

CVETANKA NECEVA,

Plaintiff,

v.

STOP AND SHOP #820, ABC
CORPORATIONS 1-10, ABC
MAINTENANCE 1-10, XYZ
MANAGEMENT 1-10 and JOHN/JANE
DOES 1-10, (last five names being
fictitious and unknown)

Defendants.

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-001615-24

On Appeal from:
SUPERIOR COURT OF
NEW JERSEY
LAW DIVISION:
BERGEN COUNTY
DOCKET NO.: BER-L-6819-22

Sat Below:
Hon. David V. Nasta, J.S.C.

CIVIL ACTION

PLAINTIFF/APPELLANT'S BRIEF

Of Counsel: Damon A. Vespi, Esq.
Attorney ID No.: 025991998
dvespi@vespilegal.com

On the Brief: Jared E. Drill, Esq.
Attorney ID No.: 004702000
jdrill@vespilegal.com

THE VESPI LAW FIRM, LLC
361 Union Blvd.
Totowa, New Jersey 07512
(973) 633-1000
Attorneys for Plaintiff/Appellant,
Cvetanka Neceva

Submitted on: May 5, 2025

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PRELIMINARY STATEMENT

The summary judgment standard is well established with a clear mandate that summary judgment is only proper if, when viewing the evidence in the light most favorable to the non-moving party, no genuine issue of material fact is in dispute. When evaluating a summary judgment motion, the motion must draw all legitimate inferences from the facts in favor of the non-moving party in order to determine whether a rational factfinder could resolve the alleged disputed issue in favor of the non-moving party. For the reasons set forth below, in granting Defendant's motion for summary judgment and denying Plaintiff's motion for reconsideration, the motion Court improperly applied the summary judgment standard to the facts and evidence in this premises liability action.

On November 30, 2021, Plaintiff/Appellant, Cvetanka Neceva ("Plaintiff") was a business invitee at Defendant/Respondent, Stop & Shop's ("Defendant") grocery store in Ridgewood, New Jersey. After picking up a few groceries, Plaintiff went to purchase her last item, Kombucha, which was located in the refrigerator section of the store. When Plaintiff approached the refrigerator area to look for the Kombucha, a male employee was located to her right, stocking items from a cart into the refrigerator. The cart with the boxes of items was between Plaintiff and the employee. While Plaintiff was looking for the Kombucha, unbeknownst to her, the male employee moved to the other side of the cart, directly next to Plaintiff and knelt

down within a foot of where she was standing, keeping one leg outstretched behind him. The employee did not warn, alert, and/or advise Plaintiff that he was kneeling directly beside her or that he had even moved. After finding her Kombucha, Plaintiff turned around and immediately tripped over the employee's outstretched leg, falling over him onto her right side. As a result, she suffered significant injuries and has incurred extensive unpaid medical expenses.

Defendant admits that it has a duty to ensure that employees stock merchandise in a reasonably safe manner to customers. Despite this, the undisputed evidence demonstrates that its employee knelt down directly beside Plaintiff, out of her line of vision and without any warning that he was next to her. Since Plaintiff could not see the employee because he was kneeling, and because he was within only a foot of her (clearly in her path of travel), a reasonable jury can easily find that his outstretched leg created a dangerous condition.

Defendant filed a motion for summary judgment. Plaintiff opposed the motion. On November 15, 2024, following oral argument, the Honorable David V. Nasta, J.S.C. ("the motion judge" or "the motion court") granted Defendant's motion, holding that absent a statute, regulation, manual, or rule, specifically providing that an outstretched leg of an employee stocking shelves is a dangerous condition, a reasonable juror could not find that a dangerous condition existed. However, this is not the standard and in fact, our Supreme Court has explicitly held

that statutes, regulations, or even expert testimony are not necessary to establish the existence of a dangerous condition if the subject can be understood by jurors utilizing their own common judgment and experience. In the instant matter, there is nothing esoteric about understanding the danger presented by an employee kneeling directly next to a customer, in her path of travel, where Plaintiff could not see him and without warning such as to require this heightened standard.

Furthermore, while the motion judge held that Defendant's actions were within the normal activities of a grocery store, respectfully, whether the actions as set forth by the evidence were reasonable is a factual question to be decided by the jury and not as a matter of law.

If the motion judge's Orders stand, the standard for a motion for summary judgment would not only shift the burden to the non-moving party (here the Plaintiff) but would require the Plaintiff in a non-technical case to establish standard of care. It further would permit the Court, rather than a jury, to make factual determinations. For the reasons set forth herein, it is respectfully requested that the Orders of November 15, 2024 and January 17, 2025 be reversed, and the matter remanded for trial.

STATEMENT OF FACTS

On November 30, 2021, Plaintiff was a business invitee at Defendant's grocery store in Ridgewood, New Jersey. (Pa12-23)

After picking up a few groceries, Plaintiff went to purchase her last item, Kombucha, which was located in the refrigerator section of the store. (2T 20:5-13; 21:3-8)

When Plaintiff approached the refrigerator area to look for the Kombucha, a male employee was located to her right, stocking items from a cart into the refrigerator. The employee was to the right of the cart with he boxes of supplies and the cart was between Plaintiff and the employee. (2T 26:22-27:4; 27:13-18)

While Plaintiff was looking for the Kombucha, unbeknownst to her, the male employee moved to the left side of the cart, directly next to Plaintiff and knelt down, keeping one leg outstretched behind him. (2T 27:5-8; 27:19-24; 28:3-6; 28:17-23)

After moving, the employee was now within only one (1) foot of where Plaintiff was standing, directly in her path of travel as she turned around. (2T 28:7-12)

Plaintiff did not see or hear the employee move directly next to her and was not aware that he was there when she turned around to walk away. (2T 25:2-14; 27:21-28:2)

The employee did not warn, alert, and/or advise Plaintiff that he was kneeling

directly beside her. (2T 27:21-28:2)

After finding her Kombucha, Plaintiff turned around and immediately tripped over the employee's outstretched leg, falling over him onto her right side. (2T 23:14-20; 25:12-8; 12-14)

The employee immediately apologized to Plaintiff. (2T 25:21-22)

Plaintiff served the report of human factors expert, Stephen Wilcox ("Mr. Wilcox"). (Pa61-70) Mr. Wilcox explains and defines human factors as:

the applicable of knowledge about human beings to the design and evaluation of the things that human beings use. The field includes the study of human capabilities, limitations, and tendencies. Human factors professionals study, among other things, how people perceive and respond to the circumstances that they face, what they tend to do in what situations, what causes falls and other accidents, and the implications of this type of information for the design and evaluation of products, systems, and informational materials, including facilities.

(Pa63-64)

Mr. Wilcox has forty (40) years of experience in the field of human factors, and this experience includes investigating accidents and the causes of falls. (Pa64)

Based upon his education and forty (40) years of experience in the field of human factors, Mr. Wilcox applied a human factors methodology, supported by literature cited in his report, to analyze the facts and circumstances of Plaintiff's fall. In doing so, Mr. Wilcox concluded that the employee's extended leg created a tripping hazard, which caused Plaintiff to trip and fall. (Pa64-67)

More specifically, Mr. Wilcox explained in his report that three requirements

must be met to constitute a tripping hazard: 1) it was in the path of travel; 2) it was capable of causing a fall; and 3) it was hidden from the Plaintiff at the time of the fall. (Pa65)

Based upon his experience, coupled with the evidence in this case, Mr. Wilcox concluded that the first two requirements were met as the employee's leg was clearly in the area of travel as he was in the aisle of a grocery store, and a leg is capable of causing a fall. (Pa65)

Mr. Wilcox also explained, based upon his knowledge, experience, the evidence in this case, and supporting literature, that the third requirement was also met, i.e. that the extended leg was hidden from Plaintiff at the time of her fall. In so opining, Mr. Wilcox explained that based upon human factors (and supported by cited literature in his report), people such as Ms. Neceva look forward in their direction of travel as opposed to down at their feet. Therefore, any ability to see the employee's leg would have only been peripheral, if at all, which has poor acuity. As explained by Mr. Wilcox, the fact that the employee was outside her field of vision is supported by the evidence that the employee moved. Therefore, while initially she saw the employee and he did not pose a hazard, after he moved, she was no longer able to see him. This is further supported by the fact that the employee was kneeling down, outside her central line of vision. Based upon this, Mr. Wilcox opined that the outstretched leg constituted a dangerous condition. (Pa65-67)

PROCEDURAL HISTORY

Plaintiff filed a Complaint on December 23, 2022, alleging that while a business invitee at Defendant's supermarket, Plaintiff was caused to trip and fall. (Pa12-23)

On February 15, 2023, Defendant filed an Answer. (Pa24-37)

Defendant filed a motion for summary judgment on September 24, 2024. (Pa3-4) Plaintiff opposed the motion. (Pa3-4)

On November 15, 2024, the motion judge heard argument and issued an oral decision granting Defendant's motion and dismissing Plaintiff's Complaint. (1T¹; Pa1) Specifically, the motion judge held that absent a statute, regulation, or expert testimony, specifically providing that an outstretched leg of an employee stocking shelves is a dangerous condition, a reasonable juror could not find that a dangerous condition existed. (1T 18:18-19:9, 19:13-22, 20:6-12) The motion judge also made a factual determination, stating that a dangerous condition did not exist because "[nothing appear[ed] to be outside the normal operation of a . . . supermarket, *as The Court would understand it or know it.*" (1T 20:23-25)(emphasis added)

On December 5, 2024, Plaintiff filed a motion for reconsideration of the November 15, 2024 Order. (Pa114-15) The motion judge did not hear argument but

¹ 1T references the November 15, 2024 Motion Transcript; 2T references the Deposition Transcript of Plaintiff, Cvetanka Neceva, dated March 19, 2024; and 3T references the Deposition Transcript of Kimberly Vickers, dated March 19, 2024.

entered an Order denying Plaintiff's motion on January 17, 2025. (Pa2) A statement of reasons was not provided in or with the Order. (Id.)

This appeal follows.

LEGAL ARGUMENT

Standard of Review

A. Summary Judgment

New Jersey's standard for summary judgment as set forth in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) entitles a movant to summary judgment only if the adverse party, having all facts and inferences viewed most favorably towards it, has not demonstrated the existence of a dispute whose resolution in its favor will entitle him or her to judgment. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact challenged[.]" R. 4:46-2(c).

When evaluating a summary judgment motion, the motion court "does not draw inferences from the factual record as does the factfinder in a trial, who 'may pick and choose inferences from the evidence to the extent that 'a miscarriage of justice under the law' is not created.'" Globe Motor Company v. Igdalev, 225 N.J. 469, 479 (2016) *citing* Brill, 142 N.J. at 536. "Instead, the motion court draws all legitimate inferences from the facts in favor of the non-moving party" in

order to determine whether a rational factfinder could resolve the alleged disputed issue in favor of the non-moving party. Ibid.

B. Reconsideration

Reconsideration requires the exercise of the trial court's discretion, in the interest of justice. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) *quoting* D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rule 4:49-2 requires a showing that the trial court erred in some way, or new evidence that was not available at the time of the motion. The Rule requires the movant to include "a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred." R. 4:49-2. This has been construed to mean a showing that the court has based its decision on a "palpably incorrect or irrational basis" or that it is clear the court failed to consider or appreciate significant evidence. Cummings, 295 N.J. Super. at 384 (*quoting* D'Atria, 242 N.J. Super. at 401). While the Trial Court has discretion when deciding reconsideration motions, this discretion is not without guidance in the established case law, with the focus on "the ultimate goal of substantial justice." Johnson v. Cyklop Strapping Corp. 220 N.J. Super. 250, 264 (App. Div. 1987).

In Plaintiff's motion for reconsideration in this matter, it was respectfully submitted that the motion Court failed to appreciate the totality of the evidence in granting Defendant's motion for summary judgment.

POINT I

THE MOTION COURT COMMITTED A REVERSIBLE ERROR IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE ISSUE OF WHETHER DEFENDANT'S MOVING TO KNEEL DIRECTLY NEXT TO THE PLAINTIFF, OUTSIDE HER FIELD OF VISION AND WITHOUT ANY WARNING, CONSTITUTES A DANGEROUS CONDITION IS A QUESTION OF FACT TO BE DETERMINED BY A JURY (Pa1; Pa2; T16-23)

The elements of a negligence cause of action are well-settled. "To sustain a cause of action for negligence, a plaintiff must establish four elements: '(1) a duty of care,² (2) a breach of that duty, (3) proximate cause, and (4) actual damages.'" Townsend v. Pierre, 221 N.J. 36, 51 (2015).

A. STATUTES, REGULATIONS, OR EXPERT TESTIMONY ARE NOT NECESSARY TO ESTABLISH THE EXISTENCE OF A DANGEROUS CONDITION IF THE CONDITION CAN BE UNDERSTOOD BY JUROR UTILIZING THEIR COMMON JUDGMENT AND EXPERIENCE.

It is well settled that whether a dangerous condition existed at the time of injury is a question for the jury. Vincitore v. New Jersey Sports and Exposition

² "It is well recognized that the common law imposes a duty of care on business owners to maintain a safe premises for their business invitees because the law recognizes that an owner is in the best position to prevent harm." Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 306 (2010). This duty includes an affirmative duty to inspect the premises and "requires a business owner to discover and eliminate dangerous conditions, to maintain the premises in safe condition, *and to avoid creating conditions that would render the premises unsafe*." Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003)(emphasis added). While not argued by Defendant in its motion or directly addressed by the motion judge in his decision, it is undisputed that Plaintiff was a business invitee on Defendant's property.

Authority, 169 N.J. 119, 124 (2001)(internal citations omitted) Thus, a motion for summary judgment on the issue of whether a dangerous condition existed on the property may only be granted when no reasonable fact finder could conclude from the evidence that a dangerous condition existed. Despite the fact that Defendant (who as the moving party had the burden) failed to present any legal support that it did not create a dangerous condition as a matter of law, the motion Court held that the “in the absence of a case, rule, regulation, manual or anything else,” a reasonable juror could not determine that a dangerous condition existed. (1T 18:24-19:9; 19:13-22; 20:6-12) While the motion Court properly recognized that “this is a classic standard general application of whether or not a dangerous condition is created,” it applied an inapplicable, heightened standard to the facts herein. (1T 19:10-12)

A plaintiff is not required to establish the applicable standard of care in non-technical negligence cases. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2015)(citing Sanzari v. Rosenfeld, 34 N.J. 128, 134 (1961)). As our Supreme Court has stated:

[I]t is sufficient for the plaintiff to show what the defendant did and what the circumstances were. The applicable standard of conduct is then supplied by the jury, which is competent to determine what precautions a reasonably prudent man in the position of the defendant would have taken.

[Id. at 406-07]. In fact, our Supreme Court has explicitly held that statutes, regulations, or expert testimony are not necessary to establish the existence of a

dangerous condition if “the subject can be understood by jurors utilizing [their] common judgment and experience.” Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 450 (1993)(finding expert testimony not necessary for plaintiff to establish the existence of a dangerous condition); see also Scully v. Fitzgerald, 179 N.J. 114, 127-28 (2004)(holding that a statute, regulation, and/or expert testimony is not required to explain danger of throwing a lit cigarette onto a pile of papers or other flammable material); Campbell v. Hastings, 348 N.J. Super. 264, 270-71 (App. Div. 2002)(holding that expert testimony was not necessary to establish that the condition was dangerous because it could be easily understood by jurors utilizing common judgment); Hardy v. Sparta Twp. High Sch., 2016 N.J. Super. Unpub. LEXIS 1117 (App. Div. May 16, 2016)(Pa122-28)(reversing trial court’s finding that “absent any case law stating that this activity was ‘inherently unreasonable or inherently dangerous,’” an expert was needed to submit to a jury)

In Hopkins, the plaintiff fell when she was proceeding "down from one level of the house to another and missed a step, which she claimed constituted a dangerous condition because the connecting step was camouflaged by the similar floor that covered both levels." 132 N.J. at 431-32. In addressing the question of whether expert testimony (and thus standards and/or regulations) were necessary to establish the existence of a dangerous condition, the Court held that “any juror, any person of average knowledge and ordinary experience, could determine by” the evidence

presented whether a dangerous condition existed “and whether that condition could cause an unsuspecting person to fall.” Id. at 450. The Court further held, that the hazard alleged was “relatively commonplace and ordinary” and did “not require the explanation of experts in order for [its] danger to be understood by average persons.” Ibid.

Similarly, here, when the evidence presented is viewed in the light most favorable to Plaintiff, it is clear that a jury is more than capable of determining, without the aid of statute, regulation, or expert, whether kneeling directly next to a customer, where she could not see him and without warning, is a tripping hazard and thus, a dangerous condition. There is nothing esoteric about Defendant’s actions, or their ability to cause an unsuspecting person such as Plaintiff to fall, that would prevent a juror of common judgment and sense from determining whether the Defendant acted reasonably such that a statute, manual, or regulation is required. While the motion judge may believe that a jury might conclude that this condition was not dangerous, and thus the Defendant is not liable, it is a decision for the jury to make based upon the facts without the need for an expert, statutes, or otherwise. See Hopkins, 132 N.J. at 451.

Notwithstanding, Plaintiff did, in fact, present the expert opinion of human factors expert, Mr. Wilcox. However, the Court discounted Mr. Wilcox’s opinions simply because he did not rely upon a “specific statute, regulation, rule or direct

manual” (1T 19:13-22) This is simply not the standard. As set forth in more detail in Point II below, using his over forty (40) years of experience in the field of human factors, as well as cited literature, Mr. Wilcox employed standard human factors methodology to explain why an outstretched leg outside Plaintiff’s field of vision created a dangerous condition. (Pa64-66) There is no such requirement that an expert rely upon a statute, regulation, rule, or manual. Instead, N.J.R.E. 703, which governs expert opinions, only requires that the expert base his opinions on facts or data derived from (1) the expert’s personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence, but which is the type of data normally relied upon by experts in forming opinions on the same subject.” Here, again as set forth more fully below, Mr. Wilcox relied upon the facts derived from the evidence as well as information (including his experience and the publications referenced in his report), which are relied upon by experts in his field.

Furthermore, simply because New Jersey has not legislated on the issue of supermarket shelf stocking, or because Defendant failed to create any in store manual, does not mean that a dangerous condition cannot exist. As such, it is respectfully requested that Order granting summary judgment be reversed.

B. WHETHER DEFENDANT’S ACTIONS WERE REASONABLE, WHEN VIEWED IN LIGHT OF THE EVIDENCE PRESENTED, IS A QUESTION OF FACT TO BE DETERMINED BY A JURY.

The motion judge’s determination that “[n]othing appears to be outside the normal operation of a” supermarket, and thus there can be no dangerous condition, is not an issue to be determined as a matter of law, but rather an issue for the fact-finder. (1T 20:16-25) Notwithstanding, such holding fails to appreciate the key piece of evidence that created this dangerous condition and caused Plaintiff’s fall – Plaintiff’s ability to see the condition. Courts have held that a condition, even if designed properly and otherwise considered obvious, can become dangerous if the plaintiff cannot adequately visualize the condition. See Campbell v. Hastings, 348 N.J. Super. 264, 270-71 (App. Div. 2002)(reversing summary judgment where the plaintiff could not clearly see the hazard, and the hazard could have been avoided with minimal effort by the defendant); see also Berger v. Shapiro, 30 N.J. 89 (1959); Sussman v. Mermer, 373 N.J. Super. 501, 507-08 (App. Div. 2004). In Campbell, the Court held that while a sunken foyer in and of itself was not a dangerous condition, because it was unlit, the risk of harm was reasonably foreseeable. 348 N.J. Super at 271. In Berger, the defendant argued that the absence of a brick from the top step was not a dangerous condition because it was “open and obvious” to the plaintiff and one in which the plaintiff would have been expected to see and avoid. 30 N.J. at 99. The Court, however, found that because the defendant was aware that the

plaintiff could not see the step due to her deficient eyesight, the jury could find that the defendant should have anticipated the hazard. Id. at 99-100. The Court further dismissed the defendants' claim that he did not realize that "the condition held any risk, much less an unreasonable one." Id. at 100 (internal quotations omitted). The Court held that "it was for the jury to determine whether or not a reasonable person would realize it created a hazard." Ibid.

Similarly, here, what created the dangerous condition is the act of kneeling directly beside the Plaintiff, without any notice or warning, *outside Plaintiff's field of vision*. As previously stated, it is undisputed that at the time Plaintiff approached the refrigerated area, the employee was to the right of her with a cart in between, several feet away. (2T 26:22-27:4, 27:13-18) It is similarly undisputed that while Plaintiff was facing the refrigerator, the employee moved directly next to Plaintiff and knelt down with an outstretched leg. (Id. at 27:5-8, 27:19-24, 28:3-6, 28:17-23) The employee gave Plaintiff no notice or warning that he was kneeling, outside her line of vision, within a foot of her, or that he had even moved at all. (See id. at 27:21-28:2) Therefore, while kneeling to stock shelves may be "normal" at Stop and Shop, kneeling directly next to an unsuspecting customer, outside their line of vision and without any warning, is a dangerous condition. At the very least, however, it creates an issue of fact warranting submission to the jury.

Additionally, to further address the motion judge's decision, the reason why it would not be an issue if another customer were kneeling to obtain an item off a lower shelf is because in those circumstances, the store would not have created the condition. Similarly, it likewise would not be at issue "if that employee was simply walking, not kneeling in an aisle, and simply walking or standing up, stocking the shelves and - - and the plaintiff ran into him and - - and fell" is because, in that circumstance, Plaintiff would have been able to *visualize* the employee in those examples. (1T 19:23-20:5; 20:18-20) Here, however, the employee unknowingly moved and was kneeling down and thus was a concealed hazard within Defendant's control and of its own creation. Accordingly, as in Campbell, Sussman, and Berger, because Plaintiff could not see the Defendant's employee, and no warning was provided, it is not only foreseeable but likely that kneeling within a foot of a customer created a dangerous condition.

C. WHEN VIEWING THE EVIDENCE IN PLAINTIFF'S FAVOR, A REASONABLE JURY, USING THEIR OWN COMMON SENSE, COULD CONCLUDE THAT DEFENDANT CREATED A DANGEROUS CONDITION THAT CAUSED PLAINTIFF TO TRIP AND FALL.

Defendant's duty is defined by the general duty owed by the owner of a business to its invitees "to discover and eliminate dangerous conditions, to maintain the premises in safe condition, *and to avoid creating conditions that would render the premises unsafe.*" Nisivoccia, 175 N.J. at 563 (emphasis

added). Notwithstanding, Defendant admits that it has a duty to ensure that employees stock merchandise in a reasonably safe manner to customers. A jury could rationally find, based upon their own common sense, that an employee kneeling directly next to a customer, outside the customer's line of vision and without any warning, is not reasonably safe and created a foreseeable and unreasonable risk of harm.

In Craggen v. IKEA USA, 332 N.J. Super. 53, 58 (App. Div. 2000), the plaintiff was injured when he tripped on string while loading materials into his vehicle. Id. at 57. The Court found that it was reasonably foreseeable that customers would not properly coil the string in its container after each use, thus accumulating in the parking lot and creating a tripping hazard. Id. at 63. In Gil v. Alverado, 2018 N.J. Super Unpub. LEXIS 1315 (App Div. June 6, 2018)(Pa129-34), the Court held that whether a hose left across a pathway constituted a dangerous question was an issue to be determined by the jury, even if there was evidence that the plaintiff was aware of the hose in her path of travel. Id. at *12-13. (Pa133-34)

Furthermore, a jury is permitted, and in fact instructed, that they may consider circumstantial evidence in deciding cases. Model Civil Jury Charge 1.12J. Specifically, jurors are instructed that they “are permitted to draw inferences from the evidence . . .” and that they may use their logic, their collective common

knowledge, and their *common sense* “when determining what inferences can be made from the evidence.” Id. (emphasis added)

It is common sense, and certainly within the purview of a jury, whether kneeling within one foot of a customer, outside their field of vision and without warning posed a dangerous condition. It is without question that most, if not all potential jurors, have experience shopping in a grocery store and are familiar with the conditions therein. As such, most jurors are familiar with what safety measures must be taken to keep aisles safe for customers. An employee’s outstretched leg is no different than had the employee left any other item next to the Plaintiff without warning. Indeed, if the employee placed a bag of potatoes next to the Plaintiff without warning, it would be considered a tripping hazard. Common sense dictates, and certainly permits a finding by a reasonable jury, that an outstretched leg, within only one (1) foot of an unsuspecting customer, without any warning, is a tripping hazard just as any other item left on the floor would be. Certainly, if accumulated string or a hose could be considered a tripping hazard, so could an employee’s leg, stretched out directly next to an unsuspecting customer. See Craggen, 332 N.J. at 58; Gil v. Alverado, 2018 N.J. Super Unpub. LEXIS 1315 (App Div. June 6, 2018)(Pa129-34) As such, it is for the jury to determine if the Defendant’s employee created a dangerous condition and if he acted reasonably under the circumstances.

Furthermore, Defendant's contention that its employees are permitted to stack shelves in the manner the employee was at the time has no relevance. If Defendant chooses to conduct their business in this manner, then it must do what is reasonably necessary to protect the customer from the risk of injury that is commensurate with that risk. In fact, Defendant could have exercised reasonable care with such minimal effort by simply acting as common sense would dictate and warning the unsuspecting Plaintiff that he was kneeling next to her. See Sussman, 373 N.J. Super. at 507. However, he failed to do so and as a result, Plaintiff was injured.

D. ALTHOUGH NOT SPECIFICALLY ADDRESSED BY THE MOTION COURT IN ITS DECISION, FOR THE SAME REASONS SET FORTH IN SECTION "B" ABOVE, DEFENDANT'S ARGUMENT THAT THE DANGEROUS CONDITION CREATED BY ITS EMPLOYEE WAS "OPEN AND OBVIOUS" SIMILARLY FAILS.

While not expressly addressed by the Court in its decision, contrary to Defendant's assertion, the dangerous condition here was not "open and obvious." In fact, the cases cited by Defendant in its motion for summary judgment are completely distinguishable to this case and only further illustrate that whether a dangerous condition exists is a question for the jury.

For example, in the federal district court case, Lieberman v. Carnival Cruise Lines, 2015 U.S. Dis. LEXIS 153535 (D.N.J. Nov. 13, 2015)(Pa74-86) relied upon by Defendant, the Court held that the dangerous condition is not "open and obvious" when it is difficult to see or where there is no evidence that the plaintiff should have been aware of the condition. Id. at *15. The Court there further noted that *whether*

a dangerous condition is obvious is a question for the jury. Ibid. (emphasis added); see also McGrath v. American Cyanamid Co., 41 N.J. 272 (1963)(holding that a plaintiff's claim is not barred even if he or she knew of the hazard as it is for the jury to determine whether the plaintiff failed to use the care of a reasonably prudent person under the circumstances).

Other cases cited by Defendant have absolutely no bearing on this case as there is no evidence that Plaintiff was aware of the dangerous condition, i.e. that the employee had moved and was kneeling down one foot beside her. See Jimenez v. Applebee's Neighborhood Grill & Bar, 2015 N.J. Super Unpub. LEXIS 430 at *9 (App Div. Mar. 4, 2015)(Pa87-91)(where, unlike here, the evidence clearly demonstrated that the plaintiff was aware of the risk of injury from the hot plate of food as he testified that the plate was "sizzling, smoking and 'real hot' and the plate was no longer in the possession of the defendant, but was solely in the plaintiff's control); Tighe v. Peterson, 175 N.J. 240 (2002)(the plaintiff, who was a social guest was related to the owner of the property, had used the pool twenty (20) times prior to the accident, and conceded that he was aware of the dangerous condition); Hackett v. Somerset Exec. Square, 2014 N.J. Super. Unpub. LEXIS 678 (App. Div. Mar. 27, 2014)(Pa92-93)(the plaintiff testified that he was aware of the restricted space and had previously struggled to pass through); Mathews v. University Loft Co., 387 N.J. Super. 349 (App. Div. 2006)(a product liability case involving an adult college

student's fall off of an obviously raised loft bed); Longo v. Aprile, 374 N.J. Super. 469, 474 (App. Div. 2005)(“dangers inherent with working alone on a roof, eight feet above the ground, together with those associated with the configuration of the roof, including its narrow corner and drip ledge, were self-evident.”); Lokar v. Church of the Sacred Heart, 24 N.J. 549 (1957)(property owner not liable when a chain blocking off a driveway was apparent and the cause of Plaintiff's injury was the negligence of a third-party).

Here, there is no evidence that the dangerous condition was “open and obvious.” Instead, as previously stated, the evidence clearly demonstrates that while Plaintiff initially saw the employee kneeling stocking shelves further down in a different location, while she was facing the refrigerator, the employee moved directly next to her (within one foot), kneeling with one leg outstretched, where Plaintiff could not see him. (2T 25:2-14; 26:22-27; 27:5-8; 27:13-18; 27:19-24-28:6; 28:17-23) Similarly, Plaintiff testified that she never saw the employee move and certainly was unaware that he moved directly next to her. (Ibid.) Nevertheless, any contention that Plaintiff should have been aware of the risk and/or was comparatively negligent are factual determinations to be made by a jury. See Gil v. Alverado, 2018 N.J. Super Unpub. LEXIS 1315 (App Div. June 6, 2018) (Pa129-34).

Furthermore, Defendant's argument that Plaintiff should have been aware of the employee's location, while without any evidential basis, only further demonstrates that an issue of fact exists warranting submission to a jury.

E. WHILE ALSO NOT ADDRESSED BY THE MOTION COURT, NOTICE IS NOT AT ISSUE BECAUSE DEFENDANT CREATED THE DANGEROUS CONDITION.

While the issue was not addressed in the motion judge's decision, it is undisputed that Defendant's employee³ created the dangerous condition and, therefore, "notice" is not required. "Notice, either actual or constructive, is not required where a defendant through its agents and employees creates a dangerous condition." Smith v. First Nat'l Stores, Inc., 94 N.J. Super. 462, 466 (App. Div. 1967). In Smith, the plaintiff used the defendant store's restroom; upon leaving, he slipped and fell down a flight of stairs due to sawdust tracked by the store's employees. Id. at 464-65. The court found "[i]t was circumstantially inferable that the presence of the sawdust on the stairway was substantially attributable to such use and, therefore, that any danger which may have inhered in the tracking of greasy sawdust . . . was created by defendant's employees." Id. at 465. Under those conditions, the court concluded "[n]otice, either actual or constructive,

³ While not addressed by Defendant in its motion for summary judgment, or the motion judge in his decision, it is undisputed that Plaintiff tripped over the Defendant's employee who was acting within the scope of his employment. Therefore, Defendant is vicariously liable under the doctrine of respondeat superior. DiCosala v. Kay, 91 N.J. 159, 168-69 (1982); Mavrikidis v. Petullo, 153 N.J. 117, 133-134 (1998).

is not required where

a defendant through its agents and employees creates a dangerous condition." Id. at 466. Here, the dangerous condition was clearly created by the employee and thus, proof of notice is not required.

POINT II

PLAINTIFF'S EXPERT, STEVEN B. WILCOX, PROVIDES THE "WHY AND WHEREFORE" FOR HIS OPINIONS AND, THEREFORE, SHOULD BE PERMITTED TO TESTIFY (Pa1; Pa2)⁴

While Plaintiff contends, as set forth in Point I above, that the issues in this case, specifically whether a dangerous condition existed, is not so esoteric in nature such as to require expert testimony, should the Court deem it necessary, Mr. Wilcox should not be barred from testifying because he properly provided the “why and wherefore” for his opinions.

N.J.R.E. 703 is intended to permit expert opinion based on “facts or data derived from (1) the expert’s personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence, but which is the type of data normally relied upon by experts in forming opinions on the same subject.” In short, it simply requires the expert to give the “why

⁴ While not specifically addressed by the Court’s November 15, 2024 Order, the report of Plaintiff’s human factors expert, Mr. Wilcox should not be barred as he properly provides the “why and wherefore” for his opinions.

and wherefore” of their opinion. Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002).

The net opinion rule is designed to exclude testimony that is based merely on unfounded speculation and unquantified possibilities. Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997), *certif. denied* 154 N.J. 607 (1998). It requires the expert to give the “why and wherefore” of his opinion. Rosenberg, 352 N.J. Super. at 401; Johnesee v. Stop & Shop Cos., 174 N.J. Super. 426, 431 (App. Div. 1980). However, an expert's opinion is only considered a net opinion when it consists of nothing more than a bare conclusion unsupported by any factual evidence. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). Therefore, ***only if*** the expert offers ***no evidential support*** for his opinion, other than standards that are personal to himself, should the opinion be found inadmissible. Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 102 (App. Div. 2001)(emphasis added).

However, the net opinion rule is not a standard of perfection. The rule does not mandate that an expert organize or support an opinion in a particular manner that opposing counsel deems preferable. An expert’s proposed testimony should not be excluded merely “because it fails to account for some particular condition or fact which the adversary considers relevant.” Creanga v. Jarda, 185 N.J. 345, 360 (2005). The jury alone determines whether and how much of an expert's testimony to accept. Espinal v. Arias, 391 N.J. Super. 49, 58 (App. Div. 2007). Questions regarding the

thoroughness of the expert's methodology is a "subject of exploration and cross-examination at a trial." Rosenberg, 352 N.J. Super. at 402 (quoting Rubanick v. Witco Chemical Corp., 242 N.J. Super. 36, 55 (App. Div. 1990), *aff'd as mod. on other grounds*, 125 N.J. 421 (1991)). As such, "[t]he weight to which an expert opinion is entitled to receive rests with 'the unique role of the jury[,] which is charged with assessing the credibility of all witnesses and determining the weight to be given to their testimony.'" Koseoglu v. Wry, 431 N.J. Super. 140, 160-61 (App. Div. 2013) (quoting City of Long Branch v. Jui Yung Liu, 203 N.J. 464, 491 (2010)).

Mr. Wilcox's report sets forth his opinion that the outstretched kneeling leg of Defendant's employee created a dangerous condition that caused Plaintiff to fall. (Pa65-67) In so opining, Mr. Wilcox relied upon sufficient facts and evidence in the record, his significant experience in the area of human factors, and cited literature in opining that Defendant created a dangerous condition. (Pa64-66) More specifically, Mr. Wilcox explained in his report that three requirements must be met to constitute a trip hazard: 1) it was in the path of travel; 2) it was capable of causing a fall; and 3) it was hidden from the Plaintiff at the time of the fall. (Pa65) Based upon his experience, coupled with the evidence in this case, Mr. Wilcox concluded that the first two requirements were met as the employees leg was clearly in the leg of travel as he was in the aisle, and a leg is capable of causing a fall. (Pa65) Mr. Wilcox also explains, based upon his knowledge, experience, the evidence in this case, and

supporting literature, that the third requirement was also met, i.e. that the extended leg was hidden from Plaintiff at the time of her fall. (Pa65-67) In so opining, Mr. Wilcox explains that based upon human factors (and supported by cited literature in his report), people such as Plaintiff look forward in their direction of travel as opposed to down at their feet. (Pa65-66) Therefore, any ability to see the employee's leg would have only been peripheral, if at all, which has poor acuity. (Pa65-66) As explained by Mr. Wilcox, the fact that the employee was outside her field of vision is supported by the evidence that the employee moved. (Id.) Therefore, while initially she saw the employee and he did not pose a hazard, after he moved, she was no longer able to see him. (Id.) It is further supported by the fact that the employee was kneeling down, outside her central line of vision. (Id.) Based upon this, Mr. Wilcox opined that the outstretched leg constituted a dangerous condition. (Id.)

Therefore, since Mr. Wilcox provides the “why and wherefore” for his opinions, namely basing his opinions on the customary standards in the field as well as the evidence in this case, his report should not be barred.

CONCLUSION

Pursuant to our Court's indulgent summary judgment standard of review, requiring the record to be viewed in the light most favorable to the plaintiff, it is clear that here Plaintiff presented sufficient evidence of a dangerous condition. Polzo v. Cty. of Essex, 209 N.J. 51, 75 (2012). Although Plaintiff's evidence is subject to challenge on credibility grounds, for the purpose of summary judgment, a plaintiff must be accorded every favorable inference. As such, it is respectfully submitted that the motion Court failed to appreciate the totality of the evidence in granting Defendant's motion for summary judgment.

As such, based upon the foregoing, it is respectfully requested that the Court grant the following relief:

- (a) Reverse the November 15, 2024 Order granting Defendant's motion for summary judgment and dismissing Plaintiff's Complaint; and
- (b) Grant Plaintiff's motion for reconsideration; and
- (c) Remand this matter for trial.

Respectfully submitted,
THE VESPI LAW FIRM
Attorneys for Plaintiff, Cvetanka Neceva

By: Jared Drill
JARED E. DRILL, ESQ.

Date: May 5, 2025 April 29, 2025

CVETANKA NECEVA,

Plaintiff/Appellant,

vs.

STOP AND SHOP #0820, ABC
CORPORATIONS 1-10, ABC
MAINTENANCE 1-10, XYZ
MANAGEMENT 1-10 and JOHN/JANE
DOES 1-10 (last five names being
fictitious and unknown),

Defendant/Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-001615-24

CIVIL ACTION

On Appeal from:
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO: BER-L-6819-22

Sat Below:
Hon. David V. Nasta, J.S.C.

**BRIEF FOR
DEFENDANT / RESPONDENT
THE STOP & SHOP SUPERMARKET COMPANY LLC**

Of Counsel: Daniel I. Winter, Esq.
Attorney ID: 00192207
Dwinter@cullenllp.com

On the Brief: Joseph A. Keane, Esq.
Attorney ID: 276342018
Jkeane@cullenllp.com

CULLEN AND DYKMAN, LLP
433 Hackensack Avenue, 12th Floor
Hackensack, New Jersey 07601
(201) 488-1300
Attorneys for Defendant/Respondent,
The Stop & Shop Supermarket
Company LLC
i/s/h/a Stop and Shop #0820

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Preliminary Statement

This matter arises out of an incident that occurred on November 30, 2021, in the Stop & Shop Supermarket located in Ridgewood, New Jersey. The plaintiff/appellant, Cvetanka Neceva (hereinafter “Appellant”), alleges that she was caused to trip and fall over an employee of defendant, The Stop & Shop Supermarket Company LLC (hereinafter “Respondent” or “Stop & Shop”). This occurred while the employee was kneeling beside her, stocking the refrigerator she was standing before.

Indeed, the Appellant testified to seeing the employee on the far side of a U-boat cart, and then, while she was standing in front of the refrigerator, the employee walked over to the near side of the U-boat cart, stood approximately one-foot away from her, knelt down, and began stocking the refrigerator. He did not block the entire aisle or prevent the Appellant from exiting, as the other side of the aisle was open.

Stop & Shop filed a Motion for Summary Judgment arguing that an incidental contact with a kneeling employee stocking shelves in the normal course of business is not a dangerous condition, thus the Appellant could not establish a prima facie case of negligence. In a thorough and thoughtful opinion on the record, the Honorable David V. Nasta, J.S.C. granted Stop & Shop’s Motion for Summary Judgment on November 15, 2024. The trial court gave every inference to the nonmoving party, the Appellant, and, after reviewing the record and relevant case law, determined that the facts were so one-sided that there was no genuine issue of material fact in dispute for a jury to determine. This was because an incidental contact with a kneeling employee did not constitute a dangerous condition as he was simply stocking a shelf and not

doing anything inherently dangerous. The trial court's opinion was not based solely on an absence of a statute, regulation, manual or rule regarding the standard for stocking shelves in a grocery store or supermarket, but that the undisputed material facts showed Stop & Shop did not create a dangerous condition.

In the Appellant's Motion for Reconsideration, the Appellant failed to present anything that would lead the trial court to conclude that its decision was palpably incorrect, unreasonable, or overlooked controlling precedent under Rule 4:49-2. Further, the Appellant raised for the first time the argument that the Appellant's alleged inability to see the kneeling employee was evidence of a dangerous condition. The trial court considered the motion papers and found the Appellant failed to provide new evidence and that the Appellant's arguments properly before it on reconsideration were no different than the arguments previously made in opposition to the Motion for Summary Judgment. As such, the trial court denied the motion.

This appeal of the trial court's Order denying the Motion for Reconsideration followed. The Notice of Appeal only makes reference to appealing the trial court's January 17, 2025 Order denying the Motion for Reconsideration. As in the underlying motion for reconsideration, here, the Appellant has again failed to support her claims that the trial court overlooked controlling precedent, new evidence or where the court erred. As such, the appeal of the decision denying the Appellant's motion to reconsider must be denied.

Although not included in the Appellant's Notice of Appeal, the Appellant's brief also seeks the Appellate Division to review the trial court's decision granting

summary judgment in favor of Stop & Shop. While this appears to be procedurally deficient, if the Appellate Division chooses to undertake a review of this decision as well, the trial court properly granted summary judgment in favor of Stop & Shop because the undisputed facts supported that this incidental contact with a kneeling employee was not a dangerous condition.

The Appellant claims that allowing the trial court's decisions to stand would somehow "not only shift the burden to the non-moving party (here the Plaintiff) but would require the plaintiff in a non-technical case to establish a standard of care." (Appellant Brief at page 3). This is simply not true. The Appellant failed to dispute Stop & Shop's material facts with competent evidence, thus the motion for summary judgment was granted. The burden of proof did not change. Similarly, the Appellant could not provide any competent evidence that a grocery store clerk stocking a shelf was a dangerous condition.

In this appeal, the Appellant is actually requesting this Court to exponentially expand the liability of retail businesses in New Jersey. The Appellant asks this Court to find that an incidental contact between a customer and an employee safely performing the duties of the job, can give rise for a potential personal injury lawsuit if a customer alleges injuries. This would remove a customer's obligation to use their reasonable faculties to avoid injury. Further, a decision in favor of the Appellant would expand premises liability law in New Jersey far beyond our legislature's intentions. For the reasons set forth herein, it is respectfully requested that this Appeal be denied and the trial court's decisions remain undisturbed.

Procedural History

On December 23, 2022, Appellant filed a Complaint in the Superior Court of New Jersey, Bergen Vicinage. (Pa12-23.) On February 15, 2023, Stop & Shop filed an Answer. (Pa24-37).

Stop & Shop filed a Motion for Summary Judgment on September 24, 2024. (Pa3-4). Appellant filed opposition on October 23, 2024. (Pa99-101.) Stop & Shop filed a reply to the Appellant's opposition on November 4, 2024. (Pa111-113). The trial court granted the Motion for Summary Judgment after hearing oral argument and set forth its oral opinion on the record on November 15, 2024. (1T, Pa1).

The Appellant filed a Motion for Reconsideration of the Order Granting Summary Judgment on December 5, 2024. (Pa114-115). Stop & Shop filed opposition to the Motion for Reconsideration on January 9, 2025. (Pa2). The Appellant did not file a reply to Stop & Shop's opposition. (Pa2.) The trial court denied the Appellant's Motion for Reconsideration in its January 17, 2025 Order. (Pa2). The reasons for denying the motion were set forth in the Order: "for failure to provide new evidence" and "Plaintiff's moving papers show no differences in their arguments made..." (Pa2.)

The Appellant filed this appeal to the Superior Court of New Jersey, Appellate Division, which only seeks to appeal the trial court's decision denying reconsideration, per the Appellant's Notice of Appeal. Stop & Shop now files the within opposition to the appeal.

Respondent's Statement of Facts

Appellant alleges that, on or about November 30, 2021, she was at the Stop & Shop in Ridgewood, New Jersey and was caused to fall over an employee who was kneeling down to stock shelves. (Pa41.)

Before the incident, the Appellant first saw the Stop & Shop employee stocking the refrigerator to the right of her, on the far side of the U-boat cart, in front of the same refrigerator she was selecting her grocery item from. (2T at 26:7 – 27:18.) Then, immediately before she tripped, the Appellant failed to notice the employee had moved to the near side of the U-boat cart, directly to her right:

7 Q What position was the man in that -- you

8 said --

9 A On the right -- on the right side of me.

10 When I was standing facing the refrigerator was boxes,

11 and that man was on the right side first when I saw

12 him stocking the -- kneeling and stocking the shelves

13 with the merchandise.

14 And took me couple seconds, I don't know,

15 until I choose flavor of kombucha. And I totally -- I

16 turn around myself to get to the register. I don't

17 see that man coming on the front and the next to me.

18 I turn around myself. He was -- he kneeling

19 again with the one leg little bit back. I -- I turn

20 around myself on the right side and trip from his leg

21 and fell down.

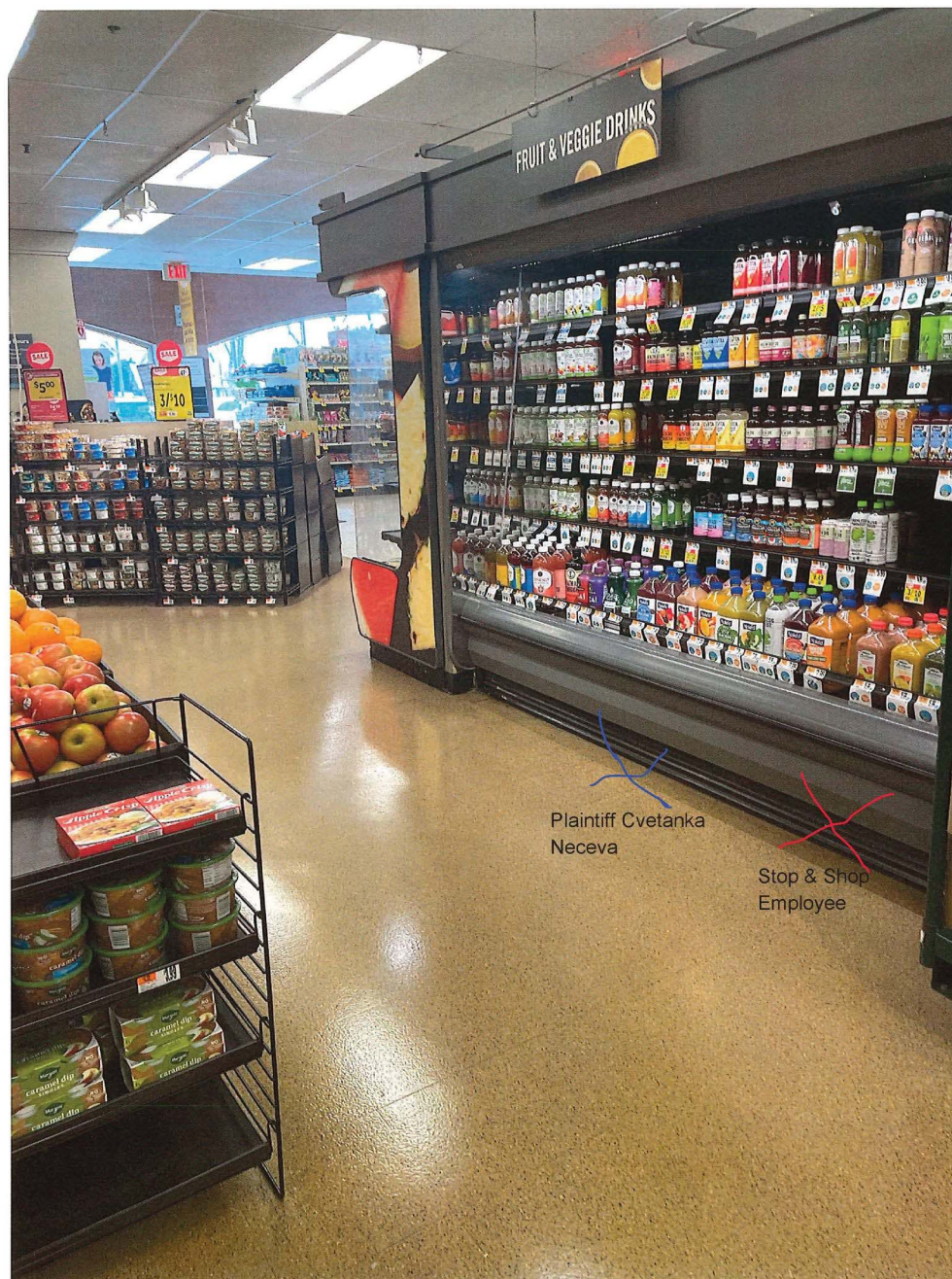
[2T at 26:7-21.]

The Appellant was standing in front of the refrigerator for between thirty seconds and one minute before the incident occurred. (2T at 28:24 – 29:2.) In that time, the employee walked over to the side of the U-boat where the Appellant was standing, knelt down next to her, outstretched one leg, and continued stocking the refrigerator. (2T at 26:7 – 22; 28:17 – 29:8.)

The Appellant estimated that the Stop & Shop employee was kneeling one foot from her. (2T at 28:7 – 12.) While the employee was kneeling beside the Appellant, the employee was “getting boxes and putting stuff in the refrigerator” and his arms were moving. (2T at 35:4 – 10.)

The Appellant testified that she did not wear prescription glasses and never had surgery on her eyes, (2T at 20:23 to 21:1.) Thus, she was perfectly capable of seeing the employee.

The Appellant then turned to her right, towards the Stop & Shop employee, took a step, and tripped on the employee’s outstretched leg. (2T at 26:18 – 21.) At her deposition, the Appellant identified where she was standing, where the Stop & Shop employee was kneeling, and where the U-boat cart was located, immediately preceding the trip and fall in the marked exhibit below. (2T at 30:13 – 32:15). The Appellant did not report the incident to Stop & Shop until one month after it occurred. (T2 at 41:17 to 20).



Kimberly Vickers was the Perishable Manager of the Ridgewood Stop & Shop at the time of the incident. (3T at 7:3-20). Ms. Vickers testified that Stop & Shop's policy for stocking shelves while the store is open is to use U-boat carts to transport merchandise and be neat when stacking merchandise. (3T at 11:10 – 24.) Further,

she testified that aisles are not closed to customers while merchandise is being stocked using the U-boat carts. (3T at 11:25 – 12:3.) Finally, employees are permitted to use U-boat carts when the store is open and customers are in the store. (3T at 12:9 – 11.)

Ms. Vickers testified that she was aware of the Appellant's incident but that over the course of her twenty-year career she was **not** aware of any other incidents in which a customer tripped over an employee of Stop & Shop. (3T at 14:30 to 15:10.)

Stephen B. Wilcox, Ph.D. is named as the Appellant's "human factors" expert. (Pa61-70.) Dr. Wilcox opined that the extended leg of the Stop & Shop employee constituted a "trip hazard" because it was in the path of the Appellant's travel, was physically capable of causing a fall, and it was hidden from the Appellant at the time of the fall. (Pa66-67.) Dr. Wilcox, concluded that the Appellant did not notice the hazard because:

- i. The Plaintiff was looking where she was going rather than down at her feet.
- ii. The retail environment of Stop & Shop provided an array of visual distractions.
- iii. The employee in question moved.
- iv. The Plaintiff had no reason to expect such a hazard in her path of travel.
- v. The employee's posture created a classic trip hazard.
[Pa66-67.]

Dr. Wilcox's report does not have a scientific basis, any scientific testing, and does not reference any standards regarding the materials he used informing his opinion. (Pa66-67.)

Legal Argument

I. THE TRIAL COURT CORRECTLY DENIED THE APPELLANT'S MOTION FOR RECONSIDERATION BECAUSE THE APPELLANT DID NOT DEMONSTRATE THE COURT ERRED AND THE APPELLANT IMPROPERLY RAISED NEW LEGAL ARGUMENTS (Pa2).

The Appellant filed a motion for reconsideration under Rule 4:49-2 to alter or amend the trial court's Order dated November 15, 2024 granting Stop & Shop's motion for summary judgment. (Pa2). The motion for reconsideration was partially based on the failure of the trial court to consider the evidence that the kneeling employee was a dangerous condition and partially on the new legal argument that the kneeling employee was "outside her field of vision."

Reconsideration is not warranted where the apparent purpose of the motion is for the movant to express disagreement with the Court's initial decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401-02 (Ch. Div. 1990) ("A litigant should not seek reconsideration merely because of dissatisfaction with a decision of the Court."). Essentially, "a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process." *Ibid.*

Reconsideration should be utilized only for those cases where (1) the court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the court either did not consider, or failed to appreciate the significance of probative, competent, evidence." *Ibid.* But if a litigant wishes to bring new or additional information to the court's attention, which it could not have provided, on

the first application, the court should, in the interest of justice (and in the exercise of sound discretion), consider the evidence. Nevertheless, motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour. Thus, the court must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration." *Ibid.*

Said another way, a litigant must initially demonstrate that the court acted in an arbitrary, capricious, or unreasonable manner before the court should engage in the actual reconsideration process. D'Atria, *supra*, 242 N.J. Super. at 401. The arbitrary, capricious or unreasonable standard is the least demanding form of judicial review. *Id.* One appellate panel expressed the standard this way, "[T]he magnitude of the error cited must be a game-changer for reconsideration to be appropriate," and went on to quote the language from D'Atria, making clear that the court must first decide whether the reconsideration standard is met before engaging in reconsideration itself. Palombi v. Palombi, 414 N.J. Super. 274, 289 (App. Div. 2010).

a. The trial court appropriately did not consider the Appellant's new legal argument regarding the Appellant's "field of vision" that were raised for the first time in her Motion for Reconsideration.

Appellant improperly raised for the first time the argument that her ability to physically see or visualize the alleged dangerous condition is a question of fact for a jury. (Pa114 – 117). However, this argument was improperly before the trial court as it was raised for the first time on a motion for reconsideration and was not raised in the original motion. Lahue v. Pio Costa, 263 N.J. Super. 575, 598 (App. Div. 1993). If a litigant "wishes to bring new or additional information to the court's attention, *which that litigant could not have provided on the first application*, the court should,

in the interest of justice, and in the exercise of sound discretion, consider the evidence.” D'Atria v. D'Atria, 242 N.J. Super. 401 (Ch. Div. 1990). However, the Appellate Division has held that a motion is properly denied if based on unraised facts known to the movant prior to the entry of judgment. Del Vecchio v. Hemberger, 388 N.J. Super. 179, 188-189 (App. Div. 2006). Further, a motion based on new legal arguments that were not presented to the court in the underlying motion is also properly denied. Medina v. Pitta, 442 N.J. Super 1, 18 (App. Div.) certif. den. 223 N.J. 555 (2015).

Indeed, there is no reason this new legal argument could not have been raised in the first application in opposition to the Motion for Summary Judgment. Discovery had concluded and no new evidence was introduced following the trial court’s decision to grant summary judgment. As such, the Appellant had every opportunity to present this argument in opposition to the Motion for Summary Judgment and failed to do so. Accordingly, the trial court properly denied the Appellant’s motion for consideration. (Pa2.)

If the court were to consider this new legal argument, there is nothing in the record to indicate the area of the incident was not well lit or the Appellant’s eyesight was deficient in any way as held to be potential dangerous conditions in the cases relied upon by the Appellant. See Campbell v. Hastings, 348 N.J. Super. 264, 270-71 (App. Div. 2002) (an unlit foyer was cause of injury to plaintiff) and Berger v. Shapiro, 30 N.J. 89 (1959) (defendant, a homeowner, was aware plaintiff, a guest, had deficient eyesight, and was using stairs with a missing step). Indeed, it is undisputed the Stop

& Shop aisle was well-lit and the Appellant testified that she did not wear prescription glasses and never had surgery on her eyes. (2T at 20:23 to 21:1.) As such, the argument that the Appellant could not “visualize” the alleged dangerous condition of the kneeling employee is not supported by the facts of this case.

Appellant also argued for the first time that the kneeling employee was a “concealed hazard.” Clearly this argument is not persuasive as the Appellant and employee were in a well-lit area of the store while the employee was actively stocking shelves approximately one foot from the Appellant. The Appellant’s failure to use the ordinary use of her faculties does not make the employee concealed. Just as a person purposely closing their eyes and tripping over an object does not make the object tripped on a “concealed hazard.”

As these arguments are not based on newly discovered evidence and could have been timely raised in opposition to the Motion for Summary Judgment, they were not considered by the trial court on reconsideration and should not be considered by this court on appeal. Even if they are considered, they do not show that the trial court’s decision was unreasonable or that it failed to consider new or overlooked evidence.

b. The Appellant failed to demonstrate that the trial court’s decision to deny the Motion for Reconsideration was based on a plainly incorrect reasoning.

The Appellant did not demonstrate that the court acted in an unreasonable manner in making its decision. The Appellant rehashed the same arguments in the Motion for Reconsideration as those made in her opposition papers to the Motion for Summary Judgment. She asserted that determination of a dangerous condition is a question of fact for the jury – an argument that was raised in the opposition papers

and at oral argument. Similarly raised again was whether a reasonable jury could conclude that Stop & Shop created a dangerous condition. Appellant incorrectly asserts what the basis of the trial court's decision was and claims the incorrect standard of review was used. In the trial court's decision, the trial court determined that an employee stocking shelves was not a dangerous condition based on a thorough review of the motion papers, opposition, and after hearing oral argument. (T1 at 18:18 to 20:25).

None of the Appellant's arguments for reconsideration cited to an error of such magnitude that would make reconsideration appropriate. Indeed, the reasons for denying the motion were set forth in the Order: "for failure to provide new evidence" and "Plaintiff's moving papers show no differences in their arguments made..." (Pa2.) As such, the trial court properly determined that the standard for reconsideration was *not* met and the Order denying reconsideration should not be vacated.

II. THE TRIAL COURT'S DECISION TO GRANT SUMMARY JUDGMENT WAS BASED ON APPELLANT'S LACK OF SUPPORTING EVIDENCE THAT A KNEELING EMPLOYEE CONSTITUTED A DANGEROUS CONDITION AND DID NOT APPLY A "HEIGHTENED STANDARD" REQUIRING A STATUTE, REGULATION, OR EXPERT TESTIMONY (Pa1, 1T).

If the Appellate Division chooses to review the trial court's decision to grant summary judgment in favor of the respondent, the Appellant still has not presented any material facts to dispute that an incidental contact with a Stop & Shop employee does not create a dangerous condition. On appeal, the disposition of a summary judgment motion is de novo, applying the same standard used by the motion judge.

Townsend v. Pierre, 221 N.J. 36, 59 (2015). Like the motion judge, the Appellate Division views "the competent evidential materials presented . . . in the light most favorable to the non-moving party, [and determine whether they] are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013). If "the evidence 'is so one-sided that one party must prevail as a matter of law,'" courts will "not hesitate to grant summary judgment." Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 540 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

While a court must view the evidence in the light most favorable to the non-movant, "[c]ompetent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'" Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009)). A motion for summary judgment will not be defeated by bare conclusions lacking factual support, Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011), self-serving statements, Heyert v. Taddese, 431 N.J. Super. 388, 414 (App. Div. 2013), or disputed facts "of an insubstantial nature." Pressler & Verniero, Current N.J. Court Rules, cmt 2.2 on R. 4:46-2 (2022).

Appellant has failed to present sufficient, admissible evidence to establish the existence of any dispute as to any material fact that would justify a trial on this matter. As the undisputed material facts show, the Appellant has failed to provide any evidence that Stop & Shop's negligence was the proximate cause of the Appellant's injury. Specifically, the Appellant relies on speculation that a jury *may*

find in its favor that a kneeling Stop & Shop employee constituted a hazardous condition. The Appellant has failed to present any competent evidential materials to support this claim that are “sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor” of the Appellant as required under Brill at 540. Accordingly, summary judgment was appropriately granted and the trial court’s decision should not be disturbed.

Respondent, Stop & Shop, is entitled to summary judgment as the Appellant cannot establish a prima facie case of negligence. It is fundamental in New Jersey law that in any case founded upon negligence, the proofs ultimately must establish that the defendant breached a duty of reasonable care which constituted a proximate cause of the plaintiff’s injuries. Brown v. Racket Club of Bricktown, 95 N.J. 280, 288 (1984). It is axiomatic that “the mere showing of an accident causing the injury sued upon is not alone sufficient to authorize the finding of an incident of negligence.” Long v. Landy, 35 N.J. 44, 54 (1961); Wyatt v. Curry, 77 N.J. Super. 1, 6 (App. Div. 1962). The simple fact that Appellant fell is not sufficient in and of itself to present a case to a jury, as negligence involves facts which must be shown and will not be presumed. Wyatt, 77 N.J. Super. at 6. See also Bratka v. Castles Ice Cream Co., 40 N.J. Super. 576, 784 (App. Div. 1956) (“It has often been said that there is a presumption against the fact of negligence; the burden of proving negligence is upon the Plaintiff and must be sustained by proof of circumstances from which Defendant’s want of due care is a legitimate inference”) (citing Hansen v. Eagle-Picher Lead Co., 8 N.J. 133, 139-40 (1951)).

The existence of a possibility of Defendant's responsibility for Appellant's injuries is insufficient to impose liability. Hanson, 8 N.J. at 144. It is incumbent upon Appellant to prove the existence of circumstances that would justify the inference that the injury was caused by Stop & Shop's wrongful act and exclude that it was due to causes unconnected to that defendant. *Id.* at 141. The burden of proving negligence is upon Appellant and must be sustained by proof of circumstances from which Defendant's want of due care is a legitimate inference. *Id.* at 141. The "mere scintilla of evidence rule" does not prevail in New Jersey. An inference can be drawn from proven facts but cannot be based upon a foundation of pure conjecture, speculations, surmise or guess. Long, *supra*, at 54.

As a legal principle, the plaintiff must present competent evidence that establishes negligence, and not mere guesses, conjecture, or surmises. Overby v. Union Landry Company, 28 N.J. Super. 100, 104 (App. Div. 1953). In this case, Appellant has presented no evidence of any negligence on the part of Defendant. In her Complaint, Appellant alleges that she was injured when she was caused to trip and fall at Stop & Shop by "an employee who was on his knees on the floor position in an unsafe manner stocking shelves." (See Pa14-15). This occurrence alone is not sufficient to allow Appellant to bring a claim for negligence, as "the mere showing of an accident causing the injury sued upon is not alone sufficient to authorize the finding of an incident of negligence." Long, *supra*, at 54.

The trial court's decision to grant summary judgment in favor of Stop & Shop was based on the undisputed material facts in this matter that the Appellant could not

prove her prima facie case of negligence. Importantly, a motion for summary judgment will not be defeated by bare conclusions lacking factual support, Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011).

a. The trial court did not apply a heightened standard against the Appellant in granting the Motion for Summary Judgment.

The trial court specifically did not apply a heightened standard to determine whether Stop & Shop created a dangerous condition. Indeed, the trial court in its opinion stated, “this is a classic standard application of whether or not a dangerous condition is created.” (T1 at page 19:10 – 12). While the Appellant offered an expert to opine on whether a dangerous condition existed, the trial court correctly pointed out that the expert did not rely on an specific statute, regulation, rule, or manual for how shelves should be stocked in a supermarket because none of those things exist. (T1 at 19:13-22.)

The Appellant argues that the Court incorrectly relied upon the absence of statutes, regulations, or case law as evidence that the employee was not a dangerous condition. Appellant cites several cases for the proposition that expert testimony is not needed to determine whether a condition was dangerous when it is easily understood by jurors. However, that is not the basis of the Court’s decision. The Court’s decision is based on the Appellant presenting no material facts to dispute that a kneeling employee was **not** a dangerous condition. As the basis of the court’s opinion, the court “questioned counsel,” “reviewed the papers,” and “reviewed the law” and found that “there’s no regulation, statute, or other governing information that indicates how... shelves... should be stocked in a grocery market or in a

supermarket.” (T1 at 18:18 to 19:2). The trial court was simply reviewing the materials presented to determine whether an employee stocking a shelf in the normal course could be considered a dangerous condition. (T1 at 20:6-11). The material facts proved that this incidental contact between the Appellant and the kneeling employee was a “normal interaction in a supermarket” and not a genuine issue of material fact for a jury to consider. (T1 at page 20:15-25.) The Court correctly found that the Stop & Shop employee was performing his duties in the normal course, which is not inherently dangerous.

The Court gave the Appellant every benefit and “stretched in every direction to determine how in the absence of a case, rule, regulation, manual or anything else, this can be determined to be a dangerous condition created by the Stop and Shop with which thus would have caused the injury to the plaintiff.” (1T at page 20:6 to 11.) The court then determined that, “A genuine issue of material fact must be created for a jury to consider. This strains the definition, in The Court’s opinion, of a genuine issue of material fact. This is -- this is normal interaction in a supermarket.” (1T at page 20:13 to 17.)

As set forth in Stop & Shop’s statement of material facts: the Appellant made incidental contact with a kneeling employee stocking a shelf in an aisle of the store. (Pa5-9). The Appellant could not provide a manual to substantiate that the employee was creating a hazardous condition by kneeling to stock the shelf. (T1 at page 8:10 - 15 at page 8:10 - 15). Nor could the Appellant point to a statute or regulation that the employee was violating in kneeling to stock the shelf. (T1 at page 8:16 - 19). In effort

to provide specific New Jersey caselaw, the Appellant referenced “mode of operation” and transient condition cases which the Court did not find persuasive. (T1 at page 8:23 to 9:21, 14:15 to 15:14.) The Court asked whether the Stop and Shop employee was blocking the aisle or preventing the Appellant from exiting the aisle, to which the answer was no. (T1 at page 14:5-12).

The Court then went through the exercise of what would be considered a dangerous condition in the grocery store and provided the Appellant with every opportunity to substantiate her claim that an employee’s outstretched leg or something similar has been determined to be a dangerous condition. (T1 at page 9:23 to 14:12.) The Court found that there was no evidence to support the claim that Stop & Shop or the employee’s actions were inherently dangerous. (T1 at page 20:6 to 25). The Court correctly found that the Appellant could not dispute Stop & Shop’s material facts: the Appellant’s incidental contact with the employee in the normal course of shopping at a grocery store did not create a dangerous condition.

b. The trial court correctly found Stop & Shop’s material facts proved the employee’s actions were reasonable.

The Appellant argues that Stop & Shop failed to present any legal support that it did not create a dangerous condition. This is simply not true. The undisputed facts revealed the Stop & Shop employee was appropriately performing the duties of his job, stocking merchandise, in accordance with Stop & Shop policy. (Pa8-9). The Stop & Shop employee was appropriately using a U-boat cart, was not required to place warning signs in the area, was permissibly stocking merchandise while the store was open, and was kneeling down to stock shelves. (Pa8-9). The employee’s actions were

all reasonable and not in violation of Stop & Shop's policies. Thus, Stop & Shop supported its position that the kneeling employee was not doing anything inherently dangerous or creating a dangerous condition with his actions. Thus, the evidence was so one-sided that summary judgment was appropriately granted in favor of Stop & Shop.

c. The trial court correctly found the undisputed material facts showed the kneeling Stop & Shop employee did not create a dangerous condition.

The Appellant again asserts that whether a dangerous condition existed is a question of fact for a jury because a jury **could** use common sense to determine that the kneeling Stop & Shop employee **may** create a dangerous condition. The simple fact that Appellant fell is not sufficient in and of itself to present a case to a jury, as negligence involves facts which must be shown and will not be presumed. Wyatt v. Curry, 77 N.J. Super. 1, 6 (App. Div. 1962). As a legal principle, the plaintiff must present competent evidence that establishes negligence, and not mere guesses, conjecture, or surmises. Overby v. Union Landry Company, 28 N.J. Super. 100, 104 (App. Div. 1953). In this case, the Court correctly determined that the Appellant has not presented any evidence to dispute Stop & Shop's material facts that showed an incidental contact with a kneeling employee did not create a dangerous condition. Thus, the Court reasonably found that there is no genuine material issue of fact for a jury to determine.

III. THE TRIAL COURT APPROPRIATELY GRANTED SUMMARY JUDGMENT BECAUSE APPELLANT COULD NOT ESTABLISH A PRIMA FACIE CASE OF NEGLIGENCE AS AN INCIDENTAL CONTACT WITH A KNEELING EMPLOYEE WAS NOT A DANGEROUS CONDITION (Pa1, 1T).

It is the plaintiff's burden to establish negligence and to provide evidence that a dangerous condition existed at the time of the accident and that Defendant had notice of same. Appellant has failed to meet this burden. As set forth below, Appellant cannot prove that Defendant had any notice of the subject condition and the store has no duty to warn of any such condition as it would be considered "open and obvious."

a. The Appellant has not proven Stop & Shop breached its duty of care.

In New Jersey, "[b]usiness owners owe to invitees a duty of reasonable or due care to provide a safe environment for doing that which is within the scope of the invitation." Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003). The fundamental elements of a negligence claim are a duty of care owed by the defendant to the plaintiff, a breach of that duty by the defendant, injury to the plaintiff proximately caused by the breach, and damages. Jersey Cent. Power & Light Co. v. Melcar Utility Co. 212 N.J. 576, 594 (2013).

Appellant was a business invitee at Stop & Shop, and it is conceded that Stop & Shop owed a duty of care to Appellant. The required elements of a negligence claim in the context of a business invitee are well-established, such that a plaintiff must prove by a preponderance of the evidence: (1) defendant's actual or constructive notice of a dangerous condition; (2) lack of reasonable care by the defendant; (3) proximate causation of plaintiff's injury; and (4) damages. Filipowicz v. Diletto, 350 N.J. Super. 552, 558 (2002). Appellant has failed to meet her burden of establishing essential elements of her claim, as Appellant has not provided any admissible evidence showing an employee stocking shelves was a hazardous condition or in any way breached its duty of care.

The “scope of a duty owed is a matter of law” and the “determination of the existence of a ‘duty to exercise reasonable care to avoid the risk of harm to another . . . is one of fairness and policy that implicates many factors.” Clohesy v. Food Circus Supermarkets, 149 N.J. 496, 502 (1997) (quoting Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 572 (1996)). Summary judgment is appropriate when the court is “satisfied a rational fact finder could not conclude defendant breached [its] duty of care.” Endre v. Arnold, 300 N.J. Super. 136, 143 (App. Div.), certif. denied, 150 N.J. 27 (1997).

“It is well recognized that the common law imposes a duty of care on business owners to maintain a safe premises for their business invitees because the law recognizes that an owner is in the best position to prevent harm.” Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 306 (2010). “[T]he business entity will not be held liable for injuries sustained ‘so long as [the business] has acted in accordance with the ordinary duty owed to business invitees, including exercise of care commensurate with the nature of the risk, foreseeability of injury, and fairness in the circumstances.’” *Id.* at 307 (quoting Hojnowski v. Vans Skate Park, 187 N.J. 323, 341 (2006)).

While we concede that Stop & Shop does have a duty to ensure that employees stocked merchandise in a reasonably safe manner to customers, Stop & Shop did not breach this duty to the Appellant and thus is not liable. *Importantly, the Appellant has set forth no evidence that the Stop & Shop employee was not exercising due care.* The undisputed facts reveal the Stop & Shop employee was appropriately performing

the duties of his job, stocking merchandise, in accordance with Stop & Shop policy. The Stop & Shop employee was appropriately using a U-boat cart, was not required to place warning signs in the area, was permissibly stocking merchandise while the store was open, and was kneeling down to stock shelves. The employee's actions were all reasonable and not in violation of Stop & Shop's policies. T3 at 11:10 – 12:11; 22:22 – 23:6. Thus, Stop & Shop was acting with due care and did not breach its duty to the Appellant.

b. Stop & Shop's Employee was Open and Obvious and Appellant Failed to Notice Him.

Even assuming, arguendo, that the alleged incident occurred and the kneeling employee was a "dangerous condition," which it was not, Respondent had no duty to warn of any such condition as it would be considered "open and obvious." An invitee may be reasonably expected to identify and take notice of an open and obvious condition without additional warning. Lokar v. Church of the Sacred Heart, 24 N.J. 549, 552 (1957). An open and obvious condition is one that should be self-evident to the invitee. Longo v. Aprile, 374 N.J. Super. 469, 474 (App. Div. 2005); see also Tighe v. Peterson, 175 N.J. 240, 242 (2002) (no legal duty owed by defendants to warn of dangerous condition where guest would observe it by reasonable use of faculties); and Andiorio v. Andiorio, No. A-4063-11T2, 2013 N.J. Super. Unpub. LEXIS 259, at *13 (App. Div. Feb. 5, 2013) (Pa94-98) (tripping hazard presented by vacuum hose lying across floor at home was "open and obvious and plaintiff could have observed it through a reasonable use of her faculties").

A business owner owes no duty to warn patrons of an open and obvious condition. Cunningham v. Briarwood Care and Rehab. Ctr., No. A-1489- 14T2, 2016 N.J. Super. Unpub. LEXIS 566 at *3 (App. Div. Mar. 15, 2016) (Pa72-73) (in affirming summary judgment, court held that mattress on floor was open and obvious hazardous condition); Lieberman v. Carnival Cruise Lines, No. 13-4716, 2015 U.S. Dist. LEXIS 153535 at *15 (D.N.J. Nov. 13, 2015) (Pa74-78) (“Generally, obvious dangers will absolve a defendant of negligence in the premises liability context.”) (citing Restatement (Second) of Torts § 343A); McGrath v. American Cyanamid Co., 41 N.J. 272, 275 (1963); Jimenez v. Applebee’s Neighborhood Grill & Bar, No. A-2247- 13T2, 2015 N.J. Super. Unpub. LEXIS 430 at *9 (App. Div. Mar. 4, 2015) (Pa87-91) (under circumstances presented, business owner did not owe duty to warn patron of dangerous condition that was open and obvious); Hackett v. Somerset Exec. Square, No. A-6344-11T1, 2014 N.J. Super. Unpub. LEXIS 678 at *3 (App. Div. Mar. 27, 2014) (Pa92-93) (“Summary judgment is generally appropriate when the hazardous nature of the condition is obvious.”), certif. denied, 218 N.J. 531 (2014); Mathews v. University Loft Co., 387 N.J. Super. 349, 356 (App. Div. 2006) (in products liability case, defendant “had no duty to warn against the danger of falling from the loft bed because the danger was ‘open and obvious.’”), certif. denied, 188 N.J. 577 (2006).

This case falls directly in line with the series of cases cited above. The kneeling Stop & Shop employee constitutes an open and obvious condition. The Appellant herself testified that the Stop & Shop employee was approximately one foot away from her before she turned into and fell. (T2 at page 28:7 – 12.) Thus, the employee

was clearly visible. Further, the Appellant knew the Stop & Shop employee was stocking the refrigerator. Indeed, she saw him stocking the other side of the refrigerator that she was selected her product from. (T2 at page 26:22 – 27:4.) The Appellant failed to reasonably use her faculties to observe when the employee walked to the side of the refrigerator where she was standing, knelt down, and continued stocking the refrigerator. (T2 at page 27:19 - 24.) Indeed, the employee was a mere foot away from the Plaintiff and she failed to notice him. (T2 at page 28:7 – 12.) To further clarify how close the employee was, the Plaintiff testified to taking a single step to her right and tripping over the employee. (T2 at page 26:18 – 21.)

A reasonable person in the Appellant's position would have noticed a person walking over to her side, standing next to her, proceeding to kneel down, and place merchandise virtually directly in front of her. Any reasonable person would have noticed the kneeling Stop & Shop employee and would certainly have been able to avoid him.

Furthermore, the employee was not "blocking Plaintiff's walking pathway" as the Appellant simply could have turned to the left and freely walk around the employee to the cash register. As the marked exhibit above shows, the Appellant was not boxed in by the employee nor was he preventing her from her sole means of egress.

Stop & Shop also has no duty to warn of such a condition as per Lokar. Since Respondent had no duty to warn of the alleged condition, Appellant cannot prove any violation of a duty owed and her negligence claims must be dismissed.

IV. THE APPELLANT'S EXPERT REPORT SHOULD BE BARRED AS INADMISSIBLE NET OPINION (Pa61-70).

The report and proposed testimony of Appellant's expert, Steven B. Wilcox, Ph.D., is an inadmissible net opinion. New Jersey courts apply the net opinion rule to evaluate the admissibility of expert testimony for purposes of a summary judgment motion. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395 (N.J. 2014) (applying the net opinion rule in the context of a motion for summary judgment to determine the admissibility of an expert's testimony establishing the standard of care in a negligence action). The New Jersey net opinion rule provides:

An expert may not provide an opinion at trial that constitutes mere net opinion. The rule prohibiting net opinions is a corollary of New Jersey Rule of Evidence 703, which provides an expert's testimony may be based on facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts in forming opinions on the same subject. Thus, the net opinion rule can be considered a restatement of the established rule that an expert's bare conclusions, unsupported by factual evidence, are inadmissible. The net opinion rule requires the expert to give the why and wherefore that supports the opinion, rather than a mere conclusion . . . Therefore, an expert offers an inadmissible net opinion if he or she cannot offer objective support for his or her opinions, but testifies only to a view about a standard that is personal. Davis, 219 N.J. at 410 (internal citations omitted).

An expert may rely on what he has learned from professional experience and personal observation, as well as on treatises and documentary support. See Rosenberg v. Tavorath, 352 N.J. Super. 385, 403 (App. Div. 2002). However, "a trial court may not rely on expert testimony that lacks an appropriate

factual foundation and fails to establish the existence of any standard about which the expert testified.” Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 373 (2011). In words, an expert may not simply give his personal opinion without relying on empirical evidence or documented industry standards. Ibid.

Here, Dr. Wilcox offers his personal opinion which is unsupported by factual evidence or scientific testing. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). In his conclusion that the extended leg of the Stop & Shop employee was a trip hazard, four of his five factors supporting this conclusion are merely his opinion and lack any scientific basis.

2. The retail environment provided an array of visual distractions.

The items on grocery shelves are designed to attract the attention of shoppers, providing a distraction that would have further reduced Ms. Neceva's likelihood of looking down at the floor as she turned to go.

3. The employee in question had moved.

Since the employee did not pose a hazard as Mr. Neceva walked up to the refrigerator, she did not have the opportunity to see his extended leg earlier. Once he moved, his leg was in Ms. Neceva's extreme peripheral vision unlike a situation, for example, where such a hazard is approached from a distance.

4. Ms. Neceva had no reason to expect such a hazard in her path of travel.

Ms. Neceva had shopped at the store regularly without encountering such trip hazards.

5. The employee's posture created a classic trip hazard.

Trips are particularly associated with barriers at floor level that are not accompanied by any sort of vertical extent that makes them easier to see. For example, the legs of tables pose no problem when they do not extend beyond the horizontal envelope of the table surface. However, table legs with feet that do extend out from confines of a table surface are known trip hazards.

In sum, the extended leg of the employee met all three criteria mentioned above, making it a trip hazard.

[Pa66.]

Dr. Wilcox provides no scientific evidence that a retail environment is distracting to shoppers. Nor is his conclusion that because the employee moved did

he pose a hazard to the Appellant. His opinion on the Appellant's expectations and prior experience is merely his opinion. Lastly, there is no scientific support or basis for the proposition that the employee's posture created a "classic trip hazard." (Pa66.)

As the undisputed material facts show, Appellant's expert report must be deemed inadmissible net opinion. Dr. Wilcox's unsupported findings are similarly unavailing in creating a question of fact as to any liability on the part of Stop & Shop. For this reason, the Defendant is entitled to summary judgment on this issue and the Appellant's expert report must be struck and her expert must be barred from testifying at trial.

Conclusion

For the reasons set forth above, this appeal of the trial court's decision denying the Motion for Reconsideration must be denied. The Appellant has not demonstrated the trial court failed to consider all of the evidence before it or that the decision was based on plainly incorrect reasoning. The only decision the Appellant seeks to appeal, per the Notice of Appeal, is the order denying reconsideration. However, if the Appellate Division considers the Appellant's request to review the trial court's summary judgment decision, this appeal must also be denied. The Appellant has not set forth any evidence to dispute an incidental contact with a kneeling employee was a dangerous condition. As such there is no basis to overturn the trial court's decision to grant Stop & Shop's Motion for Summary Judgment. Therefore, it is respectfully requested that this Appeal be denied.

Respectfully Submitted,

CULLEN AND DYKMAN, LLP
Attorneys for Defendant,
The Stop & Shop Supermarket Company LLC

BY: /s/ Daniel I. Winter
Daniel I. Winter, Esq.

/s/ Joseph A. Keane
Joseph A. Keane, Esq.

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