Superior Court of New Jersey

Appellate Division

Docket No. A-003053-23

GLENN WEIDLICH, *Plaintiff-Appellant,* vs. 313-319 FIRST STREET CONDO ASSOCIATION, INC., CLINTON HILL CONDO ASSOCIATION, 357 8TH STREET CONDOMINIUM ASSOCIATION, JOSEPH A. DEL FORNO, INC., DEL FORNO REAL ESTATE LLC, UNLIMITED BUILDING MANAGEMENT CORP., *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY DOCKET NO. HUD-795-23 Sat Below: HON. KALIMAH H. AHMAD, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

On the Brief:
MICHAEL J. REDENBURG
Attorney ID# 284802018

MICHAEL J. REDENBURG, ESQ. P.C.
Attorney for Plaintiff-Appellant
32 Broadway, Suite 412
New York, New York 10004
(212) 240-9465
mredenburg@mjrlaw-ny.com

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PRELIMINARY STATEMENT

The Plaintiff-Appellant Glenn Weidlich brought suit against the Defendants for negligence and premises liability in their acts and omissions in allowing or creating a dangerously unsafe condition on the front entry stairs of the building at 357 8th Street, Jersey City, New Jersey. Weidlich alleges that the deterioration of the 132-year old concrete entry stairs allowed or exacerbated icy conditions forming on the top landing step, despite only a very small trace of freezing rain falling on the premises. Weidlich also testified that the Defendants had recently painted the exterior steps with a paint that made the stairs "sleeker" and "rougher in the rain to navigate or when they're wet" compared to their previous condition.

Weidlich presented expert opinion that the deterioration of the old exterior stairs allowed water infiltration and dangerous freezing. The deterioration of the stairs and the new paint job created a question of fact for a jury as to whether there was an unreasonably dangerous slip and fall hazard on the stairs upon a slight freezing rain, leading to Weidlich's injury.

In their summary judgment defenses, the Defendants relied upon the "Ongoing Storm" doctrine and also presented contrary expert testimony concerning the condition of the stairs. The "Ongoing Storm" doctrine is not absolute, and evidence that a defendant created the risk or that the risk was

preexisting, such as presented here, makes it inapplicable. Furthermore, aside from the substance of the Defendant expert's opinion, his report reads as an ad hominem attack on the credibility of Weidlich's expert, highlighting the "Battle of the Experts" arising from their conflicting opinions.

Despite evidence meeting the recognized exceptions to the "Ongoing Storm" doctrine, despite the conflicting expert opinions, and despite Weidlich's description of the premises based on his personal knowledge of the recently-painted steps, the trial court overstepped its bounds and decided the conflicts in the evidence with a summary judgment. The evidence in the record, though, creates a genuine issue of material fact for the jury to resolve, and the trial court should be reversed.

PROCEDURAL HISTORY

Weidlich filed a complaint and jury demand for negligence and damages against the Defendants 313-319 First Street Condo Association, Inc., Clinton Hill Condo Association, Joseph A. Del Forno, Inc., Del Forno Real Estate LLC, and Unlimited Building Management Corp. ("Unlimited"). (Pa[1]60-70). Weidlich alleged that the Defendants were liable for the dangerously unsafe condition of the exterior front stairs of the building at 357 8th Street, Jersey City, New Jersey, which caused Weidlich to slip and fall on the steps and sustain serious personal injuries. (Pa60-70).

Weidlich thereafter filed an Amended Complaint and added 357 8th Street Condominium Association ("8th Street Condo Assoc.") as a Defendant. (Pa146-159). Defendants each filed answers to the Amended Complaint with affirmative defenses and cross-claims against each codefendant. (Pa255-263; Pa265-281; Pa285-295; Pa313-319). First Street Condo Association, Inc. and Clinton Hill Condo Association have been dismissed from the action. (T[2]4:12-18).

Joseph A. Del Forno, Inc. and Del Forno Real Estate LLC (sometimes referred to collectively as the "Del Forno Defendants") filed a motion for

[1] "Pa" refers to Plaintiff-Appellant's Appendix.
[2] "T" refers to the transcript of motion for summary judgment, dated May 10, 2024.

summary judgment. (Pa303-403). 8th Street Condo Assoc. filed a cross-motion for summary judgment. (Pa404-426). Unlimited also filed a motion for summary judgment. (Pa427-504).

The Superior Court heard oral arguments on the summary judgment motions on May 10, 2024. (T1-36). The Superior Court entered orders granting summary judgment in favor of the Del Forno Defendants and Unlimited. (Pa1-7). The court also entered an order granting 8th Street Assoc.'s cross-motion for summary judgment. (Pa8-10). Weidlich timely filed a Notice of Appeal to this Court from each of these orders. (Pa11-15; Pa23-34; Pa47-52).

STATEMENT OF FACTS

Weidlich is the owner and resident of a condominium unit at 357 8th Street, Jersey City, New Jersey. (Pa327 Dep. Tr. p. 9; Pa328, Dep. Tr. p. 10). He has lived there since he bought the condo in 2005. (Pa328, Dep. Tr. p. 10).

Del Forno Real Estate has been managing the building at 357 8th Street for the past three of four years (Pa584-585), pursuant to a management agreement between it and 8th Street Assoc. (Pa590; Pa635-642). Previously, the building was under the management of Joseph A. Del Forno, Inc., which then became Joseph A. Del Forno Real Estate LLC. (Pa585).

The building at 357 8th Street was constructed in 1890. (Pa422). The front entry steps are concrete and are open to the elements, and there are five "steps" to the staircase, though the second step down upon exiting is a "landing" of approximately 3-feet length. (Pa455-458). The steps are uneven in tread length and in riser height (Pa455-458) and have a rough, uneven exterior appearance. (Pa383; Pa394; Pa400-403; Pa420; Pa462; Pa480-489). The Del Forno Defendants hired independent contractors or a "group of maintenance guys" to remove snow and ice and to apply deicing agents upon any inclement weather. (Pa609-614).

In November 2021, the Del Forno Defendants contracted with Unlimited to have the facade of the building and the exterior steps painted. (Pa393-399).

According to the painting contract, Unlimited was to "apply Benjamin Moore exterior acrylic finish paint" to the façade and "[a]pply two coat exterior acrylic walking finish paint" to the steps. (Pa393). Unlimited employees bought from Benjamin Moore a 100% Acrylic Flat House Paint for the façade and bought a Latex Floor and Patio High Gloss Enamel" for the steps. (Pa395-398). Unlimited supervisor Victor Bezama testified that on December 1, 2021 Unlimited painted the façade with the 100% Acrylic Flat House Paint and painted the steps with the Latex Floor and Patio High Gloss Enamel. (Pa451, Dep. Tr. p. 16; Pa452, Dep. Tr. pp. 18-19).

Weidlich in his comings and goings from the building noticed that the façade and the steps had been painted, and he testified that after Unlimited's paint job, the old concrete exterior steps had become "sleeker or more - it's – they're a little rougher in the rain to navigate or when they're wet than they were before." (Pa330, Dep. Tr. p. 20). He stated that he had no difficulty walking on the newly-painted steps if "they were dry." (Pa330, Dep. Tr. p. 20).

On the morning of January 5, 2022, the Jersey City area and 357 8th Street saw temperatures just below or around freezing, and some rain and freezing rain had fallen, amounting to no more than a "trace" of precipitation. (Pa345-347; Pa351; Pa385-387; Pa418). Weidlich's expert Dr. Carl Berkowitz, Ph.D., PE, AICP, in his post-incident investigation of the stairs

concluded that the deteriorating condition of the concrete steps and the Del Forno Defendants' lack of proper maintenance over the years led to or exacerbated the icy-condition forming on the stairs as a result of a mere trace of freezing rain:

> The stairs were poorly designed and maintained. The concrete surfaces of the steps were defective. From the inspection of the stair surface, one can observe that small pieces of concrete came loose creating a pock like appearance. It further appeared that this condition has increased over time and with the foot traffic. The condition can be caused by freezing and thawing, poor finishing of the concrete surface, and the use of deicing agents. As a result of the degradation of the stair surface, water is trapped in the below surface pocket areas; and when freezing takes place the water expands to ice above the stair tread surface.

(Pa354) (Emphasis added).

Dr. Berkowitz also concluded in his report that the ordinary coefficient of friction (COF) for the landing step when wet was .41 or .42, much less than current building standard of .50 prescribed for walking safety. (Pa350; Pa353).

On that January 5 morning, Weidlich left his condo to leave for work at 7:30 a.m., and he was wearing light hiking shoes with a rubber sole with treads. (Pa329 Dep. Tr. p. 14). As he opened the door, he noticed it was a bit cold and that a "very light" rain "if any" was falling. (Pa328 Dep. Tr. p. 13; Pa332 Dep. Tr. p. 28; Pa343 Dep. Tr. p. 73; Pa351; Pa387; Pa507-508). Weidlich was not carrying anything in his hands at the time of the accident. (Pa328 Dep. Tr. p. 13). As he exited and placed his left foot down on the

landing, he slipped. (Pa328 Dep. Tr. p. 13; Pa329 Dep. Tr. p. 16; Pa339 Dep. Tr. p. 56; Pa341 Dep. Tr. p. 65). Weidlich did not even make it far enough along the stairs to reach the handrails to steady himself. (Pa328 Dep. Tr. p. 13; Pa329 Dep. Tr. pp. 16-17). Dr. Berkowitz also concluded in his report that "the locations of the handrails were too far from the walkway pathway to allow Mr. Weidlich the ability to utilize them to stabilize himself or to help him regain his balance after slipping on the icy surface" and that "[r]ailing[s] should be closer to the pedestrian walking pathway." (Pa354; Pa355).

Weidlich remembers that upon his slip and fall he was bounding or sliding down the stairs on his backside and landed on the sidewalk. (Pa329 Dep. Tr. p. 17; Pa330 Dep. Tr. p. 18; Pa331 Dep. Tr. p. 24; Pa342 Dep. Tr. p. 66). Due to his slip and fall down the concrete stairs upon exiting the building and stepping onto the exterior landing, Weidlich suffered serious injuries to his left leg. (Pa315; Pa332 Dep. Tr. p. 29; Pa334 Dep. Tr. pp. 35, 37; Pa335 Dep. Tr. p. 38; Pa344 Dep. Tr. p. 74).

With their motions for summary judgment, the Defendants produced the expert report of Mark I. Marpet, Ph.D., PE. (Pa414-426). Marpet is of the opinion that Weidlich slipped upon stepping on the concrete landing solely because of the ongoing freezing rain at 7:30 a.m. on January 5, 2022 and the resulting icy condition of the landing. (Pa414-426). Marpet states that current

building standards regarding tread and riser heights and COFs are irrelevant regarding a building constructed in 1890, prior to Jersey City's first building code. (Pa417). Marpet concludes that the COF of the steps was 0.65 wet "as found" on the date of his testing (Pa420) and that the "highly textured" surface of the concrete steps actually made them "more tractive" (Pa420; Pa424).

Marpet in his report did not directly address Dr. Berkowitz's opinion that "[a]s a result of the degradation of the stair surface, water is trapped in the below surface pocket areas; and when freezing takes place the water expands to ice above the stair tread surface." (Pa354). In fact, Marpet mischaracterizes Dr. Berkowitz's opinion as only claiming that the "stair design allows water to accumulate" (Pa424-425), when Dr. Berkowitz also concluded the longstanding, non-mitigated deterioration of the concrete steps allows water to *infiltrate* "below surface and to freeze over the tread surface" upon cold-enough temperatures. (Pa354). Marpet also did not address Dr. Berkowitz' opinion that the "the locations of the handrails were too far from the walkway pathway[.]"(Pa354; Pa355).

At the summary judgment stage, counsel for Weidlich pointed out in his response to 8th Street Assoc.'s statement of undisputed facts that Dr. Berkowitz was of the opinion that the deterioration of the exterior concrete stairs allowed water infiltration below the surface in the concrete steps, which

then would freeze above the treads under conditions such as the morning of January 5. (Pa645).

At the summary judgment hearing, Weidlich's counsel argued before the trial court that Unlimited did not use the contracted-for "walking finish" paint in painting the stairs but used a high gloss patio paint instead. (T20:12-13; T24:15-16). The trial court stated from the bench that I can't let a jury hear that" because of the word "gloss." (T20:22-21:3). Counsel argued that Weidlich should be allowed to testify from his personal knowledge about his opinion that after the painting with the high gloss patio paint the steps became "sleeker" and "rougher in the rain to navigate or when they're wet," but the trial court stated that without expert evidence it was "speculation, I can't have the jury hear that." (T9:1-8; T12:24-13:1; T20:25-21:16-20, T25:6-7).

Counsel for Weidlich also argued that summary judgment could not be had upon a "Battle of the Experts" and that "[Dr. Berkowitz] talks about other issues, the handrails are not close enough, the steps are not constructed properly, all of these things combined with the paint and the storm, that could have caused it or contributed to it, and that's the exception to *Pareja v. Princeton International Properties*, 246 N.J. 546 (2021), cause or contribute." (T6; T28:16-29:1).

However, the trial court granted summary judgment to each of the Defendants. (Pa1-10). In the stated reasons for summary judgment for the Del Forno Defendants, the trial court ruled that the ongoing storm doctrine of *Pareja* controlled and those Defendants "had no duty to remove ice from the landing area until a reasonable time after the freezing rainstorm ended." (Pa2-3).

In the stated reasons for summary judgment for Unlimited, the trial court ruled that the ongoing storm doctrine of *Pareja* controlled and that Dr. Berkowitz' report contained no conclusion in his report attributing Weidlich's slip and fall to the recent paint job making the stairs more slippery. (Pa5-7). In the stated reasons for summary judgment for 8th Street Assoc., the trial court ruled similarly as it did for Unlimited. (Pa9-10).

ARGUMENT

I. Introduction and Standard of Review

As pointed out above, the trial court refused to consider Weidlich's personal perception that the paint job had made the steps "sleeker" and "rougher in the rain to navigate or when they're wet." Instead, the trial court entertained an improper "Battle of the Experts" at the summary judgment stage and then decided to believe the Defendants' expert over Weidlich's expert in applying the "Ongoing Storm" doctrine. This is error.

A grant of summary judgment is appropriate only if "there is no genuine issue as to any material fact" and the moving party is entitled to judgment "as a matter of law." R. 4:46-2(c). The court "must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *C.V. by and through C.V. v. Waterford Township Board of Education*, 255 N.J. 289, 305 (2023).

"In ruling on a summary judgment motion, a court does not weigh the evidence and determine the truth of the matter; it only determines whether there is a genuine issue for trial." *Id*. at 305-306. "Summary judgment is appropriate only when the evidence is so one-sided that the moving party must

prevail as a matter of law." *Id*. at 306. "When there are conflicting versions of the facts that would permit a rational jury to choose either version, the resolution of that conflict requires a determination of which version is more credible. Such a factual dispute should be decided by a jury, not a court, and it is improper for the motion judge to abrogate the jury's exclusive role as the factfinder." *Suarez v. Eastern International College*, 428 N.J. Super. 10, 27 (App. Div. 2012).

Importantly, when there are competing expert opinions summary judgment is inappropriate because a trial court should never decide on its merits a dispute on which a rational jury could go either way. *See* Pressler & Verniero, *Current N.J. Court Rules Governing the Courts*, cmt. 2.3.2 on R. 4:46-2 (2019); *see, e.g., Davin, LLC v. Daham*, 329 N.J. Super. 54, 71 (App. Div. 2000). "[W]here a case may rest upon opinion or expert testimony, a court should be particularly slow in granting summary judgment." *Ruvolo v. American Casualty Co*., 39 N.J. 490, 500 (1963).

II. The Preexisting Deterioration of the Stairs and the Defendants' Recent Paint Job Made the Stairs Unreasonably Dangerous Upon a Mere Trace of Freezing Rain, Raising a Genuine Issue of Material Fact for the Jury and Making the "Ongoing Storm" Doctrine of *Pareja* Inapplicable. (Pa1-3; Pa4-7; Pa8-10)

A. Condominium Premises Liability, In General

A prima facie case of negligence requires the establishment of four elements: (1) a duty of care, (2) a breach of that duty, (3) actual and proximate causation, and (4) damages." *Jersey Central Power & Light Co. v. Melcar Utilities* Co., 212 N.J. 576, 594 (2013).

"A condominium association has a duty to exercise reasonable care to protect the condominium's residents from a dangerous condition on property within the ambit of the common elements," *McDaid v. Aztec W. Condominium Association*, 234 N.J. 130, 141-42 (2018), which includes front entrance stairs. *See* N.J.S.A. 46:8B-3(d)(ii).

N.J.S.A. 46:8B-14(a) states that a condominium association shall be responsible for the performance of "the maintenance, repair, replacement, cleaning and sanitation of the common elements." *See Lechler v. 303 Sunset Ave. Condominium Association, Inc*., 452 N.J. Super. 574, 585-86 (App. Div. 2017) (quoting N.J.S.A. 46:8B-14(a)). A condominium association has "a statutory duty to maintain the common areas, including a duty to identify and

correct dangerous conditions, and that duty extend[s] to residents of the condominium building" *Lechler*, 452 N.J. Super. at 577.

The duty "applies not only to the original construction but also to the condition of the premises thereafter and imposes upon the landowner a duty to discover its actual condition and to make such repairs, furnish such safeguards, or give such warnings as may be reasonably necessary." *Zentz v. Toop*, 92 N.J. Super. 105, 113 (App. Div. 1966).

Where the defendant's actions create a foreseeable risk of harm in a slip and fall case, an injured plaintiff need not prove either actual or constructive notice of the dangerous condition. *See generally Tymczyszn v. Columbus Gardens*, 422 N.J. Super. 253, 264 (App. Div. 2011).

Accordingly, in the present case, the pertinent issue is whether the Defendants created or allowed an unreasonably dangerous condition to occur on January 5, 2022 which caused Weidlich to slip on the stairs landing and sustain serious injury.

B. Dr. Berkowitz' Report is Sufficient to Create a Genuine Issue of Material Fact as to Whether the Deterioration in the Stairs, Without Reasonable Repairs or Maintenance, Allowed Water Infiltration and Freezing and Caused an Unreasonably Dangerous Condition, Obviating the Applicability of the "Ongoing Storm" Doctrine of *Pareja*. (Pa1-3; Pa4-7; Pa8-10)

The Defendants and the trial court centered on the "Ongoing Storm" doctrine which the supreme court pronounced in *Pareja*. In that case, the plaintiff was walking to work in the early morning hours when he slipped on ice and fell, after and during precipitation in below freezing temperatures. The plaintiff sued the owner of the property where the sidewalk was located for failing to keep the sidewalk clear of ice and snow.

The *Pareja* court ruled that the "Ongoing Storm" doctrine "reflects the commonsense recognition that compelling landowners to try to prevent the accumulation of snow and ice on commercial sidewalks during the pendency of a winter weather event would be impractical and inefficient." 246 N.J. at 553. Accordingly, the court held that "where a storm is ongoing . . . [landowners] do not have the absolute duty, and the impossible burden, to keep sidewalks on their property free from snow or ice during an ongoing storm." *Id*. at 557.

However, the *Pareja* court "also recognize[d] two exceptions that could impose a duty: if the owner's conduct increases the risk, or the danger is pre-

existing." *Id*. at 549. "[L]landowners may be liable if their actions increase the risk to pedestrians . . . on their property, for example, by creating unusual circumstances where the defendant's conduct exacerbates and increases the risk of injury to the plaintiff." *Id*. at 559. Also, "[a] landowner may be liable where there was a pre-existing risk on the premises before the storm." *Id*. "For example, if a [landowner] failed to remove or reduce a pre-existing risk on the property . . . he may be liable for an injury during a later ongoing storm." *Id*.

Here, Weidlich presented substantial evidence posing several possible causes for the unreasonably dangerous condition he encountered on the landing of the steps, other than the ongoing precipitation: (a) a preexisting deterioration of the surface of the steps which allowed water infiltration and imperceptible freezing over onto the surface; (b) handrails that were affixed to the steps too far from the pedestrian pathway; and (c) a recent paint job with the wrong paint that made the steps in Weidlich's opinion "sleeker" and "rougher in the rain to navigate or when they're wet". Dr. Berkowitz' expert opinion speaks to the first two and will be discussed here, while Weidlich's personal knowledge was the basis of the last one, which will be discussed below.

As summarized in the Statement of Facts above, Dr. Berkowitz' expert report within a reasonable degree of engineering certainty and upon his inspection of the steps concluded that "[a]s a result of the degradation of the stair surface, water is trapped in the below surface pocket areas; and when freezing takes place the water expands to ice above the stair tread surface." (Pa354). Dr. Berkowitz's opinion also concluded that "the locations of the handrails were too far from the walkway pathway to allow Mr. Weidlich the ability to utilize them to stabilize himself or to help him regain his balance after slipping on the icy surface" and that "[r]ailing[s] should be closer to the pedestrian walking pathway." (Pa354; Pa355). Dr. Berkowitz further noted that, when wet, the landing had a substandard COF of .41. (Pa350; Pa353-354).

Dr. Berkowitz' opinion regarding the water infiltration of the deteriorating steps and the unreasonably dangerous freezing rising above the surface, even upon a slight "trace" of precipitation, is substantial evidence of a preexisting dangerous condition. The Del Forno Defendants and the 8th Street Assoc. did not properly inspect, assess, repair, or rectify this preexisting condition despite the discoverable danger. The fact that the steps could freeze over in the event of a mere "trace" of freezing rain, which is not readily observable to a pedestrian such as Weidlich exiting the building during such

precipitation, shows how unreasonably dangerous the condition had become over the years.

The "ongoing storm" did not cause Weidlich's fall; the preexisting deteriorated concrete landing did. Acting as an ordinarily prudent person, when Weidlich exited the building, he noted it was cold and that there was a "very light" rain, and he merely took a first step onto the landing. (Pa328 Dep. Tr. p. 13; Pa329 Dep. Tr. p. 17; Pa331 Dep. Tr. p. 23; Pa332 Dep. Tr. p. 28; Pa339 Dep. Tr. p. 56; Pa341 Dep. Tr. p. 65; Pa343 Dep. Tr. p. 73; Pa351; Pa387). He ended up on his backside at the bottom of the stairs with a seriously injured left leg. (Pa329 Dep. Tr. p. 17; Pa330 Dep. Tr. p. 18; Pa331 Dep. Tr. pp. 22, 24; Pa332 Dep. Tr. p. 29; Pa342 Dep. Tr. p. 66).

That result also highlights Dr. Berkowitz's other opinion about the defects of the steps, where Weidlich had no chance to grab the handrail to steady himself or lessen his fall because the handrails were "too far" from the pedestrian pathway to serve their purpose under the conditions. (Pa354; Pa461; Pa647). Absence or misplacement of hand railings on a stairway has been held to be the basis for a duty to rectify an unreasonably dangerous condition where pedestrians walking in the stair pathway "have nothing to grasp if they should lose their balance." *Cf. Lechler*, 452 N.J. Super. at 585-586.

The Defendants' evidence they adduced in support of their motions for summary judgment consisted entirely of the weather report, including the undisputed "trace" of freezing rain, and Marpet's expert report. The "trace" of freezing rain, though, is indicative of the underlying dangerous condition where the deteriorating steps allowed the infiltration of water and freezing over onto the surface of the landing, a condition not readily visible to an ordinary pedestrian upon a "very light" precipitation. Marpet's report did not directly address or refute Dr. Berkowitz's opinion in this regard. Marpet's report merely mischaracterized Berkowitz's opinion as dealing with an "accumulation" of water rather than an infiltration and freezing or tried to argue that the rough surface of the concrete somehow made the landing "more tractive" when faced with an invisible layer of ice from a "trace" of freezing rain. (Pa420; Pa424). Marpet's report did not address the location of the handrails vis-à-vis an exiting pedestrian, at all.

Marpet's reliance on the grandfathering of the building at 357 8th Street from current building standards is also irrelevant. This is not a negligence per se case based on violation of applicable building codes or other ordinances. This is a common law negligence case, and the comparison of the existing conditions of the stairs to what are now recognized as safer guidelines to protect pedestrians such as Weidlich is only evidence to be considered in

determining if the Defendants met their duty of care. *See* 1 *Modern Tort Law: Liability and Litigation* § 3:79 (2d ed. 2024), which states:

> [B]uilding code requirements enacted after the construction of a building but not made retroactive have been held admissible as evidence of the standard of care required even though noncompliance with the requirements does not constitute a violation of the code. The presence of a grandfather clause in a building code penal in nature is not conclusive on the question of negligence since negligence is not limited to violations of penal statutes.

(Emphasis added).

C. Weidlich Was Allowed to Give His Opinion Based on His Personal Perception that the Stairs Became "Sleeker" and "Rougher in the Rain to Navigate or When They're Wet," Thereby Creating a Genuine Issue of Material Fact as to Whether Unlimited's Paint Job on the Stairs Caused an Unreasonably Dangerous Condition, Obviating the Applicability of the "Ongoing Storm" Doctrine of *Pareja*. (Pa1-3; Pa4-7; Pa8-10)

Unlimited was hired to "[a]pply two coat exterior acrylic walking finish paint" to the steps. (Pa393) (emphasis added). Unlimited, however, painted the steps with a Benjamin Moore "Latex Floor and Patio High Gloss Enamel." (Pa395-396; Pa451 Dep. Tr. pp. 14-15). Dr. Berkowitz noted the new paint job on the stairs but did not offer a conclusion on the slipperiness of the paint on the stairs. Defendants at the summary judgment hearing complained that the evidence of the new paint job was not relevant because there was no expert opinion addressing it as a possible cause of Weidlich's slip and fall. (T17-21).

The trial court stated that without an expert opinion on the defectiveness of the paint as applied, a jury should not hear the evidence. (T20:22-22:9; T22:1-25:7).

Weidlich, though, offered his opinion of the effect the paint had on the traction on the stairs and on the landing. Weidlich had lived in the building since 2005 and had gone up and down those stairs under all types of conditions in the 16+ years before Unlimited painted the steps on December 1, 2021. (Pa328, Dep. Tr. p. 10). Based on his personal experience and perceptions, Weidlich stated that he had noticed the new paint job and had also noticed that it made the stairs "sleeker" and "rougher in the rain to navigate or when they're wet" prior to the January 5, 2022 incident. (Pa330 Dep. Tr. p. 20).

Now, Defendants might not give credence to Weidlich's lay opinion in this regard, but a reasonable jury could, and the evidence is admissible under N.J. R. Evid. 701, which states:

> If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it:
>
> (a) is rationally based on the witness' perception; and
>
> (b) will assist in understanding the witness' testimony or determining a fact in issue.

(Emphasis added).

A lay witness offering his opinion "must have actual knowledge, acquired through the use of his or her senses, of the matter to which he or she testifies."

Estate of Nicolas v. Ocean Plaza Condominium Association, Inc., 388 N.J. Super. 571, 582 (App. Div. 2006). "Pivotal to the admissibility of N.J.R.E. 701 evidence is perception acquired through the senses." *Vitale v. Schering-Plough Corp*., 447 N.J. Super. 98, 123 (App. Div. 2016). Weidlich undisputedly had the personal experience and knowledge of the changing condition of the stairs after Unlimited's paint job.

Moreover, contrary to the trial court's caution at T20-21 re: its concerns that testimony of "gloss" paint would mean "shiny" and will make me fall, a reasonable juror would understand Weidlich's opinion the new paint made the stairs "sleeker" and "rougher in the rain to navigate or when they're wet" because it is well within the common understanding and experience of an average juror. "A nonexpert may give his opinion on matters of common knowledge and observation." *Murphy v. Trapani*, 255 N.J. Super. 65, 74 (App. Div. 1992). "N.J.R.E. 701 permits lay witness testimony regarding common knowledge based on observable perceptions." *In re Trust Created By Agreement Dated December 20, 1961, ex rel. Johnson*, 194 N.J. 276, 283 (2008).

It is also undisputed that Unlimited did not use the "walking finish" paint called for in its contract with the Del Forno Defendants. (Pa393; Pa395-398; Pa451, Dep. Tr. pp. 14-15;). Weidlich testified that Unlimited's use of a different paint made the steps less "tractive," to use Marpet's term. A juror with common understanding and knowledge would readily be able to understand and credit, or discredit, Weidlich's opinion in this regard. Expert testimony is not necessary on this particular point.

D. The Trial Court Improperly Adjudged a "Battle of the Experts" and Wrongly Granted Summary Judgment by Giving Marpet's Expert Report More Credence Than Dr. Berkowitz' Expert Report, Where the Conflicting Reports Raised a Genuine Issue of Material Fact as to Whether There was a Preexisting Dangerous Condition of the Defendants' Making That Precluded Application of the "Ongoing Storm" Doctrine of *Pareja*. (Pa1-3; Pa4-7; Pa8-10)

Dr. Berkowitz's report established a genuine issue of material fact as to whether the deterioration of the steps caused water infiltration and freezing and resulted in an unreasonably dangerous condition upon the property receiving a mere "trace" of freezing rain. Dr. Berkowitz also concluded that the handrails were too far from the pedestrian pathway and made the stairs unreasonably dangerous because a pedestrian like Weidlich would not be able to reach the rails to steady himself when encountering an icy condition like that on January 5, 2022.

Marpet's expert report, on the other hand, conflicts with Dr. Berkowitz's conclusions and attributes Weidlich's slip and fall solely to the ongoing precipitation. This is a true "Battle of the Experts" for a jury to sort out upon a review of all of the evidence.

Indicative of such a "Battle of Experts" in litigation, Marpet, in the course of reporting his opinion gratuitously criticizes Dr. Berkowitz' contrary expert report with unnecessary ad hominem attacks such as calling his research "a joke" (Pa417), insinuating Berkowitz as being "hungry for a [COF] number, any number [he] can latch on to, to cite that 0.5 [COF]" (Pa419), and calling "nonsensical" Dr. Berkowitz's conclusion that the landing step was defective (Pa424).

In applying the *Pareja* "Ongoing Storm" doctrine and in ignoring the expert opinions of Dr. Berkowitz and giving credence to Marpet's conclusions, the trial court improperly engaged in assessing the credibility of conflicting experts and invaded the province of the jury.

As noted above, a trial court should not decide the merits when there are competing expert opinions. *See, e.g., Davin, LLC*, 329 N.J. Super. at 71. A court should be particularly careful about granting summary judgment resting on opinion or expert testimony. *Ruvolo*, 39 N.J. at 500.

[T]he credibility of the expert and the weight to be accorded his testimony rests in the domain of the trier of fact. Unless contrary to common sense, common knowledge, or recognized physical laws, or based on primary facts absent from the proofs, the expert's statements are to be sifted by the jury like other testimony." *Angel v. Rand Express Lines, Inc*., 66 N.J. Super. 77, 85-86 (App. Div. 1961).

A jury is entitled to credit or reject a plaintiff's expert's opinion or a defendant's expert's opinion in assessing their credibility in deciding a case based on the facts. *See, e.g.*, *Boryszewski ex rel. Boryszewski v. Burke*, 380 N.J. Super. 361, 370 (App. Div. 2005) ("We reject Daimler's weight-of-the-evidence arguments, which are essentially based upon its expert's testimony regarding the strength of the Voyager's roof system as a whole, with inadequate consideration for the countervailing testimony of plaintiffs' witnesses. The jury was entitled to reject Daimler's expert's opinions and credit plaintiffs' evidence to the contrary").

In *Davin*, LLC, for example, a purchaser of property from a successful bidder at a foreclosure sale brought an action against the tenants in the building to eject them. The tenants filed a third-party action alleging legal malpractice by their attorney and the attorney for the landlords. In the course of the dispute, the question of whether the attorneys should have conducted a

title search prior to the tenants entering the lease became an issue between competing legal experts for the respective parties.

The trial judge granted summary judgment on the malpractice claim based on his personal experience as a lawyer that such a title search was never conducted. 329 N.J. Super. at 71. On appeal, the Appellate Division in *Davin, LLC* held that the trial judge should not have resolved the conflict of the experts by relying upon his personal observation:

> Relying on his prior extensive experience as a practicing attorney, the judge stated that an attorney for a tenant never orders a title search before advising his or client to enter into a lease. We disagree. In light of the conflicting certifications, there was a genuine issue of material fact as to whether Goins should have ordered a title search in properly representing defendants. This was a material fact precluding an award of summary judgment and requiring submission of the issue to the ultimate finder of fact.

Id.

In this case the trial judge short-stopped the jury and resolved the "Battle of the Experts" by relying upon personal experience that freezing rain can be dangerous for pedestrians and applying the "Ongoing Storm" doctrine of *Pareja* as supported in Marpet's opinion, while discounting Dr. Berkowitz's opinions. *Cf. Gilhooley v. County of Union*, 164 N.J. 533, 545 (2000) (the supreme court reversed the trial judge's granting of summary judgment because he had imposed "his own personal standard" to determine the merits of the case).

In the present case, a jury should resolve the "Battle of the Experts" and whether or not an exception to the "Ongoing Storm" doctrine is applicable. The trial court erred in granting summary judgment when there are competing expert opinions because a trial court should never decide on its merits a dispute on which a rational jury could go either way. *See Davin, LLC*, 329 N.J. Super. at 71.

CONCLUSION

The Court should reverse the trial court's granting of summary judgment to the Defendants and remand the case with instructions to conduct a full trial on the merits.

Dated: August 20, 2024

Respectfully submitted,

/s/ Michael J. Redenburg

_____

Michael J. Redenburg
Michael J. Redenburg, Esq., P.C.
32 Broadway, Suite 412
New York, NY 10004
(212) 240-9465
Attorney for Plaintiff-Appellant

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DOCKET NO. A-003053-23

GLENN WEIDLICH, Plaintiff/Appellant, vs. 313-319 FIRST STREET CONDO ASSOCIATION INC., CLINTON HILL CONDO ASSOCIATION, 357 8TH STREET CONDOMINIUM ASSOCIATION, JOSEPH A. DEL FORNO INC., DEL FORNO REAL ESTATE LLC, UNLIMITED BUILDING MANAGEMENT CORP., Defendants/Respondents.	**Law Division Docket No: HUD-L-795-23** **CIVIL ACTION** **Hon. Kalimah H. Ahmad, J.S.C.** Sat Below **BRIEF OF RESPONDENT UNLIMITED BUILDING MANAGEMENT CORP.**

SCIROCCO LAW, PC
143 Washington St.
Morristown, NJ 07960
973-691-1188
mark@sciroccoesq.com

MARK R. SCIROCCO, Esq.,
061192013 on the brief

September 23, 2024

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PRELIMINARY STATEMENT

On January 5, 2022, Plaintiff Glen Weidlich ("Plaintiff") slipped and fell on ice while descending a set of stairs outside the front door of his condominium. The incident occurred during a snow/ice storm, at a time when freezing rain was actively falling. Plaintiff sued various defendants, including the condo association 357 8th Street Condominium Association ("Condo Association") and property managers Joseph A. Del Forno, Inc. and Del Forno Real Estate LLC (collectively "Del Forno").

Unlimited Building Management Corp. ("Unlimited") is also a defendant. Unlimited was a contractor hired by Del Forno in November 2021 to paint the stairs in question. The paint job was finished over a month before the incident. Unlimited had no responsibility for snow or ice removal at any time.

Plaintiff has offered numerous theories as to why he fell. He claims that the stairs were old and deteriorated, allowing ice to form on the top landing. Plaintiff further asserts that the paint used by Unlimited made the icy steps more slippery. Lastly, Plaintiff contends that the handrails on the stairway were faulty, leaving Plaintiff nothing to grab onto when he fell.

It is undisputed that Unlimited had nothing to do with the alleged deterioration of the steps or the lack of handrails. With respect to the paint, Plaintiff's allegation is far-fetched and unsupported by the record. There is no evidence – expert or

otherwise – that the paint used by Unlimited contributed to the Plaintiff's fall. Plaintiff's liability expert is silent on the type of paint used by Unlimited, and further does not opine that Unlimited breached a standard of care in the industry.

Plaintiff only offers the vague and conclusory assertion that the paint used by Unlimited was faulty. Plaintiff tries to support this contention by noting that Plaintiff testified that he personally believes that the steps were "sleeker" or "rougher" in the rain after they were painted. But Plaintiff did not fall because of rain or a wet surface – he fell on ice. Plaintiff admitted in his deposition that he knows of no connection between the paint and the ice. As such, any opinion as to the paint must come from an expert. Yet Plaintiff's expert wholly ignores Unlimited's involvement in the steps.

Unlimited did not owe a duty of care with respect to any transitory weather condition on the date of the incident. There is no evidence that the paint was defective or causally related to the fall. Because there is no connection between Unlimited's work and the alleged hazard, the trial court's ruling granting summary judgment to Unlimited should be affirmed.

PROCEDURAL HISTORY

Unlimited adopts the procedural history set forth in the Plaintiff's brief (Pb3-4) and adds the following. On May 10, 2024, Judge Ahmad heard oral argument with respect to the motions for summary judgment filed by Unlimited, the Condo Association, and Del Forno. (T). At the conclusion of same, Judge Ahmad did not give a ruling from the bench but indicated that the Court would issue three written statements of reasons. (T 34:18- T 35:2). The orders and statements of reasons granting the motions for summary judgment were uploaded on June 3, 2024, and marked filed on May 10, 2024. (Pa1-10).

In the statement of reasons with respect to Unlimited, the court held that Plaintiff testified that the cause of his fall was ice that accumulated on the landing. (Pa6). The court rejected Plaintiff's argument that paint "somehow made an icy stair more slippery." (Pa6). The court found that Plaintiff's expert Carl Berkowitz made no conclusions concerning the paint making an icy stair more slippery and in fact "Berkowitz does not discuss the exterior paint at all in his conclusions." (Pa6). As the court put it, "it is clear that Plaintiff fell on ice, not a wet stair. A surface covered in ice is slippery." (Pa6). Because Plaintiff's expert offered no critique or analysis of Unlimited's painting work, the court held that there was no causal connection between Unlimited's work and the Plaintiff's fall. Moreover, there was "no evidence

that Unlimited breached a standard of care in the industry." (Pa6). Unlimited's motion was therefore granted.

STATEMENT OF FACTS

1. Unlimited was hired by Del Forno in November 2021 to paint the front façade and front steps of the condo in question

Unlimited was hired by Joseph A. Del Forno, Inc. ("Del Forno") to paint both the front façade of the 357 8th Street Jersey City, NJ property, as well as the front steps. (Pa393; Pa451, 17:5-7; Pa669, 9:4-13). The estimate for Unlimited's work was dated November 23, 2021. (Pa393). The work was completed by December 1, 2021, over 30 days before the January 5, 2022 accident. (Pa452, 20:14-24).

Unlimited employee Victor Bezama supervised the painting work on the stairs in question. (Pa450, 11:24-12:1). Bezama explained the process of painting the steps. (Pa450, 12:2-16). The front façade work was done first, in which Unlimited painted the building's wood cornice, brick wall, window headers and window frame. (Pa393; Pa452, 18:1-4). On the façade, Unlimited used a Benjamin Moore paint termed per specifications as "house paint." (Pa393; Pa452, 18:19-19:2; Pa395-396).

A different kind of Benjamin Moore paint, whose specifications bear the title "Latex Floor & Patio," was used on the steps in question. (Pa397-398). According to the Benjamin Moore specifications, this type of paint is recommended for

> Residential or commercial applications where a premium quality finish is desired. For interior and exterior use on unpainted concrete (new or

old) and previously finished wood or concrete floors. Particularly recommended for basements, porches, patios, breezeways, showrooms, and light industrial applications. (Pa397).

Bezama testified at his deposition that the paint used on the steps was selected based on the recommendation received from Benjamin Moore. (Pa449, 9:11-22; Pa450, 10:9-14). Bezama also testified that the paint was appropriate from his experience having painted similar steps. (Pa451, 16:16-23). Bezama confirmed that, when the steps were painted, the work fulfilled the estimate submitted to Del Forno and that all guidelines set forth in the specifications were followed. (Pa451, 15:19-22; Pa452, 19:8-18). Unlimited did not select the color of the steps but was directed by Del Forno as to same. (Pa673, 22:6-17).

2. Plaintiff's fall was due to ice which accumulated during an active winter storm

After the painting work was complete, Unlimited did not receive complaints about the steps. (Pa451, 17:8-11). Meanwhile, Plaintiff testified that after the stairs were painted, but before the incident, he used the steps approximately four times per day and did not have any issue or difficulty walking on same. (Pa330, 18:25-19:16). Prior to the incident, the Plaintiff did not complain to anyone at the condominium association about the condition of the stairs. (Pa329, 16:25-17:4).

The Plaintiff alleges that he slipped and fell on January 5, 2022 at approximately 7:30 a.m. on the stairs outside of his 357 8th Street condo. (Pa315).

At the time of the incident, it is undisputed there was active precipitation in the form of freezing rain – this is confirmed by meteorology reports served on behalf of both Plaintiff and defendants. (Pa386; Pa439). Plaintiff testified at his deposition that his fall occurred as a result of ice. (Pa339, 55:22-56:16; Pa328, 13:12-15). Plaintiff further testified that he slipped immediately after stepping onto the landing. (Pa329, 16:22-24). Plaintiff fell while he was on the landing before he even reached the steps. (Pa329, 16:22-24; 17:8-12 ("As soon as my foot hit the landing, that was it. The next thing I know I was on the sidewalk. There was no additional steps.")).

Plaintiff was asked during his deposition if he was aware of a connection between paint on the steps and ice. He responded: "What does the paint have to do with the ice? What does the paint have to do with the ice? I don't know." (Pa339, 57:8-12).

3. Plaintiff's expert engineer Carl Berkowitz does not opine that paint contributed to Plaintiff's fall or that Unlimited breached a standard of care in the industry

Plaintiff has served the report of expert engineer Carl Berkowitz in support of his claims. (Pa455). Berkowitz writes in his report that the slippery steps on which Plaintiff fell were caused by "icy conditions[.]" (Pa471).

Berkowitz's report is silent as to a causal connection between Plaintiff's fall on ice and the paint used by Unlimited. Berkowitz contends that there was a "low coefficient of friction" due to icy conditions but does not say that this was related to

Unlimited's work. (Pa471). Berkowitz does not opine that Unlimited used the wrong kind of paint. (Pa470-71). Finally, Berkowitz does not suggest that Unlimited failed to adhere to industry standards.

ARGUMENT

I. STANDARD OF REVIEW (NOT ADDRESSED BELOW)

On appeal, summary judgment orders are reviewed under the same standard that governs trial courts. DeWees v. RCN Corp., 380 N.J. Super. 511, 522 (App Div. 2005). Summary judgment shall be granted if the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged…" R. 4:46-2(c). Although genuine issues of material fact preclude the granting of summary judgment, those that are of an insubstantial nature do not. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). In a motion for summary judgment, all favorable inferences are to be granted to the non-movant. Id. at 536. When a question presented is solely a question of law, review is *de novo*. Mejia v. Quest Diagnostics, Inc., 241 N.J. 360, 370-71 (2020).

II. UNLIMITED DID NOT HAVE A DUTY OF CARE OVER THE ICE WHICH ALLEGEDLY CAUSED PLAINTIFF'S FALL (PA4)

In any case involving negligence, there must be a duty owed to the injured party, a breach of that duty, causation and damages. Conklin v. Hannoch Weisman, 145 N.J. 395, 417 (1996); Siddons v. Cook, 382 N.J. Super. 1, 13 (App. Div. 2005).

Whether a defendant owes a duty of care to another and the scope of said duty are questions of law and thus are appropriate for disposition on summary judgment. Clohesy v. Food Circus Supermarkets, Inc., 149 N.J. 496, 502 (1997); Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993); Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 555 (2015). In Hopkins, the Supreme Court departed from the categorical approach to premises liability and held instead that the existence and scope of a duty turns on an "abiding sense of basic fairness under all of the circumstances in light of considerations of public policy." Hopkins, 132 N.J. at 439; See also Weinberg v. Dinger, 106 N.J. 469, 485 (1987) (quoting Goldberg v. Housing Auth., 38 N.J. 578, 583 (1962)) ("Whether a duty exists is ultimately a question of fairness.").

a. Unlimited bore no responsibility for ice removal on the date of the incident

There is no dispute that the Plaintiff fell on ice. (Pa315 ("[Plaintiff] was exiting his apartment and stepped onto the landing of the exterior step of the building where he resides, where he encountered an icy condition causing him to slip and fall to the ground."); Pa339, 56:10-16 (Q. So you testified that…you stepped outside with your left foot, your left foot landed on ice which caused you to slip and fall down the stairs. Is that – is that all fair to say? A. Yes.)).

Plaintiff's brief struggles mightily to direct the court's attention away from the presence of ice. When describing Plaintiff's fall, Plaintiff vaguely asserts that he "slipped", leaving the reader to guess at the cause of same. (Pb7-8 ("As he exited

and placed his left foot down on the landing, he slipped.")). But the nature of the hazard is not in doubt and was confirmed by Plaintiff's expert Berkowitz. (Pa354 (stating that the lack of handrails left Plaintiff unable to stabilize himself "after slipping on the icy surface."); Pa363 (discussing the low coefficient of friction caused by "the icy conditions[.]")). Furthermore, there is agreement between both Plaintiff's and defendants' meteorologists that at the time of the incident there was an active storm, with precipitation falling in the form of freezing rain. (Pa386; Pa439).

There is a question as to whether and to what extent the "ongoing storm rule" as announced in Pareja v. Princeton Intern. Properties, applies to this case and whether it exempts the property owner/manager from having to remediate the transitory weather hazard. 246 N.J. 546 (2021). However, there is no dispute that Unlimited did not have an obligation to clear ice from the steps on the date of the incident. No party has alleged that Unlimited had such a duty. Unlimited was last involved in the property over 30 days before Plaintiff's fall. (Pa452, 20:14-24).

b. Plaintiff has not shown that paint made the icy stairs more slippery

The existence and scope of a duty of care must sometimes be supported by expert testimony. Hopkins, 132 N.J. at 444. Expert testimony is required when "a subject is so esoteric that jurors of common judgment and experience cannot form a valid conclusion." Id. at 450 quoting Wyatt by Caldwell v. Wyatt, 217 N.J. Super.

580 (App. Div. 1987); Phillips v. Gelpke, 190 N.J. 580, 590 (2007); N.J.R.E. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."). When it comes to questions outside the common knowledge of an average person, the jury cannot supply its own standard of care, but needs an expert to elucidate the standard against which to measure the defendant's conduct. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 407 (2014); Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982).

Expert testimony is necessary when dealing with proofs which constitute "a complex process involving assessment of a myriad of factors[.]" Giantonnio v. Taccard, 291 N.J. Super. 31, 44 (App. Div. 1996); see also Davis, 219 N.J. at 407-408 (holding that an expert was necessary for plaintiff to explain relevant "fire code" provisions and the manner in which they were breached); Vander Groef v. A&P, 32 N.J. Super. 365, 370 (App. Div. 1954) (Plaintiff "failed to introduce any evidence that the construction of a platform 44 inches high without steps or a ladder was in any way a deviation from standard construction, or that it was unsafe."). Such esoteric issues can be contrasted with those commonplace topics which do not require the assistance of expert testimony. See e.g., Berger v. Shapiro, 30 N.J. 89,

101-02 (1959) (expert not needed to explain hazard posed by a missing brick in top step of porch).

In this case, there is no support for Plaintiff's allegation that the paint used by Unlimited was not appropriate for the stairs. The unrefuted evidence is that the paint was recommended by an authorized Benjamin Moore retailer. (Pa449, 9:11-22; Pa450, 10:9-14). The specifications for the paint bear the title "Latex Floor & Patio" and are described as appropriate for exterior use on patios. (Pa397-398). Plaintiff says that such paint was not the "walking finish" paint that Unlimited referred to in its estimate. (Pb21). Plaintiff never quite explains why he thinks this, but instead merely asserts that it is "undisputed" that Unlimited did not use "walking finish" paint. (Pb24). **This assertion is wrong**. In fact, the testimony cited by Plaintiff on Pb24 confirms that Unlimited did apply "walking finish" paint. (Pa451, 15:19-22 ("Q. And item No. 3 [on Pa393], apply two coats exterior acrylic walking finish paint, was that completed as part of this project? A. Yes."). Plaintiff's confusion over the type of paint is nothing new and was addressed by Judge Ahmad. (T 24:4 – T 25:16; Pa6 ("Even if Plaintiff had not confused the paint used on the stairs…")).

In short, there is no evidence to suggest that there was anything wrong with the paint used by Unlimited. There is no expert on behalf of Plaintiff who offers an opinion as to the paint being defective. Plaintiff's liability expert altogether ignores Unlimited's involvement in this case. (Pa470-71).

More than this, Plaintiff would ask the jury to draw a connection between paint and a slip and fall on ice over 30 days later. As Judge Ahmad put it in the court's statement of reasons, "A surface covered in ice is slippery." (Pa6). An expert is needed to elucidate the complex question of how the paint made the ice in question more slippery in a way that materially contributed to the fall.

Finally, Plaintiff has not shown that Unlimited breached a standard in the industry. One of the prototypical reasons why expert testimony is required is to establish a prima facie case when the issue "involves the standard of care against which to measure a defendant's conduct." E&H Steel Corp. v. PSEG Fossil, LLC, 455 N.J. Super. 12, 28 (App. Div. 2018), citing Butler, 89 N.J. at 283. Cases involving construction defects are recognized to present esoteric questions requiring expert testimony. D'Alessandro v. Hartzel, 422 N.J. Super. 575, 580-81 (App. Div. 2011).

The Appellate Division's holding in Arroyo v. Durling Realty is illustrative. In that case, the plaintiff slipped on a discarded telephone calling card on the sidewalk outside of a Quick Chek store's entrance. 433 N.J. Super. 238, 241 (App. Div. 2013). A lawsuit was brought against the property owner. Id. at 243. The plaintiff pointed to an expert who attributed fault to the owner's trash removal procedures, but summary judgment was nonetheless granted because the cleaning procedures of the proprietor were not shown by competent evidence to be

unreasonable. Id. at 243-44; See also Gaffney v. America on Wheels, 16 N.J. Super. 484, 488-490 (App. Div. 1951) (granting a directed verdict in favor of a defendant because there was no indication that the alleged slippery floor was the fault of defendant or violated normal and generally accepted standards).

Here, Plaintiff's expert Berkowitz does not opine that Unlimited's work was defective or breached a standard of care in the industry – a fact which Plaintiff acknowledges in his brief. (Pb17; Pb21). As in Arroyo, without evidence that Unlimited fell short of an applicable standard, Plaintiff's claim cannot proceed.

c. Plaintiff's attempt to rely on lay witness opinion testimony to sustain the claim against Unlimited should be rejected

A lay witness can only provide an opinion if it arises from the witness' personal knowledge. E&H Steel, 455 N.J. Super. at 25; See also N.J.R.E. 602; N.J.R.E. 701. By contrast, expert testimony, "is untethered to the constraints of personal knowledge and perception imposed by these rules." E&H Steel, 455 N.J. Super. at 25; See also N.J.R.E. 703.

Here, the sole basis for Plaintiff's claim that paint made the steps in question more slippery is Plaintiff's testimony during his deposition that "I believe that [the stairs] are sleeker or more – it's – they're a little rougher in the rain to navigate or when they're wet than they were before." (Pa330, 20:2-9). Such testimony is not relevant to the inquiry in this case, because Plaintiff did not slip on a "wet" surface covered by rain – he slipped on ice. Judge Ahmad noted this distinction in the trial

court's Statement of Reasons. (Pa6 ("[I]t is clear that Plaintiff fell on ice, not a wet stair.")).

Reliance on Plaintiff's lay opinion is further belied by the fact that Plaintiff admitted in his deposition that he has no personal knowledge of a connection between paint and ice. Plaintiff testified: "What does the paint have to do with the ice? What does the paint have to do with the ice? I don't know." (Pa339, 57:8-12). Plaintiff cannot render a lay opinion on a subject that falls outside the scope of his personal knowledge.

Plaintiff attempts to couch the purported lay opinion as a mere observation of the stairs after they were painted. The question that the jury would be asked to answer is far more nuanced and complicated. It involves an analysis of whether Unlimited's paint job contributed to a fall on ice over 30 days later. Counsel for Plaintiff was pressed during oral argument on this topic and admitted that Plaintiff is not a specialist in painting. (T 21:16- T 22:22). At one point, Plaintiff's counsel conceded that specialized knowledge is necessary to guide the average person through distinctions regarding kinds of paint:

> THE COURT: But who says that, who says that this paint wasn't sufficient, I don't know that…That would be speculation, I can't have the jury hear that.

> [PLAINTIFF'S COUNSEL]: That's why they're called different kind of paints. Benjamin Moore, they've been in the paint business a long time. They make walking finish paint, floor and patio high gloss paint and the other type of paint. That's why there's all different types of paint, **and you need someone like Unlimited to be able to point you to the right kind of paint** so that Glenn Weidlich doesn't fall and get hurt.
>
> T 25:3-16 (emphasis added).

Given the limitations of Plaintiff's knowledge, he is not able to opine that the paint used by Unlimited was faulty or that the paint contributed to the icy condition on which Plaintiff slipped over 30 days later. Any opinion as to the paint would need to come from an expert. Because there is no expert supporting Plaintiff's claim against Unlimited, summary judgment is warranted.

CONCLUSION

The trial court's order granting summary judgment and dismissing all claims as to Unlimited should be affirmed.

Dated: September 23, 2024

Respectfully submitted,

Scirocco Law, PC.
Attorneys for Unlimited Building Management Corp.

s/Mark R. Scirocco
Mark R. Scirocco, Esq.

GLENN WEIDLICH, *Plaintiff-Appellant,* vs. 313-319 FIRST STREET CONDO ASSOCIATION, INC., CLINTON HILL CONDO ASSOCIATION, 357 8TH STREET CONDOMINIUM ASSOCIATION, JOSEPH A. DEL FORNO, INC., DEL FORNO REAL ESTATE LLC, UNLIMITED BUILDING MANAGEMENT CORP., *Defendants-Respondents.*	Superior Court of New Jersey Appellate Division CIVIL ACTION ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY DOCKET NO. HUD-795-23 Sat Below: HON. KALIMAH H. AHMAD, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS, JOSEPH A. DEL FORNO, INC., DEL FORNO REAL ESTATE LLC.

On the Brief: Anthony R. Fiore, Jr., Esq.
Attorney ID No. 025901991
16 Broad Street, Second Floor
Red Bank, New Jersey 07701
afiore@gagefirm.com (609) 896- 4243

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PROCEDURAL HISTORY

On 3/6/23 plaintiff Weidlich filed a Complaint and jury demand for negligence and damages against the defendants 313-319 First Street Condo Association, Inc., Clinton Hill Condo Association, Joseph A. Del Forno, Inc., Del Forno Real Estate LLC., and Unlimited Building Management Corp. alleging that the defendants were negligent and liable for an alleged hazardous condition of the exterior front stairs of the building at 357 8th Street, Jersey City, New Jersey, which caused plaintiff to slip and fall on the steps and sustain injuries. (Pa60-70). On 3/8/23 plaintiff filed an Amended Complaint and added 357 8th Street Condominium Association ("8th Street Condo Assoc.") as a defendant. (Pa146-159). On 5/31/23 defendants Joseph A. Del Forno, Inc. and Del Forno Real Estate LLC. filed an Answer to the Amended Complaint. (Pa265-281).

On 4/10/24 defendants Joseph A. Del Forno, Inc. and Del Forno Real Estate LLC. filed a motion for summary judgment. (Pa303-403). The trial court heard oral arguments on May 10, 2024, and on that same date entered an Order granting summary judgment to defendants Joseph A. Del Forno, Inc. and Del Forno Real Estate LLC. (Pa1-3). Thereafter plaintiff filed a Notice of Appeal. (Pa11-15; Pa23-34; Pa47-52).

STATEMENT OF FACTS

Plaintiff's discovery responses allege he was injured on January 5, 2022, at approximately 7:30 A.M., as he was exiting his apartment and slipped on ice immediately upon stepping out onto the landing of the exterior stairs. The landing and the stairs were painted a few weeks before the Incident. (Pa315). Plaintiff testified that the description of the incident in his answers to interrogatories was accurate and that he was caused to slip and fall because his left foot landed on ice. (Pa339, plaintiff deposition P55, L22 – P56, L16). Plaintiff testified he *slipped and fell at 7:30 a.m*. (Pa328, plaintiff deposition P11, L8-10).

The defendants' weather expert issued reports confirming the following:

JANUARY 1, 2022 No snow or ice cover was present throughout the day. Rain occurred intermittently from around 1:35 AM to 3:45-3:50 AM, and then frequently to around 2:25-2:30 PM EST. Additional rain occurred from around 4:30-4:50 PM EST through the remainder of the day. The high temperature was near 56 F and the low temperature was near 50 F.

JANUARY 2, 2022 No snow or ice cover was present throughout the day. Rain, which was ongoing from the previous day, continued to around 2:35-2:50 AM EST. Additional rain and drizzle occurred intermittently between approximately 4:20 AM and 6:30 AM, and 6:10 PM and 6:50 PM EST. The high temperature was near 59 F and the low temperature was near 37 F.

JANUARY 3, 2022 No snow or ice cover was present throughout the day. No precipitation occurred on this day. The high temperature was near 37 F and the low temperature was near 22 F.

JANUARY 4, 2022 No snow or ice cover was present throughout the day. No precipitation occurred on this day. The high temperature was near 35 F and the low temperature was near 19 F.

JANUARY 5, 2022 On the date of incident, **no snow or ice cover was present at the start of the day (midnight)**. ***Precipitation in the form of freezing rain and snow occurred intermittently from around 4:20 AM to 5:50 AM EST. After 5:50 AM, freezing rain and freezing drizzle occurred frequently to around 7:30 AM EST. After 7:30 AM, rain/freezing rain occurred frequently to around 8:25 AM EST***. Additional rain/freezing rain occurred frequently between approximately 8:50 AM and 9:05 AM, and 9:40 AM and 9:55 AM EST. After 9:55 AM EST, rain occurred frequently to around 12:30-12:35 PM EST. A trace (less than 0.1 inch) of snow and ice accumulated on this day. Due to melting, no snow or ice cover remained at the end of the day (11:59 PM EST). The high temperature was near 47 F and the low temperature was near 28 F.
(Da1-Da12, report 10/17/23 of CompuWeather Forensic Experts).

Plaintiff testified he slipped on the landing before reaching the stairs (Pa329, plaintiff deposition P16, L22-24)

> Q. How many steps had you taken onto the landing before you slipped?
> A. As soon as my foot hit the landing, that was it. The next thing I know I was on the sidewalk. There was no additional steps. It was one step and then I kind of just was on the sidewalk.
> Q. Which foot did you place onto the landing that slipped?
> A. Left.

(Pa329, plaintiff deposition P17, L8 – 17)

Plaintiff further testified:

Q. Does your unit look out to the stairs where this incident occurred?
A. I have windows facing the front, but I can't see the stairs.
Q. Were you carrying anything in your hands at the time of the incident?
A. Nothing in my hands.
Q. ***Were you using handrails at the time of the incident***?
A. ***I didn't make it that far***.
Q. Do you recall what the weather was like at the time of the incident?
A. I know it was a little cold and -- well, now I know there was ice on the ground.
Q. Was there any precipitation falling at the time of the incident?
A. If any, very light, if any.
Q. And what was --
A. To the best my memory.
Q. What was falling?
A. Rain.
Q. You recall rain falling at the time of your incident?

A. Maybe very light, if anything. If anything.
Q. ***Do you recall any freezing rain falling at the time of your incident***?
A. ***Possible. I -- possible***.
Q. Had you made any observations of the stairs or the landing before you exited the building that day?
A. Just -- I very quickly, you know, as I'm opening the door, I do tend to look down and I stepped out, yeah. Brief, brief observation.

(Pa328, plaintiff deposition P13, L2 – P14, L10)

Plaintiff's answers to interrogatories specifically allege he was caused to slip and *because of icy conditions* he encountered immediately upon stepping out onto the landing. (Pa315). Plaintiff's own liability expert specifically concluded the low coefficient of friction that allegedly existed at the moment of plaintiff's fall was *caused by* the icy conditions. (Pa471, report of Carl Berkowitz, pg. 17). Plaintiff's own weather expert noted The National Weather Service had issued a Winter Weather Advisory for *freezing rain go into effect at 4 AM. . . . Around the time of the slip-and-fall incident, 7:30 AM, it was cloudy and 32 degrees with light freezing rain*. (Da13-Da26, report 7/3/23 WeatherWorks).

The opinions of plaintiff's liability expert re: the existence of allegedly prior slippery conditions caused by rainfall accumulating on the stairs after the painting was done had *no basis in the facts* of this case. The most obvious example of the expert simply ignoring the facts of the case is the opinion that "[t]he design of the stairs allows *rain water* to accumulate on the stairs creating a slip and fall hazard." (Pa463, report of Carl Berkowitz, pg. 9). It rained on more than 15 occasions *after* the steps were painted but before plaintiff fell. (Da27-Da45, report 11/17/23 CompuWeather Forensic Experts) Plaintiff's own deposition testimony directly contradicts the opinion by the expert that rain on the stairs previously created a

slipping hazard:

Q. Can you estimate for me how many times a day you were up and down those steps ***after*** they were painted but before your incident?
A. How many times a day?
Q. Yes.
A. I would say four.
Q. Prior to the date of your incident, did you ever have any difficulty traversing or walking over the stairs ***after*** they were painted?
A. No.

(Pa330, plaintiff deposition P19, L13-16)

Plaintiff further testified his "opinion" that the stairs were rougher to navigate after painting *only arose after he slipped and fell*. Plaintiff *never* testified the stairs were slippery when they were wet before the day of the incident:

Q. But your *opinion* that the stairs after painting are rougher to navigate *only arose after your incident*, *correct*?
A. After I walked on them and they were wet, yes, or tried to, yes.
Q. Are you testifying that you had walked on them while they were wet before the date of your incident *or are you referring to the date of your incident*?
A. *I'm referring to the date of my incident*.

(Pa330, plaintiff deposition P21, L1-11)

In fact, plaintiff testified that to the best of his knowledge there was *no precipitation* after the steps were painted but before he slipped and fell:

Q. Is it your testimony that there was *no precipitation at any point in time after the steps were painted but before your accident* at which time you needed to walk on those steps?
A. It's -- I believe so, yeah. Or -- yeah, *yeah, to the best of my knowledge*, yeah
(Pa330, plaintiff deposition P20, L20-25)

LEGAL ARGUMENT

POINT I

THE STANDARD OF REVIEW IS *DE NOVO* WITH ANY RULING OF THE TRIAL COURT REVIEWED FOR AN ABUSE OF DISCRETION

The Appellate Division reviews a grant of summary judgment *de novo*, observing the same standard as the trial court. Townsend v. Pierre, 221 N.J. 36, 59, 110 A.3d 52 (2015). With respect to the trial court's exercise of its gatekeeper function, the Appellate Division reviews this for an abuse of discretion. Hisenaj v. Kuehner, 194 N.J. 6, 942 A.2d 769, 770 (2008).

Summary judgment should be granted only if the record demonstrates there is "no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). This Court considers "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406, 98 A.3d 1173 (2014) (*quoting* Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995)). If no genuine issue of material fact exists, the inquiry then turns to "whether the trial court correctly

interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J.Super. 325, 333, 64 A.3d 579 (App. Div. 2013) (*quoting* Massachi v. AHL Servs., Inc., 396 N.J.Super. 486, 494, 935 A.2d 769 (App. Div. 2007), *certif. denied*, 195 N.J. 419, 949 A.2d 847 (2008)).

The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004) (citations omitted). "Competent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'" Hoffman v. Asseenontv.com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (quoting Merchs. Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div. 2005)). A court cannot deny a motion for summary judgment merely because the opposing party points to an insubstantial or controverted fact. Id. The determination that a genuine issue of material fact exists cannot be made based on a mere argument of counsel or the bare assertion of a conclusion opposite to the factual position of the adversary. Amabile v. Lerner, 74 N.J. Super. 43 (App. Div. 1963); U.S. Pipe & Foundry Co. v. Am. Arbitration Assoc., 67 N.J. Super. 384, 400 (App. Div. 1961); Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369 (App. Div. 1960). When evidence fails to present sufficient disagreement to require submission to a jury, or when evidence is so one sided that a party must prevail as a matter of law, summary judgment should be granted. Brill, 142 N.J. at 536.

Here, the trial court did not abuse its discretion in the exercise of its gatekeeper function. There are no genuine issues of material facts. The trial court correctly applied the facts to the relevant law. The trial court correctly held that "Plaintiff slipped and fell during an ongoing storm event in the form of freezing rain. Plaintiff specifically testified the cause of his fall was the ice that had accumulated on the landing which he encountered immediately when stepping onto the landing. Moving Defendants had no duty to remove ice from the property until the storm event had ended." (Pa1).

POINT II

THE TRIAL COURT CORRECTLY HELD THE DEFENDANTS-RESPONDENTS DID NOT OWE A DUTY OF CARE TO REMOVE ICE DURING AN ONGOING STORM EVENT

"The question of whether a duty exists is a matter of law properly decided by the court…., not the jury...." Wang v. Allstate Ins. Co., 125 N.J. 2, 15 (1991). The New Jersey Supreme Court has ruled that a commercial landowner *does not have a duty to remove snow or ice from public walkways until a reasonable time after the cessation of precipitation*. To prove negligence, plaintiff must provide four essential elements: (1) a duty of care owed by the defendant; (2) a breach of that duty by the defendant; (3) an injury proximately caused by the defendant's breach of that duty; and (4) damages. Here, as a matter of law, the trial court correctly found the defendants owed no duty to the plaintiff because plaintiff slipped and fell during an ongoing storm event. Thus, summary judgment in favor of the defendants was appropriate.

In Pareja v. Princeton International Properties, 246 N.J. 546 (2021) the New Jersey Supreme Court adopted the "*ongoing storm rule*," and held that a commercial landowner does not have a duty to remove snow or ice from public walkways until a reasonable time after the cessation of precipitation. **"***The premise of the rule is that it is categorically inexpedient and impractical to remove or reduce hazards from snow and ice while the precipitation is ongoing*." *Id*. at 558.

In Pareja, the plaintiff slipped and fell on black ice on a driveway apron on the defendant's property at approximately 8:00 a.m. Freezing rain and sleet began falling at 1:00 a.m. *and continued falling through the time of the incident*. Defendant had not undertaken any attempts at snow or ice removal prior to plaintiff's fall. fall. *Id*. at 549.

> Applying our precedent to a situation where a storm is ongoing, we hold that commercial landowners do not have the absolute duty, and the impossible burden, to keep sidewalks on their property free from snow or ice during an ongoing storm. We find instead that the limiting principles established in our precedent warrant the adoption of the ongoing storm rule. *Id.* at 557.

The ruling allowed for two limited exceptions: cases where the commercial property owner takes affirmative action that increases risk to pedestrians or invitees, and cases where the hazard which causes the plaintiff to fall is the consequence of a pre-existing condition. Here, the trial court correctly held that neither exception applied:

> Here, neither exception applies, as Plaintiff slipped and fell during an ongoing storm event in the form of freezing rain. *Plaintiff specifically testified the cause of his fall was the ice* that had accumulated on the landing which he encountered immediately when stepping onto the landing. Moving Defendants had no duty to remove ice from the property until the storm event had ended. (Pa3).

It was undisputed that plaintiff specifically testified *the cause of his fall was the ice* that had accumulated on the landing which he encountered immediately when stepping onto the landing. (Pa329, deposition P16, L22-24; P17, L8 – 17). It was undisputed that the reports of the defendants' weather expert confirmed that for several days before plaintiff slipped and fell there was no precipitation and no snow or ice cover was present. On the date of incident, no

snow or ice cover was present at the start of the day (midnight) but precipitation *in the form of freezing rain and snow occurred intermittently from around 4:20 AM to 5:50 AM EST. After 5:50 AM, freezing rain and freezing drizzle occurred frequently to around 7:30 AM EST. After 7:30 AM, rain/freezing rain occurred frequently to around 8:25 AM EST*. Additional rain/freezing rain occurred frequently between approximately 8:50 AM and 9:05 AM, and 9:40 AM and 9:55 AM EST. (Da1, report 10/17/23 CompuWeather Forensic Experts). It was undisputed plaintiff's answers to interrogatories specifically alleged he was caused to slip and and fall *because of icy conditions* he encountered *immediately upon stepping out* onto the landing. (Pa315). It was undisputed plaintiff testified that he slipped and fell at 7:30 a.m. (Pa328, plaintiff deposition P11, L8-10).

In fact, the report offered by plaintiff's own liability expert specifically concludes *the low coefficient of friction* that existed when plaintiff' fell *was caused by the icy conditions***.** (Pa471, report of Carl Berkowitz, pg. 17). It is undisputed that the cause of plaintiff's fall was the icy conditions that developed during an ongoing storm event. There is no evidence the fall was caused by any *alleged* design or maintenance defects concerning the treads and risers. In fact, plaintiff slipped immediately upon stepping onto the landing. He never reached any of the stairs/risers. (Pa329, plaintiff deposition P16, L22-24; Pa329, plaintiff deposition P17, L8 – 17).

The existence of a possibility of defendant's responsibility for plaintiff's injuries is insufficient to impose liability. Hansen v. Eagle-Picher Lead Companies, 8 N.J. 133, 141 (1951). A plaintiff must introduce evidence which affords a reasonable basis for the

conclusion that it was more likely than not that the defendant's conduct was a cause in fact of the result. *The mere showing of an incident which causes injuries cannot establish negligence*. In fact, there is a presumption against it. Buckelew v. Grossbard, 87 N.J. 512, 525 (1981). It is well-established that the burden of proving the charge of negligence is upon the plaintiff and must be sustained by proof of circumstances from which the defendant's want of due care is a legitimate inference. It is a substantial right of the defendant that the plaintiff be required to meet this burden. Vander Gfoef v. Great Atlantic & Pacific Tea Co., 32 N.J. Super 365 (App. Div. 1954).

It is well-established that mere allegations set forth in pleadings without evidentiary support may not prevent the granting of summary judgment. New Jersey Mortgage and Investment Corp. v. Calvetti, 68 N.J.S 18, 25 (App. Div. 1961). It is also soundly established that when the moving party demonstrates a prima facie right to summary judgment, the opposing party is required to show by competent evidential material that a genuine issue of material fact exists. id. at 32. Although a party opposing a motion for summary judgment is entitled to all reasonable inferences when faced with a Summary Judgment Motion an "*inference is a deduction or conclusion that can be drawn only from a premise established by the proofs in the case*." Ferdinand v. Agricultural Insurance Company, 22 N.J. 482, 488 (1956).

Here, the trial court correctly found the defendants did not breach any duty owed to the plaintiff. Further, it is not sufficient for plaintiff to oppose the motion for summary judgment

by merely asserting a conclusion opposite to the factual position of the movement. New Jersey Mortgage and Investment Corp, supra, at 25.

> But where a factual foundation for contradicting the movant's assertions or denials of knowledge is lacking, and where no sound evidentiary basis is indicated for impeaching the movant's credibility, the opponent of the motion is not entitled to proceed to trial merely on the faint hope that he may be able to shake the movant's witnesses or otherwise uncover previously unexposed information. id. at 36.

Rule 4:46-2(c) specifically states that "an issue of fact is genuine only if, considering the burden of persuasion at trial, *the evidence submitted* by the parties on the Motion, together with all legitimate inferences therefrom favoring the non-moving party would require submission of the issue to the trier of fact".

Here, the issue of whether the defendant owed a duty to the plaintiff was a matter of law properly decided by the trial court. Based on the facts of the case the trial court correctly held that the defendants owed no duty to plaintiff to remove ice from the premises until a reasonable time *after* the ongoing freezing rainstorm ended. Thus, the trial court properly granted summary judgment dismissing the Complaint.

POINT III

THE TRIAL COURT CORRECTLY RULED THE "SAFETY REPORT" OF PLAINTIFF'S LIABILITY EXPERT DID NOT CREATE A GENUINE ISSUE OF FACT.

It is undisputed that Plaintiff slipped and fell *during an ongoing storm event.* In fact, the "Safety Report" report of plaintiff's liability expert notes the following: (1) plaintiff slipped and fell at 7:30 a.m. (Pa457, Incident Overview); (2) "*[t]he weather at the time of the incident was freezing and there was light freezing rain*" (Pa458); and (3) the precipitation in the form of a "wintery mix" that *began* prior to plaintiff's fall started at 6:51 a.m:

- 6:51 AM 30 °F Wintry Mix
- 7:10 AM 30 °F Light Freezing Rain
- 7:51 AM 30 °F Light Freezing Drizzle
- 8:26 AM 31 °F Light Freezing Rain

(Pa458)

Plaintiff's liability expert *is not* a weather expert and yet failed to include any reference to the report authored by plaintiff's own weather expert which specifically noted:

> The National Weather Service had a Winter Weather Advisory for freezing rain go into effect at 4 AM. **A wintry mix of snow and freezing rain overspread Jersey City, NJ between 4:25 and 4:40 AM** with a temperature of 30 - 32 degrees. **Immediately prior to the onset of the storm, exposed, undisturbed and untreated ground surfaces were clear of any naturally precipitated snow and/or ice accumulation from all past events**. For the remainder of the pre-dawn hours, **the snow and freezing rain quickly transitioned over to all freezing rain** as the temperature slowly moderated to around 31 - 32 degrees. Sunrise occurred around 7:20 AM. **Around the time of the slip-and-fall incident, 7:30**

> **AM, it was cloudy and 32 degrees with light freezing rain**. Winds were light and variable. **A Winter Weather Advisory was in effect.**

(Pa386)

Thus, in an attempt to distract from the undisputed fact that plaintiff slipped and fell during an *ongoing storm event that began shortly before the fall*, plaintiff's expert provides a 50 page report that largely ignores the facts of the case to ultimately offer an opinion that it was an alleged hazardous condition of the "stairs" that caused plaintiff to slip and fall.

Initially, plaintiff's expert *mislabels* the landing where plaintiff slipped as an "extra long step." (Pa457). Plaintiff did not fall on a step. In fact, plaintiff's own discovery responses specifically identify the "landing" and "stairs" as separate components of the area involved. (Pa308). Thus, any analysis by plaintiff's expert of alleged issues with the "stairs" has no basis in fact. Plaintiff specifically alleges "[o]n or about January 5, 2022, at approximately 7:30 A.M.., plaintiff, Glenn Weidlich, was exiting his apartment and *stepped onto the landing* of the exterior step of the building where he resides, where he encountered an icy condition causing him to slip and fall to the ground. The landing and the stairs were painted a few weeks before the Incident. Plaintiff suffered injuries as a result. (Pa315) Plaintiff's deposition testimony confirms he *slipped on the landing before reaching the stairs.* (Pa329, plaintiff deposition P16, L22-24).

Q. How many steps had you taken onto the landing before you slipped?

A. As soon as my foot hit the landing, that was it. The next thing I know I was on the sidewalk. There was no additional steps. It was one step and then I kind of just was on the sidewalk.

Q. Which foot did you place onto the landing that slipped?

A. Left. (Pa329, plaintiff deposition P17, L8 – 17)**.**

Plaintiff testified he slipped *immediately* after placing his left foot on the landing. Thus, the reference by plaintiff's expert that "*Mr. Weidlich tries to regain his balance (attempts to recover*)" also has no basis in fact. (Pa459).

Additionally, the opinion of plaintiff's expert that the landing/stairs were "slippery" prior to the date of plaintiff's fall also has no basis in fact. Plaintiff specifically testified he had no difficulty walking on the landing/stairs *after* the painting was completed but *before* the date of the freezing rainstorm when he fell.

Plaintiff certified interrogatories note the landing and the stairs ***were painted a few weeks before*** the Incident. (Pa315). The contract for the painting work to be completed by defendant Unlimited Building Management is dated 11/23/21. (Pa393). The completed work was paid for by a check dated 12/1/21 which was "posted" on 12/3/21. (Pa399). Thus, plaintiff's recollection that the stairs had been painted *several weeks* before his slip and fall is accurate.

Plaintiff testified he *never made any complaints about any condition of the stairs prior to his slip and fall*. Plaintiff also testified that, *although he used the stairs approximately 4*

times a day, he never had any difficulty walking on the steps during the several weeks *after* the painting was done but *before* the morning he fell.

Q. Can you estimate for me how many times a day you were up and down those steps after they were painted but before your incident?

A. How many times a day?

Q. Yes.

A. I would say four.

Q. And at any point in time after the paint -- *after the stairs were painted but before your incident* while you were going up and down them approximately four times a day, *did you ever make any complaints* to anybody at the condominium association *about any condition of the stairs*?

A. *No.*

Q. Prior to the date of your incident, did you ever have any difficulty traversing or walking over the stairs after they were painted?

A. *No*. (Pa330, plaintiff deposition P18, L25 – P19, L16).

. . . . . .

Q. Prior to the happening of your incident, had you ever made any complaints to anybody at the condominium association about any condition of the stairs?
A. *No*. (Pa329, plaintiff deposition P16, L25 – P17, L4).

. . . . . .

Q. Prior to the date of your incident, did you ever have any difficulty traversing or walking over the stairs *after* they were painted?
A. *No*. (Pa330, plaintiff deposition P19, L13-16).

As noted by defendant's weather expert, there was precipitation in the form of rain on numerous days prior to plaintiff's slip and fall.

- Rain 12/1/21; 12/2/21; 12/6/21; 12/11/21; 12/15/21; 12/18/21; 12/19/21; 12/21/21; 12/22/21;

- Snow 12/24/21 (0.3, due to melting, no snow cover remained at the end of the day)

- Rain 12/25/21; 12/27/21; 12/28/21; 12/29/21; 12/30/21; 12/31/21; 1/1/22; and 1/2/22 rain, but no snow or ice cover was present throughout the day, high temp 59, low 37 (Da3, report 11/17/23 CompuWeather Forensic Experts).

Thus, once again, the opinion of plaintiff's liability expert that "[t]he design of the stairs allows rain water to accumulate on the stairs creating a slip and fall hazard" has no basis in fact. (Pa463). Thus, any "opinion" that the stairs were slippery when wet prior to the morning of plaintiff's fall which occurred during an ongoing storm event in the form of freezing rain is without merit.

The bare conclusions of an expert, unsupported by factual evidence or substantial foundation, are inadmissible as a mere "net opinion." Rempfer v. Deerfield Packing Corp., 4 N.J. 135, 145 (1950) (finding an expert's opinion so "completely lacking in proper foundation as to be worthless" and not admissible); Buckelew v. Grossbard, 87 N.J. 512, 524 (1981) (Where an expert's opinion is merely a bare conclusion unsupported by factual evidence, *i.e.*, "a net opinion," it is inadmissible). As noted in Newman v. Great American Insurance Company, 86 N.J. Super 391 (App. Div. 1965), the fact that a witness may qualify as an expert in a wide general field does not make everything the expert says admissible and it must appear that the witness knows what he/she is talking about with reference to the facts of a particular case. Id. at 399. It is well settled that while qualified expert testimony may be received to support a claim, it must have a foundation in the evidence and not be based on mere speculation or

possibility. Vuocolo v. Diamond Shamrock Chem., 240 N.J. Super 289, 299 (App. Div. 1990). Nor can an opinion be based on guess or conjecture. Relose v. Green, 222 N.J. Super 545, 549-511 (App. Div) cert. denied 111 N.J. 610 (1988).

A party's burden of proof on an element of a claim may not be satisfied by an expert opinion that is unsupported by the factual record or by an expert's speculation that contradicts that record. Further, an expert cannot "reconstitute" the facts to support the expert's opinion. See, Townsend v. Pierre, 429 N.J. 522 (App. Div. 2013).

CONCLUSION

For the reasons argued above, Defendants-Respondents, Joseph A. Del Forno, Inc., and Del Forno Real Estate, LLC., respectfully request that this Court deny this appeal and affirm the trial court's Order granting the defendants Motion for Summary Judgment.

Respectfully submitted,

/s/ Anthony R. Fiore, Jr.

ANTHONY R. FIORE, JR.
Attorney for Defendant-Respondent,
Joseph A. Del Forno, Inc., and Del
Forno Real Estate, LLC.

Superior Court of New Jersey

Appellate Division

Docket No. A-003053-23

GLENN WEIDLICH, *Plaintiff-Appellant,* vs. 313-319 FIRST STREET CONDO ASSOCIATION, INC., CLINTON HILL CONDO ASSOCIATION, 357 8TH STREET CONDOMINIUM ASSOCIATION, JOSEPH A. DEL FORNO, INC., DEL FORNO REAL ESTATE LLC, UNLIMITED BUILDING MANAGEMENT CORP., *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY DOCKET NO. HUD-795-23 Sat Below: HON. KALIMAH H. AHMAD, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS

On the Brief:
MONIQUE MOREIRA
Attorney ID# 904782012
MITCHELL RAMIREZ
Attorney ID# 012762012

MOREIRA SAYLES RAMIREZ, LLC
Attorney for Defendants-Respondents
712 Kearny Avenue
Kearny, New Jersey 07032
(201) 991-9001
moreiralaw@moreiralawpc.com
mramirez@moreiralawpc.com

Date Submitted: September 20, 2024

CP COUNSEL PRESS (800) 4-APPEAL • (331552)

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PRELIMINARY STATEMENT

This is an appeal by the Plaintiff, from an order granting summary judgment in favor of the Defendants-Respondents. This case arises out of litigation instituted by the Plaintiff-Appellant, who alleged, unambiguously, that he slipped and fell on ice while exiting his apartment building during an ongoing storm event on the staircase located at 357 8th Street, Jersey City, New Jersey ("Subject Property").

Defendant, Joseph A. Del Forno Inc. & Del Forno Real Estate, LLC ("Del Forno") was the management company at the Subject Property. Defendant, Unlimited Building Management Corp. ("Unlimited") performed work on behalf of Del Forno, specifically painting the stairs in question. Defendant, 387 8th Street Condominium Association (the "Condo Association") was the condominium association for the building in question. This brief will concentrate only on the arguments made by the Condo Association; however, it should be noted that all Defendants' arguments are aligned. Namely, Plaintiff-Appellant argues that the Trial Court's decision should be reversed because the Trial Court abused its discretion in applying the "Ongoing Storm" doctrine and by rejecting his allegations that the Defendants created the risk as a result of alleged "defects" on the stairs in question. Several Defendants were named in the underlying action. Plaintiff

essentially argues, by cherry picking findings in an expert report, that the condition of the stairs made the ice/snow, more slippery and that the ongoing weather conditions at the time of the injury are of no dipositive significance.

It is respectfully submitted that the Plaintiff-Appellant's arguments must fail as they are factually distinct from the case at hand and arise from a fundamentally inaccurate interpretation of the Trial Court's well-reasoned ruling. As such, the Trial Court's decision granting summary judgment in favor of the Defendant-Respondent, 387 8th Street Condominium Association, should be affirmed.

PROCEDURAL HISTORY

For the sake of brevity, the Defendant-Respondent, Condo Association, adopts the Procedural History set forth in the Plaintiff-Appellant's Brief.

STATEMENT OF FACTS

Plaintiff in this matter is an owner of a unit in a residential building located at 357 8th Street in Jersey City, New Jersey ("Subject Location"). **(Pa327, 9:3-6).** Plaintiff moved into the subject location in approximately 2005. **(Pa328, 10:7-9).** Plaintiff alleges that on January 5, 2022 ("Incident Date"), at approximately 7:30 AM, he slipped and fell on an icy condition on

the landing of the staircase at the Subject Location. **(Pa315).** Plaintiff slipped as soon as his foot hit the landing and did not make it to the actual staircase before falling. **(Pa329, 17:8-17).** Plaintiff recalled possible freezing rain at the time of the incident. **(Pa329, 14:2-4).** Weather reports from the Incident Date provide that precipitation in the form of freezing rain occurred intermittently from around 4:20 AM to 5:50 AM. **(Pa345).** Thereafter, from 5:50 AM to approximately 7:30 AM, freezing rain and freezing drizzle occurred frequently. **(Pa345).** Finally, after 7:30 AM, rain/freezing rain occurred frequently until approximately 8:25 AM. **(Pa345).**

A few weeks before the Subject Incident, Plaintiff took note of the fact that the stairway in question had been painted. **(Pa330, 18:15-24).** Unlimited was contracted by Del Forno to paint the steps in question – the estimate/contract was dated November 23, 2021. **(Pa393).** The work in question was completed by December 1, 2021. **(Pa452, 20:18-24).** No complaints were received by Unlimited reagrding the work done on the steps. **(Pa451, 17:12-15).**

In discovery, Plaintiff served the report of Carl Berkowitz ("Berkowitz"). **(Pa350).** Berkowitz concludes that poor maintenance, a difference in riser heights, the slope of the stairs and a "low coefficient of friction" were all proximate causes of Plaintiff's fall. **(Pa363).** Berkowitz's

report completely ignores the factual record. Plaintiff never navigated the staircase in question, as he slipped on the landing at the top of the staircase. **(Pa329, 17:8-17).** Berkowitz makes no causal connection between Unlimited's painting of the stairs and Plaintiff's fall and alleges no defect as to the type of paint utilized for the steps in question. **(Pa362-63).** Berkowitz's discussion of the coefficient of friction on the stairs in question is also of no significance because he does not specify which steps he is referring to in his analysis and because his findings pertain only to dry steps and wet steps – both of which are irrelevant because the Plaintiff alleges he slipped and fell on ice. **(Pa350).**

The Condo Association produced a report authored by Dr. Mark Marpet ("Marpet") in discovery. **(Pa414).** Marpet concluded that the findings by Berkowitz are wholly inapplicable to the case at bar. **(Pa424).**

LEGAL ARGUMENT

POINT I

PLAINTIFF'S ARGUMENT THAT THE ONGOING STORM DOCTRINE IS INAPPLICABLE IS WITHOUT MERIT

Plaintiff-Appellant argues that the Court below improperly granted summary judgment because the report of Dr. Berkowitz was sufficient to create a genuine issue of material fact as to whether the deterioration of the stairs caused the dangerous condition, obviating the applicability of the "Ongoing Storm" Doctrine. Plaintiff, both in his brief at the Trial Court level, and here, effectively concedes that the Ongoing Storm Doctrine is applicable to the case at hand since freezing rain was in fact falling at the time of the Subject Incident. Plaintiff's argument is that Pareja v. Princeton International Properties, 246 N.J. 546 (2021), provides exceptions that could impose a duty during an ongoing storm. Specifically, Plaintiff argues there was a (1) pre-existing deterioration of the surface of the steps which allowed water infiltration and imperceptible freezing onto the surface, (2) the handrails were affixed too far from the pedestrian pathway and (3) the paint job made things "sleeker" in Plaintiff's opinion.

The ruling in Pareja allowed for two limited exceptions. The first is when a commercial landowner's actions increase the risk to pedestrians and invitees. Id. at 559. Pareja cites to Terry v. Cent. Auto Radiators, Inc., 732

A.2d 713, 717-18 (R.I. 1999), in defining this exception. There, the Supreme Court of Rhode Island held that "unusual circumstances existed" where a defendant moved the plaintiff's vehicle to the rear of its business and then directed the plaintiff to remove it from there. Ibid. The Rhode Island Court found that forcing the plaintiff to walk some one hundred feet over snow and ice that had been accumulating on unknown and difficult terrain was an exacerbation of the risk. Ibid. The second exception carved out by Pareja is when there is a pre-existing risk such as failing to remove snow from a previous storm that has since concluded. Ibid.

Plaintiff's first argument for a limited exception is based on the alleged pre-existing deterioration of the surface on the steps. Of significance, Plaintiff's expert, Berkowitz, inspected the subject property on June 26, 2023[1]. **(Pa486).** Berkowitz report does not casually relate any alleged deterioration to the slip and fall; instead, he makes a blanket statement "the design and maintenance defects together with the low coefficient of friction **caused by the icy conditions**, directly resulted in Mr. Weidlich's slip and fall." **(Pa471).** This, plainly, ignores the fact that the Plaintiff stated, unambiguously, that accumulated ice caused his fall. **(Pa315; Pa329, 17:8-17).** There is simply no argument that the alleged deterioration would have caused an icy condition to

[1] Date was determined by date on included photographs.

be more likely - as freezing rain was falling from the sky at the time of the fall. (**Pa345**). Plaintiff at no time testified that he had trouble navigating the staircase - he took one step and his foot landed on ice, which caused his fall. No other reason for the fall was ever given by the Plaintiff and therefore any other causes identified by counsel to Plaintiff and his expert are speculative, at best.

Plaintiff's second limited exception argument is that the handrails were too far from the doorway. Again, as with Plaintiff's prior argument, Berkowitz does not causally relate the handrail to the slip and fall. Additionally, Berkowitz fails to cite a single code indicating the handrails are in violation of when the property was constructed in 1890. This argument is yet another red herring attempting to distract from the true cause of plaintiff's slip and fall.

Plaintiff's final argument is that the paint used on the stairs, a few weeks before the incident, made the stairs "sleeker" and "rougher in the rain to navigate." Aside from the relative absurdity appurtenant to arguing that paint can make ice more slippery, Berkowitz does not casually relate the painting of the stairs to the incident. Instead, Plaintiff relies on his lay testimony in support of this argument. N.J.R.E. 702 specifically states that a witness qualified as an expert is required if technical knowledge will assist the trier of

fact in determining a factual issue. In general terms, a jury should not be allowed to speculate without the aid of expert testimony in an area where laypersons could not be expected to have sufficient knowledge or experience. Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997). Similarly, expert testimony has been found indispensable to a plaintiff's burden of showing a breach, where "the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of a party was reasonable." Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982).

As the Trial Court found, the slipperiness of paint is not within the ken of an average juror:

> MR. REDENBURG: So, first of all, and I'm not going to shout like my colleague. But, first of all, the invoice specifically says apply two-coat exterior acrylic walking finish paint.
>
> THE COURT: Right, but -- okay. So unless there's going to be someone who says departing from that standard, right, departing from what was required in the contract, I mean, I didn't see anything.
>
> MR. REDENBURG: No, but this is in the ken of an average juror, right? A jury (overlapping speakers)
>
> THE COURT: No, no, no, I can't let a jury hear that, that he departed from this, because it's pretty much saying to the jury that this is the reason why, right? We can't do that unless an expert explains departing from that did cause it because this

type of high gloss paint will, it shouldn't be used on the stairs. Is there someone -- I still don't know as I sit here right now whether the paint recommended by Benjamin was the right one. High gloss to me sounds shiny and that I'll fall. I don't know. But this is why we would need someone to tell us, I don't know what type of paint to use in places, right?

MR. REDENBURG: That's what Unlimited knows, that's why they were hired. They should now and they put it –

THE COURT: No, but in this case you have the burden of proving that their departure, right, that they caused this by using the wrong paint, right?

MR. REDENBURG: Even if they don't decide that, right, we have the plaintiff's testimony that he has a factual basis to believe that the presence of the paint contributed to his fall, that's enough. The paint –

THE COURT: What does he do for a living?

MR. REDENBURG: I'm sorry?

THE COURT: What does he do for a living?

MR. REDENBURG: He works for a company that does some kind of technology.

THE COURT: Well, why would the jury use his lay opinion? Why would I let the jury do that?

MR. REDENBURG: It doesn't matter what you do for a living, you have common knowledge, right, that if it was painted 34 days before, it could cause the staircase to be slippery.

THE COURT: No, who says that? I don't know that. If something is painted 30 days before, wouldn't it dry?

MR. REDENBURG: No, I'm not saying that it wasn't dry, but depending on the type of paint --

THE COURT: Right, so that's what Mr. Scirocco is saying. He's saying that there's no expert that shows that using this type of paint or that painting it 30 days in advance contributed to the fall, right? It caused the fall, that it was one of the contributing factors, there's nothing --

MR. REDENBURG: At a minimum it's his testimony. He says that he believes --

THE COURT: But he's not an expert in painting.

MR. REDENBURG: He's not. He's not.

THE COURT: I mean you can be a lay witness and an expert, right? If I find that he qualified, like if he did something like that for a living, if he worked at Lowe's and was the man there recommending everything to me every time I go and he knows what you use, you know, right, that's different. But there's nothing like that and the fact that he works in technology, his factual, I mean what he believes happened, doesn't a jury need to hear, at this point shouldn't you have had some type of expert?

MR. REDENBURG: I don't think the expert needs to opine on that. I think his testimony at a minimum creates an issue of fact and I think it's in the ken of an average person to believe painting a staircase can cause an issue.

THE COURT: 30 days before? Says who?

MR. REDENBURG: It doesn't have to be wet.

THE COURT: I mean but where are we getting this from, that that can cause someone to fall? Where does that come from?

MR. REDENBURG: The knowledge of an average person. Painting a home --

THE COURT: I guess I'm not average.

MR. REDENBURG: -- that you're going to step on it, that you're going to step on it. My expert, plaintiff's expert also opines on the fact that the staircase isn't constructed properly, in any event, and the handrails aren't the proper distance to have braced his fall. Those are all issues of fact as well, maybe not with respect to Unlimited. Unlimited wouldn't just be with respect to the paint.

THE COURT: I would agree with you if in fact they used house paint to paint the stairs, right, if that were true, a reasonable person could believe they (inaudible) contributed to the fall. That would be fine. But that's not what they're saying happened here. That fact is not in dispute. You don't dispute that, he didn't use the house paint, right?

MR. REDENBURG: That's what I glean, but if they used floor and patio high gloss paint instead of walking finish paint, it's the contractor, it's their, they wrote up the invoice that says we're going to use two-coat exterior acrylic walking finish paint, but instead they used floor and patio high gloss paint. You would, I would imagine, I think an average juror would imagine that patios, which could be wood or whatever type of material they're made of, floors, usually going to be wood or something other than concrete. Concrete would probably require a different kind of paint like walking finish paint because you're going to be walking over that staircase all the time.

THE COURT: Don't you walk over your deck all the time? Depends how much you're outside.

MR. REDENBURG: But it's not the same underlying --

THE COURT: But who says that, who says that this paint wasn't sufficient, I don't know that.

MR. REDENBURG: They --

THE COURT: That would be speculation, I can't have the jury hear that.

(T1: 20:11-25:7).

The Trial Court properly ruled that the Plaintiff was not qualified to provide testimony regarding the paint or the slipperiness of said paint as it falls within the purview of an expert. The Court's assessment and decision to reject Plaintiff's lay opinion regarding the applicable paint finish and application is not undercut by the inapplicable case law referenced in the Appellant brief. Each of the cases submitted in support of Plaintiff's argument are easily distinguishable from the case at hand: Estate of Nicholas v. Ocean Plaza Condominium Association, Inc., 388 N.J. Super. 571 (App. Div. 2006) (a lay person can speak to whether someone is 'insane' for purposes of N.J.S.A. 2A:14-21); In the Matter of the Trust Created by Agreement Dated December 20, 1961, ex rel. Johnson, 194 N.J. 276 (2008) (individual was not permitted to testify regarding intent to include surviving spouses in a will); Murphy v. Trapani, 225 N.J. Super. 65 (App. Div. 1992) (testimony of adjoining landowner and of licensed planner and land surveyor that deck constituted navigational hazard); Vitale v. Schering-Plough Corp., 447 N.J. Super. 98

(App. Div. 2016) (plaintiff's co-worker was allowed to testify that plaintiff had tripped and fallen over a bag of ice melt based on his perception).

POINT II

THE TRIAL COURT DID NOT WEIGH ONE EXPERT REPORT MORE HEAVILY THAN ANOTHER

The only party engaging in a battle of the experts in this case appears to be Plaintiff argues that a trial court should not decide the merits where there are competing expert opinions and cites to Davin LLC v. Daham, 329 N.J. Super. 54 (App. Div. 2015), wherein a judge appeared to rely on his personal experience, rather than a certification submitted to the Court, in rendering a decision. "Relying on **his prior experience as a practicing attorney, the judge** stated that an attorney for a tenant never orders a title search before advising his or client to enter into a lease." Id. at 71 (emphasis added). The Appellate Division did not take issue with the Trial Judge's reliance on a particular expert, but instead, on that Judge's own personal experience when he had competing affidavits before him. Ibid.

Plaintiff attempts to draw a parallel between the Trial Judge in Davin and the Trial Judge in this case by stating that the Judge relied upon personal experience that freezing rain can be dangerous for pedestrians. This argument is nonsensical – the commonsense element of ice making walkways dangerous

versus whether a title search is necessary before entering a lease is not a meritorious comparison. In addition, the Trial Judge did not rely on her personal opinions regarding freezing rain, instead, she followed this State's Supreme Court opinion in Pareja, supra, which immunizes commercial property owners from incidents during ongoing storms, and explained that Plaintiff had provided no admissible opinion testimony regarding the standard of care applicable for paint on the Subject Location.

Despite Plaintiff's contentions to the contrary, at no time did the Trial Court ignore Berkowitz's opinions and give credence to Marpet's opinion. **Of note, Marpet's name is not mentioned during the oral argument**.

The remainder of the cases cited by Plaintiff are distinguishable from the matter at bar. Angel v. Rand Express Lines, Inc., 66 N.J. Super. 77 (App. Div. 1961), involved the Rule 104 hearing of a medical expert at the time of trial. Id. at 82. The Appellate Division disagreed with the Trial Court's determination that a showing of cranial nerve damage was a prerequisite to any proof of connection between the automobile accident and [Plaintiff's] impairment of vision. Id. at 86. The Trial Court here did not make any such exclusion or finding – instead, the Trial Court found that the Plaintiff slipped and fell on ice during an ongoing storm. **(Pa3).** The Trial Court did not exclude Berkowitz's testimony and considered it in issuing its opinion as

Berkowitz's report confirms that there was an ongoing storm at the time of the incident in question. **(Pa3).**

The final case cited by Plaintiff, Boryszewski ex repl. Boryszewski v. Burke, 380 N.J. Super. 361 (App. Div. 2005), involves an automobile accident wherein the plaintiff was killed. At issue was who was at fault as several manufacturing defects were involved which required expert testimony. No testimony was excluded in Boryszewski from the jury, which was the issue on Appeal. Id. at 370. Similar to the remainder of Plaintiff's arguments, this argument is without merit as no expert testimony was excluded. Berkowitz's testimony, and his conclusion, that "the design and maintenance defects together with the low coefficient of friction **caused by the icy conditions**, directly resulted in Mr. Weidlich's slip and fall" was considered by the Court. In considering Plaintiff's expert report, along with Plaintiff's testimony that he slipped and fell on ice during active freezing rain, the Court correctly ruled that Pareja applies and all Defendants were entitled to summary judgment as no party had a duty to clear the snow and ice during an ongoing storm.

CONCLUSION

The record in this matter unequivocally reflects that the Plaintiff-Appellant has not shown how the motion judge made a reversible error in this case. Simply put, the Defendant-Respondents' home is qualified as residential and the condition that caused the Plaintiff to fall was not caused by Defendant-Respondents.

For the foregoing reasons, Defendant-Respondents respectfully submit that the Trial Court's decision to grant the Defendant-Respondents' motion for summary judgment should be sustained by the Appellate Division and the Plaintiff-Appellant's appeal should be denied.

Dated: September 20, 2024 **Respectfully Submitted,**

Moreira Sayles Ramirez LLC

By: /s/ Monique D. Moreira
Monique D. Moreira, Esq.
Attorney for Defendant-Respondents:

Superior Court of New Jersey

Appellate Division

Docket No. A-003053-23

GLENN WEIDLICH, *Plaintiff-Appellant,* vs. 313-319 FIRST STREET CONDO ASSOCIATION, INC., CLINTON HILL CONDO ASSOCIATION, 357 8TH STREET CONDOMINIUM ASSOCIATION, JOSEPH A. DEL FORNO, INC., DEL FORNO REAL ESTATE LLC, UNLIMITED BUILDING MANAGEMENT CORP., *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY DOCKET NO. HUD-795-23 Sat Below: HON. KALIMAH H. AHMAD, J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

MICHAEL J. REDENBURG, ESQ. P.C.
Attorney for Plaintiff-Appellant
32 Broadway, Suite 412
New York, New York 10004
(212) 240-9465
mredenburg@mjrlaw-ny.com

On the Brief:
MICHAEL J. REDENBURG
Attorney ID# 284802018

Date Submitted: October 17, 2024

CP COUNSEL PRESS (800) 4-APPEAL • (333141)

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PRELIMINARY STATEMENT

Defendants-Respondents 357 8th Street Condominium Association ("8th Street Condo Assoc." or "8th Street"), Joseph A. Del Forno, Inc. and Del Forno Real Estate LLC ("Del Forno Defendants" or "Del Fornos"), and Unlimited Building Management Corp. ("Unlimited") argue that the trial court correctly applied the "Ongoing Storm" doctrine. That, however, is not the pertinent issue -- which is the question of *why* the invisible ice formed on the landing to the extent it did. What a jury should have been allowed to decide is if Plaintiff-Appellant Glenn Weidlich's expert is correct in his opinion that the water infiltration into the deteriorating concrete surface was a preexisting condition due to the Defendants' neglect, thereby causing unseen ice to cover the surface upon a mere trace of freezing rain.

PROCEDURAL HISTORY

Appellant incorporates the "Procedural History" from the initial brief.

STATEMENT OF FACTS

Appellant incorporates the "Statement of Facts" from the initial brief.

ARGUMENT

I. The Defendants' Reliance on the Fact That the Landing of the Exterior Stairs was Icy Ignores the Expert Testimony That It Was the Preexisting Deterioration of the Concrete Due to Lack of Maintenance Which Made the Stairs Unreasonably Dangerous Upon a Mere Trace of Freezing Rain. (Pa1-3, Pa4-7, Pa8-10)

Weidlich testified that as he opened the condo building door that morning, he noticed it was a bit cold and that a "very light" rain, "if any," was falling. (Pa328). As he exited and placed his left foot down on the landing, he immediately slipped. (Pa329, Pa331, Pa339, Pa341). Weidlich did not even make it far enough along the stairs to reach the handrails to steady himself. (Pa328-329). Defendants' meteorological evidence confirms that the freezing rain was very light precipitation. (Pa346-347). From this evidence that a small trace of freezing rain was falling at that time, the Defendants each emphasize Weidlich's deposition testimony and expert reports to argue the Ongoing Storm doctrine must apply because it is "undisputed" that Weidlich slipped on "ice" on the landing.

What is disputed, though, is whether the deterioration of the concrete staircase led to or worsened the forming of the ice that invisibly confronted Weidlich on the landing as he first stepped onto it. If so, the Defendants' lack of maintenance would be a breach of its duty to maintain the staircase in reasonably safe condition. See generally Lechler v. 303 Sunset Ave. Condominium Association, Inc., 452 N.J. Super. 574, 585-86 (App. Div. 2017) (condo association's negligence made a condo staircase unreasonably dangerous to residents). After all, Pareja v. Princeton International Properties, 246 N.J. 546 (2021) recognizes exceptions to the Ongoing Storm rule "if the

owner's conduct increases the risk, or the danger is pre-existing." 246 N.J. at 549.

Here, jurors might be able to employ their common knowledge that freezing rain can make exterior surfaces slippery. However, the Defendants introduced no evidence into the record that the adjacent concrete surfaces such as the sidewalk, were as slippery as the concrete landing and stairs. Defendants also do not argue this in their briefs but rely solely on the general effects of freezing rain. However, a negligently-created *underlying* dangerous condition can be the proximate cause of a plaintiff's slip and fall if it "creates a situation which involves an unreasonable risk to another because of the expectable action of . . . a force of nature." Brody v. Albert Lifson & Sons, 17 N.J. 383, 389 (1955). The "ordinary forces of nature such as wind, or a rainstorm which are usual at the time and place, are conditions which reasonably [can be] anticipated." Id. at 390.

Here, the issue is not the slipperiness of freezing rain *per se*, but whether the particular condition of this deteriorating exterior concrete staircase made it unreasonably worse. In other words, based on the evidence and expert opinion, a jury could find that the stairs were extraordinarily slippery because of the water infiltration and freezing causing an invisible sheen of ice upon the deteriorating concrete, creating a surface much more dangerous than an

ordinary one upon a trace of freezing rain. See Brody, 17 N.J. at 391 ("the alleged cause is the intrinsic quality of the material used or condition created by the defendant when exposed to normal weather conditions. This is an intrinsic substance case, not a foreign substance case.").

Expert opinion with a basis in fact and on a subject beyond the ken of an average juror, can also show that it was the *underlying* condition of the concrete surface which made the steps unreasonably dangerous under the circumstances. See N.J. R. Evid. 702. Such expert testimony about this underlying condition of the concrete steps is appropriate and creates a genuine issue of material fact for the jury. See generally Brody, 17 N.J. at 392; cf. Polyard v. Terry, 160 N.J. Super. 497 (App. Div. 1978), aff'd, 79 N.J. 547 (1979), modified on other grounds, Lee's Hawaiian Islanders, Inc. v. Safety First Products, Inc., 195 N.J. Super. 493 (App. Div.1984).

In Brody, the plaintiff slipped and fell on water on an exterior terrazzo floor in a shop vestibule. From a verdict for the plaintiff, the defendant argued that this was a case the jury could have understood and decided without expert testimony. However, the court held that expert opinion on the effect of water on that particular type of exterior flooring and its ensuing slipperiness, was relevant and admissible because the court "[disagreed] with the defendant's assumption that the matter of the inherent slippery characteristics of terrazzo

or the effect of moisture thereon, is a matter of common knowledge." 17 N.J. at 392.

In an analogous opinion in Polyard, the plaintiff sued the State under the Tort Claims Act for a negligently maintained roadway that allegedly caused an automobile accident. While holding that alleged road defect in that case was not "substantial" enough to support the plaintiff's expert's opinion as a factual matter, the court nonetheless explained that based on New Jersey evidence rules, "[t]he opinion of an expert is undoubtedly admissible, and usually useful, when, as here, a road-surface characteristic is not so pronounced that its effect upon the control of an automobile is obvious." 160 N.J. Super. at 510-511 (emphasis added). "And it is within the special function of a jury to decide if the facts on which the answer of an expert is based actually exist, and the value or the weight of the testimony of the expert is dependent upon and no stronger than the facts on which it is predicated." Id.

Weidlich's expert Dr. Carl Berkowitz, Ph.D., PE, AICP, inspected the staircase landing and steps and concluded that the Defendants' lack of proper maintenance of the deteriorating concrete led to or exacerbated the icy condition as a result of a mere trace of freezing rain: "As a result of the degradation of the stair surface, water is trapped in the below surface pocket areas; and when freezing takes place the water expands to ice above the stair

tread surface." (Pa354). Dr. Berkowitz also concluded that the coefficient of friction of the staircase when wet was much less than current building standards prescribed for walking safety. (Pa350, Pa353). The Defendants did not make an objection to Dr. Berkowitz's credentials or to the admissibility of the substance of this opinion. In fact, the Defendants' motions and the report of their expert, Marpet, did not even address Dr. Berkowitz's opinion about water infiltration. Moreover, Marpet mischaracterizes Dr. Berkowitz's opinion as only claiming the "stair design allows water to accumulate" (Pa424-425; see also Del Fornos Brief at p. 18), while Dr. Berkowitz had also concluded the longstanding, non-mitigated deterioration of the concrete steps allows water to *infiltrate* "below surface and to freeze over the tread surface" in cold enough temperatures. (Pa354). Marpet also did not even address Dr. Berkowitz's opinion that "the locations of the handrails were too far from the walkway pathway[.]" (Pa354, Pa355).

Given the conflicting expert opinions, albeit Dr. Berkowitz's being the only opinion addressing water *infiltration* and freezing and the lack of a reachable handrail, Weidlich adduced sufficient evidence to present a genuine issue of material fact to the jury. The trial court erred in disregarding Dr. Berkowitz's expert opinion and then relying on the anodyne assertions of the Defendants and their expert Marpet, that freezing rain can be slippery. The

trial court's lack of mention of Marpet's "name" in its order, which the 8th Street Condo Assoc. Brief emphasizes at p. 14, is irrelevant to the "Battle of the Experts" question where the trial court adopted the same reasoning and conclusions as Marpet did in opposing Dr. Berkowitz's opinion. The Marpet report is part of the record, and the trial court was duty-bound under R. 4:46-2(c) to review and consider it, but not to name it in its order.

"When there are conflicting versions of the facts that would permit a rational jury to choose either version, the resolution of that conflict requires a determination of which version is more credible. Such a factual dispute should be decided by a jury, not a court, and it is improper for the motion judge to abrogate the jury's exclusive role as the factfinder." Suarez v. Eastern International College, 428 N.J. Super. 10, 27 (App. Div. 2012). Importantly, if there are competing expert opinions, then summary judgment is inappropriate because a trial court should never decide on its merits a dispute on which a rational jury could go either way. See Pressler & Verniero, Current N.J. Court Rules Governing the Courts, cmt. 2.3.2 on R. 4:46-2 (2019); see, e.g., Davin, LLC v. Daham, 329 N.J. Super. 54, 71 (App. Div. 2000). "[W]here a case may rest upon opinion or expert testimony, a court should be particularly slow in granting summary judgment." Ruvolo v. American Casualty Co., 39 N.J. 490, 500 (1963).

Defendant 8th Street Condo Assoc. tries to distinguish Davin and other cases on the Battle of the Experts question. (8th Street Brief at pp. 13-15). Defendant 8th Street argues that the Davin court's decision was based on a legal question of the propriety of a title search, and that the trial judge's decision to grant summary judgment based on his own professional experience with the issue, does not translate to the present case. The point of Davin, though, is that the judge did not let the jury decide which expert to believe, and instead adopted the defense expert's opinion as being congruent with his own professional experience. Likewise here, the trial court applied the Pareja doctrine and ruled in line with Marpet's opinion simply because of the existence of freezing rain, without consideration of the water infiltration or handrail issues. That should be the jury's job to decide.

Furthermore, the other cases about the Battle of the Experts which Weidlich cited in his Brief, of course have differing facts. Every case rests on its own facts. The general principle of allowing the jury to weigh expert evidence always remains, however, and the trial court here erred in deciding the issue and taking the case away from the jury.

Defendant 8th Street Condo Assoc. also attempts to distinguish factually the exceptions to the Ongoing Storm doctrine, as recognized in Pareja. For example, Pareja cites Terry v. Central Auto Radiators, Inc., 732 A.2d 713,

717-18 (R.I. 1999), in noting that a landowner can be held liable despite an ongoing storm "by creating 'unusual circumstances' where the defendant's conduct 'exacerbate[s] and increase[s] the risk' of injury to the plaintiff." Pareja, 246 N.J. at 559. Defendant 8th Street argues the facts of Terry as being distinguishable because in that case the defendant had moved the plaintiff's vehicle to the rear of its business and then directed the plaintiff to remove it from there, forcing the plaintiff to walk over a hundred feet in the snow. (8th Street Brief at pp. 5-6). The differing facts of Terry cannot undermine the applicability of the Pareja exception in this case based on the Defendants' lack of maintenance and the preexisting deterioration of the concrete staircase, because the exception is a principle of general application depending on each case's facts and circumstances. Weidlich only need show that the Defendants created "unusual circumstances" in not maintaining the concrete steps, allowing water infiltration and ice formation upon a mere trace of freezing rain. Weidlich need not show the exact facts of Terry or even ones similar to them.

Oddly, the Defendants each argue that Dr. Berkowitz's opinion was about the "stairs" and not the "landing" where Weidlich slipped, so his conclusions are somehow inapplicable. (Del Fornos Brief at p. 15; 8th Street Brief at p. 4). This argument is risible since there is no dispute that the landing

was made of the same concrete as the steps, was the same age as the steps, and was exposed to the same elements.

The Defendants also claim that Dr. Berkowitz's opinion did not tie the lack of handrails to the cause of the accident. (8th Street Brief at p. 7; Del Fornos Brief at p. 16). Dr. Berkowitz, in fact, concluded that "the locations of the handrails were too far from the walkway pathway to allow Mr. Weidlich the ability to utilize them to stabilize himself" and that "[r]ailing[s] should be closer to the pedestrian walking pathway." (Pa354, Pa355). If handrails had been reachable immediately upon a pedestrian exiting the door and as he stepped down onto the landing, a jury would understand that a pedestrian in ordinary travel such as Weidlich, would reach for the rail to begin to walk down the steps. This ordinary usage of a closely available handrail would have likely prevented the accident, particularly given the weather conditions which the Defendants repeatedly emphasize.

Finally, the Del Forno Defendants now characterize Dr. Berkowitz's expert opinion as an inadmissible "net opinion" unsupported by factual evidence. (Del Fornos Brief at pp. 18-19). Of course Weidlich slipped on ice, but again the question is *why* the imperceptible ice covered the landing and was so slippery that Weidlich ended up at the bottom of the stairs upon his first step onto the landing. Dr. Berkowitz's opinion explained that because of water

infiltrating the deteriorating concrete of the landing and steps, it made them susceptible to becoming unreasonably dangerous upon freezing, even with just a trace of precipitation. That admissible opinion is based on facts in the record and creates a question of fact for the jury.

II. The Defendants' Argument that Weidlich's Deposition Testimony is Determinative Invades the Jury's Role in Weighing Weidlich's Credibility in Claiming That the Stairs Became "Sleeker" After the Incorrect Paint Job. (Pa1-3, Pa4-7, Pa8-10)

In November 2021, the Del Forno Defendants contracted with Unlimited to have the facade of the building and the exterior steps painted. (Pa393-399). Unlimited was to "apply Benjamin Moore exterior acrylic finish paint" to the façade and "[a]pply two coat exterior acrylic walking finish paint" to the steps. (Pa.393). Unlimited's employees instead bought and applied a "Latex Floor and Patio High Gloss Enamel" for the steps. (Pa395-398).

Weidlich in his comings and goings from the building noticed that the steps had been painted, and he testified that after Unlimited's paint job the old concrete exterior steps had become "sleeker" but stated he had no difficulty walking on the newly painted steps if "they were dry." (Pa330).

Weidlich made such observations from personal knowledge. Whether a new paint job on one's building's steps made them "sleeker," is a lay opinion well within the common understanding of jurors. N.J. R. Evid. 701. "A

nonexpert may give his opinion on matters of common knowledge and observation." Murphy v. Trapani, 255 N.J. Super. 65, 74 (App. Div. 1992). "N.J.R.E. 701 permits lay witness testimony regarding common knowledge based on observable perceptions." In re Trust Created By Agreement Dated December 20, 1961, ex rel. Johnson, 194 N.J. 276, 283 (2008).

Defendant 8th Street Condo Assoc.'s emphasis on the trial court's ruling that types of paint are beyond the ken of an average juror (8th Street Brief at pp. 8-12), is as mistaken as the ruling. It is common knowledge that different types of surfaces require different types of paint, and concrete exterior steps will require a paint differing from a wooden deck or stairs, for example. An ordinary trip to the hardware store will confirm that.

The trial court's concerns about the paint for the steps being a "gloss" (T21), were also misplaced because the Defendants' use of the wrong paint created an issue of fact if it made the steps "sleeker" than before, an easily understandable issue. At the least, these concerns would have been easily assuaged if the parties were instructed that the name of the paint would not be disclosed to the jury, but just that the Defendants used the wrong paint without the "walking finish" that had been recommended.

The Del Forno Defendants try to pin alleged inconsistencies in Weidlich's deposition testimony about frequency of precipitation or him

having any problems navigating the steps after they had been painted, to argue that he never found the steps more slippery prior to Jan. 5, 2022. (Del Fornos Brief at pp. 3-5, 16-18). Weidlich first testified that "I believe they are sleeker or more – its – they're a little rougher in the rain to navigate or when they're wet than they were before." (Pa330). That observation simply means that he found them "sleeker" after the paint job and that he had never had a problem navigating the steps when they were wet prior to this new paint job.

Only upon essentially a "cross examination" at his deposition, did Weidlich get "pinned down" within the construct of defense counsel's question and state that he was referring to the "date of the incident" when he slipped. The Del Forno Defendants interpret that as saying the painted stairs were not slippery at all until coated in freezing rain on January 5, 2022. However, as stated above, a finder of fact could also conclude from this testimony that Weidlich was saying that he had walked on the steps when they were wet many times before the paint job but only encountered a problem on the stairs when wet *after* the paint job.

Weidlich did testify he did not remember any particular precipitation falling onto the steps after the paint job until the date of his fall. (Pa330). The Del Forno Defendants cite copious meteorological evidence to show that there had been precipitation in the weeks leading up to the incident. (Del Fornos

Brief at pp. 2-3, 14-15). It is Weidlich's testimony that, to the best of his knowledge, he did not remember any particular event of precipitation in that time period. Any inconsistencies in Weidlich's deposition testimony or any discrepancy with official weather records goes only to the weight of the evidence. Weidlich is not an expert meteorologist but was testifying from his personal recollection. The jury should decide whether to credit or discredit his testimony about the paint making the deteriorating concrete staircase "sleeker" when wet after the paint job.

"The mere fact that plaintiff's testimony contains contradictions and inconsistencies does not deprive it of all probative effect." De Rienzo v. Morristown Airport Corp., 28 N.J. 231, 239 (1958). "In this posture of the proofs the resolution of the conflict in the evidence and the credibility to be given plaintiff's testimony in the light of inconsistencies and contradictions contained in it [a]re matters exclusively for the jury as the triers of fact and judges of the credibility of the witnesses." Id. at 240; see also Gindin v. Baron, 16 N.J. Super. 1, 6 (App. Div. 1951).

Defendant 8th Street Condo Assoc. delves into differing facts of cases which Weidlich cited in arguing that a lay opinion which an average juror can easily comprehend is ordinarily admissible under N.J. R. Evid. 701. (8th Street Brief at pp. 8-13). Again, R. 701 is an evidence rule setting forth a general

principle, and its applicability does not depend upon exactly congruent, individual facts. N.J. R. Evid. 102 states regarding the purpose and construction of the evidence rules that they "shall be construed to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." (Emphasis added). In accordance with this purpose and construction, "a court may construe a rule in light of the facts before it and determine the application of the rule to the facts." 2B N.J. Practice: Evidence Rules Annotated (3d ed. 2024).

CONCLUSION

The Court should reverse the trial's court's granting of summary judgment to the Defendants and remand the case with instructions to conduct a full trial on the merits.

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Respectfully submitted,

/s/ Michael J. Redenburg

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Michael J. Redenburg
Michael J. Redenburg, Esq. P.C.
32 Broadway, Suite 412
New York, NY 10004
(212) 240-9465
Attorney for Plaintiff-Appellant