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ESTATE OF AMELIA BAINLARDI (mother) and AMELIA BAINLARDI (daughter), the administrator of the ESTATE OF AMELIA BAINLARDI (mother), Plaintiff-Appellant, vs. HOME DEPOT U.S.A. INC., Defendant-Respondent, and STANLEY LABADY, JOHN DOES 1-5 (Unidentified entities or individuals that owned, operated, controlled, constructed, inspected, maintained and/or repaired the store where plaintiff fell), and ABC CORPORATIONS 1-5 (Unidentified entities that owned, operated, controlled, constructed, inspected, maintained and/or repaired the store where plaintiff fell), Defendants.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003963-22 *Civil Action* ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY, DOCKET NO. MID-L-000021-20 SAT BELOW: HONORABLE ARAVIND AITHAL, J.S.C. **BRIEF SUBMITTED ON BEHALF OF PLAINTIFF-APPELLANT** On the Brief: Jessica R. Bland, Esq.

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PROCEDURAL HISTORY

Amelia Bainlardi (hereinafter "the plaintiff") was a customer of the Home Depot store located at 739 Route 33 in East Windsor, New Jersey on May 30, 2019 when she was caused to trip and fall as a result of dangerous condition in one of the shopping aisles. (Pa1).[1] A Complaint was filed on her behalf on January 20, 2020 seeking damages for the permanent injuries she sustained as a result of the fall against Home Depot U.S.A., Inc. (hereinafter "the defendant") and Stanley Labady. (Pa1). An Answer was filed on behalf of the defendant and Mr. Labady on March 16, 2020. (Pa8). The claims against Mr. Labady were subsequently dismissed with prejudice. (1T104:4-105:14).

The matter proceeded through discovery during which time the plaintiff appeared for a deposition. (1T50:17-22; 4T208:14-262:6). At her deposition, the plaintiff testified about using a cane for balance issues for about two years prior to her fall at Home Depot, tingling and numbness in her legs prior to the

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[1] Transcript and Appendix Reference Key
1T – Transcript of the June 5, 2023 Trial Date
2T – Transcript of the June 6, 2023 Trial Date
3T – Transcript of the June 7, 2023 Trial Date
4T – Transcript of the June 8, 2023 Trial Date
5T – Transcript of the June 9, 2023 Trial Date
6T – Transcript of the June 12, 2023 Trial Date
7T – Transcript of the June 15, 2023 Trial Date
8T – Transcript of the August 4, 2023 Motion Hearing
Pa – Plaintiff-Appellant's Appendix

incident, medication she took for the tingling in her legs, using a handicapped placard from the time she started taking the medication, and two falls that she had prior to the incident which involved tripping over a brick and sliding out of bed. (4T213:11-15; 4T214:3-23; 4T223:18-225:3; 4T225:16-20; 4T226:3-5; 4T226:9-12; 4T246:11-25; 4T247:15-249:7; 4T257:1-3). The plaintiff also attended a defense medical examination with Dr. Steven Robbins who authored a single report that was served in discovery. (Pa176). Although Dr. Robbins reviewed the transcript of the plaintiff's deposition and was aware of her prior medical history, he did not offer an opinion in his report that the plaintiff fell on May 30, 2019 as the result of any prior medical condition or problem in his report and explained that he was unable to determine the cause of her fall. (Pa182). As he stated in his report:

> The cause of the fall is of question to me in that it is not mentioned anywhere in the medical records by any of the people who treated her, but only in the report of Dr. Markbreiter and in her oral history to me today. Further complicating this case is the fact that she had a gait dysfunction and balance disorder leading to prior fall documented before the accident for which I examined her. In fact, she was using a walker at the time of the fall, which would further support that she was having gait problems before she fell. Nonetheless, she did fall in a store, she did fracture her hip, she was treated surgically in an uncomplicated manner, she did have DVT that was treated with medication and in a follow-up ultrasound showed resolution of the clot as is expected. She had preexistent arthritis of this hip that is unrelated to the trauma with a satisfactory reduction and healing of the hip fracture, as is documented. One would not expect posttraumatic arthritis. (Pa182).

The plaintiff's medical expert witness, Dr. Lance Markbreiter, also did not offer any opinions in his reports that the plaintiff's fall was caused by any prior medical condition. (Pa184-Pa193).

Dr. Robbins testified at a *de bene esse* deposition on May 16, 2023. (Pa72). He testified about the plaintiff's prior medical history regarding balance issues, neuropathy, and gait disturbance, and prior falls during his *de bene esse* deposition. (Pa99 at 28:10-13; Pa104 at 32:13-14; Pa108 at 36:23-37:21; Pa110 at 38:21-25; Pa113-Pa114 at 41:25-42:1; Pa119 at 47:8-13; Pa120-Pa121 at 48:13-50:8; Pa130 at 58:1-7; Pa130-Pa133 at 58:13-61:16; Pa134 at 62:1-16; Pa135 at 63:12-14; Pa135-Pa140 at 63:21-68:11). Plaintiff's counsel objected to any testimony regarding the prior falls and medical conditions. (Pa104-Pa108 at 32:15-36:21). She also noted that cross-examination on these issues was being conducted subject to the objection. (Pa127-Pa128 at 55:9-56:9).

The matter was given a peremptory trial date of June 5, 2023. (Pa33). The plaintiff's Pre-Trial Information Exchange was filed on May 23, 2023 together with her *in limine* motions. (Pa15-Pa32). The *in limine* motions included motions to bar evidence and testimony regarding the plaintiff's prior medical conditions, injuries, and falls from trial; to strike portions of the *de bene esse* deposition testimony of Dr. Robbins regarding the plaintiff's prior medical conditions, injuries, and falls; and to bar opinions of defense liability expert

Jody DeMarco, P.E. from trial. (Pa17-Pa18; Pa25-Pa32). Additional *in limine* motions were raised at the start of trial on behalf of the plaintiff which included a motion seeking to bar evidence and testimony that the vehicle in which the plaintiff was taken to the Home Depot store on the date of the incident was parked in a handicapped parking space and had a handicapped parking placard. (1T5:4-7:4).

Trial commenced on June 5, 2023 before the Honorable Aravind Aithal, J.S.C. and a jury and continued on June 6th, 7th, 8th, 9th, 12th, and 15th 2023. (1T-7T). The plaintiff was experiencing health issues unrelated to the injuries she sustained as a result of the subject incident and was unable to appear for trial.[2] (Pa33; 1T5:13-18; 3T68:14-69:1). Both the defendant and the Court were advised of the plaintiff's unrelated health condition prior to the start of trial. (Pa33; 6T159:22-160:4). Plaintiff's counsel advised the jury that the plaintiff would not be coming to Court because she is unavailable during his opening statement. (3T58:12-16). The jury was then instructed by the Trial Court that the plaintiff was unavailable and that they were not to speculate as to why she was not at trial. (3T68:14-39:1).

On the first day of trial, the Trial Court denied the plaintiff's motion to bar evidence of the handicapped placard and parking in a handicapped parking

[2] The plaintiff passed away on July 3, 2023 after trial was concluded. (Pa57).

space. (1T12:9-14; 2T40:10-18). The Trial Court granted the motion to bar Mr. DeMarco from testifying about side effects of medication taken by the plaintiff. (1T36:24-37:1; 1T37:16-21; 1T38:6-9). It also initially reserved on a decision as to whether evidence of the plaintiff's prior falls should be barred. (1T40:14-20; 1T41:2-42:19; 1T45:5-16). However, when ruling upon the motion to strike portions of Dr. Robbins' testimony, the Trial Court denied the motion to strike testimony regarding the plaintiff's prior medical history and falls. (1T173:24-174:2; 1T174:4-16; 1T175:16-176:8; 1T177:5-21; 1T179:4-190:20; 1T203:1-14; 2T29:4-23; 2T30:21-35:12; 2T39:11-13).

The parties came to an agreement that there would be no mention of evidence that was the subject of *in limine* motions that had not yet been ruled on by the Trial Court during opening statements including reference to the medications that the plaintiff was taking prior to the subject incident. (3T31:1-33:24). Given the Trial Court's rulings regarding evidence related to the plaintiff's medical history, plaintiff's counsel noted that the jury would hear that the plaintiff had peripheral neuropathy and gets numbness and tingling in her legs during his opening statement. (3T56:21-23). Defense counsel then not only told the jury that the plaintiff was having trouble with her legs including numbness and tingling but also that she was prescribed medications for these problems contrary to the parties' agreement during his opening statement. (3T86:4-21).

Dr. Markbreiter, a board certified orthopedist, was the only medical expert witness whose testimony was ultimately presented at trial.[3] (3T102:1-2). On direct examination he addressed the plaintiff's prior diagnosis of neuropathy given the rulings by the Trial Court. (3T127:8-128:17). The cross-examination then focused to a great deal about prior surgery to the plaintiff's left hip, prior physical therapy records pertaining to balance and gait issues, and a prior fall. (3T148:23-149:6; 3T149:9-25; 3T150:20-151:6; 3T151:18-153:24; 3T154:13-24; 3T155:24-156:12). The issue of the plaintiff's prior falls was addressed on redirect examination at which time Dr. Markbreiter noted that the falls were discussed in the plaintiff's deposition testimony and that one incident involved a trip over a brick and the other involved her slipping off a bed. (3T167:15-168:24; 3T169:18-170:12; 3T172:8-173:4). He also explained that the prior falls were completely unrelated to the plaintiff's fall at the Home Depot store. (3T172:20-173:4). There was further testimony regarding the prior falls on recross-examination. (3T177:3-178:4).

Since the plaintiff was unavailable, portions of her deposition testimony were read for the jury by both plaintiff's counsel and defense counsel. (4T207:14-23). The Trial Court indicated that it did not want the parties to read-in the same

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[3] The defendant did not make its decision to not present Dr. Robbins' *de bene esse* deposition testimony at trial until the end of its case. (5T159:5-8; 7T6:20-7:1).

portions of the deposition testimony. (4T202:18-21). The plaintiff initially intended on presenting a limited portion of the deposition but that had to become more expansive to address her prior medical history and falls following the Trial Court's rulings. (4T197:22-198:8). The plaintiff agreed to include all the portions the defendant wanted presented to the jury except for the testimony regarding the handicapped placard and a visit to a neurologist following a prior fall so there would be no redundancy of the testimony. (4T195:15-23; 4T197:22-198:8; 4T204:5-13). Therefore, the plaintiff's deposition testimony concerning her use of a cane for balance issues for about two years prior to her fall at Home Depot, tingling and numbness in her legs prior to the incident, medication she took for the tingling in her legs, using a handicapped placard from the time she started taking the medication, and two falls that she had prior to the incident which involved tripping over a brick and sliding out of bed was read-in by plaintiff's counsel. (4T213:11-15; 4T214:3-23; 4T223:18-225:3; 4T225:16-20; 4T226:3-5; 4T226:9-12; 4T246:11-25; 4T247:15-249:7; 4T257:1-3). The plaintiff noted that the tingling in her legs did not affect her balance. (4T225:21-23).

The plaintiff's daughter, Amelia Bainlardi, also testified in her affirmative case. (5T6:8-11). Since the Trial Court denied the plaintiff's motions *in limine* to bar evidence and testimony of her prior medical history and falls these issues

had to be addressed on direct examination. (5T13:11-15; 5T15:17-16:20; 5T17:5-24). Amelia Bainlardi testified the prior falls involved a situation where the plaintiff slid off her bed when she was sitting on the edge of the bed to put on her socks and a situation where she tripped on a cobblestone brick. (5T16:8-20; 5T17:5-20). She also explained that the numbness and tingling in plaintiff's legs did not affect her ability to walk. (5T15:24-16:1). She was then questioned about the plaintiff's prior history of neuropathy, use of a cane, prior falls, balance problems, difficulty standing, and physical therapy for balance and walking on cross-examination. (5T44:22-45:5; 5T45:10-46:6). The plaintiff also called Len Mc Cuen, P.E., AIA, CHFP and Lauren Siegel, RN, BSN, CCM, CLCP, CNLCP as expert witnesses. (4T53:8-14; 4T191:9-193:10). The Trial Court recognized Mr. Mc Cuen as an expert in the fields of architecture, engineering, human factors, and facilities management and Ms. Siegel as an expert in the field of medical billing. (4T59:19-60:5; 4T191:9-193:10).

The plaintiff rested her case on June 9, 2023 at which time the defendant moved for dismissal. (5T54:25-55:1). The Trial Court denied the motion and the defendant proceeded with its case. (5T67:2-68:3). The defendant's case began with a read-in of portions of the plaintiff's deposition testimony. (5T68:7-10). The read-in by defense counsel was primarily a repeat of the deposition already presented to the jury including the plaintiff's use of a cane for balance

issues for about two years prior to her fall at Home Depot, tingling and numbness in her legs prior to the incident, medication she took for the tingling in her legs, and the two prior falls. (5T69:21-70:12; 5T70:17-19; 5T71:15-72:10).

The defendant next called Jody DeMarco, P.E. as a witness. (5T73:21-74:5). The Trial Court recognized Mr. DeMarco as an expert in the fields of civil engineering, forensic engineering, and human factors.[4] (5T103:20-104:9; 5T105:16-106:4). Mr. DeMarco testified that he conducted a site inspection of the store in September 2022 during which time he conducted a recreation of the plaintiff and the walking path that led to her fall. (5T116:3-8). The only opinion Mr. DeMarco offered in his trial testimony was his belief that the plaintiff's rollator did not come into contact with the raised column baseplate with protruding bolts when she fell. (5T114:11-24; 6T41:13-17; 6T78:25-79:4; 6T80:9-11). He came to the conclusion that the plaintiff fell in another location by comparing the cctv footage of the plaintiff's fall, which only showed from her shoulders up, to live footage from the date of his inspection and then moving around a shopping cart with pots that was supposed to be a representation of the plaintiff. (5T123:18-125:2; 5T127:7-128:2; 6T30:24-31:28; 6T34:1-11; 6T80:16-20). The plaintiff moved to strike his testimony following direct

[4] The plaintiff objected to Mr. DeMarco being qualified as an expert in human factors but the Trial Court overruled the objection. (5T101:11-14; 5T102:17-104:9).

examination on the grounds that he did not offer any expert analysis or testify as to a subject that was beyond the ken of the average juror. (6T42:9-47:8). The Trial Court denied the motion. (6T48:6-19).

The defendant next called Frances Bainlardi, the plaintiff's daughter who was with her at Home Depot on the date of the fall, as a witness. (6T94:20-21; 6T115:5-8). Although Frances Bainlardi took the plaintiff to the Home Depot store on May 30, 2019, she did not witness her fall. (6T119:14-15; 6T120:12-15). The defendant elicited testimony regarding the prior falls where the plaintiff tripped on a brick and slid off the bed, the physical therapy the plaintiff received prior to the subject fall for tingling in her legs, and that she parked in a handicapped parking spot at Home Depot on the day of the plaintiff's fall. (6T113-24; 6T114:21-115:4; 6T115:14-23).

During the charge conference, the defendant sought to have the adverse inference charge given to the jury in regard to the plaintiff's absence from trial. (6T152:13-158:19). The Trial Court denied the request. (6T163:3-23). It further noted that it would be instructing the jury that they were not to draw any inferences or speculate as to why the plaintiff did not appear at trial. (6T164:25-168:8). Defense counsel then proceeded to comment on the plaintiff not being called as a witness at trial three times during his summation including an inference that this was an attempt to prevent the jury from judging her

credibility. (7T33:1-4; 7T39:24-40:3; 7T40:4-42:13). Plaintiff's counsel objected to the repeated comments on the plaintiff not being called as a witness. (7T40:4-42:13). The Trial Court then instructed the jury that "[y]ou are not to consider the reasons for why [the plaintiff] is not here today, whether it's a positive reason or a negative reason. You're not to infer why she's not here and take away anything from that, and I'll instruct you again when I charge you, but you're to disregard any statements made by counsel in his closing arguments as to why [the plaintiff] is not here." (7T42:23-43:5).

The Trial Court instructed the jury after summations and photographs taken by the plaintiff's daughter identified as P-9, P-10, and P-11; photographs taken by Mr. Mc Cuen during his site inspection identified as P-12, P-13, P14, and P-15; and photographs taken by Mr. DeMarco during his recreation identified as D-11A, D-11B, ad D-11C were moved into evidence. (4T78:23-79:12; 5T28:7-8; 5T53:4-13; 6T138:23-141:1; 7T120:13-121:4). Video footage from the defendant's cctv system showing the front entrance of the store and Aisle 58 from the date of the plaintiff's fall was also moved into evidence as exhibits P-4, P-5, and P-6. (5T52:19-53:2; 7T120:13-121:4).

The trial began with eight jurors of which six would be selected to deliberate and there would be two alternates. (2T52:24-53:5). Two jurors were excused during trial leaving only six jurors with no alternates. (4T53:25-59:2; 6T126:17-

127:20; 6T144:5-13). One of the jurors who remained for deliberations was observed sleeping during witness testimony and on one occasion the Trial Court had to instruct the Sheriff's Officer to ensure that she was awake. (Pa46). The jury began their deliberations on June 15, 2023. (7T121:9-10). They returned with a verdict later that day finding that the defendant was negligent but that its negligence was not a proximate cause of the plaintiff's accident. (7T124:3-125:7). An Order for Judgment Upon Jury Verdict was filed on July 12, 2023 entering judgment in favor of the defendant and dismissing the Complaint with prejudice. (Pa34).

A Notice of Motion for a new trial pursuant to *Rule* 4:49-1(a) was filed on behalf of the plaintiff on July 5, 2023. (Pa35). The plaintiff argued that the jury's verdict was inconsistent and against the weight of the evidence and that aggregation of erroneous evidentiary rulings by the Trial Court and improper comments by defense counsel in summation resulted in a miscarriage of justice. (Pa37-Pa46). The defendant filed opposition and the motion was argued before Judge Aithal on August 4, 2023. (8T). After hearing oral argument, Judge Aithal found that the evidentiary rulings were appropriate, that the curative instruction given to the jury in regard to defense counsel's comments during summation cured any prejudice to the plaintiff, and that the verdict was

supported by the evidence. (8T20:5-36:18). An Order denying the motion for a new trial was filed on August 4, 2023. (Pa47).

A Notice of Appeal was filed on behalf of the plaintiff on August 25, 2023. (Pa49). The defendant filed a Notice of Motion to dismiss the appeal on the grounds that it believed the Notice of Appeal was a legal nullity because the plaintiff passed away and her estate had not been substituted in as the plaintiff. (Pa54). Opposition to the motion was filed on behalf of the plaintiff and an Order was filed on October 24, 2023 denying the motion and providing that the plaintiff had one hundred and twenty days to have someone appointed by the Middlesex County Surrogate to prosecute the appeal on behalf of the plaintiff. (Pa56). The plaintiff's daughter Amelia Bainlardi was subsequently authorized by the Middlesex County Surrogate to continue this action on behalf of the plaintiff. (Pa58). A Consent Order was filed on January 10, 2024 providing for the plaintiff to file an Amended Complaint naming Amelia Bainlardi (daughter) as the representative of the Estate of Amelia Bainlardi (mother) as the plaintiff. (Pa59). A First Amended Complaint was filed thereafter. (Pa60). However, the defendant subsequently raised concerns over renaming the plaintiff through an Amended Complaint so a second Consent Order was filed on February 16, 2024 withdrawing the First Amended Complaint and amending the caption of the Complaint. (Pa68; Pa69).

STATEMENT OF FACTS

The plaintiff went to the Home Deport store located at 739 Route 33 in East Windsor, New Jersey on May 30, 2019 with her daughter Frances Bainlardi to buy flowers from the garden center. (4T227:8-12; 6T119:3-13). While in the garden center, the plaintiff was walking along Aisle 58. (Pa157; 4T245:1-6; 6T120:9-11). There is a roof support column in the middle of Aisle 58 which had nothing around it on May 30, 2019. (Pa147-Pa149; Pa157; 4T75:17-76:3; 4T246:7-10). The roof support column was four inches by four inches. (4T86:13-20). It sat on a baseplate that was eight inches by eight inches and three-quarters of an inch thick with one portion being lifted one inch off the walking surface. (4T86:13-20). Bolts then extended about three-quarters of an inch above the top of the baseplate. (4T86:23-87:5). The highest point of the baseplate and bolts was about two inches above the walking surface. (4T86:23-87:5). The width of Aisle 58 from the roof support column to the merchandise racks was six feet eight inches. (4T78:7-18; 4T82:10-18). However, the width of the aisle was narrowed by the placement of a glove hut display across from the column. (Pa147-Pa149; 4T77:19-78:3).

The plaintiff was walking with her rollator while in the Home Depot store. (Pa157; 4T228:14-16; 6T115:24-116:2). She used the rollator when she was going to be around a lot of people because she afraid that somebody would bump

into her and it made her feel secure. (4T212:17-21; 4T239:3-6; 4T247:5-8). The rollator was twenty-four inches wide and twenty-six inches long from the front of the handlebars to the back. (4T108:23-109:6; 4T 169:19-170:3). Mr. Mc Cuen testified that a customer walking with a rollator is something to be expected in a retail setting. (4T105:15-20; 4T108:8-17).

The plaintiff was walking towards her daughter and did not see the column or the raised base plate and bolts. (4T260:19-21). The front wheel of the plaintiff's rollator came into contact with a bolt protruding up from the base plate of the roof support column as she was walking along the aisle. (4T228:14-16; 4T232:3-5; 4T232:12-233:5; 4T235:23-236:1; 4T238:7-13; 4T260:24-261:1). The contact with the protruding bolt stopped her movement and caused her to fall to the ground. (4T228:14-16; 4T234:1-12). The plaintiff explained that she would not have fallen if the wheel of her rollator had not hit the bolt protruding from the top of the baseplate. (4T229:19-21; 4T233:15-21; 4T249:22-25).

There were no witnesses to the plaintiff's fall other than the plaintiff herself. (4T117:13-24; 4T160:11-22). Although there was cctv footage from Aisle 58 of the plaintiff's fall, it only shows the top of the plaintiff's body and head. (Pa-157). Mr. Mc Cuen testified that he reviewed the surveillance video footage but it was unusable in terms of measurement or any kind of analysis because of its

low quality. (4T63:24-64:1; 4T64:9-13; 4T110:7-12). He explained that all that can be determined from the video footage is that the plaintiff fell at the column and no determination as to whether or not the wheel of the rollator hit the base plate can be made from the video footage. (4T110:13-22; 4T156:18-23).

Mr. Mc Cuen testified that the roof support column raised baseplate with protruding bolts was a low-lying object. (4T91:20-23). He explained that this is important because a person is less likely to perceive low-lying objects that are below one foot down. (4T92:6-21; 4T98:25-99:2; 4T183:9-16). Mr. Mc Cuen further testified that the raised baseplate with protruding bolts that extended two inches above the walking surface was a tripping hazard. (4T90:9-13; 4T101:21-102:2). He testified that recognized standards require such a tripping hazard to be addressed by either removing the hazard or, if that is not possible, blocking off the hazard from pedestrians or providing a warning of the hazards. (4T102:3-12; 4T103:2-104:5). Mr. Mc Cuen cited standards from the American Society of Testing, the American National Standards Institute, and the National Safety Council in support of his opinions. (4T88:6-91:19).

The plaintiff sustained a four-part intertrochanteric fracture of her right hip as a result of the trip and fall incident. (3T114:7-9). She underwent an intramedullary nail procedure on May 31, 2019 which involved the surgical implantation of a rod and screws. (3T118:18-120:25). She was then discharged

from the hospital to a rehabilitation facility where she stayed for about three and one half weeks before returning home. (3T126:2-9). The plaintiff eventually developed severe post-traumatic arthritis as a result of the fracture to her hip. (3T123:23-125:13; 3T133:12-16; 3T140:11-18).

LEGAL ARGUMENT

POINT I

THE JUDGMENT SHOULD BE REVERSED BECAUSE THE CUMULATIVE EFFECT OF THE IMPROPER COMMENTS BY DEFENSE COUNSEL AND THE ERRONEOUS EVIDENTIARY RULINGS CLEARLY AND CONVINCINGLY RESULTED IN A MISCARRIAGE OF JUSTICE (Pa34; 1T12:9-14; 1T173:24-174:2; 1T174:4-16; 1T175:16-176:8; 1T177:5-21; 1T179:4-190:20; 1T203:1-14; 2T29:4-23; 2T30:21-35:12; 2T39:11-13; 2T40:10-18; 6T48:6-19).

A new trial is properly granted under *Rule* 4:49-1(a) when the Trial Court's evidentiary rulings resulted in undue prejudice. *Crawn v. Campo*, 136 N.J. 494, 512 (1994). *Rule* 4:49-1(a) provides that the Trial Court "shall grant" a new trial "if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." A "miscarriage of justice" is a "pervading sense of wrongness." *Baxter v. Fairmont Food Co*., 74 N.J. 588, 599 (1977). This sense of wrongness can arise in many ways including a manifest lack of inherently credible evidence to support the verdict, improper evidentiary rulings, or improper comments made by counsel during opening and closing arguments. *Id.*; see also; *Hill v. N.J. Dept. of Corrs. Com'r.*, 342 N.J. Super. 273, 302 (App. Div. 2001), *certif. denied*, 171 N.J. 338 (2001); see also; *Bender v. Adelson*, 187 N.J. 411, 431 (2006).

It has been recognized that the cumulative effect of multiple errors may warrant a new trial even if the individual errors in isolation would not require a new trial. *Pellicer v. St. Barnabas Hosp.*, 200 N.J. 22, 53 (2009). As the Appellate Division explained:

> Even when an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal. When legal errors are manifest that might individually not be of such magnitude to require reversal but which, considered in their aggregate, have caused [a party] to receive less than a fair trial, a new trial is warranted. *Barber v. ShopRite of Englewood & Associates, Inc.*, 406 N.J. Super. 32, 52 (App. Div. 2009) (internal citations omitted).

This is because a trial is a dynamic organism that can be desensitized by too much error or too much curative instruction. *Diakamopoulos v. Monmouth Med.*, 312 N.J. Super. 20, 37 (App. Div. 1998). It is respectfully submitted that each of the errors and improper comments of counsel set forth below constitute reversible error on their own and certainly warrant a new trial when combined because their cumulative effect deprived the plaintiff of a fair trial. *See*: *Torres v. Pabon*, 225 N.J. 167, 191 (2016); see also; *Morales-Hurtado v. Reinoso*, 241 N.J. 590, 591-592 (2020).

A. The Trial Court Abused its Discretion in Admitting Evidence Regarding the Plaintiff's Prior Unrelated Falls, Medical Conditions, and use of a Handicapped Placard without the Necessary Expert Testimony Establishing its Relevance to any Issue before the Jury (1T12:9-14; 1T173:24-174:2; 1T174:4-16; 1T175:16-176:8; 1T177:5-21; 1T179:4-190:20; 1T203:1-14; 2T29:4-23; 2T30:21-35:12; 2T39:11-13; 2T40:10-18; 6T48:6-19).

The defendant served a single report from Dr. Robbins in discovery. (Pa176). The purpose of an expert's report is "to forewarn the propounding party of the expected contents of the expert's testimony in order to enable preparation to counter such opinions with other opinion material." *Maurio v. Mereck Constr. Co., Inc.,* 162 N.J. Super. 566, 569 (App. Div. 1978). This principle is codified in *Rule* 4:17-4(e) which explicitly provides that an expert's report "shall contain" a "complete statement" of the expert's opinions. An expert's trial testimony is, therefore, generally confined to the opinions expressed in his or her reports. *Mauro v. Owens-Corning Fiberglass*, 225 N.J. Super. 196, 225 (App. Div. 1988), *aff'd sub nom, Mauro v. Raymark Industries, Inc.*, 116 N.J. 126 (1989).

In this matter, Dr. Robbins did not offer an opinion in his report that the plaintiff's prior falls or prior medical history contributed in any way to her fall in the Home Depot store or the injuries she sustained as a result of the fall. (Pa176-Pa183). Nor was there an opinion from any other expert witness that the plaintiff's fall was caused by any preexisting health condition, prior medication, or prior fall. (Pa184-Pa193). Therefore, the plaintiff sought to bar evidence and testimony regarding the plaintiff's prior medical conditions, injuries, and falls, use of a handicapped placard from trial and to strike portions of the *de bene esse* deposition testimony of Dr. Robbins related to these subjects. (Pa17-Pa18;

Pa25-Pa32; 1T5:4-7:4). The Trial Court denied these motions. (1T12:9-14; 1T173:24-174:2; 1T174:4-16; 1T175:16-176:8; 1T177:5-21; 1T179:4-190:20; 1T203:1-14; 2T29:4-23; 2T30:21-35:12; 2T39:11-13; 2T40:10-18).

The denial of these motions forced the plaintiff to have to address the evidence with her witnesses and resulted in the unrelated evidence being repeatedly broadcast before the jury. This began with opening statements where plaintiff's counsel had to note that the jury would hear that the plaintiff had peripheral neuropathy and gets numbness and tingling in her legs. (3T56:21-23). This was repeated by defense counsel who also commented on the plaintiff being prescribed medications for these problems contrary to the parties' agreement to not refer to medications. (3T31:1-33:24; 3T86:4-21). The unrelated medical history, falls, and treated was then repeatedly presented through witness testimony. Dr. Markbreiter was questioned about the prior diagnosis of neuropathy, a prior surgery to the plaintiff's left hip, prior physical therapy records pertaining to balance and gait issues, and prior falls. (3T127:8-128:17; 3T148:23-149:6; 3T149:9-25; 3T150:20-151:6; 3T151:18-153:24; 3T154:13-24; 3T155:24-156:12; 3T167:15-168:24; 3T169:18-170:12; 3T172:8-173:4; 3T177:3-178:4). The plaintiff's daughters were also questioned in detail about the unrelated medical history and falls. (5T13:11-15; 5T15:17-16:20; 5T17:5-24; 5T16:8-20; 5T17:5-20; 5T44:22-45:5; 5T45:10-46:6; 6T113-24;

6T114:21-115:4; 6T115:14-23). The plaintiff's deposition testimony about her prior use of a cane for balance issues, tingling and numbness in her legs, medication she took for the tingling in her legs, use of a handicapped placard, and falls was also presented to the jury. (4T213:11-15; 4T214:3-23; 4T223:18-225:3; 4T225:16-20; 4T226:3-5; 4T226:9-12; 4T246:11-25; 4T247:15-249:7; 4T257:1-3). Her deposition testimony on these subjects was presented twice during both the plaintiff's case and the defendant's case. (5T69:21-70:12; 5T70:17-19; 5T71:15-72:10).

Although a Trial Court is granted discretion in its evidentiary rulings, its rulings are subject to appellate review under the abuse of discretion standard. *Carey v. Lovett*, 132 N.J. 44, 64 (1993). The Trial Court found that it did not abuse its discretion in admitted evidence regarding the prior medical history and falls because it determined that expert testimony is not required if the evidence is being offered as to the issue of causation of a fall. (8T32:3-33:1). The plaintiff respectfully disagrees and submits that the Trial Court abused its discretion in admitting evidence related to the plaintiff's prior medical history, falls, and handicapped placard in the absence of any expert opinion establishing that the evidence was related to either the cause of the plaintiff's fall or her injuries. Furthermore, the admission of this evidence in the absence of any expert medical opinion had the clear capacity to result in a miscarriage of justice because it was

utilized by the defendant as substantive evidence and allowed the jury to speculate that the plaintiff did not fall as a result of the wheel of her rollator striking the low-lying tripping hazard but rather fell as a result of a prior medical condition without any expert guidance. (7T16:14-17:1; 7T17:6-19:16). Accordingly, the plaintiff respectfully submits that a new trial is warranted.

Before a defendant is permitted to present evidence of a plaintiff's prior accident, injury, or medical condition, he or she is required to establish that that the prior condition has some "logical relationship to the issue in the case." *Allendorf v. Kaiserman Enterprises*, 266 N.J. Super. 662, 672 (App. Div. 1993). This "logical relationship" must be established through an appropriate medical expert opinion. *Id.* This follows the principle of law that it is improper to present unexplained medical facts and data to the lay jury without the guidance of expert testimony. *Showalter v. Barilari Inc.*, 312 N.J. Super. 494, 514 (App. Div. 1998). Therefore, while the plaintiff's prior falls or medical conditions may have been potentially relevant to her the happening of her fall in the Home Depot store or her injuries, expert medical testimony was required to show this "logical relationship". *Allendorf*, 266 N.J. Super. at 672. No such expert testimony was presented at trial in this matter.

It is a well-established rule of law that "a jury should not be allowed to speculate without the aid of expert testimony in an area where laypersons could

not be expected to have sufficient knowledge or experience." *Kelly v. Berlin*, 300 N.J. Super. 256, 268 (App. Div. 1997); see also; *State v. Doriguzzi*, 334 N.J. Super. 530, 538 (App. Div. 2000). Furthermore, the interpretation of medical and/or scientific data, as well as, establishing the relationship, if any, between the data and a particular case is the exclusive function of a qualified expert witness. *Grassi v. Johns-Manville Corp.*, 248 N.J. Super. 446, 455 (App. Div. 1991). Following this basic rule of law, the proper test for determining whether a subject requires expert testimony is whether the subject at issue "is so esoteric that jurors of common judgment and experience cannot form a valid judgment" as to the facts in issue. *Butler v. Acme Markets, Inc.*, 89 N.J. 270, 283 (1982).

In *Wyatt by Caldwell v. Wyatt*, 217 N.J. Super. 580 (App. Div. 1987) a lay witness testified that he observed brake fluid leaking from the defendant's car and that the brake pads were worn down on the vehicle after the accident. The Appellate Division concluded that this testimony was "inadmissible in the absence of expert testimony that [such] observations would support an inference that the brakes were defective at the time of the accident." *Id.* at 591. The rationale for the ruling was that a jury must never be allowed to speculate on a subject that jurors of common judgment and experience cannot reasonably form a valid conclusion on without the aid of an expert opinion. *Id.* Without expert testimony, the jury was not qualified to draw an inference as to whether or not a

leak of brake fluid or a worn brake pad could lead to sudden brake failure. *Id.* Therefore, the Appellate Division ruled that it was reversible error to allow the jury to draw inferences that it was not qualified to draw. *Id.* at 592.

In the present matter, there was absolutely no expert medical evidence that plaintiff's prior falls, prior medical conditions, prior medications, or prior medical treatment had any effect on her fall at the Home Depot store or the injuries she sustained as a result of the fall. It should be noted that this is not a situation where the plaintiff's prior falls or medical history were not disclosed to the defendant, its experts, or the plaintiff's experts during the discovery period. The plaintiff candidly disclosed her prior medical history when she testified about her use of a cane for balance issues for about two years prior to her fall at Home Depot, tingling and numbness in her legs prior to the incident, medication she took for the tingling in her legs, using a handicapped placard from the time she started taking the medication, and two falls that she had prior to the incident which involved tripping over a brick and sliding out of bed during her discovery deposition. (4T213:11-15; 4T214:3-23; 4T223:18-225:3; 4T225:16-20; 4T226:3-5; 4T226:9-12; 4T246:11-25; 4T247:15-249:7; 4T257:1-3). Furthermore, expert opinion testimony is required even if evidence of prior falls is being offered to attack the plaintiff's credibility.

The matter of *Oppedisano v. Utz*, 2012 WL 2360125 (App. Div. 2012) is instructive and confirms that evidence of the plaintiff's prior medical history and falls should have been barred in this matter. In *Oppedisano*, the plaintiff alleged that she suffered from complex regional pain syndrome as a result of a motor vehicle accident and suffered from constant pain and discomfort. *Id.* at 1-2. The defendant sought to present evidence related to a subsequent accident to attack the plaintiff's credibility. *Id.* at 6. The Trial Court barred the evidence and the Appellate Division affirmed noting that the defendant was required to present expert testimony establishing the logical relationship under *Allendorf*. *Id.* at 7. As it explained, "[d]efendant was obligated to adduce some competent evidence that the subsequent accident caused the injuries or otherwise generated plaintiff's existing complaints of pain. Absent such expert testimony, consideration of evidence regarding a subsequent accident would constitute an open invitation to the jury to engage in speculation." *Id.* (internal citation omitted). The defendant argued that the evidence of the other accident was admissible to challenge the plaintiff's credibility in the absence of expert opinion. *Id.* This argument was rejected because it was likely to mislead the jury and cause them to speculate that there was a relationship with the complaints the plaintiff alleged were caused by the subject accident and was an impermissible use of the evidence in the absence of expert testimony. *Id.* at 8.

The matter of *Lintao v. Livingston*, 2011 WL 2935052 (App. Div. 2011) is also instructive in this matter. In *Lintao*, the plaintiff alleged that she suffered a permanent loss of normal function of her neck, back, left wrist, pudendal nerve, and sexual and intestinal function. *Id.* at 3. The defendant sought to present evidence of the plaintiff's prior medical problems, including scoliosis, pelvic inflammatory disease, laparoscopic procedures, and other conditions. *Id.* However, there was no expert opinion that these prior conditions had a logical relationship the case. *Id.* The Appellate Division held that evidence of the prior conditions was properly barred in the absence of medical opinion establishing the logical relationship because it had little, if any, probative value and was unduly prejudicial. *Id.* at 4-5. The Appellate Division noted that evidence of the prior conditions was overtly prejudicial because it affected her back and pelvic region and "could have caused the jury to erroneously infer, without the guidance of an expert testimony, that plaintiff's pre-existing conditions contributed to her injuries." *Id.* at 4. The defendant argued that evidence of the prior condition would be admissible under these circumstances to attack the credibility of the plaintiff and her experts. The Appellate Division disagreed stating, "[i]t is obviously the desire of counsel to merely place before the jury the existence of prior conditions, without showing them to have a bearing on the

injuries plaintiff claimed were caused by the subject accident. Such an invitation to speculate was properly precluded." *Id.* at 5.

It is respectfully submitted that the use of evidence of a prior medical condition to attack the credibility of the plaintiff or her witnesses is not an exception to the requirement that there needs to be expert opinion establishing that the prior condition is related to the happening of the accident or the resulting injuries. There is a very real danger that a jury is going to speculate and find that a relationship exists in the absence of the required expert opinion. That is what occurred in the case at bar when then the jury was repeatedly presented with testimony of the plaintiff's prior falls, prior medical condition, prior balance problems, prior neuropathy, and prior treatment without any expert guidance explaining how that evidence was relevant in any way to her fall on May 30, 2019.

Dr. Robbins, the defense examining doctor, was aware of the plaintiff's prior condition as he reviewed her deposition and commented upon the prior history in his report. (Pa176-Pa183). However, Dr. Robbins was unable to offer an opinion in his report that any prior condition, medication, treatment, or fall was related in any way to the happening of the plaintiff's fall or the injuries she sustained as a result of the fall. (Pa176-Pa183). All he could say was that the cause of the fall was a question to him and that the plaintiff's prior medical

history complicated the case. (Pa182). Even if Dr. Robbins had offered an opinion that the plaintiff's fall was caused by a prior medical condition or health disorder to a reasonable degree of medical probability in his report, his testimony was not presented at trial. The only medical expert witness who testified at trial was Dr. Markbreiter and there was no testimony from him that any prior health condition, medication, or fall, played any role in the plaintiff's fall on May 30, 2019. (3T92:2-180:3).

In spite of the fact that the defendant was unable to offer expert medical testimony relating any aspect of the plaintiff's medical history to her fall at the Home Depot store, the defendant was permitted to continuously broadcast her medical history before the jury throughout trial. The evidence was then used substantively as proof that the plaintiff fell because of her medical condition. As defense counsel hammered home during summation:

> First thing you have to do when we're considering that is let's think about the possibility that Ms. Bainlardi, **who had some balancing issues, just simply fell on her own**. Let's consider whether or not that's a possibility. Whether or not a woman who's 79 years old and has some problems with her balance could have simply just lost her balance that day and fell. Not because she's, not because she's 80, like Dr. Markbreiter said. A lot of 79-year olds don't have issues with balance and are moving around just fine. Ms. Bainlardi, unfortunately, happens to have some problems with her legs that cause her to have problems walking and issues with her balance.
>
> …

So we asked about the Gabapentin, the drugs, medicine she takes for her legs, for her numbness. And did you start taking that around the same time you started using the cane? Her answer -- no, way before. So she had been having problems with her legs, and the numbness, and the tingling, way before she even started using the cane.

Did you ever have a fall prior to your using the cane that necessitated you using the cane going forward? Her answer yes or yeah. Why did you start using the cane? Because I couldn't balance myself without it.

None of this meant to be disrespectful in any fashion. We're just addressing what the facts and the evidence are, and **I'm asking you not to ignore the clear evidence that she had issues with her balance** and issues walking.

We asked her about the numbness and the tingling in her legs and how severe is the tingling on a scale from 1 to 10. Her testimony was, it's like an 8. I don't know if you ever had a situation when you've been sitting too long and you get ready to stand up and you realize that your legs have fallen asleep and there – there's some numbness. You have to stretch and get yourself together.

That's the type of numbness and tingling, that if you take a step, you – you're going to fall. You have to get yourself together, get the numbness out. And she says that she had severe numbness and tingling. On a scale from 1 to 10, it was like an 8.

So when you consider the issues with respect to balance, you have to think about the fact that she said that she had a fall before she even started using a cane, which necessitated it. You know she had the fall with the cane on Christmas in December 2017 while she was using the cane. She had another fall in March 17 when she was in her bedroom trying to put on her socks, and then she had the fall in the Home Depot. And **it's related to the balance issues**. It's related to the fact that she doesn't walk well. **It's related to the fact that she has neuropathy, she has numbness**, she has a pain level of 8 out of 10, and she has shuffling feet. These are just simply facts of the case. The evidence which would lead to somebody possibly losing her balance and falling, even with a walker.

We talked about her physical therapy report and Dr. Markbreiter talked a little bit about this, and this is in December of 2018. In December of 2018, she reported that her balance worsened in the past six 6 months, and she reports no falls in the past six months, but

> numbness from the knees to the toes, insidious over several, several years.
>
> We asked the expert, Dr. Markbreiter, about the term festinating, and whether or not he was familiar with that since he was an orthopedic expert. He said he was not necessarily familiar with it. Festinating is rapid small steps done in attempt to keep the center of gravity in between the feet while the trunk leans forward involuntarily. That is what condition she had of just a few months prior to this. (7T16:14-17:1; 7T17:6-19:16)(emphasis added).

Without any expert explanation as to what impact the plaintiff's medical history or prior falls had on her fall at the defendant's store, the jury determined that the defendant was negligent but that such negligence was not the proximate cause of plaintiff's accident. Obviously, the lay jury took into consideration the plaintiff's prior medical history as the proximate cause of this accident based upon nothing more than the defense counsel's repeated prejudicial and medically unsupported suggestions that plaintiff's fall was caused by a prior condition.

The defendant's contention was basically that the plaintiff must have fallen because of a prior balance problem or neuropathy as evidenced by her prior falls[5]. This allegation was made without any supporting expert medical testimony. Without the aid of expert opinion testimony, the jury did not have the knowledge, training, or experience to determine the impact of any prior

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[5] There was no evidence that the plaintiff's prior falls were caused by a balance problem or any medical condition as Dr. Markbreiter testified. (3T172:20-173:4). One fall involved a trip on a brick and the other involved a situation where she slid down a bed. (5T16:8-20; 5T17:5-20).

medical conditions on the plaintiff's ability to ambulate or whether they would cause her to suddenly collapse and fall while walking. A jury not adequately informed on this extremely complex subject leapt to an unfounded conclusion of the cause of the plaintiff's fall based solely upon their speculation and preconceived notions of what the plaintiff's prior medical conditions entail and how they impact her ability to walk. It bears repeating that, "[a] jury may not speculate in an area where laypersons could not be expected to have sufficient knowledge or experience." *Posta v. Chung-Loy*, 306 N.J. Super. 182, 204 (App. Div. 1997), *certif. denied*, 154 N.J. 609 (1998). The jury needed expert medical guidance to help them understand the relevance, if any, of plaintiff's prior medical history and falls. *Showalter*, 312 N.J. Super. at 514.

As there was no expert medical opinion establishing a "logical relationship" between plaintiff's prior falls or medical conditions, evidence and testimony regarding her prior history was irrelevant and inadmissible at trial. *Paxton v. Misiuk*, 34 N.J. 453, 462 (1961). By allowing defendant to elicit testimony and present evidence regarding plaintiff's prior falls and medical conditions, the Court permitted the jury to draw inferences that it was not qualified to draw. *Wyatt*, 217 N.J. Super. at 592. The plaintiff was severely prejudiced by the jury's uneducated speculation into this complex medical area. It is, therefore, respectfully submitted that it was an abuse of discretion to admit the evidence

of plaintiff's prior falls and medical conditions in the absence of an expert medical opinion establishing a "logical relationship" to her fall and warrants a new trial.

B. The Trial Court Abused its Discretion in Denying the Plaintiff's Motion to Strike the Testimony of the Defense Engineer because his Testimony Addressed Subject Matter that was within the Common Knowledge of the Jury Rather than Expert Opinions Based upon his Training and Experience as an Engineer (6T48:6-19).

The defendant offered the testimony of Mr. DeMarco as an expert in forensic engineering and human factors. (5T87:8-10). Mr. DeMarco testified that he conducted a site inspection of the store in September 2022 during which time he conducted a recreation of the plaintiff and the walking path that led to her fall.[6] (5T116:3-8). Although he claims to have taken between sixty to seventy photographs during his recreation. Mr. DeMarco chose to include only a fraction of those photographs in his report. (5T116:14-17; 5T118:1-4; 6T61:21-23; 6T78:2-5). Mr. DeMarco testified that this inspection and recreation involved comparing the cctv footage of the plaintiff's fall to a live feed from cctv on the day of his inspection. (5T123:18-125:2). He acknowledged that the video footage of the plaintiff's fall only shows from her shoulders up and does not show the floor of the shopping aisle or the rollator. (6T52:10-53:3). He also

[6] The defendant did not provide the plaintiff with notice that its expert would be conducting a recreation of the incident thereby depriving the plaintiff the ability to monitor the recreation.

acknowledged that displays that were in the aisle on the date of the plaintiff's fall were not present during his inspection and recreation. (5T130:8-17).

Mr. DeMarco claimed that live feed from the date of his inspection showed the exact same area as shown on the footage of the plaintiff's fall. (5T143:16-144:9; 5T147:19-148:4). However, he did not know what the frames per second, aspect ratio, or software used to capture the footage was for either the video recording or live feed. (5T131:21-134:4). Nor did he conduct any type of investigation to determine if the camera was in the same position on both occasions even though he admitted that the location and direction of the angle the camera faces are extremely important. (5T142:18-143:3; 6T54:15-23). The only thing he did to determine that the camera position was the same was eyeballing the images. (6T56:25-57:2). Mr. DeMarco testified that he made a rudimentary replication of the plaintiff whom he believed was about five feet tall by stacking pot in a shopping cart to a height of four feet eight inches. (5T127:7-18; 5T127:11-128:2; 6T30:24-31:28; 6T34:1-11; 6T80:16-20). He testified that he proceeded to move the cart around until he believed that the pots were at a location where the plaintiff's head started to dip down. (5T127:19-23). He explained that he then put the pots on the ground in this location and concluded that the plaintiff's rollator did not come into contact with the raised

column baseplate with protruding bolts when she fell. (5T114:11-24; 6T34:16-35:7; 6T41:13-17; 6T78:25-79:4; 6T80:9-11).

The plaintiff moved to strike his testimony following direct examination on the grounds that he did not offer any expert analysis or testify as to a subject that was beyond the ken of the average juror. (6T42:9-47:8). The Trial Court denied the motion. (6T48:6-19). The plaintiff respectfully submits that the Trial Court abused its discretion in denying the plaintiff's motion to strike Mr. DeMarco's testimony.

The Trial Court, as the gatekeeper of expert witness testimony, must ensure that expert testimony is both needed and appropriate. *State v. Sowell*, 213 N.J. 89, 99 (2013). The determination of the admissibility of expert opinion is governed by *N.J.R.E.* 702 and *N.J.R.E.* 703. *Townsend v. Pierre*, 221 N.J. 36, 53 (2015). *N.J.R.E.* 702 first provides, "[i]f 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 general standard for determining the admissibility of an expert's opinion is whether the expert's testimony will help the jury understand the evidence presented and determine the questions in issue. *State v. Odom*, 116 N.J. 65, 71 (1989). Under this standard of admissibility, an expert will be barred from testifying when the danger

of prejudice, confusion and diversion of attention his or her testimony creates surpasses its helpfulness to the jury because it is not sufficiently reliable. *State v. Cavallo*, 88 N.J. 508, 520 (1982).

"The primary justification for permitting expert testimony is that the average juror is relatively helpless in dealing with a subject that is not a matter of common knowledge." *State v. Kelly*, 97 N.J. 178, 209 (1984). Therefore, the initial requirement imposed by *N.J.R.E.* 702 is that the intended testimony must concern a subject matter that is beyond the ken of the average juror. *Kemp ex rel. Kemp v. State*, 174 N.J. 412, 424 (2002). Expert testimony is not appropriate to explain what a jury can understand by itself. *See*: *State v. Cain*, 224 N.J. 410, 427 (2016). In other words, expert testimony is not needed when the matter is within the competence of the jury. *Sowell*, 213 N.J. at 99. The proponent of expert testimony must, therefore, demonstrate that the proposed testimony will enhance the knowledge and understanding of lay jurors with respect to other testimony of a special nature that is normally outside the usual lay sphere. *Kelly*, 97 N.J. at 209.

In the present matter, while Mr. DeMarco is a forensic engineer, he did not offer any testimony or an opinion based upon his experience as an engineer or provide any type of engineering analysis. He simply provided his personal belief as to the location of the plaintiff's fall based upon comparing the video footage showing the plaintiff's shoulders and head when she fell to a live feed of the area more than two

years later. (5T123:18-125:2; 5T127:7-128:2; 6T30:24-31:28; 6T34:1-11; 6T80:16-20). Mr. DeMarco was never qualified as an accident reconstructionist expert or an expert in forensic video analysis. Therefore, his belief was nothing more than a lay opinion as to where he felt the plaintiff's fall occurred. It is respectfully submitted that the Trial Court abused its discretion in permitting Mr. DeMarco to testify about the location of the fall under the guise of expert testimony as no such expertise was required to provide this opinion.

In performing its gatekeeping role in regard to the admission of expert opinion, the Trial Court must also assess the methodology and underlying data used by the expert to formulate an opinion. *Landrigan v. Celotex Corp.*, 127 N.J. 404, 420 (1992). It is the expert's analysis and reasoning process applied to the particular facts of the case that is at issue in determining whether his or her testimony is scientifically reliable. *Kemp*, 174 N.J. at 431. Furthermore, the proponent of expert's testimony carries the heavy burden of establishing the reliability of his or her methodology. *State v. Harvey*, 151 N.J. 117, 170 (1997). "When a proponent does not demonstrate the soundness of a methodology, both in terms of its approach to reasoning and to its use of data, from the perspective of others within the relevant scientific community, the gatekeeper should exclude the proposed expert testimony on the basis that it is unreliable." *In re Accutane Litig.*, 234 N.J. 340, 400 (2018).

In the case at bar, Mr. DeMarco testified about a recreation he performed of the incident at the defendant's store. Mr. DeMarco took a still photo from the surveillance footage that captured the fall, went to the store, and compared the still footage to a shopping cart containing pots that were intended to represent the plaintiff, and moved this shopping cart until it was aligned with what he believed was the location of the fall at the time of her fall based upon his comparison of the still photo he took against the live feed from a surveillance camera in the store. (5T114:11-24; 5T123:18-125:2; 5T127:7-128:2; 6T30:24-31:28; 6T34:1-35:7; 6T41:13-17; 6T78:25-79:4; 6T80:19-20). Mr. DeMarco offered no testimony regarding the defect or any aspect of human factors, although he was so qualified as an expert over plaintiff's objection. He solely testified to the location of plaintiff's fall based upon comparing a photograph to a live-feed video surveillance system. None of his testimony was within the ambit of forensic engineering or a human factors analysis. Allowing his testimony under the guise of 'expert testimony' given the manifest lack of credentials and qualifications allowed this jury to consider inherently uncredible evidence.

Compounding the error, Mr. DeMarco was unable to authenticate the live-feed surveillance footage and photographs. He was unaware if the live-feed footage he was using was from the same camera that captured the incident.

(5T142:18-143:3; 6T54:15-23). He was unaware of any technical features regarding the surveillance camera systems and if these features were the same – position of the camera, resolution of the cameras, aspect ratios of the cameras, frames per second of the footage, software used to capture and store the information. (5T131:21-134:4; 5T142:18-143:3; 6T54:15-23; 6T56:25-57:2). Furthermore, there was no proof that the rudimentary representation of the plaintiff he constructed by piling pots in a shopping cart accurately represented the plaintiff in his recreation. There was no testimony as to the measurement or determination of the plaintiff's height shown in the cctv footage of her fall or even an exact measurement of her height. Mr. DeMarco simply testified that the plaintiff was about five feet tall and that the height of the pots he stacked was four feet eight inches high. (5T127:7-18; 5T127:11-128:2; 6T30:24-31:28; 6T34:1-11; 6T80:16-20). The defendant never established that the methodology used by Mr. DeMarco in his recreation of the plaintiff with a stack of pots was sound or matched the actual data of the plaintiff and her fall.

By allowing Mr. DeMarco to provide an opinion as to the location of the plaintiff's fall under the guise of expert testimony to an area for which he was not qualified and using evidence that was not properly authenticated impermissibly invited this jury to speculate as to the location of the fall. This testimony clearly had the capacity to mislead the jury given the jury verdict may

suggest the jury believed that plaintiff fell at a location other than where plaintiff testified she fell. This jury should not have been able to consider Mr. DeMarco's testimony that was essentially a lay interpretation of the video footage of the plaintiff's fall that the jury was just as qualified to make on its own and the inability of the defense to authenticate the information Mr. DeMarco relied upon and establish the soundness of the methodology he employed to come to his speculative conclusion. Accordingly, the plaintiff respectfully submits that the judgment should be reversed and the matter remanded for a new trial.

C. The Comments made by Defense Counsel in Summation were Improper, Prejudicial, and had the Clear Capacity to Cause an Unjust Result (7T21:25-22:3; 7T24:7-15; 7T25:2-6; 7T33:1-4; 7T35:18-36:20; 7T39:24-40:3).

"Summations must be fair and courteous, grounded in the evidence, and free from any potential to cause injustice." *Risko v. Thompson Muller Automotive Group, Inc.*, 206 N.J. 506, 522 (2011). Although counsel is given broad latitude in summation, comments must be restrained within the facts shown or reasonably suggested by the evidence adduced during the course of trial. *Colucci v. Oppenheim*, 326 N.J. Super. 166, 177 (App. Div. 1999), *certif. denied*, 163 N.J. 395 (2005). Counsel may also not use disparaging language to discredit the opposing party or their witnesses or accuse the party's attorney of trying to deceive the jury or deliberately distorting the evidence. *Szczecina v. PV Holding Corp.*, 414 N.J. Super. 173, 178 (App. Div. 2010). When a summation has the

capacity to improperly influence the jury's ultimate decision making, judicial intervention, including the granting of a motion for a new trial, is required. *Bender*, 187 N.J. at 431.

In this matter, the plaintiff was unable to appear at trial due to unrelated health issues. (Pa33; 1T5:13-18; 3T68:14-69:1). Plaintiff's counsel advised both the defendant and the Trial Court of the plaintiff's unrelated health condition prior to the start of trial. (Pa33; 6T159:22-160:4). The trial proceeded in her absence and her deposition testimony was presented at trial in accordance with *N.J.R.E.* 804(a)(4), *N.J.R.E.* 804(b)(1)(A), and *Rule* 4:16-1(c). The defendant sought to have the adverse inference charge given to the jury in regard to the plaintiff's absence from trial. (6T152:13-158:19). The Trial Court properly denied the request because the plaintiff was an unavailable witness. *State v. Clawans*, 38 N.J. 162, 171 (1962); see also; (6T163:3-23).

Although the Trial Court ruled that the adverse inference charge was not proper, defense counsel repeatedly commented on the plaintiff's absence from trial in a tone that suggested that the plaintiff was being kept from the jury to prevent them from judging her credibility. (7T33:1-4; 7T39:24-40:3; 7T40:4-42:13). Defense counsel first stated, "[Mr. Mc Cuen] relied on [the plaintiff] and her honesty and her accuracy, and I guess they're asking you to do that too, even though she didn't come to Court to testify about what happened." (7T25:2-

6). He next stated, "[t]hey didn't call Ms. Bainlardi. They didn't call Frances. The two people that were actually in aisle 58 on May 30th, 2019, didn't call either one of them in their case." (7T33:1-4). Then when discussing the analysis of witness credibility defense counsel stated, "[t]he witness's demeanor on the stand, the presence of any inconsistent or contradictory statements. Credibility. You weren't given an opportunity to judge [the plaintiff's] demeanor." (7T39:24-40:3). Plaintiff's counsel objected to these repeated comments. (7T40:4-42:13). Although the Trial Court instructed the jury to disregard these statements and that they were not infer why the plaintiff was not present and take anything away from that, the instruction did not erase the prejudicial impact of the statements.

Our Supreme Court has instructed that counsel may not make adverse inference arguments regarding the absence of a witness from trial during summation when an adverse instruction is improper. *Washington v. Perez*, 219 N.J. 338, 364 n.7 (2014). The adverse inference charge was properly found to be inappropriate in the case at bar because the plaintiff was an unavailable witness due to an unrelated health condition. *Gonzalez v. Safe & Sound Sec. Corp.*, 185 N.J. 100, 118 (2005). It was, therefore, improper for defense counsel to repeatedly comment upon the plaintiff's absence from trial during his summation. *State v. Hill*, 199 N.J. 545, 560-561 (2009). The improper

comments were extremely prejudicial in this matter because they suggested that the plaintiff was being kept from the jury by plaintiff's counsel and that they should infer that this is because her testimony was untruthful and would have been damaging had she been called as a witness at trial. (7T25:2-6; 7T33:1-4; 7T39:24-40:3; 7T40:4-42:13).

The prejudicial impact from the comments regarding the plaintiff's absence were enhanced by additional disparaging comments regarding plaintiff's counsel. As stated above, it is improper for an attorney to make derisive statements about the parties, their attorneys, or their witnesses. *Tabor v. O'Grady*, 59 N.J. Super. 330, 340 (App. Div. 1960). This includes accusing a party's attorney of wanting to deceive the jury the jury or to have them evaluate the evidence unfairly. *See: Geler v. Akawie*, 358 N.J. Super. 437, 470-471 (App. Div. 2003), *certif. denied,* 177 N.J. 223 (2003); see also; *Henker v. Preybylowski,* 216 N.J. Super. 513, 518-519 (App. Div. 1987). As stated in *Rodd v. Raritan Radiologic Associates, P.A.*, 373 N.J. Super. 154 (App. Div. 2004):

> Although attorneys are given broad latitude in summation, they may not use disparaging language to discredit the opposing party, or witness, or accuse a party's attorney of wanting the jury to evaluate the evidence unfairly, of trying to deceive the jury, or of deliberately distorting the evidence. *Id.* at 171.

In this matter, defense counsel accused plaintiff's counsel of only giving the jury a lot of distractions at trial. (7T21:25-22:3). He also implied that the plaintiff's

daughters and counsel fabricated the manner in which the plaintiff's fall occurred and were attempting to deceive the jury and recover damages upon a fraudulent claim. (7T24:7-15; 7T35:18-36:20). The comments alone were improper. *Rodd*, 373 N.J. Super. at 171. When combined with the repeated comments that the plaintiff was not called as a witness, they were essentially suggesting that the jury should infer that the plaintiff was purposefully being kept from the jury because she would have broken down and confessed to being a liar.

It is respectfully submitted that the comments made during summation were improper and support the granting of a new trial as the cumulative effect of the comments had a clear capacity to result in a miscarriage of justice. *Henker*, 216 N.J. Super. at 520. When determining whether to set aside a verdict, the court "cannot disregard or dismiss the attorney's role in increasing the prejudice to plaintiff's case." *Green v. New Jersey Mfrs. Ins. Co.*, 160 N.J. 480, 503 (1999).

POINT II

THE TRIAL COURT ERRED IN DENYING THE PLAINTIFF'S MOTION FOR A NEW TRIAL BECAUSE THE JURY'S INCONSISTENT VERDICT WAS AGAINST THE WEIGHT OF EVIDENCE AND RESULTED IN A MISCARRIAGE OF JUSTICE. (Pa47; 8T20:5-36:18).

This matter arises out of a fall down incident wherein the plaintiff was caused to fall when the wheel of her rollator walker impacted the corner of the raised baseplate and protruding bolt of a roof support column that encroached into the walking aisle of the defendant's store. (4T228:14-16; 4T232:3-5; 4T232:12-233:5; 4T235:23-236:1; 4T238:7-13; 4T260:24-261:1). The jury returned a verdict finding that the defendant was negligent but that its negligence was not a proximate cause of the plaintiff's accident. (7T124:3-125:7). The plaintiff respectfully submits that the jury's verdict finding that the defendant's negligence was not a proximate cause of the plaintiff's accident is shocking and against the weight of evidence of the uncontested facts presented at trial.

A verdict that overlooks or undervalues crucial evidence or otherwise shocks the conscience of the court should not stand. *Law v. Newark Bd. of Ed.*, 175 N.J. Super. 26, 38 (App. Div. 1980). As noted above, *Rule* 4:49-1(a) provides that, "[t]he trial judge shall grant the motion if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law."

(emphasis added). A "miscarriage of justice" is a "pervading sense of wrongness." *Baxter*, 74 N.J. at 599. It can arise when there is a manifest lack of inherently credible evidence to support the finding, when there has been an obvious overlooking or under-evaluation of crucial evidence, or when the case culminates in a clearly unjust result. *Hayes v. Delamotte*, 231 N.J. 373, 386 (2018).

Although the trial judge does not sit as the thirteenth juror when ruling upon a motion for a new trial, his or her function is not simply a mechanical one. *Kita v. Borough of Lindenwold*, 305 N.J. Super. 43, 49 (App. Div. 1997). Rather, the judge is required to canvass the record to determine whether reasonable minds might accept the evidence as adequate to support the jury's verdict. *Hacker v. Statman*, 105 N.J. Super. 385, 391 (App. Div. 1969), *certif. denied*, 54 N.J. 245 (1969). Our Supreme Court set forth the proper procedure to be followed in *Dolson v. Anastasia*, 55 N.J. 2 (1969):

> A process of evidence evaluation, - 'weighing' -, is involved, which is hard indeed to express in words. This is not a *pro forma* exercise, but calls for a high degree of conscientious effort and diligent scrutiny. The object is to correct clear error or mistake by the jury. *Id.* at 6.

This flexible standard of reviewing the evidence before the jury allows a judge to set aside a verdict that is against the weight of evidence or that is clearly the result of mistake, passion, prejudice or partiality. *Lanzet v. Greenberg*, 126 N.J. 168, 175 (1991).

While a motion for a new trial is addressed to the sound discretion of the trial court, *Baumann v. Marinaro*, 95 N.J. 380, 389 (1984), when, as here, it clearly appears that there was a miscarriage of justice under the law, a trial court's ruling on a motion for a new trial may be reversed. *R.* 2:10-1. In reviewing the Trial Court's denial of plaintiff's request for a new trial, this Court defers to the Trial Court with respect to intangibles not transmitted by the record but otherwise makes its own independent determination of whether a miscarriage of justice occurred. *Carringo v. Novotny*, 78 N.J. 355, 360 (1979). As one panel of the Appellate Division recently noted:

> We are reminded, though, that our review is not limited to a determination of whether the trial court committed an abuse of discretion but, rather, we must make our own determination as to whether or not there was a miscarriage of justice, deferring to the trial judge only with respect to those intangible aspects of the case not transmitted by the written record – such as witness credibility, demeanor and the feel of the case. *Borngesser v. Jersey Shore Med. Ctr.*, 340 N.J. Super. 369, 378 (App. Div. 2001).

Furthermore, the Appellate Division's scope of review is essentially the same as that of the Trial Court. *Lindenmuth v. Holden*, 296 N.J. Super. 42, 49 (App. Div. 1996), *certif. denied*, 149 N.J. 34 (1997).

In the case at bar, the plaintiff respectfully submits that a diligent scrutiny of the record clearly and convincingly reveals that the jury's verdict has resulted in a miscarriage of justice. The plaintiff held the status of an invitee as a customer of the defendant's commercial establishment. *O'Shea v. K Mart Corp.*, 304 N.J.

Super. 489, 492 (App. Div. 1997). The defendant, therefore, owed the plaintiff a duty of reasonable care "to provide a reasonably safe place to do that which [was] within the scope of the invitation." *Butler*, 89 N.J. at 275. This duty is an affirmative duty that obligated the defendant to discover and eliminate any potentially dangerous condition or circumstance on the property, to maintain the property in a safe condition, and to avoid creating any conditions that would render the property unsafe. *Jerista v. Murray*, 185 N.J. 175, 191 (2005). The undisputed proofs presented at trial establish that the plaintiff was walking along a shopping aisle of the defendant's store when the wheel of her rollator walker impacted the corner of the raised base plate and protruding bolt of a roof support column that encroached into the walking aisle causing her to fall. The plaintiff's liability expert testified that the base plate of the subject column and its protruding bolts created a trip hazard and obstruction of the customer walking aisle and that allowing the hazardous condition to exist fell below the accepted standard of care. The jury clearly agreed with the plaintiff's expert as it found that the defendant was negligent. However, they then found that the defendant's negligence was not a proximate cause of the plaintiff's accident.

A proximate cause is "any cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of and without which the result would not have occurred." *Dawson*

v. Bunker Hill Plaza Associates, 289 N.J. Super. 309, 322 (App. Div. 1996), *certif. denied*, 146 N.J. 569 (1976). The test for proximate cause is satisfied where the negligent conduct is a substantial contributing factor in causing the loss. *Ettin v. Ava Truck Leasing, Inc.*, 53 N.J. 463, 483 (1969). Furthermore, the defendant does not have to foresee exactly what happened to the plaintiff. *Ricci v. American Airlines*, 226 N.J. Super. 377, 383 (App. Div. 1988). It is enough that the type of injury is within an objective realm of foreseeability. *Arvanitis v. Hios*, 307 N.J. Super. 577, 585 (App. Div. 1998).

In this matter, there was absolutely no support in the record for the jury's finding that the defendant's negligence was not a proximate cause of the plaintiff's accident. The plaintiff explained that she was walking along the aisle when the front wheel of her rollator came into contact with the bolt sticking up from the ground which caused the rollator to stop moving and her to fall to the ground. (4T228:14-16; 4T232:3-5; 4T232:12-233:5; 4T235:23-236:1; 4T238:7-13; 4T260:24-261:1). The plaintiff's description of the incident was undisputed. There was no testimony from any witnesses who claimed to have observed the plaintiff's fall and contradicted the plaintiff's description of how the fall occurred. Although surveillance footage from the store was presented at trial, only the plaintiff's head was shown on the video and it did not show how she fell. (Pa157). Nor was there any testimony from a medical or biomechanical expert offering an opinion that the plaintiff's fall was caused by anything other than

the wheel of her rollator making contact with the hazardous condition. Contrary to the evidence before it, the jury unreasonably determined that the defendant's negligence was not a proximate cause of the plaintiff's fall. This verdict defines what the New Jersey courts mean by a "pervading a sense of wrongness." The only explanation for this shocking verdict is that the jury speculated that the plaintiff fell as a result of a prior medical condition as a result of the admission of evidence of the plaintiff's prior medical history and falls without any expert guidance. It is respectfully submitted that a new trial is warranted as a result of the jury's decision, which clearly and convincingly represents a miscarriage of justice under the law.

CONCLUSION

Based upon the foregoing, the plaintiff respectfully requests that the judgment in this matter be reversed and the case remanded for a new trial.

Respectfully submitted,

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Dated: April 1, 2024

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ESTATE OF AMELIA BAINLARDI (mother) and AMELIA BAINLARDI (daughter), the administrator of the ESTATE OF AMELIA BAINLARDI (mother) Plaintiff-Appellant, vs. HOME DEPOT U.S.A. INC., Defendant-Respondent, and STANLEY LABADY, JOHN DOES 1-5 (Unidentified entities or individuals that owned, operated, controlled, constructed, inspected, maintained and/or repaired the store where plaintiff fell) and ABC CORPORATIONS (Unidentified entities that owned, operated, controlled, constructed, inspected,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003963-22 *Civil Action* ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY, DOCKET NO. MID-L-000021-20 SAT BELOW: HONORABLE ARAVIND AITHAL, J.S.C.

FILED, Clerk of the Appellate Division, May 31, 2024, **A-003963-22**

maintained and/or repaired the store where plaintiff fell)

Defendants.

DEFENDANT-RESPONDENT'S BRIEF IN OPPOSITION TO PLAINTIFF/APPELLANT'S APPEAL WITH APPENDIX

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RELEVANT PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

This personal injury trip and fall negligence action was instituted by Amelia Bainlardi (hereinafter "the plaintiff") on January 2, 2020, by filing a Complaint in the Superior Court of New Jersey, Law Division, Middlesex County against Home Depot U.S.A., Inc. (hereinafter "the defendant") and Stanley Labady.[2] (Pa1). Plaintiff alleged that the defendant was negligent in permitting a dangerous condition to exist in the garden department of its store in East Windsor, New Jersey, which caused the plaintiff to fall and sustain serious and permanent injuries. (Pa1). On March 16, 2020, the defendant filed an Answer to the Complaint, denying the allegations. (Pa8).

Thereafter, discovery was conducted during which depositions of the respective parties and the depositions of their liability expert witnesses were taken. On May 16, 2023, the defendant's damages expert, Steven Robbins, M.D. testified at a *de benne esse* deposition. (Pa72).

Trial commenced on June 5, 2023 before the Honorable Aravind Aithal, J.S.C. and a jury and continued on June 6, 7, 8, 9, 12 and 15, 2023. (1T-7T). The plaintiff moved *in limine* to bar evidence of the plaintiff's prior medical conditions, prior history of falls and to strike portions of Dr. Robbins' testimony regarding the

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[1] The Procedural History and Statement of Facts sections have been combined due to their interconnected nature, to reduce repetition and for the convenience of the Court.

[2] The claims against Stanley Labady were subsequently dismissed with prejudice. (1T104:4-105:14).

plaintiff's prior medical conditions and history of falls. (Pa 25, Pa26, Pa29 and Pa30) Plaintiff also moved *in limine* to bar evidence of the plaintiff's use of a handicapped placard. (1T5:13-18). The trial court denied the plaintiff's *in limine* motion to bar evidence of use of the handicapped placard (1T12:9-14; 2T40:10-18). and denied the motions to bar evidence of the plaintiff's prior medical conditions and history of falls and strike portions of Dr. Robbins testimony regarding plaintiff's prior medical conditions and history of falls, ruling that the evidence could be used to impeach the credibility of witnesses and as substantive evidence of the cause of the plaintiff's fall. (1T12:9-14; 1T173:24-174:1T174:4-16; 1T175:16-176:8; 1T177:6-14; 2T29:4-23; 2T33:23-34:2).

On June 7, 2023, the plaintiff's counsel gave opening statements to the jury, at which time, the jury was shown surveillance video footage of the plaintiff, on the day of the incident, walking into the Home Depot store and eventually down aisle 58 in the garden center until the time of her fall. The plaintiff is seen using a rollator walker as she walks. (3T61:23-63:13). This enabled the jury to see firsthand the plaintiff's unsteady gait and reliance on a rollator for support.

On June 8, 2023, the plaintiff called her liability expert, Len McCuen, P.E., to testify. (4T5:13-14). Mr. McCuen testified that he conducted a site inspection at the Home Depot store on December 18, 2020. (4T71:14-72:15). On that day, he met with the plaintiff and her daughters and her attorney in the parking lot. He then

proceeded into the store with only the plaintiff's daughters and the plaintiff's attorney and not the plaintiff herself, at which time he inspected and took measurements of aisle 58 and the column at issue. (4T82:10-13; 4T86:10-20; 4T159:22-160:10).

Mr. McCuen viewed the surveillance video of the plaintiff's incident. On cross-examination, he admitted that he could not make a determination, one way or the other, based on that video alone, that the plaintiff's rollator came into contact with the column. (4T156:10-157:4). Mr. McCuen admitted that he based his opinion that the cause of the accident was the wheel of the plaintiff's rollator hitting the base of the column on the plaintiff's statement that this is how the incident happened, which he found "plausible". (4T160:11-20). Mr. McCuen also testified that he had the opportunity to examine the tires of the plaintiff's rollator involved in the incident and found the rollator to be in excellent condition. (4T174:8-22).

Mr. McCuen also viewed the surveillance video depicting the plaintiff walking into the Home Depot store with a rollator on the day of the incident. Mr. McCuen admitted that as shown in the video, the plaintiff walked with a shuffle and her gait "was diminished", stating "[t]hat's why she needs the rollator". (4T166:10-25).

Due to an unrelated health issue, the plaintiff did not appear live to testify at trial. Instead, on direct, the plaintiff's counsel read in portions of her deposition

testimony. (4T208:14-17). The trial court gave the jury repeated curative instructions that it may not draw any inferences or speculate as to why the plaintiff did not appear at trial and did not testify live. (7T34:5-13; 7T42:15-43:5; 7T95:13-16).

Plaintiff's deposition testimony, read to the jury, created issues of credibility and substantive evidence with regard to the cause of her fall at the Home Depot store. The plaintiff testified that the accident at the Home Depot occurred when she was walking towards her daughter and her rollator hit the bolt of the pole and she fell to the right. (4T228:14-16). The plaintiff admitted she did not see the pole before the wheel of her rollator struck it because she was looking upward toward her daughter. (4T229:19-21). The plaintiff denied she had balance issues when she went to the Home Depot on May 30, 2019 and testified that if she had not hit the bolt, she would not have fallen. (4T249:19-25).

Plaintiff, however, also testified that on the day of the incident, she was having some issues with walking. (4T:224:14-17). She described these issues as "[m]y legs were hurting me" (4T:224:18-19) and "I have numbness… in it." (4T224:18-24). She testified that the numbness started four years ago, which would have been approximately three years before her fall at the Home Depot. (4T224:23-225:3). She was told by her doctor that the numbness could not be cured and it was something she is going to have to continue to deal with. (4T225:7-15). The plaintiff

further testified that two years before the Home Depot incident, she started using a cane for balance issues (4T:213:5-15) and a year before the Home Depot incident, she started using a rollator, which she was using at the time of the incident. (4T213:7-10). She first testified that her use of the rollator was in no way related to balance issues. (4T213:7-20; 247:5-11). Rather, her sole purpose for using the rollator was for security in the event she went out in public and someone bumped into her. (4T257:13-16). She later testified, however, that the rollator provided her with both a feeling of security and helped her with her balance. (4T:213:21-24).

The plaintiff further testified about two prior falls she had before the Home Depot incident. She testified that one incident happened outside her daughter's house on Christmas Day in 2017 when she was using her cane and tripped on a brick and fell. (4T247:15-248:12). The other incident occurred in 2018 in her bedroom when she was walking and slid down the pole of her bed. (4T248:19-249:4).

After the plaintiff's deposition testimony was read into the record, the plaintiff next called the plaintiff's daughter, Amelia, to testify. (5T6:2-3). She was not present at the Home Depot store when the incident happened. (5T36:9-20). She testified about the plaintiff's prior two falls. (5T16:8-17:24).

After the testimony of Amelia Bainlardi, the plaintiff rested (5T51:11-14), after which time, the defendant moved for a directed verdict, which the trial court denied. (5T67:24-68:3).

On direct, the defendant first read in testimony given by the plaintiff during her deposition. (5T69:17-73:17). The defendant next called its liability expert, Jody DeMarco, P.E., to testify. 5T73:21-22). Mr. DeMarco testified about a demonstration he performed at the Home Depot store to recreate the plaintiff's walking path that led to her fall to determine the cause of her fall. (5T116:3-5). As Mr. DeMarco explained, the recreation was necessary because there were no eyewitnesses to the incident and the CC-TV video capturing the plaintiff's incident did not show "where her foot placement was or where the rollator was in relation to…her when she fell…" The surveillance video only showed the upper portion of the plaintiff's body and her head. (5T115:22-25; 6T52:7-24). Mr. DeMarco took a shopping cart and stacked planting pots inside the cart to simulate the top of the plaintiff's head. He then moved the cart around aisle 58 while comparing a live feed surveillance video of aisle 58 with still photographs taken from the CC-TV video of plaintiff's incident. (T617:9-18:12). In this way, he was able to pinpoint the plaintiff's location in aisle 58 when she fell. (6T18:24-19:6) and concluded that at the time of her fall in aisle 58, the plaintiff was past the location of the column, and the wheel of her rollator did not come in contact with the base of that column. (6T20:3-13).

Plaintiff's counsel placed no objections on the record to Mr. DeMarco's testimony when Mr. DeMarco testified on direct examination nor did the plaintiff's

counsel object to any of the photos contained in Mr. DeMarco's report, which were ultimately published to the jury. (6T27:7-9; 6T31:25-32:3; 6T37:18-38:2) It was not until the close of Mr. DeMarco's testimony on direct, when the plaintiff's counsel moved to strike his testimony, in its entirety, solely on the basis that the subject of his testimony was not beyond the ken of the average juror. (6T42:9-43:21). The trial court denied the motion to strike, finding "it goes to the weight not to the admissibility". (6T44:2-4). The plaintiff's counsel then had the opportunity to cross examine Mr. DeMarco. (6T52:4-80:22).

The defendant chose not to call Dr. Robbins as an expert witness and not to play his *de benne esse* video testimony. (6T66:13-19). The defendant next called the plaintiff's daughter, Francis, to testify. (6T94:8-9). Francis was with the plaintiff at the Home Depot store on the day of the incident, but she did not witness the plaintiff's fall. (6T119:14-15; 6T120:12-15). Francis testified about the plaintiff's prior falls and that she parked in a handicapped parking spot with the plaintiff on the day of the plaintiff's fall. (6T113-24; 6T114:21-115:4; 6T115:14-23).

Notably, Francis' testimony lends support to the defendant's theory that the cause of the plaintiff's fall at the Home Depot store was due to the plaintiff's unsteady gait and balance issues and not a dangerous condition in aisle 58 of the store. Francis was asked on direct whether before the Home Depot incident, she

helped care for her mother. Her response was no, she only started helping care for her mother after the incident. (6T100:10-13). When Francis was then presented with deposition testimony she had previously given where she admitted to helping her mother shower and dress before the incident (6T102:11-103:25; 6T110:25-111:13), the jury heard Francis' response to explain her inconsistent testimony.

> A Yeah, but I didn't -- like I said, I didn't – the date, I didn't recognize, you now, remember the date because, you know, I was nervous that day. And like I said, I have a condition.

(6T112:9-12). After the plaintiff cross examined Francis, the defendant rested. (6T124:3-7).

The jury next heard the Summations of the defendant's counsel (7T13:19-47:12) and the plaintiff's counsel (7T47:18-86:7). The trial court then charged the jury (T88:7-119:3) and the jury proceeded to deliberate (7T121:9-10). By a vote of 6-0, the jury found the defendant to be negligent. (7T124:3-10; Pa158). By a vote of 6-0, the jury found that the defendant's negligence was not a proximate cause of the plaintiff's accident that occurred on May 30, 2019. (7T124:13-24; Pa158). On July 12, 2023, an Order for Judgment Upon Jury Verdict was filed entering judgment in favor of the defendant and dismissing the Complaint with prejudice. (Pa34).

On July 5, 2023, the plaintiff filed a notice of motion for a new trial, pursuant to Rule 4:49-1(a). (Pa35) In support of her motion for a new trial, the plaintiff argued that the jury's verdict, finding that the defendant's negligence was not a

proximate cause of the plaintiff's accident, was inconsistent and against the weight of the evidence. Further, the plaintiff argued that the trial court erred in permitting the introduction of evidence related to the plaintiff's prior falls, medical conditions and use of a handicapped and in permitting the defendant's liability expert to testify, on the basis that Mr. DeMarco was not qualified to render his opinions. The plaintiff also argued that defense counsel made improper comments in closing arguments regarding the plaintiff's absence from the trial and failure to testify live, the failure of the plaintiff to call her daughter to testify, and that the plaintiff, her daughters and her attorney fabricated the manner in which the plaintiff's fall occurred. During closing arguments, the plaintiff's counsel never objected to any suggestion about the facts of this accident being fabricated.

The defendant opposed the plaintiff's motion for a new trial. On August 4, 2023, Judge Aithal heard oral argument on the motion for a new trial and denied the motion in its entirety, finding that the evidentiary rulings were appropriate, that the curative instructions given to the jury in regard to defense counsel's comments during summation cured any prejudice to the plaintiff and that the verdict was supported by the evidence. (8T20:5-36:18). On August 4, 2023, an Order denying the motion for a new trial was filed. (Pa47).

On August 25, 2023, the plaintiff filed a Notice of Appeal. (Pa49).

LEGAL ARGUMENT

STANDARD OF REVIEW ON APPEAL

A. New Trial Standard

A court may only order a new trial when, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law. R. 4:49-1(a); see also *Caldwell v. Haynes*, 136 N.J. 422, 431 (1994). Therefore, a trial court should not interfere with a jury verdict unless the verdict is clearly against the weight of the evidence. *Id.* The verdict must shock the judicial conscience. *Id.* (citing *Carey v. Lovett*, 132 N.J. 44, 66 (1993)).

In the American system of justice the presumption of correctness of a verdict by a jury has behind it the wisdom of centuries of common law merged into our constitutional framework." *Baxter v. Fairmount Food Co.*, 74 N.J. 588, 597-598 (1977). The jury's evaluation of factual issues must be afforded "the utmost regard." *Love v. Nat'l R.R. Passenger Corp.*, 366 N.J. Super. 525, 532 (App. Div.), certif. denied, 180 N.J. 355 (2004). "Once the jury is discharged, both trial and appellate courts are generally bound to respect its decision, lest they act as an additional and decisive juror." *Kassick v. Milwaukee Elec. Tool Corp.*, 120 N.J. 130, 135-36 (1990).

In reviewing a trial judge's decision on a motion for a new trial, appellate courts view the evidence in a light most favorable to the party opposing the motion,

Caldwell, supra, 136 N.J. at 432 and give substantial deference to the trial judge who observed the same witnesses as the jurors in recognition of the importance of the "intangibles" not transmitted by the record such as credibility, demeanor and overall "feel of the case." See, e.g., *Carrino v. Novotny*, 78 N.J. 355, 361 (1979); *Baxter*, supra, 74 N.J. at 597-98; *Dolson v. Anastasia*, 55 N.J. 2, 7 (1969).

B. Evidentiary Rulings Standard

The trial court has wide discretion on the admission of evidence. *Green v. N.J. Mfrs. Ins. Co.*, 160 N.J. 480, 492 (1999) (concluding that "[t]he trial court is granted broad discretion in determining both the relevance of the evidence to be presented and whether its probative value is substantially outweighed by its prejudicial nature"); *State v. Koedatich*, 112 N.J. 225, 313 (1988) (in making evidentiary decisions, "the trial court has been entrusted with a wide latitude of judgment [and, as a result the] trial court's ruling will not be upset unless there has been an abuse of that discretion, i.e., there has been a clear error of judgment).

The standard of appellate review for evidentiary rulings is stringent. Evidentiary rulings are entitled to "substantial deference." *State v. Goodman*, 415 N.J. Super. 210, 224 (App. Div. 2010) (quoting *State v. Morton*, 155 N.J. 383, 453 (1998)) ("[i]n reviewing a trial court's evidential ruling, an appellate court is limited to examining the decision for abuse of discretion.") Such rulings can only be reversed on a showing "that the trial court palpably abused its discretion, that is, that its finding

was so wide of the mark that a manifest denial of justice resulted." *State v. Lykes*, 192 N.J. 519, 534 (2007) (quoting *Verdicchio v. Ricca*, 179 N.J. 1 (2004)).

POINT ONE

THE TRIAL COURT PROPERLY PERMITTED THE INTRODUCTION OF EVIDENCE RELATING TO PLAINTIFF'S PRIOR MEDICAL CONDITIONS AND FALLS AND THE USE OF A HANDICAPPED PLACARD. (1T12:9-14; 1T173:24-174:1T174:4-16; 1T175:16-176:8; 1T177:6-14; 2T29:4-23; 2T33:23-34:2; 8T31:22-32:2; 8T32:10-15; 8T32:7-33:1)

Plaintiff challenges various evidential rulings of the trial court. Among these evidential rulings is the trial court's denial of the plaintiff's *in limine* motions to bar evidence and testimony regarding the plaintiff's prior medical conditions, falls and use of a handicapped placard from trial and to strike portions of the *de bene esse* deposition testimony of defense expert, Dr. Robbins, related to these subjects[3] where the defendant offered no expert medical opinion establishing a "logical relationship" between the plaintiff's prior falls or medical conditions and her fall at Home Depot. Plaintiff contends that the trial court abused its discretion in admitting this evidence. (Pb32-33).

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[3] Dr. Robbins was never called as a witness to testify at trial and so the jury never heard his *de benne esse* deposition testimony. As the trial court correctly pointed out on the plaintiff's post trial motion for a new trial, with respect to the plaintiff's *in limine* motion to bar reference to Dr. Robbins testimony about the plaintiff's prior medical conditions and history of falls, "[t]hat's not before the Court. That wasn't before the jury. The jury never considered Dr. Robbins' testimony…So why are we arguing it today?" (8T12:2-15). The plaintiff argues that because the defendant did not announce that it would not be calling Dr. Robbins until the end of the case (Pb6, footnote 3), the trial court's denial of these motions to bar the testimony of Dr. Robbins "forced the plaintiff to have to address the evidence with her witnesses and resulted in the unrelated evidence being repeatedly broadcast before the jury" and prejudiced the plaintiff**.** (Pb21).

The trial court's ruling to permit into evidence evidence and testimony regarding the plaintiff's prior medical conditions, falls and use of a handicapped placard, however, was correct, was not an abuse of discretion and was not "so wide of the mark that a manifest denial of justice resulted." First, the trial court's evidentiary rulings admitting into evidence the testimony of the plaintiff's prior history of neuropathy and gait and balance issues and evidence of the plaintiff's prior history of falls to impeach the credibility of the plaintiff and the plaintiff's witnesses was well within the discretion of the trial court. (1T12:9-14; 1T173:24-174:1T174:4-16; 1T175:16-176:8; 1T177:6-14; 2T29:4-23; 2T33:23-34:2). As shown below, the testimony of the plaintiff and the plaintiff's witnesses created credibility issues and established a proper foundation for the admission of evidence of the plaintiff's prior medical conditions and falls and use of a handicapped placard.

Second, as the trial court properly recognized, where evidence of the plaintiff's prior medical conditions, prior falls and use of a handicapped placard was used by the defendant for purposes of rebutting the plaintiff's claims of causation for her fall and not the cause of her injuries, expert testimony was not required to introduce this evidence. (8T31:22-32:2). Further, as the trial court properly recognized, based on the video of the plaintiff walking in the Home Depot store with a rollator on the day of the incident, that the plaintiff chose to show to the jury during opening statements, "a lay person could see…that people who were unsteady on

their feet and use a device to assist with stability and mobility such as Plaintiff, may be more prone to falls." (8T32:10-15). Accordingly, without expert testimony, a jury could determine whether the plaintiff's prior history of balance and gait issues and prior falls impacted her tendency to fall and was the cause of her fall at the Home Depot. *Id.* The trial court did not abuse its discretion in permitting the introduction of this evidence as substantive evidence of the cause of the plaintiff's fall as well as to impeach the credibility of witnesses.

A. The Testimony of the Plaintiff and Her Witnesses Created Credibility Issues, Substantive Questions of Fact as to the Cause of the Plaintiff's Fall, and Established a Proper Foundation for the Admission of Evidence on the Plaintiff's Prior Medical Conditions, Falls and Use of a Handicapped Placard.

On direct examination, the sworn deposition testimony of the plaintiff was read into the record. (4T208:14-262:4).[4] Ultimately, the plaintiff's testimony created issues of credibility and substantive evidence with regard to the cause of her fall at the Home Depot store, which established a proper foundation for the admission of evidence and testimony on the plaintiff's prior history of neuropathy, balance and gait issues, prior falls and use of a handicapped placard. Proofs may be presented to a jury both as impeachment and as substantive evidence. *Wyatt by Caldwell v. Wyatt*, 217 N.J. Super. 580, 590 (App. Div. 1987) (holding testimony was proper "both to attack [defendant's] credibility and as substantive evidence that

[4] The plaintiff did not testify live at trial and the court issued a curative instruction to the jury with respect to her absence. (7T34:5-13; 7T42:15-43:5; 7T95:13-16).

the accident resulted from [defendant's] negligence."). More specifically, a prior admission or inconsistent statement "may be used either to attack [] credibility or as affirmative substantive proof." *Stoelting v. Hauck*, 32 N.J. 87, 106 (1960).

The plaintiff testified that the accident at Home Depot occurred as follows:

> I was walking towards my daughter and then, you know, my roller hit the pole, the bolt, and I fell to the right, and my roller went to the left.

(4T228:14-16). The plaintiff denied she had balance issues when she went to the Home Depot on May 30, 2019 and testified that if she had not hit the bolt, she would not have fallen. (4T249:19-25). Remaining portions of her sworn deposition testimony, however, call into question her credibility and whether the cause of her fall was her tripping on the bolt or was her losing her balance and falling on her own.

Plaintiff testified that on the day of the accident, she was having some issues with walking. (4T:224:14-17). She described these issues as "[m]y legs were hurting me" (4T:224:18-19) and "I have numbness… in it." (4T224:18-24). The numbness started four years ago, which would have been approximately three years before her fall at the Home Depot. (4T224:23-225:3). She was told by her doctor that the numbness could not be cured and it was something she is going to have to continue to deal with. (4T225:7-15). While the plaintiff denied that the numbness in her legs had some effect on her balance (4T225:21-23; 4T247:1-4), the plaintiff admitted that two years before the Home Depot incident, she started using a cane for balance issues. (4T:213:5-15). Plaintiff also admitted that a year before the Home

Depot incident, she started using a rollator, which she was using at the time of the accident. (4T213:7-10). Her testimony, however, as to the reason for her use of the rollator was inconsistent. On the one hand, she testified that her use of the rollator was in no way related to balance issues. (4T213:7-20; 247:5-11). Rather, her sole purpose for using the rollator was for security in the event she went out in public and someone bumped into her. (4T257:13-16). However, when asked if the rollator provided her with both a feeling of security and helped her with her balance, the plaintiff testified, "Maybe. Yeah". (4T:213:21-24).

The plaintiff was also questioned at the time of her deposition about two prior falls she had before the Home Depot incident. She testified that one incident happened outside her daughter's house on Christmas Day in 2017 when she was using her cane and tripped on a brick and fell. (4T247:15-248:12). The other incident occurred in 2018 in her bedroom when she was walking and slid down the pole of her bed. (4T248:19-249:4). Plaintiff denied that either incident had anything to do with her balance. (4T249:5-10). This testimony, however, is questionable as is plaintiff's credibility given her testimony regarding her use of a cane and rollator one to two years before the Home Depot incident for balance issues.

The plaintiff's credibility as to the cause of the Home Depot incident was further called into question when Dr. Markbreiter testified on cross-examination

concerning his review of the emergency room records from after the plaintiff's fall. In this regard, Dr. Markbreiter testified as follows:

> ***Q. And according to the emergency room records, are you aware that they state that she slipped and she fell on her right side?***
>
> ***A. Yes. That's exactly what it says.***
>
> ***Q. Okay. And the report goes on to note that she was unable to get up, correct?***
>
> ***A. That's correct.***
>
> ***Q. Okay. And the report goes on to note that patient was unsure what caused her to fall but was using a walker at the time.***
>
> ***A. That's what it says.***
>
> ***Q. And you're aware that it also goes on to state that she also told the ER that she normally ambulates with a walker or a cane, correct?***
>
> ***A. That's what it says. Correct.***

(T159:19-160:8) (emphasis added).

Dr. Markbreiter's testimony regarding his review of the emergency room records clearly calls into question the plaintiff's testimony that the Home Depot incident occurred when she tripped over a bolt at the base of a pole in aisle 58 of the Home Depot store. It further calls into question whether the cause of the incident was due to the plaintiff's balance/gait issues and not an alleged dangerous condition at the store. Plaintiff's credibility is at issue and introduction into evidence of her

prior medical conditions, history of falls and use of a handicapped placard to impeach her credibility was entirely appropriate.

Plaintiff's daughter, Francis, was called to testify by the defendant on direct. (6T94:8-9). Francis' testimony at trial called into question her own credibility and the credibility of the plaintiff as to the cause of her fall at the Home Depot store. Francis was asked when she moved to New Jersey in 2016 with her mother, did she help care for her mother. Her response was:

A No, not -- not until the fall.

Q Okay.

A Not until after the fall then I had to take care of her.

(6T100:10-13).

Francis was then presented with prior inconsistent testimony she gave on this topic at her deposition on August 17, 2022. (6T102:11-103:25). When shown her response given at her deposition to the question of whether she agrees that she was helping in assisting her mother with things like showering, dressing, before the Home Depot incident (6T110:25-111:13), Francis excused the inconsistencies in her response to this question, by testifying:

> A Yeah, but I didn't -- like I said, I didn't – the date, I didn't recognize, you now, remember the date because, you know, I was nervous that day. And like I said, I have a condition.

(6T112:9-12). Clearly, Francis' inconsistent testimony regarding whether she was assisting her mother with things like showering and dressing, before the Home Depot incident, calls into question her credibility and the credibility of the plaintiff herself as to the extent of her gait and balance issues before the Home Depot incident and the cause of her fall.

Plaintiff's testimony that she did not have balance issues when she went to the Home Depot store on May 30, 2019, that the incident would not have occurred had she not hit the bolt with her walker, that the numbness in her legs did not affect her balance, and that she did not use a rollator for balance issues are inconsistent with the records and testimony regarding the plaintiff's prior medical history, which document a prior diagnosis of neuropathy, gait and balance issues, use of a cane and rollator and prior falls. The introduction of evidence and testimony relating to plaintiff's prior medical conditions, history of falls and use of a handicapped placard to impeach her credibility and the credibility of her daughter, Francis, was appropriate. The trial court did not abuse its discretion in permitting the introduction of this evidence.

Additionally, the plaintiff's testimony, confirmed by her prior medical records, show that the plaintiff had a history of neuropathy and balance and gait issues before the Home Depot incident, for which she was treating. Such substantive evidence is material and highly probative because it tends to prove that a possible

cause of the Home Depot incident was the plaintiff losing her balance as she walked with her rollator down aisle 58 of the Home Depot store. The trial court properly recognized this when ruling that evidence of plaintiff's prior medical condition and history of falls could also be used as substantive evidence, in addition to used to impeach credibility. (1T177:8-12).

Ultimately, the plaintiff's misleading testimony on her prior medical conditions, history of falls and cause of the Home Depot incident created both credibility and substantive evidence. As such, the trial court did not abuse its discretion in permitting the introduction of evidence and testimony regarding the plaintiff's prior medical conditions, history of falls and use of a handicapped placard.

B. Expert Testimony Is Not Required To Admit Evidence of Plaintiff's Prior Medical Conditions, History of Falls and Use of Handicapped Placard Where the Evidence Is Used to Rebut the Plaintiff's Claim of Causation for the Incident Itself.

In the plaintiff's Brief, the plaintiff argues that "the Trial Court abused its discretion in admitting evidence related to the plaintiff's prior medical history, falls, and handicapped placard in the absence of any expert opinion establishing that the evidence was related to either the cause of the plaintiff's fall or her injuries. Furthermore, the admission of this evidence in the absence of any expert medical opinion had the clear capacity to result in a miscarriage of justice because it was utilized by the defendant as substantive evidence and allowed the jury to speculate that the plaintiff did not fall as a result of the wheel of her rollator striking the low-

lying tripping hazard but rather fell as a result of a prior medical condition without any expert guidance." (Pb22-23).

To the contrary, the trial court did not abuse its discretion in admitting evidence related to the plaintiff's prior medical history, falls, and handicapped placard in the absence of expert testimony because as the trial court correctly ruled, expert testimony is not required when the evidence at issue is used for the purpose of rebutting causation for the incident as opposed to medical causation. (8T31:19-32:2). Here, the defendant presented evidence of the plaintiff's prior falls, medical conditions, and use of a handicapped placard to demonstrate that her fall was not caused by any alleged dangerous condition at the Home Depot Store. The defendant did not contend that plaintiff's accident-related injuries were caused by a pre-existing condition or some other event. The evidence went to cause of the accident, not the cause of the injuries.

In support of her argument that the trial court improperly permitted the admission of evidence related to the plaintiff's prior medical history, falls, and use of a handicapped placard, in the absence of any expert opinion establishing that the evidence was related to the cause of the plaintiff's fall, the plaintiff relies upon three reported decisions - *Allendorf v. Kaiserman Enterprises*, 266 N.J. Super. 662, 672 (App. Div. 1993), *Oppedisano v. Utz*, 2012 WL 2360125 (App. Div. 2012)[5] and

[5] This unreported decision is exhibit Pa160 to the plaintiff's Appendix Volume I.

Lintao v. Livingston, 2011 WL 2935052 (App. Div. 2011)[6]. (Pb23, 26-7). This case law relied upon by the plaintiff, however, does not support the contention that the challenged ruling of the trial court to admit evidence of the plaintiff's prior medical conditions, falls and handicapped placard constituted an abuse of discretion. These cases are distinguishable from the present case in that unlike the present case, the challenged evidence in each of these other cases was used at trial to prove medical causation.

In *Allendorf*, the plaintiff was struck and injured by an elevator door in an office building. *Allendorf*, supra, 266 N.J. Super. at 666. The plaintiff contended that, as a result of the accident, she developed a seizure disorder. *Id.* at 672. At trial, the defense presented evidence that plaintiff had previously "passed out" prior to her accident, as had her sisters. *Id.* The defense expert neuropsychiatrist opined that this information may indicate that Allendorf had suffered from the seizure disorder prior to the accident. *Id.* The *Allendorf* Court held that a party seeking to present evidence of a prior injury or condition as to causation must show, through appropriate medical expert opinion, that the evidence has "some logical relationship" to the issue in the case. *Id (*citing *Paxton v. Misiuk*, 34 N.J. 453, 460 (1961)).

[6] This unreported decision is exhibit Pa161 to the plaintiff's Appendix Volume II.

In *Oppedisano*, the plaintiff alleged that she suffered from complex regional pain syndrome as a result of the motor vehicle accident at issue. *Oppedisano*, supra, 2012 WL 2360125 at *1. At the time of trial, the defendant sought to introduce evidence of injuries the plaintiff sustained in a subsequent accident to attack her credibility as to the injuries she claimed to have sustained in the accident at issue. The plaintiff moved to strike any reference to plaintiff's subsequent accident on the basis of the lack of expert testimony linking the subsequent accident and plaintiff's condition. *Id.* at *6-7. The trial court granted the motion and barred the evidence and the Appellate Division affirmed, holding:

> In this case, the trial judge held the evidence of the 2007 accident, absent expert testimony ***linking it to plaintiff's injuries***, required exclusion because the prejudicial impact of such evidence would substantially outweigh its probative value. We agree.

Id. at *7-8 (emphasis added).

Similarly, in *Lintao*, the evidence at issue was sought to be introduced by the defendant on the issue of medical causation. The defendant sought to

present evidence of the plaintiff’s prior medical problems, including scoliosis,

pelvic inflammatory disease, laparoscopic procedures, and other conditions. The plaintiff opposed the introduction of this evidence of plaintiff's prior conditions because defendants failed to present any expert testimony establishing that the pre-existing conditions had any role whatsoever in causing or exacerbating the injuries for which plaintiff sought compensation. *Lintao*, supra, 2011 WL 2935052 at *3.

In affirming the trial court's exclusion of evidence of the plaintiff's prior medical conditions, the Appellate Division held:

> Thus, "[a] party seeking to present evidence of a prior injury or condition ***relating to an issue of medical causation*** must show that the evidence has some 'logical relationship to the issue in the case.'" "[T]his logical relationship must be established by appropriate expert medical opinion."

Id. (citations omitted) (emphasis added).

In the present action, unlike *Allendorf*, *Oppedisano* or *Lintao*, the defendant did not attempt to establish that the plaintiff's accident-related injuries were not caused by the fall or that her injuries were pre-existing. The evidence in question was not used at trial to prove medical causation, which was discussed in each of the three cases upon which the plaintiff relies. The cases, upon which the plaintiff relies, therefore, have no bearing whatsoever on the issue of whether evidence of the plaintiff's prior falls, medical conditions, and use of a handicapped placard could be used to impeach witnesses and substantively to suggest other causes of the accident to the jury.

Furthermore, Plaintiff's argument that a lay person is not qualified to determine whether a person could fall due to issues with balance or gait is simply incorrect. Expert testimony is only required when "the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment." *Phillips v. Gelpke*, 190 N.J. 580, 5913 (2007). In this case, the average juror is certainly qualified to make a determination regarding whether or not the

plaintiff had difficulty walking in the past and whether or not she had difficulty walking on the day of the accident. A juror does not need an expert to tell them that someone with a history of balance problems, prior falls, and other medical conditions related to gait may have had difficulty walking on the day in question.

The plaintiff's difficulty in walking on the day of the incident was amplified by her use of a rollator and by video footage of the plaintiff walking in the store with her rollator on the day of the incident, which the plaintiff chose to show to the jury in her opening statement(3T61:23-62:9) and which the plaintiff's own liability expert viewed and testified showed the plaintiff walking with a shuffle with a "diminished" gait, hence her need for the rollator. (4T166:10-25).

As the trial court properly recognized:

> A lay person could see, based on the video of Plaintiff herself that she played herself in her introduction, that people who were unsteady on their feet and use a device to assist with stability and mobility such as Plaintiff, may be more prone to falls.

(8T32:10-15).

As such, the trial court properly admitted the evidence in question relating to the plaintiff's prior medical conditions and falls and use of a handicapped placard even in the absence of expert testimony.

POINT TWO

THE TRIAL COURT PROPERLY DENIED THE PLAINTIFF'S MOTION TO STRIKE THE TESTIMONY OF THE DEFENSE LIABILITY EXPERT. (6T48:9-16; 8T33:2-25)

The defendant offered the testimony of Mr. DeMarco as an expert in the fields of civil engineering, forensic engineering and human factors. (5T99:24-100:4; 6T99:24-100:1). Notably, the plaintiff did not object to Mr. DeMarco's qualifications as an expert in civil or forensic engineering, but only to his qualification as an expert in the field of human factors. (6T101:11-14). Ultimately, the court qualified Mr. DeMarco as an expert in all three fields, stating:

> …I will recognize him as an expert in the field of civil engineering, forensic engineering and human factors based upon the testimony that he's provided. I'll leave it to you for cross examination and to the jury itself at the end of the day to comment on which expert they wish to believe and why. But I believe he does have the sufficient -- he has sufficient experience, qualifications, training and education and society memberships in this case to be qualified at this stage as an expert in those three area: civil engineering, forensic engineering and human factors.

(5T103:22-104:8).

At the conclusion of Mr. DeMarco's testimony on direct, the plaintiff moved to strike Mr. DeMarco's testimony in its entirety on the basis that his testimony addressed subject matter that was within the common knowledge of a layperson and did not require expert testimony. (6T42:9-43:6). The trial court denied the plaintiff's motion to strike the testimony of Mr. DeMarco, stating:

> An expert can certainly give testimony regarding their specialized knowledge, skill, and training and experience, but the expert is not precluded from providing testimony that, as counsel puts it, a layperson could simply have just measured things out. That doesn't make it inadmissible. It certainly goes to the -- the weight of the evidence but not to the admissibility of the evidence.

(6T48:9-16).

On her motion for a new trial, the plaintiff renewed her argument that the trial court should have stricken Mr. DeMarco's testimony, but this time, on the basis that Mr. DeMarco's testimony was not within the area of his expertise as an engineer and therefore he was unqualified to render an expert opinion.[7] (8T:2-25). This was the first time the plaintiff raised this argument, having raised no objection at the time of trial to Mr. DeMarco being qualified as an expert in the fields of civil engineering and forensic engineering. (6T101:11-13). As such, the plaintiff waived this argument. See R. 1:7-2 ("for purposes of preserving questions for review on appeal relating to rulings or orders of the court or instructions to the jury, a party, at the time the ruling or order is made or sought, shall make known to the court specifically the action which the party desires the court to take or the party's objection to the action and grounds therefor); see also, *Risko v. Thompson Muller Auto. Grp., Inc.,* 206 N.J. 506, 523 (2011) (citations omitted) ("the '[f]ailure to make a timely

[7] Plaintiff's position, taken on her post-trial motion for a new trial, that Mr. DeMarco offered opinions at trial that were outside his area of expertise and he was therefore unqualified to render these opinions is contradictory to the position she took on her motion to strike at trial – that Mr. DeMarco's opinions were opinions of a lay person. (8T33:5-17). The former argument, unlike the latter, contemplates the need for expert testimony.

objection…deprives the court of the opportunity to take curative action.'"); *State v. T.J.M.*, 220 N.J. 220, 231 (2015).

The trial court properly denied the plaintiff's motion to strike Mr. DeMarco's trial testimony. The qualification and competency of a witness to provide expert testimony are matters within the sound discretion of the trial court. *Carey v. Lovett*, 132 N.J. 44, 64 (1993); *Adamson v. Chiovaro,* 308 N.J. Super. 70, 77 App. Div. 1998); *Grand View Gardens v. Borough of Hasbrouck Heights*, 14 N.J. Super. 167, 170–171 (App. Div. 1951). "A reviewing court is not permitted to create anew the record on which the trial court's admissibility determination was based." *Hisenaj v. Kuehner*, 194 N.J. 6, 12 (2008). A reviewing court will generally give deference to a trial court's grant or denial of a motion to strike expert testimony and review that decision applying an "abuse of discretion standard". *Pomerantz Paper Corp. v. New Cmty. Corp.*, 207 N.J. 344, 371-72 (2011).

The admissibility of expert testimony is governed by N.J.R.E. 702, which provides:

> 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 Rule has three 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 a state of the art such that an expert's

testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony. See *State v. Kelly*, 97 N.J. 178, 208 (1984), holding modified by *State v. Olenowski*, 253 N.J. 133 (2023); see also *State v. Townsend*, 186 N.J. 473, 494 (2006) (same). Those requirements are construed liberally in light of Rule 702's tilt in favor of the admissibility of expert testimony. See *State v. Berry*, 140 N.J. 280, 290–93 (1995). All three prongs were met in this case with respect to Mr. DeMarco's testimony and the trial court properly denied the plaintiff's motion to strike Mr. DeMarco's testimony.

A. Mr. DeMarco Has Sufficient Expertise to Offer His Testimony.

In respect of prong (3)—the individual's expertise to speak on a topic as an expert witness—our trial courts take a liberal approach when assessing a person's qualifications. This is primarily because the jury is "to determine the credibility, weight and probative value of the expert's testimony." *Lanzet v. Greenberg*, 126 N.J. 168, 186, (1991) (quoting *James v. City of East Orange*, 246 N.J. Super. 554, 588, (App. Div. 1991)); see also *City of Long Branch v. Jui Yung Liu*, 203 N.J. 464, 491 (2010) ("It is the unique role of the jury to assess the credibility of the witnesses and the weight to be given to their testimony. Expert testimony is treated no differently ....").

Courts allow any perceived thinness and other vulnerabilities in an expert's background to be explored in cross-examination and avoid using such weaknesses

as a reason to exclude a party's choice of expert witness to advance a claim or defense. That the strength of an individual's qualifications may be undermined through cross-examination is not a sound basis for precluding an expert from testifying as part of a defendant's defense, even if it likely will affect the weight that the jury will give the opinion. Rather, a court should simply be satisfied that the expert has a basis in knowledge, skill, education, training, or experience to be able to form an opinion that can aid the jury on a subject that is beyond its ken. See *Kelly*, supra, 97 N.J. at 208.

In the present case, in accordance with the above standards for the qualification of experts, the trial court properly qualified Mr. DeMarco as an expert in the fields of civil engineering, forensics engineering and human factors, finding "he has sufficient experience, qualifications, training and education and society memberships in this case", based on his testimony, to be so qualified and leaving it "to cross examination and to the jury itself at the end of the day to comment on which expert they wish to believe and why." (5T103:20-104:9). The type of reconstruction Mr. DeMarco performed is well within the expertise of an engineer and human factors expert, such as Mr. DeMarco, and the plaintiff has cited to no authority holding otherwise. Moreover, the plaintiff had the opportunity to undermine Mr. DeMarco's qualifications, methodology and conclusions on cross-examination and during closing arguments. It was ultimately for the jury to assess the qualifications

and credibility of Mr. DeMarco and the weight to be given to his testimony, as the jury was so charged before deliberations. (7T94:14-20).

In sum, Mr. DeMarco had the expertise to render his testimony.

B. Mr. DeMarco's Testimony Was Sufficiently Reliable.

The second prong of Rule 702 for the admissibility of expert testimony relates to the reliability of the expert's testimony. It is the expert's analysis and reasoning process applied to the particular facts of the case that is at issue in determining whether his or her testimony is scientifically reliable. *Kemp ex rel. Wright v. State*, 174 N.J. 412, 431 (2002). N.J.R.E. 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.'" *State v. Townsend*, 186 N.J. 473, 494 (2006) (citing N.J.R.E. 703).

In the present case, the plaintiff claims the testimony of Mr. DeMarco was unreliable because the defense did not establish the soundness of the methodology he relied upon in formulating his opinion as to the location of the plaintiff's fall. (Pb40). To the contrary, Mr. DeMarco explained to the jury his scientific methodology for recreating the plaintiff's accident, which involved an investigation, whereby he pieces together various materials related to the case to come up with the

most reasonable explanation of the cause. (5T106:23-108:1). This included his review of the depositions of the plaintiff, plaintiff's daughter and several employees of Home Depot; review of ASTM standards; review of applicable codes that go to property maintenance for the Home Depot, for the jurisdiction that it's in; review of the CC-TV video of plaintiff's incident; and review of some reference material related to the use of rollators. (5T112:25-113:17). These materials relied upon by Mr. DeMarco are all materials that fall within one of the three categories set forth in N.J.R.E. 703, thereby establishing a proper foundation for Mr. DeMarco's expert opinions.

Additionally, Mr. DeMarco's investigation included a demonstration Mr. DeMarco conducted at the Home Depot store, wherein he performed a "a recreation of the plaintiff's walking path that led to her fall." (5T116:3-5). As Mr. DeMarco explained, the recreation was necessary because the CC-TV video capturing the plaintiff's incident did not show "where her foot placement was or where the rollator was in relation to…her when she fell…" (5T115:22-25). Mr. DeMarco took a shopping cart and stacked planting pots inside the cart to simulate the top of the plaintiff's head. He then moved the cart around aisle 58 while comparing a live feed surveillance video of aisle 58 with still photographs taken from the CC-TV video of plaintiff's incident. (T617:9-18:12). In this way, he was able to pinpoint the plaintiff's location in aisle 58 when she fell. (6T18:24-19:6) and concluded that at

the time of her fall in aisle 58, the plaintiff was past the location of the column, and the wheel of her rollator did not come in contact with the base of that column. (6T20:3-13).

Plaintiff criticizes Mr. DeMarco's reconstruction of the incident on the basis that (1) the defendant never established that the methodology used by Mr. DeMarco in his recreation of the plaintiff with a stack of pots was sound or matched the actual data of the plaintiff and her fall (Pb39) and (2) Mr. DeMarco never authenticated the live feed surveillance footage and photographs (Pb38). With respect to the first criticism that it has not been established that Mr. DeMarco's recreation was sound or matches the actual data of the plaintiff and her fall, the jury heard Mr. DeMarco's testimony as to how he was able to determine that the live feed video surveillance matched the surveillance video capturing the plaintiff's incident. As Mr. DeMarco testified, when he placed the live feed surveillance video up against the May 29, 2019 surveillance video of the incident, he observed that both videos contained the same fixed objects - the aisle 58 sign, the shelves, the column – and "the outline of the picture itself verified to him that it was the same camera location, the same width, of the camera; the same height of the camera, from both the live feed and the surveillance." In other words, what he saw on the live feed and what he saw on the surveillance video was the same view. (5T138:20-24; 5T143:16-144:8; 6T18:13-19:23).

The plaintiff had the opportunity to, and did, extensively cross examine Mr. DeMarco on the recreation of the incident he performed and the opinion he reached as to the location of the plaintiff's fall based on that recreation. (T624:4-80:22). Once again, it was for the jury to assess the credibility of, and the weight to be given to, Mr. DeMarco's testimony regarding the recreation he performed to formulate his opinion as to the location of the plaintiff's fall. The jury simply considered Mr. DeMarco's testimony regarding his recreation of the incident, knowing that there were differing versions of the happening of the accident. The jury was free to accept or reject Mr. DeMarco's methodology or ultimate opinion as to the cause of the plaintiff's incident and was so charged before it deliberated. (7T94:25-95:6). Clearly, the jury accepted the defense version of the incident as the accurate depiction of the events.

With respect to the plaintiff's second point that Mr. DeMarco was unable to authenticate the live feed surveillance footage and photographs, Mr. DeMarco properly authenticated the live feed surveillance footage and photographs that were published to the jury. Rule 901 of the New Jersey Rules of Evidence provides that, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must present evidence sufficient to support a finding that the item is what its proponent claims." N.J.R.E. 901. "The authentication of photograph evidence prior to its admission seems to contemplate proof that the photograph is a

substantially correct representation of the matters offered in evidence, and this includes an identification or statement as to what the photograph shows." *Brenman v. Demello*, 191 N.J. 18, 30 (2007) (quoting *State v. Wilson*, 135 N.J. 4, 14 (1994)) (internal quotations omitted)).

"In practical terms, the authentication of a videotape is a direct offshoot of the authentication of photographic…evidence." *State v. Wilson*, 135 N.J. 4, 16 (1994). "[T]o authenticate video evidence, "a witness must identify the persons, places, or things shown in the ... videotape." *Id.* at 14. The "testimony must establish that the videotape is an accurate reproduction of that which it purports to represent…" *State v. Loftin*, 287 N.J. Super. 76, 98 (App. Div. 1996).

In the present case, Mr. DeMarco testified regarding the still photographs referenced in his report, which were ultimately published to the jury, and what was depicted in each photograph. (5T125:22-126:12; 5T127:5-128:8:4; 5T152:15-153:6; 5T:153:20-154:4; 6T23:4-27; 6T28:21-29:19; 6T:33:21-34:11; 6T34:16-35:7). During this testimony, the plaintiff's counsel cross-examined Mr. DeMarco as to the photographs (5T:129:21-139:4; 6T24:4-27:6; 6T:35:11-37:17; 6T31:11-18) and ultimately, the plaintiff's counsel stated that he had "no objection" to the photographs being published to the jury. (6T27:7-9; 6T31:25-32:3; 6T37:18-38:2) As a threshold matter, the plaintiff waived any objection to the authentication of the photos published to the jury.

Similarly, evidence of the live feed video surveillance was properly authenticated by Mr. DeMarco. Mr. DeMarco explained what the live feed video showed and its purpose in his recreation. (6T123:18-125:2).

In sum, Mr. DeMarco's testimony was sufficiently reliable and based on sound methodology and properly authenticated evidence.

C. Mr. DeMarco's Testimony Concerns a Subject Matter that is Beyond the Ken of the Average Juror.

The first prong of N.J.R.E. 702 governing the admissibility of expert testimony requires that the intended testimony of the proposed expert concern a subject matter that is beyond the ken of the average juror. N.J.R.E. 702(1). The plaintiff contends that "the trial court abused its discretion in permitting Mr. DeMarco to testify about the location of the fall under the guise of expert testimony as no such expertise was required to provide this opinion." (Pb35). It is the plaintiff's position that Mr. DeMarco's testimony "was essentially a lay interpretation of the video footage of the plaintiff's fall that the jury was just as qualified to make on its own". (Pb40).

> This is simply incorrect. The admissibility of expert testimony turns not on whether the subject matter is common or uncommon or whether many persons or few have knowledge of the matter, but [on] whether the witnesses offered as experts have peculiar knowledge or experience not common to the world which renders their opinions founded on such knowledge or experience any aid to the court or jury in determining the questions at issue.

State v. Zola, 112 N.J. 384 (1988) (quoting *Rempfer v. Deerfield Packing Corp.*, 4 N.J. 135, 141-42 (1950)). Thus, the opinion of an expert can be admitted in evidence if the expert's testimony on such a subject would help the jury understand the evidence presented and determine the facts, it may be used as evidence. *State v. Odom*, 116 N.J. 65, 70–71 (1989), abrogated by *State v. Cain*, 224 N.J. 410 (2016).

In the present case, Mr. DeMarco offered his opinion as to the location of the plaintiff's fall in line with his qualifications as a forensic engineer and human factors expert. He explained his scientific methodology for formulating his opinion as to the location of the plaintiff's fall. This included a recreation of the May 29, 2019 incident using surveillance video footage of the incident along with a live feed surveillance video and a demonstration with a shopping cart with potted plants to simulate the top of the plaintiff's head. Mr. DeMarco explained to the jury in detail how and why his recreation matched the conditions as they existed in aisle 58 at the time of the plaintiff's incident. The jury was presented with two differing versions of the incident and Mr. DeMarco's testimony clearly aided the jury in understanding the evidence presented and determining the facts.

It is difficult to understand the plaintiff's position that Mr. DeMarco's testimony "was essentially a lay interpretation of the video footage of the plaintiff's fall that the jury was just as qualified to make on its own". (Pb40). It is undisputed that the video footage of the plaintiff's fall only shows her head and does not show

"where her foot placement was or where the rollator was in relation to…her when she fell…" (5T115:22-25). It is thus inconceivable how a lay juror could determine how the plaintiff's fall occurred by review of the video footage of the incident alone. Mr. DeMarco's recreation of the incident became necessary to aid the jury in understanding the cause of the incident where there were no eyewitnesses to the incident or video or other evidence depicting the cause of the plaintiff's fall. Mr. DeMarco's method of recreating the incident, using surveillance video footage of the incident along with a live feed surveillance video and a shopping cart with potted plants to simulate the top of the plaintiff's head, was not within the ken of an average juror.

In sum, the subject matter on which Mr. DeMarco testified, was not within the ken of the average juror. His testimony aided the jury in understanding the evidence presented and determining the facts in the case. This rendered him qualified to testify as an expert witness. Accordingly, the trial court did not abuse its discretion in denying the plaintiff's motion to strike Mr. DeMarco's testimony in its entirety.

POINT THREE

DEFENSE COUNSEL'S COMMENTS DURING CLOSING WERE ENTIRELY WITHIN THE BROAD LATITUDE AFFORDED COUNSEL, DID NOT RESULT IN A MISCARRIAGE OF JUSTICE AND DO NOT WARRANT A NEW TRIAL. (8T34:1-35:20)

Plaintiff claims that she is entitled to a new trial because counsel for the defendant made comments in closing arguments regarding the plaintiff's absence from the trial, failure to testify live, the failure of the plaintiff to call her daughter to testify (Pb41-42), and that the plaintiff and her daughters and her counsel "fabricated the manner in which the plaintiff's fall occurred and were attempting to deceive the jury and recover damages upon a fraudulent claim." (Pb43-44). During closing arguments, the plaintiff's counsel never objected to any suggestion about this incident being fabricated. (7T24:7-15; 7T35:18-36:20). Any objections now raised regarding those statements have been waived. See R. 1:7-2; see also *Fertile v. St. Michael's Medical Center*, 169 N.J. 481, 495 (2001) ("We presume that when a lawyer observes an adversary's summation, and concludes that the gist of the evidence has been unfairly characterized, an objection will be advanced."); *Risko, supra,* 206 N.J. at 523 (citations omitted) ("the '[f]ailure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made,' and it 'also deprives the court of the opportunity to take curative action.' Where defense counsel has not objected, we generally will not reverse unless plain error is shown", pursuant to R. 2:10–2. Under the plain error

standard, "[t]he possibility of an unjust result must be sufficient 'to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'")).

When the plaintiff's counsel objected to comments regarding the failure of the plaintiff to testify live and the failure of her daughter to testify (7T33:1-16; 7T40:2-4), the trial court issued a curative instruction in the middle of defense counsel's argument (7T34:5-13; 7T42:15-43:5) and again issued a curative instruction when charging the jury (7T95:13-16). Such instructions certainly cured any prejudice the plaintiff alleges to have suffered.

> "When weighing the effectiveness of curative instructions, a reviewing court should give equal deference to the determination of the trial court. The adequacy of a curative instruction necessarily focuses on the capacity of the offending evidence to lead to a verdict that could not otherwise be justly reached." *State v. Winter*, 96 N.J. 640, 647 (1984). The test is whether the error was "clearly capable of producing an unjust result." *State v. Daniels*, 182 N.J. 80, 95 (2004) (quoting R. 2:10-2).

Hynes v. Gibson, 2020 WL 4723742, at *5 (N.J. Super. Ct. App. Div. Aug. 14, 2020).

In the present case, the alleged improper comments made by defense counsel during closing were followed by immediate curative instructions. Notably, the plaintiff did not object to the curative instructions that were given or request a mistrial. The trial court instructed the jury not to consider the comments at issue and it is presumed the jurors followed these instructions. While the plaintiff is dissatisfied with the jury's verdict and places blame on comments made by defense

counsel during closing arguments for the verdict, there was ample evidence to support the verdict. The trial court properly denied the plaintiff's motion for a new trial and the trial court and did not abuse its discretion in not disturbing the jury's verdict.

There is wide latitude given attorneys concerning their statements made during closing argument. As noted by the Supreme Court of New Jersey, [c]ounsel's arguments are expected to be passionate" during summation. *Risko, supra,* 206 N.J. at 522. Therefore, "broad latitude" is permitted. *Id.*

> Indeed, counsel may draw conclusions even if the inferences that the jury is asked to make are improbable, perhaps illogical, erroneous or even absurd, unless they are couched in language transcending the bounds of legitimate argument, or there are no grounds for them in evidence. On the other hand, counsel, in his summation to a jury should not misstate the evidence nor distort the factual picture.

Colucci v. Oppenheim, 326 N.J. Super. 166, 177 (App. Div. 1999).

In this case, defense counsel's summation was proper and argued the evidence as it was presented to the jury. At no time did counsel make any misstatements of evidence or distort the factual picture to the jury. As the law says, counsel is allowed to argue inferences to the jury with broad latitude.

The fact of the matter is that the plaintiff did not call Francis Bainlardi in their case-in-chief, nor did they call the plaintiff to testify live in court. Defense counsel is permitted to argue to the jury that they did not have an opportunity to judge the demeanor of these witnesses and manner of testifying live in court. Consistent with

the trial court's ruling, no statements were made suggesting why these witnesses were absent from trial. As stated by counsel in summation, there were only two people in the aisle that day that could have provided the jury with testimony regarding what happened, and the plaintiff chose to call neither of them to testify in the courtroom. (7T33:1-4).

The plaintiff's characterizations of the summation of defense counsel as improperly suggesting to the jury that the plaintiff, her daughters and/or her counsel were attempting to deceive the jury and recover damages upon a fraudulent claim is without merit and not supported by the record. Defense counsel's summation in no way suggested anything improper or argued anything outside of the evidence, and he certainly did not tell the jury that there was any scheme between the plaintiff, her daughters, and her counsel. Defense counsel merely pointed out to the jury that the plaintiff's own expert testified that his opinions were based off of a conversation in the Home Depot parking lot with the plaintiff, her two daughters, and her counsel. (7T23:25-24:15) If the jury wanted to infer that this was a "scheme" it was free to do so based on the evidence.

Moreover, the jury was charged at the end of the case that the lawyers are here as advocates for their clients and while they may consider the lawyer's comments made during their opening statements and summation, none of their comments are evidence and are not binding on them. (7T89:3-9).

Finally, the plaintiff's argument that counsel could not comment on a witness' absence because the trial court did not agree to give an adverse inference charge is without merit. The plaintiff cites to no case law to support the proposition that counsel cannot comment on the absence of a fact witness when no adverse inference charge will be given.

In sum, the plaintiff waived some of her challenges to the summation of defense counsel, the summation was proper and within the bounds of the law and, the trial court properly denied the plaintiff's motion for a new trial.

POINT FOUR

THE JURY'S VERDICT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE, DID NOT RESULT IN A MISCARRIAGE OF JUSTICE AND THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S MOTION FOR A NEW TRIAL. (8T36:11-15)

Plaintiff seeks a new trial on the grounds that the "jury's verdict finding that the defendant's negligence was not a proximate cause of the plaintiff's accident is shocking and against the weight of evidence of the uncontested facts presented at trial." (Pb45). The jury found in this case that the defendant was negligent, but its negligence was not the proximate cause of the plaintiff's fall. (Pa158). The jury's verdict that the defendant was negligent, but any negligence was not a proximate cause of her injuries was proper under the facts and the law. The trial court did not err in denying the plaintiff's motion for a new trial.

A. The Jury's Finding That the Defendant Was Negligent But Not a Proximate Cause of the Incident Was Not Inconsistent and Was Perfectly Acceptable Under the Law and Facts and Evidence in the Case.

1. New Jersey Law, the Model Jury Charges and the Model Verdict Sheet Clearly Recognize That Negligence and Proximate Cause Are Separate Concepts.

Plaintiff's contention that the jury's verdict was inconsistent is without merit. Negligence and proximate causation are separate and distinct elements. *Camp v. Jiffy Lube*, 309 N.J. Super. 305, 309 (App. Div.), certif. denied, 156 N.J. 386 (1998). The questions of negligence and proximate cause of the incident are ordinarily separate questions. *Terminal Constr. Corp. v. Bergen County*, 18 N.J. 294, 341 (1955); *Correa v. Maggiore*, 196 N.J. Super. 273, 286 (App. Div. 1984); *Corridon v. City of Bayonne*, 129 N.J. Super. 393, 398 (App. Div. 1974) A jury may allocate fault to a party in a negligence action only where it determines that party was negligent and that party's negligence was a proximate cause of the damages suffered. *Fernandes v. DAR Dev. Corp.*, 222 N.J. 390, 408 (2015) The determination of proximate cause is a decision for the jury to make. *Komlodi v. Picciano*, 217 N.J. 387, 418 (2014); *Scafidi v. Seiler*, 119 N.J. 93, 101 (1990). Proximate cause is only removed from jury consideration in the most "highly extraordinary case[s]." *Fleuhr v. City of Cape May*, 159 N.J. 532, 543 (1999).

Determining proximate cause involves a "combination of 'logic, common sense, justice, policy and precedent' that fixes a point in a chain of events, some

foreseeable and some unforeseeable, beyond which the law will bar recovery." *People Express Airlines, Inc. v. Consol. Rail Corp.*, 100 N.J. 246, 264 (1985) (quoting *Caputzal v. Lindsay Co.*, 48 N.J. 69, 77-78 (1966)). In order to determine whether proximate cause exists, the proper inquiry is "whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from defendant's breach of duty." *Clohesy v. Food Circus Supermarkets, Inc.*, 149 N.J. 496, 503 (1997) (quoting *Hill v. Yaskin*, 75 N.J. 139, 143 (1977)). See also Model Jury Charges (Civil), 6.10, "Proximate Cause - General Charge to Be Given in All Cases" (1998) ("The basic question for you to resolve is whether [plaintiff's] injury/loss/harm is so connected with the negligent actions or inactions of [defendant] that you decide it is reasonable...that [defendant] should be held wholly or partially responsible for the injury/loss/harm."). Merely committing a negligent act does not mean the act is a proximate cause of the claimed injury; instead, the act must be a "substantial factor" in bringing about the injury. *James v. Arms Tech., Inc.*, 359 N.J. Super. 291, 311 (App. Div. 2003).

Here, the jury was charged on proximate cause consistent with Model Jury Charges (Civil), 6.10. (7T100:17-101:23). Further, consistent with the Model Jury Charges, negligence and proximate cause were asked as separate questions on the verdict sheet presented to the jury. (Pb45).

Plaintiff does not seem to recognize that juries are entirely permitted to find a party negligent but not a proximate cause of a plaintiff's injuries. See, e.g. *Steele v. Kerrigan*, 148 N.J. 1, 32-33 (1997) (affirming jury finding that plaintiff was negligent but that his negligence was not a proximate cause of the incident.); *Gaido v. Weiser*, 115 N.J. 310, 312 (1989) (upholding jury verdict in medical malpractice case in which "the jury found by a vote of 5-1 that [defendant doctor] was negligent but...that the negligence was not a proximate cause of [plaintiff's] death.").

In sum, the jury's verdict that the defendant was negligent, but any negligence was not a proximate cause of the plaintiff's injuries was proper under the law. The jury's verdict was not inconsistent and did not result in a miscarriage of justice. The trial court properly denied the plaintiff's motion for a new trial.

2. The Jury's Verdict Was Supported By the Facts and Evidence in the Case.

At the trial of this matter, the plaintiff failed to testify live. The only testimony the jury heard from the the plaintiff herself was via the reading of deposition testimony. Regardless of how the jury was presented with the plaintiff's story, it is solely within the jury's province to evaluate the credibility of that testimony. Further, as set forth above, it is the jury's function to determine whether or not the plaintiff met her burden of proof as to causation. In this case, the jury did exactly that; it evaluated the credibility of the plaintiff's deposition testimony and determined that she had not met her burden on causation.

It is the plaintiff's contention that her story as to how the accident happened is "undisputed," (Pb48). This is not the case. The defendant disputed that the plaintiff's fall was caused by the wheel of her rollator striking the base plate of the roof support column. The jury was presented with differing versions of the cause of the plaintiff's fall and was free to accept or reject either version based on their determination of her credibility and all of the other evidence presented at trial by all parties. See, e.g., *Conrad v. Michelle & John, Inc.*, 394 N.J. Super. 1, 13 (App. Div. 2007) ("A jury has the power to accept or reject, in whole or in part, a witness's testimony.")

Plaintiff further argues that "there was absolutely no support in the record for the jury's finding that the defendant's negligence was not a proximate cause of the plaintiff's accident." (Pb49) To the contrary, there was a significant amount of evidence presented to the jury which could have reasonably led the jury to the conclusion that the cause of the plaintiff's fall was due to her own balance/unsteady gait issues as opposed to a dangerous condition at the Home Depot store.

In fact, the plaintiff herself chose to show the jury videos of the plaintiff walking with her rollator into and in the Home Depot store on the day of the incident during opening statements. (5T61:23-62:9). The jury also heard testimony from the plaintiff's liability expert, Mr. McCuen, regarding his review of the video surveillance footage. Mr. McCuen was asked if the footage was significant to him

in terms of how the plaintiff was entering the store and doing with the rollator. His response to this question was "[o]bviously, you don't have to be a doctor to know that if somebody is using a mobility aid like that and a senior citizen, that there's some medical conditions that have led up to that, to their using it." (4T64:14-22). Mr. McCuen also testified that the plaintiff was walking with a shuffle and her gait was "diminished" that day. (4T166:14-25).

The jury was free to conclude from this evidence that the plaintiff walked with an unsteady gait. Further, there was evidence regarding Plaintiff's prior falls, balance issues, and medical conditions that put her at risk for falls. While the plaintiff wrongly disputes the admissibility of this evidence, such evidence gave the jury an alternative explanation for the accident. The jury also heard the testimony of the defense liability expert as to the investigation he conducted to determine if the Home Depot was responsible for the plaintiff's fall, which led him to the conclusion that on the day of he incident, the plaintiff's rollator did not come in contact with the baseplate of the column. (6T41:13-17).

The jury was more than capable of weighing all of the evidence and rendering a verdict as to causation and, in fact, the jury did so unanimously when it found no proximate cause. Plaintiff has not established that the verdict was against the weight of the evidence given that it is the sole duty of the jury to weigh credibility and

determine if the plaintiff met her burden and, therefore, the trial court properly denied the plaintiff's motion for a new trial.

CONCLUSION

The jury's verdict, finding the defendant negligent but that its negligence was not a proximate cause of the plaintiff's May 30, 2019 incident is supported by the law and by the facts and evidence in the case. The jury was free to weigh the evidence and assess the credibility of the witnesses who testified before them. The jury did just that and determined that the defendant's negligence was not a proximate cause of the plaintiff's incident. The jury's verdict did not result in a miscarriage of justice and the trial court properly denied the plaintiff's motion for a new trial.

Further, the trial court did not abuse its discretion in permitting the introduction of evidence of the plaintiff's prior falls, prior medical condition or use of a handicapped placard to impeach the credibility of the plaintiff and her witnesses and as substantive evidence of the cause of the plaintiff's fall. Expert testimony was not required for the introduction of this evidence.

Finally, defense counsel's summation was well within the bounds of the law and did not result in a miscarriage of justice or undue prejudice to the plaintiff. Regardless, any claimed undue prejudice was ameliorated by the trial court's curative instructions to the jury.

For all these reasons, the plaintiff's appeal should be denied in its entirety and the jury's verdict upheld.

Respectfully submitted,

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ESTATE OF AMELIA BAINLARDI (mother) and AMELIA BAINLARDI (daughter), the administrator of the ESTATE OF AMELIA BAINLARDI (mother), Plaintiff-Appellant, vs. HOME DEPOT U.S.A. INC., Defendant-Respondent, and STANLEY LABADY, JOHN DOES 1-5 (Unidentified entities or individuals that owned, operated, controlled, constructed, inspected, maintained and/or repaired the store where plaintiff fell), and ABC CORPORATIONS 1-5 (Unidentified entities that owned, operated, controlled, constructed, inspected, maintained and/or repaired the store where plaintiff fell), Defendants.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003963-22 *Civil Action* ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY, DOCKET NO. MID-L-000021-20 SAT BELOW: HONORABLE ARAVIND AITHAL, J.S.C. **REPLY BRIEF AND APPENDIX (Pra1-Pra5) SUBMITTED ON BEHALF OF PLAINTIFF-APPELLANT** On the Brief: Jessica R. Bland, Esq.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Amelia Bainlardi (hereinafter "the plaintiff") shall rely upon the procedural history and statement of facts set forth in her initial brief.[1] Home Depot U.S.A., Inc. is hereinafter referred to as "the defendant" as it was in the plaintiff's initial brief.

LEGAL ARGUMENT

THE JUDGMENT SHOULD BE REVERSED BECAUSE THE CUMULATIVE EFFECT OF THE IMPROPER COMMENTS BY DEFENSE COUNSEL AND THE ERRONEOUS EVIDENTIARY RULINGS CLEARLY AND CONVINCINGLY RESULTED IN A MISCARRIAGE OF JUSTICE (Pa34; 1T12:9-14; 1T173:24-174:2; 1T174:4-16; 1T175:16-176:8; 1T177:5-21; 1T179:4-190:20; 1T203:1-14; 2T29:4-23; 2T30:21-35:12; 2T39:11-13; 2T40:10-18; 6T48:6-19).[2]

The plaintiff was walking with her rollator along one of the shopping aisles in the defendant's store when the wheel of her rollator came into contact with a bolt that was protruding from the base plate of a roof support column that was located in the

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[1] Transcript and Appendix Reference Key
1T – Transcript of the June 5, 2023 Trial Date
2T – Transcript of the June 6, 2023 Trial Date
3T – Transcript of the June 7, 2023 Trial Date
4T – Transcript of the June 8, 2023 Trial Date
5T – Transcript of the June 9, 2023 Trial Date
6T – Transcript of the June 12, 2023 Trial Date
7T – Transcript of the June 15, 2023 Trial Date
8T – Transcript of the August 4, 2023 Motion Hearing
Pa – Plaintiff-Appellant's Appendix
Pra – Plaintiff-Appellant's Reply Appendix

[2] The plaintiff relies upon and incorporates all arguments set forth in her initial brief in this reply brief.

walking aisle. (Pa157; 4T228:14-16; 4T232:3-5; 4T232:12-233:5; 4T235:23-236:1; 4T238:7-13; 4T260:24-261:1). The impact with the protruding bolt caused the rollator to come to a halt and the plaintiff to fall to the ground. (4T228:14-16; 4T229:19-21; 4T233:15-21; 4T249:22-25; 4T234:1-12). There was no testimony from any eyewitnesses to the plaintiff's fall to challenge the manner in which it occurred and the surveillance video footage of the incident that was played for the jury was inconclusive because it showed only the top of the plaintiff's body and head. (Pa157; 4T117:13-24; 4T160:11-22). Instead of offering any direct proof establishing that the protruding bolt did not cause the plaintiff's fall, the theme of the defense was that the plaintiff lied about tripping over the protruding bolt and was instead caused to fall as a result of a pre-existing balance issues or neuropathy. (7T16:14-17:1; 7T17:6-19:16; 7T24:7-15; 7T25:2-6; 7T33:1-4; 7T35:18-36:20; 7T39:24-40:3; 7T40:4-42:13).

The defendant was allowed to put on this defense despite there being no opinion from a medical expert that the plaintiff's fall was caused by a balance disorder or any prior medical or health condition as a result of the Trial Court's rulings on the plaintiff's motions *in limine* to bar evidence and testimony of her prior medical history and falls. (1T173:24-174:2; 1T174:4-16; 1T175:16-176:8; 1T177:5-21; 1T179:4-190:20; 1T203:1-14; 2T29:4-23; 2T30:21-35:12; 2T39:11-13). As a result of the Trial Court's ruling, the plaintiff's medical history, that no medical expert was

able to offer an opinion was related in any way to the happening of her fall, was repeatedly broadcast to the jury throughout trial. (3T31:1-33:24; 3T56:21-23; 3T86:4-21; 3T127:8-128:17; 3T148:23-149:6; 3T149:9-25; 3T150:20-151:6; 3T151:18-153:24; 3T154:13-24; 3T155:24-156:12; 3T167:15-168:24; 3T169:18-170:12; 3T172:8-173:4; 3T172:20-173:4; 4T213:11-15; 4T214:3-23; 4T223:18-225:3; 4T225:16-23; 4T226:3-5; 4T226:9-12; 4T246:11-25; 4T247:15-249:7; 4T257:1-3; 5T13:11-15; 5T15:17-16:20; 5T17:5-24; 5T15:24-16:1; 5T44:22-45:5; 5T45:10-46:6; 5T69:21-70:12; 5T70:17-19; 5T71:15-72:10; 6T113-24; 6T114:21-115:4; 6T115:14-23; 7T16:14-17:1; 7T17:6-19:16). The testimony regarding the plaintiff's medical history included:

- A prior fall when she tripped over a brick;
- A prior incident where she slid off a bed while putting on socks;
- Prior tingling and numbness in her legs;
- Medication she took for tingling in her legs;
- Treatment with a neurologist;
- Prior surgery to the plaintiff's left leg;
- Use of a handicapped placard;
- Prior diagnosis of neuropathy;
- Prior physical therapy. (*Id.*).

The plaintiff respectfully submits that the Trial Court abused its discretion in denying the plaintiff's motions *in limine* seeking to bar this evidence from trial when there was no expert opinion establishing that the evidence was related to either the cause of the plaintiff's fall or her injuries.

The defendant argues in its opposition that expert opinion is only required if evidence of a plaintiff's prior medical history is offered on the issue of causation of his or her injuries and that evidence of a plaintiff's prior medical history is admissible if offered as to the cause of an incident without an opinion from an expert establishing a relationship between the prior condition and the cause of the incident. The plaintiff respectfully disagrees and submits that there is no difference in the need for expert opinion to establish causation of injuries due to a prior medical condition or causation of a fall due to a prior medical condition. *See*: *Allendorf v. Kaiserman Enterprises*, 266 N.J. Super. 662, 672-673 (App. Div. 1993), citing, *Ratner v. General Motors Corp.*, 241 N.J. Super. 197, 203-206 (App. Div. 1990). Both issues involve the interpretation and understanding of medical data and the relationship, if any, between that data and the cause of an accident and/or the injuries a plaintiff alleges to have been caused by the accident which are esoteric issues that are beyond the ken of the average juror. "[E]xpert testimony is needed where the factfinder would not be expected to have sufficient knowledge or experience and would have

to speculate without the aid of expert testimony." *Torres v. Schripps, Inc.*, 342 N.J. Super. 419, 430 (App. Div. 2001).

While *Allendorf* involved evidence of the plaintiff's prior medical history in regard to the seizure disorder the plaintiff alleged to have sustained as a result of the incident, the Appellate Division cited to *Ratner v. General Motors Corp.*, 241 N.J. Super. 197, 203-206 (App. Div. 1990) in support of its ruling that expert medical opinion was required to establish a relationship between the prior history and an issue on the case. *Allendorf*, 266 N.J. Super. at 672-673. *Ratner* involved a situation where the defendant suggested that a motor vehicle collision was caused by the side effects of medication the plaintiff was taking which were alleged to have caused her to lose control of her vehicle. *Ratner*, 241 N.J. Super. at 204. The defendant was permitted to present evidence of the various side effects of the medication in the absence of any expert medical opinion addressing the issue. *Id.* The Appellate Division ruled that the admission of the medical data without any supporting expert opinion constituted reversible error. *Id.* at 205-206.

A similar issue was recently addressed by the Appellate Division in *Wegner v. Derrico*, 2020 N.J. Super. Unpub. LEXIS 425 (App. Div. 2020). The matter of *Wegner* involved a motor vehicle collision at an intersection where both the plaintiff and the defendant claimed to have had a green light. *Id.* at 1. The plaintiff had a prior history of seizures for which she was prescribed medication by a neurologist.

Id. at 3-4. It was the defendant's position that the plaintiff must have driven through a red light because of a seizure. *Id.* However, the defendant did not offer an opinion from a medical expert witness that the prior seizure disorder was related in any way to the cause of the collision and attempted to use an accident reconstruction expert to address the issue. *Id.* at 4. The plaintiff sought to bar evidence of her prior medical history at the outset of trial and challenged the accident reconstruction expert's qualification to address the issue. *Id.* at 4-5. The Trial Court denied the motion and evidence regarding the prior medical condition, prior medical records, medications the plaintiff took for that condition and other conditions, and a bout of pneumonia the plaintiff had prior to the collision was presented at trial. *Id.* at 5-6. Plaintiff's counsel was forced to present some of this evidence as a result of the denial of the motion *in limine*. *Id.* 13-14. The plaintiff's prior medical history was then the predominant theme of defense counsel's summation. *Id.* at 7-8.

The Appellate Division found that it was reversible error to allow evidence of the plaintiff's prior medical condition in regard to the cause of the collision to be presented at trial in the absence of a supporting expert medical opinion. *Wegner*, 2020 N.J. Super. Unpub. LEXIS at 9-10. It cited both *Allendorf* and *Ratner* in support of its ruling that an expert medical opinion was required to present evidence of the plaintiff's prior medical history. *Id.* at 12. The Appellate Division also rejected the argument that evidence of the plaintiff's prior medical history was

admissible in the absence of an expert medical opinion to impeach the plaintiff's credibility. *Id.* at 13. It explained that evidence of the plaintiff's prior medical history "was inadmissible absent expert opinion [and] [d]efendants may not, in the guise of impeachment, bootstrap the introduction of otherwise inadmissible evidence." *Id.*

It is respectfully submitted that the determination as to the effect the plaintiff's prior history of tingling and numbness in her legs, diagnosis of neuropathy, the medication she was prescribed, prior treatment, and prior falls that were not caused by a loss of balance had on her ability to ambulate and whether any of those prior issues caused her to fall while walking with her rollator in the defendant's store is beyond the ken of the average juror and required supporting expert opinion to be presented at trial. Notably, the defendant's trained medical expert who was aware of the plaintiff's medical history, examined her, and reviewed her medical records, was unable to offer an opinion that any prior condition caused her to fall within a reasonable degree of medical probability. (Pa182). If a board certified orthopedic, surgeon who has undergone years of medical training, is unable to causally relate the plaintiff's fall to any of the prior conditions that were repeatedly broadcast throughout trial, a lay jury with no medical training is unable to do anything more than speculate that the plaintiff fell as a result of her prior medical condition. "A jury may not speculate in an area where laypersons could not be expected to have

sufficient knowledge or experience." *Posta v. Chung-Loy*, 306 N.J. Super. 182, 204 (App. Div. 1997), *certif. denied*, 154 N.J. 609 (1998). It was, therefore, an abuse of discretion for the Trial Court to deny the plaintiff's motions *in limine* to bar evidence of her prior medical history. Furthermore, this was not simply harmless error because the ruling caused the plaintiff's prior medical history to become the focus of the trial.

As noted above, the plaintiff's prior medical history was repeated through all witnesses except for the liability experts. (3T127:8-128:17; 3T148:23-149:6; 3T149:9-25; 3T150:20-151:6; 3T151:18-153:24; 3T154:13-24; 3T155:24-156:12; 3T167:15-168:24; 3T169:18-170:12; 3T172:8-173:4; 3T172:20-173:4; 4T213:11-15; 4T214:3-23; 4T223:18-225:3; 4T225:16-23; 4T226:3-5; 4T226:9-12; 4T246:11-25; 4T247:15-249:7; 4T257:1-3; 5T13:11-15; 5T15:17-16:20; 5T17:5-24; 5T15:24-16:1; 5T44:22-45:5; 5T45:10-46:6; 5T69:21-70:12; 5T70:17-19; 5T71:15-72:10; 6T113-24; 6T114:21-115:4; 6T115:14-23). Defense counsel was then allowed to use this testimony without any expert support to speculate that the plaintiff must have fallen because of her prior conditions. (7T16:14-17:1; 7T17:6-19:16). He told the jury that the numbness and tingling the plaintiff experienced on prior occasions was the same as the jury would experience if their legs fell asleep and is "the type of numbness and tingling, that if you take a step, you – you're going to fall." (7T17:6-19:16). There was no support in either the factual evidence presented at trial or

supporting medical expert opinion that the numbness the plaintiff experienced in the past was the type that causes a person to fall when they take a step. There was a complete absence of any testimony from a medical expert describing the plaintiff's prior complaints of tingling and numbness, what impact such complaints had on her ability to walk, and offering an opinion that the symptoms she experienced in the past played any role in the cause of her fall at the defendant's store. Defense counsel also told the jury that the plaintiff's fall was related to the fact that she had neuropathy. (7T17:6-19:16). Again, there was no expert medical opinion to support this suggestion. There was not even any testimony from a medical expert describing what neuropathy is, what symptoms are related to the condition, or what conditions or symptoms Gabapentin, the medication the plaintiff was prescribed in the past, is meant to treat. Defense counsel also gave the jury his own definition of festinating without any expert support as further support that the plaintiff fell as a result of her prior medical condition. (7T17:6-19:16).

It is respectfully submitted that the admission of this evidence in the absence of any expert medical opinion alone had the clear capacity to result in a miscarriage of justice because it was utilized by the defendant as substantive evidence and allowed the jury to speculate that the plaintiff did not fall as a result of the wheel of her rollator striking the low-lying tripping hazard but rather fell as a result of a prior medical condition without any expert guidance.

(7T16:14-17:1; 7T17:6-19:16). The miscarriage of justice was compounded by the improper comments of defense counsel regarding the plaintiff's absence from trial. The plaintiff was unable to appear at trial due to unrelated health issues which she passed away from shortly after the trial was completed. (Pa33; Pa57; 1T5:13-18; 3T68:14-69:1). The Trial Court found that the plaintiff was an unavailable witness and properly denied the defendant's request to give the jury an adverse inference charge because the plaintiff's absence from trial was due to the unrelated health condition. *Gonzalez v. Safe & Sound Sec. Corp.*, 185 N.J. 100, 118 (2005); see also; (6T163:3-23).

Although our Supreme Court has made it unmistakably clear that attorneys may not make adverse inference arguments regarding the absence of a witness from trial during summation when an adverse instruction is improper; *Washington v. Perez*, 219 N.J. 338, 364 n.7 (2014); defense counsel repeatedly commented upon the plaintiff being kept from the jury during trial. (7T33:1-4; 7T39:24-40:3; 7T40:4-42:13). The defendant argues in its opposition that the comments on the plaintiff's absence were proper. However, it fails to cite any legal authority allowing for an attorney to make an adverse inference argument regarding the absence of a witness from trial during summation when an adverse instruction is inappropriate and not given to the jury.

Defense counsel also did not simply comment upon the plaintiff not being present at trial. (7T33:1-4; 7T39:24-40:3; 7T40:4-42:13). Rather, his summation repeatedly suggested to the jury that the plaintiff was intentionally withheld from trial in order to prevent them from judging her credibility. (7T33:1-4; 7T39:24-40:3; 7T40:4-42:13). Defense counsel first stated, "[Mr. Mc Cuen] relied on [the plaintiff] and her honesty and her accuracy, and I guess they're asking you to do that too, even though she didn't come to Court to testify about what happened." (7T25:2-6). He next stated, "[t]hey didn't call Ms. Bainlardi. They didn't call Frances. The two people that were actually in aisle 58 on May 30th, 2019, didn't call either one of them in their case." (7T33:1-4). Then when discussing the analysis of witness credibility defense counsel stated, "[t]he witness's demeanor on the stand, the presence of any inconsistent or contradictory statements. Credibility. You weren't given an opportunity to judge [the plaintiff's] demeanor." (7T39:24-40:3). The clear intent from these comments was that the jury should draw an inference that the plaintiff was untruthful in her deposition testimony that was presented at trial and that her credibility would have been destroyed had she appeared at trial and testified.

"When summation commentary transgresses the boundaries of the broad latitude otherwise afforded to counsel, a trial court must grant a party's motion for a new trial if the comments are so prejudicial that 'it clearly and convincingly appears that

there was a miscarriage of justice under the law.'" *Bender v. Adelson*, 187 N.J. 411, 431 (2006), quoting, *R.* 4:49-1(a). In the case at bar, defense counsel's improper adverse inference argument had a clear capacity to cause an unjust result particularly when combined with the admission of evidence regarding the plaintiff's prior medical condition in the absence of any medical expert opinion relating the prior condition to the cause of the plaintiff's fall. Although the Trial Court instructed the jury to disregard these statements and that they were not infer why the plaintiff was not present and take anything away from that, the instruction did not erase the prejudicial impact of the statements. (7T42:15-43:5).

The defendant also argues that the verdict should be upheld because there was no objection to the other comments of defense counsel accusing plaintiff's counsel of only giving the jury a lot of distractions at trial and implying that the plaintiff's daughters and counsel fabricated the manner in which the plaintiff's fall occurred and were attempting to deceive the jury and recover damages upon a fraudulent claim. (7:21:25-22:3; 7T24:7-15; 7T35:18-36:20). The absence of an objection does not preclude the granting of a new trial because the comments, when combined with the other comments during summation and the erroneous evidentiary rulings, were clearly capable of producing an unjust result. Improper comments may be found to require a new trial when it is of such a nature as to have been clearly capable of producing an unjust result when no objection is raised at trial. *R.* 2:10-2.

When conducting this analysis, the comments should not be considered in isolation but instead considered together with the substantial trial errors. *Comprehensive Neurosurgical, P.C. v. Valley Hosp.*, 257 N.J. 33, 85 (2024). This is because the cumulative effect of small errors may be so great as to result in prejudice even if the individual errors in isolation would not require a new trial. *Pellicer v. St. Barnabas Hosp.*, 200 N.J. 22, 53 (2009). As the Supreme Court recently explained:

> In a cumulative error analysis, we do not merely count the number of mistakes because even a large number of errors, if inconsequential, may not operate to create an injustice. Rather, we consider the aggregate effect of the trial court's errors on the fairness of the trial. *Comprehensive Neurosurgical, P.C.*, 257 N.J. at 85-86.

It is respectfully submitted that defense counsel's comments during summation to which there was no objection were improper and should be considered together with the other comments and improper evidentiary ruling and further support the granting of a new trial because the cumulative effect of the errors had a clear capacity to result in a miscarriage of justice.

A further error warranting a new trial, especially when considered cumulatively with the other errors, was the Trial Court's denial of plaintiff's motion to strike the testimony of the defense engineer Jody DeMarco, P.E. on the grounds that he did not offer any expert analysis or testify as to a subject that was beyond the ken of the average juror. (6T42:9-47:8; 6T48:6-19). The defendant offered the testimony of Mr. DeMarco as an expert in forensic engineering and human factors. (5T87:8-10).

However, he did not offer any testimony related to these fields at trial. He instead conducted an alleged accident reconstruction by stacking pots in a shopping cart to a height lower than he believed to be the height of the plaintiff, eyeballed the surveillance cameras in the store, and compared the surveillance video showing only the plaintiff's head and shoulders to come up with the location he believed the plaintiff to be when she fell. (6T56:25-57:2). Mr. DeMarco testified that he made a rudimentary replication of the plaintiff whom he believed was about five feet tall by stacking pot in a shopping cart to a height of four feet eight inches. (5T114:11-24; 5T123:18-125:2; 5T127:7-23; 5T127:11-128:2; 6T30:24-31:28; 6T34:1-35:7; 6T41:13-17; 6T56:25-57:2; 6T78:25-79; 6T80:9-20). Mr. DeMarco was never qualified as an accident reconstructionist expert or an expert in forensic video analysis and was not competent to offer anything more than a lay opinion as to where he felt the plaintiff's fall occurred. The defendant argues in its opposition that Mr. DeMarco was qualified to perform the video analysis and accident reconstruction based upon his analysis of the surveillance video. However, they do not cite any part of the record supporting this argument.

Mr. DeMarco offered no testimony regarding the defective condition created by the bolt protruding above the column base plate or any aspect of human factors. He simply testified about the location of plaintiff's fall based upon his lay comparison of a photograph to a live-feed video surveillance system. None

of his testimony was within the ambit of forensic engineering or a human factors analysis. Allowing his testimony under the guise of 'expert testimony' given the manifest lack of credentials and qualifications allowed this jury to consider inherently uncredible evidence. His testimony clearly had the capacity to mislead the jury and allow them to speculate that the plaintiff did not fall as a result of the wheel of her rollator coming into contact with the protruding bolt particularly when combined with the evidence of the plaintiff's medical history being repeated throughout trial in spite of there being no expert opinion establishing any relationship between it and the cause of the plaintiff's fall and defense counsel summation. Accordingly, the plaintiff respectfully submits that the judgment should be reversed and the matter remanded for a new trial.

CONCLUSION

Based upon the foregoing, the plaintiff respectfully requests that the judgment in this matter be reversed and the case remanded for a new trial.

Respectfully submitted,

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____
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