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HAYDEE GALLARDO,

Plaintiff/
Respondent,

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/
Appellants.

SUPREME COURT OF NEW JERSEY

DOCKET NO. 089466

**BRIEF OPPOSING
CERTIFICATION**

App. Div. Doc. No. A-2336-27

Sat Below:

Hon. Hany A. Mawla

Hon. Robert M. Vinci

ON APPEAL FROM:

UNION COUNTY

LAW DIVISION

DOCKET NO.: UNN-L-3524-16

Sat Below:

Hon. JOHN G. HUDAK, J.S.C.

Civil Action

FILED

MAR 21 2025

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**BRIEF OPPOSING PETITION FOR CERTIFICATION OF CROSS-
PETITIONER/DEFENDANT WALMART STORES EAST, L.P., I/P/A
WALMART, WAL-MART STORES INC., AND WAL-MART REAL
ESTATE BUSINESS TRUST**

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AUG 30 2024

SUPREME COURT
OF NEW JERSEY

Submitted: August 30, 2024

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COUNTER-STATEMENT OF THE MATTER INVOLVED

As the Court is aware, Plaintiff/Petitioner Haydee Gallardo has filed a Petition for Certification under the above referenced docket, and to which Defendant/Respondent Walmart has now cross-petitioned. For the sake of brevity and judicial economy, Plaintiff/Petitioner Haydee Gallardo incorporates her Statement of the Matter Involved in her affirmative petition herein, by reference thereto.

REASONS WHY CERTIFICATION SHOULD BE DENIED

Walmart's Cross-Petition fails to present a question of general public importance which has not heretofore been, or should be, settled by this Court. Its Cross-Petition presents two issues: first, whether or not ordinary snow-removal operations fall within the "unusual circumstances" exception to Pareja's no-duty rule; and second, whether the granting of summary judgment to a contractor of a landowner requires judgment in favor of the landowner. As will be more thoroughly addressed below, these issues are fact-bound, case specific issues that fail to present grounds for Certification pursuant to R. 2:12-4.

A. WHETHER OR NOT THE SNOW REMOVAL OPERATIONS ARE CONSIDERED "ORDINARY" OR CONSTITUTE "UNUSUAL CIRCUMSTANCES" IS IRRELEVANT TO EXCEPTIONS ESPOUSED BY PAREJA TO THE ONGOING STORM DOCTRINE

In Pareja v. Princeton International Properties, 246 N.J. 546 (2021), this Court adopted the on-going storm doctrine's no duty to remove snow and ice from a commercial landowner's property until a reasonable time after a storm ends. Pareja carved out two limited, specific exceptions to the on-going storm doctrine, which, in pertinent part, state that a commercial landowner may be liable "*if their actions increase the risk to pedestrians and invitees on their property, for example, by creating 'unusual circumstances.'*" Pareja v. Princeton International Properties, 246 N.J. 546, 558-9 (2021) (*quoting Terry v. Cent. Auto Radiators Inc.*, 732 A.2d 713, 717-18 (R.I. 1999)) (*emphasis added*). A second exception exists for hazards that existed on the property prior to the storm. *Ibid*.

Respondent/Cross-Petitioner Walmart continually references the exceptions to the no duty rule espoused by Pareja as "unusual circumstances." It does so in effort to lure this Court into the false notion that anything that is not "unusual" cannot fit within the well-defined parameters of these exceptions, and to affirm its misplaced argument that a question of general public importance, which has not been but should be settled by this Court, is raised by its petition, pursuant to R. 2:12-4. As argued by Walmart, the term "unusual circumstances" is a misnomer.

While indeed, this Court utilized the term "unusual circumstances" throughout its analysis and holding in Pareja, the ultimate holding carved out two clear exceptions, which have now been codified in our Model Civil Jury Charges and approved by the New Jersey Supreme Court Committee. Notably, the words

“unusual circumstances” do not exist therein. Rather, a trier of fact is instructed, in pertinent part, that the law with respect to a landowner’s obligations during an on-going storm is as follows:

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) (*emphasis added*).

A trier of fact is not charged with determining whether or not an “unusual circumstance” existed upon the premises of a commercial property owner. Rather, they are charged with determining whether or not the commercial property owner’s acts/omissions increased the risk to pedestrians and invitees on their property. With respect to the second exception, a trier of fact would be charged with determining whether or not a pre-existing risk existed on the premises of the commercial property owner. Unlike the caselaw cited by Walmart from other jurisdictions, neither question calls for a trier of fact to examine or determine whether either scenario presented an “unusual circumstance.”

Specifically, Walmart cites to other ongoing-storm jurisdictions for the proposition that the exceptions to the no-duty rule are only for unusual circumstances. Those jurisdictions, however, do not provide for the clear exceptions this Court carved out in Pareja. For example, in Cooks v. O'Brien Props., 710 A.2d 788 (Conn. App. Ct. 1998), the court held that a property owner, *in fulfilling the duty owed to invitees upon his property* to exercise reasonable diligence in removing dangerous accumulations of snow and ice, may await a reasonable time after the end of a storm to clear snow and ice only “in the absence of unusual circumstances.” Id. at, 791-2 (quoting Kraus v. Newton, 211 Conn. 191, 197-98, 558 A.2d 240 (1989)).

In Cooks, the plaintiff was caused to slip and fall down a set of steps that led to her apartment building, which were covered with snow from a snow storm that began a day earlier. Id. at 790-1. There was conflicting testimony as to whether the snow storm had ended at the time of the plaintiff’s fall. Id. at 792. In affirming the verdict in favor of the plaintiff, the appeals court held that the trial court properly instructed the jury to determine (1) whether the storm had ended and a reasonable time thereafter had passed, and (2) if a reasonable time had not passed since the end of the storm, whether unusual circumstances existed so as to have required the defendant to remove the snow and ice from the stairway prior to the end of the storm. Ibid. With respect to the latter, the trial court “instructed the jury that it could consider whether the front steps on which the plaintiff fell were

the only practical means of entry and exit from the building on the morning of the accident.” Ibid.

If Walmart agrees, as it argues in its Petition, that a lack of other safe means of ingress or egress to a landowner’s building constitutes “unusual circumstances” that would give rise to a duty to clear snow and ice prior to the conclusion of a snow storm, then it is simply unfathomable that it could argue that unusual circumstances do not exist in the case at bar, where Plaintiff fell at the entrance to Walmart’s store during, what it alleges, was an ongoing storm; irrespective of whether or not any salt or ice melt had been applied. Therefore, assuming *arguendo*, that the “unusual circumstances” jury charge in Cooks applies, rather than the current New Jersey Model Civil Jury Charge 5.20B, the Appellate Division did not err in holding that Walmart is not entitled to summary judgment or dismissal, as an inescapable question of fact still remains for the jury to decide.

Notwithstanding the inevitable legal conclusion that a question of fact remains for a trier of fact to determine, Walmart’s Petition calls upon this Court to grant review to make clear that landowners need not refrain from taking “routine measures”, such as shoveling snow or spreading salt, to benefit from the Pareja no-duty rule. As noted above, the question is not whether the acts/omissions of a commercial land owner are ordinary, routine, usual, or any other adjective which is the antonym of “unusual.” The Pareja exceptions, and

concomitant Model Civil Jury Charge 5.20B, require only that a plaintiff demonstrate that a commercial property owners actions increase the risk to pedestrians and invitees on their property, or that there was a pre-existing risk on the premises before the storm.

Creating a blanket immunity for ordinary snow removal activities, however, does not present a clearer, bright-line rule to the ongoing storm doctrine's no-duty rule. Rather, it would invite more confusion and require further analysis as to what constitutes ordinary snow removal activities; likely requiring expert testimony on the subject matter. For example, suppose Walmart had undertaken what it would consider to be "ordinary" snow-removal operations to remove snow from its parking lot during an ongoing storm and piled all the snow in the parking spaces closest to the entrance of its store. In this scenario, Walmart's customers would be forced to park in spaces further aware from the store's entrance, forcing its customers to traverse a longer, treacherous, icy path; a scenario similar to Terry v. Cent. Auto Radiators Inc., 732 A.2d 713 (R.I. 1999), which was discussed by this Court in Pareja and cited in Walmart's Cross-Petition.

Under that scenario, rather than being confronted with the simple question of whether or not Walmart's actions increased the risk to its invitees, there would be a question as to whether or not its actions in placing snow in the parking spots closest to the store, precluding the use of said parking spots, was considered

ordinary snow-removal operations. Further, it would require our courts to now define what is to be considered ordinary snow-removal operations and/or require expert testimony on the subject matter.

Conversely, if this Court were to hold that any and all snow removal operations undertaken during an ongoing storm are immune from liability, as argued by Walmart in its Petition, it would effectively nullify the first exception carved out by Pareja by allowing a commercial property owner to claim that an alleged increased risk encountered by an invitee arose from ordinary snow removal operations; even if those snow removal operations were performed in a negligent, careless, or even reckless manner. From an equitable and societal perspective, allowing such blanket immunity would result in far more harm to innocent invitees than simply requiring that a commercial landowner take efforts to ensure that their actions, *if undertaken*, do not increase the risk of harm to its business invitees, as so held by this Court in Pareja.

In that vein, Defendant's argument that there is no basis in the law or common sense to hold a landowner who does nothing at all during a winter storm immune from liability, but one who proactively works to remove the hazard exposes itself to potential liability, is likewise without merit. New Jersey's Good Samaritan Act, N.J.S.A. 2A:62A-1, for example, provides that a bystander has no duty to provide affirmative aid to an injured person, even if he or she has the ability to do so. However, once a bystander endeavors to help, common law

recognizes a duty to do so reasonably, and the volunteer could be held liable for injuries caused by his or her negligent assistance. *See, e.g., Velazquez v. Jiminez*, 172 N.J. 240, 248 (2002); *Podias v. Mairs*, 394 N.J. Super. 338, 347 (App. Div. 2007); *Praet v. Borough of Sayreville*, 218 N.J. Super. 218, 223-4 (App. Div.), *certif. denied*, 108 N.J. 681 (1987). This reasoning is not unlike that which is espoused by Pareja.

Of course, with the adoption of the ongoing storm doctrine, a commercial landowner is also free to do nothing, until a reasonable time after a storm ends, in order to avoid liability. As Walmart argued to the Appellate Division below, “[t]he ongoing storm doctrine recognizes that ‘it is categorically inexpedient and impractical to remove or reduce hazards from snow and ice while the precipitation is ongoing.’” *See Db at Page 2, (citing Pareja*, 246 N.J. at 558). Therefore, the provident course of action would simply be to wait until the storm has ended to commence operations to remove snow and ice. Like the Good Samaritan, however, should a commercial landowner volunteer effort, it must do so reasonably and without creating an increase risk to its invitees.

Respectfully, Walmart seeks to have its proverbial cake and eat it too. Pareja makes it absolutely clear that a commercial landowner has no duty to remove hazardous snow and/or ice until after a reasonable time after a winter storm event ends. It is clear that Walmart’s Cross-Petition seeks to have this Court unnecessarily expand the holding set forth in Pareja so as to further

immunize commercial landowners, and itself, should a commercial landowner take action when it had no duty to act in the first place. Had this been the intent of this Court, it would not have carved out any exceptions to the no-duty rule or specifically adopted the “unusual circumstances” rule, such as that espoused by Cooks v. O'Brien Props., 710 A.2d 788 (Conn. App. Ct. 1998), which still results an issue of material fact that must be decided by a trier of fact, as aforesaid.

Contrary to Walmart’s argument, the exceptions set forth by Pareja do not provide a different route to reach the same destination as the overruled Appellate Division holding in Pareja, which held that a commercial landowner does have 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. Instead, the exceptions clearly set forth the limited circumstances in which a commercial landowner can be held liable, which, in pertinent part, arises when the landowner increases the risk of harm.

In sum, Walmart has failed to demonstrate that there is any clear question of general public importance that requires this Court to revisit these exceptions to further clarify or revise same, other than Walmart’s desire to avoid liability to Plaintiff by attempting to have this Court immunize the case-specific acts that give rise to the increased risk of harm encountered by Plaintiff that caused her harm.

B. THE APPELLATE DIVISION DID NOT ERR IN FINDING THAT WALMART COULD BE HELD LIABLE FOR THE ACTS OF LAND PROS, WHO WAS GRANTED SUMMARY JUDGMENT PRIOR TO THE SUPREME COURT’S HOLDING IN *PAREJA*, AS WALMART OWES A NONDELEGABLE DUTY TO ENSURE A SAFE PREMISES FOR ITS INVITEES AND REMAINS LIABLE FOR THE ACTS OF ITS CONTRACTOR, LAND PROS

The second issue raised by Walmart’s Cross-Petition turns on the *law of the case* doctrine, which requires judges to respect unreversed decisions made during the trial by the same court or a higher court regarding questions of law. State v. Reldan, 100 N.J. 187, 203 (1985). Such “[p]rior decisions on legal issues should be followed *unless there is* substantially different evidence at a subsequent trial, *new controlling authority*, or the prior decision was clearly erroneous.” Sisler v. Gannett Co., 222 N.J. Super. 153, 159 (App. Div. 1987) (*emphasis added*).

Notably, Defendant Land Pros was granted summary judgment on July 1, 2019; nearly nine months prior to the Appellate Division holding in Pareja v. Princeton Int’l Props., 463 N.J. Super. 231 (App. Div. 2020), which was decided on April 9, 2020, and almost two years prior to the Supreme Court’s Decision in Pareja v. Princeton Int’l Props., 246 N.J. 546 (2021). *See Da25*. The basis for the Trial Court’s grant of summary judgment to Land Pros turned on the then-controlling caselaw espoused by Bodine v. Goerke Co., 102 N.J. L. 642 (E. & A. 1926). *See Da34*. As this Court is undoubtedly aware, its holding in Pareja v. Princeton Int’l Props., 246 N.J. 546 (2021) supersedes the holding of Bodine.

At the outset, it is curious that Defendant Walmart moved before the Appellate Division, arguing the Trial Court failed to apply the correct law to the facts of this case with respect to Pareja and the ongoing storm doctrine, and then, having prevailed on that issue before the Appellate Division, now argues that the incorrect law the Trial Court applied in dismissing Land Pros should now apply in granting a dismissal of the claims against Walmart. Stated differently, the law of the case as it existed at the time Land Pros was granted summary judgment in July 2019, prior to Pareja, is not the same law that is now applicable on remand from the Appellate Division.

Based upon the drastic change in the caselaw guiding the responsibility of commercial landowners during a snowstorm event since 2019, and the Appellate Division having agreed that the holding of Pareja applies to this litigation, Walmart's argument that it cannot be liable for the same conduct that Land Pros was already determined not to be liable for is wholly disingenuous. As was argued in Walmart's Appellate Brief, "an order denying summary judgment is not subject to the law of the case doctrine because it decides nothing and merely reserves issues for future disposition." Gonzalez v. Ideal Tile Imp'g Co., 371 N.J. Super. 349, 356 (App. Div. 2004). "Moreover, 'a denial of summary judgment is always interlocutory, and *never precludes the entry of judgment for the moving party later in the case.*'" Franklin Med. Assocs. v. Newark Pub. Sch., 362 N.J. Super. 494, 512 (App. Div. 2003)(citing Hart v. City of Jersey City, 308 N.J.

Super. 487, 498 (App.Div.1998)) (*emphasis added*). Therefore, and in light of the Appellate Division's holding that Pareja applies to the case at bar and having remanded this case back to the Trial Court, now the law of the case, reconsideration of the Trial Court's grant of summary judgment to Land Pros remains viable under R. 4:49-2, as final judgment has yet to be entered.

Furthermore, Walmart clearly establishes in its moving papers that it owes a non-delegable duty to ensure a safe premises for its invitees, to include Plaintiff. *See, e.g., Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 441 (1993). Land Pros duty to Plaintiff is separate and distinct from the duty Walmart owed to Plaintiff, as it did not own the commercial premises upon which Plaintiff fell. Rather, Land Pros obligations were defined by the contract entered into between Walmart and Land Pros. Once again, Walmart's argument that it cannot be liable for the same conduct that Land Pros was already determined not to be liable for, is misplaced, as the duty owed by Land Pros is not the same as the duty owed by Walmart as a commercial landowner. It is notable that Walmart was denied summary judgment by the same trial court judge that granted summary judgment to Land Pros. *See 155a-156a and Da25-26*.

Finally, as argued below by Defendant Walmart in its Appellate Division brief, Defendant Walmart can also be found negligent for the retention of an incompetent contractor. *See Db25-26 (citing Jarrell v. Kaul*, 223 N.J. 294, 316- 17 (N.J. 2015)). As further argued by Defendant Walmart, in order to prevail on such

a claim, Plaintiff would be required to show that the independent contractor was, in fact, incompetent or unskilled to perform the job for which they were hired. Jarrell at 320.

Evidence of Defendant's negligent hiring/retention/supervision of Land Pros can be demonstrated vis a` vis the lack of any written "Scope of Work" which would have set forth Land Pros' responsibilities as respects snow and ice removal. As set forth in the Trial Court's Statement of Reasons in granting Land Pros motion for summary judgment, no such written "Scope of Work" existed at the time the motion was decided. *See Da28*. The only terms regarding the manner of snow removal were communicated by oral agreement, which called for snow removal services once accumulations reached two inches, and there was no requirement to pre-treat the property. *Ibid*. Despite the foregoing verbal agreement, Land Pros did in fact apply a de-icing agent to snow that had accumulated on Walmart's property shortly prior to Plaintiff's fall.

As the Appellate Division below appropriately noted, Plaintiff's expert in snow and ice management testified that the "throwing of de-icer on ... snow already on the ground was absolutely not acceptable by industry standards." *See Da9*. As such, there is undoubtedly an issue of material fact as to whether Walmart was negligent in the hiring, retention and/or supervision of Land Pros, which must preclude summary judgment in Walmart's favor and, as a corollary,

the Appellate Division did not err by holding that Walmart could be held liable for the acts of Land Pros and/or the negligent hiring or retention of Land Pros.

In closing, the Appellate Division below correctly noted that “[s]ummary judgment is only proper where ‘there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.’” *See Dal7 (citing R. 4:46-2(c))*. In the case at bar, there was a genuine issue of material fact whether Walmart's conduct, through its contractor Land Pros, created a dangerous condition on the day of the accident. *Ibid.* Further, there is a material issue of fact as to whether Walmart negligently hired/retained Land Pros. Therefore, the Appellate Division properly held that this dispute was for the jury to decide on remand for a new trial. *Ibid.*

CONCLUSION

For all the foregoing reasons, the Court should deny Defendant Walmart's Petition for Certification.

Respectfully submitted,

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