JANE BISHOP, Plaintiff/Respondent, v. PUBLIC STORAGE; XYZ COMPANIES I-V (fictitious entities whose true identities are presently unknown) and JOHN DOES I-V (fictitious persons whose true identities are presently unknown), Defendants/Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET No. A-001230-24 Civil Action On appeal from: Superior Court of New Jersey, Law Division: Middlesex County Sat Below: Honorable Gary K. Wolinetz, J.S.C. Docket No. MID-L-7490-20

BRIEF OF DEFENDANT/APPELLANT PUBLIC STORAGE

Date Submitted: April 14, 2025

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PRELIMINARY STATEMENT

Plaintiff Jane Bishop filed a personal-injury complaint alleging that she fell and suffered injuries because of a defective step leading to the front office of a Defendant Public Storage facility. In her complaint, Plaintiff asserted a simple claim that Defendant negligently maintained its entranceway. Because Plaintiff only pled a negligence claim, in selecting the jury, counsel and the court geared their questions to that limited subject.

But Plaintiff was not content to try the case she had pled and attempted to transform the trial into a handicap-accessibility-rights case – even though she denied that she suffered from a disability or that a disability caused her fall. From the very inception of the trial to its conclusion, and despite objections from defense counsel and admonitions from the trial court, Plaintiff repeatedly raised the false specter that Defendant's facility was not in compliance with the Americans with Disabilities Act of 1990 (ADA) or other handicap-accessibility laws. Not only was the subject of the ADA wholly irrelevant to the case, as the court stated on multiple occasions, but Plaintiff also did not offer a stitch of evidence that Defendant's premises violated the ADA. Repeatedly violating the rules of evidence and the trial court's admonitions, Plaintiff injected this highly charged issue before a jury not screened for the subject.

During his opening statement, Plaintiff's counsel was warned at sidebar not to show a photograph of a later-installed ramp at Defendant's facility. Subsequent remedial measures are barred by N.J.R.E. 407. Nonetheless, Plaintiff's counsel displayed the photograph to the jury – his first attempt to insert the ADA into the case. That defiance of the sidebar warning elicited a mistrial application by Defendant. The court severely chastised Plaintiff's counsel for showing the jury the photograph but ultimately denied the application and instead gave a "curative" instruction.

Plaintiff's counsel made it clear that he showed the photograph because he intended to raise the question about whether the facility was handicap accessible. The court warned Plaintiff's counsel, "We're not talking about handicapped accessibility to the jury when the case has nothing to do with handicapped accessibility." In presenting his case-in-chief, Plaintiff's counsel did not introduce any evidence that the Public Storage facility violated the ADA or handicap-accessibility laws.

However, Plaintiff's counsel launched into a long-ranging, irrelevant and prejudicial cross-examination of Defendant's engineering expert on handicap accessibility and the ADA over Defendant's counsel's objections. In a seeming admission of the mistake it had made in permitting this line of questioning, the court cautioned Plaintiff's counsel before summation, "You are barred from

talking about the Americans with Disabilities Act since it's not pleaded in your complaint. It's never been part of the case as I understand it."

Undeterred, Plaintiff's counsel in summation persisted through cleverly crafted messaging in making this case an ADA case, referencing the ramp that the court told the jury to disregard and suggesting that the facility was not wheelchair accessible – and therefore not ADA compliant. But those were not the only improper remarks made by Plaintiff's counsel in his closing. Without requesting permission of the court as required by State v. Clawans, 38 N.J. 162, 170–72 (1962), Plaintiff's counsel also improperly implied that the jury could draw an adverse inference because Defendant did not call as witnesses Public Storage employees, even though Plaintiff's counsel had read to the jury their deposition testimony. Those witnesses were equally available to Plaintiff. Additionally, Plaintiff's counsel argued for damages based on the time-unit rule, despite approving jury charges that did not mention the rule, thereby depriving Defendant's counsel of the opportunity to address the subject in his summation.

Plaintiff obtained a favorable jury verdict and damages award but by unfair means. The introduction of the inflammatory subject of suggested handicap-accessibility and disability-rights violations, devoid of any relevance or factual support, along with other substantial trial errors, had the clear capacity to cause an unjust result and requires reversal and remand for a new trial.

PROCEDURAL HISTORY

On October 28, 2020, Plaintiff Jane Bishop filed a complaint in the Superior Court, Law Division, Middlesex County, alleging a common-law negligence claim against Defendant Public Storage. [Da1–Da8]. Plaintiff contended that, as a result of Defendant's negligent failure to maintain its premises in a safe condition, she sustained severe bodily injuries that required surgery. [Da1–Da8].

The Honorable Gary K. Wolinetz, J.S.C. presided over jury selection and the jury trial on July 8, 9, 10, and 11, 2024.[1] [Da9]. During jury selection, the court advised potential jurors that Plaintiff "alleges that on January 9, 2020, she suffered significant injuries as a result of a defective condition located in the entranceway to the main office located at [a] Public Storage facility." 1T75-2 to -6. The court never advised the jurors that Plaintiff alleged that the Public Storage facility did not comply with disability-rights or handicap-accessibility[2]

[1] **1T** = July 8, 2024 Jury Selection; **2T** = July 9, 2024 Jury Selection and Trial Day One, Volume 1; **3T** = July 9, 2024 Trial Day One, Volume 2; **4T** = July 10, 2024 Trial Day Two, Volume 1; **5T** = July 10, 2024 Trial Day Two, Volume 2; **6T** = July 11, 2024, Trial Day Three, Volume 1; **7T** = July 11, 2024 Trial Day Three, Volume 2; **8T** = September 13, 2024 Motion Hearing.

[2] Appellant's counsel recognizes that the term "handicap" is considered outdated and disparaging to many, but its use here solely reflects the language employed by counsel and the court, and no disrespect is intended.

laws, nor were jurors asked whether they or family members or close friends suffered from a disability.[3] 1T20-23 to 2T40-13.

On the second day of trial, following the conclusion of Plaintiff's case-in-chief, Defendant's counsel moved for a directed verdict on the basis that Plaintiff had failed to prove an essential element of her case – the cause or mechanism of her fall. 5T210-23 to 212-21. The court denied Defendant's motion for a directed verdict. 5T215-19 to 217-10.

On the last day of trial, the jury returned a verdict finding that Defendant's negligence proximately caused Plaintiff's injuries. [Da10–Da12]. The jury awarded Plaintiff $2,500,000 in damages for pain and suffering and loss of enjoyment of life. [Da12]. The court entered Final Judgment on July 22, 2024. [Da13–Da14].

On July 31, 2024, Defendant filed a post-trial motion for Judgment Notwithstanding the Verdict (JNOV) or, alternatively, for a new trial.[4] [Da15]. Defendant identified three trial errors it contended warranted a new trial: (1) Plaintiff's improper display of a photograph showing subsequent remedial

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[3] Two potential jurors asked to be and were excused because they were caring for family members with a disability, 1T44-19 to 45-9; 1T65-13 to 66-25, and a third and fourth because each had a disability, 1T54-20 to 57-2.

[4] Pursuant to Rule 2:6-1(a)(2), Defendant's brief in support of its post-trial motion for JNOV, or alternatively, a new trial, is omitted from Appellant's Appendix.

measures to Defendant's premises; (2) Plaintiff's false intimations that Defendant was in non-compliance with the ADA as evidence of negligence; and (3) Plaintiff's wrongful reference to the time-unit argument in summation, in the absence of any mention of the time-unit rule in the court's proposed jury charge. [Da19–Da20]. Defendant also alleged that the jury verdict was against the weight of the evidence. [Da19].

On September 13, 2024, the court heard arguments on the motion, see 8T, and on November 13, 2024, issued a written opinion and an Order denying Defendant relief, [Da15–Da26].

On December 30, 2024, Defendant filed a Notice of Appeal from both the trial court's Final Judgment based on the jury verdict and its Order denying a new trial. [Da27–Da31]. Defendant also filed a motion to appeal from the Final Judgment as within time, [Da32–Da33], which the Court granted on January 23, 2025, [Da34].

STATEMENT OF FACTS

On January 9, 2020, Plaintiff Jane Bishop fell and suffered injuries at the entranceway to the front office at Public Storage's Monmouth Junction facility. 4T44-10 to -12; 4T120-3 to -11. Sometime after the incident, Public Storage installed a ramp to the entranceway to the front office. 2T47-21 to 48-6. Plaintiff possessed a photograph depicting that ramp. See 2T49-14 to -17.

I. Plaintiff's Opening Statement

In his opening, Plaintiff's counsel told the jury, "[L]et me go ahead and show you some photographs," one of which depicted a ramp leading to the office entranceway of the Public Storage facility. 2T46-25 to 47-1; 2T47-6 to -8. Defendant's counsel objected to the showing of the photograph with the ramp, and at a sidebar conference Plaintiff's counsel was warned, "Don't do it." See 2T47-10; 8T15-1 to -17; 8T33-16 to 34-1.[5]

Despite that warning, Plaintiff's counsel told the jury that Public Storage "built in a ramp" after Mrs. Bishop's fall and showed the photograph of the

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[5] Although the sidebar conference is inaudible, see 2T47-10 to -17, it is clear from the court's contemporaneous remarks immediately afterwards that Plaintiff's counsel was given the warning and did not heed it. More particularly, the court elaborated at the motion-for-a-new-trial hearing on the language conveyed to Plaintiff's counsel at the sidebar, thus settling the record. 8T33-16 to -20. Defendant's counsel provided the following recollection of the sidebar conference:

> [A]nd so, plaintiff was warned, "Don't do it", at the sidebar. They did it. There was another sidebar. And . . . Your Honor says, . . . "Why are you doing this? We just had the sidebar." And they were warned. Either the warning wasn't understood or they chose to down the torpedoes. "I'm going to do it." And they did it.
>
> [8T15-10 to -17.]

The court agreed with Defendant's counsel's characterization of the sidebar conference, stating, "what [Defendant's counsel] said is an accurate representation of what was discussed at sidebar. I just wanted to state that on the record," 8T33-17 to 8T34-1.

ramp, stating "this is what the Public Storage currently looks like after this incident, that entranceway." 2T48-1 to -2; 2T49-15 to -17. Defendant's counsel objected again and moved for a mistrial. 2T49-18 to -20.

The court then chastised Plaintiff's counsel, stating, "Counsel, explain to me after our sidebar when I heard exactly what you were going to do . . . how that does not constitute a subsequent remedial measure. And tell me how it is possibly relevant . . . ." 2T50-24 to 51-7 (emphasis added). The court made clear the import of the earlier sidebar, asking Plaintiff's counsel, "Explain to me why . . . when we had already had a sidebar objecting to the photographs being -- being shown to the jury, why you elected to show a -- I call it a newly constructed facility with a -- with a ramp, why -- why that was done." 2T64-11 to -17 (emphasis added).

The court rebuked counsel, stating, "[Y]ou are skirting so close, so close [to] the Court rules, if not violating the Court rules." 2T51-14 to -16. The court asked, "What relevance does showing . . . what the defendant did after [have] anything to do with this case and not violate the -- the evidence rules?" 2T52-3 to -6. Plaintiff's counsel maintained that he wanted to use the photograph to explain why Plaintiff's engineer could not inspect the scene as it was when the

accident occurred and to ask Defendant's expert engineer, "[C]ouldn't [the ramp] have been done in 2019, wasn't this technology there?" 2T53-24 to -25.[6]

The court did not accept Plaintiff's counsel's justification, concluding, "You went as close to the line as I can imagine, if not crossing the line." 2T62-1 to -2. The court queried, "[I]s there a way to salvage this trial . . . with some cautionary or remedial instruction?" 2T63-9 to -12. Ultimately, the court decided "to make it clear that . . . what occurred was improper" by giving a curative instruction rather than granting a mistrial. 2T70-15 to -17; see also 2T78-8 to -14. The court instructed the jurors to disregard the "photograph" of the ramp and "any comments that [Plaintiff's counsel] made to you regarding that photo. You are to strike them from your mind, from your consciousness. They do not exist." 2T78-8 to -14.

II. The Trial

A. Plaintiff's Case

On January 9, 2020, Plaintiff Jane Bishop, then age 62, and her husband visited the Public Storage facility in Monmouth Junction where they had stored home furnishings in one of the facility's storage units. 4T44-10 to -14; 4T117-1 to -4; 2T190-11 to -13. Mrs. Bishop testified that, while wearing sneakers,

[6] Defendant's counsel acknowledged that he was shown the photographs before Plaintiff's counsel opened and said, "fine," but "object[ed] the first time when [he] saw where plaintiff was going with the photograph." 2T56-10 to -14.

she walked from her car to the front office to obtain the combination to the storage unit. 4T115-10 to 119-9.

As Mrs. Bishop began to step into the office, she recalled her right foot "caught on something," but she did not know how her foot got stuck. 4T120-3 to 121-4. As she lifted her left foot, she fell down, suffering serious injuries to her left elbow and breaking her nose. 4T120-6 to -11; 4T128-24 to -16. She was taken by ambulance to a hospital and later underwent several surgeries. 4T128-12 to -23; 2T191-24 to 192-3; 2T199-13 to 200-7.[7] Plaintiff could not identify the exact cause of her fall. 4T120-22 to 121-4.

According to Mrs. Bishop's testimony, at the time of the accident, she did not suffer from any "medical disability" that prevented her from walking, taking a step, or seeing. 4T112-3 to -12. Mrs. Bishop did not claim to have any disability that might have caused her to fall. 4T112-3 to -12.

Plaintiff introduced deposition testimony of Donna Murphy, a Public Storage district manager. 4T11-3 to 23-11. Ms. Murphy described the entranceway to the Monmouth Junction facility as "a little step up, like, a lip." 4T16-14 to -21. She further stated that, at any particular location, Public Storage employees would perform a walkthrough to identify safety hazards and that if

[7] Plaintiff's injuries and damages are not at issue in this appeal, and therefore not discussed in this brief.

"there was a tripping hazard, [she] would have reported it." 4T16-3 to -12; 4T21-1 to -2.

Plaintiff also introduced the deposition testimony of Tara Uhl, the property manager at the Monmouth Junction facility on the day of the accident. 4T23-12 to 34-17.[8] That morning, Ms. Uhl did a walkthrough of the property and did not notice "that anything was wrong." 4T26-6 to -9. She recalled that she was at the counter in the front office when Mrs. Bishop opened the door and fell to the floor. 4T27-20 to 29-22. She did not know what caused Mrs. Bishop to fall. 4T30-15 to 21.

Dr. Wayne F. Nolte, Plaintiff's engineering expert, testified on the conditions of the entranceway that, in his view, probably caused Mrs. Bishop to fall. 2T96-4 to 146-16. In rendering his opinion, Dr. Nolte relied on photographs and information related to the case, such as Mrs. Bishop's deposition testimony. 2T96-18 to -21; 2T104-18 to 105-5. Dr. Nolte ultimately concluded that the accident occurred because, as Mrs. Bishop was about to enter Public Storage's front office, "her right foot became caught on something at the door threshold" and when "she moved her left foot in an attempt to regain balance . . . she ultimately fell." 2T106-22 to -25.

[8] The trial transcripts incorrectly spell Tara Uhl's name as Tara Oh or Terrell Uhl. See, e.g., 2T158-14 to -15; 4T23-15.

Dr. Nolte identified several defects in the entranceway that could have caused the fall: the "step configuration," a metal strip at the top of the step, or an upraised screw, which he classified as the most probable cause of the accident. 2T120-4 to 126-13; 2T137-2 to -22. Dr. Nolte did not testify that the entranceway violated the ADA, or any law related to handicap-accessibility or disability rights. 2T96-10 to 146-16.

Following Dr. Nolte's testimony, Plaintiff's counsel expressed his intention to read to the jury a portion of the deposition testimony of Donna Murphy regarding the ramp installed after Mrs. Bishop's accident. 2T147-4 to 167-6. Defendant objected to the introduction of any evidence concerning subsequent remedial measures or handicap accessibility, including reference to the later-installed ramp and the ADA. 2T147-4 to 167-6. The court sustained Defendant's objection to the introduction of evidence about the ramp, rejecting as groundless Plaintiff's claim that such evidence was necessary to explain why Dr. Nolte could not inspect the site due to the repairs. 2T149-13 to -21; 2T150-13 to -18. Dr. Nolte had already explained that he did not inspect the site because it had changed by the time he was retained as an expert. 2T103-13 to -25; 2T111-15 to -19.

The court also rejected Plaintiff's attempt to introduce evidence on handicap accessibility. 2T153-6 to 154-4; 2T159-22 to -23. The court

rhetorically asked Plaintiff's counsel, did Mrs. Bishop fall "because the building was not handicapped-accessible?" 2T154-18 to -19. And then answered that question, "if that were the case and she was handicapped, you'd have a far different lawsuit." 2T154-21 to -23. The court further stated: "I'm not going to have you or anyone else just sort of pontificate about what could have happened. You have a claim in this case. I understand the claim. And we're not talking about handicapped accessibility to the jury when the case has nothing to do with handicapped accessibility." 2T 159-3 to -8 (emphasis added).

The court prohibited Plaintiff's counsel from referencing the ramp or the ADA in his case-in-chief. 2T159-20 to -23. The court stated it would "revisit th[e] issue to the extent that defense counsel says something that's unexpected or that deals with handicapped accessibility or anything. " 2T159-24 to 160-2.

Following Plaintiff's case-in-chief, Defendant's counsel moved for a directed verdict on the basis that Plaintiff had failed to prove an essential element of her case by not identifying the cause or mechanism of her fall. 5T210-23 to 212-21. In denying Defendant's motion for a directed verdict, the court stated that "[P]laintiff was all over the place in her description of what happened." 5T215-21 to -23. Nevertheless, the court found that "[t]here is a scintilla of evidence that would lead me to believe" a directed verdict should be denied – and "just that." 5T217-1 to -2 (emphases added).

B. Defendant's Case

Defendant's engineering expert, David Behnken, PE,[9] rebutted Dr. Nolte's testimony and determined that the door and entrance into the Public Storage facility complied with fire and relevant engineering codes. 6T21-2 to -21; 6T25-1 to -5; 6T29-4 to -7. Mr. Behnken noted that, according to municipal records, the facility had not been charged with any code violations. 6T19-14 to -17; 6T22-4 to -8. During direct examination, neither Defendant's counsel nor Mr. Behnken made any reference to the ADA, or any law related to handicap or disability accessibility. 6T8-17 to 29-9.

On cross-examination, Mr. Behnken concluded that "in all probability, [Mrs. Bishop] tripped over the properly constructed and code-compliant change in elevation between the exterior and interior walking surfaces" of the entranceway. 6T35-25 to 36-4. Mr. Behnken stated that the only code he referred to in his report was the South Brunswick maintenance code. 6T44-3 to -9. When Plaintiff's counsel began to question Mr. Behnken on New Jersey's handicap-accessibility code, Defendant objected on the basis of relevance. 6T44-10 to 46-12. The court overruled the objection, and cross-examination continued. 6T 46-11 to -12.

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[9] The trial transcripts incorrectly spell Mr. Benhken's name as "Mr. Behnkin." See, e.g., 6T8-16.

Mr. Behnken explained that municipal records indicated that the Public Storage facility was constructed before 1990, and therefore it was not subject to the handicap-accessibility code. 6T46-13 to -24. Plaintiff's counsel continued to press questions on handicap accessibility, drawing another objection by Defendant's attorney, who stated, "This is not a handicap ADA case." 4T46-25 to 47-19.

Spanning approximately fifteen transcript pages, despite Defendant's repeated objections, the court permitted a drumbeat of questions on handicap accessibility and the ADA and whether the installation of a "ramp" could have prevented Plaintiff's fall. 6T45-2 to 59-20. Plaintiff's counsel engaged in wide-open questioning about handicap accessibility and Public Storage's ability to construct a ramp even though Plaintiff offered no evidence and made no proffer that the Public Storage facility violated the ADA or any handicap-accessibility law. 6T45-2 to 59-20.

Apparently realizing that the cross-examination of Mr. Behnken went far afield, the court instructed Plaintiff's counsel not to refer to those subjects in his summation. 6T123-3 to 124-16. The court advised Plaintiff's counsel:

> You are barred from talking about the Americans with Disabilities Act since it's not pleaded in your complaint. It's never been part of the case as I understand it. And I'm precluding you from mentioning it at all during this case. You can talk about

> whatever you want to talk about. But this is not an ADA case.
>
> * * *
>
> This is not an ADA case, whether somebody mentioned something during, during testimony does not mean that it can then be the focus or a subject of a commentary.
>
> * * *
>
> Well, I'm telling you, Counsel, do not mention the ADA Act. I'm imploring you not to do so. So there is nothing -- this is not an ADA case and I can't say it any [ ]more clearly. So that's that.
>
> [6T123-3 to 124-16.]

III. Summations

Despite the court's clear directive that "this is not an ADA case," 6T124-15, Plaintiff's counsel persisted during summation in making it an ADA case through cleverly crafted messaging, 6T152-1 to -11; 6T154-3 to -18. Counsel explicitly referenced 1990, the year of the ADA's enactment, stating: "[T]he defense expert says they didn't have to change [the entryway] because this building was built before 1990." 6T152-9 to -11. Counsel pressed this ADA theme, asserting there were "code changes . . . several years before this incident happens that are to ensure safe accessibility into public spaces," without saying precisely what those code changes were. 6T152-4 to -8. To further drive home this subject forbidden by the court, Plaintiff's counsel stated, "What do we think a reasonable company would do in a situation where there are excessive code

changes regarding entrances like this? Do we not think that they would go around and make simple fixes to fix it? And defense expert told us, simple fix, put a ramp." 6T154-13 to -18 (emphasis added).

Next, the draft charge given to counsel for Plaintiff and Defendant did not contain any reference to the time-unit rule, a damages formula. 8T34-17 to 35-9. Plaintiff's counsel twice affirmed that the proposed charge was acceptable. 8T34-17 to -20. Defendant's counsel, accordingly, made no reference to the time-unit rule in his summation. 6T128-10 to 145-16. Plaintiff's counsel, however, gave a full-throated presentation on the time-unit rule over Defendant's objection. 6T167-11 to 169-20. The court overruled the objection and took responsibility for not including the time-unit rule in its draft charge. 6T165-7 to 167-9; 8T31-19 to -25. The court, however, did not advise Defendant's counsel that he would have an opportunity to respond to the argument in a rebuttal. 6T165-7 to 167-21.

Finally, Plaintiff's counsel implied that the jury could draw an adverse inference based on the fact that Defendant did not call Public Storage employees as witnesses. 6T152-15 to -21. Plaintiff's counsel reminded the jury that he had read the deposition testimony of two Public Storage employees and added, "When I read their deposition transcripts – and you didn't see any of them here in court, right? None of them showed up. They were on the witness list. They

didn't show up to testify." 6T152-15 to -21. He continued, "And you'll probably hear an instruction from the Judge, that doesn't matter." 6T152-22 to -23. Plaintiff suggested that the jury could "care" that Defendant did not call Public Storage witnesses: "Don't, you know -- you can care about it, you don't have to care about it. And it's true. Everything you've heard, everything counsel has argued, everything I'm arguing to you, you could care about it, you don't have to care about it, and that's the beautiful thing about this." 6T152-23 to 153-3 (emphases added).

LEGAL ARGUMENT

I. AFTER BEING TOLD NOT TO DO SO, PLAINTIFF'S COUNSEL IMPROPERLY DISPLAYED A HIGHLY PREJUDICIAL PHOTOGRAPH DEPICTING SUBSEQUENT REMEDIAL MEASURES, AND THE COURT ERRED IN NOT GRANTING A NEW TRIAL. (DA23–24; 2T69-1 TO -9).

Sometime after Mrs. Bishop's accident, Public Storage installed a ramp to the entranceway to the front office where Mrs. Bishop fell. 2T47-25 to 48-6. Plaintiff's counsel possessed a photograph depicting the later-installed ramped entranceway. 2T49-14 to -17. Plaintiff's counsel's attempt to display the photograph elicited an objection from defense counsel, and Plaintiff's counsel was warned at sidebar not to show the photograph to the jury. 8T15-1 to -17; see also 8T33-16 to 34-1; 2T50-24 to 51-9; 2T51-14 to -16; 2T64-11 to -17.

Despite that admonition, Plaintiff's counsel told the jury that Public Storage had "built in a ramp" after Mrs. Bishop's fall and showed the photograph, stating "this is what the Public Storage currently looks like after this incident, that entranceway." 2T48-1 to -2; 2T49-15 to -17. Defendant's counsel then objected and moved for a mistrial. 2T49-18 to -20. The court scolded Plaintiff's counsel, stating that he was "skirting so close, so close [to] the Court rules, if not violating the Court rules," and "went as close to the line . . . if not crossing the line." 2T51-14 to -16; 2T62-1 to -2. The court ultimately denied Defendant's motion and gave a curative instruction instead. See 2T78-8 to -14.

The court erred by not granting a mistrial. In an opening statement, it is improper for an attorney to say anything the attorney "knows cannot in fact be proved or is legally inadmissible." Passaic Valley Sewerage Comm'rs v. Geo. M. Brewster & Son, Inc., 32 N.J. 595, 605 (1960) (citing Paxton v. Misiuk, 54 N.J. Super. 15, 20 (App. Div. 1959), aff'd, 34 N.J. 453 (1961); Shafer v. H.B. Thomas Co., 53 N.J. Super. 19, 26 (App. Div. 1958)); see also Rule of Professional Conduct 3.4(e) ("A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."). Plaintiff's counsel violated this simple rule. After being told not to do so, he displayed to the jury a highly prejudicial

and irrelevant photograph depicting a ramp that was installed after the accident at the precise location of Plaintiff's fall.

"Evidence of remedial measures taken after an event is not admissible to prove that the event was caused by negligence or culpable conduct." N.J.R.E. 407. This Rule codifies New Jersey's "strong public policy encouraging prompt remedial measures." Szalontai v. Yazbo's Sports Café, 183 N.J. 386, 402 (2005). The Rule recognizes those remedial objectives can be thwarted if a defendant's post-accident corrective actions are admitted as proof of liability. See In re S.D., 399 N.J. Super. 107, 124 (App. Div. 2008) (recognizing that New Jersey has a "clear and longstanding public policy favoring the immunization of remedial measures from negative inferences").

The exception to N.J.R.E 407 is that "[e]vidence of subsequent remedial repairs may be admitted for purposes other than to prove negligence or culpable conduct." Lavin v. Fauci, 170 N.J. Super. 403, 407 (App. Div. 1979). But Plaintiff's counsel did not proffer any admissible reason for introducing the ramp. Instead, evidence of the ramp was offered for the improper purpose of proving Defendant's negligence and suggesting (without a shred of proof) that Defendant was noncompliant with the ADA and other accessibility laws. More specifically, the photograph was not relevant and therefore inadmissible on that basis alone. See N.J.R.E. 401. Additionally, any probative value of the

photograph of a later-constructed ramp was "substantially outweighed by the risk of . . . [u]ndue prejudice, confusing the issues, or misleading the jury. See N.J.R.E. 403(a).

Significantly, Plaintiff's counsel conceded that he did not intend to offer the photograph of the ramp in his case-in-chief and speculated about its potential use if the defense put on a case. 2T67-18 to 68-12. The following colloquy underscores that Plaintiff's counsel could not articulate a reasonable basis for the introduction of the photograph in his opening:

> THE COURT: Were you planning on using that photograph, counsel, at some point in the future with your expert?
>
> [PLAINTIFF'S COUNSEL]: No. My expert -- my expert doesn't use it. But I was going to use it for the defense experts and the defense witness.
>
> THE COURT: And what -- and to what end were you going to use that photograph?
>
> [PLAINTIFF'S COUNSEL]: It was going to be dependent on how direct examination went.
>
> THE COURT: But what -- but what -- but to what end?
>
> [PLAINTIFF'S COUNSEL]: Well, for example -- actually I haven't -- I haven't -- I haven't exactly --
>
> THE COURT: Well, I would give it some good -- I would give it --
>
> [PLAINTIFF'S COUNSEL]: I will.
>
> THE COURT: I would give it some thought as to whether that picture ever sees the light of day again.

[2T67-18 to 68-12.]

By introducing a photograph that he had no intention of using to prove any substantive point in his case-in-chief, Plaintiff's counsel violated the fundamental principle that evidence must be introduced with a legitimate and good-faith purpose. See State v. Greene, 242 N.J. 530, 548 (2020); see also Brenman v. Demello, 191 N.J. 18, 30 (2007) ("[T]he persuasive representational nature of photographs demands that the foundation for the admission of photographs must be properly laid."). Here, Plaintiff's counsel had advance warning that the introduction of the photograph violated Rule 407, and yet he chose to display it in his opening statement anyway. See Passaic Valley Sewerage Comm'rs, 32 N.J. at 605; see also Greene, 242 N.J. at 548 (recognizing that the scope of an attorney's opening statement "should be 'limited to the facts [the attorney] intends in good faith to prove by competent evidence'") (quoting State v. Wakefield, 190 N.J. 397, 442 (2007)).

While in other circumstances the court's curative instruction might have mitigated the prejudice of exhibiting the inadmissible photograph of the ramp to the jury, here, Plaintiff's counsel nullified the potential effectiveness of any such instruction by repeatedly referencing a "ramp" throughout the trial, thereby reminding the jury of the photograph they were told to forget. See, e.g., 6T56-20 to 58-4; 6T59-6 to -8; 6T154-15 to -18. Plaintiff's counsel pointedly and

continuously invoked the subject of a ramp and injected unpled, irrelevant disability and handicap-accessibility rights issues into the case through his improper cross-examination of Defendant's expert. And Plaintiff's counsel did not stop there. In summation, he argued that (1) Public Storage was "negligent" for failing to install a ramp prior to Mrs. Bishop's fall; and (2) that if a ramp had been installed on the day of the accident, the accident would have been prevented. 6T154-3 to -18. In her complaint, Plaintiff's negligence claim was that Defendant maintained a defective step, not that it failed to install a ramp.

No curative instruction can work when the forbidden bell is constantly rung. See State v. Herbert, 457 N.J. Super. 490, 505 (App. Div. 2019) (stating that "a single curative instruction may not be sufficient to cure the prejudice resulting from cumulative errors at trial") (quoting State v. Vallejo, 198 N.J. 122, 136 (2009)); see also Barber v. ShopRite of Englewood & Assocs., Inc., 406 N.J. Super. 32, 52 (App. Div. 2009) ("It is plaintiff's counsel's continued inappropriate conduct, which was not sufficiently addressed by the trial court, that leads us to conclude that defendant did not receive a fair trial and that the jury verdict was tainted by cumulative error.").

The trial court erred in not granting a new trial.

II. THE COURT ERRED BY PERMITTING PLAINTIFF'S COUNSEL TO ENGAGE IN A WHOLLY IRRELEVANT AND HIGHLY PREJUDICIAL CROSS-EXAMINATION OF DEFENDANT'S EXPERT WITNESS REGARDING INSTALLATION OF A RAMP AND THE ADA, INVITING THE JURY TO SPECULATE ABOUT WHETHER DEFENDANT'S PREMISES VIOLATED DISABILITY OR HANDICAP-ACCESSIBILITY LAWS. (DA24; 6T45-2 TO 59-20).

Plaintiff did not allege in her complaint that the condition of Defendant's premises violated the ADA or any handicap-accessibility law. [Da1–Da8]. Nor did she introduce any evidence that would have supported an ADA claim. See 2T158-1 to -3; 4T112-3 to -12. To the contrary, Plaintiff stated that, on the day she fell, she did not suffer from any disability that would have impaired her ability to walk, take a step, or see. 4T112-3 to -12. In short, this was a case about whether a step leading into the Public Storage facility was defective, not whether the facility was handicap or wheelchair accessible.

The trial court told Plaintiff's counsel multiple times that the ADA and accessibility accommodations were wholly irrelevant to the case. See, e.g., 2T154-15 to -23; 2T158-25 to 159-8. The court told Plaintiff that if she were handicapped and fell "because the building was not handicapped-accessible," she would "have a far different lawsuit." 2T154-18 to -23. The court made clear that Plaintiff's counsel would be confined to the allegations of negligence in the complaint: "[W]e're not talking about handicapped accessibility to the

jury when the case has nothing to do with handicapped accessibility." 2T159-6 to -8.

On direct examination, Defendant's engineering expert, David Behnken, testified that the Public Storage entrance was not defective and had not been cited with any municipal code violations; he did not refer to the ADA, or any law related to handicap or disability accessibility. 6T8-17 to 29-9.

Nevertheless, on cross-examination, over Defendant's repeated objections, the trial court permitted Plaintiff's counsel to transform this simple negligence case into an ADA and handicap-accessibility case. Plaintiff's counsel engaged in a lengthy, irrelevant, and highly prejudicial examination of Mr. Behnken on state and federal handicap-accessibility standards in violation of N.J.R.E. 401 and 403. 6T45-2 to 59-20. He also ventured far beyond the scope of direct examination. See N.J.R.E. 611(b) ("Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness' credibility."). More problematic, however, is that Plaintiff's counsel engaged in questioning when he had no good-faith basis to do so.

"A question in cross-examination is improper where 'no facts concerning the event on which the question was based were in evidence and the [questioner] made no proffer indicating his ability to prove the occurrence.'" Manata v. Pereira, 436 N.J. Super. 330, 348 (App. Div. 2014) (alteration in original)

(quoting State v. Rose, 112 N.J. 454, 500 (1988)). That is precisely what occurred here. Plaintiff's counsel asked questions that "suggest[ed] the existence of evidence . . . which [was] not properly before the jury." See ibid. (omission in original) (quoting State v. Spencer, 319 N.J. Super. 284, 305 (App. Div. 1999). In other words, "under the guise of 'artful cross-examination,'" Plaintiff's counsel improperly "[told] the jury the substance of inadmissible evidence." See ibid. (quoting United States v. Sanchez, 176 F.3d 1214, 1222 (9th Cir. 1999)).

Plaintiff never introduced during the trial any evidence that Defendant's facility violated the ADA or any handicap-accessibility law. Yet, the trial court permitted Plaintiff's counsel to cross-examine Mr. Behnken on the ADA and the installation of a ramp and then to lead the jury toward unfounded speculation that Defendant's facility was in violation of handicap-accessibility laws. 6T45-2 to 59-20. And all this questioning occurred despite the fact that Plaintiff admitted in her direct examination that she suffered from no handicap or disability that impaired her ability to take a simple step into the Public Storage office. 2T158-1 to -3; 4T112-3 to -12.

Spanning approximately fifteen transcript pages, and over Defendant's objections, the court permitted questions on handicap accessibility and the ADA and whether the installation of a "ramp" could have prevented Plaintiff's fall.

6T45-2 to 59-20. This line of questioning began with Plaintiff's counsel asking Mr. Behnken whether other codes were applicable to Public Storage's "entranceway" other than the municipal code that Mr. Behnken solely relied on in his direct examination and expert report. 6T44-10 to 45-1. Step by step, Plaintiff's counsel worked towards framing the case as a handicap-accessibility rights case. Plaintiff's counsel asked Mr. Behnken whether the Uniform Construction Code (UCC) adopts the "International Code Council and American National Standards Institutes standard on accessible and usable buildings and facilities?" 6T45-3 to 45-6. Mr. Behnken answered that the UCC incorporates those standards and that they are referred to as "New Jersey's handicap accessibility code." 6T45-16 to -18.

When Plaintiff's counsel pressed on, asking "And what are those handicap --", Defendant's counsel objected on relevancy grounds. 6T46-2 to -10. Plaintiff's counsel responded: "[Your] Honor, we're discussing the handicap accessibility. I want to know if that's applicable to every building in New Jersey." 6T46-4 to -6. The court overruled Defendant's relevancy objection and permitted Mr. Behnken to answer. 6T46-11 to -12. Mr. Behnken confirmed that New Jersey's handicap-accessibility code "does not apply to every building. It will depend on the year of construction for the building and use of the building." 6T46-13 to -15. And he continued that, because the Public Storage

facility was listed as a pre-1990 constructed building, the "handicap accessibility code" did not apply. 6T46-21 to -24. Undeterred by that answer, Plaintiff's counsel asked how "New Jersey's handicap laws" affect entranceways. 6T47-17. Defendant's counsel objected: "This is not a handicap ADA case." 6T47-18 to -19. The court overruled Defendant's objection, leading Mr. Behnken to again emphasize that the "year of construction of the building pre-1990s knocked out any requirements for any type of handicap accessibility." 6T48-9 to -11.

This irrelevant line of inquiry persisted, 6T48-12 to 50-18, leading to the following exchange:

> [PLAINTIFF'S COUNSEL:] Was there any federal law that was created in time that the [International Code Council] then adopted codes that were enacted by federal regulation -- or federal laws?
>
> [DAVID BEHNKEN:] The federal laws, as I said, they basically required each state to have handicap accessibility for the parties.
>
> [PLAINTIFF'S COUNSEL:] And what law are we talking about, what federal law are we talking about?
>
> [DAVID BEHNKEN:] It's in the ADA at some point, somewhere.
>
> [PLAINTIFF'S COUNSEL:] The ADA is the --
>
> [DAVID BEHNKEN:] Americans with Disabilities Act.
>
> [6T50-19 to 51-4.]

Plaintiff's counsel continued to drive home the ADA theme, asking if under handicap-accessibility regulations, "any floor transition can only be a quarter of an inch or less." 6T54-11 to -12. Mr. Behnken responded: "For handicap accessibility, yes, if it's on a handicap accessible route, which this is not, it still is not." 6T54-13 to -15. The exchange continued,

> [PLAINTIFF'S COUNSEL:] This is still not a handicap accessible route?
>
> [DAVID BEHNKEN:] Correct.
>
> [PLAINTIFF'S COUNSEL:] This is the only route in and out of this building, correct?
>
> [DAVID BEHNKEN:] That's correct.
>
> [PLAINTIFF'S COUNSEL:] It has been the only route in and out of this building since 1990, correct?
>
> [DAVID BEHNKEN:] Correct.
>
> [PLAINTIFF'S COUNSEL:] And Public Storage could have changed this route to make it accessible, correct?
>
> [DAVID BEHNKEN:] I mean, you can do anything you want. You can knock the building down.
>
> [PLAINTIFF'S COUNSEL:] What could you do? If you keep the building, what could you do to that entranceway to change it?
>
> [6T54-18 to 55-7.]

At this point, Defendant's counsel objected again, prompting the court to ask, "[H]ow much longer are we going to be talking about handicap accessibility?" 6T55-8 to -10. Plaintiff's counsel responded, "I'm talking about

changing the entranceway at this point, Your Honor." 6T55-11 to -12. The court overruled Defendant's objection. 6T56-1 to -3. But if there had been a defect in the entranceway that caused Plaintiff's fall, as Plaintiff claimed, what was the point of talking about changes to the entranceway, other than to open the forbidden topic of subsequent remedial measures and the suppressed photograph of the ramp?

Plaintiff's counsel continued with this irrelevant and highly inflammatory topic over another objection by Defendant's counsel. 6T56-9 to -21. Plaintiff's counsel asked, "What changes could you make to that entranceway?" 6T56-9 to -10. Mr. Behnken responded: "You could do several things. You could reconfigure the whole thing. You could add a ramp. You could regrade, change all the asphalt on the outside." 6T56-22 to -25. Artfully exploiting Mr. Behnken's mention of a "ramp," the obvious answer to Plaintiff's counsel's question, an entirely irrelevant and prejudicial line of questioning followed:

> [PLAINTIFF'S COUNSEL:] And what would that consist of?
>
> [DAVID BEHNKEN:] Construction of a ramp, just a sloped surface projecting away from the door.
>
> [PLAINTIFF'S COUNSEL:] And that would eliminate three different levels within this riser?
>
> [DAVID BEHNKEN:] Yes.
>
> [PLAINTIFF'S COUNSEL:] And that would -- if it was eliminated, what you testified happened to Ms.

> Bishop, which is she tripped over that entranceway, correct?
>
> [DAVID BEHNKEN:] That's pure speculation, and she could have tripped over the ramp then too.
>
> [PLAINTIFF'S COUNSEL:] Well, what is a ramp? A ramp is a smooth, flat surface that's angled up?
>
> [DAVID BEHNKEN:] It's flat. It's not angled up, but it's a ramp with a sloped surface.
>
> [PLAINTIFF'S COUNSEL:] It would have eliminated, in your opinion, because your opinion is that she tripped by hitting her foot somewhere between here and here. Is that accurate?
>
> [DAVID BEHNKEN:] Yes.
>
> [PLAINTIFF'S COUNSEL:] And a ramp would have eliminated that, correct?
>
> [DAVID BEHNKEN:] It would have eliminated the vertical surfaces, but you still would have had ultimately the change in elevation that you could have tripped over just as easily.
>
> [6T57-4 to 58-4.]

This entire colloquy made a farce of the court's instruction to the jury during opening statements to strike from their minds the image or mention of a ramp. The trial court erred by allowing this inflammatory and irrelevant line of questioning over Defendant's objections. 6T46-3 to -10; 6T47-18 to -19. See State v. Mathis, 47 N.J. 455, 471 (1966) (reversing judgment of conviction where "testimony elicited on cross-examination [was] not relevant upon the issues in the case" and instead was made in "pursuit of sundry extraneous and

distracting subjects which . . . the parties [were] probably unprepared to litigate"); see also Schueler v. Strelinger, 43 N.J. 330, 348 (1964) ("In a close case on liability the cumulative effect . . . of improper questioning cannot be ignored.") (citing State v. Orecchio, 16 N.J. 125 (1954)).

Plaintiff's counsel was essentially given free rein to question Mr. Behnken about the ADA even though: (1) Plaintiff offered no evidence and made no proffer that the Public Storage facility violated the ADA or any handicap-accessibility law, 6T45-2 to 59-20, and (2) the Public Storage facility was constructed before 1990, and therefore was not subject to the handicap-accessibility code, 6T46-17 to -24. Additionally, the questioning violated N.J.R.E. 407, which bars evidence of subsequent remedial measures to prove liability, except in the most limited circumstances. See Szalontai, 183 N.J. at 402; In re S.D., 399 N.J. Super. at 124. Plaintiff's counsel was permitted to run roughshod over the evidence rules, and the court did not curb pages of questioning that were clearly prejudicial.

Indeed, in a seeming admission that the cross-examination of Mr. Behnken went off the rails, the court instructed Plaintiff's counsel not to refer to subjects raised during cross in his summation. 6T123-3 to 124-16. The court advised Plaintiff's counsel:

> You are barred from talking about the Americans with Disabilities Act since it's not pleaded in your

> complaint. It's never been part of the case as I understand it. And I'm precluding you from mentioning it at all during this case. You can talk about whatever you want to talk about. But this is not an ADA case.
>
> [6T123-4 to -10.]

The court did not, however, instruct the jury to disregard the multiple irrelevant and highly prejudicial references to the ADA, handicap-accessibility laws, or the ramp by Plaintiff's counsel during the cross-examination of Mr. Behnken. The court had a duty to do so because Plaintiff never offered a stitch of evidence that Defendant violated the ADA or any accessibility law. See Manata, 436 N.J. Super. at 348 (noting the impropriety of an attorney to suggest in questioning the existence of evidence that he has not proffered to be true). This inflammatory excursion into the irrelevant realm of handicap-accessibility rights in a case in which Plaintiff denied suffering from a handicap deprived Defendant of a fair trial. See State v. Hatch, 21 N.J. Super. 394, 400 (App. Div. 1952) (granting a new trial because of the admission of "manifestly prejudicial evidence, wholly immaterial and irrelevant to the basic issue, and without justification as an attack upon credibility").

III. THE COURT ERRED BY PERMITTING PLAINTIFF'S COUNSEL TO MAKE IMPROPER AND HIGHLY PREJUDICIAL SUMMATION REMARKS. (SEE (A)(B) AND (C)).

A. The Court Erred by Permitting Plaintiff's Counsel to Falsely Intimate During Summation That Defendant was in Non-Compliance with the ADA, in Disregard of the Court's Instruction. (Not Raised Below).

In utter disregard of the court's clear directive to not reference the ADA in summation, Plaintiff's counsel did just that through cleverly crafted messaging. Plaintiff's counsel also improperly suggested that Defendant was not in compliance with the ADA and other handicap-accessibility laws without offering or even proffering evidence to support the truth of such a claim.

"Our system of justice places checks on the propagation of falsehood." State v. Garcia, 245 N.J. 412, 436 (2021). "Even in our adversarial system, the notion that a trial is a search for truth is not an empty anachronism." Ibid. An attorney's summation "comments must be confined to the facts shown or reasonably suggested by the evidence introduced during the course of the trial." Comprehensive Neurosurgical, P.C. v. Valley Hosp., 257 N.J. 33, 84 (2024) (quoting Hayes v. Delamotte, 231 N.J. 373, 387 (2018)). "Counsel cannot 'misstate the evidence [or] distort the factual picture' – summation comments 'must be based in truth.'" Ibid. (alteration in original) (quoting Bender v. Adelson, 187 N.J. 411, 431 (2006).

Egregious summation remarks alone can deny a litigant the right to a fair trial, even when no objection is raised. And such remarks will be "'clearly capable of producing an unjust result'" when placed "in context with the other substantial trial errors." Id. at 85 (quoting R. 2:10-2).

Plaintiff's counsel proceeded with summation remarks clearly forbidden by Supreme Court jurisprudence. He intimated that Public Storage had to make accessibility alterations to its pre-1990 constructed building (a clear reference to the ADA) without any evidence in the record to support that position. 6T152-9 to -11. Counsel also suggested that Defendant committed ADA violations, by asserting without proof that "code changes" were made "several years before this incident happens that are to ensure safe accessibility into public spaces." 6T152-1 to -8. Plaintiff's counsel then told the jury that Public Storage was "negligent" for not installing a ramp sooner than it did:

> And if you're telling me or if anyone's thinking or if anyone were to tell me that Public Storage's big corporation didn't know that these codes had been changed, I'd be shocked. I think that's impossible. And from a bigger picture, from a broadest picture, Public Storage is negligent for that.
>
> [6T154-3 to -8.]

But Plaintiff never presented evidence that the ADA or handicap-accessibility laws applied to the pre-1990 constructed Public Storage facility and instead relied on speculation to do the work. Encouraging the jury to

conjecture, without referencing the acronym "ADA," Plaintiff's counsel asked the jury: "What do we think a reasonable company would do in a situation where there are excessive code changes regarding entrances like this? Do we not think that they would go around and make simple fixes to fix it? And defense expert told us, simple fix, put a ramp." 6T154-13 to -18 (emphasis added). Here, Plaintiff's counsel not only improperly reminded the jury of the photograph of the ramp that the court had told it to forget in opening statements but also suggested – without any evidential support in the record – that the facility was not in compliance with handicap-accessibility laws or the ADA.

Thus, Plaintiff's counsel had completed the transformation of a simple negligence case into something it was not – an ADA case. Perhaps an ADA case had more emotional appeal to attempt to sway the jury into falsely believing that Defendant violated handicap-accessibility laws. See, e.g., 6T45-2 to 59-20; 6T152-1 to -11. But this was not an ADA case. And "the propagation of falsehood" has no place in our system of justice. Garcia, 245 N.J. at 436.

Counsel's prejudicial appeals to the jury had the clear capacity to tip the balance in a closely poised credibility contest. See Hofstrom v. Share, 295 N.J. Super. 186, 193 (App. Div. 1996) ("What occurred here is analogous to the situation where an attorney persists in making unwarranted prejudicial appeals to a jury which taint the verdict. In such circumstances, we have often held that

a reversal is in order."); see also Torres v. Sumrein, No. A-4887-15T1 (App. Div. Dec. 7, 2017) (slip op. at 7) (remanding for a new trial on the issue of liability where the "tenor of plaintiff's case and her counsel's repeated comments in summation were plainly aimed at doing exactly what Rule 407 forbids"—"penaliz[ing] defendants for taking remedial measures.").[10]

In addition to his spurious conjecture, Plaintiff's counsel called for the imposition of liability based on Public Storage's "negligent" failure to install a ramp when the question for the jury – as pled in Plaintiff's complaint – was to decide whether a step was defective. Underscoring the irrelevance of subjects of the ADA and handicap accessibility, Plaintiff's counsel never requested a jury charge on how the jury was to consider and weigh any evidence about the ADA and handicap accessibility. Accordingly, the jury would not have had the slightest understanding of how to use the evidence in rendering a decision on the issue before it – whether Public Storage was negligent.

One last point. If the step was defective and proximately caused Plaintiff's injuries, the presence or absence of a ramp had no relevance. And if the step was not defective, and Plaintiff fell over her own feet, then the presence

[10] Pursuant to Rule 1:36-3, counsel includes this unpublished opinion in an Appendix at pages Da35–Da42. Counsel is aware of no contrary precedent.

of a ramp too would be irrelevant, for as Mr. Behnken testified, that can happen on a ramp too.

Defendant repeatedly and unsuccessfully objected during Mr. Behnken's cross-examination to any reference to the ADA and handicap accessibility, see 6T46-2 to -10; 6T47-18 to -19; 6T55-8 to -12; 6T56-1 to -3, and therefore may have felt constrained from objecting during Plaintiff's counsel's summation. Defendant should not be penalized for waiting to raise the issue, especially when the Court was in the position to police its own directive.

B. The Court Erred by Allowing Plaintiff's Counsel, During Summation, to Improperly Ask the Jury to Draw an Adverse Inference Based on Defendant's Election Not to Call Certain Witnesses. (Not Raised Below).

During summation, Plaintiff's counsel improperly implied that the jury could draw an adverse inference based on the fact that Defendant did not call Public Storage employees as witnesses. Plaintiff's counsel did so even though (1) he had read the deposition testimony of two Public Storage employees to the jury; (2) he could have called those witnesses himself; and (3) he did not suggest what those witnesses could have said beyond what was elicited from deposition testimony read to the jury. Moreover, Plaintiff's counsel did not request an adverse-inference charge in advance of summation, as required by State v. Clawans, 38 N.J. 162, 170–72 (1962).

Plaintiff's counsel reminded the jury that he had read the deposition testimony of two Public Storage employees and added, "When I read their deposition transcripts -- and you didn't see any of them here in court, right? None of them showed up. They were on the witness list. They didn't show up to testify." 6T152-17 to -21. He continued, "And you'll probably hear an instruction from the Judge, that doesn't matter." 6T152-22 to -23 (emphasis added).

First, instructions from the court do matter. Second, if Plaintiff's counsel intended to make an adverse-inference argument, he was required to request an appropriate charge from the court. That he did not do. Instead, Plaintiff's counsel improperly suggested that the jury could "care" that Defendant did not call Public Storage witnesses: "Don't, you know -- you can care about it, you don't have to care about it. And it's true. Everything you've heard, everything counsel has argued, everything I'm arguing to you, you could care about it, you don't have to care about it, and that's the beautiful thing about this." 6T152-23 to 153-3 (emphases added).

However well camouflaged, Plaintiff's counsel invited the jury to draw an adverse inference because Defendant did not call Public Storage witnesses who he deposed and were available for him to call as witnesses. Our Supreme Court and this Court's jurisprudence strictly prohibits this unfair trial tactic.

If a plaintiff's counsel intends to comment on a defendant's "failure to produce witnesses," he is required to "inform the court of such an intent so that the court can consider all the circumstances before deciding whether the request is proper." Murin v. Frapaul Constr. Co., 240 N.J. Super. 600, 612 (App. Div. 1990) (citing Clawans, 38 N.J. at 172; State v. Irving, 114 N.J. 427, 442 (1989)). "The procedure of prior notification is . . . required whenever a party wishes to mention the inference during closing argument." State v. Hill, 199 N.J. 545, 561 (2009) (citing State v. Carter, 91 N.J. 86, 128 (1982); Clawans, 38 N.J. at 172); see also Irving, 114 N.J. at 443 (stating that as a "matter of professional conduct counsel would not diverge from the practice of alerting the court and opposing counsel at the close of the opponent's case of an intent to draw an [adverse] inference."). It is the court's obligation "to determine whether reference to an inference in summation is warranted" and whether to give a jury instruction "informing the jurors that they may draw such an inference from a party's failure to call a witness." Hill, 199 N.J. at 561 (citing Clawans, 38 N.J. at 172).

The present case is similar to Torres v. Pabon, 225 N.J. 167 (2016). In Torres, the plaintiff's counsel had deposed the defendant and could have secured his "trial testimony by service of a notice in lieu of subpoena on his counsel, pursuant to Rule 1:9-1, by court order, or by consent." Id. at 183. Nevertheless,

the trial court erred by advising the jury that it could draw an adverse inference from the defense's "decision not to call [the defendant] to testify at trial." Id. at 184.

Here, had Plaintiff's counsel requested the adverse-inference charge, it would have been denied because the Public Storage witnesses were available to both parties and because those witnesses would not have "elucidate[d] relevant and critical facts in issue" beyond their deposition testimony – that is, they could not have offered testimony "superior" to what was already a matter of record. See Washington v. Perez, 219 N.J. 338, 356 (2014) (quoting Hill, 199 N.J. at 561). Plaintiff's counsel failed to follow the guidelines set forth in Clawans, Washington, and Hill and thus deprived the trial court of the opportunity to assess the propriety of his adverse-inference argument and Defendant of the opportunity to address the issue. Moreover, because Defendant's counsel did not have an opportunity to rebut Plaintiff's summation, Plaintiff's failure to follow the required adverse-inference procedures had the clear capacity to prejudice Defendant. See Nisivoccia v. Ademhill Assocs., 286 N.J. Super. 419, 430–31 (App. Div. 1996) (stating that a "defendant in a civil suit could be disadvantaged by a plaintiff's summation comment unless defense counsel anticipates and addresses the issue first" as the defendant has "no opportunity to rebut those comments").

It was plain error for the court to allow Plaintiff's counsel to ask the jury to draw an adverse inference from Defendant's election not to call Public Storage witnesses, who could have given no more information than their deposition testimony read into the record, and then to fail to give an instruction afterward advising the jury not to draw an adverse inference. The court's error had the clear capacity to cause an unjust result. See R. 2:10-2.

C. The Court Erred by Permitting Plaintiff's Counsel to Reference the Time-Unit Argument in Summation, In the Absence of Any Mention of the Time-Unit Rule in the Court's Proposed Jury Charge. (Da25; 6T165-7 to 167-9).

The draft charge given to Plaintiff and Defendant's counsel did not contain any reference to the time-unit rule as a measure of damages. 8T34-17 to 35-9. Plaintiff's counsel twice affirmed that the proposed charge was acceptable. 8T34-17 to -20. Defendant's counsel, accordingly, made no reference to the time-unit rule in his summation. 6T128-10 to 145-16.

Plaintiff's counsel, however, gave a full-throated presentation on the time-unit rule over Defendant's objection. 6T167-11 to 169-20. In overruling the objection, the court took responsibility for not including the time-unit rule in its draft charge. 6T165-7 to 167-9; 8T31-19 to -25. That, however, did not mitigate the disadvantage to Defendant's counsel, who relied in good faith on the draft charge and had no opportunity to address the time-unit argument in his closing.

This Court's jurisprudence required (1) Plaintiff to request a time-unit-rule charge before summation and (2) the court to give advance notice of its intention to give the charge. Henker v. Preybylowski, 216 N.J. Super. 513, 520 (App. Div. 1987). "Making the request before summations not only assures that the judge will give the instruction, but also serves as timely notice to defense counsel so that he may deal with the argument in his closing statement if he so chooses." Ibid. (emphasis added).

Here, Plaintiff's counsel twice failed to object to the draft charge without the time-unit-rule instruction, and therefore Defendant did not have notice and an opportunity to address the subject in summation. 8T34-17 to 35-9. Under these circumstances, the court had an affirmative obligation to advise Defendant's counsel that he had a right to give a rebuttal to the time-unit argument. That did not happen. 6T165-7 to 167-9; 8T31-19 to -25. Without "opportunity to rebut those comments," Defendant suffered a disadvantage. See Nisivoccia, 286 N.J. Super. at 430.

This error, separately and when combined with others enumerated in this brief, requires the grant of a new trial.

IV. PLAINTIFF'S FAILURE TO RAISE THE ADA ISSUE DURING JURY SELECTION DENIED THE COURT AND DEFENDANT THE OPPORTUNITY TO QUESTION JURORS EFFECTIVELY AND SELECT AN IMPARTIAL JURY. (NOT RAISED BELOW).

Plaintiff's failure to inform the court of her intent to raise an issue regarding the ADA or handicap-accessibility rights constitutes reversible error. It was not until after jury selection that Plaintiff made clear that she intended to make the ADA a focal point of her case even though she did not plead an ADA-specific claim. This omission deprived the court and the defense of the opportunity to conduct an effective voir dire.

"The trial court's duty 'to take all appropriate measures to ensure the fair and proper administration of a . . . trial' must begin with voir dire." State v. Fortin, 178 N.J. 540, 575 (2004) (quoting State v. Williams, 93 N.J. 39, 62 (1983)). "A 'vital aspect' of that responsibility is to ensure the impaneling of only impartial jurors by ferreting out potential and latent juror biases." Ibid. (quoting Williams, 93 N.J. at 62–63, 68). "To carry out that task, a thorough voir dire 'should probe the minds of the prospective jurors to ascertain whether they hold biases that would interfere with their ability to decide the case fairly and impartially.'" Ibid. (quoting State v. Erazo, 126 N.J. 112, 129 (1991)). The failure to select an impartial jury "undermine[s] the very foundation of a fair trial." Ibid.

By failing to notify the court of her intent to raise the ADA issue, Plaintiff denied the court and defense the opportunity to question jurors about potential biases related to disabilities or the ADA. Indeed, two jurors were excused from the panel because they were caring for family members with a disability, and two other jurors asked to be excused because each had a disability. 1T44-19 to 45-9; 1T65-13 to 66-25; 1T54-20 to 57-2. We will never know whether other members of the jury had a disability or family members or close friends with disabilities that might have affected their ability to serve as impartial jurors. Nor will we know whether the jurors might have been influenced by Plaintiff's unsupported allegations about Public Storage's noncompliance with ADA regulations.

Plaintiff's withholding of critical information at the jury-selection stage deprived both the court and the defense of the opportunity to adequately vet jurors on issues relating to potential biases and prejudices. The resulting error is reversible and warrants a new trial in the interest of fundamental fairness. See R. 2:10-2.

V. THE TRIAL COURT ERRED IN DENYING A NEW TRIAL WITH RESPECT TO POINTS 1, 2 AND 5(C). (DA23–25).

In denying Defendant's motion for a new trial, the court's post-hoc rationale for not granting a new trial is at complete odds with the court's contemporaneous statements during trial.

First, the trial court's after-the-fact determination that the photograph shown by Plaintiff's counsel in opening did not constitute a subsequent remedial measure is entirely inconsistent with the court's on-the-field calls explicitly admonishing and upbraiding Plaintiff for his conduct. [Da23–Da24]; 2T50-24 to 51-7; 2T51-14 to -16; 2T64-11 to -17. Indeed, the court seriously considered granting a mistrial because Plaintiff's counsel proceeded to show an irrelevant and highly prejudicial photograph to the jury after being warned not to do so. 8T15-1 to -17; 8T33-16 to 34-1. It is only because Plaintiff's counsel crossed the line in his opening that the court severely admonished counsel and gave a curative instruction. 2T70-15 to -17; see also 2T78-8 to -14.

That Plaintiff's counsel showed the photograph depicting the ramp to Defendant's counsel on the morning of the trial is of no moment. [Da23–Da24]; 2T56-10 to -15. When Plaintiff's counsel first attempted to show the photograph to the jury, Defendant's counsel objected, and Plaintiff's counsel was cautioned not to display the photograph, 8T15-1 to -17; 8T33-16 to -20, but did so anyway. The court's revisionist account is at odds with the trial record.

Second, the trial court erred in not granting a new trial based on Plaintiff's counsel's improper injection of unpled and irrelevant ADA-related issues into his cross-examination of Defendant's engineering expert. [Da24]. The trial court is mistaken that there were "relatively few" references to the ADA.

[Da24]. Plaintiff's counsel – over Defendant's repeated objections – conducted a nearly fifteen-page cross-examination on the ADA and handicap-accessibility rights. 6T45-2 to 59-20. The questioning was irrelevant and prejudicial and had the capacity to confuse and inflame the jury. The court understood as much because it pointedly warned Plaintiff's counsel to make no mention of the ADA in his summation. 6T123-3 to 124-16.

Third, the trial court erred in not granting a new trial based on the time-unit rule. [Da25]. Although the court states that it would have permitted Defendant's counsel to address Plaintiff's time-unit argument had he asked to do so, [Da25], the court had an affirmative obligation to advise Defendant that he would be granted that opportunity because a defense rebuttal is typically not permissible. Defendant relied on the draft charge that had no mention of the time-unit rule. The absence of the opportunity to offer a rebuttal gave Plaintiff an unjustified and unfair advantage.

VI. THE SUBSTANTIAL TRIAL ERRORS CUMULATIVELY DENIED DEFENDANT A FAIR TRIAL. (PARTIALLY RAISED AT DA26).

The cumulative effect of the substantial trial errors denied Defendant a fair trial. See Orecchio, 16 N.J. at 129 ("Where . . . the legal errors are of such magnitude as to prejudice the defendant's rights or, in their aggregate have rendered the trial unfair, our fundamental constitutional concepts dictate the granting of a new trial before an impartial jury"). "[E]ven when an individual

error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal." State v. Jenewicz, 193 N.J. 440, 473 (2008); see also Feldman v. Lederle Lab'ys, 132 N.J. 339, 352 (1993) (finding that even if each error by itself did not necessarily require reversal, "[w]hen considered in combination, those errors had the cumulative effect" of mandating a retrial).

Here, the combined prejudicial effect of the trial errors had the clear capacity to cause an unfair trial. This is particularly evident given that the issue of liability was close. See State v. Blakney, 189 N.J. 88, 97 (2006) ("Substantial trial errors are more likely to tip the scales and affect the outcome in a close case, such as this one.") (citing State v. Simon, 79 N.J. 191, 207 (1979)); Biruk v. Wilson, 50 N.J. 253, 263 (1967) (holding that the "cumulative effect" of trial errors where the plaintiff's case "was extremely thin" was sufficient to cause prejudice). At the close of Plaintiff's case, the trial court denied the grant of a directed verdict only because there was a "scintilla" of evidence, and "just that," to avoid dismissing the case. 5T217-1 to -2. The court's statement underscores that Plaintiff's proofs were underwhelming and that the cumulative trial errors had the clear capacity to undermine Defendant's right to a fair trial.

CONCLUSION

For these reasons, Defendant respectfully urges this Court to reverse the Judgment in favor of Plaintiff and grant a new trial.

Respectfully submitted,

Dated: April 14, 2025

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JANE BISHOP, Plaintiff/Respondent, -vs- PUBLIC STORAGE; XYZ COMPANIES I-V (fictitious entities whose true identities are presently unknown) and JOHN DOES I-V (fictitious persons whose true identities are presently unknown), Defendants/Appellants.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001230-24 T4 On Appeal from: Superior Court of New Jersey Law Division: Middlesex County Docket No. MID-L-7490-20 Sat Below: Hon. Gary K. Wolinetz, J.S.C.

BRIEF OF PLAINTIFF/RESPONDENT

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PRELIMINARY STATEMENT

Jury verdicts are nearly sacrosanct. The decision of a jury may only be disturbed when it is "clearly and convincingly" shown that "a miscarriage of justice under the law" occurred. R. 4:49-1(a). This appeal is from a jury verdict in a premises liability case in favor of plaintiff Jane Bishop ("plaintiff"). The evidence established that Appellant-defendant Public Storage, a national company which operates self-storage facilities for public use, failed to maintain an exterior entryway to an office on its premises, that the entryway and threshold exhibited multiple defects, and that its hazardous condition caused plaintiff to fall and suffer serious permanent injuries when she attempted to enter the office.

Appellant seeks reversal of the judgment based upon alleged trial errors, contending that the trial below was "unfair" to it. The amount of damages awarded by the jury is not contested. In rendering its verdict, the jury considered evidence, consisting of photographs of the exterior office entryway and threshold, and its dangerous defects; testimony and opinions of the parties' liability experts; and the testimony of plaintiff and her husband regarding her fall, and how the permanent injuries she suffered – not contested by Appellant – affected her life.

Appellant does not discuss the actual trial evidence which led to the jury's verdict, or even include it in its Appendix, instead opting to create a themed presentation of speculative jury confusion and overall unfairness of the trial. A

review of the entirety of the proceedings below, rather than Appellant's selected snippets of the record and characterization of same, demonstrates that the jury, faced with evaluating credibility of witnesses and considering uncontestable demonstrative evidence, soundly reached its determination. It bears note that defendant chose to focus on plaintiff's alleged fault for the accident, and presented an expert witness who denied that the subject entryway was hazardous in any manner, despite photographs reflecting the entryway's myriad defects.

Juries are presumed to follow instructions and they are presumed to be able to understand and consider the issues they are to decide. This case involved simple issues relating to defendant's liability – negligence of a commercial property owner whose duty it is to keep its premises safe, and causation. Appellant merely speculates that isolated occurrences during the trial confused the jury as to what it was to consider. However, nothing in the record suggests that the jury, which quickly rendered its verdict, did not understand the evidence or did not adhere to the instructions given it by the Court.

In particular, Appellant contends that the jury thought it was to consider a failure to accommodate claim under the Americans with Disabilities Act ("ADA"), or non-compliance with the Act, due to its expert mentioning the Act during his cross-examination. Both trial counsel and the Court understood and discussed on the record that the case did not include ADA claims, and nothing other than rank

speculation supports Appellant's surmising that the jury thought otherwise or was confused about its charge.

Appellant scarcely acknowledges that the Court below considered and denied its motion for new trial, which dealt with many of the same issues raised in this appeal. In so doing, the Court issued a thorough, well-reasoned written opinion. This Court reviews appeals from decisions on motions for new trials under the same standard as the trial judge – whether "it clearly and convincingly appears that there was a miscarriage of justice under the law." R. 4:49-1(a); R. 2:10-1. Given the comprehensive opinion explaining the correct decision of the Court below, there is no basis upon which to disturb the jury's verdict.

As to errors alleged for the first time as plain error, Appellant does not address the narrow standard of review applicable to same. The Court need not consider issues raised for the first time on appeal, and again, no alleged error was "clearly capable of producing an unjust result." R. 2:10-2.

In sum, the jury's verdict was amply supported by the evidence. Appellant's submission reads as if a different trial occurred than that reflected by the record. The Court below properly denied defendant's motion for a new trial, and its rulings should be affirmed. There was no error or "plain error" arising from the Court's conduct of the proceedings below which would justify reversal of the jury's verdict.

STATEMENT OF PROCEDURAL HISTORY

A. The Jury Verdict and Post-Trial Proceedings Below

The jury verdict below was rendered on July 11, 2024. The case involved a fall by plaintiff on defendant's premises, which severely injured her. The verdict was placed on the civil docket by the Clerk on July 11, 2024, pursuant to R. 4:47(a) and R. 4:100. The Court entered a formal judgment on July 22, 2024 (Da13).

Defendant's post-trial motion for a new trial and judgment notwithstanding the verdict was denied by Order dated November 13, 2024. (Da15) A written Opinion supported the Court's denial of the motion. (Da16-26) The Court opined that some of the errors alleged were not accurate in the first place (Da20), and that defendant was unable to meet the stringent "clearly and convincingly" standard for granting a new trial pursuant to R. 4:49-1(a), or even a lesser standard, to show that a "miscarriage of justice" occurred. (Da20) The Court observed that "much of the case came down to a credibility battle" (Da19), and indeed, Public Storage chose to employ a strategy of impugning plaintiff's credibility, prompting the Court to note the "contentious" nature of defendant's counsel's examination of plaintiff.[1] (Da17)

[1] The Court below noted that defendant's counsel was "no shrinking violet in his questioning of Ms. Bishop and, in his summation, told the jury as follows: [I]f I come across as aggressive, nasty, mean-spirited, some of you may think that, I apologize.'" (Da17) The trial transcript reflects that counsel's self-assessment was on-point, and also that several of the "errors" alleged below and repeated on this appeal were prompted by circumstances created by defendant's counsel, requiring the Court to make rulings.

B. Appellate Motion Proceedings and Docketing of the Appeal

Appellant did not file a timely notice of appeal of the judgment, as required by R. 2:4-1(a). It filed a motion to extend the time to file a notice of appeal, on December 30, 2024 (Da32), which was granted on January 23, 2025. (Da34)

Appellant filed a motion below seeking to post less than the required security to obtain a stay of execution upon the judgment. The motion was opposed, and by Order dated February 19, 2025, the Court required the posting of a cash deposit in the amount of $3,044,724.59, including pre-judgment and post-judgment interest, through December 31, 2025, and stayed execution upon the judgment. (Pa32)

STATEMENT OF FACTS

The trial of this matter commenced on July 8, 2024 and concluded on July 11, 2024. The trial was not complicated – it involved a fall on commercial premises. Plaintiff and her husband testified about the incident, which occurred on January 9, 2020, and she presented via video, an engineering liability expert witness, who addressed the hazardous condition of the office entryway in which she fell. Entered into evidence were photographs of the entryway and threshold which clearly reflected poor maintenance, and multiple hazardous defects. (Pa17; Pa19-21)

Plaintiff's liability expert, Wayne F. Nolte, Ph.D., P.E., testified that there were myriad problems with the condition of the only entryway from the exterior of defendant's building into the office, including that the step from "the parking lot

surface" into the office exhibited a compound riser with three components – 2 1/2 inches of concrete, a 1 1/2 inch raised metal strip, and a 1 inch threshold (2T107-22 to 108-4); that the step was "recessed from the edge of the concrete," (2T115-20 to 115-22); that a raised screw was present on the metal piece transitioning into the floor of the office (2T110-14 to 110-22), causing the metal piece not to be secured (2T111-10 to 111-13); and that a bent piece of metal flashing on the threshold created a gap underneath the metal. (2T117-12 to 117-17) The photographs of the entryway and threshold reflected these hazards (Pa17; Pa19-21), and Dr. Nolte pointed them out on the photographs as he testified. The tiered vertical riser, Dr. Nolte opined, violated the New Jersey building code, which set forth minimums for heights of changes in elevation. (2T122-14 to 122-21; 2T123-4 to 123-6) He further explained that these multiple defects reflected that defendant had failed to keep the only means of the egress to the office in a safe condition, in violation of New Jersey's fire code. (2T119-13 to 120-23) Given plaintiff's testimony that her foot had caught on something as she began to enter the office (4T120-6 to 120-11), Dr. Nolte opined that the recessed edge of the concrete, the raised screw, or the bent metal threshold piece all were capable of having caused plaintiff's foot to become caught, which had caused her to fall. (6T123-9 to 123-22; 6T122-22 to 122-25; 6T126-7 to 126-13)

Plaintiff also presented testimony of her treating surgeon, via video (2T169-10 to 3T230-23) and read portions of deposition testimony of two Public Storage

employees into the record. (4T8-24 to 34-15) The Court denied defendant's motion for a directed verdict at the conclusion of plaintiff's case. (5T210-23 to 217-10) Defendant presented two witnesses – its liability expert, David Behnkin, a forensic engineer, and Kent Lerner, M.D., who testified via Zoom. (See 6T) Counsel for defendant also read portions of plaintiff's deposition testimony into the record, which was followed by a short rebuttal reading. (6T101-13 to 108-14) Defendant did not make a motion to dismiss at the conclusion of presentation of all evidence.

Defendant's case was premised upon its assertion that plaintiff was clumsy and prone to falling, thus, contributorily negligent in the fall she suffered. To that end, the cross-examination of plaintiff was fashioned to attempt to impugn her credibility, challenge her recollections, and raise her ire. The Court below even took the extraordinary step of commenting in its Opinion on the manner in which the case was tried, with defense counsel ultimately apologizing to the jury in his closing argument about his "aggressive" manner. (Da17) The defense's closing argument was centered upon the all-or-nothing theme that plaintiff was untruthful, invoking "false in one, false in all," (6T134-7 to 134-12), and that "Public Storage did nothing wrong" (6T133-20), because its expert had opined that "[t]here was engineeringly nothing wrong with this door." (6T21-19 to 21-21)

Relevant to the arguments being made on this appeal, there existed photographs of the entryway taken on the day of the incident, however, the parties'

experts were unable to view the site in the same condition as it existed on that day. That was so because Hurricane Ida had caused flood damage to Public Storage's premises in September, 2021, over a year and a half after plaintiff's accident. In repairing the damage, Public Storage had entirely reconstructed the entrance to the office, and added a small ramp at the entryway. Inclusion of a ramp in the redesign of the entryway had been pre-planned by Public Storage, and was incorporated into the necessary repair work. (See 2T60-16 to 61-9; Pa27; Pa26)

Plaintiff's counsel explained this to the Court when objection was made by defendant's counsel about comments made in the opening statement, though the transcription of the sidebar reflects "indiscernible." (2T47-10 to 47-17) The Court proceeded to permit counsel to explain this to the jury. (2T47-18 to 48-10)

One of plaintiff's proposed exhibits (Pa26) was a printout of a "Google Maps" photograph of the exterior of the Public Storage building which depicted the current state of the entryway. Defense counsel had agreed in advance that the photograph, along with others, could be shown to the jury during plaintiff's counsel's opening statement. (2T56-10 to 56-11) The printout showed the general area of the exterior of defendant's premises, including the reconstructed entrance to the interior office.

Notwithstanding the agreement to permit plaintiff's counsel to show the printout to the jury, when he began to do so, defendant's counsel objected and moved for a mistrial. (2T49-14 to 49-20) The asserted basis was that the printout was being

shown to demonstrate a subsequent remedial measure, contrary to N.J.R.E. 407, and was not relevant. Plaintiff's counsel told the Court that defense counsel had agreed that the photograph could be shown, explained that it illustrated why plaintiff's expert was unable to conduct a site inspection, and also explained that defendant's witnesses had testified that the entrance had been modified and why – to repair hurricane flood damage - and that the change was not, in fact, a "subsequent remedial measure" taken to remedy the defects in the entryway. (2T52-7 to 55-23)

The Court declined to grant a mistrial, expressing its concern that defense counsel had agreed to the use of the photograph (2T55-10 to 55-15), and that fact was again noted by the Court below in denying defendant's new trial motion. (Da23) The Court directed the jury to disregard the photograph. (2T78-8 to 78-14) The photograph was not admitted into evidence at any time during the trial.

Another aspect of the trial below which relates to issues raised in this appeal was the cross-examination of defendant's liability expert as to the applicability of codes and standards governing construction, maintenance and safety of the entryway. Critically, the only code or standard the expert had relied upon in formulating his opinion that "[t]here was engineeringly nothing wrong with this door" (6T21-19 to 21-21) was the South Brunswick maintenance code. He conceded that other construction and maintenance codes, including state codes, were applicable, though he had not cited other codes in his Report. (6T44-3 to 44-18)

Thus, plaintiff's counsel's cross-examination of the expert included questions concerning the applicability of other codes and standards, including what they required and whether they were applicable to the subject entranceway – classic cross-examination fodder. As addressed in detail in the Argument, infra, during the examination, the genesis of the enactment of New Jersey's Construction Code was explored, with the expert offering an explanation that the ADA was the federal law which required states to enact accessibility standards. (6T50-11 to 51-4) He ultimately opined that New Jersey's accessibility requirements did not apply to defendant's building, because it was constructed prior to 1990. (6T46-17 to 46-24) Few substantive objections were made by the defense to its expert's testimony and voluntary explanations of "handicap laws," when he was asked about "accessibility standards," and the Court overruled an objection to the entirely permissible question of how such standards were applicable to "an entranceway." (6T47-8 to 47-19)

The expert also was asked what measures might have been taken to bring the entryway into compliance with standards which were put into place after the building was constructed, and to eliminate the defects which the threshold exhibited, and he responded, "[y]ou could do several things. You could reconfigure the whole thing. You could add a ramp. You could regrade, change all the asphalt on the outside." (6T56-22 to 56-25)

The ADA and other accessibility standards were mentioned a few times by defendant's liability expert in response to these cross-examination questions which addressed the narrow basis of his opinion – a single municipal code, and that he had not considered other standards applicable to the construction, maintenance and safety of entryways – all of which related to his credibility. The case was not an ADA failure to accommodate case.[2] No claim of lack of accommodation was made.

The Court instructed the jury as to what it was to consider in determining negligence, which included Public Storage's failure to take actions to render its premises safe, as discussed further infra. The jury charges were discussed and agreed upon by counsel, and included the usual model charges relating to premises liability of commercial property owners, and the manner in which the jury was to evaluate the evidence. The jury was instructed that counsel's comments are not evidential, and was instructed as to plaintiff's entitlement to damages, should a finding of liability be made. (6T174-12 to 174-17; 6T188-15 to 7T196-22)

Facts relating to other issues which arose during the trial and the rulings and omissions to which Appellant assigns error are addressed in further detail in the Argument, infra.

[2] Title III of the ADA provides a private right of action for persons with disabilities for failure to accommodate in public facilities, including failure to provide equal access to facilities.

LEGAL ARGUMENT

POINT I

THE STANDARDS OF REVIEW APPLICABLE TO THE ERRORS ALLEGED BY APPELLANT

Appellant neglects to address the standards of review this Court must employ to evaluate the errors it alleges in this appeal. An appellate court reviewing a motion for new trial denial, as here, employs the same standard as the trial judge – whether "it clearly and convincingly appears that there was a miscarriage of justice under the law." R. 4:49-1(a); R. 2:10-1. See also Risko v. Thompson Muller Auto. Group, Inc., 206 N.J. 506, 522 (2011); Hayes v. Delamotte, 231 N.J. 373, 386, (2018). A "miscarriage of justice" may occur "when there is a 'manifest lack of inherently credible evidence to support the finding,' when there has been an 'obvious overlooking or under-valuation of crucial evidence,' or when the case culminates in 'a clearly unjust result.'" Hayes, 231 N.J. at 386, quoting Risko, 206 N.J. at 521-22. Again, the Court below, having presided over the trial, thoroughly addressed the majority of the issues which Appellant now raises. The trial record supports the Court's conclusion, and there is no basis upon which to disturb the jury's verdict.

In addition, although Appellant invokes the plain error rule (Db, Points III and IV), it fails to discuss its extremely limited applicability. An appellate court will not consider issues raised for the first time on appeal, unless the errors implicate jurisdictional issues or a public interest, or otherwise constitute plain error. See

Nieder v. Royal Indemnity Ins. Co., 62 N.J. 229, 234 (1973). The issues which Appellant's new appellate counsel has raised for the first time are not jurisdictional nor do they implicate a public interest. R. 2:10-2 addresses plain error and makes it clear that there must be showing that an error or omission was "clearly capable of producing an unjust result." See also Szczecina v. PV Holding Corp., 414 N.J. Super. 173, 184 (App. Div. 2010), quoting R. 2:10-2. Granting "relief under the plain error rule . . . in civil cases . . . 'should be sparingly employed.'" Baker v. Nat'l State Bank, 161 N.J. 220, 226 (1999) (citation omitted).

Appellant's counsel was not present at the trial below, but in a post-hoc review of the record, criticizes the trial court – not for taking affirmative actions, but instead for failing to take certain actions, which it asserts produced an "unjust result" or an "unfair trial." (Db3, Db48) There can be no showing that anything other than an evaluation of the trial evidence "clearly" affected the jury's verdict. The alleged failures of the Court below did not constitute error, let alone plain error, and the Court should decline to consider the issues raised for the first time on appeal.

POINT II

THE VERDICT OF THE JURY WAS AMPLY SUPPORTED BY THE EVIDENCE AND THERE WAS NO MISCARRIAGE OF JUSTICE; THE ERRORS ALLEGED BY DEFENDANT DID NOT AND DO NOT ENTITLE IT TO A NEW TRIAL

What is startlingly absent from Appellant's recitation of the proceedings below is a meaningful discussion of the evidence presented to and considered by the

jury in reaching its verdict. As reflected on the jury verdict sheet, the primary issue the jury was charged with determining was simple: did the evidence support a finding "that Public Storage was negligent?" (Da10) Although the defense asserted comparative negligence, it did not contest that plaintiff was injured in the fall she suffered. The Court instructed the jury as to the applicable legal principles, including those relating to liability of commercial landowners. (See 6T185-15 to 186-13)

The simplicity of the trial evidence was as straightforward as the issues the jury was to determine. Some of plaintiff's trial exhibits were photographs of the defective and hazardous entryway (Pa17; Pa19-21), yet Appellant does not mention this powerful demonstrative evidence, and completely omits the photographs from its Appendix, contrary to R. 2:6-1(a)(1)(I). There were two fact witnesses – plaintiff and her husband, and each party presented an an engineering expert witness and a medical professional to testify about plaintiff's injuries. While plaintiff contended that Public Storage had been negligent in failing to maintain its premises, the defense centered its case upon attempting to convince the jury that plaintiff was just clumsy and prone to falling, and that despite the photographs showing otherwise, the condition of the entryway was not unsafe. The jury just did not agree that defendant had fulfilled its duty to keep its premises safe for its patrons. It accepted that plaintiff's fall and injuries occurred as a result of defendant's negligence. Those determinations were amply supported by the evidence, as a review of the complete

record below demonstrates. Accordingly, there was no "miscarriage of justice," and the errors asserted – some of which were not errors at all – do not entitle Appellant to a reversal of the jury's verdict.

A. The Jury's Verdict Was Amply Supported by the Evidence

The evidence at trial included not only photographs depicting multiple defects of the office entryway, but also testimony of plaintiff and her husband as to what had occurred on the day of the incident, as she attempted to enter the office. She testified that her foot had become caught on something as she proceeded through the entryway into defendant's office, causing her to lose her balance and fall. (4T120-6 to 120-11) Dr. Nolte further explained the defects of the entryway, consistent with the photographs shown to the jury. The raised screw, the bent and unattached metal piece of the threshold, the gap between the threshold and concrete, and the multiple levels of elevation of the step up to the threshold were clearly depicted, and had been highlighted by markings on the photographs by Dr. Nolte. (Pa17; Pa19-21) The entryway was hazardous, and was not a safe egress from the building, as Dr. Nolte opined, citing to fire and building codes. Even without Dr. Nolte's testimony and opinion, it was clear to see that the entryway and threshold were in severe disrepair. The photographs, some taken by Public Storage, told the entire story.

The jury took into account this demonstrative evidence in considering whether defendant – which had a duty as an owner of commercial premises to exercise

reasonable care to ensure the safety of the premises – was negligent. A business owner's duty is one "of reasonable or due care to provide a safe environment for doing that which is within the scope of the invitation" to its patrons. Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003) (citing Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 433 (1993). The duty of care is multifaceted, and "requires a business owner to discover and eliminate dangerous conditions, to maintain the premises in safe condition, and to avoid creating conditions that would render the premises unsafe." Id, citing O'Shea v. K. Mart Corp., 304 N.J. Super. 489, 492-93 (App. Div. 1997) "[E]very commercial establishment must maintain its premises, including means of ingress and egress, in reasonably safe condition." Krug v. Wanner, 28 N.J. 174, 179 (1958) (citations omitted).

The defense expert, David Behnkin, however, opined that the entryway was not defective or unsafe, which essentially was contradicted by the photographs viewed by the jury. The outcome of the credibility contest between the liability experts was a foregone conclusion, as only Dr. Nolte's opinions were corroborated by the photographs. Mr. Behnkin persisted in his "lack of defect" opinion, nonetheless, stating that the "doorframe as constructed was fine," and that it met code requirements for "height and width," because he had contacted the municipality and no "violations concerning [the] doorway and doorway frame" had been issued." (6T18-21 to 19-3) He contended that the South Brunswick maintenance code was

only code applicable to evaluation of the condition of the premises. (6T19-9 to 19-17) Dr. Behnkin's opinion in this regard led to a round of cross-examination concerning what other building and safety codes were applicable to the entryway, and safe access to and from the building, as discussed infra.

The jury also considered evidence of plaintiff's injuries. Testimony of plaintiff, her husband and her treating physician were presented and photographs relating to her permanent injuries were admitted into evidence. (Pa18; Pa22-25)

The case was not a difficult one for the jury, in view of the overwhelming evidence supporting a finding of liability. Its verdict was unanimous. (Da10) As the Court below noted, the jury made a credibility determination with respect to plaintiff's testimony, rejected the defense's attack upon her credibility and its "false in one, false in all" proposition (6T134-7 to 135-6), and accepted that plaintiff's foot caught on the defective entryway threshold, causing her fall. (Da21-22)

Appellant's failure to discuss the evidence the jury actually considered in reaching its verdict, instead offering pure supposition of what possibly could have been in the minds of the jurors, speaks volumes. The jury was properly instructed, and there is no evidence whatsoever that the jury was confused as to its charge. It asked not a single question during its deliberation, which lasted only forty-two (42) minutes. (7T194(1)-6 to 194(2)-15) The jury's verdict was amply supported by the evidence and should not be disturbed.

B. Plaintiff's Opening Statement Did Not Reference Subsequent Remedial Measures and There Was No Error in Briefly Showing the Jury a Printout Depicting the Current State of the Subject Premises

Appellant's assertion that plaintiff's counsel suggested that defendant had undertaken "subsequent remedial measures" to cure the defects in its entryway, by beginning to show the jury a Google Maps printout during the opening statement (Db18-23) simply is not accurate, as the record reflects. The argument also ignores one critical point: defense counsel agreed that the printout could be shown to the jury! The Court below specifically noted this in denying defendant's new trial motion, which was based on the identical argument Appellant now asserts. (Da23)

Appellant makes numerous references to what it calls "the photograph," offering a misleading description of the document, but does not include it in the appellate record for this Court to review. The document at issue was a proposed exhibit included in plaintiff's pretrial submission as P-33. (Pa26) It was not a "photograph" in the usual sense of the word – it instead was a printout from the Google Maps website. It depicted a broad view of the Public Storage premises, including a row of self-storage units, and the entrance to the office, and bore a date of October 2022. Because of defendant's counsel's objection, and what ensued, the printout was not admitted into evidence or referred to after plaintiff's opening.

Public Storage had repaired flood damage to its premises, some twenty (20) months after plaintiff's accident. Counsel for plaintiff was about to explain to the

jury that plaintiff's expert could not inspect the site of the accident, because the repairs which had been made also encompassed a re-configuration of the entryway where plaintiff fell. Defense counsel objected to the comment. (2T47-6 to 47-9) Just prior to beginning to explain to the jury this fact, counsel had begun to refer to photographs of the site he was going to show to the jury, but did not, because the objection was interposed. Though the sidebar was not recorded (2T47-10 to 47-17), what was discussed is clear, as a result of what subsequently occurred. Counsel noted that he was beginning to explain to the jury why plaintiff's expert had not been able to conduct a site inspection and observe in person the condition of the area where plaintiff fell, and instead had relied upon photographs of the area in formulating his opinions. This fact related to the credibility of plaintiff's expert, which in any premises liability case is a critical component of the jury's consideration of an expert's opinion.

Plaintiff's counsel also explained to the Court that the area had been modified by Public Storage when it was repairing damage caused by Hurricane Ida, and that the installation of a small ramp had been pre-planned by Public Storage, and incorporated into the modifications. All of these facts were based upon deposition testimony of a Public Storage employee. (Pa27-31) The Court acknowledged these facts, and permitted counsel to proceed to inform the jury of these facts. Plaintiff's counsel proceeded to do so, without objection by defense counsel, as follows:

> So we hired an engineer, Dr. Wayne Nolte. . . But Dr. Wayne Nolte didn't have a chance to actually inspect the condition as it is in this photograph. This photograph, by the way, was taken on the date of the incident. Didn't have a chance to examine it as it was in this condition because Public Storage changed the overall entranceway. They built in a ramp. It was something that they had planned. And it was also done because there was a hurricane that flooded the office. So they decided to go ahead and make the change at that point, which was after Jane's incident and her fall.

(2T47-18 to 48-6, emphasis added)

Plaintiff's counsel did not, at any time, suggest that the modifications made to the office entrance, including the ramp, were made to remedy the defects in the entryway threshold, or as a response to plaintiff's accident, or should be considered to demonstrate negligence. In fact, he informed the jury of the opposite. His comments were not in violation of N.J.R.E. 407, and they were properly permitted by the Court. The Court below further confirmed this in its Opinion. (Da24)

Later during plaintiff's opening, when showing the jury several photographs of the accident site, plaintiff's counsel began to show the Google Maps printout of the photograph of the exterior of the Public Storage building. The printout showed the general exterior area of defendant's premises, including the small ramp at the entrance – which counsel had previously been permitted to mention to the jury, with the explanation that Public Storage had had to repair the entrance due to hurricane flood damage. Counsel referred to the printout, commenting that it showed "what the [sic] Public Storage currently looks like." (2T49-15 to 49-16)

Defendant objected, and then moved for a mistrial, which ultimately was denied. Indeed, defense counsel, in the same breath, moved for a mistrial, and admitted, "he showed me that picture, and I said, no problem." (2T50-13 to 50-15) He asserted a "relevancy" objection, shouting, as the Court noted, and accusing plaintiff's counsel of showing the photograph only because it depicted that a ramp had been installed. (2T50-15 to 50-19)

Based on the defense objection, the Court began to inquire about subsequent remedial measures being suggested by the printout, briefly disregarding that it had previously permitted counsel to state that a modification, including a ramp, had been made to the office entrance, and the reason the modification had been undertaken, which in fact, was not a subsequent remedial measure. Plaintiff's counsel emphatically stated that he would never attempt to suggest a subsequent remedial measure, and was not doing so, explaining:

> I'm not saying they fixed it by doing this ramp. They could have fixed it in 100 different ways. There's not -- that's not the argument, that this was done as a result of this accident. This was done over a year and a half after this accident. This was not a subsequent remedial -- remedial act.
>
> Your Honor, if I were to argue that I understand the Court's issue and I would understand defense counsel's issue. But I would never argued [sic] that. That's not the position I'm taking.

(2T52-16 to 52-25)

Counsel further emphasized that he was not arguing that Public Storage was "fix[ing] the defective condition" by entirely modifying the entrance (2T51-10 to 51-13), or that it "changed this [the entrance] a year and a half later as a result of an incident that happened in January of 2020." (2T63-18 to 63-21)

The record reflects that plaintiff's counsel was truly stunned by the objection, because of defendant's counsel's consent to his use of the photograph, and his consenting to deposition readings of Public Storage employees explaining the repairs. He noted that he "had no indication [he] couldn't use the photograph" (2T54-5 to 54-11), and expressed, "I feel set up here because how can counsel approve my use of a photograph during openings and then have me on the back end get called improper for showing it to the jury? I've -- I've -- I've never experienced that." (2T74-21 to 74-25)

Plaintiff's counsel proceeded to explain to the Court that there were many reasons the photograph might be introduced as evidence, for example to show that repairing the defects of the entryway were feasible, in cross-examining defendant's witnesses or its liability expert. He noted that if offered in any of those circumstances, the photograph would not be proffered as evidence of a subsequent remedial measure. (2T53-15 to 54-4) He again noted that the photograph could be shown to demonstrate why "it makes no sense [for the expert] to go view [the premises]." (2T54-2 to 54-4)

There was additional colloquy which demonstrated that the Court perhaps did not entirely appreciate the import of N.J.R.E. 407, or its exceptions, and that plaintiff's counsel possibly could use the photograph later in the trial – certainly in cross-examining witnesses, as counsel noted (2T75-5 to 75-8), and particularly if they testified that making the entryway safe, or actually repairing its alleged defects was not feasible. Instead, the Court stated that it "would highly doubt" that the photograph could be used for any purpose going forward. (2T75-5 to 75-9)

The mistrial defendant requested was denied. Notwithstanding that defense counsel had agreed that plaintiff's counsel could use the printout during opening statements, as was acknowledged by the Court (2T77-18 to 77-20), faced with the objection, the Court directed plaintiff's counsel to refrain from further referencing the printout and instructed the jury to disregard the photograph and counsel's remarks regarding it. (2T78-9 to 78-14) At the conclusion of the trial, the Court's instructions included the usual admonition to the jury that counsel's opening and closing statements are not evidential. (6T174-12 to 174-17)

N.J.R.E 407, "Subsequent Remedial Measures" (emphasis added) provides:

> Evidence of <u>remedial measures taken after an event</u> is not admissible to prove that the event was caused by negligence or culpable conduct. However, evidence of such subsequent remedial conduct may be admitted as to other issues.

It has long been the case, consistent with N.J.R.E. 407, that "where such evidence [of remedial measures] is offered for relevant purposes other than

negligence or culpable conduct it is admissible." Harris v. Peridot Chemical (New Jersey), Inc., 313 N.J. Super. 257, 292 (App. Div. 1998). It may be offered and admitted to "show control, to demonstrate feasibility and practicality of repair, and to impeach the credibility of a witness." Id, at 292-293, citations omitted, emphasis added. See also Lavin v. Fauci, 170 N.J. Super. 403, 407 (App. Div. 1979). Indeed, the Supreme Court in Harris found that the "evidentiary prohibition was not applicable," first and foremost acknowledging the fact that the measures undertaken by the defendant were not remedial measures at all, but instead were undertaken for an entirely different reason – to comply with the law. Id. See also Manieri v. Volkswagenwerk, 151 N.J. Super. 422, 431-435 (App. Div. 1977). The Rule's bar of evidence of subsequent remedial measures is based upon the policy consideration of encouraging prompt remedial measures – consistent with an exercise of "sound business sense," – "in order to avoid the occurrence of similar accidents." Dixon v. Jacobsen Manufacturing Co., 270 N.J. Super. 569, 587-88 (App. Div. 1994), certif. denied, 134 N.J. 482 (1983), emphasis added.

Here, as in Harris, Public Storage's modifications to its premises, which occurred almost two years later, were not "remedial," with respect to the entryway, and the printout was not used to argue that defendant had undertaken measures to cure its defects. Plaintiff's counsel instead explained the very reason the change had been made – to repair flood damage on the premises. These were not repairs to

tighten the protruding screw, or to replace the bent metal piece on the threshold, or to address the other defects depicted in the photographs of the entryway. Indeed, during the trial, defendant denied that the entryway exhibited any defects at all.

No violation of N.J.R.E 407 occurred. The Google Maps printout was not admitted into evidence, in any event, and, upon the Judge's instruction, was not referred to during the remainder of the trial. The actions taken by the Court sufficiently addressed defendant's counsel's "relevance" objection.[3]

Further, the Court below noted, in addressing defendant's new trial motion, that the photograph had not been utilized to show "an improper 'before and [after] comparison," and that it had issued an appropriate instruction to address defendant's stated concern. (Da24) Again, there was no suggestion that defendant's modifications to the entrance of the building almost two years after plaintiff's accident were undertaken to fix the defects in the entryway and threshold.

Appellant's argument about the "photograph" – which it calls the "photograph of the ramp," to support other of its arguments, is based upon a misconstruction of

[3] The unpublished decision cited by Appellant, Torres v. Sumrein, A-4887-15 (2017) (Db37), is inapposite. In that case, a "watch your step" sign was placed at the site of plaintiff's fall-down accident following the incident, and the steps where she fell were "painted bright yellow." Counsel commented about these changes, asserting that plaintiff's fall would not have happened if those specific measures had been taken prior to the accident. Here, defendant's modification of its premises was not a remedial measure, and no "before and after" comparison was made by plaintiff's counsel, as noted by the Court below.

the record. The Court did not direct plaintiff's counsel not to show the photograph, as Appellant asserts (Db, Point I) Indeed, counsel remarked when responding to defendant's mistrial motion, that he had no indication that he could not use the photograph, noting that defense counsel had consented to his using it. (2T54-5 to 54-11) He reminded the Court that the Google printout had not been the issue when defendant had objected previously; only the permissible latitude of his comments to the jury explaining the change to the premises, and that the Court's comment was not accurate. (2T64-9 to 64-22) The record does not reflect that plaintiff's counsel was directed not to show the printout to the jury but did so anyway, as Appellant argues. The predicate of Appellant's argument did not occur. [4]

Second, the photograph was not prejudicial to defendant, and ultimately, only a relevance argument was made by defendant's counsel in support of his objection to its being shown to the jury. (2T156-25 to 157-1) Although there had been a detailed explanation of why modifications were made to the entrance, almost two years after plaintiff's accident, the Court instructed the jury to disregard the photograph. If anything, the explanation, that defendant had plans to place a ramp at the entrance, and ultimately did so when its premises were damaged by Hurricane

[4] Appellant's counsel was not at the trial below, and its interpretation of the first sidebar during plaintiff's opening is speculative and incorrect. (Db, Point I) The comments plaintiff's counsel was permitted to make following the sidebar colloquy evidence that what was discussed and resolved by the Court was what counsel was permitted to tell the jury.

Ida, suggested that it had some sense of responsibility toward its patrons.

In sum, there was no error which could be assigned to plaintiff's counsel's utilizing the Google printout in the first place. The Court's addressing and resolving the defense objection to his doing so did not constitute error, was not prejudicial in any manner, and certainly did not cause a miscarriage of justice.

C. The Cross-Examination of Defendant's Expert Was Proper, and the Few Mentions by the Expert of the Americans with Disabilities Act ("ADA") During the Cross-Examination Were Not Prejudicial

A trial court has broad discretion in the conduct of a trial, including "cross-examination and the appropriate limits thereon," and its exercise of discretion will not be disturbed on appeal unless "there is a clear abuse of discretion which has deprived [a party] of a fair trial." Daisey v. Keene Corp., 268 N.J. Super. 325, 334 (App. Div. 1993), citing Janus v. Hackensack Hospital, 131 N.J. Super. 535, 540-41 (App. Div. 1974). See also Persley v. N.J. Transit Bus Operations, 357 N.J. Super. 1, 9 (App. Div. 2003).

"[A]n expert witness is always subject to . . . cross-examination as to the basis of his opinion." State v. Wakefield, 190 N.J. 397, 451-52 (2007), quoting State v. Martini, 131 N.J. 176, 264 (1993)). "[T]he weight to be given to the evidence of experts is within the competence of the fact-finder." LaBracio Family P'ship v. 1239 Roosevelt Ave., Inc., 340 N.J. Super. 155 (App. Div. 2001). Accordingly, cross-examination is critical to the jury's evaluation of an expert's opinion, and courts are

generally permissive with respect to the breadth of cross-examination of an expert witness regarding the bases of his opinions.

It has long been the law of this state that an expert witness may refer to regulations or safety codes to explain the basis of his opinion concerning a reasonable standard of care or a prevailing safety practice, even if the referenced regulations have not technically been violated based on facts in evidence. See, e.g., Smith v. Kris-Bal Realty, Inc., 242 N.J. Super. 350 (App. Div. 1990), citing McComish v. DeSoi, 42 N.J. 274 (1964). Conversely, if an opposing expert does not acknowledge the applicability of safety codes, the cross-examination of the expert may include questioning about what safety codes are actually applicable, and how so. Likewise, in order to show that a defendant could have taken actions to remedy a hazardous condition, questions are often directed to reasonable or feasible alternatives for doing so.

Appellant takes issue with the cross-examination conducted by plaintiff's counsel of defendant's liability expert. (Db, Point II) The cross-examination was entirely permissible, relating to the expert's failure to cite to construction, maintenance and safety codes which he conceded were applicable to the subject entryway. Appellant's objection is to the mention of the Americans with Disabilities Act ("ADA"), and the New Jersey Construction Code's "handicapped accessibility" requirements, by its own expert, when asked about standards applicable to the safety

and accessibility of entryways, and the follow-up questions which ensued. Defendant's counsel did not object to its expert's response, and only interposed minor objections thereafter to the cross-examination.

The portion of the cross-examination at issue specifically related to the expert's testimony on direct that he did not believe that the subject entryway and threshold exhibited defects because he had phoned municipal officials and was informed that no citations or violations had been issued relating to defendant's building. (6T19-9 to 19-17) The expert testified that the entryway was "fine by engineering standards" and "was not. . . violative of any codes." (6T25-1 to 25-5) Thus, as defense counsel characterized it in his opening, Public Storage's position was that "[t]here is nothing engineeringly wrong with this, nothing." (2T89-22 to 89-23) This all-or-"nothing" position was difficult for the defense to support, given the photographs of the entryway, obviously depicting the defects and hazardous condition pointed out and testified to by Dr. Nolte.

The defense expert did not mention any of the defects addressed by Dr. Nolte, nor the building and fire codes Dr. Nolte relied upon in opining that the entryway exhibited multiple defects, in violation of these codes. Instead, he relied solely upon the South Brunswick maintenance code, as he conceded (6T44-3 to 44-9), and took the narrow position that the entryway was sound from an engineering standpoint.

Thus, on cross-examination, plaintiff's counsel proceeded to ask the expert whether any additional codes or standards would apply to construction or maintenance of an entranceway such as that which provided access to defendant's office, and he readily agreed that other codes would apply, including state codes, and the Uniform Construction Code, which adopted ICC and ANSI standards. (6T44-10 to 45-1) Counsel inquired whether the Uniform Construction Code adopted "the ICC and ANSI standard on accessible and useable buildings and facilities," (6T45-2 to 45-6) and when counsel was beginning to locate the code section number which the expert requested in order to answer the question, the expert volunteered, "I believe you're referring to what's commonly referred to as New Jersey's handicap accessibility code." (6T45-16 to 45-18) Counsel asked the expert, "what is that, by the way," and the expert responded with an explanatory answer:

> Every state has to have handicap accessibility laws. That's a federal requirement that every state has to have their own. So the states – New Jersey included obviously, you have handicap accessibility requirements for everything from parking spaces to doorways, thresholds.

(6T45-21 to 46-1)

Defendant's counsel did not object to the questioning or the expert's response, however, when plaintiff's counsel began to ask a follow-up question, defense counsel objected, based on relevance. The Court overruled the objection when plaintiff's counsel explained he simply wanted to know whether the accessibility requirements

specified by the expert were "applicable to every building in New Jersey." (6T46-2 to 46-12) The expert proceeded to answer the question, stating "[i]t does not apply to every building," and explained that the year of the building's construction and its use were two relevant considerations. (6T46-13 to 46-15) He further opined that defendant's building would not have been subject to the accessibility requirements when it was built because the municipal records indicated that the building was "pre-1990." (6T46-17 to 46-24)

Following this testimony, counsel located the ANSI standard number, A117.1-2003, incorporated into subchapter/subcode 7 of the New Jersey regulations, which the expert had conceded were applicable, and asked what "accessibility standards" were contained in it. The expert replied, "[t]hey are the design standards requirements for New Jersey's handicap laws," and proceeded to give an example of requirements for an accessible bathroom. (6T47-2 to 47-16) When counsel asked the question, "[t]ell me how it affects an entranceway," defense counsel objected, shouting, as the Court noted, and a sidebar ensued. (6T47-17 to 47-22)

The sidebar is noted in the record as "completely indiscernible," but the outcome is reflected in the record, with plaintiff's counsel being permitted to continue freely with his cross-examination, as to the applicability of the "barrier-free subcode" to an entranceway. (6T48-2 to 48-5) Questioning along these lines continued, with no further objection by defense counsel. Plaintiff's counsel explored

the genesis of the ICC standards, and during the questioning, the expert explained, "[t]he federal laws, as I said, they basically required each state to have handicap accessibility for the parties," and he further stated that he was referring to the ADA. (6T50-11 to 51-4) He was asked about whether the ADA had been adopted by New Jersey, or incorporated into the ICC standards. No objection was made to any of these inquiries, though defense counsel asked for clarification of a general question about "codes," which was given. (6T52-11 to 52-23)

The expert also was questioned about the elevation changes in the entryway and the permissible height of a floor transition in accordance with applicable codes, and opined that the height requirement did not apply because the entryway was not "on a handicapped accessible route." (6T54-9 to 54-20) More questioning ensued, and the expert ultimately was permitted to answer a straightforward question about what changes could have been made to the entryway to eliminate the height differential and bring it into compliance with applicable codes. (6T55-2 to 56-21) His response was:

> You could do several things. You could reconfigure the whole thing. You could add a ramp. You could regrade, change all the asphalt on the outside.

(6T56-22 to 56-25)

Counsel then proceeded to ask whether construction of a ramp – the alternative mentioned by the expert – would have "eliminate[d] three different levels

within this riser." The expert responded in the affirmative. (6T57-1 to 57-9)

Defendant's counsel chose not to object to his own witness's testimony about a ramp being a feasible alternative. Obviously, the Court was not required to take any action when the expert responded to the question.

The cross-examination of defendant's expert was neither irrelevant or "highly prejudicial," as Appellant contends. (Db, Point II) The Court did not err in permitting what it recognized as an entirely appropriate cross-examination. Indeed, as plaintiff's counsel had made clear during an earlier discussion about whether certain testimony of a Public Storage employee could be read into the record, "Nolte has talked about code violations. The defense expert can be cross-examined on code violations." (2T152-21 to 152-23)

That is precisely what counsel undertook to do in cross-examining a defense expert who, quite extraordinarily, had relied on a single municipal code, and lack of code violation citations, in coming to the conclusion that the subject entryway did not exhibit defects or present a hazard. Accessibility standards including New Jersey's Construction Code as well as the ADA were addressed during the back-and-forth of the cross-examination of the expert, which explored the narrow basis of his opinion. The questioning was consistent with the law, and not prejudicial in any manner. The expert, of his own accord, referenced and explained New Jersey's handicapped accessibility code, as well as the ADA and its requirement that states

enact accessibility codes. He answered appropriate questions about what might have been done to change the entryway, and testified that a ramp would have eliminated the "vertical surfaces." (6T57-19 to 58-1)

Appellant attempts to craft its appeal around the references to the ADA during the cross-examination of its expert, and to make tangential arguments which employ extreme stretches of logic, including that the jury pool should have been "screened" regarding the ADA (Db, Point IV). However, there are two critical points which Appellant does not acknowledge in all its theories of the supposed prejudicial effect of the brief mentions of the ADA during the trial below: (1) that cross-examination of defendant's expert regarding applicable codes was entirely proper, and (2) that the mentions of New Jersey's handicap accessibility code, as well as the ADA, which led to further questioning, were uttered by its own expert witness.

The opinion of the Court below confirmed what the record reflects – that there were few references to the ADA during the cross-examination of the defense expert, and that they occurred in the context of a discussion of the applicable New Jersey Construction Code. (Da24) At the forceful insistence of defense counsel prior to closing statements, the Court instructed counsel for plaintiff to refrain from mentioning the ADA during his closing, which he did. (6T124-13 to 124-16)

In sum, there was no error in the Court's permitting plaintiff's counsel to question the defense expert about the applicability of safety and construction codes

to the subject entryway, including the ADA's requirement that states enact codes to ensure accessibility. The Court's exercise of its discretion as to same was sound, and certainly free of abuse. And there were few substantive objections to the questioning or responses, because it was, indeed, cross-examination. There is no basis for the jury's verdict to be disturbed on the basis of the Court's permitting entirely proper cross-examination of the defense expert.

D. Presentation of a Time-Unit Argument Relating to Calculation of Damages During Plaintiff's Counsel's Closing Was Proper; the Court Appropriately Addressed the Situation and No Prejudice Resulted

In Point IIIC of its brief, Appellant argues that plaintiff's counsel's use of a time-unit argument with regard to calculation of damages was improper, and as a result, "defendant suffered a disadvantage." (Db43) It is suggested that the Court erred in its handling of this issue, but not that the error caused a miscarriage of justice. This Court should not even consider Appellant's argument in this regard, as the alleged error is not cognizable on this appeal. Appellant does not take issue with the amount of damages awarded by the jury, and this alleged error relates the manner in which the jury was permitted to calculate plaintiff's damages.

In addition, Appellant's argument is based primarily on an incomplete version of what occurred at trial, and repetitive hyperbolic rhetoric, including that "Plaintiff’s counsel . . . gave a full-throated presentation on the time-unit rule over Defendant’s objection." (Db17, 42) That is not what occurred.

The jury charges were reviewed several times during the course of the trial. (5T219-14 to 234-2; 6T110-11 to 118-21) The time-unit charge was included in Plaintiff's pre-trial submission (Pa8), and no objection was raised to the inclusion of the charge.[5] Indeed, the Court asked plaintiff's counsel several times to provide plaintiff's age, so he could refer to it in discussing life expectancy when charging the jury, and there was a discussion of life expectancy, a fundamental factor in employing the time-unit method of calculating damages. (5T231-16 to 232-25) However, when the charges were compiled, the time-unit charge was mistakenly omitted by the Court, as it noted in its post-trial Opinion. (Da25) Neither plaintiff's counsel nor the Court noticed the oversight.

Defendant's counsel, however, apparently became aware of the omission, and when plaintiff's counsel began to address the time-unit method of calculation of damages, consistent with R. 1:7-1(b), counsel for defendant immediately objected. (6T165-2 to 165-9) To note that counsel was apparently lying-in-wait to make this objection is not an overstatement. Indeed, the Court below, which observed the objection, commented in its Opinion that defense counsel apparently was the only person who realized that the charge had been omitted. (Da25) Counsel did not

[5] Though the trial record does not include it, a pre-trial conference was held in chambers, during which the Court inquired as to whether the time-unit rule would be employed, and there was no objection to plaintiff's counsel indicating that he would be doing so.

mention the omission to the Court, and chose instead to object in open court to plaintiff's counsel's closing remarks.

Putting to one side that defense counsel was aware of the omission of the charge, but did not bring it to the attention of the Court, the matter was handled appropriately by the Court below. It held a sidebar conference, acknowledged that the instructions which had been compiled had mistakenly omitted the time-unit charge, and thus added the instruction required by R. 1:7-1(b) to those which were given to the jury. (6T195-6 to 196-22)

The record reflects that the Court's manner of addressing the objection was satisfactory to defense counsel at the time, though the issue is again being pressed on appeal, as it was below. There was no request made by the defense for a rebuttal statement or any additional instruction by the Court, as the record reflects, and as the Court below observed in its Opinion. (Da25) Indeed, defendant's counsel had not alluded to calculation of damages in the closing statement, other than to surmise that the jury would not get to the issue of damages, because defendant contended that liability had not been proven. (6T141-14 to 141-17)

Appellant's argument that there was "a disadvantage to Defendant's counsel, who relied in good faith on the draft charge and had no opportunity to address the time-unit argument in his closing" (Db42) is a distortion of the record, as is its suggestion that defense counsel was not given the opportunity for a rebuttal. (Db43)

In the first place, there was no "good faith" involved in counsel's objecting, rather than bringing the omission to the Court's attention. In addition, the Court below noted in its Opinion, "[a]t no point did Public Storage's counsel ask for additional time to address the time unit argument, which I certainly would have permitted. (Da25) Likewise, Appellant's suggestion that plaintiff's counsel was required to request a time-unit charge and did not (Db43), is entirely inaccurate. Plaintiff's pre-trial exchange specifically included the time-unit charge. (Pa8) The omission was simply an oversight, as the Court acknowledged.

In sum, the Court took the proper step of including the mistakenly omitted time-unit charge when the jury was instructed, there was no prejudice to defendant inherent in what occurred, and certainly, no error resulted.[6]

POINT III

THERE WAS NO PLAIN ERROR WHICH SHOULD HAVE BEEN RECOGNIZED BY THE TRIAL COURT AND WHICH CLEARLY LED TO AN UNJUST RESULT

As addressed supra, at Point I, none of the errors alleged by Appellant as plain error were "clearly capable of producing an unjust result," and thus are not cognizable on this appeal.

[6] There also was no miscarriage of justice in the Court's denial of defendant's new trial motion addressing this issue, or the issue of the Google Maps printout, or the cross-examination of defendant's expert, as Appellant contends (Db, Point V), all as addressed supra.

A. Plaintiff's Counsel's Summation Remarks Were Neither Improper or Prejudicial

An appellate court reviews criticisms of a trial court's rulings regarding a counsel's summation under an "abuse of discretion" standard. See Litton Industries., Inc. v. IMO Indus., Inc., 200 N.J. 372, 392-93 (2009). Here, Appellant alleges that the court erred in three distinct ways, permitting plaintiffs counsel to make certain comments in his closing argument. (Db, Point III) None of the comments were improper, in the first place, and secondly, the trial court certainly did not abuse its discretion by permitting counsel to deliver his summation without interruption.

Only one objection was interposed by defense counsel during the summation, relating to plaintiff's counsel's use of the time-unit argument, which was addressed and properly remedied by the trial court, as addressed supra.

1. No Comments in Plaintiff's Counsel's Closing Statement Referenced the ADA or Violated the Court's Instructions

Appellant is entirely incorrect in alleging that plaintiff's counsel "intimate[d]" that defendant was not in compliance with the ADA, and in so doing, "disregarded an instruction of the Court." (Db34) As discussed in detail, supra, the ADA was referenced by defendant's liability expert during his cross-examination, and the follow-up questions permitted by the Court, which were not objected to by defendant's counsel, were entirely proper. At the insistence of defendant's counsel prior to summations, the Court instructed plaintiff's counsel to refrain from

mentioning the ADA in his closing argument; the Court opined that it was doing so, because, as all parties involved recognized, the case did not include an ADA claim. (6T123-3 to 123-10)

Counsel followed the Court's instruction, and did not once mention the ADA. He fairly commented on the evidence, including the testimony of defendant's expert that codes other than the single municipal code upon which he relied were applicable to the construction and maintenance of defendant's building, including those relating to safe accessibility of public spaces, as required by the New Jersey Uniform Construction Code. (6T151-21 to 152-8)

Appellant charges that "cleverly crafted messaging" employed by counsel during the summation suggested to the jury that the case was about ADA compliance, including references made to defendant's expert's testimony. (Db34) To the contrary, the summation reflects that its focus was upon the evidence, including the multiple photographs, showing that the threshold and entryway were defective and hazardous, and why plaintiff's expert had so opined. Counsel fairly commented upon the defense expert's testimony that one "simple fix" for changing the tiered vertical surface of the entryway would be to install a ramp. (6T154-15 to 154-18) That comment was explicitly supported by the expert's testimony, who offered several ways the entryway could have been modified (6T56-22 to 56-25). The fact that a "simple fix" to the entryway was feasible related to the reasonableness

of defendant's omissions in failing to maintain the safety of its premises. Counsel simply questioned why a "simple fix" had not been undertaken by a company which purported to make safety a top priority. (6T153-14 to 153-15)

No objection was made to the comment, and the Court did not intervene, as it was fair comment upon the evidence, and not, as Appellant asserts, deviation from the truth. (Db34-35) A failure "to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made." Risko, 206 N.J. at 523. The Court below did not abuse its discretion, and in addition, the comments were not such as could clearly have caused a miscarriage of justice, as the jury was instructed that it was to consider only the evidence, and no one – neither the Court or counsel – suggested to the jury that it was to make a determination of whether the entryway was ADA compliant.

2. Comment by Plaintiff's Counsel Upon Defendant's Failure to Call Witnesses Identified on Its Witness List was Fair and Non-Prejudicial

In its pretrial submission, defendant identified two individuals on its witness list whose testimony it intended to present on its case, both of whom were representatives of Public Storage – Tara Uhl, and Donna Murphy. (Pa10) Neither of those fact witnesses were called by defendant. Plaintiff's counsel was not advised of this intended omission at any time during the trial. The defense's strategic choice not to call Ms. Murphy may have been based upon an earlier colloquy among counsel

and the Court concerning whether plaintiff's counsel could introduce portions of Ms. Murphy's testimony as evidence of the fact that Public Storage had been planning to modify the entrance, and had ultimately done so because of flood damage – not as a remedial measure. (2T147-16 to 161-16) During that discussion, defendant's counsel acknowledged that should he call Ms. Murphy as a fact witness, she could be cross-examined freely with her deposition testimony, and he would have to "deal with it then." (2T156-6 to 156-9) Perhaps for this reason, counsel chose to refrain from calling either identified witness to testify, but it was not until the conclusion of defendant's case that plaintiff's counsel was aware of that decision.

During his summation, plaintiff's counsel briefly mentioned the fact that he had read portions of the testimony of Public Storage's two identified witnesses into the record, but defendant had not called either to testify. (6T152-15 to 152-21) The comment was made in passing in the context of counsel's noting that the testimony of these witnesses was that "customer safety is important to us. Their [Public Storage's] number one priority" (6T153-14 to 153-17), and that "monthly inspections" and "morning walk-throughs" of the subject premises were conducted by Public Storage employees to ensure safety. (6T153-17 to 153-22) The comment that the witnesses had not been in Court or called by the defense to testify in person was a fact of which the jury was aware, was not improper, and certainly was not prejudicial to defendant, whose choice it was not to call identified witnesses.

That this comment was not improper is evidenced by the fact that no objection was made to the comment, see Risko, 206 N.J. at 523, supra, and that the Court did not intervene to strike the comment from the record. The argument made by Appellant, primarily on the basis of criminal law decisions, including State v. Clawans, 38 N.J. 162, 170–72 (1962), ignores that in a civil trial, an attorney is charged with knowledge that if a choice is made not to call a particular witness, comment thereon is fair game. Nisivoccia v. Ademhill Associates, 286 N.J. Super. 419, 429-30 (App. Div. 1996) ("[a]ll attorneys in civil cases are charged with knowledge that an adversary may focus on the failure to call a witness"). Moreover, as noted by the Court in Nisivoccia, where a similar issue was addressed, "an experienced trial attorney" should have realized based on the evidence presented in the case, that the failure to call a particular witness "might be an unanswered question in the jury's mind," and that thus, the opposing attorney's commenting on that fact "could hardly be considered prejudicial." Id at 431.

Here, as opposed to Appellant's characterization of the comment, plaintiff's counsel was not seeking an inference with respect to any fact in evidence to be made. He did not issue a "well-camouflaged" "invitation to the jury to draw an adverse inference" due to Public Storage's failure to call identified witnesses. (Db39) Plaintiff, whose burden it was to prove negligence, had presented the deposition testimony of the two witnesses on her case in chief. Counsel advised the jury in his

opening that he was going to "read some deposition transcripts of folks from Public Storage. . . who you might have seen on that witness sheet." (2T81-4 to 81-7) Counsel merely commented in his closing upon the fact that the two witnesses were included on defendant's witness list, but instead of defendant calling the witnesses to testify, plaintiff had read their testimony into the record. That was a fact.

The comment was not improper, was not prejudicial, and plaintiff's counsel had no affirmative obligation to ask the Court for an "adverse inference" charge as to "relevant and critical facts" in the case. See New Jersey Model Jury Charge, Civil, 1.18. That the Court did not address the comment did not constitute error, much less "produc[e] an unjust result."

POINT IV

THE RECORD BELOW REFLECTS THAT THE CASE DID NOT INVOLVE ADA CLAIMS, AND THE JURY RESTED ITS VERDICT UPON THE INSTRUCTIONS GIVEN IT AND EVALUATION OF THE EVIDENCE IN THE CASE

A. Appellant's Speculation that the Jury Did Not Understand What It Was Charged with Determining and Thus Ignored the Evidence Presented Is Entirely Unsupported

It is a fundamental principle underlying our jury system that juries are presumed to follow instructions. State v. Herbert, 457 N.J. Super. 490, 503–04 (App. Div. 2019). "Jurors have a sworn obligation and assumed capability to abide by the court's guidance." Hrymoc v. Ethicon, Inc., 467 N.J. Super. 42, 79 (App. Div.

2021), aff'd as modified, 254 N.J. 446 (2023) (it was wrong to presume that a jury would not understand and follow a limiting instruction concerning the proper use of particular evidence).

Here, Appellant makes various contentions concerning comments made by plaintiff's counsel in opening and closing statements, and in the cross-examination of the defense expert, concluding, in essence, that the comments confused the jury. Appellant urges this Court to accept that the jury was unable to follow the instructions it was given regarding the evidence it was to consider, including that counsel's comments do not constitute evidence. (6T174-12 to 174-17) It also suggests that the jury was unable to understand the import of the cross-examination of the defense expert, relating to the applicability of construction and safety codes, and their requirement that there be safe access to public buildings.

Appellant attempts to turn what happened at the trial below into a case that it clearly was not. Both counsel and the Court recognized throughout the trial that no handicapped accessibility claims were being made by plaintiff. Lack of handicapped accessibility to defendant's premises was not an issue to be determined, and the jury was not told that it was. Accessibility, however, in the general sense, relating to the ingress to and egress from the building were indeed issues in the case, as raised by plaintiff's liability expert. The codes and standards relating to that accessibility was explored during the testimony of both plaintiff's and defendant's liability expert.

There is a clear distinction between failure to accommodate those with physical disabilities and denial of access to public spaces, and the need for general accessibility by all members of the public, whether disabled or not. With respect to an entryway, it should provide a means to enter and exit a building safely. Plaintiff's expert clearly testified concerning this concept, and defendant's failure to maintain a safe egress from its building, in violation of fire and building codes.

Nothing suggests that the jury was unable to understand these concepts, or to make its determination based on the evidence presented. There is no evidence of any jury confusion reflected in responses recorded on the jury verdict sheet. (Da10) The questions to be resolved by the jury were straightforward and were not complex.

While Appellant's "theme" throughout its brief is that perhaps the jury thought that it was to consider whether the subject entryway was ADA compliant, there was no suggestion of same, and the argument is based upon nothing but rank speculation. The Court clearly explained the concept of negligence, including that the jury could consider defendant's direct actions, as well as its omissions, which in this case were more significant, as the photographs demonstrated the defective and hazardous condition of the entryway. Counsel properly noted that defendant's own expert had opined concerning what might be feasible methods of eliminating the defects, including installation of a ramp. It was proper for the jury to consider that evidence

and opinion of defendant's own expert as to how the defective condition of the entryway could have been remedied.

Appellant's "multiple bootstrap" argument that the jury should have been questioned about the ADA during jury selection, and its further accusing plaintiff's counsel of "failure to raise the ADA issue" (Db, Point IV) is frankly, ludicrous. It assigns "plain error" to this, as well, though its criticism is not directed to the Court. (Db44) Again, the case was not a failure to accommodate case, as all understood. The few mentions of the ADA were by defendant's expert, opening the door to further questioning concerning how the ADA required states to codify accessibility standards, and that those standards were contained in the New Jersey Construction Code. It defies reason to suggest that either the Court or counsel had an obligation to screen the jury pool prior to trial regarding "the ADA issue," when none existed.

In sum, nothing in the record suggests that the jury did not understand the instructions given it, and Appellant's arguments essentially boil down to pure conjecture that the jury was somehow confused by its defense expert's references to the ADA during cross-examination, and lacked the capacity to comprehend and consider the evidence or understand its charge. Contrary to Appellant's assertion, defendant had the benefit of an inherently fair trial, which the Court below opined was essentially a credibility contest. (Da19) There is no basis upon which to reverse

the jury's verdict based on Appellant's speculation that the jury considered anything other than what was presented to it it as evidence during the trial.

B. There Was No Grand Scheme to Mislead the Jury, and Appellant's Suggestion of Same is Without Basis

Appellant's inclusion in its brief of many disparaging comments concerning the actions of plaintiff's trial counsel warrants comment. The record, when examined in its entirety, does not support the repeated allegation that there was an attempt to mislead the jury, or to improperly place before the jury information and evidence.

Resolution of the issue regarding the Google printout of the photograph of defendant's premises was compounded by some confusion of the trial court in understanding exceptions to N.J.R.E. 407, and what it had permitted plaintiff to state to the jury. The record further clearly reflects that counsel had not anticipated an objection to the showing of the photograph, because defense counsel had agreed to permit its use during opening arguments. The photograph, of course, was not admitted into evidence. Showing the photograph to the jury did not reflect any malintent and was not designed to mislead the jury.

Likewise, the cross-examination of defendant's expert was not misleading. The examination, intended to address the credibility of the witness, was entirely proper, and proceeded with limited interruption, as it should have.

Finally, none of the comments made in plaintiffs closing argument which Appellant criticizes were intended to mislead; they were all fair comment upon the evidence, and did not violate the Court's instructions, as addressed supra.

Most of the objections during the trial were made by defense counsel, and it is apparent from a review of the record that the Court became increasingly agitated about the constant interruptions, even excusing the jury at times. (6T63-13 to 65-5) The Court had to issue a limiting instruction to the jury following defense counsel's closing statement, because of his reference to "nine binders" of medical records, which were not in evidence. (6T142-12 to 142-15; 6T145-7 to 146-11)

The Court below ruled on each objection made, and the trial proceeded without prejudice to defendant. The hyperbole employed by Appellant in its brief describing the trial below does not make its argument a better one, and its relentless disparaging of plaintiff's counsel throughout its presentation is unwarranted.

POINT V

THE TRIAL DID NOT PRESENT "CUMULATIVE ERRORS" CAPABLE OF CAUSING AN UNJUST RESULT

As set forth supra, the trial errors alleged by Appellant taken individually were either not errors at all, and surely did not result in a miscarriage of justice. While Appellant's dissatisfaction with the jury's verdict is plain to see, its arguments as to the cumulative effect of the errors it alleges, are without merit. (Db, Point VI) There was overwhelming evidence that Public Storage was negligent in its failure to

maintain the entryway to its office. Appellant chose to attempt to make the case all about a clumsy individual prone to falling down, and suggesting that her testimony was untruthful (6T132-8 to 132-24). It presented an expert who denied that the entryway presented any defects at all, contrary to the photographic evidence.

The errors which Appellant assigns to various rulings and occurrences during the trial below, either separately or cumulatively, did not cause a miscarriage of justice or result in an unfair trial to defendant. The jury dealt with simple concepts, as it was instructed to do, in this uncomplicated premises liability case, and the evidence supported the jury's verdict.

CONCLUSION

For the foregoing reasons, Appellant's appeal of the jury verdict below should be denied. There was ample evidence presented at trial to support the jury's verdict in this case, and it did not constitute a miscarriage of justice.

Respectfully,

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K. Raja Bhattacharya, Esq.

Dated: May 14, 2025

JANE BISHOP, Plaintiff/Respondent, v. PUBLIC STORAGE; XYZ COMPANIES I-V (fictitious entities whose true identities are presently unknown) and JOHN DOES I-V (fictitious persons whose true identities are presently unknown), Defendants/Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET No. A-001230-24 Civil Action On appeal from: Superior Court of New Jersey, Law Division: Middlesex County Sat Below: Honorable Gary K. Wolinetz, J.S.C. Docket No. MID-L-7490-20

REPLY FOR DEFENDANT/APPELLANT PUBLIC STORAGE

Date Submitted: May 29, 2025

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PRELIMINARY STATEMENT

When a party obtains a jury verdict in our system of justice, the means matter. When those means deny the opposing party a fair trial, then the verdict cannot stand. Plaintiff pursued an errant course from the opening statement through the summation to transform a simple premises liability case into an unpled, fictional handicap-accessibility case. The irreparable prejudice suffered by Defendant Public Storage requires that the verdict be set aside.

The sole issue in the case was whether Defendant negligently maintained the lip at the doorway to the front office of Public Storage's Monmouth Junction facility. During trial, Plaintiff attested that she did not suffer from a handicap or disability. Moreover, the trial testimony revealed that the pre-1990 constructed Public Storage facility was not governed by the Americans with Disabilities Act of 1990 ("ADA"), and no evidence was introduced that Defendant violated any handicap-accessibility law.

But those facts did not deter Plaintiff. Despite a warning *not* to show the jury a photograph of a later-installed ramp at Defendant's facility during opening statement, Plaintiff's attorney did so in contravention of N.J.R.E. 407's prohibition on the use of subsequent remedial measures to prove negligence.

The court chastised Plaintiff's attorney and contemplated granting Defendant's mistrial application. The court instructed the jury to disregard both

the photograph and mention of the ramp and told Plaintiff's attorney that he was not trying an ADA or handicap-accessibility case. Plaintiff's attorney declined to heed that advice and continued to deflect from the only real issue – whether the lip to the doorway was defective.

Over Defendant's repeated objections, Plaintiff cross-examined Defendant's expert about the ADA and handicap-accessibility laws that did not apply to the case. The entire irrelevant cross-examination, which elicited reference to a ramp, was designed to suggest that Defendant was violating those laws – thus obscuring the real issue whether the door lip was defective and caused Plaintiff's fall. Plaintiff's attorney removed any doubt about the purpose of his artful cross-examination when he essentially told the jury in summation that it could find Defendant negligent for not installing a ramp sooner than it did. Among the last words heard by the jury evoked the image and word the court told the jury to forget – the ramp.

Additionally in summation, Plaintiff improperly called on the jury to draw an adverse inference from Defendant's decision not to call to the stand Public Storage employees whose deposition testimony Plaintiff had already read into the record. Plaintiff never suggested what additional relevant testimony those employees could have offered and does not address in her brief the relevant case law that barred her attorney from making the adverse-inference argument.

A favorable jury verdict must be secured by fair means. A prejudicial opening, a prejudicial cross-examination, and a prejudicial summation – all trial errors induced by the conduct of Plaintiff's attorney – had the clear capacity to cause an unjust result, and therefore the jury verdict must be overturned and a new trial granted.

LEGAL ARGUMENT

I. PLAINTIFF'S PREJUDICIAL OPENING HAD THE CLEAR CAPACITY TO CAUSE AN UNJUST RESULT.

Plaintiff's attorney admitted that he did not intend to introduce the photograph of the ramp in his case-in-chief. See 2T67-18 to 68-12.[1] On that basis alone, showing the photograph to the jury was improper – and prejudicial because it depicted a subsequent remedial measure prohibited by N.J.R.E. 407.

An attorney's opening statement "should be 'limited to the "facts [the attorney] intends in good faith to prove by competent evidence."'" State v. Greene, 242 N.J. 530, 548 (2020) (quoting State v. Wakefield, 190 N.J. 397, 442 (2007)); see also RPC 3.4(e) ("A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be

[1] Plaintiff oddly claims that Defendant has provided a "misleading description" of the image depicting the later-installed ramp, which she now suggests should be referred to as a "Google Maps printout" rather than a photograph. See Pb18. However, during trial, Plaintiff's attorney referred to the image as a photograph, as did the court. See 2T53-22; 2T54-2; 2T54-10; 2T78-8 to -14.

supported by admissible evidence."). This well-known rule of evidence did not constrain Plaintiff's impermissible use of the photograph. That Plaintiff showed Defendant the photograph of the ramp before the trial began was not a valid excuse to disregard the court's later ruling. Pb18; 2T56-10 to -14. Defendant made a timely objection before Plaintiff showed the photograph to the jury; Plaintiff was warned not to display the photograph and yet displayed it anyway; Defendant moved for a mistrial; and the court upbraided Plaintiff's attorney but decided to try and salvage the trial by giving a curative instruction to the jury. See 2T47-10 to 49-20; 8T15-1 to -17; 8T33-16 to 34-1; 2T78-8 to -14.[2]

Contrary to Plaintiff's assertion in her brief, the trial court did not approve of or acquiesce in her attorney's opening remarks that Public Storage installed a ramp at its office entrance. See Pb19, 21. After the improper display of the photograph, the court's curative instruction explicitly directed the jury to disregard not just the photograph of the ramp, but also "any comments that [Plaintiff's attorney] made to you regarding that photo." 2T78-8 to -12. The prohibited "comments" about the photograph obviously referred to the ramp.

At no point during the trial did Plaintiff admit into evidence the

[2] Defendant's recitation of the sidebar following Plaintiff's improper display of the ramp photograph is not "speculative and incorrect," as Plaintiff claims. Pb26. Rather that account is supported by citations to the trial record and the motion for new trial hearing where the court confirmed that Plaintiff displayed the photograph after being warned not to do so. See Db7–9.

photograph of the ramp. And though the trial court instructed the jurors to strike from their memory the photograph of the ramp and any mention of it, Plaintiff's attorney made certain that memory remained fresh in their minds by repeated improper references to a ramp in his cross-examination of Defendant's expert and by telling the jury in summation that Defendant could be found negligent for not installing a ramp. See 6T56-20 to 58-4; 6T59-6 to -8; 6T154-13 to -18.

II. PLAINTIFF'S SHIFTING EXPLANATIONS TO INTRODUCE EVIDENCE OF PUBLIC STORAGE'S POST-INCIDENT RAMP INSTALLATION STRAIN CREDULITY.

Plaintiff gives multiple inconsistent and sham justifications for bringing to the jury's attention the later-installed ramp at Defendant's facility. Pb19–24.

Evidence of the ramp was barred by N.J.R.E. 407, which prohibits evidence of subsequent remedial measures offered to prove negligence or culpable conduct. See In re S.D., 399 N.J. Super. 107, 124 (App. Div. 2008) (recognizing that New Jersey has a "clear and longstanding public policy favoring the immunization of remedial measures from negative inferences"). The photograph at issue depicted a ramp installed after the incident at the precise location where Plaintiff fell. See 2T50-24 to 51-9.

Plaintiff claims that evidence of the ramp was necessary to explain why her expert could not inspect the scene. Pb9; 2T149-12 to -16. But the expert explained that he did not inspect the scene because the site had changed. See

2T103-13 to -25; 2T111-15 to -19. That explanation sufficed without any reference to a ramp.

In her brief, Plaintiff repeatedly states that the reason Public Storage installed a ramp at the location of Plaintiff's fall was due to hurricane-related flood damage, see Pb8, 9, 19, 20, 26–27, but there is no trial testimony to support those assertions. Instead, Plaintiff relies on non-record evidence in her appendix – Public Storage employee Donna Murphy's deposition testimony that was barred at trial regarding the hurricane and later-installed ramp.[3] [Pa28–31]; 2T147-25 to 150-15. Even if there were such record testimony, how would that have any relevance to the issue in this case – whether Defendant negligently maintained the entranceway at the time of Plaintiff's fall?

In another strained bid to do an end-run around N.J.R.E. 407's bar against evidence of subsequent remedial measures, Plaintiff claims that she was entitled to inquire about "reasonable or feasible alternatives" that Defendant could have taken – the installation of a ramp – "to remedy a hazardous condition." Pb28; 2T53-19 to -25. Although that formulation might be appropriate in some instances, such as in a products-liability case, here the simple issue was whether

[3] The trial transcripts do not indicate which of the photographic exhibits in Plaintiff's appendix, if any, were moved into evidence. See R. 2:6-1(c). It is ironic that Plaintiff should criticize Defendant for not including photographs in its brief when Plaintiff provides no source in the transcripts for the photographs she claims were marked into evidence. See Pb14; [Pa17–26].

Defendant failed to exercise due care in not repairing an alleged defective lip that caused Plaintiff to fall.

Our case law emphatically states that evidence of subsequent remedial repairs is not admissible to prove negligence or culpable conduct. See Lavin v. Fauci, 170 N.J. Super. 403, 407 (App. Div. 1979); Kane v. Hartz Mountain Industries, 278 N.J. Super. 129, 147-148 (App. Div. 1994) (affirming trial court's decision to bar evidence of a subsequent remedial effort on a feasibility theory where the issue "was interjected only by plaintiff's own questioning during cross-examination"). If Defendant was negligent in maintaining the lip to the front door and that was the proximate cause of the fall, the matter is over – without regard to whether a ramp could have been installed.

Plaintiff speciously asserts that she never intended to use the evidence of the ramp as a basis to prove negligence, Pb20–25, even though in summation her attorney essentially called on the jury to find Defendant *negligent* for not installing a ramp and argued that Plaintiff's injury could have been avoided had a ramp been in place. 6T154-3 to -18.

It is clear that Plaintiff was not content to try the case on the terms she pled in her complaint. The multiple attempts to insinuate the ramp into the case were a transparent effort to unfairly cast Public Storage as indifferent to handicap-accessibility and disability rights – even though no evidence was

presented that Defendant violated the ADA or any handicap-accessibility statute or municipal code. Plaintiff was not dissuaded from this approach even though she admitted that she suffered from no handicap or disability that impeded her ability to take a single step through the front door of Public Storage's office.

III. PLAINTIFF'S CROSS-EXAMINATION OF DEFENDANT'S EXPERT ON THE ADA AND NEW JERSEY'S HANDICAP-ACCESSIBILITY CODE WAS IRELEVANT AND PREJUDICIAL.

Plaintiff's cross-examination of Defendant's expert, David Behnken, on the ADA and New Jersey's handicap-accessibility codes was wholly irrelevant and introduced an unreasonable risk of "[u]ndue prejudice, confusion of issues, or misleading the jury." See N.J.R.E. 403; 6T45-2 to 59-20.

In her case in chief, Plaintiff offered no evidence that the ADA or any handicap-accessibility statute or code applied to the Public Storage facility or defined the relevant standard of care in this case. In his testimony, Dr. Wayne Nolte, Plaintiff's expert, never referenced the ADA or a handicap-accessibility code. 2T96-4 to 146-16. Indeed, Nolte opined that the most likely cause of Plaintiff's fall was that her foot got caught on an upraised screw on the lip of the front entranceway. 2T126-7 to -13.

The trial court repeatedly informed Plaintiff's counsel that the ADA and handicap-accessibility issues were irrelevant to the case. See, e.g., 2T154-15 to -23; 2T158-25 to 159-8. The court stated that if Plaintiff had fallen due to lack

of handicap access, she would have "a far different lawsuit," emphasizing: "[W]e're not talking about handicapped accessibility to the jury when the case has nothing to do with handicapped accessibility." 2T154-17 to -23; 2T157-14 to -24; 2T158-25 to 159-8. Those cautionary words did not deter Plaintiff.

Contrary to Plaintiff's assertion, see Pb29, Benhken thoroughly discussed Nolte's findings and concluded the entryway was defect-free. See 6T19-18 to 29-7. Notably, Behnken's direct testimony did not mention the ADA or handicap-accessibility codes. 6T8-17 to 29-9. Nevertheless, without any apparent basis for doing so, and over the repeated objections of Defendant, Plaintiff plied Behnken with irrelevant and highly suggestive questions about handicap accessibility, the ADA, and even a ramp. 6T45-2 to 59-20. And though Behnken repeatedly denied that any handicap-accessibility law or code applied to the Public Storage facility, fifteen pages of repetitive irrelevant questioning on the subject clearly had the capacity to confuse and mislead the jury.[4] 6T46-20 to -24; 6T48-9 to -11; see N.J.R.E. 403.

Plaintiff's claim in her brief that she was asking Benhken questions about "general accessibility" to a building, Pb46, is belied by her constant references in her questions to handicap accessibility laws and codes, see 6T45-2 to 59-20.

[4] Throughout her brief, Plaintiff suggests that Behnken "conceded" these codes applied, see Pb9, 28, 31–34, 40, but Behnken clearly testified that they did not – and Plaintiff offered no evidence to the contrary. See 6T46-20 to 48-11.

That whole line of improper questioning should have been disallowed because it "suggest[ed] the existence of evidence . . . which [was] not properly before the jury." See Manata v. Pereira, 436 N.J. Super. 330, 348 (App. Div. 2014) (omission in original) (quoting State v. Spencer, 319 N.J. Super. 284, 305 (App. Div. 1999). Plaintiff, in effect, succeeded in placing before "the jury the substance of inadmissible evidence." See Manata, 436 N.J. Super. at 348 (quoting United States v. Sanchez, 176 F.3d 1214, 1222 (9th Cir. 1999)). The court failed to instruct the jury to disregard the irrelevant and highly prejudicial cross-examination of Behnken on the ADA, handicap-accessibility laws, and the ramp.

Plaintiff's assertion that Behnken's testimony concerning the ADA and accessibility standards was offered "voluntarily" or "of his own accord", see Pb10, 33, simply ignores that Behnken was responding to questions posed by Plaintiff's counsel that the trial court ordered him to answer over Defendant's repeated objections. 6T46-3 to 56-11.

In her brief, Plaintiff refers to Defendant's objections as "minor." Pb29. In our rules of evidence, there are no "minor" objections – just those that should be sustained or overruled. Nevertheless, an objection to irrelevant testimony and to testimony that is improperly turning a simple negligence case into "a handicap ADA case" can hardly be described as "minor." 6T47-18 to -19.

The court evidently recognized that the trial had gotten off-track by Plaintiff's generalized, non-particularized references to the ADA and handicap-accessibility codes and rejected Plaintiff's request for a charge on noncompliance with industry standards as proof of negligence. 6T110-20 to 116-3; see Model Jury Charges (Civil), 5.10G, "Standards of Construction, Custom, and Usage in Industry or Trade" (approved Mar. 2010). The court noted that Plaintiff failed to present expert testimony addressing specific industry standards or relevant building codes and expressed concern that charging the jury on this issue would be "totally and completely confus[ing]," emphasizing that even the trial court itself was "completely confused" as to the applicability of the proposed jury charge. 6T114-10 to 115-10.

The trial court implicitly acknowledged the impropriety of the cross-examination of Behnken by sternly warning Plaintiff's attorney that he was "barred from talking about the Americans with Disabilities Act since it's not pleaded in your complaint. It's never been part of the case as I understand it." 6T123-4 to -10. Undeterred, and throwing caution to the wind, Plaintiff continued with the forbidden theme of transforming a simple negligence case into a fictional handicap-accessibility case.

IV. IN SUMMATION, PLAINTIFF MISCHARACTERIZED EXPERT TESTIMONY, FALSELY INTIMATED THAT DEFENDANT WAS NOT IN COMPLIANCE WITH THE ADA AND HANDICAP-ACCESSIBILITY LAWS, AND SUGGESTED TO THE JURY THAT IT COULD FIND DEFENDANT NEGLIGENT FOR NOT CONSTRUCTING A RAMP.

The only germane issue was the condition of Defendant's premises at the time of Plaintiff's fall. Behnken testified that the step leading to Public Storage's office was not defective and that no remedial measure was required, and yet Plaintiff falsely claimed that Behnken said that a ramp was a "simple fix". 6T21-2 to -21; 6T25-1 to -5; 6T29-4 to -7; 6T154-15 to -18. Behnken merely said that if the entryway were to be reconfigured to be handicap accessible, a ramp would be one way to do so, but that Plaintiff could have fallen just as easily on a ramp. 6T55-2 to 58-4. Plaintiff, however, never presented any testimony or evidence that the ADA or handicap-accessibility laws applied to the pre-1990 constructed Public Storage facility or that Defendant was required to install a ramp; Plaintiff instead relied on conjecture to substitute for facts. Her attorney queried, "What do we think a reasonable company would do . . . ? Do we not think that they would go around and make simple fixes . . . ? [S]imple fix, put a ramp." 6T154-13 to -18.

Nowhere in Plaintiff's brief does she respond to the assertion that her attorney in summation effectively "told the jury that Public Storage was 'negligent' for not installing a ramp sooner than it did." Db35 (citing 6T154-3

to -8). And that is the nub of everything that went wrong in this case from Plaintiff's opening statement displaying the forbidden photograph of the ramp, to cross-examination questions parading as answers and evidence, and a summation that squarely seeks to have Defendant held liable for not installing a ramp (without any evidence that any law required the installation of one). The trial court was simply unable to stop Plaintiff's implacable drive to turn a simple negligence case into an unpled handicap-accessibility case, even though Plaintiff suffered from no handicap or disability.

V. PLAINTIFF IGNORES THE CONTROLING CASE LAW GOVERNING ITS IMPROPER ADVERSE INFERENCE ARGUMENT IN SUMMATION.

At trial, Plaintiff read to the jury the deposition testimony of Public Storage employees Donna Murphy and Tara Uhl. 4T11-3 to 34-17. In summation, Plaintiff told the jurors, "They didn't show up to testify," and that they "could care" that Defendant did not call them as witnesses. 6T152-17 to 153-3. In short, Plaintiff improperly asked the jury to draw an adverse inference against Defendant for not calling those witnesses, without suggesting what additional *relevant* evidence they could have provided.[5] Plaintiff does not cite the controlling case law and suggests that notice protocols governing the

[5] Plaintiff was barred from introducing irrelevant portions of Murphy's deposition testimony regarding subsequent remedial measures. 2T147-25 to 150-15.

drawing of adverse inferences apply in criminal but not in civil cases. Pb43. That is wrong. See Db40.

In a civil case, "if counsel intends to comment on the failure to produce witnesses, counsel should, out of the jury's presence, inform the court of such an intent so that the court can consider all the circumstances before deciding whether the request is proper." Murin v. Frapaul Constr. Co., 240 N.J. Super. 600, 612 (App. Div. 1990) (citing State v. Clawans, 38 N.J. 162, 172 (1962); State v. Irving, 114 N.J. 427, 441–44 (1989)).

Moreover, Plaintiff takes out of context the instructions provided in Nisivoccia v. Ademhill Assocs., 286 N.J. Super. 419, 430–31 (App. Div. 1996). See Pb43. Nisivoccia does not obviate the procedural requirements an attorney must follow before raising an adverse inference argument. See State v. Hill, 199 N.J. 545, 561 (2009) (noting that the trial court must assess "the circumstances to determine whether reference to an inference in summation is warranted"). In Nisivoccia, the court recognized the risk of prejudice when a plaintiff's closing remarks called for drawing an adverse inference against a defendant for not calling a witness – without giving the defendant a chance to respond. Nisivoccia, 286 N.J. Super. at 430–31. As the court explained, a "defendant in a civil suit could be disadvantaged by a plaintiff's summation comment unless defense counsel anticipates and addresses the issue first" as the defendant has

"no opportunity to rebut those comments." Ibid. That is what occurred here.

VI. THE SUBSTANTIAL TRIAL ERRORS CUMULATIVELY DENIED DEFENDANT A FAIR TRIAL.

Plaintiff repeatedly injected into what should have been a simple premises liability trial the irrelevant and inflammatory subject of handicap-accessibility and disability rights. Yet, Plaintiff suffered from no handicap or disability and did not offer a shred of evidence that Defendant's pre-1990 constructed facility violated any federal, state, or municipal accessibility law.

Plaintiff's improper display of a photograph in opening, artful use of irrelevant questioning of an expert as a substitute for evidence, and overstepping the permissible bounds of summation all had the ability to confuse, mislead, and prejudice the jury. See N.J.R.E. 403. The cumulative prejudicial effect of the substantial trial errors had the clear capacity to cause an unjust result and ultimately denied Defendant a fair trial. See R. 2:10-2; Db47–48.

For these reasons, Defendant respectfully urges this Court to reverse the Judgment in favor of Plaintiff and grant a new trial.

Respectfully submitted,

Dated: May 29, 2025

/s/ Parth M. Parikh

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