

DEJAN MICKAKOWSKI and
JANNETTE NADLER,

Plaintiffs/Appellants

-vs-

ELZBIETA BURAK, JOZEF BURAK:
and ABC CORPORATION #1-10, as
owner, and ABC CORPORATION
#11-20 as maintenance company,
and JOHN DOE CORPORATION
#21-30, and ABC CORPORATION
#31-40 as snow removal company,

Defendants/Respondents

:
: SUPERIOR COURT OF NEW JERSEY
: APPELLATE DIVISION
:

: DOCKET NO.: A-1721-24
:

:
: SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION
: BERGEN COUNTY
:

: DOCKET NO.: BER-L-698-23
:

:
: Sat Below:
:

ELZBIETA BURAK and JOZEF
BURAK,

Third Party Plaintiffs/
Respondents

-vs-

MD GROUP, LLC,

Third Party Defendant/
Respondents

:
: HON. ANTHONY R. SUAREZ, J.S.C.
:

PLAINTIFF/APPELLANT MICKAKOWSKI'S BRIEF

BORCE MARTINOSKI, ESQ.
BORCE MARTINOSKI, LLC
ATTORNEY AT LAW
Attorney ID 014442008
75 Essex Street – Suite 220
Hackensack, New Jersey 07601
Tel: (201) 343 – 7237
Fax: (201) 343 – 2727
E-mail: martinoskilaw@gmail.com
Attorney for
Plaintiff/Appellant
Micakowski

PLAINTIFF/APPELLANT MICAKOWSKI'S

TABLE OF CONTENTS

STANDARD FOR SUMMARY JUDGMENT.....1

PROCEDURAL HISTORY.....3

STATEMENT OF FACTS.....5

 A. Leases and Riders from Respondent Burak to Appellant Micakowski
 5

 B. Renewal Rider Delivered on September 14, 2021 Leases and Riders
 from Respondent Burak to Appellant Micakowski (Pa 130).....6

 C. Respondent Burak’s Conduct During the Lease Term 2016 to 2021.....6

 D. Appellant Micakowski’s Injury February 09, 2021.....8

LEGAL ARGUMENT.....9

POINT I

THE TRIAL COURT SHOULD NOT HAVE GRANTED SUMMARY
JUDGMENT AS THE LEASE AGREEMENTS HAVE CONFLICTING TERMS
AND THE RIDERS WERE NOT CONSIDERED. (Pa 152; Pa 154).....9

 A. Order of the Two Leases and the Rider as to which was First (Pa 38; Pa
 43; Pa 48).....16

 B. “FIRST-FLOOR & BASEMENT” Indemnity Clause (Pa 40).....17

C. Lease Agreement Business and Commercial Indemnity Clause (Pa 45-46).....19

D. Rider to Lease Agreement November 01, 2016 (Pa 48).....21

SUMMARY.....21

POINT II

THE TRIAL COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT DUE TO THE DIFFERENT MAINTENANCE CLAUSES IN THE LEASES AND THE RIDERS. (Pa 152; Pa 154).....22

A. Respondent Burak modified the lease agreement by the initial rider in November 2016 outlining the Appellant Micakowski’s responsibilities. (Pa 48).....24

B. Respondent Burak modified the leases and rider by the residential leases of the tenants living in the second-floor apartment. (Pa 88).....26

C. Respondent Burak modified the lease agreements and the rider by Respondent Burak’s own conduct of occupying the property, back garage, driveway, and parking lot.....26

D. The renewal rider in September 2021 shows that the maintenance of the driveway and parking lot between November 2016 to October 2021 belong to Respondent Burak. (Pa 132).....27

| | |
|--|----|
| SUMMARY..... | 29 |
| POINT III | |
| THE TRIAL COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT AS THE RESPONDENT BURAK HAD CONTROL OVER THE BACK GARAGE, DRIVEWAY, AND PARKING LOT (Pa 152; Pa 154)..... | 30 |
| (1) the relationship of the parties (Pa 38; Pa 43; Pa 48; Pa 131)..... | 31 |
| (2) the foreseeability and nature of the risk of harm (Pa 137; Pa 139; Pa 140)..... | 31 |
| (3) the opportunity and ability to exercise care to avoid the harm (Pa 32; Pa 33; Pa 97 – Pa 103; Pa 137; Pa 139; Pa 140)..... | 32 |
| (4) the public interest (Pa 18; Pa 34; Pa 35; Pa 59; Micakowski Dep. 36:7-14, March 04, 2024; Pa 60; Micakowski Dep. 39:8-11, March 04, 2024)..... | 33 |
| (5) notions of fairness and common sense (Pa 38; Pa 43; Pa 48; Pa 131)..... | 33 |
| SUMMARY..... | 33 |
| CONCLUSION..... | 34 |

PLAINTIFF/APPELLANT MICAKOWSKI'S

TABLE OF AUTHORITY

Case Law:

Azurak v. Corporate Property Investors, 347 N.J. Super 516, 790 A.2d 956 (App. Div. 2002).....14, 15

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995).....2, 3

Doloughty v. Blanchard Constr. Co., 139 N.J. Super. 110 (Law Div. 1976)..... 11, 12

Gulf Oil Corp. v. ACF Indus., Inc., 221 N.J. Super. 420 (App. Div. 1987), certif. denied, 111 N.J. 613 (1988) 12, 13

Headley v. Cavileer, 82 N.J.L. 635 (E. & A. 1912).....23

Home Owners Constr. Co. v. Glen Rock, 34 N.J. 305 (1961).....23

Hopkins v. Fox & Lazo Realtors, 132 N.J. 426 (1993).....31

J.H. v. R & M Tagliareni, LLC, 239 N.J. 198 (2019).....30

Jerkins v. Anderson, 191 N.J. 285 (2007).....31

Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954).....1, 3

Karl's Sales & Serv. v. Gimble Bros., 2049 N.J. Super. 487 (App. Div. 1991).....24

Knorr v. Smeal, 178 N.J. 169 (2003).....23

Leitao v. Damon G. Douglas Co., 301 N.J. Super. 187 (App. Div.), certif. denied, 151 N.J. 466 (1997)..... 13, 14

Mantilla v. NC Mall Assocs., 167 N.J. 262 (2001).....9, 10, 15

| | |
|---|----------------|
| <u>Mautz v. J.P. Patti Co.</u> , 298 N.J. Super. 13 (App. Div.), <u>certif. denied</u> , 151 N.J. 472 (1997)..... | 14 |
| <u>McCabe v. Great Pac. Century Corp.</u> , 236 N.J. Super. 488 (App. Div. 1989), <u>certif. denied</u> , 121 N.J. 611-12 (1990)..... | 13 |
| <u>Meder v. Resorts Int’l Hotel, Inc.</u> , 240 N.J. Super. 470 (App. Div. 1989), <u>certif. denied</u> , 121 N.J. 608 (1990)..... | 13 |
| <u>Michaels v. Brookchester, Inc.</u> , 26 N.J. 379 (1958)..... | 30 |
| <u>Pepe v. Township of Plainsboro</u> , 337 N.J. Super. 209 (App. Div. 2001)..... | 13 |
| <u>Ramos v. Browning Ferris Indus. of S. Jersey, Inc.</u> , 103 N.J. 177 (1986)..... | 10, 12, 13, 15 |
| <u>Scully v. Fitzgerald</u> , 179 N.J. 114 (2004) | 30, 31 |
| <u>Templeton v. Borough of Glen Rock</u> , 11 N.J. Super. 1 (App. Div. 1950)..... | 1 |
| <u>Van Dusen Aircraft Supplies v. Terminal Constr. Corp.</u> , 3 N.J. 321 (1949)..... | 22, 23 |
| <u>Vitty v. D.C.P. Corp.</u> , 268 N.J. Super. 447 (App. Div. 1993)..... | 14 |
| <u>West Side Trust Co. v. Gascoigne</u> , 39 N.J. Super. 467 (App. Div. 1956)..... | 1, 2 |
| <u>Woytas v. Greenwood Tree Experts, Inc.</u> , 237 N.J. 501 (2019)..... | 3 |
| <u>Statutes & Rules:</u> | |
| Restatement (Second) of Torts § 360 (Am. Law Inst. 1965) | 30 |
| R. 4:46-2..... | 2 |
| FRCP 56(c)..... | 3 |

PLAINTIFF/APPELLANT MICAKOWSKI'S

TABLE OF JUDGMENTS/ORDERS

Micakowski, et al v. Burak, et al Order Granting Summary Judgment Filed February
03, 2025.....Pa 152

 Rider to Order dated February 03, 2025.....Pa 154

PLAINTIFF/APPELLANT MICAKOWSKI'S

TABLE OF TRANSCRIPTS

T.....January 31, 2025

PLAINTIFF/APPELLANT MICAKOWSKI'S

TABLE OF APPENDIX

Defendant/Third Party Plaintiff/Respondent Burak's Notice of Motion for Summary Judgment Filed January 02, 2025Pa 1

Defendant/Third Party Plaintiff/Respondent Burak's Statement of Material Facts.....Pa 3

Defendant/Third Party Plaintiff/Respondent Burak's Certification of Service.....Pa 7

Defendant/Third Party Plaintiff/Respondent Burak's Certification of Chase T. Gunther.....Pa 9

Exhibit A – Plaintiff/Appellant Micakowski's Complaint Filed February 06, 2023.....Pa 11¹

Exhibit B – Plaintiff/Appellant Micakowski's Answers to Form A and Supplemental Interrogatories dated August 24, 2023.....Pa 16²

Exhibit C – First Floor and Basement Lease Agreement for the property located at 324 River Drive, Garfield, NJ 07026.....Pa 37³

¹ Pa 11 – Pa 15 – Complaint was filed by the Respondent Burak, and better quality obtained via eCourts

² Pa 28 – Medical Documents were filed by the Respondent Burak, and no better quality obtained; Medical Documents redacted

³ Pa 37 – Pa 40 – Commercial Leases were filed by the Respondent Burak, and no better quality obtained

Exhibit D – Front Store Space Lease Agreement for the property located at 324 River Drive, Garfield, NJ 07026.....Pa 42

Exhibit E – Deposition Transcript of Plaintiff/Appellant Micakowski dated March 04, 2024.....Pa 50⁴

Exhibit F – Borbon v. Fantasia Indus., A-5701-08T3, 2010 N.J. Super Unpub. LEXIS 861, 2010 WL 4121750 (App. Div. April 20, 2010).....Pa 65

Third Party Defendant/Respondent MD Group, LLC Letter Brief In Support of Summary Judgment Filed January 14, 2025.....Pa 69

Plaintiff/Appellant Micakowski’s Opposition to Summary Judgment Filed January 15, 2025.....Pa 71

Plaintiff/Appellant Micakowski’s Certification of Service.....Pa 73

Plaintiff/Appellant Micakowski’s Opposition to Statement of Undisputed Material Facts and Counter Statement of Undisputed Material Facts.....Pa 74

Plaintiff/Appellant Micakowski’s Certification of Borce Martinoski, Esq.....Pa 85

Exhibit A – Residential Leases for the Second Floor Apartment for the property located at 324 River Drive, Garfield, NJ 07026.....Pa 87⁵

Exhibit B – Pictures of the property located at 324 River Drive, Garfield, NJ

⁴ Pa 50 – Deposition Transcript were filed by the Respondent Burak, and better quality obtained

⁵ Pa 87 – Pa 94 – Residential Leases were obtained from the Respondent Burak, and no better quality obtained

07026.....Pa 95

Exhibit C – Defendant/Third Party Plaintiff/Respondent Burak’s Answers to Form C and C(2) Interrogatories.....Pa 104

Exhibit D – Defendant/Third Party Plaintiff/Respondent Burak’s Answers to Supplemental Interrogatories.....Pa 125

Exhibit E – Amended Rider for the property located at 324 River Drive, Garfield, NJ 07026 dated September 14, 2021.....Pa 130⁶

Exhibit F - Plaintiff/Appellant Micakowski’s Engineering Report dated March 18, 2024.....Pa 135⁷

Defendant/Third Party Plaintiff/Respondent Burak’s Reply Filed January 24, 2025...
.....Pa 148⁸

Order Granting Summary Judgment Filed February 03, 2025.....Pa 152

Rider to Order dated February 03, 2025.....Pa 154

Notice of Appeal Filed February 14, 2025.....Pa 163

Defendant/Third Party Plaintiff/Respondent Burak Answer, Jury Demand, Counterclaim and Third-Party Complaint filed March 22, 2023.....Pa 168

Appellant/Plaintiff Micakowski Answer and Defenses filed December 14, 2023.....
.....Pa 184

⁶ Pa 130 – Pa 134 - Renewal Rider obtained from the Respondent Burak, was received, and no better quality obtained

⁷ Pa 136 – hyperlink redacted

⁸ Pa 149, Pa 150, Pa 151 – Respondent Burak’s Reply Brief Legal Response Section Redacted

Respondent/Third Party Defendant MD Answer and Defenses filed December 14,
2023.....Pa 190

Respondent/Third Party Defendant MD Answer to Count Four of Third Party
Complaint with Affirmative Defenses filed December 14, 2023.....Pa 199

STANDARD FOR SUMMARY JUDGMENT

In Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954), the court cautioned against the premature granting of summary judgment. Judson referred approvingly to Templeton v. Borough of Glen Rock, 11 N.J. Super. 1, 4 (App. Div. 1950) where the Appellate Division had stated that summary judgment is recognized as a wholesome device which may avoid needless delay and expense in awaiting and conducting trial; and the expeditious determination of a cause is admittedly an important goal of our present rules of practice and judicial administration. Nonetheless when its attainment involves the deprivation of a full and fair trial on disputed facts, its price comes too high. In addition, the Court set forth the following as procedures for the courts to follow in deciding summary judgment motions:

It is designed to provide a prompt, businesslike and inexpensive manner of disposing of any case which a discriminating search of the merits and the pleadings, depositions and admissions on file, together with the affidavits submitted on the Motion, clearly shows not to present any genuine issue of material fact requiring disposition at trial. Id. at 74.

In West Side Trust Co. v. Gascoigne, 39 N.J. Super. 467, 470 (App. Div. 1956), Justice (then Judge) Francis properly noted that, on a motion for summary judgment, the supporting papers are to be closely scrutinized whereas the opposing papers are

to be treated indulgently, that doubts are to be resolved in favor of the conventional trial, and that the matter is not to be decided on affidavits which give rise to conflicting inferences “no matter how strongly they point in one direction or the other.”

Under R. 4:46-2, a motion for summary judgment shall be granted if the pleadings, affidavits and other documents show that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Summary judgment should be granted “against a party who fails to make a showing sufficient to establish the existence of one element essential to the party’s case....” and likened the standard to the standard used in evaluating a directed verdict. Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 533 (1995).

In other words, the Judge must decide “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law”; that weighing process requires the court to be guided by the same evidentiary standard of proof - by a preponderance of the evidence or clear and convincing evidence - that would apply at trial on the merits when deciding whether there exists a genuine issue of material fact. Brill, 142 N.J. at 533-534. In holding the same, the Supreme Court of New Jersey effectively adopted FRCP 56(c), therefore giving the Court more leeway than it had under Judson.

The Supreme Court in Brill considered the Federal Rule of Civil Procedure and the national trend and held that the Courts of the State of New Jersey are “required to engage in the same type of evaluation, analysis or sifting of evidential materials as required by R. 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial.” Brill, 142 N.J. at 540.

“Under this new standard, a determination whether there exists 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in a light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party.” Brill, 142 N.J. at 540.

Appellate Court reviews the grant of a motion for summary judgment de novo, applying the same standard used by the trial court. Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 511 (2019).

PROCEDURAL HISTORY

On February 06, 2023, the Plaintiff/Appellant Micakowski (hereinafter “Appellant Micakowski”) filed a Complaint with Jury Demand. (Pa 12). On March 22, 2023, the Defendant/Third Party Plaintiff/Respondent Burak (hereinafter “Respondent Burak”) filed an Answer, Jury Demand, Counterclaim, and Third-Party Complaint. (Pa 168). On December 14, 2023, Appellant Micakowski filed an

Answer and Defenses. (Pa 184). On December 14, 2023, Third Party Defendant/Respondent MD Group, LLC (hereinafter “Respondent MD”) filed Answer and Defenses. (Pa 190). On December 14, 2023, Respondent MD filed an Answer to Count Four of the Third-Party Complaint with Affirmative Defenses. (Pa 199).

On January 02, 2025, the Respondent Burak filed a Notice of Motion for Summary Judgment. (Pa 1). On January 02, 2025, the Respondent Burak filed a Statement of Material Facts, Certification, and Exhibits. (Pa 3; Pa 9; Pa 11 – Pa 68). On January 14, 2025, Respondent MD filed a brief in support of Summary Judgment. (Pa 69).

On January 15, 2025, the Appellant Micakowski filed an Opposition to Summary Judgment. (Pa 71). On January 15, 2025, the Appellant Micakowski filed Opposition to Statement of Undisputed Material Facts and Counter Statement of Undisputed Material Facts, Certification, and Exhibits. (Pa 74; Pa 85; Pa 87 – Pa 147).

On January 24, 2025, Respondent Burak filed a reply brief. (Pa 148). On January 31, 2025, the parties had oral argument before the trial court. (T). On February 03, 2025, the Trial Court issued an order granting Summary Judgment along with a Rider. (Pa 152; Pa 154). On February 14, 2025, the Appellant Micakowski appeals the granting of the Summary Judgment. (Pa 163).

STATEMENT OF FACTS

A. Leases and Riders from Respondent Burak to Appellant Micakowski

Respondent Burak presented a lease to Appellant Micakowski labeled “FIRST-FLOOR & BASEMENT” dated “Sept 20 day of September 2016” for a term from November 01, 2016 to October 30, 2021. (Pa 38; Pa 39). This lease is signed at the bottom, but there are no names of who signed it, no date of when it was signed, no witnesses, and no notary stamp. The names are also illegible. (Pa 41; Pa 76).

Respondent Burak presented a lease to Appellant Micakowski labeled “Lease Agreement Business and Commercial” with no date at the top and for a term from “November 1, 2016 and ending on October 31, 2021.” (Pa 43). Again, the second lease is signed at the bottom with the names of the parties, but no date of when it was signed, no witnesses, and no notary stamp. (Pa 47; Pa 76).

The Respondent Burak references the rider and attaches the rider to the “Lease Agreement Business and Commercial” Lease with no date except the effective date is “November 1, 2016.” (Pa 48). The rider is signed at the bottom with the names of the parties, but no date of when it was signed, no witnesses, and no notary stamp. (Pa 49; Pa 77).

The leases and the rider do not specify the dates, the delivery dates, and which one was delivered first. (Pa 49; Pa 77). The rider does not specify which lease

controls and for which lease the rider applies as there are no provision incorporating the leases by reference. (Pa 48; Pa 49).

B. Renewal Rider Delivered on September 14, 2021 Leases and Riders from Respondent Burak to Appellant Micakowski (Pa 130).

Prior to the expiration of the lease on October 31, 2021, the Respondent Burak provided a renewal rider to the Plaintiff MICAKOWSKI. (Pa 130). On September 14, 2021, the renewal rider was delivered to the Appellant Micakowski. (Pa 132).

Respondent Burak modified the lease terms by requiring the Appellant Micakowski to be responsible for the maintenance of the driveway, parking area, and the front of the business. (Pa 132). The provision specifically stated: “Parking Lot need to be maintained keep clean, winter time remove the snow of the parking and front of the business.” (Pa 132).

Respondent Burak further modified the least terms by requiring parking spaces for their vehicles. (Pa 132). Specifically, the provision states “EXCEPTION: OWNER VEHICLE HAVE PARKING SPOT NEXT TO GARAGE.” (Pa 132).

C. Respondent Burak’s Conduct During the Lease Term 2016 to 2021

Facing the property located at 324 River Drive, Garfield, NJ 07026 from the street, the building is on the right side and the driveway and parking lot is on the left side. (Pa 18; Pa 32 – Pa 34; Pa 96 – Pa 103; Pa 137 – Pa 140; Pa 147). The garage is at the end of the driveway and parking lot in the back of property. (Pa 18; Pa 32

– Pa 34; Pa 96 – Pa 103; Pa 137 – Pa 140; Pa 147). Parking for the property is along the left adjacent to the abutting property where the vehicles should be parked in an angle and along the front of the garage in the back. (Pa 18; Pa 32 – Pa 34; Pa 96 – Pa 103; Pa 137 – Pa 140; Pa 147).

In front of the garage on the property at the end of the driveway, the Respondent Burak marked a parking space “VAN-VAN” for the parking of the Respondent Burak’s White Van. (Pa 32; Pa 33; Pa 97; Pa 99; Pa 101; Pa 102). In addition to the White Van, the Respondent Burak would park a gray Dodge Ram 4 Door Truck, which would take up anywhere from one (1) to two (2) parking spaces. (Pa 34; Pa 97 – Pa 100; Pa 103).

Respondent Burak was using three parking spaces and using the driveway on a daily basis since Respondent BURAK was also using the garage in the back of the property for construction material storage. (Pa 61 - Pa 62; see Micakowski Dep. 44:19-25, 46:12-17, March 04, 2024; Pa 18; Pa 32 – Pa 34; Pa 96 – Pa 103; Pa 137 – Pa 140; Pa 147). Respondent Burak also allowed the residential tenants living on the second-floor apartment to use the parking spaces and the driveway. (Pa 62; see Micakowski Dep. 45:1-5, March 04, 2024)

Due to Respondent Burak’s use and occupancy of the back garage, driveway, and parking lot along with allowing the residential tenant to use and occupy the parking spaces and driveway, Respondent Burak should have maintained the

driveway and parking lot from snow. (Pa 61; Pa 62; see Micakowski Dep. 44:19-25, 46:12-17, March 04, 2024).

D. Appellant Micakowski's Injury February 09, 2021

On February 09, 2021, Appellate MICAKOWSKI's fell and broke his leg at the property located at 324 River Drive, Garfield between the hours of 7:00 PM to 8:00 PM. (Pa 18; Pa 32; Pa 33; Pa 35; Pa 36; Pa 56; Micakowski Dep. 21:7; 22:2-5, March 04, 2024) The injury occurred in the driveway and parking lot by the water spout marked as "X". (Pa 32; Pa 33; Pa 58; Micakowski Dep. 32:1-25, March 04, 2024).

Appellant Micakowski went out in order to dispose of the garbage in the container located on the back side of the parking lot. (Pa 56; Micakowski Dep. 22:21-24, March 04, 2024). Appellant Micakowski injury was on black ice. (Pa 18; Pa 32; Pa 33; Micakowski Dep. 23:7; 23:16-19, March 04, 2024). Appellant Micakowski fell on his entire weight and the left foot gave in. (Pa 58; Micakowski Dep. 29:7-14, March 04, 2024)

Appellant Micakowski was transported by ambulance to Hackensack University Medical Center located at 30 Prospect Street, Hackensack, NJ 07601. (Pa 19; Pa 28 – Pa 31; Pa 59; Micakowski Dep. 34:11-13, March 04, 2024; Pa 59; Micakowski Dep. 23:7; 23:16-19, March 04, 2024). On February 11, 2021, he underwent surgery and was discharged on February 12, 2021. (Pa 59; Micakowski

Dep. 35:14-19, March 04, 2024). Appellant Micakowski sustained a left displaced ankle fracture with two (2) metal plates and screws on both sides. (Pa 18; Pa 34; Pa 35; Pa 59; Micakowski Dep. 36:7-14, March 04, 2024; Pa 60; Micakowski Dep. 39:8-11, March 04, 2024).

Appellant Micakowski had to wear a boot for five months after the surgery and two months of physical therapy. (Pa 60; Micakowski Dep. 37:22, 38:16-17, March 04, 2024). Appellant Micakowski's injury is permeant. (Pa 18; Pa 34; Pa 35; Pa 60; Micakowski Dep. 39:4-14, 40:21-22, March 04, 2024; Pa 61; Micakowski Dep. 41:4-18; 41:24-42:17, March 04, 2024).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT AS THE LEASE AGREEMENTS HAVE CONFLICTING TERMS AND THE RIDERS WERE NOT CONSIDERED. (Pa 152; Pa 154)

In Mantilla v. NC Mall Assocs., 167 N.J. 262, 275 (2001), the Court held “absent explicit contractual language to the contrary, an indemnitee who has defended against allegations of its own independent fault may not recover the costs of its defense from an indemnitor.” The Court was confronted with two apparently conflicting indemnification provisions—one which appeared to require indemnification for the indemnitee's negligence and the other which did not. Id.

Observing that indemnity provisions are to construed in accordance with the rules for construction of contracts, Id. at 272, the Court restated a “bright-line” rule, which had been enunciated in other indemnification contexts, that “a contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms.” Id. at 272-73 (quoting Ramos v. Browning Ferris Indus. of S. Jersey, Inc., 103 N.J. 177, 191, (1986) (applying the principle in construing an indemnity contract in the context of a workers’ compensation case)).

In Doloughy v. Blanchard Constr. Co., 139 N.J. Super. 110, 117 (Law Div. 1976), the Court said:

An analysis of recent case law, both in this and other jurisdictions, indicates that indemnity provisions in construction contracts are generally of one of two types. The first of these is a broad undertaking by an indemnitor to indemnify the indemnitee in respect of any damage or injury which occurs during or in connection with or as a result of the indemnitor’s performance of the contracted work. Such undertakings are usually construed, consistent with what appears to be the intent of the parties, as imposing the exclusive obligation upon the indemnitor both to defend and to respond in damages irrespective of fault and

irrespective of the absence of an express undertaking to indemnify the indemnitee for its own negligence.

The contractual language in Doloughy, a construction case, referred to claims “arising out of the performance” of the work. Id. at 119. The judge identified the contrasting type of indemnity provision as “one which is limited to risk of loss or damage resulting from the negligence or fault of the indemnitor.” Id. at 118. Contractual language used to express this “limited” type of indemnity includes “a specific reference to the indemnitor’s fault or negligence, ... [or language such as] arising from the indemnitor’s ‘acts or omissions.’” Id.

The Court then concluded that a court must determine:

Whether or not, considering all of the relational circumstances, the indemnitee reasonably expected as part of his bargain with the indemnitor that the duty he failed to perform and on which his liability to plaintiff is predicated would be performed by the indemnitor. Then, of course, as between themselves, the indemnitee should be relieved of responsibility for his breach of duty vis-a-vis plaintiff since the indemnitor’s obligation to indemnify in that situation would clearly have been within the parties’ contemplated bargain. If, on the other hand, the duty to plaintiff breached by the indemnitee was not originally or independently that of the indemnitor and was not otherwise shifted

to him by the relational circumstances between them, or if the indemnitee's expectation of the indemnitor's performance of that duty was not otherwise reasonable, the indemnitee's liability to plaintiff cannot be fairly deemed to have been within the intended coverage of an indemnity agreement limited to the indemnitor's acts or omissions.

Id. at 122-23.

In Ramos, 103 N.J. at 191, the Supreme Court enunciated basic principles in the construction of indemnification provisions by holding:

Indemnity contracts are interpreted in accordance with the rules governing the construction of contracts generally. When the meaning of the clause is ambiguous, however, the clause should be strictly construed against the indemnitee. Thus, a contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms.

The Court has construed Ramos as a modification of Doloughy and in Gulf Oil Corp. v. ACF Indus., Inc., 221 N.J. Super. 420, 428-29 (App. Div. 1987), certif. denied, 111 N.J. 613 (1988), observed:

Although Ramos was determined in a different setting, the principle just quoted must be deemed to modify the Doloughy formula which requires that only a broad indemnification for all work-related adverse

consequences need be shown for the indemnitor to provide indemnification for the indemnitee's own negligence. Under Ramos and the several cases there cited, there must be language unequivocally including the indemnitee's negligence. We accept for the purpose of this discussion that there need not be any specific mention of the indemnitee's negligence in the contract; sufficient other all-encompassing language [i.e. broad form language] ... and the contractual setting should be able to constitute such an expression in the "unequivocal terms" required by Ramos.

Applying Ramos, the contract did not state in "unequivocal terms" that the duty to indemnify extended to the indemnitee's negligence. see Meder v. Resorts Int'l Hotel, Inc., 240 N.J. Super. 470, 478-79 (App. Div. 1989), certif. denied, 121 N.J. 608 (1990); see also McCabe v. Great Pac. Century Corp., 236 N.J. Super. 488, 492-93 (App. Div. 1989), certif. denied, 121 N.J. 611-12 (1990).

Indemnification provisions will be construed in accordance with general rules for construction of contracts, and no indemnification for a party's own negligence will be found absent an unequivocal expression of an intention to so indemnify. Pepe v. Township of Plainsboro, 337 N.J. Super. 209 (App. Div. 2001) (finding that the language "any injury ... on account of any act of omission or commission of any contractor" did not provide indemnification for an agent of indemnitee); Leitao v.

Damon G. Douglas Co., 301 N.J. Super. 187 (App. Div.), certif. denied, 151 N.J. 466 (1997) (finding indemnification where the indemnification provision provided for indemnification for injury caused by “anyone directly or indirectly employed by [it], ... regardless of whether it is caused in part by a party indemnified...”); Mautz v. J.P. Patti Co., 298 N.J. Super. 13 (App. Div.), certif. denied, 151 N.J. 472 (1997) (finding the language “arising out of or resulting from the performance of the indemnitor’s work ... to the extent caused ... by any negligent act or omission of the indemnitor” did not require indemnification); Vitty v. D.C.P. Corp., 268 N.J. Super. 447 (App. Div. 1993) (finding that language precluding indemnification where the “sole active negligence” of the indemnitee caused the loss did not preclude indemnification for losses arising out of the underlying contract).

In Azurak v. Corporate Property Investors, 347 N.J. Super 516, 790 A.2d 956, 957 (App. Div. 2002), Plaintiff was injured when she slipped and fell while shopping at the Mall. At the time of the incident, the Mall had contracted with PBS to provide janitorial services to the Mall. Id. The motion judge granted the Mall’s motion for summary judgment seeking indemnification and defense costs. Id. at 958.

The language of the indemnification provision states that:

Contractor [PBS] shall indemnify, defend and hold harmless each Indemnitee [the Mall] from and against any claim (including any claim brought by employees of Contractor), liability, damage or expense

(including attorney's fees) that such Indemnitee may incur relating to, arising out of or existing by reason of (i) Contractor's performance of this Agreement or the conditions created thereby (including the use, misuse or failure of any equipment used by Contractor or its subcontractors, servants or employees) or (ii) Contractor's breach of this Agreement or the inadequate or improper performance of this Agreement by Contractor or its subcontractors, servants or employees.

Id. at 960-961.

The Appellate Court reversed and found that the focus of the provision is on the conduct of “the Contractor” with no reference to either the indemnitee or its negligence. Id. at 961. As such, the language of this indemnification provision does not meet the “unequivocal” or “explicit” test enunciated in Ramos and restated in Mantilla. Id. Therefore, the Appellate Court conclude that the indemnification agreement does not provide for indemnification of the Mall. Id.

In sum, we accept the Court’s clear and explicit language as meaning what it says and conclude that the absence of clear and explicit language addressing indemnification for the Mall’s negligence precludes recovery for its portion of the judgment or defense costs. Id. at 962.

A. Order of the Two Leases and the Rider as to which was First (Pa 38; Pa 43; Pa 48)

The Court should be mindful that the Respondent Burak labels the leases as first and second, but there is no date on either lease of when they were signed or delivered. The first lease is labeled “FIRST-FLOOR & BASEMENT” with a date of “Sept 20 day of September 2016” for a term of “NOVEMBER 01 2016” to “OCTOBER 30, 2021.” (Pa 38; Pa 39). The first lease is signed at the bottom, but there are no names of who signed it, no date of when it was signed, no witnesses, and no notary stamp as well as the names are illegible. (Pa 41; Pa 76).

The second lease is labeled “Lease Agreement Business and Commercial” with no date at the top and for a term from “November 1, 2016 and ending on October 31, 2021.” (Pa 43). Again, the second lease is signed at the bottom with the names of the parties, but no date of when it was signed, no witnesses, and no notary stamp. (Pa 47; Pa 76).

The Respondent Burak references the rider and attaches the rider to the “Lease Agreement Business and Commercial” Lease with no date except the effective date is “November 1, 2016.” (Pa 48). The rider is signed at the bottom with the names of the parties, but no date of when it was signed, no witnesses, and no notary stamp. (Pa 49; Pa 77).

The two leases and the rider have the same term and the effective date, but it is unclear as to which of the leases was presented, delivered, and signed first. (Pa 49; Pa 77). The rider does not specify which lease controls and for which lease the rider applies as there are no provision incorporating the leases by reference. (Pa 48; Pa 49).

B. “FIRST-FLOOR & BASEMENT” Indemnity Clause (Pa 40)

The lease labeled “FIRST-FLOOR & BASEMENT” has an Indemnity Clause under Provision Thirteen which states as follows:

The Landlord shall not be liable for any failure of water supply or electrical current, sprinkler damage, or failure of sprinkler service, nor for injury or damage to person or property caused by the elements or by other tenants or person in said building, or resulting from steam, gas, electricity, water, rain or snow, which may leak or flow from any part of said building or from the pipes, appliances or plumbing works of the same, or from the street or sub-surface, or from any other place, nor for interference with light or other incorporeal hereditaments by anybody other than the Landlord, or caused by operations by or for a governmental authority in construction of any public or quasi-public work, neither shall the Landlord be liable for any latent defect in the building.

The above indemnification clause does not specify that the Respondent Burak is indemnified from their own conduct, and does not provide an exception of gross negligence and willful misconduct by the Respondent Burak. (Pa 40). Also, the clause does specify water, rain, and snow, but does not provide for “ice” to be included as an indemnification. The clause separates “elements” from “water, rain, and snow.” Also, the clause does not have a reference to the “downspout,” but it does references “pipes.”

Appellant Micakowski slip and fell on black ice on the parking lot. (Pa 17 Pa 32; Pa 33; Micakowski Dep. 23:7; 23:16-19, March 04, 2024; Pa 58; Micakowski Dep. 29:7-14, March 04, 2024). The Respondent Burak failed to maintain the parking lot free and clear of ice. (Pa 17; Pa 61; Pa 62; see Micakowski Dep. 44:19-25, 46:12-17, March 04, 2024).

Since the indemnification clause fails to provide a provision for “ice” and the “downspout,” the said clause does not absolve the Respondent Burak from the responsibility to maintain the driveway and parking lot. Therefore, the “FIRST-FLOOR & BASEMENT” Lease Indemnification Clause does not free Respondent Burak of the duty and breach of duty.

C. Lease Agreement Business and Commercial Indemnity Clause (Pa 45-46)

Per the Lease Agreement Business and Commercial, Provision 23 under the caption “Non-Liability of Landlord” states as follows:

The Landlord will not be liable for any damage or injury which may be sustained the Tenant or any other person, as a consequence of the failure, breakage, leakage or obstruction of the water, plumbing, steam, sewer, waste or soil pipes, roof, drains, leaders, gutters, valleys, downspouts or the like or of the electrical, gas, power conveyor, refrigeration, sprinkler, air condition or heating systems, elevators or hoisting equipment; or by reason of the elements; or resulting from the carelessness, negligence or improper conduct on the part of any other tenant or of the Landlord or the Landlord’s or the Tenant’s or any other tenant’s agents, employees, guests, licensees, invitees, subtenants, assignees or successors; or attributable to any interference with, interruption of, or failure beyond the control of the Landlord, of any services to be burnished or supplied by the Landlord. This limitation on the Landlord’s liability will not apply to damage or injury resulting for the gross negligence or willful misconduct of the Landlord or of the Landlord’s agents, employees, guests, licensees, invitees, assignees or successors.

In the above indemnification clause, it does indemnify the Respondent Burak from his own “negligent” and “careless” conduct, but then it references “beyond the control of the” Respondent Burak. (Pa 45 – Pa 46). The above clause does have an exception for gross negligence and willful misconduct by the Respondent Burak. (Pa 46).

However, the clause does have “water,” but it does not have “snow,” “rain,” and “ice.” (Pa 45 – Pa 46). It does separate “water” from “elements.” (Pa 45 – Pa 46). Also, the clause does reference “downspout” and “pipes,” which suggests that the “pipes” and “downspouts” are different terms. (Pa 45 – Pa 46).

Again, the Appellant Micakowski slip and fell on black ice on the parking lot. (Pa 17; Pa 32; Pa 33; Micakowski Dep. 23:7; 23:16-19, March 04, 2024; Pa 58; Micakowski Dep. 29:7-14, March 04, 2024). The Respondent Burak failed to maintain the parking lot free and clear of ice. (Pa 17; Pa 61; Pa 62; see Micakowski Dep. 44:19-25, 46:12-17, March 04, 2024). Since the indemnification clause fails to provide a provision for ice, the said clause does not absolve the Respondent Burak from the responsibility to maintain the driveway and parking.

The issue contemplated in the above indemnification clause is “control” and whether the Respondent Burak controlled the area where the injury occurred. This is a factual dispute between the parties, which was not addressed by the Trial Court in the Summary Judgment Motion and Summary Judgment cannot be granted on a

factual dispute. Therefore, the Lease Agreement Business and Commercial Indemnification Clause does not free Respondent Burak of the duty and breach of duty.

D. Rider to Lease Agreement November 01, 2016 (Pa 48)

Per the Rider commencing on November 01, 2016, the Respondent Burak outlined an entire section captioned “RESPONSIBILITIES” for the Appellant Micakowski. (Pa 48). Respondent Burak specifically used the word “solely” and the word “responsible.” (Pa 48). The rider specifies the aspects of the property that the Appellant Micakowski is solely responsible for which fails to include the driveway and the parking lot.

Since the Appellant Micakowski is not responsible for the driveway and the parking lot, then the Respondent Burak is responsible for the driveway and the parking lot. As such, the Respondent Burak is in control of the driveway and parking lot. Therefore, the Respondent Burak has a reasonable duty to the Appellant Micakowski to maintain the driveway and parking lot, and the Respondent Burak breached that duty.

SUMMARY

The Respondent Burak has presented two (2) different and conflicting indemnification provisions where one requires indemnification of the Respondent

Burak absent “control” for Respondent Burak’s conduct and where the other does not provide indemnification for Respondent Burak’s conduct.

In addition, one indemnification clause does have “water,” “rain,” and “snow” separated from “elements” whereas the other just has “water” separate from the “elements.” Both indemnification clauses do not include “ice.” “Rain” and “snow” are closer to the “elements,” than “water” and “ice.” Therefore, “ice” should not be considered an “element.” Further, one indemnification clause has “pipes,” but the other has the terms “pipes” and “downspouts,” which suggests two different aspects of the property and the building.

Regardless, since there are two indemnity clauses, the Respondent Burak failed to have an indemnification clause expressed in clear and unequivocal terms as a matter of law. Based on the various different terms, the Respondent Burak failed to establish as an undisputed material fact as to which indemnity clause applies.

POINT II

THE TRIAL COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT DUE TO THE DIFFERENT MAINTENANCE CLAUSES IN THE LEASES AND THE RIDERS. (Pa 152; Pa 154)

As was explained by our Supreme Court more than seventy-five years ago, “a waiver or novation may be made by oral agreement of the parties.” Van Dusen Aircraft Supplies v. Terminal Constr. Corp., 3 N.J. 321, 326 (1949). Thus, “no matter

how stringently a contractual clause is worded, it is always open for the parties to agree orally or otherwise upon proper consideration, that they shall be partially or entirely disregarded, and another arrangement substituted.” Id. (quoting Headley v. Cavileer, 82 N.J.L. 635, 638 (E. & A. 1912)).

The parties did not disable themselves from amending, supplementing or replacing the contract provision by a later agreement made orally or by conduct objectively manifesting a new understanding. Home Owners Constr. Co. v. Glen Rock, 34 N.J. 305, 316 (1961) (“the writing requirement may be expressly or impliedly waived by the clear conduct or agreement of the parties....”).

Waiver is the voluntary and intentional relinquishment of a known right. An effective waiver requires a party to have full knowledge of his or her legal rights and intent to surrender those rights. The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference. The party waiving a known right must do so clearly, unequivocally, and decisively. Knorr v. Smeal, 178 N.J. 169, 177 (2003); see Home Owners, 34 N.J. at 316-17; see also Headley v. Cavileer, 82 N.J.L. 635, 640 (E. & A. 1912) (“waiver will not be inferred unless the evidence is clear and convincing”).

The Court should interpret any ambiguities or inconsistencies against the drafter and in favor of the non-drafting party. Karl's Sales & Serv. v. Gimble Bros., 2049 N.J. Super. 487, 493 (App. Div. 1991).

A. Respondent Burak modified the lease agreement by the initial rider in November 2016 outlining the Appellant Micakowski's responsibilities. (Pa 48)

Per the "FIRST-FLOOR & BASEMENT" Provision Twenty states in relevant part that the "Tenant will keep the sidewalk and curb in front thereof clean at all times and free from snow and ice." (Pa 41; Pa 155). However, the Lease Agreement Business and Commercial, Provision 5 states in relevant part the "Tenant will neither encumber nor obstruct the sidewalk, driveway, yards, entrances, hallways and stairs, but will keep and maintain the same in clean condition, free from debris, trash, refuse, snow and ice." (Pa 43; Pa 155)

However, the rider in November 2016, the Defendant BURAK outlined an entire section captioned "3. RESPONSIBILITIES." The "RESPONSIBILITIES" section outlines in detail what are Plaintiff MICAKOWSKI's responsibilities. The "RESPONSIBILITIES" are as follows to the Tenant Plaintiff MICAKOWSKI per the initial rider (Pa 48):

- (1) is solely responsible for any and all water/sewer charges for the subject property;

- (2) is responsible for the removal of their garbage;
- (3) is responsible for obtaining the garbage/recycling schedule from the municipality; and
- (4) is responsible for maintaining all plumbing, grease traps, sewage pipes, hood/exhaust system and encell system;
- (5) is also solely responsible for hiring a licensed exterminator to maintain and control the premises; and
- (6) is responsible for change broken water heater and air condition units, also roof fan if will necessary.

One of the leases only outlines the “sidewalk” and the “curb” as the Appellant Micakowski’s responsibility, but the other lease outlines “sidewalk,” “driveway,” “yards,” “entrances,” “hallways,” and “stairs.” However, the property does not have a yard, hallways, and stairs. (Pa 32; Pa 33; Pa 34; Pa 96; Pa 101; Pa 102; Pa 103; Pa 137; Pa 138; Pa 140; Pa 147).

The seminal difference between the two provisions is that one includes “driveway” whereas the other fails to includes “driveway.” (Pa 41; Pa 43; Pa 155). On the other hand, the rider eliminates the above provisions and outlines Appellant Micakowski’s responsibilities which does not include the maintenance of the driveway. (Pa 48).

B. Respondent Burak modified the leases and rider by the residential leases of the tenants living in the second-floor apartment. (Pa 88)

Per the Residential Lease Agreement for the 2nd Floor Apartment above the 1st Floor Commercial Space, Provision 9 states that the Landlord is not liable for loss, expense, or damage to any person or property, unless due to the Landlord's negligence. (Pa 90; Pa 92). The Defendant BURAK leased the second-floor residential apartment above the commercial space to residential tenants. (Pa 88).

There is no notice by the Respondent Burak to the residential tenant that the maintenance is the responsibility of Appellant Micakowski. (Pa 88 – Pa 94). The residential lease is silent as to who is responsible for the maintenance. (Pa 88 – Pa 94). Since the residential lease is silent, then the responsibility for the maintenance falls on Respondent Burak. (Pa – Pa 94).

C. Respondent Burak modified the lease agreements and the rider by Respondent Burak's own conduct of occupying the property, back garage, driveway, and parking lot.

Respondent Burak used the driveway and parking lot in order to park his White Van in the back of the property in front of the garage with a space that was marked "VAN-VAN." (Pa 32; Pa 33; Pa 97; Pa 99; Pa 101; Pa 102). Respondent Burak would also park a gray Dodge Ram 4 Door Truck along the parking lot taking

up one (1) to two (2) parking spaces since it was an oversized pickup truck. (Pa 34; Pa 97 – Pa 100; Pa 103).

Respondent Burak was using the garage in the back, the driveway, and three parking spaces on a daily basis. (Pa 61 - Pa 62; see Micakowski Dep. 44:19-25, 46:12-17, March 04, 2024; Pa 18; Pa 32 – Pa 34; Pa 96 – Pa 103; Pa 137 – Pa 140; Pa 147). Further, Respondent Burak allowed the residential tenants to use the parking spaces and the driveway. (Pa 62; see Micakowski Dep. 45:1-5, March 04, 2024).

Due to Respondent Burak’s control over the garage, driveway, and parking lot, Respondent Burak should have maintained the driveway and parking lot. (Pa 61; Pa 62; see Micakowski Dep. 44:19-25, 46:12-17, March 04, 2024). In effect, the Respondent Burak is occupying the property. Given Respondent Burak’s use and occupancy of the garage, driveway, and parking lot, Respondent Burak modified the maintenance clauses of the lease agreements and the rider by conduct.

D. The renewal rider in September 2021 shows that the maintenance of the driveway and parking lot between November 2016 to October 2021 belong to Respondent Burak. (Pa 132)

Prior to the expiration of the lease on October 31, 2021, the Respondent Burak provided a renewal rider to the Appellant Micakowski. (Pa 131). On September 14, 2021, the renewal rider was delivered to the Appellant Micakowski. (Pa 132).

Respondent Burak added and wanted Appellant Micakowski to be responsible for the maintenance of the driveway, parking area, and the front of the business. (Pa 132).

The provision specifically stated: “Parking Lot need to be maintained keep clean, winter time remove the snow of the parking and front of the business.” (Pa 132). Respondent Burak specifically added the maintenance of the parking lot to the renewal rider because Respondent Burak maintained the parking lot from the original lease term of November 2016 to October 2021. (Pa 41; Pa 43; Pa 155; Pa 132)

From November 2021 to October 2026 lease term, the Respondent Burak required the Appellant Micakowski to take on the new responsibility of maintaining the parking lot and the removal of snow. (Pa 132). Respondent Burak includes “snow” in the renewal, but does not include “ice.” (Pa 132).

Of note, the Respondent Burak included for the Respondent Burak to have the parking spot next to the garage in the renewal rider to show that the Respondent Burak was using and occupying garage, driveway, and parking lot. (Pa 132). As such, the Respondent Burak requires control over the garage, driveway, and parking lot, but the maintenance should be towards Appellant Micakowski. Therefore, this is an acknowledgment by Respondent Burak that he failed to provide and express in

unequivocal terms the maintenance of the driveway for the original term from November 2016 to October 2021 to Appellant Micakowski as a matter of law.

SUMMARY

One maintenance clause does not include “driveway,” but the other does have “driveway.” The rider omits the responsibility of the driveway and parking lot, and the Respondent Burak’s conduct does not follow the agreements. The renewal rider is an admission by the Respondent Burak that they should have maintained the driveway and parking lot and to shift the responsibility to the Appellant Micakowski. The Respondent Burak has created conflicts, ambiguities, and inconsistencies between the agreements as well as the conduct.

Therefore, Respondent Burak failed to express the maintenance clause in unequivocal terms. As such, the responsibility for the maintenance of the driveway and parking lot fall on the Respondent Burak. Based on the various different terms, the Respondent Burak failed to establish as an undisputed material fact as to which maintenance clause applies.

POINT III

THE TRIAL COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT AS THE RESPONDENT BURAK HAD CONTROL OVER THE BACK GARAGE, DRIVEWAY, AND PARKING LOT. (Pa 152; Pa 154)

In Michaels v. Brookchester, Inc., 26 N.J. 379, 382 (1958), a lease is historically viewed as a sale of an interest in land. As such, the landlord was not responsible for maintenance of the premises. Id. Over time, however, exceptions to that principle developed which includes “the landlord owes a duty of reasonable care with respect to the portions of a building which are not demised and remain in the landlord’s control.” Id.

In J.H. v. R & M Tagliareni, LLC, 239 N.J. 198, 218 (2019), there is an emphasis and importance of control in imposing a duty on a landlord, finding that a landlord has a duty to exercise reasonable care to guard against foreseeable dangers arising from use of those portions of the rental property over which the landlord retains control. citing Scully v. Fitzgerald, 179 N.J. 114, 121-22 (2004).

This view is reflected in the Restatement (Second) of Torts § 360 (Am. Law Inst. 1965) providing that a possessor of land who leases a part thereof and retains in his own control any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land.

A landlord that retains sufficient control over its property to make safety repairs should not be able to extinguish its duty to exercise reasonable care to guard against foreseeable dangers. see Jerkins v. Anderson, 191 N.J. 285, 294 (2007). Whether to impose a duty depends on an analysis of such factors (referred to as the Hopkins Factors) as

- (1) the relationship of the parties,
- (2) the foreseeability and nature of the risk of harm,
- (3) the opportunity and ability to exercise care to avoid the harm,
- (4) the public interest, and
- (5) notions of fairness and common sense.

Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439, 443 (1993). Generally, a landlord's duty to repair a dangerous condition on its property "arises when the harm is foreseeable and the landlord has sufficient control to prevent it." See Scully, 179 N.J. at 121-23.

(1) the relationship of the parties (Pa 38; Pa 43; Pa 48; Pa 131)

Respondent Burak is the landlord and the Appellant Micakowski is a tenant which confers a landlord-tenant relationship. As such, the first factor favors imposition of duty.

(2) the foreseeability and nature of the risk of harm (Pa 137; Pa 139; Pa 140)

Hazards posed by winter weather are generally readily foreseeable, and it would be fair to place responsibility for removal of snow and ice on Respondent Burak. Thus, factor two favors imposition of duty.

(3) the opportunity and ability to exercise care to avoid the harm

(Pa 32; Pa 33; Pa 97 – Pa 103; Pa 137; Pa 139; Pa 140)

It would be practical to require the Respondent Burak here to prevent the harm in the driveway since Respondent Burak was driving the vehicles up and down the driveway to get to the back garage and the parking spaces. Respondent Burak was driving the vehicles on top of and along where the incident occurred. Respondent Burak uses and occupies the property on a daily basis and does have access to information about the condition of the property.

Of note, one of the indemnification clauses does specific “beyond the control of the” Respondent Burak. (Pa 45 – Pa 46). As such, control is an element of one of the indemnification clauses which is Lease Agreement Business and Commercial lease. (Pa 44). As established above, the Respondent Burak does have control over the garage, driveway, and parking lot. Thus, the third factor favors a determination that there is a duty.

(4) the public interest (Pa 18; Pa 34; Pa 35; Pa 59; Micakowski Dep. 36:7-14, March 04, 2024; Pa 60; Micakowski Dep. 39:8-11, March 04, 2024)

The public interest is to hold the Respondent Burak responsible for the incident towards the tenant Appellant Micakowski over an area that the Respondent Burak controlled. Appellant Micakowski is without redress and cannot recover for his permeant injury. Public interest favors a determination of duty.

(5) notions of fairness and common sense (Pa 38; Pa 43; Pa 48; Pa 131)

Respondent Burak has control over the driveway and parking lot and should have properly and reasonably cleaned the snow and ice. The indemnification clauses in the lease agreements, the rider, and the renewal rider do not include “ice” in the said clauses. The maintenance/responsibility clauses and the conduct of the Respondent Burak dictates that Respondent Burak should have maintenance the driveway and parking lot specifically free from “ice.” As such, fairness and common senses favors determination of duty.

SUMMARY

Respondent Burak should be held responsible as the Respondent Burak did not relinquish control over the garage, driveway, and parking lot.

CONCLUSION

During the Summary Judgment, the Trial Court incorporated and combined the two (2) different indemnity clauses and the three (3) different maintenance/responsibility clauses from the two (2) different lease agreements and the initial rider. Since the Trial Court “cherry picked” which clauses and portions of the leases apply and did not analyze their differences, then the Appellant Micakowski could never survive summary judgment.

The Trial Court failed to analyze the seminal issues of whether or not the Respondent Burak established and expressed unequivocal terms to the Appellant Micakowski. Given the conflicting and different terms provided by the Respondent Burak, Respondent Burak failed to establish unequivocal terms as a matter of law.

Respondent Burak created a conflict with Appellant Micakowski as to who is responsible for the maintenance of the garage, driveway, and parking lot. The Trial Court failed to take into account as who maintains the garage, driveway, and parking lot per the residential lease. As such, the maintenance falls on Respondent Burak.

The Trial Court failed to conduct a control analysis regarding the driveway and parking lot regardless of the terms of the leases. Its apparent by clear and convincing evidence that the Respondent Burak used and occupied the driveway and parking lot, but wants to be free from liability, responsibility, and maintenance. In

effect, Respondent Burak is using the leases, rider, conduct, and the renewal rider more like a “sword” rather than a “shield” to absolve themselves.

Circling back to the summary judgment standard, the Respondent Burak wanted the leases and riders to be akin to a triple net lease where the Appellant Micakowski would be responsible for the entire property. However, looking at the four (4) corners of all the agreements, the Respondent Burak failed to establish undisputed material facts as to the terms since they are different between the agreements.

The indemnification clauses and the maintenance clauses have different terms, different obligations, different inclusions, different exclusions, and omitted hazards which automatically created a dispute of material facts. In addition to the different terms, the Respondent Burak further created a conflict over the use and occupancy of the property since Respondent Burak was using the garage, driveway, and parking lot. Respondent Burak became an additional occupant of the property by conduct. This disputed material fact requires testimony before the trier of fact.

Regardless, the control issue for the garage, driveway, and parking lot for summary judgment purposes would favor the Appellant Micakowski over the Respondent Burak. Two seminal facts that Respondent Burak controls the driveway are Respondent Burak’s own use and occupancy and Respondent Burak allowing the residential tenant to also use and occupy the driveway and parking lot. If the Trial

Court applied all of the inferences in favor of the Appellant Micakowski, Respondent Burak failed to establish as an undisputed fact that Respondent Burak does not control the garage, driveway, and parking lot.

Respondent Burak's degree of maintenance, the degree of control, and the degree of responsibility to the Appellant Micakowski is a factual dispute which is solely reserved for the trier of fact and not appropriate for summary judgment. Based on the totality of the circumstances, law and equity, and for all of the reasons mentioned above, the Trial Court's order granting Summary Judgment should be reversed and matter remanded for further proceedings.

Respectfully Submitted,

A handwritten signature in black ink that reads "Borce Martinoski". The signature is written in a cursive, flowing style.

Borce Martinoski, Esq.
Attorney for Plaintiff/Appellant
Micakowski

Date: June 24, 2025

| | |
|---|--|
| <p>DEJAN MICAkowski and JANNETTE NADLER,</p> <p>Plaintiffs/Appellants</p> <p>v.</p> <p>ELZBIETA BURAK, JOZEF BURAK and ABC CORPORATION #1-10, as owner, and ABC CORPORATION #11-20 as maintenance company, and JOHN DOE CORPORATION #21-30, and ABC CORPORATION #31-40 as snow removal company,</p> <p>Defendants/Respondents</p> | <p>SUPERIOR COURT OF NEW JERSEY</p> <p>APPELLATE DIVISION DOCKET NO.: A-1721-24</p> <p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-698-23</p> <p>SAT BELOW: The Honorable Anthony R. Suarez, J.S.C.</p> <p>CIVIL ACTION</p> |
| <p>ELZBIETA BURAK and JOZEF BURAK,</p> <p>Third-Party Plaintiffs/Respondents</p> <p>v.</p> <p>MD GROUP, LLC,</p> <p>Third-Party Defendant/Respondent</p> | |

RESPONDENTS' BRIEF IN OPPOSITION TO APPEAL

POWELL, KUGELMAN & POSTELL, LLC

131 White Oak Lane

Old Bridge, New Jersey 08857

Tel: 732-679-3777

Email: cgunther@lawppl.com

Attorneys for Defendants,

Elzbieta Burak and Jozef Burak

Chase T. Gunther, Esq. - 483472024

On the Brief

Joseph M. Powell, Esq. - 027011992

Attorney of Record

TABLE OF CONTENTS

TABLE OF JUDGMENTS.....iii

TABLE OF CITATIONSiv

TABLE OF APPENDIX.....v

PRELIMINARY STATEMENT.....1

PROCEDURAL HISTORY.....4

COUNTER-STATEMENT OF FACTS.....5

LEGAL ARGUMENT

POINT I

APPELLANT PRESENTS ISSUES THAT WERE NOT RAISED
IN THE TRIAL COURT AND THEREFORE SUCH
ARGUMENTS ARE OUTSIDE THE APPELLATE COURT’S
SCOPE OF REVIEW.....8

POINT II

APPELLANT’S NEWLY RAISED ARGUMENTS REGARDING
THE SUBSTANCE OF THE INDEMNIFICATION PROVISIONS
ARE NONETHELESS UNPERSUASIVE.....10

a. Appellant Dejan Micakowski Clarified the Existence
of Multiple Lease Agreements and Testified as to
Their Legitimacy.....11

b. Appellant Has Failed to Demonstrate How the Presence
of Similar Indemnification Provisions in Both Lease
Agreements Creates an Ambiguity as to the Intent of
the Parties.....13

POINT III

THE TRIAL COURT DID NOT ERR IN GRANTING
SUMMARY JUDGMENT AS THE PARTIES’
MAINTENANCE OBLIGATIONS HAVE NO EFFECT
ON THE ENFORCEABILITY OF THE INDEMNIFICATION
PROVISIONS.....19

POINT IV

THE TRIAL COURT DID NOT ERR IN GRANTING
SUMMARY JUDGMENT AS THE RESPONDENTS’
ALLEGED CONTROL OVER THE PARKING LOT HAS
NO EFFECT ON THEIR RIGHT TO INDEMNIFICATION.....20

CONCLUSION..... .23

TABLE OF JUDGMENTS

Respondents Elzbieta Burak and Jozef Burak hereby adopt and incorporate by reference the Table of Judgments as set forth in Appellant's Amended Brief as if fully stated herein.

TABLE OF CITATIONS

CASES:

Doloughty v. Blanchard Constr. Co.,
139 N.J. Super. 110 (Law Div. 1976).....15

Hopkins v. Fox & Lazo Realtors,
132 N.J. 426 (1993).....21,22

J.H. v. R & M Tagliareni, LLC,
239 N.J. 198, 218 (2019).....21

Jerkins v. Anderson,
191 N.J. 285, 294 (2007).....21,22

Kaneh v. Sunshine Biscuits,
321 N.J. Super. 507, 512 (App. Div, 1999).....8

Mantilla v. NC Mall Assocs.,
167 N.J. 262 (2001).....15

Mayfair Fabrics v. Henley,
48 N.J. 483, 490 (1967).....17,23

Michaels v. Brookchester, Inc.,
26 N.J. 379, 382 (1958).....21

Midland Carpet Corp. v. Franklin Associated Properties,
90 N.J. Super. 42, 43 (App. Div. 1966).....16,17,23

Ramos v. Browning Ferris Indus. Of S. Jersey, Inc.,
103 N.J. 177 (1986).....15

Scully v. Fitzgerald,
179 N.J. 114, 121-122 (2004).....21

Spiegle v. Seaman,
160 N.J. Super. 471, 475 (App. Div. 1978).....9

..

Triffin v. Somerset Valley Bank,
343 N.J. Super. 73, 77 (App. Div. 2001).....8

TABLE OF APPENDIX

Respondents Elzbieta Burak and Jozef Burak hereby adopt and incorporate by reference the Amended Appendix submitted with Appellant’s Amended Brief as if fully stated herein. Respondents additionally submit the attached Respondent’s Appendix and Table of Appendix.¹

A. First Floor and Basement Lease AgreementDa1
B. Front Store Space Lease Agreement Da5
C. Rider to Front Store Space Lease Agreement.....Da10
D. Proposed Renewal of Lease Agreement.....Da12

¹ The sole purpose of Respondents’ Appendix is to provide a more legible copy of the subject lease agreements contained in Appellant’s Appendix at Pa38-49 and Pa131-134. Respondents will cite to both appendices when referencing the subject lease agreements.

PRELIMINARY STATEMENT

The underlying matter pertains to a slip and fall that occurred in the parking lot of the commercial and residential property located at 324 River Drive, Garfield, New Jersey 07026 (hereinafter referred to as “the Property”), owned by the Respondents, Elzbieta and Jozef Burak (hereinafter “the Respondents”). Appellant, Dejan Micakowski (hereinafter “Appellant”) at all relevant times was a commercial tenant leasing the bottom floor of the Property from which he operated a restaurant. While returning from taking garbage to the dumpster in the back of the Property, Appellant alleges to have slipped and fell on a patch of black ice that accumulated in the parking lot below a downspout attached to the side of the building.

There were two lease agreements entered into between the Respondents, as property owners, and Appellant, as a commercial tenant. One was a First Floor and Basement Lease Agreement, and the other was a Front Store Space Lease Agreement, dated September 20, 2016 and November 1, 2016, respectively. The Front Store Space Lease Agreement, signed by all parties, states in clear and unequivocal terms that the Respondents are to be indemnified and held harmless for any injury suffered by the Appellant on the property as a result of leaking water pipes or downspouts. The First Floor and Basement Lease Agreement states in clear and unequivocal terms that the Respondents are to be indemnified for any injury resulting from latent defects on the Property. Furthermore, it is uncontested, for the

purpose of this appeal, that ice in the parking lot on which Appellant fell was the result of a leaking downspout creating an accumulation of water that froze over. In light of the indemnification provisions in both the Front Store Space Lease Agreement and First Floor and Basement Lease Agreement, the Respondents on January 2, 2025 filed a motion for summary judgment, seeking a dismissal of Appellant's complaint with prejudice. The Respondents based their entitlement to relief based off of 1) the obligation to perform snow and ice remediation under the Lease Agreements; and 2) the presence of the aforementioned indemnification provisions in the two lease agreements.

In opposition to the Respondents' motion for summary judgment, Appellant argued that the terms of the Lease Agreements regarding the duty to remove snow and ice from the property, were modified by the parties' conduct, due to the fact that the Respondents used a portion of the parking lot for storage and parking. Appellant's opposition focused solely on the responsibility of the parties under the lease agreements to perform snow and ice removal, and makes no argument that the indemnification provisions of the two lease agreements were somehow invalid. In light of a potential factual issue regarding the responsibility to remove snow and ice, the Respondents on Reply emphasized their entitlement to relief based solely on the existence of the indemnification provisions, regardless of the duty to remove snow and ice or the parties' alleged control over the property.

This matter was heard at oral argument on January 31, 2025, wherein the Honorable Anthony R. Suarez, J.S.C. granted summary judgment to the Respondents on the grounds that the indemnification provisions alone absolved the Respondents of any liability for Appellant's injuries. Appellant now argues on appeal that the trial court erred in granting summary judgment to the Respondents on the grounds that the two lease agreements entered by the parties contained varying indemnification provisions. Not only is this argument inappropriate on appeal, since it was not raised at the trial level, but it is unfounded, as such leases contain similar indemnification provisions clearly expressing an intent to hold the Respondents, as landlords, harmless for the type of injury that occurred here. The remainder of Appellant's arguments, regarding factual issues of control and maintenance of the property, are without merit, as the trial court deemed the Respondents to be entitled to relief solely based on the indemnification provisions.

For the foregoing reasons, the trial court rightfully concluded that Respondents Buraks are indemnified from all liability arising out of Appellant's incident in the parking lot of the property. It is therefore respectfully requested that the Court uphold the Law Division's February 3, 2025 Order dismissing Appellant's complaint as to the Respondents with prejudice.

PROCEDURAL HISTORY

Respondents Elzbieta Burak and Jozef Burak hereby adopt and incorporate by reference the procedural history as set forth in Appellant's Amended Brief as if fully stated herein. (Pb3-4).

COUNTER-STATEMENT OF FACTS

This matter arises out of an alleged slip-and-fall that occurred in the parking lot of the property located at 324 River Drive, Garfield, New Jersey 07026 (hereinafter referred to as “the Property”), which at all relevant times was owned by Respondents Elzbieta Burak and Jozef Burak (hereinafter “the Respondents”). (Pa3. See also Pa111).

Appellant Dejan Micakowski (hereinafter “Appellant”) at the time of his injury was a commercial tenant who operated a restaurant out of the bottom floor of the Property. MD Group, LLC, of which Appellant is the sole owner and operator, owns the restaurant which Appellant operated out of the first floor of the Property at the time of his injury. (Pa4, Pa12).

The Respondents entered into two lease agreements with Appellant and Respondent MD Group, LLC for the subject Property: 1) a Commercial Lease Agreement, dated September 20, 2016, for the First Floor and Basement of the Property; and 2) a Commercial Lease Agreement, dated November 1, 2016, for the Front Store Space of the Property. (Pa38-47, Da1-9). The Front Store Space Lease Agreement contains a Rider, which serves as an addendum to the Front Store Space Lease. (Pa48-49, Da10-11). Both agreements, signed between the Respondents, Appellant individually, and MD Group, LLC, leased the subject Property to Appellant and Respondent MD Group, LLC for the period of

November 1, 2016 to October 30, 2021. (Pa38-47, Da1-9). Appellant in his deposition dated March 4, 2024 testified that his signature is on both lease agreements. (Pa61 [T43:3-44:16], Pa63 [T50:5-51:2]). The parties also entered into a proposed renewal agreement, delivered September 14, 2021, should Appellant choose to renew their initial lease. (Pa131-134, Da12-15). Appellant testified that the Rider was part of the initial lease agreements, and that as part of the Rider, he had the option to renew his lease, which he declined on October 6, 2021. (Pa62-63 [T47:20-49:3]).

Appellant alleges to have suffered injury on February 9, 2021 after slipping and falling on ice in the parking lot of the Property, adjacent to the entrance to the premises, while returning from taking garbage to the dumpster located in the back of the parking lot. (Pa12). Appellant alleges that a downspout (drainage pipe) affixed to the side of the dwelling leaked water, forming a pool of black ice in the parking lot near the entrance to Appellant's business. (Pa18, Pa26).

The 23rd paragraph of the Front Store Space Lease Agreement states: "The Landlord will not be liable for any damage or injury which may be sustained by the Tenant or any other person, as a consequence of the failure, breakage, leakage or obstruction of the water, plumbing, steam, sewer, waste or soil pipes, roof, drains, leaders, gutters, valleys, downspouts or the like... or by reason of

the elements; or resulting from the carelessness negligence or improper conduct on the part of any other tenant or of the Landlord... This limitation on the Landlord's liability will not apply to damage or injury resulting from the gross negligence or willful misconduct of the Landlord...". (Pa45-46, Da7-8).

The 13th Covenant to the First Floor and Basement Lease Agreement provides: "the Landlord shall not be liable... for injury or damage to person or property caused by the elements... or resulting from steam, gas, electricity, water, rain or snow, which may leak or flow from any part of said buildings, or from the pipes, appliances, or plumbing works of the same, or from the street or sub-surface, or from any other place". The 13th Covenant additionally states: "neither shall the Landlord be liable for any latent defect in the building". (Pa40, Da3).

It is uncontested that Appellant agreed to and signed the above-mentioned Lease Agreements. (Pa61 [T43:3-44:16], Pa63 [T50:5-51:2]). It is further uncontested, for purposes of this appeal, that Appellant's fall was the result of a leaking downspout which caused a pool of ice to accumulate in the parking lot of the Property. (Pa18, Pa26).

LEGAL ARGUMENT

POINT I

APPELLANT PRESENTS ISSUES THAT WERE NOT RAISED IN THE TRIAL COURT AND THEREFORE SUCH ARGUMENTS ARE OUTSIDE THE APPELLATE COURT’S SCOPE OF REVIEW

Appellant, in their Brief, argues that the Trial Court erred in granting summary judgment because the two Lease Agreements, in addition to the Rider, have allegedly conflicting terms and therefore do not provide in “clear and unequivocal terms” an intention to indemnify the Respondents from liability for the type of harm which occurred here. (Pb9-22). At no point in Appellant’s Opposition to the Respondents’ Motion for Summary Judgment or at oral argument did Appellant take the position that the agreements entered into by the parties contained conflicting indemnification provisions that could create an issue as to enforceability. (Pa71-86. See also Oral Argument Transcript filed April 22, 2025).

Issues not raised at the trial court level are deemed to be waived for appellate purposes. Kaneh v. Sunshine Biscuits, 321 N.J. Super. 507, 512 (App. Div, 1999). The New Jersey Appellate Court generally will not consider arguments not properly raised at the trial level, unless such argument pertains to jurisdiction of the trial court or a matter of substantial public interest. Triffin v. Somerset Valley Bank, 343 N.J. Super. 73, 77 (App. Div. 2001). Pursuant to the

New Jersey Appellate Division, “it is well settled that appellate courts should decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available”. Spiegle v. Seaman, 160 N.J. Super. 471, 475 (App. Div. 1978).

The entirety of Appellant’s argument raised in their filed opposition to the Respondents’ Motion for Summary Judgment, and at oral argument, pertained to issues of snow/ice maintenance and the parties’ alleged control over the parking lot where the subject incident occurred. (Pa71-86. See also Oral Argument Transcript). Appellant at the trial level did not take any issue with the substance of the indemnification provisions in the lease agreements, despite the fact that such provisions were presented to the Court in the Respondents’ initial brief, reply brief, and during oral argument. Appellant was provided ample opportunity upon which to address their desired arguments in opposition to the Respondents’ Motion for Summary Judgment. Judge Suarez, after considering all arguments raised, ruled the indemnification provisions of both the Front Store Space Lease Agreement and First Floor and Basement Lease Agreement to be enforceable and appropriately granted summary judgment to the Respondents.

Appellant at the trial level made no contention that the substance of the subject indemnification provisions failed to demonstrate a “clear and

unequivocal” intention to indemnify the Respondents. Appellant further failed before the trial court to raise any argument that the presence of an indemnification provision in each lease agreement somehow created an issue as to their enforceability. Because Appellant took no issue with the substance of either indemnification provision at the trial level, they have waived their right to make such argument on appeal, and therefore it is respectfully submitted that such argument not be entertained by this Court.

POINT II

APPELLANT’S NEWLY RAISED ARGUMENTS REGARDING THE SUBSTANCE OF THE INDEMNIFICATION PROVISIONS ARE NONETHELESS UNPERSUASIVE

Appellant argues in Point I of their Brief, and for the first time on appeal, that the indemnification provisions of the two lease agreements are conflicting, therefore rendering unenforceable the indemnification provisions upon which the trial court found the Respondents to be entitled to summary judgment. (Pb9-22). Even if this was appropriately before the appellate court, such argument is without merit, and the trial court was proper in granting indemnity pursuant to the lease agreements’ clear intent to hold the Respondents harmless for Appellant’s injuries.

In support of their argument, Appellant attempts to call into question, as they did at the trial level, the legitimacy of the Front Store Space Lease and First Floor and Basement Lease. (Pb9-22). There is no question of fact as to the legitimacy of

these leases. The two lease agreements were signed by all parties and both demonstrate a clear intention to indemnify the Respondents, as landlords, for the exact scenario which occurred here. (Pa38-47, Da1-9). Appellant fails to cite any case law suggesting the presence of two contracts with separate indemnification provisions both relieving the landlord from liability would somehow render both provisions to be unenforceable.

a. Appellant Dejan Micakowski Clarified the Existence of Multiple Lease Agreements and Testified as to Their Legitimacy

Appellant attempts to call into question the legitimacy of the lease agreements between the parties, despite the fact that Appellant in their own testimony clarified the existence of the multiple agreements, confirming that Appellant knowingly and willingly signed each agreement. Appellant's counsel argues 1) that the two leases and rider contain no names of who signed, no date of when it was signed, no witnesses, and no notary stamp (Pb16); and 2) that it is unclear as to the order and control of each lease agreement and the rider; (Pb17). These contentions were fully argued and clarified in the lower court in light of Appellant Dejan Micakowski's deposition testimony.

First, Appellant contends that there are issues as to the lease agreements' enforceability as there are no printed names, no date of when the agreements were signed, no witnesses, and no notary stamp. This argument was unconvincing and properly dismissed by the trial court, as Appellant Dejan

Micakowski in his deposition identified such documents as the lease agreements between himself and the Respondents, and Appellant Micakowski further testified that he signed both lease agreements and the attached rider. (Pa61 [T43:3-44:16]; Pa62-63 [T47:20-49:3]; Pa63 [T50:5-51:2]).

Second, Appellant contends that the lease agreements and rider are not clear as to the scope of their control and the dates that each were entered into. As stated in the agreements, one lease is titled “First Floor & Basement”, signed on September 20, 2016, for the lease period beginning November 1, 2016. (Pa38-39, Da1-2). The other lease agreement (which Appellant’s counsel refers to as “Lease Agreement Business and Commercial” Pb16), states the defined premises as the “Front Store Space” and is deemed to be effective November 1, 2016. (Pa43, Da5). It is self-explanatory that the Rider pertains to the Front Store Space Lease Agreement, as the Rider is also effective as of November 1, 2016, and states in its terms that it serves as an addendum to the lease agreement for the premises of the front store space of the subject property. (Pa48-49, Da10).

Appellant contends that the control of each lease agreement is not clear, stating that the presence of two lease agreements creates ambiguity in which lease takes prevalence over the other. However, this argument is unconvincing as their control is self-explanatory. The parties elected to enter into two lease agreements that operate in conjunction with one another for Appellant’s lease

of the subject property. The language of the First Floor and Basement Lease Agreement indicates that it primarily governs Appellant's rental of the first floor and basement, or interior, of the property, and the Front Store Space Lease Agreement primarily governs the front area and exterior of the property. The trial court rightfully determined that the presence of these two lease agreements and rider did not create an issue of ambiguity regarding their enforceability, as Appellant testified that the parties intended to enter into these two separate leases, which Appellant knowingly and willingly signed. (Pa61 [T43:3-44:16]; Pa62-63 [T47:20-49:3]; Pa63 [T50:5-51:2]).

b. Appellant Has Failed to Demonstrate How the Presence of Similar Indemnification Provisions in Both Lease Agreements Creates an Ambiguity as to the Intent of the Parties

Appellant also argues for the first time on appeal that the lease agreements contain conflicting indemnification provisions which somehow render the Respondents' indemnification to be ineffective. Appellant argues 1) that one indemnification provision indemnifies the Respondents for their own negligence, while the other does not; 2) that the indemnification provisions are inconsistent with regard to their terminology for "the elements" (water, snow, and ice); and 3) that the presence of two indemnity clauses in and of itself creates an assumption that indemnification is not stated in "clear and unequivocal terms". (Pb9-22).

The First Floor and Basement Lease’s indemnification provision reads as follows:

“The Landlord shall not be liable for any failure of the water supply or electrical current, sprinkler damage, or failure of sprinkler service, nor for injury or damage to person or property caused by the elements or by other tenants or persons in said building, or resulting from steam, gas, electricity, water, rain or snow, which may leak or flow from any part of said buildings, or from the pipes, appliances, or plumbing works of the same, or from the street or sub-surface, or from any other place.... neither shall the Landlord be liable for any latent defect in the building”.

(Pa40, Da3). The Front Store Space Lease’s indemnification provision reads as follows:

“The Landlord will not be liable for any damage or injury which may be sustained by the Tenant or any other person, as a consequence of the failure, breakage, leakage or obstruction of the water, plumbing, steam, sewer, waste or soil pipes, roof, drains, leaders, gutters, valleys, downspouts or the like... or by reason of the elements; or resulting from the carelessness negligence or improper conduct on the part of any other tenant or of the Landlord... This limitation on the Landlord’s liability will not apply to damage or injury resulting from the gross negligence or willful misconduct of the Landlord...”.

(Pa45-46, Da7-8).

Appellant claims that the Front Store Space Lease Agreement indemnifies the Respondents for their own negligence, while the First Floor and Basement Agreement does not address indemnification for the landlord’s negligence. Appellant further emphasizes that First Floor and Basement indemnification

provision contains the terms “water”, “rain”, and “snow”, while the Front Store Space indemnification provision only mentions the term “water”. Appellant continues to state that the Front Store Space provision contains the terms “pipes” and “downspouts”, while the First Floor and Basement provision only contains “pipes”. (Pb18-22).

In support of their argument that the above-mentioned differences in the two indemnification provisions create an ambiguity as to intent, Appellant cites a string of cases which state the general legal doctrine that indemnification provisions are to be enforced where their plain language demonstrates an intention to be held harmless from liability in clear and unequivocal terms. (Including Mantilla v. NC Mall Assocs., 167 N.J. 262 (2001); Ramos v. Browning Ferris Indus. Of S. Jersey, Inc., 103 N.J. 177 (1986); Doloughty v. Blanchard Constr. Co., 139 N.J. Super. 110 (Law Div. 1976)). None of these cases support the notion that the presence of two indemnification clauses, found in separate lease agreements, both demonstrating a similar intent to indemnify a party, could somehow create an ambiguity issue that could affect their enforceability. Neither do these cases suggest that an indemnitee cannot be held harmless where an intention of such is clearly spelled out in an agreement between the parties. Furthermore, the fact that one indemnification clause mentions indemnification for the Respondents’ own negligence, and the other

does not, is irrelevant, since the negligence portion of the indemnification provision was not the basis upon which the trial court granted indemnity. As the trial court properly determined,

“The language of the signed Lease Agreements makes it clear that the parties intended Plaintiff to not have a claim for relief against the Buraks for injuries resulting from the drainage of any downspouts or water pipes on the property, as such, there is no genuine issue of material fact that the Buraks would be liable for Plaintiff’s injuries”.

(Pa161).

Appellant’s position that the presence of these two separate indemnification provisions in separate contracts somehow creates an issue as to enforceability is unfounded, since both provisions demonstrate an intention to indemnify the landlord (the Respondents Buraks). (Pa155-156) As previously mentioned, Appellant cites no case law in which the court holds that two separate indemnification provisions in two contracts could somehow cancel each other out because one provides indemnification to a slightly different extent than the other.

There is no case law cited by Appellant that would suggest the differences in these indemnification provisions raised by Appellant somehow render the provisions to be unenforceable. New Jersey courts have consistently determined that so long as a contract is clear and unambiguous, it is to be enforced as written. Midland Carpet Corp. v. Franklin Associated Properties, 90 N.J. Super. 42, 43 (App. Div. 1966).

Furthermore, exculpatory clauses in commercial leases that indemnify and hold a landlord harmless, even for their own acts of negligence, are enforceable so long as that intention is apparent from the language of the lease agreement. Midland Carpet Corp. v. Franklin Associated Properties, 90 N.J. Super. 42, 43 (App. Div. 1966). See also Mayfair Fabrics v. Henley, 48 N.J. 483, 490 (1967).

The First Floor and Basement Lease Agreement provides indemnification to the Respondents for “injury or damage to person or property caused by the elements... or resulting from steam, gas, electricity, water, rain or snow, which may leak or flow from any part of said buildings, or from the pipes, appliances, or plumbing works of the same... neither shall the Landlord be liable for any latent defect in the building”. (Pa40, Da3). The Front Store Space Lease Agreement provides indemnification for “any damage or injury which may be sustained by the Tenant or any other person, as a consequence of the failure, breakage, leakage or obstruction of the water, plumbing, steam, sewer, waste or soil pipes, roof, drains, leaders, gutters, valleys, downspouts or the like... or by reason of the elements; or resulting from the carelessness negligence or improper conduct on the part of any other tenant or of the Landlord...”. (Pa45-46, Da7-8). It is unrefuted for the purpose of this appeal that this accident was caused by a defective downspout which caused water to leak onto the parking lot and form a pool of ice upon which Appellant slipped. (Pa18, Pa26). No logical reading of these two

indemnification provisions could lead a reasonable factfinder to conclude that the lease agreements do not state, in “clear and unequivocal terms”, the parties’ intention to indemnify the Respondents for the exact type of incident which occurred here.

Judge Suarez, in his Order granting summary judgment, properly determined that:

“the Lease Agreements signed between Plaintiff and the Buraks contained multiple provisions indemnifying and holding the Buraks harmless for any injury suffered by the Tenant based on the failure or malfunction of portions of the property such as the roof, gutters, pipes, and downspouts.”

Judge Suarez also concluded in his Order:

“The language of the signed Lease Agreements makes it clear that the parties intended Plaintiff to not have a claim for relief against the Buraks for injuries resulting from the drainage of any downspouts or water pipes on the property, as such, there is no genuine issue of material fact that the Buraks would be liable for Plaintiff’s injuries.

The undisputed contractual language of the Lease Agreement requires the Buraks as Landlords to be held harmless from liability for any injuries suffered by Plaintiff resulting from the leakage of a downspout on the Property. Therefore, the Defendants Buraks are entitled to summary judgment as a matter of law on the basis that the plaintiff language of the Lease Agreements shields them from liability for Plaintiff’s injuries”.

(Pa160-161). Should the Court choose to consider this newly raised argument, it is respectfully submitted that the trial court properly ruled that the indemnification provisions of both lease agreements clearly demonstrate an intention to hold the Respondents as landlords harmless for Appellant’s injuries,

effectively indemnifying the Respondents from liability for the entirety of Appellant's claim.

POINT III

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT AS THE PARTIES' MAINTENANCE OBLIGATIONS HAVE NO EFFECT ON THE ENFORCEABILITY OF THE INDEMNIFICATION PROVISIONS

In Point II of their Brief, Appellant argues that the maintenance obligations of each party under the lease agreements create an issue of fact as to who was responsible for the removal of snow and ice from the subject property. (Pb22-29). The dispute regarding maintenance obligations was waived by the Respondents on Reply, solely for purposes of their summary judgment motion, because the Respondents were entitled to relief based on the indemnification provisions alone. Appellant at oral argument stressed that the terms in the parties' agreements created an issue of fact as to the duty to keep the property clear of snow and ice. (See Oral Argument Transcript dated April 22, 2025). In granting summary judgment to the Respondents, the trial court determined that such issues as to maintenance had no effect on the enforceability of the indemnification provisions, holding that:

“Based upon the above, Defendants' motion for summary judgment is granted as the lease agreement indemnifies and holds harmless the Defendants from any injury resulting from a leakage of the downspouts on the property.

This Court does not reach the other issues raised by the parties in their papers and at oral argument as summary judgment is warranted based upon the indemnification language of the parties agreements cited above.”

(Pa161). Because it is explicitly stated in the Court’s Order that summary judgment was granted based solely on the indemnification provisions of the lease agreements, the parties’ maintenance obligations have no bearing on the Court’s decision to indemnify the Respondents Buraks, and therefore the Respondents provide no response to such.

POINT IV

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT AS THE RESPONDENTS’ ALLEGED CONTROL OVER THE PARKING LOT HAS NO EFFECT ON THEIR RIGHT TO INDEMNIFICATION

In Point III of their Brief, Appellant claims that the Court erred in granting summary judgment to the Respondents as they used a portion of the parking lot of the subject property for vehicle parking and storage. (Pb30-33). Appellant cites to New Jersey cases which assert the common law notion that a landlord owes a duty of reasonable care to guard against foreseeable dangers over which the landlord retains control. (Pb30-33). While Respondents agree with Appellant’s recitation of the common law regarding an individual’s duty to prevent reasonable harm, none of these cases indicate that a landlord’s usage of a property somehow nullifies a bargained-for exchange to be indemnified and held harmless from liability. The trial

court heard Appellant's counsel's arguments regarding alleged issues of control and duty under the Hopkins factors, after which the trial court rightfully determined the issue of control to have no effect on the parties' contractual agreement to indemnify the Respondents from liability. (Pa161. See also Oral Argument Transcript).

Appellant, in arguing the Respondents' alleged control over the parking lot negated their right to indemnification, cites several cases which address the common law duty for property owners to exercise reasonable care to guard against foreseeable dangers over which they retain control. See Michaels v. Brookchester, Inc., 26 N.J. 379, 382 (1958); J.H. v. R & M Tagliareni, LLC, 239 N.J. 198, 218 (2019); Scully v. Fitzgerald, 179 N.J. 114, 121-122 (2004); Jerkins v. Anderson, 191 N.J. 285, 294 (2007); and Hopkins v. Fox & Lazo Realtors, 132 N.J. 426 (1993). While Respondents accept that there is a common law duty to exercise reasonable care in preventing foreseeable harm to others, none of these cases negate a landlord's right in a bargained-for exchange to create an enforceable agreement to absolve themselves from liability.

Specifically, Appellant cites the matter of Jerkins v. Anderson to take the position that "a landlord that retains sufficient control over its property to make safety repairs should not be able to extinguish its duty to exercise reasonable care to guard against foreseeable dangers". (Pb31). However, Jerkins involved a school district's duty to supervise its students during dismissal of school hours, holding that

the employees had a duty to prevent foreseeable harm to students. Jerkins v. Anderson, 191 N.J. 285, 294 (2007). This case makes no discussion of a landlord or property owner's duty to protect tenants or the landlord's ability to contractually indemnify themselves from liability. Id. To use such a case to allege a landlord cannot contractually limit their liability is a misrepresentation of the cited law.

Additionally, Appellant in support of their argument that the Respondents could not contractually absolve themselves from the common law duty to prevent foreseeable harm, cites the matter of Hopkins v. Fox & Lazo Realtors, which pertained to a real estate broker's alleged duty to reasonably prevent foreseeable harm to guests of an open house. Hopkins v. Fox & Lazo Realtors 132 N.J. 426 (1993). While the Hopkins factors cited by Appellant apply an analysis of whether a person owes a common law duty to prevent harm to another, it is silent on a defendant's owed duty of care when the involved parties have a contractual agreement to indemnify and hold the defendant harmless. Id. The remainder of the cases cited by Appellant also pertain to the general common law imposition of a duty of care to prevent foreseeable harms, and completely absent from these cases is a discussion of duty when an agreement to indemnify is involved. (Pb30-33).

New Jersey case law makes it readily apparent that a court will uphold a landlord's right to indemnification where an agreement between the parties clearly expresses a contractual right to be held harmless for the type of injury being claimed.

It is a longstanding policy that courts cannot write parties a better contract than the one they entered into. Exculpatory clauses in commercial leases that indemnify and hold a landlord harmless even for their own acts of negligence are enforceable so long as that intention is apparent from the language of the lease agreement. Midland Carpet Corp. v. Franklin Associated Properties, 90 N.J. Super. 42, 43 (App. Div. 1966). See also Mayfair Fabrics v. Henley, 48 N.J. 483, 490 (1967).

As the trial court rightfully determined, the Respondents' alleged retention of control over portions of the property has no bearing on their right to indemnification under the lease agreements. (Pa161). Appellant cites no case law which suggests a landlord's usage of the property nullifies an agreement to be held harmless for injury suffered by the tenant. Meanwhile, New Jersey courts consistently uphold agreements to hold a property owner harmless where such intention is clearly stated in the terms of a contract. The trial court properly determined that the issue of control is irrelevant to the Respondents' entitlement to indemnification from liability for Appellant's injuries.

CONCLUSION

As the Honorable Anthony R. Suarez, J.S.C. properly determined, the Respondents Buraks have a readily determinable right to indemnification from the entirety of Appellant's claim under the terms the parties' contracts. The agreements entered into between Appellant Dejan Micakowski, Respondents

Buraks, and Respondent M.D. Group, express a clear and unambiguous intention to hold the Respondents Buraks harmless for injuries suffered by the tenant arising out of water that leaks from a downspout on the property. Furthermore, the Trial Court's Order dated February 3, 2025 makes it abundantly clear that the issues of maintenance obligations and control have no effect on the Respondents' right to be held harmless under the indemnifying language in the Lease Agreements. For the foregoing reasons, the Trial Court did not err in granting summary judgment to Respondents Buraks, and properly dismissed Appellant's Complaint as to the Respondents with prejudice. Therefore, it is respectfully submitted that this Court uphold the Trial Court's February 3, 2025 Order dismissing Appellant's Complaint with prejudice.

**POWELL, KUGELMAN &
POSTELL, LLC**
Attorneys for Respondents,
Elzbieta Burak and Jozef Burak



BY:

Chase T. Gunther, Esq.

DATED: July 23, 2025

Superior Court of New Jersey
Appellate Division

Docket No. A-001721-24

DEJAN MICAKOWSKI and : CIVIL ACTION
JANNETTE NADLER, :
 :
 : ON APPEAL FROM THE
 Plaintiffs-Appellants, : FINAL ORDER OF THE
 : SUPERIOR COURT
 : OF NEW JERSEY,
 vs. : LAW DIVISION,
 : BERGEN COUNTY
 :
 ELZBIETA BURAK, JOZEF :
 BURAK, and ABC : Docket No. BER-L-000698-23
 CORPORATION #1-10, as owner, :
 ABC CORPORATION #11-20, as : Sat Below:
 maintenance company, and JOHN :
 DOE CORPORATION #21-30, and : HON. ANTHONY R. SUAREZ,
 ABC CORPORATION #31-40, as : J.S.C.
 snow removal company, :

Defendants-Respondents.

ELZBIETA BURAK and JOZEF :
 BURAK, :
 :
 Third-Party Plaintiffs- :
 Respondents, :
 :
 vs. :
 :
 MD GROUP, LLC, :
 :
 Third-Party Defendant- :
 Respondent. :

**BRIEF ON BEHALF OF THIRD-PARTY DEFENDANT-
RESPONDENT, MD GROUP, LLC**

On the Brief:

GINO P. MECOLI

ID: 018101989

ANDREW R. CHURCHILL

ID: 332762021

REILLY, MCDEVITT & HENRICH, P.C.
*Attorneys for Third-Party
Defendant-Respondent, MD Group,
LLC*

Three Executive Campus, Suite 310

Cherry Hill, New Jersey 08002

(856) 317-7180

gmecoli@rmh-law.com

achurchill@rmh-law.com

Date Submitted: July 25, 2025

TABLE OF CONTENTS

| | Page |
|--|-------------|
| TABLE OF JUDGMENTS, ORDERS, AND RULINGS | ii |
| TABLE OF AUTHORITIES | iii |
| PRELIMINARY STATEMENT..... | 5 |
| PROCEDURAL HISTORY..... | 6 |
| STATEMENT OF FACTS | 6 |
| LEGAL ARGUMENT..... | 7 |
| I. THE TRIAL COURT’S FACTUAL FINDINGS UNDERLYING THE ORDER GRANTING SUMMARY JUDGMENT ARE ENTITLED TO DEFERENCE..... | 7 |
| II. IF THE ORDER GRANTING SUMMARY JUDGMENT IS UPHELD, THEN MD GROUP, LLC, MUST BE DISMISSED FROM THIS MATTER..... | 9 |
| CONCLUSION..... | 9 |

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

Respondent, MD Group, LLC, hereby adopts and incorporates by reference the Table of Judgments as set forth in Appellant's Amended Brief as if fully stated herein.

TABLE OF AUTHORITIES

Page(s)

Cases:

Green v. Monmouth Univ.,
237 N.J. 516 (2019).....7

Gripenburg v. Twp. of Ocean,
220 N.J. 239 (2015).....8

In re Ridgefield Park Bd. of Educ.,
244 N.J. 1 (2020).....7

Kocanowski v. Twp. of Bridgewater,
237 N.J. 3 (2019).....7

Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am.,
65 N.J. 474 (1974).....8

State v. Dickerson,
232 N.J. 2 (2018).....7

State v. Fuqua,
234 N.J. 583 (2018).....7

State v. G.E.P.,
243 N.J. 362 (2020).....7

State v. Gamble,
218 N.J. 412 (2014).....8

State v. Hemenway,
239 N.J. 111 (2019).....7

State v. Hyland,
238 N.J. 135 (2019).....7

State v. Mohammed,
226 N.J. 71 (2016).....8

TABLE OF APPENDIX

Respondent, MD Group, LLC, hereby adopts and incorporates by reference the Amended Appendix submitted with Appellant's Amended Brief as if fully stated herein.

PRELIMINARY STATEMENT

This matter arises out of a claim for injuries allegedly sustained by Plaintiff/Appellant Dejan Micakowski (hereinafter referred to as “Appellant” or “Micakowski”) on February 9, 2021, at 324 River Drive, Garfield, NJ, 07026 (hereinafter referred to as “the Premises”). Appellant claims that he slipped and fell on ice in the parking lot of the Premises while taking garbage to the dumpster. Appellant allegedly sustained a left displaced ankle fracture, which required surgery and hardware.

The Premises is owned by Defendant-Respondents, Elzbieta and Jozef Burak (hereinafter referred to as “the Burak Respondents”). There existed a lease agreement between Appellant and the Burak Respondents, for Appellant’s use of the basement and first floor of the Premises, which Appellant used to operate a restaurant. MD Group, LLC, owns the restaurant which Appellant operated out of the Premises. Appellant is the sole owner and operator of MD Group, LLC.

On February 3, 2025, the Honorable Anthony R. Suarez, J.S.C., sitting in the New Jersey Superior Court, Bergen County, Law Division, Civil Part, heard oral argument on, and subsequently granted the Burak Respondents’ Motion for Summary Judgment. Appellant claims that the lower Court erred because there are multiple lease agreements with conflicting terms.

Despite Appellant’s protests, the Court did not err by granting the Burak Respondents’ motion for summary judgment.

PROCEDURAL HISTORY

Respondent, MD Group, LLC, hereby adopts and incorporates by reference the procedural history as set forth in Appellant's Amended Brief as if fully stated herein. Pa 3-4.

COUNTER STATEMENT OF THE FACTS

The Premises at issue is owned by the Burak Respondents. Pa 37; Pa 42. At the time of his injury, Appellant was a commercial tenant who operated a restaurant out of the bottom floor of the property. Pa 19. Appellant is the sole owner and operator of Respondent MD Group, which owned the restaurant that Appellant operated. Pa 54.

Appellant was injured on February 9, 2021 after allegedly slipping and falling on ice in the parking lot of the Property while returning from taking garbage to the dumpster in the back of the parking lot. Pa 17. Appellant alleges that a drainage pipe attached to the side of the Premises leaked water, forming a patch of black ice in the parking lot near the entrance to Plaintiff's business. Pa 17.

Appellant and MD Group entered into two (2) separate lease agreements with the Burak Respondents, 1) a Commercial Lease Agreement, dated September 20, 2016, for the 1st Floor and Basement of the Property; and 2) a Commercial Lease Agreement, dated November 1, 2016, for the Front Store Space of the Property. Pa 37; Pa 42. The duration of both agreements ran from November 1, 2016 until October 30, 2021. Pa 37; Pa 42. By the terms of the agreements, Appellant was

responsible for keeping the parking lot of the Premises clear of snow and ice. Pa 39; Pa 43. Further, by the terms of the agreements, Appellant agreed to hold harmless and indemnify the Burak Respondents from liability arising out of pipe leakages. Pa 39; Pa 43.

The Third-Party Complaint filed by the Burak Respondents against MD Group alleges breach of contract, and seeks contribution and indemnification by way of statute, common law, and contract. Pa 168.

LEGAL ARGUMENT

I. THE TRIAL COURT'S FACTUAL FINDINGS UNDERLYING THE ORDER GRANTING SUMMARY JUDGMENT ARE ENTITLED TO DEFERENCE

An appellate court's review of rulings of law and issues regarding the applicability, validity (including constitutionality) or interpretation of laws, statutes, or rules is de novo. See In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020) (agency's interpretation of a statute); State v. G.E.P., 243 N.J. 362, 382 (2020) (retroactivity of statute); State v. Hemenway, 239 N.J. 111, 125 (2019) (constitutionality of a statute); State v. Hyland, 238 N.J. 135, 143 (2019) (appealability of a sentence); Kocanowski v. Twp. of Bridgewater, 237 N.J. 3, 9 (2019) (statutory interpretation); Green v. Monmouth Univ., 237 N.J. 516, 529 (2019) (applicability of charitable immunity); State v. Fuqua, 234 N.J. 583, 591 (2018) (statutory interpretation); State v. Dickerson, 232 N.J. 2, 17 (2018)

(interpretation of court rules).

A reviewing court must accept the factual findings of a trial court that are “supported by sufficient credible evidence in the record.” State v. Mohammed, 226 N.J. 71, 88 (2016) (quoting State v. Gamble, 218 N.J. 412, 424 (2014)). "Reviewing appellate courts should 'not disturb the factual findings and legal conclusions of the trial judge' unless convinced that those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Gripenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). In this case, a review of the Court’s decision fails to show any findings or conclusions that were manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interest of Justice.

The trial court correctly found that the undisputed language of the agreements between Appellant and the Burak Respondents required Appellant to keep the parking lot of the Premises clear of snow and ice. Further, the trial court was correct in finding that the terms of the agreements required Appellant to hold the Burak Respondents harmless from liability for any injuries suffered by Appellant resulting from the alleged leaky drainage pipe on the Premises.

II. IF THE ORDER GRANTING SUMMARY JUDGMENT IS UPHELD, THEN MD GROUP, LLC, MUST BE DISMISSED FROM THIS MATTER.

The Third-Party Complaint filed by the Burak Respondents against MD Group alleges breach of contract, and seeks contribution and indemnification by way of statute, common law, and contract. Pa 168. There are no other claims, counterclaims, or cross claims against MD Group. Therefore, if the trial court's decision to grant summary judgment is affirmed, and the Burak Respondents are dismissed from the matter, then there will be no direct claims against MD Group.

CONCLUSION

Therefore, for the foregoing reasons, Respondents would argue that Appellants' appeal has no merit, and the trial court's order in this matter should be affirmed.

Respectfully submitted,

REILLY, McDEVITT & HENRICH, P.C.

By: /s/ Gino P. Mecoli
Gino P. Mecoli, Esquire
Andrew R. Churchill, Esquire
Attorneys for Third-Party Defendant-
Respondent, MD Group, LLC

Dated: July 31, 2025

DEJAN MICAKOWSKI and
JANNETTE NADLER,

Plaintiffs/Appellants

-vs-

ELZBIETA BURAK, JOZEF BURAK:
and ABC CORPORATION #1-10, as
owner, and ABC CORPORATION
#11-20 as maintenance company,
and JOHN DOE CORPORATION
#21-30, and ABC CORPORATION
#31-40 as snow removal company,

Defendants/Respondents

:
: SUPERIOR COURT OF NEW JERSEY
: APPELLATE DIVISION
:

: DOCKET NO.: A-1721-24
:

:
: SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION
: BERGEN COUNTY
:

: DOCKET NO.: BER-L-698-23
:

:
: Sat Below:
:

ELZBIETA BURAK and JOZEF
BURAK,

Third Party Plaintiffs/
Respondents

-vs-

MD GROUP, LLC,

Third Party Defendant/
Respondents

:
: HON. ANTHONY R. SUAREZ, J.S.C.
:

PLAINTIFF/APPELLANT MICAKOWSKI'S REPLY BRIEF

BORCE MARTINOSKI, ESQ.
BORCE MARTINOSKI, LLC
ATTORNEY AT LAW
Attorney ID 014442008
75 Essex Street – Suite 220
Hackensack, New Jersey 07601
Tel: (201) 343 – 7237
Fax: (201) 343 – 2727
E-mail: martinoskilaw@gmail.com
Attorney for
Plaintiff/Appellant
Micakowski

PLAINTIFF/APPELLANT MICAKOWSKI’S REPLY BRIEF

TABLE OF CONTENTS

PRELIMINARY STATEMENT.....1

LEGAL ARGUMENT

 POINT I

 RESPONDENTS BURAK’S STATEMENT ABOUT “ISSUED NOT
RESIDED IN THE TRIAL COURT” IS WITHOUT MERIT. (Pa 152; Pa 154;
T; Pa 40; Pa 45 – Pa 46).....2

 POINT II

 RESPONDENTS BURAK FAILED TO ESTABLISH AN
INDEMNIFICATION CLAUSE IN UNEQUIVOCAL TERMS. (Pa 152; Pa
154; T; Pa 40; Pa 45 – Pa 46).....4

 POINT III

 THE MAINTENANCE CLAUSES DO HAVE AN EFFECT ON THE
INDEMNIFICATION CLAUSES. (Pa 152; Pa 154; Pa 40; Pa 45 – Pa 46; Pa
48; Pa 130).....6

 POINT IV

 CONTROL IS AN ISSUE AND PART OF THE INDEMNIFICATION
CLAUSE. (Pa 152; Pa 154; Pa 40; Pa 45 – Pa 46; Pa 48; Pa 130).....7

CONCLUSION.....8

PLAINTIFF/APPELLANT MICAKOWSKI'S

TABLE OF APPENDIX

Defendant/Third Party Plaintiff/Respondent Burak's Notice of Motion for Summary Judgment Filed January 02, 2025Pa 1

Defendant/Third Party Plaintiff/Respondent Burak's Statement of Material Facts.....Pa 3

Defendant/Third Party Plaintiff/Respondent Burak's Certification of Service.....Pa 7

Defendant/Third Party Plaintiff/Respondent Burak's Certification of Chase T. Gunther.....Pa 9

Exhibit A – Plaintiff/Appellant Micakowski's Complaint Filed February 06, 2023.....Pa 11¹

Exhibit B – Plaintiff/Appellant Micakowski's Answers to Form A and Supplemental Interrogatories dated August 24, 2023.....Pa 16²

Exhibit C – First Floor and Basement Lease Agreement for the property located at 324 River Drive, Garfield, NJ 07026.....Pa 37³

¹ Pa 11 – Pa 15 – Complaint was filed by the Respondent Burak, and better quality obtained via eCourts

² Pa 28 – Medical Documents were filed by the Respondent Burak, and no better quality obtained; Medical Documents redacted

³ Pa 37 – Pa 40 – Commercial Leases were filed by the Respondent Burak, and no better quality obtained

Exhibit D – Front Store Space Lease Agreement for the property located at 324 River Drive, Garfield, NJ 07026.....Pa 42

Exhibit E – Deposition Transcript of Plaintiff/Appellant Micakowski dated March 04, 2024.....Pa 50⁴

Exhibit F – Borbon v. Fantasia Indus., A-5701-08T3, 2010 N.J. Super Unpub. LEXIS 861, 2010 WL 4121750 (App. Div. April 20, 2010).....Pa 65

Third Party Defendant/Respondent MD Group, LLC Letter Brief In Support of Summary Judgment Filed January 14, 2025.....Pa 69

Plaintiff/Appellant Micakowski’s Opposition to Summary Judgment Filed January 15, 2025.....Pa 71

Plaintiff/Appellant Micakowski’s Certification of Service.....Pa 73

Plaintiff/Appellant Micakowski’s Opposition to Statement of Undisputed Material Facts and Counter Statement of Undisputed Material Facts.....Pa 74

Plaintiff/Appellant Micakowski’s Certification of Borce Martinoski, Esq.....Pa 85

Exhibit A – Residential Leases for the Second Floor Apartment for the property located at 324 River Drive, Garfield, NJ 07026.....Pa 87⁵

Exhibit B – Pictures of the property located at 324 River Drive, Garfield, NJ

⁴ Pa 50 – Deposition Transcript were filed by the Respondent Burak, and better quality obtained

⁵ Pa 87 – Pa 94 – Residential Leases were obtained from the Respondent Burak, and no better quality obtained

07026.....Pa 95

Exhibit C – Defendant/Third Party Plaintiff/Respondent Burak’s Answers to Form C and C(2) Interrogatories.....Pa 104

Exhibit D – Defendant/Third Party Plaintiff/Respondent Burak’s Answers to Supplemental Interrogatories.....Pa 125

Exhibit E – Amended Rider for the property located at 324 River Drive, Garfield, NJ 07026 dated September 14, 2021.....Pa 130⁶

Exhibit F - Plaintiff/Appellant Micakowski’s Engineering Report dated March 18, 2024.....Pa 135⁷

Defendant/Third Party Plaintiff/Respondent Burak’s Reply Filed January 24, 2025...
.....Pa 148⁸

Order Granting Summary Judgment Filed February 03, 2025.....Pa 152

Rider to Order dated February 03, 2025.....Pa 154

Notice of Appeal Filed February 14, 2025.....Pa 163

Defendant/Third Party Plaintiff/Respondent Burak Answer, Jury Demand, Counterclaim and Third-Party Complaint filed March 22, 2023.....Pa 168

Appellant/Plaintiff Micakowski Answer and Defenses filed December 14, 2023.....
.....Pa 184

⁶ Pa 130 – Pa 134 - Renewal Rider obtained from the Respondent Burak, was received, and no better quality obtained

⁷ Pa 136 – hyperlink redacted

⁸ Pa 149, Pa 150, Pa 151 – Respondent Burak’s Reply Brief Legal Response Section Redacted

Respondent/Third Party Defendant MD Answer and Defenses filed December 14,
2023.....Pa 190

Respondent/Third Party Defendant MD Answer to Count Four of Third Party
Complaint with Affirmative Defenses filed December 14, 2023.....Pa 199

PLAINTIFF/APPELLANT MICAKOWSKI'S

TABLE OF JUDGMENTS/ORDERS

Micakowski, et al v. Burak, et al Order Granting Summary Judgment Filed February
03, 2025.....Pa 152

 Rider to Order dated February 03, 2025.....Pa 154

PLAINTIFF/APPELLANT MICKAKOWSKI'S

TABLE OF TRANSCRIPTS

T.....January 31, 2025

PRELIMINARY STATEMENT

The burden of proof for summary judgment is on Respondents Burak to establish an indemnity clause and a maintenance clause. Respondents Burak provided multiple indemnity clauses, multiple maintenance clause, and multiple intertwined terms to the Trial Court to pick and choose. Their own brief admits that the clauses are “similar” which is not a legal standard. The legal standard is unequivocal terms.

Respondents Burak failed to establish the basics of the date of the contract, the date of the signatures, and the order of contracts. Now, the Respondents Burak requests the Appellate Court to draft and fashion an indemnity clause and a maintenance clause that best suits Respondents Burak from the multiple clauses submitted upholding the Trial Court’s Order.

LEGAL ARGUMENT

POINT I

RESPONDENTS BURAK’S STATEMENT ABOUT “ISSUED NOT RESIDED IN THE TRIAL COURT” IS WITHOUT MERIT. (Pa 152; Pa 154; T; Pa 40; Pa 45 – Pa 46).

Respondent Burak’s Statement of Material Facts outlines the indemnification clauses and the maintenance clauses in Provision 5 to Provision 13. (Pa 4 – Pa 5). Appellant Micakowski’s Opposition to the Statement of Undisputed Material Facts

disputes the facts alleged regarding the indemnification clauses and the maintenance clauses in Provision 5 to Provision 13. (Pa 75).

Respondents Burak makes the argument the “elements” includes “snow and ice.” (T5-1 to 6). However, neither Indemnity Clause states the same. (Pa 40; Pa 45 – Pa 46). The First Floor & Basement Indemnity Clause separates elements from water, rain or snow, but does not include ice. (Pa 40). The Lease Agreement Business and Commercial Indemnity Clause separates water from the elements. (Pa 45-Pa 46). Neither indemnity clause specifically mentions “ice” and for the Respondents Burak to argue that “elements” includes “ice” is not articulated by the indemnity clauses anywhere. (Pa 40; Pa 45-Pa 46).

The Appellant Micakowski makes the argument that there are four different lease agreements as well as a residential lease upstairs. (T6-18 to 22). There was further argument that agreements have no names underneath the signatures, not dated, and the rider modifying the lease agreements. (T7-3 to 7). The argument was that the Respondents Burak modified the provisions. (T7-11 to 12).

The Respondents Burak must establish which lease agreement controls, which is first, and which provisions applies, but the Respondents Burak fails to specify anywhere in their Summary Judgment or in their Appellate Brief regarding the specific order of the leases, the dates, the names, and the signatures. (Pa 40; Pa 45-Pa 46; Pa 48).

Appellant Micakowski's argument is also based on Respondents Burak's responsibility for maintenance of the driveway and Respondent Burak's occupancy of the property. (T7-12 to 15). Further, Respondent Burak modified the agreement by the rider. (T7-23 to 24; T13-9 to 15). Appellant Micakowski argues "conflicting terms." (T13-23 to T14-2). Appellant Micakowski states that "the leases are conflicting ... And the conduct of the landlord is conflicting. That's a jury issue. Not a summary judgment issue." (T19-9 to 11).

Respondents Burak states that "all this argument about control and about the snow and ice, it has not effect on the hold harmless provision. There's no conflicting language that suggests anything but an intention for the landlord to be held harmless for this kind of injury." (T21-20 to 24; see also T24-8 to 9). Respondents Burak further states that "if the indemnification clause upheld, then the issue of control doesn't have an effect here." (T29 – 20 to 21).

The above argument by Respondents Burak fails because the Lease Agreement Business and Commercial Indemnity Clause does contemplate "control" and whether the Respondent Burak controlled the area where the injury occurred. (Pa 45 – Pa 46).

It is the Respondents Burak's burden to establish which indemnification clause, which terms, the order of the leases, and which applies. (Pa 40; Pa 45 – Pa 46; Pa 48). The papers and oral argument specifically address conflicting terms,

riders, renewal riders, conduct of the Respondents Burak, and the control issue. Therefore, Respondents Burak's argument that the issues were not raised below simply has no merit and should not even be addressed by the Appellate Court.

POINT II

RESPONDENTS BURAK FAILED TO ESTABLISH AN INDEMNIFICATION CLAUSE IN UNEQUIVOCAL TERMS. (Pa 152; Pa 154; T; Pa 40; Pa 45 – Pa 46).

Respondents Burak argues that the dates and names on the lease agreements, the rider, and the renewal rider are basically irrelevant. However, Respondents Burak fails to establish anywhere as to which was signed first, the order of the leases, and which indemnification clause applies. (Pa 40; Pa 45 – Pa 46).

Respondents Burak argues the leases are labeled "First Floor & Basement" and the "Front Store Space." (Pa 40; Pa 45 – Pa 46). However, the "First Floor" and the "Front Store Space" are the same space as there is no "First Floor" that is different from the "Front Store." Respondent Burak attempts to distinguish between the "First Floor" and the "Front Store," but the property only two (2) stories where the commercial space is at the ground level also known as the first floor, and the second floor is the residential tenancy. (Pa 18; Pa 32 – Pa 34; Pa 62; Pa 96 – Pa 103; Pa 137 – Pa 140; Pa 147).

Respondents Burak states that the parties elected to enter into two lease agreements that operate in conjunction with one another for Appellant Micakowski's lease. However, nowhere in the leases, the rider, or even the renewal rider does it state that in unequivocal terms. (Pa 40; Pa 45 – Pa 46; Pa 48; Pa 130). Further, nowhere in the Respondents Burak's production of discovery does it specify the same. (Pa 104; Pa 125).

Respondents Burak further argue at length regarding the conflicting terms and that it is a new argument, when this is the basis of the Summary Judgment, oral argument, and this appeal. Respondents Burak's consistent argument regarding conflicting terms were not raised is without merit and it should not be addressed by the Appellant Court.

“FIRST-FLOOR & BASEMENT” Indemnity Clause does not provide for “ice” to be included as an indemnification. (Pa 40). The clause separates “elements” from “water, rain, and snow.” (Pa 40). Also, the clause does not have a reference to the “downspout,” but it does reference “pipes.” (Pa 40). If this clause applies, then the Respondent Burak is not indemnified because it does not reference “ice” and “downspout.” (Pa 40).

Lease Agreement Business and Commercial Indemnity Clause does not have “ice,” but does reference “downspout” and “pipes.” (Pa 45 – Pa 46). If this clause applies, then the Respondent Burak is not indemnified because it does not reference

“ice” and the “control” aspect must be analyzed. “Control” is a factual issued that must be determined by the trier of fact rather than in Summary Judgment. (Pa 45 – Pa 46).

By the Respondents Burak’s own brief and the above references, the indemnification clauses are different. As such, Respondents Burak failed to provide an indemnification clause in unequivocal terms.

POINT III

THE MAINTENANCE CLAUSES DO HAVE AN EFFECT ON THE INDEMNIFICATION CLAUSES. (Pa 152; Pa 154; Pa 40; Pa 45 – Pa 46; Pa 48; Pa 130).

“FIRST-FLOOR & BASEMENT” Indemnity Clause does not specify that the Respondents Burak is indemnified from their own conduct, and does not provide an exception of gross negligence and willful misconduct by the Respondents Burak. (Pa 40). If this is applied, it does not protect the Respondents Burak from their conduct. When Respondents Burak modified the maintenance clauses by the rider and their own conduct, then it impacted the indemnification clauses by shifting the responsibility to Respondents Burak.

Lease Agreement Business and Commercial Indemnity Clause does indemnify the Respondent Burak from his own “negligent” and “careless” conduct, but then it references “beyond the control of the” Respondent Burak. (Pa 45 – Pa

46). The above clause does have an exception for gross negligence and willful misconduct by the Respondent Burak. (Pa 46). If this is applied, the control issues must be resolved through the analysis of the rider and renewal rider, the modifications by the Respondents Burak, and by Respondents Burak's own conduct.

Regardless of which applies, it does not protect the Respondents Burak from their conduct. Either way, it is a factual issued that must be determined by the trier of fact rather than in Summary Judgment. (Pa 45 – Pa 46). As such, Respondents Burak failed to provide an indemnification clause in unequivocal terms. Appellant Micakowski shall further rely upon the analysis in their initial brief as more fully set forth herein.

POINT IV

CONTROL IS AN ISSUE AND PART OF THE INDEMNIFICATION CLAUSE. (Pa 152; Pa 154; Pa 40; Pa 45 – Pa 46; Pa 48; Pa 130).

Lease Agreement Business and Commercial Indemnity Clause does indemnify the Respondent Burak from his own “negligent” and “careless” conduct, but then it references “beyond the control of the” Respondent Burak. (Pa 45 – Pa 46). As such, this indemnification clause made “control” an issue, but the Respondents Burak disagrees with their own clause and their own terms. As such, Respondents Burak failed to provide an indemnification clause in unequivocal

terms. Appellant Micakowski shall further rely upon the analysis in their initial brief as more fully set forth herein.

CONCLUSION

The Trial Court erred in their factual and legal analysis of the conflicting terms for the clauses and Summary Judgment should not have been granted. Appellant Micakowski hereby incorporates by references the arguments in the initial brief and the above in reply to the Respondent MD Group's brief as more fully set forth herein. Based upon the Appellant Micakowski's initial brief incorporated by reference, and for all of the reasons mentioned above, the Trial Court's order granting Summary Judgment should be reversed and matter remanded for further proceedings.

Respectfully Submitted,

Borce Martinoski

Borce Martinoski, Esq.
Attorney for Plaintiff/Appellant
Micakowski

Date: August 18, 2025