IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

HANI ENTERPRISES, INC.,

Appellant/Cross-Appellee,
v.

DARRELL PHILLIPS,

Appellee/Cross-Appellant.
_____/

DCA Case No. 4D23-1844
consolidated with
DCA Case No. 4D23-2003

A1A GROCERY INC.,

Appellant,
v.

DARRELL PHILLIPS,

Appellee.

INITIAL BRIEF OF APPELLANT HANI ENTERPRISES, INC.

An Appeal from a Final Judgment Entered in the Fifteenth Judicial Circuit in and for Palm Beach County, Florida
L.T. No.: 50-2021-CA-006220

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STATEMENT OF THE CASE AND FACTS

In this consolidated appeal, Appellant/Defendant, Hani Enterprises, Inc. ("Hani" or "Landlord"), seeks reversal of a final judgment entered in favor of Appellee/Plaintiff, Darrell Phillips ("Phillips"), following a jury verdict in a premises liability lawsuit that concerned a trip and fall outside a convenience store leased, operated, and maintained by Co-Appellant/Co-Defendant, A1A Grocery Inc. ("A1A" or "Tenant").

As discussed herein, the trial court erred in failing to direct a verdict in Hani's favor because Hani, a commercial landlord who surrendered possession and control of the premises to A1A, owed no duty to Phillips to maintain the premises under Florida law or, in the alternative, because there was no legitimate evidentiary basis upon which Hani could held liable under Florida law.

Alternatively, the trial court erred in failing to order a new trial based on the individual and/or cumulative effect of improper and highly prejudicial comments Phillips' counsel made before the jury, as well as the erroneous admission of irrelevant and highly prejudicial evidence that deprived Hani of a fair trial and resulted in a verdict that was the obvious product of passion, prejudice, and

considerations outside the record and/or matters that were improperly injected into the record, which resulted in a miscarriage of justice.

The Lease

On May 1, 2018, Hani entered into a lease with A1A, granting A1A the sole right to use, occupy, and control the premises at issue as a convenience store. (R. 1558-75).[1] Specifically, the lease provided that in consideration of the agreements set forth in the lease to be performed by A1A, Hani tendered possession of the premises to A1A for a term of 10 years, with the option to renew the lease for an additional 10-year term. (R. 1558).

Pursuant to the lease, A1A agreed the premises would be used as a convenience store and acknowledged that Hani made no representations with respect to the suitability of the premises for A1A's business. (R. 1560). The lease further provided that Hani did not agree to undertake any modifications, alterations, or improvements to the premises except as stated in the lease, and that

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[1] The Record on Appeal shall be cited as "(R. ___)," while the Transcripts of Trial Proceedings shall be cited as "(T. ___)." All emphasis has been added unless otherwise stated.

the possession of the premises by A1A established the premises were in satisfactory condition unless A1A timely provided notice to Hani that the premises were not satisfactory. (R. 1560).

Importantly, as it concerned "**Maintenance and Repairs**" of the premises, Section 9 of the lease provided:

> ***[A1A] at [A1A's] sole cost and expense shall maintain the PREMISES and appurtenances and every part thereof in good order, condition and repair, including but not limited to*** the ceilings, all doors, windows, plumbing, and pipes, electrical wiring, walls and floors, roofing, ***driveways***, ***landscaping***, ***parking lot***, switches, heating and air conditioning systems, signs, and equipment installed by or at the expense of [A1A]. [A1A] expressly waives the benefits of any statute now or hereafter in effect which would otherwise afford [A1A] the right to make repairs at [Hani's] expense or to terminate this lease because of [Hani's] failure to keep the PREMISES in good order, condition and repair.

(R. 1561-62). Section 9 further provided that if A1A failed to maintain the premises, Hani—at the expense of A1A—had the right (but not the responsibility) to take acts to maintain the premises. (R. 1562).

The lease also required A1A to comply with all applicable laws, ordinances, regulations, and rules "relating to their respective maintenance obligation;" and, "at its sole cost and expense [to] promptly comply with all laws, statutes, ordinances and governmental rule, regulation or requirement" relating to the

condition, use, or occupancy of the premises. (R. 1561-62). Furthermore, the lease provided that Hani could not reasonably withhold consent to the subletting of the premises by A1A and that if Hani sought to terminate the lease during the second option term, it had to give A1A timely notice. (R. 1558, 1567).

Hani's restricted access to the premises was also detailed in the lease by indicating Hani was only authorized to enter the premises during business hours in order to inspect the premises; show the premises to prospective purchasers or lessees; post certain notices; and to alter, improve, or repair the premises provided that the entrance of the premises was not blocked and the business of A1A was not interfered with by Hani. (R. 1563). The lease further provided that Hani could retain a key to the premises, but Hani did not have the right to unlock any of A1A's vaults or safes on the premises. (R. 1562).

Reflecting A1A's and Hani's intent that A1A would be solely responsible for maintaining the premises and for any claims arising from A1A's use of the premises or any activity permitted by A1A to be done in or about the premises, Section 12 of the lease required A1A to indemnify Hani for such claims and Section 13 of the lease

required A1A to obtain—at its sole cost but for the mutual benefit of Hani—insurance against claims for personal injury occurring on the premises. (R. 1564).[2]

Phillips' Premises Liability Lawsuit

In 2021, Phillips initiated the underlying action by filing a Complaint against Hani and A1A that alleged virtually identical allegations in separate counts arising from a trip and fall on the premises on March 14, 2020. (R. 27-31). Specifically, Phillips alleged that on March 14th, he was "hired to perform work repairing a cooler on the property" and was "injured when he tripped and fell over loose concrete wire that was hidden in the grass which had grown too high and was unmaintained." (R. 27-28).

Phillips alleged that Hani and A1A possessed, controlled, and operated the premises; and that Hani and A1A were liable for his injuries since they breached their duties to maintain the premises; correct dangerous conditions that they knew or should have known

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[2] While Hani retained a limited right under the lease to approve material changes to the premises (i.e., "alterations, additions, or improvements") before A1A made them, (*see* R. 1562), this limited right, as discussed below, does not establish Hani sufficiently controlled the premises.

about; and warn Phillips of the dangerous condition. (R. 28-31).[3] Phillips also alleged Hani had a non-delegable duty to keep the premises in a reasonably safe condition. (R. 28).

In response, Hani filed an Answer and Affirmative Defenses denying the allegations of negligence and affirmatively asserting that the acts of others caused Phillips' damages, that Hani did not breach any duty owed to Phillips, no act or omission on Hani's part caused Phillips' injuries, that the condition complained of was open and obvious, and that Hani had no notice of the alleged dangerous condition. (R. 75-79).

Defendants' Summary Judgment Motion

Defendants ultimately moved for summary judgment, which was heard by the trial court over a year later. (R. 191, 745-75). During the hearing, defense counsel detailed that the evidence showed Phillips was hired by A1A to repair the cooler at the store on March 14th and arrived around 7:00 p.m. (R. 748). Prior to starting his work, it was still light outside, and Phillips observed and cleaned

[3] Phillips dismissed his duty to warn claim at trial. (T. 1031-33).

up some concrete debris in the grass where he would be walking. (R. 749, 762).

Defense counsel further detailed that in order for Phillips to perform the repair job, he had to access a condenser located outside the store, as well as the cooler inside the store, which resulted in Phillips walking back and forth from outside the store to inside the store multiple times through the grass; and it was on his final trip outside towards his van while his hands were full that he fell after tripping on a large six-foot by three-foot piece of wire mesh while walking through the grass that he claimed he did not see. (R. 749-51, 759-60).

Defense counsel argued that the large piece of wire mesh could have been readily seen by Phillips using his ordinary senses as was evident by his numerous trips back and forth from the store walking the same path without injury, which precluded his claim for premises liability under Florida law. (R. 751-53, 757, 762-63). Defense counsel also argued there was no evidence showing Hani or A1A had actual or constructive notice of the condition prior to the incident. (R. 757-59, 763). Additionally, counsel for Hani argued Hani did not owe any duties to Phillips because pursuant to the lease between Hani and

A1A, Hani surrendered possession and control of the premises to A1A and A1A assumed the sole responsibility to maintain the premises. (R. 765-66).

At the conclusion of the hearing, the trial court indicated the summary judgment motion would be denied; however, the court did address Hani's lack of possession and control argument. (R. 774-75, R. 538).

Substitution of Counsel and Motions to Exclude Irrelevant and Unduly Prejudicial Evidence

Following the summary judgment hearing, separate counsel for Hani, who had played a limited role in the proceedings up to that point, moved to be substituted as Hani's sole counsel and for a continuance of trial, which was granted by the court. (R. 549-54, 867, 869). Notably though, Phillips opposed Hani's motion and within his opposition, Phillips contended Hani, as the landlord of the premises, had a non-delegable duty to maintain the premises. (R. 608). Phillips also claimed the lease, as well as Hani's correction of County Code violations during the lease term, showed Hani had control of the premises at the time of the incident. (R. 609-15).

Hani subsequently moved to exclude evidence of the prior Code violations on the basis that the unrelated violations were irrelevant to Phillips' premises liability claim and unduly prejudicial. (R. 601-05, 859-63). Hani then detailed in a memorandum that the prior Code violations do not establish the requisite level of control over the premises necessary to impose liability on a landlord under Florida law; and instead, only demonstrated Hani's ownership of the property, which was not contested. (R. 1118-23). A1A filed a similar motion that asserted a similar argument and added that allowing evidence of the Code violations would result in the jury speculating that Defendants were negligent in the general upkeep of the premises. (R. 965-68).

Additionally, A1A moved to exclude post-incident photographs of the premises taken by Phillips 11 days after his incident, and by Phillips' investigators 18 and 65 days later, which showed the wire mesh still on the premises. (R. 973-79). In support of this motion, A1A noted the photographs did not depict the wire mesh on the date of the incident; and that using the photographs as evidence of general disrepair of the premises after the incident would serve no purpose other than to mislead, confuse, and inflame the jury. (R. 973-79).

Phillips opposed the motion to exclude the post-incident photographs on the basis that the photographs were relevant to show Defendants failed to maintain the premises because the wire mesh remained on the premises after the incident. (R. 1039). Phillips also claimed the photographs taken 11 days post-incident established Defendants' constructive notice of the wire mesh because the photographs showed Defendants stored things behind the store and argued this suggested Defendants were frequently in the area where Phillips fell. (R. 1039). Phillips also opposed the motions seeking to exclude the Code violations on the basis that Hani's actions in working with the County to correct the violations on the premises showed Hani's right of control over the premises. (R. 1063-67).

The Testimony of Hani's President, Samar Barhoush

During trial Hani's President, Samar Barhoush, who resides in New Jersey, testified live. (T. 305-07). Ms. Barhoush explained that Hani operates as a commercial landlord and owns the property at issue. (T. 304-05). She further detailed that in 2018, a prior tenant retired and a new tenant, A1A, took possession of the property, which was being used as a convenience store. (T. 306, 326).

Ms. Barhoush also testified that the rights of Hani with respect to the property would be dictated by the lease, and that that on the day of the incident, pursuant to the lease, A1A was in possession of the property and A1A was solely responsible for maintaining the premises. (T. 331, 341, 350-51). In addition, Ms. Barhoush explained that even though Hani was allowed to have a key to the premises pursuant to the lease, she did **not** have one and that she would call the tenant (A1A) prior to going to the store and would **not** just enter the store without warning. (T. 326-27, 351).

Ms. Barhoush further testified at trial that in 2018 during the lease term, in response to the County issuing Code violations pertaining to debris at the back of the premises, she hired a contractor to clean the area. (T. 344-46, 353-54).[4] Ms. Barhoush explained that the violations pertained to debris left by the previous tenant (and not A1A) and that Hani took action to correct the violations because it would not have been unfair to make a new tenant clean the debris left by a prior tenant and because the County

[4] Documentation pertaining to the Code violations was admitted into evidence as Plaintiff's Exhibit 11. (R. 1577-93).

threatened to issue fines against Hani simply because it was the owner of the premises if the violations were not promptly corrected. (T. 344-46, 353-54).

As it pertained to the concrete wire mesh that Phillips allegedly tripped on, Ms. Barhoush testified that she did not know why the mesh was there, she did not know how long the mesh was there, she never saw the mesh, and she did not hire anyone to pour any concrete at the property. (T. 346, 351-52, 357). She further testified that if someone did not see the wire mesh, it could be a hazard. (T. 346). Ms. Barhoush also noted during trial that prior to the incident, no one had fallen at the property and A1A never told her there were any problems requiring Hani's inspection of the property. (T. 351-52).

The Testimony of A1A's Co-Owner, Mohammed Zaman

Mohammed Zaman, a co-owner of A1A, testified at trial that A1A was occupying the premises at the time of the incident and that pursuant to the lease, "A1A [was] responsible to maintain and clean the property." (T. 379-80). Mr. Zaman also testified that A1A hires someone to maintain the back of the premises; but there is no set schedule for the maintenance. (T. 378-79).

Further, Mr. Zaman admitted that when Hani turned the property over to A1A, the wire mesh that is the subject of the underlying suit was **not** on the premises. (T. 380-81). He also testified that he was unaware there was wire mesh on the premises until after Phillips filed his lawsuit; that he did not know where the wire mesh came from; and that wire mesh could be a tripping hazard if someone does not see it. (T. 365-66, 380, 398-400).

Regarding the incident, Mr. Zaman testified that he hired Phillips to repair the cooler at the store. (T. 363). According to Mr. Zaman, he communicated with Phillips via text message while Phillips was at the store and the last message he received from Phillips informed him the cooler needed freon, but the unit was frozen so Phillips would come back the next day. (T. 364).

Mr. Zaman also testified that while A1A has video surveillance inside the store, **there are no cameras outside the store**. (T. 375, 384). He further acknowledged that he received a letter two or three weeks after the incident regarding video footage, but by that time there was no surveillance footage of the inside of the store from the day of the incident because the system's servers only store footage

for four to seven days. (T. 373). He further testified he did not order the destruction of any videos. (T. 384-85).

The Testimony of A1A's Co-Owner, Mohammed Gafur

Mohammed Gafur, another co-owner of A1A, initially testified during cross examination that he felt like the landlord was responsible for keeping the premises safe; although, he did not know the identity of the landlord. (R. 431). However, he later acknowledged that his assumption was incorrect and agreed that pursuant to the lease it was A1A's job to maintain the premises, which included the driveways, landscaping, and parking lot. (T. 434).

The Testimony of A1A's Cashier, Mohammed Hussain

Mohammed Hussain testified at trial that on March 14th he was working at A1A as a cashier. (T. 963). Mr. Hussain recalled that Phillips arrived to fix the cooler around nighttime and Phillips eventually stated before exiting the store that he would talk to Mr. Hussain's boss the next day about repairing the cooler. (T. 966-67). According to Mr. Hussain, Phillips did not return to the store after he left, and Phillips did not state that he tripped outside on wire mesh. (T. 964, 967). Mr. Hussain further testified that he did not know how

the wire mesh got behind the store and he did not see the wire mesh behind the store at any point before the incident. (T. 965-66).

The Testimony of Plaintiff/Appellee, Phillips

During trial, Phillips testified that individuals from A1A (and not Hani) asked him to come onto the premises to repair the cooler and he solely dealt with people from A1A. (T. 690-91). In fact, Phillips testified he had never heard of or spoken to Hani's President. (T. 689-90). And instead, on March 14th he spoke to A1A's co-owners about repairing the store's cooler. (T. 511-14).

Phillips also testified that since he had previously completed repair work at the store, he knew he would need to access part of the AC unit sitting on a shed outside in the back of the store. (T. 578-79). In addition, Phillips admitted that as a handyman, he has a higher level of knowledge than an average person while working on job sites. (T. 683). In line with that testimony, Phillips explained that when he arrived at the store a little after 7:00 p.m., it was still light outside and the first thing he did was clear the grassy area where he would be working by removing rocks and busted up concreate so he would have a clear walking path between the back and front of the store. (T. 516, 523-24, 594, 605, 622-23). However, Phillips claimed

he did not see the wire mesh at this time even though he acknowledged a corner of the wire mesh was sitting on the asphalt exposed and not hidden in the grass. (T. 607-08).

Phillips then detailed that he made three or four trips back and forth from inside the store to the back of the store; and that during these trips, he successfully walked **the same path** cutting through the grassy area without issue. (T. 515, 530-31, 600, 603-04, 618-20, 637). He further testified that it was only on his last trip to his van when it was starting to get dark outside and he was carrying a heavy bottle of freon in one hand and tools in the other, that he tripped on the wire mesh. (T. 519, 613, 620-21, 627).

According to Phillips, after he fell, he pulled the wire mesh out of the grass and took a photo of it so he could show it to Mr. Gafur or Mr. Zaman. (T. 520, 528; *see also* R. 1555). Phillips, however, admitted he never contacted either individual to report that he tripped on the wire mesh. (T. 591, 593). Instead, Phillips claims he went to the front of the store and got the cashier's attention through the window and then told him outside of the store that he fell, but not that he tripped on wire mesh. (T. 547-48, 653-54).

Notably, Phillips conceded at trial that the wire mesh was not a danger to him when he successfully navigated the same walking path three or four times before he fell. (T. 621). He also conceded that the only reason he tripped on the wire mesh the last time he was walking to his van was because it was dark, and he did not see the wire mesh. (T. 620, 635). Phillips further acknowledged that he had no idea how long the wire mesh had been on the ground but claimed grass had grown over the wire mesh hiding it, though he conceded seeing a portion of the mesh that was exposed on the asphalt (T. 608-09).

Eleven days later, Phillips went back to the store and took photographs of the wire mesh after leaning it against the building. (T. 598-99). However, Phillips did not contact A1A's co-owners to let them know he came back to the store, nor did he share the photographs with them or show them where he fell and what he fell on. (T. 598-99). Notably, during Phillips' testimony he referred to these photographs that were admitted into evidence when describing the wire mesh and the premises, as well as three post-incident photographs taken by his investigator (which were erroneously admitted into evidence as detailed below). (R. 1524-25, 1538-40).

The Directed Verdict Motions

After Phillips presented his last witness, which was also the close of all evidence, Defendants presented their directed verdict motions. (T. 1019-20). As it concerned Hani's alleged right of control, Hani detailed that the evidence showed Hani sufficiently surrendered possession and control of the premises to A1A and A1A was solely responsible for any injuries occurring on the property. (T. 1021). Hani highlighted the fact that **both** Hani's and A1A's representatives testified that A1A was in control of the premises and responsible for maintaining the area behind the store at all times relevant to the incident (T. 1021-22). Furthermore, Hani highlighted the fact that A1A's co-owner testified that the wire mesh was not present on the premises when A1A assumed possession and control of the premises. (T. 1022).

The evidence also showed A1A (not Hani) had the right to exclude third parties, which was supported by the lease, as well as Ms. Barhoush's testimony that she did not have a key to the premises and called ahead when seeking to enter the premises. (T. 1023). Lastly, Hani argued that the actions of correcting the Code violations prior to the incident do not establish control for purposes of premises

liability and that Hani only undertook to correct the violations because the debris was left by a prior tenant (and not A1A) and that the County was going to fine Hani if the violations were not timely corrected. (T. 1023-24).

As it pertained to the alleged dangerous condition, Hani argued there is nothing inherently dangerous about wire mesh and the evidence showed Phillips walked the same path numerous times without injury. (T. 1020-21). A1A, relying on Florida's open and obvious doctrine applicable to premises liability actions, also argued the evidence showed that Phillips, who admittedly had a higher level of skill than an average person while working on job sites, using his reasonable senses could have avoided the wire mesh—and did so successfully three or four times—while on the premises; and thus, Defendants could not be liable for Phillips' injury. (T. 1138-43).

In sum, Hani argued that there was no reasonable evidentiary basis upon which Phillips could recover; and that, as a result, his case should be decided as a matter of law. Hani's argument was further supported by A1A detailing the fact there was no evidence showing either Defendant had actual or constructive notice of the wire mesh before the incident or how long the wire mesh was on the

premises before the incident. (T. 1024-26, 1136-38). A1A also detailed that photographs of the wire mesh taken post-incident could not, and do not, show constructive knowledge of the wire mesh before Phillips fell. (T. 1137-38).

After hearing argument from the Parties, the trial court addressed the issue pertaining to Hani's alleged right of control over the property and **agreed that the terms of the lease do <u>not</u> establish Hani had a duty to maintain the premises**. (T. 1145). However, the court did not grant Hani's motion for directed verdict on that issue because it had a "concern" as to whether Hani's correction of the Code violations could translate "to a duty to continually monitor the property" or "be the janitor for the place," which the court noted to be "stretch." (T. 1145-46). The court went on to state it would rule these actions were not enough, but (erroneously) believed a jury should make that determination. (T. 1145-46). The court further stated factual issues as to whether the wire mesh was open and obvious and as to notice required denial of the directed verdict motions. (T. 1144-45).

Improper Comments Before the Jury

At the start of the four-day trial, during opening statements Hani's counsel moved for a mistrial in response to Phillips' counsel stating Defendants destroyed video surveillance. (T. 232-34). Specifically, after informing the jury that Defendants told Phillips there was no video surveillance on the day of the incident, Phillips' counsel stated Defendants should not "be heard to say [Phillips] didn't report it **if they destroyed the very evidence showing that**" Phillips reported the incident to the cashier. (T. 232).

Thereafter, the trial court inquired outside the presence of the jury as to whether there was any evidence the videos had been destroyed. (T. 234). In response, **Phillips' counsel acknowledged there was <u>no evidence</u> Defendants destroyed evidence and claimed he misspoke** when he asserted to the jury that the Defendants destroyed evidence. (T. 234). The court reserved ruling on the mistrial motion and did not issue any curative instruction. (T. 234). During closing arguments, Phillips' counsel again implied Defendants destroyed evidence when questioning where the surveillance videos were. (T. 1052). Notwithstanding that fact, the

court ultimately denied the motion for mistrial after the jury's verdict was announced. (T. 1156).

Phillips' counsel also made conscience of the community arguments during closing arguments by stating the jury had been brought together for a week "to pursue the cause of justice;" (T. 1045), which was later followed by Phillips' counsel stating: "So justice here is closure. He's waited three years for the other shoe to drop. And, ladies and gentlemen, you have the power to make things right for him." (T. 1067).

Phillips' counsel also expressed his opinion on the credibility of the witnesses during closing arguments by stating one of A1A's co-owners "gave testimony that wasn't credible." (T. 1052). He also bolstered the credibility of his own client by repeatedly telling the jury that he thought Phillips was a "straight shooter," a helper, dependable, "would give somebody the shirt off his back;" and that Phillips' "demeanor was appropriate," and he "showed integrity, resilience, [and] respect" on the stand. (T. 1062, 1064).

Further, Phillips' counsel suggested during closing arguments that Defendants were not telling the jury the truth and denigrated Defendants for asserting a defense to Phillips' claims by stating:

Defendants refused to tell the jury why the wire mesh was behind the store (T. 1054); Defendants' denial and failure to accept what Phillips said was like Defendants putting their "hands over [their] eyes, [their] ears and [their] mouth," (T. 1062-63); and that underneath Defendants' defense was "the horrible and cynical idea" that Phillips made-up his claims, (T. 1064-65).

Finally, Phillips' counsel also misstated the law pertaining to landlord liability during closing arguments by informing the jury that Hani was fined by the County for Code violations because it was Hani's legal responsibility as the owner of the property to maintain the premises. (T. 1111).

The Verdict, Post-Trial Motions, and Final Judgment

On June 9th, the jury returned a verdict in favor of Phillips and awarded him a total of $3,000,315.07 in damages. (T. 1151-53; R. 1165-66).[5] As indicated on the verdict form, the jury found Hani did not "surrender possession, custody and control of the premises" and that there was negligence on the part of Hani, which was a legal cause of loss, injury, or damage to Phillips. (R. 1165). The jury also found

[5] The verdict was reduced to $2,442,562.50 due to setoffs. (R. 1469).

A1A negligently caused damage to Phillips. (R. 1165-66). The jury apportioned fault between Hani and A1A and found Hani was 25% negligent and A1A was 75% negligent. (R. 1166).

Thereafter, A1A moved to set aside the verdict and for entry of judgment in accordance with its directed verdict motion on the basis that Phillips failed to establish the wire mesh was a dangerous condition and/or failed to establish that Defendants had actual or constructive notice of the presence of the wire mesh on the property prior to the incident. (R. 1359-76). A1A also moved for a new trial on the basis that Defendants were prejudiced by the statements by Phillips' counsel and suggestion that Defendants destroyed evidence (i.e., video evidence that, as discussed previously, counsel knew never existed in the first place). (R. 1252-57). Additionally, A1A argued a new trial was warranted because Defendants were prejudiced by the admission of the post-incident photographs which were irrelevant and unduly prejudicial to Defendants. (R. 1306-09).

Hani adopted A1A's arguments and also moved to set aside the verdict and for entry of directed verdict and/or new trial on the grounds that the collective comments made by Phillips' counsel appealing to the conscience of the community as well as the

destruction of evidence resulted in fundamental error. (R. 1460-66). Hani further argued a new trial was warranted because the evidence pertaining to the Code violations was irrelevant and prejudicial. (R. 146). Additionally, Hani explained the jury was misled regarding the issue of control of the premises and relied on improperly admitted evidence to find Hani did not surrender control over the premises, though this finding is contrary to Florida law and the manifest weight of the evidence. (R. 1466-67).

Phillips also moved for entry of a final judgment and requested the trial court to add Defendants' insurance carriers as Defendants and to hold Hani and its insurance carrier jointly and severally liable for the entire amount of damages based on the argument that Hani had a non-delegable duty to maintain the premises. (R. 1191-92, 1229-32). In response, Hani explained the non-delegable duty doctrine was not applicable. (R. 1237-43). The court agreed with Hani and entered final judgment against Hani based on the jury's apportionment of fault. (R. 1469).[6]

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[6] Phillips filed a Notice of Cross-Appeal regarding the court's ruling on his non-delegable duty argument, which Hani will address in its

Hani's appeal timely followed the trial court's order denying its post-trial motion. (R. 1521-24).

SUMMARY OF THE ARGUMENT

The trial court erred in entering judgment against Hani because the jury's verdict was not supported by the evidence and contrary to controlling Florida law. The undisputed evidence at trial established Hani, a commercial landlord, did not have sufficient control over the leased premises for purposes of imposing liability on Hani. Indeed, the evidence at trial established A1A was occupying and had control of the premises at the time of the incident; and that it was A1A's sole responsibility to maintain the premises.

Even assuming *arguendo* that Hani had a duty to maintain the premises, Hani was entitled to a directed verdict based on a proper application of the open and obvious doctrine and based on the fact that Phillips failed to present any evidence that Hani had actual or constructive notice of the alleged dangerous condition on the premises prior to the incident. The trial court's failure to grant a

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Reply/Cross-Answer Brief if Phillips elects to pursue this argument on appeal.

directed verdict on either of these bases was error and should be corrected by this Court.

In the alternative, Hani is entitled to a new trial due to the prejudicial effect of the improper comments made by Phillips' counsel before the jury and the trial court's erroneous admission of irrelevant, confusing, and extremely prejudicial evidence at trial. Indeed, the cumulative effect of the numerous improper comments and the erroneous admission of evidence plainly improperly influenced the jury, infected its verdict, deprived Hani of a fair trial, and resulted in a miscarriage of justice that should be corrected by this Court.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT IN HANI'S FAVOR WHERE PHILLIPS FAILED TO ESTABLISH A VIABLE EVIDENTIARY BASIS FOR HIS PREMISES LIABILITY CLAIM AGAINST HANI

A. Standard of Review

The denial of a motion for directed verdict and a motion to set aside a verdict and enter judgment in accordance with a motion for directed verdict is subject to *de novo* review. *Geico Gen. Ins. Co. v. Hoy*, 136 So. 3d 647, 651 (Fla. 2d DCA 2013). Notably, "[a] motion for directed verdict should be granted when there is no reasonable

evidence upon which a jury could legally predicate a verdict in favor of the non-moving party." *Tequesta v. Luscavich*, 240 So. 3d 733, 738 (Fla. 4th DCA 2018).

Moreover, when a jury's verdict for a plaintiff is contrary to the weight of the evidence, an appellate court should direct a trial court to enter judgment in favor of the defendant. *Teca, Inc. v. WM-TAB, Inc.*, 726 So. 2d 828, 831 (Fla. 4th DCA 1999); *McAllister v. Miami Daily News*, 17 So. 2d 613, 614 (Fla. 1944) ("where the manifest weight and probative force of the adduced evidence clearly requires a verdict for one party and the evidence is legally insufficient to support a verdict for the opposite party … it then becomes the duty of the trial court under the law to direct a verdict."). And while appellate courts review an order denying a motion for new trial for abuse of discretion, "[d]espite this deferential standard, 'an appellate court should reverse a jury verdict when there is no rational basis in the evidence to support the verdict of the jury.'" *Izquierdo v. Gyroscope, Inc.*, 946 So. 2d 115, 118 (Fla. 4th DCA 2007) (quotation omitted).

B. The trial court erred in failing to direct a verdict for Hani because there is no reasonable evidentiary basis to support Phillips' claim that Hani had a legal duty to him based on the argument that Hani "possessed" or "controlled" the premises at the time of the incident.

When ruling on Hani's directed verdict motion, the trial court correctly concluded that the lease between Hani and A1A did not establish the requisite level of control over the premises necessary to establish a viable premises liability claim against Hani as a matter of law. The court also indicated it would conclude Hani's actions taken to correct Code violations on the premises before the incident did not translate to a continuing responsibility to maintain the premises.

Nevertheless, the trial court denied Hani's directed verdict motion because in its opinion a jury needed to resolve whether Hani's conduct in connection with the Code violations translated to control over the premises and a continuing duty to maintain the premises. This ruling was in error and should be reversed on appeal because there is no evidence Hani had the requisite level of control over the premises as required by Florida law at the time of the incident to impose liability on Hani as a landlord (i.e., the court should have directed a verdict on this issue as a matter of law).

In Florida, "[a]n owner is not responsible for injuries to persons caused solely by the lessee's operations and activities." *Narvaez v. Pestana*, 780 So. 2d 267, 267 (Fla. 4th DCA 2001). Indeed, it is well-known that "'premises liability is not predicated on ownership of the property;' instead, **the 'duty to protect others from injury resulting from a dangerous condition on the premises rests on the right to control access to the property**.'" *Bechtel Corp. v. Batchelor*, 250 So. 3d 187, 196 (Fla. 3d DCA 2018) (quotation omitted). *See also Brown v. Suncharm Ranch*, 748 So. 2d 1077, 1078 (Fla. 5th DCA 1999) ("The duty to protect others from injury resulting from a dangerous condition on a premises rests on **the party who has the right to control access by third parties to the premises**").

Therefore, in premises liability cases involving leased premises, "the extent of responsibility for injuries occurring on the leased premises during the term of the lease depends upon the extent the owner of the property maintains control over the premises." *Brown*, 748 So. 2d at 1078. And when possession and control of the premises is surrendered to a lessee, "the lessor will not be held liable for injuries sustained by third parties while on the premises since the duty to protect third persons from injuries on the premises rests on

the party who has the right of possession, custody, and control of the premises." *Id.*

In fact, more than a century ago, the Florida Supreme Court explained that a tenant occupying the premises "is prima facie liable for damages caused by defects in or dangers on the premises that reasonably could have been avoided by appropriate care taken by the tenant or occupier." *King v. Cooney-Eckstein Co.*, 63 So. 659, 660 (Fla. 1913). The Florida Supreme Court further explained that "**[t]his is the law even though the lessor covenanted to keep the premises in repair**." *Id.*

In line with Florida Supreme Court precedent, Florida's appellate courts have held that a landlord's right to make repairs under a lease does not establish the requisite level of control necessary to impose on a landlord a duty to maintain the premises. *See Narvaez*, 780 So. 2d at 267 ("a landlord's right to … make repairs under a lease does not constitute control of the premises so as to impose on the landlord a duty"). Additionally, Florida's courts have held that the prior performance of maintenance or repair work on a property does not show the right of possession or control necessary to support a premises liability claim when the claim itself is not based

on the contention that the prior maintenance or repair work was performed negligently, resulting in injury to a third party. *See*, *e.g.*, *Bechtel*, 250 So. 3d at 198-99 (rejecting argument that company's prior maintenance work was evidence of possession and control); *Kimmons v. Crawford*, 109 So. 585, 587-88 (Fla. 1926) (explaining the distinction between a premises liability claim against a landlord based on a landlord making repairs in a negligent manner that resulted in injury to another).

Nor is a landlord's right under a lease to enter the premises or terminate a lease considered evidence of sufficient control for a premises liability claim. *See Ruiz v. Wendy's Trucking, LLC*, 357 So. 3d 292, 304 (Fla. 2d DCA 2023) ("case law holds that a landlord's right to enter leased premises is not sufficient to constitute control over the property so as to impose a duty on the landlord to protect third parties."); *Fla. Power & Light Co. v. Morris*, 944 So. 2d 407, 413 (Fla. 4th DCA 2006) ("premises liability principles recognize that a landlord's right to enter the premises does not, itself, constitute control of the premises so as to impose a duty on the landlord to protect third parties."); accord *Narvaez*, 780 So. 2d at 267; *Brown*, 748 So. 2d at 1078-79 (explaining a landlord's authority to terminate

a lease "does not constitute sufficient control over the leased premises for purposes of imposing liability.").

The holdings in the above premises liability cases are all in line with the overarching principle that "**control of property for purposes of premises liability means control that rises to the level of the ability to control access or exclude others from the property**." *Bechtel*, 250 So. 3d at 196. The above cases also support the legal principle that "a landowner is **not**, by that status alone, responsible for injuries caused solely by a lessee's operations and activities." *Ruiz*, 357 So. 3d at 303 (quotation omitted).

Applying the above principles to this case, this Court should conclude that, as a matter of law, Phillips failed to offer evidence sufficient to support the jury's finding that Hani maintained possession and control of the leased premises to the extent that it could be held liable for Phillips' injuries. Specifically, in the underlying case, there was no evidence that Hani, a commercial landlord, had the ability to control access or exclude others from the premises. Instead, the evidence showed that pursuant to the lease, Hani granted A1A the sole right to use, occupy, and control the premises.

Importantly, the lease expressly stated that A1A was responsible for maintaining the premises (which included the driveways, landscaping, and parking lot), and that A1A was required to comply with all laws specific to its maintenance obligations as well as the general conditions, use, or occupancy of the premises. The lease also reflects Hani's and A1A's intent that A1A would be responsible for maintaining the premises, as well as any resulting bodily injury claims arising from any activity permitted by A1A on the premises, by requiring A1A to indemnify Hani for such claims and obtain bodily injury insurance for A1A's and Hani's benefit. Additionally, the lease restricted Hani's access to the premises by stating Hani was only permitted on the premises during normal business hours and that Hani could not block the entrance of the premises or interfere with A1A's business.

And while Phillips cherry-picked terms of the lease when arguing below that Hani had a right of control over the premises, read as a whole, it is undeniable that the lease fails to support the argument that Hani, as a landlord, had a duty to maintain the premises, which the trial court correctly concluded when ruling on Hani's directed verdict motion. Indeed, in accordance with Florida

law highlighted above and contrary to Phillips' arguments below, the fact that the lease allowed for Hani to terminate the lease, enter the premises, or make repairs does **not** show that Hani had the right of control necessary to support a premises liability claim against a landlord. Additionally, the fact that A1A would need Hani's permission under the lease to change the use of the premises or make additions/modifications to the premises does **not** show Hani had the right to control access by third parties to the premises.

Furthermore, in line with the terms of the lease, the testimony at trial showed that Hani sufficiently surrendered possession and control of the premises to A1A. Specifically, as detailed above, Hani's President testified that at the time of the incident, A1A was in possession of the premises and A1A was solely responsible for maintaining the premises. She also testified that she did not have a key to the premises and would call ahead if she intended to visit.

This testimony was **not** contradicted by A1A. Rather, A1A's co-owners **conceded** that A1A was in possession of the premises at the time of the incident, and that it was A1A's responsibility to maintain

the premises.[7] A1A's co-owner also testified that A1A hired someone to maintain the back of the premises and at the time Hani turned over possession of the premises to A1A there was no wire mesh in the back of the premises. A1A's co-owner also testified that Phillips was on the premises solely at the request of A1A, which was confirmed by Phillips himself who testified that A1A's co-owners requested his presence on the premises (and not Hani), and he has never spoken to and does not know Hani's President.

The terms of the lease, and the testimony in line with the terms of the lease, were thus insufficient to impose a duty on Hani as a landlord to maintain the leased premises under Florida law. Nevertheless, Phillips argued below that Hani had a right of control over the property because Hani corrected Code violations on the premises pertaining to debris left by a previous tenant during A1A's

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[7] As noted above, one of A1A's co-owners initially testified he believed the landlord was responsible for maintaining the premises (although he did not know who the landlord was), but later acknowledged his assumption was incorrect and that pursuant to the terms of the lease, it was A1A's job to keep the driveways, landscaping, and parking lot of the premises in good order.

lease term but prior to the incident.[8] Notably, the trial court disagreed with Phillips that this conduct would result in a continuing duty to maintain the premises—or as the court put it, to "be the janitor for the place"—but ultimately ruled the jury should make this determination. This ruling was erroneous and should be reversed on appeal.

As detailed above, Florida law holds that the requisite level of control necessary to impose on a landlord a duty to maintain the premises is **not** shown by a landlord making repairs on the premises prior to the incident.[9] This is because "control of property for purposes of premises liability means control that rises to the level of the ability to control access or exclude others from the property." *Bechtel*, 250 So. 3d at 196.

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[8] As detailed below, evidence pertaining to the Code violations should not have been admitted at trial since the evidence was irrelevant and highly prejudicial. However, even if evidence pertaining to the Code violations was admissible, it was still insufficient to support the jury's finding that Hani had sufficient control of the premises under Florida law.

[9] The exception to this rule does not apply here since Phillips' claim is not based on allegations that Hani negligently corrected the Code violations, or that its corrections either directly or proximately caused him injury.

Here, the lease and testimony in this case do not show that Hani had the ability to control access or exclude others from the property. Importantly, this conclusion is not altered by the fact that Hani corrected Code violations on the premises before the incident since the act of correcting the violations did not result in Hani being granted the continuing right to control access of third parties or exclude anyone from the premises, much less a continuing duty to maintain the premises. Nor did Hani take action in response to the Code violations on the basis that it had a duty to maintain the premises. Indeed, as explained by Hani's President at trial, Hani only undertook to correct these Code violations because it would not have been unfair to make a A1A clean the debris left by a prior tenant and because the County threatened to issue fines against Hani simply because it was the owner of the premises if the violations were not promptly corrected. Thus, the actions taken by Hani in response to the violations merely showed Hani was the property owner, which is insufficient under Florida law to support a finding of liability.

Since the evidence at trial provided no reasonable basis to support a finding that Hani had the ability to control access or exclude others from the premises; and instead showed that A1A was

in possession of the premises and solely responsible for maintaining the premises in accordance with the terms of the lease, this Court should hold that Hani had no duty to maintain the premises and Hani could not be responsible for any injuries on the property caused by A1A's operations and activities. This Court should thus conclude that the trial court erred, and the final judgment should be reversed with instructions on remand to enter judgment in Hani's favor.

C. Alternatively, assuming *arguendo* Hani had a duty to maintain the premises, the trial court erred in failing to direct a verdict in Hani's favor based on a proper application of the "open and obvious" doctrine.

For the reasons detailed above, Hani owed no duty to maintain the premises in a reasonably safe condition at the time of the incident. However, assuming *arguendo* it did, this Court should still direct that judgment be entered in Hani's favor because the evidence showed the wire mesh was open and obvious, thus precluding liability against Hani as a matter of law.[10]

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[10] Hani anticipates that A1A will also address this argument on appeal; and in the event this Court agrees with A1A, the judgment against Hani based on the same evidence should also be reversed.

In Florida, it is "well settled that the proprietor [of a business] has a right to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses." *Brookie v. Winn-Dixie Stores, Inc.*, 213 So. 3d 1129, 1130-31 (Fla. 1st DCA 2017) (quotation omitted). Thus, when the evidence in a premises liability case shows that "a reasonable person could have easily avoided the obstacle and thereby prevented injury," Florida's courts have held that a proprietor will not be subjected to liability. *Id.* at 1131.

This legal principle is commonly referred to as the open and obvious doctrine and applies to two types of obvious conditions: "1) where the condition is so 'open and obvious and not inherently dangerous'; or 2) where the condition may be dangerous but is 'so open and obvious that an invitee may be reasonably expected to discover them to protect himself.'" *Brookie*, 213 So. 3d at 1133 (quotation omitted).

Florida's courts have also "held that a landowner has no liability for falls which occur when invitees walk on surfaces not designed for walking," like the grassy area where Phillips was walking in this case. *Dampier v. Morgan Tire & Auto, LLC*, 82 So. 3d 204, 206 (Fla. 5th DCA

2012) (collecting cases). *See also Wolf v. Sam's E., Inc.*, 132 So. 3d 305, 308-09 (Fla. 4th DCA 2014) (affirming judgment in favor of a defendant on the basis that the defendant had no duty to make an area not designed for walking safe for pedestrian use). Notably, the foregoing cases rest on two main premises. First, an occupier's legal duty to use reasonable care in maintaining the premises requires only that the occupier maintain each area of the premises in a reasonably safe condition for the purpose to which that area is designed to be used. *Savignac v. Dep't of Transp.*, 406 So. 2d 1143, 1146 (Fla. 2d DCA 1981). Second, when a person uses the property in a way in which it was not intended, the person does so "at their own risk." *Id.*

When the above legal principles are applied to this case, three things are clear. First, Hani did not have a duty to make the area behind the premises safe for walking because the area was not designed for walking; and thus, Phillips was walking through the grassy area at his own risk. Second, Hani cannot be liable for failing to maintain the premises because wire mesh is not an inherently dangerous object; and thus, the wire mesh does not constitute a dangerous condition. Third, and most important, even if the wire

mesh could be considered dangerous, Hani has no liability because the evidence showed that Phillips using his ordinary senses successfully avoided tripping over the large piece of wire mesh (which he admitted was partially exposed on the asphalt) three or four times before he fell.

Indeed, Phillips, who agreed he had a higher level of knowledge than an average person while navigating job sites, testified that when he arrived at the store, it was light outside and the first thing he did was clear the grassy area where he would be working so he would have a clear walking path. Phillips also conceded that the wire mesh was not a danger to him when he successfully navigated the same walking path three or four times before he fell. He further acknowledged that when he tripped and fell, he was carrying a heavy tank of freon in one hand and tools in the other; and that the only reason he tripped was because it was dark outside, and he did not see the wire mesh.

Since the evidence in this case showed that Phillips could have easily avoided the large piece of wire mesh using his ordinary senses and, in fact **did so three or four times while walking the same path on the premises**, the trial court should have held that Hani did

not violate any legal duty to Phillips as a matter of law under the open and obvious doctrine applied in premises liability actions. This Court should therefore reverse the final judgment and direct the court to enter judgment in Hani's favor.

D. Alternatively, assuming *arguendo* Hani had a duty to maintain the premises, the trial court erred in failing to direct a verdict in Hani's favor because there is no evidence that Hani had actual or constructive notice of the alleged dangerous condition prior to the incident at issue.

Even assuming *arguendo* that Hani had a duty to maintain the premises and the wire mesh constituted a dangerous condition, this Court should still hold that judgment should be entered in Hani's favor because Phillips failed to show Hani had actual or constructive knowledge of the condition prior to the incident.

In Florida, "a storekeeper must exercise ordinary or reasonable care to see that those portions of the premises which persons may be expected to use are reasonably safe." *Burmeister v. Am. Motorists Ins. Co.*, 403 So. 2d 541, 542 (Fla. 4th DCA 1981). However, in order for a plaintiff to recover in a premises liability action, the plaintiff must show that the storekeeper "had actual notice of the condition or that the dangerous condition existed for such a length of time that in the

exercise of ordinary care the … [storekeeper] should have known of it and taken action to remedy it or guard the plaintiff from harm therefrom." *Id.* (quotation omitted; bracket in original).[11]

In this case, Phillips did not argue that either Defendant had actual notice of the wire mesh prior to the incident and instead based his premises liability claim on the contention that Defendants should have known about the dangerous condition and taken steps to remedy it prior to the incident (i.e., Defendants had constructive notice of the condition). There was no evidence in this case, however, that would allow a finder of fact to draw any reasonable inference

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[11] Florida Statute section 768.0755, entitled "Premises liability for transitory foreign substances in a business establishment," provides that "the injured person must prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it;" and that constructive knowledge may be established by evidence showing the condition existed for a sufficient amount of time before the incident such that a reasonable person should have known of the condition, or that the condition occurred with regularity and was thus foreseeable. § 768.0755(1), Fla. Stat. (2024). While the statute uses the term "substance," the Florida Supreme Court has held that this language is intended to refer to "any liquid or solid substance, item or object located where it does not belong. *Owens v. Publix Supermarkets*, 802 So. 2d 315, 317 n.1 (Fla. 2001). Accordingly, Phillips was required, pursuant to Florida's case law and section 768.0755, to show Hani had actual or constructive notice of the condition prior to the incident in order to recover in his premises liability lawsuit.

that Hani had constructive knowledge of the wire mesh prior to the incident.

In fact, there was **no** testimony from anyone in this case showing the wire mesh was on the premises for a sufficient amount of time before the incident, such that a reasonable person should have known of the alleged dangerous condition. Nor did Phillips present any evidence that people routinely tripped on wire mesh on the premises such that the alleged dangerous condition occurred with regularity and was therefore foreseeable. Instead, Hani's President as well as A1A's co-owners and its cashier testified that they did not know the concrete wire mesh was there, nor did they how the wire mesh got there as there was no construction or concrete repair work completed on the premises during the lease term.

Phillips, relying on post-incident photographs, however, claimed constructive notice was established because the photographs showed items being stored behind the store and the wire mesh still on the premises after the incident. Specifically, Phillips' argument infers that since items are shown behind the store after the incident, the jury could infer that items were also stored behind the store before the incident. And based on the inference that items were

stored behind the store before the incident, the jury could further speculate that Defendants were frequently in the back of the store to access these items. And then based on the inference that Defendants were in the back of the store frequently before the incident to access stored items, the jury could conclude that Defendants knew or should have known the wire mesh was on the premises before Phillips' incident.

This constructive notice argument, however, is clearly based on speculation and unreasonable inference stacking, which cannot support a finding of constructive notice. Stated plainly, photographs of the premises taken after the incident that do not depict the premises in the condition it was in at the time for the incident provide no evidentiary support for a claim of actual or constructive notice in a premises liability action.

First, the concept of constructive notice in a premises liability action pertains to whether a defendant should have known about the alleged dangerous condition before the incident and taken steps to remedy the condition to prevent injuries. Thus, evidence concerning a defendant's knowledge of a dangerous condition after the incident is not relevant to the concept of constructive notice. Moreover,

Phillips' claim that Defendants were frequently in the area because the post-incident photographs show items stored in the back of the premises is based on pure speculation, as well as impermissible inference stacking, and in no way shows how long the wire mesh was present or that Defendants were in fact in the area on a frequent basis. Furthermore, as it concerns Hani specifically, there was no evidence that Hani's President was ever physically in the back of the premises during the lease term and before the incident such that she could or should have had knowledge of the wire mesh.[12]

Since there was no evidence developed at trial that showed Hani had actual or constructive notice of the wire mesh prior to the incident, and Phillips' constructive notice claim was instead based on speculation and conjecture, the trial court should have granted Hani's motion for directed verdict. *See Tallahassee Med. Ctr. v. Kemp*, 324 So. 3d 14, 16 (Fla. 1st DCA 2021) (explaining directed verdict in

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[12] As a notable aside, while Phillips also claimed grass had grown over the wire mesh, this self-serving testimony is contradicted by the fact that Phillips acknowledged the wire mesh was also on the asphalt and visible. The photographs of the wire mesh also do not reflect any grass growing over or clinging to the wire mesh. (R. 1535, 1539, 1555-56).

slip and fall claim should have been granted in favor of defendant where verdict was based on impermissible inference stacking, conjecture, and speculation). Accordingly, Hani requests that this Court reverse the final judgment and direct the court to enter judgment in Hani's favor.

II. ALTERNATIVELY, THIS COURT SHOULD REMAND THIS CASE FOR A NEW TRIAL BASED ON COUNSEL'S HIGHLY IMPROPER, GROSSLY INFLAMMATORY, AND EXTREMELY PREJUDICIAL COMMENTS TO THE JURY, AS WELL AS THE TRIAL COURT'S ERRONEOUS ADMISSION OF IRRELEVANT, CONFUSING, EXTREMELY PREJUDICIAL EVIDENCE THAT INDIVIDUALLY AND/OR CUMULATIVELY INFECTED THE VERDICT, DEPRIVED HANI OF A FAIR TRIAL, AND RESULTED IN A MISCARRIAGE OF JUSTICE

A. Standard of Review: Improper Comments and Erroneously Admitted Evidence

"A trial court's order granting or denying a motion for a new trial based on either objected-to or unobjected-to improper argument is reviewed for abuse of discretion." *Allstate Ins. Co. v. Marotta*, 125 So. 3d 956, 960 (Fla. 4th DCA 2013) (quotation omitted). However, when a new trial is sought based on improper comments that were objected to at trial, this Court has held that "the trial court should grant a new trial if the argument was 'so highly prejudicial and inflammatory

that it denied the opposing party its right to a fair trial.'" *Id.* (quotation omitted).

This Court has further explained that for unpreserved challenges to improper comments, a new trial should be granted if the comments were "improper, harmful, incurable, and damage the fairness of the trial such that the public interest requires a new trial." *Marotta*, 125 So. 3d at 960. Additionally, "the cumulative effect' of preserved and unpreserved error" may be considered when evaluating whether the challenged comments resulted in harmless error. *Id.* at 961-62.

Additionally, the abuse of discretion standard of review applies to a trial court's decision to admit or exclude evidence. *Pan. City-Bay Cty. Airport & Indus. Dist. v. Kellogg Brown & Root Servs.*, 140 So. 3d 1112, 1115 (Fla. 1st DCA 2014). This "discretion, however, 'is limited by the evidence code and the applicable case law, and its interpretation of those authorities is subject to *de novo* review.'" *Id.* (quotation omitted).

B. The numerous highly improper, inflammatory, and extremely prejudicial comments made by Phillips' counsel to the jury, which undoubtedly improperly influenced the jury's reasoning and its verdict, warrant a new trial.

This Court should reverse the final judgment and remand this case for a new trial since Phillips' counsel at several points during the course of the trial and in the presence of the jury suggested Defendants destroyed evidence, urged the jury to seek justice for Phillips, bolstered Phillips' credibility while claiming one of A1A's co-owners was not credible, denigrated Defendants and their defenses, suggested Defendants were not telling the truth, and misstated the law as it pertains to a landlord's legal responsibility to maintain leased premises.

In Florida, "statements by counsel in closing argument which accuse opposing counsel of hiding evidence and of fraudulently preventing the presentation of relevant evidence constitute reversible error." *SDG Dadeland Assocs. v. Anthony*, 979 So. 2d 997, 1001 (Fla. 3d DCA 2008). *See also Emerson Elec. Co. v. Garcia*, 623 So. 2d 523, 525 (Fla. 3d DCA 1993) (ordering new trial when counsel accused the opposing party of concealing evidence where "[n]o pretrial discovery violation was ever established"); *Int'l Sec. Mgmt. Grp., Inc. v. Rolland*,

271 So. 3d 33, 51 (Fla. 3d DCA 2018) (ordering new trial where counsel may improper comments regarding missing video surveillance when there was no evidence the video was missing due to spoliation or concealment).

As detailed above, Phillips' counsel engaged in egregious conduct by suggesting to the jury that Defendants destroyed relevant video surveillance even though there was no evidence to support this suggestion or that any surveillance from the premises was missing because of spoliation or concealment. While Hani objected to these improper comments and moved for mistrial, the trial court did not give any curative instruction and ultimately denied the mistrial motion. This was reversible error under Florida law necessitating a new trial since the statements made by Phillips' counsel suggested to the jury that Defendants were concealing evidence.

Additionally, during trial, Phillips' counsel made statements that appealed to the conscience of the community by stating to the jury that they were brought together "to pursue the cause of justice;" which was later followed by Phillips' counsel stating: "So justice here is closure. He's waited three years for the other shoe to drop. And, ladies and gentlemen, you have the power to make things right for

him." (T. 1045, 1067). Notably, these comments are improper as Florida law condemns impassioned and prejudicial pleas for a jury to return a verdict that brings justice to the plaintiff. *See Cardona v. State*, 185 So. 3d 514, 519-22 (Fla. 2016) (explaining comments asking the jury to seek justice improperly inflamed the minds and passions of the jurors); *Birren v. State*, 750 So. 2d 168, 169 (Fla. 3d DCA 2000) ("Argument appealing to community sensibilities and civic conscience has repeatedly been held improper.").

Phillips' counsel also expressed his opinion during closing arguments that one of A1A's co-owners "gave testimony that wasn't credible;" while bolstering Phillips' credibility by repeatedly telling the jury that he thought Phillips was a "straight shooter," a helper, dependable, "would give somebody the shirt off his back;" and that Phillips' "demeanor was appropriate," and he "showed integrity, resilience, [and] respect" on the stand. (R. 1052, 1062, 1064). These statements were improper under Florida law and warrant a new trial.

Indeed, Florida law holds that "[a]n attorney's expression of his personal opinion as to the credibility of a witness, or of his personal knowledge of facts, is fundamentally improper." *Airport Rent-A-Car v. Lewis*, 701 So. 2d 893, 896 (Fla. 4th DCA 1997). In fact, Florida's

courts have held that "expressions by a lawyer of his personal opinion are in derogation of the Code of Professional Responsibility (now Rules of Professional Conduct, of the Rules Regulating the Florida Bar), and will not be condoned." *Moore v. Taylor Concrete & Supply Co.*, 553 So. 2d 787, 792 (Fla. 1st DCA 1989). *See also* Fla. Bar Reg. R. 4-3.4 (stating "[a] lawyer must not: state a personal opinion about the credibility of a witness … or state a personal opinion as to the justness of a cause, [or] the culpability of a civil litigant"). Thus, even in the absence of a contemporaneous objection, "courts have expressed the intention to reverse and remand such impropriety for a new trial[.]" *Moore*, 553 So. 2d at 792.

Moreover, Florida law does not allow counsel to suggest during closing arguments that a defendant engaged in shameful conduct by defending a claim, sought to avoid responsibility, or was hiding the truth. *Carnival Corp. v. Pajares*, 972 So. 2d 973, 978 (Fla. 3d DCA 2007); *Marotta*, 125 So. 3d at 960-62. Nonetheless, Phillips' counsel did just that during closing arguments by stating Defendants refused to tell the jury why the wire mesh was behind the store; Defendants' denial and their failure to accept what Phillips said was like Defendants putting their "hands over [their] eyes, [their] ears and

[their] mouth;" and Defendants' defense was based on a "horrible and cynical idea" that Phillips made-up his claims. (T. 1054, 1064-65). Since these comments run afoul Florida law, a new trial is warranted here.

Finally, Phillips' counsel misstated the law pertaining to landlord liability by informing the jury that Hani was fined by the County for Code violations because it was Hani's legal responsibility as the owner of the property to maintain the premises. (T. 1111). As detailed above, this is not the law pertaining to a landlord's liability in a premises liability action. And this misstatement of the law, in combination with the numerous other improper comments made by Phillips' counsel before the jury, warrants a new trial here. *See Charriez v. State*, 96 So. 3d 1127, 1128 (Fla. 5th DCA 2012) (noting counsel's misstatement of the law was one of many improper comments that even if not objected to warranted a new trial due to the comments cumulative effect).

In fact, while it is anticipated that Phillips will argue on appeal that the majority of these comments were not followed by a contemporaneous objection, it must be noted that the improper comments pertaining to the video surveillance were objected to and

would serve to warrant a new trial in and of themselves. Nevertheless, the cumulative effect of all the improper comments made by Phillips' counsel addressed herein rise to the level of fundamental error. *See Charriez*, 96 So. 3d at 1128 (explaining that the cumulative effect of the unobjected to comments amounted to fundamental error); *Marotta*, 125 So. 3d at 961 (holding cumulative effect of preserved and unpreserved errors resulted in reversible error); accord *Lewis*, 701 So. 2d at 897.

This Court should therefore hold that the improper comments by Phillips' counsel were harmful and denied Hani a fair trial, which necessitates a new trial on remand.

C. The fact that a new trial is warranted in this case is unaffected by the fact that some of the improper comments were unobjected to because those comments amount to fundamental error.

As explained by the Florida Supreme Court in *Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010, 1029 (Fla. 2000), when determining whether a new trial is warranted based on allegedly improper comments by counsel, "the primary concern of courts must be how the improper closing argument affected the fairness of the trial proceedings." *See also Carnival Corp. v. Jimenez*, 112 So. 3d 513,

520 (Fla. 2d DCA 2013) (explaining the focus of the new trial remedy is on the fairness of the proceedings). Thus, while a contemporaneous objection to improper comments during closing argument is generally necessary to preserve error, Florida's courts have explained that there is an exception to that requirement where "the error can be said to be fundamental." *Owens Corning Fiberglas Corp. v. Morse*, 653 So. 2d 409, 410 (Fla. 3d DCA 1995).

Notably, "[f]undamental error occurs if the argument 'was so prejudicial as to be incapable of cure by rebuke or retraction,' or if the error extinguishes 'a party's right to a fair trial.'" *Owens*, 653 So. 2d at 410 (quotation omitted). And as established by the Florida Supreme Court in *Murphy*, fundamental error in the context of unobjected-to improper comments by counsel will be shown when: the complaining party establishes the comment being challenged "was (1) improper, (2) harmful, (3) incurable, and (4) so damaging to the fairness of the trial that the public' interest in our system of justice requires a new trial." *Jimenez*, 112 So. 3d at 519 (quotation omitted).

As detailed above, Hani has established that the collective impact of the numerous comments made by Phillips' counsel were

improper, harmful, incurable, and damaging to the fairness of the trial. Therefore, this Court should grant a new trial in this case based on the collective objected to and unobjected to comments made by Phillips' counsel during trial. *See*, *e.g.*, *Florida Peninsula Insurance Company v. Nolasco*, 318 So. 3d 584, 588-89 (Fla. 3d DCA 2021) (reversing the denial of new trial in circumstances akin to those at issue in this case).

D. The trial court's erroneous admission of irrelevant, confusing, and extremely prejudicial evidence, evidence that undoubtedly improperly influenced the jury's reasoning and its verdict, warrants the grant of a new trial.

This Court should also hold that a new trial is required in this case because the trial court abused its discretion when admitting irrelevant and prejudicial evidence that was misleading and confusing to the jury, and which contributed to the verdict against Hani. In Florida, admission of "[i]nadmissible evidence constitutes grounds for a new trial where the evidence likely results in jury confusion as to the issues and evidence considered." *Probkevitz v. Velda Farms, LLC*, 22 So. 3d 609, 615 (Fla. 3d DCA 2009). Furthermore, "[a] new trial is warranted whenever irrelevant, prejudicial evidence is improperly introduced." *Id.* Indeed, Florida's

Evidence Code expressly provides that "[i]n cases tried by a jury, a court shall conduct proceedings, to the maximum extent practicable, in such a manner as to prevent inadmissible evidence from being suggested to the jury by any means." § 90.104(2), Fla. Stat. (2024)

It is also well-known that "[t]o be relevant, evidence must tend to prove or disprove a material fact." *Thigpen v. UPS*, 990 So. 2d 639, 646 (Fla. 4th DCA 2008). Stated another way, in order to be admissible, evidence "must have a tendency to establish a fact in controversy or to render a proposition more or less probable." *Id.* And while relevant evidence is generally admissible, it may be excluded under Florida Statute section 90.403, which provides that "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, [or] misleading the jury[.]" § 90.403, Fla. Stat.

In the present case, this Court should conclude that the trial court reversibly erred when it admitted evidence, over objection, of prior Code violations pertaining to the premises that were corrected by Hani before the incident, as well as post-accident photographs of the premises, which were irrelevant to show notice of the alleged dangerous condition at the time of the incident (the crux of a

premises liability claim), and confused and/or misled the jury, resulting in undue prejudice to Hani.

Specifically, this Court should hold that the evidence pertaining to the prior Code violations—none of which were specific to wire mesh—was irrelevant to the claim at issue in this case. As noted above, the violations occurred as the result of a prior tenant's failure to remove debris on the property, which were corrected before Phillips' incident. This evidence has no relevance to whether Hani or A1A had actual or constructive knowledge of the wire mesh on the premises prior to Phillips' incident, which is the crux of his premises liability lawsuit. *See Burmeister*, 403 So. 2d at 542 (explaining that in a premises liability case, a plaintiff must show the shopkeeper had actual or constructive notice of the alleged dangerous condition prior to the incident); § 768.0755(1), Fla. Stat. ("the injured person must prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it").

Moreover, contrary to Phillips' contention otherwise, this evidence is <u>not</u> relevant to show Hani's alleged right of control of the premises because, as detailed above, "control of property for

purposes of premises liability means control that rises to the level of the ability to control access or exclude others from the property." *Bechtel*, 250 So. 3d at 196. Additionally, as explained herein, a landlord making repairs on the premises that are unrelated to a plaintiff's injuries does not establish the requisite level of control necessary to support a premise liability claim against a landlord under Florida law.

Since the evidence pertaining to the Code violations was irrelevant to show Defendants' notice of the wire mesh on the premises or Hani's right of control, the admission of this irrelevant evidence was highly prejudicial and likely mislead and confused the jury by suggesting to the jury that it could be considered when determining Defendants' liability. Indeed, the admission of the irrelevant Code violation evidence, coupled with Phillips' closing argument that Hani was legally responsible to maintain the premises because it corrected the Code violations, undoubtedly contributed to the jury's verdict that found Hani did not surrender possession and control of the premises.

As detailed above, when ruling on the Parties' directed verdict motions, the trial court correctly stated that the lease between Hani

and A1A did not support a finding of liability against Hani. Nevertheless, the court let the jury determine whether Hani surrendered possession and control of the premises (and thus whether Hani owed a duty to maintain the premises) based on the evidence pertaining to Hani correcting the Code violations. Thus, without this irrelevant evidence at trial, the jury would not have rendered a verdict against Hani. Therefore, under a harmless error analysis, this Court should conclude that a new trial is warranted since the admission of the irrelevant and prejudicial Code violation evidence contributed to the verdict.

In addition, this Court should hold that the trial court committed reversible error by admitting the post-incident photographs since the photographs were irrelevant to show Defendants' actual or constructive notice of the wire mesh on the premises before the incident, which—yet again—is the material fact in controversy in a premises liability claim. As explained above, photographs in this case showing the wire mesh on the premises after the incident do not support a finding of constructive notice of the wire mesh on the premises before the incident. Nor do these photographs tend to support the premises liability claim based on constructive

notice since Phillips' argument that the photographs suggest Defendants were often in the back of the premises is based on pure speculation and impermissible inference stacking, which cannot support a jury verdict of liability. *Kemp*, 324 So. 3d at 16.

Furthermore, Florida law holds that evidence of measures taken (or the lack thereof) after an injury are "not admissible to prove negligence[.]" § 90.407, Fla. Stat. (2024). *See also Jones v. Alayon*, 162 So. 3d 360, 365-66 (Fla. 4th DCA 2015) (holding evidence of post-accident conduct inadmissible since it could inflame the jury and cause them to award damages in a desire to punish the defendant). Thus, this Court should hold that the trial court erred in permitting the post-incident photographs to be admitted into evidence at trial.

Indeed, the true purpose of admitting the post-incident photographs, which were irrelevant to the material facts at issue in this case, was to confuse the jury by suggesting to the jury that Defendants could be held liable for not removing the wire mesh after the incident, which is not a proper basis for a premises liability claim. The post-incident photographs also likely inflamed the jury and caused them to award Phillips' damages to impermissibly punish

Defendants for not removing the wire mesh after the incident (even though Phillips never specifically informed anyone associated with A1A—much less Hani—that he tripped and fell on wire mesh at the premises before his lawsuit was filed). This Court should therefore hold that a new trial is warranted in this case due to the admission of irrelevant and highly prejudicial evidence that resulted in an unfair trial.

E. Section Conclusion

Whether viewed separately or cumulatively, the numerous highly improper, inflammatory, and extremely prejudicial comments made by Phillips' counsel, as well as the trial court's erroneous admission of irrelevant, confusing, and extremely prejudicial evidence, improperly influenced the jury, deprived Hani of a fair trial, resulted in a miscarriage of justice, and warrant the grant of a new trial here.

CONCLUSION

Based on the foregoing, Hani respectfully requests that this Court reverse the trial court's final judgment and order the trial court to enter judgment in favor of Hani on remand, or alternatively, reverse and remand this case for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 25, 2024, a true and correct copy of the foregoing has been filed with the Florida Court's E-Filing Portal and served via E-Mail to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the Florida Rules of Appellate Procedure 9.045(b) and 9.210, and that the Initial Brief does not exceed 13,000 words, excluding the cover sheet, table of contents and authorities, certificates of service and compliance, and signature blocks.

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