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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

**REPLY BRIEF IN SUPPORT OF  
CROSS-PETITION FOR  
CERTIFICATION**

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.

**FILED**

SEP 13 2024

*Heather J. Baker*  
CLERK

**REPLY BRIEF IN SUPPORT OF THE 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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**RECEIVED**

SEP 13 2024

SUPREME COURT  
OF NEW JERSEY

Submitted: September 12, 2024

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### **Reply Argument**

The Response<sup>1</sup> of Petitioner/Cross-Respondent, Haydee Gallardo, to Respondent/Cross-Petitioner, Walmart Stores East, LP's, Cross-Petition offers no meritorious reason why the Court should deny certification. In fact, her arguments support granting review. Walmart seeks review of two issues of general, statewide importance. One involves the scope of the first exception to the ongoing storm doctrine enunciated in *Pareja v. Princeton Int'l Props.*, 246 N.J. 546 (2021). That limited exception applies in "unusual circumstances" when a landowner affirmatively heightens the risk of injury to business invitees. *Id.* at 558-59. The other issue involves commercial landowners' duties to invitees when those landowners employ snow removal contractors.

These issues are unsettled. Because no New Jersey appellate authority explains the scope of *Pareja*'s exceptions in this recurring area, both parties discuss out-of-state cases. (See Db4-7 (citing cases from Connecticut, Delaware, and Rhode Island); Pb2, 4-5.) Ms. Gallardo also improperly cites a jury charge as though it were substantive law. Yet, in the end, Ms. Gallardo has no answer to Walmart's showing that her reading of the unusual-circumstances exception would swallow the rule of the ongoing storm doctrine.

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<sup>1</sup> Ms. Gallardo's motion for leave to file a response to Walmart's Cross-Petition out of time is pending with the Court.

Also, the need to clarify *Pareja*'s exception extends far beyond this individual case. New Jersey is home to innumerable commercial landowners, businessowners, and contractors. All need to know their legal duties when inclement weather inevitably occurs. Wintry weather is a natural occurrence. It is not always possible to eliminate all risks from snow and ice on premises during winter storms. Businesses like Walmart need to know what duties they owe to business invitees so that they can best ensure safety and comply with the law. And in litigation arising from slips and falls on snow and ice, business owners need to know the legal rules that apply when their specialized snow-removal contractors are exonerated from liability, as was the case here.

**I. The lack of New Jersey authority interpreting the “unusual circumstances” exception to the ongoing storm doctrine supports granting certification.**

*Pareja* establishes a general rule of no liability, unless the landowner does something “unusual” to create a hazard or because a preexisting danger exists. *Pareja*, 246 N.J. at 559-60. In setting forth a general no-duty rule, the *Pareja* Court considered out-of-state authority when discussing those two exceptions. *See id.* at 558-59. *Pareja* itself did not need to explain the full scope of the exceptions, because they were not at issue. *See id.* at 559-60. The first exception (unusual circumstances that increase the risk of harm),

however, is at issue in this case. The Appellate Division's decision erroneously expands that exception.

The Appellate Division appropriately acknowledged *Pareja*'s general rule, but it went astray in determining that unusual circumstances exception might apply here at a retrial. Ms. Gallardo perpetuates that mistake by misinterpreting *Pareja*. She denigrates Walmart's use of the term "unusual circumstances" in this context. (Pb2.) But "unusual circumstances" is not Walmart's phrasing. It is the Court's. The *Pareja* decision uses that phrase seven times. *See, e.g., Pareja*, 246 N.J. at 559 ("Princeton International owes *Pareja* a duty only in unusual circumstances, none of which we find here."). The *Pareja* Court's opinion specifies that the exceptions to the ongoing storm doctrine apply only in unusual, uncommon, or extraordinary situations. Otherwise, courts could allow the exceptions to swallow the rule—as Ms. Gallardo's response demonstrates. For instance, Ms. Gallardo claims that an owner may be liable if its "acts/omissions increased the risk" to invitees. (*See* Pb3.) Yet, this "exception" would turn the ongoing storm doctrine on its head, because the doctrine permits a landowner to wait until a reasonable time after a storm ends to clear snow and ice.

Ms. Gallardo's comparison of the Good Samaritan Act, N.J.S.A. § 2A:62A-1, to *Pareja* also supports granting certification. Contrary to Ms.

Gallardo's representation, the Good Samaritan Act does not permit imposition of liability upon someone who voluntarily, but negligently, renders first aid or emergency aid. It requires the opposite by immunizing the Good Samaritan. Ms. Gallardo cites cases stating the common-law rule that the Legislature abrogated. *See Velazquez ex rel. Velazquez v. Jiminez*, 172 N.J. 240, 248 (2002), *abrogated in part by statute*, N.J.S.A. § 2A:62A-1.3; *see also Podias v. Mairs*, 394 N.J. Super. 338, 347 & n.1 (App. Div. 2007) ("This feature of the common law rule has been abrogated by statute."); *Praet v. Borough of Sayreville*, 218 N.J. Super. 218, 223 (App. Div. 1987) ("clear" purpose of Good Samaritan Act was to abrogate common-law rule), *abrogated by statute*, N.J.S.A. § 2A:62A-1.1. Walmart has argued that the unusual-circumstances exception should operate similar to the Good Samaritan Act: a commercial landowner, under no duty to remove snow or ice during a winter storm, should not be liable for voluntarily undertaking ordinary snow removal efforts during the storm. Such an undertaking is, in many instances, necessary to make safe a premises a reasonable time after a storm ends.

The Appellate Division unfortunately gave credence to an argument that Walmart could be liable during an ongoing storm for the ordinary—and common—actions of its snow-removal contractor, Land Pros of New Jersey, LLC, which had spread deicing salt on surfaces. As Walmart explained in its

principal Brief, the Appellate Division misconstrued the unusual-circumstances exception in a way that misapplies *Pareja* and creates misplaced incentives. (Db5.)

Continuing, Ms. Gallardo claims that the Model Civil Jury Charges “codified” the exceptions to *Pareja*. Not so. Model jury charges lack the force of substantive law. Rather, they are a “framework” for trial courts to build a set of jury instructions. *See New Jersey Courts, Model Civil Jury Charges*, <https://www.njcourts.gov/model-civil-jury-charges#toc-committee-on-model-civil-jury-charges> (Sept. 4, 2024). Indeed, the Supreme Court “does not sanction or approve the model charges before publication by the Committee [on Model Civil Jury Charges], although the Court does sometimes comment on the sufficiency of a charge in a particular case.” *Id.* Despite the Committee’s best efforts, model charges sometimes must be modified to accurately state the law. *See, e.g., Morlino v. Med. Ctr.*, 152 N.J. 563, 590 (1998) (remanding Model Charge 5.36(a) to the Committee for rewording).. Ironically, the trial court here adhered to then-existing model charges at Ms. Gallardo’s urging. Those model charges did not yet account for the ongoing storm doctrine, which is why the Appellate Division vacated and remanded. (Da19 (“The trial judge should have instructed the jury on the ongoing storm doctrine.”).)



Ms. Gallardo's improper use of a jury charge to support her misstatements about the ongoing storm doctrine also supports granting certification to clarify the doctrine's exceptions. Respectfully, the jury charges cannot stand in for positive legal pronouncements from this Court. And if Model Civil Jury Charge 5.20B(B)(2)(b) is unclear or does not accurately state the unusual circumstances exception, this Court should grant certification to provide clarity.

Finally, Ms. Gallardo's discussion of out-of-state authority to argue over the breadth of the ongoing storm doctrine's exceptions supports granting certification. By necessity, Ms. Gallardo cites no binding New Jersey appellate authority discussing the exceptions, because none exists. This case presents the Court with an opportunity to clarify the ongoing storm doctrine's "unusual circumstances" exception.

**II. The Court should grant certification to clarify landowners' duties when a plaintiff seeks to hold a landowner derivatively liable for the actions of an exonerated contractor.**

Walmart's second issue concerns the disconnect between the dismissal of Land Pros on summary judgment and Ms. Gallardo's attempts to hold Walmart liable for Land Pros's actions even though the trial court exonerated Land Pros from any liability. (*See* Pb13-14 (insisting that Walmart could be liable for negligently hiring Land Pros, or for "the acts of Land Pros")). Ms. Gallardo's

discussion elides this issue by misstating the procedural history and misunderstanding the law-of-the-case doctrine.

The trial court granted Land Pros' motion for summary judgment before this Court handed down *Pareja*.<sup>2</sup> The trial court denied Walmart's motions for summary judgment both pre- and post-*Pareja*. At trial, even though Land Pros had been dismissed, Ms. Gallardo chiefly sought to hold Walmart liable for Land Pros's actions. The trial court incorrectly accepted Ms. Gallardo's theory. (See Da69.) So did the Appellate Division. (See Da17.)

As Walmart acknowledged in its principal Brief, landowners have a non-delegable duty to ensure a safe premises for invitees on that premises. (Db7 (citing *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 441 (1993).) Restated, landowners cannot delegate that duty. If they do, landowners remain liable for their contractors' actions (*if* a relevant duty exists).

This Court, however, has never determined whether this nondelegable duty permits a plaintiff to hold a landowner liable for the *non-negligent* acts of its contractor. Can a landowner be vicariously liable or directly liable for a

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<sup>2</sup> After the trial court denied her motion to reconsider, Ms. Gallardo raised no further challenges to Land Pros's dismissal. She did not file a protective cross appeal following entry of judgment in the trial court, and she did not argue in the Appellate Division that the trial court erroneously dismissed Land Pros.

contractor whose actions are found to be non-negligent? The answer is no, and this Court should grant certification to make this common-sense principle clear.

As a corollary, non-delegable-duty cases have rarely discussed landowners potential liability to third parties when they *do* retain specialized contractors to perform functions like snow and ice removal. *Cf. Shields v. Ramslee Motors*, 240 N.J. 479 (2020) (holding that landlord out of possession did not have non-delegable duty to clear snow and ice from driveway); *Vasquez v. Mansol Realty Assocs., Inc.*, 280 N.J. Super. 234 (App. Div. 1995) (holding that landlord could not delegate to tenant duty to clear ice and snow from sidewalks).

Clarification of the law in this area is an issue of statewide importance. Modern commercial landowners rely on contractors with specialized knowledge for a number of tasks: snow and ice removal, maintenance and repairs, landscaping, and construction. Such business relationships are salutary, and benefit landowners and invitees alike. Businesses who hire contractors to remove snow and ice, and perform other functions may focus on their core business functions. Businessowners and the public benefit from having such maintenance functions performed by specialist contractors.

Ms. Gallardo's argument opposing certification is diffuse. She tries to avoid the clear law-of-the-case issue by misstating Walmart's arguments. Walmart never contended that the trial court applied "incorrect law" in granting Land Pros's motion for summary judgment. (*Cf.* Pb11.) Ms. Gallardo also misunderstands the law-of-the-case doctrine. True, *True*, was dismissed before *Pareja* was handed down. Nothing in *Pareja*, however, changed the law such that Ms. Gallardo could re-litigate Land Pros's liability at trial. *Pareja* strengthened arguments for the dismissal of Land Pros *and* Walmart. *Pareja* does not permit Ms. Gallardo to go back to the trial court and re-litigate (again) Land Pros's dismissal, especially since she never properly did so on initial appeal.

The Appellate Division erroneously remanded to permit Ms. Gallardo to hold Walmart liable for Land Pros's actions in applying deicing material to remove ice or snow during an ongoing storm. It should have reversed for entry of judgment in Walmart's favor. The trial court determined that Land Pros was not liable as a matter of law. A jury cannot hold Walmart liable for negligently retaining a non-negligent contractor. Because this Court has not issued any decision on the duties owed by commercial landowners and their contractors in the snow-removal context, Walmart's second question presented raises an issue of general public importance that this Court should resolve.

**Conclusion**

The Supreme Court should grant Walmart's Cross-Petition for Certification.

Respectfully submitted,

Dated: September 12, 2024 **FOWLER, HIRTZEL, MCNULTY & SPAULDING, LLC**

By: */s/ Matthew D. Vodzak*

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(NJ 046302010)  
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Walmart Stores East, L.P.

**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:

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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: September 12, 2024    **FOWLER, HIRTZEL, MCNULTY &  
SPAULDING, LLC**

By: */s/ Matthew D. Vodzak*

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