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HAYDEE GALLARDO,

Plaintiff/ Petitioner,

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/ Respondents.

SUPREME COURT OF NEW JERSEY

Docket No.: 089466

CROSS-PETITION FOR CERTIFICATION

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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.

CROSS-PETITION FOR CERTIFICATION OF WALMART STORES EAST, L.P., i/p/a WALMART, WAL-MART STORES INC., and WAL-MART REAL ESTATE BUSINESS TRUST

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OF NEW JERSEY

Submitted: June 6, 2024

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Statement of the Matter Involved

In *Pareja v. Princeton Int'l Props.*, 246 N.J. 546, 548-49 (2021), this Court held that commercial landowners owe no duty to remove snow and ice from their premises until a reasonable time after a winter storm ends. That general rule is subject to two limited exceptions for "unusual circumstances": if (1) landowners affirmatively heightened the risk of injury; or (2) the hazard existed before the storm. *Id.* at 558-59. This case presents the Court with an opportunity to clarify the first exception. It also presents this Court with an opportunity to address whether landowners may be held liable for the acts of their contractors if those contractors are dismissed on summary judgment.

In this premises-liability case, Petitioner/Cross-Respondent, Haydee Gallardo sued Respondent/Cross-Petitioner, Walmart Stores East, L.P., for money damages after she slipped and fell on slushy, icy snow in the parking lot of a Walmart store. Everyone agrees that Ms. Gallardo fell during an ongoing winter storm. In fact, Ms. Gallardo's own meteorological expert testified that a wintry mix of snow, sleet, and rain began to fall several hours before Ms. Gallardo's accident, and continued throughout that day. (Da7-8.) Yet, at Ms. Gallardo's urging, the trial court refused to apply the ongoing storm doctrine or instruct the jury on it. Ms. Gallardo argued that Walmart was liable because its snow-removal contractor, Land Pros of New Jersey, LLC, failed to pretreat

the parking lot before the storm, and because Land Pros spread salt during the storm, thus allegedly turning the falling snow, ice, and rain into slush. The trial court granted Land Pros's motion for summary judgment, but it denied several summary-judgment motions filed by Walmart (*see* Da35-45), and Walmart's motion for a directed verdict at trial (Da46-59). Walmart appealed after a jury returned a verdict in Ms. Gallardo's favor and the trial court denied post-trial relief. (*See* Da60-70.)

The Appellate Division vacated the judgment, and correctly held that the trial court's failure to instruct on the ongoing storm doctrine was reversible error. (Da19.) It erred, though, by remanding for a new trial rather than requiring entry of judgment in Walmart's favor. The Appellate Division made two errors in not granting that stronger relief for Walmart, both relating to Ms. Gallardo's contention that Land Pros made the parking lot more dangerous.

First, the Appellate Division erred by ruling that spreading salt in a parking lot during a snowstorm could constitute an "unusual circumstance" triggering the first exception to *Pareja*'s no-duty rule. (Da17.) Using ordinary methods to remove snow during a storm, like spreading salt on the ground, does not qualify as "unusual" for purposes of the exception. And expanding the exception to encompass things like that would create perverse incentives and eviscerate *Pareja*'s principal holding, as shown below.

Second, the Appellate Division erred in ruling that a "genuine dispute" existed over whether Walmart—through Land Pros's conduct—made the parking lot more dangerous. (Da17.) The trial court already determined that Land Pros could *not* be liable. (Da25-34.) Therefore, Walmart could not be liable for what Land Pros did.

These errors are not case-specific. They implicate issues of general public importance. The scope of the ongoing storm doctrine and its exceptions is a question of general importance that will recur in future cases until the Court reaffirms what it held in *Pareja*. *See R.* 2:12-4. The scope of a landowner's liability for actions of its contractors is similarly important and likely to recur. *See id.* This Court should grant certification to address these two important legal issues.

Questions Presented

Walmart requests certification of these questions:

1. Do ordinary snow-removal operations, like the spreading of salt, performed during a storm fall within the main holding of *Pareja* rather than the "unusual-circumstances" exception to *Pareja*'s no-duty rule?
2. In a premises-liability case, does a grant of summary judgment for a contractor require judgment for the landowner when the claim of liability against the landlord relies on the same acts by the contractor?

The Supreme Court should grant certification, and answer each question, "yes."

Errors Complained Of

I. The Appellate Division erred in holding that a landowner's performance of normal snow-removal operations during an ongoing storm could be "unusual circumstances" satisfying an exception to the ongoing storm doctrine.

In *Pareja*, the Court synthesized its prior cases about landowner liability for slips and falls on snow and ice, and expressly adopted the ongoing storm doctrine. The Court held that, "absent *unusual circumstances*, a commercial landowner's duty to remove snow and ice hazards arises not during the storm, but rather within a reasonable time after the storm." *Pareja*, 246 N.J. at 558 (emphasis added) (citing *Qian v. Toll Bros.*, *223* N.J. 125, 135 (2015); *Mirza v. Filmore Corp.*, 92 N.J. 390, 395-96 (1983), *Stewart v. 104 Wallace ST., Inc.*, 87 N.J. 146, 157 (1981), and *Bodine v. Goerke Co.*, 102 N.J.L. 642, 644 (E. & A. 1926)).

For this first exception (the only one at issue in this case), the *Pareja* Court held that "unusual circumstances" that increase the risk of harm to persons on the land may give rise to a duty before cessation of snowfall. *Id.* at 558-59. As an example, the Court cited *Terry v. Cent. Auto Radiators, Inc.*, 732 A.2d 713, 717-18 (R.I. 1999). The defendant in *Terry*, an auto repair shop, parked the plaintiff customer's car at the far end of the parking lot, forcing her

to traverse a longer, treacherous, icy path to retrieve her car. *Terry*, 732 A.2d at 717-18.

The plain language of the Court's holding in *Pareja*—unusual circumstances—requires something out of the ordinary that increases risk to invitees. *Unusual* circumstances are, of course, "[n]ot usual, common, or ordinary." Am. Heritage Dictionary 1901 (5th ed. 2018). Shoveling, or spreading salt or anti-skid material during a storm are not "unusual circumstances." Such activities are common, ordinary, and expected.

The Appellate Division's construction of the unusual-circumstances exception not only misapplies *Pareja*, but does so in a manner that creates seriously misplaced incentives. Under the Appellate Division's theory, commercial landowners could be held liable to invitees by taking ordinary remedial measures during a snowstorm, but *not* if they do nothing and wait for the storm to end. Thus, the decision below would, if permitted to stand, encourage landowners not to shovel snow, spread salt, or take similar ordinary measures to protect invitees. The Court should grant review to make clear that landowners need not refrain from taking such routine measures to benefit from the *Pareja* rule.

There is no basis in the law or common sense to hold that a landowner who does nothing at all during a winter storm is immune from liability but that

a landowner who proactively works to remove the hazard exposes itself to liability based on an after-the-fact argument that it should have done so differently. As the Court of Errors and Appeals recognized long ago, "to 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 v. Bouldin*, 111 N.J.L. 464, 467 (E. & A. 1933).

Case law from other ongoing-storm jurisdictions shows that the limited exceptions to the general rule are for just that: *unusual* circumstances:

- Repair shop parked the plaintiff/customer's car at far end of parking lot, forcing her to traverse icy parking lot. *Terry*, 723 A.2d at 714-15.
- Lack of other ways to exit an apartment building could constitute "unusual circumstances." *Cooks v. O'Brien Props.*, 710 A.2d 788, 792 (Conn. App. 1998).

Conversely, it is clear that attempting to remove snow or ice during a storm does not constitute an "unusual circumstance." *Berardis v. Louangxay*, 969 A.2d 1288, 1293 (R.I. 2009) (distinguishing *Terry*, and holding that "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."); *see also Allen v. Sitrin*, Nos. 2021-320 & 321, --- A.3d ---, ---, 2024 R.I. LEXIS 48, at *13 (May 23, 2024) ("[W]e have rejected the argument that unusual circumstances were present by virtue of a business invitor's failure to take action that would have made traveling during a storm safer."), *reproduced at* Da79.[1] This is so, because principles of "public policy . . . encourage any clearing or other efforts during a storm," and thus do not abrogate the landowner's entitlement to the protection of the ongoing storm doctrine. *See Morris v. Theta Vest, Inc.*, No. 08C-06-030, 2009 WL 693253, 2009 Del. Super. LEXIS 91, at *6 (Mar. 10, 2009), *aff'd mem.*, 977 A.2d 899 (Del. 2009).

This Court should grant certification and clarify that *Pareja*'s limited exceptions do not impose liability for ordinary snow-removal operations like spreading salt during a storm.

II. The Appellate Division erred by holding that Walmart could be held liable for the acts of Land Pros, which was dismissed on summary judgment.

In New Jersey, landowners owe a nondelegable duty to ensure a safe premises for invitees on that premises. *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 441 (1993). This principle means that—if a duty exists—a landowner cannot avoid it by hiring contractors. *Id.* at 441-42. Thus, the possibility that a

[1] Because *Allen* is not yet available in the Atlantic Reporter, a copy of the decision is appended. (*See* Da71.)

contractor may have been negligent does not relieve the landowner of its legal duty. In essence, landowners are vicariously liable in tort for their contractors' acts. *See Port Author. of N.Y. & N.J. v. Honeywell Prot. Servs., Honeywell, Inc.*, 222 N.J. Super. 11, 22 (App. Div. 1987) (landowner's nondelegable duty to invitees could render it vicariously liable for its contractor's actions).

As a first principle, granting summary judgment to a defendant under *R.* 4:46-2 exonerates that defendant from liability to the plaintiff. A trial court may grant summary judgment where no genuine issues of triable fact exist and when the evidence is "so one-sided that one party must prevail as a matter of law." *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995) (quotation omitted). A genuine issue of fact exists only if the evidence, together with all inferences construed in favor of the nonmoving party, would require resolution by a factfinder. *See R.* 4:46-2(c).

A related concept flows from that principle. In some instances, one party is automatically liable for the acts of the other, including master-servant situations and nondelegable duties. In such situations, exonerating the agent necessarily exonerates the principal. *See Dalton v. St. Luke's Cath. Church*, 27 N.J. 22, 27 (1958), *superseded by statute on other grounds*, N.J.S.A. § 2A:53A-7 – 11. Restated, if a master and servant are sued jointly based on the servant's tortious conduct and the servant is acquitted, "there can be no

verdict against the master." *Batts v. Joseph Newman, Inc.*, 3 N.J. 503, 509 (1950). The master could be liable only for its independent negligence. *See id.*

In dismissing Land Pros from the case, the trial court ruled that Land Pros had no duty to remove snow or ice "until after the storm ended." (Da32.) Ms. Gallardo had opposed Land Pros's summary-judgment motion by relying on her liability expert's opinion that Land Pros created a dangerous condition in the Walmart parking lot by applying rock salt. She used this same expert testimony at trial to prove her case against Walmart. (Da8-9, Da19.)

While Walmart could, in appropriate circumstances, be liable for Land Pros conduct, the converse is also true. If Land Pros—as the trial court found—is not liable, then Walmart also cannot be liable for the same conduct by Land Pros. Were a new trial to occur, a jury could not find as a matter of fact that Walmart is liable for Land Pros's conduct. (*Cf.* Da17.) The trial court already determined that Land Pros is not liable as a matter of law. (Da25-26.) Permitting Ms. Gallardo to hold Walmart liable for Land Pros's conduct would permit her to undo the grant of summary judgment to Land Pros.

* * *

The Appellate Division correctly vacated the judgment, but it should have reversed and remanded for entry of judgment in Walmart's favor. This

Court should grant certification to address the issues of general public importance implicated by the Appellate Division's holding.

Reasons Why Certification Should Be Allowed

Walmart's Petition meets the criteria to grant certification under *R.* 2:12-4. The issues presented are novel and of general public importance.

I. The scope of the exceptions to the ongoing storm doctrine is an issue of general public importance.

This Court made clear in *Pareja* that the ongoing storm doctrine immunizes landowners from liability for outdoor accidents that happen during storms unless the landowner does something unusual to create a hazard. This Court relied on case law from other jurisdictions in generally defining those exceptions. *See Pareja*, 246 N.J. at 558-59 (discussing *Terry*). This case presents the Court with the opportunity to correct an erroneous expansion of this exception.

First, no party disputes that Ms. Gallardo slipped and fell during a winter storm. Thus, the case plainly implicated *Pareja*'s general rule, and Ms. Gallardo could hold Walmart liable only were she to show that "unusual circumstances" existed. So the case presents a clean factual slate.

Second, clarification of the exception is important to all commercial landowners in New Jersey. The entire State is in a temperate climate zone, so it receives snow, sleet, and ice storms every winter. All New Jersey landowners

need guidance on the legal rules that apply to liability for falls on snow and ice. They must know how to structure their business operations so they can ensure the safety of invitees and protect themselves from liability, including the liability for the impossible burden of clearing snow and ice while it falls. *Pareja*, 246 N.J. at 557.

Third, the decision below undermines the *Pareja* Court's holding. The Appellate Division effectively revives its rejected reasonableness rule from that case. The Appellate Division's decision here would permit liability on the part of landowners for taking ordinary acts to remove snow during a storm. A plaintiff in such a case can always claim that the landowner should have pretreated, or not; should have shoveled more, or not; or should have spread more deicing material, less deicing material, different deicing material, or none. At bottom, the Appellate Division's decision to permit a jury to decide whether the in-storm snow-removal operations of Land Pros "made the parking lot more dangerous" is a different route to reach the same destination as the overruled holding of *Pareja*: "We hold that a commercial landowner has a duty to take reasonable steps to render a public walkway abutting its property—covered by snow or ice—reasonably safe, even when precipitation is falling." *Pareja*, 463 N.J. Super. 231, 251 (App. Div. 2020), *rev'd*, 246 N.J. 546. And it

would create the perverse incentive for landowners to take no action to clear precipitation during a storm for fear of losing the protection of *Pareja*.

For all these reasons, Walmart's first question presented raises an issue of general public importance that this Court should resolve.

II. Clarifying landowners' liability for their contractors' actions when those contractors are dismissed from a lawsuit presents an issue of general public importance.

Landowners generally have a duty to use reasonable care to protect their invitees against known or reasonably discoverable dangers. They commonly retain contractors with special expertise and equipment to carry out those responsibilities. This Court has never, to Walmart's knowledge, clarified that, when a contractor is granted judgment on the ground that there is no triable question of fact as to its own liability, the landowner cannot, by parity of reasoning, be held liable for the same conduct. The trial court's grant of summary judgment to Land Pros, but not Walmart, was internally inconsistent, and permitted liability to be imposed based on conduct that the trial court had already found insufficient to support liability. This scenario certainly is capable of repetition in other cases. *Cf. Pareja*, 246 N.J. at 551 (treating differently the snow removal contractor and landowner based on the plaintiff's non-opposition to former's motion for summary judgment).

Landowners also hire contractors for other things, like construction and maintenance. It is important to clarify landowners' potential premises liability when a court dismisses claims against the contractor. As with Walmart's first question presented, this second question is an unresolved legal issue of general public importance.

Comments With Respect to the Appellate Division Opinion

As shown above, the Appellate Division erred in not remanding for judgment in Walmart's favor. Both issues which Walmart raises in this Cross-Petition have their genesis in the following passage of the Appellate Division's decision:

> Here, there was a genuine dispute whether Walmart's conduct, through it contractor Land Pros, made the parking lot more dangerous on the day of the accident. Under Pareja, and the facts of this case, the question of whether spreading salt on snow during the storm was an unusual circumstances increasing or exacerbating the risk to the plaintiff was disputed and was for the jury to decide.

(Da17.)

As for Walmart's first issue, the Appellate Division cited no authority that the normal activity of spreading salt during a snowstorm could constitute unusual circumstances. No such New Jersey authority exists, providing ample reason to grant certification. Walmart also argued that permitting normal snow-removal operations to trigger an exception to *Pareja* would be unsound, create perverse incentives, and could lead to the exception swallowing the rule.

Second, by trial, no disputed facts existed as to Land Pros was negligent in performing snow-removal operations. The trial court's earlier grant of summary judgment to Land Pros removed that issue from the jury's consideration. Permitting a jury to hold Walmart liable for Land Pros's actions would contravene the law-of-the-case doctrine, which is "intended to prevent relitigation of a previously resolved issue." *Lombardi v. Masso*, 207 N.J. 517, 538 (2011) (law of the case did not apply when trial court was reconsidering its own interlocutory ruling).[2] Ms. Gallardo improperly used trial to relitigate Land Pros's liability and then blame Walmart for Land Pros's actions. Allowing Ms. Gallardo to repeat this procedure at a retrial would be erroneous. Because this Court has not issued any recent decisions on a landowner's nondelegable duty *vis-à-vis* its contractors, the Court should grant certification to provide clarification.

Conclusion and Certification

The Supreme Court should grant Walmart's Cross-Petition for Certification. Counsel certifies that this Cross-Petition presents a substantial question, and is filed in good faith and not for purposes of delay.

[2] The trial court denied Ms. Gallardo's pretrial motion to reconsider the dismissal of Land Pros. Ms. Gallardo did not appeal that ruling.

Respectfully submitted,

Dated: June 6, 2024

FOWLER, HIRTZEL, MCNULTY & SPAULDING, LLC

By: */s/ Matthew D. Vodzak*

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Certification of Service

Pursuant to *R.* 1:5-3, I am the attorney for Respondent/Cross-Petitioner, Walmart Stores East, L.P., and I certify that the following counsel were served via first-class mail:

Paul K. Caliendo, Esquire
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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: June 6, 2024

FOWLER, HIRTZEL, MCNULTY & SPAULDING, LLC

By: */s/ Matthew D. Vodzak*

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