Superior Court of New Jersey

Appellate Division

Docket No. A-000813-24T2

ARI GANCHROW, *Plaintiff-Appellant,* vs. SUEZ, SUEZ WATER NEW JERSEY, INC., VEOLIA WATER TECHNOLOGIES & SOLUTIONS, TOWNSHIP OF TEANECK, JOHN DOE 1-10 and/or ABC/XYZ COMPANY (names being fictitious for persons and/or entities unknown at this time), *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY DOCKET NO.: BER-L-5437-22 Sat Below: HON. ANTHONY R. SUAREZ, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Plaintiff Ari Ganchrow ("Plaintiff" or "Appellant" or "Ganchrow") appeals from an Order dated October 28, 2024, granting summary judgment (the "Order") to the defendant Veolia Water New Jersey, Inc. f/k/a Suez Water New Jersey, Inc. ("Defendant" or "Respondent" or "Veolia").

Late on the evening of January 14 and into the morning of Saturday, January 15, 2022, Veolia – a large, for-profit water company – performed repair operations on their broken water main in Teaneck at the intersection of Greenville Avenue and Wellington Circle. Temperatures hovered near zero degrees Fahrenheit as water continuously flowed from the work site -- located at the top of a hill on Greenville Avenue -- downward toward Hudson Road, two blocks away.

Veolia concluded work and left at about 3 a.m. without salting the road where the water had flowed – or taking any other measures to protect the public from the dangerous Veolia imminent ice that had flowed for several hours down Greenville Avenue. The area affected included where Greenville met Hudson Road in this predominantly Orthodox residential neighborhood. A few hours later, many observant Jewish adherents would be walking through this area on their way to and from Saturday services.

On Saturday morning, Ganchrow was walking home from services. Temperatures remained near zero. As Ganchrow reached the intersection of

Greenville and Hudson, he stepped into the roadway and slipped on the Veolia ice, falling and striking his head with violent force on the frigid asphalt. Four fellow synagogue attendees came upon Ganchrow lying unconscious in the street. They attended to him before he was rushed to the hospital. Ganchrow suffered a subdural hematoma which required the emergency surgical intervention of a neurosurgeon. Ganchrow now suffers from permanent Traumatic Brain Injury ("TBI") and has sustained consequential past, current, and future economic damages due to Veolia's negligence.

Among other things, the Law Division held that Plaintiff was required to proffer a water industry expert to (1) state under the circumstances, whether Veolia owed a duty of care to Ganchrow and the public, and if so, the scope of that duty and (2) to state the supposed water industry standard of care for remediating an imminent icy condition due to Veolia's broken water main. This was an obvious error and requires reversal.

First, the Law Division erred when it held that Plaintiff needed an expert to set and fix the scope of Veolia's duty, when that responsibility solely belongs to the court. Second, the Law Division erred when it held that Plaintiff needed an expert to state the supposed water industry standard of care for preventing imminent ice, when jurors already know that applying salt to a road prevents ice. These errors on these threshold issues created a series of more errors as discussed further herein.

As a matter of law, Veolia owed a duty to Ganchrow and the public to remediate the imminent icy conditions caused by their broken water main. As a matter of fact, a jury does not need a water industry expert witness to tell them, that under the circumstances, Veolia's breached their duty of care when they left the Grenville Avenue area without taking any remedial action.

This Court should reverse the Order and remand for trial.

PROCEDURAL HISTORY

Plaintiff filed his Complaint with a Demand for a Trial by Jury against Veolia and the Township of Teaneck ("Teaneck") on October 6, 2022. (Pa51-58). Veolia filed its Answer with Crossclaim against Teaneck on October 28, 2022. (Pa59-66).

Teaneck moved to dismiss the Complaint as to it on the basis that Plaintiff's Complaint did not assert a cognizable claim under the New Jersey Torts Claims Act, *N.J.S.A.* 59:1-1, *et seq.* (Pa67-75). Plaintiff opposed Teaneck's motion and further cross-moved to file an Amended Complaint. (Pa76-85). Teaneck and Plaintiff resolved their motions, withdrew them, and entered into a Consent Order filed on January 3, 2023, that permitted Plaintiff to file his Amended Complaint and provided a date by which Teaneck would file its Answer. (Pa86-88). The Amended Complaint was filed on January 10, 2023 (Pa103), after Teaneck had already filed its Answer on January 5, 2023.

(Pa92-102). Veolia filed its Answer to the Amended Complaint on January 12, 2023. (Pa111-118).

As to Veolia's liability, Plaintiff pleaded claims of negligent water main maintenance of their water main, a failure to remediate a dangerous condition claim for Veolia's failure to apply salt to Grenville Avenue, and a failure to warn of a dangerous condition. (Pa103-110)

On August 16, 2024, Veolia moved for summary judgment. (Pa131-418). On September 11, 2024, Plaintiff filed his opposition. (Pa419-492). In that opposition, Plaintiff advised the Law Division that at trial he would only pursue the liability theory that Veolia acted negligently in failing to apply salt to the roadway where water had flowed from their broken water main before leaving the worksite on that bitterly cold early morning. (By rule, Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgement was excluded from Plaintiff's Appendix.)

On October 28, 2024, the Law Division granted Veolia's motion for summary judgment and entered the Order. (Pa1-33). In that opinion, the Law Division declined to distinguish between Plaintiff's abandoned claim of negligent water main maintenance and his active claim for negligence, based on the failure to abate the dangerous condition, imminent ice, formed by the waterflow from Veolia's broken water main. Instead, the Law Division treated

it as a single, unified theory, and ruled that Plaintiff could not prevail without an expert to state the alleged water utility standards. (Pa9-23).

On September 27, 2024, Teaneck moved for summary judgment based on the Tort Claims Act (Pa93-94). On October 28, 2024, the Court granted Teaneck's motion (Pa1-33). Plaintiff does not appeal from that order. Veolia, having failed to oppose that motion, cannot now challenge the ruling absolving Teaneck of fault.

On November 22, 2024, Plaintiff filed an Amended Notice of Appeal from the Order granting Veolia's motion for summary judgment. (Pa34-50).

STATEMENT OF FACTS

Late on the evening of January 14 and into the morning of Saturday, January 15, 2022, Veolia performed repair operations on their broken water main in Teaneck at the intersection of Greenville Avenue and Wellington Circle. (Pa426-427; Pa79). At all times temperatures hovered near zero degrees Fahrenheit as water continuously flowed from the work site -- located at the top of a hill on Greenville Avenue -- downward toward Hudson Road, two blocks away. (Pa426-27; Pa79; Pa266 (Deposition of Deirdre O'Shea, Veolia Witness, 12:18 to 13:18)).

At approximately 10 p.m. on Saturday, March 14, Veolia was notified by Teaneck that their water main that they controlled located on Grenville Avenue and Wellington Circle had broken and water was spreading down Grenville

Avenue. (Pa256, Deposition of Tim Leahy, 11:9-16; Pa185-251 (Veolia's work orders)). Accordingly, by these facts or least the reasonable inference from these facts, Veolia knew that its water was flowing downhill on Grenville, toward Hudson Road. (Pa256, Deposition of Tim Leahy, 11:9-16; Pa185-251 (Veolia's work orders)).

On Saturday, January 15, 2022, Ganchrow was walking east on Grenville Avenue in Teaneck, returning home after attending services at his nearby synagogue. Temperatures remained near zero degrees. (Pa78-85; 78-80). Just before he reached the southeast corner of Grenville Avenue and Hudson Road, he stepped onto the Veolia ice, which caused him to strike his head forcefully enough on the frigid that he was knocked unconscious. (Pa78-85; Pa79; Pa165, #2).

Four fellow synagogue members came upon Ganchrow and attended to him until an ambulance arrived. Ganchrow suffered a subdural hematoma which required the emergency surgical intervention of a neurosurgeon. (Pa165, #34-4; Pa511-512 (Plaintiff Deposition,33:22-34:2;37:24-38:11)). Today Ganchrow suffers from permanent Traumatic Brain Injury due to Veolia's negligence. (Pa615, #3-4). In addition to pain and suffering damages, and other damages to be awarded, Leroy Lindsay, M.D., an expert, opined that Plaintiff will incur $655,353 in lifetime medical and supportive costs due to his TBI and its sequelae. (Pa486-492).

Veolia's testimonial representative, Deirdre O'Shea, admitted that, on January 14, 2022, Veolia controlled the water main on Grenville Avenue that broke. (Pa268-269 (Deposition of Deirdre O'Shea, 21:25-22)). Veolia placed their broken water main on Grenville Avenue and Wellington Circle out of service thereby shutting off the water on January 15, 2022, at 3:21 a.m. (Pa198; Pa268-269 (Deposition of Deirdre O'Shea, 21:25-22)). Thus, water had been flowing down Wellington Avenue by that time for over five hours. (Pa Pa185-251 (Veolia's work orders); Pa447 (Deposition of John Puzio, 17:4-19:5)). It bears repeating that at the time of Veolia's water main break, the temperature was zero degrees. (Pa268-269 (Deposition of Deirdre O'Shea, 12:18-13:4)).

Veolia's water main repair crew that was assigned to repair their broken water main on Grenville Avenue had salt with them. (Pa269 (Deposition of Deirdre O'Shea, 25:6-12); Pa448 (Deposition of John Puzio, 19:22-20:7). Veolia admitted that it does not know if they applied salt anywhere on Grenville Avenue on January 14, 2022. (Pa448-450 (Deposition of John Puzio,19:6-22:18; 29:2-12-19)).

Veolia chose not to salt the area of Grenville Avenue and Hudson Street, where the incident happened. ((Pa269 (Deposition of Deirdre O'Shea, 16:5-15)). As of January 2022, Veolia had a policy that required the application of salt around the water main break area for worker safety. (Pa448, Deposition of John Puzio, 20:18-21:9)).

At the time, Veolia had designated workers who were assigned the sole task of applying salt to roads after their water main breaks and had a specific truck at their disposal geared to apply salt. (Pa268-269 (Deposition of Deirdre O'Shea, 18:11-22; 20:6-8); Pa450-51 (Deposition of John Puzio, 27:2-4, 30:1-6)). As discussed above, Veolia performed no salting of the nearby roads even through, through O'Shea, Veolia admitted that water from their broken water mains poses a serious safety hazard in the winter. (Pa266 (Deposition of Deirdre O'Shea, 12:18-13:19)).

On January 15, 2022, Defendants failed to apply salt to Grenville Avenue and Hudson Street. (Pa267 (Deposition of Deirdre O'Shea, 16:5-15, 24: 16-19); Pa185-251 (Veolia's work orders); Pa448, 450 (Deposition of John Puzio, 19:6-22:18; 29:2-12-19); Pa283-287 (Deposition of Frank Spector, 12:7- 23, 15:6-10, 16:18-24,19:24-20:8)).

On January 15, 2022, at approximately 9:00 a.m., in response to a complaint that Grenville was covered in ice, Teaneck called in a DPW worker to specifically apply salt to Grenville Avenue between Hastings Road and Hudson Road due to the dangerous ice condition that Veolia created and then failed to remedy. (Pa283-286 (Deposition of Frank Spector, 12:7-13:23, 14:9-16:24, 19:24- 20:8, 24:2-10); Pa277-278. (Teaneck DPW overtime sheet)). Veolia reimbursed Teaneck for the costs Teaneck incurred in paying the Teaneck Police Department to provide traffic control services while Teaneck

repaired their water main on Grenville Avenue. (Pa267, (Deposition of Deirdre O'Shea, 22:4-16); Pa467; (Police Off Duty Work Company Detail payment ledger)).

ARGUMENT

POINT I

THE LAW DIVISION ERRED IN ITS ANALYSIS OF THE ISSUES RAISED BY VEOLIA IN ITS INITIAL MOTION PAPERS; THE PRECEDENT OF *JACOBS V. JERSEY CENTRAL POWER & LIGHT* IS DISPOSITIVE (Pa1-2)

"You don't need a weatherman to know which way the wind blows." Dylan, Bob, Subterranean Homesick Blues, Columbia Records (1965).[1]

[1] A 2011 survey by the *Los Angeles Times* revealed that song lyrics from Bob Dylan are frequently cited in available or reported court opinions. *See* Williams, Carol J., "In Some Courts, Dylan Rules," *Los Angeles Times*, May 9, 2011.

This specific lyric often is cited in support of the legal principle applicable to this case: that certain matters are evident and that they can be asserted with complete confidence, even if the speaker lacks specialized training or expertise. For example, in *Jorgensen v. Beach 'N' Bay Realty, Inc*., 125 Cal.App.3d 155, 163 (1981), a California appellate court wrote:

> Bob Dylan has summarized the correct rule on the necessity of expert testimony: 'You don't need a weatherman to know which way the wind blows.'" The California courts, although in harmony, express the rule somewhat less colorfully and hold expert testimony is not required where a question is 'resolvable by common knowledge.'

Common knowledge dictates that a water company does not have a license to create unabated dangerous icy conditions on public roads due to their broken water main simply because it is regulated. Yet the Law Division wrote: "In the matter at hand, with regard to Veolia, Plaintiff has no liability expert, and has not identified any industry standards governing the duties of a regulated, public water utility with regard to any of the conduct for which he seeks to hold Veolia liable." (Pa8-9). The court added that "(t)his is particularly evident with regard to the allegations was responsible for the icy condition which Plaintiff alleges caused his fall." (Pa9).

What is "particularly evident," however, is that a flow of water onto a public street will freeze into ice at temperatures near zero; and, further, that ice on a roadway poses such a foreseeable and dangerous risk to pedestrians that the one who created it has a duty to remediate it.

A. The Law Division Erred By Insisting Plaintiff Needed An Expert (Pa1-2)

1. The Law Division Did Not Apply This Court's Controlling Rule of Law As Set Forth By *Jacobs v. Jersey Central Power & Light*

In this Court's precedent, *Jacobs v. Jersey Central Power & Light*, 452 *N.J.Super*. 494, 505 (App. Div. 2017), Judge Sabatino held -- in accord with Dylan -- that not every case involving a regulated utility defendant required an expert. In fact, citing to *State v. Kelly*, 97 *N.J.* 198, 204 (1984), Judge Sabatino observed that an expert "*should not be permitted* unless it concerns a subject

matter that is 'so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman.'" *Jacobs*, 452 *N.J.Super*. at 505 (emphasis added). The Law Division got it backwards; not only was an expert not required, an expert arguably was not even permitted, given the simplicity of the matters amounting to Veolia's negligence.

Under New Jersey Rule of Evidence 702: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Thus, the New Jersey Supreme Court has held:

"To satisfy the rule," it is well-settled that

> the proponent of expert evidence must establish three things: (1) the subject matter of the testimony must be "beyond the ken of the average juror"; (2) the field of inquiry "must be at a state of the art such that an expert's testimony could be sufficiently reliable"; and (3) "the witness must have sufficient expertise to offer the" testimony.

State v. Olenowski, 253 *N.J.* 133, 143 (2023) (*quoting, State v. J.L.G*., 234 *N.J.* 265, 280, 190 A.3d 442 (2018) (*quoting* State v. Kelly, 97 N.J. 178, 208, 478 A.2d 364 (1984)).

Therefore, if Plaintiff actually tried to proffer an expert to testify on whether water transforms into ice at zero degrees Fahrenheit, or that applying salt to an icy road is a standard means of preventing ice formation or deicing

asphalt, Plaintiff could not have met this three-part test, as these matters are not beyond the ken of the common juror's knowledge or experience.

New Jersey courts routinely hold that an expert is not needed when jurors can readily grasp the basis for a plaintiff's claim that a defendant acted negligently. *See e.g., Scully v. Fitzgerald*, 179 *N.J.* 114, 127-28 (2004) (expert not required to explain danger of throwing a lit cigarette onto a pile of papers or other flammable material). Paper ignites when exposed to fire; water freezes at zero degrees Fahrenheit. These are matters of common knowledge.

Contrary to the argument made below by Veolia, and the holding of the Law Division, no special rule exists generally requiring an expert's opinion to establish duty, or a breach of duty, in a case against a regulated utility. Defendants like Veolia are governed by the same body of law holding that an expert is needed only when the matter at issue is "beyond the ken" of the common juror.

In some cases, though -- when for example a plaintiff alleges that a regulated water company did not adequately maintain and service its water mains, resulting in an area flood that damaged property – the plaintiff would need an expert to establish the common practice of how a water utility maintains its water mains. *See Fanning v. Township of Montclair,* 81 N.J.Super. 481 (App. Div. 1963).

On the other hand, New Jersey precedent establishes that a jury can determine if the actions of a public utility breached a standard of care, without benefit of a utility expert, when the negligence concerns a simple act or omission not related to the utility's regulated activities and which matter is readily understandable to a common juror. *Jacobs v. Jersey Central Power & Light,* 452 *N.J.Super.* 494 (App. Div. 2017).

In *Jacobs,* Judge Sabatino, writing for this Court, held that the plaintiff did not need an expert on regulated electric companies to establish that an electric company breached a duty of care by leaving a severe depression in the earth after removing a fallen telephone pole. *Id*. at 508.

Jacobs explicitly rejected the reasoning the Law Division employed in this case. In fact, Judge Sabatino noted that the utility defendant's most strenuous argument was that the plaintiff was "obligated to present an expert witness on liability opining about industry standards" and further the utility defendant contended that "the absence of such expert testimony requires the verdict to be set aside." *Id*. at 505. Judge Sabatino observed: "The trial judge rejected this argument, and so do we." *Id.*

Even in the face of this explicit holding in *Jacobs*, the Law Division asserted:

> Expert opinion is necessary to the standard of care the Plaintiff would have the Court impose upon the operations of Veolia. Veolia is a privately-owned, regulated water company providing service to

> 750,000 customers, primarily in Bergen and Hudson Counties, New Jersey.

(Pa11). After citing the number of ways Veolia is regulated – none of which concerned ordinary remedial work required to remove dangerous imminent icy conditions resulting from their broken water main (Pa11) – the Law Division concluded:

> Thus, the field requires the specialized technical knowledge that is beyond the ordinary knowledge and experience of the average layperson. This is underscored by the fact that Veolia is regulated by the NJBPU. It is axiomatic that the complex operations of utilities dictate that expert opinion is required to establish an appropriate standard of care, and any breach of that standard.

(Pa11).

The Law Division identified several ways Veolia was regulated. However, these observations of the Law Division concerning the ways in which Veolia is regulated (Pa11) also easily apply to the defendant electric utility in *Jacobs*. Yet that the defendant was a regulated utility had nothing to do with what the plaintiff alleged.

Judge Sabatino spoke with language equally pertinent to this case: "Although electrical power is undoubtedly a complex and technical subject matter that often would call for expert insight, plaintiff in this case was not harmed by an electrical shock or surge. She simply fell into or stumbled upon a hole in the ground, a hole which the jurors reasonably found to have been left unattended too long without durable warnings or barriers." *Id.* at 508.

This case presents a highly similar fact pattern and begs to paraphrase *Jacobs.* Although water company activity" is "undoubtedly a complex and technical subject matter that often would call for expert insight, plaintiff in this case was not harmed" by flooding or a surge from a broken pipe. He "simply fell … upon" an icy roadway "which the jurors reasonably (could find) to have been" not remediated or "left unattended too long the jurors reasonably found to have been left unattended too long."

In *Jacobs,* the defendant electric utility owned a streetlight that had fallen over. The defendant's crew removed the streetlight but left behind a hole in the ground where the utility's light once stood. Months later, Jacobs stepped in the hole left behind by the defendant utility and sustained serious injuries. Jacobs sued the utility for its negligence, arguing that that the defendant utility had a duty to repair the hole that was created when the defendant's crew removed the fallen streetlight.

As here, the *Jacobs* plaintiff did not argue that the streetlight had fallen due to the utility's negligence. The plaintiff simply argued that the utility had a duty to clean up after itself and fix the dangerous condition created by its removal and repair operations.

The jury found in favor of Jacobs. The electric utility appealed the judgment making the same argument as Veolia here, that the plaintiff's that Jacobs' complaint should have been dismissed because she did not proffer a

liability expert witness who opined as to the electrical utility industry's standard of care.

In rejecting this argument Judge Sabatino quoted from *State v. Kelly*, 97 *N.J.* 178, 208 (1984), in which the court instructed that expert testimony "should not permitted unless it concerns a subject matter that is 'so distinctly related to some science, professional, business or occupation as to be beyond the ken of the average layman.'" Judge Sabatino observed that expert testimony is unnecessary in a case when the concepts at the core of the case can be resolved through common sense. *Jacobs*, 452 *N.J.Super.* at 505.

Therefore, Judge Sabatino affirmed the trial judge's rejection of the argument that because the defendant was a utility, Jacobs had to procure an industry expert to industry standard of care applied to JCP&L:

> Tellingly, although it is highly regulated, JCP&L has not identified any provision set forth in a statute, regulation or industry guideline that specifies a standard of care addressing the specific questions of negligence posed here. JCP&L has failed to show that these questions are so esoteric or technical to be beyond juror's common notions of reasonableness. Nor did JCP&L itself proffer a liability expert.
>
> Although electrical power is undoubtedly a complex and technical subject matter that often would call for expert insight, plaintiff in this case was not harmed by an electrical shock or surge. She simply fell into or stumbled upon a hole in the ground, a hole which the jurors reasonably found to have been left unattended too long without durable warnings or barriers.

Jacobs, 452 *N.J. Super.* at 507-08.

Notably, Judge Sabatino effectively held that, before a utility can prevail on the position that an expert is required, the utility must itself explain how and why the issue is so esoteric, or regulated, so as to require an expert. The Law Division and Veolia have not explained why Plaintiff's claim that Veolia was negligent, for failing to put down salt, to prevent imminent ice, presents an esoteric issue or involves a regulated subject matter, even though *Jacobs* placed that burden on Veolia. *Jacobs*, 452 *N.J. Super.* at 507-08.

Jacobs is binding, applicable, and persuasive precedent that should cause this Court to reverse the Order. This Court's holding in *Jacobs* applies with equal force to this case, presenting a highly similar parallel fact pattern. The Law Division erred by failing to apply, and purporting to materially distinguish, Judge Sabatino's opinion in *Jacobs*.

2. The Law Division Erred By Its Reliance On *Fanning* Despite Inapposite Facts

Despite the obvious factual parallels between this case and *Jacobs*, the Law Division purported to materially distinguish *Jacobs*, and then misapplied *Fanning*, in holding that Plaintiff required an expert to proceed. In reaching its decision, the lower court focused most extensively on the Complaint's allegation of negligent maintenance of Veolia's water main – even though Plaintiff, in his opposition papers, specifically advised that this theory of liability was no longer being pursued.

This error, in turn, caused the Law Division to liken this case to *Fanning*. In *Fanning*, a property owner sued Montclair, a township which owned the town's water mains and was a water service provider to its residents. One of Montclair's water mains broke causing water damage to Fanning's property.

Fanning sued Montclair for negligence, arguing that Montclair did not conduct periodic water main inspections to determine their condition and ability to withstand high pressure. Fanning received a favorable verdict, but the Appellate Division reversed the judgement. The Court found that Fanning was obligated to present expert testimony that informed the jury what the water industry standard was for water main inspections by a water company, how such inspections are done, and how often they should be conducted.

The Appellate Division's decision in *Fanning* decision was unsurprising. It was yet another case in the long line of cases where this Court has held that if the subject is beyond the ken of the average juror, then an expert is required. When a water main must be inspected, how often must they be inspected, what the inspection should consist of, and similar questions are beyond the knowledge of the average juror.

In *Fanning*, the Appellate Division did not hold that every negligence claim against a water company mandates an expert to make out a *prima facie* negligence claim, as wrongly characterized by the Law Division. (Pa18: "Plaintiff's failure to obtain liability expert opinion is fatal to his case. *Fanning*

specifically holds that the standard of can care only be established through a qualified expert in water utilities"; Pa15: Citing to *Fanning*, "Furthermore, it is the long-standing rule in New Jersey that allegations of negligence against a water utility operation must be supported by expert testimony").

This far-too-broad, and incorrect, reading of *Fanning*, as advocated by the Law Division is illogical, creating additional proof hurdles that serve no fair or legitimate purpose. According to the Law Division, should a water company employee driving a utility vehicle, rear-end another vehicle, the plaintiff would be required to proffer an expert to state that water utility employees must observe rules of safety when driving.

What the Law Division missed is that the negligence theory *Fanning* was premised on was technical and beyond the knowledge of a typical juror. The average person does not know anything about water main inspections, if they must be done, how they are done, when they are done, and should they be done. But, under Ganchrow's negligent remediation of a dangerous condition theory, that was all immaterial. It does not matter whether Veolia's water main ruptured due to its negligent maintenance. The only thing that matters is that Veolia did not apply salt to these areas where the water flowed before leaving the scene. By doing so, Veolia exposed the public to an unreasonable, dangerous risk. And any juror with common sense would understand that.

The average juror would easily understand that if a water company's pipe bursts, causing water to flow down a residential road in freezing conditions, and the water company is aware of these facts and can readily do something to prevent the danger, then the water company must apply salt to prevent ice from forming. Jurors come into court already knowing that water freezes into ice when it is cold outside, that salt prevents ice, and that ice on the roads is dangerous. Jurors do not need an expert to tell them that Veolia breached its duty of care, when during freezing conditions, it failed to spread salt on a street covered in water because Veolia's water main broke.

Due to the Law Division's mis-framing of the issues by reference to the allegations of the Complaint -- rather than the proofs advanced in opposition to the motion -- the almost perfect factual parallel between this case and *Jacobs* eluded the Law Division. The Law Division incorrectly focused on *Fanning*. It is hard to conceive of a case that could more comprehensively and definitively reject Veolia's entire expert witness argument than *Jacobs*.

B. The Law Division Erred By Holding That An Expert's Opinion Was Necessary To Determine The Existence And Scope of Veolia's Duty (Pa1-2)

The Law Division stated that "the threshold question is whether Veolia had a duty to protect Plaintiff against an event which in fact did occur." (Pa8). It concluded that Plaintiff had not established the existence of any duty "(i)n the matter at hand, with respect to Veolia, Plaintiff has no liability expert, and has

not identified any industry standard governing the duties of a regulated, public water utility with regard to the allegations that Veolia was responsible for the icy condition which Plaintiff alleges caused his fall." (Pa8-9). Due to the lack of expert opinion, the Court determined, as a threshold matter, that Veolia labored under no duty Plaintiff as a matter of law. (Pa8-9).

The Law Division also erred on this threshold issue.

1. The Question Of Whether A Duty Exists Is One Of Law For The Court To Determine; The Law Division Erred By Seeking Expert Opinion To Establish The Existence Of Veolia's Duty

"The determination of the existence of a duty is a question of law for the court," not an issue to be decided by an expert or even the jury itself. *Petrillo v. Bachenburg*, 139 *N.J.* 472, 479 (1995) (*citing Wang v. Allstate Ins. Co.*, 125 *N.J.* 2, 15 (1991); *Strachan v. John F. Kennedy Memorial Hosp*., 109 *N.J.* 523, 529 (1988); *Essex v. New Jersey Bell Tel. Co.*, 166 *N.J.Super*. 124, 127 (App.Div.1979). The court's inquiry is one of fairness or public policy "involv(ing) a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." *Kelly v. Gwinnell*, 96 *N.J.* 538, 544 (1984) (*quoting Goldberg v. Housing Auth. of Newark*, 38 *N.J.* 578, 583 (1962)).

The Law Division's demand for expert testimony to tell the court whether, as a matter of law, a defendant owed a duty of care to a plaintiff, runs afoul of

the rule that the court itself is the expert on the law and determines questions of law:

> As a general rule an expert's testimony on issues of law is inadmissible. *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991).

No matter what, however, the Law Division erred by insisting that an expert opinion was required to establish the existence and scope of Veolia's duty. *See Petrillo v. Bachenburg*, 139 *N.J.* 472, 479 (1995) (*citing Wang v. Allstate Ins. Co.*, 125 *N.J.* 2, 15 (1991); *Strachan v. John F. Kennedy Memorial Hosp.*, 109 *N.J.* 523, 529 (1988); *Essex v. New Jersey Bell Tel. Co.*, 166 *N.J.Super*. 124, 127 (App.Div.1979). Sometimes it can be difficult to separate questions of the existence of duty, one for the Court, and breach of duty, a fact issue for the jury for which expert guidance is often provided. In a medical malpractice case, for example, it is well established that doctors owe a duty of care to their patients to render medical treatment that meets a minimum standard of care. No medical expert is required to say that; no medical expert, in fact, should be permitted to testify to that. The law creates that duty and defines its scope.

On the other hand, as to whether the defendant deviated from that defined standard of care, a medical expert would be required to specify an opinion, under

the facts of the case, as to (i) what that standard of care required and (ii) whether the doctor's actions were consistent with that standard of care.[2]

Doctors, like utilities, are regulated by the state, but no one has ever suggested that an expert is required to testify to the existence of a doctor's duty of care to its patients. The courts long ago determined the risk of a patient being injured by a doctor not meeting an applicable standard of care is sufficiently foreseeable so that the law imposes that duty. Under the facts of this matter, the court's assessment is similarly based on the question of foreseeability, and how fair it would be to place the defendant under a doctor's duty to the plaintiff based on the circumstances.

Generally speaking, the law recognizes that there is a foreseeable risk posed to pedestrians from icy conditions on roadways and sidewalks. *See, e.g.*, *Mizra v. Fillmore Corp.*, 92 *N.J.* 390, 395 (1983). In *Mizra*, the Supreme Court observed:

> In many respects, the duty to remove snow and ice is more important and less onerous than the general duty of maintenance imposed in Stewart. Snow and ice pose a much more common hazard than dilapidated sidewalks. The many innocent plaintiffs that suffer injury because of unreasonable accumulations should not be left without recourse. Ordinary snow removal is less expensive and more easily accomplished than extensive sidewalk repair. Certainly commercial landowners should be encouraged to eliminate or reduce the dangers which may be so readily abated.

[2] Even in medical malpractice cases, though, an expert is not needed when the malpractice falls within the jurors' "common knowledge."

Id. (citations omitted). Most snow and ice cases arise under fact patterns involving storms and case law recognizes distinctions based on storm activity. For example, the scope of a commercial landowner's duty can depend on the fact of whether a storm is on-going or whether the storm has ended. *See Pareja v. Princeton International Properties*, 246 *N.J.* 546 (2021).

The unusual fact in this case is that Plaintiff did not slip on ice resulting from a storm. Plaintiff fell on ice that formed from a waterflow from Veolia's broken water main. This waterflow occurred for a period of over five hours while Veolia sought to repair its property. This waterflow started at the top of the hill at the intersection of Greenville Avenue and Wellington Circle, and thereafter for about five hours of streaming traveled downhill in the direction of Hudson Street, the location of Ganchrow's fall on the Veolia ice.

Under these circumstances, including the location of their water main at the top of the hill; the number of hours that the cascading water flowed unabated downhill; the subfreezing temperatures reaching extreme lows of near zero degrees Fahrenheit; the foreseeability of pedestrians slipping on the icy crosswalks at downhill intersections was patently reasonably foreseeable. When assessing Veolia's duty, that Veolia's broken water main was instrumental in causing the ice in the first place only creates even more compelling reasons to impose a duty to abate the conditions on Veolia.

Plaintiff submits the Law Division erred, first, by failing to analyze these facts and circumstances and instead calling for an expert to instruct the court on these circumstances; and, second, by failing to hold that the slipping risk that Ganchrow faced from the ice as he crossed at the Greenville/Hudson was foreseeable under the circumstances.

2. The Law Division's "Zone of Danger" Analysis Was Improper and Erroneous

(a) The Law Division Did Not Analyze The Scope of Duty Properly

To the extent that the Law Division performed any analysis of the facts, the court cited one single fact: that the intersection was nearly six hundred feet away from their water main and, thus, Plaintiff was not within a reasonable "zone of danger" of Veolia's activities, according to the Law Division.

As an initial matter, the court erred by using the now long rejected "zone of danger" approach employed by Justice Andrews in his dissenting opinion in *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339 (1928). To Plaintiff's knowledge that approach is now rejected by every state. Like every other state, New Jersey follows the approach outlined by Justice Cardozo in his landmark majority opinion in *Palsgraf.*

Thus, the question of whether a duty of care exists is one of fairness "that involves identifying, weighing, and balancing several factors -- the relationship of the parties, the nature of the attendant risk, the opportunity and ability to

exercise care, and the public interest in the proposed solution." *Carter v. Lincoln-Mercury Leasing Div. EMAR Group, Inc.,*135 *N.J.* 182 (1994); *Hopkins v. Fox & Lazo Realtors.*, 132 *N.J.* 426, 439 (1993) (citing *Goldberg v. Housing Auth*., 38 *N.J.* 578, 583 (1962).

Taken out of factual context, and assessed independently of all other facts and circumstances, perhaps six hundred feet away from their water main may seem distant and outside of Justice Andrews's "zone of danger." But modern tort law requires a more careful analysis.

When the court adds in the downhill flow of the water, the extraordinary length of time of the water flow; the zero-degree temperatures and that Veolia was present on the scene as the water was flowing, that six hundred feet distance diminishes in significance. No expert, and certainly no expert on water utility regulation, needed to tell the Law Division that water flows downhill; or that a broken water main will cause a significant drain of water over the course of five hours, resulting in a water path, especially when traveling downhill; or that water on asphalt will turn into ice at zero degrees Fahrenheit. The foreseeability of this risk to Teaneck pedestrians in this area was evident – especially when the court considers this occurred on a Saturday morning in an Orthodox Jewish neighborhood -- and the Law Division should have made this call as a matter of law.

Another consideration of whether a duty of care is owed by the defendant to the plaintiff is the fairness of imposing the duty on the defendant. Veolia, a large for-profit water utility company, that provides water to approximately 750,00 Northern New Jersey residents and has similar operations through the United States, had the resources at their disposal to simply apply salt to two blocks of Grenville Avenue and the intersections. Furthermore, Veolia's workers were physically present as the water cascaded down Grenville Avenue making it easier for Veolia to remediate the looming dangerous condition their broken water main had created. In fact, Veolia's workers had salt in their work trucks and Veolia even had a designated salting truck at their disposal that could have been deployed to Grenville Avenue.

The Law Division made, at best, a passing reference to fairness considerations when it observed that Veolia allegedly lacked notice of the icy conditions. The Law Division claimed Veolia – whose broken water main created the icy mess – had no notice of it.

In addressing that observation, this Court should take note that, first, this is not a premises liability case concerning a defect on a premises. This case concerns the creation of a dangerous condition on a public walkway. Arguments concerning actual or constructive notice are misplaced in a case like this. Yet, even within the field of premises liability, notice is not required if, as here, the defendants created the dangerous condition. *Craggan v. Ikea USA, 332 N.J.*

Super. 53, 61 (App. Div. 2000). Even in premises liability cases, "lack of notice" is no defense for a defendant whose actions cause or contribute to the creation of the dangerous condition.

Holding Veolia to a duty to remediate the icy conditions is manifestly fair because Veolia's water main was the source of the water flow that reached Grenville Avenue and Hudson Street. Without any doubt, this Court must insist, fairly, that Veolia had a duty to abate the icy conditions, by applying salt or taking other remedial steps, to return the roadway, transformed into a dangerous surface by its waterflow, into a safe condition for the benefit of pedestrians walking through the area – like Ganchrow.

(b) It Is Not "Axiomatic" That A Defendant Owes No Duty To A Plaintiff Unless The Plaintiff Is Within A "Zone of Danger"

The Law Division justified its curt "existence" of duty analysis by noting that the intersection at issue was six hundred feet away and, ignoring that the location was a steep downhill from Veolia's water main, determining that this distance was outside the "zone of danger." For this oversimplified "principle" of law, the Law Division reached back *four decades* to a 1984 law school hornbook, the fifth edition of *Prosser and Keeton on Torts* (5th ed. 1984). That text is now in its *fifteenth* edition under the title *Prosser, Keaton & Schwartz*.

On top of citing an out-of-date law school hornbook four times during the course of its opinion, the Law Division relied extensively on a section of that

hornbook outlining a historical survey of the concept of duty and its historic association with "proximate cause."

The Law Division, however, cited this historical survey as if the principles and cases cited represented current law, and more precisely current New Jersey precedent: "The conclusion of no duty or no legal responsibility is axiomatic where the Plaintiff is outside of the zone of any obvious danger from the Defendant's conduct." (Pa8). The Law Division cited the historical survey section of the discussion for that claim.

True enough before Justice Cardozo's decision in *Palsgraf v. The Long Island Railroad*, courts may have frequently examined the existence of a duty from a "zone of danger" causation perspective – as Justice Andrews did in his dissent in *Palsgraf.*

However, the Fifth Edition of *Prosser and Keeton* continued to outline the historical progression of determining the existence of a duty by observing, just pages later in the same chapter: "In 1928 something of a bombshell burst upon this field, when the New York Court of Appeals, forsaking 'proximate cause,' stating the issue of foreseeability in terms of duty." *Prosser and Keeton on Torts* (5th ed. 1984), p.284.

The *Palsgraf* decision thereby eschewed the strict historical reliance of whether a party stood within an obvious "zone of danger." As discussed above, New Jersey and all other jurisdictions now employ a test focusing on factors of

foreseeability and fairness. Thus, the question of whether a duty of care exists is decided on foreseeability and fairness "that involves identifying, weighing, and balancing several factors -- the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." *Carter v. Lincoln-Mercury Leasing Div. EMAR Group, Inc.*,135 *N.J.* 182 (1994); *Hopkins v. Fox & Lazo Realtors.*, 132 *N.J.* 426, 439 (1993) (citing *Goldberg v. Housing Auth*., 38 *N.J.* 578, 583 (1962).

According to a more modern analysis, Ganchrow and other pedestrians foreseeably were placed at risk by Veolia's failure to remediate the icy conditions, and thus it was fair to impose a duty of care on Veolia.

C. The Law Division Erroneously Concluded That Plaintiff Needed An Expert To Establish A Breach Of Any Duty Of Care (Pa1-2)

Citing that Veolia is a regulated entity, the Law Division held that Plaintiff needed an expert to establish whether Veolia breached its duty to remediate the Veolia ice on the asphalt locations downhill from their water main, where the water had reached and froze. Critically, this Court must note that it is undisputed that Veolia took absolutely no action to restore any of the downhill areas to safety before leaving the scene of its operations.

Case law cited above applies with equal force to this point. New Jersey courts routinely hold that an expert is not needed when jurors can readily grasp the basis for a plaintiff's claim that a defendant acted negligently. Plaintiff

contended that Veolia should have, at least, salted the areas affected by its water flow stream and it failed to do so. Jurors do not need an expert to explain to them that ice is dangerous and the danger can be avoided by salting a road.

D. That Teaneck Later Applied Salt To The Area Does Not, As A Matter of Law, Absolve Veolia For Creating The Imminent Icy Conditions In The First Place (Pa1-2)

1. Teaneck's Salting Pertains to Proximate Causation, Not Duty

The Law Division also observed that Teaneck's application of salt to the area at about nine o'clock on Saturday absolved Veolia, as a matter of law, for Veolia's failures that resulted in the formation of the ice in the first place. The Law Division amended the issue before it – whether Veolia had a duty to apply salt to the Veolia imminent ice – and improperly re-framed it by stating: "The issue appears to be that Plaintiff is alleging that the DPW's salting was inadequate." (Pa14).

That was not the issue in the least. Whether Teaneck adequately salted the area has nothing to do -- at least on a summary judgment motion -- with the separate and distinct issue of whether Veolia breached its duty to apply salt to imminent icy conditions caused by its own activities. Even assuming that Teaneck itself had an independent duty to apply salt the roadway, and further assuming Teaneck did so negligently, those circumstances would not absolve Veolia of a duty to abate the imminent icy conditions that its activities caused.

At best, these circumstances concerning Teaneck would provide Veolia the basis to argue either that Teaneck is a joint tortfeasor whose activities proximately caused, in whole or part, Ganchrow's injuries; or that Teaneck's actions constituted an intervening and superseding cause which broke any causal connections between Veolia's actions and the injuries suffered by Ganchrow.

What the Law Division identified is a causation issue which, according to applicable law, is distinctly a question for the jury. "Proximate cause consist of 'any cause, which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of and without which the result would not have occurred.'" *Townsend v. Pierre*, 221 *N.J.* 36, 51 (2015) *quoting Conklin v. Hannoch Weisman*, 145 *N.J.* 395, 418 (1996). New Jersey case law uniformly holds that proximate causation generally presents a question for the jury. *J.S. v. R.T.H.*, 155 *N.J.* 330, 351 (1998); *Garrison v. Twp. of Middletown*, 154 *N.J.* 282, 308 (1998); *Kuzmicz v. Ivy Hill Park Apts.*, 147 *N.J.* 510, 540 (1997); *Martin v. Bengue, Inc.*, 25 *N.J.* 359, 374 (1957); *Glaser v. Hackensack Water Co.*, 49 *N.J. Super.* 591, 597 (App.Div. 1958).

In *Scafidi v. Seiler*, 119 *N.J.* 93, 100 (1990), the New Jersey Supreme Court explained why issues concerning proximate causation are generally left for the jury to decide:

> To recover damages for the negligence of another, a plaintiff must prove that the negligence was a proximate cause of the injury sustained. *See, e.g., People Express Airlines, Inc. v. Consolidated*

> *Rail Corp.*, 100 *N.J.* 246, 264, 495 *A.2d* 107 (1985). It is perhaps an understatement to acknowledge that causation "is an inscrutably vague notion, susceptible to endless philosophical argument, as well as practical manipulation." Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, *68 Va.L.Rev. 713, 713 (1982)*. Although the concept resists definition, we have described proximate cause as a standard for limiting liability for the consequences of an act based "'upon mixed considerations of logic, common sense, justice, policy and precedent.'" *Caputzal v. The Lindsay Co.*, 48 *N.J.* 69, 77-78, 222 *A.2d* 513 (1966) (quoting *Powers v. Standard Oil Co.*, 98 *N.J.L.* 730, 734, 119 *A.* 273 (Sup.Ct.1923), *aff'd o.b.*, 98 *N.J.L.* 893, 121 *A.* 926 (E. & A. 1923)); *accord* D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts*, § 41 at 264 (5th ed. 1984) (hereafter *Prosser and Keeton on Torts*).
>
> Proximate cause is a factual issue, to be resolved by the jury after appropriate instruction by the trial court.

In truth, what Teaneck did, or did not do, has nothing to do with Veolia's independent duty to clean-up after itself. Perhaps Teaneck's actions, if performed negligently, presented a basis for Veolia to argue that Teaneck's activities were a contributing cause for Ganchrow's injuries, or even a superseding and intervening cause. But what Teaneck did or did not do has nothing to do with whether Veolia had a duty, in the first place, to clean up after itself.

2. Teaneck Was Granted Summary Judgment On Veolia's Crossclaim And Veolia Cannot Argue Teaneck's Actions Caused Ganchrow's Injuries On Remand

At best Teaneck's actions pertain to proximate causation and would provide Veolia with the ability to argue that Teaneck's actions caused, in whole

or part, Ganchrow's injuries. Even so, this Court must take note that Teaneck also moved for summary judgment seeking a dismissal of Plaintiff's complaint against it, and all cross-claims against it. The Law Division granted that motion. Accordingly, on remand, Veolia would be barred from arguing that Teaneck's actions caused or contributed to Ganchrow's injuries, as the court ruled dispositively in favor of Teaneck when it dismissed Veolia's cross-claims against Teaneck on the merits. *Bahrle v. Exxon Corp*., 279 *N.J.Super*. 5, 22 (App.Div.1995), *aff'd on other grounds*, 145 *N.J.* 144 (1996).

In *Bahrle*, the Appellate Division observed that the trial judge had granted summary judgment to defendants Exxon/Ritchie dismissing the complaint and all crossclaims against these defendants. The Appellate Division continued:

> Entry of the summary judgments in Exxon/Ritchie's favor dismissing plaintiffs' complaint and the Texaco and Rule cross-claim was predicated on the absence of any factual dispute concerning Exxon/Ritchies' potential liability. *R.* 4:46-2. Dismissal was granted because all the submitted expert reports agreed that, based on groundwater velocity rates, any post-1975 spillage caused by Exxon/Ritchie was not a causative factor in the contamination of plaintiffs' wells. Texaco chose not to submit a competing hydrogeological report. *The summary judgment orders, not opposed by Texaco and Rule, were entered with prejudice. A dismissal with prejudice constitutes an adjudication on the merits "'as fully and completely as if the order had been entered after trial.'" Velasquez v. Franz*, 123 *N.J.* 498, 507 (1991) (*quoting Gambocz v. Yelencsics*, 468 *F.*2d 837, 840 (3rd Cir.1972)). In short, there was an adjudication of fact: Exxon/Ritchie's post-1975 conduct was not a cause of the contamination of plaintiffs' wells.
>
> Having decided Exxon/Ritchie's liability fully as a matter of law and fact, the summary judgment orders became the "law-of-the-

> case." *Lanzet v. Greenberg*, 126 *N.J.* 168, 192 (1991). Under the law-of-the-case doctrine, "where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit." *Slowinski v. Valley Nat'l Bank*, 264 *N.J.Super*. 172, 179 (App.Div. 1993), (*quoting State v. Hale*, 127 *N.J.Super*. 407, 410 (App.Div. 1974)).

Id. at 22-23.

Even though the trial judge had granted summary judgment to Exxon/Ritchie, at trial, the court "erroneously interpreted the summary judgment orders as preserving Texaco's right to construct a new factual and scientific theory against Exxon and the Ritchies, despite the prior adjudicated finding that the Exxon/Ritchie spillage was not a causative factor." *Id*. at 23. Accordingly, because the remaining defendants were allowed to argue Exxon/Ritchie's fault at trial, despite the orders of summary judgment in their favor, the Appellate Division reversed. *Id*.

Similarly, the Law Division granted summary judgment to Teaneck and dismissed Veolia's cross-claims against Teaneck in the process. Veolia is barred from impeaching that holding at trial, and cannot ask the jury to make factual findings contrary to the legal effect of an order granting Teaneck summary judgment.

POINT II

THE "ISSUE" OVER WHETHER PLAINTIFF'S EXPERT ESTABLISHED THAT THE ICY CONDITIONS RESULTED FROM WATER RUNOFF FROM VEOLIA'S WORK, (i) WAS IMPROPERLY RAISED FOR THE FIRST TIME IN REPLY; (ii) WAS NOT BASED ON FACTS RECITED IN VEOLIA'S RULE 4:46-2 STATEMENT; and (iii) RELATED ONLY TO THE LAW DIVISION'S UNNECESSARY DISCUSSION OF "NOTICE"; THE LAW DIVISION CITED TO NO EVIDENCE OF RECORD TO SUPPORT ITS "FINDINGS" (Pa1-2)

In its "reply" brief, Veolia contended for the first that Plaintiff's highly credentialed engineering expert, Harry Dales, had provided a flawed opinion due to the asserted unreliable tools he used to reach that opinion. Veolia recited a number of supposed defects in Dale's methodology and then called for Dale's opinion to be barred as net opinion under Rule 702. Without that opinion, Veolia mis-briefed, Ganchrow could not show it had "notice" of the icy conditions and, therefore, even assuming the existence of the duty recognized in *Jacobs,* Plaintiff's case failed due to lack of notice. The Law Division adopted this incorrect and improperly raised argument nearly verbatim and, critically, without any citation to the record either.

This Court should reverse all aspects of the decision pertaining to Mr. Dale and his conclusions as these issues were improperly raised in a reply brief, rely on an inadequate record for a ruling under *N.J.R.E.* 702, and are based on

"facts" that were not included within Veolia's Rule 4:46-2 Statement of Material Undisputed Facts, and which were never cited or substantiated below.

A. Veolia Raised New Arguments in Reply, and the Law Division Relied on These Positions, Even Though Not Factually Supported (Pa1-2)

In its reply brief, Veolia introduced a new argument: that being Plaintiff could not prove that the water which collected at Greenville and Hudson was runoff from its worksite operations. In supposed "support" of this "fact," Veolia argued for the first time that the expert opinion of Plaintiff's engineer, Harry Dales -- establishing that the ice, in fact, formed from the Veolia runoff -- was "net" opinion and barred under New Jersey Rule of Evidence 702.

None of this was fairly encompassed within the initial moving papers.

Ganchrow asks this Court to examine Veolia's Statement of Material Undisputed Fact pursuant to Rule 4:46-2 located at Pa140 through Pa151. Veolia outlined 68 supposedly undisputed facts said to be material to the arguments framed by the moving papers at those pages.

Not a single one of these 68 contentions asserted or placed into whether the ice on which Ganchrow fell formed from Veolia's water flow from its operations. For purposes of the motion, that the ice formed from Veolia's runoff was an accepted fact.

Not a single one of these 68 contentions asserted or placed into issue whether Dale's opinion was "net opinion." In fact, Veolia's references to Mr.

Dale's opinions at the paragraphs "57" through "68" sought only to observe that Mr. Dale admitted that he was not testifying as to a standard of care or as to the liability of the defendants – which Mr. Dale had acknowledged at his deposition.

Mr. Dale asserted that the ice which had formed at the intersection of Grenville and Hudson resulted from the water flow from Veolia's broken water main. Nothing in Veolia's Statement of Material Undisputed Fact asserted that Mr. Dale's opinion was not reliable or inadmissible as "net opinion" or otherwise under Rule 702.

Rule 4:46-2 requires that a motion for summary judgment be supported by a statement of material facts which cites "to the portion of the motion record establishing (each) fact or demonstrating that (each fact) is uncontroverted." *R.* 4:46-2(a). "(A) party opposing a motion for summary judgment (must) 'file a responding statement either admitting or disputing each of the facts in the movant's statement.' *" Claypotch v. Heller, Inc*., 360 *N.J. Super*. 472, 488 (App. Div. 2003) (*quoting R.* 4:46-2(b)). Thus, when a court reviews a motion for summary judgment, the court must limit its findings of undisputed facts to those presented in the statements of material facts submitted to the court in accordance with Rule 4:46-2(a) and (b) – and may not find purported facts that were not specified in the Rule 4:46-2 Statement. *Kenney v. Meadowview Nursing & Convalescent Ctr.*, 308 N.J. Super. 565, 573 (App. Div. 1998) (refusing to

consider "factual assertions in (the) appeal that were not properly included in the motion ... for summary judgment below" pursuant to Rule 4:46-2).

The Law Division's decision opened fire at Mr. Dale's report, characterizing it as unreliable, net opinion. (Pa18-20). In grasping for this "conclusion" – a glaring factual error made without any benefit of proper procedure or factfinding that must be followed when a party contends that an expert has furnished a "net opinion" – the Law Division engaged in a rogue "fact"-finding mission that roamed far beyond the bounds of Rule 4:46-2 and Veolia's own Rule 4:46-2 Statement of Material Facts.

As an initial matter, it is beyond dispute that the reliability of Mr. Dale's report was not raised in Veolia's the initial motion papers. At Pa18 through Pa20, not a single comment that the Law Division made in its decision about Dale's opinion is rooted in any of the 68 so-called "facts" set forth in Veolia's Rule 4:46-2 Statement of Material Undisputed Facts.

The issue of whether Dale's opinion would be "net" opinion is not even remotely hinted at within that Statement and, further, not a single cited "fact" would even support such a conclusion. What happened is that, when Veolia realized the *Jacobs* precedent doomed its motion as framed, Veolia pivoted to a new argument, in reply, that Ganchrow could not prove that the waterflow from Veolia's worksite caused the icy conditions at the intersection of Grenville and Hudson.

Since Dale's opinion establishes to the contrary, Veolia then engaged in a frontal assault on Dale, rambling on in its Reply Brief, and citing "facts" that were not included within its Rule 4:46-2. Even worse, these paragraphs in the Reply Brief cited nothing in support of the "factual" claims now being made, for the first time, in reply – save for an occasional cite like "See Exhibit Q", a generic cite to a multi-page document, without "jump" citation to a page and line.

For its part, Law Division then effectively regurgitated these paragraphs, nearly word for word, from the reply brief and adopted them as its "conclusion" that Dale's opinion did not meet the standards of Rule 702. Having been provided no citations to the record to support these "findings," the Law Division likewise cited nothing in support of what it had appropriated, uncritically, from Veolia's improper reply brief.

So, in the end, Veolia stands before this Court with a "finding" concerning Dale's opinion, even though this issue was not raised within the initial moving papers; was not supported by facts recited in the Rule 4:46-2 Statement; and was raised for the first time by way of reply argument without any meaningful citation to the factual record.

When reversing the Law Division, and remanding for trial, this Court must also clearly state that the "findings" concerning Dale's expert opinion are

similarly vacated as improperly raised, improperly cited, and improperly and incorrectly decided.

B. This Court Should Hold That New Substantive Arguments Are Improperly Raised By Way of a Reply Brief (Pa1-2)

Veolia borrowed this concept of "notice" – which, in fact, does not pertain to a case like this – from premises liability law. But even in premises liability cases, the law holds that lack of notice is no defense to a party like Veolia, whose actions caused the dangerous condition in the first place.

Plaintiff had no right to file a sur-reply to warn the Law Division that, for numerous procedural and substantive reasons, it should not follow the dangerous detour toward which Veolia was pushing the court.

This Court's rules and precedent makes it clear that this Court will not permit arguments to be advanced for the first time in a reply brief. *See R.* 2:6-5; *State v. Smith*, 55 N.J. 476, 488 (1970); *City of Elizabeth v. Elizabeth Fire Off.*, 198 N.*J. Super.* 382, 384-85 (App. Div. 1985); *Brown v. Shaw*, 174 *N.J. Super.* 32, 39 (App. Div. 1980); *Bacon v. N. J. State Dep't of Educ.*, 443 N.J. Super. 24, 38 (App. Div. 2015); *Bouie v. N.J. Dep't of Comm. Affairs*, 407 *N.J. Super.* 518, 525-26 (App. Div. 2009); *Borough of Berlin v. Remington & Vernick Eng'rs*, 337 *N.J. Super.* 590, 596 (App. Div. 2001).

Trial courts generally follow the same law when assessing summary judgment motions, even though no specific rule governs proceedings in the

lower court. This Court should clarify and hold, however, that trial courts should not rule on new issues first raised by way of a reply brief. This case presents an example of what error can occur if a moving party is permitted to add new arguments in a motion for summary judgment reply brief, after seeing that the opposing party has convincingly raised the existence of a genuine issue of material fact in their opposition brief.

Accordingly, as a corollary to the principle of law argued in Point II(A), that the motion judge should not base on a ruling on facts not included within the movants' Rule 4:46-2 Statement, this Court should further hold that it is improper for a lower court to consider arguments, first raised in reply, on a motion for summary judgment.

C. New Jersey Precedent Requires A Genuine Hearing On A Rule 702 "Net Opinion" Argument When That Argument Is Made in Connection With a Motion for Summary Judgment (Pa1-2)

Veolia's moving brief neither referenced N.J.R.E. 702 nor included any argument seeking a ruling that Dale's opinion was inadmissible net opinion. As noted above, Veolia made that argument in reply and the Law Division adopted it, nearly word for word, including "making" findings of fact not referenced in Veolia's Rule 4:46-2 Statement and not supported by any meaningful citation to the record. So the issue was raised in a procedurally defective manner for those reasons.

Additionally, a trial court that is confronted with a motion for summary judgment premised on a net opinion argument must first conduct a full evidentiary analysis and determination of the expert's opinion and only then, depending on the outcome of that analysis, may the court then evaluate the motion for summary judgment. *Townsend v. Pierre*, 221 *N.J.* 36, 53 (2015); *Estate of Hanges v. Metro. Prop. & Cas. Ins.*, 202 N.J. 369, 384-85 (2010). That did not happen here.

In *Townsend*, the New Jersey Supreme Court observed about

> When, as in this case, a trial court is "confronted with an evidence determination precedent to ruling on a summary judgment motion," it "squarely must address the evidence decision first." *Estate of Hanges v. Metro. Prop. & Cas. Ins.*, 202 *N.J.* 369, 384–85, 997 *A.*2d 954 (2010). Appellate review of the trial court's decisions proceeds in the same sequence, with the evidentiary issue resolved first, followed by the summary judgment determination of the trial court. *Id.* at 385, 997 *A.*2d 954.

Townsend, 221 *N.J.* at 53.

Even if the net opinion argument had been properly raised, Ganchrow was still entitled to a thorough evidentiary process before having his expert report stricken. Having that issue decided by way of argument and uncited "facts" set forth in a reply brief, and adopted nearly word for word by the Law Division, falls way short of what Supreme Court precedent commands.

D. "Notice" Is Not Relevant to Veolia's Liability In This Case (Pa1-2)

At risk of gilding the lily, Plaintiff notes that the "net opinion" issue was raised by Veolia also to support the contention that it lacked "notice" of the icy conditions. Plaintiff has already addressed that the rule of "actual notice" or "constructive notice" is a principle of law applicable to premises liability cases and pertains to a landowner's duty to repair latent defects on its premises. This is not a premises liability case and the concept does not apply, as discussed in Point I(C)(2)(a) (pp.29-30, above). Even so, the law holds that, even if the concept of "notice" would otherwise apply, it does not apply in cases where the defendant's own conduct caused or contributed to the creation of the dangerous condition.

Plaintiff contends that it is patently obvious that the "net opinion" issue was raised improperly, considered improperly, and decided improperly for all the reasons cited above. When reversing, this Court should remand with a clear direction that Dale's opinion must be allowed at trial, unless Veolia moves properly for Rule 702 consideration, and an evidentiary process consistent with the requirements of *Townsend v. Pierre*, 221 *N.J.* 36, 53 (2015) is performed.

POINT III

THE COURT ERRED BY GRANTING SUMMARY JUDGMENT TO VEOLIA (Pa1-2)

A. The Issues Before the Law Division (Pa1-2)

The issues before the Law Division should have been straightforward.

First, did Plaintiff need to provide expert opinion from a "water industry expert" to establish the existence and scope of a regulated water company's duty to remediate icy conditions resulting from its repair of their broken water main? In fact, expert opinion cannot be used to establish, in the first place, whether the defendant owed a duty of care to the plaintiff. Whether a duty exists, under given factual circumstances, presents a question of law for the courts to determine. The court is the "expert" in the law and, thus, no "expert" can testify as to whether, as a matter of law, a duty of care exists.

Moreover, courts determine the existence and scope of a duty of care by applying common law principles of foreseeability. Plaintiff contends, as a matter of law, that Veolia owed a duty of care to the public at large to remediate icy conditions resulting from their water main break. And, among other things, that is because it is readily foreseeable that pedestrians walking the streets in the vicinity of the waterflow could slip and fall on the ice, if left unabated.

Second, did Plaintiff need an expert to testify that, after repairing their water main break, Veolia breached its duty of care by leaving the scene without

conducting salting operations of areas where the water flowed? The Law Division erred by holding that Plaintiff needed expert opinion because a water company is a regulated entity. This Court's precedent in *Jacobs v. Jersey Central Power & Light,* 452 *N.J.Super.* 494 (App. Div. 2017) dictated the proper holding here: no expert was necessary to tell the jury that Veolia had to clean up the water flow from their broken water main.

Once again, the Law Division erred by holding that Plaintiff needed an expert to state that the standard of care required Veolia to act to attempt to remediate the Veolia ice. The Law Division rejected Plaintiff's position that ordinary jurors could use their own knowledge and experience to determine whether Veolia's decision to leave the site, with its dangerous imminent icy conditions, without taking any remedial action, was a breach of its duty of care.

Jurors, applying their own knowledge and experience, can determine that Veolia breached its duty of care by failing to perform any remediation of the areas downhill from their broken water main. In this regard, likewise, jurors possess sufficient knowledge and experience to know that applying salt to ice is a standard means of preventing ice and deicing roadways.

B. The Law Division Mis-framed The Issues (Pa1-2)

Even though the issues were really this straightforward, the Law Division complicated matters by ignoring the proofs and the theory advanced by Plaintiff in opposition to Veolia's summary judgment. The Law Division went astray

because it framed its task by reference to Plaintiff's Complaint, as a whole, rather than the sole remaining liability theory that was identified in the opposition filed in response to Veolia's motion for summary judgment.

The Complaint had alleged, among other theories of liability, that their water main break itself was the result of Veolia's negligence of inadequate maintenance of their water main. Even though Plaintiff advised the Law Division in its opposition brief that Plaintiff was no longer pursuing that theory, the Law Division ruled on it and then granted Veolia summary judgment.

The Complaint also alleged, independently of the allegations of the abandoned negligent maintenance theory, that, without regard to the cause of their water main break, Veolia acted negligently by failing to remediate the icy conditions before leaving the scene. The Complaint also alleged, as a third theory, that Veolia provided no notice to the public of the dangerous icy existence. (Pa9).

In opposition to the motion, Plaintiff declared that at trial, he would only pursue the negligent failure to remediate claim against Veolia. Yet the Law Division pursued its 14-page analysis by reference to the complaint as a whole, blurring distinct theories of liability into a singular theory subject to one analysis. Instead, the Law Division merged all of Plaintiff's alternative theories into one, as if no theory could stand independently of the declared, abandoned theory of negligent maintenance of their water main. (*See* Pa9-23).

That Veolia could be liable for simply not cleaning up after itself – even without proof that it negligently maintained the water main which caused the water flow in first place – never entered the Law Division's mind. Once the Law Division entangled the various causes of action into one – even though all of theories save the remediation theory had been abandoned – the court fell into the invited error of holding that no part of Plaintiff's case could not proceed without an expert.

Thus, the Law Division did not address these issues correctly:

- Did Veolia have a duty to clean up and remediate its imminent icy mess, caused by water bursting from the pipe, onto frigid asphalt, and traveling downhill through the neighborhood? The Law Division claimed only an expert could tell the court what was required, as a matter of law. In this regard, the Law Division performed no foreseeability and fairness analysis of its own, as required by law.
- Did Veolia breach its duty to clean up and remediate its imminent icy mess, caused by water bursting from the pipe, onto frigid asphalt, and traveling downhill through the neighborhood, when it did nothing at all to prevent ice or deice the roadway? The Law Division held that this issue was beyond the ken of the average juror and only a water utility expert could tell the jury that doing absolutely nothing to prevent ice

formation on the roadway breached a supposed water industry ice prevention and de-icing standard of care.

C. The Standard for Summary Judgment (Pa1-2)

An appellate court's duty upon review of a summary judgment motion "is to independently canvass the record and determine whether the trial court's grant of summary judgment is correct as a matter of law." *Calco Hotel Management Group, Inc. v. Gike*, 420 *N.J.Super*. 495, 507 (App.Div.) *certification denied* 208 *N.J.* 600 (2011). The Court's review of the Order mirrors that of the lower court. *Mango v. Pierce-Coombs*, 370 *N.J.Super*. 239, 249 (App.Div.2004). More specifically, *R.* 4:46-2, authorizing the granting of motions for summary judgment, provides, in pertinent part, that summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." A court must view all facts and inferences in a light most favorable to the non-moving party. *Brill v. Guardian Life Insurance Company,* 142 N.J. 520, 540 (1995).

As pertaining to legal questions determined on summary judgment, "(a) lower court's interpretation of the law and the legal consequences which flow from established facts are not entitled to any special deference." *Manalapan Realty, L.P. v. Township Committee of Township of Manalapan*, 140 *N.J.* 366,

378 (1995). The scope of review of a reviewing court as to a lower court's legal interpretations is "without limitation." *Illva Saronno Corp. v. Liberty Hill Realty Inc.*, 334 N.J.Super. 443, 450 (App.Div.2001).

As outlined in this brief, the Law Division's grant of summary judgment was based on its misunderstanding and misapplication of law, *see* Point I; its improper findings based on comments newly and improperly raised in a reply brief; *see* Point II; and its mis-framing of issues, *see* Point III. Because the Law Division misapprehended the law and improperly applied it, this Court should reverse and remand for trial.

CONCLUSION

For the foregoing reasons, this Court should reverse the Order in favor of Veolia, and remand to the Law Division for a trial on the merits.

Respectfully submitted,

LYNCH LAW FIRM, P.C.
Attorneys for Plaintiff/Appellant
Ari Ganchrow

By: /s/ Joseph M. Cerra
Joseph M. Cerra

Dated: March 25, 2025

Ari Ganchrow, Plaintiff/Appellant, v. SUEZ, SUEZ Water New Jersey, Inc., Veolia Water Technologies & Solutions, Township of Teaneck, John Do 1-10 and ABC/XYZ Company names being fictitious for persons and/or entities unknown at this time), Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APPELLATE NO. A-000813-24T2 Civil Action ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY LAW DIVISION: Bergen COUNTY DOCKET NO. BER-L-5437-22 SAT BELOW: Hon. Anthony R. Suarez, J.S.C.

BRIEF IN OPPOSITION TO PLAINTIFF/APPELLANT'S APPEAL OF ORDER GRANTING DEFENDANT/RESPONDENT, VEOLIA WATER NEW JERSEY, INC.'S, MOTION FOR SUMMARY JUDGMENT

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Preliminary Statement

Defendant/Respondent, Veolia Water New Jersey, Inc., formerly known as SUEZ Water New Jersey Inc. and incorrectly pled as SUEZ, and also incorrectly pled as Veolia Water Technologies & Solutions ("Veolia"), respectfully submits this brief in opposition to the Plaintiff/Appellant Ari Ganchrow's ("Plaintiff") appeal from an order granting Veolia's motion for summary judgment. Veolia incorporates by reference the arguments set forth in its moving papers and exhibits to the trial court. It is respectfully requested that the appeal be denied in its entirety because the order of the Honorable Anthony R. Suarez, J.S.C. was well founded, the determinations were well within the discretion of the trial court, and there is no reversible error.

In granting summary judgment in favor of Veolia, Judge Suarez held as follows:

- Expert opinion is necessary to establish the standard of care as to Veolia as the field of utility operations requires the kind of specialized technical knowledge that is beyond the ordinary knowledge and experience of the average person and not common knowledge.
- Plaintiff has no liability expert and has not identified any industry standards governing the duties of a regulated, public water utility with regard to any conduct for which he seeks to hold Veolia liable.
- The issue is not whether the intersection was salted, as it was by the Township of Teaneck ("Teaneck") two hours before the alleged accident, but whether the salting was adequate.

- Plaintiff does not have an expert to establish the standards and procedures relating to salting operations.
- Plaintiff has not identified a liability expert and has not produced a liability expert report. Having failed to disclose a qualified expert's opinion, Plaintiff cannot establish the essential elements of negligence; a duty, breach of that duty, and proximate cause.
- Jurors do not have experience with emergency water main break repairs.
- Veolia did not have actual or constructive notice of an icy condition at the Hudson-Grenville intersection.
- Teaneck had notice of ice on Grenville Avenue and sent its Department of Public Works to salt Grenville.
- Veolia did not owe Plaintiff a duty of care because Veolia did not own, control, or maintain the roadway where Plaintiff allegedly fell.
- Plaintiff has not offered any competent evidence to dispute the fact that Veolia did not have actual or constructive notice of the hazardous condition.

Judge Suarez's decision to grant summary judgment was based upon all the facts submitted in the moving and opposing papers in accordance with R.4:46-1. The trial court's decision was correct, and within his discretion. The motion record and transcript of Judge Suarez's rulings reflect that he carefully considered the arguments presented by Plaintiff and found them unsupported by the record.

It is undisputed that Plaintiff did not produce an expert report for liability. It is undisputed that Teaneck had the duty to maintain the roadway,

was notified of an icy condition on the roadway, and dispatched its DPW salting crew to salt the Hudson-Grenville intersection at 9:00 A.M., more than two hours before Plaintiff's alleged accident. It is also undisputed that Veolia did not have notice of a hazardous condition at that intersection prior to January 15, 2022.

It is unclear what Plaintiff is arguing in his appeal.

- Plaintiff cannot argue that Veolia did not promptly respond to the main break.
- Plaintiff cannot argue that Veolia did not take immediate action to protect the roadway while it repaired the main.
- Plaintiff cannot argue that Teaneck failed to salt the roadway.
- Plaintiff cannot argue that the roadway was not salted for an unreasonable time frame.
- The roadway was salted at 9:15 A.M., two hours before the accident.
- Plaintiff cannot argue that the roadway was inadequately salted prior to his accident because he has no memory of where he fell or what the condition looked like.

Judge Suarez's decision to grant summary judgment included consideration of the parties' depositions, parties' answers to interrogatories, Veolia's records and Plaintiff's references to unauthenticated images of the alleged accident location. A review of the record before Judge Suarez, and his application of the governing court rules and case law confirm that summary judgment was properly granted.

Procedural History

This case arises out of an alleged slip and fall on ice. There is no evidence in the record that reflects the condition that caused Plaintiff to allegedly fall. Plaintiff testified that he did not remember the accident, and the only known photographs of the accident location were taken the next day by his wife, without him identifying where he fell.

The incident occurred on January 15, 2022 in the street at the intersection of Hudson Road ("Hudson") and Grenville Avenue ("Grenville") in Teaneck. (Pa103) Plaintiff alleges that, at 11:30 A. M. on his way home from morning services at Temple, he slipped and fell on ice. The ice had formed at the Hudson-Grenville intersection from water that escaped from a spontaneous break in an underground water main during the evening of January 14, 2022. (Pa103) The underground water main broke beneath the roadway at the intersection of Grenville and Wellington Circle ("Wellington"). According to Plaintiff's "water flow path expert," Engineer-In-Training Harry Dales, the distance between the main break and the Hudson-Grenville intersection is 600 feet. (Pa321)

Plaintiff brought this action in a three-count Amended Complaint against Veolia and Teaneck filed on January 10, 2023. (Pa103-108)

The First Count is directed at Veolia. Plaintiff asserts that Veolia owned, managed, and controlled the water pipelines and water main located beneath Grenville and Wellington. Plaintiff alleges that, in the evening of January 14, 2022, a water main or pipe owned by Veolia burst, causing water to flow down Grenville. Plaintiff further alleges that "on information and belief" Veolia knew that its water pipes and main were old and had not been maintained. (Pa103-108) Plaintiff further alleges that, on the evening of January 14, Veolia dispatched a crew of employees to repair a broken water main in the vicinity of Grenville and Wellington. (Pa103-108) According to the Amended Complaint, Veolia's employees negligently failed to salt the road, allowing the water which had escaped from the broken water main to freeze overnight. The Amended Complaint conveniently omitted the fact that he did not fall near Grenville and Wellington. The Amended Complaint also failed to mention that Teaneck had salted the Hudson-Greville intersection two hours before he allegedly slipped and fell. (Pa103-108)

The Second Count is directed at Teaneck. Plaintiff alleges that Teaneck knew of the dangerous condition and owed a duty of care to Plaintiff to remedy the dangerous condition by notifying Veolia of the existence of water and ice and demanding that Veolia remedy the condition. Plaintiff further alleges that Teaneck owed a duty of care to remedy the icy condition itself and

to warn Plaintiff of the dangerous condition. Plaintiff alleges that Teaneck breached those duties and therefore was negligent. (Pa103-108)

Veolia filed its Answer to the Amended Complaint on January 12, 2023. (Pa111-118)

Plaintiff did not produce a liability expert, or an expert to opine that the salting done was inadequate. (Pa344-345) Instead, Plaintiff produced a "water flow" report prepared by Engineer-In-Training Harry Dales. (Pa317-342) Mr. Dales is not a licensed Professional Engineer. (Pa346)

Based on the evidence produced by Plaintiff during discovery, on August 16, 2024, Veolia moved for summary judgment. Plaintiff's opposition to the motion for summary judgment was set forth in four point headings: "No expert witness is required to explain Ganchrow's simple liability theory to a jury"; "Fanning v. Township of Montclair and the other cited cases do not support Veolia's expert witnesses necessity argument"; "Jacobs v. Jersey Central Power & Light Company dispenses with Veolia's expert requirement argument"; and "Ganchrow has established by a preponderance of the evidence a *prima facie* negligence case against Veolia."

On October 24, 2024, Judge Suarez granted Veolia's motion for summary judgment on the grounds that:

- Any allegation of negligence as to Veolia must be supported by expert opinion. New Jersey law mandates that expert

testimony be provided to establish the standards governing the conduct of water utilities in the context of allegations of negligence. Fanning v. Town of Montclair, 81 N.J. Super. 481 (App. Div. 1963). (Pa15)

- To prove its allegations of negligence, Plaintiff must have an expert. Plaintiff has no liability expert and has not identified any industry standards governing the duties of a regulated, public water utility with regard to any of the conduct for which he seeks to hold Veolia liable. Having failed to disclose a qualified expert's opinion, Plaintiff cannot establish the essential elements of the tort of negligence, duty and breach of that duty. (Pa8-10,13)

- Veolia did not have actual or constructive notice of an icy condition at the Hudson-Grenville intersection. Plaintiff has not submitted an expert report in this regard. A rational jury could not draw from the evidence that Veolia had actual or constructive notice of the allegedly defective dangerous condition. (Pa9, Pa18-20)

- There is no credible evidence that would allow a rational fact finder to infer that Veolia owed or breached a duty to Plaintiff. (Pa23);

- Plaintiff has not produced an expert report. Without an expert Plaintiff cannot establish a *prima facie* case and, therefore, summary judgment should be entered in favor of Veolia. (Pa8-10).

Plaintiff is appealing from the following order:

- Judge Suarez's Order of October 24, 2024, granting Veolia's motion for summary judgment.(Pa1-2)

Counter-Statement Of Facts

A. Veolia Water New Jersey, Inc.

Veolia is a privately-owned, regulated water utility company providing water service to over 750,000 customers primarily in Bergen and Hudson Counties, New Jersey. Veolia is regulated by the New Jersey Board of Public Utilities ("NJBPU"). The NJBPU is a regulatory authority with a statutory mandate to ensure safe, adequate, and proper utility services at reasonable rates for customers in New Jersey. See N.J.S.A. 48:2-25(a). Veolia's obligations to its customers are set forth in its Tariff ("Tariff"), which is approved by and filed with the NJBPU pursuant to N.J.A.C. 14:3-1.3. A water utility's services and systems are regulated by Title 14, Chapter 9 of the N.J.A.C. Under Chapter 9, there are ten sub-chapters that include water supply, water distribution, and plant operations. The purpose of the Tariff, and the laws enacted by the Legislature under the N.J.A.C., is to establish a regulatory framework for, among other things, the usage of water utilities by Veolia's customers.

The complexity of the technical and specialized knowledge of utilities is self-evident due to the intricacies of delivering water service to commercial and residential customers throughout the state. This is underscored by the fact that Veolia is regulated by the NJBPU.

Veolia owns and operates the water distribution system in Teaneck. The water system's primary purpose is to deliver potable water to Veolia's customers. The New Jersey Department of Environmental Protection ("NJDEP") regulates and oversees all water distribution systems. The NJDEP requires the operators of water distribution systems, including water treatment, to be licensed. (See N.J.S.A. 58:11-64 to 58:11-73 "Water Supply and Waster Operators Licensing Act"; N.J.A.C. 7:10A "Rules and Regulations Governing the Licensing of Water Supply Treatment System Operators.")

Veolia's water distribution system provides potable water to its customers through a subterranean water system. In Veolia's water distribution system, water is delivered from Veolia's reservoirs to its treatment plant through a pumping station, which, in turn, increases water pressure to deliver the water through its underground water mains. These underground mains are located several feet beneath the streets throughout Veolia's service territory. The mains are accessed by Veolia through valves located in the roadway. Water is delivered from the main to the customer's property through a service pipe that is connected to the customer's premises through a curb box. The curb box contains a valve attached to the service pipe at the curb, for turning on and shutting off water in emergencies or for purposes of repairs. The curb box is under the sidewalk. Attached to the curb box is an underground connecting

pipe that delivers the water to the customer's property. The top of the vertical pipe is at street level and is covered by a lid.

At 10:22 P.M. on January 14, 2022, the Teaneck Police Department notified Veolia by phone of a leak in the roadway near 517 Grenville Avenue.(Pa184, Pa198) According to Mapquests.com, 517 Grenville Avenue is approximately 450 feet from the Hudson-Grenville intersection. Plaintiff's "water flow path expert" estimated the distance as 600 feet. Veolia started its repair work at 11:00 P.M. on January 14, and concluded the repair of the leaking main at 5:32 A.M. on January 15, 2022. (PA198) Mark out requests were sent to NJ-One Call at 12:02 A.M., for the repair work on the underground water main, and at 12:05 A.M., for the paving and restoration work. (Pa188) Traffic control was requested by Veolia and provided by the Teaneck Police Department. (Pa269) At 12:13 A.M. on January 15, Veolia Inspector Timothy Leahy was dispatched to the location, and conducted a leak investigation. (Pa198-199) Inspector Leahy scanned the area and used a ground mic to pinpoint the leak on the underground 6-inch main. (Pa198-199, Pa255-257) Inspector Leahy isolated the leak by shutting down valves at 12:13 A.M. (Pa255-257) The main was placed out of service at 3:24 A.M. (Pa198-199) The matter was then referred to Veolia's Construction Department. (Pa198-199)

A Veolia construction crew, led by John Puzio, the construction foreman on site at the main repair, excavated around the underground water main, performed the repairs, and backfilled the trench.(Pa198-199) Mr. Puzio's crew salted the area in the vicinity of the main break on Wellington Circle. (Pa448) Mr. Puzio testified that Veolia repair trucks carry salt on them to address water in the vicinity of the repair for the safety of the crew. (Pa448) "We salted the area where we worked." (Pa448) Since Veolia's work was concluded at 5:32 A.M., the Teaneck Police Department's traffic control concluded around the same time.

Veolia was not aware of any prior issues with the main at this location, and it did not have notice of an icy condition at the Hudson – Grenville intersection during or after its repairs. (Pa298, 309)

Teaneck's Police Department provided traffic control services during Veolia's work. Veolia paid for the traffic control services. The Teaneck Police Department subsequently notified Teaneck's Department of Public Works ("DPW") of ice in the roadway at the Hudson - Grenville intersection. (Pa278)

Teaneck Ordinance, Article XIV Department of Public Works, Sec. 2-81 Division of Street Services; functions, states:

> Within the Department of Public Works, there may be a Division of Street Services, whose functions, in conjunction with the Township Engineer (who shall be in charge if the law so requires) shall be to:

> (a) Maintain all Township streets in a clean and safe condition for travel, free of obstructions and hazards, and remove leaves, snow and ice therefrom as required. [Ord. No. 3158, 7-26-1988, § 2-14.4; amended by Ord. No. 3162, 8-9-1988, § 10]

The DPW dispatched Assistant Supervisor Frank Spector to salt the roadway at the Hudson – Grenville intersection. (Pa282-284) The DPW overtime sheet for Mr. Spector reflects that, on January 15, 2022, he commenced his salting operation at 9:00 A.M. and ended at 9:21 A.M. (Pa277-278) Mr. Spector testified that he made two passes with the salt truck and spread the salt and calcium chloride on the roadway at the Hudson – Grenville intersection. (Pa284) Mr. Spector testified that he did not see any ice at the location of the main break at Wellington Circle. (Pa287) Mr. Spector admitted that it is Teaneck's job to remove and remediate ice from its streets for safe travel. (Pa288) He further admitted his job was to salt the roadway. (Pa288) Moreover, he admitted he did not notify Veolia that his salting operation had concluded. (Pa288)

Significantly, Mr. Spector testified that the conditions depicted in photographs taken by Plaintiff's wife on January 16, 2022 did not reflect the condition of the intersection at the time he salted.

In the Appellant Brief's "Statement of Facts," Plaintiff writes, "At approximately 10 p.m. on Saturday, March (sic) 14, Veolia was notified by Teaneck that their water main that they controlled located at Grenville Avenue and Wellington Circle had broken and water was spreading down Grenville Avenue." (Pa256 deposition of Tim Leahy, 11:9-16; Pa185-251 (Veolia's Work Orders)). Accordingly, by these facts or least the reasonable inference from these facts, Veolia knew that its water was flowing downhill on Grenville, toward Hudson Road. (Pa256, deposition of Tim Leahy, 11:9-16; Pa185-251 (Veolia's Work Orders))." (Pb5-6)

This is an incorrect and misleading summary of Inspector Leahy's deposition testimony and the Work Order. Inspector Leahy testified as follows:

> Q: Now having been corrected, does this mean Mr. Biner received some kind of notation at or around 10 after 10 on January 14, 2022, that there was a leak on Grenville Avenue from the water main?
>
> A: Yeah. It is what it appears in the work order. Like I said, I don't know for sure what that would entail." (Pa256).

This is a misrepresentation of the record, and is the predicate falsehood on which Plaintiff bases his entire argument that Veolia had notice of "cascading water" from the main to Hudson Avenue. Likewise, the Work

Orders do not reflect that Veolia was aware or received notice that water was "flowing down hill on Grenville." (Pa198-199).

In addition, Plaintiff argues that "Veolia as the owner of a salting truck should have been used in this scenario." Veolia's salting truck is used to salt main break locations in matters where a repair/construction crew is unable to promptly respond to a main break to salt the area around the location of the main break. It is not used for roadway salting operations beyond the immediate area being worked on by Veolia crews.

Veolia Superintendent of Planning and Systems Office Deirdre O'Shea testified that Veolia has two employees whose job responsibilities include using the salting truck in certain circumstances to treat the areas around water main breaks in the winter. (Pa270) Ms. O'Shea testified that Veolia's procedures call for the salt truck to be used to salt areas immediately adjacent to a main break when the construction/repair crews are delayed from immediately reaching the main break location. (Pa267-268)

Ms. O' Shea testified that, during the winter, Veolia repair crews carry salt to salt the area adjacent to the main break. (Pa267-268) If the construction crew is delayed, the salt truck will be dispatched to salt the immediate area of the main break. (Pa267-268) In this matter, the repair crew responded

immediately and, therefore, it was not necessary to dispatch the salt truck as the crew had arrived and salted the main break location. (Pa267-268)

In his answers to Form A Interrogatories, Plaintiff provided the following narrative: "The following answer is based on Plaintiff's limited memory of the events before the incident, the information counsel has acquired since the incident and inferences drawn from these facts: On January 15, 2022, as Plaintiff, Ari Ganchrow was walking east on Grenville Avenue, he slipped and fell on ice, on the street at the intersection of Hudson Road." (Pa165)

In his answers to Veolia's Supplemental Interrogatories, Plaintiff stated:

> "Veolia was informed that its water main ruptured the day before the incident causing water to spread on Grenville Road (sic) in freezing conditions. Upon information and belief, Veolia failed to salt the ice, clear the ice that had formed on Grenville Road (sic) and or failed to close Grenville Road (sic) that developed as a result of the water main rupture." (Pa175)

Plaintiff does not assert that Veolia had notice of an icy condition at the Hudson – Grenville intersection.

In his answers to Teaneck's Supplemental Interrogatories, Plaintiff stated: "Plaintiff recalls leaving his house that morning to attend Synagogue. Thereafter, Plaintiff has learned that he slipped and fell on ice while walking home from Synagogue on Grenville Avenue as it intersects with Hastings". (Pa179)

Plaintiff admitted that the accident occurred at approximately 11:30 A.M. (Pa80)

At his deposition, Plaintiff admitted that, on the morning of January 15, 2022, he walked to Temple Bnai Yeshurun ("Temple"), 641 West Englewood Avenue, Teaneck. Plaintiff has lived at 1308 Hastings Street for 25 years. He has been attending Temple for 25 years. He recalled that he arrived at Temple by 8:30 A.M. to attend high services.

Plaintiff has no memory of the icy condition. (Pa511-512) Plaintiff admitted that the route he walked to Temple took him down Hastings Street, making a left onto Grenville, and then a right onto Hudson Road. (Pa511-512) Plaintiff admitted that he would have seen the icy conditions in the roadway. (Pa511-512) Plaintiff admitted that he chose to walk through the Hudson – Grenville intersection despite its alleged icy condition. (Pa512) At his deposition, Plaintiff testified as follows:

> Q: So instead of taking other routes where there was no ice, you chose to walk through the area where there was an icy hazardous condition. Correct?
>
> A: Correct. (Pa512)

Plaintiff admitted that he was unaware of any eyewitnesses to the accident. (Pa168, Pa512)

It is undisputed that Plaintiff has no recollection of the events after he left Temple. (Pa511-513) It is undisputed that Plaintiff cannot identify where he fell. (Pa511-513) He was not treated by an ambulance crew at the accident location. In his Appellate Brief, Plaintiff incorrectly states, "Four fellow synagogue members came upon Ganchrow and attended him until an ambulance arrived." (Pb6) This is inaccurate. After he fell, Plaintiff went home with no memory as to how he arrived there. An ambulance never arrived at the accident location. (Pa513) At his deposition, Plaintiff testified as follows:

> Q: Did they call an ambulance?
>
> A: I was told that they called my – my internist, Dr. Wertenteil who lives two doors down from me to come over.
>
> Q: The boys called your doctor? A: yes, (Pa513) How did the boys know that he's your doctor?
>
> A: No, no, no. My wife told them to go get my doctor—who lives two houses-down—when they brought me to the house." (Pa513)

Plaintiff further testified that all of his information is based on what was told to him later and he has no recollection of the events. (Pa513). Plaintiff cannot even identify where he fell. (Pa524) Plaintiff cannot identify the specific allegedly dangerous condition which he claims caused him to slip and fall. (Pa524-525) He does not recall what the intersection looked like when he walked to Temple.

Because he has no recollection of the accident, Plaintiff cannot articulate what the condition looked like at the time of his fall. He cannot describe what it looked like or that it even existed. Photographs of the Hudson-Grenville intersection were not taken until the day after the accident, and were taken by Plaintiff's wife who was not present at the time and place of Plaintiff's fall. (Pa524-526) The one person who saw the intersection on the day of the accident, Mr. Spector, testified that the photographs did not accurately depict what the intersection looked like when he salted. In short, Plaintiff does not know where he fell, what the condition looked like, when the condition was created, or how long the condition existed. (Pa291-292) Significantly, the record before Judge Suarez did not include any evidence to show that the condition at the time of the alleged accident was in fact "hazardous."

B. Plaintiff's Allegations

Plaintiff alleges that, on and before January 15, Veolia knew or should have known of the dangerous condition at issue. Plaintiff further alleges Veolia had a duty to:

- Maintain safe water pipes and water mains and to inspect the water pipes and main;
- Fix and remediate any dangerous conditions;
- Warn him of dangerous conditions;

- To otherwise conduct its business and manage its infrastructure in a way that rendered it safe for Plaintiff.

Stripped of the hyperbole, and unnecessary repetition, Plaintiff's claims are as follows:

- Veolia knew that its water main located beneath Grenville Avenue and Wellington Circle, 600 feet from Grenville and Hudson Road had ruptured.
- Veolia knew that water was "cascading" down Grenville Avenue.
- Veolia had its repair crew on site to repair the water main.
- Veolia knew the temperature was below freezing.
- Veolia has a salt truck.
- Veolia did not apply salt to the Grenville-Hudson intersection.
- Shortly after Veolia completed its work, the Teaneck Police, recognizing the treacherous condition Veolia left behind, notified the Teaneck DPW to salt the road.

Boiled down to its basics, Plaintiff's theory of liability is that Veolia should have known water was flowing down Grenville Avenue towards Hudson Road, Veolia should have followed the path of the water from the location of the break to the Hudson – Grenville intersection, over 500 feet away, and either while Veolia was repairing the underground water main, or before or after, it should have seen the water pooling at the Hudson-Grenville intersection, and should have applied enough salt along the path of the water

and at the Hudson-Grenville intersection such that no ice would have formed. This theory is not supported by expert opinion, basic chemistry or even common sense.

Plaintiff's argument ignores the undisputed fact that the Teaneck DPW salted the roadway at the Hudson-Grenville intersection between 9:00 A. M. and 9:21 A. M. on January 15 - two and half (2 ½) hours before Plaintiff walked into the intersection. (Pa283-284)

Essentially, Plaintiff's position is that Veolia had a duty, separate from that of the Teaneck, to spread salt on Teaneck's streets. That position has no merit.

Legal Argument

I. Summary Judgment Was Properly Granted

A. Standard Of Review

The standard for review for a summary judgment motion is on a *plenary de novo* basis. The Estate of Nick Hanges v. Metropolitan Property, 202 N.J 369 at 384 (2010). In reviewing the grant or denial of summary judgment, the Appellate Division applies the same standard which governs the trial court under Rule 4:46-2(c). Perrelli v. Pastorelle, 206 N.J. 193, 199 (2011); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 539-40 (1995). Summary

judgment is granted where the record demonstrates "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); Henry v. Dep't of Human Services. 204 N.J. 320, 329-30 (2010). In determining whether there is a genuine issue of fact, the threshold issue is whether "the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, *supra*, at 540.

An appellate court defers to a trial court's evidentiary ruling absent an abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021). Appellate Courts "Review the trial court's evidentiary ruling 'under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion.'" State v. Prall, 231 N.J. 57, 590 (2018), quoting Est. of Hanges v. Metro Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010). Appellate courts apply a deferential standard in reviewing factual findings by a judge. Balducci v. Cige, 240 N.J. 574, 595 (2020). "A reviewing court must accept the factual findings of a trial court that are 'supported by sufficient credible evidence on the record.'" State v. Mohammed, 226 N.J. 71, 88 (2016) quoting State v. Gamble, 218 N.J. 412, 424 (2014)). "Reviewing appellate courts should not 'disturb the factual

findings and legal conclusions of the trial judge' unless convinced that those findings and conclusions were not manifestly unsupported by or inconsistent with the competent, relevant and reasonable credible evidence as to offend the interests of justice.'" Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015), quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am, 65 N.J. 474, 484 (1974).

The Appellate Division must review the facts in in a light most favorable to the non-moving party, "keeping in mind 'an issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion would require submission to the trier of facts.'" Schiavo v. Marina Dist. Dev. Co., LLC 442 N.J. Super 346, 366 (App. Div. 2015)(alteration in original) quoting R:4:46-2). A motion for summary judgment will not be defeated by bare conclusions lacking factual support. Petersen v. Twp. of Raritan, 418 N.J. Super 125, 132 (App. Div. 2011), self-serving statements unsupported by legally competent evidence, Heyert v. Taddese, 431 N.J. Super 388, 413-14 (App. Div. 2013), or disputed facts of an insubstantial nature. Pressler & Verniero, Current N.J. Court Rules, comment 2.1 on R.4:46-2 at 1519 (2024). "It is evidence that must be relied upon to establish a genuine issue of fact. 'Comptetent opposition requires "competent evidential, material beyond mere "speculation" and "fanciful arguments""

Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) quoting Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 425-26 (App. Div. 2009)

B. Judge Suarez Correctly Granted Summary Judgment

1. Expert opinion is necessary to establish the standard of care as to Veolia as the field of utility operations requires the kind of specialized technical knowledge that is beyond the ordinary knowledge and experience of the average person and not common knowledge.

Plaintiff's argument is a repetitive iteration of his position that expert testimony is not required to explain his "simple liability theory to the jury." It is well established that expert testimony is required to support allegations that pertain to the maintenance and testing of public water utilities. Fanning v. Town of Montclair, 81 N.J. Super. 481 (App. Div. 1963. The Appellate Division in Fanning rejected the plaintiff's theory of negligence against a water company based on the plaintiff's failure to retain an expert to establish a generally accepted standard to which the water company should be held. In Fanning, the defendant municipality's water main broke, which resulted in water damage to the plaintiff's property, flooding the basement of her house. The plaintiff's theory of negligence was that the defendant municipality failed to make periodic inspections and tests of its water mains. The Appellate

Division ruled in favor of the defendant municipality holding that the defendant municipality's alleged failure to examine or test its water mains must be related to some standard of care of feasibility. Id. at 486. Plaintiff did not produce any expert testimony to show what other kinds of examinations or tests of the water mains could and should have been made. Id. The Appellate Division noted that "[g]eneral statements as to the defendant municipality's duty to maintain its water system, and its duty to make periodic examinations and tests are not meaningful without a specification of some generally accepted standard to which defendant should be held." Id. at 486-487. Given the absence of an expert opinion, the Appellate Division rejected the plaintiff's theory of liability.

In this matter, Plaintiff is making general allegations without a specification of a generally accepted standard to which Veolia should be held. In its brief for summary judgment, Veolia cited to several cases which follow this holding. The cases cited by Veolia involved water pressure, construction, and maintenance of underground assets.

According to Plaintiff, no expert is needed in this matter. Plaintiff argues,

> "The average juror would easily understand that if a water company's pipe burst, causing water to flow down a residential road in freezing conditions, and the water company is aware of these facts and can readily do something to prevent the danger,

> then the water company must apply salt to prevent ice from forming. Jurors come into court already knowing that water freezes into ice when it is cold outside, that salt prevents ice, and the ice on the roads are dangerous." (Pb20)

This statement demonstrates Plaintiff's ignorance regarding the complexity of Veolia's water utility operations. The operations that bring water to hundreds of thousands of residences and businesses are regulated by the NJBPU and the NJDEP. The underground asset that spontaneously ruptured was not a "pipe." It was a 6-inch underground water main, part of a complex system of reservoirs, treatment plants, water mains, service lines and many kinds of valves which provide potable water to Veolia's customers in Teaneck.

Plaintiff argues that expert testimony is not required in this case, and the matter is within the purview of the ordinary juror. This argument is not supported by New Jersey case law.

The summary dismissal of a plaintiff's complaint against a water utility in the absence of expert opinion was affirmed by the Appellate Division in the unpublished decisions Funari v. American Water Works Service Co. and New Jersey American Water, (App. Div. 2013 N.J. Super. Unpub. Lexis 1352) (Pa391-395); Papaiya v. North Hudson Regional Fire Rescue, Gavidia and United Water Company, (App. Div. 2015 N.J. Super. Unpub. Lexis 2490)(Pa395-402); Colon v. City of Hoboken and United Water Company,

(App. Div. 2016 Unpub. Lexis 1827) (Pa402-409) and Prestol v. Henpal Realty Associates, Docket No. A-0633-19) (Pa409-418). The fact that people know that water freezes, salt can melt ice, and they may salt their own driveway, does not equate to knowledge and understanding of water utility operations in general, or water main repair procedures specifically. Jurors do not have experience with underground water main breaks or with emergency main break repairs. Jurors do not have experience with the procedures involved in identifying a main break, ordering traffic control, locating the valves needed to isolate the break, shutting down a water main, notifying the local fire department if any hydrants will be out of service, complying with the One Call Law and obtaining mark out of all utilities in the area to be excavated, excavating a trench around the break in order to repair the main, compliance with worker safety procedures and practices to ensure safety in and around the trench, the amount of time it takes to prepared for and complete repairs, the factors that can affect the preparation and completion of repairs, proper staffing and the number of crew members appropriate to prepare for and complete repairs the main, and the post-repair reporting, testing, and re-energizing the main, service lines and fire hydrants. These are not matters of common knowledge and experience.

Without an expert to explain how, when and why Veolia should have known about the condition, and what it should have done in response, the conclusion that Veolia had a duty, breached that duty, and proximately caused Plaintiff to fall, is pure and unadulterated speculation.

Plaintiff does not cite a single case holding that expert testimony is not needed when alleging negligence as to a water utility operation.

As stated, according to Plaintiff's "theory", if Veolia had conducted an inspection of the path of the water from the repair location to the Hudson-Grenville intersection several hundred feet away, it would have discovered water pooling at the intersection and, presumably, would have applied enough salt to either prevent or remediate the condition before Plaintiff walked through it at 11:30 A. M. on January 15. Plaintiff has not set forth the details of any such theoretical inspection. When that inspection should have occurred, how much time would have been needed to conduct the inspection, what were the conditions of the storm sewers along the path, how much salt was needed to raise the freezing point of the water, how much salt is appropriate once water has frozen, what amount of salt would have remediated the alleged condition, and most critically, whether Veolia had an obligation to maintain the salting operation to remediate the area.

Plaintiff needs an expert to opine that Veolia had a duty and violated that duty. Furthermore, Plaintiff has not set forth any evidence that the DPW did not apply enough salt, or an incorrect salting composition, or that the DPW's actions did not break the chain of causation.

As already discussed, water utility's services and systems are regulated by Title 14, Chapter 9 of the N.J.A.C. Chapter 9 consists of ten sub-chapters that include water supply, water distribution, and plant operations. For example, Veolia's duty to inspect its water valves is set forth in and N.J.A.C. 14:9-2.2, styled "Inspections of Property and N.J.S.A. 58:31-3, styled "Inspections, Testing by Water Purveyor."

Plaintiff does not cite any rule, regulation or other authority that addresses a standard for salting operations for a water utility engaged in the winter repair of a broken water main. The operations of a water utility are not within the purview of the average person. Plaintiff has not provided a basis in fact or law that supports the speculative assertion that Veolia had and breached a duty to inspect the roadway for over 600 feet from the main break, and then further breached a duty by failing to "throw salt" on Grenville Avenue.

Plaintiff's failure to obtain liability expert opinion is fatal to his case. Fanning specifically holds that the standard of care can only be established through a qualified expert in water utilities. Id. There is no such expert opinion

in this case. Veolia is a water utility. It is not a snow and ice remediation company. Any ice or snow remediation is incidental to Veolia's purpose which is to provide potable water to its customers through its water delivery system.

In granting summary judgment, Judge Suarez stated:

> "Plaintiff's failure to obtain liability expert is fatal to his case. Fanning specifically holds that the standard of care can only be established through a qualified expert in water utilities. Id. There is no such expert opinion in this case. Further, there is no genuine issue of material fact that Veolia had notice of an icy condition at the intersection of Grenville and Hudson. There is no evidence in the record of ice forming on Grenville between the main break at Wellington Circle and a distance of 600 feet to Hudson Road."

Plaintiff's theory is that Veolia's main break caused water to cascade down a hill for five hours, and that Veolia had a duty to inspect the roadway and apply salt to the roadway in order to remediate the condition.

In granting summary judgment in favor of Veolia, Judge Suarez stated:

> "Plaintiff's allegations that Veolia deviated from some unidentified standard governing the water utility industry are not supported by expert opinion. The standards and practices of water utilities with respect to inspection and maintenance of a water distribution system are clearly not matters of common knowledge. Neither are the means and methods of water main repairs, or what should be done when emergency repairs are required in the middle of the night in below freezing temperature."

Judge Suarez further held that Plaintiff does not have an expert opinion to establish the standards and procedures relating to salting operations.

Judge Suarez recognized that Veolia's salting truck is dispatched to a location when the repair crew is unable to immediately respond to the main break location. Judge Suarez noted that, in this case, a construction crew was immediately dispatched to the Wellington Circle main break, and therefore there was no need to dispatch the salting truck.

Judge Suarez's analysis is correct. Plaintiff's allegations are general statements of negligence against Veolia. Fanning specifically states that allegations against a water utility are not meaningful without a specification of some generally accepted standard to which it should be held.

Judge Suarez correctly applied Fanning to this matter. The significance of Fanning is that in matters involving water utility operations, Plaintiff is required to support general allegations of negligence with an expert opinion. Plaintiff creates a false analogy by arguing that Veolia believes its entitled to "special status" and that Veolia's employees, involved in a car accident while operating a Veolia vehicle within the scope of their employment, would mandate a liability expert. This is an absurd argument and a false equivalent. Judge Suarez's decision was reasonable and within his discretion.

2. Jacobs v. Jersey Central Power & Light Company, 452 N.J. Super (App. Div. 1997) is Not Applicable

Judge Suarez's correctly decided that Jacobs v. Jersey Central Power & Light Company, 452 N.J. Super (App. Div. 1997) is distinguishable from this matter and, therefore, not applicable. Appellant argues that "New Jersey precedent establishes that a jury can determine if the actions of a public utility breached a standard of care, without benefit of a utility expert, when the negligence concerns a simple act or omission not related to the utilities regulated activities and which matter is readily understandable to a common jury". Jacobs v. Jersey Central Power & Light Company, 452 N.J. Super (App. Div. 1997)."

In Jacobs, the "condition" was a hole where a utility pole had been removed by JCP&L. In this matter, the "condition" is an alleged icy road condition 600 feet from where Veolia repaired the main.

In Jacobs, on April 21, 2012, the plaintiff and her boyfriend were returning to their home when they noticed a streetlight pole had fallen down on the corner of their property. Plaintiff reported the downed pole to the local police department. Id. The police informed JCP&L of the situation. Having received notice that its pole had fallen, on April 22, 2012, JCP&L's technician went to repair the pole and light fixture. Id. The fallen pole was removed leaving a hole in the ground. JCP&L's technician was unable to complete the

repairs. Id. He put wires in the hole and used some soil to cover the wires but he did not completely fill the hole. Id. The technician put a safety cone around the area of the hole. There was a dispute as to whether the area of the grass was marked with paint. According to the plaintiff's testimony, days after the technician left, the cone disappeared, and the paint faded. Id. Two months after the JCP&L technician left, the plaintiff stepped into the hole while she was retrieving her mail. A day after her accident, the JCP&L repair crew returned to perform the repairs. The JCP&L repair crew testified that the area was not marked out. Id

At trial, JCP&L moved for a directed verdict at the close of the plaintiff's case. The motion was denied. On appeal, JCP&L argued that the trial court should have issued a directed verdict for JCP&L as to liability because the plaintiff did not present a liability expert on utility industry standards. The Appellate Division agreed with the trial court and held as follows:

> In light of the testimony, the jury appropriately was asked to assess whether JCP&L acted reasonably with respect to the condition in which it left Plaintiff's property after removing the downed pole. The jury also appropriately was asked to ponder whether the time that elapsed until the condition was repaired- approximately two months- was reasonable. These are subjects within the common knowledge of lay persons and are capable of being decided by the jury without expert opinion. Id.

An underground water main break and repair completed over the course of several hours is not a downed light pole. A repair left incomplete for two months is not an icy condition salted within hours of the completion of repairs. In Jacobs, the essential element of the tort of negligence – duty - was not an issue. There was no dispute that JCP&L had notice of the fallen pole. JCP&L, once notified of the fallen pole, had a duty to fix it, and also had a duty to leave the condition of the plaintiff's property in a safe condition. Rather, the issue was whether JCP&L breached that duty by leaving the hole partially filled with wires and dirt for over two months. The issue for the jury was whether JCP&L's leaving the property in an unfinished condition with a partially filled hole for two months was reasonable. There is nothing remotely similar here.

Judge Suarez correctly held that "the facts of this matter are not on point with Jacobs." Judge Suarez noted the following distinctions:

1) Veolia did not have notice of any icy condition 600 feet away from the main repair.
2) Veolia ordered traffic control by the Teaneck Police at the outset of the repair
3) The intersection was salted by the DPW four hours after the main was repaired and two hours before the accident.

Judge Suarez also aptly noted that in Jacobs, the police notified JCP&L of the open hole created by JCP&L, that JCP&L responded but was unable to

complete the repair, did not return to complete the repair, and the hole continued to exist for over two months. Judge Suarez found that at no point did Teaneck notify Veolia of a hazardous condition at the Hudson-Grenville intersection. Judge Suarez found that there was a difference between a two-month interval and a few hours.

Judge Suarez made the common sense finding that Teaneck did not need to notify Veolia of a hazardous condition since it already had dispatched its DPW salting truck to salt the intersection. Judge Suarez noted that the Appellate Division in Jacobs reasoned that a jury could decide whether two months was an unreasonable time to allow a known hazardous condition to exist without fixing it. Judge Suarez further noted that, in this matter, Plaintiff was asking the court to allow a jury to decide if Veolia had a duty to conduct inspections of the roadway, how much of the roadway was to be inspected, if there was an independent duty to salt, when Veolia should have salted, why the salting conducted by Teaneck was not insufficient, and if Veolia breached that duty. Plaintiff has not set forth any standard upon which the Court could impose such a duty.

As stated, in Jacobs, the salient fact was that JCP&L did not repair a condition they knew about for over two months. In Jacobs, the Appellate Division reasoned that a jury could decide whether two months was an

unreasonable time to allow a known hazardous condition to exist without fixing it.

In his Appellate Brief, Plaintiff does not set forth any meritorious argument to support his contention that Judge Suarez erred in his analysis of Jacobs. Plaintiff simply states that "Veolia was negligent for failing to put down salt, to prevent imminent ice."

3. Judge Suarez Correctly Held That Veolia Did Not Owe Plaintiff A Duty and Plaintiff Failed To Prove That Veolia Had Notice Of A Hazardous Condition

Plaintiff has failed to present any evidence that Veolia had notice of the allegedly hazardous condition. Judge Suarez held, "[f]urther, there is no genuine issue of material fact that Veolia had notice of an icy condition at the intersection of Grenville and Hudson. There is no evidence in the record of ice forming on Grenville Avenue between main break at Wellington Circle and a distance of 600 feet to Hudson Road. Plaintiff argues that Veolia had notice of the condition at Hudson-Grenville."

Veolia did not own, control, or maintain the subject roadway. The roadway was owned by Teaneck, and by Ordinance Teaneck had the legal duty to maintain it free from ice and snow. There is no evidence in the record from which a jury could reasonably infer that Veolia had notice of the alleged icy

condition. Plaintiff has not set forth any evidence from which a jury could infer that Veolia had constructive notice of a hazardous condition at the Hudson-Grenville intersection. As discussed, Plaintiff has not produced authenticated photographs depicting the condition at the time of the accident. Plaintiff could not authenticate his wife's photographs of the area because he could not recall what the accident location looked like when he fell. Frank Spector, the DPW employee who salted the Hudson-Grenville intersection, testified that the photographs presented by Plaintiff did not accurately depict the condition of the roadway at the time he salted. However, even if Veolia had notice, nothing would have changed. Veolia would simply have notified Teaneck which, in turn, would have dispatched the DPW to salt the area, which is exactly what happened.

Plaintiff argues that the issue of notice does not apply to this matter because Veolia created the condition. As discussed, there are no facts to support that Veolia created the icy road condition because Plaintiff does not know what caused him to fall, or even where he fell.

The issue of notice is critical. It is hypocritical for Plaintiff to argue otherwise considering that Plaintiff cites to Jacobs, Mirza v. Fillmore Corp., 92 N.J. 390 at 395 (1983) and Craggan v. Ikea USA 332 N.J. Super. 53, 61 (App.

Div. 2000). These cases involve allegations of premise liability. Mirza, a premises liability case, stands for the proposition that, if commercial property owners have actual, or constructive notice of the condition, they have a duty to remediate the defective condition within a reasonable time.

According to Plaintiff, "lack of notice" is no defense for a defendant whose actions caused or contributed to the creation of the dangerous condition. To support this assertion, Plaintiff cites to Craggan v. Ikea USA, 332 N.J. Super. 53, 61 (App. Div. 2000). However, Craggan involved a "mode-of-operation" allegation. In this matter, Plaintiff is trying to expand the mode-of-operation doctrine. The mode-of-operation rule originated with slip and fall accidents in restaurants. Bozza v. Vornado, Inc., 42 N.J. 355, at 359-360 (1964), and was slightly broadened to include supermarkets and other self-service business models. Wollerman v. Grand Union Stores, 47 N.J. 426, at 428-430 (1966).

In Craggan, the plaintiff, an independent contractor delivering home furniture to customers pursuant to contracts with home delivery service companies, tripped and fell due to his feet getting entangled with string on defendant IKEA's loading dock. The purpose of the string was to assist customers in securing merchandise in the trunk or roof of their vehicles.

IKEA's representative testified that its contractor, USI, provided janitorial services to inspect and clean the customer loading area. IKEA moved for summary judgment on the grounds that it did not have actual or constructive notice of the string on the loading dock that day. The plaintiff argued that he was not required to provide notice of the condition because of the mode-of-operation selected by IKEA. The Appellate Division agreed. The Appellate Division held "since the advent and proliferation of self-service merchandisers, this State has recognized that, notice, actual or constructive, of a dangerous condition is not required when the shopkeeper, through acts or its agents or patrons, creates the dangerous condition." Craggan at 61.

This is not a "mode-of-operation" case. In Prioleau v. Kentucky Fried Chicken, Inc., 434 N.J. Super. 558 at 571 (App. Div. 2014) the Appellate Division clarified that "the mode-of-operation [doctrine] is not a general rule of premises liability, but [rather] a special application of foreseeability principles in recognition of the extraordinary risks that arise when a defendant chooses a customer self-service business model." *Id.* at 262. Principles which apply when a business allows customers to handle products and equipment, unsupervised by employees, due to the increased risk "that a dangerous condition will go undetected and that patrons will be injured." *Id.* While "the mode-of-operation doctrine has never been expanded beyond the self-service

setting," such a setting encompasses where customers "may come into direct contact with product displays, shelving, packaging and other aspects of the facility that may present a risk." *Id.* (citing Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563-66 (2003)).

Plaintiff's alleged accident does not qualify for the "limited circumstances" in which the mode-of-operation rule applies. Veolia's business model is not a customer self-service business. If the allegation is that Veolia created a hazardous condition on a public roadway, Veolia must have either actual or constructive notice of the condition, as well as a reasonable time to remediate or repair the condition.

There are no facts in the record from which a jury could infer that Veolia had constructive notice of the hazardous condition. Since Veolia did have notice of the condition, it had no duty to correct the condition.

4. Judge Suarez Correctly Held That Harry Dales' Report is a Net Opinion

Plaintiff argues that the trial court's finding that Mr. Dales' report was a net opinion was incorrect because Veolia did not raise it in its moving papers. This argument is without merit. Plaintiff refers to R.2:6-5 in support of this contention. However, R. 2:6-5 pertains to the Court Rules Governing

Appellate Practice and addresses appellate reply briefs. Plaintiff admits it does not specifically govern motions for summary judgment.

In its motion for summary judgment, Veolia set forth in its statement of undisputed facts that Mr. Dales did not render an opinion regarding liability. In its reply brief, Veolia addressed Mr. Dales' opinion as to water flow from the broken water main because it was raised by Plaintiff in opposition to Veolia's motion for summary judgment and is cited in paragraph 18 of his counter-statement of facts. (Pa428) Plaintiff relied upon Mr. Dales' report to in support of his contention that the Veolia main break was the source of the water that allegedly accumulated at the Hudson-Grenville intersection. Specifically, to support his argument that the water emanated from Veolia's main, and that Veolia had notice of the icy condition at the Hudson-Grenville intersection, Plaintiff argued, "[a]ccordingly, Ganchrow served Veolia with Harry Dales' expert report. Mr. Dales, an engineer, opined based on his calculations, that the water that froze on Grenville Avenue and Hudson emanated from Veolia's broken water main two blocks up the hill on Grenville Avenue and Wellington Circle."

Plaintiff raised Mr. Dale's report and conclusions in its opposition to try to influence Judge Suarez's decision. Since Plaintiff raised Mr. Dale's report and opinion in its opposition to Veolia's motion, it is only proper that Veolia

should be able to address the report and findings in its reply brief. Veolia simply pointed out to the trial court that Mr. Dale's calculations were based on the wrong water company's standards and were a net opinion.

Judge Suarez had the full record before him, including Mr. Dales' report and deposition transcript. This Court has before it the full evidentiary record, Judge Suarez's decision and, therefore, any evidence on the issue that is in the record can be considered. Scott v. Salerno, 297 N.J. Super 437, 447 (App. Div. 1997). Judge Suarez correctly opined that Rule 703 requires an expert to give the "why and wherefore" of his or her opinion rather than a mere conclusion. Polzo v. County of Essex, 196 N.J. 569, 583 (2008). An expert's testimony may be termed a "net opinion" when the data on which it is based is perceived as insufficient, unreliable, or contrary to the proponent's theory of the case. Gore v. Otis Elevator Co., 335 N.J. Super. 296, 303-304 (App. Div. 2000). Judge Suarez noted that Mr. Dales' opinions were not supported by facts, studies, models, or tests and were reliant upon a standard that does not apply to Veolia. Judge Suarez recognized the obvious, i.e., that Mr. Dales relied upon a standard that did not apply to Veolia, but rather to a New York water utility that operates in New York and is regulated by the New York Public Service Commission.

5. Plaintiff's Argument that, in the event of a Remand, Veolia Cannot Argue Teaneck's Actions caused Plaintiff's Injuries is Inappropriate and Not Proper for This Appeal

Plaintiff's argument that "Veolia Cannot Argue Teaneck's Actions caused Ganchrow's Injuries on Remand" is inappropriate and not proper for this appeal. Plaintiff makes a strange and inappropriate request of the Appellate Division to rule that because Teaneck was granted summary judgment on Veolia's cross-claims Veolia cannot argue on remand that Teaneck's actions caused the accident and Plaintiff's alleged injuries. If this matter were remanded to the Law Division, such an issue would be for the trial court to decide via a motion *in limine*. Essentially, Plaintiff contends that Veolia had a duty to spread salt on the roadway separate and apart from Teaneck's duty. Plaintiff offers no authority to support this assertion. As discussed, Plaintiff offered no expert opinion as to salting operations, or the science of salting as it is applied to an icy condition.

Judge Suarez held that Plaintiff's arguments that Teaneck did not adequately remediate the ice condition, or did not do enough to prevent Plaintiff's fall, are conclusory and speculative, as he offers no expert testimony on the standards and procedures of a local government with respect to weather-related road maintenance, or what should have been done differently or additionally. Judge Suarez held that "[p]laintiff has not set forth

any evidence that the DPW did not apply enough salt, or an incorrect salting composition."

It is the law of the case that Teaneck's salting operation was not negligent, and therefore, there was no hazardous condition that purportedly caused Plaintiff to fall. In other words, Judge Suarez dismissed Plaintiff's allegations of negligent salting. Plaintiff cannot argue that at 11:30 A.M. there existed a hazardous condition due to negligent salting when the salting done at 9:00 A.M. was found, as a matter of law, not negligently or inadequately performed.

In addition, it is inappropriate for Plaintiff to state that he sustained a traumatic brain injury in an obvious attempt to influence this Court's decision. Plaintiff's alleged injury is not relevant to the issues before the Appellate Division. Plaintiff is an active practicing lawyer. At his deposition, Plaintiff testified that his alleged injury has not affected his ability to zealously and effectively represent his clients in accordance with the Rules of Professional Conduct. (Pa506-507)

Conclusion

Plaintiff's appeal should be denied in its entirety. Plaintiff's First Amended Complaint was properly dismissed as a matter of law as there are no

issues as to any material fact to support Plaintiff's claim that Veolia breached any duty owed to him or that Veolia created, or had notice of, the alleged defective condition, Veolia respectfully requests that this Court deny Plaintiff's appeal and affirm the trial court's Order granting Veolia's motion for summary judgment.

RIVKIN RADLER LLP

Attorneys for Defendant/ Respondent,
Veolia Water New Jersey, Inc. (incorrectly designated as SUEZ, United Water Company)

By: /s/ Brian R. Ade
BRIAN R. ADE, ESQ.
ALEXANDER G. PAPPAS, ESQ.

4929-4538-8862, v. 4

Superior Court of New Jersey

Appellate Division

Docket No. A-000813-24T2

ARI GANCHROW, *Plaintiff-Appellant,* vs. SUEZ, SUEZ WATER NEW JERSEY, INC., VEOLIA WATER TECHNOLOGIES & SOLUTIONS, TOWNSHIP OF TEANECK, JOHN DOE 1-10 and/or ABC/XYZ COMPANY (names being fictitious for persons and/or entities unknown at this time), *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY DOCKET NO.: BER-L-5437-22 Sat Below: HON. ANTHONY R. SUAREZ, J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Plaintiff Ari Ganchrow ("Plaintiff" or "Appellant" or "Ganchrow") submits this Reply Brief in further support of his appeal from an Order dated October 28, 2024, granting summary judgment (the "Order") to the defendant Veolia Water New Jersey, Inc. f/k/a Suez Water New Jersey, Inc. ("Defendant" or "Respondent" or "Veolia"); and in reply to Respondent's opposition brief.

PROCEDURAL HISTORY

Plaintiff incorporates the Procedural History from his initial brief and adds the following. On March 28, 2025, Plaintiff filed his initial merits brief. Veolia filed its opposition brief on May 30, 2025. Thereafter, on June 19, 2025, the Law Division filed an amplification statement, far outside the time fixed by Rule 2:5-1(b). The rule does not allow the Law Division to review the filed briefs and then comment on them. For that, and other reasons, Plaintiff requests that the amplification statement be stricken.

STATEMENT OF FACTS

Plaintiff incorporates the Statement of Facts from his initial brief.

REPLY ARGUMENT

Introduction

At the outset, this Court should note that Veolia continues to insist that Plaintiff pursues a claim based on Veolia's improper maintenance and repair of the water main at issue. [Rb, p.10; p.18]. Plaintiff repeatedly told the Law

Division that he is no longer pursuing that claim. but, even so, the Law Division attributed that theory to Plaintiff, one of the analytical errors below. [Pa17-18]. In his merits brief, Plaintiff again told this Court that he alleges no claim for negligence and repair.

Veolia will not release this argument because it is the only way it can argue that this case is governed by *Fanning v. Township of Montclair,* 81 N.J.Super. 481 (App. Div. 1963). Rather than let the theories actually alleged by Plaintiff guide the legal analysis, Veolia has found a precedent it favors, and it then employs that precedent to guide its "fact finding." Unfortunately for Veolia, this is not a *"Fanning* case." It is a "*Jacobs* case."

POINT I

THE PRECEDENT OF *JACOBS V. JERSEY CENTRAL POWER & LIGHT* IS DISPOSITIVE [Pa1-2]

A. Veolia Fails To Address *Jacobs* In Any Meaningful Way

In its initial appellate brief, Plaintiff argued at Point I, among other things, that common knowledge dictates that icy conditions on a public roadway, resulting from a broken water main, can be remediated by applying salt to the roadway. Plaintiff further contended that a flow of water onto a public street will freeze into ice at temperatures near zero; and, further, that ice on a roadway poses such a foreseeable and dangerous risk to pedestrians that the one who created that ice has a legal duty to remediate it. Nowhere in its 44-page

opposition does Veolia ever contest or address these matters, or even suggest these are not matters of common knowledge.

Veolia not only evades these points but also this Court's analysis in its precedent, *Jacobs v. Jersey Central Power & Light*, 452 *N.J.Super*. 494 (App. Div. 2017).

Veolia argued below, and the Law Division accepted, a categorical rule holding that, when a defendant is a regulated utility, a plaintiff must always retain an expert witness due to the complex nature of utility operations. [Pa18].

In *Jacobs,* Judge Sabatino observed there are no such categorical or special rules governed in utility cases and held instead that not every case involving a regulated utility defendant required an expert. *Jacobs*, 452 *N.J.Super*. at 506-507. Defendants like Veolia are governed by the same body of law holding that an expert is needed only when the matter at issue is "beyond the ken" of the common juror. *Id*. True enough, the need for an expert might be more common when the defendant is a regulated utility. But the issue doesn't have anything to do with the identity of the defendant but rather the nature of the defendant's actions at issue. Judge Sabatino held that, to require expert testimony, a party must "specify expertise" subject to its regulated activity that pertains to the actions challenged by the plaintiff. *See Jacobs,* 452 *N.J.Super*. at 506-507.

In fact, citing to *State v. Kelly*, 97 *N.J.* 198, 204 (1984), Judge Sabatino observed that an expert "*should not be permitted* unless it concerns a subject matter that is 'so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman.'" *Jacobs,* 452 *N.J.Super.* at 505 (emphasis added). Under *Jacobs,* the utility must itself explain how and why the issue is so esoteric, or regulated, so as to require an expert. *Id.*

Veolia has *never* identified a single statute or regulation that speaks to its obligations for remediating icy conditions, resulting from its repair activities, on a public roadway. It cites no provisions of the *New Jersey Statutes,* the *New Jersey Administrative Code,* or any other tool of regulation governing its clean-up activities after operations -- and which would somehow excuse Veolia from the common-sense duty to clean up a dangerous condition resulting from its operations. And that is because there are none.

Therefore, what Plaintiff challenges does not pertain to Veolia's regulated activities. Jurors can form their own conclusions, from their own judgment and knowledge, as to whether Veolia's decision to leave the worksite, without performing inspection and remediation activities, constituted a breach of its duty to persons utilizing the public roadways. *See Jacobs,* 504 *N.J.Super.* at 504-507.

In the end, any party whose activities create a dangerous condition on a public road is duty-bound to remediate it. Being a regulated utility does not

excuse Veolia from the generally applicable principle that one who causes a dangerous mess on public property has to clean up after itself.

B. <u>Veolia's Attempt To Distinguish Jacobs Is Unavailing</u>

Rather than address the *Jacobs* court's holding that a utility demanding that a plaintiff produce an expert must show how the challenged actions pertain to a regulated activity, Veolia tries to distinguish *Jacobs.* Observing that two months elapsed between the date of the telephone repair -- after which the utility failed to clean up properly -- and the accident, Veolia argues that this "notice" was essential to the outcome in *Jacobs.* Veolia then claims it had no notice of the dangerous icy condition that it had caused.

First, the doctrine of "notice" had nothing to do with the outcome in *Jacobs.* Seeing Veolia's argument and purported distinction, Plaintiff's counsel read the *Jacobs* decision several times, in vain, looking for the discussion of "notice." Unable to find the discussion being relied upon by Veolia anywhere in the opinion, Counsel eventually resorted to a global text search of *Jacobs*, seeking the word stem "notic".

The stem "notic" appears five times within the opinion, four times as "noticed," once as "notice," and not once as the term of art pertaining to the legal principles of "actual notice" or "constructive notice." Veolia has entirely imagined a "notice" analysis within *Jacobs* from that decision's three isolated

references to "two months." In truth, Judge Sabatino never discussed the issue of notice in *Jacobs*.

Thus, Veolia purports to distinguish *Jacobs* on the basis of a legal principle nowhere discussed by the court or relevant to its holding. Needless to say, Veolia has completely failed to distinguish *Jacobs*.

More significantly, to the extent that Veolia argues, and the Law Division accepted, that Veolia lacked "notice," that is plainly irrelevant, as discussed in the initial merits brief.

"Notice" of a dangerous condition pertains to common law premises liability law and generally allows that a property owner will not be liable for a dangerous condition of the *owner's* property to one who has entered onto the *owner's* property unless the owner has actual or constructive notice of the dangerous condition. *See, e.g., Bozza v. Vornado, Inc.,* 42 *N.J.* 355, 359-60 (1964). Common law recognized that a dangerous condition of an owner's property is often not the product of the owner's negligence, and can often be the result of the actions of a third person who has, lawfully or not, previously entered the premises. "Where a dangerous condition is caused by third persons, a business proprietor is liable only if it had actual or constructive notice of the condition in time to have corrected it." *Id.*

Notably, even within the field of premises liability, notice is not required if, as here, the defendants created the dangerous condition. *Craggan v. Ikea*

USA, *332 N.J. Super*. 53, 61 (App. Div. 2000). Or perhaps stated another way, a defendant is always deemed to have at least constructive notice of a dangerous condition that the defendant caused or created.

When Veolia argues, or as the Law Division writes in its Amplification Statement, that Veolia "did not own, control, or maintain" the road, they are improperly invoking premises liability concepts into a case that is not a premises liability case. Here, Veolia engaged in activities that caused a water runoff that developed into dangerous icy conditions on a public roadway. For the Law Division to claim that a party who has created a dangerous condition on public property has no duty to fix that condition because that party does not "own, control, or maintain" that property is both unprecedented and a horrific public policy declaration contrary to that policy underlying the whole of the law of torts -- that being a general duty to avoid injuring others and to take steps reasonable and necessary to avoid foreseeable harm to others.

Or, more bluntly, if you made the mess, you must clean it up.

C. Veolia Ignores The Discussion Of Legal Duty Being The Consequence of Fairness, Foreseeability and Reasonableness

Plaintiff's brief included an extended discussion on the scope of one's duty being the result of consideration of fairness, reasonableness, and foreseeability. Veolia offers but the barest response to this argument, and does so only on the basis of the irrelevant, so-called "lack of notice" and that the

accident occurred 600 feet from water main – thereby invoking, albeit not by name, the deeply flawed "zone of danger" analysis of the Law Division.

For these reasons, Plaintiff relies on its initial merits brief, as Veolia has failed to offer any other meaningful analysis of the scope of duty.

POINT II

THE TRIAL COURT IMPROPERLY RULED THAT MR. DALE'S OPINION WAS NET OPINION; THAT ISSUE WAS NOT PROPERLY RAISED, OR DECIDED

A. The "Net Opinion" Issue Was Raised Improperly and Unfairly

In its reply below, Veolia contended for the first time that Plaintiff's highly credentialed engineering expert, Harry Dales, had provided a flawed opinion due to the asserted unreliable tools he used to reach that opinion. To frame this properly, Veolia initially argued to the Law Division that it lacked actual or constructive notice of the dangerous, icy condition that it had caused. In opposition, Plaintiff contended that notice was irrelevant in its opposition but, further, even if relevant, Veolia had ignored material proof of its constructive notice. That's the sole reason why the Dale report was filed in opposition, to address an argument – "notice" – that wasn't even properly an issue in the case.

If Veolia had wanted to argue that Plaintiff's proofs of constructive notice, including the Dale report, were lacking in credibility and should be ignored on the issue, then Veolia was required to raise that issue in the first place. Instead, Veolia argued that there was no proof, which was easily rebutted. When faced

with that proof, Veolia then changed the argument in the reply brief – from "there is no proof" to "well, yes, to tell the truth, there is proof, but it is not legally sufficient." ***That*** argument must be included in an initial moving brief.

Further, in *Townsend v. Pierre*, 221 *N.J.* 36, 53 (2015), the New Jersey Supreme Court held:

> When, as in this case, a trial court is "confronted with an evidence determination precedent to ruling on a summary judgment motion," it "squarely must address the evidence decision first." *Estate of Hanges v. Metro. Prop. & Cas. Ins.,* 202 *N.J.* 369, 384–85, 997 *A.*2d 954 (2010). Appellate review of the trial court's decisions proceeds in the same sequence, with the evidentiary issue resolved first, followed by the summary judgment determination of the trial court. *Id.* at 385, 997 *A.*2d 954.

Townsend, 221 *N.J.* at 53. The Law Division violated this precedent in the manner it proceeded.

B. <u>The Standard of Review Is *De Novo*</u>

Veolia now couches this "net opinion" ruling as an "evidentiary" ruling cloaked with an "abuse of discretion" standard on appeal. That is not correct at all. That standard applies to evidentiary rulings at trial. The Law Division's ruling on a net opinion ruling is evaluated on appeal *de novo.* Even so, ruling on an issue that is raised improperly in reply fails even if this Court were to apply an abuse of discretion standard.

Likewise, the Law Division lifted the "factual" representations, in purported support of this ruling, directly from Veolia's reply brief, nearly word

for word [Compare Pa18-20 to Pra6-7][1]. The reply brief included no citations to the record. In adopting these assertions, the Law Division likewise cited nothing in the record. This means that, on a summary judgment motion, "facts" were advanced (in reply) without filing of a factual statement meeting the requirements of Rule 4:46-2, and the Law Division then lifted these unsupported representations directly from the reply brief. Accordingly, Plaintiff contends that "fact finding" of the Law Division fails even under an abuse of discretion standard.

POINT III

THAT TEANECK LATER APPLIED SALT TO THE AREA DOES NOT, AS A MATTER OF LAW, ABSOLVE VEOLIA FOR CREATING THE IMMINENT ICY CONDITIONS IN THE FIRST PLACE [PA1-2]

The Law Division also observed that Teaneck's application of salt to the area at about nine o'clock on Saturday absolved Veolia, as a matter of law, for Veolia's failures that resulted in the formation of the ice in the first place. The Law Division amended the issue before it – whether Veolia had a duty to apply

[1] Veolia's Reply Brief has been included because it falls within the exception to Rule 2:6-2(a)(2). Its inclusion is necessary to show that an issue decided below was first raised in a reply submission.
Further, the "facts" proffered in reply were not cited to any portion of the record, *see R.* 4:46-2, and additionally a comparison of the Reply Brief to the Law Division's decision demonstrates that the Law Division lifted its "facts" from this uncited recitation of "facts," meaning the Law Division purported to make factual findings without any independent assessment of the record.

salt to the Veolia imminent ice – and improperly re-framed it by stating: "The issue appears to be that Plaintiff is alleging that the DPW's salting was inadequate." [Pa14]. In his initial merits brief, Plaintiff argued that whether Teaneck had an independent duty to salt the road (which is debatable) was not relevant to the motion. Teaneck's duty, to the extent it existed, was not mutually exclusive to the duty owed by Veolia. Two parties can owe a duty, under the facts, to the plaintiff or other members of the public. That happens all the time. For the Law Division to reason that Veolia did not have a duty, because it contended that Teaneck did, is deeply flawed.

Further, what Teaneck did or didn't do has nothing to do with what duty was owed by Veolia. What Teaneck did may have proximate cause implications, but proximate cause was not an issue on the motion. Accordingly, Plaintiff continues to rely on his initial merits brief on these points.

What Veolia does take exception to is Plaintiff's contention that, on remand, Veolia cannot argue Teaneck's duty superseded Veolia's duty, or that Teaneck's actions were a proximate cause, or the sole proximate cause, of the accident.

This Court must take note that Teaneck also moved for summary judgment seeking a dismissal of Plaintiff's complaint against it, and all cross-claims against it. The Law Division granted that motion. Accordingly, on remand, Veolia would be barred from arguing that Teaneck's actions caused or

contributed to Ganchrow's injuries, as the court ruled dispositively in favor of Teaneck when it dismissed Veolia's cross-claims against Teaneck on the merits. *Bahrle v. Exxon Corp*., 279 *N.J.Super*. 5, 22 (App. Div. 1995), *aff'd on other grounds*, 145 *N.J.* 144 (1996).

POINT IV

THE AMPLIFICATION STATEMENT SHOULD BE STRICKEN

Rule 2:5-1(b) provides that, after filing and service of the Notice of Appeal, "[w]ithin 15 days thereafter, the trial judge, agency or officer, may file and mail to the parties an amplification of a prior statement, opinion or memorandum made either in writing or orally and recorded pursuant to R. 1:2-2." The Notice of Appeal was filed on November 18, 2024. Plaintiff's merits brief was filed on March 28, 2025. Veolia filed its opposition brief on May 30, 2025. And then, on June 19, 2025, the Law Division filed its "amplification statement." That statement was filed far outside the applicable timeframe.

But there are problematic aspects of the Amplification Statement that suggest that the Law Division, after reading the filed submissions, has crossed the line to advocacy and filed what amounts to a second opposition. *See State ex rel. N.P.,* 453 *N.J.Super.* 480, 489 n.4 (App. Div. 2018). Moreover, one of the "issues" raised by the Law Division has neither been advanced by Veolia as a basis for relief below, nor on this appeal. Likewise, the Law Division is now

raising this issue, on behalf of Veolia, after the initial merits brief and opposition briefs were filed.

It has been casually referenced in the briefings that Plaintiff struck his head on the pavement with enough force to knock himself unconscious. Nonetheless, when seeking summary judgment, Veolia did not seek summary judgment on that basis. That's because, although no one actually saw the accident, four young men, also returning from the same synagogue services that Saturday morning, immediately happened on the scene, and rendered Plaintiff aid until the ambulance arrived.

In its Amplification Statement, however, the Law Division now takes its singular reference in the decision to Plaintiff's lack of memory -- which it had initially made in connection to its unnecessary discussion of "constructive notice" [Pa20][2] – and now sets forth a completely new appellate issue, that being "lack of evidence of hazardous condition causation." Plaintiff objects to this so-called issue being raised for the first time, on appeal, and by the Law Division itself. The court appears to have assumed an advocacy role.

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[2] To be clear, Veolia accepted for summary judgment purposes that the icy condition existed, but argued that it lacked notice of it.

Plaintiff further observes that even this observation by the Law Division isn't logical, because whether Plaintiff had memory of what happened has no relevance at all to whether Veolia had actual or constructive notice of the icy condition.

If Veolia had actually sought summary judgment on this flimsy basis, Plaintiff would have produced affidavits from the four witnesses. Although casually referenced in its submissions, Veolia never sought summary judgment on that basis. Even in its appellate brief, Veolia mentions Plaintiff's lack of memory, but no brief heading seeks an affirmance for that reason. And yet the Law Division has now specified this as one of six reasons this Court should affirm.

The other reasons specified by the Law Division in its Amplification Statement have been previously addressed in this Reply Brief and in Plaintiff's Merits Brief. Plaintiff relies in full on those submissions in reply to the Amplification Statement.

CONCLUSION

Veolia makes a pass at trying to explain all the things an expert might need to say about what it calls the "theoretical inspection" of the area. [Rb2-29]. Whether Veolia performed an adequate inspection, or performed adequate remediation, *might* have been an issue if Veolia had performed an inspection, or made some effort of remediation. But once the water main was repaired, Veolia just left the scene. How can anyone opine about the adequacy of efforts, when no effort was made? Veolia is liable because it did have a duty to do something and it did nothing -- not because what it did was not adequate.

For the foregoing reasons, this Court should reverse the Order in favor of Veolia, and remand to the Law Division for a trial on the merits.

Moreover, Plaintiff further requests that this matter be remanded to the Law Division with a direction that the judge who decided the motion be barred from further involvement in the case, as it would seem from the untimely Amplification Statement that this judge's ability to be impartial going forward may be reasonably questioned.

Respectfully submitted,

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By: /s/ Joseph M. Cerra
Joseph M. Cerra

Dated: June 27, 2025