STEPHANIE BARBOSA Plaintiff(s)-Appellant(s), - vs - Sam J. Perez, Luisa Salinas, John Does 1-10(fictitious names representing unknown individuals) and/or XYZ Corps. 1-10 (fictitious names representing unknown corporations, partnerships and/or Limited Liability Companies or other types of legal entities) Defendant(s)-Respondent(s).	Superior Court Of New Jersey Appellate Division Docket No.: A-002682-23 *Civil Action* On Appeal From: Superior Court of New Jersey Law Division Hudson County Docket No. HUD-L-0080-22 Sat Below: Hon. Kalimah H. Ahmad, J.S.C.

BRIEF OF PLAINTIFF(S)-APPELLANT(S)

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PRELIMINARY STATEMENT

This appeal arises out of an incident that occurred on February 23, 2021, wherein Plaintiff-Appellant, Stephanie Barbosa, during her walk to work, was walking on the sidewalk affronting the property owned and maintained by Defendant-Respondents Sam Perez and Louisa Salinas (hereinafter referred to collectively as "Defendants"), when she suddenly slipped on ice on the sidewalk, lost her balance, and fell.

Approximately one week before the incident, Defendants had shoveled the snow from the sidewalk, piling it along the edges of the driveway, uphill from where the accident occurred. By placing the snow mounds in the uphill areas, Defendants created snowmelt runoff to flow downhill onto the sidewalk, forming ice, thereby causing Ms. Barbosa's fall.

Stephanie Barbosa filed suit against Defendants alleging negligence. Defendants moved for summary judgment, arguing that, as residential landowners, no duty was owed to the plaintiff. The trial court agreed and granted summary judgment, resulting in the subject appeal. Our state has a longstanding rule that where a property owner, through his negligence in cleaning the sidewalk, adds a new element of danger or hazard other than the one caused by natural forces to the safe use of the sidewalk by the pedestrian, he is liable. The issue on appeal is that, in mounding the snow on the uphill driveway, Defendants

are liable because they created the dangerous condition which proximately caused Ms. Barbosa's injuries. As set forth more fully below, the Trial Court erred in granting summary judgment.

PROCEDURAL HISTORY

On January 7, 2022, Plaintiffs-Appellants filed suit against the Defendants. (Pa1-Pa8) Defendants filed an Answer to the Complaint on February 18, 2022. (Pa9-Pa17)

Written discovery was exchanged, and the depositions of the parties took place. Discovery in this matter ended on January 11, 2024, and a Trial date was scheduled for April 1, 2024. Thereafter, on January 26, 2024, Defendants moved for summary judgment solely based on the duty owed to the Plaintiff. (Pa20-Pa27) Oral argument of the summary judgment motion was entertained by the Honorable Kalimah H. Ahmad, J.S.C. on March 1, 2024. (1T) The Court granted summary Judgment on that same day, with the decision supported by the reasons set forth on the record during the Oral Argument.[1] (Pa303)

On March 19, 2024, Plaintiff moved for reconsideration. (Pa304-Pa313) Oral argument of the Motion for Reconsideration was heard on April 12, 2024[2]. Reconsideration was denied by way of Order dated April 16, 2024. (Pa318-Pa320)

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[1] Transcript date and volume designation:
March 1, 2024 1T

[2] Transcript date and volume designation:
April 12, 2024 2T

STATEMENT OF FACTS

On February 23, 2021, Stephanie Barbosa was on her way to work, taking the bus to 45th Street and New York Avenue in North Bergen, NJ. After disembarking, she walked approximately seven streets without incident. However, as she passed in front of the property at 1324 46th Street, New Bergen, NJ, she suddenly slipped on ice on the sidewalk, lost her balance, and fell. (Pa31-Pa36) As a result, she suffered a displaced right fibular fracture, requiring ORIF surgical intervention. (Pa29)

The subject adjacent property is owned and maintained by Defendant-Respondent Sam Perez. (Pa8-Pa10) Before the slip and fall incident, Mr. Perez had shoveled snow from the sidewalk, piling it along the edges of the driveway, uphill from where the slip and fall incident occurred. (Pa157) The snow had remained piled for at least one week before the incident. (Pa159) By placing the snow mounds in the uphill areas, Defendant allowed snowmelt runoff to flow downhill onto the sidewalk causing Ms. Barbosa's fall. (Pa192) Photographs taken by police after plaintiff's fall show evidence of the melting and refreezing from the uphill mounded snow. (Pa172)

On behalf of Ms. Barbosa, counsel retained Kelly Ann Kimiecik, P.E. to determine the cause of the ice formations on the sidewalk. (Pa185) Ms. Kimiecik found that the ice displayed a ripple effect. The ripple effect is due to thin layers

of water repeatedly flowing and freezing over time. This ripple pattern suggests that the plaintiff's fall was not caused by an overnight storm but rather by the long-term effects of surface water runoff from snowmelt following the same path. (Pa193-Pa194)

Moreover, a review of New Jersey Climatological Data indicates that between February 18 and February 22, 2021, approximately 6.5 inches of snow accumulated. However, by February 23, 2021, only 1 inch of snow remained on undisturbed ground surfaces due to snow melt. This demonstrates that the surface water runoff, resulting from precipitation and the melting of mounded snow in higher areas, flowed downhill along the sloped surfaces to lower areas, such as the sidewalk. With freezing temperatures, this runoff subsequently transformed into ice. (Pa195-Pa197)

Ms. Barbosa was injured due to the defendants' negligence in creating the hazardous condition by piling the snow from the sidewalk in an uphill location, which led to melting and refreezing. This caused the icy conditions that resulted in the plaintiff's slip and fall. (Pa209)

LEGAL ARGUMENT

STANDARD OF REVIEW

A. Standard of Review as to the Granting of Defendants' Motion for Summary Judgment.

The Appellate Division's review of the granting of a motion for summary judgment is review de novo. New Jersey Appellate Courts have consistently held that "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference" and, hence, an "issue of law [is] subject to de novo plenary appellate review." Estate of Hanges v. Metropolitan Property & Cas. Ins. Co., 202 N.J. 369 (2010) (*citing* City of Atl. City v. Trupos, 201 N.J.447, 463 (2010)). Furthermore, the appellate court is "obliged to view the facts in the light most favorable to the non-moving party" who in this case, is Respondent-Plaintiff. Estate of Hanges v. Metropolitan Property & Ca. Ins. Co., 202 N.J. 369, 374 (2010) (internal citations omitted).

POINT I

SUMMARY JUDGMENT WAS IMPROPERLY GRANTED AS DEFENDANTS' ACTIONS CREATED THE HAZARDOUS CONDITION (Pa303)

When a person assumes a duty to the general public, albeit a duty he was not bound to assume, he must thereafter discharge that duty with due care. While it is true that homeowners in New Jersey generally have no duty to remove snow

and ice from an abutting sidewalk, there is an exception to that rule. Specifically, a homeowner loses sidewalk immunity where the owner creates or exacerbates a dangerous sidewalk condition. Luchejko v. City of Hoboken, 207 N.J. 191, 201 (2011). In the case at bar, there is a genuine issues of material fact as to whether defendant, by engaging in snow removal actions, created or exacerbated the hazardous condition, which caused plaintiff to fall and sustain injury.

Summary Judgment was granted on the basis that the ice condition was predicated on a freeze event that occurred the night before the incident. However, the freeze event would not have created this icy condition if the Defendant had not piled the snow uphill from the sidewalk.

The general principles are clear. An owner has no duty to keep the sidewalk abutting his land free from the natural accumulation of snow and ice. Saco v. Hall, 1 N.J. 377 (1949). To this general principle well-recognized exceptions have been established; namely, whether defendant's conduct created an unreasonable risk of harm to the injured party and whether defendant violated any duty to the injured pedestrian. Dupree v. City of Clifton, 351 N.J. Super. 237, 246-247 (App. Div. 2002), aff'd o.b. 175 N.J. 449 (2003).

The theory underlying the rule that a landowner should be under no duty to keep the sidewalk bordering his land free from the natural accumulation of snow is that the pedestrian should be expected to endure the ordinary hazards

created by natural conditions, including ice formed by the natural and incidental flow of surface water from melting snow and ice over the public sidewalk. However, a necessary corollary to such a rule must be that the pedestrian should not be expected to assume responsibility for a peril which, but for the conduct of the property owner, would not have existed at all, or might not have existed for the same length of time or to the same degree.

Thus, it was said in Saco that where the property owner, through his negligence in cleaning the sidewalk, adds a *new* element of danger or hazard other than the one caused by natural forces to the safe use of the sidewalk by the pedestrian, he is liable.

Gentile v. National Newark & Essex Banking Co., 53 N.J. Super. 35 (App. Div. 1958), represents an application of this principle. There a pedestrian was injured when he fell while attempting to negotiate a mound of snow blocking the sidewalk, created when the owner shoveled the snow from the sidewalks. The court there held that the jury could find that the owner's agents, in causing the mound of snow, created a new element of danger or hazard which was a proximate cause of the fall and the consequent injuries.

Deberjeois v Schneider, 254 N.J. Super. 694, 703 (Law Div. 1991) applies a similar principle. There defendant planted a tree in the front yard of his residence, approximately four feet from the abutting sidewalk. The growth of

the tree's roots eventually caused the sidewalk to buckle. The plaintiff fell on the damaged sidewalk. The court held that the defendant was not entitled to summary judgement, stating that residential landowner is potentially liable for affirmative conduct that cause a dangerous condition on a nearby sidewalk. The rationale for the property owner's liability is not because of the natural process of the growth of the tree roots. Instead, it is the positive act – the affirmative act – of the property owner in the actual planting of the tree which instigated the process. The fact that the affirmative act is helped along by a natural process does not thereby make the condition a natural one. Id. at 704.

Applying these principles to this case, a jury may infer from the evidence that when the defendant heaped the snow from the sidewalk on the uphill driveway, he created a new element of danger to the public other than that caused by natural forces. The Defendant was aware that the downward slope of the driveway in that area resulted in the water draining off the sidewalk subjecting it to melt and refreeze.

It has been held that where the melting snow from an unshoveled sidewalk would have frozen in any event, rendering the sidewalk equally as dangerous, if not more so, than when shoveled, the pedestrian may not recover. Taggart v. Bouldin, 111 N.J.L. 464 (E. & A. 1933). As the court said in that case, to hold the property owner answerable for damages under such circumstances because

an effort was made to keep the sidewalk clear and reduce the danger would result in an injustice. Id. at 467.

Under the circumstances of this case, however, the jury could find that had the snow remained unshoveled on the sidewalk, the water from the melted snow would have evaporated, or drained off, as it did where the plaintiff walked seven streets without encountering any ice on the sidewalks. Rather, the evidence here warrants the conclusion that water melting from heaps of snow on the uphill driveway would almost inevitably lead to an accumulation of snow melt flowing to the sidewalk, creating ice, which is exactly what happened in the within case as was evidenced in the discovery, the above photograph and admissions of the defendant.

The above stated principles are outlined in the New Jersey Model Civil Jury Charges, approved by the New Jersey Supreme Court. New Jersey Model Jury Charge 5.20B(2)(a) entitled "Liability of Owner (Occupant) Who Undertakes to Clear Sidewalk" states

> The owner [occupant] of a residential property has no duty to maintain the sidewalks adjacent to their land so long as they do not affirmatively create a hazardous condition.
> The owner [occupant] of residential premises abutting a public sidewalk is not required to clear or keep the sidewalk free from the natural accumulation of ice and snow. But the owner [occupant] is liable if, in clearing the sidewalk of ice and snow, the owner [occupant], through the owner's [occupant's] negligence, adds a new element of danger or hazard, other than that caused by the natural elements, to the use of the sidewalk by a pedestrian. In other

> words, while an abutting owner[occupant] is under no duty to clear the owner's [occupant's] sidewalk of ice and snow, the owner [occupant] may become liable where the owner [occupant]undertakes to clear the sidewalk and does so in a manner which creates a new element of danger which increases the natural hazard already there.
> Therefore, should you find that the defendant, in undertaking to remove the ice and snow from defendant's sidewalk, created a new hazard or increased the existing hazard and that this new or increased hazard proximately caused or concurred with the natural hazard to cause plaintiff's injuries, then you must find for the plaintiff.

In this case, the hazardous condition did not arise from the natural process of melting and refreezing; rather, it resulted from the defendants (adjacent property owner) affirmative act of piling snow on the uphill driveway, allowing it to melt onto the pedestrian walkway and increase the hazard to the plaintiff.

CONCLUSION

For the reasons set forth above, it is clear that the trial court erred in granting summary judgment.

Respectfully submitted,
Davis Saperstein & Salomon, P.C.

By Grace E. Robol
Grace E. Robol, Esq.

Dated: September 16, 2024

STEPHANIE BARBOSA Plaintiff-Appellant, vs. Sam J. Perez, Luisa Salinas, John Does 1-10(fictitious names representing unknown individuals) and/or XYZ Corps. 1-10 (fictitious names representing unknown corporations, partnerships and/or Limited Liability Companies or other types of legal entities.) Defendants-Respondents.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002682-23 CIVIL ACTION On Appeal From Superior Court of New Jersey Law Division Hudson County DOCKET No. HUD-L-0080-22 Sat Below: Hon. Kalimah H. Ahmad, J.S.C.

OPPOSITION BY DEFENDANTS-APPELLANTS SAM J. PEREZ AND LUISA SALINAS

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PRELIMINARY STATEMENT

This case and subsequent appeal by Plaintiff-Appellant Stephanie Barbosa (hereafter referred to as "Plaintiff") stems from a slip and fall on black ice on a public sidewalk abutting a residential property in North Bergen on February 23, 2021. (Pa28) The residential home is owned and occupied by Sam J. Perez and Luisa Salinas (known hereafter as "the Defendants"). Summary judgment was granted on motion by the Defendants as they did not violate any duty owed to the Plaintiff.

Following a February 16, 2021 snowfall, snow was removed from the subject sidewalk by the Defendants, in accordance with the local North Bergen ordinance (Pa127-130) which provides homeowners twelve daylight hours to clear snow and ice from sidewalks.

Six days later, on February 22, 2021, the day before Plaintiff's fall, .54 inches of precipitation fell, ending after sunset (5:40pm) at 7pm. (Pa133-134) The temperature then dropped overnight, and special weather bulletins for black ice were issued by the National Weather Service of Hudson County at 12:53am and 5:06am on February 23, 2021. (Pa134) Plaintiff's fall then occurred at 6:07am. (Pa28) Sunrise was 6:39am. (Pa134) Not a single daylight hour occurred between the end of the rain on February 22, 2021 and when plaintiff's fall occurred before sunrise on February 23, 2021. (Pa133-134, 136)

Plaintiff-Appellant argues that the Defendants negligently mounded snow uphill from the sidewalk, resulting in a melt-refreeze event. However, Defendant's entire property is on a slope, angled downwards to the sidewalk. (Pa301). In addition, the ice in question was due to the .54 inches of precipitation which ended at 7pm on February 22, 2021, followed by below freezing temperatures beginning at 12:51am on February 23, 2021, just hours before Plaintiff's fall. (Pa136).

Plaintiff's expert report does not explain how the subject ice could have been present during the above freezing temperatures and rain the day before plaintiff's fall. They also fail to establish why the .54 inches of precipitation (snow turning to rain) the day before the incident was not the cause of the ice, rather than mounded snow. Most importantly, Plaintiff has also failed to establish a new danger or hazard caused by the Defendants aside from the natural process of precipitation, melting snow and freezing conditions which would impose liability to the Defendants.

PROCEDURAL HISTORY

On January 7, 2022, Plaintiff-Appellant Stephanie Barbosa (hereafter referred to "the Plaintiff') filed a Complaint against the Defendant-Respondents Sam J. Perez and Luisa Salinas (hereafter referred to as "the Defendants"). (Pa1). The Defendants filed an Answer on February 18, 2022. (Pa9-Pa17). Discovery concluded on January 11, 2024 and trial was scheduled for April 1, 2024.

On January 26, 2024 the Defendants filed a motion for summary judgment. (Pa20). The Plaintiff filed their opposition on February 20, 2024. (Pa139). The Defendants filed their reply brief on February 27, 2024. (Pa298). Oral argument before the Honorable Judge Ahmad in Hudson County occurred on March 1, 2024 (1T) and an Order granting summary judgment dated March 1, 2024 was entered into e-courts on March 8, 2024. (Pa303).

On March 19, 2024, the Plaintiff filed a motion for reconsideration. (Pa304-313). The Defendants filed their opposition on April 8, 2024. (Pa314). Oral argument, again before Judge Ahmad in Hudson County, took place on April 12, 2024. (2T). The Order denying the Plaintiff's motion for reconsideration was dated April 12, 2024 and was entered into e-courts on April 16, 2024. (Pa318-320).

STATEMENT OF FACTS

Plaintiff Stephanie Barbosa alleges that on February 23, 2021 at 6:07am, she was caused to slip and fall due to black ice on the public sidewalk abutting a residential home owned by the Defendants Sam J. Perez and Luisa Salinas and located at 1324 46th Street, North Bergen, NJ 07047. (Pa 28, Answer #2). Plaintiff testified that her car had been totaled about a month prior, leading her to take the bus to 45th Street and New York Avenue in North Bergen and continuing down 46th Street to get to work. (Pa60 T25:18-19, Pa 31-36). Plaintiff had taken the bus and walked to work the day before the incident as well without issue. Pa60 T31:8-14. Plaintiff also testified that she checks the weather "compulsively," including as soon as she gets up in the morning: (Pa60, T39:8-18).

The local town ordinance for North Bergen requires homeowners to "Remove or cause to be removed all snow and ice from the sidewalk area in front of or bordering their lands, within 12 hours of daylight after the snow has ceased to fall." (Pa127 Section 1 (page 2).

The entire property owned by the Defendants is on an incline sloped to the sidewalk. (Pa301). About a week prior to Plaintiff's incident, the Defendants properly cleared all snow from the sidewalk in accordance with the North Bergen Ice Removal Ordinance. (Pa157, Pa127). There is no ordinance or statute which requires residential homeowners to physically remove snow from their property if their property is sloped downwards towards a public sidewalk to prevent melt and refreeze events.

On February 22, 2021, the day before plaintiff's fall, snow turning to rain was reported between 12pm and 7pm, totaling .54 inches. (Pa131, pages 3-4). Sunset the day before plaintiff's fall was 5:40pm. (Pa134). Sunrise the morning of plaintiff's fall was 6:39am.

(Pa134). There were no daylight hours in between when the rainfall ended at 7pm on February 22, 2021 and when plaintiff's fall occurred at 6:07am on February 23, 2021. (Pa136)

Just after midnight, at 12:53AM on February 23, 2021, there was a special weather bulletin issued by the National Weather Service for Hudson County, which includes North Bergen:

> Areas of black ice this morning….
>
> Recent precipitation and snow melt have resulted in wet roadways. Temperatures are currently above freezing across most locations, but are expected to fall into the upper 20s and lower 30s by day break. This may result in the development of black ice on any untreated surfaces. Exercise caution if traveling early this morning.
> Pa134

Another Special Weather Statement was issued at 5:06AM, 90 minutes prior to Plaintiff's accident:

> Areas of black ice this morning…
>
> Recent precipitation and snow melt have resulted in wet roadways. Temperatures falling into the lower 30's through sunrise will result in the development of black ice on any untreated surfaces. Exercise caution if traveling early this morning.
> Pa134

The trigger causing the subject black ice was the overnight freeze which occurred around 12:53am on February 23, 2021. (Pa136). Further, due to the temperatures which were above freezing the day before Plaintiff's fall, it is more than likely that the ice was formed due to rain the day before, which then froze overnight. (Pa136-138).

The Defendants did not violate any common law duty, standard, code, ordinance or North Bergen's Municipal Code, which gives homeowners 12 daylight hours to clear snow and ice from abutting sidewalks. (Pa136-138) There is no requirement or duty owed by homeowners to

physically remove snow from a sloped property to avoid a melt-refreeze event on a public sidewalk. There is no duty owed by a residential property owner to perform an overnight ice watch on public sidewalk which abut their property. As such, the Defendants owed no duty to the Plaintiff and summary judgment was properly granted.

STEPHANIE BARBOSA Plaintiff-Appellant, vs. Sam J. Perez, Luisa Salinas, John Does 1-10(fictitious names representing unknown individuals) and/or XYZ Corps. 1-10 (fictitious names representing unknown corporations, partnerships and/or Limited Liability Companies or other types of legal entities.) Defendants-Respondents.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002682-23 CIVIL ACTION On Appeal From Superior Court of New Jersey Law Division Hudson County DOCKET No. HUD-L-0080-22 Sat Below: Hon. Kalimah H. Ahmad, J.S.C.

Point I

SUMMARY JUDGMENT WAS PROPERLY GRANTED AS DEFENDANTS DO NOT OWE A DUTY TO PLAINTIFF FOR MELT AND REFREEZE EVENTS ON A PUBLIC SIDEWALK

A. Negligence Standard

Negligence is the failure to adhere to a standard of conduct that a reasonably prudent person would exercise under similar circumstances. The essential elements of a negligence claim are duty of care owed by a defendant to the plaintiffs, breach of that duty by the defendant, and injury proximately caused to the plaintiffs by defendant's breach of due care, resulting in damage. Endre v. Arnold, 300 N.J. Super. 136 (App. Div. 1997), cert. den., 150 N.J. 27 (1997).

It is well settled in New Jersey that negligence is a fact which must be proved and would never be presumed. Long v. Landy, 35 N.J. 44 (1961); see also, Bohn v. Hudson and Manhattan R. Co., 16 N.J. 180 (1954). In Long, the Supreme Court ruled,

> It is well settled that the existence of a possibility of a defendant's responsibility for a plaintiff's injuries is insufficient to impose liability. 'In

> the absence of direct evidence, it is incumbent upon the plaintiff to prove not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant and would exclude the idea that it was sue to a cause with which the defendant was unconnected. While proof of certainty is not required, the evidence must be such as to justify the inference of probability as distinguished from the mere possibility of negligence on the part of the defendant.'
> Long, 35 N.J. at 54, citing Hanson v. Eagle-Picture Lead Co., 8 N.J. 133, 141 (1951).

The plaintiff has the burden of proving negligence on the part of the defendants. The burden of proof must be sustained by proof of circumstances from which defendants' want of due care is a legitimate inference. An inference of negligence must be established from proven facts and cannot be based upon the foundation of pure conjecture, speculation, surmise, or guess. Long, 35 N.J. at 54; Rivera v. Columbus Cadet Corps. Of America, 59 N.J. Super. 445 (App. Div. 1960), cert. denied 32 N.J. 349 (1960).

Here, Plaintiff is unable to establish that the Defendants owed a duty to the Plaintiff for the ice located on a public sidewalk, which occurred from rain, snow melt and a natural freezing event. They also failed to establish any duty owed under the local municipal ordinance. (Pa128). Accordingly, summary judgment was entered.

B. The Defendants Do Not Have A Common Law Duty to Remove Snow and Ice from a Public Sidewalk

In New Jersey, it is well established that residential property owners have no common law duty to clear snow and ice from public sidewalks abutting their property. Qian v. Toll Bros, Inc., 223 N.J. 124, 135 (2015) (quoting Skupienski v. Maly, 27 N.J. 240, 247 (1958); Luchejko v. City of Hoboken, 207 N.J. 191, 201 (2011). If a property owner removes snow from a public sidewalk, they will not be liable to a person injured on the sidewalk "unless through [the

owner's] negligence a new element of danger or hazard, other than one caused by natural forces, [was] added to the safe use of the sidewalk by a pedestrian. Luchejko at 201 (quoting Saco v. Hall, 1 N.J. 377, 381 (1949)). One of the Court's reasonings is that imposing liability on residential owners for natural events like "refreeze" would discourage them clearing snow and ice in the first place. Finding it to be solid public policy to encourage homeowners to remove snow and ice from sidewalks abutting their property, the Court has upheld these principles for decades.

The Court's holding in Luchejko is directly on point to the case at hand. The Defendants cleared snow and ice from a sidewalk, which subsequently (along with additional precipitation) froze on the sidewalk. Plaintiff in the current case argues that the subject ice was due to negligently placed snow from a prior snowfall which melted and refroze. Notably, no case law exists which carves out an exception for homeowners who pile their snow next to a sidewalk, which then melts and refreezes. In fact, and entirely on point, the Courts have already considered this exact situation and clearly held: "As such, if a sidewalk had been cleared and the melting snow subsequently froze into a layer of ice, the "refreeze" would not be an 'element of danger or hazard other than one caused by natural forces.'" Id. (quoting Foley v. Ulrich, 94 N.J. Super. 410, 424 (App. Div) (Kolovky, J.A.D., dissenting), rev'd 50 N.J. 426 (1967) (reversing and adopting the Appellate Division dissent by Judge Kolovsky). Plaintiff is now asking the Court to overturn all prior case law on this issue, ignore the public policy implications and impart a substantial burden on residential property owners.

C. This Case Involves a Naturally Occurring Freeze Event, Not A New Element of Danger or Hazard

The facts in case are not as straight-forward as Plaintiff's counsel makes them seem.

This is not simply an instance of snowfall on February 16, 2021, followed by melting and refreezing over a week's time, which then led to Plaintiff's incident. Here, there were intervening events, including snow and rain on February 22, 2021, the day before Plaintiff's fall. Putting aside a homeowner's duty as to melt and refreeze events in general, homeowners do not have a duty to remediate overnight ice from a snow and rain event which ended at 7pm that evening. Plaintiff argues that this case is strictly about where the snow from a week prior to the incident was mounded, but that is an oversimplification.

On February 22, 2021, the day before plaintiff's fall, snow and rain was reported between 12pm and 7pm, starting as snow and turning to rain, with a total snowfall accumulation of .54 inches. (Pa133). Sunset had occurred at 5:40pm on February 22, 2021. (Pa134). Plaintiff's fall then took place the following morning at 6:07am. (Pa28) Sunrise was at 6:37am on February 23, 2021. (Pa134).

Even if we look to the more stringent requirements of the local municipal code, the Defendants were not negligent. The town ordinance for North Bergen requires homeowners to "Remove or cause to be removed all snow and ice from the sidewalk area in front of or bordering their lands, within 12 hours of daylight after the snow has ceased to fall." (Pa127). Here, not a single daylight hour had passed between the storm the day before, which ended at 7pm, and when plaintiff's fall occurred at 6:07, before sunrise. (Pa136).

In addition, the true cause of the ice in this case was below freezing temperatures, which were not present when the rain stopped at 7pm on February 21, 2021. (Pa133-136) Overnight, the temperature dropped below freezing, causing the precipitation and any melted snow to freeze. (Pa134-136). Two special weather bulletins were issued by the National Weather

Service for Hudson County at 12:51am and 5:06am on February 22, 2021, just hours before Plaintiff's fall. (Pa134) The first bulletin issued at 12:51am was as follows:

> Areas of black ice this morning….
>
> Recent precipitation and snow melt have resulted in wet roadways. Temperatures are currently above freezing across most locations, but are expected to fall into the upper 20s and lower 30s by day break. This may result in the development of black ice on any untreated surfaces. Exercise caution if traveling early this morning.
> Pa134

The second special weather bulletin issued at 5:06am, 90 minutes before Plaintiff's fall, similarly indicated:

> Areas of black ice this morning…
>
> Recent precipitation and snow melt have resulted in wet roadways. Temperatures falling into the lower 30's through sunrise will result in the development of black ice on any untreated surfaces. Exercise caution if traveling early this morning.
> Pa134

These intervening events, first the snow and rainfall on February 22, 2021, then the overnight freezing temperatures, are the true cause of Plaintiff's fall. The way the snow from a week earlier was mounded is a red herring in this case. Either way, both the precipitation the evening before and the melting and refreezing of the mounded snow were caused by natural forces.

New Jersey courts have already firmly established that melt and refreeze events do not trigger residential homeowner liability for snow and ice on public sidewalks. See Luchejko at 201; Saco at 381, Foley at 424. The exception outlined by the Court is when a new "element of danger or hazard" is created by the homeowner "**other than one caused by natural forces**." (emphasis added) Luchejko at 201 (quoting Saco v. Hall, 1 N.J. 377, 381 (1949). **"As such, if a sidewalk had been cleared and the melting snow subsequently froze into a layer of ice, the**

"refreeze" would not be an 'element of danger or hazard other than one caused by natural forces.'" Id. (emphasis added, quoting Foley v. Ulrich, 94 N.J. Super. 410, 424 (App. Div)(Kolovky, J.A.D., dissenting), rev'd 50 N.J. 426 (1967) (reversing and adopting the Appellete Division dissent by Judge Kolovsky. The Court went so far as to specifically hold that residential landowners are not liable for refreeze events on public sidewalks abutting their property as **refreeze events are the very definition of an "element of danger" caused by natural forces.** (emphasis added) Luchejko, at 201.

It is common knowledge, and New Jersey Courts are well aware, that snow will melt and refreeze, no matter where it is piled. There is no exception for homeowners who pile snow a certain way on their property. In the Appellate Division dissent in Foley, which was subsequently adopted by the Supreme Court, Judge Kolovsky's found "[t]he danger to the safe use of the sidewalk which existed when plaintiff fell was solely that caused by natural forces, the freezing of melting snow, a natural phenomenon which would have occurred if defendants had not shoveled the sidewalk, particularly since defendants' lawn sloped toward the sidewalk. Foley, 94 N.J. Super. at 423-24 (Kolovsky, J.A.D., dissenting).] The Court has already considered this exact issue in the current case before, including a property sloped towards a sidewalk, and they have continued to uphold that there is no extension of liability to a residential homeowner for melt and refreeze events on an abutting public sidewalk.

Further, as confirmed by the Supreme Court in Foley, it is expected that melting snow will occur, specifically on sloped properties but this does not give rise to an increased duty by a residential homeowner. Residential property owners do not owe any duty to physically remove snow from sloped properties to avoid such an occurrence, as plaintiff is expecting of the Defendants in this case. The Courts have made it clear that melt and refreeze events are a natural

event for which homeowners will not be held liable for injuries on public sidewalks.

The burden which the Plaintiff in this case would like to place on homeowners regarding snow and ice removal on public sidewalks is a heavy one. First, they are asking the Court to impose liability on a homeowner for snow which melts and refreezes on a public sidewalks. If a homeowner has a property on an incline or slope, homeowners would need to physically remove snow on their property to avoid a melt and refreeze event. The financial burden that would impose on millions of homeowners in New Jersey would be substantial.

Second, in this particular case the freeze event took place overnight, just hours before plaintiff's fall. (Pa134) Temperatures were above freezing the day before, dropping to below freezing overnight. (Pa134, 136). What plaintiff is suggesting is that homeowners also be responsible for a "24/7" ice watch on public sidewalks. This goes against decades of well-established caselaw and would create an unattainable standard for residential property owners.

CONCLUSION

The exact fact pattern in the current case has already been contemplated, decided and affirmed through decades of well-established caselaw. The Defendants cleared snow and ice from the public sidewalk. Then through the melting process and new precipitation ending the evening before Plaintiff's fall, overnight temperatures caused black ice to form, causing Plaintiff's fall before sunrise. There is simply no duty owed to the Plaintiff by the residential property owners for these naturally occurring events. Not a single daylight hour passed between when the precipitation ended and when the fall occurred. The way the snow is mounded does not distinguish this fact pattern from the decades of precedent regarding this issue as this was already contemplated and decided by the Court. There is no liability for residential property owners for melt and refreeze events on a public sidewalk and as such, these Defendants were properly granted summary judgment.

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November 5, 2024

REPLY TO TEANECK

Via E-Filing
Joseph H. Orlando, Clerk Appellate Division
Superior Court Of New Jersey
Hughes Justice Complex
25 W. Market Street
Trenton, NJ 08625

Re: STEPHANIE BARBOSA VS SAM J. PEREZ, LUISA SALINAS
Appellate Division Docket Number: A-002682-23

Dear Mr. Orlando:

This office represents Appellant, Stephanie Barbosa, in the above referenced matter. Pursuant to *R.* 2:6-2(b), kindly accept and file the within letter brief in reply to Respondents, Sam J. Perez and Luisa Salinas's brief.

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STATEMENT OF THE CASE

On February 23, 2021, Plaintiff-Appellant, Stephanie Barbosa, was on her way to work. She had walked approximately seven streets without incident. Upon reaching the sidewalk in front of the property owned and maintained by Defendant-Respondents Sam Perez and Louisa Salinas (hereinafter referred to collectively as "Defendants"), she slipped on ice, lost her balance, and fell. Approximately six days before the incident, Defendants shoveled

snow onto the uphill edges of the driveway, causing snowmelt to run downhill and form ice on the sidewalk, leading to Ms. Barbosa's fall.

Defendants attempt to mislead the Court by arguing that the icy condition resulted solely from an overnight freeze. This argument overlooks their own affirmative act of improperly piling snow in upland areas prior to the freeze, creating a hazard when temperatures dropped. The very risk associated with uphill snow piles is that melting snow will refreeze overnight, as it did here. Plaintiff walked seven blocks without issue, encountering a hazard only where Defendants' snowmelt runoff refroze on the sidewalk. This factual dispute underscores why summary judgment should not have been granted.

PROCEDURAL HISTORY

On January 7, 2022, Plaintiffs-Appellants filed suit against the Defendants. (Pa1-Pa8) Defendants filed an Answer to the Complaint on February 18, 2022. (Pa9-Pa17)

On January 26, 2024, Defendants moved for summary judgment solely based on the duty owed to the Plaintiff. (Pa20-Pa27) On March 1, 2024, the Honorable Kalimah H. Ahmad, J.S.C., rendered a decision and granted summary judgement. On March 19, 2024, Plaintiff moved for reconsideration. (Pa304-Pa313).

Reconsideration was denied by way of Order dated April 16, 2024. (Pa318-Pa320). Ms. Barbosa filed the instant appeal.

CONCISE STATEMENT OF PERTINENT FACTS

On February 23, 2021, Plaintiff-Appellant, Stephanie Barbosa, was on her way to work. She had walked approximately seven streets without incident. However, as she passed 1324 46th Street in North Bergen, NJ she slipped on ice, fell, and sustained a displaced right fibular fracture requiring ORIF surgery.

Defendants owned and maintained the property and had shoveled snow onto uphill areas along the driveway at least a week prior, allowing snowmelt to flow downhill and refreeze on the sidewalk, creating hazardous conditions. Photos taken by police after the incident showed evidence of repeated melting and refreezing from uphill snow piles.

An expert, Kelly Ann Kimiecik, P.E., determined the ice displayed a ripple pattern, consistent with ongoing runoff and refreezing rather than an isolated freeze. Weather data also showed substantial snow accumulation days prior, with only minimal undisturbed snow remaining on February 23 due to melt, further supporting runoff as the ice source. Ms. Barbosa's injuries were caused by Defendants' negligence in creating a dangerous condition by piling snow in an area prone to runoff and refreezing.

REPLY LEGAL ARGUMENT

POINT I

Defendants' Owed a Duty to the Plaintiff Due to the Affirmative Creation Exception to Residential Sidewalk Liability

Defendant's creation of the hazardous condition established a duty owed to Plaintiff. In its opposition, Defendants raise disputed material facts, which are sufficient to defeat summary judgment. Defendant argues that the ice was caused solely by an overnight freeze, not by the snow mound created six days earlier. However, this claim contradicts Plaintiff's evidence. Plaintiff's expert, Kelly Ann Kimiecik, concluded that the ice was longstanding, displaying a ripple effect caused by layers of water repeatedly flowing and freezing. This pattern suggests the ice formed over time from snowmelt runoff, not an isolated freeze.

Defendants further asserts that the sloping property left no option but to mound snow uphill. This admission supports Plaintiff's argument that Defendants' actions in piling snow uphill six days before the fall directly increased the risk at the incident site.

Plaintiff does not dispute Defendants' argument that they do not have a common law duty to remove snow and ice from a public sidewalk abutting their property. Nor does Plaintiff dispute Defendant's interpretation of Luchejko v. City of Hoboken, which held that Defendants cannot be held liable *solely* for melting snow on a cleared sidewalk because the "refreeze" would not be an

"'element of danger or hazard *other than one caused by natural forces*.'" 207 N.J. 191, 201 (2011) (emphasis added) (quoting Foley v. Ulrich, 94 N.J. Super. 410, 424 (App. Div.). Or phrased differently, an owner's negligence must create "'a new element of danger or hazard, other than one caused by natural forces.'" Luchejko, 207 N.J. at 201.

Defendants created/exacerbated the hazardous condition by improperly mounding the snow which caused plaintiff to fall and sustain injury. The manner in which Defendants cleared the snow is critical. As defendant correctly asserts, this is a matter of first impression as there is no New Jersey case law related to improperly mounded snow. However, Courts in other states have held that a reasonable jury could find negligence where a defendant cleared snow into "slopes" around a parking lot which led caused rainwater to pool into a parking lot. San Marco v. Vill./Town of Mount Kisco, 919 N.Y.S.2d 459 (2010) (finding triable issue of fact as to whether defendant municipality negligently cleared snow in a parking lot by creating piles too close to adjacent parking spaces where plaintiff fell after melting and refreezing); Smith v. Town of Greenwich, 899 A.2d 563, 574 (Conn. 2006) (holding that jury could have found that additional snow piled on sidewalk could lead to increased water flow when snow melted, increasing size and dangerousness of the resulting ice patch); Harman v. Belisle, No. HHDCV126035291S, 2014 Conn. Super. LEXIS 2211, at *14-15 (Super.

Ct. Sep. 4, 2014) (distinguishing natural and man-made snow piles and holding that an unreasonably large or tall pile of snow could lead to a finding of negligence) (citing Kiel v. Girard, 274 Ill.App.3d 821, 825, 654, appeal denied, 164 Ill. 2d 565 (1995) ("The snow mounds were man-made, not natural. Injuries caused by unnatural accumulations of piled snow may form the basis of liability, provided that the creation or placement of such piles was negligent")).

Here, as Plaintiff's expert avers, Defendants mounded snow in "upland areas along the sloped driveway" near a weep hole in the retaining wall. The evidence here could lead a reasonable to conclude that Defendant's affirmative conduct caused Plaintiff's fall and injuries.

CONCLUSION

Based upon the facts discussed throughout this brief and the Appellant's previously filed brief, it is clear that the trial court erred in granting summary judgment.

Respectfully submitted,
DAVIS, SAPERSTEIN & SALOMON P.C.

/s/ Grace E. Robol
GRACE E. ROBOL
For the Firm

GER/sne

cc: Kaitlin E. Ryan, Esq.