ARSENIO BAPTISTA,	: SUPERIOR COURT OF NEW JERSEY : APPELLATE DIVISION : DOCKET NO. A-002420-24
Plaintiff-Appellant,	:
	: : On Appeal from the Superior : Court of New Jersey
vs.	: Law Division: Union County : Docket No. UNN L 2233-23
	:
BOLLA EM REALTY LLC, RAZWAN AHMED, MOH INC., MOBIL-BOLLA OF 1440 ROUTE 23, PACKANACK MOBIL, BOLLA MANAGEMENT CORP., AND JOHN DOES 1-10,	: Sat Below: : Honorable Daniel : R. Lindemann, J.S.C.
	:
	:
Defendants-Respondents.	:
	:
	:

BRIEF OF PLAINTIFF/APPELLANT

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PROCEDURAL HISTORY

On the morning of January 5, 2022, plaintiff Arsenio Baptista parked his car next to a gas pump underneath the canopy at the Mobil Station at 1440 Route 23 in Wayne, New Jersey. [Pa149] He then decided to go into the gas station's minimart. He stepped out of his car, slipped and fell on untreated ice, and sustained injury. [Pa72]

Plaintiff filed his Complaint in the Union County Superior Court on July 12, 2023 against Bolla Em Realty LLC, Razwan Ahmed, MOH Inc., Mobil-Bolla of 1440 Route 23,Packanack Mobil and John Does 1-10, alleging that the premises at 1440 Route 23 in Wayne, New Jersey were owned, occupied, operated, maintained and or controlled by the defendants so as to cause a dangerous condition to exist thereon and that the defendants did otherwise engage in negligent and reckless conduct. Defendants Bolla Em Realty, LLC and Razwan Ahmed filed their Answer on August 30, 2023.

On May 2, 2024, Plaintiff filed a First Amended Complaint adding Bolla Management Corp. as an additional defendant. [Pa1] On May 6, 2024, an Answer was filed on behalf of Defendants Bolla Em Realty, LLC, Razwan Ahmed, and Bolla Management Corp. [Pa3]

On January 29, 2025, counsel for defendants Bolla Em Realty, LLC, Razwan Ahmed, and Bolla Management Corp. filed a motion for summary

judgment, relying on the ongoing storm rule adopted by the Supreme Court in Pareja v. Princeton International Properties, 246 N.J. 546 (2021). [Pa10] The trial judge heard argument on defendants' motion for summary judgment on February 28, 2025.[1] After oral argument summary judgment was granted on behalf of defendants Bolla Em Realty, LLC and Razwan Ahmed. [Pa20; 1T14] An Amended Order granting summary judgment to Bolla Em Realty, LLC, Razwan Ahmed, and Bolla Management Corp. was filed on April 10, 2025. [Pa22] Plaintiff filed a Notice of Appeal on April 11, 2025. [Pa24]

STATEMENT OF FACTS

On the morning of January 5, 2022, plaintiff Arsenio Baptista was driving from his home in Union, New Jersey to a job site on Hamburg Turnpike in Riverdale, New Jersey. [Pa73] He was employed as a foreman by Kemsco Construction Company, which performed roadway excavations for PSE&G. [Pa61] There was a storm that morning with rain, sleet, and freezing rain. [Pa74] Plaintiff's route included the Garden State Parkway, Route 46, and Route 23 North. These roads were all "heavily salted," and he was able to traverse them without incident. [Pa71]

At approximately 7:30 a.m., plaintiff Baptista stopped at the Mobil Station located at 1440 Route 23 in Wayne. [Pa71] He pulled his truck up next to Gas

[1] 1T = transcript of February 28, 2025

Pump #4 and parked under the gas station's canopy. [Pa146] The driver's side of his vehicle was adjacent to the gas pump. Plaintiff handed the attendant his credit card and asked him to fill up the gas tank. [Pa72] Plaintiff decided to get coffee from the station's minimart. [Pa72]

Plaintiff Baptista testified, "So, as I opened the door after giving the gas attendant the credit card to fill it up, I opened the door and took two steps going towards the front of the pickup. And I violently fell on the floor, pinning myself between the wheel and the guard, the posts that they have to protect the pumps. I collapsed on the floor underneath the canopy." Plaintiff testified, "As I was laying on my back…I looked over because I had a better angle kind of laying on my back. And I seen the sheet of ice across the whole premises, including where my pickup was, including the spot where I just fell." [Pa71-Pa73]

When asked why he didn't see the ice that he fell on, he testified, "It was black ice. I thought it was just dampness." [Pa121] Plaintiff testified, "The gas station attendant never told me be careful with your step, no advisory, nothing." [Pa72] He further testified that there was "No de-icer, no advisory, nothing on the premises." [Pa121]

The gas station attendant helped plaintiff Baptista get off the ground. [Pa72] After several minutes spent getting his bearings, plaintiff drove to the

worksite in Riverdale. He did not get coffee from the gas station's minimart. [Pa84-Pa85]

Later that morning, because he was still in a lot of pain, he decided to return to the gas station and contact the police to have the event documented. [Pa88] He called the Wayne Police Department, met with the police officer at the gas station, and took photos of the accident scene at that time. [Pa112] [Pa145]

Plaintiff has served an expert report of Cheryl Scanlon-Zinner, CSP. [Pa151] Regarding the area under the canopy where plaintiff fell, she writes, "This area meets the definition of a 'walking/working surface' as defined in [OSHA regulation] 29CFR1910.22. It is not a public walkway. In New Jersey, drivers cannot pump their own gas. This area is in fact a work area where employees pump gas. This area is not akin to a sidewalk or public walkway. It is essentially an employer work area." [Pa152]

She opines that the defendant violated the OSHA regulation, 29CFR1910.22, which holds:

> 29CFR1910.22. General Requirements.
> (a) Surface conditions.
> The employer must ensure: (1) (3) All places of employment, passageways, store rooms, service rooms and walking-working surfaces are kept in a clean, orderly and sanitary condition.
> Walking-working surfaces are maintained free of hazards such as sharp or protruding objects,

> loose boards, corrosion, leaks, spills, snow, and ice. [Pa153-155]

She also cites the National Safety Council's *Accident Prevention Manual for Businesses and Industry*. The manual states:

> **Walking surfaces**. Slips and falls are the most common type of customer injury. Although people can adjust their stride to walk across ice without falling, if they cannot see a wet spot on a floor, they may slip and fall … These injuries can occur almost anywhere at any time … The company should implement administrative controls to ensure that these hazards are quickly removed. [Pa153-155]

LEGAL ARGUMENT

POINT ONE

AS THE DEFENDANTS FAILED TO WARN PLAINTIFF OF A DANGEROUS CONDITION, SUMMARY JUDGMENT WAS INAPPROPRIATE. (Pa20-Pa23; 1T14)

As set forth in N.J. Model Civil Jury Charge 5.20F(12)(b), "The duty of an owner or occupier of premises is to provide a reasonably safe place for use by an invitee. Where the owner/occupier knows of an unsafe condition the owner/occupier may satisfy the duty by correcting the condition, or, in those circumstances where it is reasonable to do so, by giving warning to the invitee of the unsafe condition." In this matter, plaintiff Baptista testified that he was unaware of the icy conditions beneath the defendants' gas station canopy until after his fall, and that the defendants provided no warning of the hazardous

conditions. By failing to warn of the icy conditions, the defendants breached their duty to provide a reasonably safe premises for the plaintiff's use. Accordingly, plaintiff Baptista should be permitted to pursue his claim against the defendants and dismissal of plaintiff's Complaint was inappropriate.

Plaintiff testified that he pulled his truck up next to Gas Pump #4 on the defendants' premises and parked under the gas station's canopy. [Pa71] He handed the attendant his credit card and asked him to fill up the gas tank. [Pa72] Plaintiff Baptista then decided to get coffee from the station's minimart. [Pa148] He testified, "So, as I opened the door after giving the gas attendant the credit card to fill it up, I opened the door and took two steps going towards the front of the pickup. And I violently fell on the floor, pinning myself between the wheel and the guard, the posts that they have to protect the pumps. I collapsed on the floor underneath the canopy." [Pa71-Pa72]

Plaintiff testified, "As I was laying on my back…I looked over because I had a better angle kind of laying on my back. And I seen the sheet of ice across the whole premises, including where my pickup was, including the spot where I just fell." [Pa72] Plaintiff testified, "The gas station attendant never told me be careful with your step, no advisory, nothing." [Pa72] He further testified that there was, "No de-icer, no advisory, nothing on the premises." [Pa121] When

asked why he didn't see the ice that he fell on, he testified, "It was black ice. I thought it was just dampness." [Pa121]

Based on these facts, a factfinder could reasonably conclude that the defendants are liable for failing to warn of a dangerous condition. Their employee was standing at the location of the plaintiff's fall just seconds before the incident. Clearly, this employee had the opportunity to tell plaintiff Baptista to stay in his car or warn him of the icy conditions that led to plaintiff's accident seconds later. The defendants also had the opportunity to warn plaintiff of the icy conditions underneath the canopy with signage or cones. The gas station was open to the public and inviting in customers. Its attendant was serving customers under the canopy, an area that is limited and well-defined. The defendants had ample opportunity to discover the ice accumulation under the canopy. If immediate remediation of the ice was not feasible, the defendants could have easily set down warning signs and/or cones. For this reason, summary judgment was inappropriate.

"The fundamental elements of a negligence claim are a duty of care owed by the defendant to the plaintiff, a breach of that duty by the defendant, injury to the plaintiff proximately caused by the breach, and damages." Shields v. Ramslee Motors, 240 N.J. 479, 487 (2020). In Hopkins v. Fox & Lazo Realtors, 132 N.J. 426 (1993), the Supreme Court held, "Whether a person owes a duty of

reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of fairness under all of the circumstances in light of considerations of public policy." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993). The policy considerations involve weighing "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." Id.

Weighing the factors articulated in Hopkins v. Fox & Lazo Realtors, the defendants herein gained an economic benefit from operating their gas station during the plaintiff's visit and had both the opportunity and ability to exercise due care. Their employees were present on the premises, actively managing the gas station, and were fully aware of the storm that occurred on the morning of the plaintiff's fall. This is not a situation in which the plaintiff sustained injuries on the defendant's property while the defendants were absent; rather, the defendants' employee was standing several feet away from the plaintiff when he fell. The gas station's minimart was open for business, and the defendant should have reasonably anticipated pedestrian traffic beneath the canopy toward the minimart and taken appropriate measures to ensure the area was safe. Additionally, since the gas station's canopy may reduce direct sunlight and prevent melting, ice beneath it may persist longer than in uncovered area, increasing the likelihood of slipping. Considering the factors set forth in

Hopkins, it is clear that the defendants owed the plaintiff a duty of care, including a duty to warn of the unsafe icy conditions.

In Pareja v. Princeton International Properties, the Supreme Court held that commercial landowners, "...do not have the absolute duty, and the impossible burden, to keep sidewalks on their property free from snow or ice during an ongoing storm." Pareja v. Princeton International Properties, 246 N.J. 546, 557 (2021). The Court noted, "The premise of the rule is that is categorically inexpedient and impractical to remove or reduce hazards from snow and ice while precipitation is ongoing." Id. at 558. In this case, however, the plaintiff fell under a canopy—a covered area specifically designed to shield patrons and employees from the elements.

Unlike the "impossible burden" of keeping uncovered sidewalks free of snow and ice during a storm, issuing a verbal warning or posting signage under a canopy is not impractical and imposes only a minimal burden on the defendants' gas station. This is not akin to attempting to remove snow and ice while it is still actively falling. The underlying rationale of Pareja does not apply to the facts presented in this case. Plaintiff should be permitted to proceed with his failure to warn claim. Dismissal of plaintiff's Complaint was inappropriate.

POINT TWO

AS THE ACCIDENT HEREIN TOOK PLACE IN A COVERED WORK AREA GOVERNED BY OSHA, THE ONGOING STORM RULE SHOULD NOT APPLY. (Pa20-Pa23; 1T14)

As noted above, the Supreme Court held in Pareja that it would "inexpedient and impractical" for a commercial landowner to remove snow or ice from a public walkway during an ongoing storm. Pareja v. Princeton International Properties, 246 N.J. 546, 549 (2021). However, the location of plaintiff Baptista's fall was a covered work area where gas station employees are required to pump gas for customers. This area is regulated by workplace safety laws, including OSHA regulations, and is fundamentally different from a public sidewalk or walkway. [Pa152]

As explained by plaintiff's liability expert Cheryl Scanlon-Zinner, Certified Safety Professional (CSP), the fueling area in question is not a mere public walkway, but rather a regulated workplace where employees perform tasks such as fueling vehicles and interacting with customers. It is considered a work area under OSHA regulations, specifically 29 C.F.R. § 1910.22. [Pa152]

New Jersey law holds that, "The standard of care is derived from many sources, including codes adopted by the Legislature, regulations adopted by state and federal agencies, and standards adopted by professional organizations." Fernandes v. DAR Dev. Corp., Inc., 222 N.J. 390, 405 (2015).

In Fernandes, the Supreme Court stated, “This Court has determined that ‘OSHA regulations are pertinent in determining the nature and extent of any duty of care’; however, a violation of such a standard is no more than evidence of negligence, ‘if the plaintiff is a member of the class for whose benefit the standard was established.’” Id.

Although plaintiff Baptista was not an employee of the defendants, plaintiff submits that, pursuant to Fernandes, OSHA regulations and National Safety Council holdings are pertinent in determining the nature and extent of the duty of care owed to him by the defendants. OSHA requires employers to maintain safe working conditions for employees, including ensuring that areas of employment, such as gas station work areas, are free of hazards that could cause injury. OSHA regulation 29 C.F.R. § 1910.22(a)(1) mandates that "All places of employment, passageways, store rooms, service rooms and walking-working surfaces are kept in a clean, orderly and sanitary condition. Walking-working surfaces are maintained free of hazards such as sharp or protruding objects, loose boards, corrosion, leaks, spills, **snow, and ice.**" (Emphasis Supplied). [Pa153] This regulation underscores that the fueling area in a gas station is considered a workplace, not a public area like a sidewalk or public walkway.

Plaintiff's safety expert, Ms. Scanlon-Zinner, also relies on the National Safety Council's *Accident Prevention Manual for Businesses and Industry*. [Pa153] This publication is authoritative as a standard adopted by a professional organization, pursuant to Fernandes v. DAR Dev. Corp., Inc., supra.

The manual states:

> **Walking surfaces**. Slips and falls are the most common type of customer injury. Although people can adjust their stride to walk across ice without falling, if they cannot see a wet spot on a floor, they may slip and fall … These injuries can occur almost anywhere at any time … The company should implement administrative controls to ensure that these hazards are quickly removed. [Pa154]

Ms. Scanlon-Zinner opines that, "this guidance applies to walking and working surfaces such as the location where this incident occurred." [Pa154]

Unlike a public sidewalk, which may be difficult to clear during a storm, the fueling area at the gas station herein was located underneath a canopy and intended for specific work-related functions. Thus, the concerns underlying the ongoing storm rule—namely, the difficulty and impracticality of clearing public walkways during active precipitation, are not applicable in this context. OSHA regulations and National Safety Council holdings impose specific obligations on employers to maintain safe work environments for their employees, and this includes maintaining walking-working surfaces free from snow and ice. [Pa153-Pa155]

There is significant public interest in ensuring a safe work environment for employees who are tasked with pumping gas for customers, as well as for occasional customers who may exit their vehicles. In Pareja, the Supreme Court stated, "...we do not wish to submit every commercial landowner to litigation when it is not feasible to provide uniform, clear guidance as to what would be reasonable." Pareja, 246 N.J. at 557. However, in the matte*r sub judice*, OSHA and the National Safety Council provide clear and uniform guidance to employers regarding what is considered reasonable regarding maintenance of walking-working surfaces.

In sum, the fueling area of a gas station, even if it is publicly accessible, constitutes a work environment. The failure to remove hazardous ice or snow in this area is a violation of OSHA safety regulations and National Safety Council standards designed to prevent injury to employees and visitors. Plaintiff submits that OSHA regulations and National Safety Council holdings are pertinent in determining the nature and extent of the duty of care owed to him by the defendants, and that, as one of the occasional customers who exited his vehicle, the defendants owed him a duty to keep the work area underneath the canopy free of snow and ice. For this reason, plaintiff should be allowed to bring his claim against defendants Bolla Em Realty, LLC, Razwan Ahmed, and Bolla Management Corp.

POINT THREE

AS THE DEFENDANTS' ACTIONS EXACERBATED AND INCREASED THE RISK OF THE ICY CONDITIONS UNDERNEATH THE CANOPY, SUMMARY JUDGMENT WAS INAPPROPRIATE. (Pa20-Pa23; 1T14)

In Pareja, the Supreme Court noted two exceptions to the ongoing storm rule. Pareja v. Princeton International Properties, 246 N.J. 546, 559 (2021). In the first instance, "commercial landowners may be liable if their actions increase the risk to pedestrians and invitees on their property, for example, by creating 'unusual circumstances' where the defendant's conduct 'exacerbates and increase[s] the risk' of injury to the plaintiff. Id. Second, a commercial landowner may be liable where there was a preexisting risk on the premises before the storm. Id.

Herein, the defendants exacerbated and increased the risk of icy conditions by creating the impression that the area beneath the canopy was safe and free of ice. The plaintiff parked next to a pump located under the canopy, a structure whose very purpose is to shield customers from inclement weather. He reasonably believed that, by parking and walking within this covered area, he would be protected from hazardous conditions such as ice. There were no warning signs alerting him to any danger, and the gas station attendant's conduct reinforced the illusion of safety. The attendant approached the plaintiff's driver-side window, took his credit card, and began fueling the car without incident.

At no point did the attendant advise the plaintiff to remain in his vehicle or warn him of icy conditions. [Pa121]

Moreover, the gas station's convenience store was open, further signaling that the premises was safe to traverse. The plaintiff's testimony indicates that he believed the ground underneath the canopy was merely damp, not icy, and that nothing in the attendant's behavior suggested otherwise. [Pa121] The defendants' gas station was staffed and active. The lack of warnings and the attendant's conduct led the plaintiff to reasonably believe that the area was safe. Thus, the defendants' actions and omissions affirmatively increased the risk of the icy conditions by inducing a false sense of security. For this reason, plaintiff should be allowed to bring his negligence claim against defendants Bolla Em Realty, LLC, Razwan Ahmed, and Bolla Management Corp.

CONCLUSION

For the aforementioned reasons, plaintiff respectfully requests that the February 28, 2025 and April 10, 2025 Orders be reversed.

Dated: August 20, 2025

/s/GREGORY F. KRONBERG
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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2420-24

ARSENIO BAPTISTA, Plaintiff, v. BOLLA EM REALTY LLC, RAZWAN AHMED, MOH INC., MOBIL-BOLLA OF 1440 ROUTE 23, PACKANACK MOBIL, BOLLA MANAGEMENT CORP., and JOHN DOES 1-10 Defendants.	Civil Action On Appeal from the Final Order of the Superior Court of New Jersey, Law Division, Civil Part, Union County DOCKET NO. UNN-L-2233-23 Sat Below: Hon. Daniel R. Lindemann, J.S.C.

BRIEF OF DEFENDANTS-RESPONDENTS BOLLA EM REALTY LLC, RAZWAN AHMED, AND BOLLA MANAGEMENT CORP IN OPPOSITION TO PLAINTIFF'S APPEAL

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PRELIMINARY STATEMENT

In his Amended Complaint, Plaintiff-Appellant Arsenio Baptista ("Plaintiff") alleges that on January 5, 2022, at 7:26 AM, he slipped and fell on ice at the gas station located at 1440 Route 23, Wayne, NJ 07470 (the "Premises"). Defendants-Respondents Bolla EM Realty, LLC, Bolla Management Corp., and Razwan Ahmed ("Defendants") are the owner of the Premises, operator of the Premises, and an individual working at the Premises at the time of the accident, respectively.

The ice which Plaintiff claims caused him to fall was the result of an ongoing winter storm that began at approximately 5:10 AM that morning. At his deposition, Plaintiff admitted that the ice storm was ongoing when he got to the gas station:

> Q: When you exited your truck at the gas station before you fell, was there still any precipitation?
>
> A: Like a mist. Like a mist.
>
> Q: Anything.
>
> A: No, I'm telling you it was like a mist. It was like rain, rain and you would hear the ice particles like on the windshield, but it was already transitioning at that point.
>
> Q: What do you mean it was transitioning?
>
> A: Around – well, it was coming to a stop. The storm was coming to a stop. It was like just heavy overcast. The ice, I want to say it stopped around 8:30, 9:00. . . .
>
> Q: So, just to clarify your testimony, when you parked at the gas station on January 5th 2022 and you exited the truck there was still an ice storm; is that correct?

A: Yes. Yes. Yes.

[Pa80-81]. Here, Plaintiff is not arguing that the storm ended before his fall.

In his May 2, 2024 Amended Complaint, Plaintiff asserts a single cause of action sounding out of negligence for Defendants alleged failure to reasonably "operate, maintain, and or control" the Premises.

The ongoing storm rule, adopted by the Supreme Court of New Jersey in Pareja v. Princeton, Intern. Properties, dictates that "a commercial landowner's duty to remove snow and ice hazards arises not during the storm, but rather within a reasonable time after the storm." Pareja v. Princeton Intern. Properties, 246 N.J. 546, 557 (2021). Plaintiff's fall occurred during an ongoing storm. Therefore, Defendants' duty to remove the icy condition had not yet accrued. With this reasoning, the motion-judge below granted Defendants' motion for summary judgment.

Now, Plaintiff seeks to have the motion-judge's order dismissing the complaint overturned for two reasons: (1) there are applicable exceptions to the ongoing storm rule; and (2) the ongoing storm rule does not preclude liability under a failure to warn theory. Each of these theories is without merit.

Plaintiff's argument regarding exceptions to the ongoing storm rule is twofold. First, Plaintiff argues that the Occupational Safety and Health Act ("OSHA") precludes application of the ongoing storm rule. This argument is faulty

because OSHA is inapplicable to Plaintiff's case as he is not within the category of people it protects; further, even if OSHA did apply to Plaintiff's case, there is no OSHA exception to the ongoing storm rule. Plaintiff also argues that one of the named exceptions in Pareja, exacerbation of the dangerous condition, applies. This argument is procedurally improper because this issue was not raised to the motion-judge who heard and decided the motion for summary judgment. Should this Court decide to entertain this argument regardless, it is fruitless as the alleged conduct worsening the condition was simply having a canopy at the gas station, which is completely unrelated to the alleged dangerous icy condition and could not possibly be deemed an exacerbation as contemplated by Pareja.

Plaintiff's 'failure to warn' argument is misplaced because the ongoing storm rule has been applied across numerous jurisdictions to bar recovery on failure to warn claims. Moreover, even if the claim was not barred by the ongoing storm rule, Plaintiff's knowledge that ice was still coming down at the time of the fall is fatal to his claim because it is an admission that the alleged dangerous condition was already known to him.

Given the foregoing, and for the reasons expounded upon below, Defendants respectfully submit that they are entitled to summary judgment under Rule 4:46-2 and that the motion-judge's order dismissing the Amended Complaint should be affirmed.

PROCEDURAL HISTORY[1]

On July 12, 2023, Plaintiff filed a complaint in the Superior Court of New Jersey, Law Division, Union County, alleging that he sustained injuries as the result of the negligence of Defendants Bolla Em Realty LLC, Razwan Ahmed, MOH Inc., Mobil-Bolla of 1440 Route 23, Packanack Mobil, and John Does 1-10.

On August 30, 2023, Bolla Em Realty, LLC and Razwan Ahmed filled an answer to the complaint, denying all substantive claims. On May 2, 2024, Plaintiff filled an amended complaint naming Bolla Management Corp. as an additional defendant. [Pa1]. Thereafter, on May 6, 2024, an answer to the amended complaint was filled on behalf of Bolla Em Realty, LLC, Razwan Ahmed, and Bolla Management Corp ("Defendants"). [Pa3].

After substantial discovery took place, Defendants filed a motion for summary judgment on January 29, 2025. [Pa10]. In seeking dismissal of the May 2, 2024 Amended Complaint in its entirety, Defendants argued to the motion-judge that the ongoing storm rule precluded Plaintiff from obtaining relief. On February 18, 2025, Plaintiff filed an opposition to Defendants motion for summary judgment wherein they made only two arguments: (1) the Occupational Safety and Health Act provides an exception to the ongoing storm rule; and (2) Defendants could still be held liable

[1] 1T refers to the transcript of the oral argument on the underlying motion for summary judgment dated February 28, 2025.

for failure to warn even if the ongoing storm rule did apply. [Da1-6]. Each of these arguments was addressed in Defendants' reply dated February 24, 2025.

On February 28, 2025, oral argument was held in connection with Defendant's motion for summary judgment. [1T]. On that same date, the motion-judge granted the motion for summary judgment. [Pa20-21]. As the original order inadvertently did not include Bolla Management Corp. as a defendant being granted relief, the February 28, 2025 order was amended on April 10, 2025 to provide for same. [Pa22-23]. Plaintiff filed notice of the instant appeal on April 11, 2025. [Pa24-28].

COUNTERSTATEMENT OF FACTS

On January 5, 2022, Plaintiff arrived at the gas station located at 1440 Route 23, Wayne, New Jersey 07470 at approximately 7:30. [Pa73]. At that time, a winer storm which began at 5:10 AM was ongoing. [Pa33]. To get to the gas station, Plaintiff drove through the winter storm. [Pa74-75]. When Plaintiff arrived at the gas station, he knew that the storm was ongoing as he could "hear the ice particles [ ] on the windshield." [Pa81]. The Call Details Report from the Wayne Police Department confirms that "the entire town of Wayne was experiencing a heavy ice and freezing rain condition" at the time of the subject incident. [Pa149]. Indeed, at his deposition, Plaintiff admitted that the ice storm was still ongoing when he got to the gas station:

> Q: When you exited your truck at the gas station before you fell, was there still any precipitation?

A: Like a mist. Like a mist.

Q: Anything.

A: No, I'm telling you it was like a mist. It was like rain, rain and you would hear the ice particles like on the windshield, but it was already transitioning at that point.

Q: What do you mean it was transitioning?

A: Around – well, it was coming to a stop. The storm was coming to a stop. It was like just heavy overcast. The ice, I want to say it stopped around 8:30, 9:00. . . .

Q: So, just to clarify your testimony, when you parked at the gas station on January 5th 2022 and you exited the truck there was still an ice storm; is that correct?

A: Yes. Yes. Yes.

[Pa80-81]. Knowing of the ice storm, Plaintiff chose to exit his vehicle, and upon doing so, he proceeded to slip and fall. [Pa71-72].

LEGAL ARGUMENT

I. Standard of Review

The propriety of a trial court's summary judgment order is a legal question, not a factual one. Davidovich v. Israel Ice Skating, 446 N.J. Super. 127, 158 (App. Div. 2016). Therefore, appellate courts must apply the same standard as the motion judge did in their review of the motion record. Shields v. Ramslee Motors, 240 N.J. 479, 487 (2020). That standard was set forth in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995).

In Brill, the New Jersey Supreme Court affirmed the well-settled rule of law that a party is entitled to summary judgment as a matter of law if there is no genuine issue of material fact as to the liability of that party. Id. at 529-30. A determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. Id. at 540.

In short, where the evidence presented "is so one-sided that one party must prevail as a matter of law," courts should not hesitate to grant Summary Judgment. Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016) (quoting Brill, 142 N.J. at 529).

In addressing Plaintiff's argument that the April 10, 2025 Order granting summary judgment in favor of Defendants must be vacated, this Court "must confine [itself] to the original summary judgment record because that is the limited issue

before [it]." Lombardi v. Masso, 207 N.J. 517 (2001), citing Ji v. Palmer, 333 N.J. Super. 451, 463-64 (App. Div. 2000) (explaining that an appellate court "can consider the case only as it had been unfolded to that point and the evidential material submitted on that motion"). Justice Long, writing for the majority in Lombardi, phrased it as follows:

> In other words, ***our charge at this stage is to look at the original summary judgment record*** . . . and to determine whether, viewed in a light most favorable to plaintiff, it presented genuine issues of material fact requiring trial.

Lombardi, 207 N.J. at 542 (emphasis added).

In the instant matter, a review of the original summary judgment record makes clear that Plaintiff's case did not – and does not now – present any issues that should have resulted in a denial of Defendants' motion for summary judgment. Therefore, there is no reason for this Court to now overturn the motion judge's well-reasoned grant of summary judgment.

II. The Ongoing Storm Rule Applies In This Matter

The motion judge below correctly held that the ongoing storm doctrine applies to this matter. In Pareja v. Princeton Intern. Properties, the Supreme Court explained that "under the ongoing storm rule, commercial landowners do not have a duty to remove the accumulation of snow and ice until the conclusion of the storm." Pareja v. Princeton Intern. Properties, 246 N.J. 546, 558 (2021).

It is undisputed that the accident here occurred on commercial property during a winter storm. The Call Details Report from the Wayne Police Department states: "At the time of the slip and fall, the entire town of Wayne was experiencing a heavy ice and freezing rain condition on all township roadways." [Pa149]. Further, Defendants have retained a Forensic Weather Report from CompuWeather which concluded that "The Snow and Ice was the result of an ongoing event that had been occurring since around 5:10 AM EST on January 5, 2022." [Pa36]. Further, at his deposition, Plaintiff repeatedly admitted that precipitation was ongoing at the time of his fall. While being deposed, the following exchange occurred:

> Q: When you exited your truck at the gas station before you fell, was there still any precipitation?
>
> A: Like a mist. Like a mist.
>
> Q: Anything.
>
> A: No, I'm telling you it was like a mist. It was like rain, rain and you would hear the ice particles like on the windshield, but it was already transitioning at that point.
>
> Q: What do you mean it was transitioning?
>
> A: Around – well, it was coming to a stop. The storm was coming to a stop. It was like just heavy overcast. The ice, I want to say it stopped around 8:30, 9:00. . . .
>
> Q: So, just to clarify your testimony, when you parked at the gas station on January 5th 2022 and you exited the truck there was still an ice storm; is that correct?
>
> A: Yes. Yes. Yes.

[Pa80-81]. This testimony is an admission by Plaintiff that freezing rain was coming down at the time of his fall.

Therefore, under the ongoing storm doctrine, Defendants had no duty to clear the precipitation at the time the subject incident occurred. See Pareja, 246 N.J. at 558. Under a straight-forward application of the law, that is where the analysis ends. But now, Plaintiff makes two additional arguments: (a) that the Occupation Health and Safety Act ("OSHA") prevents application of the ongoing storm rule; and (b) Defendants worsened the condition such that the ongoing storm rule does not apply. Neither argument is warrants reversal.

a. OSHA Regulations Do Not Preclude the Application of the Ongoing Storm Rule in This Matter

i. OSHA Regulations Are not Applicable to Plaintiff's Case

Because Plaintiff was not an employee at Premises at the time of the accident, OSHA is inapplicable to his case. In Alloway v. Bradlees, Inc., 157 N.J. 221 (1999), the Supreme Court considered whether OSHA violations constitute evidence of negligence. In that case, the Court found that an OSHA violation was not an independent basis for a cause of action and could not be used to establish negligence per se. Alloway, 157 N.J. at 236. The Court determined that even if a plaintiff is a member of the class OSHA was created to protect, an OSHA violation could be at most evidence of negligence:

> Nevertheless, OSHA regulations are pertinent in determining the nature and extent of any duty of care. We find applicable in the circumstances of this case the well-established principle that the violation of a legislated standard of conduct may be regarded as evidence of negligence **if the plaintiff was a member of the class for whose benefit the standard was established**. J.S. v. R.T.H., 155 N.J. 330 (1998); Carrino v. Novotny, 78 N.J. 355, 359 (1979); cf. Eaton v. Eaton, 119 N.J. 628, 636 (1990) (holding the violation of careless driving statute was negligence per se because statute specifically incorporated common-law standard of care).

Id. (emphasis added). Plaintiff cites to Fernandes v. DAR Dev. Corp., Inc. to suggest that OSHA is relevant in determining liability. However, Fernandez includes the same rule as Alloway, even where a plaintiff is a member of the class which OSHA was designed to protect, a violation can only be evidence of negligence. Fernandes v. DAR Dev. Corp., Inc., 222 N.J. 390, 405 (2015).

But here, Plaintiff was not a member of the class which OSHA protects, so OSHA is irrelevant for a determination of liability. The purpose of OSHA is explicitly to prevent injuries and illnesses "arising out of work situations" and to protect "working men and woman[.]" 29 U.S.C. § 651. New Jersey courts have recognized that OSHA protects employees from employers. See Alloway, 157 N.J. at 239. As OSHA was not established for the benefit of non-employees, evidence of OSHA violations are not relevant for a determination of duty or breach unless the person injured was conducting work on the site. Plaintiff was not at the gas station in any work capacity, so any alleged OSHA violations are irrelevant for determining liability.

ii. Even if OSHA Regulations Were Applicable to Plaintiff's Case, The Ongoing Storm Rule Would Still Preclude Recovery

Plaintiff argues that since the gas station where Plaintiff fell is a "workplace" regulated by OSHA, the ongoing storm doctrine does not apply. He argues that the ongoing storm doctrine is confined only to "public walkways[.]" Plaintiff has not cited to any caselaw supporting this narrow reading of the ongoing storm doctrine. Conversely, an expansive reading of the doctrine is supported by numerous Appellate Division decisions. See, e.g., McGrath v. Vezzosi, 2024 N.J. Super. Unpub. LEXIS 1675, *15 (App. Div. June 15, 2024) [Pa160] (where the Appellate Division applied the ongoing storm rule to a private exterior stair case and stated "there is no indication anywhere in the Pareja opinion the Court intended to apply the ongoing storm rule only to public property, nor does logic or caselaw support such a conclusion."); Gallardo v. Walmart, 2024 N.J. Super. Unpub. LEXIS 814, *10 (App. Div. May 7, 2024) [Pa158] (where the Appellate Division applied the ongoing storm rule in a case where the Plaintiff, who was working as a security guard, fell in a commercial parking lot); Devaney v. Chemours Co. FC, LLC, 2024 N.J. Super. Unpub. LEXIS 776, *7 (App. Div. May 2, 2024) [Pa163] (where the Appellate Division applied the ongoing storm rule to a fall that occurred on a sidewalk in a highly secured and restricted-access industrial facility stating that

drawing narrow exceptions "overlooks Pareja's goal of providing 'uniform, clear guidance' for all commercial landowners.").

Of particular note is the Appellate Division's unpublished decision in Devaney v. Chemours Co. FC, LLC. In that matter, the plaintiff was injured during a winter storm while performing work at their work site. Id. at *3 [Pa162]. In finding that the ongoing storm rule precluded liability, the Appellate Division found that "the ongoing storm rule applies, relieving defendants of **any duty of care they may have owed plaintiff**." Id. at *6 (emphasis added) [Pa163]. The plaintiff in Devaney explicitly argued that the area he fell in should not be subject to the ongoing storm rule because it was a highly secure and restricted area. Id. at *6-7 [Pa163]. In denying that argument, the Appellate Division stated "We decline to draw arbitrary lines for the type of property that falls under Pareja." Id. at *7 [Pa163]. It is evident that the Appellate Division has already ruled that all properties are subject to the ongoing storm rule – including areas where employees are actively working.

While Plaintiff clings to the specific facts of Pareja, he has failed to cite any caselaw restricting its application to public sidewalks. Indeed, the caselaw on the ongoing storm rule includes cases where the plaintiff was injured in areas where employees work, including commercial parking lots, and are therefore subject to OSHA under Plaintiff's theory. See Gallardo, 2024 N.J. Super. Unpub. LEXIS 814 at *10 [Pa158]; Devaney, 2024 N.J. Super. Unpub. LEXIS 776 at *7 [Pa163]. There

is no legal basis to ignore the ongoing storm doctrine just because an area is subject to some OSHA regulations. Nor is there any discernable reason to carve out an exception to the ongoing storm rule for a gas station and contravene the Pareja Court's intention "to provide uniform, clear guidance as to what would be reasonable." See Pareja v. Princeton Intern. Properties, 246 N.J. 546, 557 (2021).

The ongoing storm doctrine applies to this matter and Plaintiff has admitted that the storm was ongoing at the time of his accident. Therefore, summary judgment is appropriate in this matter.

b. Plaintiff's Worsening of the Condition Argument is Procedurally Improper and Factually Unsupported

Plaintiff is generally correct that when a landowner exacerbates a dangerous condition, the ongoing storm doctrine may not apply. See Pareja, 246 N.J. at 559. However, any argument that this exception applies was waived by failure to argue it to the motion judge. Further, the alleged exacerbation here is having a canopy. [Pb13]. This is not the kind of conduct that constitutes exacerbation of a dangerous condition under Pareja.

Nowhere within Plaintiff's brief in opposition to the underlying motion for summary judgment did Plaintiff raise the issue that Defendants exacerbated the risk of injury such that the ongoing storm rule would not apply. [Da1-6]. Further, though it would be insufficient to preserve the issue for appeal, Plaintiff did not make any such argument during oral argument below. [1T]. It is the longstanding law of New

Jersey that the Appellate Division need not "consider questions or issues not properly presented to the trial court." Selective Ins. Co. of Am. v. Rothman, 208 N.J. 580, 586 (2012). Here, the issue was not raised below so it cannot not be an avenue for reversal.

Even if this Court were to consider Plaintiff's new argument that the canopy exacerbated the risk of injury, reversal would still be warranted because the argument fails on its merits. Here, merely having a canopy is the conduct Plaintiff argues exacerbates the risk of injury. [Pb13]. Plaintiff argues that this created the "illusion of safety." Id. at 14. The examples of situations where a party has been found to have exacerbated the risk of injury are far more concrete in that those parties took affirmative actions which caused the circumstances leading to the injury.

In Pareja, in explaining this exception, the Court pointed to a Rhode Island case, Terry v. Cent. Auto. Radiators, Inc. In that matter, the defendant moved a vehicle and then directed the plaintiff to walk to it such that the plaintiff needed to walk an additional one hundred feet through snow and ice. Terry v. Cent. Auto Radiators, Inc., 732 A.2d 713, 717-18 (R.I. 1999). The complained of conduct here – having a canopy at a gas station – is not remotely comparable.

In Terry, the defendant was "actively increasing" the risk to the plaintiff "by placing her vehicle so far distant and then directing her to make the longer walk over the treacherous icy terrain." Id. at 718. Here, Defendants did not "actively" do

anything to make Plaintiff's walk more dangerous and they certainly did not "direct" Plaintiff in any capacity. Further, the conduct in Terry was directly related to the dangerous condition as the defendants essentially made the plaintiff walk through the condition for longer. Id.

In this matter, the alleged exacerbation was not related to the dangerous condition; there is no expert opinion, testimony, or even allegation that the canopy made the ice accumulate at a different rate, made it more slippery, or had any other effect. Indeed, Plaintiff can point to no authority which would permit a fact finder to determine that simply having a canopy exacerbated the alleged icy condition. Therefore, Plaintiff's exacerbation argument fails on the merits, should this Court decide to consider it despite it not being raised below. The ongoing storm rule controls here and no exceptions apply.

III. Plaintiff's Failure to Warn Theory is Without Merit

a. The Ongoing Storm Doctrine Protects Against Failure to Warn Theories

Pareja specifically addresses liability of a commercial landowner were an accident occurs on their property due to an ongoing storm; the Court found that there is none and does not provide for any exception regarding failure to warn. See generally, Pareja 246 N.J. While there is no New Jersey case law regarding the ongoing storm rule in relation to the duty to warn, this issue has been addressed by other jurisdictions where the ongoing storm rule has been adopted.

Other jurisdictions which have adopted the ongoing storm rule have found that there is no more a duty to warn of the snow and ice than there is to clear it. Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699, 711 (Iowa 2016) ("The continuing-storm doctrine **suspends a property owner's general duty to exercise reasonable care in warning of** or removing snow and ice hazards until a reasonable time after the storm because continually clearing ice and snow during an ongoing storm would be impracticable."); Laine v. Speedway, LLC, 177 A.3d 1227, 1233 (Del. 2018) ("there is no duty to warn of icy conditions during a storm in progress"); Wheeler v. Grande'Vie Senior Living Cmty., 819 N.Y.S.2d 188, 190 (N.Y. App. Div. 3d. Dept. 2006) ("there is no duty to warn of icy conditions during a storm in progress."); Leon v. DeJesus, 2 A.3d 956, 957 (Conn. App. Ct. 2010) (holding that the defendant had no duty under the ongoing storm doctrine despite the plaintiff making a failure to warn argument); Walker v. Mem'l Hosp., 45 S.E.2d 898, 907 (Va. 1948) (finding that a hospital was under no duty to warn of slippery steps which were the result of an ongoing storm); Brinkman v. Ross, 623 N.E.2d 1175, 1176 (Ohio 1993) ("an owner or occupier of land ordinarily owes no duty to business invitees to remove natural accumulations of ice and snow from the private sidewalks on the premises, or to warn the invitee of the dangers associated with such natural accumulations of ice and snow.") see also Goodman v. Corn Exch. Nat'l Bank & Tr. Co., 200 A. 642, 643 (Pa. 1938) (Finding that "dangers arising" from snow and ice where

precipitation is continuous "are viewed as the normal hazards of life, for which no owner or person in possession of property is held responsible.") Indeed, at least seven jurisdictions, including close neighbors of New Jersey including New York, Connecticut, and Pennsylvania, operate the ongoing storm rule to preclude failure to warn theories.

In adopting the ongoing storm rule, the Supreme Court noted that the rule "aligns [New Jersey] with the majority rule and ten other states that have adopted the ongoing storm rule." Pareja, 246 N.J. at 558. As the Supreme Court explicitly noted that New Jersey's ongoing storm rule is aligning New Jersey law with that of other jurisdictions, the failure to warn questions should be handled in the same manner as those other jurisdictions. Such a reading would bar liability.

b. Defendants Were Not Required To Warn of Open and Obvious Conditions Such as the One Alleged Here

Even if this Court breaks from other jurisdictions treatment of the ongoing storm rule, Defendants would still have no duty to warn of the ice as Plaintiff admittedly knew that precipitation was ongoing such that the condition was open and obvious. Therefore, summary judgment must be affirmed.

A commercial landowner's duty to a party generally depends on the status of that party as a trespasser, licensee, or invitee. Jimenez v. Maisch, 329 N.J. Super. 398, 401 (App. Div. 2000). Here, Defendants admit that Plaintiff was a business invitee as he was on the premises to purchase gas. [Pa76]. The duty owed to invitees

is generally defined to require "a business owner to discover and eliminate dangerous conditions, to maintain the premises in safe condition, and to avoid creating conditions that would render the premises unsafe." Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003). Even so, landowners have no duty to warn of dangerous conditions which are open and obvious. See Delvalle v. Trino, 474 N.J. Super. 124, 139 (App. Div. 2022). Moreover, a landowner has no duty to warn of a danger already known of to the plaintiff. Berger v. Shapiro, 30 N.J. 89, 99 (1959).

Here, Plaintiff admittedly knew that freezing rain was continuing to fall when he exited his vehicle. At his deposition, Plaintiff admitted that when he arrived at the gas station as he could "hear the ice particles [ ] on the windshield." [Pa81]. Since Plaintiff already knew of the ice on the ground, as evidenced by his testimony stating that he could still hear the ice coming down, as well as the fact that he drove through the winter storm, Defendants had no duty to warn of any ice on the ground. To warn of a condition that an individual already knows of has no effect and New Jesey law does not require same. Therefore, Plaintiff cannot succeed and summary judgment must be affirmed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court affirm the motion-judge's grant of summary judgment and dismissal of Plaintiff's Amended Complaint with prejudice.

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BY: */s/ Pasquale A. Pontoriero*
Pasquale A. Pontoriero

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