PETER KRASSNER, Plaintiff/ Respondent, v. WALMART, JASON CUZZO, ABC CORPORATIONS 1-10, & JOHN DOES 1-10 (SAID NAMES, ABC, INC., AND JOHN DOE, BEING FICTITIOUS, JOINTLY, INDIVIDUALLY), Defendants/ Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001500-24 ON APPEAL FROM: SUPERIOR COURT SOMERSET COUNTY, LAW DIVISION, SOM-L-839-18 JUDGMENT ENTERED: JANUARY 7, 2025 HONORABLE EDWARD M. COLEMAN, P.J.Ch. (retired and temporarily assigned on recall) SAT BELOW

CORRECTED BRIEF FOR DEFENDANT/APPELLANT, WALMART STORES EAST, L.P., i/p/a WALMART

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Preliminary Statement

Plaintiff/Respondent, Peter Krassner, was injured at a Walmart store in Hamilton when he stepped backward into a wall-mounted fire extinguisher that fell onto his foot. In a prior appeal, this Court held that the trial court erred when it charged the jury on the mode-of-operation doctrine using *Model Jury Charge (Civil)* 5.20F(10). That instruction misinformed the jury on the law and "absolved" Mr. Krassner of his "burden to prove notice or constructive notice." (Da66.) On remand, the trial court disregarded this Court's instruction that Mr. Krassner must prove notice, either actual or constructive, and expressly authorized the jury to impose liability on Walmart *without* that required finding. The trial court expressly told the jury that a notice finding was "not necessary" to impose liability. (13T93:19 – 94:20.)

Over Walmart's objection, the trial court instructed the jury that Walmart could be liable for creating an allegedly dangerous condition that led to Mr. Krassner's injuries. *See Model Jury Charge (Civil)* 5.20F(9). That instruction permitted the jury to find that Mr. Krassner had prevailed on liability without making any finding that Walmart had actual or constructive notice to recover.

Giving this jury charge was error for two reasons. First, it directly contravened this Court's instruction and holding, by again absolving Mr. Krassner of his burden of proving that Walmart had notice of an allegedly

dangerous condition. Indeed, the trial court itself inconsistently recognized that "this whole case is notice." (13T21:16-18.) Second, this charge acted as a de facto res ipsa loquitur instruction. The instruction permitted Mr. Krassner to recover based on an assumption of negligence. Nor was this charging error harmless. Just as in the first trial, the jury was instructed that Mr. Krassner did not need to prove notice. This error, at minimum, may have affected the trial's result.

But before it reaches the jury-charge issue, this Court should reverse and remand for entry of judgment in Walmart's favor. Mr. Krassner did not meet his burden of proving negligence. If the Court does not remand for entry of judgment, it should remand for retrial at which the jury should be properly instructed that Mr. Krassner must prove that Walmart had actual or constructive notice that the fire extinguisher was a dangerous condition. Twice, Walmart did not receive a fair trial with a jury properly instructed on the law. This Court should once again correct the trial court's error.

Procedural History[1]

Mr. Krassner sued Walmart and Jason Cuzzo, Walmart's store manager, in July 2018. (Da3-5.) Walmart and Mr. Cuzzo answered in August 2018.

[1] The following transcripts have been filed in the Appellate Division, *see R.* 2:6-8:

(Da12-18.) Mr. Cuzzo was later dismissed from the case with prejudice by stipulation. (Da21.) After the parties completed discovery, the matter was tried remotely in May 2022. The first jury returned a verdict for Mr. Krassner,

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- First trial:
    - 1T: May 9, 2022.
    - 2T: May 10, 2022.
    - 3T: May 11, 2022 (Mr. Krassner's testimony).
    - 4T: May 11, 2022 (all other proceedings from that date).
    - 5TMay 12, 2022.
    - 6T: May 13, 2022.
    - 7T: May 16, 2022.
    - 8T: July 28, 2022 post-trial motions hearing.
- Retrial following remand:
    - 9T: December 16, 2024.
    - 10T: December 17, 2024.
    - 11T: December 18, 2024 (volume 1).
    - 12T: December 18, 2024 (volume 2).
    - 13T: December 19, 2024.

finding Walmart 74% at fault and Mr. Krassner 26% at fault, and awarding Mr. Krassner $1,754,135. The trial court molded that verdict to $1,317,299.90.

After the first trial, Walmart filed a post-trial motion seeking judgment notwithstanding the verdict, a new trial, or remittitur. The trial court denied Walmart's motion, and Walmart timely appealed.

This Court affirmed in part, vacated in part, and remanded for a new trial *See Krassner v. Walmart*, No. A-0065-22, 2024 WL 951253, 2024 N.J. Super. Unpub. LEXIS 354 (App. Div. Mar. 6, 2024); (Da53-82). This Court ordered a new trial on liability and comparative fault only, determining that those issues were separable from the first jury's award of damages. (Da66, 82-83.)

Following remand, the case was partly retried in person from December 16-19, 2024, on liability and comparative negligence. At the close of the evidence, the parties cross-moved for directed verdicts. The trial court denied both motions. (13T20:9-12.) The jury found Walmart 80% at fault and Mr. Krassner 20% at fault. (Da23; 13T112:13-16.) The parties renewed their cross-motions for directed verdicts, or judgment notwithstanding the verdict, which the trial court denied. (11T118:16-18.) The trial court later entered a judgment of $1,740,610.34, including prejudgment interest. (Da23-25.) Walmart timely appealed. (Da30-34.)

Statement of the Material Facts

This case arises from an incident at Walmart's store in Hamilton, New Jersey. Mr. Krassner was shopping there when he backed into a wall-mounted fire extinguisher, which fell onto his left foot, causing injuries.

A. Mr. Krassner claims that he is injured at Walmart after he contacts a wall-mounted fire extinguisher, which falls on his foot.

Mr. Krasner went to a Walmart store in Hamilton on February 23, 2018. (Da3.) While he was walking down an aisle of the store, he backed up his cart to allow another shopper to pass. (10T84:6-22.) He testified that, as he did so, he "brushed" against a wall-mounted fire extinguisher, which fell on his foot. (10T84:18-22.)

By contrast, testimony from Walmart witnesses and a surveillance video of the incident showed Mr. Krassner leaning to his left against the fire extinguisher before it fell. (Da124; 11T19:3-15.)

The photo at Da131 shows the fire extinguisher, taken the same day the accident happened. (Da131; 10T87:4-17.) Mr. Krasner placed the fire extinguisher on the floor next to the column from which it was mounted and continued shopping. (10T84:23 – 85:15.) After he went to his car, Mr. Krassner noticed his foot was hurt, so he returned to the store, and competed an incident report.

Mr. Krassner claimed that he did not see the fire extinguisher before the

incident. (10T88:20-22.) And he conceded that he had no idea whether anything about the fire extinguisher or its mounting was broken or not working before he contacted it. (10T88:23 – 89:13.) Moreover, Mr. Krassner did not look where he was going when he backed into and struck the fire extinguisher. (10T90:17-22.) He also admitted that he could have stepped aside, to his right and away from the fire extinguisher, to allow the other customer to pass by him. (10T89:14 – 90:16; 93:5-23.)

David Ferguson, a customer service manager, completed an incident report and statement. (11T129:21-23; Da104-09.) Mr. Ferguson, who by the time of the retrial was no longer a Walmart employee, claimed that the harness for the fire extinguisher was easy to undo by bumping the fire extinguisher. (7T36:24-25; 11T132:2-6; 136:13-21.) He also claimed that the mounting straps were warped. (11T137:1-9.) But he conceded that his job with Walmart did not involve investigating accidents. (11T138:8-10.) He also admitted that inspecting fire extinguishers was not part of his job, and that he was not trained how to inspect fire extinguishers or re-mount them after they were removed. (11T142:5-21; 149:11 – 150:7.) He also did not know what caused the mounting straps to warp or how long they had been in such a condition. (11T142:22 – 143:14.) Mr. Ferguson knew of no prior issues involving a fire extinguisher at the Hamilton Walmart store. (11T15-23.)

The day after the incident, Barbara Laytham, the store's asset protection manager, noted no issues with the fire extinguisher. (11T14:14 – 15:11; 16-22; 27:6-14; 145:18 – 146:19.) Walmart also pulled security camera footage from an hour before and after the incident. (11T17:24 – 18:2.) Laytham concluded that Mr. Krassner caused the fire extinguisher to fall by leaning against it after he backed into it without looking where he was going. (11T19:7-15.)

The Hamilton Walmart underwent a renovation in 2017, the year before Mr. Krassner's incident. (11T14:14 – 15:11.) Ms. Laytham could not remember whether the fire extinguisher locations were moved during the renovation, but she did recall that Walmart had the mounts and mounting devices replaced. (*Id.*) So, at the time of Mr. Krassner's incident in February 2018, the mounting device for the subject fire extinguisher was less than a year old.

Like Ms. Laytham, Mr. Cuzzo, the Walmart store manager, could not remember whether any fire extinguisher locations were moved during the 2017 renovations to the Hamilton store. (11T152:18-20; T153:24 – 154:1.) In fact, Mr. Cuzzo did not know who determined where to place wall-mounted fire extinguishers throughout the store. (11T159:6-19.) Rather, the decision on fire-extinguisher placement was made with input from local governmental authorities, including the local fire department. (11T177:10 – 178:14.) Like Ms. Laytham, Mr. Cuzzo recalled no discussions about any problems with fire

extinguishers, and he never learned of any such problems at the Hamilton Walmart store, other than this one. (11T182:23 – 183:12.)

As the asset protection manager, Ms. Laytham was responsible for overseeing safety, security, compliance, and other matters—including inspection of fire extinguishers. (11T15:12-12; 16:4-22.) Fire extinguishers are formally inspected monthly; Ms. Laytham would visually inspect them daily as she walked the store floor; and she expected that all Walmart associates would also look for, and fix, problems or issues. (11T16:4-22; 17:2-12.) The written monthly checklist would note any problems with fire extinguishers. (11T37:8 – 38:4.) Part of that monthly inspection included checking to see that the fire extinguisher was securely mounted. (11T167:1-9.) This test, a "bump test," involved applying an amount of force to see whether the fire extinguisher was stably mounted. (11T172:1-21.)

If a problem were found with the mounts for a fire extinguisher, Walmart would call maintenance and have it fixed. (11T30:4-12.) If the mounts needed to be replaced, the Hamilton store had extras left over from the 2017 remodel that employees could use. (11T32:11-24; 161:23.) Mr. Cuzzo could not remember any specific instances in which the mounting devices needed to be fixed or replaced. (11T161:11-23.) And he clarified that Walmart kept extra fire-extinguisher mountings to be quickly ready to respond to normal wear and

tear, not because it was aware of some specific problem with the mountings. (11T176:19-25.)

It is undisputed that this fire extinguisher (fire extinguisher No. 13) was inspected on February 1, 2018, the same month as Mr. Krassner's incident. (11T49:15 – 50:24; 167:14 – 169:12; Da113-23.) The fire extinguisher was inspected again, six days after Mr. Krassner's incident, and the inspection report notes no problems or issues. (11T168:3-11; Da113.) Those inspections included checking to ensure that fire extinguishers were "mounted correctly." (11T50:14-24.)

Mr. Krassner did not initially notice any injury, but when he returned to the store, he reported that his foot was sore. The retrial did not involve damages, so this discussion of Mr. Krassner's injuries is for background purposes, only. Mr. Krasner had a well-documented history of preexisting health problems, including diabetes, vascular disease, cardiovascular disease, atrial fibrillation, and osteoarthritis. (Da58.) Notwithstanding that history, Mr. Krassner's experts contended that the incident caused him to suffer from Complex Regional Pain Syndrome, a permanent injury. (Da58-60.) Mr. Krassner stopped formal medical treatment in 2020, and his medical bills were $26,000. (Da78-79.)

B. At the first trial, the trial court erroneously gives a mode-of-operation jury instruction.

At the first trial, the trial court instructed the jury using *Model Charge* 5.20F(10). (6T94:25 – 95:16.) That charge told the jury that Walmart could be liable even if it, "did not have actual or constructive knowledge of the particular unsafe condition which caused the accident and injury." (6T95:14-16.) The trial judge mistakenly thought that *Model Charge* 5.20F(11) was the only mode-of-operation charge, (5T242:15 – 243:23), but current *Model Charge* 5.20F(10) is also an outdated mode-of-operation charge. *See Prioleau v. Ky. Fried Chicken, Inc.*, 223 N.J. 245, 263 n.5 (2015).

The jury at the first trial awarded over $1.7 million, which the trial court molded and later reduced to a judgment of $1,491,562.50. (Da59.) Walmart timely appealed the first judgment.

C. This Court vacates and remands for retrial on liability and comparative negligence.

This Court affirmed in part, vacated in part, and remanded. This Court held that a partial retrial was required, because the trial court erred in giving a mode-of-operation jury charge. At retrial it would be necessary to determine whether Walmart had constructive notice of the fire extinguisher's condition and instruct the jury thus:

> Given our decision above regarding the improper jury charge, the jury will again have to resolve the disputed facts regarding the

> condition of the fire extinguisher and determine if the evidence supports the argument that Walmart had constructive notice of the condition.

(Da74.)

D. On remand, the trial court again allows liability without proving notice.

After this Court remanded, the trial court tried this matter before a jury from in December 2024. Per the scope of remand, the second trial concerned only Walmart's liability and Mr. Krassner's contributory negligence.

On the penultimate afternoon of trial, the trial court held the charging conference. As he did at the first trial, Mr. Krassner asked the trial court to give a res ipsa loquitur charge, specifically *Model Jury Charge (Civil)* 5.10D. (12T205:25 – 206:2; 207:6 – 217:9; Da87.) Citing *Szalontai v. Yazbo's Sports Cafe*, 183 N.J. 386 (2005), and *Cockerline v. Menendez*, 411 N.J. Super. 596 (App. Div. 2010) (holding trial court erred in giving res ipsa charge), the trial court denied Mr. Krassner's request. Three times, the trial court stated that Mr. Krassner's "interaction" with the fire extinguisher caused it to fall. (12T216: 5-11; 217:3-7.) Thus, Mr. Krassner's voluntary act or negligence contributed to the fire extinguisher falling, foreclosing any res ipsa loquitur theory. (12T215:22-23.)

Mr. Krassner had also requested that the trial court charge the jury with *Model Charge* 5.20F(9). (Da86-87.) After rejecting the res ipsa charge, the trial

court stated that it intended to charge the jury on certain subparts of *Model Charge* 5.20F, including subpart (9), noting that its application was "disputed." (12T205:5-12.) To the trial court's understanding, the mere location of the fire extinguisher was a dangerous condition. (12T217:10-25.)

In objecting to *Model Charge* 5.20F(9), Walmart argued that this case has always been about whether Walmart had notice of a dangerous condition of the fire extinguisher. (12T220:13-16.) This argument is consistent with the prior appellate decision:

> By instructing the jury in accordance with *Model Jury Charge (Civil)* 5.20F(10), the court absolved plaintiff of their burden to prove notice or constructive notice.

(Da66.) Walmart also argued that the fire extinguisher's location was not dangerous, and the mounting straps were the alleged dangerous condition. (12T218:8 – 221:15.) Simply put, there was "no evidence that Wal[m]art created the dangerous condition": the "damaged bracket." (12:13-16.) "The dangerous condition has to be there was something wrong with that fire extinguisher. . . . . If there was some damage, and Wal[m]art should have found out about it, or is Plaintiff responsible because he didn't turn around?" (12T224:19-25.) Walmart argued that Mr. Krassner needed "to prove that we had notice that there was a damaged bracket." (12T212:9-10.) Walmart concluded that instructing the jury on *Model Charge* 5.20F(9) was

"fundamentally against" what is at issue and would not fit the facts of the case. (12T225:2-6.)

In response, Mr. Krassner claimed that Walmart chose the location of the fire extinguisher. (12T221:17 – 222:18.) Mr. Krassner never explained how Walmart created the dangerous condition at issue: the alleged condition of the mounting brackets or straps that caused the fire extinguisher to fall when Mr. Krassner contacted it. The trial court overruled Walmart's objection, stating that it would give *Model Charge* 5.20F(9). (12T228:20 – 229:16.)

When it charged the jury, the trial court read *Model Charge* 5.20F(8) followed immediately by *Model Charge* 5.20F(9). *Model Charge* 5.20F(8) instructs the jury that a plaintiff must show actual notice or constructive notice to recover, whereas *Model Charge* 5.20F(9) states that a plaintiff need not show notice if the defendant created the dangerous condition:

> If you find that the premises was not in reasonably safe condition, then in order to recover, the Plaintiff must show either actual notice for a period of time before Plaintiff's injury to permit the owner, and the exercise of reasonable care, to have corrected that condition; or constructive notice.
>
> When the term actual notice is used, we know that the owner or the owners employees actually knew about the unsafe condition.
>
> When we talk about constructive notice, we mean that the particular condition existed for such a period of time that an owner of the premise, in the exercise of reasonable care, should have discovered its existence. That is to say constructive notice means that the person having a duty of care to another is deemed to have

> notice of such unsafe condition which exists for such a period of time a person of reasonable diligence would have discovered the dangerous condition.
>
> If you find that the premise [sic] was not in a reasonably safe condition, and that the owner, or occupier, or agent, or servant, or employees of the owner or occupier created their condition through their own acts or omissions, then in order for Plaintiff to recover, *it's not necessary that you find that the owner/occupier had either actual or constructive notice* of that particular unsafe condition.

(13T93:19 – 94:20 (emphasis added).)

During its deliberations, the jury asked to rewatch the video of the incident. (13T107:20 – 109:16.) The jury also asked whether the exemplar fire extinguisher was the same made and model as the one involved in Mr. Krassner's incident. (13T110:3 – 111:9.) Then, the jury returned a verdict finding Walmart 80% at fault and Mr. Krassner 20% at fault (13T111:22 – 112:19; Da23.) After the jury was discharged, Walmart renewed its motion for a directed verdict or judgment notwithstanding the verdict. (13T114:19 – 115:20.) Mr. Krassner cross-moved for judgment notwithstanding the verdict on comparative negligence (13T115:22 – 116:9.) The trial court denied both motions on the record. (13T116:10 – 118:18.) The trial court reduced the jury's verdict to judgment on January 7, 2025. (Da23-25.) Walmart secured a supersedeas bond, and timely appealed. (Da30-34; 132-33.)

Argument

As this Court held in the last appeal, this case has always been about notice. The issues are whether Mr. Krassner proved that Walmart should have known that the wall-mounted fire extinguisher was a dangerous condition, and whether the jury was properly instructed on the notice principles that apply in premises-liability cases. but the jury was again never required to decide those issues in the second trial.

At the threshold, though, Mr. Krassner failed to proffer any evidence by which a reasonable juror could conclude that Walmart should have known that leaning against or bumping the fire extinguisher would easily cause it to fall to the ground. Mr. Krassner conflated the fire extinguisher's location with the alleged condition of the mounting straps. The location did not cause the accident. The alleged condition of the mounting straps did, and Mr. Krassner did not show that Walmart should have known that the straps were too easily disengaged. Second, and assuming evidence of constructive notice, the trial court once again improperly instructed the jury in a way that absolved Mr. Krassner of proving notice. By using *Model Jury Charge (Civil)* 5.20F(9), the trial court confusingly—and incorrectly—instructed the jury that Mr. Krassner need not prove notice.

The Court should vacate and remand for entry of judgment in Walmart's

favor. Alternatively, the Court should remand for a new trial because of the trial court's error in instructing the jury.

I. The trial court erred by refusing to grant judgment for Walmart because Mr. Krassner failed to prove that Walmart had notice of a dangerous condition, and he presented no evidence that Walmart created any dangerous condition.

Raised below: 13T12:1 – 14:18 (motion for directed verdict); 13T114:6 – 115:20 (motion for judgment notwithstanding the verdict).

In reviewing the denial of a motion for directed verdict under *Rule* 4:40-1 or a motion for judgment notwithstanding the verdict (JNOV) under *Rule* 4:40-2, this Court applies the same standard that governs trial courts. *See Conforti v. County of Ocean*, 255 N.J. 142, 162 (2023) (JNOV); *Frugis v. Bracigliano*, 177 N.J. 250, 269 (2003) (directed verdict). This Court considers whether the evidence at trial together with all legitimate inferences could sustain a judgment for the prevailing party. *Conforti*, 177 N.J. at 162. If, under this standard, reasonable minds could differ, JNOV should be denied. *Id.* On the other hand, if no rational juror could conclude that the plaintiff met its burden of proof on each prima-facie element of a cause of action, a court should grant JNOV. *Id.* at 163.

A business owner like Walmart owes a duty of due care to its business-invitee patrons. *Prioleau*, 223 N.J. at 257. That duty, however, is not absolute.

In other words, a business owner "is not an insurer of the safety of his patrons, although he is liable for injuries caused by his negligence." *Linders v. Bildner*, 129 N.J.L. 246, 247 (Sup. Ct. 1942), *aff'd per curiam*, 130 N.J.L. 555 (E. & A. 1943); *accord Znoski v. Shop-Rite Supermkts., Inc.*, 122 N.J. Super. 243, 248 (App. Div. 1973). "Ordinarily, an invitee seeking to hold a business proprietor liable in negligence 'must prove, as an element of the cause of action, that the defendant had actual or constructive knowledge of the dangerous condition that caused the accident.'" *Prioleau*, 223 N.J. at 257 (internal quotation omitted). Proof of notice is not required if the defendant created a dangerous condition through its own negligence. *See Smith v. First Nat'l Stores, Inc.*, 94 N.J. Super. 462, 466 (App. Div. 1967).

No party disputes that the fire extinguisher caused Mr. Krassner's injuries when it struck his foot. Nor is it disputed that the fire extinguisher fell after Mr. Krassner contacted it. The parties hotly dispute whether Walmart had notice that the mounting straps were dangerous. (*See infra* Point I(B).) Mr. Krassner's bumping into the fire extinguisher was a necessary action in the chain of events leading to his injury, but it—alone—was not sufficient to cause him injury. In other words, as applied to the facts, the fire extinguisher's location was a condition, but it was not a *dangerous* condition. Had the mounting clasp not opened, nothing would have happened. Walmart might

have been responsible for the fire extinguisher's location in coordination with local officials. But that act alone was insufficient for Mr. Krassner to prevail at trial.

Rather, Mr. Krasner needed to prove that Walmart had notice that the fire extinguisher was likely to fall if bumped into. Yet Walmart did not create the alleged warped condition of the straps. And—more importantly—Mr. Krassner presented no evidence that Walmart should have known that the straps were in a dangerous condition. Without any such evidence, Mr. Krassner could not prove his case.

A. Mr. Krassner could not rely on an owner-created danger theory to prevail at trial.

In all landowner-created-danger cases from the Supreme Court and this Court, the condition allegedly created by the landowner directly caused the plaintiffs' injuries. This principle is unsurprising. A plaintiff need not prove that a defendant had notice of a dangerous condition if the defendant created that dangerous condition. *Gill v. Krassner*, 11 N.J. Super. 10, 15 (App. Div. 1950). In other words, notice principles do not apply if the defendant was actively negligent in creating a dangerous condition.

In *Tymczyszyn v. Columbus Gardens*, 422 N.J. Super. 253, 257 (App. Div. 2011), the plaintiff fell on ice formed when snow removed by a contractor melted and refroze. In reversing summary judgment for the defendant, this

Court held that a jury could conclude that the defendant's "negligent accumulation of snow" on either side of a pathway gave rise to a foreseeable risk that melting snow would refreeze into a patch of ice. *Id.* at 260; *cf. Ruiz v. Toys R Us, Inc.*, 269 N.J. Super. 607, 614-15 (App. Div. 1994) (error to require notice of specific water leak on which plaintiff slipped where defendants had actual notice of overall roof leaks).

Similarly, in *O'Shea v. K Mart Corp.*, 304 N.J. Super. 489, 491-92 (App. Div. 1997), the plaintiff, shopping for a golf bag, pulled one off a 5′ high store shelf, and a second bag fell on her face. In reversing summary judgment, this Court held that the stacking of the golf bags at eye level could warrant a finding of liability since it was expected that consumers like the plaintiff would manipulate and move them off the shelves. *Id.* at 494.

The *O'Shea* Court cited *Smith*, 94 N.J. 462, in which a grocery-store patron fell on steps after using a restroom. The stairway was usually covered in sawdust, which the store's meat department spread to, ironically, prevent people from slipping on offal or droppings. *Id.* at 465. This Court held that the slippery stairs could have "resulted from the tracking of the sawdust upon the stairway . . . by the defendant's own employees." *Id.* at 466; *see also Plaga v. Foltis*, 88 N.J. Super. 209, 210-11 (App. Div. 1965) (plaintiff fell on piece of fat or gravy-soaked bread dropped from busboy's cart).

Like *Smith*, in *Altalese v. Long Beach Twp.*, 356 N.J. Super. 1, 3-4 (App. Div. 2003), a township created an uneven surface when it paved a bike lane, which caused the plaintiff to trip and fall. Because the surface created a substantial risk of injury when the bike lane was used with due care and in a foreseeable manner, this Court reversed an order granting summary judgment to the township. *Id.* at 5 (quoting N.J.S.A. § 59:41-a).

This case is different from all these owner-created-danger cases. Mr. Krassner argued that Walmart was liable because it chose to place the fire extinguisher where patrons might bump into it. But he was not injured by merely bumping into the fire extinguisher. Rather, he was injured when he bumped into the fire extinguisher which caused it to fall. It is this allegedly dangerous condition that caused him injury—not the location of the fire extinguisher.

Compare this case with *O'Shea*. In *O'Shea*, negligently stacked merchandise fell directly because the plaintiff tried to pull down another piece of merchandise. *O'Shea*, 304 N.J. Super. at 493. Unlike *O'Shea*, however, it is undisputed that the fire extinguisher was secured to its wall mounting. It was not just sitting on a shelf, and Mr. Krassner did not intend to manipulate or move the fire extinguisher. Therefore, the accident would not have happened unless his contact with the extinguisher caused the mounting straps to fail; so

that is the relevant condition that must have been hazardous for liability to be supportable.

This case is also unlike *Tymczyszyn* and *Smith*, because it does not involve a transient condition created by a defendant's employee or agent. In those cases, the defendants were responsible for creating the condition that caused the fall: in *Tymczyszyn* an icy sidewalk and in *Smith*, slippery stairs. This case is also distinguishable from *Altalese*, because there the plaintiff was directly injured by the owner-created condition.

Here, there was some evidence that Walmart, together with local authorities, considered where to place fire extinguishers throughout the store. Indeed, the testimony was that fire extinguishers need to be readily accessible in case they are needed. But there was no testimony that Walmart created the *condition* that led to the fire extinguisher falling: allegedly dangerous mounting straps.

The trial court's framing would abrogate the requirement to prove notice in any premises-liability case. Any plaintiff could bypass notice by arguing that the defendant "created" a condition with that "condition" being merely susceptible to the hazard that actually caused the accident. Indeed, that is why, this Court vacated the first judgment; it expressly found that the trial court has wrongly relieved Mr. Krassner of proving notice. *Cf. Jeter v. Sam's Club*, 250

N.J. 240, 252 (2022) ("Mode of operation is a judicially created rule that alters a plaintiff invitee's burden of proof in certain premises liability negligence actions."). "Such an expansive rule would represent a departure from this Court's longstanding jurisprudence in negligence cases brought by invitees." *Prioleau*, 223 N.J. at 264 n.5.

For instance, consider a spill in a freezer aisle at a grocery store emanating from a leaky freezer. Under such facts, a plaintiff must show that the proprietor either knew, or should have known, of the spill. *See, e.g.*, *Teixeira v. Walmart Stores, Inc.*, No. 18-13103, 2021 WL 4272828, 2021 U.S. Dist. LEXIS 180017, at *10-11 (D.N.J. Sept. 16, 2021), *appeal discontinued*, No. 21-2934 (3d Cir. Apr. 6, 2022). Using Mr. Krassner's logic, however, a plaintiff could prevail by arguing that the proprietor constructed the store, laid the flooring, or placed the freezers, thus "creating" the condition. The plaintiff would not need to show that the proprietor had actual or constructive notice of the spill.

At bottom, the trial court's legal analysis would abrogate the notice requirement and expose businesses to broad forms of liability that governing law squarely rejects. "A storekeeper is not an insurer of the safety of his patrons, although he is liable for injuries caused by his negligence." *Linders*, 129 N.J.L. at 247. The rule has always been that business owners are liable

only for those conditions caused by their negligence. *Nisivoccia v. Glass Gardens, Inc.*, 175 N.J. 559, 563 (2003).

Finally, Mr. Krassner cannot rely on post-incident observations of the fire extinguisher mounting straps to show that Walmart *created* an allegedly dangerous condition. Such an argument would require impermissible speculation, just like in *Presto v. Henpal Realty Assocs.*, No. A-066-19, 2021 WL 1100148, 2021 N.J. Super. Unpub. LEXIS 476 (App. Div. Mar. 23, 2021).[2] In *Prestol*, the plaintiff fell and broke her ankle in a 2″ depression a public roadway outside her work. Among other defendants, she sued a water company that had twice performed repairs years before her fall. She tried to argue that the water company created the dangerous condition through expert testimony. This Court rejected that argument and affirmed a grant of summary judgment, holding that the expert's opinion was "unsupported by any objection data other than her post-accident observations." *Id.* at *29.

So, too here. The only evidence of a dangerous condition is Mr. Ferguson's post-incident observations that, to him, the mounting straps appeared to be warped and easy to undo. This lay opinion, unsupported by any

[2] A copy of the Court's *Prestol* decision is in the Appendix. (*See* Da37-51.) In researching this decision, undersigned counsel uncovered no contrary authority. *See R.* 1:36-3.

evidence or inference that the straps were warped or loose *before* Mr. Krassner's incident, cannot show that Walmart created the condition of the mounting straps. It also cannot show that Walmart had notice of any defect. (*See infra*, Point I(B).)

The Court should reject Mr. Krassner's argument of owner-created danger. That improper framing relieved Mr. Krassner of proving notice.

* * *

Because Mr. Krassner did not—and could not—prove that Walmart created the alleged dangerous condition of the fire extinguisher which caused his injury, he needed to rely on traditional notice principles to prevail. Here, he failed, as well.

B. Mr. Krassner failed to prove that Walmart had notice that the fire extinguisher was likely to fall when contacted by a person or object.

A plaintiff who fails to prove that a business owner had actual or constructive notice of a dangerous condition cannot prove liability. *Prioleau*, 223 N.J. at 257-58. The mere existence of an alleged dangerous condition is not constructive notice of that condition. *Arroyo v. Durling Realty, LLC*, 433 N.J. Super. 238, 243 (App. Div. 2013). Rather, "[a] defendant has constructive notice when the condition existed 'for such a length of time as reasonably to have resulted in knowledge and correction had the defendant been reasonably

diligent.'" *Jeter*, 250 N.J. at 251 (quoting *Troupe v. Burlington Coat Factory Warehouse Corp.*, 443 N.J. Super. 596, 602 (App. Div. 2016)). A plaintiff may prove constructive notice through the characteristics of the dangerous condition or eyewitness testimony. *Id.* at 251-52.

To begin with, Mr. Krassner could not rely on actual notice. Mr. Krassner never proffered any evidence tending to show that Walmart actually knew that the fire extinguisher was allegedly dangerous such that it would fall when "bumped."

Mr. Krassner also did not prove constructive notice. Not only did Mr. Krassner fail to prove how long the fire extinguisher's mounting was allegedly dangerous, but he also provided no evidence beyond speculation or conjecture that the mounting brackets were dangerous in the first place. The only potential evidence, even when viewed in a light most favorable to Mr. Krassner, does not meet that standard.

True, Mr. Ferguson thought that the mounting brackets were "warped," and the fire extinguisher was too easy to remove. Those post-accident observations, without more, could not show constructive notice. That Walmart also kept spare mounting brackets proves nothing.[3] Using that evidence to hold

[3] In the first appeal, this Court affirmed the denial of Walmart's motion for a directed verdict. (Da74.) But in so doing, it emphasized that the new trial on liability would require presentation of evidence anew. (Da77-78.) Thus, this

Walmart liable substitutes correlation for causation. The bracket could have been damaged solely by Mr. Krassner's negligence in backing into the fire extinguisher. On this trial record, there was no way to show that the brackets were damaged before—or by anything else other than—his intervention. "An inference [of negligence] can be drawn only from proved facts and cannot be based upon a foundation of pure conjecture, speculation, surmise or guess." *Prioleau v. Ky. Fried Chicken, Inc.*, 434 N.J. Super. 558, 570-71 (App. Div. 2014), *aff'd as modified*, 223 N.J. 245 (2015).

Moreover, Mr. Krassner was barred from arguing that Walmart should have used a different design to secure fire extinguishers to wall mounts. Mr. Krassner's only evidence to support this claim was a photograph he personally took at the Hamilton Walmart store in 2024. The trial court excluded this evidence for two reasons. First, Mr. Krassner lacked an expert or any other information showing that an alternative mounting system was available in 2018 when the accident happened. (9T16:19 – 26:7.) Second, the change in the mounting system was an inadmissible subsequent remedial measure under N.J.R.E. 407. (9T16:19 – 26:7.)

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appeal involves a different factual record, and the law-of-the-case doctrine does not govern the sufficiency analysis. *See Sisler v. Gannett Co.*, 222 N.J. Super. 153, 159 (App. Div. 1987).

In his closing argument Mr. Krassner claimed that Walmart had notice based on the number of inspections it performed. (13T75:24 – 76:22.) But that reasoning turned the notice analysis on its head. Inspections (unless they uncover a hazardous condition) serve to *dis*prove notice by showing that the defendant made efforts to ensure safety and found no safety issue. *See, e.g.*, *Troupe*, 443 N.J. Super. at 602. Mr. Krassner identified no logical explanation for how performing inspections that fail to identify any hazard could rationally impute notice to the defendant where that notice would not otherwise exist. The theory would also create a Catch-22. A careless business owner would be faulted for failing to inspect. A diligent business owner, by contrast would be charged with "notice" of hazards by virtue of taking the very actions that the careless one had *failed* to take.[4]

In any event, none of this supplies any evidence of notice. The mere existence of warped straps post-incident is not evidence that Walmart knew about it, or should have known about it, beforehand. *Arroyo*, 433 N.J. Super. at 243. The lynchpin of constructive notice is the existence of a condition for an unreasonable amount of time. *See Troupe*, 443 N.J. Super. at 602. Mr. Krassner

[4] At the first trial, Mr. Krassner made essentially the opposite argument: that Walmart had notice because it did not thoroughly inspect the fire extinguishers. (5T36:18 – 38:3.)

presented no evidence for how long the mounting straps were in an allegedly dangerous condition. He presented no evidence how Walmart could have known of those straps. The only evidence shows that Walmart regularly and diligently inspected all fire extinguishers in its stores, including the mounting devices for wall-mounted fire extinguishers. Those formal inspections occurred monthly, and informal visual inspections occurred daily. The jury was never presented with any evidence by which it could conclude that Walmart should have known that the fire extinguisher was likely to fall if contacted by a person or object. Without proof of notice, Mr. Krassner could not prevail at trial.

* * *

Mr. Krassner failed to prove that Walmart created the dangerous condition that injured him, the mounting straps for the fire extinguisher that fell on his foot. Similarly, he failed to prove that Walmart had actual or constructive notice of that alleged dangerous condition. The absence of proof of notice is "fatal" to his case. *Prioleau*, 223 N.J. at 257-58. The trial court should have granted Walmart's motion for JNOV. Because it did not, this Court should reverse and remand for entry of judgment in Walmart's favor.

II. The trial court erred by charging the jury that Walmart could be liable for creating a dangerous condition, because *Model Charge* 5.20F(9) absolved Mr. Krassner from proving notice, just as in the first trial.

Raised below: (12TT218:8 – 221:15; 222:19 – 225:19)

Appropriate jury charges are essential for a fair trial. *Prioleau*, 223 N.J. at 256. Failing to tailor a jury charge to the given facts of a case constitutes reversible error where a different outcome might have prevailed had the jury been correctly charged. *Reynolds v. Gonzalez*, 172 N.J. 266, 289 (2002). "[A] jury charge must correctly state the applicable law, outline the jury's function and be clear in how the jury should apply the legal principles charged to the facts of the case at hand." *Viscik v. Fowler Equip. Co.*, 173 N.J. 1, 18 (2002).

When reviewing a challenge to jury instructions, this Court scrutinizes the charge, and whether an erroneous charge may have affected the trial's result. *See Washington v. Perez*, 219 N.J. 338, 351 (2014). "[E]rroneous instructions on material points are presumed to be reversible error." *Id.* (quotation omitted). In addition, a jury instruction that has no basis in the evidence is insupportable because it tends to mislead the jury. *Prioleau*, 223 N.J. at 257.

New Jersey's Model Civil Jury Charges are "valuable aids," but they are not binding authority. *Graphtnet, Inc. v. Retaurus, Inc.*, 250 N.J. 24 (2022). Instead, such charges gain the imprimatur of law only when the Supreme Court

reviews their language ensure that it accurately states the law. *Id.*

This principle is not a matter of first impression; this Court has already decided it. At the first trial, the trial court instructed the jury using the current version of *Model Charge* 5.20F(10) (rev. Nov. 2022). (Da63-65.) This Court noted that the drafters retained *Model Charge* 5.20F(10) and created "unnecessary confusion" following promulgation of the current mode-of-operation charge, *Model Charge* 5.20F(11). (Da64-65.) The committee kept *Model Charge* 5.20F(10) even though the Supreme Court disapproved of its language in *Prioleau* as neither accurate nor cogent. (Da65-66 (quoting *Prioleau*, 223 N.J. at 263 n.5).) The lesson of *Prioleau* and the prior appeal in this case is that use of Model Charges, alone, does not bulletproof jury instructions from claims of error. That is why this Court expressly stated that the trial on remand should resolve whether Walmart had prior notice of the putative dangerous condition. (Da66.)

Were the Court to disagree with Walmart on evidentiary sufficiency of constructive notice, it would still need to vacate and remand for retrial. The trial court's jury charge on premises liability was reversible error.

A. The trial court's charge erroneously relieved Mr. Krassner of proving notice and functioned as an ersatz res ipsa loquitur charge.

Especially in the premises-liability cases, conflicting charges not based

on evidence can irrevocably confuse a jury and lead to an unfair trial. In *Prioleau*, for instance, the trial court gave an erroneous mode-of-operation charge, just as the trial court did at the first trial. *Prioleau*, 223 N.J. at 265. To try to salvage the verdict, the plaintiff argued that the mode-of-operation charge was harmless error. The Supreme Court unanimously rejected that argument, holding that the jury could have come to a different conclusion had it been properly instructed, especially since the plaintiff lacked any evidence that the defendant restaurant knew of the alleged dangerous condition. *Id.* at 266-67.

Just as *Model Charges* 5.20F(10) and (11) conflict, so too do *Model Charges* 5.20F(8) and (9). Those two charges are inherently contradictory, because they tell the jury the opposite thing. *Model Charge* 5.20F(8) tells the jury that the plaintiff must prove notice:

> **8. Notice of Particular Danger as Condition of Liability**
>
> If you find that the land (or premises) was not in a reasonably safe condition, then, in order to recover, plaintiff must show either:
>
> (a) Actual Notice for a period of time before plaintiff's injury to permit the owner/occupier, in the exercise of reasonable care, to have corrected it; or
>
> (b) Constructive Notice.
>
> When the term Actual Notice is used, we mean that the owner/occupier or the owner's/occupier's employees actually knew about the unsafe condition.

> When the term Constructive Notice is used, we mean that the particular condition existed for such period of time that an owner/occupier of the premises in the exercise of reasonable care should have discovered its existence. That is to say, constructive notice means that the person having a duty of care to another is deemed to have notice of such unsafe conditions, which exist for such period of time that a person of reasonable diligence would have discovered them.

Model Jury Charge (Civil) 5.20F(8). Indeed, commentary to *Model Charge* 5.20F(8) states that it applies "to those cases where the defendant is not at fault for the creation of the hazard o[r] where the hazard is not to be reasonably anticipated as an incident of defendant's mode of operation." *Model Jury Charge (Civil)* 5.20F(8), Note to Judge (citing *Maugeri v. Great Atl. & Pac. Tea Co.*, 357 F.2d 202 (3d Cir. 1966) (dictum)).

By contrast, *Model Charge* 5.20F(9) tells the jury that the plaintiff need not prove notice:

> **9. Notice Not Required When Condition is Caused by Defendant**
>
> If you find that the land (or premises) was not in a reasonably safe condition and that the owner/occupier and/or an agent, servant or employee of the owner/occupier created that condition through their own act or omission, then, in order for plaintiff to recover, it is not necessary for you also to find that the owner/occupier had actual or constructive notice of the particular unsafe condition.

Model Jury Charge (Civil) 5.20F(9).

The Note to *Model Charge* 5.20F(8) suggests that a trial court should not charge a jury on both (8) and (9), or, for that matter (11), the mode-of-

operation charge. *Model Charge* 5.20F(8) requires a plaintiff to prove actual or constructive notice. *Model Charge* 5.20F(9) relieves a plaintiff of proving notice if the defendant created a dangerous condition, and *Model Charge* 5.20F(11) relieves a plaintiff of proving notice if the injury arose from certain self-service operations. The case cited in the Note to *Model Charge* 5.20F(8) characterizes notice and owner-created danger as "two different theories of recovery." *Maugeri*, 357 F.2d at 203.

The reason for not using *Model Charge* 5.20F(8) and (9) in tandem should be obvious. A judge confuses a jury by telling it opposite things. For example, in *N.Y.-Conn. Dev. Corp. v. Blinds-To-Go (U.S.), Inc.*, 449 N.J. Super. 542, 555 (App. Div. 2017), this Court reversed a verdict in a contract dispute. The jury found that the parties had an express contract but no breach of that contract. *Id.* at 556. The judge, however, had instructed the jury to then consider whether the plaintiff could recover in *quantum meruit*, a legal theory available only if no express contract exists. *Id.* at 556-57. Even though it found that a contract existed, the jury found for the plaintiff on *quantum meruit*. The trial court's "failure to provide clear and correct jury charges and instructions" required this Court to reverse. *Id.* at 557; *see also State v. Moore*, 122 N.J. 420, 432-33 (1991) (reversible error to instruct jury that defendant had burden of proving essential element of crime while also instructing jury that state had

burden of proof).

In the first appeal, this Court held that the trial court erroneously gave *Model Charge* 5.20F(10), which improperly absolved Mr. Krassner of his burden of proving notice or constructive notice. (Da66.) The use of *Model Charge* 5.20F(10) permitted the jury to hold Walmart liable based on a theory that Walmart employees or other customers created a hazardous condition that was likely to result from the manner of Walmart's business.

That ruling was plainly correct, as the use of fire extinguishers in Walmart's store had nothing to do with self-service aspects of a business triggering the mode-of-operation doctrine. This Court's ruling in the first appeal also requires reversal, again. Just like *Model Charge* 5.20F(9), *Model Charge* 5.20F(10) instructs the jury that it may find the defendant liable if the premises were in a hazardous condition, "whether *caused by defendant's employees* or by others, such as customers," and the hazardous condition was likely to result from the particular manner of the defendant's business. *Model Jury Charge (Civil)* 5.20F(10) (rev. Nov. 2022). In fact, when comparing the two model charges, *Model Charge* 5.20F(9) is *more* prejudicial, because it does not link the creation of any hazardous condition by the defendant's employees to the particular manner of operation of the business.

Thus, the trial court's decision on remand contradicts this Court's

instructions in the first appeal. *See Tomaino v. Burman*, 364 N.J. Super. 224, 233-34 (App. Div. 2003) (trial court must follow appellate court's instructions on remand). The trial court recognized that this Court did not directly address *Model Charge* 5.20F(9) in the first appeal. (12T217:22-25.) That is so, because *Model Charge* 5.20F(9) was not given in the first case. But this Court did address what jury instructions should be given on remand. This Court held that the trial court must give jury instructions requiring Mr. Krassner to prove constructive notice. The trial court "absolved" Mr. Krassner of the burden of proving notice, because *Model Charge* 5.20F(10) "completely negates the need for notice." (Da66-67; *see also id.* at 74 ("Given our decision above regarding the improper jury charge, the jury will again have to resolve the disputed facts regarding the condition of the fire extinguisher and determine if the evidence supports the argument that Walmart *had constructive notice of the condition*.") (emphasis added).) Jury instructions must be tailored to the facts of the case. This Court's admonition in the first appeal provides further fodder for why the use of *Model Charge* 5.20F(9) was error, because this case as always been about notice. (*See* 13T21:16-18 (statement of trial judge) ("[T]this whole case is notice.").

Turning to those facts of record at the second trial, *Model Charge* 5.20F(9) does not apply, just as *Model Charge* 5.20F(10)—which uses similar

"created" language—did not apply. To reiterate what Walmart argued above, Mr. Krassner was not injured solely by the location of the fire extinguisher. He was injured by its alleged condition. This distinction is material. Had Mr. Krassner been injured by the location—alone—of the fire extinguisher, then he might have had a case for using *Model Charge* 5.20F(9). For example, had Mr. Krassner contacted the fire extinguisher and sustained a shoulder injury, he might have a case for arguing that Walmart was liable for placement of the fire extinguisher, just as the store owner in *O'Shea* could be liable for the way it stacked merchandise. *See O'Shea*, 304 N.J. Super. at 495-94. (Walmart would likely argue that the large red fire extinguisher was an open and obvious condition, as it did here. *Cf. Tighe v. Peterson*, 175 N.J. 240, 241 (2002) (per curiam) (social host had no duty to warn guest not to dive into shallow end of pool).) But those aren't the facts of this case, and changing the facts changes what jury instructions should be used. Mr. Krassner was not injured by the fire extinguisher's location. He was injured when its mounting straps did not prevent the fire extinguisher from falling after he contacted it. The mounting straps and mount are the alleged dangerous condition. Walmart did not create that condition, and Mr. Krassner presented no evidence that it did. Even if Walmart placed the fire extinguisher in its harness and straps, Mr. Krassner needed to prove that Walmart had constructive notice of dangerousness: the

fact that the straps were too easy to open or were warped *before* Mr. Krassner's interaction with the fire extinguisher.

In closing argument, Walmart argued that it lacked notice that the fire extinguisher straps would not keep the fire extinguisher from falling if contacted by a person or object (13T40:4 – 41:4):

- "We know there's no evidence of this type of accident ever occurring in that store until [Mr. Krassner] hit [the fire extinguisher]." (13T23:20-21.)
- "So from February 1st, 2018, through February 23rd, when the accident happens, there would have been approximately 264 safety inspections going on." (13T28:18-21.)
- "There were never any accident trends involving fire extinguishers; there were no customer incidents involving fire extinguishers, and lots and lots of people passed through this area." (13T37:11-14.)
- "The Judge is also going to instruct you about the need for Plaintiff to prove that Wal[m]art had notice that the premises were allegedly not safe." (13T39:13-15.)
- "Plaintiff has no proof to show that any dangerous condition existed for such time as to constitute constructive notice." (13T41:5-8.)

Because of the trial court's erroneous instructions, Walmart also argued that

Mr. Krassner's owner-created danger theory failed, too. (13T41:12-23.)

In his summation, Mr. Krassner argued that Walmart had *actual* knowledge that the straps were too weak to keep the fire extinguisher from falling if someone bumped it because they checked fire extinguishers so many times:

- "And why are fire extinguishers such a big deal at Wal[m]art that they have check[]lists?" (13T50:14-15.)
- "So why would you think it's a good idea to use that method to mount this thing in that aisle if you know that you have to constantly check on it?" (13T:5316-19.)
- " . . . there's two kinds of notice. There's actual, which means you actually knew there was a problem. Here, that's plain on its face." (13T76:14-17.)
- "So yes, there is actual notice on the part of Wal[m]art that this was a problem." (13T76:21-22.)

Unfortunately, the trial court conflated the fire extinguisher's location with its condition, and its instructions eviscerated Walmart's ability to defend itself. All those inspections, lack of any prior accidents, and lack of knowledge of any issues with fire extinguishers became irrelevant, because the jury was wrongly instructed that notice did not matter.

In essence, the trial court's use of *Model Charge* 5.20F(9) functioned as a stand-in for the res ipsa loquitur charge that it rightly refused to give. Res ipsa loquitur applies only if the plaintiff shows that (a) the occurrence of an accident ordinarily bespeaks negligence; (b) the injury-causing instrumentality was within the defendant's exclusive control; and (c) there is no sign that the plaintiff's own voluntary act or neglect caused the accident. *Szalontai*, 183 N.J. at 398. Here, the trial court correctly rejected Mr. Krassner's request for a res ipsa instruction. The fire extinguisher was not within Walmart's exclusive control, and the evidence showed that Mr. Krassner's own actions in not looking where he was going were the but-for cause of the accident.

Yet Model Charge 5. 20F(9) permitted Mr. Krassner to hold Walmart liable merely because the fire extinguisher fell on his foot. By overriding traditional negligence principles, Mr. Krassner held Walmart liable even though he presented no evidence that the alleged dangerous condition of the fire extinguisher existed for an unreasonable amount of time such that Walmart should have discovered it. And by conflating the fire extinguisher's location with its condition, Mr. Krassner could hold Walmart liable based merely on the happening of the accident itself. This concept equates to res ipsa loquitur.

The evidence at trial failed to show that Walmart created any dangerous condition causing Mr. Krassner's injuries. The fire extinguisher's location is

not the same as its allegedly dangerous condition: insufficient mounting straps which did not hold up the fire extinguisher when Mr. Krassner contacted it. The trial court should not have given the confusing and contradictory *Model Charge* 5.20F(9).

B. The error in charging the jury was not harmless.

A jury-charging error is not harmless if it "may have affected the trial's result." *Walker v. Costco Wholesale Warehouse*, 445 N.J. Super. 111, 120 (App. Div. 2016) (quoting *Washington*, 219 N.J. at 351). As noted above, New Jersey appellate courts presume that erroneous instructions on material points constitute reversible error. *Washington*, 219 N.J. at 351. This principle is so, because jury charges are roadmaps, and bad roadmaps can lead a jury astray. *McClelland v. Tucker*, 273 N.J. Super. 410, 417 (App. Div. 1994).

The Supreme Court's decision in *Prioleau* is almost directly on point. There, as here, the trial court gave different instructions on business-owner liability. But because the jury may have found liability based on the erroneous instruction, the Supreme Court refused to accept the plaintiff's harmless-error argument. *Prioleau*, 223 N.J. at 265-66.

Here, the trial court's contradictory instructions led the jury down the wrong path on the key element of this case: notice. As Walmart stated above, in alternating paragraphs, the trial court instructed the jury that Mr. Krassner

did not need to prove notice and that he did need to prove notice. And there is no way to determine whether *Model Charge* 5.20F(9) affected the jury's deliberations. The jury was not asked any special interrogatories, so it is equally possible that it decided the case based on owner-created danger as on notice. "A court may not assume that the jurors disregarded the improper instructions." *Ruiz*, 269 N.J. Super. at 613. Indeed, this is the same reversible error that occurred at the first trial. (*See* Da57-57 (finding harmless error argument "unpersuasive" because *Model Charge* "5.20F(10) completely negates the need for notice, even if it is coupled with 5.20F(8).".)

Because the trial court gave an erroneous instruction on the key issue, the error in charging the jury was not harmless. And because the error was not harmless, the Court should vacate and remand with instructions to retry the case on liability and comparative negligence without use of *Model Charge* 5.90F(9) if it finds that Mr. Krassner presented sufficient evidence of constructive notice.

Conclusion

This Court should reverse the trial court's judgment and remand with directions to enter judgment in Walmart's favor. If the Court does not reverse, it should vacate and remand for a new trial.

Respectfully submitted,

Dated: April 28, 2025

FOWLER, HIRTZEL, MCNULTY & SPAULDING, LLC

By: */s/ Matthew D. Vodzak*

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PETER KRASSNER,	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
Plaintiff-Respondent,	:	
	:	DOCKET NO. A-001500-24T4
vs.	:	
	:	**Civil Action**
WALMART,	:	
	:	ON APPEAL FROM THE SUPERIOR
Defendant-Appellant	:	COURT OF NEW JERSEY, LAW
	:	DIVISION, SOMERSET COUNTY,
and	:	DOCKET NO. SOM-L-839-18
	:	
JASON CUZZO, ABC	:	SAT BELOW: HONORABLE EDWARD
CORPORATIONS 1-10, &	:	M. COLEMAN, J.S.C.(Retried on Recall)
JOHN DOES 1-10 (said names	:	
ABC, Inc., and John Doe, being	:	
fictitious, jointly, individually),	:	
	:	
Defendants.	:	Date Submitted: May 29, 2025
	:	

BRIEF FILED ON BEHALF OF THE PLAINTIFF-RESPONDENT

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PROCEDURAL HISTORY

Walmart (hereinafter "the defendant") is the operator of a commercial retail establishment located at 700 Marketplace Boulevard in Hamilton, New Jersey. (Da12)[1]. The aisles of the store were arranged by the defendant in a manner that resulted in a roof support column obstructing a portion of one of the shopping aisles. (Da126-Da130). The defendant attached a fire extinguisher to this column in a way that the fire extinguisher protruded into and further obstructed the walking aisle. (Da126-Da131). The fire extinguisher was held in place by a strap that was shown to be easily opened. (13T18:22-24). Peter Krassner (hereinafter "the plaintiff") was shopping at the defendant's store on February

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[1] Appendix and Transcript Reference Key
Da – Defendant-Appellant's Appendix
Pa – Plaintiff-Respondent's Appendix
First Trial
1T – Transcript of May 9, 2022 Trial Date
2T – Transcript of May 10, 2022 Trial Date
3T – Transcript of May 11, 2022 Trial Date (testimony of Peter Krassner)
4T – Transcript of May 11, 2022 Trial Date (all other proceedings from that date)
5T – Transcript of May 12, 2022 Trial Date
6T – Transcript of May 13, 2022 Trial Date
7T – Transcript of May 16, 2022 Trial Date
8T – Transcript of July 28, 2022 Post-Trial Motion Hearing
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9T – Transcript of December 16, 2024 Trial Date
10T – Transcript of December 17, 2024 Trial Date
11T – Transcript of December 18, 2024 Trial Date (Volume I)
12T – Transcript of December 18, 2024 Trial Date (Volume II)
13T – Transcript of December 19, 2024 Trial Date

23, 2018 when he lightly brushed against the protruding fire extinguisher that obstructed the aisle. (10T84:2-5; 10T84:8-22). This occurred as he was stepping out of the way to allow another customer to pass. (10T84:2-5; 10T84:8-22). The fire extinguisher fell from the column and landed on the plaintiff's left foot resulting in severe permanent injuries. (Da4; Da56-Da57; 10T84:8-22).

A Complaint was filed on behalf of the plaintiff on June 29, 2018 seeking damages for the permanent injuries he sustained in the February 23, 2018 incident. (Da3). The defendant and Jason Cuzzo were named as defendants in the Complaint. (Da13). An Answer was filed on their behalf on August 6, 2018. (Da12). The claims against Mr. Cuzzo were voluntarily dismissed with prejudice on April 11, 2022. (Da21). The action proceeded to trial before the Honorable Edward Coleman, J.S.C. (Recall) and a jury that commenced on May 9, 2022. (1T). Judge Coleman's jury charge included Model Jury Charge 5.20(F)(10) when instructing the jury on the issue of notice. (6T94:6-95:16). Model Jury Charge 5.20(F)(9) was not given as part of the jury instruction at that trial. (6T79:7-111:17). The jury returned a verdict on May 16, 2022 that found both the plaintiff and defendant negligent, that there negligence was a proximate cause of the plaintiff's injuries, apportioned liability seventy-four

percent to the defendant and twenty-six percent to the plaintiff and awarded damages in the amount of $1,754,135.25. (6T7:12-12:21).

The defendant filed a motion seeking either a directed verdict, a motion for a new trial, or remitter following the May 16, 2022 verdict. (8T4:1-8). The motion was denied in its entirety and the defendant subsequently filed a Notice of Appeal. (Da54). The Appellate Division found that the Trial Court erred by providing Model Jury Charge 5.10F(10) to the jury in its charge because the charge is, in substance, a mode-of-operation charge and there was no suggestion that the plaintiff's contact with the fire-extinguisher occurred in the context of a self-service operation. (Da63; Da66). It further found that the improper charge warranted a new trial on liability. (Da68). However, the Appellate Division also determined that the Trial Court properly denied the defendant's motion for a directed verdict and the motion for a new trial as to damages and remanded the action for a new trial on liability only. (Da74; Da82). The Appellate Division also ruled that the plaintiff was not required to present opinion testimony from a liability expert because the facts regarding "the placement of the fire extinguisher and related inspections to determine whether it was sufficiently secured to the beam were not so esoteric that jurors would be unable to form a judgment as to whether Walmart's conduct was reasonable." (Da76-Da77).

This matter proceeded to a second trial on liability only before Judge Coleman and a jury on December 16, 2024. (9T). The plaintiff sought to have the Model Jury Charge 5.20F(9) entitled "Notice Not Required When Condition is Caused by Defendant" given to the jury in his request to charge. (Da4-Da5). The defendant objected to the charge being given at the Charge Conference and argued that the dangerous condition is limited to the condition of the harness that attached the fire extinguisher to the column and there was no proof that the defendant damaged the harness. (12T217:10-225:19). Judge Coleman disagreed with the defendant's argument and noted that the plaintiff's claim regarding the dangerous condition was not limited to the harness itself but was rather the placement of the fire extinguisher in an area that obstructed the shopping aisle with a strap that easily opened with the slightest touch. (12T225:20-228:8; 12T228:20-229:16). As he explained in his ruling:

> That it's not only the strap, it's also the placement of the fire extinguisher that caused or created the hazardous condition which poor, unfortunate Plaintiff backed into, and apparently, apparently came in contact with the strap which easily opens. Or if it had been previously opened, touched it so that it released itself from the fork in the bracket that was holding the fire extinguisher.
>
> So it's two-fold argument coming from the Plaintiff.
>
> It is talking about the placement. Now, we don't have a placement by Mr. Cuzzo, the manager, the placement by the directors of WalMart, the planning division who designs the store and where to place things.

So I believe it does come in. Section nine does come in. So if they make those findings, if they say that there was a hazardous condition existing before the Plaintiff walked down that aisle, by the placement, and that his backing up and brushing it slightly caused it -- caused the reaction falling on his foot, well the jury can find that, you know, the charge indicates that there's no need for notice of this condition since they created it by placing the fire extinguisher there.

And it doesn't take an expert to put that in front of the jury. That's already in front of the jury without an expert.

Yes, they placed it here; yes, it's easily opened. Yes, they knew it would obstruct that aisle.

…

It's two-part. It's the placement. Your argument coming from the Plaintiff's side of the case. I mean there's two sides of this case. But I don't know if the jury's going to take that for granted, but on their side of the case it's a two-part argument.

One, the Defendant chose where to place this. They did it carefully, because they wanted they wanted to avoid the obstruction of the main aisle, so they put it in a side aisle.

Instead of putting it on the other side of the post, they put it on this side of the post where it's in the aisle.

And they know people come in contact with things in the store all the time. What effectively happened is the Defendant[sic], backing up and not looking where he's going, backing up, bumped into it, brushed into it causing it to release.

So you know, I'm not confining myself to is the clasp a dangerous condition. That's not required. It's a combination argument coming from the Plaintiff's side of the case, as I understand it. (12T227:4-228:8; 12T228:20-229:16).

In accordance with his ruling, Judge Coleman included Model Jury Charge 5.20F(9) in his jury instruction on the issue of notice. (13T93:19-94:20).

The defendant and plaintiff moved for a directed verdict at the close of evidence. (13T12:1-3; 13T12:4-5). Judge Coleman denied both applications. (13T16:23-20:12). The jury returned a unanimous verdict on December 19, 2024 finding that both the plaintiff and defendant were negligent, that their negligence was a proximate cause of the plaintiff's injuries and apportioning liability eighty percent to the defendant and twenty percent to the plaintiff. (13T111:14-113:6). Applications for judgement notwithstanding the verdict were made on behalf of the plaintiff and defendant following the verdict. (13T114:19-116:9). Judge Coleman denied both applications. (13T116:10-118:18). In ruling upon the applications, Judge Coleman reasoned as follows:

> Here we have the verdict by the jury indicating that they have scrutinized the evidence and I don't think anybody here could say that this jury didn't pay attention to what happened, and carefully watched everything that was presented in the court, because that was my observation.
>
> They followed every witness, they followed the instructions attentively. They followed the video, they followed all of the evidence. They made a decision, which is what we asked them to do.
>
> And it's clear, um, from my observations, that they did find that there was sufficient, sufficient notice as against both parties. And certainly notice as against the Defendant with regard to the condition of the fire extinguisher.

> More importantly, the placement of the fire extinguisher in a narrow aisle, in that there's admissions that they knowingly placed it in that aisle because they didn't want to interfere with the main corridor which was 15 feet wide; and instead put it in a narrow corridor, in which effectively caused that fire extinguisher to be closer to the patrons of the store.
>
> Also the nature of the strap that went around the fire extinguisher was easily disengaged.
>
> It's apparent to me that the jury agreed with the Defendant, to some extent, and that's why they allocated 20 percent as against the Plaintiff. They agreed with the argument that it was somewhat negligent on his part not to turn around and look behind him to see where he's going when he backed up and knocked into the fire extinguisher; therefore, disengaging the bracket that was holding it, causing it to fall on his foot.
>
> On the other hand, they found that there was sufficient notice as against the Defendant, as to the condition of the fire extinguisher; the placement of the fire extinguisher, which led to the accident. And they made their allocations as to who was more at fault, finding against the defendant. (13T117:1-118:15).

An Order of Judgment in the amount of $1,740,610.34 representing the damages awarded at the first trial plus the stipulated past medical expenses apportioned in accordance with the jury's verdict at the second trial plus pre-judgment interest was filed on January 7, 2025. (Da23). A Notice of Appeal was subsequently filed on behalf of the defendant. (Da30).

STATEMENT OF FACTS

The Walmart store located at 700 Marketplace Boulevard in Hamilton, New Jersey was remodeled in December 2017. (11T14:19-21; 11T129:24-130:1; 11T153:21-23). The remodeling involved the installation of a new tile floor and shelving. (11T14:23-25; 11T153:21-23). The store has roof support columns that were not moved during the remodeling and the Store Manage was unsure if the shopping aisles were reconfigured at that time. (11T154:9-11; 11T164:2-9). However, on February 23, 2018, one of the roof support columns was situated at the intersection of Action Alley and the Personal Care aisle. (Da126-Da131; 11T164:20-24). The store was laid out in such a manner on that date that the column encroached into the Personal Care aisle. (Da126-Da131; 11T163:23-164:1). A fire extinguisher was then placed on the side of the column facing the Personal Care aisle thereby further encroaching into and obstructing the aisle. (Da126-Da131; 11T106:22-25). The decision to place the fire extinguisher in this location was not made at the store level but was rather dictated by the defendant's Planning Department. (11T159:15-19; 11T165:16-19; 11T177:12-16; 11T191:5-9).

The Store Manager testified that they wanted to keep Action Alley, which is sixteen feet wide, free of obstructions because it is a main aisle and a high traffic area. (11T164:20-165:15). However, neither the Store Manager nor the Asset

Protection Manager, who was responsible for store safety, was able to explain why the fire extinguisher was placed on the side of the column facing the narrower Personal Care aisle rather than on the other side of the column where it would not have projected into and obstructed any of the customer shopping aisles. (Da126-Da131; 11T15:12-15; 11T111:1-6; 11T164:16-19). Nor was the Store Manager able to recall any other fire extinguishers being mounted in such a way that they encroached into other shopping aisles in the store. (11T173:21-174:3).

The defendant's management personnel were aware that customers bump into beams, aisles, and merchandise "on a fairly regular basis" in the store. (11T139:4-19; 11T157:4-10). Therefore, the Store Manager agreed that merchandise should be stacked in a stable way and not hanging off shelves to avoid causing an accident if bumped into by a customer. (11T157:19-158:5). The fact that the column with the fire extinguisher that encroached into the Personal Care shopping aisle is covered by diamond plating on the bottom is indicative that the defendant's knowledge of the likelihood of customers bumping into things in the store includes that column. (Da126-Da131; 11T112:21-23).

The defendant has other fire extinguishers that are mounted on hooks so the extinguishers have to be lifted up in order to be removed from their mountings.

(11T1118:5-12). However, the defendant chose not to mount the fire extinguisher on the side of the column that encroached into the Personal Care shopping aisle in such a manner. (Da126-Da131; 11T140:13-15). Instead, the defendant mounted the fire extinguisher to the column with a single narrow strap that went around the cylinder of the fire extinguisher and was held in place by a clasp. (Da126-Da131; 11T140:13-15). The defendant maintained extra straps in the store to replace them when they are damaged. (11T31:23-32:2; 11T160:5-21). The mounting did not have a base for the fire extinguisher to sit upon and prevent it from falling if the strap became unclasped. (Da126-Da131).

The defendant presented an exemplar of the fire extinguisher and its mounting strap at trial. (11T60:23-64:5). During her testimony, the Asset Protection Manager used the exemplar to demonstrate how the clasp on the strap that holds the fire extinguisher in place works. (11T60:23-64:5; 11T106:19-107:17). Judge Colemen witnessed the demonstration and, when ruling upon the defendant's application for a directed verdict, he noted:

> It's quite evident in viewing the demonstration by Ms. Laytham that it was quite easily opened, opening the clasp, which opened the strap. (13T18:22-24).

The jury was then able to inspect the exemplar fire extinguisher and its strap and see exactly how easily the clasp opens while they deliberated at the request of the defendant. (12T250:11-251:1).

The plaintiff went to the Walmart store on February 23, 2018 to purchase a few items including toothpaste and mouthwash. (10T84:2-17). He was in the Personal Care aisle, where the column and fire extinguisher encroached into the aisle, to get his items. (Da126-Da131; 10T84:8-9). Another customer was also in the aisle with her child and a shopping cart at that time. (10T84:9-14). The other customer was trying to turn around to the exit the aisle but there was not enough room so the plaintiff backed up so she could get by. (10T84:16-20). While backing up, the plaintiff brushed against the fire extinguisher that was protruding into the aisle. (10T84:18-22). The fire extinguisher fell from its harness and landed on the plaintiff's left foot. (10T84:20-22).

The incident was captured by the defendant's surveillance system. (Da124). The video from 12:44 and 29 seconds to 12:45 and 45 seconds was shown to the jury at trial. (10T92:16-20). The defendant's Customer Service Manager testified that based upon his review of the video the plaintiff did not anything wrong and that his action was "a very natural action." (11T141:12-17). The Store Manager similarly testified that he "wouldn't consider any of the activities viewed in the video inappropriate". (11T166:3-22).

The plaintiff moved the fire extinguisher out of the middle of the aisle after it fell and then reported the incident to customer service. (10T84:23-85:24). David Fergusson, the Customer Service Manager, was the defendant's employee

to whom the plaintiff reported the incident. (11T129:21-130:12). Mr. Fergusson went to the aisle where the incident occurred at which time he observed that the harness for the fire extinguisher was "exceedingly easy to undo." (11T130:23-25; 11T132:2-10; 11T137:19-138:3). He also observed that the straps were warped and not sitting flush against the cylinder of the fire extinguisher. (3T137:1-9). The Asset Protection Manager acknowledged that there is no way to bend the mounting strap around the fire extinguisher while it is engaged. (13T107:18-21). Mr. Fergusson put the fire extinguisher back in the mounting strap on the column and tried to recreate what the plaintiff described to him. (11T135:6-11; 11T135:24-136:7). He found that the latch immediately disengaged just by bumping into the side of the harness when he recreated what happened. (11T136:15-21).

The Asset Protection Manager claimed that store employees conduct inspections of the fire extinguishers on a monthly basis that are documented on a checklist. (11T16:7-11). She also claimed that the employees of the store are supposed to be checking for hazards as they walk through the store every day. (11T22:15-17; 11T96:9-15). These alleged daily inspections are not documented. (11T97:19-21; 11T99:2-3). The Asset Protection Manager further testified that she would not make a notation on the monthly checklist if she observed an unbuckled strap and would just close the strap. (11T109:6-11).

Although the Asset Protection Manager acknowledged that the surveillance system would have captured the alleged inspections going back six months from the date of the incident, she failed to preserve any recordings showing that the alleged inspections of the fire extinguisher and its mounting were secure took place. (11T99:4-16; 11T100:7-9; 11T123:16-25). She instead only preserved the recordings from the hour before and hour after the incident to determine if the defendant had notice of a hazardous condition. (11T125:19-126:3; 11T156:9-18).

On the day of the incident, the Customer Service Manager closed the latch and left the fire extinguisher in place without making any repairs to the harness. (11T140:22-141:1). The Asset Protection Manager testified that she was not informed of any repairs being made to the fire extinguisher after the incident. (11T27:23-25). Although an inspection of the fire extinguisher allegedly occurred a few days after the incident, the defendant's employees failed to document the warped condition of the strap. (11T94:9-95:22). The Store Manager testified that a problem would only be documented on the monthly checklist if an issue was found on the date of the alleged inspection. (11T167:21-169:12). He further testified that there would be no documentation if a fire extinguisher fell from its mounting without injuring someone. (11T169:19-170:1).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTIONS FOR A DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE INFERENCES OF FACT WEIGHED IN THE PLAINTIFF'S FAVOR WOULD ALLOW A JURY TO FIND THAT THE DEFENDANT BREACHED THE DUTY IT OWED THE PLAINTIFF (13T16:23-20:12; 13T116:10-118:18).

The defendant made an application for a directed verdict at the close of evidence that was denied by the Trial Court. (13T12:1-3; 13T16:23-20:12). In denying the motion, the Trial Court noted that there was evidence presented at trial that would allow the jury to find in the plaintiff's favor on the issue of liability. (13T19:5-19). He explained his reasoning thusly:

> Number one, there's testimony in the case that, in fact, the Defendant store chose to place the fire extinguisher at that section on that smaller aisle because they knew it was an obstruction in the main aisle, and there was a lot of traffic and people and movement and carts in the main aisle, and they decided to move it to the side aisle which was narrower.
>
> In addition to that, they chose to move it to the side of the pillar that was closest to the smaller aisle, rather than the other side; or to leave it in the open 15-foot wide walkway that was the main aisle, and chose to place it in that location.
>
> We also knew that the straps do fail on occasion and that, um, they had replacement straps there and available. (13T19:5-19).

The defendant renewed the application as a judgment notwithstanding the verdict after the jury returned their verdict. (13T114:19-116:9). The Trial Court

again denied the application. (13T117:1-118:15). The defendant now appeals the Trial Court's rulings and argues that the evidence at trial did not establish that it was negligent as a matter of law. The plaintiff respectfully disagrees and submits that the Trial Court's rulings on the defendant's motion and the verdict should be affirmed.

The standard for ruling upon a motion for a directed verdict filed pursuant to *Rule* 4:37-2(b) and *Rule* 4:40-1 is the same as that for a motion for summary judgment filed pursuant to *Rule* 4:46-1. *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520, 535-536 (1995). Under this standard, the Court must accept as true all evidence that supports the plaintiff and give her the benefit of all legitimate inferences from the evidence. *Sackman v. New Jersey Mfrs. Ins. Co.*, 445 N.J. Super. 278, 291 (App. Div. 2016). "[T]he judicial function here is quite a mechanical one. The trial [judge] is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." *Dolson v. Anastasia,* 55 N.J. 2, 5-6 (1969). If the Court determines that reasonable minds could differ as to the outcome after weighing the inferences of fact in the plaintiff's favor, then the contested issue must be submitted to the jury. *Frugis v. Bracigliano*, 177 N.J. 250, 269 (2003). In other words, "[a] directed verdict can be entered *only* if, accepting as true all evidence supporting the party opposing the motion and

according that party the benefit of all favorable inferences, reasonable minds could not differ." *Edwards v. Walsh*, 397 N.J. Super. 567, 571 (App. Div. 2007)(emphasis in original).

The same standard applies to a motion for a directed verdict filed pursuant to *Rule* 4:40-2. *Sun Source v. Kuczkir*, 260 N.J. Super. 256, 267 (App. Div. 1992), *certif. denied*, 133 N.J. 439 (1993). "In reviewing a motion for judgment notwithstanding the verdict, a court does not attempt to discern how the jury reached its verdict or what evidence the jury credited versus what evidence it discounted. Instead, the inquiry is only whether the evidence presented at trial, together with the legitimate inferences therefrom, *could sustain a judgment in favor* of the party that prevailed at trial." *Conforti v. County of Ocean*, 255 N.J. 142, 171 (2023)(emphasis in original)(quotation omitted). Therefore, a jury's verdict may not be disturbed merely because reasonable minds might have reached a different conclusion based upon the evidence. *Besler v. Board of Educ. of West Windsor-Plainsboro Regional School Dist.*, 201 N.J. 544, 572 (2010).

The Appellate Division applies the same standard when reviewing the Trial Court's ruling on a motion for judgment at trial. *Smith v. Millville Rescue Squad*, 225 N.J. 373, 397 (2016); see also; *Akhtar v. JDN Props. at Florham Park, LLC*, 439 N.J. Super. 391, 403 (App. Div. 2015), *certif. denied*, 221 N.J. 566 (2015).

This standard "ensures that Appellate Tribunals will not overstep their bounds by usurping the jury's task of assessing the credibility of the witnesses." *Sons of Thunder, Inc. v. Broden, Inc.*, 148 N.J. 396, 415 (1997). It further ensures that the jury's factual determinations will only be disturbed if that jury could not have reasonably used the evidence to reach its verdict. *Garmeaux v. DNV Concepts, Inc.*, 448 N.J. Super. 148, 164 (App. Div. 2016).

In this matter, the defendant has failed to establish that the facts were so utterly one-sided that it was entitled to judgment as a matter of law at trial. It should be noted that the plaintiff was not required to prove that the jury would definitely find in his favor in order to defeat the motion for a directed verdict. *Becker v. Eisenstodt*, 60 N.J. Super. 240, 247 (App. Div. 1960). The burden of proof applicable to a civil action is the preponderance of the evidence standard. *State v. Seven Thousand Dollars*, 136 N.J. 223, 238 (1994). Under the preponderance of the evidence standard, the plaintiff merely has to convince the jury that the desired inference is more probable than not. *Liberty Mut. Ins. Co. v. Land*, 186 N.J. 163, 169 (2006). As the Model Jury Charge instructs:

> The term 'preponderance of the evidence' means that amount of evidence that causes you to conclude that the allegation is probably true. To prove an allegation by the preponderance of the evidence, a party must convince you that the allegation is more likely true than not true. *M.J.C.* 1.12(H).

Furthermore, since the issue of the defendant's liability was before the Trial Court on its motion for a directed verdict, all inferences of fact were required to be drawn in the plaintiff's favor with issues of credibility being left for the jury. *Rena, Inc. v. Brien*, 310 N.J. Super. 304, 311 (App. Div. 1998).

The plaintiff held the status of a business invitee as a customer of the defendant's store. *O'Shea v. K Mart Corp.*, 304 N.J. Super. 489, 492 (App. Div. 1997). The defendant owes a duty to its invitees to exercise ordinary care "to render the premises reasonably safe" for the purposes embraced in the invitation. *M.J.C.* 5.20F(5); see also; *Handleman v. Cox*, 39 N.J. 95, 111 (1963)(explaining that the duty of care owed by an occupier of land to an invitee is to use reasonable care "to make the premises safe[.]"). In other words, it "must exercise reasonable care for the invitee's safety." *M.J.C.* 5.20F(5). This duty is imposed on business operators because they are in the best position to prevent and control the risk of harm to their patrons. *Bauer v. Nesbitt*, 198 N.J. 601, 615 (2009).

The duty imposed on the defendant was an affirmative duty obligating it to discover and eliminate any potentially dangerous condition or circumstance on the property, to maintain the property in a safe condition, and "to avoid creating any conditions that would render the property unsafe." *Jerista v. Murray*, 185 N.J. 175, 191 (2005). Therefore, the defendant was not only required to inspect

for and remediate unsafe conditions but was also required to not create any dangerous conditions in the store. *O'Shea*, 304 N.J. Super. at 492-493. As the Appellate Division explained, "[d]efendant owed [the invitee] a duty not only to exercise ordinary care to render the premises reasonably safe for the purposes for which the invitee entered, but to abstain from any act which would make the invitee's use of the premises dangerous." *Gill v. Krassner*, 11 N.J. Super. 10 (App. Div. 1950). Furthermore, while a defendant must have actual or constructive notice of an unsafe condition to be held liable for an unsafe condition that it did not create, notice is not required when the dangerous conditions is created by the defendant or its employees. *O'Shea*, 304 N.J. Super. at 493.

The defendant argues that it did not breach the affirmative duty to provide the plaintiff with a reasonably safe premises as a matter of law and contends that the Trial Court should have granted its motion for a directed verdict or judgment notwithstanding the verdict. In making this argument, the defendant offers a version of facts with all inferences weighed in its favor. That is not, however, the proper standard for review of the denial of its motion. Rather, all evidence that supports the plaintiff's position must be accepted as true and all legitimate inferences from the evidence must be weighed in the plaintiff's favor. *Riley v. Keenan*, 406 N.J. Super. 281, 298 (App. Div. 2009), *certif. denied*, 200 N.J. 207

(2009). The Trial Court applied the correct standard in ruling upon the defendant's motions and properly found that the issue of whether the defendant negligently breached the duty it owed the plaintiff was for the jury to resolve. (13T16:23-20:12; 13T117:1-118:15).

The inferences of fact presented at trial weighed in the plaintiff's favor support a finding that the placement of the fire extinguisher was a hazardous condition in the defendant's store. The fire extinguisher was situated on a roof support column that was located at the intersection of two shopping aisles. (Da126-Da131; 11T164:20-24). One aisle was referred to as Action Alley and it was sixteen feet wide. (11T164:20-24; 11T165:13-15; 11T164:25-165:12). The other aisle was a Personal Care aisle stocked with oral hygiene products and was much narrower than Action Alley. (Da126-Da131; 11T106:22-25). The layout of the aisles was such that the roof support column further narrowed Personal Care aisle by encroaching into the aisle. (Da126-Da131; 11T163:23-164:1). The fire extinguisher was placed on the side of the column that faced the narrow Personal Care aisle instead of being placed on the other side of the column that did not encroach into any aisle. (Da126-Da131; 11T106:22-25). Thus, the fire extinguisher projected out even further into the narrow aisle already encroached by the column creating a grater obstruction for customers walking in the aisle. (Da126-Da131).

The defendant and its employees were aware that customers routinely bumped into things in the store when the fire extinguisher was mounted on the side of the column encroaching into the narrow Personal Care aisle. (11T139:4-19; 11T157:4-10). In fact, the Customer Service Manager explained that customers bump into beams, aisles, and merchandise "on a fairly regularly basis". (11T139:4-19). It was evident that the defendant was aware the roof support beam encroaching into the Personal Care aisle was in the way of customers walking in the aisle as the bottom of the column was covered in diamond plating. (11T139:4-19). Testimony from the defendant's Store Manager established that the defendant and its employees were aware that care had to be taken in the placement of items in the store in order to protect against accidents if customers bumped into shelves or other objects in the store. (11T157:19-158:5). The defendant was aware that it had to keep the shopping aisles free of obstructions for the ease of movement of the customers. (11T164:20-24; 11T165:13-15; 11T164:25-165:12).

The fire extinguisher was not only placed in a location where it obstructed a narrow customer walkway and where a customer may foreseeably come into contact with it but was held in place in that location by a single strap that could become unclasped simply by a customer brushing up against it. (Da124; 10T84:18-22). The Customer Service Manager who investigated the incident

admitted that the harness for the fire extinguisher was "exceedingly easy to undo." (11T130:23-25; 11T132:2-10; 11T137:19-138:3). A demonstration of an exemplar fire extinguisher and mounting strap performed by the defendant's Asset Protection Manager showed just how easy it was for the type of clasp used to be opened. (13T18:22-24). If the clasp was inadvertently opened when contacted by someone, there was no base under the fire extinguisher to prevent it from falling to the ground. (Da126-Da131).

These facts, at the very least, created a question of fact as to whether the placement of the fire extinguisher constituted an unsafe condition of the store and support a finding that the defendant negligently breached the duty to provide the plaintiff with a reasonably safe premises. Negligence is generally defined as, "conduct which falls below a standard recognized by law as essential to the protection of others from unreasonable risk of harm." *Sanzari v. Rosenfeld*, 34 N.J. 128, 134 (1961). Stated another way, "[t]o act non-negligently is to take reasonable precautions to prevent the occurrence of foreseeable harm to others." *Weinberg v. Dinger*, 106 N.J. 469, 484 (1987). Therefore, negligence exists when a reasonably prudent person, under similar circumstances, would recognize and foresee an unreasonable risk or likelihood of harm or danger to another from the defendant's action or inaction. *Rappaport v. Nichols*, 31 N.J. 188, 201 (1959). Simply stated, "if there is some probability of harm

sufficiently serious that a reasonable person would take precautions to avoid it, then failure to do so is negligence." *De Milio v. Schrager*, 285 N.J. Super. 183, 191 (Law Div. 1995).

Since negligence is essentially a matter of risk, the standard of care in a negligence action focuses on the reasonably foreseeable danger. *Theobald v. Dolcimascola*, 299 N.J. Super. 299, 305 (App. Div. 1997). "If there is some probability of harm sufficiently serious that a reasonable person would take precautions to avoid it, then failure to do so is negligence." *De Milio*, 285 N.J. Super. at 191. However, it is not necessary that the defendant anticipate the very occurrence which resulted from his or her wrong doing but it is sufficient that it was within the realm of foreseeability that some harm might occur. *Avedisian v. Admiral Realty Corp.*, 63 N.J. Super. 129, 133 (App. Div. 1960); see also; *Lutz v. Westwood Transp. Co.*, 31 N.J. Super. 285, 289 (App. Div. 1954), *certif. denied*, 16 N.J. 205 (1954). Thus, a tortfeasor is liable for injuries resulting in the ordinary course of events from their negligent acts or omissions and it is enough that their negligence was a substantial factor in bringing about the injuries. *Rappaport*, 31 N.J. at 203.

In the case at bar, a jury could find that a reasonably foreseeable hazard was created by the placement of the fire extinguisher on a column with a strap that was easily opened simply by someone brushing, especially when that column

encroached into a walking aisle. It was reasonably foreseeable that if a customer came into contact with the fire extinguisher strap, the extinguisher could dislodge, fall from the column and injure a customer. As the Appellate Division recognized in the prior appeal, a jury could conclude that the placement of the fire extinguisher in a manner in which it encroaches into any shopping aisle, particularly a narrow side aisle created a dangerous condition. (Da73). A jury could further determine that the hazardous condition resulting from the placement of the fire extinguisher constituted a negligent breach of the affirmative duty the defendant owed the plaintiff. While the defendant argues that the placement of the fire extinguisher did not create a hazard, that was simply an argument for it to make before the jury and does not entitle it to judgment as a matter of law. A jury's verdict may not be disturbed on a motion for judgment notwithstanding the verdict merely because reasonable minds might have reached a different conclusion based upon the evidence. *Besler*, 201 N.J. at 572.

The defendant appears to be making a proximate cause argument on appeal that the placement of the fire extinguisher could not have been considered a hazard that caused the plaintiff's injuries because the plaintiff was not directly injured by brushing against the fire extinguisher but was injured when it fell and landed on his foot. A proximate cause is "any cause which in the natural and

continuous sequence, unbroken by an efficient intervening cause, produces the result complained of and without which the result would not have occurred." *Dawson v. Bunker Hill Plaza Associates*, 289 N.J. Super. 309, 322 (App. Div. 1996), *certif. denied*, 146 N.J. 569 (1976). The test for proximate cause is satisfied where the negligent conduct is a substantial contributing factor in causing the loss. *Ettin v. Ava Truck Leasing, Inc.*, 53 N.J. 463, 483 (1969). Thus, "[w]hen negligent conduct creates an unreasonable risk or likelihood of harm or danger to others, setting off foreseeable consequences that lead to plaintiff's injury, the conduct is deemed the or at least a proximate cause of the injury." *Grzanka v. Pfeifer*, 301 N.J. Super. 563, 573 (App. Div. 1997). The defendant does not have to foresee exactly what happened to the plaintiff. *Ricci v. American Airlines*, 226 N.J. Super. 377, 383 (App. Div. 1988). It is enough that the type of injury is within an objective realm of foreseeability. *Bendar v. Rosen*, 247 N.J. Super. 219, 229 (App. Div. 1991); see also; *Arvanitis v. Hios*, 307 N.J. Super. 577, 585 (App. Div. 1998).

A tortfeasor is, therefore, liable for a plaintiff's injuries if their negligence was a substantial factor in causing the injuries. *Camp v. Jiffy Lube No. 114*, 309 N.J. Super. 305, 310 (App. Div. 1998), *certif. denied*, 156 N.J. 386 (1998). As the Appellate Division summarized this principle of law:

> Even if damage would have occurred in the absence of a defendant's negligence, liability may still be imposed upon a showing that the

> negligent conduct was a substantial factor in causing the alleged harm. Therefore, there may be two or more concurrent and directly cooperative proximate causes of an injury. Such causes need not be exclusively capable of producing the injury, they need only be a substantial factor in bringing about the harmful results. Stated differently, liability attaches not only to the dominating cause but also to any cause which constitutes at any event a substantial factor in bringing about the injury. *Dawson*, 289 N.J. Super. at 322-323(internal citations omitted).

Under the substantial factor principle, a tortfeasor's negligence is deemed a proximate cause even where there are other intervening causes which were either foreseeable or normal incidents of the risk created. *Conklin v. Hannoch Weisman*, 145 N.J. 395, 419 (1996).

In the present matter, a heavy metal fire extinguisher secured in place by a single strap that could be easily opened simply by being brushed against was located in an area where it encroached into a narrow walkway and where customers would likely make contact with it. (Da126-Da131; 11T106:22-25; 11T139:4-19; 11T157:4-10). A foreseeable consequence of placing the fire extinguisher in this location is that it would fall from its mounting if a customer brushed against it and injure a customer. It could, therefore, be found to be an unsafe condition that caused the plaintiff's injuries.

The inferences of fact presented at trial weighed in the plaintiff's favor also support a finding that the hazardous condition was created by the defendant and/or its employees. The testimony at trial indicated that the decision to place

the fire extinguisher on the side of the roof support column encroaching into the narrow aisle location was made by the defendant's Planning Department. (11T159:15-19; 11T165:16-19; 11T177:12-16; 11T191:5-9). When asked who was responsible for the location of the fire extinguisher, the Store Manager responded, "[t]he home office. WalMart Corporate. Most likely the store planning department." (11T191:5-9).

While the defendant contends that the decision as to where and how to mount the fire extinguisher was made with input from the local fire department, the testimony supporting that allegation was not credible. The defendant cites the testimony of its Store Manager in support of this contention. (11T177:10-178:14). However, the Store Manager conceded on re-direct examination that he was just speculating that the planning department would have contacted the local fire department and he did not have any knowledge of whether that happened. (11T191:10-24). "Mere guess or conjecture is not a substitute for legal proof." *Pelose v. Green*, 222 N.J. Super. 545, 551 (App. Div. 1988). The Store Manager's speculation does not, therefore, support the entry of judgment as a matter of law on the issue of whether the defendant created the unsafe condition. To the extent his speculation is given any consideration, it was the exclusive function of the jury to evaluate the credibility of the testimony which at most created a disputed issue of fact for the jury to resolve. *Parks v. Rodgers*,

176 N.J. 491, 502 (2003). It is respectfully submitted that there was ample proof at trial that would allow a jury to find that the defendant created the unsafe condition that caused the plaintiff's injuries. Accordingly, the Trial Court properly denied the defendant's motion for a directed verdict.

The defendant also argues that it was entitled to judgment as a matter of law because its employees claimed to have not been advised of any prior incidents where customers were injured by a fire extinguisher falling from its mounting. However, as previously noted, the facts must be weighed in the plaintiff's favor with issues of credibility being left for the jury to resolve on the defendant's motions for a directed verdict and judgment notwithstanding the verdict. *Alves v. Rosenberg*, 400 N.J. Super. 553, 565-566 (App. Div. 2008). Furthermore, the jury was not "obligated to accept as true the naked assertion" of defendant's employees. *Ellison v. Housing Auth. of South Amboy*, 162 N.J. Super. 347, 352 (App. Div. 1978). The jury could have found that the claim that the defendant's employees were not personally aware of any other customers being injured in the same manner as the plaintiff was injured was not credible. This is especially true in light of the evidence regarding how easily the strap used to hold the fire extinguisher in place could become unbuckled and the admission that customers bump into things in the store on a regular basis. (11T139:4-19; 11T157:4-10; 13T18:22-24).

The jury could have also found that the testimony of the defendant's employees did not mean that the defendant did not have knowledge that fire extinguishers could come into contact with customers and fall from their mountings when held in place by a strap that was easily opened when brushed against. The defendant's employees were careful to testify only that they were not aware of any fire extinguishers falling from their mountings and injuring a customer. (11T60:13-17; 11T186:2-8). They did not testify that they were not aware of incidents where fire extinguishers were brushed against or otherwise were caused to fall to the ground without injuring a customer. Furthermore, the claims of the defendant's employees that they were allegedly not aware of prior injuries being caused by falling fire extinguishers were based only upon their memory regarding their experience. (11T104:25-105:4; 11T121:15-25; 11T 171:22-25). Their testimony was not based upon any research of records or records from other stores. (11T121:15-25; 11T171:19-21). The Store Manager even conceded that he would not have known about the subject incident if he was not the manager when it occurred. (11T171:7-14). He further testified that the store would not document incidents where a fire extinguisher fell without injuring someone. (11T169:19-170:1). Therefore, the testimony of the defendant's employees did not support judgment as a matter of law being entered in the defendant's favor.

Finally, the evidence at trial was sufficient to support a finding that the defendant had constructive notice of the unsafe condition even if consideration of the unsafe condition were limited to the strap holding the fire extinguisher in place. It should be noted that the plaintiff was not required to establish that the defendant had notice that the strap could be easily opened when simply being brushed against through direct evidence. *Joseph v. Passaic Hospital Ass'n*, 26 N.J. 557, 574 (1958). Rather, this may be established through circumstantial evidence that affords a fair and reasonable presumption of the facts inferred. *Kelly v. Hackensack Water Co.*, 10 N.J. Super. 528, 533 (App. Div. 1950). In a civil action, circumstantial evidence does not have to exclude every other reasonable hypothesis than the truth of the fact sought to be proven. *Miller & Dobrin Furniture Co., Inc. v. The Camden Fire Ins. Co. Ass'n*, 55 N.J. Super. 205, 215 (Law Div. 1959). Therefore, circumstantial evidence, "as a basis for deductive reasoning in the determination of civil issues, is defined as a mere preponderance of probabilities[.]" *Joseph*, 26 N.J. at 574.

The strap holding the fire extinguisher in place was found to be warped and not sitting flush against the cylinder of the fire extinguisher. (3T137:1-9). The defendant's employee conceded that there is no way to bend the mounting strap around the fire extinguisher while it is engaged. (13T107:18-21). This testimony provided circumstantial evidence that the warped condition did not

occur when the plaintiff brushed against it and instead existed before the incident and would have been discovered had proper inspections been carried out. The fact that the defendant maintained extra harnesses in the store to replace them could be found as circumstantial evidence that the defendant was aware that the straps were likely to be damaged and needed to be replaced. (11T31:23-32:2; 11T160:5-21). According to the testimony of the defendant's employees, the store employees were supposed conduct a formal inspection of the fire extinguisher on a monthly basis and also inspecting it for hazards on a daily basis while walking through the store. (11T16:7-11; 11T22:15-17; 11T96:9-15). A jury could find that the defendant's employees failed to conduct proper inspections particularly since the defendant had the ability to provide direct proof of the inspections but failed to preserve the video recordings that would have shown the inspections and did not present testimony from the employees who allegedly conducted the inspections. (11T99:4-16; 11T100:7-9; 11T123:16-25).

It is respectfully submitted that this circumstantial proof allowed a jury to find that the defendant had constructive notice that the fire extinguisher was not safely mounted to the column that encroached into the shopping aisle. In the prior appeal, the Appellate Division found:

> We are further satisfied that when viewing the facts here in a light most favorable to plaintiff along with all reasonable inferences,

> there was sufficient evidence presented to raise a fact issue as to whether Walmart had constructive notice of the condition. Walmart acknowledged that upon inspection following the incident, the fire extinguisher's metal harness was warped and therefore was not in the typical round configuration so that it could sit flush against the cylinder of the extinguisher. Ferguson also testified the latch on the mount for the extinguisher easily disengaged. Plaintiff acknowledged there was no direct evidence of the condition of the harness before the accident, but we agree the circumstantial evidence raises a reasonable inference that the apparatus securing the extinguisher to the beam was damaged before the accident and could have been discovered by a reasonable inspection. Moreover, although Walmart argued there were no prior similar incidents involving a fire extinguisher being knocked off a beam, the evidence also showed Walmart kept back-up brackets in the store. Accordingly, the trial court correctly denied Walmart's motion for reconsideration for a directed verdict and for a new trial based on the constructive notice issue. (Da73-Da74).

The facts pertaining to this ruling were essentially the same as set forth above and it is respectfully submitted that the Trial Court properly denied the defendant's motion for a directed verdict and judgment notwithstanding the verdict.

The testimony at trial also supported a finding that the strap was not warped and was "exceedingly easy to undo". The Asset Protection Manager claimed that she inspected the strap the day after the incident and found it to be in its normal condition. (11T143:15-18). A jury could have, therefore, found that the type of strap used was exceedingly easy to undo whether or not it was damaged and was in that condition from the time it was installed. The demonstration of the exemplar fire extinguisher provided further support for such a finding as it

confirmed that the strap could be easily undone and opened. (13T18:22-24). The evidence at trial, therefore, supported a finding that the defendant's employees had actual knowledge that the strap was exceedingly easy to undo well before the incident. They would have observed this condition of the strap when they allegedly conducted their monthly inspections. This provides another basis for the jury to have found that the defendant had not only constructive notice of the unsafe condition of the strap used to hold a fire extinguisher while affixed to a column obstructing a narrow shopping aisle and where customers could come into contact with it, but also actual notice of its condition. Accordingly, the plaintiff respectfully submits that the Trial Court properly denied the defendant's motions for judgment as a matter of law and the verdict should be affirmed.

POINT II

THE TRIAL COURT PROPERLY GAVE MODEL JURY CHARGE 5.20F(9) IN ITS JURY INSTRUCTION BECAUSE THE EVIDENCE PRESENTED AT TRIAL SUPPORTED THE CHARGE (12T227:4-228:8; 12T228:20-229:16; 13T93:19-94:20).

The plaintiff was shopping at the defendant's retail establishment when he brushed against the fire extinguisher encroaching into the narrow shopping aisle in order to make room for another customer to get by. (Da126-Da131; 10T84:2-22). When he did so, the fire extinguisher fell from its mounting and landed on his foot. (Da126-Da131; 10T84:2-22). Therefore, as noted in Point I above, the plaintiff held the status of a business invitee and the defendant owed him a duty of reasonable care "to provide a reasonably safe place to do that which [was] within the scope of the invitation." *Butler v. Acme Markets, Inc.*, 89 N.J. 270, 275 (1982). This was an affirmative duty obligating the defendant to conduct inspections to discover and eliminate any potentially dangerous condition or circumstance on the property, to maintain the property in a safe condition, and to avoid creating any conditions that would render the property unsafe. *Hopkins v. Fox & Lazo, Realtors*, 132 N.J. 426, 434 (1993); see also; *Nisivoccia v. Glass Gardens, Inc.*, 175 N.J. 559, 563 (2003).

Although a defendant must have actual or constructive notice of an unsafe condition to be held liable for an unsafe condition that it did not create, notice

is not required for a defendant to be held liable for dangerous conditions created by it or its employees. *Smith v. First Nat'l Stores*, 94 N.J. Super. 462, 466 (App. Div. 1967). This principle is set for in Model Jury Charge 5.20F(9) which provides:

> If you find that the land (or premises) was not in a reasonably safe condition and that the owner/occupier and/or agent, servant or employee of the owner/occupier created the condition their own act or omission, then, in order for the plaintiff to recover, it is not necessary for you also to find that the owner/occupier had actual or constructive notice of the particular unsafe condition. *M.J.C.* 5.20F(9).

The proofs at trial supported a finding that the defendant created a dangerous condition in its store that caused the plaintiff's injury by placing the fire extinguisher in a manner that encroached into and obstructed a customer walking aisle and/or by securing it in that location by using a strap that was easily opened. (12T227:4-228:8; 12T228:20-229:16). Therefore, the Trial Court provided Model Jury Charge 5.20F(9) in its instruction to the jury on the issue of notice. (13T93:19-94:20). The defendant argues on appeal that the Trial Court erred in providing Model Jury Charge 5.20F(9) to the jury and that the error warrants a new trial because the instruction resulted in a miscarriage of justice. The plaintiff respectfully disagrees and respectfully submits that the verdict should be affirmed.

Appropriate jury instructions are essential to a fair trial. *Cavanaugh v. Skil Corp.*, 331 N.J. Super. 134, 160 (App. Div. 1999), *aff'd*, 164 N.J. 1 (2000). "A jury is entitled to an explanation of the applicable legal principles and how they are to be applied in light of the parties' contentions and the evidence produced in the case." *Viscik v. Fowler Equip. Co.*, 173 N.J. 1, 18 (2002). The Trial Court is, therefore, required to give comprehensible explanations of the relevant questions that the jury must decide and apprise them of the law applicable to the issues in the case. *Vallejo by Morales v. Rahway Police Dept.*, 292 N.J. Super. 333, 342 (App. Div. 1996), *certif. denied*, 147 N.J. 262 (1996). A proper charge explains "the function of the jury, set[s] forth the issues, correctly state[s] the applicable law in understandable language, and plainly spell[s] out how the jury should apply the legal principles to the facts **as it may find them**." *Velazquez v. Portadin*, 163 N.J. 677, 688 (2000)(emphasis added).

When reviewing a jury charge for a miscarriage of justice, the instruction must be examined as a whole rather than focusing on the contested charge in isolation. *Estate of Kotsovska v. Liebman*, 221 N.J. 568, 592 (2015). The scope of review is limited to whether the jury charge as a whole was capable of producing an unjust result. *Zappasodi v. State*, 335 N.J. Super. 83, 89 (App. Div. 2000). It has been noted that an Appellate Court should not reverse a Trial Court when the charge adequately conveys the law and does not confuse or mislead

the jury. *Sons of Thunder, Inc.*, 148 N.J. at 418. It has been further noted that "[c]ourts uphold even erroneous jury instructions when those instructions are incapable of producing an unjust result or prejudicing substantial rights." *Fisch v. Bellshot,* 135 N.J. 374, 392 (1994).

As noted above, the jury instruction must plainly spell out how the jury should apply the legal principles to the facts "as it may find them." *Jurman v. Samuel Braen, Inc.*, 47 N.J. 586, 591-592 (1966). Therefore, the Trial Court's function in deciding whether a specific charge on the issue of liability should be given to the jury is similar to that in ruling upon a motion for summary judgment or for a directed verdict. *Walker v. Costco Wholesale Warehouse*, 445 N.J. Super. 111, 121 (App. Div. 2016). Under this standard, "[t]he requested instruction generally should be given, as long as there is a reasonable basis in the evidence to support the predicate factual contention that can trigger the charge, in light of the proofs **and all reasonable inferences** that may be drawn from those proofs." *Id.*(emphasis added). Furthermore, the Trial Court must defer to the jurors as the ultimate finders of fact in deciding whether the evidence present in support of a claim or defense is credible. *Id.* at 120-121.

In *Walker*, the Trial Court refused to give the mode-of-operation charge to the jury as requested by the plaintiff. *Walker*, 445 N.J. Super. at 127. The Appellate Division found that while the plaintiff had not provided a particularly

compelling factual basis to support his mode-of-operation argument, he presented enough evidence to at least justify the charge being given. *Id.* It explained that the jurors should have been allowed to evaluate whether the plaintiff met his burden of proving the elements to support the mode-of-operation charge. *Id.*

The evidence at trial in this matter established that the defendant's corporate office was responsible for the placement of the fire extinguisher that fell and landed on the plaintiff's foot. (11T159:15-19; 11T165:16-19; 11T177:12-16; 11T191:5-9). The defendant chose to place the fire extinguisher on a roof support column that was offset from the shelves, thereby causing the column to obstruct a portion of a narrow side aisle in the store. (Da126-Da131). Rather than placing the fire extinguisher on the side of the column that was not facing any of the aisles or even on the side that faced the sixteen foot wide main aisle, the defendant placed it on the side of the column facing the narrow aisle it encroached upon. (Da126-Da131). As a result, the fire extinguisher encroached even further into the narrow aisle. (Da126-Da131). The defendant chose to place the fire extinguisher in this location in spite of the knowledge that customers would bump into things on a regular basis while shopping in the store. (11T139:4-19; 11T157:4-10).

Although the fire extinguisher was mounted in a manner that obstructed the narrow walkway, the defendant elected not to mount it with hooks where it would have to be lifted up in order to be removed from the mounting. (11T1118:5-12). Instead, the defendant chose to hold the fire extinguisher in place by a single strap that could become unclasped simply by a customer brushing up against it where it encroached into a narrow shopping aisle. (Da124; 10T84:18-22). The defendant's employee who inspected the particular strap after the incident explained that it was "exceedingly easy to undo." (11T130:23-25; 11T132:2-10; 11T137:19-138:3). A demonstration of an exemplar fire extinguisher and mounting strap performed at trial confirmed that the clasp was easily opened. (13T18:22-24). The inferences of fact from the evidence and testimony presented at trial weighed in the plaintiff's favor support a finding that the defendant created an unsafe condition in its store that caused the plaintiff's injuries. Model Jury Charge 5.20F(9) was, therefore, an appropriate instruction to be given to the jury. *Prioleau v. Kentucky Fried Chicken, Inc.*, 223 N.J. 245, 264-265 (2015).

The defendant appears to argue that the principle of law that a plaintiff does not have to prove that a defendant had actual or constructive notice when the unsafe condition was created by the defendant applies only if the unsafe condition was a transient condition. Although there have been circumstances

involving transient hazardous conditions that were created by defendants or their employees in the case law cited by the defendant, none of those opinions or any other legal authority cited by the defendant limits the principle to only transient conditions. In fact, one of the opinions cited by the defendant involved a static condition of a foreseeable pedestrian pathway that was alleged to have been created by the defendant's employees. *Atalese v. Long Beach Twp.*, 365 N.J. Super. 1, 3-4 (App. Div. 2003).[2] There are other examples involving static conditions created by a defendant in the case law.

In *Brody v. Albert Lifson & Sons*, 17 N.J. 383 (1955), the plaintiff was injured when she slipped on a terrazzo floor of an exterior vestibule to the defendant's store. *Id.* at 386. The terrazzo floor did not have any abrasive material in its surface rendering it slippery when it was dry and considerably slippery when wet. *Id.* It also had a downward gradient towards the street. *Id.* It had been wet at the time of the plaintiff's fall as a result of rain that had fallen that day. *Id.* at 387-388. One of the issues before the Supreme Court was whether the plaintiff was required to prove that the defendant had notice of the slippery condition of the terrazzo floor. *Id.*at 388. The Supreme Court found that the plaintiff was not required to prove notice because the jury could infer from the

[2] It should be noted that *Atalese* involved a claim against a public entity for a dangerous condition of public property that was governed by Section 59:4-2 of the Tort Claims Act which does not apply to the case at bar.

evidence that the construction of the floor rendered it liable to become slippery when wet and the defendant omitted precautions that would have been practical or reasonable under the circumstances. *Id.* at 389-390.

In *Rasnow v. Harmon Cove Towers Condo. Ass'n*, 2019 N.J. Super. Unpub. LEXIS 821 (App. Div. 2019)[3], the plaintiff was caused to slip on a wet concrete stairway on the defendant's property. The concrete stairs were painted with an epoxy paint at the time of the plaintiff's fall without any materials to render the stairs slip resistant under wet conditions. *Id.* at 3. The Trial Court granted the defendant's motion for summary judgment on the grounds that it did not have constructive notice of the wet condition of the stairs on the date of the plaintiff's fall. *Id.* The plaintiff argued on appeal that he was not required to establish that the defendant had actual or constructive notice of the hazardous condition because the defendant was responsible for creating the condition. *Id.* at 8. Citing various legal authorities, including Model Jury Charge 5.20F(9), the Appellate Division noted that a plaintiff need not prove either actual or constructive notice when the defendant's actions create a foreseeable risk of harm. *Id.* at 9. It then found that a question of fact existed as to whether the dangerous condition that caused the plaintiff to fall was created by the defendant

[3] The unpublished opinion is included in the plaintiff's Appendix at Pa1. Plaintiff's counsel is not aware of any contrary unpublished opinions.

such that the plaintiff was not required to establish notice and reversed the Order granting the motion for summary judgment. *Id.* at 13-14.

In the present matter, the defendant placed the fire extinguisher in an area where it encroached into a narrow walkway and where customers would likely make contact and secured in place using a single strap that could be easily opened simply by being brushed against. (Da126-Da131; 11T106:22-25; 11T139:4-19; 11T157:4-10). A foreseeable consequence of placing the fire extinguisher in this location is that it would fall from its mounting if a customer brushed against it and injure a customer. Therefore, the facts supported a finding that the defendant created an unsafe condition that caused the plaintiff's injuries supporting the jury being given Model Jury Charge 5.20F(9) at trial.

The defendant also suggests that the Trial Court was bound to give only Model Jury Charge 5.20F(8) pertaining to actual or constructive notice on the issue of notice at the second trial because the Appellate Division found that Model Jury Charge 5.20F(10) was inapplicable to the facts of this matter. The Trial Court was only required to follow the Appellate Division's specific ruling in the first appeal which was that the mode-of-operation charge was improper and should not be given to the jury. *Tomaino v. Burman*, 364 N.J. Super. 224, 234 (App. Div. 2003), *certif. denied*, 179 N.J. 310 (2004). Model Jury Charge 5.20F(9) was not given at the first trial and its applicability to the facts of this

matter and was not at issue in the prior appeal. (Da53-Da82; 6T79:7-111:17). There was, therefore, no prior ruling as to whether the instruction on the issue of notice when the facts support a finding that the unsafe condition was created by the defendant was appropriate. (Da53-Da82). Since the issue of whether Model Jury Charge 5.20F(9) was an appropriate instruction was not before the Appellate Division in the prior appeal and had not been ruled upon, the Trial Court was not precluded from giving the instruction at the second trial. *Lynch v. Scheininger*, 314 N.J. Super. 318, 326 n.6 (App. Div. 1998), *aff'd*, 162 N.J. 209 (2000)(explaining that the law of the case doctrine "only applies to a specific issue which has been contested and decided at an earlier stage in litigation.").

Model Jury Charge 5.20F(9) addresses a separate and distinct theory of liability than Model Jury Charge 5.20F(10). As the Appellate Division noted, Model Jury Charge 5.20F(10) addresses the mode-of-operation doctrine. (Da63; Da66). The mode-of-operation doctrine applies to circumstances involving a self-service method of operating a business and requires a nexus between the self-service operation and the creation of the hazardous condition that caused the plaintiff to be injured. *Prioleau*, 223 N.J. at 262. In the prior appeal, the Appellate Division found that the mode-of-operation charge was improper because there was no suggestion that the plaintiff's contact with the fire-

extinguisher occurred in the context of the self-service operation of the defendant's store. (Da63; Da66). Model Jury Charge 5.20F(9) is an alternative theory of liability from the mode-of-operation doctrine that obviates the need to prove actual or constructive if the jury finds that the dangerous condition was caused by the defendant. *Prioleau*, 223 N.J. at 255. Therefore, a finding that the mode-of-operation charge was inapplicable does not preclude Model Jury Charge 5.20F(9) from being given in a second trial when the evidence at the second trial would allow a jury to find that the dangerous condition was created by the defendant or its employees. *Id.* at 265 n.7(finding that Model Jury Charge 5.20F(9) was properly given at trial while also finding the mode-of-operation charge was improperly given.).

The plaintiff was also not precluded from requesting to have Model Jury Charge 5.20F(9) given at the second trial simply because he did not seek to have that charge given at the first trial. *Murphy v. Implicito*, 392 N.J. Super. 245, 256-257 (App. Div. 2007). "Where a new trial has been granted the case stands as if there had never been a trial; the court has the same power with reference to matters connected with the trial of the case as it had before the first trial was had, and it is the duty of the court to proceed as in the first instance. The new trial is had as if there had never been a previous one." *Franklin Discount Co. v. Ford*, 27 N.J. 473, 492 (1958). Therefore, the plaintiff was not limited to the

same theory of liability that had been offered in the first trial and was permitted to argue that the defendant breached the duty it owed him by creating the dangerous condition in its commercial establishment and seek to have Model Jury Charge 5.20F(9) given at the second trial. *Murphy*, 392 N.J. Super. at 257. Furthermore, as stated above, the Trial Court was not precluded from giving the instruction at the second trial since the issue was not before the Appellate Division and ruled upon in the prior appeal. *Lanzet v. Greenberg*, 126 N.J. 168, 192 (1991).

The defendant further argues that it was reversible error to give Model Jury Charge 5.20F(9) together with Model Jury Charge 5.20F(8) because it contends that the two instructions can never be given together. The plaintiff respectfully disagrees. A plaintiff may assert alternative grounds for establishing a defendant's liability at trial when the inferences of fact support both claims. *Caputo v. Nice-Pak Products, Inc.*, 300 N.J. Super. 498, 504 (App. Div. 1997), *certif. denied*, 151 N.J. 463 (1997). Therefore, the plaintiff was not required to proceed with only a claim that the defendant had notice of the unsafe condition or only a claim that the defendant created the condition. Furthermore, as detailed above, the inferences of fact supported a finding that the defendant created the unsafe condition that caused the plaintiff's injury. Since the evidence

supported this finding, the Trial Court was required to include Model Jury Charge 5.20F(9) in its instructions to the jury. *Walker*, 445 N.J. Super. at 127.

The Trial Court's entire instruction on notice was also not confusing or misleading. The instruction did not compel the jury to disregard the issue of notice or even suggest that the plaintiff did not have to establish notice under all circumstances. (13T93:19-94:20). It simply instructed them that "if [they] find" that the premises was not in a safe condition and that the defendant or its employees created the condition through their own acts or omissions then it was not necessary for them to find that the defendant had actual or constructive notice of the unsafe condition. (13T94:13-20). The disputed issue of fact as to whether the defendant created the dangerous condition was for the jury to decide. *See*, *Gordon v. Daftani*, 2009 N.J. Super. LEXIS 2827 at 7 (App. Div. 2009), *certif. denied*, 201 N.J. 273 (2010)[4](ruling that it was for the jury to decide whether the defendant created a hazardous condition or had constructive notice of the hazard where the inferences of fact weighed in the plaintiff's favor supported either finding). There were facts established at trial in this matter that would allow the jury to find that the defendant created the unsafe condition that caused the plaintiff's injuries. The jury could have also found that the defendant

[4] The unpublished opinion is included in the plaintiff's Appendix at Pa6. Plaintiff's counsel is not aware of any contrary unpublished opinions.

did not create the unsafe condition. The Trial Court was required to instruct the jury that it should apply the legal principles to the facts "as it may find them." *Velazquez*, 163 N.J. at 688. It is, therefore, respectfully submitted that the Trial Court's instruction explaining the law on the issue of notice depending upon the jury's ultimate determination as to whether the defendant created the dangerous condition or not was proper.

The last argument made by the defendant is that the jury instruction given at trial was essentially a *res ipsa loquitur* charge. Again, the plaintiff respectfully disagrees. The *res ipsa loquitur* charge instructs the jury that they may "infer negligence from the happening of the incident" if its requirements are established. *M.J.C.* 5.10D. The instruction given to the jury in this matter did not include any such language or any language that even suggested that the plaintiff was relieved of his burden of proving that the defendant's negligence. It simply instructed the jury that "if [they] find" that the premises was not in a safe condition and that the defendant or its employees created the condition through their own acts or omissions then it was not necessary for them to find that the defendant had actual or constructive notice of the unsafe condition. (13T94:13-20). The instruction was consistent with the law and the language of Model Jury Charge 5.20F(9).

The Supreme Court's ruling in *Prioleau* confirms that there is no hint of the jury being misled into inferring the defendant's negligence by the language of Model Jury Charge 5.20F(9). In that matter, the jury was given the model jury charges on mode-of-operation, Model Jury Charges 5.20F(10) and 5.20F(11), and the model jury charge on unsafe conditions created by the defendant, Model Jury Charge 5.20F(9). *Prioleau*, 223 N.J. at 253. The Supreme Court noted that the mode-of-operation charges gives rise to an inference of negligence that alters the ordinary allocation of the burdens between the parties. *Id.* at 263. It found that the mode-of-operation charges were improper because there was no evidence that the hazard that caused the plaintiff's fall had any relationship to the self-service operation of the defendant's business. *Id.* at 264. However, it found that Model Jury Charge 5.20F(9) was properly given because it was supported by the facts. *Id.* at 264-265. In discussing Model Jury Charge 5.20F(9), the Court noted that the instruction permits a plaintiff to recover without showing that the defendant had actual or constructive notice of the unsafe condition "if" the jury finds that the premises was "not in a reasonably safe condition" and the defendant created that condition through its own act or omission. *Id.* at 253. In other words, the charge does not provide for an inference of negligence because the jury must first determine that the defendant

negligently created an unsafe condition in order the plaintiff to be relieved of having to establish notice.

The evidence at trial allowed a jury to find that the defendant created an unsafe condition on its property that caused the plaintiff's injuries. The Trial Court was required to instruct the jury on the legal principles applicable to the facts "as it may find them." *Jurman*, 47 N.J. at 591-592. Model Jury Charge 5.20F(9) sets forth the law pertaining to a finding that the unsafe condition was created by the defendant. Accordingly, the plaintiff respectfully submits that the Trial Court did not err by including Model Jury Charge 5.20F(9) in its instruction to the jury. Moreover, the Trial Court was required to provide the instruction as its omission would have constituted reversible error.

CONCLUSION

Based upon the foregoing facts and law, the plaintiff respectfully submits that the rulings of the Trial Court be affirmed.

Respectfully submitted,

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_____
Brett R. Greiner, Esq.

Dated: May 29, 2025

PETER KRASSNER, Plaintiff/ Respondent, v. WALMART, JASON CUZZO, ABC CORPORATIONS 1-10, & JOHN DOES 1-10 (SAID NAMES, ABC, INC., AND JOHN DOE, BEING FICTITIOUS, JOINTLY, INDIVIDUALLY), Defendants/ Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001500-24 ON APPEAL FROM: SUPERIOR COURT SOMERSET COUNTY, LAW DIVISION, SOM-L-839-18 JUDGMENT ENTERED: JANUARY 7, 2025 HONORABLE EDWARD M. COLEMAN, P.J.Ch. (retired and temporarily assigned on recall) SAT BELOW

REPLY BRIEF FOR DEFENDANT/APPELLANT, WALMART STORES EAST, L.P., i/p/a WALMART

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Reply Argument

This appeal is about notice. In the first appeal, this Court characterized the key issue as whether Walmart "had constructive notice" that the fire extinguisher was a "dangerous condition." (Da72; Da74.) This Court recognized that Mr. Krassner must prove constructive notice to support his claims, because there was no evidence of actual notice. Mr. Krassner took a shortcut at the first trial by requesting a jury charge on mode of operation. This Court held that giving that charge was reversible error, because it vitiated the requirement that Mr. Krassner prove notice. (Da74.) The Court stated that a jury would again need to determine, "if the evidence supports the argument that Walmart had constructive notice of the condition." (*Id.*)

On remand, Mr. Krassner took a different shortcut by convincing the trial court to give *Model Jury Charge (Civil)* 5.20F(9), even though the trial court agreed with this Court, stating, "this whole case is notice." (13T21:16-17.) Just like the mode-of-operation charge incorrectly given at the first trial, *Model Charge* 5.20F(9) vitiated the requirement—imposed not only by New Jersey law generally but by this Court in this very lawsuit—that Mr. Krassner must prove constructive notice. The argument conflates the dangerous condition at issue. Mr. Krasner was not injured by the fire extinguisher's physical location in the Walmart store. He was injured by the purported failure

of its mounting straps after he struck it. The trial court's post-verdict conclusion that the jury "found that there was sufficient notice as against [Walmart], as to the condition of the fire extinguisher," (13T118:10-11), cannot be reconciled with the jury charge, because the jury was instructed that Mr. Krassner did not need to prove notice. (13T94:13-20.)

In his response brief, Mr. Krassner introduces a new, spurious contention that he advanced two distinct theories of liability at trial, under which Walmart allegedly created the dangerous condition *or* had notice of it. (Pb35.)

The "dangerous condition" that allegedly caused Mr. Krassner's injuries was the condition of the mounting straps holding the fire extinguisher. Mr. Krassner presented no evidence that Walmart created the mounting straps, so he needed to prove that Walmart should have known that the straps were allegedly too easily displaced, or were warped and damaged. When Mr. Krassner had no such evidence, he was permitted to take a shortcut—just like he was permitted to do at the first trial—by again requesting and receiving an improper jury instruction that improperly lowered his burden of proof.

Mr. Krassner's renewed attempt to evade his burden has no more merit than his first one did. He cannot hold Walmart liable, because the record contains no evidence that Walmart should have known that the fire extinguisher's mounting straps were a dangerous condition that could cause the

fire extinguisher to fall. And even if (contrary to fact) there *had* been any evidence of constructive notice, a new trial would still have been required because the jury was not required to *find* constructive notice to impose liability. (Da73.)

I. Mr. Krassner improperly uses inadmissible evidence, continues to conflate the facts, and inverts the burden of proof to lessen the prejudicial effect of the erroneous jury charge.

Model Charge 5.20F(9) relieved Mr. Krassner of the requirement to prove constructive notice. Giving that charge was reversible error. Mr. Krassner tries to evade his burden of proving constructive notice—and the need for proper jury instructions—in three ways: through inadmissible evidence; conflation of the facts; and inverting the burden of proof.

A. Mr. Krassner improperly uses inadmissible evidence.

New Jersey courts presume that erroneous instructions on material points constitute reversible error. *Washington v. Perez*, 219 N.J. 338, 351 (2014). The trial court instructed the jury using the wrong legal principles on the key issue in this case: constructive notice.

Mr. Krassner cannot use inadmissible evidence to try to minimize the prejudicial effect of the erroneous jury charge. He criticizes Walmart for not electing to mount the fire extinguisher with hooks that would require it to be lifted to be removed. (Pb39 (citing 11T118:5-12).) First, the cited testimony

does not say what Mr. Krassner says it does. Second—and more importantly—the trial court precluded Mr. Krassner from arguing that Walmart was liable because a feasible alternative mounting system existed. (9T18:8 – 22:7.) The trial court rejected Mr. Krassner's attempt to admit a subsequent remedial measure through the backdoor. (*Id.*) Mr. Krassner did not challenge that ruling. Thus, the record does not support Mr. Krassner's misstatement that Walmart "chose" a particular mounting system. (Pb39.) In short, this inadmissible evidence cannot be used to lessen the prejudicial effect of providing the jury with the wrong law to decide the case.

B. Mr. Krassner incorrectly conflates the "dangerous condition" at issue.

In place of required notice, Mr. Krassner conflates the fire extinguisher's location with its condition. His appeal brief repeatedly equivocates by referring to a "dangerous

s condition" without acknowledging that condition was the fire extinguisher's mounting straps:

- "[F]inding that mode-of-operation charge was inapplicable [did] not preclude Model Jury Charge 5.20F(9) from being given in a second trial when the evidence at the second trial would allow a jury to find that the dangerous condition was created by the defendant or its employees." (Pb44.)

- Mr. Krassner "was not limited to the same theory of liability that had been offered in the first trial and was permitted to argue that the defendant breached the duty it owed to him by creating the dangerous condition in its commercial establishment and seek to have Model Jury Charge 5.20F(9) given at the second trial." (Pb44-45.)
- "The disputed issue of fact as to whether the defendant created the dangerous condition was for the jury to decide." (Pb46.)
- "The [t]rial [c]ourt's instructions explaining the law on the issue of notice depending upon the jury's ultimate determination as to whether the defendant created the dangerous condition or not was proper." (Pb47.)

When Mr. Krassner eventually turns to the evidence that he claims could support a liability finding, he makes the equivocation express, stating that it could be supported by showing where "and/or" how it was maintained. (Pb35.) If Mr. Krassner is claiming that Walmart *created* the mounting system for the fire extinguisher, he cites no record evidence, and there is none. (The record citations in his brief are of the trial court's statements during the charging conference.) If he thinks Walmart could be liable under some other theory, he never addresses Walmart's argument that the fire extinguisher's location alone was insufficient to hold it liable—because Mr. Krassner's backing into the fire

extinguisher without looking was the but-for cause of the fire extinguisher falling onto his foot.

Brody v. Albert Lifeson & Sons, Inc., 17 N.J. 383 (1955), does not apply. There, the defendant itself constructed a terrazzo floor that was slippery when wet or dry, and the plaintiff's expert testified that the defendant neglected to try to reduce slipperiness, either in construction or by using floor mats. *Id.* at 386-87. The Court held that notice was not required because the defendant had constructed the floor in a manner that rendered it intrinsically slippery. *Id.* at 390-91.

Not only is *Brody* inapplicable, but it also undermines Mr. Krassner's case. The *Brody* Court found that the plaintiff did not need to prove notice because, it did *not* involve a situation where there was "a defective condition arising either suddenly or by wear over a period of time." *Id.* at 389. Here, the fire extinguisher fell purportedly because of the condition of the straps. According to Mr. Krassner, they were too easy to undo or were warped. Mr. Krassner also claims that the straps were defective. But he presented no evidence that Walmart should have discovered the condition of the straps before Mr. Krassner's incident.

Mr. Krassner also understates what this Court held in the first appeal. Mr. Krassner claims that this Court "recognized" that the fire extinguisher's

placement was a dangerous condition. (Pb24 (citing Da73).) But this Court actually stated that the fire extinguisher might be a "hazardous condition" if Mr. Krassner dislodged it by brushing against it when Walmart's associates testified that the fire extinguisher should not have fallen. (Da73.) In its discussion, this Court chiefly cited cases discussing notice. (*See* Da72 (citing *Prioleau v. Ky. Fried Chicken, Inc.*, 223 N.J. 245, 257 (2015); *Troupe v. Burlington Coat Factory Warehouse Corp.*, 443 N.J. Super. 596, 602 (App. Div. 2016)).) And it concluded its discussion by noting that Mr. Krassner would need to prove constructive notice on remand. (Da74.) In other words, Mr. Krassner needed to show that Walmart should have known that an alleged defective condition of the mounting straps caused the fire extinguisher to fall after Mr. Krassner contacted it. Thus, this Court's prior decision confirms that Mr. Krassner needed to prove constructive notice and could not rely on a landowner-created-danger theory to hold Walmart liable.

C. Mr. Krassner improperly inverts the burden of proof.

As a third shortcut, Mr. Krassner blames Walmart for not disproving its own liability. But Walmart had no obligation to do so. Over a century ago, the Court of Errors and Appeals held that plaintiffs in premises-liability cases have the burden of proving liability. "Where liability is made to depend at all upon notice to the defendant, the plaintiff must establish the notice before the

defendant is called upon to contest it; in other words, it is not to be presumed." *Garland v. Furst Store*, 93 N.J.L. 127, 130 (E. & A. 1919). This principle applies generally to all negligence cases. *See Brown v. Racquet Club of Bricktown*, 95 N.J. 280, 288 (1984).

The Court should not be swayed by Mr. Krassner's attempts to burden shift. Walmart did not need to produce any evidence, let alone evidence showing lack of notice. Besides contradicting longstanding law, Mr. Krassner would require Walmart to prove a negative: that it lacked constructive notice. Walmart did not need to accede to Mr. Krassner's suggestion to preserve six months of surveillance tape to support undisputed testimony that it inspected fire extinguishers, or provide written documentation of daily sight-checks of fire extinguishers performed by Walmart associates. (Pb12-13.) Rather, Mr. Krassner needed to prove that the condition of the fire extinguisher's mounting straps existed for so long that Walmart should have known about it.

At bottom, Mr. Krassner's attempt to impose an evidentiary burden on Walmart is yet another attempt to skirt the lack of evidence of constructive notice. At every turn—through evidence, argument at trial, jury instructions, and on multiple appeals—Mr. Krassner has tried to take shortcuts to prove liability. The Court should not let him succeed.

II. Mr. Krassner misstates the law.

In his brief, Mr. Krassner does not accurately recite the legal standards that apply to Walmart's argument for judgment notwithstanding or a new trial based on the erroneous jury charge.

A. Mr. Krassner improperly uses speculation and conjecture.

Just as Mr. Krassner could not require Walmart to prove lack of notice, he also could not use speculation or conjecture to establish the notice that he bears the burden of proving. Circumstantial evidence may show that a dangerous condition existed long enough that it should have been discovered. *See Troupe*, 443 N.J. Super. at 602. But that principle does not apply here.

Some things that Mr. Krassner cites as "circumstantial evidence" are not evidence at all. (*See* Pb30-31.) 3T137:1-9 is a citation of a transcript from the *first* trial, and is the trial court's discussion when it denied Walmart's motion for directed verdict at that trial, not evidence. The citation to 13T102:18-21 appears to be a typographical error, since it is an aside between the court and counsel while the jury was deliberating at the second trial. Further, Mr. Krassner's discussion of why Walmart kept extra mounting straps is incomplete. Walmart kept spare mounting straps because they were "extras" from the store remodel. (11T32:22-23.) Walmart's retention of extra mounting straps cannot show notice that the fire extinguisher at issue had defective mounting straps, or that Walmart should have known about that fire

extinguisher's allegedly defective mounting straps.

The cornerstone of constructive notice is the existence of a dangerous condition for long enough that a landowner should have discovered it. *Troupe*, 443 N.J. Super. at 602. Mr. Krassner fails to cite any record evidence from the second trial that could show that Walmart should have known that the fire extinguisher's mounting straps were dangerous.

B. The outcome might have been different had the trial court properly instructed the jury, and Mr. Krassner waived any harmless-error argument.

As shown above, Walmart was entitled to judgment and the case should have ended. But even if that had not been the case, it was entitled to a correct jury charge on duty. Mr. Krassner conflates case citations and quotations discussing harmless error and plain error. He does not argue for the former, and the latter does not apply.

Under the correct standard, an appellate court "should reverse" when an appellant objects to an erroneous jury charge, "unless the error is harmless." *Toto v. Enusar*, 196 N.J. 134, 144 (2008) (reversing this Court and holding that erroneous jury charges required new trials). In other words, an appellate court should award a new trial, "where the jury outcome might have been different had the jury been instructed correctly." *Velazquez v. Portadin*, 163 N.J. 677, 688 (2000).

The Court should not conduct harmless-error review. Mr. Krassner provides no argument on this point. He instead argues that the jury charge was not erroneous at all. Thus, the harmless-error cases he cites, *e.g.*, *Fisch v. Bellshot*, 135 N.J. 374, 392-93 (1994), do not apply. An appellee who opposes an appellant's arguments on the merits and does not raise harmless error waives that argument. *See State v. Vincenty*, 237 N.J. 122, 135-36 (2019). In any event, Walmart argued that the trial court's error could not be harmless. (*See* Db40-41.) And any discussion of harmless error is incomplete without acknowledging that New Jersey courts presume that erroneous instructions on material points constitute reversible error. *Washington*, 219 N.J. at 351.

Mr. Krassner also errs by urging the Court to focus on the whole charge. He does not explain how this action could salvage the judgment. The error Walmart challenged is the charge's most important part: the legal duty that applies to Walmart. In *Viscik v. Fowler Equip. Co.*, 173 N.J. 1, 18 (2002), for instance, the Supreme Court explained that examining a challenged charge in context may show that other language vitiates an alleged error. In applying this standard, however, the Court concluded though that the jury charge in *Viscik* was reversible error. It applied the wrong law to the facts, *id.*, just like this case.

The trial court's charge—in context—was manifestly confusing. Right

after it told the jury that Mr. Krassner needed to prove actual or constructive notice, the trial court instructed the jury that he did *not* need to prove notice. The trial court's instruction does not explain the "dangerous condition" at issue, or how the contradictory instructions could be applied to the facts. Without a roadmap, the jury was left with no direction to reach a proper verdict. Mr. Krassner identifies no other parts of the jury charge that could undo the error on the material issue in the case. None exist.

Flowing from his misstatement of the legal principles, and for the first time on appeal, Mr. Krassner claims that he placed two, alternative theories of liability before the jury: one of owner-created danger and one of constructive notice. He cites nothing in the record to support this newfound theory, because he could not. Mr. Krassner never made such an argument to the trial court. As a result, the trial court's jury charge did not tell the jury that Mr. Krassner was seeking to recover on alternative theories of liability. Rather, as in the first trial, Mr. Krassner tried to artificially lower his burden of proof by removing the need to prove notice.

Mr. Krassner's "two theories" strategy cannot be reconciled with the commentary to the *Model Charge Jury Charge (Civil)* 5.20F(8) Notice of Particular Danger as Condition of Liability. That commentary states that the charge applies "to those cases where the defendant is not at fault for the

creation of the hazard." This commentary strongly suggests that *Model Charges* 5.20F(8) and (9) should not be given in tandem without some further explanation.

Mr. Krassner also improperly cabins this Court's ruling in the first appeal. He claims that the Court never ruled whether *Model Charge* 5.20F(9) was appropriate. That statement is true but incomplete. This Court held that Mr. Krassner needed to prove constructive notice to prevail at trial. As this Court stated, *Model Charge* 5.20F(10) "absolved plaintiff of their burden to prove notice or constructive notice." (Da66.) So did *Model Charge* 5.20F(9). In the prior appeal, this Court held that a new trial was required for a jury to determine whether "Walmart had constructive notice of the condition" that injured Mr. Krassner. (Da74.) When Mr. Krassner convinced the trial court to use *Model Charge* 5.20F(9), he evaded the scope of this Court's prior ruling. Contrary to this Court's holding, the jury was permitted to find Walmart liable without determining whether Walmart had constructive notice of the condition of the fire extinguisher's mounting system.

Murphy v. Implicito, 392 N.J. Super. 245 (App. Div. 2007), cited by Mr. Krassner, does not apply. That case merely holds that parties may present "new claims and defenses" at the subsequent trial. *Id.* at 256 (quoting *Franklin Disc. Co. v. Ford*, 27 N.J. 473, 492 (1958)). Here, Mr. Krassner did not present new

claims or defenses. And he identifies *no* new or different evidence that he presented at the second trial to support his novel contention that he presented two theories of liability. In fact, this case is just like *Murphy*, in which this Court held that the plaintiff could not proceed on a new theory of liability at retrial because he lacked the required evidence to sustain it. *Id.* at 257.

Finally, *Caputo v. Nice-Pak Prods., Inc.*, 300 N.J. Super. 498 (App. Div. 1997), does not support Mr. Krassner's claim that a trial court may give contradictory model jury charges without clarification or modification of those instructions. That case was about theories of liability—not jury instructions. The *Caputo* Court held that a plaintiff could ask a jury to decide the inconsistent theories of breach of contract and unjust enrichment. This Court never addressed jury instructions there, as the trial court had directed a defense verdict before any jury charge was given. *Id.* at 501.

Instead, the more recent decision, *N.Y.-Conn. Dev. Corp. v. Blinds-To-Go (U.S.), Inc.*, 449 N.J. Super. 542 (App. Div. 2017), is instructive when a plaintiff proceeds on inconsistent legal theories (though Mr. Krassner could not do so here). In *Blinds-To-Go*, as in *Caputo*, the plaintiff proceeded on inconsistent legal theories, but the trial court failed to properly instruct the jury on those theories. This Court reversed, because the "jury instructions and verdict sheet both misstated the applicable legal principles of contract law." *Id.*

at 557. Even were the Court to accept Mr. Krassner's contentions that he pursued two theories at trial and that evidence supported each, the Court would still need to reverse since the jury instructions do not properly explain the law that applies.

In sum, instructing a jury on a wrong legal principle irrevocably taints a verdict even if the jury also is instructed on the correct principle. *Brown*, 95 N.J. at 297. The record contains no evidence that Walmart created the dangerous condition that caused the fire extinguisher to fall. Using *Model Charge* 5.20F(9) was reversible error.

Conclusion

This Court should reverse the trial court's judgment and remand with directions to enter judgment in Walmart's favor. If the Court does not reverse, it should vacate and remand for a new trial.

Respectfully submitted,

Dated: June 12, 2025

FOWLER, HIRTZEL, MCNULTY & SPAULDING, LLC

By: */s/ Matthew D. Vodzak*

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