTRATE BEFORE A JURY THAT DEFENDANT, RESTAURANT DEPOT, OWED PLAINTIFF A NON-DELEGABLE DUTY TO USE REASONABLE CARE TO PROTECT PLAINTIFF AGAINST KNOWN OR REASONABLY DISCOVERABLE DANGERS AND BREACHED THAT DUTY BY NOT ONLY FAILING TO IMPLEMENT POLICIES AND PROCEDURES TO ADDRESS THE RISK OF OVERLOADED U-BOATS, BUT ALSO BY FAILING TO PROVIDE ADEQUATE AND PROPER TRAINING TO ITS EMPLOYEES TO ENSURE PROPER USE OF THE U-BOATS BY ITS CUSTOMERS (2T.20:9-16)

The trial court erred in ruling that without the aid of expert testimony, Plaintiffs cannot demonstrate that Restaurant Depot was negligent. (2T.20:9-16) While Plaintiffs would have been able to retain an expert had Restaurant Depot not spoliated such evidence, expert testimony is not possible because Plaintiffs' expert could not review the events surrounding the incident that would have been depicted on surveillance footage had such footage been retained by Restaurant Depot.

Therefore, despite the inability to serve an expert report since video surveillance was unavailable to be reviewed by Plaintiffs' expert as a result of Restaurant Depot's failure to preserve such footage, which effectively deprived Plaintiffs of critical evidence surrounding the event, Plaintiffs contend that expert testimony is not needed. Our Supreme Court has acknowledged that "[a]s to the absence of expert testimony, except for malpractice cases, there is no general rule or policy requiring expert testimony as to the standard of care." Butler v. Acme Mkts,

87 N.J. 270, 283 (1982). The test as to whether expert testimony is needed is "whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the party was reasonable." Id.

Expert testimony is not required in the instant matter because the negligence that Plaintiffs allege against Restaurant Depot involves the failure of Restaurant Depot to ensure that customers would not overload their U-boats to the point where one's sight becomes obstructed while pushing such an industrial grade apparatus, thereby risking injury to other customers. The subject matter is such that jurors of common judgment and experience can form a valid judgment as to whether the conduct of Restaurant Depot was reasonable. See id. Thus, even without the aid of expert testimony, Plaintiffs should be permitted to go before a jury because Plaintiffs can demonstrate that Restaurant Depot owed Plaintiffs a non-delegable duty to use reasonable care to protect Plaintiff against known or reasonably discoverable dangers, and breached that duty, by not only failing to implement policies and procedures to address the risk of overloaded U-boats, but also by failing to provide adequate and proper training to its employees to ensure proper use by its customers.

To establish a cause of action for negligence, three (3) elements must be proven: (1) a duty of care owed by defendant to plaintiff; (2) a breach of that duty of care; and (3) an injury to plaintiff proximately caused by defendant's breach. Endre

v. Arnold, 300 N.J. Super. 136, 141 (1997) (citations omitted). Despite Restaurant Depot's contention that Plaintiffs cannot prevail on a claim of negligence against Restaurant Depot without retaining an expert, Plaintiffs submit that they can establish a prima facie case of negligence by successfully proving all three (3) elements under a premises liability theory without expert testimony.

In general, "a landowner has 'a non-delegable duty to use reasonable care to protect invitees against known or reasonably discoverable dangers.' " Jimenez v. Maisch, 329 N.J. Super. 398, 403 (App. Div. 2000) (quoting Kane v. Hartz Mountain Indus., 278 N.J. Super. 129, 140 (App. Div. 1994), aff'd, 143 N.J. 141 (1996)). A landowner, who by invitation, express or implied, induces persons to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for the purpose embraced in invitation. Piro v. Pub. Serv. Elec. & Gas Co., 103 N.J. Super. 456, 463 (App. Div. 1968).

The trial court erred when it ruled that Plaintiffs needed to retain an expert in order to establish Restaurant Depot's negligence. (2T.20:9-16) Ample evidence exists to prove that Restaurant Depot owed Plaintiff a non-delegable duty to use reasonable care to protect Plaintiff against known or reasonably discoverable dangers, and that Restaurant Depot breached that duty, by not only failing to implement policies and procedures to address the risk of overloaded U-boats, but also by failing to provide adequate training to its employees to ensure proper use of

the U-boats by its customers. Furthermore, since Plaintiffs are alleging that Restaurant Depot was negligent based on a premises liability theory, and that Restaurant Depot breached its duty of due care to Plaintiff, a business invitee, by failing to undertake risk reducing measures to avoid situations where dangerous conditions can arise due to customers overloading the U-boats supplied by Restaurant Depot and which can lead to injury, an expert opining on Restaurant Depot's responsibilities under a premises liability theory is unnecessary.

A business invitee is owed a higher degree of care by an owner or possessor of property because that person has been invited on the premises for purposes of the owner which are often commercial or business related. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 434 (1993). Business owners owe to invitees a duty of reasonable or due care to provide a safe environment for doing that which is within the scope of the invitations. Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003); See also Butler, supra, 89 N.J. at 275. "Only to the invitee or business guest does a landowner owe a duty of reasonable care to guard against any dangerous conditions on his or her property that the owner either knows about or should have discovered." Hopkins, 132 N.J. at 434. Since "[n]egligence is tested by whether the reasonably prudent person at the time and place should recognize and foresee an unreasonable risk or likelihood of harm or danger to others," Clohesy v. Food Circus Supermarkets, 149 N.J. 496, 506 (1997), "[t]he duty of due care requires a business

owner to discover and eliminate dangerous conditions that would render the premises unsafe." Nisivoccia, 175 N.J. at 563 (internal citations omitted).

In Hopkins, the Court discussed the common law history of a landowner's duty to prevent a hazardous condition or to warn those on the land. 132 N.J. at 433. The Court observed that for many years the common law focused on the property rights and determined the scope of the landowner's duties according to the status of the injured party as a business invitee, a licensee, or a trespasser. Id. Since Hopkins, cases have continued to apply the common-law legal relationships in defining a landowner's duty of care. Jimenez, 329 N.J. Super. at 401-02; See, e.g., Moore v. Schering Plough, Inc., 328 N.J. Super. 300 (App. Div. 2000) (security guard was invitee owed a duty of reasonable care at the commercial premises he patrolled); Rigatti v. Reddy, 318 N.J. Super. 537, 541 (App. Div. 1999) (landowner owed employee of an independent contractor injured on his property a duty owed to an invitee); Accardi v. Enviro-Pak Sys. Co., 317 N.J. Super. 457 (App. Div.), certif. denied, 158 N.J. 685 (1999) (independent contractor deemed to be invitee). Accordingly,

> An owner or possessor of property owes a higher degree of care to the business invitee because that person has been invited on the premises for purposes of the owner that often are commercial or business related. A lesser degree of care is owed to a social guest or licensee, whose purposes for being on the land may be personal as well as for the owner's benefit. The owner owes a minimal degree of care to a trespasser, who has no privilege to be on the land. See, e.g., Snyder [ ]

> [v. I. Jay Realty], [ ] 30 N.J. [ ] [303], 311 [(1959)]; Taneian v. Meghrigian, 15 N.J. 267, 271 [(1954)]; Russell v. Merck & Co., 211 N.J. Super. 443, 417 (App. Div. 1986); Caroff v. Liberty Lumber Co., 146 N.J. Super. 353, 357-58 (App. Div. 1977)
>
> Hopkins, 132 N.J. at 433-34.

The more recent approach to the question of a landowner's duty has approached the question more flexibly and with fact-sensitive consideration of public policy and fairness. Jimenez, 329 N.J. Super. at 402; See also Hopkins, 132 N.J. at 439. To determine whether the owner of property had a duty in particular circumstances to the injured person, a court must examine such factors as: (1) the relationship of the parties, (2) the nature of the attendant risk, (3) the opportunity and ability to exercise care, and (4) the public interest in the proposed solution. Meier v. D'Ambose, 419 N.J. Super. 439, 445 (App. Div. 2011); Hopkins, 132 N.J. at 439; Carvalho, 143 N.J. at 573. The determination of whether a party owes a duty of reasonable care to another is very fact-specific and principled. Hopkins, 132 N.J. at 439. The inquiry with respect to the duty of a business proprietor to its business invitees to provide a reasonably safe place to do that which is within the scope of the invitation should be whether in light of all the surrounding circumstances, it is fair and just to impose a duty to exercise reasonable care in preventing foreseeable harm to patrons. Ridenour v. Bat Em out, 309 N.J. Super. 634, 644 (App. Div. 1998).

An examination of the aforementioned factors, as well as pertinent case law, readily supports the conclusion that Restaurant Depot owed Plaintiff a non-delegable

duty of care. First, in analyzing the relationship of the parties, Plaintiff was clearly an invitee upon the premises of Restaurant Depot. Her presence was solely occasioned by the fact that she was invited, as a member of the public, for business purposes, onto the proprietor's premises—namely to purchase a food product which Restaurant Depot sold.

Second, the nature of the risk was significant. Restaurant Depot provides heavy duty equipment on its premises available for use by its customers, namely the use of its industrial grade wheeled flatbed carts, known as "U-boats," to transport a large number of heavy items while they shop throughout the store. As a customer, Plaintiff, while shopping in Restaurant Depot's store, reasonably relied upon Restaurant Depot to ensure that the U-boats were properly used by its customers. Unfortunately, while Plaintiff, who was looking to purchase a leg of lamb from the Meat Department at Restaurant Depot's warehouse, was struck, without warning, by an overloaded U-boat that was operated by Perez-Hernandez, another customer. (Pa25; Pa28) The risk of injury was foreseeable and resulted in Plaintiff sustaining serious and permanent injuries. (Pa47-Pa52)

Third, Restaurant Depot, as the operator of the premises and given the nature of its business, knew that patrons and staff alike would utilize the heavy-duty U-boats, and therefore, had an opportunity and ability to exercise care. Restaurant Depot was cognizant of the fact that its employees and customers would be

traversing the store and would therefore come into close proximity with customers and employees pushing heavy duty, industrial sized carts. Therefore, the risk of injury to another customer or employee from the potentiality of another customer overloading their U-boat to the point where the U-boat operator's sight becomes obstructed while pushing the cart was serious and foreseeable. Restaurant Depot had the opportunity and ability to exercise care to ensure that fellow customers were properly utilizing its U-boats by not stacking items too high in a manner that would obstruct the U-boat operator's visibility.

Fourth, the public interest commands that Restaurant Depot be found to owe a duty of care to Plaintiff. All individuals who enter a store, including, but not limited to employees and customers, have a right to assume that the U-boats supplied by Restaurant Depot are properly operated throughout the store. They also have a right to assume that any individual who improperly utilizes such equipment, by, for example, stacking product too high, will not only be warned by store personnel to reduce their load to ensure that the U-boat operator's view is not obstructed, but will also assist such person with actually reducing such load.

Restaurant Depot opens its doors to customers and thus undoubtedly encourages public use of its premises. The public interest is served by requiring Restaurant Depot to maintain its premises in a safe condition for its invitees. Under both the fairness test utilized by recent decisions and the common law approach

premised on the status of the person on the property at the time of the injury, Restaurant Depot, as the owner or possessor of the premises, owed Plaintiff a non-delegable duty to use reasonable care to protect against known or reasonably discoverable dangers. Kane, supra, 278 N.J. Super at 140.

In order to establish premises liability, a plaintiff also bears the burden of proving that the owner of the premises breached the duty of care owed to plaintiff. Jerista, supra 185 N.J. at 191. Plaintiff contends that in addition to owing a duty of care to its customers, who are invitees, Restaurant Depot breached its duty of care by failing not only to provide appropriate training, but also by failing to implement policies or procedures for its own employees regarding the use of its U-boats.

Kolomer, the regional manager for Restaurant Depot, and who was regional manager for the Hackensack location at the time of Plaintiff's incident, testified that a customer utilizing and pushing a U-boat should not have a pile of merchandise on the U-boat high enough to cause a customer to be unable to see over the merchandise. (Pa113-Pa114) In addition, according to Kolomer's testimony, if a customer is not looking around the side of the U-boat, but is pushing a U-boat piled high with merchandise to the point where the customer cannot see over the load, that situation poses a danger to both fellow customers and Restaurant Depot employees. (Pa114) Based on his own admission, in the past, in a situation where a customer was pushing a U-boat with product piled higher than that person was capable of seeing over such

a load, he would stop that customer and offer to bring the customer another U-boat, help them reduce their load, or instruct the customer to pull, rather than push, the U-boat, in order for them to see in front of them. (Pa114)

Even though Kolomer admitted that he previously stopped customers upon noticing that their U-boats were overloaded and that no customer pushing a U-boat should have a pile of merchandise that results in their inability to see over that merchandise, no formal training is provided to Restaurant Depot's employees to look for situations where customers' U-boats are stack too high with product, to warn them of the danger such condition posed to other customers, and to assist customers in reducing their overloaded U-boats. (Pa114) Therefore, according to Kolomer, because no formal program has been implemented by Restaurant Depot concerning the safe operation of the U-boats, employees are not provided with any instruction about how to rectify situations where U-boats are found to be overloaded which pose a risk of serious injury. (Pa114)

Moreover, Hidasi, the assistant store manager at the Hackensack location at the time of Plaintiff's incident, testified that he was instructed to push the U-boats from behind and to exercise caution when moving around. (Pa94-Pa95) Hidasi, by his own admission, stated that if a situation arose where a customer was found pushing a U-boat with items that were obstructing the customer's view, he would try to avoid incidents at all costs. (Pa95) Like Kolomer, when Mr. Hidasi was asked if

there was ever a situation in which he would help a customer separate a customer's oversized U-boat load onto two (2) separate U-boats, Mr. Hidasi admitted "that would be something that could happen" and that because he was trained in safety, he was "trained to look out for things of that nature that could be unsafe . . ." (Pa95) Hidasi conceded that although he, in his role as manager, was provided some instruction as to how to push and maneuver the U-boats, similar to Kolomer's testimony, no guidance was ever provided regarding the danger that an overloaded U-boat could pose. (Pa94-Pa95)

The testimony of Kolomer and Hidasi further evidences the fact that expert opinion is not required for Plaintiffs to establish Restaurant Depot's liability. By their very own admission at deposition, both Kolomer and Hidasi established that although they would help to rectify a customer's overloaded U-boat, there is no company-wide policy that exists to train its employees on the dangers posed by overloaded U-boats. Notably, despite the fact that Restaurant Depot's "Accident Investigation Form" inquires whether a U-boat was involved in the reported injury (Pa153-Pa154), Restaurant Depot failed to institute a formal safety training program on the proper use of the U-boats that are supplied to its customers. The absence of Restaurant Depot implementing such a formal training program is indicative of the failure on the part of Restaurant Depot, as a business owner, to abide by its duty of owing invitees, such as Plaintiff, a duty of reasonable or due care to provide a safe

environment for doing that which is within the scope of the invitations. See Nisivoccia, supra, 175 N.J. at 563. Since Kolomer and Hidasi, at deposition, effectively conceded that the standard was for them to look out for overloaded U-boats and help to rectify such dangerous conditions, and yet, at the same time, indicated that Restaurant Depot never implemented a formal training program for its employees to ensure the safe operation of Restaurant Depot's U-boats, the trial court erred in ruling that Restaurant Depot be summarily dismissed from the case because Plaintiffs did not retain an expert. (2T.20:9-16)

Furthermore, while this Court in Znoski v. Shop-Rite Supermarkets, Inc., 122 N.J. Super. 243, 248-49 (App. Div. 1973) has previously determined that no breach of a duty by a food store proprietor occurs in situations where a customer, operating a shopping cart supplied by the proprietor, causes injury to another patron outside the proprietor's store in a parking lot, such a situation is readily distinguishable from the instant matter. In Znoski, plaintiff, a customer of defendant, Shop-Rite, parked his car and was on the sidewalk, near the entrance of the store, when an unknown youth hit him in the back with one of Shop-Rite's shopping carts. Id. at 276. This resulted in plaintiff falling and sustaining injuries. Id. While a jury awarded plaintiff damages, defendant appealed and the Appellate Division reversed, entering a judgment in favor of defendant. Id. at 245, 249.

However, Znoski is readily distinguishable from the instant matter. While the Court in Znoski determined that the shopping cart that struck the plaintiff was not a dangerous instrumentality, the U-boat that struck Plaintiff in Restaurant Depot's warehouse was a heavy-duty industrial grade cart that was much larger in size and weight than a conventional shopping cart, and which had a top shelf for placing product. In addition, unlike the conventional shopping cart in Znoski, where there was no indication that the cart was used in any other manner than the manner for which it was designed, the U-boat that is the subject of this litigation had the ability to be overloaded. In fact, the U-boat was overloaded in such a way so as to obstruct the view of the individual pushing the cart, thereby becoming a dangerous instrumentality which caused Plaintiff to be struck.

In addition, to prove a breach of such a duty of care, a plaintiff must show that the defendant had actual or constructive knowledge of the dangerous condition that caused the accident. Brown v. Racquet Club of Bricktown, 95 N.J. 280, 291 (1984). Actual notice is "notice given directly to, or received personally by a party." Black's Law Dictionary 1087 (7th ed. 1999). Constructive notice is defined as follows:

> that the particular condition existed for such period of time that an owner/occupier of the premises in the exercise of reasonable care should have discovered its existence. That is to say, constructive notice means that the person having a duty of care to another is deemed to have notice of such unsafe conditions, which exist for such period of time that a person of reasonable diligence have discovered them.

> [Model Jury Charge (Civil), 5.20F, "Active and Constructive Notice Defined" (2003).]

See Parmenter v. Jarvis Drug Stores, 48 N.J. Super. 507, 510 (App. Div. 1957) (defining "constructive notice" as "the existence of a condition for such a length of time as reasonably to have resulted in knowledge and correction had the defendant been reasonably diligent.")

Although business owners owe to invitees a duty of reasonable care to provide a safe environment for doing that which is within the scope of the invitation, "owners of premises generally are not liable for injuries caused by defects for which they had no actual or constructive notice and no reasonable opportunity to discover. Nisivoccia, supra, 175 N.J. at 563. For that reason, '[o]rdinarily an injured plaintiff . . . must prove, as an element of the cause of action, that the defendant[s] had actual or constructive knowledge of the dangerous condition that caused the accident.' " Id.

However, our State's Supreme Court, "guided by equitable consideration, has found it appropriate to relieve a plaintiff of the burden of proving actual or constructive notice of a dangerous condition 'in circumstances in which, as a matter of probability, a dangerous condition is likely to occur as the result of the nature of the business, the property's condition, or a demonstratable pattern of conduct.' " Jeter v. Sam's Club, 250 N.J. 240, 252 (2022) (quoting Nisivoccia, supra, 175 N.J. at 559). As such, this rule gives rise to a rebuttable inference that defendant is negligent and eliminates the need for plaintiff to prove actual or constructive notice.

Prioleau v. Kentucky Fried Chicken, Inc., 223 N.J. 245, 258 (2015); See Nisivoccia, supra, 175 N.J. at 563-65; Wollerman v. Grand Union Stores, Inc., 47 N.J. 426, 429 (2015); Bozza v. Vornado, Inc., 42 N.J. 355, 359-60 (1964).

Plaintiffs allege that Restaurant Depot would have had actual and/or constructive notice of such dangerous condition. Plaintiff testified that while she shopped at Restaurant Depot's store, there were employees "everywhere." (Pa15) Given that Perez-Hernandez was operating a Restaurant Depot supplied U-boat with product so high to the point where it obstructed his vision to safely push the U-boat through the various aisles of Restaurant Depot's warehouse, is indication that the unsafe condition would have been present for a sufficient length of time to alert store personnel that were positioned throughout the store. At some point, Perez-Hernandez would have walked past a Restaurant Depot employee with his overloaded U-boat. Having had knowledge of the overloaded U-boat and the dangerous condition that it posed to other customers, store personnel, particularly had a formal training program been implemented, should have then undertaken some correction action to remediate the hazard posed by the U-boat. Instead, however, the non-compliance of store personnel in approaching Perez-Hernandez and addressing the dangerous condition is what ultimately led Perez-Hernandez to strike Plaintiff.

This situation is readily distinguishable from the Court's finding in Znoski. Unlike the plaintiff in Znoski, who was struck while on the sidewalk outside of the physical store, Plaintiff in the instant matter was struck while inside Restaurant Depot's store. Therefore, while Shop-Rite store personnel would not have had any actual or constructive notice of any improper use of the shopping cart on behalf of the individual who struck the plaintiff since the incident did not occur within the confines of the store, the fact that Perez-Hernandez was pushing his U-boat throughout the store, coupled with Plaintiff's testimony that there were employees "everywhere" (Pa15), evidences that Restaurant Depot store personnel would have had sufficient time to have notice of the dangerous instrumentality.

Plaintiffs further contend that since this State's Supreme Court has relieved a plaintiff of the burden of proving actual or constructive notice in situations where as a matter of probability, a dangerous condition is likely to occur as the result of the nature of the business, Plaintiffs, assert that the mere fact that U-boats are supplied to customers without any requisite training of its staff to look out for overloaded U-boats and correct dangerous conditions, Plaintiffs submit that they are entitled to a rebuttable inference that Restaurant Depot is negligent.

POINT IV

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO VIDA CAFÉ BY DETERMINING THAT PEREZ-HERNANDEZ WAS NOT A BORROWED AGENT OF VIDA CAFÉ (1T.12:24-14:11)

The trial court erred by failing to recognize that sufficient facts exist for a jury to find that Vida Café should be subjected to liability under the borrowed-employee doctrine. (1T.13:11-14:11) The borrowed-employee doctrine, also known as the "special employee" (or, formerly, "borrowed servant") doctrine of vicarious liability, has a long history in this State's jurisprudence. Pantano v. New York Shipping Ass'n., 254 N.J. 101, 110 (2023). According to the doctrine, "[A] party 'who expects to derive a benefit or advantage from an act performed on [that party's] behalf by another must answer for any injury that a third person may sustain from it.' " Id. at 111 (citing Galvao v. G.R. Robert Const. Co., 179 N.J. 462, 468 (2004) (quoting Carter v. Reynolds, 175 N.J. 402, 408 (2003)).

Our courts have developed a two-part test. See Galvao, 179 N.J. at 467. Control is the threshold inquiry. Id. at 472. There are four methods as to which a party can demonstrate control. Id. at 472-73:

> The first part is showing "on-spot" control, which is 'the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, not only what shall be done, but how it shall be done.' Id. at 472 (quoting Wright v. State, 169 N.J. 422, 426-37 (2001)). As an alternative to direct evidence of on-spot control, parties can show that an employer has "broad" control in any of three ways: based on (1) the 'method of payment'; (2) who 'furnishes the

> equipment'; and (3) the 'right of termination.' Ibid. (quoting Wright, 169 N.J. at 472). 'The retention of either on-spot, or broad, control by a general employer would satisfy this first prong.' Ibid. (emphasis added). A 'lack of control ends the inquiry.' Id. at 474.
>
> Pantano, 254 N.J. 111-12.

Once the control prong is met and the general employer is found to have control, the analysis moves onto the business-further prong. Galvao, 179 N.J. at 472. "A worker is furthering the general employer's business if both " 'the work being done [by the loaned employee] is within the general contemplation of the [general employer,]' and the general employer derives an economic benefit by loaning its employee.' " Id. at 472-73 (second alteration in original) (emphasis added) (quoting Viggiano v. William C. Reppenhagen, Inc., 55 N.J. Super. 114, 119 (App. Div. 1959)).

In addition, "an agency relationship is created 'when one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.' " New Jersey Lawyers' Fund for Client Prot. v. Stewart Title Guar. Co., 203 N.J. 208, 220 (2010) (quoting Restatement (Third) of Agency § 1.01 (2006) (internal quotation marks omitted). Generally, an agent may only bind his principal for such acts that are within his actual or apparent authority. Id. (citing Carlson v. Hannah, 6 N.J. 202, 212 (1951)).

The Court should reverse the trial court's grant of summary judgment to Vida Café because genuine issues of fact exist which demonstrate that Vida Café had

control over Perez-Hernandez. Vida Café directed him to shop at Restaurant Depot and to purchase certain products for its business. (Pa64-Pa65) On the date of Plaintiff's incident, Perez-Hernandez was at Restaurant Depot for exactly that purpose—to purchase products for Vida Café. (Pa83) Vida Café provided him with a Mamajuana Café Restaurant Depot membership card, which Perez-Hernandez furnished after the accident. (Pa69; Pa99; Pa163) Without such a card, Perez-Hernandez could not make purchases for anyone at Restaurant Depot. Once he purchased those products, he was directed to deliver those products to Vida Café's store in Manhattan. (Pa87) The sole purpose for hiring Perez-Hernandez was for him to purchase essential ingredients in order for Vida Café to prepare dishes for patrons, and as such the products he purchased helped derive an economic benefit to Vida Café.

CONCLUSION

For the foregoing reasons, Plaintiffs contend that the Appellate Court should reverse the trial court's grant of summary judgment as to Restaurant Depot and Vida Café and reinstate Plaintiffs' Complaint.

Respectfully submitted,

/s/*E. Drew Britcher*
E. DREW BRITCHER

Dated: June 13, 2024

SNEZANA SUMULIKOSKI and SIME SUMULIKOSKI, her husband Plaintiffs, v. RESTAURANT DEPOT, MIGUEL PEREZ-HERNANDEZ, VIDA CAFÉ, INC. d/b/a MAMAJUANA CAFÉ; JOHN DOE 1-10; JANE DOE 1-10; JOHN DOE CORP 1-10, fictitious names, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002256-23 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO. BER-L-2002-21 SAT BELOW: HONORABLE JOHN D. O'DWYER, P.J.Cv.

DEFENDANT-RESPONDENT RESTAURANT EPOT'S, LLC (IMPROPERLY PLED AS RESTAURANT DEPOT) BRIEF AND APPENDIX IN OPPOSITION TO PLAINTIFFS/APPELLANTS' APPEAL

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PRELIMINARY STATEMENT

This is a personal injury matter arising from a customer to customer related accident that occurred on April 26, 2019 at the Defendant's, Restaurant Depot, LLC (improperly pled as Restaurant Depot) ("Restaurant Depot") warehouse in South Hackensack, New Jersey. Defendant, Miguel Perez-Hernandez, was a customer in the Restaurant Depot warehouse when he accidentally struck Plaintiff, Snezana Sumulikoski ("Plaintiff") with his shopping cart, known as a "U-boat." An Order of Judgement by Default has been entered against Perez-Hernandez.

The evidence in this record shall tell this Court that Restaurant Depot secured summary judgment, and thereafter withstood Plaintiffs' unsuccessful attempt at interlocutory review. Restaurant Depot successfully opposed the attempt at interlocutory review because the trial court correctly, faithfully, and properly fulfilled its duty in applying the proper, controlling law to these facts. Plaintiffs simply could not and cannot sustain their burden of proof regarding the adequacy of Restaurant Depot's store operations without the aid of expert testimony. Moreover, there is no proof that Restaurant Depot had actual or constructive notice of any allegedly dangerous condition or breached any duty owed to Plaintiff.

Instead, Plaintiffs attempt to distract this Court from the fatal flaws in their case by raising red herrings and baseless allegations of spoliation of evidence, adverse inferences and jury charges. However, the motion court correctly ruled that this matter should not be presented to a jury. As Plaintiffs did not retain a liability expert, the jury would have been left to speculate as to the proper standard of care with regard to customer use of shopping carts, known as "U-boats", and speculate as to what constitutes an 'overloaded' U-boat. More importantly, there was never any video surveillance capturing the subject incident to be preserved. Plaintiffs never sent any notices of preservation letters and should not now be allowed to retroactively impose what amounts to a super duty on Restaurant Depot over four years after the fact. Notwithstanding the foregoing, a photograph depicting the U-Boat utilized by Perez-Hernandez at the time of the subject incident, along with the items he intended to purchase, was taken and exchanged as part of the discovery process was preserved.

Irrespective of the polish Plaintiffs have now put on their case, the truth remains inviolate, as it must. Summary judgment was properly entered below in favor of Restaurant Depot. This Court should now affirm its entry and deny Plaintiffs the relief they seek.

STATEMENT OF FACTS

Plaintiffs allege that on April 26, 2019, Plaintiff Snezana Sumulikoski was standing in an aisle of the Meat Department of the Restaurant Depot warehouse located at 45 Wesley St, South Hackensack, New Jersey, when a customer pushed a shopping cart into her back. (Pa001-Pa012; Pa231-Pa239). Plaintiffs' Second Amended Complaint alleges that Restaurant Depot failed to ensure that signs and/or warnings were posted with respect to the proper use of its "U-boats" and to ensure that all customers followed said proper use of the same. (Pa231-Pa239).

Restaurant Depot's Accident Investigation Form dated April 26, 2019 provides that one customer was pushing an industrial cart known as a "U-boat" and that there was no surveillance video of the incident. (Pa153-Pa154). The Assistant Store Manager, Michael Hidasi, authored an Investigator Statement for Customer Accidents dated April 26, 2019, which provides that the customer pushing the U-boat was Defendant, Miguel Perez Hernandez.(Pa156). Plaintiff's own Injured Party's Statement of Accident, which she authored on April 26, 2019, confirms that she was pushed in the back. (Pa157).

Defendant, Miguel Perez Hernandez, authored a statement in Spanish on April 26, 2019, which was translated into English by a former Restaurant Depot employee named Yamaira Gonzalez. (Pa158-Pa159). The statement provides

that Hernandez was pushing his U-boat when Plaintiff stopped rapidly to ask an employee a question and he did not see her and he hit her with a box that was on his U-boat. (Pa158-Pa159).

At her deposition, Plaintiff testified that she was standing in the Meat Department talking to a Restaurant Depot employee and behind her was an open aisle. (Pa025; Pa027). Plaintiff testified that she was talking with this employee for a "very short time" and her back was turned when the accident happened. (Pa028). Plaintiff testified then that "all of a sudden [she] got struck from the right side." (Pa028). Plaintiff could not provide any description of the speed of the U-boat because she agreed that she did not see it happen and her back was completely turned. (Pa030). Plaintiff admitted that she did not know what exactly made contact with her back. (Pa030). Plaintiff admitted she never saw Defendant Hernandez behind his cart, pushing his cart, and/or pulling his cart prior to the impact. (Pa030-Pa031). Plaintiff had no knowledge as to who loaded Hernandez' U-boat. (Pa031). Plaintiff did not know whether any Restaurant Depot employee in any way assisted in loading products onto Hernandez' U-boat prior to the accident. (Pa031). Plaintiff testified that a photograph produced in discovery (contained in the Appendix at Pa040; Pa172) appeared to be the subject U-boat that struck her.

Plaintiff testified that she had never been trained to push shopping carts at Home Depot or Costco and that she was unaware of any policies, procedures or signs related to customers pushing shopping carts at Home Depot or Costco. (Pa022-Pa023).

Steven Kolomer, Restaurant Depot's Regional Manager, testified that there are stickers posted on every U-boat which provide a "warning" to customers on how to push the U-boat and to have a clear view. (Pa113). Michael Hidasi, assistant store manager at the time of Plaintiff's accident, testified that the training that he received regarding the safe operation of U-boats was that he was instructed to push the U-boats from behind and to be careful when moving around. (Pa095). Plaintiff admits she was shown photographs depicting signs, including the following: "power equipment on premises" and "no children on carts," and a notice about wearing appropriate shoes within the warehouse. (Pa041).

Plaintiffs failed to present any evidence that there were no warnings on the U-boats or that the warnings were in any way deficient. Plaintiffs failed to present any evidence as to what constitutes an "overloaded" U-Boat and that Hernandez' U-boat was "overloaded" and the industry standards regarding a business proprietor's duty related to a customer's usage of a U-boat.

After the accident, Plaintiff was taken to the manager's office to fill out her statement. (Pa033). While in the office, Plaintiff claims Restaurant Depot's manager showed her a video. (Pa033). Plaintiff conceded that the video did not capture the actual impact of her being struck by Hernandez' U-boat. (Pa033). Plaintiff did not even know if the video she saw captured the aisle where the accident happened. (Pa033). Plaintiff admitted that neither she nor the Restaurant Depot employee she was talking to were even seen on the video. (Pa033-Pa034). On the date of loss, Plaintiff executed a Medical Attention Waiver which provides:

> I understand that I have been given an opportunity to seek medical attention for my injury however I do not wish to seek medical attention because I feel my injury is minor. I have reported my injury only as a precautionary measure.

(Pa155).

Plaintiff, who is 5' 2", admitted that she later walked out of the store under her own power and she was able to climb up into her Hummer and drove herself home. (Pa042).

Michael Hidasi testified that if an incident was not captured on camera then Restaurant Depot would not preserve any video. (Pa096). Restaurant Depot produced its discovery on November 9, 2021 at which point it disclosed it was not in possession of any video surveillance footage from the date of loss.

(Pa146). On January 10, 2023, Restaurant Depot requested that Plaintiffs' counsel produce a copy of any and all notices of preservation ever sent to Restaurant Depot and proof of service of same. (Da032). Plaintiffs never produced any notices of preservation sent to Restaurant Depot nor proofs of service of same in discovery. On appeal, Plaintiffs concede no such notices were ever sent.

PROCEDURAL HISTORY

Plaintiffs filed their original Complaint on March 25, 2021. (Pa202-Pa208). On May 7, 2021, Plaintiff filed an Amended Complaint naming Perez-Hernandez and Mamajuana Café as additional defendants and adding additional causes of action. (Pa209-Pa217). On January 24, 2022, Plaintiffs filed their Second Amended Complaint. (Pa231-Pa239). After numerous discovery extensions, by Order dated April 28, 2023, the discovery end date was extended once again making the new discovery end date July 3, 2023 and set an arbitration date of August 2, 2023. (Da005-Da006).

On June 7, 2023, Restaurant Depot again moved to extend discovery. (Pa255-Pa256). By Order dated June 23, 2023, Restaurant Depot's motion to extend discovery was denied.(Pa257-Pa258). On July 12, 2023, after the July 3, 2023 discovery end date passed, Restaurant Depot moved for summary judgment. (Pa259-Pa265). On July 19, 2023, after Restaurant Depot's summary

judgment motion was filed and arbitration was scheduled, Plaintiffs moved to re-open discovery and for the first time sought additional time to procure an expert liability report. (Pa266-Pa267). Restaurant Depot opposed said motion. Plaintiffs' also moved to amend their Complaint to assert a claim for the spoliation of evidence. (Pa266-Pa267).

On August 25, 2023, the trial court conducted oral argument and ultimately granted Plaintiffs' motion to re-open and extend discovery and denied Restaurant Depot's motion for summary judgment. (Pa322-Pa323; Pa326-Pa327). Plaintiffs' motion to amend their Complaint to assert a claim for the spoliation of evidence was denied. (Pa326-Pa327).

On September 6, 2023, Restaurant Depot filed a motion for reconsideration of both August 25, 2023 Orders. (Pa328-Pa329). On September 22, 2023, the trial court conducted oral argument and denied Restaurant Depot's motion for reconsideration. (Pa330-Pa331).

Restaurant Depot then filed a motion seeking interlocutory appellate review of the trial court's August 25, 2023 and September 22, 2023 Orders. (Pa332-Pa334). Restaurant Depot's motion for leave to appeal was denied by way of an Order dated October 30, 2023. (Pa335).

Pursuant to one of the trial court's August 25, 2023 Orders, Plaintiffs were required to serve expert liability reports by September 30, 2023 and the

discovery period was re-opened until November 30, 2023. (Pa326-Pa327). Plaintiffs never served a liability expert report on their behalf.

On December 1, 2023, after the November 30, 2023 discovery end date passed, Restaurant Depot again moved for summary judgment arguing that Plaintiffs could not prevail on the claim of negligence without expert testimony and because Plaintiffs could not establish that Restaurant Depot had actual or constructive notice of any allegedly dangerous condition or breached any duty owed to Plaintiff. (Pa336-Pa344). Plaintiffs opposed the motion.

On January 18, 2024, the Honorable John D. O'Dwyer, P.J.Cv. held oral argument on Restaurant Depot's motion for summary judgment. Judge O'Dwyer ultimately granted Restaurant Depot's motion for summary judgment by way of an Order dated January 19, 2024. (Pa385-Pa386). Judge O'Dwyer articulated his reasons on the record as follows:

> The Court finds that Restaurant Depot is entitled to summary judgement. Expert testimony is required for a standard of care owed by Restaurant Depot, as to its policies, procedures and protocols, if any, followed throughout the industry with regard to training of employees as to the safe use of U-boats by patrons and warnings and or labels we placed on U-boats to alert customers as to safety.
>
> As to Plaintiff's argument of constructive notice, the Court finds that there was no constructive notice in this case. There is no viable claim for spoliation of evidence as to the videotape. There was no -- the Court notes there was no request for preservation of the evidence.

> Further, there was no reasonable basis in this Court's mind to believe that the video showing operation of the U-boat by Mr. Miguel Perez-Hernandez, if that's his name, as he traversed the store before the incident was relevant, which would have placed Restaurant Depot in a position of understanding, it should have preserved that.
>
> That is, Restaurant Depot, the facts demonstrate they met with the Plaintiff shortly after the incident, within moments of the incident, apparently, reviewed to see what they could find. They did not find the moment of incident and had no awareness of a necessity to preserve beyond that. The Court doesn't find that to be unreasonable. So I don't find that they would have breached any duty in that regard.
>
> As to the Mode of Operation argument. Same is simply inapplicable to the case law as applied to the facts in this case. The Court grants summary judgement.

(2T20:9-21:17).

Thereafter, Plaintiffs moved for interlocutory appeal of the trial court's January 19, 2024 Order. (Pa388-Pa389). By way of an Order dated February 26, 2024, the Appellate Division denied Plaintiffs' leave for appeal. (Pa391).

After an Order of Judgement by Default was entered against Perez-Hernandez on March 14, 2024(Pa393-Pa394), Plaintiffs timely filed a notice of appeal. (Pa395-Pa398).

LEGAL ARGUMENT

STANDARD OF REVIEW ON ORDERS FOR SUMMARY JUDGMENT

The propriety of a trial court's summary judgment order, such as the January 19, 2024 Order from which Plaintiffs seek relief (Pa385-386), is a legal question and not a factual one. Davidovich v. Israel Ice Skating, 446 N.J. Super. 127, 158 (App. Div. 2016). This Court shall apply the same standard as the motion court did in its review of the motion record, Shields v. Ramslee Motors, 240 N.J. 479, 487 (2020), which is to say that, "the movant is entitled to judgment if, on the full motion record, the adverse party, who is required to have the facts and inferences viewed most favorably to it, has not demonstrated a prima facie case." C.W. v. Cooper Health System, 388 N.J. Super. 42, 57 (App. Div. 2006).

In addressing Plaintiffs' argument that the January 19, 2024 summary judgment Order must be vacated, this Court "must confine [itself] to the original summary judgment record because that is the limited issue before [it]." Lombardi v. Masso, 207 N.J. 517, 542 (2001), citing Ji v. Palmer, 333 N.J. Super. 451, 463-64 (App. Div. 2000)(explaining Appellate Courts "can consider the case only as it had been unfolded to that point and the evidential material submitted on that motion"). Justice Long, writing for the majority in Lombardi, phrased it thusly:

> In other words, ***our charge at this stage is to look at the original summary judgment record***…and to determine whether, viewed in a light most favorable to plaintiff, it presented genuine issues of material fact requiring trial.

Lombardi, 207 N.J. at 542. [Emphasis added.]

A fair, dispassionate review of the original summary judgment record makes clear with crystal clarity that Plaintiffs' case did not – and does not – present any such issues that should have resulted in a denial of Restaurant Depot's motion, or should compel this Court to overturn the motion court's well-reasoned grant of summary judgment.

POINT I

THE TRIAL COURT PROPERLY GRANTED RESTAURANT DEPOT SUMMARY JUDGMENT BECAUSE PLAINTIFFS CANNOT PROVE RESTAURANT DEPOT WAS NEGLIGENT WITHOUT SUPPORTING EXPERT TESTIMONY

Plaintiffs' argument that Restaurant Depot spoliated evidence and that they are entitled to a jury charge is a red herring designed to distract this Court from the fact the trial court correctly ruled this matter should not be submitted to a jury in the first place because Plaintiffs cannot prevail on a claim of negligence against Restaurant Depot without expert testimony on their behalf.

Pursuant to R. 4:46-2, it is appropriate for a court to grant summary judgment when "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to summary judgment as a matter of law." Bare conclusions in the pleadings without factual support in affidavits will not defeat a motion for summary judgment. Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011); Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999). As stated by Triffin v. Am. Int'l Grp., Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004), the respondent must do more than show that there is some metaphysical doubt as to the material facts. See also Merchants Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div. 2005)

(summary judgment cannot be resisted by speculation or "fanciful arguments nor disputes as to irrelevant facts.…").

It is a well-established principle under New Jersey law that in order to establish a cause of action for negligence, Plaintiff has the burden of proving that she has a substantial right which was violated by the defendant and that the violation caused the Plaintiff's injury or damage. Ryans v. Lowell, 197 N.J. Super. 266, 274-5 (App. Div. 1984). One cannot recover for damages merely upon proof of the happening of an accident. Mockler v. Russman, 102 N.J. Super. 582, 588 (App. Div. 1968). Negligence is never presumed; it must be proven. Mockler, supra, 102 N.J. Super. at 588. In order to prove a cause of action for negligence, three elements must be successfully proven: (1) a duty of care owed by defendant to plaintiff; (2) a breach of that duty by defendant; and (3) an injury to plaintiff proximately caused by defendant's breach. Endre v. Arnold, 300 N.J. Super 136, 141 (1997) (citations omitted).

Expert testimony is governed by N.J.R.E 702 which states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

The test of the need for expert testimony is whether the subject matter of the testimony is so esoteric that jurors of common judgment and experience cannot

form a valid judgment as to whether the conduct of the party was reasonable. Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982). A jury should not be allowed to speculate without the aid of expert testimony in any area where a layperson could not be expected to have sufficient knowledge or experience. Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1998). New Jersey courts have strictly adhered to this notion.

In Brody v. Lifson, 17 N.J. 383 (1955), an action for personal injuries suffered during a fall on terrazzo floor, the Supreme Court of New Jersey held that the effect of moisture on terrazzo flooring was not a matter of common knowledge, therefore, the submission of expert testimony on this issue was not in error. In Giantonnio v. Taccard, 291 N.J. Super. 31 (App. Div. 1996), the court held that expert testimony was necessary to establish the requisite standard of care for a funeral parlor's procession and their deviation therefrom because:

> [T]he safe conduct of a funeral procession constitutes a complex process involving assessment of a myriad of factors such as traffic conditions, particular road hazards, the length of the procession, time constraints, the distances involved, traffic volume and the availability of police escort services. We believe that this calculus is beyond the ken of the average juror.

Id. at 44. See Dare v. Freefall Adventures, Inc., 349 N.J. Super. 205 (App. Div. 2002) (expert testimony was necessary to establish the standard of care of co-participants at a skydiving facility). "Expert testimony is needed where the

factfinder would not be expected to have sufficient knowledge or experience and would have to speculate without the aid of expert testimony." Torres v. Schripps, Inc., 342 N.J. Super. 419, 430 (App. Div. 2001). "[E]xpert testimony will not be admissible unless it assists the average juror to understand the evidence. Thus, such testimony should not be permitted unless it relates to a subject matter which is so distinctively related to some science, profession, business or occupation as to be 'beyond the ken of the average laymen.'" Boland v. Dolan, 140 N.J. 174, 188 (1995).

Applying these standards, the trial court correctly granted summary judgment finding that Plaintiffs could not make a prima facie case of negligence without the aid of expert testimony.

Judge O'Dwyer found:

> Expert testimony is required for a standard of care owed by Restaurant Depot, as to its policies, procedures and protocols, if any, followed throughout the industry with regard to training of employees as to the safe use of U-boats by patrons and warnings and or labels we placed on U-boats to alert customers as to safety.

(2T20:10-16).

Plaintiffs claim that because Restaurant Depot was negligent on a premises liability theory supporting expert testimony is not necessary. However, this exact argument has been rejected by controlling case law. (Please see Point II supra for more details). Careful scrutiny of the motion record reveals it would

be improper to allow this matter to proceed to jury without supporting expert testimony because it would cause the trier of fact to speculate as to the standard of care owed by Restaurant Depot.

Plaintiffs allege that on April 26, 2019, Plaintiff Snezana Sumulikoski was standing in an aisle of the Meat Department of the warehouse located at 45 Wesley St, South Hackensack, New Jersey, when another customer pushed an "overloaded" shopping cart into her back. (Pa001-Pa012; Pa231-Pa239). Plaintiffs' Second Amended Complaint also alleges that Restaurant Depot failed to ensure that signs and/or warnings were posted with respect to the proper use of its wheeled flatbed carts, known as "U-boats" and to ensure that all customers followed said proper use of the same. (Pa231-Pa239).

Initially, Steven Kolomer, Restaurant Depot's Regional Manager, testified that there are stickers posted on every U-boat which provide a "warning" to customers on how to push the U-boat and to have a clear view. (Pa113). Plaintiffs have failed to establish that there were no warnings on the U-boats or that the warnings were in any way deficient. Michael Hidasi, assistant store manager at the time of Plaintiff's accident, testified that the training that he received regarding the safe operation of U-boats was that he was instructed to push the U-boats from behind and to be careful when moving around. (Pa095). Plaintiff admits she was shown photographs depicting signs, including the

following: "power equipment on premises" and "no children on carts," and a notice about wearing appropriate shoes within the warehouse. However, Plaintiffs have failed to establish that said training and warnings/signs were in any way deficient. (Pa041).

Plaintiffs have even failed to establish the U-boat in question was "overloaded." For example, Plaintiff testified that a photograph produced in discovery (contained in the Appendix at Pa040; Pa172) appeared to be the subject U-boat that struck her. (Pa040; Pa172). The U-boat is designed with a top shelf and the photograph depicts products resting on same. There is no evidence that this U-boat was used in any way other than the manner in which it was designed.

Plaintiffs attempt to cover their failure to obtain a liability expert report by contending that their expert needed access to video surveillance footage in order to render an opinion. Plaintiffs presented no information whatsoever directly from their expert attesting or certifying as to same in violation of R. 1:6-6. Moreover, Plaintiffs and/or their liability expert offered no explanation as to why the above photograph was not sufficient for the expert to render an opinion.

Ignoring the fact that there was no video to be preserved (please see Point III supra for more details) and the numerous cases where expert testimony is

offered in the absence of video, there is no excuse for failing to procure a liability report concluding that Hernandez' U-boat was "overloaded", establishing industry standards regarding formal policies, training or protocols, and opining to the adequacy of Restaurant Depot's warning stickers, and the design and use of the U-boats themselves. There is and was ample evidence in the motion record to allow an expert to have made such conclusions, including the above photograph, and Plaintiffs' inability to produce supporting expert testimony, despite their best efforts to obtain same, is telling. Plaintiffs were unable to obtain a liability expert report because it is clear that Restaurant Depot was not negligent.

Without said supporting expert testimony, jurors would be left to speculate as to whether the U-boat was even 'overloaded' or was being used in a way other than which it was designed, what are applicable industry standards, and how Restaurant Depot deviated from same. Torres, supra, 342 N.J. Super. at 430. For example, Plaintiffs claim additional surveillance footage would have shown Perez-Hernandez passing various employees with his cart. However, Plaintiffs have offered no expert opinion to support the argument that these employees should have stopped Perez-Hernandez or intervened in anyway (even if the employees saw him). Plaintiffs also cannot prove causation and that the

failure to implement certain policies, training or protocols caused the subject incident.

Based on the foregoing, the trial court correctly ruled Restaurant Depot was entitled to summary judgment dismissing Plaintiffs' Complaint with prejudice due to Plaintiffs' failure to procure supporting expert testimony and this ruling should be affirmed.

POINT II

THE MOTION COURT PROPERLY HELD THAT PLAINTIFFS CANNOT ESTABLISH THAT RESTAURANT DEPOT BREACHED ANY DUTY OWED TO PLAINTIFF OR HAD ACTUAL OR CONSTRUCTIVE NOTICE OF THE ALLEGEDLY DANGEROUS CONDITION AT ISSUE

Plaintiffs argue on appeal that Restaurant Depot was negligent based on a premises liability theory of negligence and breaching a duty of care owed to Plaintiff as a business invitee. However, Plaintiffs failed to establish that the trial court erred by granting Restaurant Depot summary judgment when it ruled that Restaurant Depot did not have constructive notice of the allegedly dangerous condition at issue and that the "Mode of Operation" rule was inapplicable to the facts in the case.

Assuming *arguendo* Plaintiffs do not need expert testimony (a point which Restaurant Depot does not concede), Plaintiffs still cannot meet their burden of proving negligence under a premises liability theory of liability. In New Jersey, "[t]he proprietor of premises to which the public is invited for business purposes of the proprietor owes a duty of reasonable care to those who enter the premises upon that invitation to provide a reasonably safe place to do that which is within the scope of the invitation." Butler, supra, 89 N.J. at 275-276; see also NJ Model Jury Charge 5.20F, Duty Owed – Conditions of Premises. The Supreme Court added, "[n]egligence is tested by whether the reasonably prudent person at the

time and place should recognize and foresee an unreasonable risk or likelihood of harm or danger to others." Ibid. "The duty of due care requires a business owner to discover and eliminate dangerous conditions, to maintain the premises in safe condition, and to avoid creating conditions that would render the premises unsafe. Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003) (internal citations omitted).

Additionally, "[o]rdinarily an injured plaintiff asserting a breach of that duty must prove, as an element of the cause of action, that the defendant had actual or constructive knowledge of the dangerous condition that caused the accident." Ibid. citing Brown v. Racquet Club of Bricktown, 95 N.J. 280, 291 (1984).

Thus, Plaintiffs must demonstrate that there was a dangerous condition and that Restaurant Depot had actual or constructive notice of the allegedly dangerous condition in order to prevail. "Existence of an alleged dangerous condition is not constructive notice of it." Sims v. City of Newark, 244 N.J. Super. 32, 42 (Law Div. 1990). There is no evidence to support the theory that Restaurant Depot had actual notice of the allegedly dangerous condition. Consequently, Plaintiff must establish that Restaurant Depot had constructive notice of the condition in order to prevail. The Appellate Division defined constructive notice in Parmenter v Jarvis Drug Store, Inc., 48 N.J. Super. 507,

510 (App. Div. 1957) as "the existence of the condition for such a length of time as reasonably to have resulted in knowledge and correction had the defendant been reasonably diligent." Thus, in order to establish constructive notice on the part of Restaurant Depot, Plaintiffs must establish that the alleged dangerous condition existed for so long a time as to be, in the exercise of reasonable care, discoverable and remediable before the Plaintiff's alleged injury occurred. Plaintiffs' claim must fail as there is no proof in the motion record that Restaurant Depot had constructive notice of any potentially dangerous issues with regards to Hernandez' use of the U-boat.

In Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238 (App. Div. 2013), the plaintiff filed suit against the owner of a convenience store after she slipped and fell on a discarded telephone calling card on the sidewalk near the entrance to the store. The plaintiff claimed that the presence of the plastic calling card on the ground created an unreasonably safe condition. However, the plaintiff in Arroyo was unable to establish how the calling card ended up on the ground or how long it had been there. Consequently, the trial court granted the defendant's motion for summary judgment as plaintiff was unable to present any evidence that the calling card was on the ground for an unreasonable amount of time. Arroyo, supra, 433 N.J. Super. at 242. In upholding the trial's court's decision, Arroyo held that "there is no genuine issue as to whether defendant had actual

or constructive notice of the presence of the discarded phone card on the sidewalk. The absence of such notice is fatal to plaintiff's claims of premises liability." Id. at 243. Restaurant Depot disputes that a dangerous condition existed. Notwithstanding the foregoing, this matter is analogous to Arroyo as Plaintiff cannot establish how long the allegedly dangerous condition existed.

Similarly, in Dombrowska v. Kresge-Newark, Inc., 75 N.J. Super. 271, 275 (App. Div. 1962), the court held that a finding of constructive notice was impossible where there was no evidence to show how long the allegedly dangerous condition existed. In Dombrowska, the plaintiff claimed that she was injured in a fall as a result of a dangerous condition inside a department store. Id. at 272. Specifically, the plaintiff claimed that she was injured when she felt a 'jerk' while riding on an escalator. Plaintiff argued that the 'jerk' in the escalator was caused by a deteriorated condition, i.e., a worn wheel underneath the steps of the escalator. In upholding the trial's dismissal of plaintiff's claim, Dombrowska held:

> [T]here was absolutely no proof that a worn wheel existed in the escalator in question. It would be sheer speculation for a jury to infer that a worn wheel in fact did exist and produced the 'jerk and vibration of some sort,' alleged by plaintiff to have caused her fall. Further, there was no evidence that defendant's inspections of the escalator…were either unreasonably infrequent or superficial. Consequently, there was no indication whatever that a dangerous condition existed

> over a period of time sufficient to put defendant on notice.

Id. at 274-275. Thus, the court held that plaintiff failed to establish constructive notice, therefore, she could not sustain a negligence claim as a matter of law. Id. at 275.

The undisputed facts of the motion record demonstrate the following. Plaintiffs allege that on April 26, 2019, Plaintiff Snezana Sumulikoski was standing in an aisle of the Meat Department of the Restaurant Depot warehouse located at 45 Wesley St, South Hackensack, New Jersey, when a customer pushed a shopping cart, into her back. (Pa001-Pa012; Pa231-Pa239). Restaurant Depot's Accident Investigation Form dated April 26, 2019 provides that one customer was pushing an industrial cart known as a "U-boat" and that there was no surveillance video of the incident. (Pa153-Pa154). The Assistant Store Manager, Michael Hidasi, authored an Investigator Statement for Customer Accidents dated April 26, 2019, which provides that this other customer was Defendant, Michael Perez Hernandez.(Pa156). Plaintiff's own Injured Party's Statement of Accident, which she authored on April 26, 2019, confirms that she was pushed in the back. (Pa157).

Defendant, Michael Perez Hernandez, authored a statement in Spanish on April 26, 2019, which was translated into English by a former Restaurant Depot employee name Yamaira Gonzalez. (Pa158-Pa159). The statement provides that

Hernandez was pushing his U-boat when Plaintiff stopped rapidly to ask an employee a question and he did not see her and he hit her with a box that was on his U-boat. (Pa158-Pa159).

At her deposition, Plaintiff testified that she was standing in the Meat Department talking to a Restaurant Depot employee and behind her was an open aisle. (Pa025; Pa027). Plaintiff testified that she was talking with this employee for a "very short time" and her back was turned when the accident happened. (Pa028). Plaintiff testified then that "all of a sudden [she] got struck from the ride side." (Pa028). Plaintiff agreed that she could not provide any description of the speed of the U-boat because she agreed that she did not see it happen and her back was completely turned. (Pa030). Plaintiff admitted that she did not know what exactly made contact with her back. (Pa030). Plaintiff admitted she never saw Hernandez behind his cart, pushing his cart, and/or pulling his cart prior to the impact. (Pa030-Pa031). Plaintiff had no knowledge as to who loaded Hernandez' U-boat. (Pa031). Plaintiff did not know whether any Restaurant Depot employee in any way assisted in loading products onto Hernandez' U-boat prior to the accident. (Pa031).

Based on same, there is no evidence in the record reflecting that there was a dangerous condition in the Restaurant Depot's warehouse. Initially, the photograph of the U-boat does not reflect it is "overloaded." The U-boats are

designed to have a top shelf for placing products. Plaintiffs also cannot establish actual notice or how long the allegedly dangerous condition existed prior to the subject incident which should result in summary dismissal of Plaintiffs' claim – a point which Plaintiffs concede. There is no evidence in the record establishing that any Restaurant Depot employee observed Hernandez pushing the alleged overloaded U-boat, but somehow failed to intervene.

Plaintiffs ask this Court to ignore the fatal flaws in their case by straddling conflicting arguments contending that Restaurant Depot's failure to preserve video evidence stopped Plaintiffs from having evidence of constructive notice (please see Point III supra for more details) while also arguing that the "Mode of Operation" rule obviates the need to prove same.

However, Plaintiffs' reliance on Wollerman v. Grand Union Stores, Inc., 47 N.J. 426, 429-30 (1966) is entirely misplaced. Wollerman and other cases cited by Plaintiffs deal with falls within stores resulting from foreign substances or items on the floor held for sale by stores in the usual course of their business. See Wollerman, supra, 47 N.J. at 428 (plaintiff slipped and fell the vegetable section of the defendant's supermarket on a string bean). The Appellate Division in Znoski v. Shop-Rite Supermarkets, Inc., 122 N.J. Super. 247-248 (App. Div. 1973) specifically rejected this same argument, finding Wollerman "inapposite"

to the case where a youth hit the plaintiff in the back with one of Shop-Rite's shopping carts.

In Znoski, the plaintiff-customer parked his vehicle along the sidewalk of a Shop-Rite and while attempting to enter the store, an unknown youth hit him in the back with one of Shop-Rite's carts near the entrance door. Znoski, supra, 122 N.J. Super. at 246. The impact propelled plaintiff's body causing his feet to come in contact with the wooden curbing, resulting in Plaintiff falling and sustaining the injuries for which the suit was instituted. Ibid. A jury awarded the plaintiff damages and Shop-Rite appealed. Id. at 245-246. On appeal, the Appellate Division found:

> It is undisputed also that the area around the entrance and exit doors was not crowded, and no one had activated the entrance door as plaintiff approached it. Plaintiff produced no expert witnesses to prove that the entrance and exit doors were improperly constructed or designed for the anticipated use by patrons with shopping carts. No expert proof was offered to show that the sidewalk in front of and surrounding the doors, or the wooden curbing abutting the end of the sidewalk, was improperly constructed, designed or maintained for the reasonably safe use by patrons; or that proper design required some form of railing or divider at or near the wooden curb. No proof was offered to show that the use of shopping carts in the area around the doors created a foreseeable danger or hazard requiring special precautions to be taken by Shop-Rite. Nor was proof offered to show that Shop-Rite had actual or constructive knowledge that patrons, or other third parties, used the carts for any purpose or

> in any manner other than those for which they were designed.

Id. at 246-247. The Znoski Court specifically refused to apply the "Mode of Operation" rule because the Court was:

> [U]able to say that a substantial risk of injury is implicit, or inherent, in the furnishing of shopping carts to patrons by a store proprietor. Shopping carts are not dangerous instrumentalities, and they are uniquely suitable for the purpose for which furnished. Shop-Rite was under a legal duty of exercising ordinary care to furnish a reasonably safe place and safe equipment for its patrons consistent with its operation and the scope of its invitation. It is not an insurer for the safety of its patrons. The issue is not merely whether it was foreseeable that patrons, or other third parties, would negligently or intentionally misuse shopping carts, but whether a duty exists to take measures to guard against such happenings.

Id. at 247-248. The Court further noted that it was "difficult to visualize how an incident such as here involved could have been prevented even if reasonable precautions had been taken" and noted that without any expert testimony, the jury would have had to decide Shop Rite's responsibility on the basis of speculation and conjecture. Id. at 248.

Based on these undisputed facts and on Znoski, Judge O'Dwyer specifically found "that there was no constructive notice" (2T20:17-20) and that Plaintiffs' "Mode of Operation" argument was "inapplicable . . . as applied to the facts in this case." (2T21:14-17). On appeal, Plaintiffs utterly fail to

distinguish Znoski which is controlling upon this Court. Plaintiffs should not be allowed to present this matter to a jury to decide Restaurant Depot's alleged notice and duty on the basis of speculation and conjecture.

Accordingly, Plaintiffs cannot prevail on the claim of negligence as Plaintiffs cannot establish that the Restaurant Depot had actual or constructive notice of any allegedly dangerous condition or breached any duty owed to Plaintiff. Therefore, the trial court correctly ruled that Restaurant Depot should be afforded summary judgment. This ruling should be affirmed.

POINT III

PLAINTIFFS/APPELLANTS HAVE FAILED TO DEMONSTRATE THE TRIAL COURT ERRED WHEN IT RULED THAT RESTAURANT DEPOT DID NOT FAIL TO PRESERVE EVIDENCE AND DID NOT GRANT AN ADVERSE INFERENCE CHARGE

Faced with clear shortcomings in their case, Plaintiffs desperately try to create an appealable issue by contending that they should have been afforded an adverse inference charge due to Restaurant Depot's alleged failure to retain surveillance footage. Plaintiffs assert this feeble argument while ignoring that the trial court correctly ruled this matter should not be submitted to a jury in the first instance. Regardless, the trial court appropriately found, after careful scrutiny of the factual record, that Restaurant Depot did not breach any duty to preserve evidence. This ruling should not be disturbed.

Plaintiffs cite to Hirsch v. General Motors Corp., 266 N.J. Super. 222, 234 (Law Div. 1993) and claim that Restaurant Depot failed in its affirmative duty to preserve evidence. In Aetna Life and Cas. Co. v. Imet Mason Contractors, 309 N.J. Super. 358, 366-377 (App. Div. 1998), this Court found that the duty to preserve evidence arises when there is: 1) pending or probable litigation involving the defendants; (2) knowledge of the existence or likelihood of litigation; (3) foreseeability of harm, or in other words, discarding the evidence would be prejudicial; and (4) evidence relevant to the litigation.

Initially, Restaurant Depot's Accident Investigation Form dated April 26, 2019, provides that there was no surveillance video of the incident. (Pa153-Pa154). After the accident, Plaintiff was taken to the manager's office to fill out her statement. (Pa033). While in the office, Plaintiff claims Restaurant Depot's manager showed her a video. (Pa033). Plaintiff conceded that the video did not capture the actual impact of her being struck by Hernandez' U-boat. (Pa033). Plaintiff did not even know if the video she saw captured the actual aisle where the accident happened. (Pa033). Plaintiff admitted that neither she nor the Restaurant Depot employee she was talking to were ever seen on the video. (Pa033-Pa034).

Moreover, the facts demonstrate that this was a very minor incident. On the date of loss, Plaintiff executed a Medical Attention Waiver which provides:

> I understand that I have been given an opportunity to seek medical attention for my injury however I do not wish to seek medical attention because I feel my injury is minor. I have reported my injury only as a precautionary measure.

(Pa155).

Plaintiff, who is 5' 2", admitted that she later walked out of the store under her own power and she was able to climb up into her Hummer and drove herself home. (Pa042). No police or EMS were ever called to the store. Michael Hidasi testified that if an incident was not captured on camera, then Restaurant Depot

would not preserve any video. (Pa096). Plaintiffs concede that they never sent any notices of preservation sent to Restaurant Depot.

Unlike the progeny of cases cited by Plaintiffs, here there is no evidence Restaurant Depot failed to preserve. There also no foreseeability of harm or prejudice to Plaintiffs and nor is there any indication that Restaurant Depot failed to preserve evidence that would be relevant to a litigation in such a scenario where it is undisputed that no video evidence of the actual incident exists.

Accordingly, the trial court found that Restaurant Depot did not fail in its duty to preserve evidence and that Plaintiffs were not entitled to an adverse inference. Judge O'Dwyer specially held:

> There is no viable claim for spoliation of evidence as to the videotape. There was no -- the Court notes there was no request for preservation of the evidence.
>
> Further, there was no reasonable basis in this Court's mind to believe that the video showing operation of the U-boat by Mr. Miguel Perez-Hernandez, if that's his name, as he traversed the store before the incident was relevant, which would have placed Restaurant Depot in a position of understanding, it should have preserved that.
>
> That is, Restaurant Depot, the facts demonstrate they met with the Plaintiff shortly after the incident, within moments of the incident, apparently, reviewed to see what they could find. They did not find the moment of incident and had no awareness of a necessity to preserve beyond that. The Court doesn't find that to be

> unreasonable. So I don't find that they would have breached any duty in that regard.

2T20:19-21:13).

Review of this portion of Judge O'Dwyer's decision is limited. In Cockerline v. Menendez, 411 N.J. Super. 596, 620-621 (App. Div. 2010), the Appellate Division recognized that, "[d]epending on the circumstances, spoliation can result in dismissal, a separate tort action for fraudulent concealment, discovery sanctions, or an adverse trial inference against the party that caused the loss of evidence. [citation omitted]. The selection of the appropriate sanction is left to the trial court's discretion and will not be disturbed if it is just and reasonable in the circumstances." (internal quotation and citation omitted). See also State v. Garland, No. A-3808-19, 2022 WL 2659320, at *6 (App. Div. July 11, 2022)(Da036-Da045)("The scope of our review of the trial court's decision not to issue an adverse inference instruction is limited. We review a denial of a request for an adverse inference jury charge applying a deferential abuse of discretion standard); Nause v. Atlanticare Reg'l Med. Ctr. - Mainland Campus, No. A-2649-17T2, 2019 WL 418065, at *2 (App. Div. Feb. 4, 2019)(Da033-Da035)("We review the imposition or denial of sanctions for abuse of discretion. One of the sanctions the court may impose is an adverse inference charge." [internal citation omitted]).

Here, Plaintiffs present no evidence or compelling reason to disturb the motion court's finding and instead rely solely on the United States District Court's ruling in Nagy v. Outback Steakhouse, Civil Action No. 19-18277 (MAS)(DEA), 2024 U.S. Dist. LEXIS 29288, *1-22 (D.N.J. Feb. 21, 2024) (Pa399-Pa407). As set forth in R. 1:36-3, no unpublished opinion "shall constitute precedent or be binding upon any court." See e.g., Baldini v. New Jersey Mfrs. Ins., 220 N.J. 544, 559 (2015). This Court is especially not bound by the unpublished opinion of another jurisdiction. See In re Bacharach, 344 N.J. Super. 126, 133 (App. Div. 2001).

The facts of the Nagy case make it easily distinguishable – chiefly, that video of the fall was actually recorded on Outback's surveillance camera and Outback was served with a preservation letter demanding that it preserve any and all surveillance video. Nagy, supra, at *3. Immediately after the fall, the plaintiff was taken from the premises by ambulance and Outback learned the next day that the plaintiff was in the hospital and waiting to undergo surgery. Id. at *2. The Nagy court found that Outback then "preserved some but not all of the most pertinent video evidence while allowing the rest to be overwritten" and that "the video at issue here was not merely overwritten in the normal course. It was affirmatively not preserved after being viewed by an Outback employee and claims administrator, and it was allowed to be overwritten." Id. at *15. In Nagy,

the allegedly dangerous condition (the grease spill) would have been readily apparent to anyone tasked with preserving the video. Conversely, there is no evidence, via expert opinion or otherwise, of an dangerous condition that would have been readily apparent to the Restaurant Depot employee tasked with identifying what, if any, video evidence should have been preserved.

Similar to 27-35 Jackson Ave., LLC v. Samsung Fire & Marine Ins. Co., Ltd., 469 N.J. Super. 200, 211 (App. Div. 2021), a case relied on by Plaintiffs, there are no published decisions in which an adverse or spoliation inference was used as a remedy in similar circumstances and an adverse or spoliation inference has no place in this litigation. Instead, in Davis v. Barkaszi, 424 N.J. Super. 129, 148 (App. Div. 2012), the Appellate Division found that a spoliation charge was erroneous where plaintiff "failed to make the 'threshold showing'" that the defendant improperly destroyed the surveillance footage. The owner of the defendant-bar in Davis looked at surveillance video and saw nothing on the recording to contradict a bartender's version of the incident and therefore did not preserve any footage. Davis, supra, 424 N.J. Super. at 137-138. Of note, the bar did not have any policy concerning data preservation and the footage was re-recorded every week. Id. at 149.

Plaintiffs should not be able to impose what amounts to a super duty to preserve video evidence that could allegedly assist Plaintiffs' attorney's theory

of the case over four years after the fact without ever serving a timely notice of preservation letter and when all parties agree the subject incident was never captured on video. There is no basis in law to support Plaintiffs' contention that all video from the date should have been preserved. The incident was not captured on video and Restaurant Depot's policy is that it does not preserve video where an incident is not captured. Plaintiffs failure to issue any notice of preservation is specifically relevant as Restaurant Depot would be left to guess as to what footage, which aisles, and for how long footage could potentially be relevant to Plaintiffs' case.

Therefore, the trial court did not err when it decided not to award an inference charge and granted Restaurant Depot's motion for summary judgment. Restaurant Depot submits that there is nothing in the record that should call for the reversal of the Order granting that motion.

CONCLUSION

For the foregoing reasons, Restaurant Depot respectfully submits that summary judgment was properly entered below. This Court should now affirm its entry and deny Plaintiffs the relief they seek.

KENNEDYS CMK LLP

By: /s/ Pasquale A. Pontoriero _
Pasquale A. Pontoriero, Esq.
Attorneys for *Defendant, Restaurant Depot, LLC (improperly pled as Restaurant Depot) ("Restaurant Depot")*

Date: July 29, 2024

SNEZANA SUMULIKOSKI and SIME SUMULIKOSKI, her husband, Plaintiffs, v. RESTAURANT DEPOT; MIGUEL PEREZ HERNANDEZ; MAMAJUANA CAFÉ; JOHN DOE 1-10; JANE DOE 1-10; JOHN DOE CORP. 1-10, fictious names, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-0002256-23 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO. BER-L-2002-21 SAT BELOW: HON. JOHN D. O'DWYER, P.J.Cv.

DEFENDANT-RESPONDENT VIDA CAFÉ INC. D/B/A MAMAJUANA CAFÉ IMPROPERLY PLED AS MAMAJUANA CAFÉ'S BRIEF IN OPPOSITION TO PLAINTIFFS/APPELLANTS' APPEAL

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PRELIMINARY STATEMENT

Plaintiff/Appellant Snezana Sumulikoski ("Plaintiff"), along with her husband Sime Sumulikoski, filed a personal injury action for injuries sustained on April 26, 2019 as a result of Defendant, Miguel Hernandez ("Hernandez") pushing a cart, known as a U-Boat, into Plaintiff while she was shopping in the meat department of Defendant/Respondent Restaurant Depot ("Restaurant Depot") located at 45 Wesley St., South Hackensack, New Jersey. After the incident, Hernandez showed a Restaurant Depot membership card issued to Defendant/Respondent Vida Café Inc. d/b/a Mamajuana Café's (improperly pled as Mamajuana Café) ("Vida Café") to a Restaurant Depot employee.

There is no dispute that Hernandez, against whom a default judgment is entered, is an independent contractor and a 1099 employee[1], who shops for Vida Café on an as-needed basis. Vida Café submits that there is no proof that Hernandez actually shopped for Vida Café on the day of the incident. Nevertheless, even if Hernandez did shop on behalf of Vida Café on the day of the subject incident, Vida Café cannot be held liable for Plaintiff's alleged injuries that were caused by Hernandez as the law unequivocally holds that the negligence of an independent contractor cannot be

[1] https://www.irs.gov/faqs/small-business-self-employed-other-business/form-1099-nec-independent-contractors

imputed to his principal. Based upon the well-established law and uncontroverted facts, the trial court properly granted summary judgment in favor of Vida Café.

In this appeal, Plaintiff/Appellant again attempts to thwart these undisputed facts and obfuscate the law by asserting two theories in less than two page: (1) Hernandez had "apparent authority" from Vida Café and (2) Hernandez was a "borrowed employee." Plaintiff woefully tries to establish "apparent authority" based upon Hernandez's use of Vida Café's Restaurant Depot's card after he shopped on the day of the incident. However, the apparent authority cannot be established solely by proof of the conduct of the supposed agent. *Mercer v. Weyerhaeuser Co.*, 324 N.J. Super. 290, 318 (App. Div. 1999). Rather, Plaintiff must show reliance on the appearance of authority in order to invoke the doctrine. In this case, to succeed on such a theory, Plaintiff must offer facts that she relied upon Hernandez's presentation of Vida Café's card to her detriment to establish such a claim. Those facts simply do not exist in this case, thus making the theory of apparent authority inapplicable to this case.

Nor can Plaintiff establish that Hernadez was not a "borrowed employee" of Vida Café. This is a completely nonsensical argument because Hernandez is (1) not an employee of Vida Café and (2) was not borrowed by anyone. This argument is another attempt to throw

proverbial spaghetti at the wall to see what sticks so Plaintiff can maintain her claims.

Despite Plaintiff's creative machinations of the law, no factual or legal basis exists to find Defendant/Respondent Vida Cafe liable for Plaintiff's injuries. Vida Café submits that the trial court properly granted summary judgment in favor of Vida Café and therefore requests that this Court affirm the trial court's decision and deny Plaintiff's request for relief.

STATEMENT OF FACTS

Plaintiff alleges that April 26, 2019, while Plaintiff was shopping at Restaurant Depot in Hackensack, New Jersey, she was hit with a U-boat cart operated by Miguel Hernandez. (Pa231-239) Plaintiff alleges under the doctrine of *respondeat superior*, Vida Café is responsible for Hernandez's act. However, as will be set forth below, the undisputed facts establish that Hernandez was unequivocally not an employee, but rather an independent contractor for Vida Cafe.

Since 2018, Vida Café pays Hernandez One Hundred Fifty Dollars ($150.00) for each shopping trip shop he makes for Vida Café. (Pa00067, Pa00069). At the end of the year, Vida Cafe provides Hernandez with an IRS 1099 tax form. (Ra00006) Hernandez testified that he is not solely reliant on his income from Vida Café as a means of employment. (Pa00082)

In 2019, at the time of accident, Hernadez retained Restaurant Depot cards for Vida Café as well as other businesses. (Pa00082, Pa00084) Hernandez also shopped at Restaurant Depot on behalf of various entities, both commercial and individuals, and testified that he could shop for multiple entities in one trip. (Pa00082, Pa00083, Pa00086)

To utilize Hernandez's services, Vida Café provides Hernandez with a list of products via text message, Whats App, or a phone call for "essentials" like "rice, seasonings, beans, oil, butter."

(Pa00065, Pa00078, Pa00088) Vida Café does not provide Hernandez with instructions on how to conduct his shopping assignments at Restaurant Depot. (Pa00070, Pa00076, Pa00086) There is no dispute that Hernandez shops for Vida Café only on Mondays and Thursdays. (Pa00074-00075). Vida Café manager Victor Santos testified that he does not know the schedule that Hernadez keeps when shopping for other entities at Restaurant Depot. (Pa00070)

According to the Restaurant Depot Accident Witness Statement, on the day of the subject incident, Friday, April 26, 2019, Plaintiff Snezana Sumulikoski shopped in the meat department of Restaurant Depot, at which time Hernandez was pushing the cart at the time of the injury. (Pa00153-154, Pa00156, Pa00157). According to the Accident Form, Hernandez showed the Restaurant Depot employee a card allegedly provided to him by Vida Café. (Pa00158-159).

Hernandez testified that he does not know what entity he was shopping for on the day of the incident, April 26, 2019. (Pa00083, Pa00084, Pa00086). Hernandez also always supplies Vida Café with a receipt for purchases he made on the restaurant's behalf. (Pa00075) Vida Café manager Santos testified that Vida Café has no credit card records or Restaurant Depot receipts to establish Hernandez shopped on its behalf on April 26, 2019. (Pa00075) Bank statements were also provided in discovery that showed no purchases

were made on Vida Café's debit card on the day of the subject incident.

Hernandez further testified that even if he used the Vida Café Restaurant card to gain entrance at Restaurant Depot, it did "not necessarily" mean that he purchased those items for Vida Café. (Pa00083)

PROCEDURAL HISTORY

Plaintiffs filed their initial complaint on March 25, 2021. On May 7, 2021, Plaintiffs filed an Amended Complaint adding Hernandez and Mamajuana Café as additional defendants with additional causes of action. The incorrect Mamajuana Café was named, resulting in Plaintiffs filing a Second Amended Complaint on December 1, 2021 which named Vida Café d/b/a Mamajuana Café. Vida Café filed an Answer on April 4, 2022.

On July 28, 2023, at the current expiration discovery date, Vida Café moved for summary judgment.

On August 25, 2023, the trial court conducted oral argument and granted Vida Café's motion for summary judgment. The reasons provided by Judge John D. O'Dwyer, P.J.Cv. are as follows:

> The essential difference between an employment and an independent contractor is the one who hires an independent contractor has no right to control the manner in which the work is to be done. Rather, the work performs out of the contractor's own enterprise and the contractor is properly charged with responsibility for preventing the risk of injury.
>
> The facts demonstrate that Miguel Hernandez worked for Vida Café on a (indiscernible) basis using a 1099 form on a trip-by-trip basis for said fee. As stated before, he performs similar task for other entities on the same basis. Other than providing a list of goods, details on how the work was to be performed is left to Mr. Hernandez…..(1T:11:12-12:1)
>
> Having analyzed the arguments of both Plaintiff and Restaurant Depot in opposition of the motion for summary judgment to Vida Café, this

> Court finds Vida Café is entitled to summary judgement. Miguel Hernandez was not the agent of Vida Café.
>
> Apparent authority does not fit this factual scenario. There is no reliance in this matter to the fact that he had an access card, to this Court, doesn't appear to be a factor that impacts the analysis. Furthermore, he was not a borrowed servant. Vida Café did not control directly or broadly the actions of Miguel Hernandez.
>
> It's generally, an employer is a person engaged to perform service for another employer. The employee who is subject to the employer's control or the control of the physical conduct provided (indiscernible) by the Plaintiff. Stop There. It's generally understood, where an employee is a person engaged to perform services for another. The employee is subject to the employer's control and the control of physical conduct is necessarily required for such service in order to impose liability.
>
> In this matter, the case did not control the conduct of Miguel Hernadez. If one looks at the factors involved in making the analysis, really apparent (indiscernible) is an independent contractor. The café did not exercise control over the details. Mr. Hernandez, as a separate business, performed similar services for multiple other entities shopping for restaurants.
>
> The case did not supply any tools or instrumentalities, et cetera. He was paid on a 1099 form rather than as an employee and the services performed were ancillary to rather than party of the regular business of the café. Furthermore, the parties did not believe they were in a relationship as to employee-employer. All right, that's that. (1T:12:24-14:10)

As Vida Café was successful on its summary judgment motion, it did not participate in the remaining discovery and motions that

ensued; this includes an interlocutory appeal, which was denied by the Appellate Division. An order of judgment was entered against Hernandez on March 14, 2024 and Plaintiff filed a notice of appeal. (Pa 0393-394, Pa0395-398) Vida Café notes that the order granting summary judgment to it was not part of the initial notice of appeal and was only included in Plaintiff's amended brief.

STANDARD OF REVIEW

The Appellate Division's review of the trial court's summary judgment order, while *de novo*, must still apply the same legal standard set forth in R. 4:46-2. *Prudential Prop. & Cas. Ins. Co. v. Boylan*, 307 N.J. Super. 162, 167 (App. Div.), *certif. denied*, 154 N.J. 607 (1998). The Court does not weigh the evidence, but instead must decide if there are genuinely disputed issues of fact sufficient to defeat summary judgment and sufficient to submit to a jury R. 4:46-2(c); *see also Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995). The Appellate Division's record remains confined to that reviewed by the trial court. *Lombardi v. Masso,* 207 N.J. 517, 542 (2001). If "the evidence 'is so one-sided that one party must prevail as a matter of law,' " summary judgment is still proper. *Brill*, 142 N.J. at 540.

As will be set forth below, applying the standard for summary judgment mandates retaining judgment in favor of Vida Café. Plaintiff's request for relief must be denied, as the law cannot impute Hernandez's alleged negligent acts as an independent contractor to Vida Café. Reviewing the record before the Court in a light most favorable to Plaintiff demonstrates that the trial court's rational, fact-based decision granting summary judgment to Vida Café was proper and should not be overturned by this Court.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY GRANTED VIDA CAFÉ'S MOTION FOR SUMMARY JUDGMENT BECAUSE VIDA CAFÉ CANNOT BE HELD VICARIOUSLY LIABLE FOR THE INDEPENDENT CONTRACTOR'S NEGLIGENT ACTS AS A MATTER OF LAW

The New Jersey Supreme Court consistently holds that a principal is not liable for the negligent acts of an independent contractor. *Puckrein v. ATI Transp., Inc.*, 186 N.J. 563, 574 (2006). The Court reasons that the central difference between an employee and an independent contractor is that one who hires an independent contractor "has no right of control over the manner in which the work is to be done." *Baldasarre v. Butler*, 132 N.J. 278, 291 (1993). Instead "it is regarded as the contractor's own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility for preventing the risk …." *Id. See also Majestic Realty Assocs., Inc. v. Toti Contracting Co.*, 30 N.J. 425, 430-31 (1959) ([O]rdinarily where a person engages a contractor…he is not liable for the negligent acts of the contractor in the performance of the contract). The undisputed nature of Hernandez and Vida Café's relationship warrants summary judgment in favor of Vida Café.

In this case, there is no factual dispute that Hernandez always operated as an independent contractor retained by Vida Café on an as-needed basis. The undisputed testimony of both Hernandez

and Vida Café's manager Victor Santos confirms that Hernandez was not an employee of Vida Café, but instead was hired as an independent contractor who shopped at Restaurant Depot one to two times a week, on Mondays and Thursdays. (Pa00066, Pa00069, Pa00074, Pa00075, Pa00085) The nature of the relationship is further exemplified with Hernandez's IRS Form 1099 from Vida Cafe, which is used specifically by a person who is not an employee for services, and instead is an independent contractor. (Ra00006) Thus, Vida Café and Miguel Hernandez understood and intended the scope of the relationship to be that of an independent contractor and principal. Therefore, Vida Café cannot be responsible for any alleged negligence on Hernandez' part and remains entitled to summary judgment.

Not surprisingly, Plaintiff's brief does not even address the undisputed fact that Hernandez is an independent contractor for Vida Café. However, for the completeness of the record, Vida Café will establish that none of the specific exceptions to the law apply because the undisputed facts establish that (i) Vida Café does not retain control over the manner and means by which the work is performed; (ii) shopping does not constitutes a nuisance per se; and (iii) there is no proof that Vida Café knowingly engages an incompetent independent contractor. *Majestic Realty Assocs.*, 30 N.J. at 431.

A. Vida Café does not retain control over the manner and means in which Miguel Hernandez shopped.

"Supervisory acts performed by the employer will not give rise to vicarious liability where the supervisory interest relates only to the result to be accomplished, not to the means of accomplishing it." *Mavrikidis v. Petullo*, 153 N.J. 117, 135 (1998).

Other than providing Hernandez with a list of products, Vida Café retains no control over the details of Miguel Hernandez' activities. Hernandez shops for provisions on a weekly or bi-weekly basis for the restaurant after receiving a shopping list from Vida Café. Hernandez is paid by Vida Café by trip. (Pa00065, Pa00066, Pa00069, Pa00078, Pa00088). Vida Café provides no specific instructions regarding how much time Mr. Hernandez should spend shopping, how many other clients he could simultaneously shop for, nor what type of vehicle he uses to transport the goods. (Pa00070, Pa00076, Pa00082, Pa00083, Pa00086) Vida Café did not retain the right to control how the work was completed. Vida Café simply provides a list of the requested goods. Hernandez shops and delivers the food. Therefore, this exception cannot apply.

B. Shopping for a customer is not a per se nuisance.

A nuisance per se signifies "that danger inheres in the activity itself at all times, so as to require special precautions to be taken with regard to it to avoid injury. It means more than

simply danger arising from the casual or collateral negligence of persons engaged in it." *Majestic Realty Assocs.*, 30 N.J. at 435. Generally, per se nuisance activities involve "the use of instrumentalities, such as fire or high explosives, which require constant attention and skillful management in order that they may not be injurious to others …." *Restatement (Second) of Torts* § 427 comment a.

No facts or law exist to warrant the application of this exception. As cited in Restaurant Depot, "[s]hopping carts are not dangerous instrumentalities, and they are uniquely suitable for the purpose for which furnished." *Znoski v. Shop-Rite Supermarkets, Inc.*, 122 N.J. Super. 243, 247-48 (App. Div. 1973). Nor has Plaintiff presented any facts demonstrating that the activity Hernandez was conducting on the date of the accident was a nuisance per se. Thus, no reasonable factfinder would find that shopping for provisions in a wholesale restaurant equipment and supply center is so inherently dangerous as to void the well-accepted rule.

C. No facts establish Hernandez as an incompetent contractor.

To prevail against the principal for hiring an incompetent contractor, "a plaintiff must show that the contractor was, in fact, incompetent or unskilled to perform the job for which he/she was hired, that the harm that resulted arose out of that

incompetence, and that the principal knew or should have known of the incompetence." *Puckrein*, 186 N.J. at 576. However, "no presumption as to the negligence of an employer in hiring an independent contractor arises from the fact that, after being hired, the contractor is negligent in the performance of his duties and injures the person or property of another." *Mavrikidis,* 153 N.J. at 136; *see also Cassano v. Aschoff*, 226 N.J. Super. 110, 114 (App. Div. 1988) (the fact that a contractor is negligent or incompetent in the manner in which he performs a particular job does not mean that he is incompetent generally).

In this case, the record is devoid of evidence that Hernandez was incompetent, that Plaintiff's harm arose from that alleged incompetence, or that Vida Café knew or should have known of that incompetence. In fact, the record shows that Hernandez was experienced at procuring restaurant supplies on behalf of several companies and individuals that engage his services. He successfully worked for Vida Café since 2018 with no incident. (Pa00069, Pa00085) No reasonable factfinder could find that even if Hernandez was indeed incompetent at the time of the accident, that the incompetence would qualify as an exception to the well-established rule.

Thus, no exceptions apply to abrogate Hernandez's status as independent contractor at the time the incident, whether or not he was shopping on behalf of Vida Café, thereby nullifying any

attribution of liability to Vida Café. As there is no material fact in dispute as to Hernandez's status as an independent contractor, the trial court correctly ruled that Vida Café was entitled to judgement as a matter of law. This ruling should be affirmed.

POINT II

CONTRARY TO PLAINITFF'S ARGUMENT, THE TRIAL COURT PROPERLY RULED THAT VIDA CAFÉ HAS NO APPARENT AUTHORITY OVER HERNANDEZ.

Plaintiffs cannot dispute that Vida Café hired Hernandez as an independent contractor. There is also no proof that Hernandez actually shopped for Vida Café on the day of the incident. However, to circumvent these facts and cloud the law, Plaintiff again attempts to argue that Hernandez's liability can be imposed on Vida Café under the doctrine of apparent authority. *Sears Mortg. Corp. v. Rose*, 134 N.J. 326, 337-38 (1993). Yet the fatal flaw in this analysis is that Plaintiff never "relied" on Hernandez being an alleged employee of Vida Café and that this reliance, in turn, somehow caused Plaintiff's injury. Without showing actual reliance by Plaintiff, Plaintiff cannot meet her requisite burden of proof needed to establish the doctrine of apparent authority.

Reliance is an essential element to proving apparent authority. *Wilzig v. Sisselman*, 209 N.J. Super. 25, 36 (App. Div.), *certif. denied*, 104 N.J. 417 (1986). However, reliance is a legal term of art, and requires more than Restaurant Depot completing an incident form and taking a picture of the card and Plaintiff using this form as a basis for filing suit against Vida Café. The Court requires an affirmative act by Plaintiff demonstrating that her alleged reliance on the "apparent

authority" of Hernandez caused her to behave differently to her detriment. There is no such reliance in this case.

For instance, in *Mercer v. Weyerhaeuser Co.*, 324 N.J. Super. 290, 319-320 (App. Div. 1999), the plaintiffs sued manufacturer Weyerhaeuser as well as a home seller for the negligent selection of aluminum windows for its homes. In their testimony, Plaintiffs claimed that Weyerhaeuser was a successful building company and that the builder, Scarborough's affiliation with it was an important factor in making their purchase decision of a home. Defendant Scarborough used Weyerhaeuser on business cards, brochures, press lists correspondence and newspaper advertisement. On appeal, the Court determined that Weyerhaeuser was not entitled to summary judgment on the issue of apparent authority because when Weyerhaeuser authorized a third party (Scarborough) to use its logo on business cards brochures, press lists and correspondence and advertisements at the time plaintiffs purchased their homes, it caused plaintiffs to act on the third-party credentials and affiliation with the manufacturer. The Court concluded that Plaintiffs' reliance on the advertising in its decision-making process prevented Weyerhaeuser from obtaining summary judgment on the issue of apparent authority. *Id.* at 321.

Similarly in *Arthur v. St. Peters Hospital*, 169 N.J. Super. 575, 577 (1979) a hospital was considered to have apparent

authority over the doctors, who were independent contractors, but who worked in the hospital's emergency department.

Both cases demonstrate that apparent authority exists when the plaintiff acted in a particular manner because of the alleged apparent authority that veiled the tortfeasor.

However, as in this matter, where there is no reliance, there is no apparent authority and the Appellate Division should affirm that trial court's grant summary judgment as the Supreme Court did in *Bahrle v. Exxon Corp.*, 279 N.J. Super. 5, 15 (App. Div. 1995), *aff'd*, 145 N.J. 144 (1996). In *Bahrle v. Exxon Corp.*, plaintiffs' wells were contaminated by seepage from a local gas station. *Id.* Plaintiffs sought to hold the national oil company, defendant Texaco Corporation, liable on a theory of apparent authority. Plaintiff's argument was that all gas stations bearing a "Texaco" sign were under the control of corporate Texaco and had a product of a certain quality, thereby rendering Texaco liable for the local gas station's seepage. *Id.* at 24-25. In rejecting Plaintiff's apparent authority argument in *Bahrle*, the Court noted that:

> [T]his is not a case where a patron had relied on the oil company's insignia or its advertising in seeking out the service of a local station, and was injured as a result of that service being rendered. Plaintiffs produced absolutely no evidence that they in any manner relied upon the fact that [the] station was a Texaco station. Not a single

> plaintiff testified that they moved into the area ultimately contaminated in reliance on the fact that the station displayed the Texaco insignia. Nor is there any proof that plaintiffs remained residents in the neighborhood . . . because they had relied on the fact that Texaco was in control of the station and would thus prevent it from becoming a source of contamination. Therefore, there was no factual or legal basis to hold Texaco liable on a vicarious liability theory.

[*Id.* at 26-27.]

Similarly in *Simpkins v. 7-Eleven, Inc.*, 2008 N.J. Super. Unpub. LEXIS 2450, *22-24 (App. Div. 2008), the Court granted summary judgment to a national franchise in a case where Plaintiff, a customer at a local 7-Eleven convenience store, was attacked and stabbed by another customer. (Ra0009) The injured party brought suit against both 7-Eleven Corp. and the individual franchisee. Despite Plaintiff's assertion that 7-Eleven had apparent authority over the franchisee, the Court determined that there was no evidence that Plaintiff relied in any way on the fact that the independently-owned store was a 7-Eleven franchise.

> Plaintiff made this point clear in the following deposition testimony:
>
> Q. Now, why did you go to the 7-Eleven store?
> [PLAINTIFF]: To get cigarettes and coffee and something to eat.
> Q. Why did you choose 7-Eleven?
> [PLAINTIFF]: It was the closest store around from my sister's house.

Because the Court concluded there was simply no evidence to establish the essential element of reliance, without which a claim

of apparent authority cannot be sustained as a matter of law, summary judgment was granted to the corporate 7-Eleven. *Id.*

In this case, there is no evidence proffered by Plaintiff that her conduct was somehow altered because she believed that Hernandez was a Vida Café employee. Nor is there evidence of any conduct by Restaurant Depot, other than taking a picture of the membership card, of which Hernandez had several, acted differently because Hernandez presented the card. If fact, there is no evidence that Vida Café was even involved in this Friday shopping trip.

Plaintiff takes the term "reliance" out of context from well-established case law in a weak attempt to keep Vida Café in this case. Plaintiff's only "reliance" on Hernandez showing a Vida Café care was for purposes of completing an incident form and suing Vida Café. This is certainly not the level of reliance set forth in *Mercer, infra,* and *Arthur, infra*, in which a party made decisions because she relied on another party's apparent authority. Since there are no facts establishing any actual reliance by Plaintiff, Plaintiff cannot establish Vida Café's alleged apparent authority over Hernandez. Therefore, Hernandez's status as an undisputed independent contractor remains unchanged and warrants summary judgment in favor of Vida Café. The trial court's decision should be affirmed by this Court.

POINT III

THE TRIAL COURT PROPERLY DETERMINED HERNANDEZ IS NOT A BORROWED EMPLOYEE.

Simply put, Hernandez is not a borrowed employee and this argument makes no sense when applied to these facts. To be a borrowed employee, the alleged tortious individual needs to be borrowed from another employer. The general employer loans its worker to another employee, known as a special employer. *Patano v. New York Shipping Ass'n*, 254 N.J. 101, 111 (2023). There is no general employer loaning out its employee to Vida Café. Nor is Vida Café loaning out an employee. The facts of this case belie this argument as it is undisputed that Hernandez was an independent contractor, not borrowed from anyone or any company. Plaintiffs' argument is a red herring and in no way changes Hernandez's status as an independent contractor. Vida Café submits that there is nothing in the record that creates a material issue of fact, warranting a reversal of the trial court's order based upon the "borrowed employee" doctrine.

CONCLUSION

Based upon the foregoing reasons, Vida Café respectfully submits that summary judgment was properly be granted by the trial court. This Court should now affirm its entry and deny Plaintiff's relief.

Respectfully submitted,

O'TOOLE SCRIVO LLC

/s/*Amy E. Robinson*
Amy E. Robinson

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002256-23

	: ON APPEAL FROM:
SNEZANA SUMULIKOSKI and	:
SIME SUMULIKOSKI, her husband	: SUPERIOR COURT OF NEW JERSEY
	: LAW DIVISION: BERGEN COUNTY
Plaintiffs,	: DOCKET NO.: BER-L-2002-21
	:
-vs-	:
	: CIVIL ACTION
RESTAURANT DEPOT, MIGUEL	:
PEREZ-HERNANDEZ, VIDA CAFÉ,:	
INC. d/b/a MAMAJUANA CAFÉ	:
JOHN DOE 1-10; JANE DOE 1-10;	: Sat Below:
JOHN DOE CORP 1-10, fictitious	:
names,	: HONORABLE JOHN D. O'DWYER,
	: P.J.Cv.
Defendants.	:
	:

REPLY BRIEF FILED ON BEHALF OF PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Defendant, Restaurant Depot contends that the trial court properly granted summary judgment because: Plaintiffs cannot prove that Restaurant Depot was negligent without expert testimony; Plaintiffs cannot establish that it breached any duty; and, Restaurant Depot did not fail to preserve evidence. Restaurant Depot attempts to shift the Court's focus away from the central issue in this case – that is, the spoliation of surveillance footage leading up to, and including the moment, co-Defendant Perez-Hernandez struck and injured Plaintiff with an overloaded Restaurant Depot U-boat. Restaurant Depot should not be permitted to have engaged in self-serving maneuvers and benefit from the destruction of evidence it rightfully knew would have aided Plaintiffs in proving their case and be permitted to escape liability by claiming that Plaintiffs lack the requisite proofs to prove their claim.

Plaintiffs assert that because of Restaurant Depot's failure to maintain the surveillance footage, Plaintiffs are entitled to an adverse inference jury charge and rebuttable presumption that the missing evidence would be unfavorable to Restaurant Depot. Moreover, Plaintiffs contend that they can establish negligence on the part of Restaurant Depot without the need for expert testimony.

Separately, co-Defendant, Vida Café contends that the trial court's grant of summary judgment was appropriate because at the time Perez-Hernandez struck Plaintiff, Perez-Hernandez was an independent contractor and not an employee and

that Vida Café cannot be found liable. Plaintiffs assert that Vida Café should be found vicariously liable for Perez-Hernandez's negligent acts under one of the recognized exceptions pertaining to independent contractors.

LEGAL ARGUMENT

I. CONTRARY TO RESTAURANT DEPOT'S CONTENTION, DEFENDANT BREACHED ITS DUTY TO PRESERVE EVIDENCE

Defendant, Restaurant Depot, claims that there was no basis for it to preserve the surveillance footage that existed on the date that Plaintiff was struck by a Restaurant Depot U-boat because it alleges that it is undisputed that no video evidence of the actual incident exists. Yet, such conclusion is premised solely upon its reliance on the judgment of Michael Hidasi ("Hidasi"), who was assistant store manager at the time of Plaintiff's incident. Hidasi was the lone individual who reviewed the surveillance videos on the day of the incident to ascertain what was present on the footage and who ultimately determined, without consulting any other personnel, including personnel from the corporate office, not to retain footage simply because he could not find a clear video of the moment of impact. (Pa96-Pa-97) Similar to the Court's recognition in Nagy v. Outback Steakhouse, Civil Action No. 19-18277(MAS)(DEA), 2024 U.S. Dist. LEXIS 29288, *1-22, *11-12 (D.N.J. Feb. 21, 2024) that "[i]t is unclear to the Court how a sophisticated litigant can reasonably expect to fulfill its duty to preserve evidence by leaving the responsibility of that

preservation in the hands of [a] restaurant manager who is given absolutely no guidance as to Outback's preservation duties," Restaurant Depot's manager, who was tasked with preserving video, also had no guidance regarding the preservation of surveillance footage as evidenced by his decision not to preserve any footage whatsoever simply because he did not see the point of impact.

However, had Restaurant Depot implemented a more specific video surveillance retention policy regarding in-store customer incidents, Hidasi would have ensured the preservation of footage from all available cameras. The retention of such footage would have shown Perez-Hernandez, at a minimum, pushing his overloaded U-boat throughout the store, up to, and including the time the incident occurred that calendar day. It would have also been probative of issues such as how long the dangerous condition, caused by Perez-Hernandez's overloaded U-boat, existed, and the failure on the part of Defendant's employees to take the necessary affirmative steps to cure the hazard.

Moreover, Hidasi testified that by his estimate, the Hackensack location had between 20 and 30 different surveillance camera locations throughout the store and that if there was an incident, store personnel could register the time code and the camera number and send such information to the corporate office, since corporate had the ability to pull and save the footage (Pa96). Rather than rely on his own judgment, Hidasi at the very least, should have noted all relevant cameras that he

briefly reviewed so that personnel from the corporate office could have further reviewed all available footage. This would have been accomplished had Restaurant Depot had a specific video surveillance retention policy regarding in-store incidents.

Our courts recognize the tort of spoliation. Jerista v. Murray, 185 N.J. 175, 201 (2005) (See Rosenblit v. Zimmerman, 166 N.J. 391, 400-01 (2001)). While a duty to preserve evidence is not boundless, a duty arises when there is: (1) pending or probable litigation; (2) knowledge by the party of the existence or likelihood of litigation; (3) foreseeability of harm or prejudice to another party if the evidence were discarded; and (4) evidence relevant to the litigation. Hirsch v. General Motors Corp., 266 N.J. Super. 222, 250-51 (Law Div. 1993).

An analysis of these factors as applied to the facts of this case overwhelmingly shows that Restaurant Depot had an affirmative duty and was under an obligation to preserve all surveillance footage, preceding and including the point of impact, that day. First, such a duty arose when store personnel became aware of the incident, which created a probability of litigation. Second, store personnel took affirmative steps to document the incident for no other purpose than the anticipation of litigation. Third, Restaurant Depot knew of Plaintiff's injury, the prospects that litigation would ensue, and that Plaintiff would be prejudiced by her inability to utilize surveillance footage. Lastly, since the issue surrounding this matter involves the failure on the part of Restaurant Depot's employees to remediate the risk of harm caused by Perez-

Hernandez's overloaded U-boat, any surveillance footage that should have been preserved by Restaurant Depot would have been relevant to this litigation. Defendant's characterization that the imposition of such a duty on retaining footage amounts to some kind of "super duty" is simply false.

Having met the elements necessary to succeed on a spoliation claim, Plaintiffs further contend that the trial court failed to recognize that an adverse inference charge is appropriate under the circumstances. Such an inference allows the jury to infer that the destroyed or concealed evidence would have been unfavorable to the spoliator. Jerista,185 N.J. at 202 (citing Rosenblit, 166 N.J. at 401-02).

Defendant's reliance on Davis v. Barkaszi, 424 N.J. Super. 129 (App. Div. 2012) as to why Plaintiff should not be afforded an adverse inference charge is misplaced and is easily distinguishable from the instant matter. In Davis, Defendant bar, who learned about the accident after it occurred, had its owner review the surveillance footage and saw nothing that would contradict the bartender's account of the evening, the latter of whom testified that defendant-patron did not act inappropriately at any point prior to him leaving the bar.

Unlike the bar, who had the difficult task of attempting to identify whether the patron was visibly intoxicated based on surveillance footage, the Restaurant Depot incident involved the use of an overloaded U-boat and a distinct, physical injury to Plaintiff that was easily identifiable on footage. Perhaps most importantly, while the

bar's owner had no reason to expect that plaintiff would bring suit against it since the patron was involved in an accident with a third party, which did not occur on the bar's premises, Plaintiff's incident occurred while she was an invitee on Plaintiff's premises and Defendant was put on notice of Plaintiff's injury and possible litigation.

Restaurant Depot argues that Nagy is distinguishable chiefly because the video of plaintiff's fall was actually recorded on Outback's surveillance camera and because Outback was served with a preservation letter. To support its argument, Defendant relies upon its faulty assumption that video of Perez-Hernandez striking Plaintiff was never captured on surveillance footage. Such an assumption is based on Mr. Hidasi's own determination that the video surveillance he reviewed did not capture the moment of impact.

However, had Mr. Hidasi simply provided the footage to the corporate office, corporate personnel could have further reviewed the tapes, which likely, would have captured the point of impact from one of the 20 to 30 different cameras situated throughout the store. (Pa96) Assuming arguendo that even if the moment Plaintiff was struck was not actually recorded, the many cameras located throughout the store would have shown Perez-Hernandez pushing his overloaded U-boat as he made his way through the store. Additionally, Outback had been served with a preservation letter, evidently, because plaintiff retained counsel immediately following her injury.

Plaintiffs, in the instant matter, could not possibly have been expected to serve a preservation letter upon Restaurant Depot because Plaintiffs did not retain counsel to represent them until approximately eight (8) months after the incident.

In a last-ditch effort to try and distinguish the facts of Nagy from the instant matter, Defendant notes that the Nagy Court found that Outback had preserved some but not all of the most pertinent video evidence. However, as the Nagy Court indicated "[i]n this case, whether no video was produced or an incomplete selectively-preserved clip was produced, the result is the same; namely, that [p]laintiffs are deprived of evidence relevant to the claims in this case."

Retaining such footage would not have been unduly burdensome to Restaurant Depot. This is evidenced by Hidasi's testimony as to the feasibility of preserving footage, which could be retained simply by registering the timecode and camera number and sending that information to the corporate office. (Pa96)

II. ALTHOUGH DEFENDANT SPOLIATED CRITICAL EVIDENCE AND PREVENTED PLAINTIFFS FROM RETAINING AN EXPERT, RESTAURANT DEPOT OWED PLAINTIFF A NON-DELEGABLE DUTY AND BREACHED THAT DUTY

While Plaintiffs identified a liability expert and made every effort to retain that expert, the identified expert was not retained because he could not review the events surrounding the incident and appropriately render a report because of Restaurant Depot's failure to preserve such footage. Defendant asserts that Plaintiffs

violated R. 1:6 because Plaintiffs presented no information attesting to the fact that the expert needed access to the surveillance footage in order to render an opinion. Plaintiffs' counsel, as an officer of the court, did certify to the trial court as to the veracity of this information.

Our Supreme Court has acknowledged that "[a]s to the absence of expert testimony, except for malpractice cases, there is no general rule or policy requiring expert testimony as to the standard of care." Butler v. Acme Mkts., 89 N.J. 270 (1982). "The test as to whether expert testimony is needed is whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the party was reasonable." Id. at 283. Despite the prejudicial effect of Restaurant Depot's decision not to retain all pertinent surveillance footage has had on Plaintiffs, expert testimony is not required in the instant matter because the subject matter is such that jurors of common judgment and experience can form a valid judgment as to the proper use of a U-boat, and whether the conduct of Restaurant Depot was reasonable.

In addition, Defendant's assertion that jurors would be left to speculate as to whether the U-boat was overloaded is simply wrong, as the Accident Investigation Form completed by Restaurant Depot indicates that Plaintiff was struck with a "full U-boat" (Pa153), confirming that the merchandise was stacked too high. This was also corroborated by Plaintiff's testimony at the time she viewed the surveillance

footage, whereby an employee (presumably, Hidasi) "made a comment [as to] how full the customer's cart [was]" (Pa32)

Among the cases which Defendant relies upon as to why it believes expert testimony is required in the instant matter to establish the requisite standard of care are Giantonnio v. Taccard, 291 N.J. Super. 31 (App. Div. 1996) and Dare v. Freefall Adventures, Inc., 349 N.J. Super. 205 (App. Div. 2002). In Giantonnio, the Court noted that expert testimony was necessary to establish the requisite standard of care for a funeral procession because such a procession "constitutes a *complex* process." 291 N.J. Super. at 44. (emphasis added) In Dare, the Court opined that "skydiving requires the training and licensing of participants." 349 N.J. Super. at 215. No such complexity or special licensing to operate a U-boat exists in the instant matter, as a jury certainly has sufficient knowledge to form a valid judgment as to whether Restaurant Depot's conduct was reasonable by not addressing the hazardous condition caused by Perez-Hernandez's overloaded U-boat.

Therefore, even without the aid of expert testimony, Plaintiffs should be permitted to go before a jury because Plaintiffs can demonstrate that Restaurant Depot owed Plaintiffs a non-delegable duty to use reasonable care to protect Plaintiff against known or reasonably discoverable dangers, and breached that duty, by not only failing to implement policies and procedures to address the risk of overloaded U-boats, but also by failing to provide and implement adequate training and

protocols to its employees to ensure proper use of the U-boats by its customers. To establish a cause of action for negligence, three (3) elements must be proven: (1) a duty of care owed by defendant to plaintiff; (2) a breach of that duty of care; and (3) an injury to plaintiff proximately caused by defendant's breach. Endre v. Arnold, 300 N.J. Super. 136, 141 (1997) (citations omitted).

To determine whether the owner of property had a duty in particular circumstances to the injured person, a court must examine such factors as: (1) the relationship of the parties, (2) the nature of the attendant risk, (3) the opportunity and ability to exercise care, and (4) the public interest in the proposed solution. Meier v. D'Ambrose, 419 N.J. Super. 439, 445 (App. Div. 2011)

In analyzing the relationship of the parties, Plaintiff was clearly an invitee, as her presence was solely occasioned by the fact that she was invited onto Restaurant Depot's premises for business purposes to purchase a food product. Second, the nature of the risk was significant in that Restaurant Depot provided heavy duty equipment on its premises, namely the use of its industrial grade flatbed U-boats that could easily be overloaded. Third, Restaurant Depot, as the operator of the premises and given the nature of its business, had an opportunity to and ability to exercise care. Fourth, the public interest commands that Restaurant Depot be found to owe a duty of care to Plaintiff because the public interest is served by requiring Restaurant Depot to maintain its premises in a safe condition for its invitees.

Plaintiff can also satisfy its burden of establishing that Restaurant Depot breached its duty of care under a premises liability theory, See Jerista, supra, 185 N.J. at 191, by not only failing to provide appropriate training, but also by failing to implement policies and procedures for its employees concerning U-boat usage. Steven Kolomer, regional manager for the Hackensack location at the time of Plaintiff's incident, and Hidasi, have established, through their testimony, that there is no company-wide policy or safety program that exists to train its employees on the dangers posed by overloaded U-boats. (Pa113-Pa114; Pa94-Pa95) The absence of implementing such a program is indicative of Restaurant Depot's failure, as a business owner, to abide by its duty of reasonable care to provide a safe environment to invitees on its premises.

Moreover, Restaurant Depot had actual and/or constructive notice of the dangerous condition that caused the accident. According to Plaintiff's testimony, employees were "everywhere" at the time she shopped at the store (Pa15). In addition, Perez-Hernandez's pushing a Restaurant Depot supplied U-boat throughout the store with merchandise stacked so high that it obstructed his vision is indication that the unsafe condition would have been present for a sufficient length of time to alert store personnel that were positioned throughout the store.

Defendant's reliance on Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238 (App. Div. 2013) and Dombrowska v. Kresge-Newark, Inc., 75 N.J. Super. 271 (App.

Div. 1962) is also entirely misplaced for its proposition that there is no proof in the record that Restaurant Depot had constructive notice of any potentially dangerous issues with regards to Perez-Hernandez's use of the U-boat. Unlike a small discarded calling card or a defect in an escalator that is completely hidden from view, the size of both the industrial U-boat and the products that were stacked too high on it would have been visually apparent to store personnel and should have prompted them to remediate the dangerous condition.

III. ALTHOUGH PEREZ-HERNANDEZ WAS AN INDEPENDENT CONTRACTOR AND NOT AN EMPLOYEE OF VIDA CAFÉ, VIDA CAFÉ SHOULD BE HELD VICARIOUSLY LIABLE

Vida Café's premises its argument that it cannot be held vicariously liable for Perez-Hernandez's negligent acts because Perez-Hernandez was not an employee, but rather was an independent contractor. Although Plaintiff does not dispute that Perez-Hernandez was an independent contractor of Vida Café, Vida Café should be held vicariously liable for his tortious conduct which caused injury to Plaintiff. One of the exceptions to the general rule of nonliability of principals/contractees for the negligence of their independent contractors is where the landowner or principal retains control of the manner and means of the doing of the work which is the subject of the contract. See Mavrikidis v. Petullo, 153 N.J. 117, 133 (1998)

Plaintiffs submit that because Vida Café retained control over Perez-Hernandez's work, the exception to the independent contractor rule is applicable.

Victor Santos ("Santos"), director of operations of Vida Café, testified that Perez-Hernandez, since 2018, was the individual who was hired to shop at Restaurant Depot on behalf of Vida Café in exchange for a fee for his services. (Pa68-68; Pa72) Vida Café provided specific instructions as to when he was to shop at Restaurant Depot. Depending upon the season, he was directed, by Vida Café, to shop on specific days. (Pa75) He was instructed to purchase specific products for Vida Café. (Pa75) He was directed to deliver those products to Vida Café's store in Manhattan. (Pa87) He was provided with a Vida Café physical debit card, which he always retained to make purchases at Restaurant Depot. (Pa71). He was also given a Restaurant Depot membership card bearing the name of Mamajuana Café, which he kept in his possession. (Pa69; Pa163)

Since Plaintiff has demonstrated that Vida Café retained control over the manner and means in which Perez-Hernandez shopped at Restaurant Depot at the time of Plaintiff's injures, the trial court erred in failing to recognize an exception to the no liability rule of a principal for the torts of an independent contractor.

Plaintiffs contend that Vida Café is also vicariously liable for Perez-Hernandez's negligent acts under apparent authority. In such a scenario, liability is imposed on the principal for its agent's tortious conduct " 'not as the result of the reality of a contractual relationship but rather because of the actions of a principal or an employer in somehow misleading the public into believing that the relationship

or the authority exists.' " Est. of Cordero ex rel. Cordero v. Christ Hosp., 403 N.J. Super. 306, 312 (App. Div. 2008) (internal quotations omitted).

Vida Café makes the unsupported claim that no proof exists that Perez-Hernandez shopped for Restaurant Depot on the date Plaintiff was injured. Yet, the record indicates otherwise. Two (2) receipts produced by Santos revealed that the products purchased on the day of Plaintiff's incident were made at the Restaurant Depot Hackensack location utilizing Mamajuana Café's Restaurant Depot account. (Pa72-Pa74) Vida Café has not presented any proof to cast doubt that Perez-Hernandez was making purchases on behalf of Restaurant Depot.

Furthermore, Vida Café mistakenly contends that Plaintiff did not rely on Perez-Hernandez's representations as being an alleged employee of Vida Café. After Perez-Hernandez struck Plaintiff with his overloaded U-boat, he made various representations regarding his affiliation with Vida Café, which justified both Restaurant Depot, and, in turn, Plaintiff's reliance upon the fact that he had the authority to purchase products on Vida Café's behalf. This caused both parties to perceive that Perez-Hernandez's negligent acts were the responsibility of Vida Café.

At the time that an incident report was created, Perez-Hernandez furnished his Restaurant Depot membership card bearing the name of Mamajuana Café. (Pa163) This establishes that he would not have been admitted into the store on the date of the incident had he not been furnished with Vida Café's membership card. (Pa100)

In addition, the incident report notes that Plaintiff "was asking an employee a question when another customer (*Mamajuana Café*) with a full U-boat pushed against her back . . ." (emphasis added) (Pa153)

Vida Café wrongfully contends that the level of reliance proffered by Plaintiffs is insufficient and is analogous to the Court's finding in Bahrle v. Exxon Corp., 279 N.J. Super. 5 (App. Div. 1995), aff'd, 145 N.J. 144 (1996). The Court found no apparent authority because the corporate entity had no reasonable means of control over the franchisee that resulted in the ensuing injury. Since the owner had no direct relationship with Texaco, there was no reliance by plaintiff that the gas station belonged to defendant oil company. However, the instant matter is distinguishable because Perez-Hernandez was directly hired by Vida Café and made specific outward manifestations that led Plaintiff to rely on those representations and to believe that he was a Vida Café employee.

CONCLUSION

For reasons set forth herein, and in Plaintiffs' initial brief, Plaintiffs contend that the Appellate Court should reverse the trial court's grant of summary judgment to Restaurant Depot and Vida Café and reinstate Plaintiffs' Complaint.

Respectfully submitted,

/s/ *E. Drew Britcher*
E. DREW BRITCHER