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IDELISA PEREZ,

Plaintiff-Appellant,

v.

CALIXTO LEON, CLAUDINA LEON, and/or JOHN DOE I-X (a person, persons, entity or entities whose identity is presently unknown),

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-002582-23

CIVIL ACTION

On Appeal from the Law Division, Hudson County

Docket No. HUD-L-000715-21

Sat Below:

Hon. Anthony V. D'Elia, J.S.C.

BRIEF IN SUPPORT OF THE APPEAL

On the brief and of counsel:

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PRELIMINARY STATEMENT

Plaintiff, Idelisa Perez, fell while traversing a public sidewalk on the property of defendants, Calixto and Claudina Leon, that was unlevel, covered with ice and snow and hazardous. Defendants have acknowledged that the improper slope of the sidewalk was known to them and, in fact, was created by them when they had the sidewalk built. The presence of ice and snow also is undisputed. Those three hazards combined to create a hazardous condition that caused plaintiff's fall and injuries. Nonetheless, the trial court granted summary judgment to defendants.

Defendants presented three arguments that are unsupported by law or fact. First, they claimed they owed no duty to maintain the public sidewalk on their property. That is incorrect as a matter of law and the facts of this case. Defendants have a duty not to create or to exacerbate a dangerous sidewalk condition. They suggest that the condition of the sidewalk was pre-existing so there can be no liability for the hazardous condition that it presented. That claim is definitively negated by the testimony of Calixto Leon that he had the sidewalk constructed while he owned the property, thus creating the dangerous condition. There is no immunity from liability for a hazardous condition created by defendants.

Defendants alternatively claim that the sidewalk is not defective. That is a factual issue that is admittedly disputed and so not resolvable on a motion for summary judgment.

Finally, defendants claimed that plaintiff's expert, Hamid Beg, P.E., provided a net opinion. There was no motion to preclude Mr. Beg's testimony. Nonetheless, the trial court ruled that Mr. Beg's testimony was barred as a net opinion. The court failed to set forth findings of fact or conclusions of law but seemed to conclude that because Mr. Beg did not know the condition of the sidewalk before defendants built the new sidewalk, his opinion was nothing more than a personal opinion. The condition of the sidewalk before defendants installed the existing sidewalk is irrelevant. Mr. Beg relied in part on roadway construction codes in effect at the time of construction of the sidewalk. The court's holding ignores that the applicable codes are appropriate evidence for an expert to consider when determining if the current condition is unsafe. It also ignores the proper bases for an expert's opinion, i.e., experience, training, facts and data in the record, and relevant codes, regulations and industry standards. The decision to bar Mr. Beg was an abuse of discretion.

Defendants acknowledged that Mr. Beg based his opinion on testimony from defendant Calixto Leon and plaintiff, photographs and in-person inspection of the site, measurements of the sidewalk slope, published guidelines for sidewalk

construction and decades of training and experience. Defendants simply did not like what he had to say and hired their own expert to respond. Those opinions should be considered by the factfinder and should not be rejected by the court acting as a preemptive juror.

Implicit in defendants' motion was the claim that they have no duty to keep the public sidewalk on their residential property clear of ice and snow. Again, neither the law nor the facts support that claim. A local municipal ordinance imposes a mandatory duty on defendants to clear snow and ice from sidewalks abutting any street in the Town of West New York. Under the common law, moreover, defendants may be held liable for defects and dangerous conditions of their property that they create. The testimony in the record is that there was snow earlier in the day that had stopped before plaintiff fell and that the location where plaintiff fell was covered in ice and snow. The existence of ice, therefore, allows for the reasonable conclusion that it was not from the storm earlier that day but from a prior weather event and that the sidewalk had been improperly maintained by defendants. That the defects and dangerous conditions caused and created by defendants were obscured by the snow fall from earlier in the day does not absolve them of responsibility for the hazardous conditions. The motion for summary judgment should have been denied, and so the Order below must be reversed.

PROCEDURAL HISTORY

On February 22, 2021, plaintiff, Idelisa Perez, filed suit against defendants, Calixto and Claudina Leon. Pa2. She alleged that while lawfully walking on the public sidewalk owned, occupied, constructed, controlled, maintained and/or repaired on the property of defendants, she was caused to fall due to the negligence of defendants, causing her severe personal injuries. Pa2-3. Specifically, defendants "negligently, carelessly and recklessly created and/or maintained a nuisance and/or hazardous condition * * * , including failing to properly construct, repair and maintain the public sidewalk so that this failure alone or in conjunction with the layer of snow on the sidewalk, caused the plaintiff to slip and fall." Pa3.

Defendants filed an Answer on January 10, 2022, denying all liability. Pa6. The matter proceeded through discovery and arbitration. Pa14. On February 15, 2024, defendants moved for summary judgment, seeking an "Order dismissing Plaintiff's complaint as Defendants did not breach a duty owed to the Plaintiff." Pa13. Plaintiff opposed the motion. After a brief (the transcript reflects that the hearing took less than nine minutes, 1T) hearing on March 15, 2024, the trial court barred the opinion of plaintiff's engineer, Himad Beg, P.E., granted the motion for summary judgment and dismissed the complaint with prejudice. 1T9:7-10:3. An Order of Dismissal was filed on March 18, 2024. Pa1.

Plaintiff timely filed her Notice of Appeal on April 29, 2024. Pa221.

STATEMENT OF FACTS

On February 20, 2019, between 5:00 p.m. and 6:00 p.m., plaintiff fell on the public sidewalk abutting 438 54th Street, West New York, New Jersey. Pa211. The property was owned and occupied by defendants. Pa212. Defendants purchased the property in 1972. Pa213. Defendants replaced the sidewalk during their ownership of the property. Pa213.

Plaintiff's fall occurred on the sidewalk adjacent to a carport on the property. Pa212. The sidewalk at the incident location forms a ramp with an abrupt and excessive change in walking surface slope, which increases the likelihood of a pedestrian slipping there. Pa121-23; Pa142-55. While walking on the sidewalk adjacent to the carport, plaintiff's right foot slipped out from under her, and she fell on her back and left elbow. Pa19. Plaintiff suffered a full thickness rotator cuff tear to her right shoulder, requiring surgery, and a non-displaced fracture of her left elbow. Pa19.

At the time of the fall, the sidewalk was unshoveled. Pa127. It had snowed lightly earlier in the day but had stopped prior to the fall. Pa19. The sidewalk leading up to defendants' property was clear. Pa54. Plaintiff reported the fall to defendant Calixto Leon right after it happened. Pa27. Defendant Calixto Leon blamed plaintiff for wearing sneakers instead of boots. Pa27. On February 23, 2019, plaintiff reported the fall to the police. Pa127.

In discovery, plaintiff produced the report of HUB Engineering and identified Himad Beg, P.E., the author, as an expert witness. Pa86. The report concludes that plaintiff's fall "was caused, individually or in combination, by the following:"

- Abrupt and excessive change in the public sidewalk surface running slope at the incident location, which acts as a ramp and was measured to change from 6.7% to 21.3% in the direction of pedestrian travel.

- A "hidden" pedestrian slipping hazard in the form of ice and snow that covered the abrupt, excessively sloped concrete public sidewalk surface at the incident location, which was uncleared, unsalted and/or unsanded at the time of the incident.

- Improper/inadequate snow/ice removal from the incident concrete public sidewalk surface prior to the incident.

- Inadequate salting/sanding of the incident concrete public sidewalk surface prior to the incident.

Pa88-89.

Mr. Beg inspected, photographed and documented the location and provided measurements and standards indicating that the slope of the sidewalk exceeds industry standards, safe design standards and guidelines and presented a hazardous condition. Pa102-06. Mr. Beg's professional opinion within a reasonable degree of scientific and engineering probability is based on numerous factors, including but not limited to New Jersey Department of Transportation (NJDOT) Roadway Design Manual, 1995; NJDOT Roadway Design Manual, 2015; NJDOT Standard

Roadway Construction Details, 2007; Code of the Town of West New York, New Jersey; International Code Council (ICC) International Property Maintenance Code, 2015; nationally recognized consensus safety standards, education, training and decades of experience as a Professional Engineer. Pa106-15; Pa122-23; Pa158-60.

In part, Mr. Beg relied on the 1995 and 2015 NJDOT Roadway Design Manuals. Pa107-110. According to those manuals, they are "primarily informational or guidance in character and serve to assist the engineer in attaining good design." Pa176. The quoted language indicates that the guidelines are exactly the type of information that should be considered "in attaining good design" and, therefore, are appropriate for an expert to reference in analyzing whether a given design is hazardous. Pa176. In sum, the report documented facts or data derived from the expert's personal observations, evidence admissible at the trial, and data and references, including codes, standards and ordinances, that are the type of data on which experts normally rely.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION BY BARRING PLAINTIFF'S EXPERT WITNESS. (PA1; 1T9:7)

A. Standard of Review.

A trial court's decision regarding the evaluation, admission or exclusion of expert testimony is generally reviewed for an abuse of discretion. Hisenaj v. Kuehner, 194 N.J. 6, 16 (2008). An abuse of discretion occurs when a trial judge's decision was "not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005); see State v. S.N., 231 N.J. 497, 515 (2018). If, however, the trial court applies the wrong legal standard in deciding to admit or to exclude evidence, the decision is reviewed de novo. State v. Trinidad, 241 N.J. 425, 448 (2020); Hassan v. Williams, 467 N.J. Super. 190, 214 (App. Div. 2021).

B. Discussion.

There was no motion to preclude or to bar the testimony of Himad Beg, P.E. As such, his testimony was incorrectly barred.

As a basis for barring the opinion, the trial court incorrectly concluded that there was no way to know what defendants had done when defendants rebuilt the sidewalk and that it could have been rebuilt as it originally existed. 1T8:15-9:7. That is not the point. The trial court failed to appreciate that because defendants had rebuilt the driveway "completely new," they were obligated to build it correctly, properly and safely. Defendant Calixto Leon testified that he did not repair the sidewalk and carport entrance. **He rebuilt the location from scratch**.

"Q. Okay. During the time that you owned your home had you ever – have you ever had your sidewalk repaired or constructed? A. Repaired? No. It was done new about 25 years ago, completely a new one." Pa66 at 14:22-15:1. There was no need to know what was there before; what was there at the time of the fall was **created** by defendants. There was no speculation involved.

Based on that incorrect reasoning, the court ruled that the 1995 design standard considered by Mr. Beg was "out." 1T9:3. "You can't rely upon that, and he has no other facts to support his opinion that the defendant might have violated that standard, which is what he's basing his opinion on. So, I'm going to bar Mr. Beg's opinion. It is a net opinion for that reason." 1T9:3-8. That decision was factually incorrect. The testimony, photographs, measurements and defendants' admission **all** support the conclusion that defendants deviated from the 1995 design standard **and** created a hazardous condition.

The trial court also failed to apply the proper standard to the proposed expert testimony because it disregards all other factors in favor of a single basis for Mr. Beg's analysis. There are three basic requirements for the admission of expert testimony: (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at least at a state of the art that such an expert's testimony could be sufficiently reliable and (3) the witness must have sufficient expertise to offer the intended testimony. State v.

Kelly, 97 N.J. 178, 208 (1984). The report and proposed testimony of Himad Beg, P.E., satisfies those three requirements.

Certainty is not the requirement for admissibility. Evidence may be direct, circumstantial, or inferential. The value of the evidence is to be determined by the factfinder as instructed by the court. The question of causation is presumptively a question of fact for a jury, and the facts and opinions of plaintiff's expert are sufficient for a jury to infer a reasonable conclusion, not mere speculation. As stated in Evid. R. 703, an expert's opinion must be based on "facts or data * * * perceived by or made known to the expert at or before the hearing." An expert's conclusion is considered to be a "net opinion," and thereby inadmissible, only when it is a bare conclusion unsupported by factual evidence. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981).

Evid. R. 703 addresses the foundation for expert testimony. It mandates that expert opinion be grounded in "'facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts.'" Polzo v. County of Essex, 196 N.J. 569, 583 (2008) (quoting State v. Townsend, 186 N.J. 473, 494 (2006)). The net opinion rule is not a standard of perfection. The rule does not mandate that an expert

organize or support an opinion in a particular manner that opposing counsel deems preferable.

An expert's proposed testimony should not be excluded merely "'because it fails to account for some particular condition or fact which the adversary considers relevant.'" Creanga v. Jardal, 185 N.J. 345, 360 (2005) (quoting State v. Freeman, 223 N.J. Super. 92, 116 (App. Div. 1988), certif. denied, 114 N.J. 525 (1989)). The expert's failure "to give weight to a factor thought important by an adverse party does not reduce his testimony to an inadmissible net opinion if he otherwise offers sufficient reasons which logically support his opinion." Rosenberg v. Tavorath, 352 N.J. Super. 385, 402 (App. Div. 2002) (citing Freeman, supra, 223 N.J. Super. at 115–16). The bases for the expert's opinion are presumptively a proper subject of exploration and cross-examination at a trial. Ibid. (citing Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 55 (App. Div. 1990), modified on other grounds, 125 N.J. 421 (1991)).

Based on decades of experience in the design, construction and evaluation of roadways and walkways, along with investigation of the site, measurements of the as-built conditions, examination of photographs and consideration of the testimony of the witnesses, Mr. Beg concluded that the condition of the sidewalk exceeded safe limits and was a contributory cause of plaintiff's fall. It was not constructed consistent with design standards applicable at the time and presented a hazardous

condition in its current state. That is not a net opinion. See Townsend v. Pierre, 221 N.J. 36, 53-54 (2015); Evid. R. 703. It is properly based on education, training, experience, personal observations, admissible evidence and data on which experts normally rely. A jury may disregard an expert's properly based conclusions. See Model Jury Charge (Civil) 1.13 "Expert Testimony" (Apr. 1995). On summary judgment, however, when all reasonable inferences must be resolved in favor of the non-movant, the evidence may not be disregarded.

The trial court imposed a requirement that does not exist, i.e., there must be a government regulation or code cited before an expert can testify regarding industry standards. First, Mr. Beg did reference the design standard in effect both at the time of construction of the sidewalk and at the time of the fall. More importantly, the 1995 design standard, which the court erroneously excluded and on which the trial court exclusively based its decision, was merely one factor relevant to the determination that the sidewalk presented a hazardous condition. Under the trial court's rationale, no homeowner would ever have to repair or to maintain a public sidewalk no matter how dangerous, antiquated, obsolete or hazardous. A wooden sidewalk from the 1800s could have exposed rusty spikes and splintered boards so long as a plaintiff cannot prove that it was not built to "industry standards" at the time.

That reasoning ignores the issue: does the condition of the sidewalk at the time of the fall present a hazardous condition? That is the issue to which the expert is testifying, and current codes, standards, regulations and ordinances are all relevant to whether the premises are safe in their current condition. The decision to disregard Mr. Beg's testimony was erroneous, an abuse of discretion and should be vacated.

POINT II

THE ORDER GRANTING SUMMARY JUDGMENT MUST BE REVERSED BECAUSE, BASED ON THEIR AFFIRMATIVE ACTS, DEFENDANTS ARE NOT ENTITLED TO SIDEWALK IMMUNITY AND ARE RESPONSIBLE FOR THE HAZARDOUS CONDITION THEY CREATED. (PA1)

A. Standard of Review.

In reviewing an order granting summary judgment, an appellate court uses the same standard as the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998); see Templo Fuente De Vida Corp. V. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (Templo Fuente) ("we review the trial court's grant of summary judgment de novo under the same standard as the trial court," and we accord "no special deference to the legal determinations of the trial court"). The trial court must not decide issues of fact: it must decide only whether any such issues exist. Brill v.

Guardian Life. Ins. Co., 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954); R. 4:46-5.

Summary judgment should not be granted where the adjudication of such a motion would constitute what is in effect a trial by pleadings and affidavits involving issues of fact. Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 211-12 (App. Div. 1987). Summary judgment serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses, however, it is not a substitute for a full plenary trial. United Advertising Corp. v. Metuchen, 35 N.J. 193, 195-96 (1961). Accordingly, summary judgment should be denied unless the right thereto appears so clearly as to leave no room for controversy. Sisselman, supra, 215 N.J. Super. at 212.

B. Discussion.

Defendants moved for summary judgment on the basis of sidewalk immunity. They maintained that as residential owners of the property, they were not responsible for the abutting sidewalk under Nash v. Lerner, 311 N.J. Super. 183, 192 (App. Div. 1998), rev'd on other grounds, 157 N.J. 535 (1999). Nash stands for the proposition that there is no duty on a residential property owner to repair or to maintain an abutting sidewalk damaged by the elements or wear and tear. Nash, however, does not apply at bar because defendants **created** the sidewalk, and thus, created the hazardous condition. The law is clear that because

defendants caused the hazardous condition to exist, they may be held liable for injuries and damages incurred. Luchejko v. City of Hoboken, 207 N.J. 191 (2011); Stewart v. 104 Wallace Street, Inc., 87 N.J. 146 (1981).

Defendant Calixto Leon testified that he has lived at the property where plaintiff fell for 50 years. Pa64 at 8:4-11. He purchased the property in 1972. Pa200. Mr. Leon testified that the sidewalk where plaintiff was caused to fall "was done new about 25 years ago, completely a new one." Pa66 at 14:25-15:1. Asked to clarify, defendant stated unequivocally "It's never been repaired. The sidewalk was constructed about 25 years ago." Id. at 15:8-9. Mr. Leon "hired a contractor to do it." Id. at 16:8. That was an affirmative act that foreseeably created a hazardous condition and, as such, defendants are not entitled to be immunized from liability for their conduct. In Deberjeois v. Schneider, 254 N.J. Super. 694 (Law Div. 1991), aff'd, 260 N.J. Super. 518 (App. Div. 1992), the trial court, on a motion for summary judgment, examined the sidewalk exception-to-liability rule and concluded as follows:

> Implicit in the rule is the proposition that the condition which insulates the property owner must be one which is a totally natural condition. **Therefore, if the condition is an artificial one, or one precipitated by the property owner's affirmative act, the proposition that it would be unfair to attach liability is no longer relevant.**
>
> * * * * *

> **If we consider the origin of the rule, its rationale and the public policy which form the premise to the traditional rule we must conclude that it is only those natural causes brought about solely by the elements which exempts the property owner from liability. All others result in liability.**

Id. at 703-04 (emphasis added).

The question in Deberjeois was whether a property owner is liable to a pedestrian who falls on a defective sidewalk where the defect is caused by the roots of a tree located in the front yard of the property. Applying the analysis above, the court denied summary judgment to the defendant, who had invoked the sidewalk immunity rule, because of his affirmative act in planting the tree. There was no finding of negligence nor was there any mention of negligence in planting the tree. Rather, the act of planting the tree in such close proximity to the sidewalk that its roots caused a defective condition in the sidewalk was sufficient to render the exemption inapplicable. Applying that same analysis to the case at bar, the trial court should have denied summary judgment because of defendants' affirmative act in building the "completely new" sidewalk.

As to whether the condition is hazardous, that is a fact issue to be resolved at trial. Plaintiff has produced sufficient evidence in the form of fact and expert testimony, photographs, measurements, codes and guidelines from which a reasonable juror could find that the slope of the sidewalk exceeded proper limits and was therefore dangerous. Defendants dispute that conclusion. The factfinder

is charged with resolving that disputed issue of material fact. See Model Jury Charge (Civil) 6.10 "Proximate Cause – General Charge" (Nov. 2019); Model Jury Charge (Civil) 1.13 "Expert Testimony" (Apr. 1995).

There is no dispute that defendants caused the location to be modified during their ownership of the property. How long ago they claim to have done that is immaterial; the current condition of the property presents a dangerous condition created by defendants. It is dangerous without precipitation and becomes more dangerous in the presence of ice and snow. To accept defendants' argument would be to immunize property owners and contractors who ignore safe practices simply because they are not professional highway design engineers, who apparently would be the only people obligated to construct roadways and walkways safely.

Moreover, in addition to losing sidewalk immunity because they rebuilt the sidewalk, defendants caused or allowed an icy condition to exist on that sidewalk that presented a hazardous condition for pedestrians. They had a duty to clear the sidewalk of snow and ice. See Town of West New York Ordinances, Ch. 352 (Streets and Sidewalks), Art. III (Removal of Snow and Ice), §352-8 (Owners or occupants responsible for snow removal). The testimony establishes that at the time of plaintiff's fall there was ice with snow on top. Pa54-55 at 62:22-24; 63:9-64:2; 65:5-8. The sidewalk from plaintiff's residence up to defendants' property was all clear of ice and snow. Pa54 at 63:14-64:2. Defendants concede that the

"cause of Plaintiff's fall was slipping on snow and ice." Pa203; Pa212-13. The weather information indicates that there had been only snow on the date of the fall prior to the time of the fall. Pa79. The reasonable inference from those facts is that the ice was from a prior weather event and that the sidewalk had not been cleared as required. The snow of that date concealed both the excessive slope and the underlying ice, all 3 conditions combining to cause plaintiff to fall. The testimony that there was ice and that the ice contributed to plaintiff's fall requires that summary judgment be denied.

A trial court must not decide issues of fact: it must decide only whether any such issues exist. Brill, supra, 142 N.J. at 540; Judson, supra, 17 N.J. at 75; R. 4:46-5. Whether the excessively sloped sidewalk and/or pre-existing ice caused or contributed to Ms. Perez's fall is a question for a jury, not a judge. Article I, paragraph 9 of the New Jersey Constitution adopted in 1947 states clearly that "[t]he right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons." N.J. Const. art. I, ¶9; see also N.J. Const. of 1844 art. I, ¶7 (the "right of trial by jury shall remain inviolate"). The role of the trial court is to determine only whether there exists a genuine dispute regarding a material fact. Suarez v. E. Int'l College, 428 N.J. Super. 10, 27 (App. Div. 2012) (motion judge may not abrogate the jury's exclusive role as the finder of fact), certif. denied, 213 N.J. 57 (2013). On the record presented and pursuant to

the constitutional and common law of New Jersey, summary judgment should have been denied.

CONCLUSION

For the foregoing reasons, plaintiff requests that the order granting summary judgment be reversed and that the matter be remanded for trial.

Respectfully submitted,

MICHAEL C. KAZER

By: *__/s Michael C. Kazer_____*
Michael C. Kazer, Esq.
Counsel for plaintiff

DATED: August 12, 2024

Superior Court of New Jersey

Appellate Division

Docket No. A-002582-23

IDELISA PEREZ, *Plaintiff-Appellant,* vs. CALIXTO LEON, CLAUDINA LEON, and/or JOHN DOE I-X (a person, persons, entity or entities whose identity is presently unknown), *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY Docket No. HUD-L-000715-21 Sat Below: HON. ANTHONY V. D'ELIA, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS CALIXTO LEON AND CLAUDINA LEON

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PRELIMINARY STATEMENT

Plaintiff Idelisa Perez appeals from an order granting summary judgment in favor of the Defendant-Respondents, Calixto and Claudina Leon. This case arises out of litigation instituted by the Plaintiff-Appellant, who alleged that she tripped and fell as a result of a snow and ice accumulation on the sidewalk abutting Defendant-Respondent's residential home.

Plaintiff-Appellant now argues that the Trial Court's decision should be reversed because the Trial Court abused its discretion by barring Plaintiff's expert witness and misapplied controlling law in support of the Defendant-Respondents' motion for summary judgment.

It is respectfully submitted that the Plaintiff-Appellant's arguments must fail as they are either factually distinct from the case at hand or improperly interpret the decision made by the Trial Court. As such, the Trial Court's decision granting summary judgment in favor of the Defendant-Respondents, Calixto and Claudina Leon should be affirmed.

PROCEDURAL HISTORY

For the sake of brevity, the Defendant-Respondent adopts the Procedural History set forth in the Plaintiff-Appellant's Brief.

STATEMENT OF FACTS

Plaintiff in this matter alleges that she was caused to slip and fall on ice on the property affronting Defendants' property on or about February 20, 2019, between 4 and 6 PM. **(Pa2-Pa5 and Pa 19).** Defendants' property, located at 438 54th St., West New York, New Jersey (the "Premises") is a residential property. **(Pa200-201).** On the date of the incident, according to Plaintiff's own weather expert, it began snowing around 12 PM and continued to snow until 6 PM, when the weather turned to freezing rain and sleet until 10 PM. **(Pa79).** The sole cause of Plaintiff's fall was slipping on snow and ice. **(Pa54, page 62:22-24)**:

Q: What made you fall? Was it ice, snow or a combination?

A: Combination of both.

Plaintiff testified that the area had not been cleared of snow and ice at the time of the incident **(Pa54, page 63:5-8)**:

Q: Okay. Did it look like it had been shoveled at all earlier that day or the day before.

A: To me it didn't seem like it had been cleaned.

Defendants have resided in the Premises since purchasing it in 1972. **(Pa200).** Since that time, the only individuals to inhabit the Premises are the Defendants, or immediate family of the Defendants. **(Pa200).** In 1987,

Defendants turned the basement apartment into a garage/carport. **(Pa200).** The project required that work be done on the sidewalk by repouring the cement to be consistent aesthetically with the driveway – the work was done in or around 1987. **(Pa200).**

Plaintiff produced an engineering report, authored by Himad Beg ("Beg") in the course of discovery. **(Pa86-Pa123).** Beg concluded that the Premises had an "[a]brupt and excessive change in the public sidewalk surface running slope at the incident location, which acts as a ramp and was measured to change from 6.7% to 21.3% in the direction of pedestrian travel." **(Pa88).** Beg relied, principally, on a 1995 NJDOT Roadway Design Manual for his conclusion that the alleged repour of the sidewalk was done negligently. **(Pa103).** NJDOT's stated purpose of the Roadway Design Manual obviates that it is meant for the structure and design of new roads; making the application of this standard to residential sidewalks improper and baseless. **(Pa162).**

In response to Beg's report, Defendants retained, and served a report from Dr. Mark Marpet ("Marpet"). **(Pa190-199).** Marpet found that the Premises was constructed in 1899, and that the streets were principally constructed within that time period as well. **(Pa195).** Marpet further

concluded that it is inappropriate to apply an NJDOT Design Manual to a repour of a residential sidewalk:

> It isn't clear when the sidewalks were first put in, but it should be crystal clear that they were put in well before the 1995 NJDOT Roadway Design Manual. That's critical because the building evaluations the curbs together set the cross slope of the sidewalk and the property lines and driveway elevations set the driveway apron transitions. Thus, even if the sidewalk had been repoured after the 1995 New Jersey Roadway design manual was published, the sidewalk maintenance performed to repair the cracked sidewalk would not come under aegis of that publication.

(Pa197).

The remainder of Beg's conclusion related to an imparted duty, by Beg, on residential Defendants, to clear snow and ice from their sidewalk, which does not exist in New Jersey:

- Abrupt and excessive change in the public sidewalk surface running slope at the incident location, which acts as a ramp and was measured to change from 6.7% to 21.3% in the direction of pedestrian travel.
- A "hidden" pedestrian slipping hazard in the form of ice and snow that covered the abrupt, excessively sloped concrete public sidewalk surface at the incident location, which was uncleared, unsalted and/or unsanded at the time of the incident.
- Improper/inadequate snow/ice removal from the incident concrete public sidewalk surface prior to the incident.

(Pa88-89).

LEGAL ARGUMENT

POINT I

PLAINTIFF'S ARGUMENT THAT THERE WAS NO MOTION TO PRECLUDE OR BAR THE TESTIMONY OF HIMAD BEG IS WITHOUT MERIT

i. Plaintiff improperly characterizes the opinion set forth by the Court.

Plaintiff-Appellant argues that the Court below improperly barred the testimony of Himad Beg as there was no motion to preclude or bar Beg's testimony. This argument is without merit. The motion for summary judgment contained a point of law wherein it was argued that the report of Himad Beg is a net opinion.

Plaintiff-Appellant fails to cite any statute or case law in support of the position that a formal motion is required for a trial court to rule on an evidentiary issue. This is because no such support exists. Rather, courts are permitted to rule upon evidentiary issues raised in a motion for summary judgment absent the filing of a formal motion. Specifically, when "a trial court is 'confronted with an evidence determination precedent to ruling on a summary judgment motion,' it 'squarely must address the evidence decision first.'" Schwartz v. Menas, 251 N.J. 556, 569 (2022) (quoting Townsend v. Pierre, 221 N.J. 36, 53 (2015)). Such reasoning aligns with the discretion

granted to the trial courts to use its sound discretion with respect to the admissibility of evidence. See Townsend, 221 N.J. at 52.

Appellate review mirrors that employed by the trial court, "with the evidentiary issue resolved first, followed by the summary judgment determination of the trial court." Ibid. "[E]videntiary decisions are reviewed under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." Rodriguez v. Wal-Mart Stores, Inc., 237 N.J. 35, 57 (2019) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)).

Here, Defendant-Respondent raised the issue of the admissibility of Beg's expert opinion in the moving papers submitted to the trial court in support of the motion for summary judgment. The trial court then properly reviewed this evidentiary issue prior to ruling on the Defendant-Respondent's motion for summary judgment. Again, Plaintiff-Appellant's argument is without merit.

Plaintiff-Appellant, rather transparently, has tried to argue that a simple sidewalk apron constitutes a dangerous condition. Plaintiff-Appellant argues that the Court below incorrectly concluded that there was no way to know what Defendants had done when they "rebuilt the sidewalk." Plaintiff's

misconstrue, and mispresent the colloquy held by the court, which was premised on the fact that because Beg had no documentary evidence upon which to rely for the proposition that the project was done negligently, his opinion defined a net opinion and was utterly baseless:

> The Court: [Beg] has information that defendant worked on the sidewalk about 25 years ago on the sidewalk about 25 years ago. Is there anything in this motion record, any rational evidence that the jury will hear as to what the defendant did or didn't do 25 years ago?
>
> RAMIREZ: No, Your Honor.
>
> …
>
> THE COURT: Was there any other facts presented to the expert as to what the defendant did or didn't do to the sidewalk 25 years ago?
>
> MR. KAZER: No, Your Honor. There are no records available about the construction.
>
> …
>
> THE COURT: All right. And there will be no -- and there will be no such facts induced at the time of trial, I would assume.
>
> MR. KAZER: That is correct.
>
> THE COURT: All right. Is -- is Mr. Beg's opinion that what the defendant did or didn't do 25 years ago somehow contributed to the slope and the leak and the -- and the flowing of the wat -- the melting ice across the sidewalk? Is that his opinion?
>
> MR. KAZER: I think it is, Your Honor.

> THE COURT: And what does he have to base that opinion on if he doesn't know what the heck happened 25 years ago?
>
> …
>
> THE COURT: So, I -- I -- I -- I can see by our arguments -- you can see where I'm going that -- that I am going to bar Mr. Beg's opinion as a net opinion because he can't speculate as to what either was done in 1985, which would have pre-dated the design 20 manual that he referred to, or what he did 25 years ago, which arguably, for the purposes of this motion, I'm finding only for the purposes of this motion. Arguably, that design manual applied to what the defendant did 25 years ago. Since we can't say what he did or didn't do, and nobody will ever see or hear that, then you can't say he violated a design manual 25 years ago or in 1985. So, that standard is out. You can't rely upon that, and he has no other facts to support his opinion that the defendant might have violated that standard, which is what he's basing his opinion on. So, I'm going to bar Mr. Beg's opinion. It is a net opinion for that reason. A residential property owner does not have a separate obligation to maintain the sidewalk. I understand the plaintiff is 11 arguing there is a municipal ordinance that places the obligation on the property owner to address or bring to their attention problems with the sidewalk. However, the case law is pretty clear, and it's -- I don't have it in front of me. I'm not even give the cite to (indiscernible) standard that that -- that -- those type of municipal ordinances does not 18 then convert the obligation to deal with the problem into a duty to third parties. It doesn't create liability for residential property owners. It just shifts the burden of trying to deal with it and the cost to the property owners. So, that doesn't create any potential claim for the plaintiff. The municipal ordinance that's in place either. So, for all of those reasons, I am going to dismiss plaintiff's complaint. And for the reasons raised by the defendant in their brief.

T1: 4:7-10:3.

Plaintiff-Appellant fails to appreciate the point made by the Court that without citation to records and standards, it cannot prove that a duty was breached. The question is not whether Defendant rebuilt or repaired the sidewalk in question, or even when the repair was done (there was a debate as to when the work was actually done- whether it was in 1987 or in 1999, and the court conceded for purposes of the motion that it considered the work to have been done in 1997).[1] The decision, rather, arose from the lack of evidence of what was done, how it was done, and how it violated the design manual. The only standards set forth by Plaintiff's expert, Beg, pertain to a code which espouses non-mandatory guidelines for the creation of new roadways.

ii. Beg's opinion was a net opinion.

The Court below properly ruled that Beg's report is a net opinoin. The entire report arises out of a singular statement from defendant Calixto Leon that he contracted for work to be performed on the sidewalk "about 25 years ago." Derivative of that one statement is Beg's report which rests entirely on

[1] And the reason why I say 25 years ago was because 25 years ago is after 1995. See? If -- if --if -- I'm finding that the 1995 design manual certainly would have applied to anything -- even if we assume, for the purposes of this motion, for purposes of the motion only, that would apply to anything that the defendant did 25 years ago in 1999 because it would have been a new sidewalk. Even assuming that, your expert doesn't know what he did or didn't do years ago. So, how could he have been found to be in violation of the design manual?
T6:14-25

inapplicable standards and baseless assumptions, which the Court below relied upon in its decision to exclude this evidence.

New Jersey Rule of Evidence 702 governs the admissibility of expert testimony: "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 well-established test to determine whether expert testimony is required turns on "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." Scully v. Fitzgerald, 179 N.J. 114, 127 (2004) (quoting Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982)). Experts' opinions must be founded either upon facts within their own knowledge or, in the case of a hypothetical question, upon facts and inferences supportable by the proofs, such as evidence which there is a fair possibility the jury will accept. Beam v. Kent, 3 N.J. 210, 215 (1949). As to what constitutes an "expert opinion," N.J.R.E. 703 provides that an expert opinion must be supported by facts or data in the record, or alternatively, an expert opinion must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

The "Net Opinion Rule" precludes experts from expressing bare conclusions, unsupported by factual evidence. Buckalew v. Grossbard, 87 N.J. 512, 524 (1981). The expert's opinion must be based upon "facts or data . . . perceived by or made known to the expert at or before the hearing. Beam, supra, 3 N.J. at 215; Stanley Co. of America v. Hercules Powder Co., 16 N.J. 295, 305-06 (1954); Fink v. City of Paterson, 44 N.J. Super. 129, 135 (App. Div. 1957). When evaluating an expert, "a court must ensure that the proffered expert does not offer a mere net opinion." Pomerantz Paper Corp. v. New Community Corp., 207 N.J. 344, 372 (2011). The Pomerantz court described the Net Opinion Rule as follows:

> That is, an expert's bare opinion **that has no support in factual evidence** or similar data is a mere net opinion which is not admissible and may not be considered. The admissibility rule has been aptly described as requiring that the expert **"give the why and wherefore**" that supports the opinion, **"rather than a mere conclusion."** .
>
> . . Applying these standards, our Appellate Division has concluded that a trial court may not rely on expert testimony that lacks an appropriate factual foundation and fails to establish the existence of any standard about which the expert testified."

Id. at 372-73 (internal citations omitted)(emphasis added).

In explaining the Net Opinion Rule, the Appellate Division noted that "[e]xpert testimony should not be received if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture."

Vuocolo v. Diamond Shamrock Chem. Co., 240 N.J. Super. 289, 299 (App. Div.), (certif. denied, 122 N.J. 333 (1990)). Most importantly, reliability must also be established. In re Commitment of R.S., 173 N.J. 136 (1970). The expert must establish that the methodology utilized in formulating his opinion "was correctly used to produce that evidence," State v. Marcus, 294 N.J. Super. 267, 275 (App. Div. 1996); and that "it derives from a reliable methodology supported by some expert consensus." Suanez v. Egeland, 353 N.J. Super. 191, 195 (App. Div. 2002).

The only "standards" upon which Beg's report relies are **guidelines** given by a public body for use by highway design engineers Even a cursory review of the purpose and scope of these guidelines obviates that they simply have no application to the matter at bar because they are to be used for the joint construction of new roadways and sidewalks,"The guidelines contianed in this manual...are primarily informational or guidance in character and serve to assist the engineer in attaining good design. Deviations from this information or guidance do not require a design exception." (**Pa-176a)**. Its application to the repour of cement on a sidewalk apron borders on the absurd. As the Court concluded, "Since we can't say what he did or didn't do, amd nobody will ever see or hear that, then [Y]ou can't say he violated a deign manual 25 years ago or in 1985. So that standard is out." **T:8:25-9:2-3.** In other words, there is no

proof a design engineer was used, or that any design was done. This is a cement repour of a sidewalk apron, nothing more.

Even if the court had found that the Design Manual was violated, it should not have mattered for two reasons. First, the Design Manual is specifically applied to the construction of **new** roads and the sidewalks abutting them. This matter deals with neither. Secondly, the Design Manual does not espouse standards, it espouses guidelines. This is not the manual of a national or local authority and thus is not evidence of anything. **The Design Manual itself says that deviations from its guidelines do not even require a design exception**. Beg's entire report is thus founded solely upon hypotheticals. The Supreme Court addressed these types of reports in the matter of Townsend v. Pierre, 221 NJ 36 (2015). In Townsend, the lower court found that the "[expert] opinion's shortcomings could be remedied by the use of hypothetical questions." Id. at 58. The Supreme Court disagreed. Hypotheticals must be supported by a "requisite foundation in the facts." Id. at 59.

Lastly, the report failed to cite to any objective sources for the proposition that the slope in the sidewalk causes the snow to pile up. It contains multiple conclusory statements with no reference to the record. There was no interaction of facts on the record, nor is there a suggestion that is what

happened in this particular matter. Furthermore, these conclusory statements compound upon themselves but inventing a duty which does not exist for residential landowners in New Jersey. As such, the Court below properly ruled that the report of Himad Beg was a net opinion.

POINT II

RESIDENTIAL IMMUNITY IS APPLICABLE IN THE SUBJECT MATTER AS THE CONDITION WAS NOT CREATED BY DEFENDANTS

Plaintiff's argument is that Defendants were improperly dismissed in this matter because they created the sidewalk and thus created the dangerous condition. Plaintiff relies exclusively on Deberjeois v. Schneider, 254 N.J. Super. 694 (Law Div.), aff'd, 260 N.J. Super. 518 (App Div. 1992) in support of it's "exception to liability rule." There, the property owner, planted a tree, which without question, caused the sidewalk to raise, and subsequently, the plaintiff to trip and fall. Id. at 703-704. Plaintiff then argues that the Deberjeois Court found no negligence as to the planting of the tree; however, the raised sidewalk in that case was undisputedly a hazard. The "hazard" in this case, is snow and ice, an unquestionably natural condition, which allegedly was made more dangerous by a sloped sidewalk as per Beg.

Plaintiff-Appellant's reliance on Deberjeois is misplaced. There was no dispute between the parties in Deberjeois that the tree root caused the sidewalk to become raised and thus brought about the hazardous condition that caused the plaintiff's injury. The question to be answered was whether the property owner's action of planting a tree could be deemed an artificial condition that

would overcome the residential sidewalk immunity. This is in opposition to the issue at hand.

Here, the question at issue is whether a hazardous condition existed at the time of the incident at all. Plaintiff has attempted to demonstrate the existence of a hazardous condition in support of this claim to overcome the residential immunity. As discussed supra, the entirety of Plaintiff's claims rested upon the expert opinion of Beg. But the trial court correctly found that Beg's opinion constituted a "net opinion" and therefore could not be admissible to establish the existence of a hazardous condition. It follows that, absent competent evidence establishing that a property owner "create[d] or exacerbate[d] a dangerous sidewalk condition[,]" residential landowners do not owe a duty to pedestrians to maintain the sidewalks abutting their property. Luchejko v. City of Hoboken, 207 N.J. 191, 210 (2011). Plaintiff has not and cannot present such evidence to establish a condition and this cannot establish liability

Plaintiff then also attempts to overcome the long-established residential immunity by relying on municipal code. It is well established that municipal ordinances do not create a tort duty, as a matter of law. Smith v. Young, 300 N.J. Super. 82, 95 (App. Div. 1997). There is no debate that Defendants

property is residential in nature. Defendants therefore owed no duty to the Plaintiff.

Even if this municipal code had created a phantom duty, Plaintiff's expert report very clearly obviates that the storm was ongoing at the time Plaintiff fell. This would relieve Defendants of liability under the New Jersey Ongoing Storm rule as espoused in Pareja v. Princeton Int'l Properties, 246 N.J. 546, 558 (2021) ("The alternative to the duty imposed by the Appellate Division is the ongoing storm rule. The premise of the rule is that it is categorically inexpedient and impractical to remove or reduce hazards from snow and ice while the precipitation is ongoing. We agree. Our precedent makes clear, and we reiterate today, that absent unusual circumstances, a commercial landowner's duty to remove snow and ice hazards arises not during the storm, but rather within a reasonable time after the storm.").

CONCLUSION

The record in this matter unequivocally reflects that the Plaintiff-Appellant has not shown how the motion judge made a reversible error in this case. Simply put, the Defendant-Respondents' home is qualified as residential and the condition that caused the Plaintiff to fall was not caused by Defendant-Respondents.

For the foregoing reasons, Defendant-Respondents respectfully submit that the Trial Court's decision to grant the Defendant-Respondents' motion for summary judgment should be sustained by the Appellate Division and the Plaintiff-Appellant's appeal should be denied.

Respectfully Submitted,

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IDELISA PEREZ,

Plaintiff-Appellant,

v.

CALIXTO LEON, CLAUDINA LEON, and/or JOHN DOE I-X (a person, persons, entity or entities whose identity is presently unknown),

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-002582-23

CIVIL ACTION

On Appeal from the Law Division, Hudson County

Docket No. HUD-L-000715-21

Sat Below:

Hon. Anthony V. D'Elia, J.S.C.

REPLY BRIEF IN SUPPORT OF THE APPEAL

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LEGAL ARGUMENT

POINT I

DEFENDANTS' ARGUMENT IN THE FORM OF A STATEMENT OF FACTS IS INACCURATE, INAPPROPRIATE AND UNPERSUASIVE.

Defendants set forth as a Statement of Facts statements that are contrary to the facts, disputed facts or opinions rather than facts. On summary judgment, the movant does not get the benefit of the doubt. R. 4:46-2(c). All facts and reasonable inferences must be resolved in favor of the non-movant. Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016). Because defendants ignore that basic premise of the standard for review of a motion for summary judgment, defendants' arguments fail.

For example, defendants claim in the very first paragraph of their Statement of Facts that "[t]he sole cause of Plaintiff's fall was slipping on snow and ice." Db3. In discovery, plaintiff produced the report of HUB Engineering and identified Himad Beg, P.E., the author, as an expert witness. Pa86. The report concludes that plaintiff's fall "was caused, individually or in combination, by the following:"

- Abrupt and excessive change in the public sidewalk surface running slope at the incident location, which acts as a ramp and was measured to change from 6.7% to 21.3% in the direction of pedestrian travel.

- A "hidden" pedestrian slipping hazard in the form of ice and snow that covered the abrupt, excessively sloped concrete public sidewalk surface at the incident location, which was uncleared, unsalted and/or unsanded at the time of the incident.

- Improper/inadequate snow/ice removal from the incident concrete public sidewalk surface prior to the incident.

- Inadequate salting/sanding of the incident concrete public sidewalk surface prior to the incident.

Pa88-89. Defendants' statement, therefore, is **not** a fact but, rather, a material issue in the case, which is in dispute. Given that material factual dispute, summary judgment was inappropriate.

As another example, defendants state in the Statement of Facts that "NJDOT's stated purpose of the Roadway Design Manual obviates that it is meant for the structure and design of new roads; making the application of this standard to residential sidewalks improper and baseless." Db4. That "statement" is not only an opinion, rather than a fact, but also lacks logical and grammatical sense. The Roadway Design Manual is **not** the standard of whether the location constructed by defendants is unsafe. Rather, it is a logical reference for an engineer to consider in analyzing the facts and actual conditions in order to render an opinion regarding whether the location created by defendants was unsafe. In fact, the appendix citation used by defendants, Pa162, confirms that fact:

> In summary, NJDOT designs in the 21st Century should represent the product of reasonable people making reasonable decisions that reflect

> consideration of the needs of all road users, and social and environmental impacts. Highway designs must reflect a thoughtful understanding of the context of the project, in addition to adherence to standards and guidelines.

Pa162. That is a prototypical example of the type of reference materials that an engineer should consider in reaching a conclusion regarding the unsafe condition of the premises.

Defendants' Statement of Facts also claims that their hired expert, Dr. Mark Marpet, "found that the Premises was constructed in 1899, and that the streets were principally constructed within that time period as well." Db4. First, a jury is free to disregard defendants' expert testimony completely. Model Jury Charge (Civil) 1.13 "Expert Testimony" (Apr. 1995). As such, it cannot be the basis for a judgment in favor of defendants as a matter of law. Moreover, that "fact" is contradicted by plaintiff's expert and the record, and all inferences that may arise from that contradiction must be resolved in favor of the non-movant – plaintiff – at the summary judgment stage.

Second, the "statement" seeks to misrepresent the material fact that defendants completely reconstructed the location where plaintiff fell **after** they purchased the property in 1972. Pa200; Pa213. Defendant Calixto Leon testified that he did not repair the sidewalk and carport entrance. **He rebuilt the location from scratch**. "Q. Okay. During the time that you owned your home had you ever

– have you ever had your sidewalk repaired or constructed? A. Repaired? No. It was done new about 25 years ago, completely a new one." Pa66 at 14:22-15:1. Although Calixto Leon later contradicted himself regarding exactly when the new garage/carport was installed, there is no dispute that the driveway cut was **not** installed in 1899 and that the Premises as they existed at the time of the fall were not as constructed in 1899. Defendant Calixto Leon certified that "we turned the basement apartment into a garage/carport." Pa200. Obviously, the driveway was installed new at the time of the renovation as a basement apartment would not have a driveway. Nothing in defendants' Statement of Facts supports their position or is supported by the record.

POINT II

BECAUSE THERE WAS NO MOTION TO BAR PLAINTIFF'S EXPERT, HIS TESTIMONY SHOULD HAVE BEEN CONSIDERED.

Defendants baldly assert that no motion to bar plaintiff's expert is required. Db6. In support, they cite Townsend v. Pierre, 221 N.J. 36 (2015), and Schwartz v. Menas, 251 N.J. 556 (2022). Neither case supports defendants' position. Both cases held that properly raised evidentiary issues need to be resolved before rendering a decision on a pending dispositive motion. There is nothing novel about those holdings. In both cases, however, there was a properly raised motion to preclude the non-movant's expert from testifying. The motions to preclude were

argued and decided, as they should have been. Here, there was no properly raised evidentiary issue. Absent a motion to preclude, the evidence and inferences should have been resolved in the non-movant's favor.

POINT III

THE TRIAL COURT ERRED IN FINDING PLAINTIFF'S EXPERT OPINION WAS A NET OPINION.

Defendants attempt to frame the trial court's decision to bar plaintiff's expert as based on "the lack of evidence of what was done, how it was done, and how it violated the design manual." Db10. There was no lack of evidence, however, on each of those points. Although defendants failed to produce any records or plans, defendant Calixto Leon testified to what was done. Plaintiff established through defendant's own testimony, Pa66, defendant's certification, Pa200, and defendants' requests for admission, Pa213, that the sidewalk as it existed at the time of plaintiff's fall was created by defendants. Because defendants had rebuilt the driveway "completely new," they were obligated to build it correctly, properly and safely. There was no need to know what was there before; what was there at the time of the fall was **admittedly created by defendants**. Defendants' claim of "baseless assumptions" is false. Db11.

As for the alleged lack of evidence of violation of the design manual, Mr. Beg addressed that issue. He reviewed the testimony of the parties and

photographs of the location. Pa91-98. He inspected the location. Pa102. He made measurements and documented the condition of the premises. Pa102. He related the documented conditions to the available standards for safe design and construction. Pa102-03. The testimony, photographs, measurements and defendants' admissions **all** support the conclusion that defendants deviated from the 1995 design standard **and** created a hazardous condition. There are three basic requirements for the admission of expert testimony: (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at least at a state of the art that such an expert's testimony could be sufficiently reliable and (3) the witness must have sufficient expertise to offer the intended testimony. State v. Kelly, 97 N.J. 178, 208 (1984). The report and proposed testimony of Himad Beg, P.E., satisfies those three requirements. There was no lack of evidence to support the expert's opinion.

As stated in N.J.R.E. 703, an expert's opinion must be based on "facts or data * * * perceived by or made known to the expert at or before the hearing." An expert's conclusion is considered to be a "net opinion," and thereby inadmissible, only when it is a bare conclusion unsupported by factual evidence. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). N.J.R.E. 703 mandates that expert opinion be grounded in "'facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not

necessarily admissible in evidence but which is the type of data normally relied upon by experts.'" Polzo v. County of Essex, 196 N.J. 569, 583 (2008) (quoting State v. Townsend, 186 N.J. 473, 494 (2006)). Himad Beg, P.E., satisfied every requirement.

The issue to be decided and to which plaintiff's expert opined is "did the condition of the sidewalk at the time of the fall present a hazardous condition?" Current codes, standards, regulations and ordinances are all relevant to whether the premises are safe in their current condition. The decision to disregard Mr. Beg's testimony was erroneous, an abuse of discretion and should be vacated.

POINT IV

DEFENDANTS' CLAIM THAT THEY DID NOT CREATE THE CONDITION OF THE SIDEWALK IS CONTRARY TO THE EVIDENCE.

Defendants' argument in Point II of their brief is not credible. First, they claim that "the condition [of the property] was not created by defendants." Db16. As established in discovery, the opening brief and this reply, **defendant Calixto Leon has admitted creating the current condition of the property.** See Pa66 (Deposition of Calixto Leon); Pa200 (Certification of Calixto Leon); Pa213 (Defendants' Requests for Admission); Pb15; supra at 3-4. Defendants' factual claim is not merely disputed, it has been definitively disproven.

Second, defendants claim that "[p]laintiff relies exclusively on Deberjeois v. Schneider, 254 N.J. Super. 694 (Law Div. 1991), aff'd, 260 N.J. Super. 518 (App. Div. 1992)[,] in support of it's [sic] 'exception to liability rule.'" Db16. In reality, defendants are the ones invoking the "exception to liability rule," and it does not apply. The residential immunity created under Nash v. Lerner, 311 N.J. Super. 183, 192 (App. Div. 1998), rev'd on other grounds, 157 N.J. 535 (1999), that defendants argued below does not apply because the condition of the property was created by defendants, not imposed by the government. Defendants admit that during their ownership and occupancy, they created a "garage/carport" and reconstructed the location at issue "to be consistent aesthetically with the driveway." Pa200. The law of premises liability has long held that because defendants caused the hazardous condition to exist, they may be held liable for injuries and damages incurred. Luchejko v. City of Hoboken, 207 N.J. 191 (2011); Saco v. Hall, 1 N.J. 377 (1949). Ignoring the undisputed evidence that defendants created the condition of the property does not allow defendants to avoid liability.

CONCLUSION

There is no dispute that defendants caused the location to be modified during their ownership of the property. How long ago they claim to have done that is immaterial; the current condition of the property presents a dangerous condition created by defendants. It is dangerous without precipitation and becomes more

dangerous in the presence of ice and snow. To the extent that is debatable, then it is for a jury to decide. Whether the excessively sloped sidewalk and/or pre-existing ice caused or contributed to Ms. Perez's fall also is a question for a jury, not a judge. Suarez v. E. Int'l College, 428 N.J. Super. 10, 27 (App. Div. 2012) (motion judge may not abrogate the jury's exclusive role as the finder of fact), certif. denied, 213 N.J. 57 (2013). On the record presented and pursuant to the constitutional and common law of New Jersey, summary judgment should have been denied. For the foregoing reasons, and those set forth in the opening brief, plaintiff requests that the order granting summary judgment and barring plaintiff's expert be reversed and that the matter be remanded for trial.

Respectfully submitted,

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DATED: September 27, 2024