A-65-24

HAYDEE GALLARDO,

Plaintiff/ Cross-Respondent,

v.

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/ Cross-Petitioner.

SUPREME COURT OF NEW JERSEY

Docket No.: 089466

BRIEF IN RESPONSE TO AMICUS CURIAE BRIEF

Appellate Division
Docket No.: A-2336-22

Sat Below:
Honorable Hany A. Mawla, J.A.D.
Honorable Robert M. Vinci, J.A.D.

SUPERIOR COURT
UNION COUNTY, LAW DIVISION,
Docket No: UNN-L-3524-16

Sat Below:
Honorable John G. Hudak, J.S.C.

BRIEF OF WALMART STORES EAST, L.P., i/p/a WALMART, WAL-MART STORES INC., and WAL-MART REAL ESTATE BUSINESS TRUST, IN RESPONSE TO THE AMICUS CURIAE BRIEF OF THE NEW JERSEY ASSOCIATION FOR JUSTICE

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RESPONSE ARGUMENT

Cross-Petitioner, Walmart Stores East, LP, submits this Brief in response to the Amicius Curiae Brief of the New Jersey Association for Justice (NJAJ). NJAJ fails to persuasively explain why the Supreme Court should create an exception to the ongoing storm rule for snow-removal operations that occur during a winter storm. Simply put, the rule of *Pareja v. Princeton Int'l Props.*, 246 N.J. 546 (2021), does not render a landowner liable when it or its contractors attempt to remove snow during a storm so that premises are safe a reasonable time after the storm ends. NJAJ also misunderstand the basis on which Cross-Respondent, Haydee Gallardo, attempted to hold Walmart liable in this case. Finally, NJAJ's position that landowners must either do nothing during a snowstorm, or actively remove snow and face potential liabiltiy, is a perverse rule that this Court should reject, as have most other jurisdictions.

I. Because landowners have no duty to remove snow during an ongoing storm, attempting to remove snow during an ongoing storm cannot constitute "unusual circumstances."

In *Pareja*, this Court reaffirmed the categorical rule that landowners have no duty to remove snow or ice during an ongoing winter storm, with two exceptions. *Pareja*, 246 N.J. at 558. "The premise of the rule is that it is categorically inexpedient and impractical to remove or reduce hazards from snow and ice while the precipitation is ongoing." *Ibid.* Further, the ongoing

storm rule has a long history in New Jersey. *Ibid.* (citing, among other cases, *Bodine v Goerke Co.*, 102 N.J.L. 642 (E. & A. 1926)).

NJAJ misreads *Pareja* and would have the "unusual circumstances" exception apply anytime a landowner acts to remove snow during (or possibly before) a storm. NJAJ incorrectly frames the issue as imposing liabiltiy on landowners that "choose to act during a storm." (NJAJb6.) But landowners who pretreat before a storm or begin to remove snow and ice during a storm do not act gratuitously. They do so to fulfil their duty to render safe premises "within a reasonable time after the storm." *Pareja*, 246 N.J. at 558. Waiting until a storm ends to remove snow will often create more danger to occupants on the land and thus more liabiltiy to landowners. In addition, waiting until the storm ends to perform snow removal may be unfeasible and impracticable.

If, as NJAJ urges, the unusual circumstances exception could punish landowners who engage in snow-removal activities before or during a storm, the exception would devour the rule. Properly interpreted, the ongoing storm doctrine provides landowners with the knowledge that they may remediate snow and ice during storms while knowing that their prudence will not expose them to liabiltiy for falls that happen during the storm. As the *Pareja* Court stated, landowners "do not have the absolute duty, and the impossible burden, to keep sidewalks on their property free from snow or ice during an ongoing

storm." *Pareja*, 246 N.J. at 557. Thus, it makes no sense to then impose liability on a landowner who tries to make its premises safe while snow still falls. Unmasked, NJAJ's argument attempts to resurrect that impossible duty foreclosed by *Pareja* by another means.

First, NJAJ improperly quotes the current *Model Jury Charge (Civil)* 5.20B (rev. Nov. 2022) as if thought were law. Model Jury Charges, however, "are not binding statements of law." *State v. O'Donnell*, 255 N.J. 60, 79 (2023). Walmart respects the volunteer committee's hard work in drafting model charges. Sometimes, though, mistakes are made, and this Court respectfully requests modifications and corrections. *See ibid.* Ironically, the Model Charges existing at the time of trial in this case did not accurately account for *Pareja*. In refusing to give a non-standard (but correct) charge, (Da69), the trial court erred, which is the grounds on which the Appellate Division reversed. (Da14.)

Second, NJAJ cites a purported "consensus among courts and practitioners" that landowners can be liable during a storm for negligent snow removal. (NJAJb12.) This consensus does not exist. Rather, a consensus exists—in the opposite direction. Jurisdictions that apply the ongoing storm doctrine, including those *Pareja* cited, overwhelmingly hold that allegedly

negligent snow removal during a storm is not an "unusual circumstance" making landowners liable for falls during the storm.

Start with Rhode Island, the state from which *Pareja* imported the term "unusual circumstances." *See Pareja*, 246 N.J. at 559 (quoting *Terry v. Cent. Auto Radiators, Inc.*, 732 A.2d 713, 717-18 (R.I. 1999)). Rhode Island rejects NJAJ's argument that negligent snow removal could vitiate the ongoing storm doctrine. *Berardis v. Louangxay*, 969 A.2d 1288, 1292-93 (R.I. 2009). The plaintiff in *Berardis*, like Ms. Gallardo, fell during a storm. Like Ms. Gallardo and NJAJ, the plaintiff argued that unusual circumstances existed because the defendant "had done some shoveling and had applied ice melt to the walkway, as well as periodically inspecting the premises, without thereafter removing further accumulation . . . ." *Ibid.* As this Court should, the Rhode Island Supreme Court held that the allegedly negligent snow removal did not constitute an "unusual circumstance." "The mere fact that the defendant's manager undertook the task of shoveling and applying ice melt earlier in the day did not increase the risk created by a continuing storm." *Ibid.*

Next, consider Delaware. *See Pareja*, 246 N.J. at 588 (citing *Laine v. Speedway, LLC*, 177 A.3d 1227 (Del. 2018)). Delaware landowners also cannot be liable for falls during a snowstorm—even if the landowners actively try to remove snow:

> Landowners should not fear legal liability for not clearing every inch of their property during an all-day snowstorm if they attempt to clear some public areas of snow during a snowfall. *To hold otherwise would be a disincentive to vigilant efforts by landowners to monitor and clear snow during snowstorms*. Every landowner would choose to wait out a snowstorm rather than clear a path for fear of legal jeopardy. Such a fear would be a grave detriment to the public.
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> * * *
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> Since it continued to snow all day, [the defendant] was entitled to await the end of the snowfall and a reasonable time afterwards before undertaking make its property reasonably safe by clearing it of snow and ice. The fact that [the defendant] may have removed some snow before the snowfall ended is of no consequence.

Kovach v. Brandywine Innkeepers, Ltd. P'ship, No. 98C-01-232 JEB, 2001 WL 1198944, 2001 Del. Super. LEXIS 373, at *7, *8 (Oct. 1, 2001) (emphasis added), *quoted in Laine*, 177 A.3d at 1232 n.18.

Next, turn to Connecticut. *Pareja*, 246 N.J. at 558 (citing *Kraus v. Newton*, 558 A.2d 240, 243 (Conn. 1989)). That state's courts have expounded on the meaning of "unusual circumstances," but Walmart has found no Connecticut case holding that allegedly negligent snow removal is an "unusual circumstance." *See Sinert v. Olympia & York Dev. Co.*, 664 A.2d 791, 793 (Conn. App. 1995) (defendant's status as commercial landowner was not an "unusual circumstance"); *Cooks v. O'Brien Props.*, 710 A.2d 788, 793 (Conn. App. 1998) (lack of alternate exit plus slackening precipitation could constitute "unusual circumstance"); *cf. Cafarelli v. First Nat'l Supermkts., Inc.*, 741 A.2d

1010, 1013-14 (Conn. Super. 1999) (criticizing *Cooks* and limiting it to its facts).

Continue to New York. *See Pareja*, 246 N.J. at 558 (citing *Solazzo v. N.Y. Transit Author.*, 843 N.E.2d 748 (N.Y. 2005)). New York's storm-in-progress rule is the *only* rule that approaches NJAJ's position, but it still falls short. New York permits liabiltiy once a landowner "elects to engage in snow removal," but merely failing to remove all snow and ice, without more, cannot establish that a defendant increased the risk of harm. *Balagyozyan v. Fed. Realty Ltd. P'ship*, 142 N.Y.S.3d 77, 79-80 (App. Div. 2021). In this case, Ms. Gallardo's theory of liabiltiy rested on the snow-removal contractor's failure to shovel or plow the parking lot before it applied deicing material. And New York's rule is contrary to longstanding New Jersey law, under which a landowner's acts in removing snow introduces no new element of danger, because not removing snow would make walking surfaces "equally, if not more dangerous[,] to pedestrians . . . ." *Taggart v. Bouldin*, 111 N.J.L. 464, 467 (E. & A. 1933).

Lastly, consider Pennsylvania. *See Pareja*, 246 N.J. at 258 (citing *Goodman v. Corn Exch. Nat'l Bank & Tr. Co.*, 200 A. 642 (Pa. 1938)). Pennsylvania courts apply a unique doctrine called "hills and ridges," which requires a plaintiff to prove certain elements to recover for all slips and falls

on snow and ice. *Collins v. Phila. Suburb. Dev. Corp.*, 179 A.3d 69, 74 (Pa. Super. 2018). Pennsylvania courts generally reject arguments that landowners could be liable for slips and falls during storms for allegedly negligent snow removal. *Id.* at 76 (no liabiltiy for failing to pretreat); *see also Hedglin v. Church of St. Paul*, 158 N.W.2d 269, 272 (Minn. 1968) ("fact that the possessor may have attempted to take corrective measures during the storm's progress" does not vitiate ongoing storm doctrine); *Woods v. Sing Szechuan Rest., LLC*, 913 S.E.2d 341, 348 (Va. App. 2025) (holding that melting and refreezing snow was not an artificial condition for which landowner could be liable).

This case law from the other jurisdictions on which *Pareja* relied eviscerates NJAJ's position. Simply put, a landowner need not remove snow during a snowstorm. If the landowner nonetheless tries to remove snow during the storm, it still cannot be liable until a reasonable time after the storm ends. The Court should reject NJAJ's argument to the contrary.

II. A landowner cannot be liable for the acts or omissions of an exonerated snow-removal contractor.

Other than rehashing a landowner's duty, NJAJ offers no persuasive reason why Ms. Gallardo could hold Walmart liable for its "conduct" in hiring Land Pros of New Jersey, LLC, to remove snow and ice from Walmart's premises. As NJAJ concedes, Ms. Gallardo claimed that Land Pros made the

parking lot more dangerous by not plowing slush before applying deicing material. (Da41.) But Land Pros received summary judgment, and Walmart cannot be held liable for the conduct of an exonerated party. NJAJ's vague references to Walmart's "conduct" raise the question of what conduct was at issue. The record shows that Walmart's conduct was entirely derivative of Land Pros's conduct. In denying Walmart's post-trial motion for judgment notwithstanding the verdict, the trial court cited Land Pros' conduct in applying deicing material but not removing sleet and snow as it was falling onto the parking lot. (Da69.) While the trial court determined that *Pareja* did not apply (Da68), first Ms. Gallardo, and now NJAJ, merely repackage that claim as an exception to *Pareja*.

Setting aside the ongoing storm rule, NJAJ's argument would require the Court to ignore the grant of summary judgment for Land Pros unchallenged beyond the trial court. NJAJ concedes that Ms. Gallardo theorized that Walmart was negligent "through its contractor" in applying salt to actively falling snow without shoveling or removing accumulated precipitation. (NJAJb2.) No party disputes, however, that only Land Pros engaged in snow-removal operations in the parking lot where Ms. Gallardo's incident happened.

NJAJ ignores the logical hole in its argument by claiming that Land Pros was granted summary judgment based on the lack of an "independent duty to

remove snow or ice during the storm." (NJAJb10 (emphasis removed).) The word "independent" appears nowhere in the trial court's opinion. (*See* Da27-34.) Rather, the trial court rejected the same theory that Ms. Gallardo later used at trial against Walmart: that Land Pros' use of rock salt "may have created a dangerous condition in the parking lot." (Da32.) If Land Pros had no duty to remove snow, then how could Walmart have a duty? If Land Pros could not be liable under the theory that it "created" the slush in the parking lot, then how could Walmart be liable?

Walmart recognizes that New Jersey landowners owe certain nondelegable duties to persons on their land. But, when landowners employ independent snow-removal contractors—a ubiquitous practice—and those snow-removal contractors are exonerated from liability, the landowners cannot be held liable on the *same* facts based on the *same* legal theories.

NJAJ's argument about the negligent buck-passing landowner is a red herring. Ms. Gallardo claimed that Walmart and Land Pros were at fault, a common occurrence in winter-weather slip-and-fall cases. *See, e.g.*, *Pareja*, 246 N.J. at 551 (plaintiff sued the landowner and later joined the snow-removal contractor); *Qian v. Toll Bros., Inc.*, 223 N.J. 124, 130-31 (2015) (plaintiffs sued, among other parties, landowner and snow-removal contractor). Ms. Gallardo's claims against Land Pros failed. Because her claims against

Walmart were derivative of Land Pros' conduct, those claims should have failed, too.

On the other hand, if landowners retain snow-removal contractors who perform their duties negligently (and the ongoing storm rule does not otherwise apply), those landowners cannot escape liability by blaming the contractors. The landowners will still be on the hook. *See Vasquez v. Mansol Realty Assocs.*, 280 N.J. Super. 234, 238 (App. Div. 1995) (holding that commercial landowner is liable to third party injured as result of negligent snow removal by commercial tenant). But this hypothetical situation requires a negligent snow-removal contractor whose negligence injures a person on the land. Land Pros was not negligent. So neither could Walmart be negligent.

III. NJAJ's position would perversely punish prudent landowners and result in less safety.

Walmart agrees, in part, with NJAJ that the law should encourage safe snow removal. NJAJ's argument, however, would make premises *less* safe, and it would resurrect the "impossible burden" that *Pareja* buried. *Pareja*, 246 N.J. at 557.

Under NJAJ's theory, landowners who do anything before or during a storm must defend their actions in court. This concept is exactly what *Pareja* sought to avoid. *See id.* at 557-58. Permitting liability against landowners who pretreat or try to remove snow during a storm will prompt landowners to do

nothing. Worse, it will place landowners in a Catch-22. Do something before or during the storm, and face liabiltiy for likely slips and falls during the storm. Or, do nothing, and face liability for slips and falls a reasonable time after the storm when it is impossible to remove snow and ice in time. It would be both nonsensical and perverse to immunize the landowner who does nothing while punishing the prudent one who works to remediate snow and ice as best as possible before and during the storm.

The Court of Errors and Appeals long ago unanimously rejected NJAJ's illogical contention:

> [T]o hold a property owner answerable in damages, for injuries received because an effort is made to keep the sidewalk clear and to reduce the danger to pedestrians, would result in a hardship and an injustice

Taggart, 111 N.J.L. at 467. This Court reaffirmed that principle 34 years later, when it unanimously reversed a conflicting decision by the Appellate Division, which had held that a landowner created a new element of danger by shoveling snow and piling it on the sides of a sidewalk. *Foley v. Urich*, 50 N.J. 426 (1967), *rev'g per curiam* 94 N.J. Super. 410 (App. Div. 1967). The dissenting judge in the Appellate Division found no basis to hold a landowner liable for such conduct, failing to salt a shoveled sidewalk, or doing so improperly. *Foley*, 94 N.J. Super. at 425-26 (Kolovsky, J.A.D., dissenting).

* * *

This Court may reverse the Appellate Division by answering "yes" to either question on which it granted certification. The ongoing storm doctrine does not punish landowners who try to remove snow and ice during a storm even though ensuring a safe premises may not be possible until a reasonable time after the storm ends. And though a landowner has a nondelegable duty to ensure safe premises, it cannot be held derivatively liable for the conduct of an exonerated snow-removal contractor.

Conclusion

The Supreme Court should reverse the Appellate Division and remand with directions to enter judgment for Walmart and against Ms. Gallardo.

Respectfully submitted,

Dated: September 17, 2025

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