Superior Court of New Jersey

Appellate Division

Docket No. A-003851-23T4

DEBRA GOTTSLEBEN, *Plaintiff-Appellant,* JOHN J. DELANEY, JR., her husband, *Plaintiff,* vs. CHRISTOPHER ANNESE and/or JOHN DOES 1-5, MAUREEN N. ANNESE and/or JANE DOES 1-5, TOWN OF MORRISTOWN, ABC CORP. 1-5 (fictitious names), XYZ CORP. 1-5 (fictitious names), GHI MAINTENANCE CORP. (fictitious name), DOE LANDSCAPING 1-5 (fictitious names), *Defendants-Respondents.*	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY DOCKET NO. MRS-L-1436-22 Sat Below: HON. LOUIS S. SCEUSI, J.S.C.

BRIEF FOR PLAINTIFF-APPELLANT

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Date Submitted: November 5, 2024

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PRELIMINARY STATEMENT

This matter is presented on appeal from a summary judgment Order of the Superior Court, Law Division, Morris County vicinage. On June 28, 2024, the Honorable Louis S. Sceusi, J.S.C., (Ret.), entered an Order granting summary judgment in favor of the defendants/respondents Christopher Annese and Maureen Annese. (Hereinafter referred to as "Respondents"). The case involves a slip and fall on a sidewalk outside an unoccupied property where the appellant suffered serious personal injuries. We respectfully submit that the Trial Court's decision was erroneous for two reasons. First, there were material facts in dispute resolved by Trial Court in favor of the movant, in violation of the standards set forth in Brill v. Guardian Life, 142 N.J. 520, 522 (1995). Second, we respectfully submit that the law applied by the Trial Court was inappropriate because the property involved in plaintiff's injury was neither a private residence nor was it a classic "commercial property." As a result, the duties that apply to the respondent's conduct should, respectfully, be revisited by this Court.

This matter involves a claim for serious personal injuries that occurred when the plaintiff/appellant slipped and fell on a snowy/icy sidewalk on February 18, 2021. The reason this case does not present the typical winter

weather, fall-down personal injury case is because it involves some unusual facts. We submit that the property involved in this case was not a "residence" at the time of the accident, and instead was an unoccupied commercial-like property under renovation. In fact, the facts demonstrated that the property was unoccupied from October 2020 to August 2021. Therefore, we submit that the law that would typically guide the court regarding a residential fall-down on snow and ice is not applicable -- we submit that the property is more properly characterized as either a commercial property under construction or a hybrid type of property status that would require the respondent to keep the area clear. We submit that the property could not be a residence, however, because the term "residence" necessarily contemplates the concept of "domicile" and clearly that was not the case here. As outlined below, and according to the testimony of the defendant Christopher Annese, on the date of the accident, the property was not occupied by Mr. and Mrs. Annese until six months later, at some time in August 2021.

PROCEDURAL HISTORY

The instant matter was initiated on August 16, 2022, when Plaintiffs filed a Complaint with the Morris County Superior Court Clerk. (Pa20). On September 13, 2022, Defendants Christopher Annese and Maureen Annese filed an Answer to the Complaint with the Morris County Superior Court

Clerk. (Pa28). Thereafter, although not relevant to the current appeal, on September 29, 2022, Defendant Town of Morristown filed its Answer to the Complaint with the Morris County Superior Court Clerk. (Pa38)

On April 8, 2024, a Notice of Motion by Defendants Christoper Annese and Maureen Annese was filed seeking an Order for Summary Judgment. (Pa49). On April 12, 2024, an Order of the Honorable Rosemary E. Ramsay was entered, granting Defendant Town of Morristown's Motion for Summary Judgment. (Pa187). Thereafter, on June 28, 2024, the Order of the Honorable Louis S. Sceusi, was entered, granting the respondents' Motion for Summary Judgment. (Pa1). For the sake of brevity and Judicial economy, various case management and discovery Orders are omitted herein as they do not impact the Appellate Division's consideration of the within Appeal. The Amended Notice of Appeal was filed on August 13, 2024. (Pa11).

STATEMENT OF FACTS

This matter involves a claim for serious personal injuries that occurred when the plaintiff/appellant slipped and fell on a snowy/icy sidewalk on February 18, 2021, while walking on a sidewalk located in front of 53 Headly Road in Morristown, New Jersey. (Pa20). This case does not present the typical winter fall-down personal injury case involving a fall on a residential

property owner's sidewalk because it involves some unusual facts. We submit that the property involved in this case was not a "residence" at the time of the accident, and instead was an unoccupied commercial-like property under renovation. In fact, the facts demonstrated that the property was unoccupied from October 2020 to August 2021. (Pa129). Therefore, we submit that the law that would typically guide the court regarding a residential fall-down on snow and ice is not applicable; we submit that the property is more properly characterized as either a commercial property under construction or a hybrid type of property status that would require the respondent to keep the area clear. We submit that the property could not be a residence, however, because the term "residence" necessarily contemplates the concept of "domicile" and clearly that was not the case here. As outlined below, and according to the testimony of the defendant Christopher Annese, on the date of the accident, the property was not occupied by Mr. and Mrs. Annese until six months later, at some time in August 2021. (Pa129).

In fact, on the date of the accident, the property was only "occupied" by a contractor who was making the property habitable for the defendants. (Pa131). Notwithstanding this property status, the respondent Annese testified that within hours of a snowfall that occurred on February 16, 2021, he went to the property and cleared the snow and ice down to the concrete surface.

(Pa132). Based on that testimony, the testimony of the plaintiff and photographic evidence produced in this case, however, it is apparent that the respondents failed to remove the snow to create a safe walking surface, and instead created a much more dangerous condition on the walkway. (Pa182-186, Pa156-159, Pa 134). It is that undertaking that creates culpability on the part of the defendants, if the Court were to accept that the law regarding residential properties applies. However, in this application we respectfully urge that the law applying to commercial sidewalks should apply. We respectfully submit that because the defendants were making improvements to the property for more than six months, and not residing at the property, it was more like a commercial undertaking than a residence. In that circumstance, we submit the respondents had an affirmative duty to make the sidewalk abutting their property safe, and in that circumstance the plaintiff would not be required to prove that the defendant made the sidewalk more dangerous.

Alternatively, as argued below and urged before the Court, if it is concluded that notwithstanding the fact that the respondents did not live at the property, and were simply making improvements to the property, that the property was in fact residential the respondents are deemed "residents" of the property, then the undertaking to clear the snow was done in a reckless and/or negligent manner, creating a more dangerous condition than that which existed

naturally, and did not result from the natural elements of thaw, remelting and refreezing of snow. In either event, we respectfully submit that factual disputes existed below, requiring a jury's consideration and resolution. The Appellant respectfully submits that these issues should have been submitted to a jury for consideration. The Respondent should have been required to first identify undisputed material facts demonstrating that the area was properly cleared, and that he did not create a new hazard or make a natural hazard worse. We respectfully submit that the Court did not recognize the factual disputes that should have been left for resolution by a jury. We respectfully submit that despite the fact there were disputed material facts, the Trial Court accepted the inferences more favorably toward the movant, and improperly resolved the issues of fact in favor of the movant/respondent.

LEGAL ARGUMENT

POINT I: THE TRIAL COURT ERRED IN RESOLVING QUESTIONS OF FACT IN FAVOR OF THE RESPONDENT AND GRANTING SUMMARY JUDGMENT (Pa1-Pa10)

In the Law Division, the respondent set forth "undisputed" material facts that were accepted by the Court, and we respectfully submit inappropriately resolved those facts in favor of the movant. The appellant alleged the following facts, supported by competent evidence, and some were admitted

and other points disputed by the respondent.

The appellant alleged and the respondent admitted that from October 2020 through August 2021, the defendants did not reside at 53 Headley, and therefore it was not defendants' residence. Pa129. In fact, during this time frame the property was under construction by Chris Schilling, a general contractor. Pa131. The respondent stated that during the time frame while living in Parsippany, he would only visit the 53 Headley property only occasionally. Pa129. Thereafter, when the respondent resided at Dehart Street in Morristown, he testified would only visit the property once or twice weekly. Id.

The respondent testified that when he would clear an accumulation of snow on the sidewalk at 53 Headley, he would clear the snow down to the concrete and then spread salt or ice melting material on the sidewalk. Pa156-159. Mr. Annese also testified that the photographs depicting the partially cleared sidewalk that were taken on the date of the accident do not depict a condition of the sidewalk he would leave after clearing snow. Id. Mr. Annese said that he would leave the property better than the condition depicted in the photographs. (Id.) The appellant submits that the only proper inference that can be drawn from this testimony is that the respondent partially or negligently cleared the snow on February 16, 2021, creating a new, artificial condition.

The appellant testified that the photographs depict the condition of the sidewalk on the date of the fall, and based on that appearance, a direct, fair and reasonable inference would be that a poor attempt was made to remove the snow from the sidewalk in question. Pa182-186. The photographs depict a cake of snow that was not nearly as deep as the snow on either side of the sidewalk, so the only proper inference that could be deduced is that some attempt had been made to clear the walkway, leaving it in a dangerous condition.

The appellant testified that she would typically wake for work at approximately 5:00 a.m., and that her work day started at 7:45 a.m. She further testified that as her ordinary routine, she would take a walk for exercise every morning before work began. Pa 148. On the morning of February 18, 2021, the appellant testified that her fall occurred at approximately 7:00 a.m. and that the weather had just begun with some flurries, but there was no new accumulation. Pa148,156. The appellant recalls falling on a patch of ice that remained from the defendant's efforts to clear the snow two days prior. Pa159-160. She stated that none of the walking area was cleared to concrete, as indicated by the respondent. Pa156.

The Appellant's weather expert, Steve Pelletiere from Ion Weather, opined that snow did not fall in the vicinity of the defendant's property again until after the plaintiff's injury: "The complex winter storm and snow event of

Thursday, February 18, 2021, began between approximately 7:10 am and 7:30 am and ended between 1 :00-2:00 pm during the evening. The pre-dawn and early morning hours of this day were generally mostly cloudy and cold with no precipitation falling. Additionally, there was no ongoing storm rule in effect as the snow started approximately 15 minutes after the plaintiffs slip and fall." Expert Report of Stephen Pelletiere, Ion Weather, Page 8). Pa117-126. We respectfully submit that the only reasonable inference that can be drawn from that testimony is the snow/ice condition that caused the appellant's injury occurred as a result of the respondent's incomplete snow removal attempts, because no new accumulations had fallen prior to the appellant's injury, and no melt/freeze cycle had occurred.

Furthermore, according to Mr. Pelletiere, while there had not been any snowfall on February 17, 2021, there had been snowfall of 7" on February 16, 2021. According to the testimony of respondent Annese, he or another member of his family would have gone to 53 Headley and removed the snow from the sidewalks within 12 hours of the snowfall on February 16, 2021. (Id.). A reasonable inference from that testimony supports the appellant's contention that respondent's efforts were poor and incomplete, and the respondent instead created a dangerous condition on the sidewalks, which resulted in the appellant's injury.

It is undisputed that at the time of the appellant's injury, the property involved in this incident was not the residence of and was not occupied by the respondents. In fact, the property was totally unoccupied until six months after the inury. At the time of this incident, since the property could not be characterized as a private residence, because no one resided there, the law that would ordinarily apply to duties of residential property owners would be inapplicable. When drawing all inferences in favor of the appellant, the only conclusion is that the respondents did not remove snow in a reasonable manner, created as new and hazardous condition.

I. We Submit That the Law Should Respectfully Consider Properties Under Long-Term Renovation to be Commercial Properties For Purposes of Imposing Duties to Keep Abutting Sidewalks Clear and Safe for Pedestrians. (Pa1-Pa10)

In connection with this application for relief from the Law Division's Summary Judgment Order, the Appellant is requesting that this Court reconsider and extend the law as it applies to property owners, and impose a stricter standard, whether it be a commercial standard or a hybrid standard that would take into consideration properties under construction.

In Luchejko v. City of Hoboken, 207 N.J. 191 (2011), the New Jersey Supreme Court's decision distinguished the two types of property –

commercial versus residential, and pointed out that New Jersey Courts have not moved from the holding that does not "impose sidewalk liability on homeowners." Luchejko, 207 N.J. at 204, 208. We respectfully submit, however, that the respondents here *were not merely homeowners*, they were acting as general contractors for an extended period of time, rehabilitating and renovating a residential property. In Luchejko, the Court was considering the differences between condominiums and rental premises, resolving that a condominium was a residence and carried more facts in common with a privately owned residential home. Here, however, we are respectfully asking the Court to consider the differences between a residential home and a property that is under renovation.

Our NJ Supreme Court has concluded that commercial landowners have a duty to make abutting walkways safe. "Commercial landowners are responsible for maintaining the public sidewalks abutting their property in a reasonably safe condition." Mirza v. Filmore, 92 N.J. 390, 394 (1983), citing Stewart v. 104 Wallace St., Inc., 87 N.J. 146, 157 (1981). "The many innocent plaintiffs that suffer injury because of unreasonable accumulations should not be left without recourse."(Id., See Stewart, 87 N.J. at 155, 157). We submit that same question here in a quasi-commercial or commercial setting: why should this appellant, Ms. Gottsleben be left without legal

recourse?

It is clear from a review of the testimony before the Court and the law that the defendant Annese had a duty to safely remediate snow and ice conditions at their property, refrain from creating hazards, and finally, had duty to warn of hazards. We submit that if the Trial Court had agreed that a property under renovation is more like a commercial property than a private residential premises, the motion may have been defeated. The property owner's duty in this case arises out of a fact pattern that is unique, and the nuances of the relationship between the property owner and pedestrian are more like, we submit, the relationship between the commercial property owner and pedestrian than the residential property owner and pedestrian.

In order to determine the nature and extent of the duty owed by the property owner to a third party who enters on to the property, the Court typically will evaluate the nature of the relationship between the property owner and the individual on the property. Here, while the property was a residential house, it *was not a residence. It begs the question – if the property is not a residence, why should the respondents get the benefit of "residential property owner immunities?"* We respectfully submit the property could only be considered commercial, or perhaps a hybrid of the two, up and until the time it became a residence.

Although the Trial Court emphasized that the NJ Supreme Court decision in Luchejko v. City of Hoboken, 207 N.J. 191 (2011) was controlling, it is important to first consider that the condominium building involved in the Luchejko case was an occupied condominium – and so was an actual residence at the time. Like a commercial entity, the respondents in the matter before the Court were renovating the property, thereby increasing its value, for nearly ten months prior to residing in the property, and then the accident occurred six months prior to occupancy. Like the Court reasoned in Luchejko, we submit that keeping the property free from hazards is a risk that can be spread in the cost of renovation. Id. At 203, citing Mirza v. Filmore Corp., 92 N.J. 390, 395-96. ("The many innocent plaintiffs that suffer injury because of unreasonable accumulations should not be left without recourse. See Stewart, 87 N.J. at 155, 157. Ordinary snow removal is less expensive and more easily accomplished than extensive sidewalk repair. Certainly, commercial landowners should be encouraged to eliminate or reduce the dangers which may be so readily abated. Moreover, many municipalities have adopted ordinances that require snow removal."). Id.

We respectfully submit that it is the *use* of the property at the time of appellant's injury, and not the *eventual use*. The considerations of imposing liability upon a resident do not apply – because the property owner was

engaged in improving the property, not living there. As a matter of simply fairness and equity the appellant should have an opportunity to seek redress for her injuries where a property owner makes a decision to be absent from and engage in construction on what is essentially vacant property for such an extended period of time.

To this end, one of the most important considerations by our Supreme Court in Luchejko was the fact that commercial properties make a profit in their operations. Here, we submit that is precisely what the respondents were doing – renovating the property which, necessarily increasing the value of the property. The issue begs the question – if the respondents were contractors who had been rehabilitating and renovating the property for resale, then would the Court accept that the activities on the property were commercial in nature? We submit that in that circumstance, the issue would not be debatable.

In the matter before the Court the question should be, respectfully, whether or not it is fair to deny an appellant/pedestrian, who is injured while trying to walk in front of a woefully maintained construction, from seeking redress of her injuries. We submit that it is unfair, and a commercial standard should be applied, or a hybrid of the two should be created, which would have required the respondents to make the premises safe for pedestrians. The appellant was a pedestrian whose presence would be regularly expected to use

the sidewalk, and vis-à-vis the respondent, would best be characterized as an invitee or licensee. The respondent was not present at the property and would not be a resident of the property for a period of *six months*. In a commercial setting, New Jersey law would have required no less. According to New Jersey's Model Civil Jury Charges, the duty owed by a property owner to an invitee or licensee is as follows:

> The law imposes upon the owner of commercial or business property the duty to use reasonable care to see to it that the sidewalks abutting the property are maintained in reasonably good condition. In other words, the law says that the owner of commercial property must exercise reasonable care to see to it that the condition of the abutting sidewalk is reasonably safe and does not subject pedestrians to an unreasonable risk of harm. The concept of reasonable care requires the owner of commercial property to take action with regard to conditions within a reasonable period of time after the owner becomes aware of the dangerous condition or, in the exercise of reasonable care, should have become aware of it. If, therefore, you find that there was a condition of this sidewalk that was dangerous in that it created an unreasonable risk of harm for pedestrians, and if you find that the owner knew of that condition or should have known of it but failed to take such reasonable action to correct or remedy the situation within a reasonable period of time thereafter as a reasonably prudent commercial or business owner would have done under the circumstances, then the owner is negligent. A commercial property owner may have a duty to clear public sidewalks abutting their properties of snow and ice for the safe travel of pedestrians. Maintaining a public sidewalk in a reasonably good condition may require removal of snow or ice or reduction of the risk, depending upon the circumstances. The test is whether a reasonably prudent person, who knows or should have known of the condition, would have within a reasonable period of time thereafter caused the public sidewalk to be in reasonably safe condition.

NJ Model Civil Charges, 5.20B(2)(b).

"In general, a landowner has 'a non-delegable duty to use reasonable care to protect invitees against known or reasonably discoverable dangers.'" Jimenez v. Maisch, 329 N.J. Super. 398, 402 (App. Div. 2000)(quoting Kane v. Hartz Mountain Indus., 278 N.J. Super. 129, 140 (App. Div. 1994), aff'd, 143 N.J. 141 (1996)) In this case, the appellant was simply out for a morning walk, and the respondent Annese owed her a non-delegable duty to have safe access to the sidewalks.

Instead of clearing the sidewalks, the defendant himself created a hazardous condition, and thereby had notice of the hazards. According to the appellant, and not disputed by the respondent, the snow was not cleared to the concrete surface. According to the appellant's expert, there was a 7" snowfall on February 16th, but no snow on the 17th, and then no snow on the 18th until after the appellant's injury. In any event, we submit that it was not unreasonable for the plaintiff to expect a clear sidewalk to complete her morning exercise, and the defendants had a duty to clear the snow, remediate the dangerous condition, refrain from creating more dangerous conditions, and a duty to warn. Likewise, it is not unreasonable or unduly burdensome upon a property owner who is renovating property to include within the zone of risk

the obligation to keep the property safe, particularly in the property owner's absence. The defendant Annese failed in these regards. It is for these reasons and the reasons stated below, alternatively, that we respectfully submit the Summary Judgment Order should be reversed, and this matter should be returned to the Trial Court.

II. If This Court Concludes that the Respondents Are Entitled to Residential Property Owner Status, We Respectfully Submit the Trial Court Erroneously Resolved Factual Disputes in Favor of the Movant Requiring the Reversal of the Summary Judgment Order. (Pa1-Pa10)

Here, we respectfully submit that the Trial Court improperly resolved all material factual disputes in favor of the movant, and then concluded that based upon those facts that the movant/respondent had neither created a new hazard nor had he worsened an existing hazard. As a result, the Summary Judgment motion below was resolved in favor of the property owner/respondent. We respectfully submit that New Jersey law requires a different result.

Pursuant to New Jersey's Model Jury Charge 5.20B(B)(2)(a):

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

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

The legal source of Model Jury Charge 5.20B(B)(2)(a) is the Supreme Court case Stewart v. 104 Wallace St., Inc., 87 N.J. 146 (1981), which distinguished landowner responsibility between residential and commercial owners. The Stewart Court reasoned that while "commercial landowners are responsible for maintaining in reasonably good condition the sidewalks abutting their property and are liable to pedestrians injured as a result of their negligent failure to do so…[t]he duty to maintain abutting sidewalks…is confined to owners of commercial property." Stewart, 87 N.J. at 157-59. These principles were restated in Luchejko v. City of Hoboken, 207 N.J. 191 (2011), cited above.

In the present matter, in concluding that the respondent's property was not commercial, Judge Sceusi reasoned that "the Appellate Division construed a commercial property determination in the following way: What we glean from Stewart and its progeny is an unexpressed, but nevertheless intended

limitation to its rule: liability is imposed upon the owner of a profit, or not-for-profit enterprise, regardless of whether the enterprise is in fact profitable. It is the capacity to generate income which is the key. In part, liability is imposed because of the benefits the entrepreneur derives from providing a safe and convenient access for its patrons. Secondly, such an enterprise has the capacity to spread the risk of loss arising from injuries on abutting sidewalks, either through the purchase of commercial liability policies or "through higher charges for the commercial enterprise's goods and services." See Abraham, 281 N.J. Super. at 85 (internal citation omitted). Based on this framework, the Court cannot qualify Defendants' Property as commercial." Pa8.

The New Jersey Supreme Court has held that "[r]esidential homeowners . . . will not be liable unless they create or exacerbate a dangerous condition." Luchejko v. Hoboken, 207 *NJ 191,* 210 (2011). It is also clear that where a property owner removes snow, they will be liable for a pedestrian's injury if they create a hazard that does not exist as a result of "natural forces." Id. At 201. We know from the testimony outlined above, no "natural forces" occurred between the attempt by the defendant to clear snow and the plaintiff's fall.

Our Model Jury Charges make clear that where a hazard is created or made more hazardous by a residential property owner, the residential property

owner will be liable "where … the owner attempts to make repairs or correct some defect therein for which she/she is not responsible, he/she becomes responsible if he/she makes the repairs negligently and thereby causes the sidewalk, after the repairs, to be more dangerous than before or if he/she causes a new hazard from the old." New Jersey Model Charge 5.20B(B)(l)(b).

In their attempts to navigate around this imposition of liability, we respectfully submit that the defendant heavily relies upon the unreported Appellate Division decision of Nunez v. Gallo, 2018 WL 6836109 (App. Div. 2015). In that decision, the Court cites precisely what we have cited above; a residential homeowner will be liable for dangerous abutting sidewalks where they "create or exacerbate a dangerous condition." Luchejko v. Hoboken, 207 *NJ 191,* 210 (2011). Luchejko also makes clear that where a property owner removes snow, the property owner will be liable for a pedestrian's injury if they create a hazard or exacerbate a condition that does not exist as a result of "natural forces." Id. At 201. That is precisely what occurred here – failed snow removal efforts are not "natural forces."

The facts in Nunez are readily distinguishable from the case currently before the Court. In Nunez, there was a continuing snowfall that did not end until *after* the plaintiff's fall. The defendant Gallo removed the snow that had accumulated up and until 7:15 a.m., but then left his residence for work at

approximately 8:45 a.m. The significant snowfall continued (an intervening natural event), and the plaintiff fell at approximately 10:00 a.m.

Here, in the case before the Court, the snowfall ended two days prior to plaintiff's fall, and if he is believed by a jury, two days after the respondent's failed attempt to remove the snow, which dangerously changed the condition of the walking surface. New snow in the case before this Court did not fall until after her injury, and the new snowfall had *no bearing* on the plaintiff's injury, like what occurred in Nunez. We submit that in consideration of all of the facts viewed most favorably to the plaintiff, it is clear that the appellant can establish all of the necessary elements to sustain her burden of proof, and there are material questions of fact that must be resolved by a jury. Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995). The determination of whether a genuine issue of material fact exists "that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540.

Here, we respectfully submit that the issue of whether or not the condition of the property was caused and created by the defendant's failure to

properly remove the snow is a material factual dispute, and that dispute must be resolved by a jury. This is true *whether or not* the Court determines that the subject property would be deemed a residential, commercial property, or some kind of hybrid. The manner in which the snow removal occurred, whether or not it was completed in a reasonable manner, or whether or not the conduct created a new hazard or worsened an existing hazard are also factual issues that would need to be resolved by a jury. It is for these reasons and the reasons outlined above that the appellant respectfully submits that the Order entering summary judgment should be reversed and this matter should respectfully be remanded for trial.

CONCLUSION

We respectfully submit that the Trial Court erred in entering summary judgment, and the matter should be reversed and remanded for a trial on the issues presented herein. We submit that the respondent should have been considered on the same footing as a commercial entity, and the duties associated with that status should have controlled. In the alternative, we respectfully submit that if the Court considered the respondent to be a residential property owner, there were many material facts in dispute which would have precluded summary judgment in this matter. We respectfully submit that those facts should be submitted to a jury for consideration.

Respectfully submitted,

/s/ Anthony P. Caivano
By:_____
Anthony P. Caivano, Esq.

Dated: November 5, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003851-23 T4

DEBRA GOTTSLEBEN, Plaintiff-Appellant JOHN J. DELANEY, JR., her husband, Plaintiff, v. CHRISTOPHER ANNESE and/or JOHN DOES 1-5, MAUREEN N. ANNESE and/or JANE DOES 1-5, TOWN OF MORRISTOWN, ABC CORP. 1-5 (fictitious names), XYZ CORP. 1-5, GHI MAINTENANCE CORP. (fictitious name), DOE LANDSCAPING 1-5 (fictitious name), Defendants-Respondents.	**CIVIL ACTION** On Appeal from the Final Order of the Superior Court of New Jersey, Law Division, Civil Part, Morris County Docket No. MRS-L-1436-22 Sat Below: Hon. Louis S. Sceusi, J.S.C.

DEFENDANTS-RESPONDENTS CHRISTOPHER ANNESE AND MAUREEN ANNESE'S BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPEAL

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PRELIMINARY STATEMENT

By her appeal, plaintiff-appellant Debra Gottsleben requests that this Court overturn the Order entered below by The Honorable Louis S. Sceusi, J.S.C., on June 28, 2024, granting summary judgment in favor of defendants-respondents Christopher and Maureen Annese (hereinafter "the Anneses"). However, the record below clearly demonstrates that upon the completion of pre-trial discovery, the Motion Court correctly applied the law to the facts of record before it and granted summary judgment on the basis that: (a) the Anneses were entitled to summary judgment in this case as long-standing and very clear New Jersey law holds that residential property owners do not have a duty to repair, maintain, or clear snow and/or ice from public sidewalks that abut or are adjacent to their property and, consequently, the Anneses have no liability for plaintiff-appellant Debra Gottsleben's alleged slip and fall and her injuries; (b) contrary to plaintiff-appellant's assertions, the Anneses' property bordering the public sidewalk on which plaintiff-appellant slipped and fell is not a commercial property, a finding that would have eliminated the application of residential property owner immunity in this case, and; (c) the Anneses did not create a new hazard or exacerbate an existing hazard as alleged by plaintiff-appellant. This holding by the Motion Court was proper and well-supported, and it should now be affirmed by this Court.

Procedural History

On August 16, 2022, plaintiffs-appellants Debra Gottsleben and John Delaney, Jr. filed their Complaint in this matter against defendant-respondent Christopher Annese, defendant-respondent Maureen Annese, and defendant Town of Morristown. (Pa20.) By the Complaint, plaintiff-appellant Debra Gottsleben sought damages from the various defendants for the personal injuries that she allegedly suffered as a result of her slip and fall on the public sidewalk adjacent to the Anneses' property that occurred on February 18, 2021. Plaintiff-appellant John Delaney, Jr. sought damages for the loss of companionship, services and consortium of his wife allegedly caused by the injuries she suffered in her slip and fall. (Pa25.)

In the First Count of the Complaint, plaintiffs-appellants alleged that the Anneses "had a legal duty to properly maintain the aforementioned property. In particular, the Anneses had a legal obligation to maintain their premises in a reasonable and prudent manner." (Pa21, First Count, ¶3.) Also in the First Count, plaintiffs-appellants alleged that "a dangerous condition existed, wherein snow and ice was not properly removed and/or remediated." (Pa21, First Count, ¶4.) Plaintiffs-appellants further alleged in the First Count that the Anneses "were negligent in that they failed to exercise reasonable care to maintain the premises in a safe condition and also failed to warn the plaintiff,

and other invitees, of the dangerous condition which existed on their premises." (Pa21, First Count, ¶4.)

On September 13, 2022, the Anneses filed their Answer to the Complaint, wherein they denied all of the substantive allegations asserted against them. (Pa28.)

On April 12, 2024, the Motion Court granted summary judgment in favor of defendant Town of Morristown. Town of Morristown is not a party to this appeal.

On April 18, 2024, the Anneses filed a motion seeking summary judgment on the grounds that they were not liable for plaintiff-appellant Debra Gottsleben's alleged slip and fall and her resulting injuries as the well-settled law in New Jersey holds that residential property owners are not liable for injuries caused by the dangerous condition of public sidewalks adjacent to their property, including the presence of unshoveled or allegedly improperly shoveled snow and/or ice. (Pa49.)

By Order entered on June 28, 2024, The Honorable Louis S. Sceusi, J.S.C. granted the Anneses' motion and entered an Order granting summary judgment in their favor, which Order included His Honor's Statement of Reasons. (Pa1; Pa3.)

On or about August 8, 2024, plaintiff-appellant Debra Gottsleben filed her Notice of Appeal. Thereafter, on August 13, 2024, plaintiff-appellant filed an Amended Notice of Appeal. (Pa11.)

Statement of Facts

In this matter, plaintiff-appellant Debra Gottsleben alleges that on February 18, 2021, she slipped and fell on a public sidewalk covered by snow and/or ice that runs adjacent to the property owned by the Anneses located at 53 Headley Road in Morristown, New Jersey. As a result of this slip and fall, plaintiff-appellant claims that she suffered various personal injuries.

Plaintiff-appellant Debra Gottsleben served her answers to Form A Interrogatories in this case. (Pa53.) Form A Interrogatory No. 2 asks that the plaintiff give her version of the occurrence at issue. In response to this interrogatory, plaintiff-appellant Debra Gottsleben stated as follows:

> On the date of the accident, February 18, 2021, I slipped and fell on an accumulation of snow and ice that was improperly cleared on the sidewalk located at the corner of 53 Headley Road and Lidgerwood Parkway, Morristown, New Jersey. The sidewalk was inadequately cleared, was unsafe, was not properly cleared for pedestrian traffic, nor was it covered with snow melting products, sand or salt. Furthermore, there were no warnings of any type in place. There was a layer of partially shoveled and packed snow and ice creating a hazard for pedestrians, such as myself.

(Pa53, answer to Form A Interrogatory No. 2.)

During discovery, the Anneses propounded Supplemental Interrogatories on plaintiff-appellant. (Pa61.) Supplemental Interrogatory No. 2 asked plaintiff-appellant to explain in detail

each act that she contended the Anneses performed that they should not have performed and/or which they failed to perform that they should have performed, the performance of which or the failure of which plaintiff-appellant contended contributed to the damages and injuries at issue. In response to this supplemental interrogatory, plaintiff-appellant Debra Gottsleben stated as follows:

> The defendants failed to properly maintain and/or clear the sidewalk of snow and ice located at the corner of Headley Road and Lidgerwood Parkway, Morristown, New Jersey, they allowed an unsafe condition to exist upon the premises; they failed to warn of the unsafe, hazardous condition.

(Pa61, answer to Supplemental Interrogatory No. 2.)

Supplemental Interrogatory No. 5 asked if plaintiff-appellant contended that the Anneses had actual notice of said dangerous or hazardous condition and, if such a contention is being made, set forth the time and manner in which the Anneses were put on such notice. In response to this supplemental interrogatory, plaintiff-appellant Debra Gottsleben stated as follows:

> Yes. An incomplete attempt had been made to remove the snow and ice, but the job was not complete, and no ice melt product, salt or sand was spread in the area. It snowed earlier in February 2021, but I am not aware of the date upon which attempts to clear the snow and ice were made by the defendants.

(Pa62, answer to Supplemental Interrogatory No. 5.)

Supplemental Interrogatory No. 6 asked if plaintiff-appellant contended that the Anneses had constructive notice of the alleged

dangerous or hazardous condition and, if such a contention is being made, set forth each and every fact that plaintiff-appellant contended demonstrates the existence of constructive notice. In response to this supplemental interrogatory, plaintiff-appellant Debra Gottsleben stated as follows:

> The defendants had constructive knowledge of the snow because it had snowed and ice stormed earlier in February 2021, and failed attempts were made to clear the snow.

(Pa62 – Pa63, answer to Supplemental Interrogatory No. 6.)

Defendants-respondents Christopher and Maureen Annese served their answers to Form C Interrogatories in this case. (Pa66.) Form C Interrogatory No. 2 asked that the Anneses give their version of the occurrence at issue. In response to this interrogatory, the Anneses stated as follows:

> We have no firsthand knowledge of the alleged accident described in Plaintiffs' Complaint as we were not present. We were living at 11 Dehart Street in Morristown at the time while our house was being renovated after we had recently purchased it.

(Pa67, answer to Form C Interrogatory No. 2.)

Plaintiff-appellant Debra Gottsleben's deposition in this matter was conducted on August 23, 2023. (Pa145.) At her deposition, plaintiff-appellant Debra Gottsleben testified that on February 18, 2021, she was walking on the sidewalk and all of a sudden she slipped on ice. She further stated that she was aware of the presence of the ice on the sidewalk before she slipped and

fell. (Pa148 at 11:2-22.) She would walk on this particular sidewalk every workday. (*Id.* at 12:2-9.)

At her deposition, plaintiff-appellant Debra Gottsleben was shown a photograph of the sidewalk on which she fell. (Pa82.) According to plaintiff-appellant Debra Gottsleben, this photograph shows the condition of the sidewalk at the time of her fall. (Pa163, 70:9-23.) Plaintiff-appellant stated that in the 20 feet leading up to the area on the sidewalk where she fell, she did not experience any slipperiness or any other problems with the sidewalk that gave her problems with walking. (Pa159 at 55:1-24; 56:1-4.) Plaintiff-appellant Debra Gottsleben also testified that the condition of the sidewalk seen in this photograph may have been the condition of the sidewalk that she observed when she walked on the same area on February 17, 2021, the day before her fall. (Pa163 at 72:14-25; 73:1.)

Defendant-respondent Christopher Annese's deposition in this matter was conducted on November 15, 2023. (Pa127.) At his deposition, Mr. Annese testified that he and his wife purchased the property at 53 Headley Road in Morristown in October of 2020. (Pa129 at 8:22-25; 9:1-3.) They did not actually move into the house at 53 Headley Road until August of 2021. (*Id.* at 9:4-6.) From October of 2020 to August of 2021, the property at 53 Headley Road was being renovated. (Pa131 at 14:18-22.) The only renovation work being done on the property at the time of plaintiff-

appellant's alleged fall was demolition work inside the house. (Pa132 at 18:10-16.)

In addition, Mr. Annese testified that from January 1, 2021 to February 18, 2021, he and his wife had cleared snow off the sidewalk adjacent to their property multiple times. (Pa137 at 41:11-19.) When they would clear the sidewalk, they would use shovels and a snowblower, and would put down rock salt. (Pa132 at 20:24; 21:1-7.) Moreover, they would clear the sidewalk down to the concrete, and then would put down the rock salt. (Pa133 at 23:17-21.)

Mr. Annese also stated that at no time from January 1, 2021 to February 18, 2021, did a neighbor or anyone else contact him and tell him that the sidewalk adjacent to his property was covered with snow and ice and needed to be cleared, or about any condition of the sidewalk. (Pa137 – Pa138 at 41:20-25; 42:2; 42:7-17.) Likewise, no one ever contacted him and told him that the sidewalk was slippery and that he should put salt down. (*Id.* at 42:3-6.) Furthermore, the Anneses were never given a summons for not properly clearing snow from the sidewalk adjacent to 53 Headley Road. (Pa134 at 29:8-11.)

After the close of discovery, the Anneses moved for summary judgment on the basis that under long-standing New Jersey law, residential property owners like themselves have no responsibility to clear snow and/or ice from a public sidewalk abutting their

property, and they cannot be found liable for any injuries that plaintiff-appellant allegedly sustained as a result of her slip and fall. (Pa49.)

On June 28, 2024, after reviewing all parties' submissions and hearing oral argument, Judge Sceusi granted summary judgment in favor of the Anneses. (Pa1.) Judge Sceusi articulated his reasons for granting summary judgment as follows:

> [T]he Court cannot qualify Defendants' Property as commercial. Simply put, the Property was not designed with the intention of generating any income or profit. Defendants purchased the Property to reside there as a family and in fact continue to reside there. It was not owned in any way for investment purposes, nor did Defendants expect to receive any benefit from the use of the sidewalk at issue. The Property was and is strictly used as Defendants' private home, and the fact that renovations were ongoing at the time of the incident does not impact or otherwise alter these findings.
>
> * * *
>
> The Court is satisfied that the Supreme Court case Foley v. Ulrich, 50 N,J, 426 (1967) – as cited by Defendants – is on "all fours" with the facts of this case. Accordingly, as Foley sets forth, to allege that Defendants poorly cleared snow and/or ice from the sidewalk is not enough to circumvent the bar against imposing liability on residential property owners. Foley, 50 N.J. at 427. Simply put, clearing of snow is not tantamount to the creation of a hazardous condition aside from one caused by natural forces. Thus, because Plaintiff does not allege that Defendants somehow created a new element of hazard or danger, Defendants cannot be held liable for any injuries Plaintiff sustained from the subject accident.

(Pa10.)

On August 8, 2024, plaintiff-appellant filed her Notice of Appeal. Thereafter, on August 13, 2024, plaintiff-appellant filed an Amended Notice of Appeal. (Pa11.)

STANDARD OF REVIEW ON ORDERS FOR SUMMARY JUDGMENT

The propriety of a trial court's summary judgment order, such as the June 28, 2024 Order which plaintiff-appellant seeks to have overturned in the case before this Appellate Court (Pa1), is a legal question and not a factual one. *Davidovich v. Israel Ice Skating*, 446 *N.J. Super.* 127, 158 (App. Div. 2016). This Appellate Court shall apply the same standard as the Motion Court did in its review of the motion record. *Shields v. Ramslee Motors*, 240 *N.J.* 479, 487 (2020). Pursuant to that standard, "the movant is entitled to judgment if, on the full motion record, the adverse party, who is required to have the facts and inferences viewed most favorably to it, has not demonstrated a prima facie case." *C.W. v. Cooper Health System*, 388 *N.J. Super.* 42, 57(App. Div. 2006).

In addressing plaintiff-appellant's argument that the June 28, 2024 summary judgment Order must be vacated, this Court "must confine [itself] to the original summary judgment record because that is the limited issue before [it]." *Lombardi v. Masso*, 207 *N.J.* 517, 542 (2001), citing *Ji v. Palmer*, 333 *N.J. Super.* 451, 463-64 (App. Div. 2000)(explaining that an appellate court "can consider the case only as it had been unfolded to that point and

the evidential material submitted on that motion"). Justice Long, writing for the majority in *Lombardi*, phrased it as follows:

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

Lombardi, *supra*, 207 *N.J.* at 542. [Emphasis added.]

In the instant matter, a review of the original summary judgment record makes clear that plaintiff-appellant's case did not – and does not now – present any such issues that should have resulted in a denial of the Anneses' motion for summary judgment, or should compel this Court to now overturn the Motion Court's well-reasoned grant of summary judgment.

LEGAL ARGUMENT

I. HISTORY OF THE LAW IN NEW JERSEY ON RESIDENTIAL PROPERTY OWNER IMMUNITY FOR THE CONDITION AND MAINTENANCE OF PUBLIC SIDEWALKS

At the outset of this legal argument, it is worthwhile to discuss the evolution of the law of this State on the issue of residential property owner immunity for public sidewalks. This well-established law holds that residential property owners are not responsible for defects or hazardous conditions on public sidewalks that abut their property, unless they actually caused those defects or hazardous conditions. The law in this regard is best crystallized in the Model Jury Charges. Specifically, Model

Jury Charge 5.20B(B)(1)(a), entitled "Liability of Abutting Owner or Occupant," provides as follows:

> The owner (occupant) of residential premises abutting a public sidewalk is not responsible for defects therein caused by the action of the elements or by wear and tear incident to public use. If, however, you find that the defective condition of the sidewalk was the result of negligent construction thereof by the owner (occupant) or that it resulted from any activity, commercial or otherwise, which was carried on by him/her, the plaintiff may recover for the injuries resulting from such defective condition.

(Pa95.)

Likewise, Model Jury Charge 5.20B(B)(1)(b), instructs as follows:

> A residential property owner owes no duty to the public to repair a sidewalk which is in a state of disrepair by reason of normal wear and tear by reason of the elements such as rain, snow, frost and the like. Nor is mere failure to fully correct the old condition a sufficient basis for liability.
>
> Where, however, the owner attempts to make repairs or correct some defect therein for which she/she is not responsible, he/she becomes responsible if he/she makes the repairs negligently and thereby causes the sidewalk, after the repairs, to be more dangerous than before or if he/she causes a new hazard from the old.

(Pa96.)

Most importantly for purposes of the instant matter and this appeal, Model Jury Charge 5.20B(B)(2)(a), entitled "Liability of Owner (Occupant) Who Undertakes to Clear Sidewalk," instructs as follows:

> The owner [occupant] of a residential property has no duty to maintain the sidewalks adjacent to their land so long as they do not affirmatively create a hazardous condition.
>
> The owner [occupant] of residential premises abutting a public sidewalk is not required to clear or keep the sidewalk free from the natural accumulation of ice and snow. But the owner [occupant] is liable if, in clearing the sidewalk of ice and snow, the owner [occupant], through the owner's [occupant's] negligence, adds a new element of danger or hazard, other than that caused by the natural elements, to the use of the sidewalk by a pedestrian. In other words, while an abutting owner [occupant] is under no duty to clear the owner's [occupant's] sidewalk of ice and snow, the owner [occupant] may become liable where the owner [occupant] undertakes to clear the sidewalk and does so in a manner which creates a new element of danger which increases the natural hazard already there.
>
> Therefore, should you find that the defendant, in undertaking to remove the ice and snow from defendant's sidewalk, created a new hazard or increased the existing hazard and that this new or increased hazard proximately caused or concurred with the natural hazard to cause plaintiff's injuries, then you must find for the plaintiff.
>
> Should you find, however, that the defendant did not increase the natural hazard or create a new element of danger which proximately caused or concurred in causing plaintiff's injuries, you must find for the defendant.

(Pa98 – Pa99.)

The law that underpins these model jury charges is found in a long line of cases holding that residential property owners are not liable for injuries caused by the dangerous conditions of sidewalks adjacent to their property. Specifically, in 1976, our

Supreme Court reaffirmed the long-standing principle "that, absent active misconduct, property owners would not be liable for dangerous sidewalk conditions." *Yanhko v. Fane*, 70 *N.J.* 528, 534-37 (1976). Then, in 1981, in *Stewart v. 104 Wallace St., Inc.*, 87 *N.J.* 146, 157 (1981), the Supreme Court reversed in part the holding in *Yanhko*, and held that "commercial landowners are responsible for maintaining in reasonably good condition the sidewalks abutting their property and are liable to pedestrians injured as a result of their negligent failure to do so."

However, the Supreme Court was extremely careful to note that "[t]he duty to maintain abutting sidewalks that we impose today is confined to owners of commercial property." *Id.* at 159. Thereafter, our Supreme Court acknowledged that in *Stewart*, it did not extend sidewalk liability to residential properties, and it has not done so since. *Luchejko v. City of Hoboken*, 207 *N.J.* 191, 195 (2011). The Court reaffirmed the "commercial/residential dichotomy," noting that it "represents a fundamental choice not to impose sidewalk liability on homeowners[.]" *Id.* at 208. The *Luchejko* Court made it clear that:

> In cases since [*Stewart*], we may have grappled with what was or was not commercial property, but we have not deviated in our holdings that residential property owners are not liable for sidewalk injuries.

Id. at 204. *See also, Nash v. Lerner*, 157 *N.J.* 535 (1999); *Dupree v. City of Clifton*, 351 *N.J. Super.* 237 (App. Div. 2002), *aff'd*

o.b., 175 *N.J.* 449 (2003); *Murray v. Michalak*, 114 *N.J. Super.* 417, 419 (App. Div. 1970), holding that a plaintiff cannot establish a prima facie case of liability of a residential homeowner merely by presenting proof that the sidewalk was in a dangerous condition.

Of course, as is seen in the Model Jury Charges, the immunity afforded to residential property owners for the condition of an adjoining sidewalk is not absolute. Instead, the New Jersey Supreme Court has held that "[r]esidential homeowners can safely rely on the fact that they will not be liable unless they create or exacerbate a dangerous condition." *Luchejko, supra*, 207 *N.J.* at 210. In this regard, the abutting landowner is liable for faulty or dangerous construction of a sidewalk if either he or his predecessors in title built the sidewalk. *Stewart v. 104 Wallace St., Inc., supra*, 87 *N.J.* at 152. Similarly, the owner is also liable for improper or negligent repair of the sidewalk. *Ibid.* Likewise, if the sidewalk is rendered unsafe by the abutting owner's "special use" or his "improper use" of it, the owner will be liable. *Ibid.* Finally, an abutting owner may be liable for injuries arising from an "invasion of the public easement for the owner's benefit by the erection and use of devices located over and above the sidewalk" that creates "a dangerous condition in the public easement." *Id.* at 152-153.

Important for purposes of this appeal, the New Jersey Supreme Court has also made it transparently clear that residential property owner/public sidewalk immunity applies in cases involving snow and ice on a public sidewalk. Specifically, our Supreme Court has held that residential property owners do not have a common-law duty to clear snow or ice from a public sidewalk and the failure to do so does not expose them to liability. *Luchejko, supra,* 207 *N.J.* at 211; *Qian v. Toll Brothers, Inc.,* 223 *N.J.* 124, 136 (2015). Unquestionably, this is the legal standard that we now see in the Model Jury Charge.

Recently, the legal landscape changed, but not for residential property owners. More particularly, in 2024, in the case of *Padilla v. Young II An,* 257 *N.J.* 540 (2024), our Supreme Court expanded the holding of *Stewart* and established a new bright line rule for commercial properties of any kind located in a commercially-zoned area. More specifically, the Supreme Court held that "all commercial property owners owe a duty to maintain abutting sidewalks in reasonably good condition," irrespective of whether commercial activity is actually occurring on the property. *Id.* at 562. Our Supreme Court went on to hold that:

> [T]he sidewalk liability distinction should be between commercial and residential properties, not among certain types of commercial properties, or commercial properties with buildings, or commercial properties with active, potentially profitable entities on them. This is the distinction from *Stewart.*

Ibid. Importantly, the Court in *Padilla* made no change to the law governing the sidewalk liability of residential property owners, such as the Anneses.

Based on this long line of case law, much of it handed down by our Supreme Court, the Motion Court in the instant matter properly granted summary judgment in favor of the Anneses. Plaintiff-appellant allegedly slipped and fell on snow and/or ice on a public sidewalk abutting the Anneses' property. Throughout this case, plaintiff-appellant has contended that she slipped and fell on snow and/or ice, which are natural elements. She did not allege that she slipped and fell on a dangerous condition that the Anneses created or exacerbated, such as uneven sidewalk slabs, holes in the concrete, or artificial obstacles of some kind. Consequently, the well-established law of this State applies and calls for summary judgment in favor of the Anneses, which the Motion Court properly and correctly granted.

It is noteworthy that plaintiff-appellant Debra Gottsleben does not appear to disagree that the foregoing is the law in New Jersey. Rather, she wants this Appellate Court to change this long-standing law set mostly by our Supreme Court. The Anneses respectfully request that this Appellate Court decline this invitation to overhaul the law.

II. APPELLANT'S CONTENTION THAT THE ANNESES' PROPERTY WAS A COMMERCIAL PROPERTY IS CONTRARY TO THE LAW AND SHOULD BE REJECTED

In her appellate brief, plaintiff-appellant wants this Court to find that the Anneses' property adjoining the public sidewalk on which plaintiff-appellant purportedly slipped and fell is a commercial property, an argument that was flatly rejected by the Motion Court. The reason behind this argument by plaintiff-appellant is obvious. If the Anneses' property is found to be commercial in nature, the Anneses would be subject to a common-law duty to clear snow and ice from the public sidewalk abutting their property, and the failure to do so would expose them to liability in this case. So, it is very clear why plaintiff-appellant would want this Appellate Court to reverse the Motion Court and find that the Anneses' property was a commercial property as such a finding would inure to her benefit in this case.

However, plaintiff-appellant's claim that the Anneses' property should be seen as commercial was wholly misplaced when presented to the Motion Court and it remains wholly misplaced in this appeal. Indeed, not only is this claim without legal precedent, it runs contrary to pure common sense. Since our Supreme Court's holding in *Stewart*, courts in New Jersey have addressed the distinction between residential and commercial properties. In *Grijalba v. Florio*, 431 *N.J.Super.* 47 (App. Div. 2013), the Appellate Division started its analysis of the

distinction by looking at the common definitions of "residential" and "commercial." Specifically, the Appellate Division noted that "residential" has been defined as:

1. "[D]esigned for people to live in" and "concerning or relating to residence." *Id.* at 67 (citing *Residential, Oxford Dictionaries).*

2. "Used as a residence or by residents." *Id.* at 67 (citing *Merriam-Webster's Dictionary,* 1060 (11th ed.2012).

3. "{T}he act and or fact of dwelling in one place for some time" and "[t]he place where one lives." *Id.* at 67 (citing Merriam-Webster's Dictionary, 1335 (11th ed.2012).

4. "The act or fact of living in a given place for some time," and [t]he place where one actually lives." *Id.* at 67 (citing *Black's Law Dictionary* 1335 (8th ed.2004).

5. "A structure used, in whole or in substantial part, as a home or place of residence by any natural person , whether or not a single or multi-unit structure, and that part of the lot or site on which it is situated and which it is devoted to the residential use of the structure, and includes all appurtenant structures." *Id.* at 67 (citing *N.J.A.C.* 13:45A – 16.1A).

Conversely, the *Grijalba* Court discussed the following definitions of "commercial":

1. "[C]oncerned with or engaged in commerce" and "making or intended to make a profit." *Id.* at 68 (citing *Commercial, Oxford Dictionaries Online).*

2. "[O]ccupied with or engaged in commerce work intended for commerce" and "viewed "with

> regard to profit." *Id.* at 68 (citing *Merriam-Webster's Dictionary*, 249 (11th ed.2012).

After performing its analysis, the Appellate Division in *Grijalba* set forth the following standard to be applied when deciding whether a premises is residential or commercial:

> [O]n remand, we direct the judge to consider, at a minimum, the following factors when classifying Florio's property as either "commercial" or "residential": (1) the nature of the ownership of the property, including whether the property is owned for investment or business purposes; (2) the predominant use of the property, including the amount of space occupied by the owner on a steady or temporary basis to determine whether the property is utilized in whole or in substantial part as a place of residence; (3) whether the property has the capacity to generate income, including a comparison between the carrying costs with the amount of rent charged to determine if the owner is realizing a profit; and (4) any other relevant factor when applying "commonly accepted definitions of 'commercial' and 'residential' property."

Id. at 68.

Similarly, in *Briglia v. Mondrian Mortgage Corporation,* 304 *N.J. Super.* 77 (1997), the plaintiff slipped and fell on ice hidden under fresh snow which had accumulated on the public sidewalk abutting the neighboring property, a single-family home which had been abandoned by its prior owner, defendant Daniel Spencer, and was in the possession of the first mortgagee, defendant Mondriant Mortgage Corporation. *Id.* at 79-80. At the time of the fall, the house was vacant and uninhabitable. The Appellate Division was asked to determine whether a mortgagee in possession of vacant

residential property was a commercial landowner for purposes of imposing sidewalk liability. *Id.* at 79. In affirming the trial court's grant of summary judgment in favor of the defendant, the Appellate Division held:

> The vacant house does not generate income. Mondrian does not derive a benefit from the sidewalk abutting a vacant house. Even if the house was listed for sale, access to it for that purpose is simply not sufficient. It does not make it a commercial property because access is not any different than if a private residence was offered for sale. Mondrian is not conducting a daily business at 32 Brainard Street to which a "safe and convenient access is essential." More importantly, because no activity takes place there, Mondrian does not have any employees present to monitor the necessity for snow and ice removal.

Id. at 81 (citations omitted).

Undeniably, applying the standards expressed in *Grijalba* and *Briglia* leads to the unmistakable conclusion that the Anneses' property located at 53 Headley Road in Morristown was in no way a commercial property the way plaintiff-appellant would like it to be. The Anneses bought that property so that they and their family could live there. It was going to be, and is now, their primary residence where they live their day-to-day lives as a family, not as a money-making enterprise. There were never any plans for commercial activities or revenue generation to go on there. The property was never intended to be rented out and, indeed, has never been rented out since the Anneses purchased it. They had not sold, and were not going to sell, anything out of the house.

There was not, nor was there ever intended to be, any daily business being run by the Anneses at 53 Headley Road. No patrons or customers were ever going to be coming and going from their property. The property was not being owned in any way for investment or business purposes by the Anneses. The property had no means for generating income to spread the risk of loss. In no way were the Anneses going to derive any benefit from the sidewalk abutting their property. The fact that renovations being performed to the house may have increased the fair market value of the property favoring the Anneses in the future should mean nothing, as the fair market value of many residential properties increases due to market trends, irrespective of whether or not any renovations were performed. 53 Headley Road is not even located in a commercial section of Morristown, but rather a purely residential section. Unquestionably, the unavoidable fact is that 53 Headley Road was going to be, and has been, used solely as the Anneses' private residence.

The facts of the matter before this Appellate Court also bear a striking resemblance to the facts in the unpublished decision of the Appellate Division in *Cardenas v. Severino*, 2019 WL 6598238 (App. Div. Dec. 5, 2019) (Da1).[1] In *Cardenas*, the

[1] Understanding that *Cardenas* is an unpublished decision, it is not offered to this Court as dispositive in the instant matter, but rather only as informative since the facts and issues before the Appellate Division in *Cardenas* are so similar to those presented here.

plaintiff Nivia Cardenas claimed to have fallen on a stretch of "uneven sidewalk" sustaining injuries to her ribs, back, and shoulders. *Id.* at *1. The accident occurred in front of a home owned by the Severino defendants. At the time of the accident, the home was vacant. *Id.*

The evidential record showed that the home had been purchased in 2008, after the death of the previous owner, and that the plan "was to renovate the property and eventually, the [Severino's] son . . . would reside there." *Id.* at *1. The renovations "stretched over the seven years prior to plaintiff's accident and were not completed until about six months thereafter." *Id.* Once the renovations were completed, however, the Severinos' son did not move into the property, as the defendants at that point instead opted to rent out the property instead. *Ibid.*

Upon motion, the court granted summary judgment in favor of the defendants explaining that the "property was not commercial at the time of the accident because it was not being used for business activity in any fashion." *Id.* at *2. The Motion Judge indicated that the "dispositive factor" in his analysis

> was not the capacity of the property to generate income at some indeterminate point in the future, but rather on whether the property ha[d] in the past or at the [time of the alleged injury been] used to generate income.

Id. at *2. The motion court further noted that the defendants "were not actively marketing the home for sale or rental, nor made it accessible to potential buyers or tenants." *Ibid.*

On appeal, the plaintiff argued that the property was akin to a "rental home" and should therefore be considered commercial. *Ibid.* The plaintiff specifically argued that

> *because there were people making renovations to the property, defendants were liable to them and anyone else traversing the sidewalk* adjoining the front of the property. Plaintiff argue[d] since the property was a rental home, it should be considered a commercial property.

Id. at *2 (Emphasis added).

The Appellate Division affirmed the motion court's decision as "the record established the property was not used for commercial purposes." *Id.* at *3. The Appellate Division was further convinced that "the property was not being used for a commercial purpose and was not intended to be used in that capacity at the time of plaintiff's accident." *Ibid.* To the extent certain arguments raised by the plaintiff were not specifically addressed, such as the argument that the property should be considered commercial because "there were people making renovations," the Appellate Division found that such arguments "lack sufficient merit to warrant discussion in a written opinion" citing *R.* 2:11-3(e)(1)(E). *Id.* at *3.

In light of New Jersey's clear jurisprudence on the issue, to argue that the Anneses' property was anything but a residential property is a stretch of monumental proportions. The fact that at the time of plaintiff-appellant's fall the Anneses were not yet living at 53 Headley Road and had the house undergoing renovations to prepare for their move-in does nothing to change these conclusions. Plaintiff-appellant has offered no legal precedent - either in New Jersey or any other jurisdiction – that would support her claim that there should be a change in the law to a so-called "hybrid" application. Consequently, plaintiff-appellant's argument in her appeal based on the contention that the Anneses' property should somehow be seen as a commercial property should be flatly rejected by this Court.

III. APPELLANT'S CONTENTION THAT THE ANNESES CREATED A NEW HAZARD OR EXACERBATED AN EXISTING HAZARD SHOULD BE REJECTED

In her appellate brief, plaintiff-appellant offers this Court a second argument as an alternative to her first. Specifically, plaintiff-appellant argues that even if the Court were to conclude that the Anneses' property was residential and not commercial, the Anneses' motion for summary judgment should still have been denied by the Motion Court because the Anneses allegedly either created a new dangerous condition or exacerbated an existing dangerous condition that caused plaintiff-appellant to fall. Plaintiff-appellant supports this argument by contending that her fall was

not caused by "natural forces," but rather a dangerous unnatural condition that the Anneses created. To accept this argument, this Appellate Court would have to acknowledge that snow and ice are not natural forces or natural elements. Of course, not only is that argument contrary to common sense, it is directly contrary to the very contentions made by plaintiff-appellant herself throughout this case.

In particular, in the First Count of her Complaint, plaintiff-appellant alleged that "a dangerous condition existed, wherein snow and ice was not properly removed and/or remediated." (Pa21, First Count, ¶4.) Similarly, in her answers to interrogatories, plaintiff-appellant described her fall and the cause of her fall as follows:

> On the date of the accident, February 18, 2021, I slipped and fell on an accumulation of snow and ice that was improperly cleared on the sidewalk located at the corner of 53 Headley Road and Lidgerwood Parkway, Morristown, New Jersey. The sidewalk was inadequately cleared, was unsafe, was not properly cleared for pedestrian traffic, nor was it covered with snow melting products, sand or salt. Furthermore, there were no warnings of any type in place. There was a layer of partially shoveled and packed snow and ice creating a hazard for pedestrians, such as myself.

(Pa53, answer to Form A Interrogatory No. 2.)

Likewise, in response to Supplemental Interrogatory No. 5, plaintiff-appellant stated, in part:

> An incomplete attempt had been made to remove the snow and ice, but the job was not complete, and no

> ice melt product, salt or sand was spread in the area.

(Pa62, answer to Supplemental Interrogatory No. 5.

Clearly, at no time did plaintiff-appellant allege that the Anneses had created a new hazard or exacerbated an existing hazard that caused her to fall. Instead, she has always contended that the Anneses essentially did a bad job clearing the sidewalk, and that her fall was caused by the presence of snow and ice on the sidewalk. Contrary to plaintiff-appellant's contentions, such conduct on the part of residential property owners like the Anneses is not enough to trigger the exceptions to the residential-public-sidewalk immunity established by the long line of legal precedent discussed at great length above.

New Jersey law clearly demonstrates that plaintiff-appellant's argument in this regard is without merit. New Jersey law holds that residential property owners do not have a common-law duty to clear snow or ice from a public sidewalk abutting their property, and that the failure to do so does not expose them to liability. *Luchejko, supra,* 207 *N.J.* at 211; *Qian v. Toll Brothers, Inc.,* 223 *N.J.* 124, 136 (2015). Nothing demonstrates the emptiness of plaintiff-appellant's argument more definitively than the holding of our Supreme Court in *Foley v. Ulrich,* 50 *N.J.* 426 (1967), a case strikingly similar to the instant matter. The Anneses presented *Foley* to the Motion Court which relied upon it

significantly in rejecting plaintiff-appellant's opposition to the Anneses' motion for summary judgment, which advanced this very same argument that plaintiff-appellant is now making to this Appellate Court. Interestingly, plaintiff-appellant makes absolutely no mention of the Supreme Court's holding in *Foley* in her appellate brief, and that avoidance is telling.

In *Foley,* our Supreme Court overturned the Appellate Division and declined to find liability on the part of the defendants who had allegedly created a greater hazard by shoveling the snow into mounds alongside the public sidewalk, which then melted and refroze on the sidewalk. The facts of *Foley* were laid out in detail in the Appellate Division's opinion that was ultimately overturned by the Supreme Court. *See*, *Foley v. Ulrich,* 94 *N.J.Super.* 410 (App Div. 1967),*rev'd* 50 *N.J.* 426 (1967). As the Appellate Division recounted, the plaintiff fell on an icy sidewalk in front of the defendants' property. *Id.* at 412. The plaintiff had fallen on December 26, 1965. The evidence demonstrated that it had snowed approximately seven inches on December 23 and 24, and the weather was otherwise clear on the date of the plaintiff's fall. *Id.* at 413. As the plaintiff approached the sidewalk in front of the defendant's property, she could see that the sidewalk had been shoveled after the storm two days earlier and that the snow had been heaped on each side of the sidewalk. *Id.* at 413. The plaintiff did not see any ice until after she had fallen. What

she ultimately saw was "a complete sheet of ice, frozen water * * *. It was just clear. You couldn't see it." *Id.* at 413. The plaintiff contended that snow had melted and frozen over the sidewalk, and could not be seen. *Id.* at 413. The testimony at trial revealed that the defendant Mr. Ulrich had originally shoveled the sidewalk on December 23 and 24, and that the defendant Mrs. Ulrich had shoveled the sidewalk again on December 26, prior to the plaintiff's fall. *Id.* at 414. The defendant Mr. Ulrich later conceded that after he and his wife had shoveled the snow from the sidewalk following the storm, some snow had melted and flowed down on the sidewalk area, and that water had frozen on the sidewalk. *Id.* at 414.

In her subsequent lawsuit against the Ulrich defendants, plaintiff Foley contended that the defendants had created a new element of hazard by clearing the snow from the sidewalk and shoveling it in mounds on both sides of the sidewalk. When that snow melted, some of the water collected in a depression in the sidewalk and froze, and it was this ice that caused the plaintiff to fall. *Id.* at 412. At trial, the jury returned a verdict in favor of the plaintiff. *Id.* at 419. On appeal, the Ulrich defendants argued that there was no proof that they were responsible for the addition of a new element of danger in the use of the sidewalk and that, even if they negligently cleared the sidewalk, they were not liable because there was no new hazard

other than that caused by natural forces. *Id.* at 412-413. The Appellate Division disagreed with the defendants and affirmed. The case then went to the New Jersey Supreme Court.

Our Supreme Court reversed the Appellate Division's conclusion. In so finding, the Supreme Court adopted the dissent of Judge Kolovsky in the Appellate Division decision which reasoned that a residential property owner does not owe a duty to the public where the property owner shovels the snow from the sidewalk, and ice forms on the sidewalk after the shoveled snow melts. More particularly, in his dissent, Judge Kolovsky stated:

> The majority is of the view that the jury could have found from the evidence that by clearing the snow and piling it on each side of the sidewalk defendants added "a new element of danger or hazard, other than that caused by natural forces * * * to the safe use of the sidewalk as a pedestrian." * * *
>
> I do not agree. The danger to the safe use of the sidewalk which existed when plaintiff fell was solely that caused by natural forces, the freezing of melting snow, a natural phenomenon which would have occurred if defendants had not shoveled the sidewalk, particularly since defendants' lawn sloped toward the sidewalk. As the court said in Taggart, supra, "Had the snow been left on the sidewalk, the warmth of the sun would have melted the snow as well as that which fell upon the lawn, converting it into water which, when the temperature fell, would have frozen, rendering the sidewalk equally, if not more dangerous to pedestrians."

Id. at 423-24. Judge Kolovsky concluded his dissent by finding that "[n]o element of danger or hazard other than one caused by

natural forces was created by the defendants." *Id.* at 424. Upon its review of the case, our Supreme Court, in a unanimous decision, reversed the Appellate Division "for the reasons expressed in the dissenting opinion of Judge Kolovsky in the Appellate division." *Foley v. Ulrich,* 50 *N.J.* 426,427 (1967).

The Anneses submit that the holding of our Supreme Court in *Foley* is on all fours with the instant matter, and the Motion Court properly applied it. Like the defendants in *Foley*, the Anneses did not create a new hazard or exacerbate an existing hazard when they shoveled the sidewalk. At worst, it can only be said that the Anneses may have been negligent or sloppy in the way they shoveled the sidewalk. As alleged by plaintiff-appellant in her answers to interrogatories, the improper clearance of the sidewalk led to an accumulation of snow and ice on the sidewalk that caused her to fall. It is undisputed that ice and snow are natural forces. So, just as our Supreme Court found that the *Foley* defendants shoveling of snow may have played a role in the plaintiff's fall, it was still the natural elements of snow and/or ice that caused her to slip and fall. Here, even assuming that the Anneses' shoveling may have been poorly performed, it was still snow and/or ice – natural forces – that caused plaintiff-appellant to slip and fall. Therefore, for the same reasons articulated by Judge Kolovsky in *Foley* that were adopted by our Supreme Court, the Anneses cannot be found liable for something that natural

forces actually caused, irrespective of how those natural forces may have been moved around after they initially fell to the Earth.

The Anneses did not initially intend or expect to address the unpublished case of *Nunez v. Gallo,* 2018 WL 6836109 (App. Div. Dec. 31, 2018) in this appeal, as plaintiff-appellant had opposed its consideration by the Motion Court as it is an unpublished opinion. However, in her appellate brief, plaintiff-appellant has brought this case to this Court's attention and opened the door for the Anneses to present to this Court how *Nunez* is strikingly similar to the instant matter and is significantly instructive. (Pa100.) In *Nunez,* the plaintiff, while delivering FedEx packages, slipped and fell on an icy and snow-covered public sidewalk on February 18, 2014. From February 17, 2014, into the morning of February 18, 2014, several inches of snow fell and accumulated on the public sidewalk where the plaintiff had his fall, which abutted the defendants' property. At approximately 7:15 a.m. on February 18, 2014, defendant Louis Gallo went outside and removed the snow from the sidewalk using a shovel and snow blower. Gallo testified that he did not observe any ice in the area where the plaintiff fell. He also acknowledged that he did not put down any salt or de-icing compound. He then left for work at approximately 8:45 and it was still snowing. After Gallo left for work, the snow continued to fall up until the time the plaintiff had his accident. (Pa100 at *1.) The plaintiff arrived at the Gallos' home to make

a delivery shortly before 10:00 a.m. He pulled the package to be delivered to the Gallos from his truck and slipped while carrying the package on the public sidewalk adjoining the Gallos' property. He testified that he slipped on ice that was concealed by snow. *Ibid.*

Thereafter, the plaintiff sued the Gallos alleging negligence. In support of his case, the plaintiff relied on an expert who rendered the opinion that the plaintiff's fall was caused by a "hidden hazard in the form of ice underneath fresh snow on a public sidewalk, which was uncleared, unsalted and/or unsanded at the time of the accident." *Ibid.* Following the completion of discovery, the Gallos moved for summary judgment. In opposition to this motion, the plaintiff argued that the ice, which caused the plaintiff to slip, formed by the melting and refreezing of snow piles created by defendant Louis Gallo in the days prior to the plaintiff's fall. In addition, the plaintiff contended that Louis Gallo failed to use salt or any ice melt component on the sidewalk. The trial court determined, as a matter of law, that the defendants had no duty to the plaintiff because Louis Gallo's actions in clearing the sidewalk added no new danger or hazard. *Id.* at *1.

On appeal, one of the arguments made by the plaintiff was that the defendants' voluntary undertaking to shovel the public sidewalk exposed them to liability, an argument very similar to

that being made by plaintiff/appellant Debra Gottsleben in the instant matter. This argument was flatly rejected by the Appellate Division. *Id.* at *2. In rejecting this argument, the Appellate Division acknowledged that "[u]nder common law, residential property owners have no duty to clear the snow and ice from public sidewalks abutting their land." *Id.* at *2 (citing *Qian v. Toll Bros. Inc.*, 223 *N.J.* 124, 135 (2015), and *Luchejko v. City of Hoboken*, 207 *N.J.* 191, 201 (2011)). The Appellate Division went on to state that "[i]f a property owner decides to remove snow from a public sidewalk, he or she will not be liable to a person who is injured on the sidewalk ***'unless through [the owner's] negligence a new element of danger or hazard, other than the one caused by natural forces***, [was] added to the safe use of the sidewalk by a pedestrian.'" *Id.* at *2 (citing *Luchejko, supra*, 207 *N.J.* at 201.)[Emphasis added.] "As such, if a sidewalk had been cleared and the melting snow subsequently froze into a layer of ice, the 'refreeze' would not be an 'element of danger or hazard other than one caused by natural forces.'" *Ibid.* (quoting *Luchejko, supra*, 207 *N.J.* at 201.) The *Nunez* Court went on to hold that "residential property owners are encouraged to clear public sidewalks, and they will not be subject to liability unless they create a new danger or hazard other than the one caused by natural forces." *Id.* at *2.

Finally, the Appellate Division rejected the plaintiff's argument that the defendants were negligent because they failed to apply a de-icer after Louis Gallo cleared the snow from the sidewalk. *Id.* at *3. Specifically, the Appellate Division held:

> [I]t is undisputed that after Louis Gallo shoveled the snow, it continued to snow and additional snow accumulated. Consequently, nothing Louis Gallo did created a new danger or hazard. The ice was present under the snow before Louis Gallo shoveled it. The ice was also present under the snow that accumulated after Louis Gallo shoveled the public sidewalk.

Id. at *2-*3.

In the instant matter, the evidence that was presented to the Motion Court demonstrated that plaintiff-appellant Debra Gottsleben simply slipped on snow and/or ice on the sidewalk, and it is undisputed that snow and ice are elements or hazards caused by natural forces. What happened to plaintiff-appellant Deborah Gottsleben is exactly what happened to the plaintiff in *Foley*. Here, there is no evidence that any of the exceptions to the well-established law of New Jersey apply in this case. More particularly, the Anneses did not construct the sidewalk, they did nothing to create the snowy and icy condition, they never performed any maintenance or repairs to the sidewalk, and they did not utilize the sidewalk for any particular or improper use. The only thing they did to the sidewalk was clear snow and/or ice off it.

Most importantly, there is no evidence demonstrating that the Anneses created a new element of danger or hazard on the sidewalk as a result of any actions that they undertook when they shoveled the sidewalk. For example, when they shoveled, they did not cause the concrete slabs to become uneven, they did not remove any portion of a concrete sidewalk slab, they did not create or enlarge a hole in the sidewalk, and they did not drain water from their property onto the sidewalk creating a new icy condition. Likewise, there is no evidence that the Anneses did anything to exacerbate any such pre-existing hazardous conditions when they shoveled the sidewalk. Certainly, plaintiff-appellant did not allege this type of affirmative conduct on the part of the Anneses. Nothing demonstrates this better than plaintiff-appellant's answers to interrogatories, where she contended that the Anneses "improperly" and "inadequately" cleared the sidewalk, did not use "snow melting products, sand or salt," failed to "clear the sidewalk of snow and ice," and made "an incomplete attempt . . . to remove the snow and ice." By her own Complaint and answers to interrogatories, plaintiff-appellant did not contend that the Anneses somehow created a new element of hazard or danger. Rather, she alleged that they simply did a bad job of clearing snow and/or ice from the sidewalk.

As made patently clear in *Foley*, plaintiff-appellant's assertions in this regard are not enough to establish liability on

the part of a residential property owner like the Anneses under the well-established law of this State. Her fall was caused by the forces and elements of snow and ice created by nature. As the case law clearly demonstrates, that does not win the day for plaintiff-appellant in this case. Once again, plaintiff-appellant has offered this Appellate Court no legal precedent, from New Jersey or anywhere else, that should persuade this Court to find otherwise. Instead, the Motion Court applied the law correctly to the facts of this case, and that finding has no reason to be disturbed. Consequently, plaintiff-appellant's argument in this regard should be rejected by this Court.

IV. THE MOTION COURT'S GRANT OF SUMMARY JUDGMENT SHOULD BE AFFIRMED FOR PUBLIC POLICY REASONS

The Anneses submit that there are significant public policy considerations that support the Motion Court's grant of summary judgment in favor of residential property owners like them, and that lead to the conclusion that plaintiff-appellant's proposed changes to the law should be rejected.

First, with regard to plaintiff-appellant's argument that alleged negligent or poor shoveling of snow and/or ice off a public sidewalk creates a new or exacerbated hazard, such a heightened standard of liability would fly in the face of public policy designed to encourage residential property owners to help out the community and clear public sidewalks. As our Supreme Court has

made clear, "society has an interest in encouraging people to clear public sidewalks and avoiding 'the inequity of imposing liability on those who voluntarily do so.'" *Luchejko, supra,* 207 *N.J.* at 201. Certainly, if plaintiff-appellant were to succeed and convince this Appellate Court to change well-established legal precedent in this regard, informed homeowners would never take it upon themselves to clear any sidewalk of snow and ice for fear of exposing themselves to liability if they do not clear the sidewalk well enough. Instead, they will just leave the sidewalk alone and allow pedestrians to traverse the sidewalk at their own peril. The property owners will know full-well that if they do nothing, the law will protect them from liability. But the moment they do something to help pedestrians walk around in their neighborhood, they will open the door to potential liability. Undoubtedly, they will choose to keep that door closed and do nothing. However, the fact remains that communities need these types of contributions from its citizens, as a poorly shoveled sidewalk is better for the town than a sidewalk not shoveled at all.

Second, with regard to plaintiff-appellant's contention that residential properties that are under renovation should be re-classified as commercial properties, it cannot be denied that such a change in property classification would have a significant negative impact on ordinary people who own residential properties. Homeowners would suddenly be placed in the position of wondering

whether any form of home renovation or improvement would be worth undertaking if they may be exposed to liability for accidents that occur on abutting sidewalks during the course of said renovations. The scope of such a change would, furthermore, be entirely unclear. Would such a niche carveout for residential immunity include a situation where homeowners must temporarily vacate the property to fumigate or to have the property inspected? Surely, most likely faced with the fear of exposing themselves to this heightened threat of liability, the homeowners would shy away from making renovations and needed improvements to their home that would require them to vacate the premises for a period of time. To dissuade home owners from engaging in such activities would surely not serve the public interest.

Finally, there would undoubtedly be a snowballing effect on the cost of necessary insurance resulting from the increased exposure to homeowners for undertaking renovations – a very common occurrence. Homeowners policies would not be enough to provide the needed insurance coverage, or may not provide such coverage at all. Instead, since renovations are involved, homeowners may have to purchase comprehensive general liability insurance policies with higher policy limits, especially if they are going to be considered general contractors as suggested by plaintiff-appellant. These added layers of insurance coverage are more expensive. The mere increased cost of additional insurance would

dissuade homeowners from renovating their homes not only for aesthetic reasons, but also for necessary reasons such as improved plumbing or heating systems.

The Anneses, undoubtedly speaking for every owner of property abutting public sidewalks in New Jersey, respectfully request that this Appellate Court decline plaintiff-appellant's invitation to completely turn meaningful public policy on its head by revamping well-established, long-time and mostly Supreme Court law in this State.

CONCLUSION

For all the foregoing reasons, defendants-respondents Christopher and Maureen Annese respectfully request that this Court deny plaintiff-appellant's appeal in its entirety.

Respectfully submitted,

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Superior Court of New Jersey
Appellate Division Docket No.: A-003851-23T4

Appellate Division Clerk's Office
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Trenton, New Jersey 08625-0970

Re: Debra Gottsleben, (Plaintiff-Appellant) v. CHRISTOPHER ANNESE and/or JOHN DOES 1-5, MAUREEN N. ANNESE and/or JANE DOES 1-5, TOWN OF MORRISTOWN, ABC CORP. 1-5 (fictitious names), XYZ CORP. 1-5 (fictitious names) GHI MAINTENANCE CORP. (fictitious name) DOE LANDSCAPING 1-5 (fictitious name), (Defendants-Respondents).

Civil Action:	On Appeal From the Final Order of the Superior Court of New Jersey, Law Division, Morris County
County:	Morris
Docket No.:	MRS-L-1436-22
Sat Below:	Hon. Louis S. Sceusi, J.S.C.

Dear Judges of the Appellate Division:

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Pursuant to R. 2:6-2(b), please accept this letter brief in lieu of a more formal submission and in further support of the Plaintiff-Appellant's appeal in this matter.

PRELIMINARY STATEMENT

This matter is presented on appeal from a final summary judgment order of the Superior Court, Law Division, Morris County vicinage. In short, this case involves a winter slip and fall personal injury matter that occurred on a sidewalk outside an unoccupied, under renovation property where the appellant suffered serious personal injuries. In our initial moving papers, we respectfully submitted that the Trial Court's decision was erroneous for two reasons. First, we argued that there were disputed material facts improperly resolved by Trial Court in favor of the movant, in violation of the standards set forth in Brill v. Guardian Life, 142 N.J. 520, 522 (1995). Second, we respectfully submitted that the law applied by the Trial Court was inappropriate because the property involved in plaintiff's injury was not a residence at the time of the incident, rather it was more like a "commercial property." In this case, the Plaintiff/Appellant seeks justice under unique circumstances that we submit require the Appellate Division to take a closer look at the applicable law.

As we have previously argued, the reason this case does not present the

typical winter weather, fall-down personal injury case is because the property involved in this case was not a "residence" at the time of the accident, and instead was an unoccupied commercial-like property under renovation. In fact, the facts demonstrated that the property was unoccupied for a long period of time before it became a residence -- from October 2020 to August 2021. Therefore, we submitted that while the law that would typically guide the court regarding a residential sidewalk fall-down on snow and ice, here the factual basis and rationale behind the law was not applicable. The property was more properly characterized as either a commercial property under construction or a hybrid type of property status that would have permitted the defendants/respondents to measure and protect against their potential exposure for failing to maintain the property and bear the risk of harm.

The Respondent/Defendant relies heavily on the NJ Supreme Court's decision in Luchejko v. City of Hoboken, 207 N.J. 191, 195 (2011). In that case, the defendant was a condominium complex in which homeowners actively resided at the property. We submitted that those considerations regarding residential properties would not apply here because here the property was vacant and being renovated for a period of ten months. We submit under those circumstances a property owner should be required to keep walkways safe for

expected pedestrian traffic, protect them from foreseeable harm, and the burden of requiring that type duty is not extraordinary.

Therefore, as we submitted in our initial papers, the law typically guides the court regarding a residential fall-down on snow and ice is not applicable – the property wasn't a residence. We submit the query to this Court -- how can the owner of a residential, occupied property have the identical legal rights and protections that as the owner of a vacant property under renovation? How is that construction of the law fair to an innocent pedestrian? We respectfully submit that the law should protect the innocent pedestrian exposed to unreasonable risks of harm, and in this circumstance the law should permit the claim.

As we argued in our initial papers, on the date of the accident, if the property can be characterized as occupied to any extent, it was only "occupied" by a paid contractor who was making the property habitable for the defendants. In the alternative, we submitted that if the court does not agree that the subject property was commercial-like and a higher duty must be imposed, the appellant alternatively argues that that the respondents failed to remove the snow to create a safe walking surface, and instead creating a much more dangerous condition on the walkway. If the Court were to accept that the law regarding residential

properties applies, we respectfully submit it is that dangerous undertaking and creation of an unnatural hazard that creates culpability on the part of the respondents/defendants. In either event, we respectfully submit that factual disputes existed below that required a jury's consideration and resolution.

The Appellant respectfully submits that these issues should have been submitted to a jury for consideration. The Respondent should have been required to first identify undisputed material facts demonstrating that the area was properly cleared, and that he did not create a new hazard or make a natural hazard worse.

LEGAL ARGUMENT

POINT I.

THE STANDARD FOR DUTIES OF COMMERCIAL PROPERTY OWNERS SHOULD RESPECTFULLY INCLUDE BUILDINGS UNDER RENOVATION

The defendants/respondents correctly cite that in Stewart v. 104 Wallace Street, Inc., 87 N.J. 146 (1981), the New Jersey Supreme Court balanced tort law considerations, and held in the interests of fairness and justice, commercial landowners should be "held responsible for maintaining abutting public sidewalks and to be required to recompense innocent pedestrians injured as a result of the negligent failure to do so." Id. At 157, cited by Luchejko, supra.

The argument that the appellant urges here is not a stretch of the law, and we submit that the New Jersey Supreme Court has not been reluctant to impose "commercial sidewalk liability" in unusual circumstances.

One such case involved a not-for-profit parochial school, where the court reasoned that even though nothing is "sold" at the school like a commercial property, it cannot be considered a residence since no one lives there. Luchejko, Id. at 204, analyzing Brown v. Saint Venantius Sch., 111 N.J. 325, 335 (1988).

In Brown, the New Jersey Supreme Court carefully considered whether or not a parochial school would be considered a commercial or residential property for purposes of duties to maintain abutting sidewalks. The Court reasoned that an important factor in measuring whether a property is "commercial" for these purposes is determining the property's capacity to generate income. Clearly a parochial school is not a "for profit" endeavor, yet the Court excluded the school from "residential" category because no one resided there. The Court reasoned that the result of choosing to impose the "commercial standard" against a parochial school was much less harsh than imposing the entire risk of loss on the innocent plaintiff. Brown at 334. We submit the same reasoning should apply here.

In the case presently before the Court, no one was residing at the

respondents' premises at the time of the incident, and clearly the renovation and improvement of a building is a financial investment that will provide a future financial benefit to the property owner. We submit that the more appropriate consideration when deciding what law applies ought to be whether or not the property is actually a "residence" at the time of the incident.

The issue is not as clear-cut as the respondent argues in its opposition to this Appeal. The court recognized that the status of a property is not absolute, and that each set of fact would need to be analyzed on the case merits. As the New Jersey Supreme Court first opined in Stewart, "(a)s for the determination of which properties will be covered by the rule we adopt today, commonly accepted definitions of "commercial" and "residential" property should apply, with difficult cases to be decided as they arise." Stewart, 87 N.J. 150, 159-60. We submit that the present case is one such "difficult case" where the need to closely analyze the differences, the Court should closely consider the status of the property and whether or not the result is fair to the Ms. Gottsleben, the innocent plaintiff/appellant. We respectfully submit the decision should be reversed for those considerations and application of the law.

We submit it is the Court's role to assess fairness as it applies to the involved parties, and it begs the question, what is fair to the innocent plaintiff?

We are not asking that this Court go so far as to accept Justice Pollock's or Justice Clifford's concurring opinions in Brown, where they suggest that injured pedestrians should be able to pursue actions against property owners, regardless of their status. Justice Clifford stated that he would go even further than imposing liability on a parochial school: "why should we draw a distinction between a commercial owner and a residential or any other kind of owner for purposes of the imposition of liability in favor of an innocent pedestrian?" Brown, 111 N.J. at 339-340. In the same case, Justice Pollock similarly opined that all property owners should be liable to innocent pedestrians: "In each instance, the property owner is better able to control the risk and to distribute the cost of that risk. As we pointed out in Mirza, prudent property owners can, and generally do, purchase comprehensive or homeowners' liability insurance covering sidewalk accidents. (Citing Mirza v. Filmore, 92 N.J. 390, 398). Furthermore, the injured party's need for compensation is no less when he or she walks down the sidewalk alongside one property than it is when he or she walks alongside another. Finally, it is fair that the pedestrian be allowed to recover no matter who owns the property." Brown, 111 N.J. at 341-342). We respectfully submit that Justice Clifford's and Justice Pollock's rationale was correct – the law creates unfair, silly results when it creates differently liabilities for different property owners depending on their

use. The property owners are still in a better position than innocent plaintiffs to protect against unreasonable risks of harm.

As we argued in our initial papers, it is clear from a review of the testimony before the Court and the law that the defendant Annese had a duty to safely remediate snow and ice conditions at their property, refrain from creating hazards, and finally, had duty to warn of hazards. We submit that if the Trial Court had agreed that a property under renovation is more like a commercial property than a private residential premises, the motion would have been defeated, and the plaintiff/appellant would have had her opportunity at justice before a jury. The property owner's duty in this case arises out of a fact pattern that is unique, and the nuances of the relationship between the property owner and pedestrian are more like, we submit, the relationship between the commercial property owner and pedestrian than the residential property owner and pedestrian.

Again, we respectfully submit that it is the use of the property at the time of appellant's injury that should be determinative, and not the eventual use. The considerations of imposing liability upon a resident do not apply – because the property owner was engaged in improving the property, not living there. As a matter of simply fairness and equity the appellant should have an opportunity to

seek redress for her injuries where a property owner makes a decision to be absent from and engage in construction on what is essentially vacant property for such an extended period of time.

The respondent contends that this case is really like Briglia v. Mondrian Mortgage Corporation, 304 N.J. Super. 77 (App. Div. 1997) a case where a residential property was simply abandoned, unoccupied, and left vacant by its holder in fee simple, and the defendant Mondrian was a mortgagee in possession, and not a simple property owner. The building in Briglia was vacant, but the property was not under active renovation. The clear distinction here is that the property in the matter before the court was under renovation – a different circumstance that changed the character of the property at the time of the incident. Commercial events – construction was ongoing at the time of the accident. It is the active renovation of the property in the case presently before the Court that changes the character of the property.

POINT II

THE TRIAL COURT ERRONEOUSLY RESOLVED FACTUAL DISPUTES IN FAVOR OF THE MOVANT, REQUIRING THE MATTER TO BE REVERSED AND REMANDED FOR TRIAL

As we argued in our initial moving papers, we respectfully submit that the

Trial Court improperly resolved the material factual disputes in favor of the movant, and then concluded that based upon those facts that the movant/respondent had neither created a new hazard nor had he worsened an existing hazard. As we submitted in the initial Appellate papers and reiterate here, that the resolution of those facts should have been made by a jury, and therefore the Summary Judgment motion should have been denied.

As cited previously, pursuant to New Jersey's Model Jury Charge 5.20B(B)(2)(a):

> The owner [occupant] of a residential ... is liable if, in clearing the sidewalk of ice and snow, the owner [occupant], through the owner's [occupant's] negligence, adds a new element of danger or hazard, other than that caused by the natural elements, to the use of the sidewalk by a pedestrian. In other words, while an abutting owner ... may become liable where the owner [occupant] undertakes to clear the sidewalk and does so in a manner which creates a new element of danger which increases the natural hazard already there. Therefore, should you find that the defendant, in undertaking to remove the ice and snow from defendant's sidewalk, created a new hazard or increased the existing hazard (emphasis added) and that this new or increased hazard proximately caused or concurred with the natural hazard to cause plaintiff's injuries, then you must find for the plaintiff.
> Id. (emphasis added).

We respectfully submit this is for a jury to decide, and not a Court that does not have the opportunity to weigh the testimony of the respective parties for credibility.

The New Jersey Supreme Court has held that "[r]esidential homeowners will not be liable unless they create or exacerbate a dangerous condition."

Luchejko v. Hoboken, 207 NJ 191, 210 (2011). It is also clear that where a property owner removes snow, they will be liable for a pedestrian's injury if they create a hazard that does not exist as a result of "natural forces." Id. At 201. We know in the case presently being considered by the court, from the testimony and expert opinion outlined above, no new "natural forces" occurred between the attempt by the defendant to clear snow and the plaintiff's fall. There was no new snow or other precipitation, and there was no freeze/thaw cycle. We submit that the respondent/defendant created a hazardous condition.

Our Model Jury Charges make clear that where a hazard is created or made more hazardous by a residential property owner, the residential property owner will be liable "where ... the owner attempts to make repairs or correct some defect therein for which she/she is not responsible, he/she becomes responsible if he/she makes the repairs negligently and thereby causes the sidewalk, after the repairs, to be more dangerous than before or if he/she causes a new hazard from the old." New Jersey Model Charge 5.20B(B)(l)(b).

In their attempts to navigate around this imposition of liability, we respectfully submit that the defendant heavily, and improperly relied upon the unreported Appellate Division decision of Nunez v. Gallo, 2018 WL 6836109 (App. Div. 2015). In that decision, the Court cites precisely what we have cited

above; a residential homeowner will be liable for dangerous abutting sidewalks where they "create or exacerbate a dangerous condition." Luchejko v. Hoboken, 207 NJ 191, 210 (2011). Luchejko also made clear that where a property owner removes snow, the property owner will be liable for a pedestrian's injury if they create a hazard or exacerbate a condition that does not exist as a result of "natural forces." Id. At 201. That is precisely what occurred here – failed snow removal efforts are not "natural forces."

As we argued in our previous submission, the facts in Nunez are readily distinguishable from the case currently before the Court. In Nunez, there was a continuing snowfall that did not end until after the plaintiff's fall. The defendant Gallo removed the snow that had accumulated up and until 7:15 a.m., but then left his residence for work at approximately 8:45 a.m. The significant snowfall continued (an intervening natural event), and the plaintiff fell at approximately 10:00 a.m.

Here, in the case before the Court, the snowfall ended two days prior to plaintiff's fall, and if the defendant/respondent is believed by a jury, two days after the respondent's failed attempt to remove the snow, which dangerously changed the condition of the walking surface. New snow in the case before this Court did not fall until after her injury, and the new snowfall had *no bearing* on

the plaintiff's injury, like what occurred in Nunez. We submit that in consideration of all of the facts viewed in a light most favorably to the plaintiff, the appellant can establish all of the necessary elements to sustain her burden of proof, and there are material questions of fact that must be resolved by a jury. Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995).

Here, we respectfully submit that the issue of whether or not the condition of the property was caused and created by the defendant's failure to properly remove the snow is a material factual dispute, and that dispute must be resolved by a jury. This is true *whether or not* the Court determines that the subject property would be deemed a residential, commercial property, or some kind of hybrid. The manner in which the snow removal occurred, whether or not it was completed in a reasonable manner, or whether or not the conduct created a new hazard or worsened an existing hazard are also factual issues that would need to be resolved by a jury. It is for these reasons and the reasons outlined above that the appellant respectfully submits that the Order entering summary judgment should be reversed and this matter should respectfully be remanded for trial.

CONCLUSION

We respectfully submit that the Trial Court erred in entering summary judgment, and the matter should be reversed and remanded for a trial on the

issues presented herein. We submit that the respondent should have been considered on the same footing most like a commercial entity, and the duties associated with that status should have controlled. In the alternative, we respectfully submit that if the Court considered the respondent to be a residential property owner, there were material facts in dispute which would have precluded summary judgment in this matter.

Respectfully submitted,

By: _____
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/APC

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