ELLEN ENGLISH AND HER HUSBAND, KEITH ENGLISH

Plaintiffs

v.

LINCE GROUP, LLC, PAT'S AMERICAN BUTCHER SHOP, LLC, AMERICAN BUTCHER, FRANK'S MEAT MARKET, SALON DESANDO, TOWNSHIP OF SCOTCH PLAINS, JOHN DOES 1-10 & ABC CORPORATIONS 1-10

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.: A-002344-23 T1

Civil Action

ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT, LAW DIVISION, UNION COUNTY

DATED: APRIL 15, 2024

SAT BELOW

HONORABLE JOHN HUDAK, J.S.C.

BRIEF ON BEHALF OF DEFENDANT/APPELLANT, LINCE GROUP IN SUPPORT OF APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

RULES, REGULATIONS & STATUTES

APPENDIX TABLE OF CONTENTS

Page

VOLUME I (Da 1 to Da 195)

PRELIMINARY STATEMENT

This appeal arises out of a pedestrian trip-and-fall incident that occurred on a public sidewalk in the Township of Scotch Plains. The issue on appeal is a question of fundamental fairness and whether a commercial property owner owes a duty to a pedestrian who trips on a raised sidewalk lip/edge that is not abutting and in front of their commercial building.

The plaintiff, Ellen English, was caused to trip and fall on a raised sidewalk lip/edge that was four (4) feet from defendant/appellant, Lince's property line and plaintiff fell in front of a municipal driveway/entrance to a public parking lot owned by the Township of Scotch Plains.

Both the motion and trial judges in denying summary judgment and allowing the matter to proceed to trial expanded the holding in Stewart v. 104 Wallace Street, 87 N.J. 146 (1981) as it relates to sidewalk liability and a commercial property owner.

In denying Lince's motion the judge unfairly imposed a duty of care on the commercial property owner to a pedestrian who did not fall on the sidewalk in front of their commercial property. The court without any authority expanded the holding Stewart and made Lince responsible to inspect and maintain the public sidewalk that was not in front of their commercial property. As set forth in Stewart and most recently in the Padilla v. Young Il An, 257 N.J. 540 (2024) decision, our Supreme

Court has always focused on what is fair for both the commercial property owner and pedestrians who use the public sidewalk when imposing a duty of care on commercial property owners. Lince files this appeal of the orders and decisions of the motion and trial judges, which in expanding the holding in Stewart made Lince responsible for a public sidewalk that is not in front of and abutting their commercial property. "[I]t is axiomatic that although a trial court can [ ]'discover' what the law has always been it cannot create new law." C.W. v. Roselle Board of Education, 474 N.J. Super. 644 (App. Div. 2023) citing State v. Knight, 145 N.J. 233, 249 (1996).

Lince Group now appeals from the entry of the judgment by the trial court on April 15, 2024.

PROCEDURAL HISTORY

On January 1, 2020, plaintiff/respondent, Ellen English instituted a civil action against defendant/appellant, Lince Group, LLC (hereinafter "Lince"). Plaintiff filed an amended Complaint on August 12, 2020 and named the Township of Scotch Plains (hereinafter "Scotch Plains") as a defendant. (Da 1).

On September 8, 2021, Lince filed a Motion for Summary Judgment to dismiss plaintiff's amended Complaint, since the fall incident occurred four feet from Lince's property line and not in front of their commercial property. On December 7, 2021, the Honorable Alan G. Lesnewich, J.S.C. entered an Order and Statement of Reasons denying Lince's motion. (Da 16).

On January 4, 2022, Lince filed a Motion for Reconsideration of the order denying summary judgment. On January 21, 2022, Judge Lesnewich entered an Order denying Lince's motion. (Da 26).

On March 25, 2022, Scotch Plains filed a Motion for Summary Judgment. On May 19, 2022, Judge Lesnewich entered an Order denying Scotch Plans' motion. (Da 28).

On November 17, 2023, Lince again filed a Motion for Summary Judgment to dismiss plaintiff's Complaint. (Da 37). On December 4, 2023, plaintiff filed opposition and a cross-motion as to the issue of duty, seeking to have Lince "adjudged to have owed the plaintiff a duty to maintain the public sidewalk abutting

its property upon which the plaintiff fell in a reasonably safe condition as a matter of law." (Da 103).

On January 18, 2024, the Honorable Daniel Lindemann, J.S.C. entered an Order and Statement of Reasons denying Lince's motion and plaintiff's cross-motion. (Da 214). Thus, eleven (11) days before the trial date the was no finding as a matter of law that Lince owed a duty to maintain the public sidewalk four feet from their property line where plaintiff's fall occurred. (Da 214).

On January 29, 2018, this matter was assigned for trial with the Honorable John Hudak, J.S.C. After the close of plaintiff's case, on February 5, 2024, Scotch Plains and Lince each moved for a directed verdict. (6T5:10-6T10:21 and 6T12:21-6T16:2).[1] Plaintiff also moved for a directed verdict as to liability only against

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1 1T = Transcript of January 8, 2024

2T = Transcript of January 29, 2024

3T = Transcript of January 30, 2024

4T = Transcript of January 31, 2024

5T = Transcript of February 1, 2024

6T = Transcript of February 5, 2024

7T = Transcript of February 6, 2024

8T = Transcript of February 16, 2024

Lince. (6T10:23-6T12:19). Judge Hudak denied Lince and plaintiff's motions and reserved as to Scotch Plains' motion. (6T17-24).

On February 6, 2024, the jury entered a verdict against Lince and Scotch Plains apportioning liability 60% as to Lince; 30% as to Scotch Plains and 10% as to plaintiff and awarded $1.2 million to the plaintiff. (7T4:22-7T6:25).

On February 16, 2024, Judge Hudak granted Scotch Plains' Motion for a Directed Verdict and plaintiff's cross-motion for judgment of 90% liability against Lince. (8T15:23-8T24:1). On March 4, 2024, the Order for a Directed Verdict as to Scotch Plains was entered by Judge Hudak. (Da 221). On March 6, 2024, an Order for Judgment and molding the judgment were entered by Judge Hudak. (Da 223).

On February 23, 2024, Lince timely filed a Motion for a New Trial, which was returnable on March 15, 2024. (Da 228). Thereafter, the court adjourned the return date for the motion to March 28, 2024, April 12, 2024 and then to April 26, 2024, when Judge Hudak entered an order denying Lince's motion for a new trial since Lince had filed their Notice of Appeal. (Da 232).

On April 15, 2024, an amended Order for Judgment was entered by Judge Hudak. (Da 234). It is from that judgment that Lince appeals.

On June 7, 2024, Judge Hudak pursuant to Lince's motion entered and order staying the judgment. (Da 237). Lince timely filed their Notice of Appeal on April 8, 2024. (Da 239).

STATEMENT OF FACTS

This trip-and-fall incident arises out of plaintiff, Ellen English's fall on June 22, 2019 on a sidewalk lip/edge on East Second Street in Scotch Plains. (Da 1; Da 244 and 5T113:1-14). Plaintiff tripped on a raised sidewalk lip/edge that was located in front the municipal driveway/entrance (a/k/a "Tarquins Alley"), which is owned by co-defendant, Scotch Plains. (Da 244; Da 245; Da 246; 5T162:18-21 and 5T114:13-19). Scotch Plains acquired Tarquins Alley in or around 2000 for access to the municipal parking lot #5. (4T54:19-25 and 4T55:1-3). The Tarquins Alley driveway/entrance is not a street, it did make the Lince building a "corner property" and it was never described as such. (Da 244; Da 250 and 4T234:17-19). There are no sidewalks along Tarquins Alley. (Da 244 and 4T235:2-9).

Lince is a family business and the owner of the multi-unit commercial building/property located at 1812-1826 East Second Street (4T80:23-25 and 4T130:13-18), "1826 is the butcher shop" that is next to and on the right of Tarquins Alley. (4T81:1). The commercial building was purchased by Lince in January 2016. (4T80:15-18). Prior to the fall incident, Lince never made any changes their property or the sidewalks in front of their building. (4T92:8-11 and 4T93:15-23).

On June 22, 2019, plaintiff was running south on the sidewalk along East Second Street at approximately 12:30 p.m. (5T112:17 and 5T113:4-6). Plaintiff testified that this route was familiar to her (5T142:24-T143:1) and that she had

previously observed the raised sidewalk lip/edge. (5T143:14-18). Plaintiff was running a mile every nine (9) minutes (5T145:2-3) as she approached the driveway apron and sidewalk in front of Tarquins Alley (Da 244 and 5T146:12-15) and caught her right foot on the sidewalk's lip/edge. (Da 246 and 5T147:10-15). Prior to the fall, plaintiff had not crossed in front of Lince's building. (5T162:18-21). Plaintiff's fall occurred approximately four (4) feet north of Lince's property line. (Da 247; Da 248; Da 249 and 4T138:9-T139:9). Several weeks later plaintiff returned to the fall location with her son who took a photograph of the sidewalk's raised lip/edge, which was marked at trial as Exhibit P-17. (Da 246 and 5T144:2-3). Since plaintiff fell in front of Tarquins Alley, which was owned by Scotch Plains she named them as a defendant. (Da 1 and 5T153:7-10).

Lince's northern property line ran adjacent to the building's exterior wall and along Tarquins Alley. (Da 244; 4T90:1-3 and 4T200:13-17). Plaintiff's fall did not occur in front of Lince's commercial building. (Da 244; Da 246 and 5T147:10-15). Plaintiff's fall occurred in front of the municipal parking lot #5's driveway entrance, Tarquins Alley, which was owned by Scotch Plains. (Da 244, Da 246 and 4T140:20-23). Tarquins Alley is an asphalt driveway/entrance that is maintained by Scotch Plains. (Da 244 and 4T32:21-T33:1).

Lince's property manager, Tillie Yu performed inspections of the building's perimeter, exterior walls and the sidewalk in front of their building twice a month.

(4T84:5-22; 4T131:25-4T132:4 and 4T130:19-23). Since Lince purchased the commercial property in 2016, they did not control nor have they ever undertaken to inspect or maintain the sidewalk where plaintiff fell that was next to and not in front of their commercial building. (4T95:25-4T96:8 and 4T132:5-8).

Scotch Plains' sidewalk ordinance states that "every owner" was responsible to inspect, maintain and repair the sidewalks **in front** of their property. Township ordnance, **§ 15-2.8 Keeping Sidewalks Free from Obstructions and Nuisances**, states:

> Every owner, tenant, lessee and occupant of any building or lot (whether vacant or occupied) within or near the built-up portions of the Township shall keep and cause to be kept the sidewalk and flagging and curbing **in front thereof**, free from obstructions and nuisances of every kind, and shall not allow anything in the area or yard or on about the premises to become a nuisance or dangerous or prejudicial to life and health.
> (Da 251).

Scotch Plains Director of Public Works, Frank DiNizo testified that: "building owners and residents, as well, have to maintain their **own sidewalks and repair them**." (4T47:13-15). He further testified that sidewalks were "in between commercial property building--commercial building and the street (4T22:3-10) and

"from the curb to the building is the owner--is the owner's responsibility." (4T33:24-25)[2]

DiNizo testified consistent with the municipal ordinance that a commercial property owner is responsible for the abutting sidewalk in front of their building. (4T50:7-20). Explaining that a "commercial property owner is responsible from **their building to the curb**." (4T50:21-25) and specifically, from **"the front of their building" to the "inside of the curb."** (4T51:1-3). Finally, Director DiNizo confirmed that Scotch Plains followed the municipal sidewalk ordinance (4T50:18-20) and inspected and maintained the sidewalks in front of the municipal building. (4T21:23-4T22:3).

Lince was aware of and followed Scotch Plains' sidewalk ordinance and inspected and maintained the sidewalk in front of their building. (4T97:4-14). Lince never inspected, maintained or controlled the sidewalk where plaintiff fell as it was not in front of their building and approximately 49.5 inches from their property line. (Da 247; Da 248; Da 249 and 4T96:2-8).

Post Fall Incident-Remedial Acts

On July 1, 2019, Lince contacted Scotch Plains to request that the township inspect the tree and tree roots located in front of their commercial building.

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[2] "The Revised General Ordinances of the Township of Scotch Plains, 1978" **§1-2. Definitions**.
Sidewalk. Shall mean any portion of a street between the curbline and the adjacent property line, intended for the use of pedestrians, excluding parkways.

(4T101:11-14 and 4T102:1). Since purchasing the building in 2016, the tree's roots had become overgrown and disrupted the brick pavers and a sidewalk slab that surrounded the tree. (4T108:21-4T109:4 and 4T133:14). This was not the location where plaintiff fell and the brick pavers and sidewalk were not involved. (4T104:22-4T105:1 and 4T132:21-23).

Scotch Plains had the tree cut down and the roots removed, at the end of July 2019. (4T115:16-22 and 4T133:11-17). Thereafter, Scotch Plains ordered Lince to re-do the brick pavers in front of their commercial building. (Da 252 and 4T134:9-23). Lince hired a mason contractor who repaired and replaced the brick pavers, along with a sidewalk slab in front of their building. (Da 252 and T134:20-23). Lince was then ordered by the Scotch Plains to replace the brick pavers next to and to the right of their property line, requiring Lynch to replace all of the brick pavers so that they would be uniform and the same color. (Da 253 and 4T135:4-22). Lince was charged an additional $10,300 because of Scotch Plains' directive. (Da 253). Prior to plaintiff's fall Lince never exercised control over the brick pavers next to their property line. (4T136:6-16). Lince replaced the brick pavers next to their property line as a courtesy to Scotch Plains and did not assert control over the brick pavers next to their property line. (4T150:1-8).

At no time after Lince purchased the commercial property did anyone on behalf of Scotch Plains inform or advise Lince that they were responsible to inspect

or maintain the sidewalk's lip/edge that was in front of Tarquins Alley. (4T135:23–4T136:2). Lince was never issued any citation/violation or advised to make any repairs to the sidewalk's lip/edge that plaintiff tripped over. (4T136:2-5). To date, despite notice of the fall incident and the trial, Scotch Plains has not undertaken to repair the tripping hazard/sidewalk lip located in front of Tarquins Alley where plaintiff fell. (4T47:5-6).

Plaintiff's Injury

Following the fall, plaintiff sought treatment with an orthopedist, Dr. Krell, and underwent surgery to repair her fractured right wrist, which involved the placement of hardware on June 27, 2019, at a surgery center. (5T124:17-19).

In September 2019, three months after the fall, plaintiff returned to her position as a middle school English teacher and has never missed a day of teaching. (5T155:15-18). Plaintiff underwent a second procedure for the removal of the hardware in her right wrist on August 19, 2020. (5T129:17-20).

Plaintiff confirmed at trial that she has not scheduled any future surgery and more specifically, a fusion surgery involving her right wrist. (5T140:5-10). Plaintiff continues to teach middle school students and she has not requested any accommodations from the school's principal, nor has she ever discussed retirement. (5T156:1-7). Finally, plaintiff continues to run albeit her speed has decreased. (5T136:13-14).

LEGAL ARGUMENT

POINT I

THE MOTION AND TRIAL JUDGES INCORRECTLY EXPANDED THE HOLDING IN STEWART IN FINDING THAT PLAINTIFF'S FALL LOCATION ABUTTED LINCE'S COMMERCIAL PROPERTY

(Raised Below: 1T4:2-1T26:9 and 3T60:2-3T74:19).

A. Plaintiff's Fall Location Did Not Abut Nor Was It In Front Of Lince's Commercial Building.

Plaintiff, Ellen English and co-defendant, Scotch Plains did not dispute that Lince's northern property line ran along their building's exterior wall. Nor was it disputed that plaintiff fell approximately four (4) feet past Lince's property line. (Da 247-249). All parties agreed that plaintiff tripped and fell on a raised sidewalk lip/edge, which was located **in front** of Tarquins Alley, the driveway/entrance to municipal parking lot #5, owned by Scotch Plains and next to Lince's commercial building. Plaintiff did not trip in front of Lince's commercial building. (Da 244 and Da 246).

B. Standard of Review

It is well-established that the existence of a duty of care is a legal question to be determined by the court. Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 572, (1996). The scope of any such duty is likewise determined by the court as a matter of law. Kelly v. Gwinnell, 96 N.J. 538, 552, (1984).

It is also well settled that where the court acts under a misinterpretation or misapplication of the applicable law, the appellate court does not give deference to the motion judge or trial court's determination. Rather, the appellate court adjudicates the controversy in light of the applicable principles in order that a manifest denial of justice be avoided. Kavanaugh v. Quigley, 63 N.J. Super. 153,158 (App. Div. 1960). "Interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378(1995).

A question of law is reviewed de novo. Hedden v. Kean Univ., 434 N.J. Super. 1, 10 (App. Div. 2013).

C. Lince Did Not Owe A Duty to Plaintiff

For more than 65 years questions relating to sidewalk liability have had one goal in mind: fairness. Padilla v. Young IL An, 257 N.J. 540, 542 (2024). "Determining the scope of tort liability has traditionally been the responsibility of the courts." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993).

The Supreme Court's decision in Krug v. Wanner, 28 N.J. 174 (1958), involved a plaintiff who tripped on a cellar door in front of a commercial property. Plaintiff filed a complaint against both the commercial landlord and the tenant. In reversing the dismissal of plaintiff's complaint the Court stated:

> For the protection of its patrons, every commercial establishment must maintain its premises, including

> means of ingress and egress, in reasonably safe condition. (Citations omitted). And although the paved sidewalks **fronting a commercial establishment** are primarily for the use of the public generally, their condition is so beneficially related to the operation of the business that the unrestricted legal duty of maintaining them in good repair might, arguably, be placed on it.
> Id. at 179.

The Court concluded that: "In the instant matter there was evidence from which the jury could reasonably find that the landlord-defendant and the tenant-defendant each exercised a measure of control over the cellar doors and that each failed to discharge his responsibility to the plaintiff." Id. at 182. The Krug decision set the stage for the definitive change in sidewalk liability that occurred 23 years later.

The Supreme Court's decision in Stewart v. 104 Wallace Street, 87 N.J. 146 (1981), required a commercial building owner to be responsible for maintaining, in reasonably good condition, sidewalks "abutting" and in front of their property and were liable to pedestrians injured as a result of their negligent failure to do so. The property owner has a "general common law duty to business invitees – to retain his premises in a condition safe from defects that the business is charged with knowing or discovering … ." Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 311 (2010). The Court further stated that liability would be limited to sidewalks **in front of a commercial property** and that: "[t]he duty to maintain abutting sidewalks that we

impose today is confined to owners of commercial property." Stewart at 159, (citing Krug, supra 28 N.J. at 180). The facts in this matter confirm plaintiff, English was running through the downtown and was never in front of nor a customer of Lince's commercial tenants.

The holding in Stewart, was clear and unequivocal that an abutting sidewalk was defined as being **in front of the commercial building**. The Court never stated, suggested or inferred that a commercial property owner was responsible for the sidewalk that was next to and not in front of the commercial building.

> We hold today that **commercial landowners are responsible for maintaining in reasonably good condition the sidewalks abutting their property** and are liable to pedestrians injured as a result of their negligent failure to do so. Although we recognize that the "no liability" rule remains the law in the majority of jurisdictions, see Annot., Liability of abutting owner or occupant for condition of sidewalk, 88 A.L.R.2d 331 (1963), **we prefer to apply the rule of our neighboring state to cases involving commercial property. In Pennsylvania, the rule has long been that it "is the primary duty of property owners along a street to keep in proper repair the sidewalk in front of their respective properties."** Mintzer v. Hogg, 192 Pa. 137, 144, 43 A. 465, 466 (1899); accord, Nash v. Atlantic White Tower System, Inc., 404 Pa. 83, 170 A.2d 341 (1961); Breskin v. 535 Fifth Ave., 381 Pa. 461, 113 A.2d 316 (1955); Green v. Borough of Freeport, 218 Pa. Super. 334, 280 A.2d 412 (1971); see generally Annot., supra, 88 A.L.R.2d at 348-52.
> Id. at 157.

"Abutting sidewalk," meant **in front of a commercial building** and not adjacent or next to the left or right. The Court stated: **"The rule we adopt today rationalizes our law by enabling an injured person to recover damages for injuries sustained on the sidewalk in front of a store as well as those sustained in the store."** Id. at 160.

The Court's definition of an abutting sidewalk was based on and supported by several decisions from the Supreme Court of Pennsylvania, stating: "we prefer to apply the rule of our neighboring state to cases involving a commercial property." Id. at 158. The Court cited to the eighty-two year old decision in Mintzer v. Hogg, 192 Pa. 137 (1899), wherein the Pennsylvania Supreme Court discussed the question of a "defendants' neglect of duty in not keeping the pavement in front of their 'house in such order and condition as to permit persons traveling over and along said pavement to do so safely,' etc., was fairly submitted to the jury, with instructions so full and adequate that no just exception can be taken thereto." Id. at 144. The Mintzer court held, "It is the primary duty of property owners along a street to keep in proper repair the sidewalk **in front of their respective properties.**" Id. Finally, the Mintzer court cited the enabling statute stating: "By Act March 25, 1805, § 5(4 Smith's Laws, p. 233) councils were authorized by ordinance to compel property owners to pave the footwalks, and by Act April 10, 1826, § 2 (P.L. 366) it was made

the duty of property owners to pave the footway **in front of their respective properties**, and to keep the same in repair." Id. at 145.

The Mintzer decision defined an abutting sidewalk as in front of the commercial building. Therefore, the Stewart Court in citing to and discussing Mintzer clearly defined an abutting sidewalk to be in front of the commercial building and within the property lines of the commercial property.

The motion and trial judges' decisions, which expanded the holding in Stewart were incorrect as an abutting sidewalk could only be the sidewalk in front of Lince's commercial building.

The fact that a portion (13 inches) of the sidewalk was in front of Lince's building is irrelevant. Plaintiff fell on the sidewalk's lip/edge 49.5 inches from Lince's property line and in front of Tarquins Alley, which is owned and controlled by Scotch Plains. See Qian v. Toll Bros. Inc., 223 N.J. 124, 138 (2015) (critical factor in determining whether a sidewalk is "public" is whether "the municipality ha[s] sufficient control over or responsibility for the maintenance and repair of the sidewalk."). There is nothing in the record to suggest that Lince ever controlled the sidewalk in front of Tarquins Alley or that Scotch Plains ever directed Lince to inspect or maintain the sidewalk.

Four months after this matter was tried, the New Jersey Supreme Court again addressed the issue of sidewalk liability as it pertains to an injured pedestrian on an

abutting sidewalk in front of a vacant commercial lot in Padilla v. Young Il An, 257 N.J. 540 (2024). Padilla involved a pedestrian who was caused to trip and fall on a sidewalk that was in front of a vacate commercial property. The plaintiff's complaint was dismissed on summary judgment by the trial court, which relied on appellate division's decision in Abraham v. Gupta, 281 N.J. Super. 81 (App. Div. 1995) (stating that the liability imposed on a commercial property owners to reasonably maintain abutting sidewalks did not apply to sidewalks abutting vacant lots).

Plaintiff appealed and summary judgment was affirmed in an unpublished opinion. Thereafter, plaintiff's petition for certification was granted, 253 N.J. 570 (2023) and on June 13, 2024, the Supreme Court issued their decision reversing the appellate court and remanded the matter back to the trial court.

While the Padilla decision focused on a fall on a sidewalk in front of a vacant commercial lot, the Court discussed Stewart and sidewalk liability and that "commercial landowners are responsible for maintaining in reasonably good condition the sidewalks abutting their property and are liable to pedestrians injured as a result of their negligent failure to do so." Id. at 551 (citing Stewart at 149, 157). The Court then made it clear that guiding principles and fairness required that "all commercial landowners--including owners of vacant commercial lots--must maintain the public sidewalks abutting their property in reasonably good condition and can be liable to pedestrians injured as a result of their negligent failure to do so."

Id. at 557-58. The Padilla Court established a "bright line rule ... that all commercial property owners owe a duty to maintain abutting sidewalks in reasonably good condition--will ensure fairness, consistency, and predictability in our courts going forward. As noted in Stewart, the 'standard of care, after all, will be reasonableness.'" Id. at 562 (citing Stewart at 158). The Padilla decision did not change the Stewart Court's definition of an "abutting sidewalk," which is the sidewalk in front of the commercial building/property. Simply put, while a vacant property owner may be liable to an injured pedestrian, the fall or accident must occur on the sidewalk in front of the commercial property.

D. Summary Judgment Should Have be Granted to Lince

(Raised Below: 1T4:2-1T26:9 and 3T60:2-3T74:19).

In denying Lince's motion for summary judgment Judge Lindemann, in his Statement of Reasons stated:

> Here, Defendant's Motion for Summary Judgment should be **DENIED**. "The determination of whether a party has a duty of care, and the scope of such a duty, are questions of law that must be decided by the court." In Sanchez v. Independent Bus Co., Inc., 358 N.J. Super. 74, 80 (App. Div. 2003) (Emphasis added). However, this Court's review of the instant record, taken together with careful review, thorough discussion by the Trial Court reflected in its 12/7/21 Order, this Court finds the 12/7/21 continues to be accurate and is here upheld, restated, and reinforced as the controlling law of the case here.
> (Da 220).

Judge Lesnewich's order of December 7, 2021 (Da 16) denying Lince's summary judgment motion did not establish the law of the case. "An order denying summary judgment is not subject to the law of the case doctrine because it decides nothing and merely reserves issues for future disposition." Gonzales v. Ideal Tile Importing Co., 371 N.J. Super. 349, 356 (App. Div. 2004). See also, Lawson v. Dewar, 468 N.J. Super. 128, 135-36 (App. Div. 2021) (Holding that "[i]nterlocutory rulings are "not considered 'law of the case' and are 'always subject to reconsideration up until final judgment is entered.'"); Blunt v. Klapproth, 309 N.J. Super. 493, 504 (App. Div. 1998), ("Denial of summary judgment preserves rather than resolves issues; therefore, later reconsideration of matters implicated in the motion, including the reasons in support of the denial, are not precluded.") (citing A&P Sheet Metal Co. v. Edward Hansen, Inc., 140 N.J. Super. 566, 573-74 (Law Div. 1976)).

"The trial court has complete power over its interlocutory orders and may revise them when it would be consonant with the interests of justice to do so." Ford v. Weisman, 188 N.J. Super. 614, 619 (App. Div. 1983) (citations omitted). "A significant aspect of the interlocutory nature of an order is its amenability to the trial court's control until entry of final judgment without interposition of considerations appropriate to finality." Lombardi v. Masso, 207 N.J. 517, 534-35 (2011) (quoting Pressler & Verniero, Current New Jersey Court Rules).

Although Judge Lindemann referenced Judge Lesnewich's decision; a review of the Statement of Reasons confirmed that Judge Lesnewich failed to answer the question presented and specifically, did Lince owe a duty of care to plaintiff, to inspect and maintain a sidewalk's lip/edge that was located four feet from their property line and not in front of their commercial building pursuant to Stewart. Judge Lesnewich made a finding that:

> The Court has thoroughly reviewed the well drafted pleadings by both parties. In the Court's opinion, the underlying factual issue is appropriate for a jury to decide. **There is a genuine issue of fact as to whether Lince Group or Scotch Plains was negligent in maintaining the depressed driveway apron or raised sidewalk abutting Lince Group's property**. Given the underlying factual issues presented in this case, R. 4:46-2(c) requires that the matter be considered by a jury. Therefore, the Court must deny Defendant Lince's Motion for Summary Judgment.
> (Da 25).

Not only did Judge Lesnewich fail to decide whether Lince had a legal duty, which is a question of law; but incorrectly stated that plaintiff fell on a sidewalk that abutted Lince's commercial property. Judge Lesnewich in December 2021 allowed plaintiff's claim to proceed against Lince without finding as a matter of law that Lince owed a duty to plaintiff. The judge was correct in stating the question of negligent maintenance was for the jury, but the issue of whether Lince had a duty is a question of law for the judge. Most importantly, there was no law of the case or

duty owed by Lince to the plaintiff. If Judge Hudak believed that a duty a duty of care was established, it what reversed by Judge Lindemann's order dated January 18, 2024 and the **denial of plaintiff's cross-motion for summary judgment**. (Da 214). Judge Lindemann never made a finding that Lince owed plaintiff a duty to inspect and maintain the public sidewalk where plaintiff fell as a matter of law. (Da 214-220).

This incorrect expansion of Stewart continued on January 30, 2024, day two of the trial, with Judge Hudak's finding as a matter of law that the sidewalk's lip/edge where plaintiff fell, that was four (4) feet north of Lince's property line and not in front of their commercial building was an "abutting sidewalk" under Stewart. Judge Hudak in denying Lince's motion stated:

> But it's not a question of fact as to whether it's abutting. I think Judge Lesnewich's opinion made it quite clear. He said, "the abutting sidewalk." I think the defendant's position that, somehow, that (indiscernible) inconsistency was -- not correct. You know, he ruled on the summary judgment motion that it's abutting sidewalk, but there's a question of fact as to whether the negligence of Scotch Plains or Lince, in dealing with how that occurred, and what happened.
>
> So, that being said, I'm going to deny the motion in limine for, basically, two reasons. One is, it's a dispositive motion out of time. That was already addressed in the summary judgment motion. And, it is an abutting sidewalk.
> (3T74:4-17).

Judge Hudak in denying Lince's motion for directed verdict, on February 6, 2024 again discussed and referenced the holding in Stewart and misstated the definition of an "abutting sidewalk." Judge Hudak stated:

> Stewart is clear in its language. Stewart, in its decision, used abutting. They footnote and referenced Pennsylvania dicta, that Pennsylvania said abutting and in front. However, Stewart did not rule that it was abutting and in front. Stewart ruled it was abutting.
> (6T17:21-25)
>
> ...
>
> The Supreme Court did not use the -- the phrase abutting and in front of in Stewart. It used abutting. In reference to the Pennsylvania decision in court is dicta. The Supreme Court could have clearly said, if it had wanted to, that sidewalks abutting and in front of commercial properties. It doesn't use that phrase. Courts, since then, have used abutting. They've been clearly, clearly upheld.
> (6T20:20-6t21:2)

Finally, Judge Hudak described Lince's motion as being "dispositive" and "out of time." However, as noted above plaintiff's cross-motion filed on December 4, 2023, seeking to have Lince "adjudged to have owed the plaintiff a duty to maintain the public sidewalk abutting its property upon which the plaintiff fell in a reasonably safe condition as a matter of law" was denied. (Da 220). Therefore, prior to the trial date, there was never a finding as a matter of law by any judge that Lince owed a duty of care to plaintiff.

Lince was required to make the application to Judge Hudak before the trial for a legal determination as to whether they owed a duty of care to plaintiff in order to properly defend against plaintiff's claim and make a record for their appeal. This appellate court can well understand that it was both confusing and a contradiction for Judge Lindemann to deny both Lince's summary judgment motion and also deny plaintiff's cross-motion as to whether Lince owed a duty of care to plaintiff. Accordingly, there was no definitive ruling on January 18, 2024 as it related to the duty of care Lince owed to plaintiff and this was eleven (11) days before the trial.

Lince's motion was timely, appropriate and unlike the facts in Cho v. Trinitas Regional Medical Center, 443 N.J. Super. 461 (App. Div. 2015) would not have dismissed all of the plaintiff's claims as Scotch Plains was still a defendant and owned the property in front of the sidewalk where plaintiff fell.

As discussed in Padilla and in Stewart, the Supreme Court's focus on sidewalk liability was about fairness to both the commercial property owners and pedestrians. Padilla at 542. Neither decision ever discussed nor held that a commercial property owner had to go past their property line to inspect the adjacent sidewalk. What is not disputed is that plaintiff brought a claim against Scotch Plains who owned the driveway/entrance in front of the sidewalk where plaintiff fell. Plaintiff has never cited to any authority stating that a public entity and a commercial property owner had a common duty or were responsible for the inspection and maintenance of a

sidewalk that is in front of a property owned by a municipal entity. MacGrath v. Levin Properties, 256 N.J. Super. 247, 253 (App. Div. 1992) (Affirming summary judgment in favor of a shopping center owner based on a finding that it did not owe a duty of care to a patron who was injured off premises on a public way).

E. Scotch Plains Sidewalk Ordinance was a codification of Stewart.

(Raised Below: 6T12:21-6T16:2)

Judge Hudak erred in failing to recognize that, although Scotch Plains' sidewalk ordinance did not create a tort duty by itself, it imposed a duty of care on Scotch Plains consistent with Stewart. Luchejko v. City of Hoboken, 414 N.J. Super. 302, 319 (App. Div. 2010), aff'd, 207 N.J. 191 (2011). The ordinance stated that: "every owner" was responsible to inspect, maintain and repair the sidewalks in front of their property. Township ordnance, **§ 15-2.8 Keeping Sidewalks Free from Obstructions and Nuisances**, stated:

> Every owner, tenant, lessee and occupant of any building or lot (whether vacant or occupied) within or near the built-up portions of the Township shall keep and cause to be kept the sidewalk and flagging and curbing in front thereof, free from obstructions and nuisances of every kind, and shall not allow anything in the area or yard or on about the premises to become a nuisance or dangerous or prejudicial to life and health.
> (Da 251 and 4T50:3-20).

Scotch Plains' sidewalk ordinance is almost identical to the Newark sidewalk ordinance referenced in Stewart, which stated:

> Any person owning, leasing or occupying any house or other building, or vacant lot, **fronting on any street in the city shall**, at his or their charge and expense, well and sufficiently pave and maintain in good repair, in accordance with this title and the regulations of the director, **the sidewalk, including the authorized installations thereon and therein, and the curb of the street in front of such house, building or lot.**
> Stewart at 156.

Scotch Plains' sidewalk ordinance was not inconsistent with Stewart, and in footnote No. 4, the Court acknowledged that it created a duty of care, and stated that:

> It has been suggested that this ordinance alone would be sufficient to create a duty running directly from abutting landowners to pedestrians using the sidewalk, and that violation of the ordinance by an abutting landowner would constitute negligence per se. See Moskowitz v. Herman, 16 N.J. 223, 228 (1954) (Jacobs, J., dissenting). However, we rest on our decision today on broader principles of common law.
> Id. at 162

Scotch Plains' sidewalk ordinance expressly stated that "every owner" is responsible to inspect, and maintain the sidewalks **in front of the property** and to keep the **sidewalk and flagging and curbing in front**, **"free from obstructions and nuisances of every kind."** Like Newark's sidewalk ordinance cited in Stewart, Scotch Plains' ordinance established a duty of care for "every owner" including the township albeit subject to the Tort Claims Act. Importantly, plaintiff never

identified any statute or caselaw that created or established a joint duty of care for a municipal public sidewalk.

The ordinance stated, "in front thereof" and was valid in 2019 when the plaintiff tripped and remained valid and consistent with Stewart through the trial. The ordinance makes no distinction for or eliminated Scotch Plains from inspecting and maintaining **"the sidewalk and flagging and curbing in front thereof, free from obstructions and nuisances of every kind ... ."** (Da 251).

For purposes of trial, the sidewalk ordinance was valid and reasonable and was never challenged or found to be inconsistent with Stewart. First Peoples Bank of NJ v. Township of Medford, 126 N.J. 413, 418 (1991). Further, Scotch Plains' DPW Director, Frank DiNizo, testified that Scotch Plains would follow the municipal ordinance. The trial court's refusal to instruct the jury that the township's sidewalk ordinance was valid and not inconsistent or superseded by Stewart was a misapplication of the law and a manifest denial of justice to Lince. The sidewalk ordinance was a codification of the Stewart decision.

POINT II

The Trial Judge Erred in Granting a Directed Verdict to Scotch Plains

(Raised Below: 8T4:2-8T24:1).

The court rules and applicable case law make it clear that a jury's verdict is entitled to "considerable respect" unless there has been a "manifest miscarriage of justice."

> The judgment of the initial factfinder then, whether it be a jury, as here, or a judge as in a non-jury case (citations omitted) is entitled to very considerable respect. It should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination, after canvassing the record and weighing the evidence, that the continued viability of the judgment would constitute a manifest denial of justice. The process of "weighing" the evidence is not to encourage the judge to "evaluate the evidence as would a jury to ascertain in whose favor the evidence preponderates" (Kulbacki v. Sobchinsky, 38 N.J. 435, 455, (1962) (Haneman, J., concurring) and on that basis to decide upon disruption of the jury's finding. "(T)he judge may not substitute his judgment for that of the jury merely because he would have reached the opposite conclusion; he is not a thirteenth and decisive juror." Dolson v. Anastasia, supra, 55 N.J. at 6. Nevertheless, the process of evidence evaluation called "weighing" is not "a pro forma exercise, but calls for a high degree of conscientious effort and diligent scrutiny. The object is to correct clear error or mistake by the jury." Id. It is only upon the predicate of a determination that there has been a manifest miscarriage of justice, that corrective judicial action is warranted.
>
> The comparative strictness of these rules is historic in nature, with roots deep in the common law. In the American system of justice the presumption of correctness

> of a verdict by a jury has behind it the wisdom of centuries of common law merged into our constitutional framework. Of course such verdict is not sacrosanct and can never survive if it amounts, manifestly, to a miscarriage of justice. The resolution of this latter question is reposed in the courts. Respect for our constitutional system requires that this obligation be approached, in all contingencies, with utmost circumspection, lest the courts intrude upon responsibilities which have traditionally, intentionally and constitutionally been vested in a jury of citizens.
> Baxter v. Fairmount Food Co., 74 N.J. 588, 597-98 (1977).

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

accepting as true all evidence supporting the party opposing the motion and according that party the benefit of all favorable inferences, reasonable minds could not differ." Edwards v. Walsh, 397 N.J. Super. 567, 571 (App. Div. 2007).

A. Scotch Plains Owed A Duty of Care to Plaintiff

The location of plaintiff's fall was in front of Tarquins Alley, the driveway/ entrance to municipal parking lot #5. Tarquins Alley was acquired by Scotch Plains in 2000 and the DPW Director confirmed that Tarquins Alley was inspected and maintained by the township. Public property is not limited to property in which a public entity is the fee owner but also includes property that it controls. Roman v. City of Plainfield, 388 N.J. Super. 527, 534 (App. Div. 2006). Our Supreme Court has directed that the Tort Claims Act does not exclude public sidewalks from the definition of public property. Norris v. Borough of Leonia, 160 N.J. 427, 442 (1999).

Lince's property line when extended from the front of their building to the curb, passed through the subject sidewalk slab and approximately 13 inches of the sidewalk was **in front** of Lince's commercial. The remaining 49 ½ inches of the sidewalk was in front of Tarquins Alley. During the trial neither plaintiff, plaintiff's liability expert or Scotch Plains disputed that Lince's northern property line ran along their building's exterior wall and that plaintiff did not trip **in front of Lince's commercial property**.

As discuss above and consistent with Stewart v. 104 Wallace Street, 87 N.J. 146, 157 (1981), Scotch Plains' municipal ordinance **§15-2.8 Keeping Sidewalks Free from Obstructions and Nuisances**, confirmed that the township owed a duty of care to the plaintiff.

The municipal ordinance expressly stated, "in front thereof" and was valid in 2019 and remained. The ordinance's language makes no distinction for or eliminated the township from inspecting and maintaining **"the sidewalk and flagging and curbing in front thereof, free from obstructions and nuisances of every kind ...."** (Da 251).

B. Plaintiff's Expert Established That The Sidewalk was a Dangerous Condition

"[T]o be considered a substantial risk a dangerous condition must be considered together with the anticipated use of the property." Atalese v. Long Branch Township, 365 N.J. Super. 1, 5 (App. Div. 2003). The Supreme Court has noted that the determination of whether a dangerous condition exists on the property is ultimately a question for the jury. Posey ex rel. Posey v. Bordentown Sewerage Authority, 171 N.J. 172, 188 (2002). Plaintiff's liability expert, James Kennedy, P.E., testified that the 1 5/8 inch raised sidewalk edge/lip was a dangerous condition. (4T183:1-9). The DPW Director also testified that the sidewalk was a "hazard" and should have been repaired. (4T35:18-22). The jury understood the evidence

presented and the testimony of Kennedy and DiNizo and found that a dangerous condition did in fact exist on the sidewalk in front of Tarquins Alley.

Mr. Kennedy's opinion relating to sidewalk liability and the duty of care was not only a misstatement of Stewart and Scotch Plains' municipal ordinance, but pursuant to the jury instructions, was rejected by the jury. See Boddy v. Cigna Property and Casualty Companies, 334 N.J. Super., 649, 659 (App. Div. 2000) (It is well established that "expert witnesses simply may not render opinions on matters which involve a question of law." Healy v. Fairleigh Dickinson Univ., 287 N.J. Super. 407, 413 (App. Div.) *certif. denied*, 145 N.J. 372 (1996) *cert. denied,* 519 U.S. 1007 (1996)).

The jury interrogatory specific to Scotch Plains was answered in the affirmative (8-0) and confirmed that Scotch Plains owed plaintiff a duty of care, was negligent and proved all of the statutory requirements as to such negligence and proximately caused plaintiff's injury. (7T5:13-21). The trial judge should not have stepped in to become a "thirteenth and decisive juror." Dolson, supra, 55 N.J. at 6.

C. Notice of the Dangerous Condition was Established

A public entity will be liable for injuries caused by a dangerous condition of public property either where its employees created the condition or where it had actual or constructive notice of the dangerous condition. N.J.S.A. 59:4-2. Actual notice exists when the defendant had knowledge of the condition and knew or should

have known of its dangerous character. N.J.S.A. 59:4-3(a). Constructive notice exists when the condition existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. N.J.S.A. 59:4-3(b). Plaintiff presented ample evidence including serial photographs of East Second Street and specifically, Tarquins Alley, establishing that the raised sidewalk lip/edge had been evolving for at least three years. The DPW Director confirmed that the township was responsible for the inspection and maintenance of the asphalt on Tarquins Alley. As such, Scotch Plains would have been on notice of the raised sidewalk lip and the jury's verdict confirmed this.

The jury's verdict as to Scotch Plains followed the jury instructions and law that was provided by Judge Hudak and stated:

> A public entity is considered to have actual notice of the dangerous condition if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character. Thus, if you find that an employee of the public entity actually saw the condition or should have reasonably discovered its dangerous character, then the public entity had actual notice of the dangerous condition.
>
> The public entity is considered to have constructive notice if the condition existed for such a period of time and was of so obvious a nature that the public entity, exercising due care, should have discovered the dangerous condition and its dangerous character. In addition, if you find that due to the length of time the dangerous condition was there and the obviousness of the condition, an employee performing

> his or her job with reasonable care should have discovered the dangerous condition and its dangerous character, then the public entity is assumed to have had constructive notice of the condition.
> (6T122:25-6T123:20).

N.J.S.A. 59:4-1(a) defines "dangerous condition" as "a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." Lince's property manager testified that prior to the plaintiff's fall, she had called Scotch Plains to complain about the tree and tree roots in front of the Lince building. As such, Scotch Plains had actual notice of the hazard/dangerous condition along the sidewalks of East Second Street in the area of Tarquins Alley prior to the plaintiff's fall.

There was sufficient evidence presented to the jury for them to find against Scotch Plains pursuant to the Tort Claims Act. The Supreme Court in Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969), discussed a motion for a directed verdict and stated:

> Reference should first be made to the distinction between a motion for a new trial after a jury verdict as against the weight of the evidence (R. 4:49—1(a)) and a motion for involuntary dismissal at the end of the plaintiff's case (R. 4:37—2(b)), a motion for judgment at the close of all the evidence or at the close of the evidence offered by an opponent (R. 4:40—1), or a motion for judgment notwithstanding the verdict (R. 4:40—2). In the case of motions for involuntary dismissal, the test is, as set forth in R. 4:37—2(b) and equally applicable to motions for judgment, whether 'the evidence, together with the legitimate inferences therefrom, could sustain a judgment in favor' of the party opposing the motion, I.e., if, accepting as true all the evidence which supports the

> position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied. Bozza v. Vornado, Inc., 42 N.J. 355, 200 A.2d 777 (1964); Bell v. Eastern Beef Co., 42 N.J. 126, 199 A.2d 646 (1964); Franklin Discount Co. v. Ford, 27 N.J. 473, 490, 143 A.2d 161, 73 A.L.R.2d 1316 (1958). The point is that the judicial function here is quite a mechanical one. The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion.

Based on the above, Scotch Plains' motion for Directed Verdict/Judgment should have been denied and the jury's verdict left undisturbed.

POINT III

THE DAMAGE AWARD IS EXCESSIVE, AGAINST THE WEIGHT OF THE CREDIBLE EVIDENCE AND SHOCKS THE CONSCIOUS RESULTING IN A MISCARRIAGE OF JUSTICE

(Da 298, Motion for a New Trial).

The jury's verdict of $1.2 million is so shocking that it has resulted in a miscarriage of justice. At the forefront of this discussion, this appellate court cannot forget that the ultimate goals of damages in personal-injury actions is to compensate fairly the injured party. Deemer v. Silk City Textile Mach. Co., 193 N.J. Super. 643, 651, (App. Div. 1984). Fair compensatory damages resulting from the tortious infliction of injury encompasses no more than the amount that will make plaintiff whole, that is, the actual loss. Rough v. Weintraub, 105 N.J. 233, 238 (1987). "The purpose, then[,] of personal injury compensation is neither to reward the plaintiff, nor to punish the defendant, but to replace plaintiff's losses." Domeracki v. Humbolt Oil & Ref. Co., 443 F.2d 1245, 1250 (3rd Cir.), *cert. denied*, 404 U.S. 883 (1971). The jury's verdict can only be perceived as a punishment award in the face of bias and prejudice that erodes the fundamental values of our civil justice system. Moreover, the jury's award was clearly influenced on the incorrect law from the trial judge that two entities were responsible for the inspection and maintenance of the sidewalk in question. Lince throughout the trail maintained that plaintiff did not fall

in front of their commercial building on an "abutting sidewalk" and the excessive verdict is evidence that the jury intended to punish Lince.

In instances that suggest a jury's verdict was the result of bias or unfairness, an order for a new trial on all issues is an appropriate remedy. "Where damages are so grossly excessive as to indicate prejudice, partiality or passion on the part of the jury suggesting that the liability verdict is tainted or that there was a compromised verdict as to liability, a new trial must be granted as to all issues." Von Borstel v. Campan, 255 N.J. Super. 24, 31 (App. Div. 1992). To justify a new trial on all issues, there must be evidence of trial error, attorney misconduct, or some other indicia of bias, passion or prejudice impacting the liability of the verdict. Fertile v. Saint Michael's Medical Center, 169 N.J. 481, 499 (2000). As discussed above, it is Lince's position that the trial judge misinterpreted and misapplied the holding in Stewart in making a determination as a matter of law that Lince was responsible for the inspection and maintenance of an adjacent sidewalk and specifically, the location of plaintiff's fall incident, four (4) feet north of Lince's property line.

While parties are generally not permitted to a new trial on all issues based upon a damage verdict alone, that principle must yield to cases where the issue of damages is so interrelated with liability that one cannot be retired alone without working an injustice. Id.; Ahn v. Kim, 145 N.J. 423, 434-35 (1996); Tronolone v. Palmer, 224 N.J. Super. 92, 98 (App. Div. 1988).

The instant matter falls within the category of case requiring a new trial on all issues. Lince's appeal identifies several errors during the trial. Namely, the incorrect interpretation and an expansion of Stewart's holding concerning the duty of a commercial property owner and the failure to instruct the jury on the definition of an "abutting sidewalk" as meaning in front of a commercial building as clearly stated in Stewart and the failure of the trial judge to allow Scotch Plains' municipal sidewalk ordinance to establish the duty of care for the sidewalk in question.

THE JURY AWARD FOR PAIN AND SUFFERING IN THE AMOUNT OF $1.2 MILLION IS EXCESSIVE

The jury's award of compensatory damages for plaintiff's pain and suffering in the amount of $1.2 million is grossly excessive, shocking to the conscience and contrary to the weight of the evidence. This is demonstrated by the evidence put forth by not only the plaintiff, her damage expert and the defense medical damage expert, all of whom testified that future surgery concerning a right wrist fusion procedure was unlikely 4 ½ years after the plaintiff's fall incident.

The evidence presented relating to her damages and limitations established that more than four years after plaintiff's fall she never discussed with her orthopedic surgeon or testified at trial that she was likely to undergo a future surgical intervention. In addition, plaintiff testified that she missed no time from her position as a middle school teacher and had never asked for any accommodations from her

principal. Nor did plaintiff ever contemplate early retirement, because she loved to teach.

Remittitur is designed to reduce excessive damages awarded by a jury to a level that is within the limits of an appropriate verdict. Fertile v. Saint Michael's Medical Center, 169 N.J. 481, 492 (2001). Remittitur had been routinely employed by the courts and is common practice in New Jersey to avoid the unnecessary expense of a delay of a new trial. Baxter v. Fairmount Food Co., 74 N.J. 588 (1997). Accordingly, where there is a clear case of an excessive jury verdict that is against the weight of the evidence and shocking, the court will set aside such verdict. Tramutola v. Bortone, 118 N.J. Super. 503, 518 (App. Div. 1972), modified 63 N.J. 6 (1973).

In the case of Tronolone v. Palmer, the appellate division held that:

> Not every excessive damage verdict may be amendable to an order for remittitur. Where ... the verdict seems to be a compromise as to liability or to be the result of some other error or distortion, the entire result of the trial must be discarded and a new trial must be ordered. Id. at 98

The appellate court further explained that a "liability verdict may survive only if it is separable and otherwise sound and the damage verdict can be dealt with alone." Id. Otherwise, the only remedy for a verdict where both liability and damages findings constituted a miscarriage of justice is a new trial. In the alternative, where the court denies a motion for new trial, and "where the quantum

of damages is the sole source of the court's determination that a denial of justice has taken place," the court may enter an order for remittitur. Fertile at 491,(citing Velop, Inc. v. Kaplan, 301 N.J. Super. 32, 42, 62-4 (App. Div. 1997). As such, "remittitur ... may be employed only in cases in which a new trial as to damages only is proper." Epstein v. Grand Union Co., 43 N.J. 251, 252 (1964) (emphasis added); see also Caldwell v. Haynes, 136 N.J. 422, 443 (1994).

Based on the evidence presented at trial, the verdict award of $1.2 million is shocking to the conscience and could only be the result of prejudice, partiality, or passion on the part of the jury suggesting that the liability verdict is tainted or that there was a compromised verdict as to liability.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decisions of the motion and trial judges were incorrect and an expansion of the Supreme Court's holding in Stewart and the law relating to sidewalk liability for a commercial property and this appellate court should vacate the judgment against the defendant/appellant, Lince Group.

This appellate court should find that not only do the individual errors committed by the motion and trial judges require that the judgment against Lince Group be vacated but also that the cumulative errors by the trial court mandate reversal of the trial court's decisions as they constituted harmful error and as such require that the judgment against Lince Group be vacated and plaintiff's Complaint be dismissed with prejudice.

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Lince Group, LLC

Dated: September 6, 2024

By: _____
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ELLEN ENGLISH AND HER HUSBAND, KEITH ENGLISH,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Plaintiffs/Respondents/Cross-Appellants,	:	DOCKET NO. A-002344-23-T1
vs.	:	**Civil Action**
LINCE GROUP LLC,	:	ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, UNION COUNTY,
Defendant/Appellant,	:	DOCKET NO. UNN-L-219-20
and	:	SAT BELOW: HONORABLE DANIEL R. LINDEMANN and HONORABLE
TOWNSHIP OF SCOTCH PLAINS,	:	JOHN G. HUDAK, J.S.C.
Defendant/Respondent,	:	
and	:	
PAT'S AMERICAN BUTCHER SHOP LLC, PAT'S ALL AMERICAN BUTCHER, FRANK'S MEAT MARKET, SALON DESANDO, LLC, JOHN DOES 1-10 & ABC CORPORATIONS 1-10,	:	**BRIEF FILED ON BEHALF OF THE PLAINTIFF/RESPONDENT/CROSS-APPELLANT**
Defendants.	:	On the Brief: Patrick J. Flinn, Esq.

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

TABLE OF APPENDIX

TABLE OF CITATIONS

Case Law

Court Rules

Model Jury Charges

Statutes

Secondary Sources

PROCEDURAL HISTORY

Ellen English (hereinafter "the plaintiff") was jogging on the public sidewalk on East Second Street in the Township of Scotch Plains, New Jersey on June 22, 2019 when her right foot caught the edge of an elevated section of sidewalk causing her to trip and fall to the ground. (5T112:24-113:3; 5T114:10-115:14).[1] A Complaint was filed on behalf of the plaintiff and her husband on January 16, 2020 seeking damages for the permanent injuries she sustained as a result of the fall against Lince Group, LLC (hereinafter "defendant Lince Group"), the owner of the abutting commercial property. (Da50). Defendant Lince Group filed an Answer to the Complaint together with a Third-Party Complaint asserting a claim against the Township of Scotch Plains (hereinafter "defendant Scotch Plains") on February 13, 2020. (Pa1). An Answer to the Third-Party Complaint was filed on behalf of defendant Scotch Plains on July 13, 2020. (Pa35). The plaintiff subsequently amended the Complaint to name defendant Scotch Plains

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[1] Appendix and Transcript Reference Key
Pa – Plaintiff/Respondent/Cross-Appellant's Appendix
Da – Defendant/Appellant's Appendix
1T – Transcript of the January 8, 2024 Motion Hearing
2T – Transcript of the January 29, 2024 Trial Date
3T – Transcript of the January 30, 2024 Trial Date
4T – Transcript of the January 31, 2024 Trial Date
5T – Transcript of the February 1, 2024 Trial Date
6T – Transcript of the February 5, 2024 Trial Date
7T – Transcript of the February 6, 2024 Trial Date
8T – Transcript of the February 16, 2024 Motion Hearing

as a direct defendant and an Answer was filed on its behalf on August 12, 2020. (Da1; Pa41).

The Complaint also named tenants of the abutting commercial property as defendants including Pat's American Butcher Shop LLC, Pat's All American Butcher, and Frank's Meat Market. (Da50). An Answer was filed on behalf of Pat's American Butcher Shop LLC and Pat's All American Butcher on April 17, 2020 and default was entered against Frank's Meat Market on July 13, 2020. (Pa15; Pa33). The plaintiff filed an Amended Complaint on May 26, 2020 naming Salon Desando, LLC as a defendant. (Pa19). An Answer to the Amended Complaint was filed on behalf of Salon Desando, LLC on December 22, 2021. (Pa56). A Stipulation of Dismissal was filed on March 18, 2021 dismissing the claims against Salon Desando, LLC. (Pa69). The claims against Pat's American Butcher Shop LLC and Pat's All American Butcher were subsequently dismissed by Order granting their motion for summary judgment. (Pa71).

Defendant Lince Group filed a motion for summary judgment on September 8, 2021 seeking dismissal of the Complaint on the grounds that it could not be held liable for the plaintiff's fall caused by the elevated section of sidewalk as a matter of law. (Pa71). The motion was returnable before the Honorable Alan G. Lesnewich, J.S.C. who filed an Order denying the motion on December 7,

2021. (Da16). Defendant Lince Group filed a motion for reconsideration of the Order on January 4, 2022. (Pa73). Judge Lesnewich found that there was no basis for reconsideration of its Order denying defendant Lince Group's motion for summary judgment and denied the motion. (Da26).

Defendant Scotch Plains filed a motion for summary judgment on March 25, 2022 in which it argued that it could not be held liable for a dangerous condition of public property under the Tort Claims Act on the grounds that the raised edge created by the elevated section of sidewalk was not a dangerous condition and it did not have notice of the condition as a matter of law. (Da32-Da36). The motion was returnable before Judge Lesnewich. (Da28). After hearing oral argument, Judge Lesnewich found that there genuine issues of material fact as to whether the raised edge of the sidewalk amounted to a dangerous condition and whether defendant Scotch Plains had constructive notice of the condition. (Da34-Da36). Accordingly, an Order was filed on May 19, 2022 denying the motion. (Da28).

On November 17, 2023, defendant Lince Group filed another motion for summary judgment in which it again argued that it could not be held liable for the plaintiff's fall caused by the elevated section of sidewalk as a matter of law. (Da37). The plaintiff opposed the motion and filed a cross-motion for partial summary judgment seeking the entry of an Order ruling that defendant Lince

Group owed her a duty to maintain the public sidewalk abutting its property in a reasonably safe condition. (Da103). The motions were returnable before the Honorable Daniel R. Lindemann, J.S.C. who heard oral argument on January 8, 2024. (1T). Judge Lindemann filed Orders on January 18, 2024 denying both motions. (Da214; Pa81).

The matter proceeded to trial before the Honorable John G. Hudak, J.S.C. and a jury that began on January 29, 2024 and continued on January 30th and 31st, 2024 and February 1st, 5th, and 6th, 2024. (3T-7T). Defendant Lince Group filed a motion *in limine* at the outset of trial in which it again argued that it did not owe the plaintiff a duty to maintain the elevated sidewalk that caused the plaintiff to trip and fall. (Pa90). It argued that a commercial property owner is only responsible for the public sidewalks that are in front of the premises and sought to have the jury instructed that abutting means in front of. (3T62:16-64:11). Judge Hudak addressed the motion prior to opening statements and initially noted that Judge Lesnewich clearly found that the sidewalk was abutting defendant Lince Group's property but determined that there was a question of fact as to who may have been negligent in dealing with the defect. (3T61:8-13; 3T61:23-62:1). He then found that the Supreme Court in *Stewart v. 104 Wallace St., Inc.* 87 N.J. 146 (1981) repeatedly used the term "abutting" when ruling that commercial landowners are responsible for the maintenance of public sidewalks

abutting their property and that abutting has a common definition. (3T68:24-69:10; 3T69:14-19; 3T69:24-70:2). He then found that the sidewalk where the plaintiff tripped and fell abutted defendant Lince Group's property and denied the motion *in limine*. (3T70:24-74:18).

The plaintiff presented fact witness testimony from Keith English, Frank Dinizo, Tillie Yu, and herself and expert witness testimony from James Kennedy, P.E., and Dr. Joseph Barmakian in her case in chief. (3T125:21-126:5; 4T17:16-22; 4T73:9-16; 4T165:11-23; 5T:2-3; 5T108:6-17). Mr. Kennedy was accepted as an expert witness in the field of civil engineering, professional planning, and walkway safety for the purposes of testifying as to the safe practices and procedures regarding sidewalk maintenance. (4T174:25-175:11). The plaintiff also offered several photographs that were admitted into evidence on February 1, 2024 including photographs marked as exhibits P-1 to P-2; P-4 to P-5; P7 to P10; and P-14 to P-17 that were used during witness testimony. (5T240:14-250:12). The defendants presented the testimony of only the defense examining doctor, Dr. Michael Bercik, in their cases. (5T188:18-21).

After all parties rested, applications for a directed verdict seeking dismissal of the plaintiff's claims were filed by defendant Scotch Plains and defendant Lince and an application for a directed verdict as to the negligence of defendant Lince Group was filed on behalf of the plaintiff. (6T5:10-10:21; 6T10:23-12:19;

6T12:21-16:2). Judge Hudak reserved a decision on the application filed on behalf of defendant Scotch Plains. (6T17:10-12). He then denied the applications filed on behalf of defendant Lince Group finding that there were questions of fact pertaining to defendant Lince Group's liability. (6T17:8-22:4). However, in his ruling, Judge Hudak again rejected defendant Lince Group's argument that the elevated sidewalk that caused the plaintiff to fall did not abut its property because it was not directly in front of the premises. (6T17:8-23:1; 6T23:7-12; 6T24:14-19). As he explained:

> Abutting has a definite definition to it. It means abutting up to. It doesn't mean on your property. It means abutting to your property. Here is your property line. Abutting means abutting up to it. Otherwise, if I -- if you read abutting as abutting has to be -- abutting up to it and in front of it, that eliminates the word abutting. It gives it no meaning.
>
> The Supreme Court did not use the – the phrase abutting and in front of in Stewart. It used abutting. In reference to the Pennsylvania decision in court is dicta. The Supreme Court could have clearly said, if it had wanted to, that sidewalks abutting and in front of commercial properties. It doesn't use that phrase. Courts, since then, have used abutting. They've been clearly, clearly upheld. (6T20:13-21:2).

Judge Hudak also denied the plaintiff's application for a directed verdict on the grounds that there were questions of fact that were to be resolved by the jury as to defendant Lince Group's liability. (6T21:8-23:1).

The jury was charged after closing arguments were completed. (6T108:7-146:4). The instruction given to the jury pertaining to the liability of defendant Lince Group was consistent with Model Jury charge 5.20B. (6T125:1-126:16).

As for defendant Scotch Plains, Judge Hudak instructed the jury on the requirements for establishing liability against a public entity pursuant to *N.J.S.A.* 59:4-2 and recovering non-economic damages pursuant to *N.J.S.A.* 59:9-2(d) under the Tort Claims Act. (6T120:8-124:25; 6T138:5-139:23). The jury returned a unanimous verdict on February 6, 2024 finding that defendant Lince Group was negligent and a proximate cause of the accident; that the plaintiff and/or defendant Lince Group established all statutory requirements as to the negligence of defendant Scotch Plains which was a proximate cause of the accident; that the plaintiff was negligent and a proximate cause of the accident; apportioning liability sixty percent to defendant Lince Group, thirty percent to defendant Scotch Plains, and ten percent to the plaintiff; and awarding the plaintiff damages in the amount of $1,200,000.00 for non-economic damages. (7T5:7-6:18).

Following the verdict, Judge Hudak set forth a briefing schedule as to the application for a directed verdict filed on behalf of defendant Scotch Plains. (7T7:21-8:3). Defendant Scotch Plains argued that it was entitled to a directed verdict on the grounds that it was not established at trial that the abrupt surface projection created by the elevated sidewalk that caused the plaintiff to trip and fall was a dangerous condition, that it had notice of the condition, and that its failure to protect against the condition was palpably unreasonable. (8T5:6-10).

The plaintiff filed opposition together with a cross-motion for judgment to be entered against defendant Lince Group in the amount of ninety percent of the damages awarded by the jury in the event the motion for a directed verdict was granted. (Pa92). Defendant Lince Group also filed opposition to the motion for a directed verdict but did not file opposition to the plaintiff's cross-motion. (8T13:1-5). Judge Hudak heard oral argument on February 16, 2024 at which time he found that while there was more than enough evidence to support a finding that there was a dangerous condition, there was no evidence presented at trial supporting a finding that defendant Scotch Plains was palpably unreasonable or had constructive notice of the condition. (8T15:23-22:15). An Order granting defendant Scotch Plains' motion for a directed verdict and dismissing all claims against it was filed on March 4, 2024. (Da221). Judge Hudak also found that the jury verdict should be molded to reflect defendant Lince Group ninety percent liable for the damage award since he granted the motion for a direct verdict and entered an Order reflecting his ruling on March 6, 2024. (8T23:7-22; Da224).

An Order for Judgment entering judgment in the amount $1,219,234.20 against defendant Lince Group was filed on March 6, 2024. (Da225). It was discovered that there was an error in the pre-judgment calculation in the Order for Judgment and that it inadvertently omitted post-judgment interest so the

plaintiff requested that the Order for Judgment be revised to correct the error. (Pa100). No opposition was filed to the request and a revised Order for Judgment was filed by the Trial Court on April 15, 2024 entering judgment in the amount of $1,218,748.81 together with post-judgment interest against defendant Lince Group. (Da234).

A motion for a new trial was filed on behalf of defendant Lince Group was filed on February 23, 2024. (Da228). The plaintiff filed opposition to the motion on March 7, 2024. (Pa94). The motion hearing was adjourned on multiple occasions and was scheduled to be heard on April 26, 2024 but defendant Lince Group filed a Notice of Appeal prior to a ruling on the motion. (Da239). An Order was filed on April 26, 2024 denying the motion as moot because of the filing on the Notice of Appeal. (Da232). The plaintiff a Notice of Cross-Appeal seeking review of the Order granting defendant Scotch Plains' motion for a directed verdict. (Pa101). An Order was subsequently filed on June 7, 2024 granting defendant Lince Group's motion for a stay of judgment pending the outcome of the appeal upon defendant Lince Group's filing of a supersedeas bond. (Da237).

STATEMENT OF FACTS

Defendant Lince Group was the owner of a property located at the address of 1812 to 1826 East Second Street in the Township of Scotch Plains, New Jersey on June 22, 2019. (4T74:15-17; 4T75:13-17; 4T80:15-18; 4T80:23-81:1). The property is a multi-tenant commercial property that has six commercial tenants. (4T74:15-17; 4T81:19-82:2). It is a corner property that has frontage along two public right of ways, East Second Street and Tarquins Alley. (4T188:8-18; 4T192:2-7; 4T203:4-11). The Tarquins Alley right of way provides access to a municipal parking lot located behind the commercial property owned by defendant Lince Group from East Second Street. (4T31:4-11; Da244).

A public sidewalk is situated along the East Second Street right of way and abuts the commercial property owned by defendant Lince Group. (Pa186:1-13; Da244; Pa106). The plaintiff was jogging on the public sidewalk along East Second Street on Saturday June 22, 2019 when her right foot caught the edge of an elevated section of the sidewalk abutting defendant Lince Group's commercial property causing her to trip and fall to the ground. (5T112:24-113:3; 5T114:10-115:14). The elevated section of sidewalk that caused the plaintiff to trip and fall is shown in photographs that were marked as P-2; P-16; and P-17 at trial and admitted into evidence. (5T115:15-19; 5T118:1-11; 5T119:16-23; 5T240:14-250:12; Da246; Pa106; Pa114). The nonplanar condition was

seventeen inches wide and created a change of elevation of one and three eighths inches to one and five eighths inches. (4T182:15-183:9; Pa113). Mr. Kennedy testified that the nonplanar condition was an unsafe and hazardous condition. (4T179:12-25; 4T183:10-14). Defendant Scotch Plains' Director of Public Property and defendant Lince Group's property manager both acknowledged that that the nonplanar condition should be repaired because it is a safety issue that can cause a person to trip. (4T34:23-35:17; 4T35:18-36:1; 4T95:9-20).

Mr. Kennedy testified that, based upon his inspection, the nonplanar condition was due to slab of sidewalk being lifted by tree roots growing under the slab as opposed to the other side sinking. (4T193:5-195:2). He further testified that there were years to discover the unsafe condition prior to the plaintiff's fall as his review of images of the area show that the nonplanar condition had been in more or less the same condition since 2015. (4T192:11-21; 4T197:18-22). The property manager for defendant Lince Group acknowledged that exhibit P-1 showed the condition of the sidewalk as it existed in June 2019 and also how it looked when defendant Lince Group purchased the abutting commercial property in 2016. (4T92:8-13; 4T94:2-20). Mr. Kennedy testified that the unsafe nonplanar condition that existed for years could have been repair by removing and repouring the slab, cutting a ramp in place of the abrupt surface projection, providing a warning by highlighting or painting the

area, or putting a cone or barrel over the unsafe condition. (4T195:8-196:22). There was testimony that the cost of removing and repouring another slab of sidewalk was only five hundred dollars. (4T127:15-18; Da252). Defendant Scotch Plains' Director of Public Property acknowledged that if he was advised of the nonplanar condition that he would have blocked off the area so nobody would get hurt until it was fixed. (4T65:9-12; 4T67:25-68:15).

The nonplanar condition that caused the plaintiff to trip and fall was located at the junction between a concrete slab of the public sidewalk and the Tarquins Alley right of way. (Pa106). The property line for the commercial property owned by defendant Lince Group bisects this sidewalk slab. (4T187:9-8; 4T200:13-21). Mr. Kennedy testified that the nonplanar condition of the sidewalk abuts the commercial property owned by defendant Lince Group. (4T186:5-13; 4T233:17-21). He further testified that defendant Lince Group is responsible for maintaining, repairing, and inspecting the uneven area of sidewalk as the abutting commercial landowner. (4T183:23-184:12; 4T192:8-10; 4T197:10-3). However, he agreed that defendant Scotch Plains could also have repaired the condition. (4T210:20-211:7).

The Director of Public Property for defendant Scotch Plains testified that based on the Town's policies and procedures, it is the responsibility of all property owners to inspect and maintain the sidewalks abutting their property.

(4T20:22-24; 4T24:9-17; 4T23:13-24:4; 4T28:10-13; 4T34:5-11). He further testified that the public sidewalk in front of defendant Lince Group's commercial property begins where the asphalt of Tarquins Alley meets the concrete sidewalk. (4T81:2-6). He went on to testify that defendant Lince Group was responsible for the raised area of the sidewalk that caused the plaintiff to trip and fall. (4T67:9-11).

The property manager for defendant Lince Group agreed that sidewalks should be level and even for safety and that an uneven joint can be a tripping hazard. (4T88:4-10). She also agreed that the nonplanar condition that caused the plaintiff to trip and fall should have had a cone or high visibility tape to alert people to the presence of the condition. (4T94:21-95:24). However, she claimed that defendant Lince Group did not do anything to protect against the unsafe condition because the part of that slab that was elevated was not in front of the commercial property and was on the other side of the property line. (4T95:25-96:5; 4T145:24-146:1). She testified that it was her understanding that a commercial property owner is only responsible for the maintenance and repair of public sidewalks that are in front of their property pursuant to the local ordinance. (4T130:19-131:5; 4T136:6-16; 4T155:3-5; 4T156:13-16).

Although defendant Lince Group's property manager claimed that it was her understanding that defendant Lince Group was only responsible for the sidewalk

directly in front of the property, the proofs showed that it maintained and repaired the area of the sidewalk that extended beyond the property line and reached Tarquins Alley. (4T123:24-125:8; 4T131:13-17). The sidewalk abutting defendant Lince Group's commercial property is made up of concrete slabs and brick pavers. (Pa106). Defendant Lince Group replaced the brick paver section of the sidewalk after the plaintiff's fall, including the brick pavers up to Tarquins Alley that were beyond the property line and adjacent to the elevated concrete slab that caused the plaintiff to trip and fall. (4T123:24-125:8). It also performed other maintenance work in this area of the sidewalk. (4T131:13-17).

Defendant Lince Group presented Section 15-2.8 of the Township of Scotch Plains ordinance at trial which provides that owners and occupiers of property in the township "shall keep and cause to be kept the sidewalk … in front" of their property free from obstructions. (3T111:14-112:2; 4T49:22-50:17; Da251). When Mr. Kennedy was questioned about the ordinance at trial, he explained that "frontage" is defined by ordinance as "the land lying along the right of way line of a street between the street lot lines within the lot - - of a lot." (4T189:18-23). He then testified that the facing of a building is not determinative of a front. (4T190:16-17). As he explained:

> the facing of a building is not determinative of a front. Let's say you had a corner lot; let's say your house was on a corner. Your front door

> might be facing one street, but you also have frontage on the side street[.] (4T190:16-20).

Mr. Kennedy further testified that there is no conflict between the law in New Jersey that commercial property owners are responsible for the sidewalks that abut their property and the ordinance in its totality. (4T191:7-192:1).

In regard to defendant Lince Group's commercial property, Mr. Kennedy testified that it sits on a corner between East Second Street and Tarquins Alley which are public right of ways and meet the definition of a street in the ordinance. (4T188:8-13; 4T190:24-191:6; 4T192:2-7; 4T203:7-9). It, therefore, has frontage on both East Second Street and Tarquins Alley. (4T190:24-191:6; 4T215:20-25). Mr. Kennedy then testified that the elevated section of sidewalk that caused the plaintiff to trip and fall is along Tarquins Alley and in front of defendant Lince Group's commercial property as it forms a radius between the two frontages of the corner property. (4T214:9-215:1; 4T215:20-25). He went on to explain that "[i]t would be absurd to have a corner lot and only pick the sidewalk that lies across your own front door and not the one that goes down your side." (4T:229:3-6).

The plaintiff tried to break her fall with her right hand and landed on her right wrist when she fell to the ground. (5T115:9-24). Her right wrist was swollen, deformed, and extremely painful after the fall. (3T130:16-18; 5T116:2-4; 5T117:12-14). She called her husband and her daughter who responded to the

scene and was taken to the Summit Medical Group emergency walk-in facility by her daughter. (3T129:20-130:3; 5T17:15-20; 5T116:25-117:8; 5T121:2-4). X-rays were taken at the facility that revealed a fracture of the wrist that went through the joint and out through the distal radius as well as damage to the joint. (5T16:11-15; 5T18:16-19; 5T19:7-20:25; 5T121:17-21). The plaintiff followed up with an orthopedic surgeon two days later. (5T16:17-19; 5T122:13-14).

The orthopedic surgeon ordered a CAT scan when he saw the plaintiff. (5T123:2-6). The CAT scan showed a markedly displaced, comminuted, intra-articular fracture of the right distal radius. (5T15:5-6; 5T21:5-22:13). Dr. Barkmakian, a board certified orthopedic surgeon, reviewed the CAT scan for the jury and pointed out the shattered and displaced bone, the pieces of bone that broke off and shifted away, and the break to the surface of the joint. (5T8:14-21; 5T22:14-25:4). He explained that "[t]his fracture is a significant injury to the actual joint itself with multiple pieces. The bone is basically shattered an -- displaced." (5T22:20-23). The plaintiff required immediate surgery to repair the fractures which she underwent on June 27, 2019. (5T15:6-8; 5T16:19-21; 5T25:24-26:5; 5T123:11-21; 5T124:17-19). The surgery involved an open reduction and internal fixation with the bone being put back as close as possible to where they were before being broken and held in place with a metal plate and screws. (5T26:14-27:11; 5T123:25-124:6). It also involved a carpal tunnel

release to relieve pressure on the nerves. (5T26:14-27:1). The plaintiff began occupational therapy shortly after the operation which continued until October 29, 2019. (5T126:21-25; 5T29:16-30:1).

The plaintiff was suffering from unmanageable pain after the surgery and was unable to use her right arm. (5T125:3-122). She is right hand dominant and could not drive or write at that time and needed assistance getting dressed and with other activities she would normally do. (5T122:10-11; 5T125:11-126:9). As a result of the inability to use her right hand, the plaintiff was overusing her left hand resulting in her developing trigger thumb of her left thumb. (5T30:10-31:12; 5T127:15-22). The immobility of the plaintiff's right arm also resulted in her developing a frozen right shoulder. (5T31:16-32:6; 5T128:1-4). As Dr. Barmakian explained:

> When you -- she had a significant injury to her wrist, so she wasn't using her right hand very much and that affected the shoulder because she didn't use her arm, so the shoulder got stiff. But at the same time because she wasn't using her right hand enough, she started to overuse her left hand, which is her non-dominant hand. She's using her non-dominant hand much more than usual and that's why she developed the trigger thumb. (5T32:18-33:1).

The plaintiff underwent physical therapy and received cortisone injections for her frozen shoulder and received cortisone injections for her left trigger thumb. (3T131:22-132:6; 5T32:7-14; 5T51:7-20; 5T128:5-10).

The plaintiff continued to suffer from pain and limitations to her right wrist following the surgery and occupational therapy and remained under the care of an orthopedist. (5T30:2-9). She eventually came under the care of another orthopedist at the Hospital for Special Surgery due to her ongoing complaints. (5T33:6-16). X-ray testing on July 1, 2020 looked suspicious as to whether a screw was in the joint so a CAT scan was ordered. (5T33:10-35:3). The CAT scan showed that the surface of the joint was irregular, a significant widening of the space between the bones, and that the surgery was unsuccessful in reducing the joint. (5T35:13-36:23). Dr. Barmakian explained that the findings on the CAT scan would be causing the plaintiff to have pain and limitation of motion and the location of the screw was possibly making it worse. (5T39:2-7). Therefore, the plaintiff underwent a second operative procedure on August 19, 2020 to remove the hardware and attempt to free up some of the scar tissue. (5T39:18-40:4; 5T128:4-10). She underwent another course of occupational therapy following the second surgery. (5T40:19-22).

Although the plaintiff had some improvement initially after the second surgery, she reverted back to the same loss of motion and pain that she suffered from before within a few weeks of the operation. (5T40:12-16; 5T43:7-13; 5T130:4-7; 5T130:15-20). The plaintiff remained under active treatment for not only the injuries to her right wrist but also for those to her right shoulder, and

left thumb. (5T51:7-20; 5T55:2-9). X-ray testing on September 1, 2020 showed a loss of cartilage and signs of posttraumatic arthritis. (5T41:1-42:1; 5T49:14-18). An MRI of the right wrist that was performed on March 5, 2022 confirmed the irregularity of the joint space with the bones almost touching and development of arthritis between the scaphoid bone and radius. (5T53:3-19). Dr. Barmakian testified that the posttraumatic arthritis is consistent with the plaintiff's limited motion and pain. (5T42:3-11).

The plaintiff underwent a series of cortisone injections to her right wrist with the most recent injection before trial being administered in October 2023. (5T55:21-23; 5T56:14-17; 5T57:13-16; 5T139:12-20). Dr. Barmakian explained that cortisone injections temporarily take the inflammation away but do not do anything to fix the underlying problem. (5T55:24-56:7). He further explained that the plaintiff's treatment options are to continue with cortisone injections and a brace or to undergo a fusion of the joint. (5T55:14-20). The goal of the fusion surgery would be to reduce the plaintiff's pain, but it would also result in the complete loss of her wrist motion. (5T61:15-21). The plaintiff had not undergone the fusion surgery as of the time of trial because of her concern that she would have to stop working and would not be able to perform other activities with her family. (3T136:2-18; 5T140:9-141:1).

Dr. Barmakian examined the plaintiff in October 2020 and again on December 14, 2023. (5T44:2-45:1; 5T57:22-58:6). He testified that the plaintiff had continued complaints of pain and limited motion to her wrist, left thumb triggering, and improvements to the right shoulder but still did not have full overhead motion when he saw her in December of 2023. (5T57:22-58:15). He also testified that his examination showed that the plaintiff still had a loss of forward elevation, that the loss of motion to the plaintiff's wrist had become worse. (5T58:20-59:17). When asked why the condition of the plaintiff's wrist has gotten worse, Dr. Barmakian responded:

> Well, this is what happens with arthritis. When you have loss of the - - of the cushioning affecting the cartilage, you get basically bone rubbing on bone and that just worsens over time because there's no - - there's no way for it to improve. (5T59:18-19).

Dr. Barmakian further explained that the plaintiff's wrist will get continually worse because the joint is not congruent and the cartilage is already lost and further erode the more she uses her wrist. (5T67:2068:2).

Dr. Barmakian's final diagnoses were a distal radius fracture with comminution, intra-articular extension into the radiocarpal joint, posttraumatic arthritis in the right wrist, right carpal tunnel syndrome, left trigger thumb, and adhesive capsulitis of the right shoulder. (5T15:13-17; 5T65:22-66:9). He testified that these injuries and the plaintiff's pain and disabilities are all related to the June 22, 2019 fall. (5T15:18-20; 5T65:22-66:9; 5T69:25-70:4). He

further testified that there is permanency with the injuries to the plaintiff's right wrist, right shoulder, and left thumb. (5T66:14-67:5-11). He also testified about how these permanent injuries impact each other and explained:

> Well, if her right wrist was completely normal, then the right shoulder problem wouldn't be as significant, but because she has limited movement in the right wrist, she depends on her shoulder more to position her hand in space. So, when -- you know, when you have limitation in one part, you -- you count more on the other part.
>
> So, the fact that she has limited motion in her wrist already and may have a fusion, it's going to - - the right shoulder loss of motion is going to impact her more in terms of her function. The same thing with the left thumb. I mean, she has to use her left hand more now than she did before. She's right-hand dominant and so she's using her non-dominant hand more and that - - she - - like I said, if she had a normal right hand, her left thumb wouldn't be as big a problem, but it now is because she's limited on the right side already. (5T69:7-24).

Dr. Barmakian also testified that the plaintiff will require ongoing treatment including surgery for the trigger thumb, an exercise program for the right shoulder, and either continue with the cortisone injections to the right wrist which will eventually not work as effectively or undergo fusion surgery which will help with the pain but will result in a complete loss of movement to the wrist. (5T60:2-16; 66:22-67:11). His opinions were all given within a reasonable degree of medical probability. (5T12:22-13:2).

The plaintiff testified that she has been suffering from pain in her right wrist every day since the time of her fall. (5T131:18-20; 5T133:18-22; 5T141:8-14). She explained that she has not had a pain free day since the fall. (5T141:12-14).

She described the pain as throbbing and burning with shooting pain into her hand at times. (5T134:7-9). She further explained that using her hand in her daily life makes the pain worse. (5T133:22-134:4; 5T169:22-23). The pain has caused the plaintiff to have difficulty sleeping because it wakes her up at night. (3T134:2-7; 5T16:24-168:8). The plaintiff's ability to use her right arm has also been limited by the injuries to her wrist. (5T134:19-135:1). She explained that she does not have the mobility in her hand to turn it the way she did before the fall. (5T135:6-7). The plaintiff also continues to suffer from pain to her left thumb occasion and to her right shoulder when she raises her arm above her head and using the whiteboard at work. (3T132:20-138:8; 5T166:20-167:5). She further explained that while her right shoulder has improved, she does not have complete motion as she did before and continues to have issues with her thumb. (5T128:14-21). The plaintiff also has a long surgical scar on the underside of her wrist that was shown to the jury at trial. (5T134:10-17).

The plaintiff was an active person prior to sustaining her permanent injuries who enjoyed many recreational activities with her family. (5T110:6-25). She testified that her injuries have impacted everything she does because she is right hand dominant. (5T135:8-25). As she explained:

> It's my dominant hand and it's the ability to use my hand in addition to the strength of my hand. So just as simple as getting up in the morning and preparing to go to work and, you know, doing your basic hygiene type of activities and blow-drying your hair and opening up a

> bottle of water or, you know, taking pots and pans out of the cabinets, or loading and unloading the dishwasher. I cannot tell you how many things I've dropped and have broken because I don't have the strength in my right hand that I had prior to the injury. (5T131:6-17).
>
> …
>
> My right wrist impacts everything I do since It's my dominant hand. Everything from putting keys in the front door to open the house, to putting keys in my car to start the car, to shifting the shifter in the car to put it in drive, to turning the steering wheel in my car.
>
> As far as work, you know, teachers spend a lot of time doing lesson plans and work on laptops. I get tremendous fatigue in my hand from doing my lesson plans and, you know, writing. I used to think I -- anyway, I cannot write like the way I used to. Writing on the Smartboard in the classroom is challenging. Just daily care, caring for my family, things around the house, doing laundry, doing dishes, emptying and loading dishwashers have all been impacted by my injury. (5T135:8-25).

Her ability to exercise has also been impacted as she is unable to lift weights, engage in yoga with her daughters, perform push-ups and can only run or walk. (3T133:16-134:1; 5T136:17-22). The plaintiff's ability to engage in activities with her family and students has also been impacted such as not being able to button her daughter's wedding dress on her wedding day or partaking in a flower planting project with her students at school. (5T138:3-25).

While the plaintiff continues to teach and has not missed a day because of her dedication to her students, she has had to make her own accommodations by having her husband help load her bags into the car when she goes to school or having her students help her move things at school or using a cart to push her

materials. (3T134:10-15; 5T175:20-22; 5T176:8-20). Furthermore, the plaintiff's husband explained that she is exhausted when she comes home from school now and does not do as much when she gets home from work as she did in the past. (3T134:25-135:16). He also testified that he notices problems with his wife's wrist every day. (3T133:9-11). Dr. Barmakian testified that the plaintiff's limitations in activities are consistent with his findings on examination and the diagnostic testing. (5T101:3-21).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S RULINGS ON DEFENDANT LINCE'S MOTION FOR SUMMARY JUDGMENT AND MOTION *IN LIMINE* SHOULD BE AFFIRMED BECAUSE THEY FOLLOWED CONTROLLING LEGAL AUTHORITY CONCERNING AN ABUTTING COMMERCIAL LANDOWNER'S OBLIGATION TO MAINTAIN THE PUBLIC SIDEWALK IN A REASONABLY SAFE CONDITION (Da214; 3T60:2-74:19).

Defendant Lince Group filed three motions prior to trial in which it argued that it was not responsible for maintaining the area of the sidewalk that caused the plaintiff to trip and fall because it was not directly in front of the premises. (Pa71; Pa73; Da37). It argued in these motions that abutting commercial landowners are only responsible for maintaining public sidewalks that are in front of their property. The motions were all denied. (Da16; Da26; Pa81). The initial motion for summary judgment and motion for reconsideration were denied by Judge Lesnewich and the second motion for summary judgment was denied by Judge Lindemann. (Da16; Da26; Pa81). Defendant Lince Group is appealing the Order filed on January 18, 2024 denying its second motion for summary judgment. Since the appeal concerns a review of a motion for summary judgment, the plaintiff will present the facts from the motion record that was before the Trial Court at that time.

Defendant Lince Group is the owner of the commercial property located at the corner of East Second Street and Tarquins Alley in Scotch Plains, New Jersey. (Da121; Da163 at No. 1; Da169-Da170). Tarquins Alley is a public right of way that connects East Second Street to the public parking lot behind defendant Lince Group's property. (Da119; Da121; Da169-Da170). On June 22, 2019, the plaintiff was jogging along the East Second Street public sidewalk when her right foot caught the edge of an elevated section of sidewalk causing her to trip and fall. (Da153 at 10:7-14; Da153 at 11:2-5; Da154 at 15:3-11; Da154 at 17:14-17; Da155 at 18:19-24). The elevated slab of sidewalk that caused the plaintiff to trip and fall was within both the East Second Street and Tarquins Alley right of ways and abutted the commercial property owned by defendant Lince Group. (Da121; Da210).

Mr. Kenney noted that the abrupt change in elevation that caused the plaintiff to trip and fall was the result of a section of the concrete sidewalk that became elevated above the adjoining sidewalk. (Da117-Da119). The change in elevation measured one and three-eighths inches to one and five-eighths inches in height. (Da119). Mr. Kennedy noted that Google street view images show that the nonplanar condition of the sidewalk was in a substantially similar condition from August 2015 through August 2019. (Da119). He opined that defendant Lince Group was obligated to maintain and repair the elevated section

of sidewalk involved in the plaintiff's fall as the abutting landowner. (Da121; Da125). The Director of Public Property for defendant Scotch Plains testified at his deposition that the owner of 1812-1828 East Second Street, defendant Lince Group, is responsible for the maintenance of the concrete sidewalk where the plaintiff's fall occurred. (Da199 at 6:22-7:1; Da206 at 35:18-37:11).

Defendant Lince Group's representative testified at her deposition that the property line for the commercial property owned by defendant Lince Group is a line from the edge of the building going down to the street. (Da183 at 33:4-23; Da184 at 36:20-24). Photographs show that the elevated section of sidewalk that caused the plaintiff to trip and fall is partially in front of the commercial building owned by defendant Lince Group. (Da169-Da170). Defendant Lince Group's representative admitted at her deposition that the elevated section of sidewalk that caused the plaintiff to trip and fall starts on the property in front of the building owned by defendant Lince Group. (Da192 at 68:22-69:2). Mr. Kennedy noted that portions of the concrete walkway were directly in front of the building owned by defendant Lince Group and, therefore, it was obligated to maintain the raised walkway whether or not it abutted a public way on the side of the building. (Da121).

The subject public sidewalk is made up of concrete slab sections and brick paver sections. (Da169-Da173). After the plaintiff's fall, defendant Lince

Group replaced sections of the brick pavers including the brick pavers that extended beyond the edge of the building and are next to the elevated section of sidewalk that caused the plaintiff to trip and fall. (Da171-Da173; Da193 at 72:8-73:24). Mr. Kennedy noted that the fact that defendant Lince Group replaced the bricks that extended beyond the edge of the building is indicative of its responsibility for this area of the abutting walkway. (Da121).

Although the established legal precedent in New Jersey is commercial landowners are responsible for maintaining the sidewalks "abutting" their property in reasonably good condition and are liable to pedestrians injured as a result of their negligent failure to do so, *Stewart v. 104 Wallace Street, Inc.*, 87 N.J. 146, 157 (1981), defendant Lince Group took the position that it was entitled to judgment as a matter of law because it suggested that the abutting commercial landowners' maintenance obligation only extends to the sidewalks that sit in front of their property. This argument was rejected by both Judge Lesnewich and Judge Lindemann who denied defendant Lince Group's motions for summary judgment. (Pa71; Pa73; Da37). Defendant Lince Group again raised the argument before the Trial Court in a motion *in limine* and a motion for a directed verdict. (3T62:16-64:11; 6T12:21-16:2). Judge Hudak also rejected the argument and found that the sidewalk that caused the plaintiff to trip and fall abutted defendant Lince Group's property and gave the Model Jury

Charge for liability of an owner of commercial property for defects in abutting sidewalks to the jury. (3T61:8-13; 3T61:23-62:1; 3T68:24-69:10; 3T69:14-19; 3T69:24-70:2; 3T70:24-74:18; 6T17:8-23:1; 6T23:7-12; 6T24:14-19; 6T125:1-126:16). Defendant Lince Group argues that the three trial judges were incorrect and expanded the holding of *Stewart* because it contends that "an abutting sidewalk could only be the sidewalk in front of Lince's commercial building." (Db at page 18).

The present matter involves a trip and fall incident that occurred as a result of an abrupt surface projection on a public sidewalk that was caused by an elevated section of sidewalk. (5T115:15-19; 5T118:1-11; 5T119:16-23; 5T240:14-250:12; Da117-Da119; Da246; Pa106; Pa114). A sidewalk is the part of the public right of way that is designed for the use of pedestrians and is exclusively reserved for them. *Gaskill v. Active Environmental*, 360 N.J. Super. 530, 534 (App. Div. 2003). "[A]ny act or obstruction that unnecessarily incommodes or impedes its lawful use by the public is a nuisance. The traveling public has the right to assume that there is no dangerous impediment or pitfall in any part of it." *Stewart*, 87 N.J. at 151. Prior to the Supreme Court's ruling in *Stewart* all abutting landowners were not responsible for maintaining public sidewalks and were only liable for defects created by negligent construction or

repair or for their use of the sidewalk that rendered it unsafe. *Padilla v. Young Il An*, 257 N.J. 540, 548 (2024).

In *Stewart*, the Supreme Court eliminated the no liability rule as to abutting commercial property owners and held that, given the substantial benefits abutting commercial property owners obtain from the public sidewalk, they are responsible for maintaining the sidewalks "abutting" their property in a reasonably good condition and are liable to pedestrians injured as a result of their negligent failure to do so. *Stewart*, 87 N.J. at 157. The duty to maintain the public sidewalk extends to the entire sidewalk abutting the commercial property. *Dupree v. City of Clifton*, 351 N.J. Super. 237, 246 (App. Div. 2002), *aff'd* 175 N.J. 449 (2002). Furthermore, the abutting commercial owner will be liable whether the hazardous condition was created by nature or by a third person and whether the hazard was created by the condition of the sidewalk itself or by foreign material. *Mirza v. Filmore Corp.*, 92 N.J. 390, 394-395 (1983).

Defendant Lince Group argues that it had no duty to maintain the slab of sidewalk that caused the plaintiff to fall because the raised portion of that slab was not directly in front of or within is property line. However, a commercial landowner's duty to maintain an abutting public sidewalk does not hinge on its ownership or control of the sidewalk. *Bedell v. St. Joseph's Carpenter*, 367 N.J. Super. 515, 525 (App. Div. 2004). The Supreme Court has explained that a

commercial landowner's duty to maintain an abutting public sidewalk is an exception to the general principle that a premises occupier is not liable for an "off premises" injury. *Kuzmicz v. Ivy Hill Park Apartments, Inc.*, 147 N.J. 510, 518 (1997). As the Court stated:

> Generally, a possessor of land is not liable for off-premises injuries merely because those injuries are foreseeable. That general rule protects an abutting property owner from liability for injuries that occur on a public way. A narrow exception imposes liability on commercial landowners for injuries to pedestrians on abutting sidewalks. The duty to maintain the sidewalks flows from the economic benefit that a commercial landowner receives from the abutting sidewalk and from the landowner's ability to control the risk of injury. *Id.* (internal citations omitted).

It should be remembered that the rule announced in *Stewart* holds a commercial landowner responsible for maintaining the sidewalks "abutting" their property, not on their property or in front of their property, in a reasonably safe condition. *Stewart*, 87 N.J. at 157. In explaining the ruling, the Supreme Court stated, "there is the obvious arbitrariness of the fact that in accidents occurring within the boundaries of business premises, a plaintiff injured as a consequence of defendant's failure to maintain safe premises would have a cause of action, whereas the same plaintiff injured on a poorly maintained public sidewalk just outside the premises would, under the present law, have no such cause of action." *Id.* at 156-157.

In *Stewart*, the plaintiff was leaving a tavern that was operated by 104 Wallace Street, Inc. when he fell on a dilapidated sidewalk abutting a vacant boarded lot owned by the defendant Jay-Nan Corporation. *Stewart*, 87 N.J. at 149-150. The lot upon which the tavern was located was also owned by defendant Jay-Nan Corporation. *Id.* The issue was whether an "abutting" commercial landowner is liable for a pedestrian's injuries caused by a dilapidated sidewalk. *Id*. at 148. The Court held that "[c]ommercial property owners are henceforth liable for injuries on the sidewalks **abutting** their property that are caused by their negligent failure to maintain the sidewalks in reasonably good condition." *Id.* at 150(emphasis added).

Defendant Lince Group does not cite the holding of any controlling New Jersey precedent ruling that a commercial landowner's obligation to maintain the public sidewalk is limited to only that portion of the sidewalk sitting directly in front of their property or limiting the definition of abutting to meaning only the sidewalk lying across the front of the commercial property. It refers to a sentence in *Stewart* stating that its holding would allow a person to recover damages for injuries sustained on the sidewalk in front of the store as well as inside the store and a refence to a decision from a Pennsylvania court noting that it was the law in that state that it is the primary duty of a property owner along a street to keep the sidewalks in front of their respective properties in proper

repair. However, these sentences, which are at best dicta, did not in any way limit the actual holding expressed by the Court or set forth a unique definition of the term abutting. Furthermore, while the sidewalk in front of a commercial property certainly abuts the property, there simply is no ruling in *Stewart* that abutting sidewalks are limited to those in front of the property.[2] Nor would any such ruling make sense because, as in the case at bar, a commercial premises can be situated on a corner lot that is abutted on multiple sides by public right of ways and there is no rational reason for imposing a duty for only the section of the sidewalk that is along the public right of way in front of the property.

A review of *Stewart* shows that the holding set forth by the Supreme Court did not limit the definition of abutting to only the sidewalk in front of a commercial property. *Stewart*, 87 N.J. at 149-160. In setting forth its holding, the Supreme Court repeatedly instructed that commercial landowners are responsible for maintain the sidewalks that abut their property:

> Today, for the reasons stated below, we overrule *Yanhko* and hold that a plaintiff has a cause of action against a commercial property owner for injuries sustained on a deteriorated sidewalk **abutting** that commercial property when that owner negligently fails to maintain the sidewalk in reasonably good condition. *Id.* at 149.

[2] The fact the abutting sidewalk in some of the opinions addressing the liability of a commercial property owner was in front the premises at issue in those matters is irrelevant because the fact that such sidewalks fall within the category of abutting sidewalks does not mean that the category is limited to only those sidewalks.

> …
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> Commercial property owners are henceforth liable for injuries on the sidewalks **abutting** their property that are caused by their negligent failure to maintain the sidewalks in reasonably good condition. *Id.* at 150.
>
> …
>
> We hold today that commercial landowners are responsible for maintaining in reasonably good condition the sidewalks **abutting** their property and are liable to pedestrians injured as a result of their negligent failure to do so. *Id.* at 157.
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> …
>
> The duty to maintain **abutting** sidewalks that we impose today is confined to owners of commercial property. *Id.* at 159. [emphasis added in all].

The Supreme Court did not in any way state that it was changing the definition of the term "abutting" from its regularly understood definition in its ruling. Abutting is generally defined as: "to join at a border or boundary; to share a common boundary with[,]" *Black's Law Dictionary*, 8th Ed. (West 2004), or "to touch along a border or with a projecting part; to terminate at a point of contact; to border on." *Webster's Universal Encyclopedic Dictionary*, (Merriam-Webster, Inc. 2002). If the Supreme Court did not intend its holding to apply to sidewalks that border the commercial property it would not have used the term abutting in its holding and would have simply held that commercial landowners are responsible for maintaining the sidewalks in front of their property.

Further proof that the Supreme Court was not using the term "abutting" to mean "in front of" is that the fact that it used the term interchangeably to describe both the property and the sidewalk. At the outset, the Supreme Court explained that it was being asked to decide whether an "abutting commercial landowner" is liable for a pedestrian's injuries caused by a dilapidated sidewalk. *Stewart*, 87 N.J. at 149. It then stated that the present law of sidewalk liability with respect to "abutting commercial property owners" is anachronistic and produces harsh and unfair results. *Id.* at 150. It went on to explain that while it acknowledged that whether the ownership of "the property abutting the sidewalk" is commercial or residential matters little to the injured pedestrian, it is believed that the case for imposing a duty to maintain sidewalks is particularly compelling with respect to "abutting commercial property owners." *Id.* at 159. The use of the term "abutting" in reference to the sidewalk and the property is a clear indication that the Supreme Court was not defining the term to mean "in front of" because such a meaning does not make sense in that context.

The Supreme Court has repeatedly confirmed that the duty imposed on commercial landowners in *Stewart* is to maintain the public sidewalks "abutting" their property. *Bligen v. Jersey City Housing Auth.*, 131 N.J. 124, 136 (1993); see also; *Luchejko v. City of Hoboken*, 207 N.J. 191, 195 (2011); see also; *Shields v. Ramslee Motors*, 240 N.J. 479, 490 (2020); see also; *Pareja v.*

Princeton Intern. Properties, 246 N.J. 546, 555 (2021). Shortly after *Stewart*, the Supreme Court expanded the duty imposed on abutting commercial landowners when it held that maintenance of the public sidewalk "abutting" commercial properties under *Stewart* includes the removal of snow and ice. *Mirza*, 92 N.J. 390, 400 (1983). It then ruled that a parochial school falls within the commercial landowner category established in *Stewart* for purposes of liability for maintenance of "abutting: sidewalks. *Brown v. St. Venatius School*, 111 N.J. 325, 335 (1988). Just this year when faced with issue of whether the owner of a vacant commercial property was subject to the rule of law announced in *Stewart* the Supreme Court held that all commercial landowners must maintain the public sidewalks "abutting" their property in reasonably good condition and can be held liable to a pedestrian injured as a result of their negligent failure to do so. *Padilla*, 257 N.J. at 557-558.

The Appellate Division has also repeatedly noted that the duty imposed on commercial landowners extends to the public sidewalks "abutting" their property:

- [L]iability is imposed on the owners and tenants in control of commercial property **abutting** the sidewalk. *Wasserman v. W.R. Grace & Co.*, 281 N.J. Super. 34, 38 (App. Div. 1995).

- A commercial landowner has a well-established duty to maintain an **abutting sidewalk** in reasonably good condition. *Vasquez v. Mansol Realty Associates, Inc.*, 280 N.J. Super. 234, 237 (App. Div. 1995).

- A lessee in exclusive possession of commercial premises **abutting** the sidewalk is subject to the same duty, but not to the extent of absolving the landlord from responsibility. *Smith v. Young*, 300 N.J. Super. 82, 85 (App. Div. 1997)(citations omitted).

- Commercial landowners are "responsible for maintaining in reasonably good condition sidewalks that **abut** their property. *Nash v. Lerner*, 311 N.J. Super. 183, 188 (App. Div. 1998), *rev'd on other grounds*, 157 N.J. 535 (1999).

- [A]n owner of commercial property has, in this jurisdiction, the duty of maintaining the **public sidewalk abutting the premises** in a reasonably safe condition, and will consequently be liable to a pedestrian who is injured as a result of the failure to do so. *Knoetig v. Hernandez Realty Co.*, 255 N.J. Super. 34, 39 (App. Div. 1992), *certif. denied*, 130 N.J. 394 (1992).

- The focus of the sidewalk liability upon **adjacent** landowners, then, is upon whether the property was residential or commercial[.] *Restivo v. Church of St. Joseph*, 306 N.J. Super. 456, 463 (App. Div. 1997), *certif. denied*, 153 N.J. 403 (1998).

- We conclude that except for sidewalks **abutting commercial property** and for curbs that are structurally an integral part of such sidewalks, *Stewart* similarly left undisturbed the *Yankho* rule an abutting property owner is not liable for maintaining the public way, which includes curbs. *Levin v. Deveo*, 221 N.J. Super. 61 (App. Div. 1987).

- Our Supreme Court first held in 1981 that an **abutting** commercial landowner may be liable for injuries to a pedestrian caused by a dilapidated sidewalk, if the owner failed to maintain the sidewalk in good condition. *Zepf v. Hilton Hotel & Casino*, 346 N.J. Super. 6, 15 (App. Div. 2001).

- In *Stewart*, the Court held that commercial landowners owe a duty to reasonably maintain the **sidewalks abutting** their property and, if they fail to exercise that duty, they are liable to the injured pedestrians. *Mohamed v. Iglesia Evangelica Oasis De Salvacion*, 424 N.J. Super. 489, 492 (App. Div. 2012).

- Commercial landowners, however, are responsible for maintaining in reasonably good condition the sidewalks **abutting their property** and are liable to pedestrians injured as a result of their negligent failure to do so. *Briglia v. Mondrian Mortg. Corp.*, 304 N.J. Super. 77, 80 (App. Div. 1997), *certif. denied*, 152 N.J. 13 (1997).

- In *Stewart* the Court carved out an exception to the non-liability rule by imposing liability on **abutting** commercial landowners. *Liptak v. Frank*, 206 N.J. Super. 336, 338 (App. Div. 1985), *certif. denied*, 103 N.J. 471 (1986).

- Liability can and will attach, however, if the property owned by a religious organization is used for commercial purposes, regardless of the property's non-profit status. In that event, the organization is under a duty to maintain **the entire sidewalk abutting** its property and is liable for injuries to the public caused by unrepaired defects. *Ellis v. Hilton United Methodist Church*, 455 N.J. Super. 33, 38-39 (App. Div. 2018)(citations omitted).

- Our Supreme Court carved out an exception to this no-liability rule with respect to sidewalks **abutting a commercial landowner's property**. *Dupree*, 351 N.J. Super. at 241. [emphasis added in all].

The Model Jury Charge titled, "Liability of Owner of Commercial Property for Defects, Snow and Ice Accumulation and Other Dangerous Conditions in Abutting Sidewalks" similarly instructs:

> The law imposes upon the owner of commercial or business property the duty to use reasonable care to see to it that the sidewalks **abutting** the property are maintained in reasonably good condition. In other words, the law says that the owner of commercial property must exercise reasonable care to see to it that the condition of the **abutting** sidewalk is reasonably safe and does not subject pedestrians to an unreasonable risk of harm. *M.J.C.* 5.20B(2)(b)(emphasis added)

It has been noted that "[g]enerally speaking, the language contained in any model jury charge results from the considered discussion amongst experienced jurists and practitioners." *Estate of Kotsovska v. Liebman*, 221 N.J. 568, 595 (2012). Therefore, if the rule of law announced in *Stewart* was limited to sidewalks in front of a commercial property as suggested by defendant Lince Group, the Model Jury Charge would certainly instruct jurors that the duty is limited to such sidewalks rather than to the sidewalks abutting the commercial property.

The commercial property at issue in this matter is a corner lot that borders the East Second Street right of way in the front and Tarquins Alley right of way on the side. (4T188:8-18; 4T192:2-7; 4T203:4-11; Da121). The elevated slab of sidewalk that caused the plaintiff to trip and fall is located right at the corner of the building with a portion of that slab situated directly in front of the property and a portion to the side of the property. (Da169-Da170; Da245; Da250; Pa106). The property line for the commercial property owned by defendant Lince Group bisects that slab of sidewalk. (4T187:9-8; 4T200:13-21; Pa121). Therefore, that section of sidewalk is along the Tarqiuns Alley right of way and is both in front of and borders the commercial property owned by defendant Lince Group. (4T214:9-215:1; 4T215:20-25; Da169-Da170). In other words, it is an "abutting" public sidewalk that defendant Lince Group owed a duty to maintain

in a reasonably safe condition and can be held liable for the plaintiff's injuries caused by their negligent failure to do so. *Stewart*, 87 N.J. at 157.

Defendant Lince Group contends that the opinion in *McGrath v. Levin Properties*, 256 N.J. Super. 247 (App. 1992), *certif. denied*, 130 N.J. 19 (1992) supports its argument that it was not responsible for maintaining the portion of the abutting sidewalk that was not directly in front of its property. That matter did not, however, involve the issue of an abutting commercial landowner's duty to maintain the public sidewalk abutting it property. In that matter, a patron of a shopping center was struck by a vehicle while she was crossing a State highway. *McGrath*, 256 N.J. Super. at 248-249. The issue was whether the shopping center owed a duty to its invitee to provide her with a safe means of passage across the State highway or to warn her of the inherent dangers in crossing the highway. *Id.* The Appellate Division noted that the control of traffic on the highway and pedestrian passage across the highway rests solely with the State. *Id.* at 253. It also distinguished the issue involving the control of the vehicular roadway to the maintenance of a public sidewalk abutting commercial property where a duty is imposed on the abutting commercial landowner. *Id.* at 250-251.

Unlike public roadways that are under the exclusive control of public entities, municipalities are not solely responsible for the provision and maintenance of

public sidewalks. *Stewart*, 87 N.J. at 158. As the Supreme Court explained, "[m]ost important, sidewalk repair and maintenance can no longer accurately be characterized solely as a municipal responsibility." *Id.* at 158. Pursuant to statute, municipalities are specifically authorized to impose the obligation for the construct, repair, or maintenance of public sidewalks on the owners of "abutting" lands. *N.J.S.A.* 40:65-14. Therefore, the case law addressing the obligation to control vehicular roadways has no application to the case at bar involving an abutting public sidewalk.

As stated above, defendant Lince Group owed a duty to maintain the public sidewalk abutting its commercial property. *Stewart*, 87 N.J. at 157. The proofs establish that the section of sidewalk that was elevated and caused the plaintiff to trip and fall was part of the public sidewalk that abutted defendant Lince Group's property. (4T186:5-13; 4T233:17-21; 4T214:9-215:1; 4T215:20-25; Da121; Da169-Da170). Therefore, defendant Lince Group owed the plaintiff a duty and the Trial Court properly denied its motion for summary judgment and motion for a directed verdict.

Defendant Lince Group's subsequent actions further establish that the elevated section of sidewalk abuts its property. The public sidewalk includes both concrete slabs and sections of brick pavers. (Da171-Da173; Pa106). After the plaintiff's fall, defendant Lince Group repaired and replaced sections of the

brick pavers, including a section next to the elevated section of sidewalk that extended beyond the edge of the building. (4T123:24-125:8 Da193 at 72:8-73:24). Its repair of the brick paver section of the public sidewalk beyond its property line and next to the subject elevated section of sidewalk is further proof of defendant Lince Group's control over that area of the abutting public sidewalk and maintenance responsibilities. *Kane v. Hartz Mountain Indust., Inc.*, 278 N.J. Super. 129, 148 (App. Div. 1994), *aff'd*, 143 N.J. 141 (1996).

Defendant Lince Group also argues that a Township of Scotch Plains ordinance establishes that it was only obligated to maintain the portion of a public sidewalk that is directly in front of its building and cannot be held liable for the plaintiff's fall and injuries. First of all, contrary to defendant Lince Group's argument, the municipal ordinance does not limit the responsibility of the owner of a premises that is bordered on multiple sides by public right of ways to maintaining only the sidewalks that are in front of the property and required defendant Lince Group to maintain the area of sidewalk that caused the plaintiff to trip and fall. Mr. Kennedy explained that "frontage" is defined by ordinance as "the land lying along the right of way line of a street between the street lot lines within the lot - - of a lot." (4T189:18-23). Therefore, the facing of a building is not determinative of a front and when a property is a corner lot, it has frontage along both the front and side right of ways. (4T190:16-20).

In regard to defendant Lince Group's commercial property, Mr. Kennedy testified that it sits on a corner between East Second Street and Tarquins Alley which are public right of ways and meet the definition of a street in the ordinance. (4T188:8-13; 4T190:24-191:6; 4T192:2-7; 4T203:7-9). It, therefore, has frontage on both East Second Street and Tarquins Alley. (4T190:24-191:6; 4T215:20-25). Mr. Kennedy then testified that the elevated section of sidewalk that caused the plaintiff to trip and fall is along Tarquins Alley and in front of defendant Lince Group's commercial property as it forms a radius between the two frontages of the corner property. (4T214:9-215:1; 4T215:20-25). He went on to explain that "[i]t would be absurd to have a corner lot and only pick the sidewalk that lies across your own front door and not the one that goes down your side." (4T:229:3-6).

Secondly, the duty to maintain a public sidewalk in a reasonably safe condition in regard to tort liability was established through the common law, not municipal ordinance. *Stewart*, 87 N.J. at 151. In *Stewart*, the Supreme Court explained that "[t]he drawing of the parameters of tort liability has historically been a matter of common law and squarely with the province of [the Supreme] Court." *Id.* at 158; see also; *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 439 (1993)(explaining that the determination of the scope of tort liability has traditionally been the responsibility of the courts). It went on the expressly

reject the suggestion that it base the duty it created on abutting commercial landowners on municipal ordinances and explained that its ruling was based on "broader principles of common law." *Id.* at 156 n.4. It has since been noted that the Supreme Court in *Stewart* held "as a matter of common law" that commercial landowners are responsible for maintaining in reasonably good condition the sidewalks "abutting" their property and are liable to pedestrians injured as a result of their negligent failure to do so. *Strauss v. Borough of Chatham*, 316 N.J. Super. 26, 30 (App. Div. 1998). Most recently when addressing the issue of whether the duty imposed by *Stewart* to maintain abutting sidewalks applied to owners of vacant commercial properties, the Court explained that the question before it concerned the development of New Jersey's common law doctrine governing premises liability, a responsibility historically entrusted to the Supreme Court. *Padilla*, 257 N.J. at 547.

It is also well-recognized that municipal ordinances are irrelevant to the issue of tort duty in regard to the maintenance of public sidewalks. *Brown*, 111 N.J. at 335. This is because such ordinances are not adopted for the purpose of protecting individual members of the public but rather are to impose upon those regulated the public burdens of municipal government. *Luchejko*, 207 N.J. at 200-201. Therefore, the Trial Court did not err in instructing the jury with the rule of law set forth in *Stewart* regarding a commercial landowner's obligation

to maintain the public sidewalk abutting its property rather than the Township of Scotch Plains ordinance.

Defendant cites *First Peoples Bank v. Medford*, 126 N.J. 413 (1991) for the proposition that the Township of Scotch Plains ordinance it cites is consistent with *Stewart.* However, that opinion did not address the subject ordinance, any other ordinance regarding sidewalk maintenance, or the issue of the common law tort duty a commercial landowner owes regarding the maintenance of abutting sidewalks. That opinion was addressing a challenge to the validity of a municipal ordinance regarding the issuance of sewer permits. *Id.* at 415. Accordingly, the opinion has no application to the case at bar and does support the argument that the ordinance at issue in this matter controls the tort duty imposed on defendant Lince Group.

The law in New Jersey is clear, a commercial landowner owes the public a duty to maintain the sidewalks "abutting" their property in a reasonably safe condition, not just the portion of the sidewalk that is in front of the property. The commercial property owned by defendant Lince Group that was located at the corner of two public right of ways abutted the section of the slab of sidewalk that was elevated and caused the plaintiff to trip and fall. Accordingly, the Trial Court properly denied all of defendant Lince Group's motions and instructed the jury in accordance with the rule of law set forth in *Stewart*.

POINT II

THE JURY'S AWARD OF DAMAGES SHOULD NOT BE DISTURBED ON APPEAL BECAUSE THE AWARD WAS REASONABLY SUPPORTED BY THE EVIDENCE AND DOES NOT SHOCK THE CONSCIENCE (Da232).

The plaintiff sustained a displaced comminuted intra-articular fracture of the right distal radius as a result of the June 22, 2019 fall down incident. (5T15:5-6). She underwent open reduction and internal fixation surgery of the fracture to her right wrist on June 27, 2010 with a carpal tunnel release procedure at the same time. (5T15:6-8; 5T16:19-21; 5T16:14-27:11). She had to undergo a second surgery on August 19, 2020 to remove the hardware and free up some of the scar tissue that had developed. (5T15:10-11; 5T39:18-40:4). The plaintiff has developed posttraumatic arthritis in the right wrist which is visible on both MRI and X-ray diagnostic testing. (5T15:13-17; 5T41:1-42:1; 5T53:3-54:19). She suffers from a loss of mobility to her wrist and hand, constant pain, swelling with activity, and deformity of the wrist ulnar prominence. (5T57:22-58:6; 5T59:6-10; 5T133:15-22; 5T134:2-9; 5T135:6-7; 5T141:8-14; 5T230:3-10). She also developed a frozen right shoulder and left trigger thumb as a result of the period of time that she could not use her dominant right hand. (5T15:11-13; 5T30:10-31:12; 5T31:16-25; 5T32:18-33:1; 5T126:21-25; 5T127:15-22).

The plaintiff has undergone several cortisone injections to try to improve the symptoms of the posttraumatic arthritis but they have been largely ineffective.

(5T55:21-56:7; 5T57:13-16). Her most recent injection prior to trial was in October 2023. (5T57:13-16). The plaintiff has also been indicated for a right wrist total fusion but had not undergone the surgery prior to trial because of her concerns about too much functional loss with no wrist motion and losing the ability to be a teacher. (3T136:2-18; 5T55:14-20; 5T61:15-21; 5T67:5-11; 5T132:25-133:3; 5T140:9-141:1). She has undergone physical therapy and cortisone injections for the injuries to her right shoulder and left and will require surgery for her left thumb which she plans on having in the future. (5T51:7-20; 5T58:11-15; 5T60:2-5; 5T128:14-16).

The plaintiff has been left with permanent pain and limitations to her right wrist, right shoulder, and left thumb despite the extensive treatment she has endured. (5T66:10-67:11). The plaintiff and her husband testified about the significant impact her permanent injuries have had on virtually all aspects of her life. She has trouble writing, trouble with penmanship, trouble with computer work, trouble writing on the board at school, trouble driving, difficulty with the shifter in her vehicle. (5T135:8-25). She is not able to enjoy exercising as she did prior to the fall aside from running and can no longer lift weights, perform yoga with her daughters, or do push-ups. (3T133:16-134:1; 5T136:17-22). She has to ask her students for help moving her supplies throughout the school or uses a cart. (5T176:8-20). She has trouble with household chores such as

cooking, cleaning, doing the laundry, and loading and unloading the dishwasher. (3T133:16-134:1; 5T135:8-25; 5T156:18-25). She also has trouble with activities of daily living such as performing personal hygiene activities, blow drying her hair, opening bottles, and putting keys in the door to open the house or start her car. (5T101:3-7; 5T131:6-17; 5T135:10-25). The jury had the opportunity to observe the plaintiff, her physical limitations, and the surgical scar on her right arm during trial.

The plaintiff will continue to suffer from the daily pain and limitations for the remainder of her life, which is anticipated to be over twenty-three (23) years. (6T42:19-25; 6T140:2-4). As a result, the jury's damages award must not only compensate the plaintiff for what she already endured for the four and one half years prior to trial but also for more than twenty-three years of additional pain, suffering and loss of enjoyment of life that she will suffer from for the remainder of her life. The jury awarded the plaintiff $1,200,000.00 in damages for past, present, and future pain, suffering, disability, impairment, and loss of enjoyment of life. (7T5:7-6:18).

Defendant Lince Group is seeking to have this Court vacate the jury's award of damages on the grounds that it was excessive and against the weight of the evidence. The plaintiff respectfully disagrees and submits that the damages awarded for her past and future pain, suffering, disability, impairment, and loss

of enjoyment of life is a fair and reasonable for the permanent injuries she suffered as a result of the fall and is supported by the testimony and evidence presented at trial. The same evidence could easily have resulted in a much larger verdict which would have likewise been sustainable. If anything, the jury's award is conservative under the facts of this case and there is nothing in the record or the result to suggest that the jury's verdict was the result of sympathy.

"Our civil system of justice places trust in ordinary men and women of varying experiences and backgrounds, who serve as jurors, to render judgments concerning liability and damages." *Johnson v. Scaccetti*, 192 N.J. 256, 279 (2007). It is the jury's "feel of the case" that ultimately controls the outcome of every case. *He v. Miller*, 207 N.J. 230, 266 (2011). "Once the jury is discharged, both trial and appellate courts are generally bound to respect its decision, lest they act as an additional and decisive juror." *Kassick v. Milwaukee Elec. Tool Corp.*, 120 N.J. 130, 135-36 (1990). In other words, a jury's verdict may not be set aside merely because a Court might have found otherwise. *Kovacs v. Everett*, 37 N.J. Super. 133, 138 (App. Div. 1955), *certif. denied*, 20 N.J. 466 (1956). Div. 1966).

The goal of a motion for a new trial is not for the Court to substitute its personal judgment for that of the jury, but to correct the jury's clear error of mistake. *McRae v. St. Michael's Medical*, 349 N.J. Super. 583, 597 (App. Div.

2002). The Supreme Court has long admonished trial courts to resist the natural impulse to substitute their decision for that of the jury. *Baxter v. Fairmont Foods*, 74 N.J. 588, 597 (1977). Simply stated, the Court "is not the thirteenth and decisive juror." *Dolson v. Anastasia*, 55 N.J. 2, 6 (1969). The jury's verdict is entitled to considerable respect and should be set aside with great reluctance and only in the clearest cases of injustice. *Fritsche v. Westinghouse Elec. Corp.*, 55 N.J. 322, 330 (1970); see also; *Crego v. Carp*, 295 N.J. Super. 565, 577 (App. Div. 1996), *certif. denied*, 149 N.J. 34 (1997).

The Supreme Court has stressed that the Court's authority to set aside a verdict as being excessive is "limited." *Jastram v. Kruse*, 197 N.J. 216, 228 (2008). This is because a jury's verdict, including its award of damages, is cloaked with a presumption of correctness. *Cuevas v. Wentworth Group*, 226 N.J. 480, 501 (2016). Therefore, substantial deference must be accorded a damage award rendered by a jury. *Id.* at 485. "That substantial deference derives from the recognition that when a case is entrusted to a jury, the jury is responsible for determining the quantum of damages." *Orientale v. Jennings*, 239 N.J. 569, 589 (2019).

"A jury verdict, from the weight of evidence standpoint, is impregnable unless so distorted and wrong, in the objective and articulated view of the judge, as to manifest with utmost certainty a plain miscarriage of justice." *Carringo v.*

Novotny, 78 N.J. 355, 360 (1979). *Rule* 4:49-1(a) instructs that a new trial may be granted only if "having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." (emphasis added). The same "miscarriage of justice" standard applies to the review of verdict by both trial and appellate courts. *R.* 4:49-1(a); see also; *R.* 2:10-1. A "miscarriage of justice" is a "pervading sense of wrongness needed to justify an appellate or trial judge undoing a jury verdict … which can arise … from manifest lack of inherently credible evidence to support the finding, obvious overlooking or underevaluation of crucial evidence, or a clearly unjust result." *Baxter*, 74 N.J. at 599, citing *State v. Johnson*, 42 N.J. 146, 162 (1964).

When determining if a damage verdict is so disproportionate to the injury and resulting disability as to shock the Court's conscience and convince it that to sustain the award would be manifestly unjust, the Court is to consider the evidence in a light most favorable to the injured plaintiff. *Spragg v. Shore Care*, 293 N.J. Super. 33, 63 (App. Div. 1996). As our Supreme Court instructed:

> A trial judge should not interfere with the quantum of damages assessed by a jury unless it is so disproportionate to the injuries and resulting disabilities shown as to shock his conscience and to convince him that to sustain the award would be manifestly unjust. In making its overview, **a court must accept the medical evidence in the most favorable light to the plaintiffs**; **it must accept the conclusion that the jury believed the plaintiffs' injury claims and the testimony of their supporting witness**, and if tested on such bases the verdict (even

> if generous) has reasonable support in the record, the jury's evaluation should be regarded as final. *Taweel v. Starn's Shopright Supermarket*, 58 N.J. 227, 236 (1971) (citation omitted)(emphasis added).

The Court must also "evaluate the nature and extent of the injury, the medical treatment that the plaintiff underwent and may be required to undergo in the future, the impact of the injury on the plaintiff's life from the date of injury through the date of trial, and the projected impact of the injury on the plaintiff in the future." *Jastram*, 197 N.J. at 229.

Our Supreme Court has further instructed that because reasonable people may disagree about inferences which may be drawn from common facts, the Court may not reweigh the evidence and impose a new verdict simply because it disagrees with the jury's decision. *Kulbacki v. Sobchinsky*, 38 N.J. 435, 444-445 (1962). "If reasonable minds might accept the evidence as adequate to support the jury verdict, it cannot be disturbed by the trial court." *Id.* at 445. Therefore, a jury's damages verdict should not be interfered with unless the overall amount is clearly against the weight of the evidence. *Horn v. Village Supermarkets, Inc.*, 260 N.J. Super. 165, 178 (App. Div. 1992), *certif. denied*, 133 N.J. 435 (1993). Furthermore, as the Supreme Court noted, there is a "wide range" in acceptable non-economic damages. *He*, 207 N.J. at 253.

The measurement of non-economic damages is an amount that reasonable persons would estimate to be fair compensation for the damages a plaintiff

sustains as a result of the defendant's tortuous conduct. *Glowacki v. Underwood Mem'l Hosp.*, 270 N.J. Super. 1, 15 (App. Div. 1994). "That means such sum as would be reasonable compensation for his [or her] bodily injuries, for the pain and suffering resulting therefrom, past, present and future, for the effect of those injuries upon his [or her] health according to their degree and probable duration, and for any permanent disability which in reasonable probability has resulted or will result." *Theobold v. Angelos*, 40 N.J. 295, 304 (1963). The reasonable compensation for such damages is left to the impartial conscience and judgment of the jurors. *Adams v. Cooper Hosp.*, 295 N.J. Super. 5, 13 (App. Div. 1996), *certif. denied*, 148 N.J. 463 (1997).

"In assessing damages in tort actions there generally is no precise correspondence between money and physical or mental suffering." *Goss v. American Cyanamid Co.*, 278 N.J. Super. 227, 240 (App. Div. 1994). Because pain and suffering do not have any known mathematical or financial dimensions, the only standard for evaluation is such amount as reasonable persons estimate to be fair compensation. *Botta v. Brunner*, 26 N.J. 82, 95 (1958). There is simply no predetermined graduated scale that is used to measure damages in a personal injury case. *Andryishyn v. Ballinger*, 61 N.J. Super. 386, 393 (App. Div. 1960), *certif. denied*, 33 N.J. 120 (1960). As the Supreme Court noted in *DeHanes v. Rothman*, 158 N.J. 90 (1999):

> The value of pain and suffering is simply beyond the reach of science. No Market place exists at which such malaise is bought and sold… It has never been suggested that a standard of value can be found and applied. The varieties and degrees of pain are almost infinite. Individuals differ greatly in susceptibility to pain and in capacity to withstand it. And the impossibility of recognizing or of isolating fixed levels of plateaus of suffering must be conceded. The nature of pain and suffering [thus] remains intrinsically and intractably subjective, and necessarily, any equation between pain, suffering, impairment and the like and monetary compensation remains elusive and speculative. *Id.* at 97 (internal citations omitted).

Therefore, the appraisal of the amount of non-economic damages is left to the sound discretion of the jury. *Cuevas*, 226 N.J. at 499 (2016).

In order to disregard the jury's award of damages, defendant Lince Group must establish that the damages assessed by the jury are so disproportionate to the plaintiff's permanent injuries and resulting disability that the award shocks the Court's conscience and convinces it that it would be manifestly unjust to sustain the award. *Orientale*, 239 N.J. at 589. Defendant Lince Group has, however, failed to make a showing that the jury's award of damages was in any way disproportionate to the plaintiff's permanent injuries and disabilities, never mind shocking to the conscience. Furthermore, in arguing that the damage award should be vacated, defendant Lince Group presents the evidence in a light most favorable to it and completely disregards the evidence favorable to the plaintiff. However, as stated above, all evidence supporting the verdict must be accepted as true and all reasonable inferences must be drawn in favor of

upholding the verdict. *Harper-Lawrence, Inc. v. United Merchants & Mfrs., Inc.*, 261 N.J. Super. 554, 559 (App. Div. 1993), *certif. denied*, 134 N.J. 478 (1993).

The plaintiff sustained permanent injuries to multiple body parts as a result of the June 22, 2019 fall. (5T66:10-67:11). The first permanent injury is a displaced comminuted intra-articular fracture of the right distal radius. (5T15:5-6). The fracture required open reduction and internal fixation surgery with carpal tunnel release. (5T15:6-8; 5T16:19-21; 5T16:14-27:11). The plaintiff had to undergo a second surgery approximately a year later to remove the painful hardware. (5T15:10-11; 5T39:18-40:4). She has a permanent surgical scar on the underside of her wrist that was shown to the jury at trial. (5T46:23-24; 5T134:10-17; 5T229:22-230:2). The plaintiff has developed posttraumatic arthritis in the right wrist which is visible on both MRI and X-ray diagnostic testing. (5T15:13-17; 5T41:1-42:1; 5T53:3-54:19). She suffers from loss of mobility to her right wrist and hand and constant pain and limitations every day. (5T57:22-58:6; 5T59:6-10; 5T133:15-22; 5T134:2-9; 5T135:6-7; 5T141:8-14). She explained that she has not had a pain free day since the date of her fall. (5T141:12-14). Although the plaintiff underwent multiple cortisone injections to try to improve the symptoms of the posttraumatic arthritis, the injections were largely ineffective. (5T55:21-56:7; 5T57:13-16; 5T139:19-23).

The second permanent injury that the plaintiff sustained as a result of the injury is a frozen right shoulder. (5T15:11-12; 5T31:16-25; 5T32:18-33:1; 5T66:5-6; 5T127:15-22). This was not a traumatic injury but developed in September 2020 when the plaintiff began trying to use her wrist more. (5T31:18-32:6). The frozen shoulder developed due to the plaintiff's inability to use of the right hand and arm as a result of the fractures. (5T32:1-6; 5T32:18-21; 5T128:1-4). The plaintiff underwent physical therapy and received cortisone injections for this injury. (5T32:7-14; 5T58:11-15). Although the plaintiff has had improvement with the shoulder, she still has loss of forward elevation and overhead use of her dominant shoulder. (5T58:20-59:5; 5T66:14-21; 5T78:5-8; 5T89:5-16; 5T102:18-104:3; 5T128:17-21). The third permanent injury that the plaintiff sustained as a result of the subject fall is a left trigger thumb. (5T15:13; 5T30:10-31:9; 5T32:18-33:1; 5T126:21-25; 5T127:15-22). The plaintiff developed this injury as a result of overuse of her nondominant hand. (5T30:17-22; 5T31:10-15; 5T32:18-31:1; 5T127:15-22). Her left thumb continues to be painful on occasion with intermittent triggering and a significant functional deficit. (5T:18-23; 5T18-23; 5T66:20-23; 5T128:14-16). She has received cortisone injections for this injury. (5T31:7-9; 5T51:16-20; 5T60:2-3; 5T128:7-8).

Dr. Barmakian testified that the plaintiff will require additional treatment in the future including a fusion of the right wrist and surgery for the left trigger thumb. (5T55:14-20; 5T66:22-67:4; 5T60:2-66). The plaintiff explained that she has not undergone the fusion surgery as of this time because of concerns about too much functional loss with no wrist motion and does not want to lose the ability to be a teacher. (5T140:9-141:1). It has long been recognized that a tortfeasor is liable for all damages that naturally and proximately flow from his or her negligence. *Ginsberg v. St. Michael's Hosp.*, 292 N.J. Super. 21, 35 (App. Div. 1996), citing, *Ciluffo v. Middlesex General Hospital*, 146 N.J. Super. 476, 482 (App. Div. 1977). This includes damages for future medical treatment. *Campo v. Tama*, 133 N.J. 123, 129 (1993). In order to recover these damages, a plaintiff is not required to establish that the future consequences are certain to occur. *Mauro v. Raymark Indus., Inc.*, 116 N.J. 126, 133 (1989). He or she only has to show that it is reasonably probable to occur. *Id.* Furthermore, "[t]he amount to be awarded [for future consequences] must largely be left to the good judgment of the jury." *Coll v. Sherry*, 29 N.J. 166, 175 (1959).

The plaintiff was only fifty-nine years old at the time of trial. (5T109:10-11). The injuries she sustained as a result of defendant Lince Group's negligence are permanent injuries. (5T66:10-67:11). The plaintiff and her husband explained the symptoms that she suffers from as well as the impact her injuries

and disabilities have had on her daily life activities. This includes difficulties and limitations with work, recreational activities, activities of daily life, and taking care of herself. (3T133:16-134:1; 5T101:3-7; 5T131:6-17; 5T133:16-134:1; 5T135:8-25; 5T136:17-22; 5T156:18-20; 5T176:8-20). She will continue to suffer from these injuries for the remainder of her life, which is expected to be another twenty-three point nine years.

When evaluating the nature and extent of the plaintiff's permanent injuries, the impact those injuries have had on the plaintiff's life from the date of injury through the date of trial, and the projected impact of the injuries will have on the plaintiff over the remainder of her life, the jury's verdict of $1,200,000.00 for pain, suffering, disability, impairment, and loss of enjoyment of life is reasonable. The jury carefully weighed the plaintiff's injuries, the pain she has already endured and is expected to endure in the future, her loss of enjoyment of life, and the impact her injuries have had on her employment, recreational activities, and daily life activities in awarding damages. The record demonstrates neither clear error nor mistake by the jury in rendering its damages award and defendant Lince Group has failed to establish that there was a "miscarriage of justice under the law." Accordingly, the plaintiff respectfully submits that the jury's verdict should be affirmed on appeal.

POINT III

THE ORDER GRANTING DEFENDANT SCOTCH PLAINS' MOTION FOR A DIRECTED VERDICT SHOULD BE REVERSED BECAUSE THE INFERENCES OF FACT WEIGHED IN THE PLAINTIFF'S FAVOR ESTABLISH LIABILITY FOR A DANGEROUS CONDITION OF PUBLIC PROPERTY UNDER THE TORT CLAIMS ACT (Da221; 8T15:25-23:16).

The plaintiff was jogging along the East Second Street public sidewalk when her right foot caught the edge of an abrupt elevated section of sidewalk causing her to trip and fall. (5T112:24-113:3; 5T114:10-115:14). It was undisputed at trial that the abrupt surface projection that caused the plaintiff to trip and fall was a tripping hazard and that it had been in existence for at least three years prior to the plaintiff's fall. (4T34:23-35:17; 4T35:18-36:1; 4T95:9-20; 4T179:12-25; 4T183:10-14). The abrupt surface projection was located where the public sidewalk that abutted defendant Lince Group's property adjoined the Tarquins Alley right of way. (Pa106). Defendant Lince Group argued that the tripping hazard is located on property owned by defendant Scotch Plains and that the municipality is responsible for maintaining the area.

Defendant Scotch Plains made an application for directed verdict pursuant to *Rule* 4:37-2(b) at the close of evidence.[3] (6T5:10-10:21). The Trial Court

[3] It should be noted that defendant Scotch Plains previously filed a motion for summary judgment based upon essentially the same facts as presented at trial that was denied. (Da28).

reserved a decision on the application at that time and instructed the jury as to the different liability standards applicable to the abutting commercial landowner and the municipality under the Tort Claims Act. (6T17:10-12; 6T120:8-124:25; 6T125:1-126:16). The jury returned a verdict finding both defendants to be partially at fault apportioning liability sixty percent to defendant Lince Group and thirty percent to defendant Scotch Plains with ten percent being attributed to the plaintiff. (7T5:7-6:18). The Trial Court allowed the parties to submit briefs and heard oral argument on the application for a directed verdict after the verdict was announced. (7T7:21-8:3; 8T). The Trial Court found that there was no evidence presented at trial supporting a finding that defendant Scotch Plains was palpably unreasonable or had constructive notice of the condition under the Tort Claims Act and filed an Order dismissing all claims against it on March 4, 2024. (8T15:23-22:15; Da221). The plaintiff respectfully submits that the Trial Court erred in granting defendant Scotch Plains' motion for a directed verdict because the inferences of fact weighed in the plaintiff's favor supported a finding of liability against it under the Tort Claims Act.

Appellate review of an Order granting a motion for a directed verdict is *de novo*. *Akhtar v. JDN Props. at Florham Park, LLC*, 439 N.J. Super. 391, 403 (App. Div. 2015). Under this standard of review, the "trial court's interpretation of the law and the legal consequences that flow from established facts are not

entitled to any special deference." *Manalapan Realty, L.P. v. Twp. Committee of Twp. of Manalapan*, 140 N.J. 366, 378 (1995). Furthermore, in reviewing the matter, the Appellate Division applies the same standard as the motion judge. *ADS Assoc. Group, Inc. v. Oritani Sav. Bank*, 219 N.J. 496, 510 (2014).

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

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

Defendant Scotch Plains' motion for a directed verdict was based on the argument that the proofs at trial did not support liability for a dangerous condition of public property under section 59:4-2 of the Tort Claims Act. Pursuant to *N.J.S.A.* 59:4-2, a public entity will be held liable if the property was in a dangerous condition at the time of the accident; there was proximate cause between the injury and the condition; the dangerous condition created a reasonably foreseeable risk of the kind of injury that was incurred; the public entity had notice in sufficient time to protect against the condition or that the condition had been created by an act or omission of a public employee acting within the scope of his employment; and the public entity's failure to correct the dangerous condition was palpably unreasonable. *Brown v. Brown*, 86 N.J. 565, 575 (1981). Defendant Scotch Plains only raised three sections of the statute as a basis for judgment as a matter of law, specifically that the abrupt surface projection that caused the plaintiff to trip and fall was not a dangerous condition of public property, that it did not have actual or constructive notice of the dangerous condition, and that its failure to protect against the dangerous condition was not palpably unreasonable.

A. The Inferences of Fact Weighed in the Plaintiff's Favor Establish that the Elevated Sidewalk Along the Foreseeable Pedestrian

Pathway was a Dangerous Condition of Public Property (Da221; 8T16:22-17:17).

Although public entities remain immune from certain types of claims, the overall purpose of *N.J.S.A.* 59:4-2 is to hold them liable for the dangerous conditions of their property. *Smith v. Fireworks by Girone, Inc.*, 180 N.J. 199, 216 (2004). The Supreme Court has noted that the determination of whether a dangerous condition exists on the property is ultimately a question for the jury. *Posey ex rel. Posey v. Bordentown Sewerage Authority*, 171 N.J. 172, 188 (2002). Here, a jury could and reasonably did find that it is more probable than not that the abrupt change of elevation along the foreseeable pedestrian pathway caused by the raised sidewalk is a dangerous condition of public property.

Although not every defect of property constitutes a dangerous condition, there is no bright line measurement demarcating a required height for abrupt surface projections to reach in order to constitute a dangerous condition. The Tort Claims Act defines a dangerous condition as "a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." *N.J.S.A.* 59:4-1(a). This refers to physical conditions of the property and not to activities on the property. *Levin v. County of Salem*, 133 N.J. 35, 44 (1993). In determining whether a condition of the property was dangerous, the condition

cannot be considered in a vacuum. *Atalese v. Long Beach Twp.*, 365 N.J. Super. 1, 5 (App. Div. 2003). "Instead, it must be considered together with the anticipated use of the property to determine whether the condition creates a substantial risk of injury and, therefore, qualifies under the statute as dangerous." *Id.*

In *Atalese*, the plaintiff was walking along in a bike lane along a municipal roadway when she fell on an uneven portion of the pavement that measured three quarters of an inch in height. 365 N.J. Super. at 3. The Trial Court granted the municipality's motion for summary judgment on the grounds that a three-quarter inch change in elevation was not a dangerous condition of public property as a matter of law. *Id.* at 4. The Appellate Division disagreed and reversed the Order granting summary judgment. *Id.* at 6. The Appellate Division noted that the change in elevation was along an area of the road designated for pedestrians and bicyclists. *Id.* Given the foreseeable use of the property by pedestrians, the Appellate Division found that a jury could determine that the three-quarters of an inch change in elevation created a substantial risk of injury. *Id.*

The present matter involves an elevated public sidewalk located at the corner of the East Second Street and Tarquins Alley right of ways. The primary function of this public sidewalk is the public's right to travel on it. *Stewart*, 87 N.J. at 151. Thus, it was not only foreseeable that pedestrians would be traveling

upon the sidewalk, but the sidewalk was specifically intended for such use. *Id.* Defendant Scotch Plains' representative acknowledged that the sidewalk is for use by pedestrians to run or walk upon and that sidewalks should be level and even. (4T24:18-25:9). This foreseeable pedestrian walkway for use by the general public had an abrupt seventeen inch wide change in elevation between the sidewalk that abutted defendant Lince Group's commercial property and the Tarquins Alley right of way that measured between one and three-eighths inches to one and five-eighths inches. (4T182:15-183:9; Pa106; Pa113).

It is undeniable that both the Tarquins Alley right of way and the public sidewalk constitute public property. Public property is statutorily defined as "real or personal property owned **or** controlled by the public entity, but does not include easements, encroachments and other property that are located on the property of public entity but are not owned or controlled by the public entity." *N.J.S.A.* 59:4-1(c). Thus, public property is not limited to property in which a public entity is the fee owner but also includes property that it controls. *Roman v. City of Plainfield*, 388 N.J. Super. 527, 534 (App. Div. 2006). Our Supreme Court has directed that the Tort Claims Act does not exclude public sidewalks from the definition of public property. *Norris v. Borough of Leonia*, 160 N.J. 427, 442 (1999). As it explained:

> There is no suggestion in the TCA that the Legislature intended to exclude sidewalks from the definition of public property. The

> Legislature made no effort to exempt sidewalks from the purview of *N.J.S.A.* 59:4–2, despite the prevailing understanding at common law that sidewalks were comparable to streets and considered public property. Thus, logic and common sense dictate that the statutory definition of 'public property' in that section encompasses sidewalks. *Id.*

Therefore, the fact that defendant Lince Group has a duty to maintain the sidewalk abutting its commercial property does not mean that the sidewalk is not public property. *Id.* Furthermore, it was undisputed that Tarquins Alley was owned and maintained by defendant Scotch Plains. (4T32:21-33:1; 4T54:23-25).

The inferences of fact weighed in the plaintiff's favor support a finding that the abrupt one and three-eighths inch to one and five-eighths inch surface projection was a dangerous condition of the public sidewalk. The plaintiff's engineer testified that the change in elevation was well beyond the maximum thresholds for safety and created a hazardous condition within a foreseeable pedestrian pathway that caused the plaintiff to trip, fall, and sustain injury. (4T179:12-25; 4T183:10-14; 4T197:14-17). Defendant Scotch Plains' own Director of Public Property admitted that the surface projection was a tripping hazard that should be repaired. (4T34:23-35:17; 4T35:18-36:1). At the very least, the evidence at trial created a question of fact that was properly submitted to the jury as to whether the admitted tripping hazard along the foreseeable pedestrian pathway created a substantial risk of injury when the property was used with due care in a manner in which it is reasonably foreseeable that it will

be used. Accordingly, the Order granting defendant Scotch Plains' motion for a directed verdict should be reversed.

B. The Inferences of Fact Weighed in the Plaintiff's Favor Establish that it had Constructive Notice of the Dangerous Condition of the Public Sidewalk (Da221; 8T17:18-20:21; 8T22:8-13).

A public entity will be held liable for injuries caused by a dangerous condition of public property when its employees created the condition or where it had actual or constructive notice of the dangerous condition. *N.J.S.A.* 59:4-2. Actual notice exists when the defendant had knowledge of the condition and knew or should have known of its dangerous character. *N.J.S.A.* 59:4-3(a). Constructive notice exists when the condition existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. *N.J.S.A.* 59:4-3(b).

While defendant Scotch Plains claims that it was not aware of the dangerous condition that caused the plaintiff to trip and fall, there was testimony from the representative of the abutting commercial landowner that she made several complaints by telephone to the municipality prior to sending emails to the municipality on July 1, 2019 reporting a series of falls on an uneven sidewalk. (4T101:11-102:20; 4T145:19-23). Although she claimed to have lied when stating that there were multiple falls other than the plaintiff's fall and that she

was referring to the brick pavers in front of the property in the telephone calls, a jury could find that these claims were not credible and were simply an attempt by her to suggest that she did not have notice of the dangerous condition. There was, therefore, proof presented at trial that would allow a jury to find that defendant Scotch Plains had actual notice of the dangerous condition. Even in the absence of this evidence, the circumstantial proofs established that defendant Scotch Plains had at the very least constructive notice of the change in elevation that caused the plaintiff to trip and fall.

In a civil action, circumstantial evidence does not have to exclude every other reasonable hypothesis than the truth of the fact sought to be proven. *Miller & Dobrin Furniture Co., Inc. v. The Camden Fire Ins. Co. Ass'n*, 55 N.J. Super. 205, 215 (Law Div. 1959). In other words, such evidence is not required to have the quality of certainty. *Kita v. Borough of Lindenwold*, 305 N.J. Super. 43, 50 (App. Div. 1997). It has long been recognized that "[i]n civil cases, …, it is not necessary that the minds of the jurors be freed from all doubt; it is their duty to decide in favor of the party on whose side the weight of the evidence preponderates and according to the reasonable probability of truth." *Jackson v. Delaware L & W.R. Co.*, 111 N.J.L. 487, 490 (Err. & App. 1933). Therefore, circumstantial evidence, "as a basis for deductive reasoning in the determination

of civil issues, is defined as a mere preponderance of probabilities[.]" *Joseph v. Passaic Hospital Ass'n*, 26 N.J. 557, 574 (1958).

The circumstantial evidence in this matter supported a finding that the employees of defendant Scoth Plains had constructive notice of the dangerous condition that caused the plaintiff to trip and fall. This matter does not involve a transient condition that was only present for a short period of time prior to the incident. It involves a one and three-eighths inch to one and five-eighths inch surface projection that was caused by the elevation of one section of sidewalk above the adjacent surface of Tarquins Alley. (4T182:15-183:9; Pa113). The plaintiff's engineer testified that the abrupt surface projection would have taken years to develop. (4T192:11-21; 4T197:18-22). It was undisputed that the condition had existed for at least three years prior to the plaintiff's fall. (4T92:8-13; 4T94:2-20). Therefore, defendant Scotch Plains' employees had years to discover the dangerous condition during which time they performed work in maintaining Tarquins Alley. (4T32:21-33:1). Furthermore, the dangerous character of the surface projection was readily apparent as defendant Scoth Plains' Director of Public Property was able to determine that the raised edge was an unsafe tripping hazard that should be repaired simply by viewing a photograph of the defect. (4T34:23-35:17; Pa106). A jury could and did find that the tripping hazard was of such an obvious nature and existed for such a

period of time that defendant Scotch Plains' employees, in the exercise of due care, should have discovered the change in elevation and its dangerous character. Accordingly, the plaintiff respectfully submits that the Order granting defendant Scotch Plains' motion for a directed verdict should be reversed. *Lodato v. Evesham Twp.*, 388 N.J. Super. 501, 511-512 (App. Div. 2006).

C. The Inferences of Fact Weighed in the Plaintiff's Favor Establish that its Failure to Protect Against the Dangerous Condition of the Public Sidewalk was Palpably Unreasonable (Da221; 8T20:22-22:7; 8T22:14-23:1).

The Tort Claims Act provides that public entity is not liable for a dangerous condition of public property if the actions it took to protect against the dangerous condition or the failure to take such action were not palpably unreasonable. *N.J.S.A.* 59:4-2. "Protect against" is defined by the Tort Claims Act to include repairing, remedying or correcting a dangerous condition; providing safeguards against a dangerous condition; or warning of a dangerous condition. *N.J.S.A.* 59:4-1(b). In this matter, defendant Scotch Plains failed to take any steps to protect against the dangerous condition that existed along the public sidewalk where Tarquins Alley and the section of sidewalk abutting the commercial property owned by defendant Lince Group joined together. Defendant Scotch Plains had several options available to it. It could have patched the surface of Tarquins Alley to level it with the sidewalk, it could have advised the abutting landowner of its obligation under the local ordinances to repair the sidewalk, it

could have repaired the sidewalk itself and charge the abutting landowner if it failed to respond, or it could have simply provided a warning of the dangerous condition. Weighing the facts in plaintiff's favor, a jury could find that defendant Scotch Plains' absolute failure to take even the simplest of steps to protect against the foreseeable hazard was palpably unreasonable.

While palpably unreasonable conduct is more than simple negligence, it is not very negligent or grossly negligent conduct. *Schwartz v. Jordan*, 337 N.J. Super. 550, 555 (App. Div. 2001), *certif. denied*, 168 N.J. 293 (2001). As the Appellate Division stated:

> Palpably unreasonable conduct is, of course, more than mere negligence; but we have said that **it does 'not necessarily mean 'very' negligent, 'grossly' negligent or 'extraordinarily' negligent**,' *Holloway v. State*, 239 N.J. Super. 554, 560, 571 A.2d 1324 (App. Div. 1990). The Supreme Court reversed in part our decision in *Holloway*, but in doing so, it quoted the above language. *Holloway v. State*, 125 N.J. 386, 404 593 A.2d 716 (1991). As posed by the Supreme Court, the inquiry is whether no prudent person could approve of the government entity's action or inaction. *Id.* at 403, 593 A.2d 716; *Kolitch v. Lindeahl*, 100 N.J. [485,] 493, 497 A.2d 183 [(1985)]. *Id.* (emphasis added).

Thus, palpably unreasonable means that a public entity acted or failed to act under circumstances which make it manifest and obvious that no prudent person would approve of its course of action or inaction. *Furey v. City of Ocean*, 273 N.J. Super. 300, 312-313 (App. Div. 1994).

Our Supreme Court has repeatedly stressed that the decision whether the actions taken by the public entity to protect against the dangerous condition or the failure to take such action was palpably unreasonable is a question of fact for the jury to decide. *Vicitore v. Sports & Expo. Auth.*, 169 N.J. 119, 130 (2001); see also; *Brown*, 86 N.J. at 580; see also; *Shuttleworth v. Conti Constr. Co.*, 193 N.J. Super. 469 (App. Div. 1984). The Court can make this determination only in extreme cases where no reasonable juror could differ. *Wooley v. Bd. of Chosen Freeholders*, 218 N.J. Super. 56, 62 (App. Div. 1987). All that the plaintiff has to show in order to defeat a public entity's motion for judgment as a matter of law is that "a jury could reasonably find from the evidence that no prudent person would approve of the [defendant's] course of action or inaction." *Daniel v. State Dept. of Transp.*, 239 N.J. Super. 563, 600 (App. Div. 1990), *certif. denied*, 122 N.J. 325 (1990).

The present matter is not one of those extreme cases where the determination of whether defendant Scotch Plains' failure to protect against the dangerous condition was palpably unreasonable can be determined as a matter of law. The facts weighed in the plaintiff's favor establish that there was a dangerous condition along a pedestrian pathway. (4T179:12-25; 4T183:10-14; 4T197:14-17). The substantial risk of injury created by the abrupt change in elevation along the public sidewalk could have been easily protected against through

minimal effort by defendant Scotch Plains. Although Scotch Plains adopted an ordinance requiring the abutting landowner to maintain and repair the sidewalks located in the public right of way, it had the ability and obligation to ensure that the required maintenance was performed. (4T210:24-211:7). Defendant Scotch Plains stuck its head in the sand and was blind to the dangerous condition of the public sidewalk that was under its control by failing to take any action to protect against the hazard for years.

A simple inspection of the sidewalk when defendant Scotch Plains employees were maintaining Tarquins Alley would have revealed the dangerous condition and the repairs of either Tarquins Alley or the sidewalk needed to be undertaken. (Pa106). If it believed that the abutting landowner was responsible for the repair of the dangerous condition under its ordinances, it could have then advised the abutting landowner of the tripping hazard and its obligation under the ordinances to repair the hazard. This would have not cost defendant Scotch Plains anything but a little time. If the abutting landowner did not make the repair in a timely fashion, defendant Scotch Plains could have made the repair itself and charged the abutting landowner for the costs of the repair. *N.J.S.A.* 40:65-14. At the very least, defendant Scotch Plains could have simply highlighted the tripping hazard by painting it with warning paint to alert the general public using the sidewalk

of the unsafe condition or blocking off the area with a barrel. (4T195:8-196:22; 4T65:9-12; 4T67:25-68:15).

Any of these measures would have been simple, inexpensive, and would have been an effective means to protect against the dangerous condition in the public right of way. A jury could and did find that no prudent person would approve of the complete failure to take any of these simple steps to avoid the risk of injury created by the dangerous condition. The Appellate Division has recognized that a public entity's failure to address a dangerous condition through the use of modest and inexpensive remedial efforts supports a finding that the actions or inactions of the public entity were palpably unreasonable. *Roe by M.J. v. New Jersey Transit Rail Operations, Inc.*, 317 N.J. Super. 72, 82 (App. Div. 1998), *certif. denied*, 160 N.J. 89 (1999). Accordingly, the plaintiff respectfully submits that the Order granting defendant Scotch Plains' motion for a directed verdict should be reversed.

CONCLUSION

Based upon the foregoing, the plaintiff respectfully requests that the rulings denying defendant Lince Group's motions for summary judgment and a directed verdict and the jury's award of damages be affirmed and the Order granting defendant Scotch Plains' motion for a directed verdict be reversed such that this matter is remanded for the entry of judgment consistent with the jury's verdict together with pre and post-judgment interest.

Respectfully submitted,

Levinson Axelrod, P.A.
Attorneys for Plaintiff-Appellant

s/Patrick J. Flinn, Esq.

_____
Patrick J. Flinn, Esq.

Dated: October 30, 2024

ELLEN ENGLISH and her husband KEITH ENGLISH, Plaintiffs/Respondents/Cross-Appellants v. LINCE GROUP, LLC, Defendant/Appellant v. TOWNSHP OF SCOTCH PLAINS, Defendant/Respondent and PAT'S AMERICAN BUTCHER SHOP, LLC, PAT'S ALL AMERICAN BUTCHER, FRANK'S MEAT MARKET, SALON DESANDO, LLC, JOHN DOES 1-10 & ABC CORPORATIONS 1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002344-23 On Appeal from: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: UNION COUNTY DOCKET NO.: UNN-L-219-20 Sat Below: Hon. Daniel R. Lindemann, J.S.C. and Hon. John G. Hudak, J.S.C

BRIEF ON BEHALF OF DEFENDANT/RESPONDENT, TOWNSHIP OF SCOTCH PLAINS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases Continued:

Rules and Statutes:

PRELIMINARY STATEMENT

In the instant appeal, Plaintiff/Appellant, Ellen English and Defendant/Appellant, Lince Group, challenge the decision of the Honorable John G. Hudak, J.S.C. to grant Defendant/Respondent, Township of Scotch Plains' motion for a directed verdict which was granted by the Court on February 16, 2024. A review of Judge Hudak's decision reveals that the Court granted Defendant/Respondent Scotch Plains' directed verdict because the Court found that neither the plaintiff nor defendant Lince Group had presented any evidence whatsoever to establish that Defendant Township of Scotch Plains had actual and/or constructive of the raised sidewalk the plaintiff tripped on while running down East Second Street in front of the property owned by Defendant Lince Group nor was the conduct of Defendant/Respondent Township of Scotch Plains in maintaining the sidewalk in front of Lince Group palpably unreasonable. 8T, Page 13, Line 23 to Page 23, Line 22). Defendant/Respondent, Township of Scotch Plains, respectfully submits that a review of the record below, which included the testimony of the plaintiff, Ellen English, Frank DiNizo, the Director of Public Works for Defendant Township of Scotch Plains, Tillie Yu, a representative of Lince Group and the plaintiff's expert, James Kennedy, P.E., did not establish any notice on Scotch Plains or that their actions were palpably unreasonable.

PROCEDURAL HISTORY

1. On January 16, 2020, Plaintiff/Appellant Ellen English instituted a civil suit against Defendant/Appellant, Lince Group, LLC.

2. On August 12, 2020, Plaintiff/Appellant filed an Amended Complaint to include Defendant/Respondent Township of Scotch Plains as a defendant. Da1

3. On March 25, 2022, Defendant/Respondent Township of Scotch Plains filed a motion for summary judgment.

4. On May 19, 2022, the Honorable Alan G. Lesnewich, J.S.C. entered an Order denying said motion for summary judgment. Da28

5. On January 19, 2024, the within matter was assigned to the Honorable John G. Hudak, J.S.C. for trial. At the close of the plaintiff's case on February 5, 2024, Defendant/Respondent, Township of Scotch Plains moved for a directed verdict. The plaintiff also moved for a directed verdict on the issue of liability against Lince Group, LLC. Judge Hudak denied the plaintiff's motion but reserved as to Township of Scotch Plains' motion. See 6T Page 17, Line 9 to Page 22, Line 4.

6. On February 6, 2024, the jury entered a verdict against Lince Group and Township of Scotch Plains apportioning liability 60% against Lince Group, 30% against Township of Scotch Plains and 10% against the plaintiff, and awarded the plaintiff the sum of $1,200,000.00. 7T Page 4, Line 22 to Page 7, Line 15.

7. On February 16, 2024, the Honorable John G. Hudak, J.S.C. granted the Township of Scotch Plains' motion for a directed verdict. 8T Page 13, Line 23 to Page 23, Line 22.

STATEMENT OF FACTS

1. The plaintiff testified that on June 22, 2019, she injured herself while running on the sidewalk on East Second Street in Scotch Plains, New Jersey in front of property owned by Defendant/Appellant Lince Group. 5T, Page 111, Line 22 to Page 112, Line 2.

2. The plaintiff provided the following testimony with regard to the happening of the accident. "So, I'm running and I catch my right foot on the lip of the sidewalk and before I know it, I'm in the air. And what's entering my mind is that I am petrified that I'm going to fracture my skull. So, what happens is I take my right hand and I break my fall and I land up a bit." 5T Page 115, Line 8-14. The plaintiff further testified that based upon running in the area on prior occasions that she was aware of the raised lip that caused her to trip and fall. 5T Page 163, Line 5 to Page 164, Line 3. More significantly, the plaintiff testified that prior to June 20, 2019, she never told anyone at the Township of Scotch Plains about the lip that caused her to fall. 5T Page 165, Line 16-18.

3. In the plaintiff's case in chief, the plaintiff called to testify Frank DiNizo, the Director of Public Works for Defendant, Township of Scotch Plains. Mr. DiNizo testified that he has been employed by the Township since June 14, 1993 and was currently employed as the Director of Public Works. 4T Page 19, Line 14-24. Mr. DiNizo testified that he was familiar with the policies and

procedures within the Township regarding sidewalks and that the Township only maintains sidewalks that are made of asphalt around school areas, and that the concrete sidewalks are the responsibility of residents or business owners. 4T Page 20, Line 9-24. Mr. DiNizo further testified that abutting sidewalks of commercial properties are the responsibility of the commercial property owner. 4T Page 22, Line 3-10. Mr. DiNizo further testified that according to the Township's policies and procedures, abutting commercial property owners are responsibility for the sidewalks abutting their property. 4T Page 23, Line 1-9.

4. More importantly, Mr. DiNizo was questioned concerning the sidewalk in front of the property owned by Defendant Lince Group, LLC, including but not limited to being shown a photograph marked as P1. 4T Page 28, Line 14-25. Based upon his review of the photograph, Mr. DiNizo testified to the following: (1) the township does not maintain the poured concrete sidewalks in the photograph; and (2) the township does not maintain the brick pavers in the sidewalk that abuts the Lince Group property owner is responsibility of the property owner. 4T Page 33, Line 15-18.

5. Mr. DiNizo further testified that according to the policies and procedures of Scotch Plains that they have a reactive policy and not a proactive policy with regard to inspecting sidewalks. 4T Page 63, Line 25 to Page 66, Line 14. Mr. DiNizo elaborated on this procedure testifying that when the

Township would receive a phone call concerning a sidewalk, he would make a determination as to whether it was a residential sidewalk and/or commercial sidewalk by looking at the tax map and that putting the residential property owner or the commercial property owner on notice to make the appropriate repair. 4T Page 63, Line 25 through Page 66, Line 14. Finally, Mr. DiNizo testified that prior to June 22, 2019, the Township of Scotch Plains had not received any notice whatsoever of the raised sidewalk in front of the Lince Group's property which caused the plaintiff to trip and fall. 4T Page 66, Line 15 through Page 67, Line 2.

6. In support of their claim to establish negligence upon the defendants Lince Group, LLC and the Township of Scotch Plains, plaintiff's counsel called James Kennedy, P.E., a professional engineer, to testify. Mr. Kennedy did not testify on direct examination that Defendant Township of Scotch Plains had any responsibility whatsoever for the plaintiff's accident. 4T Page 219, Line 25 to Page 220, Line 4. Mr. Kennedy further testified that he was not aware of any notice whatsoever, constructive or actual, to Defendant Scotch Plains concerning the alleged raised sidewalk in front of the property owned by Defendant Lince Group which caused the plaintiff to trip and fall. 4T Page 220, Line 6-10. Finally, Mr. Kennedy was questioned concerning Defendant Township of Scotch Plains' reactive policy with regard to inspecting policies and indicated that the same was acceptable. 4T Page 220, Line 14 to Page 221, Line 21.

8. The plaintiff in their case in chief also called Tillie Yu, a representative of the Lince Group. Ms. Yu testified that prior to the plaintiff's fall on June 22, 2019, she had never contacted the Township of Scotch Plains about the raised sidewalk in front the Lince Group property. 4T, Page 145, Line 24 to Page 146, Line 1.

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW FOR DIRECTED VERDICT PURSUANT TO NEW JERSEY COURT RULE 4:40-1

In the instant matter, Judge Hudak initially reserved on the Defendant/Respondent, Township of Scotch Plains' motion for a directed verdict at the close of the plaintiff's case. Once the verdict was announced, the Court requested counsel for Defendant/Respondent Scotch Plains to file a legal brief in support of its original application for a directed verdict and for the other parties to respond accordingly.

On February 16, 2024, Judge Hudak heard oral argument on Defendant/Respondent Scotch Plains' motion for a directed verdict. At the conclusion of oral argument, the Court granted the motion for a directed verdict. In particular, Judge Hudak found that neither the plaintiff nor Defendant Lince Group had established any actual and/or constructive notice of the raised sidewalk in front of the property owned by Defendant Lince Group against Defendant/Respondent Scotch Plains. The Court further found the actions of Defendant/Respondent Scotch Plains with regard to maintaining the sidewalks in the Township of Scotch Plains not to be palpably unreasonable.

Rule 4:40-1 provides for the following:

> A motion for judgment, stating specifically the grounds therefore, may be made by a party either at the close of all the evidence or at the close of the evidence offered by an opponent. If the motion is made prior to the close of all the evidence and is denied, the moving party may then offer evidence without having reserving the right to do so. A motion for judgment which is denied is not a waiver of a trial by jury if all parties to the action have so moved.

In Frugis v. Bracigliano, 177 N.J. 250 (2003), the New Jersey Supreme Court was called upon to interpret Rule 4:40-1, which dealt with claims of negligent supervision and civil rights claims against the Elmwood Park Board of Education and Bracigliano. In particular, "[b]efore closing arguments, the trial court directed a liability verdict for the plaintiffs on their negligence and negligent supervision claims against the board and on their negligence, intentional tort and 42 U.S.C.A. Section 1983 claims against Bracigliano." Id. at 267. In analyzing the rule, the court acknowledged the following standard:

> In determining whether a directed verdict was properly granted under Rule 4:40-1, we apply the same standard that governs the trial courts. Luczak v. Township of Evesham, 311 N.J. Super. 103, 108 (App. Div.) certif. denied 156 N.J. 407 (1998). As a summary judgment motion, we must determine "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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 250, 563 (1995) (Internal quotation marks and citations omitted). If, given the board the benefit of the most favorable evidence and inferences to be drawn from that evidence, "reasonable minds could differ" as the outcome, the contested issues must be submitted to a jury. Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969). However, if the evidence of uncontradicted

> testimony is "so plain and complete that disbelief of the story could not reasonably arise in the rational process of ordinary intelligent mind, then a question has been presented to the court to decide and not the jury." Ferdinand v. Agric. Ins. Co., 22 N.J. 482, 494 (1956). Supra. at 269-270.

In applying the aforementioned undisputed facts to the aforementioned standard, there is no doubt whatsoever that there was no notice of the raised sidewalk in front of the commercial premises owned by Defendant Lince Group on behalf of Defendant/Respondent Scotch Plains, and that the actions of Scotch Plains were not palpably unreasonable as found by Judge Hudak. Accordingly, there are no questions of fact concerning these two issues to have denied the motion.

POINT II

THE TRIAL COURT PROPERLY GRANTED THE DIRECTED VERDICT FOR DEFENDANT/RESPONDENT TOWNSHIP OF SCOTCH PLAINS AS THE RECORD BELOW FAILED TO ESTABLISH NOTICE OF THE DANGEROUS CONDITION AND FAILED TO SUBSTATIATE THAT DEFENDANT/RESPONDENT SCOTCH PLAINS' ACTIONS REGARDING MAINTENANCE OF THE COMMERCIAL SIDEWALK WAS PALPABLY UNREASONABLE.

On February 16, 2024, the Honorable John Hudak, J.S.C. granted Defendant/Respondent Township of Scotch Plains' directed verdict pursuant to Rule 4:40-1 because the Court found that the testimony of any of the witnesses at the time of trial had failed to establish that Defendant/Respondent Township of Scotch Plains had notice of the raised lip in front of the commercial property owned by Defendant/Appellant Lince Group, LLC, nor was there any testimony by any witness that Defendant/Respondent Township of Scotch Plains' maintenance of the commercial sidewalk was palpably unreasonable. 8T Page 13, Line 23 to Page 23, Line 22. In support of Judge Hudak's ruling, we have reviewed and analyzed the testimony of the plaintiff, Ellen English, Frank DiNizo, Director of Public Works for the Township of Scotch Plains, Tillie Yu on behalf of the Lince Group and James Kennedy, P.E., the plaintiff's liability expert, all who testified in the plaintiff's case in chief. The testimony of these four witnesses unequivocally supports Judge Hudak's decision.

Constructive/Actual Notice - N.J.S.A. 59:4-2

In order for a plaintiff to make a recovery for injuries against the public entity, the plaintiff must satisfy the requirements of N.J.S.A. 59:4-2. Said statute provides for the following:

> A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> a. A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> b. A public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.
>
> Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.

It is well established in the law public entities are "immune from tort liability unless there is a specific statutory provision imposing liability." Kahrar v. Borough of Wallington, 171 N.J. 3. 10 (2002). "Under the TCA immunity for tort liability is the rule and liability is the exception." Posey v. Bordentown Sewage Authority, 171 N.J. 172, 181 (2002). Accordingly, "a public entity is immune from tort

liability unless there is a specific statutory provision that makes it answerable for a negligent act or omission." Polzo v. County of Essex, 209 N.J. 51, 65 (2012).

The aforementioned provision of the statute has been interpreted by our courts in numerous decisions over the years. In general, our courts have held that notice can be established by either proof of actual notice or constructive notice. Polzo v. County of Essex, 209 N.J. 51, 52 (2012). Constructive notice of a dangerous condition by a public entity under N.J.S.A. 59:4-2 occurs "only if the plaintiff establishes that the condition existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." N.J.S.A. 59:4-3(b). More importantly, the mere existence of an alleged dangerous condition is not constructive notice of it." Simms v. City of Newark, 244 N.J. Super. 32, 42 (Law Div. 1990). *See also*, Arroyo v. Darlington Realty, LLC, 433 N.J. Super. 238, 243 (App. Div. 2013).

It is respectfully submitted that a review of the record below fails to establish that Scotch Plains had either actual or constructive notice. First, Plaintiff, Ellen English, while acknowledging the existence of the raised lip in front of the property owned by Defendant/Appellant, Lince Group prior to her fall, she never contacted anyone at the Township of Scotch Plains prior to her fall to make them aware of the alleged condition. 5T Page 163, Line 5 to Page 164, Line 3 and 5T

Page 165, Line 16-18. Frank DiNizo, Director of Public Works for Defendant Township of Scotch Plains, testified that prior to June 22, 2019, the Township of Scotch Plains had not received any notice whatsoever of the raised sidewalk in front of the Lince Group property. 4T Page 66, Line 15 through Page 67, Line 2. The plaintiff's liability expert, James Kennedy, P.E., testified that he was not aware of any notice whatsoever, constructive or actual, that Defendant/Respondent Township of Scotch Plains had been made aware of the raised sidewalk in front of the property owned by Defendant/Appellant Lince Group which caused the plaintiff to fall. 4T Page 220, Line 6-10. Finally, Tillie Yu, representative of Lince Group, testified that she never advised the Township of Scotch Plains of the raised sidewalk in front of the property owned by Defendant/Appellant Lince Group prior to the plaintiff's fall. 4T Page 145, Line 24 to Page 146, Line 12.

Palpably Unreasonable - N.J.S.A. 59:4-2

Assuming arguendo that there was some scintilla of evidence of notice, Defendant/Respondent Township of Scotch Plains respectfully submits that their policy concerning the sidewalk maintenance was not palpably unreasonable. Palpably unreasonableness implies "behavior that is patently unacceptable under any given circumstance." Polzo, 209 N.J. Super. at 75. "When a public entity acts in a palpably unreasonable manner, it is obvious that no prudent person would approve of it s course of action or inaction." Id. at 76. Palpably unreasonable

conduct "implies a more obvious and manifest breach of duty of a negligence and poses a more owner's burden on the plaintiff." Wilson v. Phillipsburg, 171 N.J. Super. 278, 286 (App. Div. 1979). While a public entity's behavior concerning being palpably unreasonable is generally considered a jury question, a determination of palpably unreasonableness, like any other fact question before a jury, is subject to the court's assessment whether it can be reasonable be made under the evidence presented. Maslo v. Jersey City, 346 N.J. Super. 346, 351 (App. Div. 2002). As a matter of law, "the question of palpably unreasonableness may be decided by the court as a matter of law in appropriate cases." Maslo 346 N.J. Super. at 350.

A review of Judge Hudak's decision reveals that he concluded that there was no evidence whatsoever to establish that the conduct of Defendant/Respondent Township of Scotch Plains was palpably unreasonable. According to Frank DiNizo, the Township of Scotch Plains had a reactive and not proactive inspection process with regard to residential and commercial sidewalks. Mr. DiNizo further testified that once he had received notice of such a condition, it would be determined whether it was a residential or commercial property and take the appropriate action. If it was a commercial property, the commercial property owner would be put on notice to correct the condition as they were responsible for maintaining said sidewalk. 8T Page 13, Line 23 through Page 23, Line 22. More

importantly, the plaintiff's own liability expert, James Kennedy, P.E., was questioned concerning Scotch Plains' inspection procedure with regard to commercial sidewalks. Mr. Kennedy testified that based upon his educational background and working for multiple municipalities, that the procedure was acceptable. 4T Page 220, Line 14 through Page 221, Line 21. It is respectfully submitted that because municipalities are given broad immunities and protections set forth in Title 59, and because there is no evidence challenging Defendant/Respondent Township of Scotch Plains' policy/procedures with regard to maintaining sidewalks, Judge Hudak's ruling is appropriate as a matter of law.

CONCLUSION

Based on the above, it is respectfully submitted that the ruling of the Honorable Judge Hudak for a directed verdict for Defendant/Respondent, Township of Scotch Plains was correct and Plaintiff/Appellant and Defendant/Appellant, Lince Group's appeals should be denied.

Respectfully submitted,

Richard J. Guss

Dated: January 6, 2025

ELLEN ENGLISH AND HER HUSBAND, KEITH ENGLISH

Plaintiffs

v.

LINCE GROUP, LLC, PAT'S AMERICAN BUTCHER SHOP, LLC, AMERICAN BUTCHER, FRANK'S MEAT MARKET, SALON DESANDO, TOWNSHIP OF SCOTCH PLAINS, JOHN DOES 1-10 & ABC CORPORATIONS 1-10

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.: A-002344-23 T1

Civil Action

ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT, LAW DIVISION, UNION COUNTY

DATED: APRIL 15, 2024

SAT BELOW

HONORABLE JOHN HUDAK, J.S.C.

REPLY BRIEF ON BEHALF OF DEFENDANT/APPELLANT, LINCE GROUP IN SUPPORT OF APPEAL

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LINCE GROUP, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

LEGAL ARGUMENT

POINT I

THE SUPREME COURT'S HOLDING IN STEWART WAS LIMITED TO SIDEWALKS IN FRONT OF A COMMERCIAL PROPERTY

(Raised Below: 1T4:2-1T26:9 and 3T60:2-3T74:19).

A. Plaintiff's Fall Location Was Not In Front Of Lince's Commercial Building.

A review of the opposition briefs filed by plaintiff, Ellen English and co-defendant, Scotch Plains do not dispute that Lince's northern property line ran along the building's left exterior wall. It was also not disputed that Tarquins Alley, the driveway/entrance to municipal parking lot #5, was owned by Scotch Plains and adjacent to Lince's commercial building. (4T90:1-3, Da 244). The Lince property was not a "corner" property, and there was no sidewalk located along the northern/left side of the building. In fact, Scotch Plains defines a sidewalk as "any portion of a street **between the curbline and the adjacent property line**, intended for the use of pedestrians, excluding parkways." [1] Tarquins Alley was not a street, had no curbline or sidewalk and was not designated for use by pedestrians.

Plaintiff's attempt to create a factual basis to support and expand sidewalk liability as to Lince fails and should be rejected by this appellate panel since plaintiff

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[1] Township of Scotch Plains, NJ – Chapter 1. General § 1-2. Definitions. – Sidewalk
Shall mean any portion of a street between the curbline and the adjacent property line, intended for the use of pedestrians, excluding parkways.

fell in front of the municipal driveway and was approximately four (4) feet past Lince's northern property line. (Da 334-36). Simply put, plaintiff did not trip in front of Lince's commercial building. (Da 331 and Da 333).

B. Lince Did Not Owe A Duty to Plaintiff.

As previously stated, questions relating to sidewalk liability have had one goal in mind: fairness. Padilla v. Young IL An, 257 N.J. 540, 542 (2024). "Determining the scope of tort liability has traditionally been the responsibility of the courts." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993).

The Supreme Court's decision in Stewart v. 104 Wallace Street, 87 N.J. 146 (1981), required a commercial building owner to be responsible for maintaining, in reasonably good condition, sidewalks "abutting" and in front of their property and were liable to pedestrians injured as a result of their negligent failure to do so.

The holding in Stewart, was clear and unequivocal that an abutting sidewalk was defined as being **in front of the commercial building**. The Court never stated, suggested or inferred that a commercial property owner was responsible for the part of a sidewalk that was **not in front of the commercial building**.

> We hold today that **commercial landowners are responsible for maintaining in reasonably good condition the sidewalks abutting their property** and are liable to pedestrians injured as a result of their negligent failure to do so. Although we recognize that the "no liability" rule remains the law in the majority of jurisdictions, see Annot., Liability of abutting owner or occupant for condition of

> sidewalk, 88 A.L.R.2d 331 (1963), **we prefer to apply the rule of our neighboring state to cases involving commercial property. In Pennsylvania, the rule has long been that it "is the primary duty of property owners along a street to keep in proper repair the sidewalk in front of their respective properties."** Mintzer v. Hogg, 192 Pa. 137, 144, 43 A. 465, 466 (1899); accord, Nash v. Atlantic White Tower System, Inc., 404 Pa. 83, 170 A.2d 341 (1961); Breskin v. 535 Fifth Ave., 381 Pa. 461, 113 A.2d 316 (1955); Green v. Borough of Freeport, 218 Pa. Super. 334, 280 A.2d 412 (1971); see generally Annot., supra, 88 A.L.R.2d at 348-52.
> Id. at 157.

There was no ambiguity, "abutting sidewalk," meant **in front of a commercial building** and not adjacent or next to the left or right. The Court stated: **"The rule we adopt today rationalizes our law by enabling an injured person to recover damages for injuries sustained on the sidewalk in front of a store as well as those sustained in the store."** Id. at 160.

Plaintiff's citation to Dupree v. City of Clifton, 351 N.J. Super. 237, 246 (App. Div.), *aff'd* 175 N.J. 449 (2002), that the duty to maintain a public sidewalks extends to the entire sidewalk abutting the commercial property is not the law. The appellate court's decision in Dupree was focused on the use of a property, and specifically, whether a non-profit corporation/church who also used the premises for commercial purposes was required to maintain the sidewalk abutting/in front of their property.

The court concluded that the trial judge properly found that the church was not a commercial landowner because the church did not use its property, in whole or in part, for commercial purposes. Id. However, the court was clear that for there to be liability the location of the plaintiff's fall incident must be: "**in front of the church or its commercial building ... .**" Id. This language is consistent with Stewart that a pedestrian's fall must have occurred on a sidewalk in front of a commercial building for property owner to be liable.

Plaintiff next relies on Bedell v. St. Joseph's Carpenter, 367 N.J. Super. 515, 525 (App. Div. 2004). Here again, the plaintiff in Bedell **fell in front of the commercial building.** Plaintiff had crossed a 50-foot wide street to make a delivery. When he reached the opposite side of the street, he mounted the curb and walked along it for a few steps before turning left to cross the grassy strip separating the curb and sidewalk approximately 15 feet in front of the defendant's building. Id. at 518. Although the court's decision confirmed that a commercial property owner was responsible for the grassy strip **in front of** their property, it was clear in stating that:

> **the grassy strip in front of defendant's property** runs uninterrupted and parallel to the sidewalk, separating it from the curb. Those visitors dropped off curbside have no choice but to traverse the grassy strip to reach the sidewalk and ultimately the adjoining buildings. For those exiting a car parked on the opposite side of the street, while it is conceivable, as the trial court suggests, that they may walk the length of the block to the corner, cross the street, and walk back down the sidewalk to their destination, it is also reasonably foreseeable that they would instead cross

> the street conveniently and directly from where they park their car, necessitating crossing the grassy strip to reach the sidewalk on the other side.
> Id. at 523-24.

Both of the decisions confirm without question, that a plaintiff's fall incident must **be in front of the commercial property and with their property lines**. This appellate panel should recognize that plaintiff failed to identify any decision concerning sidewalk liability that made a commercial property owner responsible for a fall in front of a neighboring/adjacent property.

C. Plaintiff's Liability Expert Cannot Expand the Holding in Stewart.

Plaintiff's reference and citation to the trial testimony of her liability expert, James Kennedy, P. E. is also misplaced and does not expand the Supreme Court's holding in Stewart. The issue on appeal (whether a commercial owner is liable for a pedestrian fall that occurs next to and not in front of their property) is a question of law for the court and not a liability expert.

In Ptaszynski v Atlantic Health Systems, Inc., 440 N.J. Super. 24, 37 (App. Div. 2015), the appellate court discussed and made clear that expert opinion testimony on matters of domestic law are not admissible. State v. Grimes, 235 N. J. Super. 75, 80 (App. Div.), certif. denied, 118 N.J. 222 (1989). The trial judge has the exclusive responsibility to instruct the jury on the law to be applied to avoid the "danger ... that the jury may think that the 'expert' in the particular branch of the law

knows more than the judge[.]" Ibid. (quoting Marx & Co. v. Diners' Club, Inc., 550 F.2d 505, 512 (2d Cir.), *cert. denied* 434 U.S. 861 (1977)).

The fact that a portion (13 inches) of the sidewalk (not where the plaintiff fell) was in front of Lince's building is irrelevant. Plaintiff fell on the sidewalk's lip/edge 49.5 inches from Lince's property line and in front of Tarquins Alley, which is owned and controlled by Scotch Plains. See Qian v. Toll Bros. Inc., 223 N.J. 124, 138 (2015) (critical factor in determining whether a sidewalk is "public" is whether "the municipality ha[s] sufficient control over or responsibility for the maintenance and repair of the sidewalk."). **There is nothing in the record to suggest that Lince ever controlled the sidewalk in front of Tarquins Alley or that Scotch Plains ever directed Lince to inspect or maintain the sidewalk.**

Finally, Scotch Plains' in their appellate brief does not deny they were under a duty to maintain the sidewalk in front of Tarquins Alley pursuant to Stewart and the municipal ordinance (Da 251), but argue only that they were "properly granted a directed verdict" pursuant to the tort claims act and specifically, a lack of notice of the raised sidewalk lip in front of Tarquins Alley and that their maintenance of the commercial sidewalk was not palpably unreasonable. As such, Scotch Plains acknowledged they had a duty to inspect, maintain and repair the sidewalk in front of Tarquins Alley. Most significantly, neither plaintiff or Scotch Plains has cited to any municipal ordinance, state statute or case law, which expanded the holding in

Stewart, to state that two separate and unrelated entities can be liable for a pedestrian's fall incident that occurred on a sidewalk in front of a property that was not jointly owned.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decisions of the motion and trial judges were incorrect and an expansion of the Supreme Court's holding in Stewart and the law relating to sidewalk liability for a commercial property and this appellate court should vacate the judgment against the defendant/appellant, Lince Group.

This appellate court should find that not only do the individual errors committed by the motion and trial judges require that the judgment against Lince Group be vacated but also that the cumulative errors by the trial court mandate reversal of the trial court's decisions as they constituted harmful error and as such require that the judgment against Lince Group be vacated and plaintiff's Complaint be dismissed with prejudice.

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Dated: January 16, 2025

By: Robert T. Gunning
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ELLEN ENGLISH AND HER HUSBAND, KEITH ENGLISH, Plaintiffs/Respondents/Cross-Appellants, vs. LINCE GROUP LLC, Defendant/Appellant, and TOWNSHIP OF SCOTCH PLAINS, Defendant/Respondent, and PAT'S AMERICAN BUTCHER SHOP LLC, PAT'S ALL AMERICAN BUTCHER, FRANK'S MEAT MARKET, SALON DESANDO, LLC, JOHN DOES 1-10 & ABC CORPORATIONS 1-10, Defendants.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002344-23-T1 **Civil Action** ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, UNION COUNTY, DOCKET NO. UNN-L-219-20 SAT BELOW: HONORABLE DANIEL R. LINDEMANN and HONORABLE JOHN G. HUDAK, J.S.C. **AMENDED REPLY BRIEF FILED ON BEHALF OF PLAINTIFF/RESPONDENT/CROSS-APPELLANT** On the Brief: Patrick J. Flinn, Esq.

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

TABLE OF CITATIONS

Case Law

Model Jury Charges

Statutes

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Ellen English (hereinafter "the plaintiff") shall rely upon the procedural history and statement of facts set forth in her initial brief.[1] The Township of Scotch Plains is hereinafter referred to as "defendant Scotch Plains" and Lince Group, LLC is hereinafter referred to as "defendant Lince Group" as they were in the plaintiff's initial brief.

[1] Transcript and Appendix Reference Key
Pa – Plaintiff/Respondent/Cross-Appellant's Appendix
Da – Defendant/Appellant's Appendix
1T – Transcript of the January 8, 2024 Motion Hearing
2T – Transcript of the January 29, 2024 Trial Date
3T – Transcript of the January 30, 2024 Trial Date
4T – Transcript of the January 31, 2024 Trial Date
5T – Transcript of the February 1, 2024 Trial Date
6T – Transcript of the February 5, 2024 Trial Date
7T – Transcript of the February 6, 2024 Trial Date
8T – Transcript of the February 16, 2024 Motion Hearing

LEGAL ARGUMENT

THE ORDER GRANTING DEFENDANT SCOTCH PLAINS' MOTION FOR A DIRECTED VERDICT SHOULD BE REVERSED BECAUSE THE INFERENCES OF FACT WEIGHED IN THE PLAINTIFF'S FAVOR ESTABLISH LIABILITY FOR A DANGEROUS CONDITION OF PUBLIC PROPERTY UNDER THE TORT CLAIMS ACT (Da221; 8T15:25-23:16).

The plaintiff was jogging on the public sidewalk along the East Second Street right of way in the Township of Scotch Plains on Saturday June 22, 2019. (5T112:24-113:3; 5T114:10-115:14). Her path of travel took her across the intersection of East Second Street and the Tarquins Alley right of way. (5T113:23-115:14; Da244). The property located at the corner of East Second Street and Tarquins Alley is a multi-tenant commercial property owned by defendant Lince Group. (4T74:15-17; 4T81:19-82:2; 4T188:8-18; 4T192:2-7; 4T203:4-11). A section of the public sidewalk that abutted the commercial property was elevated between one and three-eighths inches to one and five-eighths inches where it adjoined the Tarquins Alley right of way. (4T182:15-183:9; 5T112:24-113:3; 5T114:10-115:14; Pa106; Pa113). There was no dispute that this abrupt surface projection along the public sidewalk was a tripping hazard that should be repaired. (4T34:23-35:17; 4T35:18-36:1; 4T95:9-20; 4T179:12-25; 4T183:10-14). The plaintiff's right foot caught on the raised edge of the section of sidewalk causing her to fall to the ground and fracture her right

wrist resulting in permanent injuries to her right wrist, right shoulder, and left thumb. (5T66:14-67:5-11; 5T114:10-115:14).

Defendant Scotch Plains initially sought dismissal of the Complaint by way of a motion for summary judgment in which it argued that the plaintiff could not establish that it was liable for a dangerous condition of public property under *N.J.S.A.* 59:4-2 as a matter of law. (Da32-Da36). The motion was denied. (Da28). The matter proceeded to trial at which time defendant Scotch Plains again sought dismissal of the Complaint as a matter of law by making an application for a directed verdict. (6T5:10-10:21). The Trial Court reserved ruling on the application and submitted the issue of defendant Scotch Plains' liability to the jury. (6T17:10-12). In doing so, the Trial Court instructed the jury on the requirements for imposing liability on defendant Scotch Plains for a dangerous condition of public property under the Tort Claims Act. (6T120:8-124:25). This included explanations as to the issues of notice and the palpably unreasonable standard. (6T122:21-124:11). The jury was specifically instructed:

> The fourth element is you must also – also find that the public entity had either -- had actual or constructed notice of the dangerous condition, and that it had noticed in sufficient time prior to the injury to have corrected the condition. A public entity is considered to have actual notice of the dangerous condition if it had actual knowledge of the existence of the condition, and knew or should have known of its dangerous character. Thus, if you find an employee of the public entity actually saw the condition and should

> have reasonably discovered its dangerous character, then the public entity had actual notice of the condition.
>
> The public entity is considered to have constructive notice if the condition existed for such a long period of time and was so obvious in nature that the public entity, exercising due care, should have discovered the dangerous condition and its dangerous character. In addition, if you find that due to the length of time the dangerous condition was there and the obviousness of the condition, an employee performing his or her job with reasonable care should have discovered the dangerous condition and its dangerous character, then the public entity is assumed to have had constructive knowledge of the condition.
>
> The fifth element is that any measures taken by the public safety or its failure to take any measures to address the dangerous condition were palpably unreasonable. That is, the plaintiff must prove that the actions taken by the public entity or the lack of actions to respond to the dangerous condition by either correcting, repairing, remediating, safeguarding, or warning of -- was palpably unreasonable.
>
> Mere carelessness or thoughtfulness -- thoughtlessness or forgetfulness or inefficiency is not enough. The action of the public entity must be more than that. To be palpably unreasonable, the action or inaction must be plainly and obviously without reason or reasonable basis. It must be capricious, arbitrary, or outrageous. (6T122:21-124:11).

There is no contention that the jury instruction did not properly explain the standard for holding a public entity liable for a dangerous condition of public property. Furthermore, it must be assumed that the jury followed this clear instruction when it reviewed the evidence and testimony presented at trial and unanimously found that the plaintiff and/or defendant Lince Group established all statutory requirements as to the negligence of defendant Scotch Plains which

was a proximate cause of the accident and apportioned thirty percent of liability to defendant Scotch Plains. *State v. Marini*, 187 N.J. 469, 477 (2006).

Although the jury unanimously found that the plaintiff and/or defendant Lince Group established all statutory requirements as to the negligence of defendant Scotch Plains which was a proximate cause of the accident, the Trial Court granted defendant Scotch Plains' application for a directed verdict on the grounds that there was no evidence presented at trial supporting a finding that defendant Scotch Plains was palpably unreasonable or had constructive notice of the condition under the Tort Claims Act. (8T15:23-22:15; Da221). A motion for a directed verdict may granted "only if, accepting the non-moving party's facts and considering the applicable law, no rational jury could have drawn from the evidence presented that the non-moving party is entitled to relief." *Carbajal v. Patel*, 468 N.J. Super. 139, 158 (App. Div. 2021). Here, the evidence and testimony presented at trial together with all legitimate inferences being considered in the plaintiff's favor supported a finding that defendant Scotch Plains was liable for a dangerous condition of public property under *N.J.S.A.* 59:4-2. Accordingly, the plaintiff respectfully submits that the Trial Court erred in disregarding the jury verdict and granting defendant Scotch Plains' motion for a directed verdict.

In its opposition, defendant Scotch Plains does not dispute that the evidence and testimony presented at trial would enable a jury to conclude that the abrupt change in elevation between the concrete slab of public sidewalk that abutted defendant Lince Group's commercial property and the Tarquins Alley right of way was a dangerous condition of public property. It only argues that the evidence and testimony presented at trial was insufficient for establishing that it had notice of the dangerous condition and that its failure to protect against the dangerous condition was palpably unreasonable. The plaintiff respectfully disagrees and submits that the Order granting the application for a directed verdict made on behalf of defendant Scotch Plains and respectfully submits that the Order should be reversed.

In arguing that the evidence and testimony at trial did not create a question of fact for the jury to resolve on the issue of notice, defendant Scotch Plains focuses on it allegedly not having actual knowledge of the dangerous condition of the public sidewalk. However, the plaintiff was not required to establish that it had actual notice of the dangerous condition in order to hold it liable under *N.J.S.A.* 59:4-2. A public entity may be held liable for a dangerous condition of public property when it had "actual **or** constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." *N.J.S.A.* 59:4-

2(b)(emphasis added). A public entity is deemed to have constructive notice of a dangerous condition when "the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." *N.J.S.A.* 59:4-3(b). Furthermore, this may be established by circumstantial evidence. *Troupe v. Burlington Coat Factory Warehouse Corp.*, 443 N.J. Super. 596, 602 (App. Div. 2016).

The circumstantial proofs presented at trial created, at the very least, a question of fact for the jury to resolve as to whether defendant Scotch Plains had constructive notice of the dangerous condition that caused the plaintiff to trip and fall. The dangerous condition in this matter was an abrupt seventeen inch wide change in elevation between two slabs of the public sidewalk that abutted defendant Lince Group's commercial property near the Tarquins Alley right of way that measured between one and three-eighths inches to one and five-eighths inches. (4T182:15-183:9; Pa106; Pa113). The Director of Public Property for defendant Scotch Plains was able to identify the abrupt surface projection along the pedestrian pathway as a tripping hazard that should be repaired simply by looking at a photograph of the area. (4T34:23-36:1). This obvious tripping hazard had been in the same condition for at least three years prior to the plaintiff's fall. (4T92:8-13; 4T94:2-20). The testimony further established that

defendant Scotch Plains maintained the Tarquins Alley that directly adjoins the elevated section of the public sidewalk. (4T32:25-33:1; Pa106). Therefore, defendant Scotch Plains' employees had years to discover the dangerous condition during while they were performing their work in maintaining Tarquins Alley. (4T32:21-33:1). A jury could and did find that the tripping hazard was of such an obvious nature and existed for such a period of time that defendant Scotch Plains' employees, in the exercise of due care, should have discovered the change in elevation and its dangerous character. Accordingly, the plaintiff respectfully submits that the Order granting defendant Scotch Plains' motion for a directed verdict should be reversed. *Lodato v. Evesham Twp.*, 388 N.J. Super. 501, 511-512 (App. Div. 2006).

Defendant Scotch Plains also argues that there was no testimony presented at trial that would have allowed a jury to find that its failure to protect against the dangerous condition was palpably unreasonable. Although palpably unreasonable misconduct differs in degree from ordinary negligent, it does not mean conduct that is grossly or extraordinarily negligent. *Schwartz v. Jordan*, 337 N.J. Super. 550, 555 (App. Div. 2001), *certif. denied*, 168 N.J. 293 (2001). An action or inaction is palpably unreasonable when it is plainly and obviously without reason or a reasonable basis. *M.J.C.* 5.20A(5). The inquiry is whether no reasonable person could approve of the public entity's action or inaction.

Schwartz, 337 N.J. Super. at 555. "Whether or not conduct is palpably unreasonable is a jury determination." *Estate of Gonzalez v. City of Jersey City*, 247 N.J. 551, 576 (2021).

The facts weighed in the plaintiff's favor establish that there was a dangerous condition created by the abrupt change in elevation caused by a raised section of public sidewalk that adjoined the Tarquins Alley right of way. (4T179:12-25; 4T183:10-14; 4T197:14-17). Although the dangerous condition existed for at least three years, there was no evidence or testimony presented at trial indicating that defendant Scotch Plains undertook any action to protect against the admitted tripping hazard. (4T34:23-35:17; 4T92:8-13; 4T94:2-20). Defendant Scotch Plains argues that no rational factfinder could find that its failure to do anything to protect against the dangerous condition was palpably unreasonable because it adopted an ordinance that required the abutting landowner, defendant Lince Group, to maintain and repair the sidewalk and it took a reactive approach to responding to a conditions that created a substantial risk of injury on a public sidewalk that adjoined another public right of way. Defendant Scotch Plains has not cited any legal authority establishing that this alone establishes that all reasonable persons would approve of its inactions.

While defendant Scotch Plains cites *Maslo v. City of Jersey City*, 346 N.J. Super. 346 (App. Div. 2002) that found that the plaintiff had not established that

the city's failure to protect against a dangerous condition of a public sidewalk was not palpably unreasonable as a matter of law, the facts underlying that ruling differ from the case at bar. In *Maslo*, the city not only adopted an ordinance imposing responsibility for the maintenance of public sidewalks on abutting landowners, it also established an agency that was dedicated to monitor compliance with the ordinance. *Maslo*, 346 N.J. Super. at 350. Therefore, the city was active in its protection of dangerous conditions on public sidewalks by taking affirmative steps to ensure that property owners repaired dangerous conditions on the public sidewalks abutting their property. *Id.* Defendant Scotch Plains undertook no such action and simply sat by and allowed a dangerous condition to exist for years. A further difference is that there is no indication in *Maslo* that the dangerous condition of the public sidewalk in that matter adjoined another public right of way that it maintained. It is, therefore, respectfully submitted that the ruling in *Maslo* does not compel entry of judgment in favor of defendant Scotch Plains as a matter of law in this action, particularly where a jury unanimously found that its inaction was palpably unreasonable. "Cases state principles but decide facts, and it is only the decision on the facts that is a binding precedent." *DeBonis v. Orange Quarry Co.*, 233 N.J. Super. 156, 168 (App. Div. 1989).

Defendant Scotch Plains also argues that the testimony of the plaintiff's liability expert, James Kennedy, P.E., required a finding that its failure to protect against the dangerous condition of the public sidewalk abutting defendant Lance Group's commercial property was not palpably unreasonable. It contends that Mr. Kennedy agreed that its alleged policy of not taking any active steps to protect against dangerous conditions of public sidewalks was acceptable. However, the testimony defendant Scotch Plains cites in support of this contention, 4T220:14-221:21, does not actually support the contention. When asked if he found defendant Scotch Plains' alleged policy to be reasonable, Mr. Kennedy responded that it was not for him to agree or disagree with the policy and he did not have an opinion on the issue. (4T220:14-221:21). He further testified that defendant Scotch Plains could have fixed the dangerous condition of the public sidewalk. (4T210:24-211:7).

Even if Mr. Kennedy had opined that he believed that the decision to not take any affirmative steps to ensure that dangerous conditions of the public sidewalks were repaired or protected against, that would not compel a jury to find in the favor of defendant Scotch Plains on the issue of whether its inactions were palpably unreasonable. "A jury has no duty to give controlling effect to any or all of the testimony provided by the parties' experts, even in the absence of evidence to the contrary." *Amaru v. Stratton*, 209 N.J. Super. 1, 20 (App. Div.

1985). They may accept all of the opinions of the experts, a portion of their opinions, or none of their opinions. *State v. Spann*, 236 N.J. Super. 13, 21 (App. Div. 1989).

As stated above, there is no dispute that the nonplanar condition between the raised section of the public sidewalk that abutted defendant Lince Group's commercial property and the surface of the Tarquins Alley right of way is a dangerous condition of public property. The fact that defendant Lince Group was required to repair the raised sidewalk slab that abutted its property under the common law and the ordinance of Scotch Plains, *Stewart v. 104 Wallace St., Inc.* 87 N.J. 146, 157 (1981); see also; 4T67:9-11; see also; 4T191:7-192:1; does not mean that a jury could not find that no reasonable person could approve of the public entity's action or inaction. The substantial risk of injury created by the abrupt change in elevation along the public sidewalk could have been easily protected against through minimal effort by defendant Scotch Plains.

A simple inspection of the sidewalk when defendant Scotch Plains employees were maintaining Tarquins Alley would have revealed the dangerous condition and the repairs of either Tarquins Alley or the sidewalk needed to be undertaken. (Pa106). If it believed that the abutting landowner was responsible for the repair of the dangerous condition under its ordinances, it could have then advised the abutting landowner of the tripping hazard and its obligation under the ordinances

to repair the hazard. This would not have cost defendant Scotch Plains anything but a little time. If the abutting landowner did not make the repair in a timely fashion, defendant Scotch Plains could have made the repair itself and charged the abutting landowner for the costs of the repair. *N.J.S.A.* 40:65-14. At the very least, defendant Scotch Plains could have simply highlighted the tripping hazard by painting it with warning paint to alert the general public using the sidewalk of the unsafe condition or blocking off the area with a barrel. (4T195:8-196:22; 4T65:9-12; 4T67:25-68:15).

Any of these measures would have been simple, inexpensive, and would have been an effective means to protect against the dangerous condition in the public right of way. A jury could and did find that no prudent person would approve of the complete failure to take any of these simple steps to avoid the risk of injury created by the dangerous condition. The Appellate Division has recognized that a public entity's failure to address a dangerous condition through the use of modest and inexpensive remedial efforts supports a finding that the actions or inactions of the public entity were palpably unreasonable. *Roe by M.J. v. New Jersey Transit Rail Operations, Inc.*, 317 N.J. Super. 72, 82 (App. Div. 1998), *certif. denied*, 160 N.J. 89 (1999). Accordingly, the plaintiff respectfully submits that the Order granting defendant Scotch Plains' motion for a directed verdict should be reversed and the jury verdict reinstated.

CONCLUSION

Based upon the foregoing, the plaintiff respectfully requests that the Order granting defendant Scotch Plains' motion for a directed verdict be reversed such that this matter is remanded for the entry of judgment consistent with the jury's verdict together with pre and post-judgment interest.

Respectfully submitted,

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Attorneys for Plaintiff-Appellant

s/Patrick J. Flinn, Esq.
_____
Patrick J. Flinn, Esq.

Dated: February 5, 2025