SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000182-24 T2

DIEGO GARCIA, an individual, EVELYN TORRES, an individual, Plaintiffs-Appellants, v. GREGORIO PAULINO, an individual, RUFINA RODRIGUEZ, an individual, JOHN DOES (1-5), factiously named individuals, ABC COS. (1-5), fictitiously named business entities, Defendants-Respondents	:	CIVIL ACTION MID-L-3377-21 ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX VICINAGE SAT BELOW: HON. BINA K. DESAI, J.S.C.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANTS DIEGO GARCIA AND EVELYN TORRES

STATHIS & LEONARDIS LLC
32 S. Main Street, Edison, NJ 08837
T: (732) 494-0600
F: (732) 494-0206
Attorneys for Plaintiffs-Appellants
Diego Garcia and Evelyn Torres

Counsel of Record and On the Brief:
Sean M. Mahoney, Esq.
N.J. Attorney I.D. 155812015
smahoney@stathisleonardis.com

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

TABLE OF APPENDIX

[1] Statement of Material Facts required in the Appendix because this appeal concerns the grant of summary judgment. R. 2:6-2; R. 2:6-4.

[2] Responses to Statement of Material Facts and Counter-Statement of Material Facts required in the Appendix because this appeal concerns the grant of summary judgment. R. 2:6-2; R. 2:6-4.

[3] Responses to Counter-Statement of Material Facts required in the Appendix because this appeal concerns the grant of summary judgment. R. 2:6-2; R. 2:6-4. This reply brief also contained new attachments and relevant statements as to the veracity of those attachments, namely, a Deed, a Title, and a Tax Map. See also Pa122 – Pa130.

[4] The partially illegible copies annexed are the only copies made available to the Plaintiffs by the Defendants. Redactions have been made to remove mortgage account numbers from Pa134, Pa136, Pa138, Pa140, Pa142, Pa144, Pa148, Pa150, Pa152, Pa154, Pa156, Pa158, Pa159, and Pa161; TIN numbers from Pa148; and credit card numbers from Pa168-171.

STATEMENT OF ALL ITEMS SUBMITTED TO THE COURT ON THE SUMMARY JUDGMENT MOTION PURSUANT TO R. 2:6-1(a)(1)

Plaintiffs' Opposition to Defendants' Motion for Reconsideration of Summary Judgment Denial

*Duplicates and repeats have been omitted pursuant to R. 2:6-1(a)(2)

TABLE OF AUTHORITIES

Court Rules:

Ordinance:

Case Law:

Treatises:

PRELIMINARY STATEMENT

On February 3, 2021, Plaintiffs Diego Garcia and Evelyn Torres were tenants living in Defendants Rufina Rodriguez and Gregorio Paulino's two-unit property. Defendants lived downstairs and Plaintiffs lived upstairs.

On that date, the Plaintiffs separately slipped and fell on the Defendants' icy sidewalk. Plaintiff Torres was sleeping when Plaintiff Garcia fell, and then vice versa. As a result, the Plaintiffs did not speak between their falls.

The Plaintiffs filed a joint complaint against the Defendants. The subject of this appeal is the Trial Court's grant of the Defendants' summary judgment motion and simultaneous denial of the Plaintiffs' motion to extend and compel discovery.

The Trial Court found that the sidewalk was a public sidewalk, and further that the Defendants' property was residential (as opposed to commercial) in nature. Therefore, the Trial Court held that the Defendants did not owe the Plaintiffs a duty of care for ice hazards upon the sidewalk, and granted summary judgment in favor of the Defendants and against the Plaintiffs.

The Plaintiffs submit that the Trial Court erred because there was a genuine issue of material fact concerning whether the sidewalk was public or private. The Plaintiffs submit that the Defendants have submitted insufficient and contradictory proof in that regard, and that both the lease agreement between

the parties and Defendant Rodriguez's testimony create an inference of ownership and/or the responsibility to maintain the sidewalk.

The Plaintiffs also respectfully submit that the Trial Court erred by overlooking the relationship between the Plaintiffs and Defendants – landlords/tenants with an active lease agreement – in determining that the property's nature and use was residential. The Plaintiffs submit the Trial Court erred by focusing upon the nature and use of the Defendants' property instead of the lease agreement. The Plaintiffs submit the Court overlooked the terms of the lease agreement and the privity of contract amongst the parties.

The Trial Court also denied the Plaintiffs' motion to extend and compel discovery as "moot." The motion sought more specific discovery responses as to the Defendants' ownership and use of their property, including but not limited to the Defendants' mortgage statements and tax documents concerning profit/loss from rental income. The Plaintiffs respectfully submit the Trial Court erred because the outstanding discovery was directly relevant to the nature and use of the Defendants' property, i.e. whether the property was commercial or residential. Therefore, the further discovery may affect the property owners' residential public sidewalk immunity.

For the above reasons, as explored herein, the Plaintiffs respectfully request that the Appellate Division reverse the Trial Court's decisions, vacate

the Trial Court's orders, and remand this matter back to the Trial Court for further proceedings and a Jury Trial on Liability and Damages.

PROCEDURAL HISTORY[5]

On June 7, 2021, Plaintiffs Diego Garcia and Evelyn Torres filed a joint complaint against Defendants Rufina Rodriguez and Gregorio Paulino. (Pa1-Pa6).[6] On December 23, 2021, the Defendants filed a joint Answer to the Plaintiffs' Complaint. (Pa7 - Pa18).

On June 9, 2022, defense counsel, Michael K. Willison, Esq., filed a discovery extension stipulation letter. (Pa19). On August 26, 2022, the Court extended discovery through December 7, 2022. (Pa20 - Pa22). On December 2, 2022, the Court extended discovery through March 7, 2023. (Pa23 – Pa24). On March 3, 2023, the Court extended discovery through July 7, 2023. (Pa25 – Pa26). On June 23, 2023, the Court extended discovery through October 20, 2023. (Pa27).

On September 21, 2023, the Defendants filed a motion for summary judgment, seeking to dismiss the Plaintiffs' complaint with prejudice. (Pa28 –

---

[5] Pursuant to R. 2:6-8, the Plaintiffs hereby designate the following transcripts:

1T Court Transcript (October 27, 2023)
2T Court Transcript (August 22, 2024)

[6] "Pa" = Plaintiff's Appendix.

Pa29; Pa30 – Pa35). On October 4, 2023, the Plaintiffs filed a motion to extend discovery. (Pa36).

On October 10, 2023, the Plaintiffs filed an opposition to the Defendants' motion for summary judgment, which included a response to the Defendants' statement of material facts and a counter-statement of material facts. Pa37 – Pa45). On October 16, 2023, the Defendants filed a response to the Plaintiffs' counter-statement of material facts, including two new exhibits. (Pa46 – Pa61).

On October 27, 2023, the Trial Court denied, without prejudice, the Defendants' motion for summary judgment, to allow for additional discovery. (Pa62). Also on October 27, 2023, the Trial Court denied the Plaintiffs' motion to extend discovery in favor of a forthcoming proposed case management consent order. (Pa63 – Pa64).

On November 13, 2023, the Trial Court granted the parties' case management consent order. (Pa65 – Pa67). The order extended discovery through May 15, 2024, and required, inter alia, the Defendants to appear for further depositions limited to the issues of "residential vs. commercial" ownership of their property. Id.

On June 4, 2024, the Defendants renewed their summary judgment motion by way of a motion for "reconsideration." (Pa690 – Pa70). On June 6, 2024, the Plaintiffs filed a motion to extend and compel discovery from the Defendants –

more specifically, the motion sought more specific discovery responses to the Plaintiffs' post-deposition discovery demands dated April 29, 2024. (Pa81).

On August 22, 2024, the Trial Court held remote oral argument concerning the pending motions. (1T) On that date, the Trial Court issued a statement of reasons on the record, granted the Defendants' motion for reconsideration (and, thus, summary judgment in their favor and against the Plaintiffs), and denied the Plaintiffs' motion to compel and extend discovery "as moot." (1T; Pa99 – Pa100; Pa101 – Pa102).

The Plaintiffs have filed a Notice of Appeal of both decisions and orders, and seek remand to the Trial Court for further proceedings for the reasons set forth herein and below. (Pa103 – Pa107).

STATEMENT OF FACTS

In April 2018, Defendants Rufina Rodriguez and Gregorio Paulino purchased a two-unit property at 49-51 Broad Street in Perth Amboy, New Jersey. (Pa346:10-18, Pa347:25-348:7) The Defendants have lived on the first floor of the property since May 2018. (Pa345:23-Pa346:5)

On June 1, 2018, Defendants Rufina Rodriguez and Gregorio Paulino, as landlords, entered into a Lease Agreement with Ignacio Garcia and Esperanza Trujillo, as tenants, to lease the property known as 49 Broad Street, 2nd Floor, Perth Amboy, NJ 08861. (Pa110 – Pa115). Ignacio Garcia and Esperanza

Trujillo are Plaintiff Garcia's father and mother, respectively. (Pa195:1-10). Plaintiff Garcia has lived with his parents on the property since June of 2018. Id. Plaintiff Torres – who has been Plaintiff Garcia's girlfriend since 2018 – moved in to the property in 2021 before the slip-and-fall incidents occurred. (Pa195:11-18; Pa280:7-23).

When observing the property from Broad Street, the door to the left is the Defendants' entrance, and the door to the right is the Plaintiffs' entrance. (Pa348:21-349:2; Pa109)

The Lease Agreement required the tenants to pay rent of $1,800.00 each month to Defendant Rodriguez. (Pa110). The Lease Agreement stated that "[m]ajor" maintenance of the leased premises will remain the responsibility of the Defendants. (Pa112).

The Lease Agreement stated, regarding the "Use of Premises,"

> . . . Lessee shall comply with all the sanitary laws, **ordinances**, rules, and orders of appropriate governmental authorities affecting the cleanliness, occupancy, and preservation of the demised premises, **and the sidewalks connected thereto**, during the term of this lease.
>
> [Pa110 – Pa11 (emphasis added.)]

On February 3, 2021, the Plaintiffs were separately exiting the property when they slipped and fell on the Defendants' icy sidewalk. (Pa1 – Pa6). More specifically, at approximately 3:26 a.m., Plaintiff Diego Garcia, who had just returned home from work, slipped and fell on the Defendants' sidewalk while he was walking to retrieve his phone from his car. (Pa207:18-208:3; Pa117). Plaintiff Garcia's doorbell camera recorded his fall. (Pa117). After falling, Plaintiff Garcia went inside and went to sleep. (Pa218:16-20). Plaintiff Torres was sleeping at the time. (Pa209:1-6).

Then, at approximately 8:45 a.m., Plaintiff Torres slipped and fell in the same area while she was walking to her car to go to work. (Pa287:1-15). Plaintiffs did not speak in the interim. (Pa209:7-13; Pa293:2-18). Mr. Garcia's doorbell camera also recorded Ms. Torres' fall. (Pa118).

Both Plaintiffs confirmed there was no salt on the ground when they respectively slipped and fell. (Pa288:4-15; Pa212:11-13; Pa222:21-223:3). They both confirmed that the Defendants' efforts concerning clearing the sidewalks of snow and ice (including shoveling and salting) have increased since the incident occurred. (Pa300:14-301:9; Pa210:25-212:10).

On February 2, 2021, the day before the plaintiffs' respective falls, there are four (4) doorbell video recordings of Defendant Gregorio Paulino shoveling/sweeping the property's front porch walkway between 07:15 a.m. and

07:21 a.m. (Pa116). The first shows a person shoveling the porch and throwing the snow toward the sidewalk. Id. The second shows a person walking on the porch with a broom. Id. The third and fourth show a person shoveling the snow from the defendants' front walkway. Id. The fourth shows that person shoveling the snow from the walkway onto the sidewalk. Id.

On February 10, 2023, Defendant Rodriguez appeared for her deposition. (Pa330 – Pa390). Ms. Rodriguez has worked as a custodian for a couple different school districts since approximately 2014. (Pa342:20-343:16). As a custodian, Ms. Rodriguez was responsible for keeping the sidewalks of the respective schools free and clear of snow and ice, and also to apply salt to the walkways. (Pa343:17-344:4). As a custodian, Ms. Rodriguez's training included how and when to apply salt (including post-snow removal and when the temperature is going to drop). (Pa344:5-345:16).

During her deposition, Ms. Rodriguez was asked why she cleared snow and ice from the sidewalk, and she testified that it is her "responsibility to have everything clear. **It is my property, my home**." (Pa351:18-343:3) (emphasis added). In fact, Ms. Rodriguez testified that she "always" kept the sidewalks clean. (Pa357:24-358:2). The above response was in direct response to a question concerning the "sidewalk in front of that painted red brick wall." (Pa351:25-353:3).

In response to a question regarding policies and procedures regarding the inspection, maintenance, or snow/ice remediation of the defendants' property and the sidewalks in front of it, Ms. Rodriguez stated that the defendants are "always attentive" and the defendants "always make sure that the sidewalk and everything is clean." (Pa358:8-16). Ms. Rodriguez testified that she understood that, as the owner of this property, it was her duty to ensure that the sidewalks were reasonably safe for members of the public and her tenants to use. (Pa354:22-355:5).

Ms. Rodriguez confirmed that, during a snow event, the defendants would remove the snow so "everything [is] okay to be able to walk." (Pa358:21-359:3). Ms. Rodriguez testified that the defendants inspect the sidewalk in front of the property every one to two hours. (Pa358:17-20).

Ms. Rodriguez confirmed that the Defendants keep shovels and a bucket of salt on premises. (Pa359:4-10). Ms. Rodriguez testified that the shovels and bucket of salt are kept in the basement, but are brought up to the front porch during a snow event. (Pa359:11-23). Ms. Rodriguez testified that the Defendants "always" put salt down, but could not recall whether they did on the date of the Plaintiffs' respective falls. (Pa363:18-364:6).

Ms. Rodriguez testified that the defendants shoveled and applied salt to the sidewalk on February 1, two days before the plaintiffs' respective falls.

(Pa365:12-366:14). Ms. Rodriguez did not recall whether the defendants shoveled or applied salt on February 2, the day before the Plaintiffs' respective falls. (Pa366:15-22).

Long before her deposition, Ms. Rodriguez gave a statement to the insurance company's investigator, with the assistance of an interpreter, on May 18, 2021. (Pa 119). (Please forgive the screeching in the background of the recording; this is how the Defendants produced the audio.) Ms. Rodriguez stated that the defendants maintain the interior and the exterior of the premises. Id. at 02:39-02:48. Ms. Rodriguez stated that, when it snows, she worries a lot about the snow because she is a custodian by occupation. Id. at 07:57-08:16. Ms. Rodriguez stated that the tenants, including the Plaintiffs, always use the front door to enter and exit the apartment. Id. at 10:00-10:10.

On February 10, 2023, Defendant and subject property owner Gregorio Paulino appeared for his deposition. Mr. Paulino testified that, "Usually when snow falls, we clean the sidewalk and we put down salt." (Pa398:22-399:3) Mr. Paulino testified that he does this for "safety." (Pa399:4-9). Mr. Paulino testified that he does not recall whether he shoveled or salted the sidewalk between February 1 (two days before the Plaintiffs' respective falls) through February 3 (date of the Plaintiffs' respective falls. (Pa399:14-400:7. However, Mr. Paulino testified that he shovels or salts the sidewalk "regularly." (Pa400:2-7).

During discovery, the defense sent a "survey" from Andrew Wu of Formosa Engineering, dated November 16, 2023. (Pa120 – Pa121). There is no explanation provided with the survey. Id. There are various red lines, arrows, and longitudinal/latitudinal expressions without context. Id. There is a red rectangle encompassing an area, which appears to end at the porch stairs, i.e. exclusive of the red retaining wall and walkway to the sidewalk. Id.

As it pertains to those areas, Ms. Rodriguez testified that she exclusively cares for the retaining wall and the shrubs therein; that nobody from the City of Perth Amboy maintained the retaining wall area in any way since 2018 (when she purchased the property); and that if she did not care for the area, "everything is going to be overgrown, then the city is going to come and give me a ticket." (Pa436:6-438:9).

Ms. Rodriguez appeared for a further deposition on April 29, 2024 pursuant to Grijalba v. Floro, 431 N.J. Super. 57 (App. Div. 2013). (Pa410 – Pa455.) Ms. Rodriguez again confirmed that the tenants' rent was $1,800 per month on the date of the incidents (later bumped up to $1,900 per month). (Pa421:23-25).

She did not know the square footage of the home, and could not provide the square footage of the first story (where Defendants lived) or the second story (where Plaintiffs lived). (Pa423:14-22). However, Defendant Rodriguez

confirmed that the first story (where Defendants lived) had a living room, a dining room, a kitchen, three bedrooms, one bathroom, a basement, and a yard. (Pa422:22-423:2). She confirmed that the Plaintiffs did not have access to those areas. (Pa423:3-6). She then confirmed that the Plaintiffs had a living room, a kitchen, one bathroom, and four bedrooms. (Pa423:7-13). Additionally, each unit has separate utilities. (Pa430:22-24). The Defendants pay their own utilities (except for water). (Pa430:25-431:9).

Defendant Rodriquez testified that she decided to rent the second story of her property because "the four of us [i.e. the Defendants and their two daughters] couldn't live in two apartments." (Pa422:18-21). Ms. Rodriguez confirmed that one of the reasons she rented a portion of her property was "to pay taxes and all of the other expenses," in addition to "the bank [mortgage]" and "to pay everything. Everybody has to pay their keep. Nothing is free at [*sic*] this life." (Pa424:10-22).

Defendant Rodriguez confirmed that there are other expenses associated with the defendants' ownership of their home, including lights, solar panels ($100/month), water, and utilities, inclusive of gas ($100/month) and water. (Pa429:5-430:21). Ms. Rodriguez testified that the Plaintiffs/tenants pay for their own utilities, except they split the water bill 60/40. (Pa430:22-431:9).

In regard to her taxes, Ms. Rodriguez does file a "Schedule E Income or Loss from Rental Real Estate" form, and has done so every year since 2018. (Pa431:10-16). Ms. Rodriguez testified that she only claimed a loss during one year, which is 2024. (Pa431:17-19). She does not recall whether she had any losses from 2018 through 2021. (Pa431:1-3). The defendants paid $319,000 for their home. (Pa426:25-427:3).

On April 29, 2024, immediately following Ms. Rodriguez's supplemental deposition (i.e. the same date), the Plaintiffs forwarded supplemental discovery responses to the Defendants. (Pa130). On June 4, 2024, the defendants provided partial documents, many of which were borderline illegible, in response to the Plaintiffs' post-deposition demands. (Pa131 – Pa171). There were a few of the Defendants' Mortgage Statements from M&T Bank as follows (Pa134 – Pa145):

Date	Total Due
10/3/2018	**$2,423.93**
11/7/2018	
1/4/2019	
1/19/2020	**$2,418.68**
1/12/2021	**$2,672.21**
3/15/2021	

The Defendants did not provide mortgage statements for April, September, and December of 2018, February 2019 through December 2019, February 2020 through December 2020, and February 2021. However, assuming

that the bank payments were consistent for the above timeframes, the defendants' bank payments for mortgage, taxes, insurance, etc. averaged $2,504.94/month for that three-year span. As such, the Defendants' tenants, including the Plaintiffs, were paying the overwhelming percentages of: 74.3% (2018-2019), 74.4% (2020), and 67.4% (2021) of the Defendants' monthly bank payments. This is so despite the fact that the defendants have exclusive access to the basement and the yard, and are therefore in exclusive possession of more of the property than the tenants/Plaintiffs.

Please also recall that the tenants, including the Plaintiffs, pay for all their own utilities and even split the water bill 60/40 with the defendants. (Exhibit M at 21:22-22:9)

LEGAL ARGUMENTS

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACTS THAT PRECLUDE JUDGMENT AS A MATTER OF LAW. (2T; Pa99 – Pa100).

In New Jersey, summary judgment shall be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. R. 4:46-2(c). See also Sommers v. McKinney, 287 N.J. Super. 1,

9 (App. Div. 1996) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995)). An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, "together with all legitimate inferences therefrom favoring the non-moving party," would require submission of the issue to the trier of fact." Id.

The Court must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540 (1995).

An Appellate Court uses the same standard as the trial court when reviewing a trial court's decision to grant summary judgment. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). An Appellate Court decides first "whether there was a genuine issue of fact and, if there was not, it then decides whether the lower court's ruling on the law was correct." Walker v. Alt. Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987).

Moreover, the Appellate Division reviews a trial judge's decision on whether to grant or deny a motion for reconsideration under R. 4:49-2 for an "abuse of discretion." Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

That is so because the "rule applies when the court's decision represents a clear abuse of discretion based on plainly incorrect reasoning or failure to consider evidence or a good reason for the court to reconsider new information." Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 4:49-2 (2022).

However, "[w]here the order sought to be reconsidered is interlocutory . . . Rule 4:42-2 governs the motion." JPC Merger Sub LLC v. Tricon Enters., Inc., 474 N.J. Super. 145, 160 (App. Div. 2022). Reconsideration under R. 4:42-2 offers a "far more liberal approach" than R. 4:49-2. Id. (citing Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021). "Rule 4:42-2 declares that interlocutory orders 'shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice.'" Id. (quoting R. 4:42-2(b)).

Here, for the reasons set forth at length below, the Trial Court erred by granting summary judgment in favor of the Defendants and against the Plaintiffs because there are genuine issues of material facts, including whether the Plaintiffs fell on a public or private sidewalk, the relationship and privity between the Plaintiffs and the Defendants, and the nature and use of the Defendants' property.

Moreover, the Trial Court erred by prohibiting the Plaintiffs from conducting further relevant discovery concerning the "residential vs. commercial" distinction.

Lastly, the motion sought to be "reconsidered" by the Defendants (i.e. the initial denial of their summary judgment motion) was an interlocutory order, and therefore was governed by R. 4:42-2 instead of R. 4:49-2. For that reason, the "abuse of discretion" standard does not apply to this Appeal.

II. THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFFS SLIPPED AND FELL ON A PUBLIC SIDEWALK BECAUSE THE DEFENDANTS' TESTIMONIES AND DISCOVERY RESPONSES INDICATE THEY OWNED AND CONTROLLED THE SIDEWALK. (2T; Pa99 – Pa100).

The Defendants have failed to prove – or, put otherwise, have failed to eliminate all genuine issues of material facts as to – the ownership and status of the sidewalk where the Plaintiffs fell. There is competent evidence that the sidewalk is part of the Defendants' property, including but not limited to Defendant Rufina Rodriguez's admissions during her testimonies and the Lease Agreement between the parties. In fact, Defendant Rodriguez testified that it was her responsibility to keep the sidewalk clear: "**It is my property, my home**." (Pa351:18-343:3) (emphasis added).

The Defendants contend that the sidewalk is public, but they have failed to establish that fact. Instead, the Defendants have only confused the issue

through their own actions, their own testimonies, and through the provision of competing and contrary documents. (Moreover, a discussion of the language of the Lease Agreement is set forth in § III, infra.)

The Defendants have supplied two competing and contrary documents. First, attached to the Defendants' reply brief in further support of their original motion for summary judgment was a "Tax Map" showing their property at Block Number 139, Lot Number 19.01. (Pa122 – Pa130). The "Tax Map" showed that the Defendants' property immediately abutted Broad Street, i.e. there was no sidewalk or grass berm between the property and the street. (Pa128) The reasonable inference is that the sidewalk is part of the Defendants' property; put differently, the Defendants' own everything between the structure (i.e. the house) and the street.

Then, during the discovery period following denial of the first summary judgment motion, the Defendants provided a document from Andrew Wu of Formosa Engineering, Inc. (Pa120 – Pa121). This document does not have any context, and Mr. Wu has not provided any additional context. This document purports to show a drawing of the Defendants' property, and includes certain red markings that appear to include, inter alia, latitudinal/longitudinal references and a rectangle around the dwelling structure. On the Broad Street side, the red rectangle extends about one-third of the way beyond the porch steps into the

retaining wall, but does not encompass the remainder of the retaining wall, the concrete sidewalk, the "conc. line," or Broad Street.

A reasonable jury could find that this non-contextual red rectangle is intended to encompass only the dwelling structures (i.e. the buildings) but not the entire property itself. Even assuming that the red rectangle is Mr. Wu's expression of the Defendants' property line, which remains in dispute, Mr. Wu's drawing would exclude the majority of the red retaining wall, which is contrary to Defendant Rodriguez's testimony.

More pointedly, Ms. Rodriguez testified that she exclusively cares for the retaining wall and the shrubs therein; that nobody from the City of Perth Amboy maintained the retaining wall area in any way since 2018 (when she purchased the property); and that if she did not care for the area, "everything is going to be overgrown, then the city is going to come and give me a ticket." (Pa436:6-438:9).

Additionally, there is video footage of Defendant Gregorio Paulino clearing snow from the walkway between the retaining wall the day before the Plaintiffs' falls, indicating it is the Defendants' property. (Pa116). This area was beyond the red rectangle drawn by Mr. Wu. (Pa120 – Pa121).

Therefore, when viewed in the light most favorable to the Plaintiffs herein, there is a genuine issue of material fact concerning whether the sidewalk is

public or part of the Defendants' property. Thus, there are genuine issues of material facts that precluded judgment as a matter of law, and the Defendants' summary judgment motion should have been denied.

III. THE TRIAL COURT OVERLOOKED THE IMPORTANCE OF THE LANDLORD/TENANT RELATIONSHIP BETWEEN THE PARTIES AND THE LANGUAGE OF THE LEASE AGREEMENT, WHICH ATTEMPTED TO DELEGATE THE DEFENDANTS' SNOW AND ICE REMEDIATION OF THE SIDEWALK TO THE PLAINTIFFS-TENANTS. (2T; Pa99 – Pa100).

In addition to the confusion arising from the Defendants' conflicting testimonies, actions, and documents, the Defendants' argument contradicts its own Lease Agreement. They argue that they do not have any responsibility to clear the public sidewalk of snow and ice but the Lease Agreement itself attempts to delegate the "cleanliness" of the "sidewalks connected" to their property. (Pa110 – Pa11).

The Lease specifically adopts and incorporates "ordinances" of "appropriate governmental authorities." Id. The City of Perth Amboy has a municipal ordinance stating:

> The owner or **owners**, occupant or **occupants** of any premises, property, or vacant land abutting or bordering upon any street in the City of Perth Amboy **shall** remove all snow and/or ice from the **sidewalks** of any street or, in case of ice which may be so frozen to the **sidewalks** as to make removal impracticable, shall cause

> the same to be thoroughly covered with sand or ashes within twenty-four (24) hours after same has ceased to fall or form thereon.
>
> [City of Perth Amboy, N.J., Code § 380-1(A) (2011) (emphasis added).]

The Lease agreement incorporated that ordinance by reference and required the tenants (including the Plaintiffs) to comply with all "sanitary laws, **ordinances**, rules, and orders of appropriate governmental authorities affecting the cleanliness, occupancy, and preservation of the demised premises, **and the sidewalks connected thereto**[.]" (Pa110 – Pa11).

Therefore, by incorporating reference to the relevant ordinances, and by explicitly expanding the scope of the Lease Agreement to include the "the sidewalks connected" to the premises, the Defendants attempted to delegate their responsibility for such area. By way of such attempted delegation, the defendants have admitted that the "sidewalks connected" to its property are the Defendants' responsibility.

Plaintiffs agree that a municipal ordinance does not create a tort duty as a matter of law. Luchejko v. City of Hoboken, 207 N.J. 199, 211 (N.J. 2011). The rationale is that such ordinances are not adopted for the intended purpose of protecting members of the public, but rather to impose upon those regulated

"the public burdens of the municipal government." Fielders v. N.J. St. Ry. Co., 68 N.J.L. 343, 352 (E. & A. 1902).

However, the Luchejko case, as well as its foundational common law, concern cases in which a stranger is walking on a public sidewalk abutting a property. That is not the case here. (See also § IV, infra, for a more detailed discussion of the aforesaid statement.)

Here, we have a contract specifically incorporating the municipal ordinance. In other words, the Lease Agreement's language and the privity between the Plaintiffs and the Defendants controls. As a result, the Lease does not involve the imposition of the public burdens of municipal government upon the Defendants; the Lease attempts to impose that burden onto the tenants.

A reasonable jury could conclude that the Lease Agreement's explicit inclusion and incorporation of "the sidewalks connected" to the premises evinced the Defendants' ownership of or responsibility for those sidewalks, especially when read in conjunction with the ordinance, which is also incorporated by reference. Moreover, a reasonable person – and certainly a reasonable Jury – could find that the Defendants' attempt to partially delegate

such a responsibility would cause the Defendants' tenants, including the Plaintiffs, to understand this to be the Defendants' obligation.[7]

In light of the above, there are genuine issues of material facts that precluded judgment as a matter of law, and the Defendants' summary judgment motion should have been denied.

IV. THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANTS DID NOT OWE A DUTY TO THE PLAINTIFFS ON THE SIDEWALK BECAUSE SAFE AND CONVENIENT ACCESS TO THE DEFENDANTS' PROPERTY WAS INHERENTLY INCLUDED IN THE PLAINTIFFS' TENANCY. (2T; Pa99 – Pa100).

As set forth above, the Plaintiffs dispute that they fell on a "public" sidewalk; or, if it is "public," the Plaintiffs submit that the Defendants' incorporation of the sidewalks and the relevant borough ordinance pertaining to the sidewalks created a duty between the landlords/Defendants and tenants/Plaintiffs. Therefore, the Plaintiffs submit that this section and the issues contained herein are moot. Nonetheless, the Plaintiffs will comment upon these issues without waiving the objection to their germaneness.

An owner or possessor of property owes a higher degree of care to the business invitee because that person has been invited onto the premises for purposes of the owner that often are commercial or business related. Hopkins

[7] A landowner's obligation to maintain an abutting public sidewalk is a "non-delegable duty." See, generally, Shields v. Ramslee Motors, 240 N.J. 479 (2020).

v. Fox & Lazo Realtors, 132 N.J. 426, 433 (1993) Only to the invitee or business guest does a landowner owe a duty of reasonable care to guard against any dangerous conditions on his or her property that the owner either knows about or should have discovered. Hopkins at 434. That standard of care encompasses the duty to conduct a reasonable inspection to discover latent dangerous conditions. Id. (citing Handleman v. Cox, 39 N.J. 95, 111, 187 A.2d 708 (1963); Restatement (Second) of Torts § 343 (1969); Butler v. Acme Markets, Inc., 89 N.J. 270, 275, 445 A.2d 1141 (1982)).

In Stewart v. 104 Wallace St, Inc., 87 N.J. 146, 157 (1981), commercial landowners were held responsible for maintaining the sidewalks abutting their property in reasonably good condition and liable to pedestrians injured as a result of their negligent failure to do so. Then, in Mirza v. Filmore Corp., 92 N.J. 390, 395 (1983), that duty of commercial landowners was extended to the removal of snow or ice, or reduction of the risk from those conditions under appropriate circumstances. "The test is whether a reasonably prudent person, who knows or should have known of the condition, would have within a reasonable period of time thereafter caused the public sidewalk to be in reasonably safe condition." Id. at 395-296.

In Stewart, 87 N.J. at 160, the Supreme Court of New Jersey provided the courts with guidance as to which properties were to be covered by the new rule:

"As to the determination of which properties will be covered by the rule we adopt today, commonly accepted definitions of 'commercial' and 'residential' property should apply, with difficult cases to be decided as they arise." By way of footnote, the Court stated that an "apartment building would be 'commercial' properties covered by the rule." Id. at n.7.

Moreover, "where the property is partially commercial and partially non-commercial, the former [commercial use] will take precedence in the application of the rule in Stewart." Gilhooly v. Zeta Psi Fraternity, 243 N.J. Super. 201, 205 (Law Div. 1990).

Our Courts have long attempted to firm up the residential vs. commercial distinction, particularly in connection with owner-occupied properties with a commercial rental component. See, e.g., Hambright v. Yglesias, 200 N.J. Super. 392 (App. Div. 1985), Brown v. St. Venantius Sch., 111 N.J. 325 (1988), Gilhooly v. Zeta Psi Fraternity, 243 N.J. Super. 201 (Law Div. 1990), Borges v. Hamed, 247 N.J. Super. 353 (Law Div. 1990), aff'd, 247 N.J. Super. 295 (App. Div. 1991), Avallone v. Mortimer, 252 N.J. Super. 434, 437 (1991), Wasserman v. W.R. Grace & Co., 281 N.J. Super. 34 (App. Div. 1995), Abraham v. Gupta, 281 N.J. Super. 81, certif. denied, 142 N.J. 455 (1995), Smith v. Young, 300 N.J. Super. 82 (1997), Dupree v. City of Clifton, 175 N.J. 449 (2003), Luchejko

v. City of Hoboken, 207 N.J. 191 (2011), Grijalba v. Floro, 431 N.J. Super. 57 (App. Div. 2013),

In Avallone v. Mortimer, 252 N.J. Super. 434 (1991), the Appellate Division tackled the question, "[W]hat should be the result where the owner resides in a two- or three-family residence which abuts the sidewalk in question?" Id. at 437. There, the plaintiff – **a stranger to the property** – tripped and fell in front of the defendants' home, which was owned and occupied by the defendants. Id. at 435. The Court held that "the residential sidewalk exception be continued for owner-occupants whose residency is established to be the predominant use." Id. at 438 The Court offered "clear-cut examples" to illustrate its holding, but recognized that "[c]loser cases than those set forth in these examples will, of course, arise." Id.

The Court identified that "consideration of the factors of extent of income and extent of non-owner occupancy in terms of time and space, should enable a trial judge to determine whether the owner's residential occupancy preponderates." Id. The Court concluded its analysis by recognizing that this will lead to genuine issues of material facts and, thus, trials: "Where there are factual disputes respecting these factors, or where their weight is unclear, these will require resolution by a trier of fact." Id. The Court ultimately remanded the

matter "to permit exploration of the pre-dominance of use issue" by motion or trial." Id. at 439.

In their summary judgment motions, the Defendants here relied upon Smith v. Young, 300 N.J. Super. 82 (1997). In Smith, the property was a two-family home co-owned by sisters: Young and Benjamin (whose Estate had subsumed ownership upon her death). Id. at 97. Young lived on the first floor, but the Estate rented out the second floor and collected rent. Id. at 97. **The Plaintiff did not live on the property and was a stranger to the owner**. Rather, the plaintiff there slipped and fell on an accumulation of ice on a public sidewalk while walking past the defendants' property. Id. at 84.

The Court recognized the "lingering difficulties" of the classification issues of owner-occupied properties, but held that the owner-occupied, two-family property in question was within the exempted category and the owners were absolved from any duty to maintain abutting sidewalks under "currently prevailing standards." Id. at 101.

Please note that Justice Brochin dissented in favor of remand as to the issues of fact regarding amount of rental income, etc. Id. Please also note that Smith did **not** create a bright line rule that all two- and three-family houses are considered "residential for purposes of sidewalk liability. Id.

In Grijalba v. Floro, 431 N.J. Super. 57, 59-60 (App. Div. 2013), the defendant owned a two-family house. The defendant originally resided on the second floor and rented the first floor for rental income. The defendant eventually moved to the basement due to financial difficulties and began to rent the second floor for rental income, thereby doubling her rental income. Id. at 60. **The plaintiff did not live on the property and was a stranger to the owner**. The plaintiff was walking by the defendant's property one day when he slipped and fell on ice on the public sidewalk, sustaining injuries. Id.

The Court began its analysis by recognizing multiple themes arising from the above cases, including: the residential-commercial distinction requires a case-by-base, fact-sensitive analysis. Id. at 66. Based upon the factual record, the Court remanded the matter to the Law Division for the Court to determine, at a minimum, the following factors when determining whether the defendant's property was commercial or residential:

> (1) the nature of the ownership of the property, including whether the property is owned for investment or business purposes;
>
> (2) the predominant use of the property, including the amount of space occupied by the owner on a steady or temporary basis to determine whether the property is utilized in whole or in substantial part as a place of residence;

> (3) whether the property has the capacity to generate income, including a comparison between the carrying costs with the amount of rent charged to determine if the owner is realizing a profit; and
>
> (4) any other relevant factor when applying "commonly accepted definitions of `commercial' and `residential' property."
>
> [Id. at 73.]

The Court maintained that the commercial vs. residential determination required a more fully formed record, and that the totality of the circumstances test, on a case-by-case, fact-sensitive basis, where the parties have disputed the general nature of the ownership of the property and the use to which it is put, follows the Court's repeated approach for the "last three decades" of resolving difficult cases as they arise. Id. at 73-74.

Unfortunately, all of the above-cited cases concerned a random passer-by or stranger's injuries while walking past a random property. Put differently, none of those cases involved a plaintiff who actually lived upon the defendant's property in consideration of and exchange for the payment of rent. Nor did any of those other plaintiffs have a contractual privity, through a lease agreement, with the defendant/landowners.

Those cases are readily distinguishable from the present matter for that reason. The Plaintiffs here were not random passers-by or strangers to the property; rather, the Plaintiffs here were the Defendants' tenants/residents who lived on the property to the Defendants' financial advantage.

So then, the logical inquiry is whether the duty owed by the Defendants (as owners of the property) to the Plaintiffs (as tenants/residents of the property) extends to the public sidewalk in front of the Defendants' property.

The rationale for "commercial sidewalk" liability but "residential sidewalk" immunity is that "commercial and other non-residential entities are more readily able to pass to their users the added costs associated with sidewalk liability." Avallone at 437-38. However, there is an important public policy underpinning that rationale: "the benefits enjoyed by the 'commercial establishment' by use of abutting sidewalks for ingress and egress purposes should impose a concomitant duty to keep those means of ingress and egress in reasonable good repair." Abraham v. Gupta, 281 N.J. Super 81, 84 (App. Div. 1995) (citing Brown v. St. Venantius School, 111 N.J. 325, 334-35 (1988)).

In Brown, our Supreme Court extended the Stewart rule to private and parochial schools in part because "[s]afe and convenient access to [such schools] is undeniably a necessary component of that defendant's daily activities." Id. The Court specifically noted that

> the School would be liable if plaintiff had slipped and injured herself on the steps leading into the school or inside the school building. To expand the School's duty of care to its abutting sidewalks does not greatly add to the type of maintenance tasks the School routinely undertakes. **Safe and convenient access to the School is undeniably a necessary component of that defendant's daily activities.** Nor do we believe care of the sidewalks should inordinately add to the School maintenance expenses. Private schools obviously carry liability insurance.
>
> Id. at 334-35 (emphasis added).

While Brown concerned a private/parochial school's duty, the rationale utilized by our Supreme Court is directly applicable to the present matter. Essentially, the rationale for not imposing sidewalk liability on residential properties is that every property owner would suddenly owe a duty to every other person on earth walking upon the public sidewalks that abut their property – including those that have no intent to enter, exit, or use the owner's property.

Here, just like in Brown, safe and convenient access, including ingress and egress, was a necessary component of the Plaintiffs' tenancy upon the Defendants' property. Please recall that the Plaintiffs were not strangers passing by this property – they lived there, and their ingress and egress to the property was dependent upon the sidewalk. Without such access, ingress or egress would

have been impossible. Indeed, Defendant Rodriguez admitted that the Plaintiffs' only means of access to the property was to traverse the sidewalk, the front walkway, up the stairs, onto the porch, and through the front door. (See Pa119 at 10:00-10:10). Therefore, the Defendants had actual notice that the sidewalk area would be traversed by the Plaintiffs; in fact, same was not only "foreseeable," but "actually known."

For the above reasons, the Trial Court erred in granting summary judgment in favor of the Defendants and against the Plaintiffs.

V. THE TRIAL COURT ERRED IN DENYING THE PLAINTIFFS' MOTION TO EXTEND AND COMPEL DISCOVERY RESPONSES FROM THE DEFENDANTS AS "MOOT" BECAUSE THE DISCOVERY SOUGHT INCLUDED REQUESTS FOR DOCUMENTS RELEVANT TO THE DEFENDANTS' CAPACITY TO GENERATE INCOME OR PROFIT FROM THE PLAINTIFFS' TENANCY, AND THEREFORE RELEVANT TO THE PROPERTY'S STATUS AS COMMERCIAL OR RESIDENTIAL.

(2T; Pa101 – Pa102).

The Plaintiffs respectfully disagree with the Trial Court's ruling that their motion to compel and extend discovery was "moot." (Pa68; 2T). The Trial Court erroneously held that the discovery sought would not impact its analysis or decision. However, based upon the outstanding discovery, there are genuine issues of material facts which preclude judgment as a matter of law in favor of the Defendants and against the Plaintiffs.

As set forth above and reiterated herein, in Grijalba v. Floro, 431 N.J. Super. 57, 59-60 (App. Div. 2013), the Appellate Division stated that the "residential vs. commercial" distinction requires a case-by-case, fact-sensitive analysis, and that the Court must determine the following factors:

> (1) the nature of the ownership of the property, including whether the property is owned for investment or business purposes;
>
> (2) the predominant use of the property, including the amount of space occupied by the owner on a steady or temporary basis to determine whether the property is utilized in whole or in substantial part as a place of residence;
>
> (3) whether the property has the capacity to generate income, including a comparison between the carrying costs with the amount of rent charged to determine if the owner is realizing a profit; and
>
> (4) any other relevant factor when applying "commonly accepted definitions of `commercial' and `residential' property."
>
> [Id. at 73.]

Here, the Plaintiffs' motion to extend and compel discovery was required by Defendant Rodriguez's then-recent supplemental deposition. The motion sought to compel discovery relevant to the Grijalba and Mineros factors, as discussed above and herein. More specifically, the Defendants' partial and

inadequate post-deposition discovery responses were incomplete and included nearly-illegible documents. (See Pa131 – Pa171). For example, Plaintiffs requested mortgage statements from April 2018 through March 2021, but only six (6) months' statements were provided. (Pa134 – Pa145). Additionally, the Defendants objected to various requests, including those for the relevant mortgage statements, property taxes, utility bills, and Defendants' tax documents, including their Schedule E Tax Forms, Part I, "Income or Loss from Rental Real Estate and Royalties." (Pa131 – Pa133).

The Trial Court determined the discovery sought to be "moot" because it pertained only to Grijalba Factor #3 (capacity to generate income; comparison between carrying costs; realization of profit). (2T55:4-11). The Trial Court held that Grijalba Factors #1, 2 and 4 favored the Defendants, and that Factor #3 was "neutral." (2T38:21-39:21). Therefore, the Trial Court held that no further discovery would alter the Court's decision, and the motion was therefore "moot." Plaintiffs disagree.

The Plaintiffs do agree with the Trial Court that the Grijalba decision does not place any enhanced significance upon any one of the four factors, but specifically emphasizes that the Court must apply a "totality of the circumstances test, on a case-by-case fact-sensitive basis[.]" 431 N.J. Super. 57, 73-74 (App. Div. 2013). Therefore, the Trial Court's de-emphasis on Factor #3

actually reflected a quantitative review of the factors (i.e. two opposing factors will always outweigh one favorable factor) as opposed to a fact-sensitive inquiry. Indeed, "whether a property's predominant use has the capacity to generate income, regardless of whether an actual profit is obtained through the use" is "central to the Appellate Division's inquiry in such matters." Luchejko v. City of Hoboken, 207 N.J. 191, 206 (2011). When reviewing the totality of the circumstances in the present matter, the sought-to-be-compelled discovery may have either tilted the scales in the Plaintiffs' favor or created a genuine issue of material fact as to the commercial vs. residential determination.

In support of this argument, the Plaintiffs rely upon the unpublished Appellate Division decision of Mineros v. London, A-1091-1574 (June 19, 2018, App. Div.), which was also cited to the Trial Court. In Mineros, the plaintiff tripped on the sidewalk in front of the defendant's property. Slip op. at 1. The defendant lived in one unit and rented out the other two units to tenants. Id. at 1 to 2. The Appellate Division remanded the matter for a determination as to multiple Grijalba factors. Id. at 8-12.

More specifically, the Appellate Division first disagreed with the Trial Judge's ruling regarding Grijalba Factor #1, more specifically, the finding that the defendant's property is "primarily her residence" and that renting out the other two units was "incidental to the property's primary use: serving as

defendant's residence." Id. at 8. The Court held that "the evidence indicated defendant also owned the building for business purposes, such as to yield a profit, as discussed below." Id.

Here, the evidence indicated that the Defendants owned the building for joint purposes: residential but also business/commercial, such as to yield a profit. In fact, Defendant Rodriguez only claimed a "loss" in calendar year 2024, with the reasonable inference being that she claimed a "profit" for 2018 through 2023, including the year of the Plaintiffs' falls: 2021. (Pa431:10-16; Pa431:17-19; Pa431:1-3).

The Mineros Court then addressed Grijalba Factor #2, the predominant use of the property.[8] Mineros at 9. Here, Defendant Rodriguez did not know the square footage of the home, and could not provide the square footage of the first story (where Defendants lived) or the second story (where Plaintiffs lived). (Pa423:14-22). However, Defendant Rodriguez confirmed that the first story (where Defendants lived) had a living room, a dining room, a kitchen, three bedrooms, one bathroom, a basement, and a yard. (Pa422:22-423:2). She confirmed that the Plaintiffs did not have access to those areas. (Pa423:3-6). The Plaintiffs had a living room, a kitchen, one bathroom, and four bedrooms.

[8] There was also a lengthy discussion of the admissibility of an affidavit, which is not relevant or applicable to this Appeal.

(Pa423:7-13). Additionally, each unit has separate utilities. (Pa430:22-24). The Defendants pay their own utilities (except for water). (Pa430:25-431:9).

The Mineros Court then addressed Grijalba Factor #3, "whether the property has the capacity to generate income, **including a comparison of the carrying costs with the amount of rent charged** to determine if the owner is realizing a profit." Mineros at 10 (emphasis added). The Court noted the amount of rental income annually for the defendants, and specifically referred to the defendants' Federal Tax Schedule E "Income or Loss from Rental Real Estate" form showing the defendants' rental income. Id. at 11. The Court found that the defendant's rental use of the property had the capacity to generate income and profit, and "**the trial court erred in dismissing this factor simply because it was disputed or non-dispositive**." Id. (emphasis added).

Here, we similarly argue that the Trial Court erred by finding that Factor #3 was non-dispositive. Moreover, we know from the limited documents provided that the majority [74.3% (2018-2019), 74.4% (2020), and 67.4% (2021)] of the Defendants' monthly bank payments – mortgage, taxes, liability insurance, PMI, etc. – were paid by the tenants, including the Plaintiffs. (Pa134 – Pa145).

In fact, Defendant Rodriguez testified that she filed her "Schedule E Income or Loss from Rental Real Estate" tax form every year since 2018.

(Pa431:10-16). This is the same form specifically cited by the Mineros Court. Slip op. at 11. Absolutely critically, Ms. Rodriguez only claimed a loss during one year from 2018-2024, which was 2024. (Pa431:17-19; Pa431:1-3). Therefore, the reasonable inference is that the Defendants made a profit or gained "income" for 2018 through 2023, including 2021, the date of the Plaintiffs' falls.

Here, the Plaintiffs submit that the Trial Court erred by disallowing the Plaintiffs to create a fully developed record as it pertained to Factor #3 (capacity to generate income; comparison between carrying costs; realization of profit). The Trial Court erred in holding that no amount of discovery on Factor #3 would make a difference because Factors #1 and 2 weighed against the Plaintiffs.

In light of the above, the Plaintiffs' outstanding discovery demands are directly relevant to the factual issues pertaining to the Grijalba factors, including Factor #3. More specifically, those outstanding demands include: more legible copies of those documents provided; mortgage statements from April, September, and December of 2018, February 2019 through December 2019, February 2020 through December 2020, and February 2021; property tax information for 2018 through 2021; and Schedule E Tax Forms, including Part I "Income or Loss from Rental Real Estate and Royalties'" from 2018 through 2022. All of these documents – including the Schedule E Tax Forms, as

explicitly referenced by the Mineros Court – are relevant to the commercial vs. residential distinction.

Therefore, the Trial Court erred by finding that those documents would not alter the Court's holding, and would not create a genuine issue of material fact.

VI. WHILE THE PLAINTIFFS DISAGREE THAT THEIR MOTION TO COMPEL AND EXTEND DISCOVERY WAS "MOOT," THE TRIAL COURT CORRECTLY HELD THAT, ABSENT THAT RULING, IT WOULD HAVE GRANTED THE PLAINTIFF'S MOTION PURSUANT TO THE APPLICABLE STANDARD. (2T; Pa101 – Pa102).

Extensions of the time for completion of discovery are governed by R. 4:24-1(c), which states in relevant part:

> The parties may consent to extend the time for discovery for an additional 60 days by stipulation filed with the court or by submission of a writing signed by one party and copied to all parties, representing that all parties have consented to the extension. A consensual extension of discovery must be sought prior to the expiration of the discovery period. If the parties do not agree or a longer extension is sought, a motion for relief shall be filed … and made returnable prior to the conclusion of the applicable discovery period. […] [I]f good cause is otherwise shown, the court shall enter an order extending discovery. […] No extension of the discovery period may be permitted after an arbitration or trial

> date is fixed, unless exceptional circumstances are shown.

Pursuant to R. 4:24-2, a motion to compel discovery must be made returnable prior to the expiration of the discovery period.

Here, there are two relevant discovery orders. The first relevant order, dated November 13, 2023, set a new discovery end date of May 15, 2024, and required the Defendants to appear for further depositions limited to the issues of "residential vs. commercial" ownership of their property by that date. (Pa65 – Pa67). Defendant Rodriguez was noticed and appeared within the allotted timeframe. Immediately following the deposition (i.e. the same date), the Plaintiffs forwarded discovery requests to the Defendants. (Pa130). The requests were limited to the "residential vs. commercial" ownership of their property, and sought mortgage statements, limited tax documents, utility bills, etc.

The second relevant Court Order, dated June 19, 2024, required the Defendants to respond to the above demands no later than June 7, 2024 and extended discovery through June 15, 2024. (Pa97 – Pa98). Ultimately, the Defendants' responses were served on June 4, 2024, but they were inadequate and borderline illegible. (Pa131 – Pa171). See also § V, supra. Therefore, two days later, the Plaintiffs filed a motion to compel and extend discovery. (Pa81).

Although the Trial Court denied the motion as "moot" (as addressed in § V, supra), the Court correctly stated that if the reconsideration/summary judgment motion was denied, then the motion to compel and extend discovery would have been granted. (2T55:12-21). The Court stated,

> I do find that even though it was made outside of the time of discovery, if this motion [for summary judgment] was denied, and if the case was going to proceed to trial, then I would have granted the motion to compel. I do think **it would have been appropriate and relevant for the factors**, if this case were going forward. So to the extent I need to add that for – for purposes of a full record here, the motion [to extend and compel discovery] would have been granted if summary judgment had not been granted.
>
> [Id. at 55:7-18 (emphasis added).]

Therein, the Trial Court implied that good cause and/or exceptional circumstances were present pursuant to R. 4:24-1(c) and R. 4:24-2 if the motion was not "moot." The Plaintiffs respectfully submit that they acted as diligently as possible by filing the motion to extend and compel discovery. Please recall that the Plaintiffs' motion was filed two (2) days after receiving the discovery responses from the Defendants, and therefore could not possibly have acted sooner to make the motion returnable before the end of discovery.

Therefore, good cause and/or exceptional circumstances existed, as implied by the Trial Court.

CONCLUSION

For the reasons contained herein, Plaintiffs Diego Garcia and Evelyn Torres respectfully request the Appellate Division reverse the Trial Court's decisions, vacate the Trial Court's orders, and remand this matter back to the Trial Court for further proceedings and a Jury Trial on Liability and Damages.

Oral Argument is respectfully requested.

STATHIS & LEONARDIS LLC
Attorneys for Plaintiffs

/s/ Sean M. Mahoney
BY: _____
SEAN M. MAHONEY

DATED: November 25, 2024

Superior Court of New Jersey

Appellate Division

Docket No. A-000182-24 T2

DIEGO GARCIA, an individual, and EVELYN TORRES, an individual, *Plaintiffs-Appellants,* vs. GREGORIO PAULINO, an individual, RUFINA RODRIGUEZ, an individual, JOHN DOES (1-5), factiously named individuals, and ABC COS. (1-5), fictitiously named business entities, *Defendants-Respondents.*	CIVIL ACTION ON APPEAL FROM THE ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX VICINAGE DOCKET NO. MID-L-3377-21 Sat Below: HON. BINA K. DESAI, J.S.C.

BRIEF FOR DEFENDANTS-RESPONDENTS

On the Brief:
MICHAEL WILLISON
Attorney ID# 048751995

DICKIE, MCCAMEY & CHILCOTE, P.C.
Attorneys for Defendants-Respondents
41 South Haddon Avenue, Suite 5
Haddonfield, New Jersey 08033
(856) 354-0192
mwillison@dmclaw.com

Date Submitted: December 27, 2024

CP COUNSEL PRESS (800) 4-APPEAL • (334876)

TABLE OF CONTENTS

Page

APPENDIX TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PROCEDURAL HISTORY

Plaintiffs commenced this action by filing a complaint on or about June 7, 2021. (Pa1-Pa6). Defendants filed an Answer to Plaintiffs' Complaint on December 23, 2022, denying all liability denying any and all liability. (Pa7-Pa18). On September 21, 2023, Defendants filed a Motion for Summary Judgment based on the immunity of residential property owners for the condition of public sidewalks adjacent to their property. (Pa28-Pa29). On October 27, 2023, the Honorable Bina K. Desai denied Defendants' Motion without prejudice. (Pa62). Pursuant to Judge Desai's October 27, 2023 Order, Defendants were permitted to file a motion for reconsideration in lieu of a subsequent motion for summary judgment upon the completion of additional discovery. (Pa62). On November 13, 2023, Judge Desai entered a Consent Order directing Defendants to appear for further depositions limited to the issues of "residential vs. commercial" ownership of the property as stated in Grijalba v. Floro, 431 N.J. Super. 57 (App. Div. 2013). (Pa65-Pa67). Following the completion of Defendant Rufina Rodriguez's second deposition, Plaintiffs served Defendants with supplemental discovery requests, seeking additional records. (Pa130). Defendants then provided responses to Plaintiffs' supplemental discovery requests on June 4, 2024. (Pa131-Pa171) After Defendants responded to Plaintiffs' additional discovery requests, Plaintiffs

file a Motion to Extend Discovery and Compel supplemental responses to their additional discovery requests. (Pa81). Following completion of Defendant Rodriguez's second deposition and additional supplemental discovery, Defendants filed a Motion for Reconsideration of the Court's denial of its Motion for Summary Judgment. (Pa69-Pa70). Following oral argument on August 22, 2024, Judge Desai granted Defendants' Motion for Reconsideration, thereby granting summary judgment in favor of Defendants and dismissing Plaintiffs claims with prejudice. (Pa99-Pa100).

Judge Desai's Order granting summary judgment rendered Plaintiffs' Motion to Extend Discovery and Compel Supplemental discovery responses moot. An Order was therefore entered denying Plaintiffs' Motion to Extend and Compel as moot. (Pa101-Pa102).

This appeal followed.

COUNTER-STATEMENT OF FACTS

Plaintiffs commenced this action by filing a complaint on or about June 7, 2021. (Pa1-Pa6). Defendants filed an Answer to Plaintiffs' Complaint on December 23, 2022, denying any and all liability. (Pa7-Pa18). In their Complaint, Plaintiffs allege that they slipped and fell on Defendants' premises on or about February 3, 2021 due to the presence of snow and/or ice on the sidewalk. (Pa3).

Defendants own the property located at 49-51 Broad Street, Perth Amboy, New Jersey 08861. (Pa8). The property located at 49-51 Broad Street is a "twin" or "duplex", with Defendants occupying the first floor and renting the second floor apartment. (See February 10, 2023 Deposition Testimony of Rufina Rodriguez Pa347-Pa349). Defendants had rented the second floor unit, designated as 49 Broad Street, to Ignacio Garcia and Esperanza Trujillo. (See Residential Lease Agreement, Pa110-Pa115). Both Plaintiff Diego Garcia ("Garcia") and Plaintiff Evelyn Torres ("Torres") were allegedly residing in the second floor apartment at the time of the alleged accidents.

Plaintiff Diego Garcia's fall occurred at approximately 3:00 a.m. (Da2). Plaintiff Torres' fall occurred at approximately 8:40 a.m. (Da11).

Plaintiffs produced video footage of their respective falls from a Ring door camera. (Pa117; Pa118). Successive screen shots of the video of Garcia's fall are included at paragraph 11 of the Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment. (Pa31-Pa33).[1]

Successive screen shots of the video of Torres' fall with Ms. Torres' location circled in the last two photos for clarity are included at paragraph 12 of the Statement of Undisputed Facts in Support of Defendants' Motion for

[1] As stated in Plaintiffs' submissions, the Statement of Material Facts is a necessary part of the record since the Order being reviewed is a grant of summary judgment.

Summary Judgment. (Pa33-Pa34).[2] The footage of both falls demonstrates that both Plaintiffs slipped on the public sidewalk in front of Defendants' property.

Plaintiff Garcia does not have any knowledge concerning how long the icy spot where he fell had been present before his fall or when it was created. (Pa216). He also acknowledged that the sidewalk had been shoveled prior to his fall. (Pa222). Garcia did not have any information that Defendants were aware of the icy patch where he fell at any point prior to his accident. (Pa217-Pa218).

Plaintiff Torres testified that she slipped and fell on the sidewalk but did not actually observe any ice. (Pa288). Torres further testified that she is not aware of any evidence to indicate that Defendants were aware of an icy patch on the sidewalk at any time prior to her fall. (Pa292).

Defendant Rodriguez testified that no one reported any concerns about ice in the area of Plaintiffs' falls at any point prior to the accidents. (Pa372).

It is undisputed that both Plaintiffs fell on the public sidewalk in front of Defendants' property. It is further undisputed that there is no evidence to

[2] As stated in Plaintiffs' submissions, the Statement of Material Facts is a necessary part of the record since the Order being reviewed is a grant of summary judgment.

indicate that either Defendant had notice of an icy patch in the area of Plaintiffs' falls at any point prior to the accidents.

Pursuant to the November 13, 2023 Consent Order entered by Judge Desai, Defendant Rufina Rodriguez appeared for a second deposition on April 29, 2024 limited to the "residential vs. commercial" ownership of the property as stated in Grijalba, supra. (Pa410-Pa455).

On April 29, 2024, Plaintiffs then served a request for additional documentation concerning the Grijalba factors following Ms. Rodriguez's second deposition. (Pa130). Defendants provided responses to Plaintiffs' supplemental document requests on June 4, 2024. (Pa131-Pa171). Defendants also had a survey conducted of their property, which demonstrates that the location of Plaintiffs' falls is outside of their property boundaries. (Pa120-Pa121).

New evidence consisting of Defendant Rodriguez's deposition testimony, Defendants' supplemental document production and the Fermosa Engineering survey was generated through additional discovery following Judge Desai's October 27, 2023 Order. Based on this additional evidence, Defendants filed their Motion For Reconsideration of their Motion for Summary Judgment. (Pa69-Pa70).

ARGUMENT

A. The Trial Court Properly Granted Defendants' Motion for Reconsideration and Entered Summary Judgment in Favor of Defendants.

Plaintiffs' characterizations aside, the still shots taken from the videos of both Plaintiffs' falls, as well as the video footage itself, constitute indisputable evidence that Plaintiffs' falls both occurred on the public sidewalk. (Pa117; Pa118). Prior to Stewart v. 104 Wallace Street, Inc., 87 N.J. 146 (1981), a property owner did not have any liability for the condition of the sidewalk abutting the property. In Stewart, the Supreme Court of New Jersey held that a commercial landowner is responsible for maintaining the abutting sidewalks and can be held liable for injuries suffered as a result of their negligent failure to do so. Id. 157. In so holding, the Court specifically limited its decision to commercial property owners and refused to extend such liability to residential property owners:

> The duty to maintain abutting sidewalks that we impose today **is confined to owners of commercial property**….While we acknowledge that whether the ownership of the property is commercial or residential matters little to the injured pedestrian, we believe that that the case for imposing a duty to maintain sidewalks is particularly compelling with respect to abutting commercial property owners.

Id. at 159 (citations omitted, emphasis added).

It remains the well-established law of New Jersey that a residential property owner does "not owe a duty of care to a pedestrian injured as a result of the condition of the sidewalk abutting landowner's property." Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 492 (App. Div. 2012). In addition, New Jersey Courts have held that properties like Defendants are considered residential. In Smith v. Young, 300 N.J. Super. 82 (App. Div. 1997), Plaintiff sued Defendants after slipping and falling on an accumulation of ice on the public sidewalk in front of Defendants' property. Defendants' property was a two-family home in which one of the co-owners lived in one unit and a second unit was rented to tenants. Under these circumstances, the Court held that Defendants' property was "unquestionably residential in use". Id. at 97. It went on to hold as follows:

> With these perceptions in mind, and with the benefit of hindsight regarding the fruitless search for portable classification criteria, we now conclude that, while the Supreme Court may have intended to include property solely held for investment purposes within the *Stewart* rationale, it had no intention to subsume small owner-occupied dwellings, such as two-or three-family homes, within the classification of commercial property. Such uses are clearly in a category of their own, for they are residential both "in the nature of their ownership" as well as in "the use to which the property is put." The property at issue here, being an owner-occupied, two-family home is clearly within the exempted category, absolving the owners from the duty to maintain abutting sidewalks under currently prevailing standards.

Id. at 99-100 (quoting Hambright v. Yglesias, 200 N.J. Super. 392, 395 (App. Div. 1985)).

Accordingly, the Appellate Division determined that the residential nature of properties such as Defendants' relieves Defendants owning such properties from a duty to maintain the public sidewalk. In addition, it is important to note that the Appellate Division reached this conclusion despite the fact that Defendants had hired a handyman to clear the sidewalk of snow and ice. Id. at 98.

The Trial Court's conclusion that Defendants' property is residential is supported by this Court's decision in Grijalba v. Floro, 431 N.J. Super. 57 (App. Div. 2013). Specifically, the Appellate Division identified the following relevant factors in determining whether a property is residential or commercial:

> (1) the nature of the ownership of the property, including whether the property is owned for investment or business purposes; (2) the predominant use of the property, including the amount of space used by the owner on a steady or temporary basis to determine whether the property is utilized in whole or in substantial part as a place of residence; (3) whether the property has the capacity to generate income, including a comparison between the carrying costs with the amount of rent charged to determine if the owner is realizing a profit; and (4) any other relevant factor when applying commonly accepted definitions of "commercial" and "residential" property.

431 N.J. Super. at 73.

In Grijalba, this Court held that in determining whether a property is "residential" or "commercial", courts use commonly accepted definitions of those terms. Id. at 67. It then examined numerous common definitions of

"residential" and "commercial". This Court noted that "residential" has been defined as "designed for people to live in" and "concerning or relating to residence." Id. (quoting *Oxford Dictionaries Online*) and "[t]he place where one resides". Id. (quoting *Black's Law Dictionary* 1135 (8th Ed. 2004)).

The Grijalba Court also quoted the definition of "residential" or "non-commercial" contained in the New Jersey Administrative Code as:

> a structure used, in whole or in substantial part, as a home or place of residence by any natural person, whether or not a single or multi-unit structure, and that part of the lot or site on which it is situated and which is devoted to the residential use of the structure and includes all appurtenant structures.

Id. (Quoting N.J.A.C. 13:45A-16.1A (2004)).

The Grijalba Court further noted that "commercial" has been defined as "concerned with or engaged in commerce" and "making or intended to make a profit". Grijalba v. Floro, 431 N.J. Super. 57, 68 (App. Div. 2013) (quoting *Oxford Dictionaries Online*) and "occupied or engaged in commerce work intended for commerce" and "viewed with regard to profit". Id. (quoting *Merriam-Webster's Dictionary* 249 (11th ed. 2012).

At her second deposition, Defendant Rodriguez testified that the subject property has been their primary residence since they purchased it in 2018. (Pa417). She further testified that there are no business entities using any part of 49-51 Broad Street testified that no one living in 51 Broad Street works out

of the home. (Pa418). Ms. Rodriguez testified that the portion of the premises Defendants occupy and have exclusive access to consists of a living room, dining room, kitchen, three bedrooms, a bathroom, a basement and the yard. (Pa422-Pa423). The second floor rental unit consists of a living room, kitchen, a bathroom and four bedrooms. (Pa423). Ms. Rodriguez testified that the rent charged for 49 Broad Street was initially $1,800 per month. (Pa421).

Ms. Rodriguez testified that the current mortgage payment for the property is $2652.27 per month and was $2424.00 per month in 2018. (Pa428). Defendants' mortgage statement from February 1, 2024 confirms her testimony concerning the current payment. As part of their supplemental document production, Defendants provided additional mortgage statements which reflect that the monthly payments ranged from $2,423.93 in 2018 to $2,672.21 in 2021. (Pa134-Pa145). The monthly mortgage statements also reflect that the payment includes taxes and insurance. (Pa134-Pa145).

Grijalba involved a determination of whether Defendant's property constituted a two-family or a three-family home at the time of the Plaintiff's accident. 431 N.J. Super. at 59. The court noted that "if the property is deemed to be a two-family house, then our decisions since *Stewart* have generally held that the property is considered residential, as that term is

commonly applied. We do not disturb that precedent." Id. The Grijalba Court then went on to state:

> We agree with the proposition expressed in Smith that typical owner-occupied two-family homes are generally in a category of their own and that an exploration of the predominant use of that type of property is usually unwarranted.

Id. at 69.

In the present case, Defendants reside in a two-family, owner-occupied property. Pursuant to Smith and Grijalba, supra, their property should be classified as residential. Moreover, Grijalba states that when the property is a typical owner-occupied two-family home, an exploration of the predominant use of the property is usually not warranted. The evidence provided through discovery between the denial of Defendants' initial Motion for Summary Judgment and the Trial Court's grant of Defendants' Motion for Reconsideration, further support that Defendants' property is residential.

As discussed above, courts use commonly accepted definitions of "residential" and "commercial" to determine in which category a property belongs. Based on the definitions used by the Grijalba Court, the Trial Court properly determined that Defendants' property is residential. The evidence and testimony clearly establish that the property is "designed for people to live in". The evidence and testimony further demonstrate that the property is used "in whole or in substantial part, as a home or place of residence." Moreover,

the definition from the New Jersey Administrative Code states that "residential" can include multi-family units and also includes the lot or site upon which the property is situated.

Ms. Rodriguez testified that the property in question has been Defendants' primary residence since they purchased it in 2018. They have lived continually at the property since that time. In addition, the portion of the property which Defendants occupy includes an extra room (the dining room), the basement and the back yard. Accordingly, Defendants have continually used a substantial portion of the property as their primary residence since 2018.

Viewing the evidence in terms of the definitions of "commercial" used in Grijalba further confirms that Defendants' property is residential. Defendants' property is not "concerned with or engaged in commerce", "making or intended to make a profit", "occupied or engaged in commerce work intended from commerce" or "viewed with regard to profit."

Ms. Rodriguez testified that there are no business entities using any part of 49-51 Broad Street testified that no one living in their portion of the property works out of the home. (Pa418-Pa420). In addition, the evidence demonstrates that Defendants are not making a profit from renting a portion of the property. Defendants charged $1,800 per month for the rental portion of

the property. This is less than their monthly mortgage payment at any time since they purchased the property. In addition, Defendants are responsible for repairs and upkeep of the property. Accordingly, this is not an investment property and Defendants are clearly not generating a profit. At most, they are defraying some of the costs associated with owning the property. This does not satisfy the definition of "commercial" as used by the court in Grijalba.

An examination of each of the Grijalba factors further confirms that Defendants' property is residential. The first factor is the nature of the property owners, including whether it is owned for investment or business purposes. Ms. Rodriguez's testimony and the additional documentation produced by Defendants demonstrates that Defendants did not purchase the property for investment or business purposes. In addition, no business activity is occurring at the property.

The second factor is the predominant use of the property, including the amount of space used by the owner on a steady or temporary basis to determine whether it being used in whole or substantial part as a place of residence. Ms. Rodriguez's testimony establishes that Defendants are using a substantial part of the property as their place of residence. In addition, they have done so continuously since 2018. There is no evidence of Defendants using the property for any other purpose.

The third factor is whether the property has the capacity to generate income, including a comparison of the carrying costs with the amount of rent charged to determine the owner is realizing a profit. The documentation provided demonstrates that Defendants' carrying costs exceed the amount of rent charged. There is no evidence that Defendants are generating any profit in connection with the rental portion of the property.

The fourth factor is any other relevant factors when applying the commonly accepted definitions of "commercial" and "residential". There is no evidence in the record of any other relevant factors beyond what is discussed above.

Noticeably absent from Plaintiffs' Appellate Brief is any argument that the Trial Court erred in concluding that Defendants are residential property owners pursuant to Grijalba. This is because all of the evidence generated in this case supports a finding that Defendants' property is residential and not commercial. As residential property owners, Defendants do not have a duty to maintain the public sidewalk in front of their property. Since the evidence clearly demonstrates that they both fell on the public sidewalk, the Trial Court properly granted Defendants' Motion for Reconsideration and entered summary judgment in their favor.

B. The Trial Court Properly Determined That Plaintiffs' Falls Occurred On A Public Sidewalk As There Are No Genuine Issues of Material Fact Concerning The Location of the Falls

Plaintiffs-Appellants attempt to dispute Judge Desai's well-reasoned decision by creating genuine issues of material fact where none exist. Unlike most cases, the Plaintiffs' falls were both captured on video. A review of the video footage, as well as the still shots submitted by Defendants in support of their motion, clearly demonstrate that both falls occurred on the public sidewalk in front of Defendants' property and not on the sidewalk running between the public sidewalk and the front porch. The video and photos demonstrate that both falls occurred beyond the retaining walls on either side of the sidewalk leading from Defendants' residence to the public sidewalk. Both the still shots and the video depict that that falls are partially obstructed by the retaining walls. The only explanation for this is that the falls occurred on the opposite side of the pillars from where the doorbell camera was located. To argue otherwise is completely contrary to the undisputed evidence.

On October 26, 2023, a survey of Defendants' property was completed by Formosa Engineering. (Pa120-Pa121). This survey establishes that Defendants' property boundaries do not include the sidewalk in front of the property. This survey was provided to Plaintiffs on December 4, 2023. the survey clearly contains the notation "P.O.B." in the lower right corner,

denoting the "point of beginning" of the property line. Judge Desai properly took judicial notice of this fact. (T44-21-25). Comparing the property line in the survey with the video and still shots of the falls irrefutably demonstrates that the fall occurred outside of Defendants' property boundaries on the public sidewalk. In the six months between the production of the survey and the filing of Defendants' Motion for Reconsideration, Plaintiffs did nothing to rebut the survey or provide any support for their position that the sidewalk in front of Defendants' property is not public. The survey is therefore undisputed.

Plaintiffs also attempt to manufacture an issue of fact by arguing that there is a conflict between the 2019 Perth Amboy Tax Map and the Fermosa Survey. The tax map does not contain any reference to the presence of a sidewalk or any specific boundary lines concerning Defendants' property and the sidewalk. The survey was therefore obtained to clarify this issue. Moreover, the relevant issue is whether the sidewalk in front of the Defendants' residence is a public sidewalk or part of Defendants' property. Neither of these documents demonstrate that the sidewalk is part of Defendants' property. One is silent on the issues; the other demonstrates that the sidewalk is not part of Defendants' property. Accordingly, there are no conflicting conclusions to be drawn from these two documents. In addition,

this does not change the fact that it is Plaintiffs' burden to demonstrate that the fall occurred on Defendants' property and they failed to do so.

In addition, Plaintiffs' argument that Defendants' motion must be denied because they have not established that the sidewalk in front of the property was public, misses the mark. It is ultimately Plaintiffs' burden to establish a duty on the part of Defendants. Therefore, it is Plaintiffs who must establish that the subject accidents occurred as a result of a dangerous condition on Defendants' property. Plaintiffs have failed to point this Court to any facts to indicate that the public sidewalk in front of Defendants' property is actually part of Defendants' premises. In the time since this Court originally heard Defendants' Motion For Summary Judgment, Defendants obtained a survey of the property conclusively demonstrating that both falls occurred outside the Defendants' property lines on the public sidewalk. Without any contrary evidence, Plaintiff have failed to raise a factual issue to be submitted to a jury concerning the locatin of the fall in relation to Defendants' property boundaries. Accordingly, the Trial Court properly found that Plaintiffs' falls occurred on the public sidewalk.

Plaintiffs also argue that a genuine issue of material fact exists because Defendants treated the public sidewalk as part of their property and regularly cleared the sidewalk of snow and ice. First, this testimony does not change the

fact that an undisputed survey of the property confirms that its boundaries do not include the sidewalk in front of the house where Plaintiffs fell. Second, numerous New Jersey cases have concluded that a residential property owner's decision to voluntarily clear the public sidewalk of snow and ice does not create a duty to third parties. In Luchejko v. City of Hoboken, 207 N.J. 191 (2011), the Supreme Court of New Jersey weighed in on this issue. Luchejko involved a slip and fall accident in front of a condominium. After determining that the condominium was residential and not commercial, the Supreme Court reaffirmed the general rule that residential property owners are not liable to a third party who suffers an injury on a public sidewalk, even if the property owner had voluntarily removed snow:

> at common law, property owners had no duty to clear the snow and ice from public sidewalks abutting their land. If a property owner decided to remove snow from a public sidewalk, he would not be liable to a person who injured himself on the sidewalk "unless through [the owner's] negligence a new element of danger or hazard, other than one caused by natural forces, [was] added to the safe use of the sidewalk by a pedestrian. As such, if a sidewalk had been cleared and the melting snow subsequently froze into a layer of ice, the "refreeze" would not be an "element of danger or hazard other than one caused by natural forces." That rule, which survives today for residential property owners, reflects the societal interest in encouraging people to clear public sidewalks and the inequity of imposing liability on those who voluntarily do so.

Id. at 201. (citations omitted).

In Nunez v. Gallo, 2018 N.J. Super. Unpub. LEXIS 2849 (App. Div.

Dec. 31, 2018),[3] Plaintiff filed suit against Defendants after slipping and falling on the public sidewalk in front of their home. The record indicated that Defendants were residential homeowners and they had removed snow from the sidewalk approximately three hours prior to Plaintiff's fall. Defendants acknowledged that they did not apply salt or any de-icing agent. It continued to snow up until approximately the time of Plaintiff's fall. Plaintiff retained an engineer, who opined that Plaintiff's fall was the result of ice, which was hidden under fresh snow, which was uncleared and unsalted at the time of the incident. In opposition to Defendants' motion for summary judgment, Plaintiff argued that the ice had formed as a result of melting and refreezing of snow from the piles that Defendants had initially cleared early in the day. Affirming the trial court's grant of summary judgment in favor of Defendants, the Court cited Luchejko, supra, and Foley v. Ulrich, 94 N.J. Super. 410, 424 (App. Div. 1967) (Kolovsky, J.A.D., dissenting)' rev'd. 50 N.J. 426 (1967) (adopting dissenting opinion) for the principle that melting and refreezing into ice does not constitute an "element of danger or hazard other than one caused by natural forces." 2018 N.J. Super. Unpub. LEXIS 2849 at p. 3 of 4. (citations omitted). Accordingly, the Court rejected Plaintiff's argument that Defendants created a greater hazard by shoveling the sidewalk.

[3] Da19-Da21.

> The danger to the safe use of the sidewalk which exited when plaintiff fell was solely that caused by natural forces, the freezing of melting snow, a natural phenomenon which would have occurred if defendants had not shoveling the sidewalk…

Id. at p. 4 of 4 (quoting Foley, supra, 94 N.J. Super. at 423-24).

In addition, the Appellate Division specifically rejected Plaintiff's argument that Defendants were negligent for failing to apply a de-icing agent after shoveling.

> Plaintiff also argues that defendants here were negligent because they failed to apply a de-icer after Louis Gallo cleared the snow from the sidewalk. Defendants did not create any additional hazard by voluntarily shoveling the snow and not applying salt or a de-icing compound. According to plaintiff's theory, the ice was present before Louis Gallo shoveled the snow. Moreover, it is undisputed that after Louis Gallo shoveled the snow, it continued to snow and additional snow accumulated. Consequently, nothing Louis Gallo did created a new danger or hazard. The ice was present under the snow before Louis Gallo shoveled it. The ice was also present under snow that accumulated after Louis Gallo shoveled the public sidewalk.

Id.

In the present case, Plaintiffs are arguing that Defendants are liable for failing to properly maintain the public sidewalk by permitting a patch of ice to exist on the sidewalk. As discussed above, the formation of ice is a naturally forming condition and has been considered as such by New Jersey courts. Plaintiffs have not come forward with any evidence to indicate the existence of an "element of danger or hazard other than one caused by natural forces." In

addition, public policy considerations preclude a finding of liability against Defendants in the present matter. While the record reflects that Defendants had shoveled the sidewalk, public policy and "societal interests" seek to encourage residential property owners to clear snow from the sidewalks adjacent to their properties without fear of being held legally responsible for doing so.

C. The Trial Court Properly Did Not Base Its Decision On The Landlord-Tenant Relationship and The Language of the Lease Agreement As Those Issues Are Irrelevant To The Issue of Whether Defendants Owed A Duty to Plaintiffs Under New Jersey Law

At the time of the subject accidents, Plaintiff Diego Garcia's parents, Ignacio Garcia and Esperanza Trujillo, were tenants in the second floor of Defendants' property. Plaintiffs attempt to argue that Defendants' position is contradicted by the language in the Lease Agreement with Mr. Garcia and Ms. Trujillo. In support of this argument, Plaintiffs cite to a City of Perth Amboy municipal ordinance which states

> The owner or owners, occupant or occupants of any premises, property, or vacant land abutting or bordering upon any street in the City of Perth Amboy shall remove all snow and/or ice from the sidewalks of any street or, in the case of ice which may be so frozen to the sidewalks as to make removal impracticable, shall cause the same to be thoroughly covered with sand or ashes within twenty-four (24) hours after same has ceased to fall or form thereon.

City of Perth Amboy Municipal Code Section 380-1(A) (2011).

Plaintiffs then quote language from the lease agreement under Paragraph 7, "Use of the Premises", which states in part as follows:

> Lessee shall comply with all the sanitary laws, ordinances, rules, and orders of appropriate governmental authorities affecting the cleanliness, occupancy, and preservation of the demised premises, and the sidewalks connected thereto, during the term of this lease. (Pa110 – Pa111).

Plaintiffs then attempt to argue that the language in the lease agreement indicates that Defendants incorporated the Perth Amboy ordinance and constitutes an acknowledgement that Defendants are responsible for maintaining the public sidewalk adjacent to their property. This is further evidence of the type of mental gymnastics that Plaintiffs are asking the Court to engage in to find a way around the fact that Defendants do not have a duty to maintain the public sidewalk. First, Plaintiff's argument would mean that the language cited in the lease agreement would support a finding that responsibility for maintaining the sidewalks was that of the tenants and not Defendants. Second, the ordinance references sidewalks abutting or bordering a premises or property, not connected to the leased premises as stated in the lease. There is no evidence or testimony indicating that Defendants included this language in the lease in order to transfer responsibility for maintaining the public sidewalk to the tenants.

Third, even if the language in the lease agreement is construed as incorporating the local ordinance, that does not provide a basis for liability against Defendants. New Jersey law provides that a local ordinance does not abrogate the general rule under State law that a residential property owner is not responsible for maintenance of the sidewalk adjacent to their property. Breach of a local ordinance directing private individuals to care for public property does not render those individuals liable to third parties. Luchejko v. City of Hoboken, 207 N.J. 191 (2011). The rationale is that such ordinances are not adopted for the purpose of protecting individual members of the public, but rather are to transfer the public burden of maintenance from the municipality to the property owners. As such, municipal ordinances do not create a tort duty as a matter of law. Brown v. Saint Venantius School 111 N.J. 325 (1988); Lodato v. Evesham Twp., 388 N.J. Super. 501 (App. Div. 2006).

Plaintiffs attempt to distinguish the above authority from the present matter by arguing that these cases all relate to members of the general public rather than tenants. However, they have failed to point this Court to any authority for this position. There is no basis for the argument that the rationale of Luchejko does not apply if there if the injured party is a tenant. There is also no basis for Plaintiffs' strained interpretation of the lease that it specifically incorporates the municipal ordinance. Moreover, if Plaintiffs'

argument is correct and the lease controls, it would lead to the conclusion that the tenants and not Defendants are responsible for maintaining the sidewalk. Plaintiffs' argument that evidence of Defendants delegating that responsibility to the tenants means that it is actually Defendants' obligation makes no sense and is not supported by the lease language they purport to rely upon or New Jersey law.

Plaintiffs' citation to Shields v. Ramslee Motors, 240 N.J. 479 (2020) does not support their position. Shields involved a slip and fall on the driveway of a commercial property. The Court specifically noted that the driveway was part of the property and separated from the public sidewalk by a fence. Id. at 484. In addition, the Supreme Court concluded that the tenant was responsible for maintaining the property pursuant to the lease agreement. The Court also stated that a commercial property owner's duty to maintain abutting sidewalks is non-delegable. Id. at 490. This means that a commercial landlord cannot allocate responsibility to maintain a public sidewalk to a tenant. Id. Shields is therefore distinguishable from the present matter. This case involves a residential property owner and a residential lease. In addition, it is undisputed that Plaintiffs' falls did not occur on Defendants' property, unlike the Plaintiff in Shields.

The Trial Court properly concluded that there was no authority for Plaintiffs' argument. Moreover, it noted that under New Jersey law, a tenant and their guests are only deemed to be business visitors of the landlord when they are in the common areas of the property. (cite) In the present matter, it is undisputed that these falls did not occur in the common area of Defendants' property. Rather, they occurred on the public sidewalk. The Trial Court further correctly noted, pursuant to Luchejko, supra, that a public sidewalk is not considered a common area. (T50-17-20).

D. The Trial Court Did Not Err In Finding That Defendants Did Not Owe A Duty To the Plaintiffs On The Sidewalk Based On An Inherent Obligation To Provide Safe and Convenient Access As A Result Of Plaintiffs' Tenancy, As Plaintiffs Did Not Raise This Argument Before The Trial Court and It Is Not Supported By New Jersey Law.

Finally, Plaintiffs attempt to argue that the Trial Court erred in finding that Defendants did not owe a duty to the Plaintiffs because safe and convenient access to the property is inherently included in Plaintiffs' tenancy. This argument, and the authority cited by Plaintiffs in support of it, was not raised before the Trial Court. Appellate Courts will decline to consider questions or issues which were not raised before the trial court despite an opportunity to do so. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Accordingly, Plaintiffs have waived this argument.

In the event the Court finds that Plaintiffs have not waived this issue, Plaintiffs' argument is not supported by New Jersey law. As previously discussed, Plaintiffs do not cite any authority for the proposition that a residential property owner has a duty to maintain the adjacent public sidewalk when the injured party is a tenant rather than a member of the general public. Since there is no support for their position under New Jersey law, Plaintiffs attempt to argue that Defendants should have a legal duty to Plaintiffs based on the benefits of using the abutting sidewalk for ingress and egress. However, that rationale has been applied only to commercial property owners. In support of this argument, Plaintiffs cite Abraham v. Gupta, 281 N.J. Super. 81 (App. Div. 1995) and Brown v. St. Venantius School, 111 N.J. 325 (1988). Abraham involved an accident on a public sidewalk adjacent to a vacant commercial lot. Brown involved a fall on the steps of a private/parochial school. In Brown, the Court specifically found that the school was a commercial property because no one lived there and it was a private, for-profit school. Accordingly, the school's predominant use could not be considered residential. It was only after this decision was made that the Court imposed liability.

The law in New Jersey is that a property owner's duty to maintain an adjacent public sidewalk is based on the classification of the property as

commercial or residential. As discussed at length supra, the evidence is undisputed that Defendants' property is residential. There is absolutely no evidence in the record from which this Court could determine that Defendants' property is commercial. Indeed, Plaintiffs have not specifically argued on appeal that the Trial Court erred in determining that Defendants are residential property owners. Despite this, Plaintiffs now want this Court to disregard 40 years of jurisprudence and impose liability on residential property owners based on the benefits enjoyed by commercial establishments through the use of abutting sidewalks. This "benefit" has never been applied to a residential property owner. No authority for this argument exists and it should be rejected by the Court.

E. The Trial Court Properly Denied Plaintiffs' Motion to Extend and Compel Discovery Responses As Moot Because Defendants Provided Sufficient Information For The Court To Determine That Defendants' Property Was Residential.

Pursuant to the November 13, 2023 Consent Order entered by Judge Desai, discovery in this case was extended to May 15, 2024 and Defendants were ordered to appear for a second deposition limited to the issues of "residential vs. commercial" ownership of the property pursuant to Grijalba. Plaintiffs then waited until April 29, 2024 to conduct the redeposition of Ms. Rodriguez. Plaintiffs then served supplemental discovery requests as stated in their Motion and Defendants provided responses to those requests. Defendants

objected to production of their tax information as the request for that information is not relevant to the subject matter of the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

First, Plaintiffs' Motion to Compel and Extend Discovery was untimely and should have been denied on that basis. R. 4:24-1(c) provides as follows:

> (c) **Extensions of Time.** The parties may consent to extend the time for discovery for an additional 60 days by stipulation filed with the court or by submission of a writing signed by one party and copied to all parties, representing that all parties have consented to the extension. A consensual extension of discovery must be sought prior to the expiration of the discovery period. **If the parties do not agree or a longer extension is sought, a motion for relief shall be filed with the Civil Presiding Judge or designee in Track I, II, and III cases and with the designated managing judge in Track IV cases, and made returnable prior to the conclusion of the applicable discovery period.** The movant shall append to such motion copies of all previous orders granting or denying an extension of discovery or a certification stating that there are none. On restoration of a pleading dismissed pursuant to R. 1:13-7 or R. 4:23-5(a)(1) or if good cause is otherwise shown, the court shall enter an order extending discovery. Any proposed form of extension order shall describe the discovery to be completed, set forth proposed dates for completion, and state whether the adverse parties consent. Any order of extension may include such other terms and conditions as appropriate. **No extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown.**

R. 4:24-1(c) (2024) (emphasis added).

In addition, R. 4:24-2(a) provides that motions to compel discovery must be made returnable prior to the expiration of the discovery period unless the

court otherwise permits for good cause shown. It is undisputed that Plaintiff's Motion to Compel and Extend Discovery were returnable after the discovery end date. Accordingly, it was untimely under the rules and should have been denied by the Trial Court on that basis. In addition, Plaintiffs failed to establish exceptional circumstances for the relief requested. As Plaintiffs admitted in their Motion, the exceptional circumstances standard applied since a trial date had been set. In order to satisfy the exceptional circumstances standard, Plaintiffs was required to demonstrate:

> (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.

Rivers v. LSC P'ship, 378 N.J. Super. 68, 79 (App. Div. 2005).

Plaintiffs failed to demonstrate exceptional circumstances in support of their Motion to Extend and Compel. They failed to demonstrate why this discovery was not completed during the discovery period and did not provide the Trial Court with any facts to support such a position. In addition, the additional discovery requested was not essential. Further, there was no explanation for why a further extension was not requested. Finally, there were no facts contained in Plaintiffs' motion which indicated that the circumstances

were clearly beyond the control of Plaintiffs and counsel. Plaintiffs could have conducted this discovery at any time between November 13, 2023 and the discovery end date.

In addition, the additional information requested by Plaintiffs was not relevant to the pending action. Plaintiffs were permitted additional time to conduct the re-deposition of Defendants concerning the Grijalba factors related to the classification of Defendants' property as residential or commercial. The Grijalba factors consist of the following:

> (1) the nature of the ownership of the property, including whether the property is owned for investment or business purposes; (2) the predominant use of the property, including the amount of space used by the owner on a steady or temporary basis to determine whether the property is utilized in whole or in substantial part as a place of residence; (3) whether the property has the capacity to generate income, including a comparison between the carrying costs with the amount of rent charged to determine if the owner is realizing a profit; and (4) any other relevant factor when applying commonly accepted definitions of "commercial" and "residential" property.

431 N.J. Super. at 73.

As this Court stated in Grijalba, whether the property has the capacity to generate income involves an examination of the carrying costs compared to the rent charged to determine if the owner is realizing a profit. Defendants provided the necessary information for the Court to conduct this analysis. At her second deposition, Ms. Rodriguez testified that the current mortgage

payment for the property was $2652.27 per month and was $2424.00 per month in 2018. (Pa428). Defendants' mortgage statement from February 1, 2024, which was produced in response to Plaintiffs' supplemental document requests, confirmed her testimony concerning the current payment. As part of their supplemental document production, Defendants also provided additional mortgage statements which reflect that the monthly payments ranged from $2,423.93 in 2018 to $2,672.21 in 2021. (Pa134-Pa145). The monthly mortgage statements also reflect that the payment includes taxes and insurance. (Pa134-Pa145). Plaintiffs and the Court therefore had all of the information needed to evaluate the rental income against the carrying costs pursuant to Grijalba. Plaintiff's tax records are therefore not necessary and not relevant to the Court's determination of whether Defendants are generating a profit from the property. The Trial Court obviously agreed that additional information was not necessary in order to determine whether Defendants' property was residential or commercial under Grijalba.

In addition, Plaintiffs citation of Mineros v. London, No. A-1091015T4 (App. Div. June 19, 2018) does not support their arguments. Plaintiffs' characterization notwithstanding, the Mineros Court remanded the case because it held that the trial court improperly failed to consider an affidavit submitted by Plaintiff in opposition to Defendant's motion for summary

judgment regarding the square footage occupied by Plaintiff as opposed to the rental space in the building. Defendant had submitted competing measurements in its motion and the Court determined that this created a factual issue. In the present case, we do not have this issue. While specific measurements and square footage have not been submitted, Ms. Rodriguez testified that the portion of the premises Defendants occupy and have exclusive access to consists of a living room, dining room, kitchen, three bedrooms, a bathroom, a basement and the yard. (Pa422-Pa423). The second floor rental unit consists of a living room, kitchen, a bathroom and four bedrooms. (Pa423).

In their Counterstatement of Facts in Opposition to Defendants' Motion for Reconsideration, Plaintiffs stated that Defendants are "in exclusive possession of way more of the property than tenants/Plaintiffs." (Da24).[4] Accordingly, there is no dispute that Defendants occupy and use a substantial part of the property as their residence. In addition, the Court in Mineros

[4] Including a portion of Plaintiffs' Counterstatement of Facts in Opposition to Defendants' Motion for Reconsideration in the Appendix is necessary because Plaintiffs are attempting to argue that factual issues exist and additional discovery is necessary pursuant to the Mineros case concerning, inter alia, the amount of space that Defendants occupied at the property vis-à-vis the amount of space occupied by the tenants. Plaintiffs' Counterstatement of Facts at paragraph 88 contradicts this argument as Plaintiffs admit that Defendants occupied "way more" of the property than the tenants.

found that the excluded affidavit submitted by Plaintiff raised issues concerning whether the Defendants' building had 3 or 4 units. There is no dispute in the present case that there was only Defendants' primary residence and one apartment. Finally, the record in Mineros contained no evidence of Defendant's carrying costs from which the Court could determine whether a profit was being realized. Pursuant to Grijalba, whether the property has the capacity to generate income involves a comparison of the carrying costs with the amount of rent charged. Defendants provided documentation demonstrating that their carrying costs exceed the amount of rent charged. There is no evidence that Defendants are generating any profit in connection with the rental portion of the property.

F. The Trial Court Properly Found That There Was No Evidence That A Dangerous Or Hazardous Condition Existed That Was Known To Defendants That Would Create A Duty to Plaintiffs.

In addition, the Trial Court specifically found that there was no evidence to support a finding that a dangerous or hazardous condition existed that was known to the Defendants which would create a legal duty to Plaintiffs. (T51-25-T53-2). It is well-recognized that the owner or possessor of land owes a duty to conduct a reasonable inspection to discover latent dangerous conditions as well as to guard against any dangerous conditions that the owner either knows about or should have discovered. *See Parks v. Rogers,* 176 N.J. 491,

825 A.2d 1128 (2003). In the case at bar, the Trial Court concluded there was nothing in the record to suggest that Defendants were aware of a dangerous or hazardous condition prior to Plaintiffs' falls. The record is devoid of any evidence that Defendants knew or should have know about any alleged dangerous condition on the public sidewalk prior to either fall. Plaintiff Garcia's fall occurred at 3:00 a.m. and Plaintiff Torres' fall occurred at 8:40 a.m. There is no evidence that Defendants were notified of the condition at any point prior to either fall. Defendants' Statement of Undisputed Material Facts in Support of Motion for Summary Judgment at paragraphs 16 and 18 state that neither Plaintiff Garcia nor Plaintiff Torres have any information that Defendants were aware of the icy patch where they fell at any point prior to their respective accidents. (Pa35) Plaintiff admitted both of these Statements of Fact. (Pa38-Pa39). Therefore, even if this Court concludes that Defendants were commercial property owners and had responsibility to maintain the public sidewalk, there is no evidence to support actual or constructive notice of a dangerous or hazardous condition which would trigger a legal duty to Defendants. These undisputed facts provide an additional basis for the Trial Court's grant of summary judgment in Defendants' favor.

CONCLUSION

Since Stewart v. 104 Wallace Street, Inc., 87 N.J. 146 (1981), it has been the law of this State that a commercial property owner is responsible for maintaining the public sidewalk abutting its property. In the 45 years since Stewart, it has remained the law of New Jersey that a residential property owner has no duty to maintain the public sidewalk adjacent to his or her property. The only exception to that rule is if the property owner' negligence created a new element of danger or hazard, other than one caused by natural forces. Luchejko v. City of Hoboken, 207 N.J. 191, 201 (2011). On appeal, Plaintiffs have not argued that the Trial Court erred in determining that Defendants are residential property owners. Accordingly, that argument is waived and the Trial Court's determination on that issue must remain undisturbed. Even if this Court somehow interprets Plaintiffs' appeal as encompassing that issue, the record is clear that Defendants are residential property owners. The complete lack of any evidence of commercial activity at the property means that there is not dispute on this issue to submit to a jury. The evidence of the factors pursuant to Grijalba v. Floro, 431 N.J. Super. 57, 68 (App. Div. 2013) indisputably demonstrate that Defendants are residential property owners. In addition, the undisputed facts demonstrate that Plaintiffs' falls occurred on the public sidewalk, not on Defendants' property. Plaintiffs

have done nothing to rebut the video evidence and the property survey. Accordingly, there is no genuine issue of material fact concerning the location of the Plaintiffs' falls. In addition, Plaintiffs have not provided any support for their argument that the lease between Defendants and Plaintiff Garcia's parents creates a duty to maintain the public sidewalk. In addition, the Trial Court concluded that the record did not contain any evidence that a dangerous or hazardous condition existed which would create a duty on the part of Defendants or that Defendants had actual or constructive notice of any such condition. This issue was not address by Plaintiffs in their appellate brief, is therefore waived and provides an additional basis for the grant of summary judgment in Defendants' favor.

Since the Trial Court properly granted summary judgment in favor of Defendants, it properly denied Plaintiffs' Motion to Extend and Compel Discovery as moot. Moreover, the outstanding discovery that Plaintiffs argue they are entitled to has no bearing on the case at bar and is not necessary for the Court to determine whether Defendants are commercial or residential property owners. The fact that Plaintiffs have not even raised the issue of Defendants' ownership status as an issue for appeal undermines their argument that the additional information requested is relevant to the subject matter of the pending action or the matters before this Court on appeal.

For the foregoing reasons, Defendants Rufina Rodriguez and Gregorio Paulino respectfully request that this Honorable Court AFFIRM the Trial Court's decision of August 22, 2024 granting Defendants' Motion for Reconsideration and entering judgment as a matter of law in their favor.

Respectfully submitted,

DICKIE, McCAMEY & CHILCOTE, P.C.

BY: /s/ Michael K. Willison

Michael K. Willison, Esquire

Attorneys for Defendants-Respondents
Rufina Rodriguez and Gregorio Paulino

Dated: December 27, 2024