SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3903-18

MOURIES YOUSSEF and
FATEN YOUSSEF, his wife,

Plaintiffs-Appellants/
Cross-Respondents,

v.

SHRI-RAM DONUTS #3 LLC,
d/b/a DUNKIN DONUTS,

Defendant-Respondent/
Cross-Appellant,

and

LIPOWSKI SNOW PLOWING,
STATE FARM FIRE AND
CASUALTY INSURANCE
COMPANY and CLG
BROADWAY, LLC,

Defendants-Respondents.

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Argued October 28, 2020 – Decided January 7, 2021
Remanded by Supreme Court June 29, 2021
Resubmitted August 25, 2021 – October 22, 2021

Before Judges Ostrer and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-0929-17.

Foley & Foley, attorneys for appellants (Michael C. Kazer, of counsel; Sherry L. Foley and Timothy J. Foley, on the briefs).

O'Toole Scrivo, LLC, attorneys for respondent-cross appellant Shri-Ram Donuts #3, LLC (Robert J. Gallop, of counsel and on the brief; Franklin D. Paez, on the brief).

Gartner & Bloom, PC, attorneys for respondent Lipowski Snow Plowing, LLC (Alexander D. Fisher and Kenneth M. O'Donohue, on the brief).

PER CURIAM

In our initial decision in this matter, Youssef v. Shri-Ram Donuts #3 LLC, A-3903-18 (App. Div. Jan. 7, 2021) (slip op. at 19-22, 26), we vacated the trial court's March 29, 2019 orders granting defendants Shri-Ram Donuts #3, LLC d/b/a Dunkin Donuts (Shri-Ram) and Lipowski Snow Plowing, LLC (Lipowski) (together, "defendants") summary judgment dismissing plaintiffs Mouries Youssef's (Youssef) and Faten Youssef's (together, "plaintiffs") complaint. We also vacated an order directing that Shri-Ram indemnify Lipowski for defense costs based on our conclusion a determination of the indemnification obligation should abide the disposition of plaintiffs' negligence claims. Id. at 22-26. We

revisit those orders pursuant to the Supreme Court's remand directing that we consider our prior opinion in light of its decision in Pareja v. Princeton International Properties, 246 N.J. 546 (2021).

We allowed the parties to submit supplemental briefs following the remand order. Having considered the record, the arguments presented by the parties prior to our initial opinion and following the Court's remand, and the Court's decision in Pareja, we affirm the court's summary judgment orders as well as its order directing that Shri-Ram indemnify Lipowski for its defense costs.[1]

I.

The undisputed facts established for purposes of defendants' summary judgment motions, see R. 4:46-2, are detailed in part in our prior decision, see Youssef, slip op. at 3-7. We briefly summarize plaintiffs' claim and the pertinent facts supported by the parties' Rule 4:46-2 statements to provide context for the issues presented on remand.

[1] In our initial decision, we also affirmed orders denying plaintiffs' motions to extend or reopen discovery and for reconsideration. Youssef, slip op. at 26. We do not revisit those rulings because their resolution is unaffected by Court's affirmation of the ongoing storm rule in Pareja, and they are not implicated by our decision on the issues presented on remand.

The complaint alleges plaintiff Youssef slipped, fell, and suffered injuries on an ice and snow-covered sidewalk immediately adjacent to the door to Shri-Ram's donut shop that Youssef exited during a snow event. In their complaint, plaintiffs alleged Shri-Ram and the contractor it employed to provide snow removal services, Lipowski, were negligent by failing to properly remove ice and snow from the sidewalk and by creating a hazardous condition of snow and ice.

The parties' Rule 4:46-2 submissions on the summary judgment motions established that at approximately 10:20 a.m. on March 5, 2015, Youssef slipped and fell on the sidewalk abutting Shri-Ram's donut shop as he exited from the shop's door. There was an ongoing snow event at the time, and, according to Youssef, the sidewalk was covered with approximately five inches of snow and ice when he fell. According to Youssef, two days prior to March 5, 2015, he complained to the donut shop's manager that the sidewalk in front of the store was "full of ice and snow."

Shri-Ram leases the donut shop property and is responsible under its lease for snow removal. On the day Youssef fell, Shri-Ram and Lipowski were parties to a contract in which Lipowski agreed to provide snow removal services for the property, including the sidewalk where Youssef fell. The agreement required

that Lipowski provide snow removal services when there was an accumulation of two or more inches of snow or upon Shri-Ram's request.

Vinod Mally was employed as the manager of the donut shop on March 5, 2015. She testified "there was heavy snow around ten to eleven o'clock in the morning," and Lipowski had performed snow and ice removal services at the property on two or three times prior to Youssef's fall.[2] Mally testified Lipowski last performed the services approximately thirty minutes before Youssef fell, and that the walkway "was pretty clean." Mally also said it was snowing heavily, but there was "no ice."[3] Mally testified she inspected Lipowski's work each time, and she found no problems with it. Lipowski's owner, Richard Lipowski,

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[2] In its Rule 4:46-2 statement, Lipowski cites to Mally's deposition testimony in support of its factual assertion there was "a heavy snow around ten to eleven o'clock in the morning." In their response to the Lipowski Rule 4:46-2 statement, plaintiffs deny that factual assertion, but they do not cite to any competent evidence supporting the denial. See R. 4:46-2(b). We therefore accept Lipowski's factual assertion as true for purposes of its summary judgment motion. See Ibid. (providing that material facts conforming to the requirements of Rule 4:46-2(a) "will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of [Rule 4:46-2(a)] demonstrating the existence of a genuine issue [of material fact]").

[3] Lipowski's assertion of these facts is supported by citation to Mally's deposition testimony. Again, plaintiffs' denial of the facts is not supported by a citation to any competent evidence. See R. 4:46-2(b). We note, however, that in its Rule 4:46-2(a) statement, Lipowski otherwise states Youssef testified there were five inches of snow on the sidewalk.

recalled that in addition to removing snow and ice on the property prior to Youssef's fall, he applied salt using a salt spreader, and that the donut shop's manager approved the work.

There was conflicting evidence concerning the condition of the sidewalk where Youssef fell. Mally, who assisted Youssef after he fell, described the sidewalk as "pretty clean" with "no ice." Another witness, Michael Manzo, who also assisted Youssef after he fell, noted the snow was falling but the sidewalk "[l]ooked like it was just cleaned."

Assaine Ifegous was at the donut shop at around the same time as Youssef, and he recalled the sidewalk was covered by approximately five or six inches of snow, with ice under the snow and no indication the sidewalk had been salted. According to Ifegous, he nearly fell on the sidewalk due to the snow prior to entering the donut shop, and, when he left the shop, he saw Youssef in an ambulance.[4]

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[4] Plaintiffs' assert that another witness, Ehab Malak, who was also at the donut shop and observed Youssef and the ambulance, described the sidewalk as "bumpy" with ice and snow. However, Malak was not timely identified during discovery as a witness. See Youssef, slip op. at 14-15. For purposes of our consideration of defendants' summary judgment motions, Malak's putative testimony is of no moment because, even assuming it could properly be considered, it is cumulative and would not raise any genuine issues of material fact not otherwise supported by other competent evidence.

Richard Lipowski returned to the property about an hour after Youssef fell, and he took photographs of the sidewalk about two hours after Youssef's fall. The photographs show the sidewalk and that it was snowing. The photographs do not show a significant accumulation of ice or snow on the sidewalk near the donut shop's door, but as noted, the photographs are not of the sidewalk at the time Youssef fell.

Based on those facts, the trial court granted defendants summary judgment. The court determined neither Shri-Ram nor Lipowski owed a legal duty to plaintiffs to address the hazardous condition caused by the snow and ice while the precipitation was falling. As we observed in our initial decision, "the court appeared to apply the so-called 'ongoing-storm rule,' which 'relieves commercial landowners from any obligation to try to render their property safe while sleet or snow is falling.'" Youssef, slip op. at 11 (citation omitted). It was on that basis that the court awarded summary judgment to Shri-Ram and Lipowski.

Plaintiffs appealed from the order granting summary judgment to defendants. In our decision on plaintiffs' appeal, we relied on this court's opinion in Pareja v. Princeton International Properties, 463 N.J. Super. 231, 235 (App. Div. 2020), "where we rejected the 'ongoing-storm rule' and held that 'a

commercial landowner has a duty to take reasonable steps to render a public walkway abutting its property — covered by ice and snow — reasonably safe' regardless of whether there is an ongoing snow event." Youssef, slip op. at 19 (quoting Pareja, 463 N.J. Super. at 235).

The Supreme Court subsequently granted Lipowski's petition for certification and remanded for reconsideration of our opinion in light of the Court's decision in Pareja. Youssef v. Shri-Ram Donuts #3 LLC, 247 N.J. 234 (2021). In Pareja, the Court adopted the ongoing storm rule, holding "commercial 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." 246 N.J. at 557. The Court explained that, under the rule, "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." Id. at 558.

The Court noted two exceptions to the rule. In the first instance, "commercial landowners may be liable if their actions increase the risk to pedestrians and invitees on their property, for example, by creating 'unusual circumstances' where the defendant's conduct 'exacerbate[s] and increase[s] the risk' of injury to the plaintiff." Id. at 559 (alteration in original) (citation

omitted). "Second, a commercial landowner may be liable where there was a preexisting risk on the premises before the storm." Ibid. The latter exception rule applies, for example, where there is a failure "to remove or reduce a pre-existing risk on the property, including the duty to remove snow from a previous storm that has since concluded." Ibid.

On remand we are tasked with considering our reversal of the motion court's summary judgment orders in light of the Court's decision in Pareja. Our prior decision reversing the orders was founded on a rejection of the motion court's reliance on the ongoing storm rule, see Youssef, slip op. at 19-22. The Court's adoption of the ongoing storm rule in Pareja therefore requires that we abandon the reasoning supporting our reversal of the orders and conduct a de novo review of the summary judgment record to determine the validity of the orders. See Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016) (explaining appellate courts conduct a de novo review of summary judgment orders applying the same standard as the trial court).

II.

Our review of a summary judgment order requires that we determine "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that 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." Ibid. (quoting R. 4:46-2(c)). We "must view the facts in the light most favorable to the non-moving part[ies], which in this case [are] plaintiff[s]." Bauer v. Nesbitt, 198 N.J. 601, 605 n.1 (2009) (citing R. 4:46-2(c)); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

In our review of a summary judgment record, we limit our determination of the undisputed facts to those properly presented in accordance with Rule 4:46-2. Kenney v. Meadowview Nursing & Convalescent Ctr., 308 N.J. Super. 565, 573 (App. Div. 1998). We review the trial court's legal conclusions de novo. Est. of Hanges v. Metro. Prop. & Cas. Ins., 202 N.J. 369, 385 (2010).

Plaintiffs argue the Court's adoption of the ongoing storm rule applies only to commercial landowners and therefore does not bar their claims against Shri-Ram and Lipowski because neither is a commercial landowner. Plaintiffs contend that since Shri-Ram is the lessee of the property and Lipowski was the contractor hired by Shri-Ram to remove snow and ice from the property, the Court's reasoning and holding in Pareja is inapposite, and the negligence claims against defendants should be decided without regard to the ongoing storm rule.

In Pareja, the Court discussed the ongoing storm rule in the context of a commercial landowner's liability, 246 N.J. at 557-59, but its reasoning and

holding apply with equal force to a lessee, such as Shri-Ram, who is contractually bound to provide snow and ice removal under its lease. As the Court explained, "[t]he premise of the [ongoing storm] rule is that it is categorically inexpedient and impractical to remove or reduce hazards from snow and ice while the precipitation is ongoing." Id. at 558. That premise is no less applicable to a lessee who is contractually obligated to remove snow and ice from commercial property than it is for the commercial landowner.

A commercial landowner may properly delegate to a tenant the legal duty to remove ice and snow from the leased property. Shields v. Ramslee Motors, 240 N.J. 479, 489-94 (2020). It is undisputed that is what occurred here. Under its lease with the commercial landowner of the property, Shri-Ram assumed the responsibility to remove ice and snow from the property. In our view, however, it would be incongruous to apply the ongoing storm rule to a commercial landowner that operates its business on its own property, but to impose a different and more onerous duty on a business that leases a commercial property, operates its business on the property, and, pursuant to its lease, assumes responsibility for snow and ice removal.

In both instances, the premise supporting the Court's adoption of the ongoing storm rule — that it is "inexpedient and impractical" to impose a legal

duty requiring removal of the hazardous conditions caused by ice and snow during an ongoing storm, Pareja, 246 N.J. at 558 — applies equally to the owner of the commercial property and the lessee who operates its business on the property. We therefore reject plaintiffs' claim the ongoing storm does not apply to Shri-Ram because it was the lessee, as opposed to the owner, of the property. See, e.g., Balagyozyan v. Fed. Realty Ltd. P'ship, 142 N.Y.S.3d 77, 79 (App. Div. 2021) (explaining under the "storm-in-progress rule," that the property owner and tenant in possession "will not be held responsible for accidents caused by ice and snow that accumulates during a storm 'until an adequate period of time has passed following cessation of the storm to allow . . . an opportunity to ameliorate the hazards caused by the storm'" (alteration in original) (citation omitted)).

We similarly reject plaintiffs' claim the ongoing storm rule does not apply to Lipowski because it is the contractor hired by the commercial tenant to remove ice and snow during a storm. Again, the Court's rationale supporting its adoption of the ongoing storm rule requires application of the rule to a snow and ice removal contractor. The Court found it inexpedient and impractical to impose a legal duty to keep a property free and clear of accumulating ice and snow while the storm is ongoing, and a contractor is in a no better position than

a commercial landlord or tenant to ensure there is no accumulation of ice and snow on a property resulting in hazardous conditions during an ongoing storm. Requiring a contractor to ensure no accumulation of ice and snow on a property during a storm would impose a legal duty impossible to satisfy due to the continuous accumulation of ice and snow that inevitably results from an ongoing storm. Under the circumstances presented by the summary judgment record, we discern no basis to conclude the ongoing storm rule should not apply to Lipowski. See, e.g., Balagyozyan, 142 N.Y.S.3d at 79 (finding the "storm-in-progress rule" applies to the "property owner, tenant in possession, [and] snow removal contractor"); Smilowitz v. GCA Serv. Grp. Inc., 957 N.Y.S.2d 391, 392 (App. Div. 2012) (same).

Application of the ongoing storm rule here permits only a finding that Shri-Ram and Lipowski had no common law duty during the storm to address hazardous conditions on the property caused by the accumulation of ice and snow during the storm. See Pareja, 246 N.J. at 557-60. As noted, the Court determined that the ongoing storm rule does not apply where: the actions of commercial landowners increase the risk to pedestrians and invitees "by creating 'unusual circumstances' where the defendant's conduct 'exacerbate[s] and increases the risk of injury to the plaintiff'"; or where there was a preexisting

risk on the property that the landowner failed to remove, including removing snow or ice from a prior storm. Id. at 559 (alteration in original).

We first address plaintiffs' claim that even if the ongoing storm rule applies to Shri-Ram and Lipowski, the court erred by granting summary judgment because the record establishes defendants breached the duty imposed under Pareja's pre-existing-risk exception to the ongoing rule. Plaintiffs claim Youssef's fall resulted from ice or snow that preexisted the March 5, 2015 storm event during which he fell. To support their contention, they cite to Youssef's testimony there was an accumulation of five or more inches of snow where he fell, and two days prior to his fall, he complained to the donut shop manager about the accumulation of ice and snow on the sidewalk from a previous storm. He asserts that after complaining to the donut shop manager, the condition of the sidewalk "remained unchanged" for the two days until he fell.

Plaintiffs also cite to an expert's report they contend states "it began heavily snowing after plaintiff's fall." Plaintiffs contend these purported facts establish there was an accumulation of ice and snow on the sidewalk prior to the March 5, 2015 storm, and that therefore there is a genuine issue of material fact as to whether the purported hazardous conditions existed prior to the storm that caused Youssef's fall.

Plaintiffs' claim is not supported by competent evidence in the summary judgment record, as reflected in the parties' Rule 4:46-2 statements. For example, plaintiffs' claim Youssef slipped on ice or snow that was present on the sidewalk prior to the March 5, 2015 storm is founded on their assertions that Youssef complained to the donut shop manager about accumulated snow and ice two days before he fell and the accumulation "remained unchanged" until he fell. There is no support in the parties' Rule 4:46-2 statements establishing that the purported accumulation of ice and snow about which Youssef said he complained "remained unchanged" until he fell. Thus, plaintiffs' claim an accumulation of ice and snow prior to the March 5, 2015 storm caused Youssef to fall finds no support in the Rule 4:46-2 statements establishing the facts considered by the motion court. We therefore cannot consider the purported fact — that the accumulation of snow and ice Youssef said he complained about prior to the storm "remained unchanged" until he fell — as either establishing an undisputed fact or as raising an issue of fact, precluding summary judgment for Shri-Ram or Lipowski. See Kenney, 308 N.J. Super. at 573.

Plaintiffs offer no other evidence or statements of fact properly presented in accordance with Rule 4:46-2 establishing there was any accumulation of ice or snow on the sidewalk prior to the March 5, 2015 storm that caused him to

fall. For that reason alone, plaintiffs' reliance on the preexisting-condition exception to the ongoing storm rule, see Pareja, 246 N.J. at 559, finds no support in the summary judgment record.

Similarly, plaintiffs' reliance on the purported fact it did not start snowing heavily on March 5, 2015, until after Youssef fell was not a purported fact included in any party's Rule 4:46-2 statements, and, therefore, is not part of the summary judgment record. See Kenney, 308 N.J. Super. at 573; see also R. 4:46-2(c). As support for that factual assertion, plaintiffs rely solely on an expert report from a meteorologist. The report, however, does not constitute competent evidence as to when the storm began on March 5, 2015. The report is hearsay, see Corcoran v. Sears Roebuck & Co., 312 N.J. Super. 117, 126 (App. Div. 1998), and cannot be properly relied on to establish a fact in support of, or in opposition to, a summary judgment motion, see R. 4:46-2(c).

Even if the report constituted competent evidence, it does not state, as plaintiffs claim, that snow first began to fall on March 5, 2015 "after" Youssef fell. Instead, the report confirms the storm began in the morning and snow continued into the afternoon. The report states that on March 5, 2015, it "was generally snowy with some rain and sleet mixing at times during the morning and then heavier snow by the afternoon." Thus, the report confirms that rain,

sleet, and snow fell during the morning hours when Youssef fell, and plaintiffs otherwise admitted Lipowski's statement of material fact that "at the time of [Youssef's] alleged slip and fall, there was an ongoing snow event," and that "there was a heavy snow around ten to eleven o'clock in the morning."[5] Plaintiffs further relied in their Rule 4:46-2(b) statement of material facts on the testimony of their witness, Ifegous, who stated it was "still lightly snowing" as he walked on the sidewalk "abutting" the donut shop at around 10:00 a.m. Youssef testified he fell at around 10:20 a.m.

Despite plaintiffs' bald assertions to the contrary, the undisputed facts presented by the summary judgment record establish it was snowing prior to, at the time of, and subsequent to Youssef's fall. Plaintiffs' claim Youssef must have fallen on snow left by a prior storm because it did not start to snow on March 5, 2015, until after Youssef fell is bereft of support in competent evidence presented in accordance with Rule 4:46-2. Rather, as plaintiffs admitted in their response to Lipowski's Rule 4:46-2(a) statement, Youssef fell during an ongoing storm. Plaintiffs fail to demonstrate there is genuine issue of material fact

[5] We accept Mally's testimony as true for purposes of the motion because it was cited as support for the statement that it was snowing heavily between ten and eleven o'clock, and, although plaintiffs denied that statement of fact in their Rule 4:46-2(b) response, plaintiffs' denial was unsupported by a citation to any competent evidence. See R. 4:46-2(c).

permitting imposition of liability on Shri-Ram or Lipowski under the preexisting-condition exception to the ongoing storm rule, see Pareja, 246 N.J. at 559, because there is simply no competent evidence there was any hazardous condition existing prior to the March 5, 2015 storm that caused Youssef's fall.

Plaintiffs also argue that although Shri-Ram and Lipowski did not have a duty under the Court's decision in Pareja to remove the accumulation of ice and snow caused by the storm while the storm was ongoing, there is sufficient competent evidence in the record supporting a finding defendants may be found liable under Pareja's other exception to the ongoing storm rule. More particularly, plaintiffs claim that once Shri-Ram and its contractor Lipowski undertook to address the hazardous conditions created by the ongoing storm by removing the snow and ice and salting the sidewalk, they had a duty to do so in a manner that did not exacerbate or increase the risk of injury to Youssef. See Pareja, 246 N.J. at 559. Plaintiffs contend defendants breached that duty by failing to properly clear and salt the sidewalk.

The summary judgment record establishes there was an accumulation of snow and ice on the sidewalk. Youssef testified there was five inches of snow on the sidewalk where he fell. He also testified there was ice under the snow. He further testified there "had been no salt scattered," but plaintiffs' statements

of material fact do not cite to any competent evidence establishing the basis for Youssef's personal knowledge of that purported fact. See R. 1:6-6. Ifegous testified the conditions on the sidewalk were as Youssef described them.

Under the ongoing storm rule, Shri-Ram and Lipowski are not liable for hazardous conditions existing during a storm that are caused by the accumulation of snow or ice during the storm. Pareja, 246 N.J. at 557. They did not "have a duty to remove the accumulated snow and ice until the conclusion of the storm." Id. at 558. The second exception to the ongoing storm rule relied on by plaintiffs requires evidence that defendants' actions exacerbated or increased the danger presented by the accumulation of the snow or ice during the storm. Id. at 559.

Plaintiffs' evidence establishes nothing more than an accumulation of snow and ice caused the hazardous condition plaintiffs claim caused Youssef's fall. Plaintiffs point to no evidence beyond the mere accumulation of the snow and ice — to perhaps more than five inches — that resulted in Youssef's fall. Plaintiffs failed to present any evidence either Shri-Ram or Lipowski acted in any manner to exacerbate or increase the risk of injury to Youssef presented by the accumulated snow and ice. A mere failure to remove ice and snow during an ongoing storm does not support a finding of liability under the ongoing storm

rule; a plaintiff must show that the risk of injury presented by the accumulation of ice and snow was increased or exacerbated by the defendant's actions. Id. at 559. Even when the evidence and facts in the Rule 4:46-2 statements are viewed in a light most favorable to plaintiffs as the non-moving parties, see Bauer, 198 N.J. at 605 n.1, plaintiffs make no such showing here.[6] Thus, there is no basis in the summary judgment record permitting a finding that either Shri-Ram or Lipowski is liable under the Pareja exception to the ongoing storm rule for actions that exacerbated or increased the risk of injury presented by the accumulation of ice and snow during the storm.[7] See Pareja, at 559.

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[6] Youssef's and Ifegous's testimony that they saw no signs of salting does not establish that either Shri-Ram or Lipowski exacerbated or increased the risk of injury presented by the accumulated ice and snow. Indeed, the conclusory statements concerning the absence of salt, even if accepted as true, do not support a finding defendants exacerbated or increased the risk presented by the accumulated ice and snow.

[7] We also reject plaintiffs' claim Lipowski is liable under Restatement (Second) of Torts § 324A (Am. Law Inst. 1965), which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
> (a) his failure to exercise reasonable care increases the risk of such harm, or

In sum, based on our review of the summary judgment record in light of the Court's opinion in Pareja, we are convinced the motion court correctly determined the ongoing storm rule bars plaintiffs' negligence claim against Shri-Ram and Lipowski as a matter of law. We reject plaintiffs' claim there are genuine issues of material fact supporting a finding of liability against Shri-Ram and Lipowski under the exceptions to the ongoing storm rule recognized by the Court in Pareja. We therefore affirm the court's summary judgment orders.

Our affirmation of the summary judgment orders also requires reconsideration of our initial decision vacating the order directing that Shri-Ram

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> (b) he has undertaken to perform a duty owed by the other to the third person, or
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Plaintiffs could not establish Lipowski failed to exercise reasonable care to address the accumulated ice and snow during the storm because it did not have a duty, as a matter of law, to do so under the ongoing storm rule, see Pareja, 246 N.J. at 557, and plaintiffs otherwise failed to present evidence that the purported failure to remove the accumulated ice and snow increased the risk of harm to Youssef beyond that presented by the accumulated ice and snow itself. For the same reason, we find Lipowski did not undertake a duty owed by Shri-Ram to Youssef because, under the ongoing storm rule, Shri-Ram did not owe a duty to Youssef to remove the snow and ice that accumulated during the storm until after the storm concluded. Pareja, 246 N.J. at 558-59. Last, plaintiffs presented no evidence Youssef suffered harm based on any reliance that Lipowski undertook to clear the accumulated ice and snow. In sum, there is no evidence supporting application of Section 324A of the Second Restatement here.

indemnify Lipowski for its defense costs. We determined that based on our finding of an ambiguity in the indemnification agreement, and because "[c]osts incurred by an [indemnitee] in defense of its own active negligence . . . are not recoverable," Youssef, slip op. at 24 (alterations in original) (quoting New Gold Equities Corp. v. Jaffe Spindler Co., 453 N.J. Super. 358, 387 (App. Div. 2018)), Lipowski's entitlement to defense costs should abide a determination of its liability on remand, id. at 26.

Given our determination that Lipowski is entitled to summary judgment on plaintiffs' cause of action, we discern no basis to again vacate the court's order directing that Shri-Ram indemnify Lipowski for its defense costs. As we noted in our prior decision, an indemnitee may recover defense costs "after-the-fact" "if the indemnitee is adjudicated to be free from active wrongdoing regarding the plaintiff's injury[] and has tendered the defense to the indemnitor at the start of the litigation." Mantilla v. NC Mall Assocs., 167 N.J. 262, 273 (2001). That is now the case here. We therefore affirm the court's order directing that Shri-Ram indemnify Lipowski for its defense costs.

Affirmed.