Docket No. A-003003-23

Superior Court of New Jersey
Appellate Division

ASHWINNI D. SEOPERSAD,

Plaintiff-Appellant,

v.

FULGER'S GOLDEN BEER & LIQUORS A/K/A FULGER'S HARRISON; CIFELLI & SONS GENERAL CONTRACTING, INC; PRAJ 98, LLC; TOWN OF HARRISON; ABC CORPORATIONS 1-10; XYZ PARTNERSHIPS 1-10; AND JOHN DOES 1-10;

Defendants-Respondents.

CIVIL ACTION

On appeal from a final judgment of the Law Division, Hudson County, Docket No. HUD-L-0442-21

Sat Below:
Hon. Anthony V. D'Elia, J.S.C.

BRIEF AND APPENDIX FOR PLAINTIFF–APPELANT ASHWINNI D. SEOPERSAD

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On the Brief

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PRELIMINARY STATEMENT

Under New Jersey law, a case must be remanded for a new trial if a motion for judgment was granted against a plaintiff who made a prima facie showing of negligence. A case must also be remanded for a new trial where a verdict makes inconsistent findings because it reflects mistake or confusion as a matter of law.

Here, the plaintiff, Ashwinni D. Seopersad, tripped on a newly constructed and uniformly colored step while exiting a commercial store owned and operated by Praj 98, LLC (Praj), and Fulgers Golden Beer & Liquors (Fulgers). The step was constructed by Cifelli & Sons General Contracting, Inc. (Cifelli), on behalf of the Town of Harrison (Harrison). Ms. Seopersad now appeals from an order denying her motion for a new trial, an order granting Fulgers's and Praj's motion for judgment under R. 4:40-1 at trial, and an order of judgment in favor of Cifelli.

First, the order granting Fulger's and Praj's motion for judgment must be reversed because their motion was both procedurally and substantively improper. *Second*, the order of judgment in favor of Cifelli must be reversed because the verdict's finding of negligence absent proximate cause reflects jury mistake or confusion as a matter of law. *Third*, the order of judgment in favor of Cifelli must be reversed because the finding that Harrison was negligent cannot be reconciled with the finding that Cifelli was not negligent in this case.

Therefore, as set forth in detail below, this Court must reverse the orders and remand for a new trial.

PROCEDURAL HISTORY

At trial, Praj 98, LLC (Praj), and Fulgers Golden Beer & Liquors (Fulgers) prevailed on a motion for judgment against the plaintiff, Ashwini D. Seopersad, at the close of their case-in-chief, arguing that Ms. Seopersad's liability expert, Dr. Wayne Nolte, testified that they reasonably relied on the Town of Harrison, which had settled before the trial commenced below. See 3T73:1-5; 6T27:2-20.

After Fulgers and Praj had prevailed on their motion for judgment at trial, Cifelli & Sons General Contracting, Inc., (Cifelli) presented its own case-in-chief and moved for judgment on an identical basis unsuccessfully. See 3T73:1-5.

Before the jury began its deliberations, the trial court declined to change Jury Verdict Form questions—over Ms. Seopersad's objection—regarding Cifelli and Harrison on negligence and proximate cause. 4T99:20–104:3. When the jury itself questioned the meaning of negligence and proximate cause, 4T106:22–107:4, the trial court attempted to clarify those concepts with examples about multi-car collisions and explanations about basketball. See 4T116:16-19 ("So negligence is, as I call it, no harm, no foul. Negligence is you break a rule playing basketball, but there's no harm so they're not going to call a foul.").

During its deliberations, the jury sought clarification about Question 4 of the Jury Verdict Form. 4T118:7; see also Pa17. Through the foreperson, the jury expressed concerns about potential contradictions in its instructions and findings.

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* 1T (Mar. 13, 2024); 2T (Mar. 20, 2024); 3T (Mar. 25, 2024); 4T (Mar. 26, 2024); 5T (Mar. 27, 2024); 6T (May 10, 2024).

4T118:7–122:21. An ensuring colloquy revealed the jury "answered no to one," 4T122:2, and "*Yes to four*." 4T122:5 (emphasis added). The court averred that "we're not holding you to the answers," 4T122:11-14, ushering the jury back to its deliberations. 4T122:11-14. And when the jury ultimately reached its verdict, it found that Cifelli was not negligent and that Harrison was negligent but was not a proximate cause of the accident. Pa17.

Following this verdict, Ms. Seopersad moved for a new trial on grounds that Fulgers and Praj were not entitled to judgment at the close of their own case (for both procedural and substantive reasons) and that the verdict was inconsistent (in both its issue-specific findings and its party-specific findings). 6T4:1–28:17. The trial court, however, denied the motion. Pa23.

In denying Ms. Seopersad's motion for a new trial, the court wrongly found that Fulgers's and Praj's motion for judgment "was made at the right time . . . after the codefendant [Cifelli]'s evidence was presented and [after Cifelli] closed [its] case as far as I remember it on the record." 6T27:6-20. Yet Fulgers and Praj had, in fact, moved for judgment at the close of their own case-in-chief before Cifelli presented any evidence whatsoever. See 3T73:1-5 (denying Cifelli's motion for judgment at the close of all evidence and referencing Praj's earlier motion). The court next declined to consider, or even hear, Ms. Seopersad's substantive argument about Fulgers's and Praj's motion for judgment in conclusory fashion:

> MR. SCHWARTZ: Your Honor, I thought you were going to let me place my position on the record with regard to the motion –
>
> THE COURT: It is, it is. I don't need to hear it. It's in the brief. The briefs are in the record. We have had oral argument. I'm moving on to my next motion. Respectfully, Counsel, I have a lot scheduled today. I have to grant oral argument. I did. I'm basing my decision for the reasons I placed on the record. There's no need to have further oral argument. Everything that you've raised is also in your well-written briefs. Thank you to all counsel.
>
> MR. SCHWARTZ: May I –
>
> THE COURT: – and thank you everybody. Off the record.
>
> MR. SCHWARTZ: – may I – thank you, Judge.
>
> THE CLERK: Off the record.

6T27:25–28:17. And the court repeatedly justified the perfunctory nature of its rulings throughout oral argument by recourse to impermissible speculation about a comparative fault finding that the jury never made. 6T26:22-24 ("If they believe that it was all her fault, then who cares how many defendants you have in the case. They believed it was all her fault.").

Because the trial court's denial of Ms. Seopersad's motion for a new trial relies on improper speculation, contains factual inaccuracies, and ignores binding precedent, Ms. Seopersad now appeals the order denying her a new trial, Pa23, the order granting Fulgers's and Praj's motion for judgment under R. 4:40-1, Pa14, and the order of judgment in favor of Cifelli. Pa21. And Ms. Seopersad asks that this Court reverse the orders and remand for a new trial as to each of the parties.

FACTUAL BACKGROUND

On October 25, 2019, Ms. Seopersad fell due to a uniformly colored step—which was built by Cifelli at the behest of Harrison—in the entryway of a store operated by Fulgers and owned by Praj. See 1T17:18-24; see also Pa41–Pa42.

When construction began, this "new step was not part of Cifelli's original scope of work." 2T52:5-7; 3T41:4-8. Cifelli constructed the step after "[f]ield changes were agreed upon." 2T46:2l; 3T:41:19-21. Cifelli recommended these field changes to Harrison verbally, 3T43:20 ("Verbal, it's all done verbal."), and "no additional blueprints, or plans, or specifications were prepared by the town." 3T43:17-20. When Cifelli completed the step—the evening before the accident—Cifelli removed cones and tape from the surrounding area. 2T42:7-14 (providing date of completion); 3T10:2-18 (discussing its removal of the cones and tape).

Before Ms. Seopersad's fall, Fulgers and Praj "had notice of the step that was installed . . . [and purportedly] caution[ed] the plaintiff a day or so prior to the fall to watch her step as she exited the store, as there was a newly installed step." 2T30:7-14. Fulgers and Praj understood that they "could have painted it if [they] needed to or wanted to before the accident." 2T98:17-21. Yet Fulgers and Praj "failed to mark the step edge with a bright color paint . . . or to even place a cone outside of the door to inform of this new change in elevation." Pa39.

By pre-trial stipulation, "the parties ha[d] agreed . . . that [Ms. Seopersad's] medical expenses related to the injuries sustained in the accident total $968,000." 1T19:15-17.

STANDARD OF REVIEW

The "standard of review on appeal from decisions on motions for new trial is . . . whether there was a miscarriage of justice under the law." Hayes v. Delamotte, 231 N.J. 373, 386 (2018). As such, the record and evidence must be thoroughly canvassed to identify any errors or mistakes and determine if they were capable of producing an unjust result. Ibid.; see, e.g., Lanzo v. Cyprus Amax Mins. Co., 467 N.J. Super. 476, 513–14 (App. Div. 2021) ("Based on our thorough review of the record, we are convinced that the judge's erroneous decisions were clearly capable of producing an unjust result, and therefore, new trials are required."). A miscarriage of justice arises where a verdict reflects jury mistake or confusion, Neno v. Clinton, 167 N.J. 573, 590 (2001), a verdict runs counter to the evidence, Crawn v. Campo, 136 N.J. 494, 511–12 (1994), or errors otherwise culminate in an unjust outcome. See Hayes, 231 N.J. at 386; Delvecchio v. Twp. of Bridgewater, 224 N.J. 559, 582 (2016) (concluding that "the trial court should have found a miscarriage of justice under the law" and that "Plaintiff is entitled to a new trial").

In reviewing an order granting "a motion for judgment under Rule 4:40–1, [the Appellate Division] appl[ies] the same standard that governs the trial courts." Smith v. Millville Rescue Squad, 225 N.J. 373, 397 (2016). This standard requires that "if, accepting as true all the evidence which supports the position of the [nonmovant] and according [nonmovant] the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied." Ibid.

LEGAL ARGUMENT

I. This Court must reverse and remand for a new trial because Fulgers's and Praj's procedurally improper motion for judgment did not show and could not show that Plaintiff failed to establish a prima facie case.

On appeal from an order granting a motion for judgment under R. 4:40-1, review must be undertaken de novo, using the same standard that governed below. Smith v. Millville Rescue Squad, 225 N.J. 373, 397 (2016) ("apply[ing] the same standard that governs the trial courts"); Lechler v. 303 Sunset Ave. Condo. Ass'n, 452 N.J. Super. 574, 582 (App. Div. 2017) ("We review the ruling de novo, using the same standard applied in the trial court.").

Under R. 4:40-1, a party may move for judgment at either the close of an opponent's case or the close of all evidence. Verdicchio v. Ricca, 179 N.J. 1, 30 (2004). A motion for judgment "should only 'be granted where no rational juror could conclude that plaintiff marshaled sufficient evidence to satisfy each prima facie element of a cause of action.'" Smith, 225 N.J. at 397 (quoting Godfrey v. Princeton Theological Seminary, 196 N.J. 178, 197 (2008)). And where, as here, a motion for judgment is granted against a plaintiff who has "made a prima facie showing of a cause of action, . . . *the matter should be remanded for a new trial*." Aronsohn v. Mandara, 98 N.J. 92, 107 (1984); e.g., Potente v. Cnty. of Hudson, 187 N.J. 103, 106 (2006) ("[B]ecause we conclude that the directed verdict was improvidently granted, we now reverse and remand the matter for a new trial.").

A. Fulgers's and Praj's motion for judgment plainly contravened R. 4:40-1's timing requirements because—contrary to the trial court's recollection—it was *not* made after Cifelli rested its case.

By its very terms, R. 4:40-1 limits motions for judgment to two situations: the close of an opponent's evidence *or* the close of all evidence. R. 4:40-1. Any attempt to move for judgment at another time would be "procedurally incorrect." E&H Steel Corp. v. PSEG Fossil, LLC, 455 N.J. Super. 12, 21 n.5 (App. Div. 2018). Such "procedural irregularities favor reversing." Velazquez v. Jiminez, 336 N.J. Super. 10, 33–34 (App. Div. 2000) (reversing where defendant "did not move for judgment either at the close of the plaintiffs' evidence or at the close of all the evidence"), *aff'd*, 172 N.J. 240 (2002).[1]

In denying Ms. Seopersad's motion for a new trial, the trial court found that the motion for judgment "was made at the right time," 6T27:6-7, because it "was made after the codefendant [Cifelli]'s evidence was presented and [after Cifelli] closed [its] case as far as I remember it on the record." 6T27:18-20.

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[1] While procedural violations of timing requirements may warrant reversal of orders granting various motions, e.g., Salazar v. MKGC+Design, 458 N.J. Super. 551, 559 (App. Div. 2019) (reversing order granting sanctions because the judge did not comply with or "cite to any rule concerning the timing of [such] motions"); Thabo v. Z Transp., 452 N.J. Super. 359, 371 (App. Div. 2017) (same), they prove fatal to orders granting dispositive motions. See Cho v. Trinitas Reg'l Med. Ctr., 443 N.J. Super. 461, 474 (App. Div. 2015) (addressing "the appropriate timing of dispositive motions" where "timing requirements of Rule 4:46-1 were violated" and reversing on due process grounds after "utterly reject[ing] the argument that the dismissal should be affirmed . . . because plaintiffs suffered no prejudice in the dismissal of claims that lacked merit"), *certif. denied*, 224 N.J. 529 (2016).

The trial court specifically reasoned as follows:

> Procedurally I find that it was made at the right time. [Fulgers and Praj] had to wait until the defendants' testimony was presented *because the plaintiff legitimately at the time of trial would have a right to rely not only upon their evidence against Fulgers and Praj but* [*also upon*] *any evidence that would have been presented by Cifelli and Sons at the time of trial. . . .*
>
> Theoretically the plaintiff could have relied upon the live testimony of, of, of Cifelli and Sons' witnesses to try to make an argument that Fulgers and Praj should stay in the case. *That's why the motion was made after the codefendant* [*Cifelli*]*'s evidence was presented and they closed their case as far as I remember it on the record.*

6T27:6-23 (emphasis added).

Contrary to the trial court's recollection, however, Fulgers and Praj moved for judgment at the close of their own case-in-chief and *not* after Ciffelli rested. See 3T73:1-5 (denying Cifelli's motion for judgment at the close of all evidence, referencing Praj's earlier motion, and stating why Praj's motion was granted.).[2]

Thus, Fulgers's and Praj's R. 4:40-1 motion was "procedurally incorrect." E&H Steel Corp., 455 N.J. Super. at 21 n.5; Velazquez, 336 N.J. Super. at 33–34. And because Fulgers's and Praj's procedurally improper motion plainly deprived Ms. Seopersad of the very right that the trial court had purported to safeguard—*viz.*, "a right to rely . . . upon the evidence . . . presented by Cifelli," 6T27:8-12—the order entering judgment and the order denying a new trial must be reversed.

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[2] Orders denying motions for new trials cannot be viewed deferentially "where, as here, the trial judge [has] a mistaken recollection of what transpired at the trial." Sweeney v. Pruyne, 134 N.J. Super. 15, 18 (App. Div. 1974), *aff'd*, 67 N.J. 314 (1975).

B. The trial court's rationale for entering judgment fails as a matter of law because an expert's opinion testimony on reasonableness is *not* dispositive as to breach of duty in an ordinary negligence case.

Under New Jersey law, a "jury has no duty to give controlling effect to . . . testimony provided by the parties' experts, even in the absence of evidence to the contrary." Waterson v. Gen. Motors Corp., 111 N.J. 238, 248 (1988) (finding defendant was "not entitled to a directed verdict"). The mere fact that an expert testifies does "not mean that the [c]ourt as a matter of law ha[s] to accept it or that the jury as the factfinders ha[ve] to believe [it]." Id. at 249.

In "ordinary negligence actions, . . . a jury [may] find that the duty of care has been breached without an expert's opinion.'" Fernandes v. DAR Dev. Corp., 222 N.J. 390, 404 (2015) (quoting Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 407 (2014)). And the question of whether a defendant's conduct "constitutes reasonable care . . . is resolved not by a judge but by a jury." Filipowicz v. Diletto, 350 N.J. Super. 552, 561 (App. Div. 2002), *certif. denied*, 174 N.J. 362 (2002).[3]

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[3] Scully v. Fitzgerald, 179 N.J. 114, 127 (2004) ("The duty involved in this case was not of an esoteric nature. . . . It is within the province of the jury ultimately to determine whether defendant breached that duty."); e.g., Jacobs v. JCP&L Co., 452 N.J. Super. 494, 508 (App. Div. 2017) ("The judge rightly left it to the jury's common sense to decide [breach of duty] based on the evidence and general principles of reasonable care."); Cassanello v. Luddy, 302 N.J. Super. 267, 275 (App. Div. 1997) (finding the defendant was not entitled to judgment at trial because "expert's answer is not fatal to plaintiff's case"); see also MODEL (CIVIL) JURY CHARGE § 1.13 (providing that the jurors "are not bound by the testimony" and "may accept or reject all or part of an expert's opinion").

For instance, in Alves v. Rosenberg, this Court found "no error in [a] judge's denial of plaintiff's motion for judgment under Rule 4:40-1" where plaintiff relied on "uncontradicted, credible [expert] testimony that defendant's conduct deviated from the standard of care about which plaintiff's expert opined" because "a jury could question [an expert]'s conclusions, especially when affording defendant all reasonable inferences to which he is entitled at that stage." 400 N.J. Super. 553, 566 (App. Div. 2008).

Here, in granting Fulger's and Praj's motion for judgment, the trial court reasoned that the testimony of Ms. Seopersad's liability expert, Dr. Wayne Nolte, was "dispositive as to Pra[j] because [Dr. Nolte] clearly stated in direct and cross that it was reasonable for the owner to rely upon the Town of Harrison." 3T73:1-5; 6T5:4-18 (same). Just "because [Dr. Nolte] said it did not mean that the [c]ourt . . . had to accept it or that the jury as the fact finders had to believe him." Waterson, 111 N.J. at 249; see, e.g., Martin v. Newark Pub. Sch., 461 N.J. Super. 330, 339 (App. Div. 2019) (finding opioid treatment unreasonable even though an expert specifically "opined that continuing treatment with Percocet was 'reasonable'").[4] Dr. Nolte's testimony did not in any way entitle Fulgers and Praj to judgment in

[4] Indeed, based on the trial court's rationale, Ms. Seopersad would have been entitled to judgment against Fulgers and Praj on liability if Dr. Nolte had testified that reliance upon Harrison was *unreasonable*. Contra Alves, 400 N.J. Super. at 566 (finding plaintiff's expert testimony was not dispositive as to breach of duty because a jury could have rejected expert's opinion even if it was uncontested).

this case because "a factfinder is not required to accept an expert's opinion." E&H Steel Corp. v. PSEG Fossil, LLC, 455 N.J. Super. 12, 29 (App. Div. 2018). Indeed, Dr. Nolte's testimony could not have been dispositive as to breach of duty in this case because "tripping on a step that one is not expecting and that is difficult to see does not involve a matter that is beyond the comprehension of the jurors." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 450 (1993) (citing Berger v. Shapiro, 30 N.J. 89, 102 (1959)). As the trial court had itself acknowledged at the outset, "[e]xpert witnesses . . . give [the jury] an opinion, not a statement of a fact, but an opinion, . . . [and jurors] determine how reliable that opinion is . . . [and] whether [they] should rely on some of it, all of it or none of it." 1T23:24–24:5.

Thus, as the jury could have rejected Dr. Nolte's testimony in its entirety, the trial court erred in finding Dr. Nolte's testimony to be dispositive of breach. See Waterson, 111 N.J. at 248 (finding that expert's uncontested testimony did not entitle defendant to a directed verdict); Alves, 400 N.J. Super. at 566 (finding uncontested expert testimony insufficient to grant a motion for judgment at trial). And as the trial court improperly entered judgment in favor of Fulgers and Praj, the orders granting the motion for judgment and order denying the motion for a new trial must be reversed. See Berger, 30 N.J. at 102 (reversing order granting motion for judgment because "it is obvious that an expert need not be called to inform a jury as to . . . the step of a porch"); cf. Waterson, 111 N.J. at 248; Alves, 400 N.J. Super. at 566; Cassanello, 302 N.J. Super. at 275.

C. Fulgers and Praj did not and could not demonstrate entitlement to judgment under R. 4:40-1 because Ms. Seopersad had made a prima facie showing as to each element of negligence in this case.

To prevail under R. 4:40-1, Fulgers and Praj needed to demonstrate that an element of negligence could not be established at trial. Smith, 225 N.J. at 397; Aronsohn, 98 N.J. at 107. A negligence claim consists of four essential elements: (1) duty of care, (2) breach, (3) causation, and (4) damages. Coleman v. Martinez, 247 N.J. 319, 337 (2021).

Here, as in prior cases involving analogous facts, Ms. Seopersad made a prima facie showing as to each element. See Monaco v. Hartz Mountain Corp., 178 N.J. 401, 418 (2004) (reversing order of judgment in commercial defendant's favor because—even if the municipality bore responsibility for the condition—it owed a duty of care, and whether it breached its duty was for a jury to decide); Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 449 (1993) (finding "plaintiff had in fact established a prima facie case" and expert testimony was unnecessary for jury to decide "whether a step . . . could cause an unsuspecting person to fall"); Handleman v. Cox, 39 N.J. 95, 104 (1963) (reversing order of judgment in favor of defendant and finding question of whether a stairwell constitutes a dangerous condition is a for a jury to decide); Lechler v. 303 Sunset Ave. Condo. Ass'n, 452 N.J. Super. 574, 586 (App. Div. 2017) (reversing order of judgment where the plaintiff fell on steps because she had made a prima facie case of negligence).

First, Fulgers and Praj owed a duty as a matter of law because they own and operate a store on "commercial property." Stewart v. 104 Wallace St., Inc., 87 N.J. 146, 159 (1981). Fulgers's and Praj's ownership and operation of a store on commercial property conclusively establishes that they owed Ms. Seopersad a duty because there is *no* "case-by-case, commercial-property-by-commercial-property approach to determining when a duty is owed." Padilla v. Young Il An, 257 N.J. 540, 561 (2024) (adopting a "bright-line rule that commercial property owners owe a duty").[5] This duty required them "to exercise reasonable care for [Ms. Seopersad's] safety, including making reasonable inspections of [their] own property and the abutting sidewalk and taking such steps as were necessary to correct or give warning of a hazardous condition thereon." Monaco, 178 N.J. at 418 (citing Handleman, 39 N.J. at 111).

Second, as Fulgers and Praj owed "a duty to [Ms. Seopersad] to maintain [their] land in a safe condition, to inspect, and to warn of defects whether within [their] power to correct or not, . . . it was for the jury to determine whether a

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[5] Even before Padilla adopted this bright-line rule, a "fully duty analysis" would have been unnecessary because Plaintiff's status as an invitee suffices to establish the applicable duty of care in this case. Estate of Desir ex rel. Estiverne v. Vertus, 214 N.J. 303, 317 (2013) (explaining that the traditional common law categories—invitee, licensee, and trespasser—function as shorthand for the full duty analysis in Hopkins); Lechler, 452 N.J. Super. at 583 (same); Peguero v. Tau Kappa Epsilon Loc. Chap., 439 N.J. Super. 77, 88 (App. Div. 2015) (finding only cases in which "the duty of care is *not* well settled [require] a so-called 'full duty analysis'").

breach of that duty occurred." Id. at 401 (reversing the order granting judgment). Ms. Seopersad made a prima facie showing that the step constituted a dangerous condition because she proffered testimony, photographs, and video showing—among other things—the step's uniform coloration, see Hopkins, 132 N.J. at 449, its lack of warning signs, see Monaco, 178 N.J. at 418, and its lack of a handrail. See Parks v. Rogers, 176 N.J. 491, 503 (2003).[6] Because Ms. Seopersad's accident occurred "post-Hopkins, [Fulgers and Praj] were on notice that a camouflaged or concealed step . . . was a potentially dangerous condition." Reyes v. Egner, 201 N.J. 417, 430 (2010) (citing Hopkins, 132 N.J. 426, 450 (1993)). Therefore, Ms. Seopersad inarguably raised "fact questions as to the visual prominence of the elevation change on stairs which have the same color as the [ground] on both ends, the adequacy [or lack] of the warning signs, and the absence of a handrail." Geringer v. Hartz Mountain Dev. Corp., 388 N.J. Super. 392, 405 (App. Div. 2006). And even if reasonable jurors may have found the step "was not dangerous and should not result in the imposition of liability, . . . it is *their* decision to make." Hopkins, 132 N.J. at 451.

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[6] See also Reyes v. Egner, 404 N.J. Super. 433, 462 (App. Div. 2009) (finding that both a "stair having the same color as the floor" and "the lack of a handrail" had "raise[d] factual issues of a hazard that preclude summary judgment"), *aff'd*, 201 N.J. 417 (2010); Sussman v. Mermer, 373 N.J. Super. 501, 507 (App. Div. 2004) (finding "lack of a handrail [allows] a trier of fact [to] find that [a step] presented a foreseeable and unreasonable risk of harm").

Third, Ms. Seopersad made a prima facie showing of proximate causation because she proffered direct and circumstantial evidence that the step constituted a substantial factor in her accident. Lynch v. Scheininger, 162 N.J. 209, 228 (2000); Scafidi v. Seiler, 119 N.J. 93, 101 (1990).[7] Fulgers and Praj do not dispute that Ms. Seopersad did, in fact, "fall from the step to the ground." Knox v. Goodman, 45 N.J. Super. 428, 437 (App. Div. 1957), *certif. denied*, 25 N.J. 47 (1957). At trial, Ms. Seopersad and Dr. Nolte testified about how the step's condition contributed to the accident. See Ibid. Thus, as the jury had sufficient information to decide proximate cause for itself, the issue of proximate cause was [for] the jury." Ibid.; e.g., Handleman, 39 N.J. at 112 (concluding "the jury could properly find that the stairwell was a . . . proximate cause" based on "shortness of the platform"); Berger, 30 N.J. at 102 (reversing order entering judgment because "it is obvious that an expert need not be called to inform a jury as to . . . the step of a porch" and whether the step caused the plaintiff's fall was "for the jury to resolve"); Reyes, 404 N.J. Super. at 467 (finding the fact that plaintiff fell on a step with "monochromatic coloration" sufficed to make proximate cause a jury question).[8]

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[7] A showing of "proximate cause does not need to be absolute but . . . can be established by circumstantial evidence." Ocasio v. Amtrak, 299 N.J. Super. 139, 153 (App. Div. 1997).

[8] Cf. Gilbert v. Stewart, 247 N.J. 421, 448 (2021) ("Only in extraordinary cases will the issue of proximate cause be removed from the factfinder."); J.H. v. R&M Tagliareni, LLC, 239 N.J. 198, 245 (2019) (finding that "[p]roximate cause and . . . breach are ordinarily questions for the jury"); Lynch, 162 N.J. at 229 (same).

Fourth, Ms. Seopersad proffered "prima facie proof of actual damages," 27-35 Jackson Ave., LLC v. Samsung Fire & Marine Ins. Co., 469 N.J. Super. 200, 215 (App. Div. 2021), because the "parties ha[d] agreed amongst themselves that [her] medical expenses related to the injuries sustained in the accident total $968,000." 1T19:15-17. She testified about her extensive injuries and supplied expert testimony as to the precise nature of her injuries, the extent of medical care, the amount of her medical expenses, and the economic implications of her injuries for future employment. See 3T74:2-14 (finding that "the only issue [for the jury] is reasonableness and necessity" and "[n]ot the amount of bills"). Accordingly, Ms. Seopersad made a prima facie showing of damages at trial warranting that issue's submission to the jury with respect to both Fulgers and Praj in this case. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 535 (1995) (observing "courts should treat plaintiff's proofs as uncontradicted, both as to liability and damages . . . to determine whether a prima facie case has been established" when deciding a defendant's motion for "a directed verdict pursuant to Rule 4:40-1"). After all, the fact that Ms. Seopersad "may not prevail on her claim for damages does not affect her right to pursue it." Runyon v. Smith, 163 N.J. 439, 442 (2000).

Therefore, as Ms. Seopersad "established a prima facie case concerning . . . the camouflaged step," Hopkins, 132 N.J. at 449, the trial court improperly granted Fulgers's and Praj's motion for judgment. See Monaco, 178 N.J. at 418; Hopkins, 132 N.J. at 449; Handleman, 39 N.J. at 104; Berger, 30 N.J. at 102. Thus, "*the matter should be remanded for a new trial*." Aronsohn, 98 N.J. at 107.

II. This Court must reverse the judgment and remand for a new trial on all issues because the verdict of negligence absent proximate cause is fatally inconsistent and reflects mistake or confusion as a matter of law.

If a negligence claim arises from an accident involving only a single cause, a verdict of "negligence but absence of proximate cause [i]s patently inconsistent." Neno v. Clinton, 167 N.J. 573, 587 (2001) (quoting Pappas v. Santiago, 66 N.J. 140, 143 (1974)). Such verdicts "bespeak confusion or mistake on the part of the jury." Ibid.; Mercedes-Benz Corp. v. Lotito, 328 N.J. Super. 491, 508 (App. Div. 2000) (finding "inconsistent verdicts are fatally defective and should normally be set aside" because they show "the jury failed to comprehend the issues involved in the trial"), *certif. denied*, 165 N.J. 137 (2000). And as a "verdict that a defendant negligently maintained a step but that [its] negligence was not proximate cause of a slip and fall [i]s inconsistent," Neno, 167 N.J. at 588 (citing Menza v. Diamond Jim's, Inc., 145 N.J. Super. 40, 45–46 (App. Div. 1976)), the verdict here "irresistibly leads to the conclusion that a new trial is required in this case." Ibid.[9]

For instance, in Menza, the plaintiff "tripped over a step and injured herself while on defendant's premises." 145 N.J. Super. at 42. The plaintiff "alleged that

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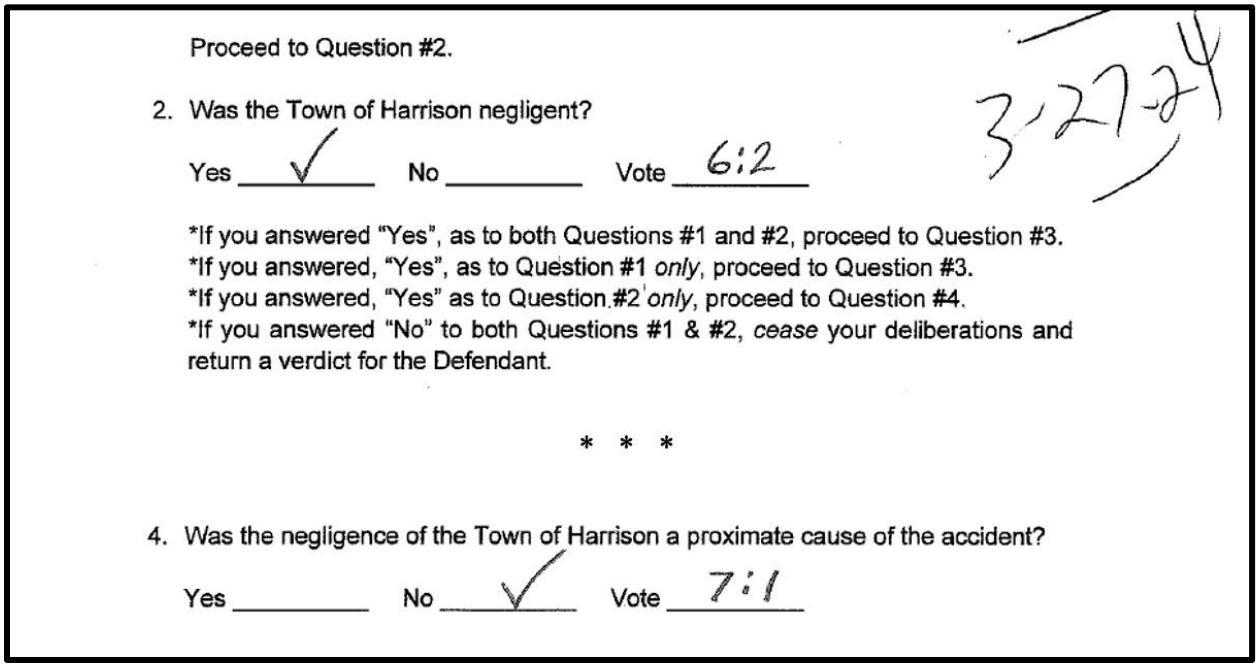
[9] Even in cases involving a "possible inconsistency, . . . the interests of justice are better served by a retrial." Jurado v. W. Gear Works, 131 N.J. 375, 391 (1993). Although juries in "criminal [trials] may return illogical or inconsistent verdicts," inconsistent verdicts will "not be tolerated in civil trials." State v. Grey, 147 N.J. 4, 10 (1996). In civil trials, inconsistent verdicts reflect "jury confusion or mistake" and "cannot be sustained." Williams v. James, 113 N.J. 619, 631, 633 (1989).

defendant was negligent because there was no warning of a step." Ibid. The jury, in turn, found that the defendant was negligent but was not a proximate cause of the accident. Ibid. On appeal, the plaintiff argued that the jury's finding stemmed from a mistaken understanding of the judge's instructions. Id. at 44. This Court, however, reversed and remanded for a new trial because a verdict of negligence absent proximate cause reflected mistake or confusion on the jury's part. Id. at 45. This Court explained that, on retrial, "the jury should be instructed only as to the issue of negligence," ibid., because "there is no warrant for the submission of [proximate cause or contributory negligence] to the jury." Id. at 45–46. Thus, this Court reversed and remanded for a new trial. Id. at 46.

Here, as in Menza, the Jury Verdict Form included a finding of negligence absent proximate cause. Pa17. It specifically included the following findings:



Proceed to Question #2.

2. Was the Town of Harrison negligent?

Yes ✓ No _____ Vote 6:2

3-27-24

*If you answered "Yes", as to both Questions #1 and #2, proceed to Question #3.
*If you answered, "Yes", as to Question #1 *only*, proceed to Question #3.
*If you answered, "Yes" as to Question #2 *only*, proceed to Question #4.
*If you answered "No" to both Questions #1 & #2, *cease* your deliberations and return a verdict for the Defendant.

* * *

4. Was the negligence of the Town of Harrison a proximate cause of the accident?

Yes _____ No ✓ Vote 7:1

Pa17. Just as the verdict of negligence without proximate cause proved fatally inconsistent when the plaintiff tripped and fell on the defendant's step in Menza, 145 N.J. Super. at 45, so too the verdict of negligence without proximate cause is fatally inconsistent in this case. See ibid.

Like Menza, Ms. Seopersad's accident involved a single cause (the step) without any intervening causes or superseding causes. See id. at 45. These facts "leave no doubt that if there was negligence, there was also proximate cause." Ibid. Neither Ms. Seopersad, Cifelli, Praj, nor Fulgers alleged—let alone proved—that anything "intervened in the chain of causation." Capaldo v. Reimer, 40 N.J. 269, 274 (1963) ("nothing would have justified the jury, having found [negligence] with respect to [defendant's] conduct, in concluding that such conduct was not a proximate cause"). And considering this backdrop, "if [Harrison] was negligent, [then it] proximately caused at least some of [Ms. Seopersad's] injuries." Neno, 167 N.J. at 588. As such, the "verdict that [Harrison] negligently [built] the step but that [its] negligence was not a proximate cause of [Ms. Seopersad's] fall was inconsistent." Ibid. (citing Menza, 145 N.J. Super. at 45–46).

In attempting to reconcile the verdict's inconsistency below, the trial court impermissibly speculated that the jury had made a finding of comparative fault against Ms. Seopersad. E.g., 6T26:22-24 ("If they believe that it was all her fault, then who cares how many defendants you have in the case. They believed it was

all her fault."). Yet an inconsistent verdict cannot be reconciled by speculation about the jury's intent. See Lewis v. Am. Cyanamid Co., 155 N.J. 544, 561 (1998) (declining "to speculate about the meaning of the jury's findings" and remanding "the issue of defendants' liability for retrial"); Jurado v. W. Gear Works, 131 N.J. 375, 390 (1993) (finding the "Appellate Division should not have assumed that the jury decided the issue"); Theer v. Philip Carey Co., 133 N.J. 610, 624 (1993) ("We are constrained to disagree with the court's reasoning and its conclusion. It is not possible to reconstruct and recast the jury's deliberations simply by parsing the answers . . . or identifying which of its determinations or answers is critical or eliminating the erroneous interrogatory from the mix."); In re C.J., 474 N.J. Super. 97, 123 (App. Div. 2022) ("While the court ultimately, and correctly, noted it could not speculate regarding what the jury may have concluded . . . , the court did engage in some conjecture as to how the jury may have arrived at its verdict. . . . On remand, the court should not speculate as to how the jury may have reached its decision."), *certif. denied*, 253 N.J. 602 (2023).

Contrary to the trial court's view, the verdict does *not* contain a finding of comparative fault against Ms. Seopersad. See Pa17–20. Such a finding must be memorialized by expressly ascribing the plaintiff a specific percentage of fault. Lewis, 155 N.J. at 562 ("If, on retrial, the jury determines that plaintiff was aware of the risk . . . , it must determine the extent to which his negligence caused his

injuries . . . in the form of a percentage." (quoting N.J.S.A. 2A:15-5.2a(2))); see Velop, Inc. v. Kaplan, 301 N.J. Super. 32, 53 (App. Div. 1997) (refusing to assume that others were liable when, "in assessing comparative fault for negligence, . . . the verdict form gave . . . no percentage of fault").

Even if speculation were permissible—which, as a matter of law, it is not—"nothing would have justified the jury, having found [negligence] with respect to [the defendant's] conduct, in concluding that [it] was not a proximate cause." Capaldo v. Reimer, 40 N.J. 269, 274 (1963). Insofar as the trial court speculated about comparative fault, such speculation plainly defies the well-settled principle that "members of the public are entitled *to assume that the sidewalk, for its full width, is free from* [*conditions*] *which would render its use dangerous*." Krug v. Wanner, 28 N.J. 174, 184 (1958) (emphasis added). So "protective is this assumption in law that *pedestrians do not have to look for or be on guard for such dangers*." Ibid. (emphasis added). Because Ms. Seopersad fell on a step that Cifelli constructed for Harrison on the sidewalk in the entryway of Fulgers's and Praj's store here, Ms. Seopersad did not bear any obligation to be on guard for the step. See Krug, 28 N.J. at 184; see also Stewart v. 104 Wallace St., Inc., 87 N.J. 146, 151 (1981) ("The traveling public has the right to assume there is no dangerous impediment or pitfall in any part of it."); Gellenthin v. J&D, Inc., 38 N.J. 341, 352 (1962) (same); Saco v. Hall, 1 N.J. 377, 382 (1949) (same).

Speculation aside, "there is no ready, logical, or practical manner in which the two answers can be reconciled." JMB, 228 N.J. Super. at 616 ("We need not speculate on how the jury came to decide the two questions so inconsistently."). The fact that the verdict's inconsistency pertains to Harrison does not lessen its significance in any way here because—regardless of which party it concerns—it reflects *the jury's* mistake, confusion, or unfitness. See Neno, 167 N.J. at 587; Mercedes, 328 N.J. Super. at 508. Given that Cifelli, Fulgers, and Praj raised the issue of Harrison's liability, they cannot now argue the findings as to Harrison were insignificant in this case. See N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 340 (2010) ("A defendant cannot beseech and request the trial court to take a certain course of action, and upon adoption by the court, take his chance on the outcome of the trial, and if unfavorable, condemn the very procedure he sought claiming it to be error and prejudicial."); Brett v. Great Am. Rec'n, Inc., 144 N.J. 479, 503 (1996) (finding that "where error [stems from an attempt] to secure a tactical advantage at trial, the party responsible will not be permitted to complain on appeal.").

Therefore, as the jury rendered a patently inconsistent verdict in this case, this Court must reverse and remand for a new trial. Neno, 167 N.J. at 590; Menza, 145 N.J. Super. at 46; see also Ogborne v. Mercer Cemetery Corp., 197 N.J. 448, 461 (2009) ("[W]hen a trial error that affects liability occurs, the new trial shall encompass all issues.").

III. In any event, the Court must reverse and remand for a new trial because the jury's finding that Harrison was negligent cannot be reconciled with its finding that Cifelli was not, as Harrison only acted through Cifelli.

Under New Jersey law, a verdict cannot be sustained if its findings as to distinct parties are logically inconsistent. Navarro v. George Koch & Sons, Inc., 211 N.J. Super. 558, 581 (App. Div. 1986), *certif. denied*, 107 N.J. 48 (1986). A verdict containing inconsistent findings thus necessitates a new trial. See ibid. (remanding for new trial based upon findings that "were inherently inconsistent" because if "the failure to warn . . . was a proximate cause . . . as to ETC's claim, it necessarily had to have been a proximate cause . . . as to Navarro's claim").

In this case, the jury could only find Harrison negligent by applying either "the general rule of vicarious liability set forth in N.J.S.A. 59:2-2 or [the] public entity liability with regard to the dangerous condition of public property set forth in N.J.S.A. 59:4-2." Ogborne v. Mercer Cemetery Corp., 197 N.J. 448, 452 (2009). Either scenario presupposes Cifelli's own negligence because vicarious liability requires primary liability,[10] and creating a dangerous condition entails negligence. See Polzo v. Cnty. of Essex, 209 N.J. 51, 67 (2012) ("A dangerous condition . . . may be created if, for example, . . . paving of a roadway is negligently performed.").

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[10] "In every form of vicarious liability, the blameworthy behavior or status of the primarily liable person must be established as a prerequisite to recovery against the secondarily liable person." Wilkerson v. C.O. Porter Mach. Co., 237 N.J. Super. 282, 301 (Law. Div. 1989).

While "a municipality . . . cannot avoid liability for . . . defects resulting from [its] work merely because the improvements are done by an independent contractor," Bechefsky v. City of Newark, 59 N.J. Super. 487, 493 (App. Div. 1960), such municipal liability will arise only "where the independent contractor has *acted in a negligent manner or created a nuisance*." Id. at 494 (emphasis added).[11] So "the city would be liable *if its contractor had been negligent*." Russell-Stanley Corp. v. Plant Indus., 250 N.J. Super. 478, 494 n.8 (Ch. Div. 1991) (emphasis added) (citing Majestic Realty Assocs. v. Toti Contracting Co., 30 N.J. 425, 432 (1959)). And as the "obligation of a municipality to maintain its streets in reasonably safe condition for public travel [is] a non-delegable duty," Araujo v. N.J. Nat. Gas Co., 62 N.J. Super. 88, 102 (App. Div. 1960) (citing Bechefsky, 59 N.J. Super. at 493), a municipality will be "subject to the same liability for bodily harm caused by the negligence of the contractor [as] though [the municipality] had [it]self done the work of construction or maintenance." Araujo v. N.J. Nat. Gas Co., 62 N.J. Super. 88, 102 (App. Div. 1960), *certif. denied.*, 33 N.J. 328 (1960).[12]

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[11] The TCA recognizes "nuisance . . . as a dangerous condition of property." Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 97–98 (1996).

[12] See Milstrey v. City of Hackensack, 6 N.J. 400, 412 (1951) ("Fishbough is also liable . . . for the nuisance created by his hand, even though the work was done for the municipality."); e.g., Taverna v. City of Hoboken, 43 N.J. Super. 160, 166 (App. Div. 1956) (finding contractor's breach "sufficient to make his misfeasance that of the city"), *certif. denied*, 23 N.J. 474 (1957); Messier v. City of Clifton, 24 N.J. Super. 133, 139 (App. Div. 1952) (finding that city could be liable if its contractor negligently failed to keep a lamppost lit).

Here, then, the jury could not find Harrison negligent while simultaneously finding Cifelli was not negligent because Harrison had only acted through Cifelli. See Bechefsky, 59 N.J. Super. at 493 (holding that municipal liability will arise "where the independent contractor has acted in a negligent manner"). In this case, the "negligence, if any, occurred in the performance of work . . . delegate[ed] to an independent contractor [Cifelli] for whose negligence [Harrison] is responsible." Karpinski v. Borough of S. River, 85 N.J.L. 208, 211 (E&A 1913).

Because "[d]erivative liability can only arise from primary liability, and . . . the cause of action against [Harrison was] predicated [upon Cifelli's negligence], there cannot logically and legitimately be a verdict against [Harrison] exonerat[ing] [Cifelli] of the alleged tort." Gudnestad v. Seaboard Coal Dock Co., 27 N.J. Super. 227, 235 (App. Div. 1953), *aff'd in part, rev'd in part, on other grounds*, 15 N.J. 210 (1954). Thus, as the trial involved Ms. Seopersad's claim that the "negligence of [Cifelli is] imputable to [Harrison], [the] verdict in favor of [Cifelli] and against [Harrison] is inconsistent." Maldonato v. Ironbound Transp. Co., 9 N.J. Misc. 985, 986 (Sup. Ct. 1931); cf. Batts v. Joseph Newman, Inc., 3 N.J. 503, 509 (1950) ("Where a master and servant are sued jointly and the action against the master is predicated solely on the tortious conduct of the servant, there can be no verdict against the master if a verdict is found in favor of the servant."); Mason v. Niewinski, 66 N.J. Super. 358, 374 (App. Div. 1961) (finding "[t]here was plain error" and "the verdict may not stand" if it "exculpat[es] the servant [but not] the master also").

Even if the finding of negligence against Harrison were not premised upon vicarious liability, the finding would necessarily entail that the step constituted a dangerous condition because "a dangerous condition at the time of injury [i]s a necessary element of the cause of action." Smith v. Fireworks by Girone, Inc., 180 N.J. 199, 218 (2004). On these facts, Harrison could only have been negligent "for creating a dangerous condition on private property." Posey ex rel. Posey v. Bordentown Sewerage Auth., 171 N.J. 172, 190 (2002). Because the creation of a dangerous condition is a factual predicate for a verdict finding negligence against Harrison, see ibid., a verdict finding Harrison negligent necessarily entails that a dangerous condition was created. Cf. State v. Johnson, 376 N.J. Super. 163, 169 (App. Div. 2005) ("Where the verdict necessarily includes the factual predicate, no separate finding is required."), *certif. denied*, 183 N.J. 592 (2005). Given that Harrison had acted only through Cifelli here, Harrison could not have created a dangerous condition unless Cifelli had done so. Cf. ibid. Therefore, the verdict's finding that Harrison was negligent and Cifelli was not negligent is inconsistent. Cf. Navarro, 211 N.J. Super. at 581 ("[I]f the failure to warn ETC was a proximate cause of the explosion as to ETC's claim, it necessarily had to have been a proximate cause of the explosion as to Navarro's claim.").[13]

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[13] An "independent contractor who . . . creat[es] a dangerous condition remain[s] responsible long after the work ha[s] been completed" and "should be liable . . . for his act." Cogliati v. Ecco High Frequency Corp., 92 N.J. 402, 412 (1983).

Notably, Cifelli's improperly presented plan-or-design immunity defense—that it had "followed the direction of the Town Engineer," 4T8:11-12[14]—cannot reconcile the verdict's inconsistent findings as to Cifelli and Harrison because Cifelli did *not* plead any such affirmative defense in its Answer, see Pa54–Pa60, let alone demonstrate that Harrison's original blueprints contemplated the step, even though it "had the burden of pleading the affirmative defense of plan/design immunity and the burden of proof." Luczak v. Twp. of Evesham, 311 N.J. Super. 103, 108 (App. Div. 1998); see also Buteas v. Raritan Lodge No. 61 F. & A.M., 248 N.J. Super. 351, 363 (App. Div. 1991) ("An affirmative defense is ordinarily waived if not pleaded. . . . We have no doubt that the middle of trial is too late for the raising of an affirmative defense where, as here, neither significant public nor constitutional issues are at stake."); Brown v. Brown, 208 N.J. Super. 372, 384 (App. Div. 1986) ("[A]n affirmative defense [is] required to be pleaded.").

To establish plan-or-design immunity under N.J.S.A. 59:6-4, Cifelli required proof that Harrison included the step in "the *original* plan or design," Luczak, 311 N.J. Super. at 109 (emphasis added), that was "approved *in advance of the construction* or improvement." Pandya v. Dep't of Transp., 375 N.J. Super. 353,

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[14] See, e.g., 3T:1:13 ("Q. Did the town, when they came out to design the step, did they request that a railing be added? A. No. Q. Did they request that nose edges be added? A. No. Q. Did they request that the step be painted? A. No. Q. Would that have been something that Cifelli & Sons would've been – A. No. Q.– able to do on it's own without direction from the town? A. No.").

367 n.2 (App. Div. 2005); Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 111 (1996) (finding plan-or-design immunity failed because, even though defendant "claimed adherence to government plans and specifications, it ha[d] not presented . . . its *initial* decision establishing the drainage system"); Thompson v. Newark Hous. Auth., 108 N.J. 525, 535–36 (1987) (concluding that, unless the initial "plans embraced the condition about which plaintiff complain[s], . . . the defense of plan or design immunity must fail"); see, e.g., Costa v. Josey, 83 N.J. 49, 59 (1980) (observing that operational level decision "to include a handrailing for the steps in front of [a] building [does] not create immunity"). At trial, Cifelli had outright conceded that the step was not part of the original plan but was a field change "done verbal[ly]." 3T43:17-20. Therefore, as the step was a verbal field change, Cifelli lacked any basis whatsoever for presenting this affirmative defense below. See Russo, 144 N.J. at 111; Thompson, 108 N.J. at 535–36; Costa, 83 N.J. at 59.

While public contractors often raise derivative plan-and-design immunity, they cannot do so absent "a finding of primary immunity, the necessary predicate to derivative immunity." Leibig v. Somerville Senior Citizens Hous., Inc., 326 N.J. Super. 102, 107 (App. Div. 1999). In this case, "Harrison [wa]s not entitled to invoke design–plan immunity." Pa12. Therefore, "Cifelli had a duty to exercise due care in constructing the step outside of Fulgers." Pa8. And "Cifelli cannot escape liability because it was simply working under the instruction of Harrison." Pa8.

Thus, as Harrison only acted through Cifelli, Harrison could not have created a dangerous condition unless Cifelli itself had created a dangerous condition. See Navarro, 211 N.J. Super. at 581 ("[I]f the failure to warn ETC was a proximate cause of the explosion as to ETC's claim, it necessarily had to have been a proximate cause of the explosion as to Navarro's claim."). As such, a finding that Harrison was negligent but Cifelli was not negligent is "inherently inconsistent in light of the applicable law." Ibid. Accordingly, this Court must reverse and remand for a new trial on all issues. See ibid.; see also Ogborne, 197 N.J. at 461 ("[W]hen a trial error that affects liability occurs, the new trial shall encompass all issues.").

CONCLUSION

In sum, this Court must reverse and remand for a new trial because the entry of judgment in favor Fulgers and Praj at the close of their own case was both procedurally and substantively improper (R. 4:40-1), the verdict's findings on negligence and proximate cause demonstrate jury mistake or confusion here, and the verdict's contrary findings as to Harrison and Cifelli are irreconcilable.

DATED: August 23, 2024 Respectfully submitted,

By:/s/Douglas S. Schwartz
Douglas S. Schwartz, Esq.
Counsel for Plaintiff, Ashwinni D. Seopersad

ASHWINNI D. SEOPERSAD, **Plaintiff-Appellant,** **v.** **FULGER'S GOLDEN BEER & LIQUORS A/K/A FULGER'S HARRISON; CIFELLI & SONS GENERAL CONTRACTING, INC.; PRAJ 98, LLC; TOWN OF HARRISON; ABC CORPORATIONS 1-10; XYZ PARTNERSHIPS 1-10: ABC ASSOCIATIONS 1-10; AND JOHN DOES 1-10;** **Defendants-Respondents,**	**SUPERIOR COURT OF NEW JERSEY** **APPELLATE DIVISION** **Docket No. A-003003-23** **Civil Action** **ON APPEAL FROM:** **SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY** **Docket No.: HUD-L-442-21** **Sat Below:** **The Honorable Anthony V. D'Elia, J.S.C.**

BRIEF FOR DEFENDANTS-RESPONDENTS FULGER'S GOLDEN BEER & LIQUORS A/K/A FULGER'S HARRISON AND PRAJ 98, LLC

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PROCEDURAL HISTORY

This matter arises out of a trip and fall accident that occurred on October 25, 2019 at the property owned by Defendant Praj 98 LLC (hereafter "Praj"), in which Defendant Fulger's Golden Beer & Liquors a/k/a Fulger's Harrison (hereafter "Fulger's") operated a liquor store. On October 23, 2019 and October 24, 2019, at the property owned by Praj in which Fulger's operated a liquor store, Defendant Cifelli & Sons General Contracting, Inc. (hereafter "Cifelli") constructed a step in conjunction with a road/sidewalk project being performed at the request of the Township of Harrison ("Harrison"). 2T65:15-66:20; 2T42:2-13. On the day of the Plaintiff's fall, the owner of Defendant's Praj and Fulger's, noticing that the barricade to the newly constructed step had been removed by either Cifelli or Harrison, opened the store for business. 2T67:14-19. Plaintiff was one (1) of the first three (3) customers to patron Fulger's on October 25, 2019. Defendant Praj and Fulger's neither requested, paid for nor had any say in construction of the step. 2T67:20-68:15. Plaintiff fell while exiting the store approximately forty-five (45) minutes after the store had open for business on the day that the owner of Praj 98 LLC and Fulger's observed that the barricade had been removed by either Cifelli or Harrison. 2T68:20-69:7.

Plaintiff filed a lawsuit alleging personal injuries as a result of the accident. The matter was tried before a jury and Honorable Anthony V. D'Elia, J.S.C on March 21, 2024. Upon conclusion of Defendants' Fulger's and Praj's

evidence, and prior to evidence being presented by Defendant Cifelli, Judge D'Elia granted Defendant Praj and Fulger's Motion for a Directed Verdict pursuant to R.4:40-1. Plaintiff filed a Motion for a New Trial which was denied by the Court on May 10, 2024.[1] This Appeal ensued.

[1] 8T Mar. 21, 2024); 7T (Mar. 19, 2024).

LEGAL ARGUMENT

POINT I

AS THE MOTION FOR A DIRECTED VERDICT WAS MADE AT THE CONCLUSION OF DEFENDANTS' EVIDENCE, AND NO OTHER EVIDENCE REMAINING TO BE PROFFERED TO THE COURT BY DEFENDANT CIFELLI ALLEGED NEGLIGENCE AGAINST DEFENDANTS PRAJ AND FULGER'S, THE MOTION FOR A DIRECTED VERDICT SHOULD BE DEEMED MADE TIMELY.

With regard to Plaintiff's argument that the motion for a directed verdict was untimely pursuant to Rule 4:40-1, it should first be noted that the Court, within its discretion, has the ability to relax any Rule if adherence to the same would result in an injustice. See Rule 1:1-2. Also, it is respectfully submitted to the Court that the motion for a directed verdict was timely as the same was brought at the end of Defendants' case in chief. The remaining Defendant to present evidence, Cifelli, did not present evidence of negligence against Defendant Fulger's and Praj. 8T74:22-8T129:4. In fact, Mr. Cronin testified that he found the step in question to be was not hazardous. 8T124:1-5. As such, the evidence was concluded as to Plaintiff and Defendants Fulger's and Praj upon conclusion of testimony by Defendants Fulger's and Praj's witnesses. In as much as testimony concluded between Plaintiff and Defendants Fulger's and Praj, the motion for a directed verdict was timely pursuant to Rule 4:40-1.

In Advance Piece Dye Works, Inc v. Travelers Indemnity Company, 64 N.J. Super. 405, 415 (App. Div. 1960), a dismissal of the complaint was granted without the Plaintiff presenting all of its proofs. Instead of a presentation of the evidence, the Court requested a proffer from the Plaintiff as to what the evidence would show. The Appellate Division held that where the merits of the case have not been tried, a dismissal of the complaint would amount to an injustice. The procedural deficiency was dismissal of the Complaint prior to Plaintiff's presentation of its case in chief.

Plaintiff's reliance on Velazquez v. Jimenez, 336 N. J. Super. 10, 33-34 (App. Div. 2000), aff'd, 172 N.J. 240 (2002), is misplaced. In Velasquez, the underlying case was tried before a jury between March 24, 1998 and April 7, 1998. Defendant Ranzini filed a motion to mold the verdict. Thereafter, the trial judge, on May 15, 1998, over one (1) month after the entry of the jury verdict, granted a judgment n.o.v. sua sponte, ruling that Dr. Ranzini was not negligent as a matter of law, and set aside the jury's verdict against that defendant. The sua sponte granting of the judgment n.o.v. occurred prior to oral argument on May 15, 1998 concerning Dr. Ranzini's motion to mold the jury verdict, without prompting by counsel for Dr. Ranzini. In addition to reversing the trial judge's entry of judgment n.o.v. on substantive grounds, the Appellate Division noted that under R.4:40-2, a judgment n.o.v. cannot be entered unless a motion for judgment or the equivalent had been made during the trial. Id. at 33-34.

Additionally, the Trial Court's sua sponte judgment n.o.v. was not made within twenty (20) days after the verdict or the jury's discharge as required by Rule 4:40-2 (b). Id. at 35 (footnote 5). While Defendant Ranzini argued that his pretrial motion for summary judgment was the equivalent of a directed verdict motion under Rule 4:40-1, the Appellate Division noted that the grounds upon which the pretrial summary judgment motion was made differed from the grounds upon which the trial judge granted the sua sponte judgment n.o.v. As such, the granting of the same was inappropriate.

Also, Plaintiff's reliance on Cho v. Trinitas Regional Medical Center, 443 N.J. Super. 461, 472 (App. Div. 2015), cert. denied, 224 N.J. 529 (2016), is distinguishable. In Cho, the Defendants filed a summary judgment motion under the guise of an in limine motion. The Appellate Division noted the frequent misuse of summary judgment motions under the guise of in limine motions and as such, recognized that the appropriate Rule under which the motion should have been heard was Rule 4:46-1, which requires that a motion for summary judgment be returnable no later than thirty (30) days before the scheduled trial date unless Court orders for good cause. Id. at 471. As such, the nature and timing of the Cho motion is obviously distinguishable from the case at bar since the Cho court addressed the issue of a summary judgment motion being made on the eve of trial as opposed to the within matter wherein the directed verdict motion was made upon the conclusion of Defendants' case in chief, after

Plaintiff presented its case and rested, with no other proofs being presented by the remaining Defendant, Cifelli to assess negligence against Defendants Fulger's and Praj.

In the case at Bar, Plaintiff had a full and fair opportunity to litigate. No other evidence was to be presented in the trial after Defendants Fulger's and Praj rested so as to in any way prove that Defendants Fulgers and Praj breached their duty of care or were a proximate result of the accident. The sole remaining Defendant to present evidence was Cifelli, and its expert, Michael Cronin P.E, made no opinion concerning the negligence of Defendants Fulger's and Praj. As such, the Rule 4:40-1 directed verdict motion was appropriately before the Court for consideration.

POINT II

PLAINTIFF'S APPEAL SHOULD BE DISMISSED AS NO JURY COULD FIND THAT DEFENDANTS ACTED UNREASONABLY RESULTING IN A BREACH OF THE DUTY OF CARE.

Plaintiff alleges that Defendants Praj and Fulger's breached the duty of care owed to the Plaintiff thereby resulting in damages. As such, Plaintiff alleges that the Trial Judge's granting of the Motion for a Directed Verdict was improper. However, the Trial Judge reasoned that no rational jury could find, based upon the facts as presented at trial, that Defendants Praj and Fulger's acted unreasonably.

It is clear that the owner of a premise to which the public is invited for business purposes of the owner owes a duty of reasonable care to those who enter the premise upon that invitation to provide a reasonably safe space to do that which is within the scope of the invitation. Arroyo v. Durling Realty LLC, 433 N.J. Super 238, 243 (App. Div. 2013), quoting Bulter v. Acme Markets, Inc., 89 N.J. 270, 275 (1982). The duty of care "requires a business owner to discover and eliminate dangerous conditions, to maintain the premises in safe condition, and to avoid creating conditions that would render the premise safe." Id., quoting Nisivoccia v. Glass Gardens, Inc., 175 N.J.559, 563 (2003). A landowner owes a duty to a business invitee to guard against any dangerous condition on the property that the owner either knows about or should have

discovered. Hopkins v. Fox and Lazo Realtors, 132 N.J.426, 434 (1993). Included in the duty of reasonable care owed to an invitee is to conduct a reasonable inspection to discover latent dangerous conditions of which the owner knew or should have discovered. Id. at 433-434. In order to hold a business proprietor liable in negligence, a Plaintiff must prove that the Defendant had actual or constructive knowledge of the dangerous condition that caused the accident. Prioleau v. Kentucky Fried Chicken, Inc., 223 N.J. 245, 257 (2015). "The mere existence of a dangerous condition does not, in and of itself, establish actual or constructive notice." Id. at 571. A defendant has constructive knowledge of a condition when the same existed for such a length of time as reasonably to have resulted in knowledge and correction had the Defendant been reasonably diligent. Troup v. Burlington Coat Factory Warehouse Corp., 443 N.J. Super. 596, 602 (App. Div. 2016). "The characteristics of the dangerous condition giving rise to the slip and fall or eyewitness testimony" concerning the length of time the condition existed "may support an inference of constructive notice about the dangerous condition." Id.

In the case at bar, it is clear that Defendants Praj and Fulger's did not request work to be performed, pay for the work to be performed or have any say in the work being performed. 2T65:19-66:20. It is clear that the services were performed by Cifelli at the request of Harrison. 2T39:3-40-11. It is further clear that after the new step was installed, barricades were removed and thus,

Defendant Fulger's and Praj opened the store for business, and further, that Plaintiff fell within forty-five (45) minutes of the store being open. 2T68:1-23. Rocco Russomano, the municipal engineer for Harrison, as well as Plaintiff's own liability expert, Dr. Wayne Nolte, PE, both testified that it was reasonable for Praj and Fulger's to rely upon the work that was done by a licensed contractor at the request of and with the approval of the municipality as the work was constructed to code. 2T60:9-14; 7T70:7-16. Mr. Russomano testified that pursuant to the applicable code, there was nothing unsafe about the curbing depicted in P-45, a trial exhibit which depicted the newly installed step/curbing. 2T43:6-7; 2T60:22-61:11.

Plaintiff's expert, Dr. Wayne Nolte, testified at trial that it was reasonable for a property owner to rely upon a licensed contractor and the municipality concerning work that was performed. 7T70:7-16. Dr. Nolte further confirmed that in his report, he stated that Harrison's conduct was "palpably unreasonable and the proximate cause of the accident." 7T59:6-61:7.

The trial judge found that "There's no way for this jury to find that [defendants Parj and Fulgers] acted unreasonably if [Plaintiff's] own expert said, yeah, if [Praj and Fulgers] relying on the town, which [Praj and Fulgers] testified, by the way, on the defense case, he was, that's reasonable…." 8T66:18-23. The trial judge further decided, "I guess. I don't know. In any event, I'm going to grant the motion. I'm going to grant the motion because I do

believe that the question of the reasonableness of the property owner is off the table. When the plaintiff's expert says, if [Praj and Fulgers]- if [Praj and Fulgers] relied upon the town then [Praj and Fulgers] was acting reasonably. There's no evidence that [Praj and Fulgers] had a separate duty except to act reasonably. He had a duty to make sure that the steps were safe. Did he violate the duty to act unreasonably by not painting it yellow? When plaintiff's own expert says it's reasonable for [Praj and Fulgers] to think the stair- the step is safe and [Praj and Fulgers] doesn't have to do anything because the town approves it then the jury cannot speculate otherwise. We got the defense expert saying it. We got the plaintiff's expert saying it. For them to pull it out of thin air that they're going to disagree with plaintiff's own expert on the ultimate question of fact, reasonableness, when there's no other evidence that is was unreasonable. What- what- how can this- a lay person jury without the assistance of any other testimony, put a burden on a property owner like Mr. Patel to figure out that that step was somehow unsafe. There's nothing in this case that says that. So, I'm going to grant the motion. I'm going to dismiss." 8T71:22-72:24.

It is clear that Defendants Praj and Fulger's did not have the requisite knowledge, actual or constructive, based upon reliance on the municipality and contractor, and the length of time which the subject step was open to the public to traverse. As such, even assuming that the subject step was a dangerous

condition, no reasonable jury could find that the Defendants Praj and Fulger's acted unreasonably, and breached duty of care owed to the Plaintiff.

CONCLUSION

For the foregoing reasons, Plaintiff's Appeal should be denied in its entirety with respect to Defendants Praj and Fulger's.

Respectfully submitted,

Foster & Mazzie LLC

s/Mario A. Batelli
Mario A. Batelli, Esq.
Counsel for
Defendants/Respondents
Fulger's Golden Beer & Liquors
a/k/a Fulger's Harrison, and Praj
98, LLC

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET No. A-003003-23
Virginia E. Hughes, Esquire
I.D. #: 028831987

ASHWINNI D. SEOPERSAD,

Plaintiff - Appellant,

vs.

FULGER'S GOLDEN BEER & LIQUORS a/k/a FULGER'S HARRISON;
CIFELLI & SONS GENERAL CONTRACTING, INC.;
PRAJ 98, LLC;
TOWN OF HARRISON;
ABC CORPORATIONS 1-10;
XYZ PARTNERSHIPS 1-10;
and JOHN DOES 1-10,

Defendants- Respondents.

CIVIL ACTION

On appeal from a final judgement of the Law Division, Hudson County, Docket No. HUD-L-0442-21.

Sat Below:
Hon. Anthony V. D'Elia J.S.C.

BRIEF FOR DEFENDANT-RESPONDENT CIFELLI & SONS GENERAL CONTRACTING, INC.

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PRELIMINARY STATEMENT

This matter was tried over two weeks, beginning March 13, 2024, and concluding March 27, 2024 before Judge Anthony D'Elia The jury deliberated for the better of part of two days before rendering a verdict that on its face demonstrates a well-reasoned consideration of all factors and a fairly and justly determined verdict. Appellate filed a motion for a new trial. When this motion was denied, he appealed.

In this appeal the Appellant does not argue any errors in the trial. Rather, the Appellant argues that the jury must have made a mistake because the jurors did not adopt the Appellant's position that the Respondent Cifelli had a duty to improve on the design created by Harrison's town engineer. In his argument the Appellant ignores all the evidence supporting Respondent's argument that it correctly fulfilled its duty to perform the construction work it was hired to perform following the Uniform Construction Code, and the plans and instructions of the Town of Harrison. It is clear from the verdict that the Jury agreed with The Respondent that it had no right or duty to add to Harrison's design but rather correctly performed the work it was hired to complete. Therefore, the court should affirm the trial court's denial of the plaintiff's request for a new trial.

PROCEDURAL HISTORY

On February 1, 2021, the plaintiff, Ashwinni D. Seopersad, filed a Complaint alleging negligence against the defendants, Fulgers Golden Beer & Liquor a/k/a Fulgers Harrison, Cifelli & Sons General Contracting Inc, Praj 98 LLC and the Town of Harrison. (Pa43). On or about February 26, 2021, the defendant Cifelli and Sons filed its Answer to the plaintiff's Complaint. (Pa.54). On or about February 18, 2021, the defendant Town of Harrison filed its Answer to plaintiff's Complaint. (Pa.61) On or about March 5, 2021, defendants Fulgers Golden Beer & Liquor a/k/a Fulgers Harrison & Praj 98 LLC filed their Answer to plaintiff's Complaint (Pa.79) Discovery was conducted by the parties until August 12, 2023.

Counsel for Cifelli and Sons General Contractors filed a motion for summary judgement which was denied by the Hon. Kimberly Espinales-Maloney J.S.C. on or about December 19, 2022 (Pa.2). The Town of Harrison also filed a motion for summary judgment which was denied by the Hon. Anthony V. D'Elia on January 26, 2023. (Pa12)

Prior to trial the Town of Harrison settled with the plaintiff. A jury trial then commenced on March 11, 2024, before the Honorable Anthony V. D'Elia and continued over a two-week period until March 27, 2024. (Pa16)

On March 21, 2024, at the close of the plaintiff's case and after eight days of trial, attorneys for Fulgers Golden Beer & Liquors a/k/a Fulgers Harrison and Praj

98 LLC made a motion for a directed verdict against Plaintiff. The Hon Anthony V. D'Elia J.S.C. granted this motion on March 21, 2024.(Pa14)

The trial then proceeded against Cifelli & Sons General Contracting and the Town of Harrison only. Additional testimony was taken on March 21, March 25 and March 26, 2024.(Pa16) The court gave its jury instructions on March 26, 2024 and the jury began deliberating. (4T41-T106)

After the jury began its deliberations it sent the court three questions which the court summarized as follows: 1) What is the difference between a proximate cause and the proximate cause; 2) Define negligence for us; and 3) What is the difference between negligence and proximate cause. (4T106:22 – 107:4) The court answered these three questions and after the jury went back into the jury room appellant's counsel thanked the court for its instructions to the jury and specifically stated that the example given was a good one. (4T117:10-13)

After the court answered the questions, The jury continued to deliberate. Subsequently, the jury asked an additional question regarding the jury verdict form. The court went through the form with them and ultimately corrected the form to use the language requested by the appellant's counsel. Again, counsel for appellant did not object to anything the court stated to the jury. (4T 118:8 – 122:20)

On March 27, 2024, the verdict was returned as follows: Was Defendant Cifelli & Sons Contracting Inc. negligent? Answer: No. Vote 8:0; Was the Town of

Harrison negligent? Answer: Yes. Vote 6:2. Was the Town of Harrison a proximate cause of the accident? Answer No. Vote 7-1. As instructed, the jury did not answer the remaining questions regarding plaintiff's negligence since it answered no to questions 1 and 4. (Pa 17 and Trial Transcript 5)

The appellant filed a Motion for a New Trial. Oral argument was heard on that motion on May 10, 2024, and the motion was denied. (Pa23) A final order was entered on May 13, 2024 (Pa23)

On May 13, 2024, Appellant filed a Notice of Appeal of the March 27, 2024, order granting the directed verdict in favor of Fulgers and Praj, the April 12, 2024 Order entering judgement in accordance with the Jury verdict of March 27, 2024 and the May 13, 2024 Order denying the Appellant's motion for a new trial.

STATEMENT OF FACTS

The accident

On the morning of the accident, Appellant, Ashwinni Seopersad, alleges that she went into the store operated by Fulgers Golden Beer & Liquor (Fulgers) in a building owned by Praj 98 LLC (Praj), to buy some snacks before work. As she stepped out of the store she fell. The Appellant believes that she fell because there was a new step at the entrance to Fulgers with which she was not familiar.(7T:11:12-25 and 12:1-17)

History of the step

For many years a person exiting Fulgers encountered an 8-inch step that led to the sidewalk bordering Davis Avenue in Harrison. As Appellant's expert, Wayne Nolte, P.E. Ph.D., testified, just before plaintiff's accident, the old sidewalk was removed, and a new sidewalk was poured for the new handicap accessible rampway at the corner of Davis Avenue and Harrison Avenue as required by the American for Disabilities Act. Mr. Nolte testified that as a result of following the blueprints created by the Town of Harrison for this project, the installation of this new handicap rampway caused a change in elevation at the entrance to Fulgers that had to be accommodated, and that is why additional concrete was added to the original step.(7T:15:21-25 and 16:1-21 and 73:10-18).

Cifelli witnesses testified that after the issue was discovered they called the town engineer who after consultation instructed them to construct the step.

On March 25, 2024, Michael Cifelli testified on behalf of Cifelli and Sons Construction. Mr. Cifelli testified that the Township of Harrison put out a bid for a project to install handicap ramps in sidewalks at various intersections including the intersection near Fulgers. Cifelli was awarded the contract.(3T:4:14-18 and 6:16-19) Prior to beginning work the Town of Harrison gave Cifelli a set of blueprints that outlined the specific work Cifelli was to perform.(3T:5:19-23). Mr. Cifelli testified that 99% of the time field changes are needed over the course of a project. When that happens Cifelli calls the engineer hired by the town to come out and discuss the issue. The engineer will do an inspection and advise Cifelli what the engineer wants him to do. Mr. Cifelli testified: "He tells us what to do. He's the designer and then we'll build it."(3T:7:14-25 and 8:1-3) When asked if the new design is memorialized in writing, Mr. Cifelli responded: "No, basically it's just if it's approved, we get paid. If it's not approved or if the engineer doesn't like it, or something is wrong, he'll make us redo it…" (3T 8:10-18) Finally, Mr. Cifelli testified that the cones and barricades that Cifelli uses to protect the work are removed when the concrete is fully dry.(3T:11:6-16)

Vincent Farro, the foreman for Cifelli that oversaw the construction in front of Fulgers, also testified.(3T:29:2) Prior to beginning work on the project for the Town of Harrison, Mr. Farro reviewed the blueprints and performed a walkthrough

to look at each corner where they were going to work.(3T:30:2-17). This walkthrough was performed with the town engineer.(3T:31:6-7)

In regard to the specific work done in front of Fulgers, Mr. Farro testified that when the Cifelli crew began its work at the corner in front of Fulgers, Mr. Farro identified a grading issue and notified the town engineer. Mr. Farro suggested that to solve the issue, they add more concrete to the step at the entryway to Fulgers and the town engineer agreed telling Cifelli to install a step that had a minimum tread depth of 12 inches and a maximum rise of 7 inches.(3T 40:8-25, 41:1-25, and 43:1-22.)

After the town engineer gave this instruction, Cifelli built the form and poured the concrete. The town engineer approved the form before the concrete was poured and then came back after it cured.(3T 32:25-33:1-20) Up until the point when the concrete is cured, the whole area is barricaded by cones and caution tape placed around the work area.(3T:35:5-12) Once they felt that concrete was dry enough to walk on and for the store to open up they took the cones, barricades, signs and caution tap to the next intersection.(3T:35:13-17)

Testimony of Rocco Russomano, town engineer of Town of Harrison was consistent with testimony of Cifelli employees.

The jury heard the testimony of Rocco Russomano, the town engineer of the Town of Harrison.(2T:31:3-13) Mr. Russomano testified that in regard to the sidewalk project outside Fulgers, he prepared the plans and specifications for the

bidding process and was involved in construction oversight on a daily basis.(2T35:16-23) Mr. Russomano testified that after the demolition of the sidewalk it was determined that they couldn't maintain a one on twelve slope as required by the ADA. There were two solutions considered: steeply sloped wedge leading up to the step of the store or create an extended step. Mr. Russomano decided to create the step and told Cifelli that there had to be dimensional uniformity in the step and the maximum rise should be seven inches and the minimum tread depth should be at least 12 inches.(2T:38:4-20)

Mr. Russomano further testified that Cifelli made a suggestion on how to fix the situation, but Cifelli had to get permission from him to create the step. He specifically stated that Cifelli did not have the unilateral right to make the change without first getting permission.(2T:46:2-25) Mr. Russomano testified that after the step was built he inspected it and approved it.(2T:47:3-17)

Finally, Mr. Russomano testified that the step was built to code. He testified that the code does not require that the step be painted or any other device be added to it. (2T:43:1-11)

Defense expert, Michael Cronin explained to the jury the different roles played by the Town of Harrison and Cifelli in this project, pursuant to the Uniform Construction Code.

On March 21, 2024, the jury heard testimony from Michael Cronin, the liability expert retained by counsel for Cifelli. Mr. Cronin explained to the jury the

Uniform Construction Code covers all aspects of construction including the roles and responsibilities of the different parties. First, the UCC identifies the design professional which could be a licensed engineer or architect. That party is responsible for the actual design, plans and specification of the construction project. Second, the UCC identifies someone known as the responsible party. That responsible party is the one who is designated by the owner to ensure that all work is performed appropriately, and in accordance with the code, specifications and/or plans developed by the design professional. Finally, the UCC identifies the contractor, the actual person or party that is going to perform the work. That person is responsible for performing the work according to the specifications of the design professional.(8T:81:18-25 and 82:1-23) Applying this to the case, Mr. Cronin identified the Town of Harrison as both the design professional and the responsible party.(8T: 82:24-25 and 83:2-4)

Mr. Cronin also testified that in his expert opinion, the case was about a design issue not a construction issue. A contractor works at the direction of the engineer, and he would not blame Cifelli for following the direction of the engineer. (8T:125:20-25 and 126:1-2)

Appellant's Liability Expert, Wayne Nolte, agreed with Mr. Cronin that the Town of Harrison was responsible for the existence of the step through the actions of its town engineer.

Mr. Nolte opined on page 16 of his expert report and during cross examination at trial, that "The Town of Harrison permitted this step to be created through Rocco Russomanno, a Licensed Professional Engineer, who either knew or should have known that the step without barricade, or without a bright colored warning on its edge, created a hazardous condition."(7T:60:17-24 and pa40)

Mr. Cronin testified that Cifelli and Sons did not breach or violate any codes in this case.

Mr. Cronin opined, within a reasonable degree of engineering certainty, that based on all the evidence he reviewed, as well as his inspection of the subject step, that Cifelli did not violate any code in this case.(8T: 84:23-25 and 85:1-2)

Mr. Cronin went on to explain that Cifelli was hired by the Town of Harrison to perform construction work. There was an engineer on site, hired by the Town of Harrison to supervise the work. Cifelli performed the work in compliance with the plans and specifications that were given to them by the Town of Harrison. Specifically, Mr. Cronin testified: "That is the role of a contractor is to perform that work in accordance with the applicable code, standards, industry standards, and of course, as to the direction of a professional engineer. It's not the responsibility of a contractor to determine what work should or should not be performed, and it's completely reasonable for them to rely upon that engineer that whatever they direct them to do is the code compliant and safe way to do it."(8T:85:8-17)

Mr. Cronin specifically testified that the work performed by Cifelli was good work that was accepted by the town as meeting their requirements which further supports the position that the step was code compliant and safe when they left the site. (8T:85:18-25)

Both defense liability experts testified that the new step did not create a hazardous condition and fully complied with the applicable code.

Both Walter Wysowaty, the liability expert hired by counsel for Fulgers and Praj and Michael Cronin testified that the step as constructed by Cifelli was not a hazardous condition. (8T:56:9-13 and 87:1-10)

In addition, both experts testified that the Uniform Construction Code was the main code adopted by the State of New Jersey that applied to the design of the ingress and egress to Fulgers and more specifically, the other codes reference by plaintiff's expert Wayne Nolte did not apply to the case.(8T 16:6-25, 18:15-25 and 19:1-25, 20:1-2, 83:7-25, 84:1-22).

Both defense experts testified that they were not aware of any code that was adopted by the State of New Jersey and the Town of Harrison which requires the painting of the step.(8T:20:12-17 and 86:1-5.) Similarly, both defense experts testified that they were not aware of any code adopted by the State of New Jersey or the Town of Harrison that required any additional safety measures such as a nose or railing.(8T 20:18-22 and 86:23-25 and 87:1))

Mr. Nolte also agreed that there was no structural defect in the step, and it did not violate the Uniform Construction Code.

Mr. Nolte testified that there was no structural defect with the constructed step.(7T: 57:8-14) Mr. Nolte admitted that the as built step did not violate the Uniform Construction Code since its riser height was 6 inches which is within the code. (7T:62:6-11) Mr. Nolte also testified that there is nothing in the Uniform Construction Code that requires markings and edgings.(7T:62:12-17) Further, he admitted that suggestions made by ASTM are guidelines not actual standards.(7T:63:6-24)

Mr. Nolte's theory was that plaintiff fell because of a failure to warn but acknowledged that Cifelli had no duty to warn after the work was completed.

Mr. Nolte testified that the hazardous condition was a matter of warning.(7T:73:1-2) Moreover, Mr. Nolte admitted that under the Uniform Construction Code Cifelli had no such duty to place warning cones after the work was completed.(7T:77:21-25 and 78:1)

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION FOR A NEW TRIAL SINCE THE VERDICT WAS NOT CONTRARY TO THE WEIGHT OF THE EVIDENCE OR A PRODUCT OF MISTAKE, PASSION, PREJUDICE OR PARTIALITY.

A. STANDARD OF REVIEW

Appellate review of a "trial court's decision on a motion for a new trial is substantially the same as that controlling the trial court except that due deference should be made to the trial court's 'feel of the case,' including credibility." *Caldwell v. Haynes*, 136 N.J. 422, 432, 643 A.2d 564 (1994) Pursuant to *Rule* 4:49-1(a) "The trial judge shall grant the motion if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, *it clearly and convincingly appears that there was a miscarriage of justice under the law*." (Emphasis added).

"A 'judge may not substitute his [or her] judgment for that of the jury merely because he [or she] would have reached the opposite conclusion[,]'" because the judge may not act as a thirteenth juror. *Cuevas v. Wentworth Grp.*, 226 N.J. 480, 501, 144 A.3d 890 (2016) (quoting *Baxter v. Fairmont Food Co.*, 74 N.J. 588, 598, 379 A.2d 225 (1977)). Both the Trial Court and the Appellate Court give "considerable deference" to a jury verdict, and it:

> "should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination, after canvassing the record and weighing the evidence, that the continued viability of the judgment would constitute a manifest denial of justice." That is, a motion for a new trial "should be granted only where to do otherwise would result in a miscarriage of justice shocking to the conscience of the court."[*Little v. Kia Motors Am., Inc.*, 455 N.J. Super. 411, 425, 190 A.3d 502 (App. Div. 2018) (quoting *Risko v. Thompson Muller Auto. Grp., Inc.*, 206 N.J. 506, 521, 20 A.3d 1123 (2011)).]

In the end, a new trial is only proper when the trial court determines that the verdict was "contrary to the weight of the evidence or clearly the product of mistake, passion, prejudice, or partiality." *Lanzet v. Greenberg* 126 N.J. 168, 175 (1991).

B. The appellant has not presented the evidence in the light most favorable to the respondent nor demonstrated that the verdict was contrary to the weight of the evidence or clearly the product of mistake, passion, prejudice or partiality.

In this case there is more than sufficient evidence to support the jury's findings on liability and this verdict carries the presumption of correctness absent some showing of mistake, passion, prejudice, or partiality *Romano v. Galaxy Toyot*a, 399 N.J. Super. 470 (App. Div. 2008).

First, the court is required to look at all the evidence in the light most favorable to the respondent. *Caldwell v. Haynes*, 136 N.J. 422, 432, 643 A.2d 564 (1994) As one can see from comparing the Statement of Facts of Appellant's brief, to the Respondent's Statement of Fact, appellant has ONLY set forth facts that are favorable to himself and has completely ignored the facts elicited through testimony

that supported Cifelli's position that it acted reasonably. More specifically, the jury's verdict is amply supported by the following:

1. All parties agreed that the need for a new step was not caused by any negligence on the part of Cifelli. It was strictly caused by the topography of the area in conjunction with the preexisting building entrance to Fulgers.

2. All experts agreed that the step was built in accordance with the Uniform Construction Code which both defense experts stated was the only applicable standard.

3. Both plaintiff and defense experts agreed that there was no structural defect in the step.

4. Respondent's expert, Michael Cronin opined that that the work performed by Cifelli was good work that was accepted by the town as meeting their requirements which further supports the position that the step was code compliant and safe when they left the site.

5. Mr. Nolte testified that the only reason he found the step hazardous was because the parties failed to warn of the change in the step such as painting the edge of the step yellow.

6. The engineer for the Town of Harrison, Rocco Russomanno was consulted when the field change was needed and agreed with the suggestion that a new step be installed. Mr. Russomanno testified that Cifelli had no authority to make any change

to the plans without obtaining his approval first. Mr. Russomanno gave the parameters for the step and inspected it and approved it after its construction. He specifically testified that he did not require Cifelli to paint the step because that was no code that required the step to be painted.

7. Mr. Nolte conceded that Cifelli had no duty to place any warnings after the work was completed.

8. All witnesses agreed that there is nothing in the Uniform Construction Code that requires any kind of warning on this type of step.

9. Both defense experts, Wysowaty and Cronin testified that the step as built was not hazardous and needed no warning.

This evidence was presented to the jury and the jury returned the correct verdict. The evidence, which the court must assume is true, more than supports the position of Cifelli that the step it built was in compliance with the Uniform Construction Code and the requirements of its customer, the Town of Harrison. It further supports Cifelli's position that it had no right or duty to change the design or instructions of the town engineer employed by the Town of Harrison.

It is respectfully submitted that all of the evidence set forth above and in Respondent's Statement of Facts, demonstrates that the jury verdict is not the result of mistake, passion, prejudice, or partiality on the part of the jury. In short there is

ample evidence to support the jury's finding that Cifelli was not negligent in this case.

C. THE FINDING THAT THE TOWN OF HARRISON WAS NEGLIGENT BUT THAT SUCH NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT IS NOT INCONSISTENT AND DOES NOT DEMONSTRATE THAT THE JURY'S CONCLUSION THAT CIFELLI WAS NOT NEGLIGENT WAS A PRODUCT OF MISTAKE PASSION, PREJUDICE OR PARTIALITY.

Appellant seems to concede that there was sufficient evidence to support the Jury's verdict that Cifelli was not negligent. Instead, he tries to argue that the way the jury answered the questions regarding the settling defendant, Town of Harrison, demonstrates that they did not understand the concept of proximate cause and therefore the verdict must be rejected as to Cifelli and the matter be remanded for a new trial.

First, none of the cases that plaintiff cites are cases where the court ordered a new trial of a defendant because of an alleged inconsistency in the verdict against a settling defendant. Even if the court believed that the verdict regarding the Town of Harrison demonstrated some kind of mistake or lack of understanding, a new trial is not necessary since the Town of Harrison settled with the plaintiff prior to the trial and no new trial is needed to determine whether it is liable to Appellant for her injuries. Thus, the argument is really a red herring and immaterial to the overall verdict.

Secondly, Appellant is incorrect in his assertion that it is automatically inconsistent for a jury to find a party negligent but not the proximate cause of the accident. Negligence and proximate cause are classic and discrete elements of a personal injury case. *Weinberg v. Dinger, 106 N.J. 469, 484, 524 A.2d 366 (1987)*. Appellant had the burden of proving those discrete elements. It is not at all unusual for jurors in a personal injury case to find that a defendant acted unreasonably in some respect but that their conduct did not proximately cause the accident.

Proximate cause requires not only that a defendant's negligence be a "but for" cause of an accident, but also comprise a "substantial factor" in producing the injury. *See, e.g., Rappaport v. Nichols, 31 N.J. 188, 203, 156 A.2d 1 (1959)*; *Camp v. Jiffy Lube No. 114, 309 N.J. Super. 305, 309-11, 706 A.2d 1193 (App. Div.), certif. denied, 156 N.J. 386, 718 A.2d 1215 (1998)*. The record here rationally supports the factfinder's assessment that Harrison could have acted more reasonably in its initial design of the project, in its supervision of the project or in its decision on how to fix the problem, without finding that whatever they thought was an error was a substantial factor in causing the accident.

Appellant relies heavily on the case of *Menza v. Diamond Jim's Inc.* 145 N.J. Super. 40, (App. Div. 1976), claiming that the verdict was identical to the verdict entered by the jury in the case currently before the court. This is not accurate. In fact, the verdicts are very different.

In *Menza* the plaintiff allegedly tripped and sustained injury because the stairs owned by the defendant were not properly lighted, and the carpet was worn and torn. The jury rendered a verdict that found the defendant negligent but not the proximate cause of the plaintiff's injury, plaintiff was not contributory negligent, and the amount of appellant's damages was $15,000. Note in this case the jury found that the premises presented a dangerous condition, that plaintiff was not negligent but then awarded the plaintiff $15,000 despite the fact that they found that the defendant was not the proximate cause of the accident and injury. Since there is no way to reconcile the obvious internal contradiction in these findings, the Appellate Court found that the verdict must have been the result of mistake or confusion.

This is not the same situation as in the current case. Here, there is no internal contradiction that patently demonstrates that the jury was confused. Plaintiff's counsel never argued that if the jury found Harrison negligent then it should go on to plaintiff's negligence because proximate cause was clear as a matter of law. As the trial court noted one obvious explanation for the finding is that the jury thought that the plaintiff's negligence was the sole cause of the accident. This is not speculating on what the jury was thinking, this is simply demonstrating that the finding of negligence, but no proximate cause does not prove that the verdict was due to some mistake about the meaning of proximate cause. Throughout the case the defendants argued that the sole reason plaintiff fell was because she was not looking

where she was going. If the jury accepted that argument, then even if they thought Harrison could have done a better job in designing the project, they would not have found Harrison's actions a substantial factor in causing the accident.

In the end, the alleged inconsistency is not material anyway. The jury found Cifelli not negligent. This verdict is amply supported by the trial record and should not be overturned over findings as to a settling party.

D. THE TOWN OF HARRISON HAD INDEPENDENT RESPONSIBILITY FOR THE DESIGN AND SUPERVISION OF THE CONSTRUCTION PROJECT AND THEREFORE THE JURY WAS WITHIN ITS PREROGATIVE TO FIND CIFELLI WAS NOT NEGLIGENT THOUGH THE TOWN OF HARRISON WAS.

The Appellant's second argument for a new trial is that the verdicts that Cifelli was not negligent, but the Town of Harrison was negligent are logically inconsistent. This argument however is based on the false premise that the work of Cifelli and the work of the Town of Harrison were identical and overlooks long established case law that the Town of Harrison, as the owner of the property, had an independent duty that was broader than the duty owned by Cifelli. The jury was shown over and over again that the Town of Harrison had a broader and independent duty which was different then Cifelli's duty to construct a structurally sound step that met the building code and the specifications designed by the Town of Harrison. Therefore, plaintiff's whole argument fails.

The jury heard ample testimony from multiple parties including the defense expert Michael Cronin who explained how the Town of Harrison, through its engineer, Rocco Russomano, played an integral and independent role in construction of the new sidewalk in front of Fulgers and the creation of the step.

The jury heard multiple witnesses testify that Cifelli was not in violation of the Uniform Commercial Building Code. Further, the jury heard Mr. Cronin explain that New Jersey Administrative Code Section 5:23-2.21 (also known as the Uniform Construction Code) establishes the roles and responsibilities of various parties involved in a construction project. Specifically, this section states that the architect or engineer shall design the project in accordance with all applicable codes. ***Cifelli was not the engineer or architect*** on the subject project.

The code section states that the owner of the project shall designate a responsible person in charge of the work. The owner of the project was the Town of Harrison. The Town of Harrison was required to provide a person in charge of the work. ***Rocco Russomanno was the responsible person in charge***.

The code section states that the contractor shall perform their work in accordance with the applicable regulations and plans and specifications. Both defense experts and the engineer for the Town of Harrison stated that Cifelli performed their work in reasonable conformance with all plans and specifications at the direction of the Town of Harrison.

Michael Cronin testified that Cifelli's work was in compliance with the plans and specifications. However, the field change which required adding the step was designed by the Town of Harrison Engineer. The Town of Harrison Engineer took responsibility for the design of the step, giving instructions as to its depth and height. No additional instructions were given. The Town Engineer inspected the step and ensured it was code complaint.

Testimony from Rocco Russomanno, confirmed that the subject step was built according to the applicable codes and guidelines. Mr. Russomanno testified that he approved the step, inspected the step after it was constructed and concluded that the step was complaint with the codes. Furthermore, Mr. Russomanno testified that *Cifelli could not make any field changes without his authorization.* In addition, as to warnings, there was no code requirement to paint the step.

These facts defeat any argument that the Town of Harrison could only be liable to plaintiff because it was vicariously liable for the work of Cifelli. It had its own independent responsibility for the design and code compliance of the work. It is not inconsistent to conclude that Cifelli was not negligent when it constructed the step pursuant to applicable code and the design and instruction of the engineer but that the Town through its engineer was negligent in the design of the step or the whole sidewalk project. Cifelli argued through lay and expert testimony that it was not allowed to go beyond what the applicable code required and what the town

engineer instructed. Appellant does not cite any case that would create such a duty as a matter of law. The Town of Harrison, on the other hand, who was the owner of the step was not so constrained. Its engineer could have instructed Cifelli to add things, like a yellow painted strip, to the step even though the code did not require it. Cifelli could not do this independently, but Harrison could. Therefore, it is not inconsistent for the jury to find Cifelli was not negligent, but the Town of Harrison was.

Appellant's brief cites to many cases where the court ruled that the municipal owner of the property could not avoid liability for a dangerous condition on public property simply because it hired an independent contractor to do the work. These cases are not on point. They deal only with the scope of the duty of a municipality and do not discuss the duty of the independent contractor. None of these cases state that a contractor is automatically liable if a jury finds the owner of the property liable. None of them hold that a contractor cannot argue that his duty is limited to the proper performance of the work pursuant to the contract he signed.

Next, Appellant argues that a finding that Harrison was negligent means that the jury concluded that the step was a dangerous condition. From this premise he makes the leap that the dangerous condition it found had to be due to the negligence of Cifelli. If the allegation was that step was structurally deficient or that it was built with an incorrect height or depth, then the argument might have merit. It has no merit

in this case because the sole allegation against all the defendants was after the perfectly acceptable and up to code step was built defendants should have placed a warning on the step such as a painted yellow line. However, everyone agreed that the building code adopted by the State of New Jersey did not require any kind of warning on this step. Furthermore, the evidence demonstrated there was nothing in the plans prepared by the Town of Harrison or the verbal instructions proposed by the Town of Harrison, that required such a warning. That was the extent of the Cifelli's duty, and the jury concluded that they had satisfied that duty. The fact that they found that the Town of Harrison had not satisfied its broader duty of care does not mean that the verdicts are inconsistent.

Finally, Cifelli did not improperly present a plan and design immunity defense at trial. It argued and the jury agreed that it fulfilled its duty of care – to comply with applicable codes along with the blueprints and verbal instructions of the Town of Harrison.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal should be denied in its entirety and the order denying a new trial be affirmed.

Respectfully submitted,

VILACHÁ & DEMILLE
Attorneys for respondents Cifelli and Sons General Contracting Inc.

Virginia E. Hughes
BY: _____
Virginia E. Hughes, Esq.

January 30, 2025

Docket No. A-003003-23

Superior Court of New Jersey
Appellate Division

ASHWINNI D. SEOPERSAD,

Plaintiff-Appellant,

v.

FULGER'S GOLDEN BEER & LIQUORS A/K/A FULGER'S HARRISON; CIFELLI & SONS GENERAL CONTRACTING, INC; PRAJ 98, LLC; TOWN OF HARRISON; ABC CORPORATIONS 1-10; XYZ PARTNERSHIPS 1-10; AND JOHN DOES 1-10;

Defendants-Respondents.

CIVIL ACTION

On appeal from a final judgment of the Law Division, Hudson County, Docket No. HUD-L-0442-21

Sat Below:
Hon. Anthony V. D'Elia, J.S.C.

REPLY BRIEF FOR PLAINTIFF–APPELLANT ASHWINNI D. SEOPERSAD

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On the Brief

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LEGAL ARGUMENT

I. This Court must reverse the order granting Fulgers's and Praj's motion for judgment and remand for retrial because Ms. Seopersad established a prima facie of negligence regarding the uniformly colored step here.

In their brief, Fulgers and Praj argue that the order granting their R. 4:40-1 motion for judgment should be affirmed on grounds that "no reasonable jury could find [they] acted unreasonably and breached [the] duty of care owed to Plaintiff." (Fulgers's & Praj's Br. 14.) Fulgers and Praj reason that the expert testimony at trial proved they reasonably relied upon Cifelli to build a step that was not dangerous. (Id. at 12–13.) Yet Fulgers's and Praj's argument fails because reasonable minds could differ while accepting as true any evidence that favors Ms. Seopersad and granting her all favorable inferences. See Holm v. Purdy, 252 N.J. 384, 400 (2022) (quoting Smith v. Millville Rescue Squad, 225 N.J. 373, 397 (2016)).

On appeal from an order granting a motion for judgment, a reviewing court undertakes the R. 4:40-1 inquiry *de novo*. Ibid. The R. 4:40-1 inquiry boils down to a single issue: whether reasonable minds could differ while accepting as true any evidence favoring the nonmovant with the benefit of all favorable inferences. Ibid. And when reasonable minds could differ, R. 4:40-1 mandates reversal. Ibid.; see Smith, 225 N.J. at 397 ("The motion should only be granted where no rational juror could conclude that the plaintiff marshaled sufficient evidence to satisfy each prima facie element of a cause of action.").

A. When Dr. Nolte's testimony is accepted as true, viewed in totality, and given the benefit of all favorable inferences—as it must be—Dr. Nolte's testimony establishes a prima facie case of negligence.

Under New Jersey law, the "duty owing by the owner or occupier of land [is] reasonable care under the circumstances . . . [and] whether reasonable care was exercised is for the jury." Simmel v. New Jersey Coop. Co., 28 N.J. 1, 9 (1958). Such a duty cannot be extinguished by reliance upon others as a matter of law. See Monaco v. Hartz Mountain Corp., 178 N.J. 401, 418 (2004) ("The trial court's . . . idea that Hartz was absolved of its duty . . . because the City owned and . . . maintained the sign simply has no basis in our jurisprudence. Hartz had the same duty as any commercial landlord. It was for the jury to determine whether that duty was breached."); Brown v. Racquet Club of Bricktown, 95 N.J. 280, 299 (1984) ("The owner does not escape responsibility because it . . . relied on the contractor's expertise."); Mayer v. Fairlawn Jewish Ctr., 38 N.J. 549, 555 (1962) (holding that landowner's "nondelegable duty to exercise reasonable care" renders it liable for "the construction work [that] was performed by . . . an independent contractor").

Here, taking as true Dr. Nolte's testimony—as required under R. 4:40-1—Fulgers and Praj owed a duty to inspect their property for dangerous conditions, warn customers of them, and remediate them. 7T54:4–17. A dangerous condition existed on Fulgers's and Praj's property within a reasonable degree of certainty, 7T54:18–23, rendering "immaterial [the issue of] whether the construction work was . . . performed by [either Fulgers or Praj] or by an independent contractor."

Mayer v. Fairlawn Jewish Ctr., 38 N.J. 549, 555 (1962); Gill v. Krassner, 11 N.J. Super. 10, 15 (App. Div. 1950).[1] Their failure to address the dangerous condition constitutes a breach of duty: "If the[ir] business is open, [they] absolutely [have] to do something about it." 7T81:13–25. As Fulgers and Praj failed to provide a handrail, paint the step, refinish the treads, or utilize signs or cones to give warning, 7T48:3–53:17; 3T71:21–24, Fulgers and Praj breached their duty to Ms. Seopersad. See Parks v. Rogers, 176 N.J. 491, 502 (2003); Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 450 (1993); e.g., Reyes, 404 N.J. Super. at 462; Sussman v. Mermer, 373 N.J. Super. 501, 507 (App. Div. 2004) ("[L]ack of a handrail [allows] a trier of fact [to] find [a step] presented a foreseeable and unreasonable risk of harm").

Therefore, accepting Dr. Nolte's testimony as true, viewing it in its totality, and granting all favorable inferences to Ms. Seopersad—as R. 4:40-1 requires—Dr. Nolte's testimony did not support the trial court's entry of judgment here.

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[1] Pannucci v. Edgewood Park Snr. Hous. – Phase 1, LLC, 465 N.J. Super. 403, 415 (App. Div. 2020) (same); Rosenberg v. Otis Elevator Co., 366 N.J. Super. 292, 303 (App. Div. 2004) (same); De Los Santos v. Saddlehill, Inc., 211 N.J. Super. 253, 263 (App. Div. 1986) (same), *certif. den.*, 107 N.J. 101 (1987); e.g., Reyes v. Egner, 404 N.J. Super. 433, 458 (App. Div. 2009) (finding "owner of property is directly responsible [for its condition] even if [another] had built the offending component"), *aff'd*, 201 N.J. 417 (2010); Port Auth. of N.Y. & N.J. v. Honeywell Protective Servs., 222 N.J. Super. 11, 21 (App. Div. 1987) ("owner of a building has a nondelegable duty to exercise reasonable care for the safety of persons using the premises at his invitation. If . . . a dangerous condition . . . results in injury to an invitee, the owner is liable. . . . [I]t is immaterial whether the construction work was performed by . . . an independent contractor."); Ultimate Computer Servs., Inc. v. Biltmore Realty Co., 183 N.J. Super. 144, 153 (App. Div. 1982) ("Defendant contends . . . that it is not liable because the roof was designed and installed by a subcontractor. We find the argument unpersuasive. A property owner is liable for a dangerous condition created by its subcontractor. It cannot delegate its duty to others."), *certif. denied*, 91 N.J. 184 (1982).

B. In any event, Ms. Seopersad established a prima facie case because reasonableness is not an engineering question and, in this context, lay testimony, photographs, and video suffice as a matter of law.

Under R. 4:40-1, an order entering judgment in favor of a defendant must be reversed if a plaintiff's evidence suffices to establish a prima facie case. Smith, 225 N.J. at 397. Where, as here, a premises liability claim involves a trip and fall accident on a monochrome step, "testimony of lay witnesses and photographs of the step . . . establish[] a prima facie case . . . without the aid of expert testimony." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 450 (1993). In the context of such a claim, "reasonable[ness] is [*not*] a question of good engineering practice." Ibid. The jury makes its own reasonableness determination based on the evidence. Ibid.

Here, as in Hopkins, Ms. Seopersad presented lay testimony about the step, photographs depicting the step, and a video depicting the accident. See id. at 449. Any "person of average knowledge and ordinary experience could determine by considering the testimony and by examining a photograph whether a step was camouflaged or obscured and whether [it] could cause [Ms. Seopersad] to fall." Id. at 450. Ms. Seopersad thus established a prima facie showing of negligence. See ibid. (finding "plaintiff had in fact established a prima facie case concerning . . . the camouflaged step" where she "*relied only on the testimony of lay witnesses and photographs of the step*" (emphasis added)). While jurors, as the factfinders, may ultimately conclude that the step "was not dangerous and should not result in the imposition of liability . . . , it is *their* decision to make, and they are fully capable of making that decision without the assistance of experts." Id. at 451

Thus, as Ms. Seopersad presented evidence establishing a prima facie case, the order entering judgment in favor of Fulgers and Praj must be reversed here.

C. Fulgers's and Praj's notice argument fails because they admitted actual notice and because the law imputes constructive notice here.

Under New Jersey law, "[n]otice is not a factor when the defendant property owner, its servant, agent, or employee creates the hazardous condition." Brown, 95 N.J. at 301; O'Shea v. K Mart Corp., 304 N.J. Super. 489, 493 (App. Div. 1997) ("Notice, either actual or constructive, is not required where a defendant *creates* a dangerous condition." (emphasis in original)).

Here, insofar as Fulgers and Praj attempt to claim lack of notice by asserting "[i]t is clear that [they] did not have the requisite knowledge, actual or constructive, based upon reliance on the municipality and contractor, and the length of time which the subject step was open to the public to traverse,"[2] their attempted notice argument fails because they already admitted having actual notice. 2T30:7-14.

Even if Fulgers and Praj had not admitted actual notice—which they did—Fulgers's and Praj's attempt to argue lack of notice would still fail because where, as here, an independent contractor's work has created a dangerous condition on a commercial property, *the proprietor*, "*in legal effect*, *created the condition by* [*its*] *own act*." Gill, 11 N.J. Super. at 15. As Fulgers and Praj owed Ms. Seopersad "a duty [that they] could not delegate, nor relieve [themselves of] by engaging an independent contractor," ibid., they remain directly "liable for the defects in the ultimate result accomplished by [Cifelli], *i.e.*, [their] duty to exercise due care in

[2] Fulgers's and Praj's Br. 13; see also id. at 11 (reciting general principles of notice).

the maintenance of the store remains with [them] whether [they] discharge that duty [themselves], or by [their] employee, or by a third party who, as to [them], may have the status of an independent contractor." Ibid. And as Fulgers and Praj, "in legal effect, created the condition, . . . notice ha[s] no application." Ibid.

Therefore, as Fulgers's and Praj's notice argument fails as a matter of law, and as reasonable minds could differ about the evidence presented at trial here, see supra Points I.A–I.B, the trial court's order granting the motion for judgment must be reversed. See Holm, 252 N.J. at 400; Smith, 225 N.J. at 397. Accordingly, this case must be remanded for a new trial against Fulgers and Praj at minimum. See Holm, 252 N.J. at 414; Smith, 225 N.J. at 379.[3]

II. The Court must reverse and remand for a new trial because the finding that Harrison was negligent cannot be reconciled with a finding that Cifelli was not, as Harrison owed a narrower duty and acted only through Cifelli.

In its brief, Cifelli attempts to reconcile the verdict by claiming that it owed a lesser duty of care to Ms. Seopersad than the "Town of Harrison . . . , who was the owner of the step." (Cifelli's Br. 24.) Cifelli maintains that it did not owe a general duty of reasonable care and that Ms. Seopersad failed to "cite any case

[3] "At common law, in cases of joint tortfeasors, a reversal as to one defendant would be a reversal as to all defendants." Tedeschi v. Silver Rod-Paterson, Inc., 15 N.J. Super. 322, 327 (App. Div. 1951). While the Rules of Court do not require as much, courts retain "discretionary power to order a new trial as to all defendants." Ibid. (citing Ferry v. Settle, 6 N.J. 262, 265 (1951)). In Tedeschi, for example, "the jury found for defendant Macchiarelli, but because the dismissal of [another] defendant, Silver Rod-Paterson, Inc., may have been prejudicial to the plaintiff, [this Court] believe[d] that justice demand[ed] the exercise of judicial discretion in ordering a new trial as to both defendants." Ibid. Just as the directed verdict's entry may have prejudiced the plaintiff in Tedeschi, so too the directed verdict's entry may have prejudiced Ms. Seopersad in this case. See ibid. Thus, this Court should also reverse and remand for a new trial against Cifelli. See ibid.

that would create such a duty as a matter of law." (Ibid.) Cifelli goes so far as to claim that "it was not allowed to go beyond what the applicable code required and what the town engineer instructed." (Ibid.) And Cifelli concludes "[t]he fact that [the jury] found the Town of Harrison had not satisfied its broader duty of care does not mean that the verdicts are inconsistent" (id. at 25–26) because "the jury agreed [Cifelli] fulfilled its duty of care – to comply with applicable codes along with the blueprints and verbal instructions of the Town of Harrison." (Id. at 26.)

However, Cifelli's attempt to reconcile the verdict fails as a matter of law because Cifelli owed Ms. Seopersad the broader duty of reasonable care,[4] and the Town of Harrison—which did *not* own the property—owed a narrower "duty to refrain from palpably unreasonable conduct." Ogborne v. Mercer Cemetery Corp., 197 N.J. 448, 459 (2009). Despite Cifelli's contrary assertions, the Town of Harrison did not own the property at issue; Praj owned the property and leased it to Fulgers. Cifelli owed a duty of reasonable care to anyone affected by its work and would be "liable in tort to all those who may be injured by a negligently-built structure." Aronsohn, 98 N.J. at 106.[5]

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[4] See Carter Lincoln-Mercury, Inc. v. EMAR Grp., Inc., 135 N.J. 182, 195 (1994); Aronsohn v. Mandara, 98 N.J. 92, 106 (1984); H. Rosenblum, Inc. v. Adler, 93 N.J. 324, 336 (1983); Rosenberg v. Town of N. Bergen, 61 N.J. 190, 197 (1972); Totten v. Gruzen, 52 N.J. 202, 209 (1968); Mayer v. Fairlawn Jewish Ctr., 38 N.J. 549, 559 (1962); Terranella v. Union Bldg. & Const., 3 N.J. 443, 448 (1950); Bacak v. Hogya, 4 N.J. 417, 423 (1950).

[5] See, e.g., Snyder v. Am. Ass'n of Blood Banks, 144 N.J. 269, 292 (1996) (finding that a contract neither limits nor precludes a contractor's liability to third persons); Essex v. New Jersey Bell Tel. Co., 166 N.J. Super. 124, 129 (App. Div. 1979); Abel Holding Co. v. Am. Dist. Tel. Co., 147 N.J. Super. 263, 271 (App. Div. 1977); Sarris v. A. A. Pruzick & Co., 37 N.J. Super. 340, 350 (App. Div. 1955).

Moreover, Cifelli's duty of care to Ms. Seopersad "arises independently of [its] contract." Bacak, 4 N.J. at 423.[6] Separate and "apart from its contractual obligation to [Harrison], [Cifelli] was under a common law duty to . . . warn travelers of [a dangerous condition's] presence; the failure to do so constitute[s] negligence." Messier v. City of Clifton, 24 N.J. Super. 133, 141 (App. Div. 1952). Cifelli's duty extends to and encompasses "the failure to do [anything] which a reasonably prudent person would have done." Black v. Borough of Atl. Highlands, 263 N.J. Super. 445, 454 (App. Div. 1993). And Cifelli's duty to Ms. Seopersad did "not terminate, as a matter of law, upon the work having been completed and accepted by [Fulgers and Praj] or [Harrison]." Rosenberg, 61 N.J. at 197 (citing Totten, 52 N.J. at 210).

Whereas Cifelli owed this general "duty to exercise ordinary care," Bacak, 4 N.J. at 423, Harrison owed a limited "duty to refrain from palpably unreasonable conduct." Ogborne, 197 N.J. at 459. Between the two, the palpably unreasonable "standard implies a more obvious and manifest breach of duty and imposes a more onerous burden on the plaintiff." Ibid. Thus, Cifelli's attempt to reconcile the verdict by claiming that Harrison owed a broader duty fails as a matter of law.

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[6] Symbiont Sci. Eng'g & Constr. v. Ground Improve. Servs., 723 F. Supp. 3d 363, 379 n.12, 381 (D.N.J. 2024) (applying New Jersey law and finding that a contractor's "duty of care is not defined by the contractual relationship" in a "negligence [case] where recovery would flow from the independent duty imposed by law").

Even ignoring the palpably unreasonable standard that applies to Harrison, the jury could not find Harrison breached its duty in this premises liability case without first having found that "a dangerous condition [existed] as a necessary element of the cause of action." Smith v. Fireworks by Girone, Inc., 180 N.J. 199, 218 (2004); see, e.g., Buddy v. Knapp, 469 N.J. Super. 168, 198 (App. Div. 2021) (finding, "[o]nce a dangerous condition is found to exist," the inquiry is "whether those involved in bringing about an injury to another were exercising due care"); cf. Wade v. Kessler Inst., 172 N.J. 327, 338 (2002) ("[T]he jury could not find defendant liable for breaching an implied covenant of good faith and fair dealing without first finding that an implied contract of employment existed."). The "duty of due care requires a [defendant] to avoid creating conditions that would render the premises unsafe." Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003). Here, any dangerous condition necessarily arose through Cifelli's acts because Harrison only acted through Cifelli. Harrison could not have created a dangerous condition unless Cifelli itself created it. Thus, Harrison could not have breached its duty of care unless Cifelli did so. See Bacak, 4 N.J. at 425 (stating general rule that, under most circumstances, "the independent contractor . . . alone is liable").

Plainly, then, the verdict implicates jury mistake or confusion in this case. The verdict cannot be explained, as Cifelli suggests, by the scope of the respective duties because Cifelli's "duty to warn [was] as great as [Harrison's] duty to warn."

Navarro v. George Koch & Sons, Inc., 211 N.J. Super. 558, 581 (App. Div. 1986), *certif. denied*, 107 N.J. 48 (1986) (finding "verdicts were inherently inconsistent"). The verdict can only be explained by Cifelli's improper defense and concomitant misrepresentations at trial, which are reprised on appeal and require reversal.

While Cifelli conclusorily asserts that it "did not improperly present a plan and design immunity defense at trial,"[7] Cifelli unwittingly concedes that it did so by stating that it "argued[,] and the jury agreed[,] that it fulfilled its duty of care to comply with applicable codes along with the blueprints and verbal instructions of the Town of Harrison"[8] because its duty would only be so limited in that context. See Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 111 (1996) ("While the City pled this defense in its answer and claimed adherence to government plans and specifications, it has not presented any evidence about its initial decision establishing the drainage system."); Anzalone v. Westech Gear Corp., 141 N.J. 256, 270 (1995), *cert. denied*, 516 U.S. 1046 (1996) (finding contractor's adherence to specifications is no defense absent a showing that "the duty to warn imposed under state tort law . . . is 'precisely contrary' to the . . . government's specifications").

In this case, Cifelli's liability did not depend upon contractual obligations or code compliance but hinged exclusively "on general negligence standards."

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7 Cifelli's Br. 26.

8 Cifelli's Br. 26.

Kane v. Hartz Mountain Indus., Inc., 278 N.J. Super. 129, 143 (App. Div. 1994), *aff'd o.b.*, 143 N.J. 141 (1996) (reversing verdict for contractor where jury was misled that its liability turned on code compliance). Cifelli's "lack of responsibility under its contract for the design of the [step was] not relevant." Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 396 (1982). Cifelli's "adherence to or reliance upon [Harrison]'s plans, even if required by its contract, [wa]s equally irrelevant." Ibid.

Even if Cifelli complied with every applicable code—which it did not[9]—Cifelli's compliance would not entail that it satisfied its duty of care because the "codes represent minimum standards and do not establish [its] complete duty." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 411–12 (2014). Neither code nor contract had "required the displacement of [Cifelli's] state law duty to warn." Anzalone, 271 N.J. Super. at 532. Here, Cifelli could not argue that it was "acting in compliance with . . . specifications because there were no such specifications." Id. at 537.[10] Cifelli had verbally recommended the step after construction began; the step did not appear in Harrison's plans or specifications at all. 3T43:13–20. At bottom, Harrison "did not make [Cifelli] do anything—[Cifelli] chose not to provide any safety measures or warnings." Id. at 536; Michalko, 91 N.J. at 396.

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[9] See 3T72:2–15; 7T55:20–23.

[10] 3T43:13–20.

While nothing prevented Cifelli's "compl[iance] with both its contractual obligations and the state-law prescribed duty of care," Anzalone, 141 N.J. at 267, Cifelli presented its defense to insinuate that "the [g]overnment made me do it." Ibid.[11] Cifelli improperly intimated to the jury—as it incorrectly asserts now—that the absence of a statutory or contractual violation entailed a lack of negligence. (Cifelli's Br. 25.) Cifelli misinformed the jury that it "did not violate any code," 4T3:14–4:14, even though it knew this statement was inaccurate because it had already been informed as much by the trial court: "But [Dr. Nolte] did say about the field change [that] Cifelli had to follow the code, and the code included edge markings, change of color, railings too . . . ,et cetera. *So*, *in light of what he actually testified to*, *do you still want to make your motion*." Ibid. (emphasis added).

Likewise, Cifelli asserted "[t]here was no code obligating [it] to warn any pedestrian or the plaintiff once the work was completed," 4T3:14–4:14, even though its duty of care is not statutory and did "not terminate, as a matter of law, upon the work having been completed," Rosenberg, 61 N.J. at 197. And Cifelli then told the jury that "Dr. Nolte testified that there's no code obligating them to warn," 4T3:14–4:14, when his testimony indicated the exact opposite here. 7T55:20–23.

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[11] See, e.g., 3T43:13–20 ("Q. Did the town, when they came out to design the step, did they request that a railing be added? A. No. Q. Did they request that nose edges be added? A. No. Q. Did they request that the step be painted? A. No. Q. Would that have been something that Cifelli & Sons would've been – A. No. Q.– able to do on it's own without direction from the town? A. No.").

Thus, as Cifelli did not owe a lesser duty than Harrison as a matter of law, a finding that Harrison was negligent but Cifelli was not negligent is inconsistent. Navarro, 211 N.J. Super. at 581.[12] The verdict indicates that the jury was misled by Cifelli's legally and factually baseless defense, which produced an unjust result. See Ehrlich v. Sorokin, 451 N.J. Super. 119, 132 (App. Div. 2017) (reversing for retrial based on improper informed-consent defense and summation referencing it). That error demands a remand for a new trial. Ibid.; see Ogborne, 197 N.J. at 461.

III. In any event, the Court must reverse the judgment and remand for retrial on all issues because the verdict of negligence absent proximate cause is fatally inconsistent and reflects mistake or confusion as a matter of law.

In its brief, Cifelli attempts to distinguish the verdict here from those in prior cases on ground that the "inconsistency [is] against a settling defendant." (Cifelli's Br. 18.) Cifelli attempts to reconcile the verdict by speculating that "the sole reason plaintiff fell was because she was not looking where she was going." (Id. at 21.) And Cifelli ultimately seeks to sidestep the issue by claiming that the "alleged inconsistency is not material anyway." (Ibid.)

Contrary to Cifelli's view, the fact that the verdict's inconsistency pertains to Harrison does not in any way lessen its significance here because it reflects *the jury's* confusion. Neno, 167 N.J. at 587. As Cifelli clearly believed Harrison's

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[12] As Cifelli's "summation comments . . . implied an untruth," Bender v. Adelson, 187 N.J. 411, 433 (2006), they were sufficiently "prejudicial as to require a new trial." Ibid.; Comprehensive Neurosurgical P.C. v. Valley Hosp., 257 N.J. 33, 84 (2024); Brenman v. Demello, 191 N.J. 18, 33–34 (2007). Cifelli's summation would produce an unjust result by limiting the jury's consideration of Cifelli's liability to events preceding Ms. Seopersad's accident. And this error, alone, requires reversal here.

liability was material when it raised the issue at trial, it cannot now claim otherwise. See N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 340 (2010).

Where, as here, a negligence claim involves only a single cause, a verdict finding "negligence but absence of proximate cause [i]s patently inconsistent." Neno v. Clinton, 167 N.J. 573, 587 (2001). At trial, Ms. Seopersad argued Cifelli "was negligent because there was *no warning of a step*." Menza v. Diamond Jim's, Inc., 145 N.J. Super. 40, 42 (App. Div. 1976). The step, in fact, lacked warnings. E.g., 7T54:14–23. Cifelli, in turn, attributed the lack of warnings to Harrison. E.g., 8T124:3–20. And the jury found Harrison negligent absent proximate cause. Pa17.

If, as Cifelli improperly speculates, the jury had found Ms. Seopersad was "not looking where she was going,"[13] the jury's verdict would still reflect confusion as to proximate cause because an unsuspecting person—such as Ms. Seopersad—would derive the most benefit from a warning (*i.e.*, it is a more substantial factor). See Latzoni v. City of Garfield, 22 N.J. 84, 90 (1956) (emphasizing importance of "warning to the unknowing and unsuspecting traveler"). The warnings at issue—"edge markings, change of color, railings"[14]—"would have directed passage . . . on a level surface so no one would have ever encountered the elevation differential," 7T50:9–23, thereby allowing Ms. Seopersad to avert the accident here. See ibid. And given that Harrison "was negligent in failing to [warn], [its] conduct would have contributed . . . to at least some of plaintiff's injuries." Neno, 167 N.J. at 588.

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[13] Cifelli's Br. 21.

[14] 3T72:8.

Indeed, Cifelli's own position on appeal—*viz.*, "plaintiff fell was because she was not looking where she was going," and "the jury accepted that argument"—would require reversal because Ms. Seopersad, "a member of the traveling public[,] has the right to assume that there is no dangerous impediment or pitfall in any part of the sidewalk, and is not obliged to anticipate dangerous conditions, [but only to] exercise reasonable care to avoid them if [s]he sees or is aware of them." Krug v. Wanner, 28 N.J. 174, 183 (1958) (remanding for "new trial on all issues between all of the parties" where "jury did find that the landlord had been negligent [but] precluded recovery by its finding . . . of contributory negligence"). If Cifelli's view were correct, the jury could not have found any comparative negligence because Ms. Seopersad would not have had a duty to avoid the step in this case. See ibid.

Thus, as the finding of negligence absent proximate cause "demonstrates jury confusion or mistake," Neno, 167 N.J. at 590, which "irresistibly leads to the conclusion that a new trial is required," ibid., this Court must reverse and remand.

CONCLUSION

In sum, this Court must reverse and remand for retrial because the entry of judgment under R. 4:40-1 was both procedurally and substantively improper, the finding of negligence absent proximate cause reflect jury mistake or confusion, and the verdict's contrary findings as to Harrison and Cifelli are irreconcilable.

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Respectfully submitted,

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