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SUPREME COURT OF NEW JERSEY

HAYDEE GALLARD, Plaintiff/Petitioner, vs. WALMART, DEBRA LEWIS, WAL-MART STORES INC., UNION 22 PLAZA, LLC, WAL-MART REAL ESTATE BUSINESS TRUST, WAL-MART STORES EAST, L.P., LAND PROS OF NEW JERSEY, LLC, JOHN DOES 1-10 (SAID NAMES BEING FICTITIOUS, REAL NAMES UNKNOWN), AND ABC CORP. 1-10 (SAID NAMES BEING FICTITIOUS, REAL NAMES UNKNOWN), JOHN DOES SUBCONTRACTORS 1-10 (SAID NAMES BEING FICTITIOUS, REAL NAMES UNKNOWN), Defendants/Respondents.	DOCKET NO. 089466 Civil Action On Appeal from: May 7, 2024 DECISION OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APPELLATE DIVISION DOCKET NO.: A-2336-22 Sat Below: Hon. Hany A. Mawla Hon. Robert M. Vinci

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AUG 15 2025
SUPREME COURT
OF NEW JERSEY

BRIEF ON BEHALF OF *AMICUS CURIAE*, NEW JERSEY ASSOCIATION FOR JUSTICE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF INTEREST

The New Jersey Association for Justice (hereinafter "NJAJ"), formerly known as the Association of Trial Lawyers of America - New Jersey, respectfully submits this brief as *amicus curiae* in support of the position advanced by plaintiffs/petitioner, Haydee Gallardo.

NJAJ is a voluntary, statewide organization of approximately 2,000 attorneys dedicated to the protection of consumer rights and the preservation of the civil justice system. NJAJ's membership is comprised primarily of trial lawyers who represent individual plaintiffs in personal injury and other civil matters. Throughout its history, NJAJ has been a leading voice in both the courts and the Legislature, advocating to preserve and strengthen the fundamental protections afforded by New Jersey's tort law, jurisprudence, and Court Rules. NJAJ appears in this matter as amicus curiae to ensure that those protections remain robust, particularly for injured individuals seeking redress for harm caused by negligent conduct.

PRELIMINARY STATEMENT

This case presents a critical opportunity to reaffirm the limited scope of the "ongoing storm" rule articulated in Pareja v. Princeton International Properties, 246 N.J. 546 (2021), and to prevent it from being stretched into a doctrine of near-blanket immunity for commercial landowners. The New Jersey Association for Justice

("NJAJ") submits this brief as amicus curiae to emphasize that Pareja does not, and should not, shield commercial property owners from liability when their affirmative conduct during a storm creates or exacerbates hazardous conditions that endanger the public.

On January 5, 2015, plaintiff/petitioner, Haydee Gallardo slipped and fell in a Walmart parking lot during an active winter storm. Shortly before her fall, Walmart's contractor applied salt to the area without first removing accumulated snow. Gallardo alleges this created a slushy, refreezing condition that caused her injuries. The trial court denied Walmart's motion for summary judgment under the Pareja ongoing storm rule, and the Appellate Division affirmed, finding a jury could reasonably conclude that Walmart's actions increased the risk of harm.

Walmart's actions, through its contractor, in applying salt to actively falling snow without shoveling or removing accumulated precipitation, allegedly transformed the surface into slushy, refreezing conditions that posed greater risks to invitees. That conduct, if proven, fits squarely within the "unusual circumstances" exception to the ongoing storm rule, which recognizes a duty where a commercial landowner increases the risk to others on the property.

Moreover, Walmart cannot avoid liability by shifting blame to its contractor. Under longstanding New Jersey law, commercial landowners owe a nondelegable duty to maintain their premises in a reasonably safe condition for business invitees.

That duty persists even when maintenance responsibilities are contracted out. Allowing a property owner to escape liability merely because a contractor was involved would not only contravene that doctrine but would also gut the core protections Pareja preserved for injured persons.

The Appellate Division properly held that this issue is for the jury to decide, and the dismissal of the subcontractor is not a basis for Walmart to not be held accountable. To adopt Walmart's position would not only distort Pareja but would also discourage safe and responsible winter maintenance practices. This would invite businesses to perform partial, perfunctory, or even counterproductive snow-removal measures with impunity. Such a result would undermine the very purposes of premises liability law and the public policy protections underlying the Court's exceptions in Pareja.

A*micus curiae* NJAJ urges this Honorable Court to reaffirm that commercial landowners remain accountable when their actions during a storm increase the risk of harm, and to reject any rule that would convert the ongoing storm doctrine into a safe harbor for negligent conduct.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

NJAJ will rely on the Statement of Facts and Procedural History as recited by the plaintiff/petitioner.

LEGAL ARGUMENT

I. THE ONGOING STORM RULE DOES NOT SHIELD LANDOWNERS WHO INCREASE THE RISK OF HARM THROUGH THEIR OWN CONDUCT.

In Pareja, this Court adopted the ongoing storm rule, holding that commercial landowners generally do not have a duty to remove snow or ice while precipitation is actively falling. However, this Court also recognized two critical exceptions to that no-duty rule: (1) when the landowner's conduct affirmatively increases the risk of harm to others, what the Court referred to as "unusual circumstances," and (2) when there is a pre-existing hazard on the premises before the storm began. Id. at 559–60.

The exception at issue in this case is the "unusual circumstances" exception. While this Court did not adopt a formal factors and/or elements test to determine what exactly counts as an "usual circumstance," it did provide an example as to what *could* fall into that category. This Court cited, Terry v. Central Auto Radiators, Inc., 732 A.2d 713 (R.I. 1999), and used the facts in that case as an example of conduct that would be an exception.

In Terry, the Rhode Island Supreme Court vacated a judgment as a matter of law in favor of a commercial defendant where a customer slipped on ice while retrieving her car immediately after a snowstorm. Id. at 719. Although Rhode Island's ongoing storm rule permitted landowners to wait a reasonable time after a

storm to address accumulated snow and ice, the court held that the defendant's specific conduct of directing the plaintiff to traverse an icy, unfamiliar lot at dusk, exacerbated the natural risks posed by the storm. Id. at 718. Under those "unusual circumstances," the court concluded the defendant had a duty to act reasonably and remanded the case for a jury to decide whether that duty was breached.

Here, Walmart's conduct here is no less culpable than what occurred in Terry. Walmart, through its contractor, undertook snow and ice removal efforts during the storm by applying salt to areas where snow had already accumulated, without first clearing it. According to plaintiff's expert, that approach was not only ineffective but counterproductive, as it created a slushy surface prone to dangerous refreezing. Far from being a reasonable response to weather conditions, this conduct allegedly made the premises more hazardous for customers like Ms. Gallardo. Like the directive in Terry, Walmart's actions during the storm arguably made conditions more dangerous, not less, and thus fall squarely within the exception described in Pareja.

The Appellate Division correctly concluded that a jury could find such conduct falls within the "unusual circumstances" exception and thus triggers a duty of care under Pareja. That conclusion reflects the plain language and intent of the Court's holding in Pareja, which expressly preserved liability where a commercial landowner's actions make conditions worse, not better, for business invitees.

Immunizing a property owner in such circumstances would undermine the purpose of the rule and send a dangerous message: that commercial entities may perform partial or negligent snow-removal measures without consequence, even if those efforts **increase** the likelihood of injury.

Importantly, the determination of whether a landowner's conduct increased the risk of harm is inherently fact-sensitive. This question, like most issues of negligence, is for the jury to resolve. As this Court acknowledged in Pareja, and the Appellate Division recognized here, it would be improper to foreclose such claims at the summary judgment stage where evidence supports a finding that the landowner's actions created or exacerbated a dangerous condition.

The ongoing storm rule strikes a balance between practicality and public safety. It does not, and was never intended to, insulate commercial landowners from liability when they choose to act during a storm and do so negligently. The rule allows landowners to wait until a storm concludes, but once they intervene, they must do so with reasonable care. That framework not only reflects sound policy but also preserves the fundamental right of injured individuals to have their claims heard by a jury.

II. COURTS IN OTHER ONGOING STORM RULE JURISDICTIONS TREAT CORE ISSUES AS QUESTIONS OF FACT FOR THE JURY.

When adopting the ongoing storm rule in Pareja, this Court explicitly looked

to the laws of neighboring jurisdictions of Delaware, Pennsylvania, Connecticut, and New York, for guidance, noting that each had developed approaches consistent with New Jersey's climate and legal values. See id. at 558. Critically, each of these jurisdictions recognizes that whether a storm was ongoing at the time of the incident, and whether a landowner had a reasonable time to act, are fact-sensitive determinations properly left to the jury. If the Court found these jurisdictions persuasive in adopting the doctrine, it should continue to follow their example by rejecting categorical immunity at the summary judgment stage where factual disputes remain.

In Delaware, the Supreme Court held that disputes over whether a landowner acted reasonably in delaying snow and ice removal during a storm "should be treated as any question of fact." Laine v. Speedway, LLC, 177 A.3d 1227, 1230 (Del. 2018).

In Pennsylvania, they have long held that the question of whether the landowner had a reasonable opportunity to address icy conditions is one "for the jury alone to decide." Goodman v. Corn Exch. Nat'l Bank & Tr. Co., 200 A. 642, 644 (Pa. 1938).

In Connecticut, the state's highest court ruled that it was within the jury's purview to determine "whether a storm has ended or whether a plaintiff's injury has resulted from new ice or old ice when the effects of separate storms begin to converge." Kraus v. Newton, 211 Conn. 191, 198 (1989).

New York has gone even further in embracing jury determinations. Its courts have consistently held that whether a storm was ongoing and whether the landowner had a reasonable time to remedy hazardous conditions are factual disputes not appropriate for summary judgment. In Simon v. Granite Bldg. 2, LLC, the court affirmed the submission of the ongoing storm question to the jury, finding a triable issue as to whether a storm was even in progress at the time of the accident. 97 N.Y.S.3d 240, 245 (App. Div. 2019); citing Arroyo v. Clarke, 148 A.D.3d 479 (N.Y. App. Div. 2017), and Calix v. New York City Tr. Auth., 14 A.D.3d 583 (N.Y. App. Div. 2005).

These authorities collectively reinforce a key principle: the application of the ongoing storm rule is not a binary or mechanical exercise. Whether a storm was in progress, whether the landowner's response was reasonable, and whether their conduct increased the risk of harm are all context-driven determinations that belong with the jury, particularly where, as here, the landowner affirmatively intervened during a storm in a way that allegedly made conditions more hazardous.

To follow Pareja's guiding jurisdictions is to reject a rule of automatic immunity. It is to reaffirm that in cases involving winter hazards and dynamic conditions, liability should turn not on a rigid doctrine, but on the careful deliberation of a jury weighing the facts.

III. WALMART CANNOT ESCAPE LIABILITY SIMPLY BECAUSE ITS SNOW REMOVAL CONTRACTOR WAS DISMISSED FROM THE CASE.

It is a longstanding principle of New Jersey premises liability law that a commercial landowner owes a nondelegable duty to maintain its property in a reasonably safe condition for business invitees. That duty persists even when the landowner retains a contractor to perform maintenance services on its behalf. The law does not allow a landowner to outsource responsibility for public safety or shift legal accountability to a third party whose actions it authorized and directed.

This rule is firmly rooted in New Jersey Supreme Court precedent. In Hopkins v. Fox & Lazo Realtors, the Court reaffirmed that a commercial property owner owes a direct duty of care to invitees and remains liable for unsafe conditions on its property regardless of whether a third party created the hazard. 132 N.J. 426, 434–35 (1993). The rationale is straightforward: business owners are in the best position to control their premises and ensure the safety of those they invite onto them.

Walmart's attempt to avoid liability based on the dismissal of its snow removal contractor, Land Pros, is legally and factually flawed. Walmart now argues that because Land Pros was granted summary judgment, it too must be immune from liability under a "master-servant" theory. But this fundamentally misstates the trial court's decision. The trial court granted summary judgment in Land Pros' favor solely on the basis that a snowstorm was ongoing at the time of the fall, and

therefore, under Bodine v. Goerke Co., 102 N.J.L. 642 (E. & A. 1926), Land Pros had no **independent duty** to remove snow or ice during the storm. Da32. The court did not find that Walmart's duty was extinguished, nor did it conclude that Walmart's liability was derivative of Land Pros' conduct. This is especially true in this case, where neither Walmart nor Land Pros were able provide the court with a Scope of Work that would lay out the duties and responsibilities of Land Pro.

To the contrary, Walmart's duty is independent and nondelegable. The mere fact that its contractor was dismissed does not absolve Walmart of liability. That dismissal does not alter Walmart's own conduct, nor does it erase its responsibility to ensure that its property remained safe for invitees during the storm—particularly where Walmart, through Land Pros, undertook to perform salting operations in a manner that allegedly increased the risk of harm.

To hold otherwise would create a dangerous loophole in New Jersey law: commercial landowners could outsource winter maintenance, later disavow any control or oversight, and escape liability by blaming the contractor. That approach not only contravenes binding precedent but also erodes the public protections the law is designed to uphold. The duty to maintain safe premises remains with the landowner. Walmart cannot contract that duty away.

IV. THE LAW SHOULD ENCOURAGE SAFE SNOW REMOVAL, NOT IMMUNITY FOR NEGLIGENT EFFORTS THAT INCREASE THE RISK OF HARM.

Walmart argues that it would be poor policy to expose commercial landowners to liability for attempting to perform "ordinary snow removal operations" during a storm, suggesting that such efforts should be categorically protected to encourage proactive safety measures. However, this argument mischaracterizes both the holding in Pareja and the nature of the trial court's decision in this case.

The issue is not whether Walmart attempted to address winter conditions; the issue is **how** it did so. The Appellate Division did not hold that salting during a storm is per se negligent. Rather, it concluded that when a landowner intervenes and allegedly makes conditions **more dangerous**, as Gallardo's expert opined happened here, those facts may trigger the "unusual circumstances" exception under Pareja and must be evaluated by a jury.

The fact is supported when we look at Model Jury Charges (Civil), 5.20B, which state in its relevant part:

> 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.
>
> [When there was an ongoing storm or a dispute as to whether there was an ongoing storm, add the following language:] However, a commercial property owner does not have a duty to keep sidewalks on its property free [from] snow or ice during an ongoing storm. A commercial property owner's duty to remove snow and ice hazards arises not during a storm, but rather within a reasonable time after the storm. There are two exceptions that may give rise to a duty before then. First, a commercial property owner may be liable if its actions increase the risk to pedestrians and invitees on their property. Second, a commercial property owner may be liable where there was a pre-existing risk on the premises before the storm.
>
> [Model Jury Charges (Civil), 5.20B, "Liability for Defects in Public Streets and Sidewalks: Liability of Owner of Commercial Property for Defects, Snow and Ice Accumulation and Other Dangerous Conditions in Abutting Sidewalks" (rev. Nov. 2022) (footnotes omitted).]

The charge does not use phrase "unusual circumstances" at all. Instead, it instructs that a commercial property owner may be liable "if its actions increase the risk to pedestrians and invitees on their property." This reflects a consensus among courts and practitioners that the core question is not whether the conduct is "unusual," but whether it created a greater danger. Walmart's argument attempts to resurrect semantics that the current model jury charge has already moved past, and in doing so, it distorts the exception recognized in Pareja.

Encouraging landowners to address snow and ice is a laudable goal, but it does not require blanket immunity for negligent execution. Immunity is not necessary to incentivize good-faith snow removal efforts because Pareja already shields landowners in two key scenarios: (1) when they choose to do nothing during an ongoing storm, and (2) when they intervene in a reasonable and non-negligent manner that does not create or increase a dangerous condition. See id. at 559–60. It is only when a landowner affirmatively undertakes a remediation effort **and** performs that effort negligently, creating a heightened risk, that liability becomes a jury question. That standard strikes the proper balance between encouraging property maintenance and protecting invitees from avoidable harm.

Moreover, Walmart's framing of "ordinary snow removal" invites more uncertainty, not less. What qualifies as "ordinary"? Is it ordinary to salt without shoveling? Is it ordinary to leave slush to refreeze in sub-freezing temperatures? These questions are inherently fact-sensitive. The better rule is the one the Appellate Division applied: when a landowner intervenes during a storm and its actions allegedly increase the danger, the case should proceed to the jury under Pareja's exception.

The burden remains with the plaintiff to prove that the landowner's conduct was negligent and that it created a greater risk of harm. Requiring that minimal threshold of proof promotes safe conduct without punishing well-executed efforts.

Walmart's preferred approach, immunizing all snow removal activities so long as they occur during precipitation, would unjustly reward even hazardous conduct and undermine the protective purpose of premises liability law.

CONCLUSION

Amicus curiae New Jersey Association for Justice respectfully urges this Honorable Court to affirm the Appellate Division's decision and reject Walmart's attempt to expand the ongoing storm rule into a blanket immunity. The exception recognized in Pareja applies where a commercial landowner's actions increase the risk of harm, even during a storm. That is precisely the jury question raised here, and the law, public policy, and model jury charge all support allowing it to proceed. Moreover, Walmart cannot escape liability by pointing to its contractor's dismissal, as its duty to maintain safe premises is nondelegable under New Jersey law.

Respectfully submitted,
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