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CAROLYN J. WALDVOGEL, Plaintiff-Appellant, vs. WALMART, INC., BISERKA NIKOLOVA, JOHN DOES 1-10 & ABC CORPORATIONS 1-10, Defendants-Respondents.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002926-23-T2 **Civil Action** ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY, DOCKET NO. MID-L-6576-21 SAT BELOW: HONORABLE BINA K. DESAI, J.S.C.

BRIEF SUBMITTED ON BEHALF OF THE PLAINTIFF-APPELLANT

On the Brief:
Patrick J. Flinn, Esq.

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PROCEDURAL HISTORY

Carolyn Waldvogel (hereinafter "the plaintiff") was a customer of the Walmart store located at 290 Route 18 in East Brunswick, New Jersey on July 14, 2020 when she was caused to trip and fall as a result of dangerous condition of the premises while exiting the store. (Pa1; Pa61 at 12:3-6).[1] The dangerous condition that caused the plaintiff to trip and fall was created by the foot of a temporary barricade erected at the entrance of the Walmart store that was bent and protruded above the surface and into the pedestrian walkway. (Pa63 at 20:14-22; Pa217-Pa219; Pa220; Pa234). A Complaint was filed on her behalf on November 15, 2021 seeking damages for the permanent injuries she sustained as a result of the fall against Walmart, Inc. and Biserka Nikolova (hereinafter "the defendants" collectively or "defendant Walmart" and "defendant Nikolova" individually). (Pa1). An Answer was filed on behalf of defendants on January 24, 2022. (Pa12).

A motion for summary judgment was filed on behalf of the defendants on February 28, 2024 on the grounds that they were relieved of their duty to provide the plaintiff with a reasonably safe premises because they argued that the raised foot of the barricade that caused the plaintiff to trip and fall was open and obvious and the

[1] Transcript and Appendix Reference Key
1T – Transcript of the April 12, 2024 Motion Hearing
Pa – Plaintiff-Appellant's Appendix

plaintiff saw a raised barricade foot when she entered the store. (Pa22; 1T6:15-7:5). Opposition to the motion was filed on behalf of the plaintiff in which it was argued that the contention that the dangerous condition was open and obvious and/or that the plaintiff saw it while entering the store did not relieve the defendants of the duty they owed her as a business invitee but was rather an issue as to the affirmative defense of comparative negligence and that there were disputed issues of fact to be resolved by the jury. (Pa57; 1T6:6-8:2). The motion was argued before the Honorable Bina K. Desai, J.S.C. on April 12, 2024 who found that the raised barricade foot was an open and obvious condition as a matter of law and that the defendants, therefore, did not owe the plaintiff a duty to warn of the condition. (1T11:20-13:18). An Order was filed later that day granting the motion and dismissing the Complaint with prejudice. (Pa40).

A motion for reconsideration of the Order granting the defendants' motion for summary judgment and dismissing the Complaint was filed on behalf of the plaintiff on April 17, 2024. (Pa42). The defendants filed opposition to the motion. (Pa46). Although the plaintiff requested oral argument in the Notice of motion, Judge Desai did not grant the request and decided the motion on the papers. (Pa43; Pa44). An Order denying the motion was filed on May 10, 2024 along with a written Statement of Reasons. (Pa44; Pa46). In the written Statement of Reasons, Judge Desai again found that the defendants did not owe a duty to warn the plaintiff of the dangerous

condition created by the raised barricade foot because she found that it was an open and obvious condition as a matter of law. (Pa47-Pa48). A timely Notice of Appeal was subsequently filed on behalf of the plaintiff on May 24, 2024. (Pa49).

STATEMENT OF FACTS

The plaintiff went to the Walmart store located at 290 Route 18 in East Brunswick, New Jersey on July 14, 2020 to purchase groceries. (Pa61 at 11:15-17; Pa62 at 13:3-4). This was during the pandemic and defendant Walmart had erected temporary barricades at the entrance of the store in order to separate the entrance and exit doors and to control the flow of customers entering the store. (Pa91-Pa92 at 12:17-13:13; Pa94 at 15:14-19; Pa18 at 18:1-5; Pa185 at 39:4-9). Photographs taken by a Walmart employee from that day show that the feet of multiple barricades were raised above the ground and that one of the feet was bent upwards. (Pa152 at 6:7-23; Pa183 at 37:11-24; Pa215-Pa219). There is no dispute that the feet of the temporary barricades that defendant Walmart erected at the entrance of the store are supposed to lay flat on the ground. (Pa105 at 26:2-4; Pa230-Pa233). Defendant Walmart had extra barricades available to replace barricades that were damaged or that presented safety concerns because of feet that were bent up. (Pa99-Pa100 at 20:22-21:1; Pa108 at 29:11-18; Pa120 at 41:14-24; Pa122 at 43:6-11; Pa196 at 50:2-6).

The plaintiff testified at her deposition that she noticed the barricades that were erected at the entrance of the Walmart store and that a foot on one of the barricades was sticking up when entering the store on the date of her fall. (Pa63 at 20:1-6; Pa64 at 22:3-6). She further testified that after she completed her shopping, she did not

walk the same way through the barricades when she exited the Walmart store as she had when she entered the store. (Pa63 at 18:5-14). While walking back to her car, the plaintiff tripped on one of the raised barricade feet and fell to the ground. (Pa61 at 12:3-6; Pa63 at 20:12-20; Pa64 at 22:10-14). She explained that she felt her left foot catch under the foot of a barricade and that the top of her foot was scraped and bruised after the incident. (Pa63 at 20:12-20; Pa64 at 22:10-14; Pa78 at 77:17-78:19; Pa78 at 79:19-23).

Although the plaintiff did not see which raised foot caught her foot and caused her to trip and fall because the facemask that she was wearing during the height of the Covid-19 pandemic blocked her view of her feet, she identified the bent barricade foot shown in the photograph marked as WM000006 as the most likely one based upon her path of travel. (Pa63 at 20:12-20; Pa64 at 21:1-11; Pa64 at 22:10-14; Pa78 at 77:12-78:6; Pa78 at 79:13-80:7; Pa220-Pa222). The plaintiff's expert engineer, James Kennedy, P.E., noted the photographs of the barricades show that the bent foot was raised several inches above the concrete walkway and protruded into the pedestrian walkway creating a tripping hazard. (Pa228-Pa233). Defendant Walmart's representative acknowledged that the bent foot of the barricade that protruded in a raised condition into the pedestrian walkway is a tripping hazard. (Pa125-Pa126 at 46:10-47:15).

Mr. Kennedy opined that defendant Walmart failed to inspect and maintain the subject entrance walkway area in a manner which conformed to its own policies and procedures and in accordance with adopted maintenance codes and accepted engineering practices, and thereby maintained an unreasonably hazardous condition within an area of foreseeable use by customers and that its failure to abate the hazardous walkway condition caused the plaintiff to fall and sustain injury. (Pa234). As he explained in his report:

> Based upon the above background and analysis, as well as my education and experience as a professional engineer, Walmart Stores East, LP failed to properly inspect the store entrance walkway area, thus permitting a hazardous bent support foot of a barricade to protrude above the surface and into the walkway intended for use by customers. The failures and inactions of Walmart Stores East, LP to inspect, discover, and abate this hazard was in violation of its own policies and procedures and caused Ms. Waldvogel to fall and become injured. Walmart Stores East, LP failed to inspect and maintain the subject entrance walkway area in a manner which conformed to its own policies and procedures and in accordance with adopted maintenance codes and accepted engineering practices, and thereby maintained an unreasonably hazardous condition within an area of foreseeable use by customers. The failure of Walmart Stores East, LP to abate the hazardous walkway condition caused Ms. Waldvogel to fall and sustain injury.
>
> In conclusion and in addition to the foregoing, Ms. Waldvogel's encounter with the bent support foot of the barricade which protruded into and above the walkway surface caused her to fall and sustain injury. Based upon the above background and analysis, as well as my education and experience as a professional engineer, Walmart Stores East, LP failed to exercise due care for the safety of its customers, thereby causing injury to Ms. Waldvogel. (Pa234).

The barricade with the bent foot along with all other barricades that had a potential issue were removed and replaced by Walmart employees immediately after the plaintiff's fall because it was determined that the foot was raised too much. (Pa195 at 49:16-24; Pa196 at 50:10-13; Pa197 at 51:1-3).

LEGAL ARGUMENT

THE ORDER GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE THE DEFENDANTS OWED THE PLAINTIFF AN AFFIRMATIVE DUTY TO PROVIDE HER WITH A REASONABLY SAFE PREMISES AND THE INFERENCE OF FACT WEIGHED IN THE PLAINTIFF'S FAVOR WOULD ALLOW A JURY TO FIND THAT THE DEFENDANTS BREACHED THAT DUTY (Pa40-Pa41; Pa44-Pa48; 1T5:21-13:18).

The plaintiff was a business invitee of the defendants' retail establishment when she was caused to trip and fall on the foot of a temporary barricade that was bent and protruded in a raised condition into the pedestrian walkway along the means of ingress/egress to the store. (Pa61 at 11:15-17; Pa62 at 13:3-4; Pa63 at 20:12-20; Pa64 at 22:10-14; Pa78 at 77:17-78:19; Pa78 at 79:19-23 Pa228-Pa233). It is not disputed that the feet of the barricades erected at the entrance of the Walmart store were supposed lay flat on the ground or that the raised foot of the barricade that protruded into the pedestrian walkway and caused the plaintiff to trip and fall was a tripping hazard. (Pa105 at 26:2-4; Pa125-Pa126 at 46:10-47:15; Pa228-Pa233). Mr. Kennedy opined that the failure to abate the tripping hazard violated accepted standards and defendant Walmart's own policies and procedures. (Pa234). He further opined that defendant Walmart failed to exercise due care for the safety of its customers by maintaining the unreasonably hazardous condition within an areas foreseeably used by its customers which caused the plaintiff to trip, fall, and become injured. (Pa234).

Although the defendants owed the plaintiff an affirmative and non-delegable duty to discover and eliminate any potentially dangerous condition or circumstance on the property and to avoid creating any conditions that would render the premises unsafe, *Jerista v. Murray*, 185 N.J. 175, 191 (2005), the Trial Court granted the defendants' motion for summary judgment and denied the plaintiff's motion for reconsideration on the grounds that the defendants were essentially relieved of this duty because it found that the tripping hazard created by the raised barricade foot was open and obvious as a matter of law. (Pa47-Pa48; 1T11:20-13:18). The plaintiff respectfully submits that the Trial Court's finding that no duty was owed to the plaintiff is contrary to established legal authority directing that a business operator is not relieved of the duty it owes its invitee to render the premises reasonably safe simply because the unsafe and hazardous condition may have been open and obvious or noticed by the invitee. *Taneian v. Meghrigian*, 15 N.J. 267, 273-275 (1954); see also; *Zentz v. Toop*, 92 N.J. Super. 105, 115 (App. Div. 1966), *affd.,* 50 N.J. 250 (1967); see also; *McGrath v. American Cyanamid Co.*, 41 N.J. 272, 275 (1963); see also; *Moore v. Schering Plough, Inc.*, 328 N.J. Super. 300, 302-303 (App. Div. 2000). Accordingly, the plaintiff respectfully requests that the Order granting the defendants' motion for summary judgment be reversed and the matter remanded to the Law Division for trial.

Appellate review of an Order granting summary judgment is *de novo*. *Templo Fuente De Vida Corp. v. National Union Fire Ins. Co. of Pittsburgh*, 224 N.J. 189, 199 (2016). Under this standard of review, the "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." *Manalapan Realty, L.P. v. Twp. Committee of Twp. of Manalapan*, 140 N.J. 366, 378 (1995). Furthermore, in reviewing the matter, the Appellate Division applies the same standard under *Rule* 4:46-2 as the motion judge. *RSI Bank v. Providence Mut. Fire Ins. Co.*, 234 N.J. 459, 472 (2018). This standard provides for the entry of summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *R.* 4:46-2(c).

Summary judgment is a stringent remedy that should be denied unless the right thereto appears so clear as to leave no room for controversy. *Akhtar v. JDN Properties at Florham Park, L.L.C.,* 439 N.J. Super. 391, 398 (App. Div. 2015). In order to obtain summary judgment, the moving party carries the burden of excluding all reasonable doubt as to the existence of a genuine issue of material fact. *Saldana v. DiMedio*, 275 N.J. Super. 488, 494 (App. Div. 1994). Furthermore, the Court may not pick and choose inferences from the

motion record in ruling upon a motion for summary judgment. *Globe Motor Co. v. Igdalev*, 225 N.J. 469, 480 (2016). Rather, the Court must look at the facts in a light most favorable to the non-moving party and draw all inferences of doubt in their favor. *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520, 536 (1995).

Our Supreme Court has stressed that "[i]t [is] not the court's function to weigh the evidence and determine the outcome but only to decide if a material dispute of fact existed." *Parks v. Rodgers*, 176 N.J. 491, 502 (2003). The non-moving party has the right to proceed to trial "where there is the slightest doubt as to the facts." *Ziegelheim v. Apollo*, 128 N.J. 250, 261 (1992)(emphasis added). A jury question is presented even when the evidence is undisputed if reasonable fact-finders can draw different inferences from the testimony and evidence. *Frugis v. Bracigliano*, 351 N.J. Super. 328, 350 (App. Div. 2002), *aff'd in part, rev'd in part*, 177 N.J. 250 (2003). Furthermore, while the issue of duty is generally considered a matter of law properly decided by the Court, summary judgment is not proper where a jury could resolve issues of fact that would support the imposition of a duty. *See*: *Alloway v. Bradlees, Inc.*, 157 N.J. 221, 240 (1999); see also; *Mulraney v. Auletto's Catering*, 293 N.J. Super. 315, 324 (App. Div. 1996), *certif. denied*, 147 N.J. 263 (1996). It is only when the evidence is so "utterly

one-sided" that a Court may decide that a party should prevail as a matter of law. *Gilhooley v. County of Union*, 164 N.J. 533, 545 (2000).

In the present matter, the Trial Court granted the defendants' motion for summary judgment on the basis that it determined that they did not owe the plaintiff a duty. (Pa47-Pa48; 1T11:20-13:18). It cited *Hopkins v. Fox & Lazo, Realtors*, 132 N.J. 426 (1993) as providing the basis for its ruling. (Pa47-Pa48). In *Hopkins*, the Supreme Court was addressing the issue of the duty that is owed to a plaintiff for a condition of a premises when the relationship between the plaintiff and defendant do not fit within the common law classifications, specifically the duty a real estate broker owes to a visitor of an open house that the broker is hosting for the sale of the property. *Hopkins*, 132 N.J. at 432; 434-435. It ruled that a real estate broker has a duty to conduct a reasonable broker's inspection when such an inspection would comport with the customary standards governing the responsibilities and functions of real estate brokers with respect to open house tours which would impose a limited duty on the broker to warn visitors of discoverable physical features or conditions of the property that pose a danger to the visitors. *Id.* at 444-445. The Supreme Court noted the owners of the property remains primarily liable for the safety of all invitees on the property and they owe their invitees a duty "to make reasonable inspections of the property and to remedy any reasonably discoverable defects." *Id.* at 441.

It is respectfully submitted that *Hopkins* is not controlling in this matter. Although our courts are gradually moving away from the common law classifications of trespasser, licensee, and invitee to broader principles of tort obligations in performing a duty analysis when a plaintiff does not fit precisely in one of the classifications, the law pertaining to the common law classifications applies when the plaintiff falls squarely within a classification. *Estate of Desir ex rel. Estiverne v. Vertus*, 214 N.J. 303, 316-317 (2013). This is because a full duty analysis has already been performed for the common law classifications. *Rowe v. Mazel Thirty, LLC*, 209 N.J. 35, 45 (2012). As the Supreme Court explained:

> The common law categories are a shorthand, in well-established classes of cases, for the duty analysis; they, too, are based on the relationship of the parties, the nature of the risk, the ability to exercise care, and considerations of public policy. The only difference is that, through the evolution of our common law, the duty analysis has already been performed in respect of invitees, licensees (social guests), and trespassers. In furtherance of the goal of a 'reasonable degree of predictability,' those standards continue to guide us. *Id.* (citations omitted).

The common law classifications set forth established duties on a sliding scale such that "as the legal status of the visitor improves, the possessor of land owes him more of an obligation of protection." *Id.* at 43-44. Therefore, the duty of care owed to a licensee is greater than that owed to a trespasser but less than that owed to an invitee. *Lechler v. 303 Sunset Ave. Condo. Ass'n*, 452 N.J. Super. 574, 583 (App. Div. 2017).

It is undeniable that the plaintiff falls squarely within the classification of an invitee as a customer of defendant Walmart's commercial establishment when she tripped on the raised foot of a barricade that defendant Walmart erected along the means of ingress and egress from the store. *O'Shea v. K Mart Corp.*, 304 N.J. Super. 489, 492 (App. Div. 1997); see also; *Nelson v. Great Atl. & Pac. Tea Co.*, 48 N.J. Super. 300, 305 (App. Div. 1958). A business owner, such as defendant Walmart, owes a duty to its invitees to exercise ordinary care "to render the premises reasonably safe" for the purposes embraced in the invitation. *M.J.C.* 5.20F(5); see also; *Handleman v. Cox*, 39 N.J. 95, 111 (1963)(explaining that the duty of care owed by an occupier of land to an invitee is to use reasonable care "to make the premises safe[.]"). In other words, it "must exercise reasonable care for the invitee's safety." *M.J.C.* 5.20F(5). This duty is imposed on business operators because they are in the best position to prevent and control the risk of harm to their patrons. *Bauer v. Nesbitt*, 198 N.J. 601, 615 (2009).

The duty that an operator of a business establishment owes to its invitees is an affirmative duty that obligates it to not only discover and eliminate any potentially dangerous condition or circumstance on the property but also to avoid creating any conditions that would render the premises unsafe. *Nisivoccia v. Glass Gardens, Inc.*, 175 N.J. 559, 563 (2003). The affirmative obligation to discover and eliminate any potentially dangerous conditions on the premises applies not only to the interior of

a store but also to the means of egress and ingress provided for the use of invitees. *Ivins v. Town Tavern*, 335 N.J. Super. 188, 194 (App. Div. 2000). As our Supreme Court explained, "[f]or the protection of its patrons, every commercial establishment must maintain its premises, including means of ingress and egress, in reasonably safe condition." *Krug v. Wanner*, 28 N.J. 174, 179 (1958).

In the case at bar, the Trial Court apparently found that the duty the defendants owed the plaintiff was limited to providing a warning about dangerous conditions on the property and was relieved of that duty because it found that the dangerous condition created by the raised barricade foot was open and obvious as a matter of law. (Pa47-Pa48; 1T11:20-13:18). However, while duty owed to a social guest/licensee is to provide a warning of dangerous conditions of which the owner has actual knowledge and the guest is unaware, a duty of reasonable care "to guard against **any** dangerous condition" on the property that the owner knows about or should have discovered is owed to an invitee. *Hopkins*, 132 N.J. at 434(emphasis added). It is undeniable that the plaintiff was not a mere licensee while at the Walmart store but rather held the status of a business invitee.

It is recognized that the duty owed to an invitee is greater than that owed to a social guest/invitee. *Lechler*, 452 N.J. Super. at 583. A social guest/licensee takes the property as he finds it and is simply entitled to have the same knowledge possessed by the host regarding hazardous conditions. *Berger v.*

Shapiro, 30 N.J. 89, 98 (1959). The host is not required to discover defects or maintain the property in a safe condition. *Id.* In regard to a social guest/licensee, the host merely represents that the property is as safe as it appears to be. *Rowe*, 209 N.J. at 44. Therefore, there is no duty when the social guest/licensee is either aware of the dangerous condition or would observe it through reasonable use of his or her faculties. *Bagnana v. Wolfinger*, 385 N.J. Super. 1, 4 (App. Div. 2006).

The duty owed to an invitee is higher than that owed to a social guest/licensee. *Rowe*, 209 N.J. at 44. As stated above, it is an affirmative duty to protect invitees on the premises by discovering and eliminating any hazardous conditions on the property and rendering the property reasonably safe for the purposes for which the invitee entered. *Brown v. Racquet Club of Bricktown*, 95 N.J. 280, 290 (1984); see also; *Gill v. Krassner*, 11 N.J. Super. 10, 14-15 (App. Div. 1950). Therefore, the owner/operator of a commercial establishment still owes its business invitee a duty to render the premises safe even if the dangerous condition may be found to be open and obvious or the invitee saw the condition. *Taniean*, 15 N.J. at 275.

In *Zentz*, the plaintiff held the status of an invitee while working for a contractor on the defendant's property. *Zentz*, 92 N.J. Super. at 111. The plaintiff was injured when he tripped and fell over a wire located on the surface of the roof he was

working on. *Id.* at 108. There was a question as to whether the plaintiff had prior notice of the wire and the Trial Court granted the defendant's motion for judgment notwithstanding the verdict. *Id.* at 111. The Appellate Division, and Supreme Court, found that this was reversible error. *Id.* at 115. It noted that, "even if plaintiff knew of the danger, that knowledge alone would not have barred him." *Id.* This principle was again noted by the Supreme Court in *McGrath* when it stated:

> the issue of defendant's breach of duty would be two-fold: (1) whether the danger was due to a failure to exercise due care or (2) if it was a danger which due care would not have avoided, nonetheless would due care require notice or warning to the decedent. Decedent's appreciation of the danger would be pertinent as to (2), for there would be no need to inform one of a danger he already knows. On the other hand, **if the danger was created by defendant's breach of duty, that negligence would not be dissipated merely because the deceased knew of it**. Negligence would remain, but such knowledge would take us to the question of contributory negligence, **and the deceased would not be barred on that account simply because he knew of the hazard**. Rather the issue would be whether the deceased acted as a reasonably prudent man in view of a known risk. *Id.* at 275 (emphasis added).

The principle of law is further evident in *Moore* where the Appellate Division found that the defendant owed its invitee a duty of care to exercise reasonable care in circumstances where the invitee slipped on an accumulation of snow and was aware that the ground was covered by three inches of snow. *Moore*, 328 N.J. Super. at 302-303.

The different impact that the awareness of a hazard has on the duties owed to a social guest/licensee and invitee was explained by the Supreme Court in *Taniean*:

> It is a corollary of this principle that the gratuitous licensee's awareness of the peril is an absolute bar to recovery: for the occupier's liability is predicated on the concealment of the danger from the licensee. In the case of an invitee, the occupier is under a duty of care to render the premises reasonably safe, and there is a breach of the duty when under the occupier's invitation persons come upon land which the occupier knows or ought to know has elements of danger, **notwithstanding the invitees are themselves aware of the risk of harm**, although contributory fault may bar recovery for a breach of the duty. But in the case of a gratuitous licensee, there is no breach of duty if the licensee also knows of the hazard, or the risk of injury would be obvious to a reasonably prudent person. These rules of status and duty are embedded in the common law. *Taniean*, 15 N.J. at 275 (emphasis added).

The difference in the impact that the awareness of a hazard has on the duties owed to a social guest/licensee and invitee is also shown through the Model Jury Charges that are given to a jury in a premises liability action:[2]

M.J.C. 5.20F(4) Social Guest – Defined and General Duty Owed

A social guest is someone invited to a host's premises. The social guest must accept the premises of the host as the social guest finds them. In

M.J.C. 5.20F(12) Notice to Invitee or Obviousness of Defect

a. Affecting Negligence or Comparative Negligence

Whether defendant has furnished an invitee with a reasonably safe place for the invitee's use may depend upon the

[2] It has been noted that "[g]enerally speaking, the language contained in any model jury charge results from the considered discussion amongst experienced jurists and practitioners." *Estate of Kotsovska v. Liebman*, 221 N.J. 568, 595 (2012).

other words, the host has no obligation to make the home safer for the social **guest** than for the host. The host also is not required to inspect the premises to discover defects that might cause injury to the social guest.

If, however, the host knows or has reason to know of some artificial or natural condition on the premises which could pose an unreasonable risk of harm to the guest and that the guest could not be reasonably expected to discover it, the owner/occupier owes the social guest a duty to exercise reasonable care to make the condition safe or to give warning to the guest of its presence and of the risk involved. In other words, although a social guest is required to accept the premises as the host maintains them, the guest is entitled to the host's knowledge of dangerous conditions on the premises. On the other hand, **where the guest knows or has reason to know of the condition and the risk involved and nevertheless enters or remains on the premises, the host cannot be held liable for the accident**.

[Where Appropriate Add:]

If you find that the property owner/occupier (1) knew or obviousness of the condition claimed to be hazardous and the likelihood that the invitee would realize the hazard and protect against it.

Even though an unsafe condition may be observable by an invitee, you may find that an owner/occupier of premises is negligent, nevertheless, in maintaining said condition when the condition presents an unreasonable hazard to invitees in the circumstances of a particular case.

If you find that defendant was negligent in maintaining an unsafe condition, **even though the condition would be obvious to an invitee**, the fact that the condition was obvious should be considered by you in determining whether the invitee was comparatively negligent (a) in proceeding in the face of a known hazard or (b) in the manner in which the invitee proceeded in the face of a known hazard.

b. Warning of Danger

The duty of an owner or occupier of premises is to provide a reasonably safe place for use by an invitee. Where the owner/occupier knows of an unsafe condition the owner/occupier may satisfy the duty by correcting the condition, or, in those circumstances where it is reasonable to do so, by giving warning to the invitee of the unsafe condition.

Where a warning has been given, **it is for you as jurors to determine whether the warning given was adequate to meet the duty of care**

had reason to know of the dangerous or defective condition, (2) realized or in the exercise of reasonable foresight should have realized it involved an unreasonable risk of harm to the guest, (3) had reason to believe the guest would not discover the condition and realize the risk, and (4) failed to take reasonable steps to protect the guest from the danger by either making the condition safe or warning the guest of the condition and the risk involved, you may find the host negligent under the circumstances. **If, however, you find that the defect was obvious and the owner/occupier had reason to believe the social guest would be aware of the defect and the risk involved, you must find the host was not negligent even though an injury occurred.**

owed to the invitee. In this regard you should consider the nature of the defect or unsafe condition, the prevailing circumstances, and the likelihood that the warning given would be adequate to call attention to the invitee of the hazard and of the need to protect against said hazard.

c. Distraction or Forgetfulness of Invitee

Even if you find that plaintiff knew of the existence of the unsafe or defective condition, or that the unsafe or defective condition was so obvious that defendant had a reasonable basis to expect that an invitee would realize its existence, plaintiff may still recover if the circumstances or conditions are such that plaintiff's attention would be distracted so that the plaintiff would not realize or would forget the location or existence of the hazard or would fail to protect against it.

Thus, even where a hazardous condition is obvious, <u>you must first determine</u> whether, in the circumstances, the defendant was negligent in permitting the condition to exist. You should still consider the plaintiff's comparative negligence. To find plaintiff comparatively negligent, defendant must prove that plaintiff should have had knowledge of the particular danger and knowingly and voluntarily encountered that risk before it can be found that plaintiff was negligent. In considering whether plaintiff was comparatively negligent,

> you may consider that even persons of reasonable prudence in certain circumstances may have their attention distracted so that they would not realize or remember the existence of a hazardous condition and would fail to protect themselves against it. Mere lapse of memory or inattention or mental abstraction at the critical moment is not an adequate excuse. One who is inattentive or forgetful of a known and obvious danger is comparatively negligent unless there is some condition or circumstance which would distract or divert the mind or attention of a reasonably prudent person.

The Model Jury Charges make it clear that while an open and obvious condition may relieve a defendant of the limited duty owed to a social guest/licensee, it does not relieve the defendant of the affirmative duty to render the premises reasonably safe it owes to its invitee. It is respectfully submitted that the Trial Court's ruling in this matter was contrary to that established law and the Order granting the defendants' motion for summary judgment should be vacated.

The affirmative obligation defendant Walmart owed the plaintiff, its business invitee, was also non-delegable. *Gill*, 11 N.J. Super. at 15. The Trial Court's ruling delegates this duty directly to the plaintiff by making her fully responsible for the dangerous condition of the means of ingress and egress resulting from the raised feet of the barricades erected at the entrance of the store. The ruling

essentially provides that the owner/operator of a commercial establishment does not have to take any steps to maintain the premises in a reasonably safe condition when an invitee notices a condition of the premises at an earlier time or is generally aware of the condition of the property. Under this ruling, no commercial property owner would ever be responsible for maintaining their property from snow or ice because a business invitee would be aware of the snow and ice. Such a position is not supported by the law. *See: Moore*, 328 N.J. Super. at 302-303. A commercial land occupier must take steps to eliminate the hazardous condition for the protection of its invitees. *Jerista*, 185 N.J. at 191.

Rather than eliminating the duty as in the case of a social guest/licensee, evidence that the dangerous condition may have been open and obvious or known by the invitee is merely an issue for comparative negligence.[3] *McGrath*, 41 N.J. at 275. The mere fact that a condition may be observable or that the plaintiff saw the condition does not mandate a finding of comparative negligence. *Bates v. Valley Fair Enterprises, Inc.*, 86 N.J. Super. 1, 13 (App. Div. 1964). Negligence is never presumed and must be proved. *Myrlak v. Port Auth. of N.Y. and N.J.*, 157 N.J. 84, 95 (1999). The same reasonable person standard that applies to a defendant's negligence applies to the alleged negligence of a plaintiff. *Shutka v. Pennsylvania*

[3] Comparative negligence is an affirmative defense that the defendants are saddled with the burden of proving. *R.* 4:5-4; see also; *Heimbach v. Mueller*, 229 N.J. Super. 17, 26 (App. Div. 1988); see also; *Renz v. Penn Cent. Corp.*, 87 N.J. 437, 460 (1981).

R. Co., 74 N.J. Super. 381, 390 (App. Div. 1962), *certif. denied*, 38 N.J. 183 (1962). Furthermore, the issue of a plaintiff's care for his or her own safety or what degree of observation would be reasonable is generally a matter for the jury's consideration even when walking into a known danger or in view of a known danger. *Moore*, 328 N.J. Super. at 307; see also; *Bree v. Jalbert*, 87 N.J. Super. 452, 458 (Law Div. 1965), *aff'd on other grounds*, 91 N.J. upper. 38 (App. Div. 1966); see also; *Doherty v. Trenton rust Co.*, 42 N.J. Super. 398, 403-404 (App. Div. 1956). "Only in the clearest case of contributory fault, where a contrary hypothesis is not fairly admissible, does the question become one of law for decisive action by the court." *Poland v. Parsekian*, 81 N.J. Super. 395, 402 (App. Div. 1963), *certif. denied*, 41 N.J. 520 (1964).

In the present matter, the defendants have not established that the plaintiff was comparatively negligent as a matter of law. This is not a situation where the plaintiff voluntarily proceeded in the face of a known hazard. The issue is not merely whether the plaintiff observed the raised barricade foot that caused her to trip and fall or, in the exercise of reasonable care, would have observed the condition, but, also, whether a reasonably prudent person, faced with such a condition would have elected to proceed and whether, as she was proceeding, she exercised reasonable care. *Bates*, 86 N.J. Super. at 13. In fact, the plaintiff testified that she did not see the raised foot of the barricade when it caught her foot and caused her to fall. (Pa77

at 77:12-16). Although the plaintiff testified that she saw a raised foot on the barricade when entering the store, a jury could find that the plaintiff was not unreasonable for not noticing the raised foot that caused her to fall or not remembering the location of the raised foot she saw earlier while negotiating the barricades erected by defendant Walmart while exiting the store and walking to her car.

Even if there were evidence establishing that the plaintiff was negligent and that her negligence was a proximate cause of her fall, that would not entitle the defendants to judgment as a matter of law. The Comparative Negligence Act provides that a plaintiff's "negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought or was not greater than the combined negligence of the persons against whom recovery is sought." *N.J.S.A.* 2A:15-5.1. It is only when the plaintiff's negligence exceeds the defendant's negligence that the plaintiff's cause of action cannot be sustained. *Kane v. Hartz Mountain Industries*, 278 N.J. Super. 129, 150-151 (App. Div. 1994), *aff'd* 143 N.J. 141 (1996). In order to determine the percentage of fault to be attributed to each party, the fact finder has to weigh all of the evidence, make conclusions of fact, and apportion fault amongst the parties. These are functions of the jury, not the Court

in ruling upon a motion for summary judgment. *Piccone v. Stiles*, 329 N.J. Super. 191, 196 (App. Div. 2000). It is respectfully submitted that the defendants have not carried their burden of establishing their affirmative defense of comparative negligence as a matter of law.

Finally, the Order should be reversed because the proofs weighed in the plaintiff's favor, at the very least, create a question of fact as to whether the defendants violated the affirmative non-delegable duty to render the premises reasonably safe for the plaintiff. "While it is within the province of the trial court to determine the legal status of a person coming on another's land, it is the function of the jury to determine the condition of the property and the reasonableness of defendants' care, and to determine the comparative fault of each party. The determination of what constitutes reasonable care under particular circumstances is to be resolved not by a judge but by a jury." *Filipowicz v. Diletto*, 350 N.J. Super. 552, 561 (App. Div. 2002), *certif. denied*, 174 N.J. 362 (2002)(citations omitted). Furthermore, it is not the Courts function to weigh the evidence and determine the outcome on a motion for summary judgment. *Parks*, 176 N.J. at 502. The Court simply determines if there are disputed issues of fact after weighing all inferences in the non-moving party's favor with the functions of weighing the evidence and resolving credibility disputes being left exclusively for

the jury. *Conrad v. Michelle & John, Inc.*, 394 N.J. Super. 1, 13 (App. Div. 2007). As the Appellate Division explained:

> The slightest doubt as to an issue of material fact must be reserved for the factfinder, and precludes a grant of judgment as a matter of law. Any issues of credibility must be left to the finder of fact. That is so even where a witness's testimony is uncontradicted, as long as, when considering the testimony in the context of the record, persons of reason and fairness may entertain differing views as to its truth. Summary judgment should be denied unless the right thereto appears so clearly as to leave no room for controversy. *Akhtar*, 439 N.J. Super. at 398-399 (internal citations omitted).

The inferences of fact weighed in the plaintiff's favor, at the very least, create a genuine issue of material fact as to whether the defendants violated the duty they owed the plaintiff.

The defendants erected temporary barricades along the ingress/egress walkway to the store multiple feet of the barricades being raised above the ground. (Pa91-Pa92 at 12:17-13:13; Pa94 at 15:14-19; Pa18 at 18:1-5; Pa185 at 39:4-9; Pa215-Pa219). It was undisputed that the feet of the barricades were supposed to lay flat on the ground. (Pa105 at 26:2-4; Pa230-Pa233). It was also not disputed that the foot of a barricade that is bent and raised above the walking surface is a tripping hazard. (Pa125-Pa126 at 46:10-47:15; Pa220-Pa222). The defendants allowed the barricades with the raised feet that created tripping hazards for their invitees to remain in place even though they had extra barricades available to replace those that were damaged or that presented safety

concerns. (Pa99-Pa100 at 20:22-21:1; Pa108 at 29:11-18; Pa120 at 41:14-24; Pa122 at 43:6-11; Pa196 at 50:2-6). It was not until immediately after the plaintiff fell that they removed and replaced the barricade with the bent foot and all other barricades that had potential issues. (Pa195 at 49:16-24; Pa196 at 50:10-13; Pa197 at 51:1-3).

The plaintiff's liability expert opined that the barricade with the raised foot created a tripping hazard and that the defendants' failure to abate the hazard caused the plaintiff to trip and fall. (Pa234). As he concluded in his report:

> Based upon the above background and analysis, as well as my education and experience as a professional engineer, Walmart Stores East, LP failed to properly inspect the store entrance walkway area, thus permitting a hazardous bent support foot of a barricade to protrude above the surface and into the walkway intended for use by customers. The failures and inactions of Walmart Stores East, LP to inspect, discover, and abate this hazard was in violation of its own policies and procedures and caused Ms. Waldvogel to fall and become injured. Walmart Stores East, LP failed to inspect and maintain the subject entrance walkway area in a manner which conformed to its own policies and procedures and in accordance with adopted maintenance codes and accepted engineering practices, and thereby maintained an unreasonably hazardous condition within an area of foreseeable use by customers. The failure of Walmart Stores East, LP to abate the hazardous walkway condition caused Ms. Waldvogel to fall and sustain injury.
>
> In conclusion and in addition to the foregoing, Ms. Waldvogel's encounter with the bent support foot of the barricade which protruded into and above the walkway surface caused her to fall and sustain injury. Based upon the above background and analysis, as well as my education and experience as a professional engineer, Walmart Stores East, LP failed to exercise due care for the safety of its customers, thereby causing injury to Ms. Waldvogel. (Pa234).

The inferences from the facts and expert opinion weighed in the plaintiff's favor would allow a jury to find that the defendants violated the "high duty of care" they owed the plaintiff to discover and "eliminate" dangerous conditions, to maintain the premises in a safe condition, and to avoid creating any conditions that would render the premises unsafe. *Nisivoccia*, 175 N.J. at 563.

It is respectfully submitted that the Trial Court overlooked established legal precedent in finding that the defendants did not owe the plaintiff a duty when it found that the tripping hazard was an open and obvious condition as a matter of law. It is further submitted that the determination as to whether the tripping hazard created by a raised foot of one of the many barricades defendant Walmart placed along the means of ingress and egress was open and obvious is a jury question. Accordingly, the plaintiff respectfully submits that the April 12, 2024 Order granting the defendants' motion for summary judgment should be reversed and the matter remanded to the Law Division for trial.

CONCLUSION

Based upon the foregoing, the plaintiff respectfully requests that the April 12, 2024 Order granting the defendants' motion for summary judgment and dismissing the Complaint with prejudice be reversed and the case remanded for trial.

Respectfully submitted,

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s/Patrick J. Flinn, Esq.
_____
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Dated: August 13, 2024

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CAROLYN J. WALDVOGEL, Plaintiff, vs. WALMART, INC., BISERKA NIKOLOVA, JOHN DOES 1-10 & ABC CORPORATIONS 1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002926-23-T2 CIVIL ACTION On appeal from the Superior Court of New Jersey, Law Division, Middlesex County Sat Below: Hon. Bina K. Desai, J.S.C.

BRIEF OF DEFENDANTS-RESPONDENTS WALMART, INC AND BISERKA NIKOLOVA

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PRELIMINARY STATEMENT

Plaintiff Carolyn Waldvogel (hereinafter "Plaintiff" tripped and fell on a raised leg of a metal barricade that had been placed outside of the Walmart retail store located in East Brunswick, New Jersey on July 14, 2020. Defendants Walmart ("Walmart") and Biserka Nikolova (hereinafter collectively referred to as "Defendants") filed a motion for summary judgment which was granted by the trial court. In her opposition, Plaintiff argued that Walmart's duty as a business owner was not limited by the fact that a hazardous condition may have been open and obvious and that comparative negligence was an issue properly within the province of a jury.

After conducting oral argument, the trial court correctly held that the condition of the raised barricade leg was open and obvious and known to Plaintiff and therefore, Defendant Walmart had no duty to warn of the specific condition. The trial court did not err in its analysis and specifically found that it was undisputed that Walmart is a business and owed a duty to provide a reasonably safe premises to Plaintiff as a business invitee. Nevertheless, the duty of care of a business owner is subject to limitation when it comes to dangers that are open, obvious and easily understood. As the trial court correctly observed, the raised barricade leg was open and obvious to Plaintiff as evidenced by Plaintiff's testimony that she saw the raised leg as she entered the Walmart and had notice of the condition. Satisfied with the

foregoing, the trial court then correctly concluded that it need not address Plaintiff's arguments regarding comparative negligence. Accordingly, the trial court's decision granting Defendants motion for summary judgment was properly decided and should be upheld.

PROCEDURAL HISTORY

On November 15, 2021, Plaintiff filed a Complaint alleging generally that Defendants acted negligently in the maintenance, inspection, and repair of the area of Plaintiff's fall. On January 24, 2022, Defendants filed an Answer in response to Plaintiff's Complaint. Thereafter, the parties engaged in written discovery, conducted fact depositions, and exchanged expert reports.

Defendants filed a motion for summary judgment which was argued before the Honorable Bina K. Desai, J.S.C. on April 12, 2024. (Pa22, T1).[1] That day, the trial court issued an Order granting Defendants' motion for summary judgment and dismissing the Complaint with prejudice. (Pa40). On April 17, 2024, Plaintiff filed a motion for reconsideration of the trial court's decision to grant Defendants' motion for summary judgment which was opposed. (Pa42). The trial court decided the motion on the papers and issued a Statement of Reasons on May 10, 2024, denying

[1] Appendix and Transcript Reference Key
Pa – Plaintiff/Appellant's Appendix
Da – Defendant/Respondent's Appendix
T – Transcript of the April 12, 2024 Motion Hearing

Plaintiff's motion for reconsideration. (Pa46). Plaintiff filed the instant appeal on May 24, 2024.

COUNTERSTATEMENT OF FACTS

Plaintiff went to purchase milk at the Walmart store located in East Brunswick, New Jersey on July 14, 2020. (Pa26 ¶ 2). When Plaintiff entered the Walmart, she noticed metal barricades that had been placed outside of Walmart and that the leg of one of the metal barricades was bent upward. (Pa27 ¶¶ 8 & 9). Plaintiff did not report the raised barricade leg to Walmart. (Pa28 ¶ 14). She then shopped for a brief period of time. (Pa27 ¶ 3). Plaintiff tripped over a metal barricade leg that was bent upward after she exited the store. (Pa28 ¶ 13). Plaintiff exited the Walmart from a different location from where she entered and then walked past the barricades at the entrance to walk back to where she had parked her car. (Pa38 ¶1). Plaintiff acknowledged that the barricades that she walked past to return to her car were the same barricades that she passed when she entered the Walmart. (Pa38 ¶1). At the time, Plaintiff wore a facemask which blocked her view of her feet. (Pa28 ¶ 12). However, Plaintiff was aware of and saw the raised leg of the metal barricade on which she tripped when she entered the store. (Pa28 ¶ 15). The then-Front End Coach, Rebekah Mayer, was deposed and testified that she replaced the barricade that Plaintiff tripped over immediately after it came to her attention. (Pa37 ¶9).

THE TRIAL COURT RULING

In granting Defendants' motion for summary judgment, the trial court found that the condition of the raised barricade leg was open and obvious and known to Plaintiff. (T13:13-16). In light of this, the trial court concluded that there was no duty because the condition was open and obvious and entered summary judgment. (T13:13-18).

LEGAL ARGUMENT

A. STANDARD OF REVIEW

On appeal, the reviewing court must apply the same standards under Rule 4:46 as the trial court. Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007). Summary judgment is appropriate when the movant demonstrates "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Rule 4:46-2(c). The New Jersey Supreme Court in Brill v. Guardian Life Ins. Co. of America held:

> Under this . . . standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment, requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

142 N.J. 520, 540 (1995). To preclude summary judgment, the non-moving party must present competent evidence sufficient to create a genuine issue of fact. Id. at 523 (quoting Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 75 (1954)). Disputed facts "of an insubstantial nature" do not preclude summary judgment. Id. at 529. The pertinent inquiry on a motion for summary judgment is "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 536. Where a rational jury could reach but one conclusion, the trial judge must not send the case to trial. Id. at 541 (internal quotation omitted).

The issue in this case is whether Defendants owed a duty to Plaintiff to warn of the raised barricade leg. "The question of whether a duty exists is a matter of law properly decided by the court, not the jury." Wang v. Allstate Ins. Co., 125 N.J. 2, 15 (1991) (citing Strachan v. John F. Kennedy Mem'l Hosp., 109 N.J. 523, 529 (1988)). In this case, it is undisputed that Plaintiff observed the raised barricade leg when she entered the Walmart store and walked by the same set of barricades as she walked towards where she parked her car. Plaintiff did not report the raised barricade leg to Walmart and there is no evidence that Walmart knew of the raised barricade leg or how the barricade leg came to be bent or how long the condition existed.

B. THE TRIAL COURT CORRECTLY HELD THAT WALMART DID NOT HAVE A DUTY TO WARN OF THE RAISED BARRICADE LEG BECAUSE THE DANGER WAS SELF-EVIDENT AND KNOWN TO PLAINTIFF (Pa40, T13:13-15)

The owner of a business owes a duty of reasonable care to warn against known or reasonably discoverable dangerous conditions on the property to those who enter the property as business invitees. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 434 (1993). Plaintiff argues that Defendants owed her "an affirmative and non-delegable duty to eliminate any conditions that would render the premises unsafe." (Appellant's Brief at p.9). Nevertheless, the duty owed to a business invitee is that of reasonable care and is not unlimited as evidenced by our caselaw applying the principles of the open and obvious doctrine in cases where the relationship of the parties was that of business owner and business invitee. See Lokar v. Church of the Sacred Heart, Mount Ephraim, 24 N.J. 549, 14-15 (1957) (holding that a business owner does not have a duty to warn against known dangers); see also Cotter v. United States, 2010 WL 2178958 UNPUB. (D.N.J. May 26, 2010**)** (granting summary judgment where the plaintiff was aware of the presence of wheel stops prior to her fall); Cunningham v. Briarwood Care and Rehabilitation Center, 2016 WL 958140 UNPUB. (App. Div. Mar. 15, 2016) (holding that a rehabilitation facility did not breach its duty to the plaintiff who observed a mattress that caused her to fall prior to her fall); Khutorsky v. Macy's, Inc., 2013 WL 163301 UNPUB. (App. Div. Jan. 16, 2013) (upholding the trial court's decision that although a business owner has a duty to its customers to provide a reasonably safe premises, it has no duty to warn of dangers that are open, obvious and easily understood); Jimenez v. Applebee's

Neighborhood Grill & Bar, 2015 WL 893236 UNPUB. (App. Div. Mar. 4, 2015) (holding that a business owner had no duty to warn of a sizzling hot plate of food as the plate presented an open and obvious condition).

In her Appeal, Plaintiff argues that viewing the facts in the light most favorable to Plaintiff as the non-moving party, there was a sufficient question of fact as to whether Defendants maintained a reasonably safe premises such that Defendants' motion for summary judgment should have been denied. In making this argument, Plaintiff contends that Defendants attempted to delegate this duty to Plaintiff and that Defendants' duty to maintain the premises in a reasonably safe condition did not change simply because the condition may have been observed by passersby. However, Plaintiff fails to address the fact that the duty of a business owner to an invitee is not without limit.

Plaintiff further argues that the trial court misapplied the appropriate duty of care despite the fact that the trial court specifically noted that it was undisputed that Walmart owed Plaintiff a reasonable duty of care as a business invitee. The trial court correctly applied the principles of the open and obvious doctrine in this case and provided a thorough analysis of whether a duty existed in the face of the raised barricade leg. The trial court noted that the issue before it was whether the condition was open and obvious and correctly found that Plaintiff saw the condition noting that it was open and obvious to anyone traversing the area and therefore, Defendants

had no duty as to the specific condition of the raised barricade leg because it was open and obvious.

Plaintiff argues that the trial court's findings were contrary to established legal authority but fails to cite a single case that addresses the facts of the case at bar. Plaintiff relies upon Zentz v. Toop, 92 N.J. Super. 105, 115 (App. Div. 1966), *affd.,* 50 N.J. 250 (1967), to argue that the fact that a hazardous condition is able to be seen or may have been previously observed does not relieve a commercial entity of its duty to maintain a safe, hazard free premises. However, the facts of Zentz differ significantly from the instant matter. There, the plaintiff tripped and fell on a wire supporting an air conditioning tower while he was working as a contractor on the roof of a commercial property. Zentz 92 N.J. Super. at 108. The plaintiff recalled seeing some wires near the air conditioner tower but did not recall seeing the wire that caused him to trip. Id. at 109. The Zentz court explained that the fact that a condition is obvious does not always remove all unreasonable danger such as where people would not expect to find the condition where it is or would be distracted or unlikely to see the condition. Here, there is no evidence that Plaintiff was distracted or unlikely to see the condition. In fact, Plaintiff admits she observed the condition she alleges caused this incident before she entered the Walmart and testified that she was paying attention to where she was walking before she fell. (Pa59 at 21:20-23). Likewise, the photograph bearing Bates-stamp WM000005 that Plaintiff identified

as a photograph of the raised barricade leg where she fell, shows that there is a sign attached to the barricade that states "Watch your Step," providing a warning to those in the area. (Pa217).

Additionally, Plaintiff relies upon Teneian v. Meghrigan, but that case is also distinguishable. 15 N.J. 267 (1954). There, the court addressed the duty of landlords to those in common areas where the landlord has retained control. Id. In Teneian, the plaintiff fell down the stairs in the common area of a multi-family apartment building because the landlord failed to replace the light fixture in the stairwell and the plaintiff could not see the stairs as she descended. Id. at 270. The landlord knew the light fixture was in need of repair before the plaintiff fell and the question before the court was whether the plaintiff was barred from recovery because of her own comparative negligence. Id. at 282. The instant matter differs from Teneian in that there is no evidence of what caused the barricade leg to become raised or how long it had been raised, and Plaintiff did not report the condition to Walmart. Moreover, the trial court found that because the raised barricade leg was open and obvious and Plaintiff did in fact admit to seeing the raised barricade leg, it did not need to address the issue of comparative negligence.

The instant matter also differs from McGrath v. American Cyanamid Co. There, the plaintiff, a contractor's employee, died when he fell into a trench after the temporary "catwalk" that had been erected over the trench upended. In McGrath,

our Supreme Court was unpersuaded by the defendant's "assumption of risk" arguments and upheld the Appellate Division's finding that there was a duty of care owed and evidence of a breach of that duty. 41 N.J. 272, 274 (1963).

By way of reference to the foregoing cases and reliance upon the Model Civil Jury Charges, Plaintiff argues that a business owner can never be relieved of the duty owed to an invitee even in the face of a condition that is open and obvious but fails to address the fact that our courts have found that a business owner's duty is limited by the open and obvious doctrine when a hazard is known to the invitee . See e.g., Lokar at 24 N.J. 549.

CONCLUSION

For the foregoing reasons, the trial court's decision to grant Defendants' motion for summary judgment was properly decided and should be upheld.

Respectfully submitted,

d'Arcambal Ousley & Cuyler Burk

By: /s/Elizabeth McPhillips
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CAROLYN J. WALDVOGEL, Plaintiff-Appellant, vs. WALMART, INC., BISERKA NIKOLOVA, JOHN DOES 1-10 & ABC CORPORATIONS 1-10, Defendants-Respondents.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002926-23-T2 **Civil Action** ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY, DOCKET NO. MID-L-6576-21 SAT BELOW: HONORABLE BINA K. DESAI, J.S.C.

REPLY BRIEF SUBMITTED ON BEHALF OF THE PLAINTIFF-APPELLANT

On the Brief:
Patrick J. Flinn, Esq.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Carolyn Waldvogel (hereinafter "the plaintiff") shall rely upon the procedural history and statement of facts set forth in her initial brief.[1] Walmart, Inc. and Biserka Nikolova are hereinafter referred to as "the defendants" as they were in the plaintiff's initial brief.

[1] Transcript and Appendix Reference Key
1T – Transcript of the April 12, 2024 Motion Hearing
Pa – Plaintiff-Appellant's Appendix

LEGAL ARGUMENT

THE ORDER GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE THE DEFENDANTS OWED THE PLAINTIFF AN AFFIRMATIVE DUTY TO PROVIDE HER WITH A REASONABLY SAFE PREMISES AND THE INFERENCE OF FACT WEIGHED IN THE PLAINTIFF'S FAVOR WOULD ALLOW A JURY TO FIND THAT THE DEFENDANTS BREACHED THAT DUTY (Pa40-Pa41; Pa44-Pa48; 1T5:21-13:18).

A hazardous condition was created along the means of ingress and egress to the Walmart store located at 290 Route 18 in East Brunswick, New Jersey as a result of the raised legs of barricades that were erected in the area. (Pa63 at 20:14-22; Pa217-Pa219; Pa220; Pa234). The plaintiff was exiting the store when her foot caught on one of the legs of a barricade that was bent up and protruded into the walkway causing her to her to fall to the ground. (Pa61 at 12:3-6; Pa63 at 20:12-20; Pa64 at 22:10-1; Pa78 at 77:17-78:19; Pa78 at 79:19-23). It was undisputed that the bent foot of the barricade that protruded in a raised condition into the pedestrian walkway is a tripping hazard. (Pa125-Pa126 at 46:10-47:15; Pa228-Pa233). Although the plaintiff noticed the barricades that were erected at the entrance of the Walmart store and that a foot on one of the barricades was sticking up when entering the store, she did not see the raised leg of the barricade that caused her to fall when she exited the store later that day while taking a

different route than when she entered the store. (Pa63 at 20:1-6; Pa64 at 22:3-6).

The defendants do not dispute that the plaintiff was a business invitee while on the premises of the Walmart store. However, they contend that the Trial Court properly granted their motion for summary judgment on the grounds that they did not owe a duty to the plaintiff because they argue that the duty owed to a business invitee is limited to providing a warning of dangerous condition and are relived of this duty if the dangerous condition was allegedly open and obvious. The plaintiff respectfully submits that thus argument is contrary to established legal precedent.

First of all, "[t]he duty of due care to a business invitee includes an affirmative duty to inspect the premises and '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.'" *Troupe v. Burlington Coat Factory Warehouse Corp.*, 443 N.J. Super. 596, 601 (App. Div. 2016), citing, *Nisivoccia v. Glass Gardens, Inc.*, 175 N.J. 559, 563 (2003) and *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 433 (1993). In other words, the defendants owed the plaintiff a duty "to use reasonable care to make the premises safe[.]" *Handleman v. Cox*, 39 N.J. 95, 111 (1963). The law is clear that a warning alone may satisfy this duty only "in those circumstances where it is reasonable to do so[.]" *Kingett v. Miller*, 347 N.J. Super. 566, 568 (App. Div. 2002). Where it is reasonable to do so,

"the warning **must render the premises reasonably safe** to fulfill the duty owed to the invitee." *Berrios v. United Parcel Service*, 265 N.J. Super. 436, 442 (Law Div. 1992), *aff'd,* 265 N.J. Super. 368 (App. Div. 1993)(emphasis added). As the Model Jury Charge instructs:

> The duty of an owner or occupier of premises is to provide a reasonably safe place for use by an invitee. Where the owner/occupier knows of an unsafe condition the owner/occupier may satisfy the duty by correcting the condition, or, **in those circumstances where it is reasonable to do so**, by giving warning to the invitee of the unsafe condition.
>
> Where a warning has been given, **it is for you as jurors to determine whether the warning given was adequate to meet the duty of care owed to the invitee**. In this regard you should consider the nature of the defect or unsafe condition, the prevailing circumstances, and the likelihood that the warning given would be adequate to call attention to the invitee of the hazard and of the need to protect against said hazard. *Model Jury Charge* 5.20F(12)(b)(emphasis added).

Whether a warning is adequate to discharge the duty owed to a business invitee such that it renders the premises safe is generally a question for the jury. *Kingett*, 347 N.J. at 568.

Secondly, a defendant is not relieved of the affirmative duty to render the premises safe simply because a dangerous condition may be found to have been open and obvious or noticed by the invitee. *Taneian v. Meghrigian*, 15 N.J. 267, 273-275 (1954); see also; *Zentz v. Toop*, 92 N.J. Super. 105, 115 (App. Div. 1966), *affd.,* 50 N.J. 250 (1967); see also; *McGrath v. American Cyanamid Co.*, 41 N.J. 272, 275 (1963); see also; *Moore v. Schering Plough, Inc.*, 328 N.J. Super. 300, 302-

303 (App. Div. 2000). The present matter is on point with this case law as the plaintiff held the same status while on the premises of the defendant as in those matters and there were conditions that the plaintiff was either alleged to have been aware of or were obvious. The rule of law is also described our Model Jury Charges that instruct that a defendant may be found to have negligently maintained an unsafe condition "even though the condition would be obvious to an invitee" and that "even where a hazardous condition is obvious, you must first determine whether, in the circumstances, the defendant was negligent in permitting the condition to exist." *M.J.C.* 5.20F(12)(a) and (c). The defendants have not cited any controlling legal authority overruling the case law or finding that the Model Jury Charges do not accurately reflect the applicable law.

The defendants cite *Lokar v. Church of the Sacred Heart, Mount Ephraim*, 24 N.J. 549 (1957) in support of their argument that they did not owe a duty to its invitee to render the premises safe. However, the plaintiff in *Lokar* was not injured as a result of a dangerous or unsafe condition of the premises. *Id.* at 551. Rather, in that matter the plaintiff was injured as a result of an unidentified person's ill-use of a barrier that blocked vehicular traffic for the safety of individuals on the property. *Id.* at 553-554. The Court found that the accident was caused by the intervening act of another person and there was no proof that the defendant was guilty of any negligence that proximately contributed to the

plaintiff's injuries. *Id.* at 554. It is respectfully submitted that the ruling in that matter has no application to the case at bar or the issue of the duty the defendants owed their invitee in the case at bar.

The defendants also cite unpublished opinions in support of their argument that they are relieved of the affirmative duty owed to an invitee when there is an allegation that the dangerous condition was either open and obvious or noticed by the plaintiff at an earlier time. However, the unpublished opinions do not have controlling or precedential value. *Building Materials Corp. of America v. Allstate Ins. Co.*, 424 N.J. Super. 448, 465 (App. Div. 2012), *certif. denied*, 212 N.J. 198 (2012), citing, *Guido v. Duane Morris LLP,* 202 N.J. 79, 91 n.4 (2010). *Rule* 1:36-3 explicitly provides:

> No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel.

Following this rule, the Appellate Division held that it was manifestly incorrect for a court to cite and rely upon an unpublished opinion as authoritative. *Clarke v. Clarke*, 349 N.J. Super. 55, 61 (App. Div. 2002). The Supreme Court has similarly noted that an unpublished opinion "cannot reliably be considered part of our

common law." *Trinity Cemetery Ass'n, Inc. v. Township of Wall*, 170 N.J. 39, 48 (2001). Accordingly, the plaintiff respectfully submits that the unpublished opinions relied upon by the defendants do not overrule the case law and rules of law set forth in the Model Jury Charges cited by the plaintiff.

It is respectfully submitted that the Trial Court overlooked established legal precedent in finding that the defendants did not owe the plaintiff a duty when it found that the tripping hazard was an open and obvious condition as a matter of law. It is further submitted that the determination as to whether the tripping hazard created by a raised foot of one of the many barricades defendant Walmart placed along the means of ingress and egress was open and obvious is a jury question. Accordingly, the plaintiff respectfully submits that the April 12, 2024 Order granting the defendants' motion for summary judgment should be reversed and the matter remanded to the Law Division for trial.

CONCLUSION

Based upon the foregoing, the plaintiff respectfully requests that the April 12, 2024 Order granting the defendants' motion for summary judgment and dismissing the Complaint with prejudice be reversed and the case remanded for trial.

Respectfully submitted,

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Dated: September 19, 2024