DARREN A. FULLMAN, Plaintiff/Respondent, vs. NANCY L. LEMMO, NICHOLAS LEMMO and JOHN DOES 1-10 (representing presently unidentified individuals, businesses, and/or corporations who owned, operated, maintained, supervised, designed, constructed, repaired and/or controlled the vehicle in question or otherwise employed the defendant), Defendant/Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000337-23 Civil Action **Submitted on: March 11, 2024** On Appeal from: Superior Court of New Jersey Law Division: Union County Docket No. UNN-L-2103-18 Sat Below: Hon. John G. Hudak, J.S.C.

AMENDED BRIEF AND APPENDIX ON BEHALF OF DEFENDANT/APPELLANT NANCY L. LEMMO

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS OF APPENDIX

Page

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Page

TABLE OF CITATIONS

Page

Cases

Rules of Court

Rules of Evidence

PRELIMINARY STATEMENT

This matter arises out of a 2017 motor vehicle accident that occurred in Summit, New Jersey, when defendant struck the rear end of plaintiff's vehicle after both were stopped at a red traffic signal. Plaintiff declined immediate emergency care and drove away in his vehicle following the accident. He later sought treatment for neck and back pain, and filed a personal injury complaint, seeking, *inter alia*, damages for pain and suffering and future medical expenses.

Defendant conceded liability prior to the seven-day jury trial. The jury returned a verdict in favor of the plaintiff, awarding $200,000.00 for pain and suffering, and $200,000.00 for the cost of future medical treatments.

The trial court committed a litany of harmful errors during the course of the trial, compelling defendant to file a motion for a new trial on the bases that: the court abused its discretion in confining the defense expert's testimony to the four corners of his report; the court abused its discretion in admitting photographs of deployed head restraints without expert testimony; the court erred in refusing to issue a limiting instruction to the jury following plaintiff's failure to present quantitative evidence of any future medical expense aside from surgeon's fees; and the cumulative effect of the trial court's numerous rulings constituted abuses of discretion that resulted in a manifestly unjust verdict.

Defendant now appeals the trial court's denial of the motion for a new trial. A new and fair trial must be ordered to remedy this clear miscarriage of justice.

PROCEDURAL HISTORY

This personal injury action arises out of an August 30, 2017 motor vehicle accident that occurred in Summit, New Jersey. On June 19, 2018, Plaintiff/Respondent Darren A. Fullman ("Plaintiff") filed a Complaint in the Superior Court of New Jersey, Law Division, Union Vicinage, asserting negligence and statutory tort claims against Nancy L. Lemmo and Nicholas Lemmo ("Defendants"). (Da1-13) Defendants filed an Answer to the Complaint on July 6, 2018. (Da14-16)

On April 19, 2022, the trial court granted Plaintiff's unopposed motion for summary judgment on the issue of liability. (Da65)

Immediately prior to trial, Plaintiff voluntarily dismissed Nicholas Lemmo from the action. (2T3:19-22) [1] The case was tried over the course of

[1] The designation "1T" refers to the transcript of trial proceedings held on June 26, 2023.
The designation "2T" refers to the transcript of trial proceedings held on June 27, 2023.
The designation "3T" refers to the transcript of trial proceedings held on June 28, 2023.
The designation "4T" refers to the transcript of trial proceedings held on June 29, 2023.

seven days from June 26 through 20, 2023, and July 5 and 6, 2023. (See 1T to 7T) On July 6, 2023, the jury returned a verdict in favor of Plaintiff and against Nancy Lemmo, awarding damages in the amount of $400,000. (Da61)

On July 24, 2023, Defendant/Appellant Nancy Lemmo ("Defendant") filed a motion for a new trial. (Da17) Plaintiff opposed the motion and, following oral argument on August 30, 2023, the court denied Defendant's motion. (Da52; 8T) Defendant filed a Notice of Appeal on October 3, 2023. (Da54)

The trial court filed the Order entering Judgment on November 9, 2023. (Da62-64)[2]

The designation "5T" refers to the transcript of trial proceedings held on June 30, 2023.
The designation "6T" refers to the transcript of trial proceedings held on July 5, 2023.
The designation "7T" refers to the transcript of trial proceedings held on July 6, 2023.
The designation "8T" refers to the transcript of oral argument on Defendant's motion for a new trial, and the trial court's decision, held on August 30, 2023.

[2] The final Judgment of $581,192.09 included $100,000.00 of medical expenses that the parties had agreed to add to the verdict, and $81,192.09 in pre-judgment interest.

STATEMENT OF FACTS

A. The Accident and Plaintiff's Medical Treatment

This matter arises out of an August 30, 2017 motor vehicle accident that occurred at the intersection of Morris and Summit Avenues in Summit, New Jersey. (4T40:8-12; 4T40:13-15) Plaintiff alleges he was stopped at a red traffic signal for approximately 30 seconds when he was struck from behind by Defendant. (4T41:17 to 42:3)

At the time of the accident, Defendant was operating a 2011 Jaguar FX owned by her husband, Nicholas Lemmo. (4T192:16-22) Defendant had stopped for a red light immediately behind the Plaintiff's vehicle. (4T195:5-20) After the traffic signal turned from red to green, Defendant observed Plaintiff's vehicle begin to move forward, and Defendant proceeded to do the same. (4T197:12-20) Plaintiff's vehicle then stopped abruptly, and, although Defendant applied her brakes, she hit Plaintiff's vehicle from behind. (4T197:19-24) Defendant described the impact as a "tap," and estimated she was traveling at a speed of approximately 5 miles per hour. (4T197:10 to 198:3) Defendant testified there was minimal damage to either car (4T198:18-24), and introduced photographs of both vehicles. (Da103-113)

Plaintiff, alternately, described some damage he observed to his vehicle, but did not offer any testimony as to the force of the impact, other than to say

that he had never had that kind of accident before. (4T44:23 to 45:1; 4T48:9 to 49:8)

As a result of the accident, Plaintiff alleged that he was dizzy and suffered from a headache and pain to his neck and back. (4T78:19-22) Although Plaintiff drove his vehicle home following the accident, a friend brought him to and from the emergency room later that day. (4T78:3-22) Plaintiff later sought treatment from Wayne Fleischhacker, D.O., Paul Lyons, D.C., and Mark Cohen, M.D., for chiropractic treatment, physical therapy, and pain management. (4T79:19 to 81:15)

Plaintiff also consulted with neurosurgeon Nirav Shah, M.D., who opined that Plaintiff would require one cervical and two lumbar fusion surgeries in the future. (4T55:11 to 86:1; 4T86:6-13) Plaintiff, however, did not wish to pursue surgery at the time of his four visits with Dr. Shah between 2020 and 2023. (4T87:11-14) Plaintiff testified he believes that he will ultimately need to undergo surgery. (4T89:2-7)

A. The Complaint and Trial

On June 19, 2018, Plaintiff filed a four-count Complaint in the Superior Court of New Jersey, Law Division, Union Vicinage, Docket No. UNN-L-2103-08, asserting negligence and statutory tort claims against Nancy Lemmo and Nicholas Lemmo. Plaintiff alleged to have sustained disc bulges, disc

herniations, and disc annular tears at various levels of the cervical and lumbar spine as a result of the accident. In addition to seeking damages for pain and suffering, Plaintiff sought damages for future medical expenses. (Da2; Da10-13)

On April 29, 2022, Plaintiff obtained an Order entering summary judgment on the issue of liability, finding Defendant Nancy Lemmo was 100% at fault for causing the accident. (Da65) In June 2023, Plaintiff voluntarily dismissed the Complaint against Nicholas Lemmo, the owner of Defendant's vehicle. (2T3:19-22)

The matter proceeded to a jury trial before the Honorable John G. Hudak, J.S.C., on June 26, 27, 28, 29, 30, and July 5 and 6, 2023. (1T to 7T) Liability was not at issue.

The jury rendered a verdict on July 6, 2023, finding that Plaintiff sustained a permanent injury proximately caused by the August 20, 2017 accident. (Da61; 7T) The jury awarded $200,000.00 for the Plaintiff's injuries, and, after finding Plaintiff would require future medical treatment, awarded $200,000.00 for future medical bills. (7T45:6 to 46:10)

B. Expert Testimony

i Plaintiff's Expert Nirav Shah M.D.

Nirav Shah, M.D., is a neurosurgeon that testified via *de bene esse* deposition on behalf of Plaintiff.[3] Plaintiff initially consulted with Dr. Shah on September 30, 2020, for headaches and neck and back pain. (Da74 at T18:16-19; 18:20-24) Dr. Shah diagnosed herniations at L1-2 and L2-3 based on his review of Plaintiff's MRI films. (Da77 at T31:9-12) He also found a herniation at L4-5. (Da78 at T35:5-9) In the cervical spine, Dr. Shah found a herniation at C3-4. (Da78 at T36:3-11)

Plaintiff next treated with Dr. Shah on November 24, 2020, and October 27, 2022. During both of these visits, Dr. Shah discussed with Plaintiff potential surgery for the neck and back. (Da82-53 at T52:17 to 57:10) Plaintiff's most recent visit before Dr. Shah's deposition was on February 7, 2023. Dr. Shah testified that he expects that Plaintiff will require surgery for the cervical spine, specifically the C3-4 level, which would involve removing the disc at that level, replacing it, and fusing it. (Da84 at T58:10 to 59:3) Dr. Shah testified that Plaintiff may also require surgery for the lumbar spine, to include the L4-5 level,

[3] Dr. Shah's videotaped deposition was shown to the jury on June 28, 2023. (3T140:15) Because that testimony was not transcribed as part of the trial transcript, a copy of Dr. Shah's *de bene esse* deposition transcript is included as part of the Appendix. (Da70-102)

or the L1-2 and L2-3 levels, which might require a fusion or a less invasive discectomy. (Da84 at T59:4-23) Dr. Shah recommended a two-level lumbar fusion at L1-2 and L2-3. (Da85 at T63:21-25)

Dr. Shah testified that the surgeon fee alone for a two-level lumbar fusion (L1-2 and L2-3) would be approximately $85,000.00. (Id. at T65:3-20) Over defendant's objection, Dr. Shah testified that there were other surgical costs attendant to the fusion, such as fees for the hospital, anesthesia, nursing care, imaging, and therapy, which would exceed the quoted fee. (Id. at T65:21 to 67:3)

Dr. Shah testified that the surgeon fee for a cervical fusion surgery would also be $85,000.00, which again would be exclusive of charges for the facility, anesthesia, and after care. (Da86 at T68:13-24)

Dr. Shah finally testified that the potentially-necessary fusion procedure for the L4-5 level in the lumbar spine would also carry a charge of $85,000.00, again exclusive of hospital fees. (Da87 at T69:2 to 70:8)

Dr. Shah concluded that the proposed future surgeries were causally related to the August 2017 motor vehicle accident. (Da87 at T72:22 to 73:4)

ii. Defense Expert Michael Bercik

Defendant retained Michael Bercik, M.D., an expert in the field of orthopedic surgery, to conduct an independent medical examination of Plaintiff

on February 4, 2019. (Da22; 5T34:9-11) Dr. Bercik concluded that Plaintiff sustained cervical and lumbosacral sprains as a result of the accident, but did not suffer a permanent injury as a result of the August 30, 2017 accident. (Da29; 5T39:4-19)

Dr. Bercik reviewed Plaintiff's MRI studies, and opined that neither scan showed a herniation. (5T42:19 to 43:1) The cervical MRI revealed a disc bulge at C3-4. (5T48:15 to 49:22) The lumbar MRI revealed degeneration and a bulge at L1-2, with no abnormalities noted at L2-3 and L4-5. (5T59:1 to 60:9; 61:24 to 63:14; 64:2-5) Dr. Bercik opined that none of the findings on the MRI studies were caused by the accident on August 30, 2017. (5T63:17-21) Dr. Bercik found no clinical objective abnormalities on examination of the cervical or lumbar spine. (5T68:17-21; 5T70:1-4)

Dr. Bercik testified that the Plaintiff was at maximum medical improvement, meaning Plaintiff did not require any further treatment. (5T78:6-16) Plaintiff had reached the maximum benefit of treatment.

Dr. Bercik reviewed additional records and reports after authoring his initial expert report. None of the additional records changed Dr. Bercik's opinion that Plaintiff had reached the maximum benefit of treatment as of February 4, 2019 - the date of his initial report. (5T78:17-25)

Defense counsel attempted to question Dr. Bercik as to whether the Plaintiff was a candidate for cervical or lumbar fusion surgery, but was met with an objection from Plaintiff's counsel. The trial court sustained the objection.[4] (5T79:9-17)

In summations, Plaintiff argued that Dr. Bercik never testified that Plaintiff did not need surgery, and there was no evidence that surgery was unnecessary. (6T67:10-22)

During oral argument on the motion for a new trial, Defendant pointed out that: (1) Dr. Bercik's report specifically opined that Plaintiff did not need further medical attention; and (2) Dr. Bercik testified at his deposition that that Plaintiff did not need further medical attention or surgery. (8T7:24 to 8:9)

Plaintiff's counsel acknowledged that Dr. Bercik provided an opinion regarding future surgery at his deposition, but argued that his testimony was limited to the lumbar procedure, not the cervical procedure, since lumbar was the only procedure projected at that time by Plaintiff's prior surgeon, Dr. Mark Cohen. (8T12:7-15)

[4] The side bar discussing the objection was not recorded. (5T79:15)

C. Headrest Testimony

At the time of the accident, Plaintiff was operating a 2009 Mercedes-Benz CLK, which was equipped with headrests that would deploy in the event of certain collisions.[5] (4T52:8-17)

Prior to opening statements, the parties placed several stipulations on the record, including one which barred any reference to airbag deployment or the use of seatbelts. (3T11:2-6) The trial court agreed with the stipulation, noting that:

> I think it's clear under the law that whether or not an airbag goes off is not dispositive of anything . . . without . . . expert testimony . . . .
>
> * * *
>
> The case law is fairly clear without an expert here to discuss whether or not – how the airbags go off… it will be struck.

(3T11:7-16; 3T12:7-12)

Prior to Plaintiff's testimony on June 29, 2023, counsel reiterated the argument that expert testimony would be required to inform the jury as to the force of impact required to engage the headrest airbag. (4T5:20 to 6:2) Plaintiff's counsel made a proffer to the court that Plaintiff's testimony would corroborate

[5] The "deployment" is described, at times, as an airbag. Based on the record, it is not clear what actually causes the headrest or head restraint to deploy, but it is apparently a mechanism designed to prevent injury.

photographs depicting the headrest airbag in its deployed state, but would not reference the force of impact required to cause the deployment. (4T6:17 to 7:2)

The trial court ruled it would bar any testimony regarding how the headrest airbags were deployed, but would permit Plaintiff to: (1) utilize photographs depicting the headrest airbag in its deployed state and; (2) offer testimony confirming that the photograph of a deployed airbag was identical to how the headrest appeared after the accident. (4T7:6-21)

Defendant expressed concern with the court's ruling, surmising that the jury would infer that the device engaged as a result of the impact, undermining the trial court's recognition that Plaintiff, a layperson, could not offer opinion as to what caused the headrest to deploy. (4T8:12-22) Defendant argued that the jury should not be shown photographs of the headrest, as there would be no testimony that the impact from Defendant's vehicle caused the device to engage. (4T8:23 to 9:25)

During his testimony, Plaintiff presented to the jury various photographs that he took at the scene of the accident. (4T52:18 to 53:2) On three separate occasions, Plaintiff's counsel sought to elicit testimony from Plaintiff regarding the damage to the interior of his vehicle. Each of these questions was met with an objection that was sustained by the trial court. (4T53:11 to 54:14)

Counsel then asked Plaintiff a fourth time what damage he observed to the interior of the vehicle. This objection was met with yet another objection that was followed by a side bar.[6] The court again sustained the defense's objection. (4T54:17-24)

Following the side bar, counsel asked Plaintiff to identify the differences in the interior of his vehicle before and after the accident, to which he responded the "headrests were deployed." (4T55:1-5) Counsel then asked Plaintiff whether photographs of the headrest would help him visualize the damage incurred. (4T55:9-14) The trial court again sustained the defense objection. (4T55:16-17)

Counsel then displayed a photograph to the jury, which Plaintiff testified depicted a deployed headrest. Although Plaintiff admitted he could not determine whether it the deployed headrest belonged to the driver or passenger side headrest, he offered that both headrests had deployed. (4T55:20 – 56:4)

In summations, Plaintiff urged the jury to consider deployment of the head restraints as one factor evincing that the impact was significant. (6T78:10-11)

D. Argument and Testimony Regarding Defendant's Texting

On April 19, 2022, the court granted Plaintiff's unopposed Motion for summary judgment on the issue of liability. (Da65) Accordingly, there was no issue as to liability for the jury to consider at the time of trial.

[6] Pursuant to the transcript, the side bar was inaudible. (4T54:21)

Despite the fact that fault for the accident was not at issue, counsel for Plaintiff persisted in mentioning in her opening statement that the use of a handheld device to text or call while driving violated the rules of the road, and suggested that Defendant's distracted driving caused the accident and Plaintiff's injuries. (3T32:4-11; 3T33:15-23)

Defendant objected to the reference to texting, as it was irrelevant in light of the Defendant's admission that she caused the accident, and was intended solely to inflame the jury. Counsel requested that the court strike the reference to Defendant's alleged use of her cell phone, but the court declined to do so. (3T34:8 to 35:25; 3T36:1-11)

Plaintiff's counsel also elicited testimony regarding the Defendant's cell phone use during Plaintiff's direct testimony. Plaintiff testified that the Defendant told him that the accident happened because she was texting. (4T47:12-14) Plaintiff's counsel engaged in several additional attempts to elicit testimony regarding Defendant's phone use, which when objected to, were sustained as "asked and answered." (4T47:17 to 48:8)

E. Future Surgical Fees

During the charge conference, Defendant requested the court to modify the future medical expense charge so that the jury could only consider the surgeon's fees – as testified to by Dr. Shah – as the only future medical expense.

(6T6:1-25) Plaintiff objected to the proposed modification, noting that the surgeon's expenses offered by Dr. Shah were "a floor, not a cap," and that the jury could consider other expenses. (6T7:2-9)

The trial court declined to modify the charge in accordance with Defendant's requested limitation, observing that while the jury could consider other factors, "they c[ould]n't run wild." (6T4:13-14) Despite recognizing the jury had no basis to determine what or how much the other expenses were, the court nevertheless determined the jury knew there would be expenses beyond the $85,000.00 surgeon's fee. The court reasoned that if the jury awarded excessive damages, it may require post-verdict motions. (6T7:10-18)

The charge to the jury included Model Jury Charge 8:11I, regarding future medical expenses. The court instructed the jury that the Plaintiff had the "right to be compensated for any future medical expenses resulting from the injuries brought about by" the Defendant. (6T112:24 to 113:20)(Emphasis added.) The charge further instructed that the future medical expenses must be based on the probable amount the Plaintiff would incur. (6T114:1-6)

F. Defendant's New Trial Motion

On August 30, 2023, the trial court entertained oral argument on Defendant's motion for a new trial, which sought review of three evidential issues that were decided during the course of the trial. (8T18:7-10)

The court concluded that it had not abused its discretion in allowing the photos of the inside of the vehicle. The court reasoned that since there was no testimony regarding whether or not the airbags went off, but rather only testimony regarding the condition of the vehicle before and after the accident, that there was no abuse of discretion. The court held that it was appropriate for the jury to review the photos of the damage to the headrests in order to assess this damage and infer there was more than minimal damage. (8T18:10 to 19:4)

The court also found that Dr. Bercik was consistent in his opinion (espoused in his reports and trial testimony) that Plaintiff had reached the maximum medical benefit of treatment. However, the court found that it was not a logical extension of Dr. Bercik's opinion that the Plaintiff did not require surgery. (8T19:5-13) Further, despite the fact that Dr. Bercik was deposed and was questioned about his opinions regarding future surgery, the court found that Plaintiff had no chance to depose Dr. Bercik as to why he felt surgery was not appropriate or recommended. (8T19:5 to 20:1)

The court finally rejected Defendant's argument regarding the court's alleged error in failing to modify the jury charge as to future medical expenses. The court concluded that the model jury charge adequately addressed the issues that Defendant had raised regarding the other expenses mentioned in Dr. Shah's testimony. (8T20:2-25)

The court denied Defendant's Motion for a New Trial on August 30, 2023 (Da52), and this appeal ensued.

LEGAL STANDARDS OF APPELLATE REVIEW

Defendant's new trial motion was predicated on three alleged trial errors: (1) that the trial court erred in barring Defendant's expert from offering opinions as to future surgery; (2) that the trial court erred when it allowed plaintiff to display photographs of and proffer testimony regarding his vehicle's deployed headrests (despite holding that expert testimony is required to explain how and why airbags deploy); and (3) that the trial court failed to give a limiting instruction to the jury on regarding future medical expenses.

An appellate court reviews a trial court's evidential rulings for an abuse of discretion. Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008); see also Dinter v. Sears, Roebuck & Co., 252 N.J. Super. 84, 92 (App. Div. 1991) (citations omitted).

The Supreme Court has stated:

> Evidentiary decisions are reviewed under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion . . . . Stated differently, then, the admissibility of evidence — one that is entrusted to the exercise of sound discretion — requires that appellate review, in equal measures, generously sustain that decision, provided it is supported by credible evidence in the record.

Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382 (2010).

The Court applies a similar discretionary standard of review to a trial court's determinations regarding the admissibility of expert testimony. Townsend v. Pierre, 221 N.J. 36, 52 (2015) ("[t]he admission or exclusion of expert testimony is committed to the sound discretion of the trial court.").

"A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021) (quoting State v. R.Y., 242 N.J. 48, 65 (2020)). "[A] functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue." State v. R.Y., 242 N.J. 48, 65 (2020) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). "When examining a trial court's exercise of discretionary authority, [this Court will] reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011) (quoting Union Cty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 (App. Div. 2007)).

With respect to Defendant's claim that the trial court failed to modify the jury charge and issue a limiting instruction, the Court must review Defendant's contention under a reversible error standard. See R. 2:10-2; see generally State v. Adams, 194 N.J. 186, 206 (2008). Appropriate and proper jury instructions

are essential for a fair trial. State v. Scharf, 225 N.J. 547, 581 (2016); Prioleau v. Ky. Fried Chicken, Inc., 223 N.J. 245, 256 (2015); Washington v. Perez, 219 N.J. 338, 350–51 (2014) ("accurate and precise instructions to the jury" are of "critical importance"). "Erroneous instructions are poor candidates for rehabilitation as harmless, and are ordinarily presumed to be reversible error." State v. McKinney, 223 N.J. 475, 495-96 (2015) (quoting State v. Afanador, 151 N.J. 41, 54 (1997)). "An erroneous jury charge 'when the subject matter is fundamental and essential or is substantially material' is almost always considered prejudicial." State v. Maloney, 216 N.J. 91, 104-05 (2013) (quoting State v. Green, 86 N.J. 281, 288 (1981)).

A trial judge must grant a motion for a new trial if "it clearly and convincingly appears that there was a miscarriage of justice under the law." R. 4:49-1(a). This Court applies the same standard on appeal. R. 2:10-1. A miscarriage of justice exists when a "pervading sense of 'wrongness'" justifies the "undoing of a jury verdict[.]" Lindenmuth v. Holden, 296 N.J. Super. 42, 48 (App. Div. 1996) (quoting Baxter v. Fairmont Food Co., 74 N.J. 588, 599 (1977)).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN BARRING THE DEFENSE EXPERT FROM TESTIFYING THAT PLAINTIFF DID NOT REQUIRE FUTURE SURGERY

(Raised below: 5T79:9-15; 8T19:5-20:1)

The trial court contributed to a miscarriage of justice by limiting defense expert Michael J. Bercik, M.D.'s testimony to the "four corners" of his narrative report in the absence of any surprise or prejudice to Plaintiff.

On February 4, 2019, Dr. Bercik performed an independent medical examination ("IME") of Plaintiff. (Da22) After the IME and his review of Plaintiff's medical records and MRI imaging, Dr. Bercik concluded that Plaintiff sustained a non-permanent cervical and lumbar sprain from the accident, and had reached "the maximum benefit of treatment." (Da29)

Dr. Bercik authored ten supplemental reports after his original February 4, 2019 report. In one such report (Da32), he recited that he had reviewed a June 7, 2021 narrative report of Plaintiff's expert, Nirav Shah, M.D., in which Dr. Shah offered the opinion that Plaintiff would require decompression and fusion surgeries at C3-4 and L1-3 due to injuries sustained in the accident. (Da43) Dr. Bercik's supplemental report stated that despite Dr. Shah's opinion, Dr. Bercik's

original opinion that Plaintiff had reached the maximum benefit of treatment and sustained no permanent injuries in the accident remained unchanged. (Da33)

Dr. Shah's recorded deposition testimony was played for the jury during trial. (3T140:15) Dr. Shah testified that Plaintiff's accident-related injuries would require future cervical and lumbar fusion surgeries. (Da85 to 86 at T64:1 to 65:2)

When the defense later attempted to elicit an opinion from Dr. Bercik regarding whether the Plaintiff required future cervical and/or lumbar fusion surgeries as a result of injuries sustained in the accident, Plaintiff objected on the basis that that specific opinion was not contained in any of Dr. Bercik's reports. The trial court improvidently and unjustly sustained Plaintiff's objection. (5T79:9-16)

A. Expert Testimony That Contains the Logical Predicates for and Conclusions from a Pretrial Report Should Be Permitted Absent a Showing of Surprise, Prejudice, or a Design to Mislead.

It is well-established that "[t]rial judges have discretion to preclude an expert from testifying to opinions not contained in his or her report or in any other discovery material." Anderson v. A.J. Friedman Supply, 416 N.J. Super. 46, 72 (App. Div. 2010), certif. denied, 205 N.J. 518 (2011); Ratner v. General Motors Corp., 241 N.J. Super. 197, 202 (App. Div. 1990). However, the decision of whether to exclude expert testimony at the time of trial on the grounds that it

goes beyond the parameters of the expert's report "must be just and reasonable." Mauro v. Owens-Corning Fiberglass Corp., 225 N.J. Super. 196, 206 (App. Div. 1988), add'd sub nom., Mauro v. Raymark Indus., Inc., 116 N.J. 126 (1989). To that end, expert testimony should be permitted to include "the logical predicates for and conclusions from statements made in the report." Velazquez ex rel. Velazquez v. Portadin, 321 N.J. Super. 558, 576 (App. Div. 1999), rev'd on other grounds, 163 N.J. 677 (2000). It is neither fair nor reasonable to limit an expert "to a statement of bare conclusion without giving the expert a chance to explain his or her reasons in detail." Id.

Accordingly, trial courts are instructed to refrain from excluding expert testimony that deviates from a pretrial report absent a showing of surprise, prejudice, or a design to mislead. Velazquez, 321 N.J. Super. 558; Amaru v. Stratton, 209 N.J. Super. 1, 11 (App. Div. 1985)(neither the *New Jersey Rules of Court* nor the *New Jersey Rules of Evidence* limit an expert's testimony to material disclosed by an expert's oral or written reports during trial preparation); Westphal v. Guarino, 163 N.J. Super. 139, 148 (App. Div.), aff'd, 78 N.J. 308 (1978)(medical expert's testimony should have been permitted notwithstanding the fact that plaintiff's counsel had failed to provide the names and reports of the expert because there was no design to mislead or surprise defense counsel, and the plaintiff's case would have been prejudiced by not allowing the testimony).

Where an expert's proffered testimony contains "the logical predicates for and conclusions from" the report, an opposing party can neither claim prejudice nor surprise. McCalla v. Harnischfeger Corp., 215 N.J. Super. 160, 171 (App. Div. 1987) (quoting Maurio v. Mereck Constr. Co, Inc., 162 N.J. Super. 566, 569 (App. Div. 1978)).

B. The Trial Court Erred in Concluding Dr. Bercik's Proposed Testimony Was Not a "Logical Extension" of His Reports.

(Raised below 8T7:3 to 19:18)

The trial court erred when it perfunctorily and baselessly concluded that Dr. Bercik's opinion that Plaintiff's did not need surgery was not a "logical extension" of his opinion that Plaintiff had reached the maximum medical benefit of treatment. (8T19:5-18) It is undisputed that Dr. Bercik offered opinions in his initial report, supplemental reports, and trial testimony that Plaintiff suffered nonpermanent sprain and strain injuries in the subject accident and had reached "the maximum benefit of treatment." (5T78:6 to 79:8) The phrase "maximum benefit of treatment," by its plain language and as described by Dr. Bercik at trial, indicates that Plaintiff had reached the pinnacle of treatment for his injuries, and that **any** additional treatment would be of no benefit. (Da29; 5T78:8-16)

Contrary to the unsubstantiated conclusion of the trial court, the very logical extension of Dr. Bercik's finding that Plaintiff had reached the maximum

benefit of treatment is that no additional treatment – including surgery – would be of any benefit or be required in the future. Put another way, the attempted proffer of testimony that Plaintiff did not require surgery was a logical predicate for the conclusion reached by Dr. Bercik that Plaintiff had reached maximum medical improvement. As recognized in Velazquez, 321 N.J. Super. at 576, the trial court's limitation of Dr. Bercik "to a statement of bare conclusion without [providing him] a chance to explain his or her reasons in detail" was unfair and unreasonable, and constituted an abuse of discretion. The inability of the Defendant to rebut the testimony of Plaintiff's expert on the need for future treatment was clearly prejudicial.

C. Dr. Bercik's Barred Testimony Posed No Danger of Surprise or Other Prejudice and Should Have Been Permitted. (Raised below 8T7:3 to 19:18)

The claims by the Plaintiff on Defendant's motion for a new trial that he was "surprised" or "prejudiced" by Dr. Bercik's intended testimony was flatly disingenuous. Plaintiff had ample opportunity to depose Dr. Bercik and explore his opinions regarding surgery. In fact, during Dr. Bercik's deposition in March 2020, Plaintiff's counsel asked Dr. Bercik whether he agreed with a treatment

recommendation for a lumbar fusion surgery, to which Dr. Bercik testified he did not.[7] (8T12:7-22)

After reviewing Dr. Shah's June 7, 2021 narrative report, in which he opined the Plaintiff would require future cervical and/or lumbar fusion surgeries as a result of the accident, Dr. Bercik clearly and unequivocally indicated that his review of Dr. Shah's report did not alter any of his previously stated opinions. (Da33) There can be no other logical conclusion drawn but that Dr. Bercik's opinion remained the same: that Plaintiff did not require future cervical and/or lumbar fusion surgery. Against this factual background, and knowing that Dr. Bercik previously testified that he did not believe Plaintiff to be a candidate for surgery, Plaintiff elected *not* to redepose Dr. Bercik. Due to Plaintiff's strategy in deposing Dr. Bercik before his review of Dr. Shah's report, and then determining not to redepose Dr. Bercik, Plaintiff should not have persuasively claimed surprise at the time of trial. See, e.g., Congiusti v. Ingersoll-Rand Co., 306 N.J. Super. 126, 131 (App. Div. 1997) (testimony of defendant's experts was admissible even though the details of their theories were not fully disclosed in the expert reports because plaintiff failed to depose the experts and the details of experts' theories were not fully revealed).

[7] The opinion for future cervical surgery was not in the case at the time of the deposition.

The trial court's suppression of Dr. Bercik's trial testimony relating to Plaintiff's need for surgery was a harmful and prejudicial to the defense, and the court's refusal to recognize that injury on the motion for a new trial wholly unjust. An expert's purpose in the legal process is to aid jurors in understanding complex evidence. N.J.R.E. 702. That purpose is frustrated where, as it was here, an expert is deprived of the opportunity to provide an opinion based on the contextual implications of his written report. The jury was deprived of critical commentary relating to a significant issue and category of damages in dispute: Plaintiff's need for future surgery. The jury was left to consider the unrefuted testimony of Dr. Shah, which, as Plaintiff noted in closing, was unchallenged by the defense. The testimony from Dr. Bercik on the need for future surgeries, if allowed, would have contained the logical predicates for and conclusions from the statements made in the reports exchanged in discovery.

By neglecting to identify any surprise, prejudice, or a design to mislead that would have been wrought by the inclusion of Dr. Bercik's proffered testimony regarding Plaintiff's need for surgeries, the trial court unreasonably and fatally disregarded the legal framework governing the admission of testimony which is outside the scope of an expert's report, which ultimately impacted the jury's decision in the case to the detriment and prejudice of the Defendant. (See Point III, infra)

Under the circumstances, the trial court mistakenly failed to recognize that its error contributed to a grave miscarriage of justice. Accordingly, Defendant respectfully requests that this Court reverse the erroneous ruling by the trial court and order a new trial.

POINT II

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF DEPLOYED HEADRESTS IN THE ABSENCE OF EXPERT TESTIMONY

(Raised below: 4T5:6 to 10:12; 8T18:10 to 19:4)

During discovery, it was explained that Plaintiff's vehicle was equipped with a safety restraint system, in which head restraints could disengage or deploy to cradle an occupant's head to prevent whiplash. (Da48 at T47:14 to 48:10)

Prior to opening statements, the parties placed stipulations on the record, including one which barred any reference to any "airbag"[8] deployment. (3T11:2-6) The trial court noted approval with the stipulation, reciting that:

> I think it's clear under the law that whether or not an airbag goes off is not dispositive of anything . . . without . . . expert testimony . . . .
>
> * * *
>
> The case law is fairly clear without an expert here to discuss whether or not – how the airbags go off… it will be struck.

[8] The term "airbag" was used interchangeably or referred to or encompassed the "head restraint" safety feature in Plaintiff's vehicle by the trial court and counsel below.

(3T11:7-16; 3T12:7-12)

At trial, Defendant asked the court to bar Plaintiff from testifying that his vehicle's head rests disengaged as a result of the rear impact to his vehicle, since expert testimony would be required as to the force necessary to trigger the restraints. (4T5:20 to 6:2) The trial court indicated that while it would bar any testimony regarding how or why the head restraints deployed, it would nevertheless permit Plaintiff to: (1) show the jury photographs depicting the headrests in a deployed state and; (2) offer testimony confirming that the photograph of the deployed restraints was identical to how they appeared after the accident. (4T7:6-21) Defendant argued that the jury would infer that the head restraints engaged as a result of the impact, thereby undermining the trial court's recognition that Plaintiff, a layperson, could not offer opinion as to what caused the headrest to deploy. (4T8:12-22)

During Plaintiff's direct testimony, the jury was shown various photographs of the interior and exterior of Plaintiff's vehicle in its "post-accident condition." One photograph, which was admitted into evidence, depicted the driver's and passenger's side headrests disengaged from their normal positions. (Da45) Plaintiff testified that both headrests appeared in that deployed condition after the accident. (4T55:20 to 56:4)

In closing, Plaintiff urged the jury to consider deployment of the head restraints as a factor evincing the impact from Defendant's vehicle was significant. (6T78:10-11)

A. Expert Testimony is Required to Explain Why an Airbag Did or Did Not Activate in a Specific Accident.

The trial court abused its discretion by improperly admitting the photograph and testimony regarding the deployed head restraints in Plaintiff's vehicle following the accident. The court's decision – which followed its own recognition that expert testimony is required to explain why or why not airbags deploy – was contradictory and prejudicial.

Where a case "involves a complex instrumentality, expert testimony is needed in order to help the fact-finder understand 'the mechanical intricacies of the instrumentality' . . .". Rocco v. New Jersey Transit Rail Operations, Inc., 330 N.J. Super. 320, 341 (App. Div. 2000)(quoting Jimenez v. GNOC, Corp., 286 N.J.Super. 533, 546 (App. Div.), certif. denied, 145 N.J. 374 (1996). One such "complex mechanism or instrumentality" is a motor vehicle's airbag system. Taing v. Braisted, 456 N.J. Super. 465, 470 (App. Div. 2017).

In Taing, the court noted it was not uncommon in automobile negligence cases for either plaintiffs to attempt to prove that the deployment of airbags is evidence of a significant motor vehicle impact, nor for defendants to attempt to show that the nondeployment of an airbag demonstrated an accident was

relatively minor. Id. at 469. However, due to the myriad variables and intricacies surrounding airbag deployment, and general lack of agreement between the parties as to whether airbags should have deployed, expert testimony is required to explain why an airbag did or did not activate under specific circumstances. Id. at 469-70; see also Morales-Hurtado v. Reinoso, 457 N.J. Super. 170, 193 (App. Div. 2018), aff'd, 241 N.J. 590 (2020)("Evidence concerning airbags deploying or not deploying is inadmissible in the absence of expert testimony.").

Indeed, the trial court appropriately recognized that whether or not an airbag deploys "is not dispositive of anything . . . without . . . expert testimony." (3T11:7-16; 3T12:7-12)

B. The Fact of Head Restraint Disengagement Does Not Provide a Jury With Any Meaningful Information and Serves Only to Mislead the Jury.

(Raised below: 4T8:12-22; 8T18:10 to 19:4)

It is both confounding and contradictory that the trial court admitted, over Defendant's objection, photographs and testimony that depicted deployed head restraints in Plaintiff's vehicle in the absence of any expert testimony explaining how or why such restraints were triggered.

Liability was not at issue during the trial. Defendant admitted that she struck Plaintiff from the rear. The photograph depicting deployed head restraints does not tend to prove or disprove any issue in the case. It is apparent that

Plaintiff introduced the head rest disengagement photos and testimony to prompt the jury to infer that the force of impact was more substantial than that suggested by the photographs depicting minor damage to the exterior of the vehicles. (6T78:10-11; Da103-113) By permitting such evidence, however, the trial court ran afoul of precise harm against which the Taing court warned: that the jury would be left to improperly speculate as to why the airbags (or, in this case head restraints) deployed:

> Whether or not the airbags deployed is not relevant in the absence of expert testimony because it does not, without more information, tend to prove or disprove an issue in the case. In the absence of expert testimony, the jury would not know the amount of force needed to trigger the specific airbag contained in the subject vehicle. Moreover, without an expert providing an explanation as to how an airbag system functions, a jury would not know the location of the airbag sensors on the subject vehicle. Accordingly, a jury would not be able to understand why an airbag system did, or did not activate, in a particular accident.

Taing, 456 N.J. Super. at 469–70.

Here, the trial judge appropriately found that Plaintiff could not testify regarding the force of impact required for deployment of the head restraint system, or testify that the accident triggered the activation of the head restraints. The judge's prejudicial errors were two-fold: first he permitted the introduction of photographic evidence depicting deployed headrests without expert testimony. (4T6:17 to 9:25) Second, he permitted Plaintiff to testify that the

"headrests were deployed" and authenticate photographs showing the post-accident condition of his vehicle's interior, showing the deployed headrests. (4T55:1-5) The result of this error allowed the jury to speculate as to the force of impact to the Plaintiff's vehicles which would have caused the deployment. As the Taing court noted:

> [T]he fact that the airbags [do or do not] not deploy does not provide the jury with any meaningful information and could mislead the jury. It is possible that a serious accident with significant motor vehicle damage may not cause airbag deployment for one reason or another. Conversely, there may be circumstances when a minor accident with very little motor vehicle damage could cause the airbags to deploy. In the court's view, it is improper for the jury to consider these issues in the absence of expert testimony to explain how the airbag system on a particular vehicle works and why it did, or did not, activate as a result of a particular accident.

Taing, 456 N.J. Super. at 470.

Here, there was no expert to explain the force required to deploy the head restraints. The admission of the headrest deployment not only undermined and contradicted the trial court's ruling on the necessity of expert testimony, but prevented the jury from focusing on relevant trial issues – such as whether Plaintiff sustained a permanent injury – and instead resulted in demonstrable and significant prejudice to the Defendant by allowing an inference that the headrest deployed as a result of the impact.

The court again erred on Defendant's motion for a new trial by analogizing photographs of deployed headrests to exterior vehicular damage photos, which do not generally require expert testimony. (8T18:7-23) Any evidence surrounding the fact of airbag deployment – whether through lay witness testimony or photographical depictions – is meaningless without expert testimony and can serve only to mislead the jury to an improper speculation. It is simply illogical and inconsistent to hold that the Plaintiff should not be permitted to testify that the accident caused the headrests to deploy, but permit the jury to consider photographs of deployed headrests. The capacity to mislead the jury is identical in both circumstances.

For the confusion, speculation, and overwhelming prejudice wrought by the trial court's inherently contradictory holdings regarding the admissibility of head restraint deployment in the absence of expert testimony, Defendant requests reversal of the trial court's denial of the motion for a new trial.

POINT III

THE TRIAL COURT COMMITTED ERROR BY FAILING TO GIVE AN APPROPRIATE LIMITING INSTRUCTION WITH RESPECT TO THE AWARD FOR FUTURE MEDICAL EXPENSES

(Raised Below: 6T6:3 to 9:1; 8T20:2 to 21:6)

At trial, the only testimony offered by Plaintiff with regard to the cost of his proposed future cervical and/or lumbar fusion surgeries was that of Dr. Shah,

who testified via de bene esse deposition that the physician's fee for each surgery would be $85,000.00. (Da86-87 at T65:3 to 70:8; Da42) Dr. Shah testified that there were additional fees associated with the fusion surgeries, such as facility fees (hospital anesthesia, nursing care, imaging, therapy), but failed to provide any opinion regarding the reasonable cost of any of those associated fees. (Da86 at T66:23 to 67:3)

During the charge conference, Defendant requested the court to modify the future medical expense charge so that the jury could consider only the surgeon's fees as the only future medical expense, and not any other associated costs for which no expert testimony was provided. (6T6:1-25)

The trial court denied Defendant's request for a limiting instruction, observing that while the jury could consider other factors, " they c[ould]n't run wild." (6T4:13-14) The court reasoned that if the jury awarded excessive damages, it may require post-verdict motions. (6T7:10-18)

The court charged the jury on Model Jury Charge 8:11I, regarding future medical expenses, without modification, instructing the jury that the Plaintiff had the "right to be compensated for <u>any</u> future medical expenses resulting from the injuries brought about by" the Defendant. (6T112:24 to 113:20)(Emphasis added.) The Charge includes language that the future medical expenses must be

based on the probable amount of expenses the Plaintiff would incur. (6T114:1-6)

A jury may award future medical expenses where there is a reasonable probability that such expenses "flow[ed] from the past harm." Coll v. Sherry, 29 N.J. 166, 175 (1959); Dombroski v. City of Atlantic City, 308 N.J. Super. 459, 469 (App. Div. 1998); Higgins v. Owens-Corning Fiberglas Corp., 282 N.J. Super. 600, 611-12 (App. Div. 1995). Future medical expenses are permissible where they "can be calculated objectively and without difficulty." Mauro, 225 N.J. Super. at 211.

Plaintiff's expert, Dr. Shah, opined that Plaintiff would in the future require one cervical and two lumbar fusion surgeries, and that that the surgeon's fee attendant to each surgery was $85,000.00. (4T55:11 to 86:1; 4T86:6-13; Da42) There was no quantitative estimate of any other cost attendant to the three surgeries, nor was there any other specific evidence presented regarding Plaintiff's need for any other future treatment.

The jury awarded Plaintiff the round sum of $200,000.00 in future medical expenses. Assuming the jury had accepted Dr. Shah's testimony regarding the surgeon's fees for the recommended surgeries, its award – based on the record evidence – should have been a multiple of $85,000.00, depending on how many surgeries it deemed reasonable and necessary. An award of $200,000.00

represents a surgeon's fee for approximately 2 1/3 surgical procedures. Although it is impossible to know what the $200,000.00 future medical expenses verdict was comprised of, the verdict suggests the jury's damages calculation included the value of the other "associated" costs attendant to the surgeries to which Dr. Shah testified, but for which he failed to provide any quantitative cost estimate.

In Lesniak v. Cty. of Bergen, 117 N.J. 12, 25 (1989), the Court noted a plaintiff has an obligation to furnish the jury with "some evidentiary and logical basis for calculating or at least, rationally estimating a compensatory award" and "must keep in mind the need to balance the risk of jury speculation against a general tort-law goal of full compensation for an injured plaintiff." (Quotation omitted.) Here, Plaintiff submitted no evidence on the basis of which the jury could make a dollar-and-cents calculation of any "associated" costs.

The simple remedy would have been for the Court to modify the future medical expense charge as requested by the Defendant to limit the jury's consideration of further medical expenses to the surgeon's fees. The failure to do so resulted in a jury award of $200,000.00 for future medical expenses based on partial guesswork that was unsupported by any record evidence.

The trial court's determination on Defendant's motion for a new trial only compounded its error in modifying the jury charge. The court found that there

was no prejudice to the Defendant because the award was "less" than what Dr. Shah testified the medical bills would be. (8T20:8-24) However, Defendant's argument is not simply that the verdict is against the weight of the evidence – Defendant's argument is that jury verdict is, in part, based on speculation and is unsupported by the record evidence. The trial court's refusal to restrict the jury's conjecture and speculation regarding future medical damages is even more significant considering the court limited Defendant's expert from offering testimony about the lack of need for future surgery.

In light of the foregoing, the trial court's refusal to issue a limiting instruction to the jury was plainly in error, and the jury's speculative award of damages was prejudicial to the Defendant, and constituted grounds for a new trial.

Accordingly, Defendant requests that the Court reverse the trial court's denial of Defendant's motion seeking a new trial, and remand the matter to the trial court.

POINT IV

DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE OF THE CUMULATIVE EFFECT OF MULTIPLE ERRORS BY THE TRIAL COURT

(Raised below: *Passim*; 3T34:8 to 35:25; 3T36:1-11)

Each individual error set forth in Points I through III is sufficient, in and of itself, to constitute grounds for a new trial. When considered together as a whole, however, the cumulative effect of the errors constitutes an additional ground upon which to set aside the verdict and order a new trial.

The cumulative error doctrine provides that where a court's legal errors "are of such magnitude as to prejudice the defendant's rights or, in their aggregate have rendered the trial unfair," a new trial by jury must be granted. State v. Orecchio, 16 N.J. 125, 129 (1954). Under the doctrine, "when an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal." State v. Jenewicz, 193 N.J. 440, 473 (2008); see also Pellicer v. St. Barnabas Hosp., 200 N.J. 22 (2009)(defendant was the subject of multiple rulings which individually did not constitute sufficient grounds for reversal, but the cumulative effect of the errors had the effect of prejudicially denying a fair trial to the defendant).

The cumulative errors warranting a new trial are not limited to those set forth in Defendant's motion for a new trial. There were additional rulings during the course of the trial that contributed to the deleterious impact on the defense. In one such instance, the court improperly admitted evidence of Defendant's conduct that was irrelevant and unfairly prejudicial.

Liability was not at issue during the trial. Nevertheless, in Plaintiff's opening statement to the jury, counsel suggested that Defendant's use of a cell phone while driving violated the rules of the road, and caused the accident and Plaintiff's injuries. (3T32:4-11; 3T33:15-23) Defendant objected to the reference to texting as irrelevant and inflammatory in light of Defendant's admission that she caused the accident. The court declined to strike the reference to Defendant's alleged use of her cell phone. (3T34:8 to 35:25; 3T36:1-11) Plaintiff's counsel continued to elicit testimony regarding the Defendant's cell phone use during Plaintiff's direct testimony, in which he testified that Defendant told him that the accident happened because she was texting.[9] (4T47:12-14) The references to Defendant's cell phone usage had one purpose and one purpose only - to inflame the jury.

[9] Defendant denied that she was texting, or that she told Plaintiff she had been texting. (4T196:6-12)

A driver's use of a handheld cellular telephone while driving is relevant to the issue of his or her negligence. See O'Toole v. Carr, 345 N.J. Super. 559, 566 (App. Div. 2001), aff'd, 175 N.J. 421 (2003) (cell phone use at the time of an accident may constitute negligence giving rise to liability). Here, however, Defendant admitted liability for the accident. Any reference to Defendant's cell phone usage, therefore, was irrelevant to the remaining trial issues of whether Plaintiff sustained a permanent injury, and, if so, what measure of damages would compensate him. The admission of Defendant's cell phone usage was inherently inflammatory, and carried the risk that the jury would be diverted from the true issues in the case, and misuse the evidence to increase the damages awarded to Plaintiff.

The trial court should have excluded evidence that Defendant was using her cell phone at the time of the accident as irrelevant and highly prejudicial. See N.J.R.E. 403 (evidence should be excluded if its probative value "is substantially outweighed by the risk of undue prejudice, confusion of issues, or misleading the jury"); Verdicchio v. Ricca, 179 N.J. 1, 34 (2004); Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999). Its failure to do so contributed to the unfair trial accorded Defendant.

The cumulative effect of the trial court's errors in this case, when taken together, were prejudicial to Defendant and impacted the jury verdict. In the

interests of justice, and owing to the trial court's multiple plain errors and abuse of discretion, the jury's verdict must be set aside, and this Court should remand the case for a new trial.

CONCLUSION

For the foregoing reasons, Defendant/Appellant Nancy Lemmo respectfully requests that this Court reverse the trial court's denial of Defendant's motion for a new trial, and remand the matter to the Law Division for a new trial.

Respectfully submitted,

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Dated: March 11, 2024

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DARREN A. FULLMAN, Plaintiff-Respondent, vs. NANCY L. LEMMO, Defendant-Appellant, and NICHOLAS LEMMO and JOHN DOES 1-10 (representing presently unidentified individuals, businesses, and/or corporations who owned, operated, maintained, supervised, designed, constructed, repaired and/or controlled the vehicle in question or otherwise employed by the defendant), Defendants.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000337-23 *Civil Action* ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, UNION COUNTY, DOCKET NO. UNN-L-2103-18 SAT BELOW: HONORABLE JOHN G. HUDAK, J.S.C.

BRIEF SUBMITTED ON BEHALF OF THE PLAINTIFF-RESPONDENT

On the Brief: Jessica R. Bland, Esq.

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED BY THE DEFENDANT

TABLE OF APPENDIX

Volume I

Volume II

TABLE OF CITATIONS

Case Law

Court Rules

Model Jury Charge

PROCEDURAL HISTORY

A Complaint was filed on behalf of Darren Fullman (hereinafter "the plaintiff") on June 19, 2018 seeking damages for permanent injuries he sustained as a result of an August 30, 2017 motor vehicle collision that occurred on Morris Avenue in Summit City, New Jersey. (Da1)[1]. Certifications from two of the plaintiff's treating physicians, Dr. Matthew DeLuca and Dr. Wayne Fleischhacker, stating that the plaintiff sustained permanent injuries to his neck and back as a result of the subject collision were filed with the Complaint in compliance with *N.J.S.A.* 39:6A-8(a). (Da10; Da12). The operator, Nancy Lemmo (hereinafter "the defendant") and the owner, Nicholas Lemmo, of the vehicle that crashed into the back of the plaintiff's vehicle were named as defendants in the Complaint. (Da1). An Answer was filed on their behalf on July 6, 2018. (Da14).

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[1] Transcript and Appendix Reference Key
1T – Transcript of the June 26, 2023 Trial Date
2T – Transcript of the June 27, 2023 Trial Date
3T – Transcript of the June 28, 2023 Trial Date
4T – Transcript of the June 29, 2023 Trial Date
5T – Transcript of the June 30, 2023 Trial Date
6T – Transcript of the July 5, 2023 Trial Date
7T – Transcript of the July 6, 2023 Trial Date
8T – Transcript of the August 30, 2023 Motion Hearing
Da – Defendant-Appellant's Appendix
Pa – Plaintiff-Respondent's Appendix

The defendant named Dr. Michel Bercik as an expert witness during the discovery period. (Da22). Dr. Bercik conducted a single defense medical examination of the plaintiff on February 4, 2019. (5T29:16-24; Da22). He issued a report on the day of his examination in which he stated that the MRIs of the plaintiff's cervical and lumbar spine showed bulging discs with no herniations. (Da28). He further stated that the plaintiff sustained cervical and lumbosacral sprains as a result of the August 30, 2017 motor vehicle collision with no permanent physical impairment and that the plaintiff reached maximum benefit of treatment. (Da29). Dr. Bercik reviewed the records and reports of the plaintiff's ongoing treatment and diagnostic testing following his examination and issued nine supplemental reports. (Pa1-Pa16; Da32). This included a report from the plaintiff's treating neurosurgeon, Dr. Nirav Shah, in which he discussed the need for cervical and lumbar decompression surgery in the future. (Da32; Da42-Da43). However, Dr. Bercik did not comment on or even mention the treating neurosurgeon's surgical recommendation in any of his supplemental reports. (Pa1-Pa16; Da32).

The issue of liability was resolved by the Court and the matter proceeded to a damages-only trial on June 26, 2023 before the Honorable John G. Hudak, J.S.C. and jury, and continued on June 27th, 28th, 29th, 30th, 2023 and July 5th and 6th, 2023. (1T-7T; Da65). The plaintiff voluntarily dismissed his claims against

Nicholas Lemmo at the outset of trial. (1T3:19-22). A stipulation as to the amount of the plaintiff's past medical expenses, which was agreed to be $100,000.00, was also entered into by the parties and it was agreed that the amount would not be submitted to the jury and would be added to the verdict. (3T6:15-8:17). There was also a stipulation that no references to airbags or the use of seatbelts would be made during trial. (3T11:2-12:12). The plaintiff testified on his own behalf at trial and presented the testimony of Brandon Acosta, Dr. Fleischhacker, and Dr. Shah. (3T-4T). He also presented photographs of the property damage to his vehicle and of the defendant and her vehicle that were identified at exhibits P-1 and P-2A through N and admitted into evidence on June 29, 2023. (4T67:1-69:2; 157:8-160:20; Pa17-Pa31). The defense case consisted of the testimony of the defendant, Dr. Michael Bercik, Megan Deliberis, and Jeffrey Coughlin. (4T-5T).

Photographs of the damage to the vehicles were marked by the plaintiff and defendant.[2] (Pa17-Pa31; Da103-Da111). This included a photograph of the interior of the plaintiff's vehicle showing that the front of the front-seat headrests had been disengaged from the back portion of the headrests following the collision. (Pa18). Prior to the plaintiff's testimony on the fourth day of trial,

[2] The photographs marked P-1, P-2A through P-2J, and D1 through D-11 were moved into evidence. (4T157:17-160:20; 4T209:25-210:5).

the defendant raised an objection to the plaintiff testifying about the condition of the headrests following the collision. (4T5:6-6:15). Judge Hudak ruled that the plaintiff could testify that the photographs showed how the headrests looked following the accident. (4T7:3-10:12). He then sustained objections to any questions that were found to have been beyond the scope of his ruling during direct examination of the plaintiff. (4T53:14-54:24; 4T55:9-18). The plaintiff was simply permitted to testify that he noticed that both headrests were deployed following the collision and that the photograph marked as P-2A showed the headrest that was deployed. (4T55:3-5; 4T55:20-56:4).

Dr. Bercik testified that the plaintiff sustained soft tissue injuries consisting of cervical and lumbar sprains as a result of the subject motor vehicle collision. (5T39:18-40:3; 5T78:2-3; 5T101:4-8). He further testified that these are not permanent injuries and that the plaintiff reached maximum medical improvement for these injuries to his neck and back by the time of his February 4, 2019 examination and did not require any further treatment. (5T40:2-17; 5T78:11-16). Defense counsel proceeded to ask Dr. Bercik if he had an opinion as to whether the plaintiff requires either cervical or lumbar fusion surgery at any level of his neck or back. (5T79:9-12). Plaintiff's counsel objected on the grounds that no such opinion was offered in Dr. Bercik's reports. (5T79:13). Defense counsel conceded at sidebar that Dr. Bercik did not state that the

plaintiff does not need future surgery in any of his reports. (8T6:18-20). Judge Hudak sustained the objection. (5T79:14-16). Dr. Bercik did, however, testify that he did not think that the plaintiff was a candidate for surgery. (5T78:15-16).

Dr. Shah testified that the plaintiff will likely require surgery to both his cervical and lumbar spine in the future. (Da85 at 63:1-25; Da86 at 67:6-68:7; Da87 at 69:2-25). He explained that the lumbar procedures will first involve a two-level fusion at L1-L2 and L2-L3 and then an extension of the fusion at L4-L5. (Da85 at 63:1-25; Da87 at 69:2-25). He further explained that the plaintiff will also have to undergo a cervical fusion at C3-C4. (Da86 at 67:6-68:7). Dr. Shah testified that the anticipated cost for the surgeon's fee will be $85,000.00 for each of the four levels. (Da86 at 65:3-20; Da86 at 68:13-24; Da87 at 70:2-8). He further testified that there will also be charges for aftercare, facility fees, anesthesia, nursing care, imaging, and therapy that will be in excess of the surgeon's fee. (Da86 at 66:23-67:3). Dr. Shah acknowledged on cross-examination that the fee charged for surgery is not necessarily the amount that will actually be paid and that doctors may accept less than the amounts he offered in full and final payment depending upon the circumstances. (D98-Da99 at 115:16-118:6). The defense medical billing expert, Ms. Deliberis, testified that the cost for the two-level lumbar fusion surgery will be $40,764.65 and that

the cost for the cervical fusion surgery will be $24,626.49. (4T170:17-18; 4T177:10-13; 4T181:24-182:4). She did not, however, offer an opinion as to the cost of the extension of the lumbar fusion at L4-L5. (4T189:18-190:14).

The defendant sought to have Judge Hudak modify Model Jury Charge 8.11I for future medical expenses by instructing the jury that the only cost that they could consider in regard to future medical expenses is the cost for the surgeon's fee. (6T6:3-25). Judge Hudak denied the request to instruct the jury that they were limited to the amount Dr. Shah offered for the future surgeries. (6T7:10-23). He explained that if the jury rendered an amount that "shocks the conscious" the damage award may be modified post-verdict, which is consistent with the remittitur procedures under *Rule* 4:49-1 for an excessive damage award. (6T8:3-18). Judge Hudak then instructed the jury in accordance with Model Jury Charge 8.11I during his charge to the jury. (6T112:25-115:22). Defense counsel was not limited in his argument regarding future medical expenses during his summation during which time he stressed that Dr. Shah only testified about the surgeon's fee of $85,000.00 for each procedure and that Dr. Shah said that he quite often accepts less than this amount depending on the source of payment. (6T41:22-42:23).

The jury began their deliberations on the afternoon of July 5, 2023. (6T123:13-124:10). They returned a verdict on July 6, 2023 finding that the

plaintiff sustained a permanent injury that was proximately caused by the subject motor vehicle collision, awarding him non-economic damages in the amount of $200,000.00, finding that the injury proximately caused by the subject motor vehicle collision will require future medical treatment, and awarding damages for future medical expenses in the amount of $200,000.00. (7T45:6-46:10). A Judgment Upon Jury Verdict in the amount of $581,192.09, representing the $400,000.00 in damages awarded by the jury together with the stipulated past medical expenses in the amount of $100,000.00 and prejudgment interest in the amount of $81,192.09, plus post-judgment interest was entered on November 8, 2023. (Da23).

A motion for a new trial pursuant to *Rule* 4:49-1 was filed on behalf of the defendant on July 24, 2023. (Da17). The defendant raised three issues of error that she believed were committed by the Trial Court as the basis for a new trial: admission of the photograph of the interior of the plaintiff's vehicle showing the headrest; precluding Dr. Bercik from testifying about future surgery; and giving the Model Jury Charge on future medical expenses. (8T3:17-5:9). The plaintiff filed opposition to the motion and oral argument was heard by the Trial Court on August 30, 2023. (8T). The Trial Court found that it did not abuse its discretion in its evidentiary rulings and that it properly instructed the jury on future medical expenses. (8T16:17-21:6). An Order denying the motion for a

new trial was filed on August 30, 2023. (Da52). The defendant subsequently filed a Notice of Appeal. (Da54).

STATEMENT OF FACTS

The plaintiff was stopped for a red light on Morris Avenue on August 30, 2017 when a vehicle operated by the defendant crashed into the back of his vehicle and pushed his car about ten to fifteen feet forward. (4T40:11-41:25; 4T126:18-127:3). He explained that he was in shock and wanted to regain himself because he never had that kind of impact before the crash. (4T44:21-45:1). He eventually exited the vehicle after he came to himself at which time he looked at the damage to the vehicles. (4T45:2-10; 4T48:9-12). The plaintiff testified that he observed a crack on the bottom side of the bumper, a wrinkle to the frame of his vehicle over the passenger rear wheel well, damage to the lid of the trunk, and the headrest were deployed. (4T48:13-49:3; 4T55:3-5; 4T55:20-56:4; 4T56:17-58:14; 4T133:2-19). He took photographs of the interior and exterior of his vehicle at the scene of the collision as well as a photograph of the defendant pushing a piece of her vehicle back into place after the collision. (4T52:20-56:13; 4T59:20-63:22; 4T69:13-19; 4T70:5-71:14; 4T132:1-8; Pa18-Pa31).

The plaintiff had a friend take him to the emergency room later on the day of the collision with complaints of dizziness, headaches, and pain to his neck and

back. (4T78:5-22). He underwent diagnostic testing at the hospital including x-rays and CT scans of his head and neck and was discharged later that day. (3T72:20-73:1; 4T79:1-6). The plaintiff came under the care of Dr. Fleischhacker, who is board certified in anesthesia and pain management, on September 26, 2017. (3T69:3-8; 3T70:3-6; 3T72:10-12; 4T79:19-21). He presented with pain to his neck and back that was radiating into his right arm and leg. (3T72:13-17). Dr. Fleischhacker initially recommended that the plaintiff undergo conservative chiropractic treatment and physical therapy. (3T73:8-10; 4T80:21-81:12).

Dr. Fleischhacker ordered MRIs of the cervical and lumbar spine that were performed on November 17, 2017. (3T73:19-21; 3T74:9-13). He reviewed the MRI studies and testified that they showed a herniated disc and two bulging discs to the cervical spine and herniated and bulging discs to the lumbar spine. (3T74:14-24; 3T79:2-23; 3T84:18-19; 3T85:8-9; 3T118:20-119:7; 3T119:17-19; 3T119:25-120:3). The plaintiff then began a series of pain management procedures that included cervical and lumbar epidural injections and a lumbar nerve root block. (3T79:20-80:16; 3T85:16-23; 3T87:11-88:1).

Dr. Fleischhacker also referred the plaintiff to Dr. Marc Cohen, a spine surgeon, who recommended that the plaintiff undergo a discogram. (3T91:20-23; 4T83:4-14; Da81 at 48:8-12). Dr. Fleischhacker performed a CAT scan

discogram of the plaintiff's lumbar spine on April 29, 2019. (3T92-94:20; Da81 at 46:23-47:1). Dr. Fleischhacker testified that the discogram confirmed the presence of a grade 4 annular tear at L1-L2 and showed the jury the dye leaking from the tear in the disc on the study. (3T97:22-98:9; 3T98:15-99:23; 3T132:10-15). The plaintiff underwent additional pain management procedures following the discogram including facet injections, medical branch blocks, and radiofrequency ablation to his lumbar spine. (3T100:8-102:16). He remained under Dr. Fleischhacker's care for over five years and saw him as recently as the day before Dr. Fleischhacker testified. (3T85:16-23; 3T104:5-9; 3T127:11-12; 4T85:5-10). Dr. Fleischhacker also gave the plaintiff a prescription for handicapped license plates and a placard. (4T151:20-152:2)

Dr. Fleischhacker testified that the plaintiff sustained herniated and bulging discs to the neck with radicular syndrome and herniated and bulging discs and annular tear to the back with discogenic pain, radicular syndrome and lumbar facet syndrome as a result of the subject motor vehicle collision. (3T104:22-105:5). He further testified that these are permanent injuries that have not healed to function normally and will not heal to function normally with further medical treatment. (3T106:4-107:14). His opinions were all given within a reasonable degree of medical probability. (3T71:24-72:4).

The plaintiff also came under the care of Dr. Shah, a board certified neurosurgeon specializing in brain and spine surgery, for a surgical recommendation after pain management failed to improve his symptoms and Dr. Cohen retired. (Da71 at 6:4-7:10; Da71 at 8:15-24; Da81 at 48:13-20; Da83 at 54:17-55:2). The plaintiff had already undergone physical therapy, chiropractic treatment, and pain management when he first saw Dr. Shah on September 30, 2020. (Da74 at 18:16-19; Da74-Da75 at 20:21-21:12). The prior treatment did not provide any lasting relief for the plaintiff's injuries and he presented with complaints of headaches, some memory issues, difficulty concentrating, dizziness, fatigue, and pain to the neck and back that was radiating into the right arm and right leg. (Da74 at 19:15-20:20). Dr. Shah reviewed the MRIs of the plaintiff's cervical and lumbar spine and testified that they revealed disc herniations at L1-L2 and L4-L5 with annular tears at L1-L2 and L2-L3 and a disc herniation at C3-C4. (Da76 at 26:21-25; Da77 at 31:9-14; Da78 at 33:1-11; Da78 at 34:17-36:11). He also reviewed the lumbar discogram and testified that it showed evidence of a tear at L1-L2 by the dye leaking out and a little bit of leakage at L3-L4 and L4-L5. (Da82 at 49:7-21).

Dr. Shah testified that the plaintiff sustained a C3-C4 disc herniation, an L1-L2 disc herniation with annular tear, an L2-L3 annular tear, and an L4-L5 disc herniation as a result of the subject motor vehicle collision. (Da87 at 70:9-24;

Da93 at 94:2-16). He further testified that these are permanent injuries that have not healed to function normally and will not heal to function with further treatment and rendered a poor prognosis for the injuries. (Da87 at 71:14-72:14). Dr. Shah also diagnosed the plaintiff with a concussion but explained that this injury would get better over time. (Da82 at 51:22-52:16). He explained that the plaintiff struck his head on the headrest and that his symptoms were consistent with post-concussion syndrome. (Da100 at 121:13-17). Dr. Shah's opinions were all given within a reasonable degree of medical probability. (Da74 at 18:8-15).

Dr. Shah recommended a two-level lumbar fusion at L1-L2 and L2-L3 followed by an extension of the fusion at L4-L5 and a cervical fusion at C3-C4. (Da85 at 63:1-25; Da86 at 67:6-68:7; Da87 at 69:2-25). When asked why it will be necessary for the plaintiff to undergo the surgery in the future within a reasonable degree of medical probability, Dr. Shah responded:

> For a number of reasons. Number one, he had not markedly improved with conservative treatment, in terms of his symptoms; albeit a lot of it being subjective, in his owns words. His physical exam was relatively unchanged. He – he's tried a number of conservative treatment, up to I think 18 pain management techniques, injection, therapy, activity modification, hopes and dreams; all of those things. And none of those things have gotten him back to his preinjury baseline.
> So the fact that he's still symptomatic this far out, there's a probability that he'll continue to worsen in an accelerated manner. So if I did an MRI five years from now, within probability it will show an

> accelerated change at L1-L2, L2-L3, and even L4-L5. And that will lead to surgical decision making. (Da85 at 64:1-20).

He further testified that the need for future surgery is causally related to the subject motor vehicle collision. (Da85-Da86 at 64:21-65:2).

Dr. Shah testified that he did not recommend surgery when he first saw the plaintiff and instead recommended that he continue with pain management to stave off surgery as long as possible. (Da82 at 50:20-51:18). He saw the plaintiff again on November 4, 2020; October 27, 2022; and February 7, 2023. (Da82 at 52:17-20; Da83 at 54:13-16; Da84 at 57:11-14). Dr. Shah had discussions about surgery with the plaintiff at these visits and about doing everything they could to avoid surgery. (Da83 at 53:10-22; Da83-Da84 at 56:21-57:10; Da84 at 58:10-59:23). He explained that the plaintiff, who was forty-seven years old at the time of the collision, is relatively young and the consequences of performing surgery now include adjacent segment failure that could result in additional surgeries ten to fifteen years later. (4T36:5-8; 40:13-15; Da85 at 61:4-62:5).

The plaintiff testified that he had discussions with Dr. Shah about the pros and cons of the recommended surgeries but opted to not undergo surgery as of the time of trial. (4T87:11-25). He explained that he decided to not yet have the surgery because he still has young children, is scared of the procedure, there is no guarantee of relief, and because his medical bills are already piling up and

he has no coverage for additional treatment. (4T88:1-89:1; 4T89:13-22; 4T155:21-24). Dr. Shah also noted that the plaintiff had concerns about the long recovery with a lot of down time, the impact on his family commitments, the risks of the procedures, and financial concerns. (Da85 at 62:6-25). However, the plaintiff testified that he is going to have the surgery at some point in the future. (4T88:1-10). As he responded when asked if he anticipated undergoing the recommended surgeries, "I will. I'm not going to have a choice if I want to have - - you know, there's a risk, but I'm going to have no choice at some point." (4T89:2-7).

The plaintiff and his son also testified about the impact his permanent injuries have had on his life. (4T25:4-14; 4T20:19-21:24T90:1-96:21; 4T147:17-151:10). This includes his day-to-day life such as putting on his socks, his sleep, his relationship with his five children, his activ1ities such as deejaying which he enjoyed for over thirty years, recreational activities such as bike riding and playing sports with his children and working on cars, lifting heavy things, traveling, and driving long distances. (4T15:16-18; 4T20:19-21:2; 4T25:4-14; 4T90:1-96:22; 4T147:17-151:10). When asked if there was anything else he would like to share with the jury in terms of how his injuries have affected his life, the plaintiff explained, "It's changed everything. It's changed my life with my kids." (4T96:11-15).

LEGAL ARGUMENT

POINT I

THE VERDICT AND JUDGMENT SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS EVIDENTIARY RULINGS (4T5:6-10:12; 5T79:9-16).

The defendant argues that the jury's verdict should be overturned and this matter remanded for a new trial because she complains that the Trial Court made improper evidentiary rulings during trial. Specifically, the defendant contends that the Court improperly barred the defense examining doctor from testifying about the plaintiff's future surgical recommendations and improperly allowed the plaintiff to testify about the pre and post-collision condition of the headrests in his vehicle and present photographs of the interior of his vehicle showing the separation of the headrests in the absence of expert testimony. The plaintiff respectfully disagrees and submits that the Trial Court did not abuse its discretion in making these rulings.

The admissibility of evidence is left to the sound discretion of the Court and substantial deference is given to its evidentiary rulings. *State v. Morton*, 155 N.J. 383, 453 (1998), *certif. denied*, 532 U.S. 931 (2001). A trial court's evidentiary rulings "will be reversed only if it constitutes an abuse of discretion." *State v. Feaster*, 156 N.J. 1, 82 (1998), *certif. denied*, 532 U.S. 932 (2001). "Evidentiary decisions are reviewed under the abuse of discretion

standard because . . . the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." *Estate of Hanges v. Metro. Prop. & Cas. Ins. Co*., 202 N.J. 369, 383-384 (2010). Therefore, "[o]n appellate review, a trial court's evidentiary ruling must be upheld 'unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide off the mark that a manifest denial of justice resulted.'" *Belmont Condominium Ass'n, Inc. v. Geibel*, 432 N.J. Super. 52, 95-96 (App. Div. 2013), *certif. denied*, 216 N.J. 366 (2013), citing, *Green v. N.J. Mfrs. Ins. Co*., 160 N.J. 480, 492 (1999).

It is also not enough for a to show that "some legal error exists in the trial record" to have a jury verdict vacated and a new trial ordered. *Graves v. Church & Dwight Co., Inc*., 267 N.J. Super. 445, 471 (App. Div. 1993), *certif. denied*, 134 N.J. 566 (1993). "Under *Rule* 2:10-2, a reviewing court should reverse only if a trial error is clearly capable of producing an unjust result." *Campo v. Tama*, 133 N.J. 123, 132 (1993). The same miscarriage of justice standard applies whether the disgruntled party claims that the verdict was against the weight of evidence or that improper rulings during trial resulted in prejudice.[3] *Hill v. New Jersey Dept. of Corrections Com'r. Fauver*, 342 N.J. Super. 273, 302 (App. Div.

[3] The defendant does not argue on appeal that the jury's verdict was either against the weight of the evidence or that the any aspect of the damage award was excessive. Therefore, those issues are not addressed in this opposition.

2001), *certif. denied*, 171 N.J. 338 (2001). That standard requires the reviewing court to determine "whether an error at issue was so grave that it caused the jury to be misled, confused, or inadequately informed." *Boland v. Dolan*, 140 N.J. 174, 189-190 (1995).

> Whether an error is reason for reversal depends upon some degree of possibility that it led to an unjust verdict. *State v. Macon*, 57 N.J. 325, 335 (1971). The possibility must be real, one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached. *Id.* at 336. *State v. Alston*, 312 N.J. Super. 102, 114-115 (App. Div. 1998).

Therefore, a new trial should not be ordered where an improper ruling amounted to only harmless error. *Kaplan v. Haines*, 96 N.J. Super. 242, 253 (App. Div. 1967), *aff'd*, 51 N.J. 404 (1968); see also; *Ryslik v. Krass*, 279 N.J. Super. 293, 302-303 (App. Div. 1995).

A. The Trial Court did not Abuse its Discretion in Sustaining the Objection to the Question posed to Dr. Bercik as to Whether the Plaintiff Requires Fusion Surgery at any Level of his Cervical or Lumbar Spine at Trial (5T79:9-16).

Dr. Shah testified that the plaintiff requires additional treatment in the future for the permanent injuries he sustained as a result of the subject motor vehicle collision including a two-level fusion of his lumbar spine at L1-L2 and L2-L3 followed by an extension of the fusion at L4-L5 and a fusion of his cervical spine at C3-C4. (Da85 at 63:1-25; Da86 at 67:6-68:7; Da87 at 69:2-25). This testimony was permitted because Dr. Shah's pre-trial medical narrative reports

that were served in discovery specifically spoke to the need and types of future treatment. (Da42-Da43). Conversely, the trial court sustained an objection to a question posed to Dr. Bercik asking him if he had any opinion as to whether the plaintiff requires fusion surgery at any level of his neck and back because he did not address either future treatment or Dr. Shah's opinion regarding the fusion surgeries in any of his reports. (Da22-Da30; Da31-Da33; Pa1-Pa16). The defendant argues that the trial court erred in sustaining the objection which resulted in a miscarriage of justice and warrants a new trial. The plaintiff respectfully disagrees and submits that the trial court properly sustained the objection to the question asking Dr. Bercik to offer new opinions on a subject that he did not address in his reports.

It is a generally understood principle that an expert's testimony at trial must be confined to opinions expressed in his or her report. *Mauro v. Owens-Corning Fiberglass*, 225 N.J. Super. 196, 225 (App. Div. 1988), *aff'd sub nom, Mauro v. Raymonde Industries, Inc.*, 115 N.J. 126 (1989). The purpose of an expert's report is "to forewarn the propounding party of the expected contents of the expert's testimony in order to enable preparation to counter such opinions with other opinion material." *Maurio v. Mereck Constr. Co., Inc.,* 162 N.J. Super. 566, 569 (App. Div. 1978). This principle is codified in *Rule* 4:17-4(e) which explicitly provides that an expert's report "shall contain" a "complete statement"

of the expert's opinions and the basis thereof including "the facts and data" considered by the expert. Our discovery rules are meant to eliminate the element of surprise and prevent a trial by ambush. *McKenney v. Jersey City Medical Center*, 167 N.J. 359, 370 (2001).

Uniform interrogatory Form C, Number 10 required the defendant to set forth the subject matter that their experts were expected to testify about at trial. Dr. Bercik performed a one-time defense medical examination of the plaintiff on February 4, 2019 and authored ten reports that were served in discovery in response to that interrogatory. (5T29:16-24; Da22-Da30; Da31-Da33; Pa1-Pa16). Dr. Bercik did not provide any opinion supported by facts or data as to the future surgeries recommended by Dr. Shah or any analysis as to same. (Da22-Da30; Da31-Da33; Pa1-Pa16). He simply stated that the plaintiff has "reached maximum benefit of treatment" and that the patient has "sustained no permanent physical impairment as a result of this injury." (Da29; Da33). There was simply no opinion that the plaintiff did not require any further treatment but only that the maximum "benefit" of the treatment was reached. (Da29; Da33). This distinction is shown by the direct examination of Dr. Bercik:

> Q I wanted to ask you a hypothetical, if the plaintiff got additional medical treatment after February 4th of 2019 and he testified that it did not provide any last -- lasting relief of symptoms, is that supportive of your opinion that as of the date you examined him he reached the maximum benefit of treatment?

A Yes. (5T79:1-8).

As such, the trial court did not abuse its discretion in sustaining the objection to the question asking Dr. Bercik if he had an opinion as to whether the plaintiff required fusion surgery at any level of his neck or back.

In his initial report dated February 4, 2019, Dr. Bercik states after setting forth his past medical history, history of previous injuries, physical examination, and review of medical records that the plaintiff sustained a post-cervical sprain and post-lumbosacral sprain. (Da28). He further notes in the Prognoses and Comments section of his report that there are no objective findings on examination to correlate with the patient's complaints, and that in his opinion, the patient "has reached maximum benefit of treatment" and that the patient has "sustained no permanent physical impairment as a result of this injury." (Da29). Further, he opines that the "patient may resume his regular activities of daily living and work without restriction." (Da30). Nowhere in the report does Dr. Bercik provide any analysis as to whether the pain management procedures that had been performed to date were necessary or effective, but rather indicates only that he had reached "maximum benefit of treatment" without setting forth the whys and wherefores of his opinions. (Da29).

Although Dr. Bercik comments on the fact that the plaintiff underwent a discogram procedure performed on April 19, 2019 by Dr. Fleischhacker and that

that it was positive for pain generation at L1-L2 in his July 29, 2019 report, no explanation as to whether or not the procedure was necessary or analysis of same was provided. (Pa1). In his October 28, 2019 report, Dr. Bercik reviews the films from the discogram study and CT scan and again states only after noting his findings that his "opinions concerning the patient's diagnoses and prognoses in regard to the motor vehicle accident of 8/30/2017 remain unchanged from those stated in the previous reports." (Pa3). In the addendum report dated November 14, 2019, Dr. Bercik reviewed the narrative report of Dr. Fleischhacker and some additional medical records. (Pa4-Pa5). He again repeated that his opinions remain unchanged. (Pa5).

In the addendum reports dated January 19, 2020 and February 26, 2020, Dr. Bercik recites the findings in Dr. Cohen's report and the treatments that the plaintiff underwent. (Pa6-Pa9). Again, there is no analysis and Dr. Bercik provides no whys and wherefores in these reports but rather only states that his "opinions concerning the patient's diagnoses and prognoses in regard to the motor vehicle accident of 8/30/17 remain unchanged from those stated in previous reports." (Pa7; Pa9). In the addendum reports dated May 6, 2020 and December 17, 2020, again Dr. Bercik only recites some of the findings in the treatment records provided to him for review. (Pa10-Pa12). Specifically in his review of Dr. Shah's notes, he makes no comment whatsoever in response to Dr.

Shah's findings regarding the plaintiff's spinal injuries. (Pa12). Again, he states only that his "opinions concerning the patient's diagnoses and prognoses in regard to the motor vehicle accident of 8/30/17 remain unchanged from those stated in previous reports." (Pa12). There is no analysis provided as to why his opinion that the plaintiff had reached maximum medical improvement in either of these reports and none of the "whys and wherefores" were provided either in support of same. (Pa10-Pa12).

In the addendum report dated September 16, 2021, Dr. Bercik reviews the Treatment Narrative of Dr. Shah and Dr. Shah's interpretation of the diagnostic studies that the plaintiff underwent. (Da32-Da33). Nowhere in the report does Dr. Bercik reference Dr. Shah's recommendations concerning the three spinal fusion surgeries recommended for Plaintiff at the C3-C4 level, L1-L2 level, and L4-L5 level. (Da32-Da33). Further, nowhere in the September 16, 2021 addendum does Dr. Bercik explain why his interpretation of the diagnostic studies supports any findings that the plaintiff is not going to need the spinal surgery recommended by Dr. Shah in the future. (Da32-Da33). Rather, once again, he states only that his "opinions concerning the patient's diagnoses and prognoses in regard to the motor vehicle accident of 8/30/17 remain unchanged from those stated in previous reports." (Da33). He did not provide any analysis as to why his opinions that the plaintiff had reached maximum benefit of

treatment may be extended to mean that the plaintiff does not need the surgery that was recommended by Dr. Shah. (Da32-Da33). As such, the plaintiff was not provided with notice of the basis of Dr. Bercik's opinions concerning the recommended future fusion surgeries.

Finally, the last addendum report issued by Dr. Bercik dated March 16, 2022 again reviews treatment notes relating to the plaintiff's ongoing treatment for injuries sustained in the crash. (Pa15-Pa16). Once again, there is no analysis provided or explication of the "whys and wherefores" concerning his opinions. (Pa15-P16). Rather, he simply states that his "opinions concerning the patient's diagnoses and prognoses in regard to the motor vehicle accident of 8/30/17 remain unchanged from those stated in previous reports." (Pa16).

The above-outlined review of Dr. Bercik's reports confirms that there is no opinion or analysis as to whether the plaintiff requires fusion surgery at any level of his neck or back. (5T29:16-24; Da22-Da30; Da31-Da33; Pa1-Pa16). While Dr. Bercik was of the opinion that the conditions to the plaintiff's lumbar and cervical spine were degenerative and not caused by the subject crash, he did not discuss in any way whether the treatment the plaintiff was receiving or that was recommended for the future for those conditions that the plaintiff's doctors found to be traumatically caused by the collision was reasonable or necessary. (5T29:16-24; Da22-Da30; Da31-Da33; Pa1-Pa16). Notice was not provided to

the plaintiff that Dr. Bercik either agreed or disagreed with the opinions of Dr. Shah that the plaintiff will require fusion surgery in the future. (5T29:16-24; Da22-Da30; Da31-Da33; Pa1-Pa16). All that was provided to the plaintiff was the regurgitation of Dr. Bercik's opinion that his "opinions concerning the patient's diagnoses and prognoses in regard to the motor vehicle accident of 8/30/17 remain unchanged from those stated in previous reports" without further analysis. (5T29:16-24; Da22-Da30; Da31-Da33; Pa1-Pa16). Indeed, there is not even any mention in the report dated September 16, 2021 of the cervical and lumbar fusions recommended by Dr. Bercik, and no analysis as to why those surgeries are not needed. (Da32-Da33). Therefore, an opinion as to whether Dr. Bercik believed the plaintiff requires fusion surgery at any level of his neck or back is simply not a logical predicate of the opinions that were expressed in his reports.

The defendant argues that the objection to the question asking Dr. Bercik if he had an opinion as to whether the plaintiff required a fusion at any level of the neck or back should have been overruled because he was asked about a surgical recommendation of Dr. Cohen at deposition in 2020. Dr. Bercik testified that he was not really able to agree with recommendation based on the information he had at that time because he did not know how Dr. Cohen arrived at his diagnosis. Dr. Bercik issued four additional reports after that deposition after

he reviewed the additional treatment records and medical reports related to the plaintiff's ongoing treatment. (Pa10-Pa16). This included the report of Dr. Shah in which he explained that the plaintiff requires fusion surgery to the cervical and lumbar spine. (Pa13). Dr. Bercik did not address the surgical recommendations or alter the prior opinions he expressed in his earlier reports to offer an opinion as to whether the plaintiff required fusion surgery to his neck or back after having the additional medical records and reports within a reasonable degree of medical probability. (Pa10-Pa16). Therefore, the deposition did not provide a basis for allowing Dr. Bercik to answer the question as to whether he had an opinion that the plaintiff requires a fusion at any level of the neck or back.

Given that Dr. Bercik's reports were totally devoid of any foundation for providing testimony as to the future surgeries recommended by Dr. Shah, the trial court did not abuse its discretion in sustaining the objection to the question asking Dr. Bercik if he had an opinion as to whether the plaintiff required fusion surgery at any level of his neck or back. *Nicholl v. Reagan*, 208 N.J. Super. 644, 651 (App. Div. 1986). It would have been prejudicial to the plaintiff to allow Dr. Bercik to offer opinions that he did not offer in his reports. The rationale for limiting the expert's testimony is that the opposing party will be blindsided and suffer prejudice and surprise when the expert's report fails to alert them as

to all of the opinions the expert intends on testifying about at trial. *Velazquez ex rel. Velazquez v. Portadin*, 321 N.J. Super. 558, 576-577 (App. Div. 1999). Accordingly, the plaintiff respectfully submits that the trial court did not abuse its discretion in sustaining the objection to the question asking Dr. Bercik if he had an opinion as to whether the plaintiff required fusion surgery at any level of his neck or back.

Even if it were found that the trial court abused its discretion in sustaining the objection, that ruling did not result in undue prejudice or a miscarriage of justice warranting a new trial. Dr. Bercik offered his opinion that the plaintiff sustained only cervical and lumbar sprains as a result of the subject motor vehicle collision which he believed were not permanent injuries at trial. (5T39:18-40:17; 5T78:2-3; 5T101:4-8). He also offered his opinion that the plaintiff "reached maximum benefit of treatment" as of February 4, 2019. (5T78:11-15). More importantly, he testified that "[**he**] **didn't think** [**the plaintiff**] **was a candidate for surgery**." (5T78:15-16)(emphasis added). Therefore, the defendant was able to broadcast the opinion of Dr. Bercik that was not set forth in his reports that the plaintiff did not need surgery and the trial court's sustaining of the objection to the question asking him if he had an opinion as to whether the plaintiff required fusion surgery at any level of his neck or back did not have any prejudicial impact sufficient to raise a reasonable

doubt as to whether the alleged error led the jury to a result it otherwise might not have reached. Accordingly, even if the ruling on the objection was an abuse of discretion, the alleged error would not support the granting of a new trial. *Crawn v. Campo*, 136 N.J. 494, 512 (1994).

B. The Trial Court did not Abuse its Discretion in Allowing Limited Testimony Regarding the Plaintiff's Observations of the Separation of the Headrests of his Vehicle Following the Collision (4T5:6-10:12).

The theme of the defense in this matter was that the plaintiff could not have sustained a permanent injury as a result of the collision because the defendant argued there was little to no damage to the vehicles as a result of the defendant's vehicle merely tapping the back of the plaintiff's vehicle. This defense began in defense counsel's opening statement and continued through the presentation of photographs of the exterior of the vehicles involved in the collision; the defendant's testimony that there was no damage to the vehicles except for one piece of her vehicle that popped out of place and that her vehicle only tapped the plaintiff's vehicle; cross-examination of the plaintiff as to there being no pieces of the vehicle or glass being left in the roadway following the crash; and defense counsel's summation about the property damage in which he stressed that the photographs of the vehicles show that the plaintiff did not sustain his burden of proving that he sustained a permanent injury. (4T50:21-51:20; 4T128:7-11; 4T197:25-198:24; Da103-Da111; 6T17:17-18:16; 6T21:10-23:6;

6T23:17-24:4; 6T25:8-9). While the defendant was certainly permitted to present selected photographs of the exterior property damage to the vehicles an testimony regarding the lack of some damage, such as parts of the vehicle being knocked off or broken glass, without expert testimony establishing the force needed for any such damage, so too was the plaintiff permitted to present the full picture of the damage to his vehicle by presenting photographs and testimony of the damage he observed following the collision.

It is firmly established that evidence surrounding the happening of a motor vehicle collision is admissible where there is an issue of as to the seriousness of the plaintiff's injuries even if liability is not an issue. *Gambrell v. Zengler*, 110 N.J. Super. 377, 380 (App. Div. 1970). In *Brenman v. Demello*, 191 N.J. 18 (2007) the Supreme Court ruled that photographs of the damage to vehicles involved in an accident are admissible when the extent of the plaintiff's injuries are at issue in trial without the need for expert testimony. *Id.* at 21. The Supreme Court further instructed the Committee on Model Jury Charges to develop a model instruction to be given in cases where photographs depicting the damage to vehicles involved in the accident are admitted. *Id.* at 36. This reflects the routine nature with which photographic evidence of the physical damage of vehicles should be admitted into evidence. That instruction was given in this matter. (6T103:21-104:13).

In this matter, the plaintiff observed damage to both the exterior and interior of his vehicle and took photographs of that damage which were presented to show the full extent of the damage to his vehicle. (4T48:13-49:3; 4T52:20-56:13; 4T55:3-5; 4T55:20-56:4; 4T56:17-58:14; 4T59:20-63:22; 4T69:13-19; 4T70:5-71:14; 4T132:1-8; 4T133:2-19; Pa18-Pa31). This included a photograph showing that the headrests of the plaintiff's vehicle were separated after the collision. (Pa18). As the defendant notes in its brief, the plaintiff's vehicle was equipped with deployable headrests that can pop forward in a collision. (Da48 at 47:24-49:13). The headrests of both the passenger and driver seats in the vehicle separated during the subject crash. (4T55:3-5; Da45). The plaintiff's head struck the headrest during the collision and he sustained a concussion with post-concussion syndrome. (Da100 at 121:13-17).

Photographs showing damage to the exterior of the plaintiff's vehicle and the interior of the vehicle were exchanged in discovery as part of the property damage photos from the insurance claim file and as part of the plaintiff's personal documentation of the damage to his vehicle. (Pa17-Pa31; Da103-Da108). The fact that the headrests deployed and became separated was also noted in the discovery deposition of the property damage appraiser. (Da47 at 47:17-48:24).

The defendant did not file any pre-trial motions seeking to bar evidence or testimony related to the condition of the headrests of the plaintiff's vehicle following the crash. (3T5:23-17:8; Pa32-Pa70). Nor was any objection raised to the notation to the fact that the headrests of the plaintiff's vehicle came apart during opening statements. (3T33:4-10). An objection was eventually raised on the fourth day of trial to the plaintiff testifying about the condition of the headrests following the collision on the grounds that an expert would be needed to testify as to forces needed for the headrests to have come apart. (4T5:6-6:15). The trial court ruled that the plaintiff could testify that the photographs showed how the headrests looked following the crash, but he could not testify as to the forces involved in the deployment of the headrests or what caused them to become that way. (4T7:3-10:12). The trial court then sustained objections to any questions that were found to have been beyond the scope of his ruling during direct examination of the plaintiff. (4T53:14-54:24; 4T55:9-18). The plaintiff was simply permitted to testify that he noticed that both headrests were deployed following the collision and that the photograph marked as P-2A showed the headrest that was deployed. (4T55:3-5; 4T55:20-56:4).

It is respectfully submitted that the trial court did not abuse its discretion in allowing the plaintiff to testify simply as to the condition of the headrests following the collision and presenting a photograph of that condition at trial.

The defendant relies upon a ruling from a trial court on the issue of whether a defendant could elicit testimony that the airbags of the plaintiff's vehicle did not deploy in a collision in the absence of expert testimony, *Taing v. Braisted*, 456 N.J. Super. 465 (Law Div. 2017)[4], and a ruling from an appellate court ruling on the same issue. *Morales-Hurtado v. Reinoso*, 457 N.J. Super. 170, 193 (App. Div. 2018), *aff'd*, 241 N.J. 590 (2010). It is respectfully submitted that those opinions are not controlling in the case at bar. "Cases state principles but decide facts, and it is only the decision on the facts that is a binding precedent." *DeBonis v. Orange Quarry Co.*, 233 N.J. Super. 156, 168 (App. Div. 1989).

This matter is distinguishable from *Taing* and *Morales-Hurtado* because it does not involve evidence of airbags. It is also distinguishable because in those matters the defendants were seeking to suggest to the jury that the force of the collision was minimal because the airbags in the plaintiffs' vehicles had not deployed. *Taing*, 456 N.J. Super. at 467; see also; *Morales-Hurtado*, 457 N.J. Super. at 193. The nondeployment of an airbag is significantly different from the separation of the headrests of the plaintiff's vehicle because there could be various reasons why an airbag did not deploy, such as they were not deigned to deployed in the type of collision or impact involved in the collision or there was

[4] The defendant incorrectly identifies the opinion as an opinion from the Appellate Division.

a defect in the system that prevented the airbag from deploying. In such a situation an expert would be needed to address those issues.

The separation of the headrests in the present matter is no different than any other damage to the plaintiff's vehicle. The Supreme Court has ruled that photographs showing the damage or lack of damage to a vehicle following a collision are admissible in the absence of expert testimony. *Brenman*, 191 N.J. at 21. It explained while parties may utilize expert proofs to show that there is or is not a relationship between the extent of the damage and the plaintiff's injuries, such expert testimony addresses only the weight to be given to the evidence, not its admissibility. *Id.* The defendant utilized this law to present evidence of minimal exterior damage to the vehicles and testimony that no parts of the vehicles broke off or glass shattered that were left on the road following the collision without an expert explaining what forces would be necessary to cause such extensive damage to infer that the plaintiff could not have sustained a permanent injury as a result of the collision. She does not explain why the damage to the plaintiff's headrests should be treated any differently. The plaintiff did not testify as to the force that was required, but rather explained simply that they did deploy and authenticated the photographs demonstrating the post-crash interior of the car. It is respectfully submitted that the trial court decision to allow this limited testimony and photograph to be presented at trial

was not so wide of the mark that it constituted an abuse of its discretion. Furthermore, any alleged error did not result in any undue prejudice to the defendant or result in a verdict that the jury would not have otherwise reached.

The testimony regarding the condition of the headrests was a passing reference in trial that was not repeatedly broadcast before the jury. While the focus of the defense and defense counsel's summation was on the post-collision photographs of the vehicles and claim that there was limited to no damage from the alleged tap on the back of the plaintiff's vehicle as proof that the plaintiff did not sustain permanent injuries, the plaintiff's case was not focused on the condition of his headrests or the other property damage. Nor was any argument made that the evidence was proof of the extent of the plaintiff's injuries. As plaintiff's counsel stated in his summation:

> I just have to talk to you briefly about the property damage, the photographs you were shown. As Mr. Lorenzo told you, as Dr. Bercik told you, it doesn't have anything to do with the injury. Despite that, despite the fact the judge will tell you, despite the fact Dr. Bercik told you, they wanted to show you a lot of photographs of the cars.
>
> So let's talk about that. Defendant took the stand and she testified that only damage to her car was where that sensor was popped out. Darren said, it made sense he saw with his own eyes, the front bumper looked out of aline to me. If you don't think so, that's fine. Defendant says that was it, my license plate was damaged before this, it was bent or whatever from the bracket all I had was the sensor.
>
> Okay, assume that's all true. Darren wasn't in that car. Darren was in the car where the steel got bent. Darren was in the car where the head restraints were deployed. Darren was in the car where the trunk

> was shifted out of alignment. You'll have these in the evidence room, I marked this one, this seems to show the hood line the way it wasn't lined up after the collision. This one shows you how when the rear of the car was pushed forward, that the fender above the wheel well buckled.
>
> Now I know we have these super blowups from Kinkos or something that don't have the same detail as these, and you can play with angles and you can talk about shadows. But the bottom line is it's unrefuted that this damage came from this collision. If it didn't I imagine Mr. Lorenzo could've presented some evidence to suggest otherwise. Run a CarFax, I don't know.
>
> But Darren also told you that when he saw his car sitting out at the repair shop and he drove by was a little concerned that it was left out in the elements like that, he was able to take these photographs which showed the accordion of the metal under the bumper. So, I think it's wonderful if the worst thing that happened to the defendant's vehicle is that she had to have her friend push her sensor back in, but that's not the evidence as to what happened to Darren's car.
>
> But despite that, despite the bent steel, I still go back and say who cares? Because nobody in this case has told you that you need a certain level of property damage to cause a certain level of injury or vice-versa. Why is it being shown to you? I guess, you know, maybe somebody in there will think there is a correlation between damage and injury. But if they say that, remember to tell them we didn't hear any evidence about there being a relationship between the two things. (6T77:1779:17).

Furthermore, there was significant evidence from the plaintiff's two treating physicians regarding the objective medical evidence of the plaintiff's injuries, their opinions that the injuries were permanent and would not heal to function normally, the extensive treatment the plaintiff has already endured, and the multiple operative procedures he requires in the future to support the jury's

finding that he sustained a permanent injury as a result of the collision and award of $200,000.00 for pain and suffering damages. Under these circumstances, it is respectfully submitted that any alleged error in the trial court's ruling did not result in undue prejudice to the defendant warranting a new trial. The lack of any argument by the defendant that the verdict was against the weight of evidence or that the amount of damages was excessive on appeal speaks volumes as to the lack of any prejudice to the defendant by the trial court's ruling.

C. The Limited Testimony Regarding the Defendant's use of a Cellphone at the Time of the Collision does not Constitute Plain Error (Not Raised Below).

For the first time on appeal, the defendant argues that the trial court abused its discretion in allowing testimony that she was using her cellphone at the time of the subject collision which resulted in a miscarriage of justice. However, there was no improper ruling regarding this testimony because the defendant did not object to the testimony. (4T47:12-48:7). The only objection raised during this limited testimony was to follow-up questioning on the grounds that it was leading and asked and answered. (4T47:12-48:7). The trial court sustained these objections and the questioning moved on to another subject. (4T47:12-48:11). As the transcript of the testimony provides:

> Q Okay. Did Ms. Lemmo tell you anything about how the accident happened from her perspective?
>
> A She just mentioned that she was texting.

Q Okay. Did she apologize?

A I can't recall if she apologized or not.

Q But she did, in fact, say that she was –

A Yeah.

Q -- using her phone at the time of the accident?

A Yes.

MR. LORENZO: Objection, Your Honor. Leading. Asked and answered.

THE COURT: Sustained. Rephrase the question, counsel.

MS. BLAND: Okay. I'll withdraw that.

BY MS. BLAND:
Q So it's fair to say that you understood that she was using her phone. Fair to say?

MR. LORENZO: Same objection, Your Honor.

MS. BLAND: Okay.

THE COURT: Sustained.

BY MS. BLAND:
Q So moving -- moving on, you had an opportunity to take a look at the damage at the scene of the accident?

A Yes. (4T47:12-48:11).

The defendant not only failed to object to the testimony, she also failed to raise the testimony as a basis for a new trial in her motion before the trial court. (8T3:1-21:6).

The trial court was deprived of the opportunity to rule on the admissibility of the testimony regarding the defendant's use of her cellphone as a result of the defendant's failure to object to the testimony or raise the issue in her motion for a new trial. Appellate courts will generally decline to consider issues not properly presented to the trial court when an opportunity for such a presentation was available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest. *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 (1973). If the testimony to which no objection was raised is considered on appeal, it must be judged under the plain error standard. *State v. Gore*, 205 N.J. 363, 382-383 (2011). Under this standard, the testimony must have been of such a nature as to have been clearly capable of producing an unjust result to warrant reversal. *State v. Frisby*, 174 N.J. 583, 591 (2002).

It is respectfully submitted that the testimony regarding the defendant's statement that she was texting at the time of the collision was not of such a nature as to have been clearly capable of producing an unjust result to warrant reversal of the verdict in this matter even if were found to be inadmissible. This was a passing reference in describing the happening of the accident that was

denied by the defendant. (4T196:9-12). It was not repeated throughout witness testimony or hammered home in summation. Nor was it presented in an attempt to improperly affect the jury's analysis of the case such as the defendant's blatant attempt to engender sympathy for her by testifying that her husband passed away the month before trial. (4T192:2-10). Furthermore, the testimony was relevant because the parties' versions of the circumstances of the collision were presented at trial and evidence that the defendant was using her phone at the time of the collision challenged the credibility of her version of the crash.

The plaintiff testified that he was stopped at the red light when his vehicle was struck from behind by the defendant's vehicle and pushed about ten to fifteen feet forward. (4T40:11-41:25; 4T126:18-127:3). He further testified that he never had experienced that kind of impact before and had to compose himself before he could get out of the vehicle to check on the damage. (4T44:21-45:1). The defendant, on the other hand, accused the plaintiff of starting to drive forward and then stopping short causing her to have to slam on her brakes.[5] (4T197:17-21). She then claimed that her vehicle merely tapped the back of the plaintiff's vehicle. (4T197:25-198:3; 4T211:1-14). The defendant's statement

[5] No explanation is given by the defendant as to why it was permissible for her to attempt to show that the plaintiff was negligent in the operation of his vehicle when liability was decided by the court when she claims that the testimony about her use of her phone was improper.

that she was texting at the time of the collision was relevant for the jury's consideration of the credibility of her version of the collision because it had a tendency in reason to show that she was not paying attention when it occurred. Even if it were found to be inadmissible, it was not of such a nature to have been clearly capable of producing an unjust result to warrant reversal. Accordingly, the plaintiff respectfully submits that the verdict should be affirmed.

POINT II

THE TRIAL COURT PROPERLY GAVE THE MODEL JURY CHARGE FOR FUTURE MEDICAL EXPENSES TO THE JURY(6T6:3-9:1).

The principal goal of damages in personal-injury actions is to compensate fairly the injured party. *Caldwell v. Haynes*, 136 N.J. 422, 433 (1994). Therefore, a tortfeasor is liable for all damages that naturally and proximately flow from his or her negligence. *Ginsberg v. St. Michael's Hosp.*, 292 N.J. Super. 21, 35 (App. Div. 1996), citing, *Ciluffo v. Middlesex General Hospital*, 146 N.J. Super. 476, 482 (App. Div. 1977). This includes damages for future medical treatment and expenses related to that future treatment. *Campo v. Tama*, 133 N.J. 123, 129 (1993); see also; *Hall ex re. Hall v. Rodricks*, 340 N.J. Super. 264, 273 (App. Div. 2001). The damages sought by the plaintiff in this matter included damages for future medical expenses.

Dr. Shah, the plaintiff's treating neurosurgeon, testified that the plaintiff will likely require surgery to both his cervical and lumbar spine in the future. (Da85 at 63:1-25; Da86 at 67:6-68:7; Da87 at 69:2-25). He explained that the lumbar procedures will first involve a two-level fusion at L1-L2 and L2-L3 and then an extension of the fusion at L4-L5. (Da85 at 63:1-25; Da87 at 69:2-25). He further explained that the plaintiff will also have to undergo a cervical fusion at C3-C4. (Da86 at 67:6-68:7). Dr. Shah testified that the anticipated cost for the surgeon's fee will be $85,000.00 for each of the four levels. (Da86 at 65:3-20; Da86 at 68:13-24; Da87 at 70:2-8). He further testified that there will also be charges for aftercare, facility fees, anesthesia, nursing care, imaging, and therapy that will be in excess of the surgeon's fee. (Da86 at 66:23-67:3).

The defendant sought to have the trial court modify Model Jury Charge 8.11I and instruct the jury that they could not consider anything other than the physician fees testified to by Dr. Shah, which was $85,000.00 per level fused, for a total of $340,000.00. (6T6:3-25). The trial court denied the defendant's request and instructed the jury as follows:

> Darren Fullman in this case seeks to recover future medical expenses. Darren Fullman has a right to be compensated for any future medical expenses resulting from the injuries brought about by Nancy Lemmo's wrongdoing.
>
> If it is reasonably probable that the plaintiff will incur medical expenses in the future, then you should also include an amount to compensate the plaintiff for those medical expenses. Deciding how

much to award for any future medical expenses think about the factors mentioned in discussing the nature and extent and duration of plaintiff's injury. Also consider the plaintiff's age today, his general state of health before the accident, and how long you reasonably expect the medical expenses to continue.

Obviously, the time period covering plaintiff's future medical expenses cannot go beyond the point when it is expected that he may recover from his injuries. You should also consider plaintiff's life expectancy in assessing future medical expenses.

You should be aware that the figure that you have been given on life expectancies are statistical averages. They do not treat them as necessary or fixed rules, since they are general estimates. Use them with caution and use your sound judgment in taking them into account.

For future medical expenses you must base your decision on the probable amount the plaintiff will incur. It is the burden of the plaintiff to prove by a preponderance the probable need for future medical care and the reasonableness of the charge for future medical care.

Deciding what plaintiff's future medical expenses are understand that the law does not require mathematical exactness. Rather you must do sound judgment based on reasonable probability. Once you have decided how much medical care plaintiff will need in the future, you must then consider the effects of inflation and interest.

As to inflation you should consider the effects it will probably have in reducing the purchasing power of money. Any awar[d] of future medical expenses should be increased to account for losses due to inflation.

The consideration of interest requires that you should not just award plaintiff the exact amount of medical care that he will need in the future. The reason for that is that plaintiff will have that money now even though he will not have needed that money until some future time - - or some time in the future. And that means that plaintiff will be able to invest the money and earn interest on it now even though

> otherwise would not have had that money to invest until some future date.
>
> To make up for this, you must make an adjustment for having the money available now even though the expense will not be experienced until the future. This adjustment is known as discounting, and what discounting does is give you the value of the money that you get now instead of getting it at some future time. In other words, it gives you the present value or present worth in a single lump sum of money which otherwise was going to be received over a number of years at so much per year.
>
> Your goal is to create a fund of money which will be enough to provide plaintiff future medical care and which will be used up at the end of the total period of need. In arriving at the amount of that fund, the present value of future need, you should consider the interest the fund would earn, the probable amount by which taxation on the interest would decrease the money available to plaintiff and the effect of inflation in decreasing the purchasing power of money. (6T8:3-18; 6T112:25-115:22).

The instruction was consistent with Model Jury Charge 8.11I. The jury awarded the plaintiff only $200,000.00 in damages for future medical expenses which is significantly less than the amount sought by the plaintiff. The defendant argues that verdict should be reversed and the matter remanded for a new trial because she claims that the jury charge regarding future medical expenses was incorrect. The plaintiff respectfully disagrees.

"It is fundamental that a trial court is not bound to instruct a jury in the language requested by a party." *Bolz v. Bolz,* 400 N.J. Super. 154, 163 (App. Div. 2008). When reviewing a jury charge for a miscarriage of justice, the instruction must be read as a whole. *Domurat v. Ciba Specialty Chemicals*, 353

N.J. Super. 74, 93 (App. Div. 2002), *certif. denied*, 175 N.J. 77 (2002). The scope of review is limited to whether the jury charge, as a whole, was capable of producing an unjust result. *Zappasodi v. State*, 335 N.J. Super. 83, 89 (App. Div. 2000). "Courts uphold even erroneous jury instructions when those instructions are incapable of producing an unjust result or prejudicing substantial rights." *Fisch v. Bellshot,* 135 N.J. 374, 392 (1994). Therefore, a new trial should not be ordered when the charge adequately conveys the law and does not confuse or mislead the jury. *Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, 418 (1997).

In the present matter, the trial court gave the Model Jury Charge crafted specifically to address future medical expenses in its entirety. "Generally speaking, the language contained in any model charge results from the considered discussion amongst experienced jurists and practitioners." *Flood v. Aluri-Vallabhaneni*, 431 N.J. Super. 365, 383-384 (App. Div. 2013), *certif. denied*, 216 N.J. 14 (2013). There is a "presumption of propriety that attaches to a trial court's reliance on the model jury charge[.]" *Estate of Kotsovska v. Liebman*, 221 N.J. 568, 596 (2015). Here, the instruction on future medical expenses that was given to the jury tracked the language of Model Jury Charge 8.11I including the instruction that the jury must base its decision on the probable amount that the plaintiff will incur and that it is the plaintiff's burden

to prove by a preponderance of evidence not only the need for future medical care but also the reasonableness of the charge for future medical care.

The defendant argues that the language of the Model Jury Chare should have been modified to advise the jury that there was a cap on the amount of damages that they could award for future medical expenses that was limited to the anticipated amount expressed by Dr. Shah. However, a party is not entitled to have the jury charged in words of his or her own choosing. *Borowicz v. Hood*, 87 N.J. Super. 418, 423 (App. Div. 1965), *certif. denied*, 45 N.J. 298 (1965). If the instructions, as a whole, clearly and correctly state the principles of law pertinent to the issues, they are sufficient. *Abramsky v. Felderbaum*, 81 N.J. Super. 1, 7 (App. Div. 1963), *certif. denied sub nom.*, *Abramsky v. Esso Standard Oil Company*, 41 N.J. 246(1963). The jury instruction in this matter that was consistent with the Model Jury Charge for future medical expenses clearly and correctly stated the law regarding the award of damages for future medical expenses.

An injured plaintiff may recover fair and reasonable compensation for future medical expenses. *Schroeder v. Perkel*, 87 N.J. 53, 69-70 (1981). In order to recover these damages, the plaintiff need only show that there is a reasonable probability that he or she will incur those expenses. *Coll v. Sherry*, 29 N.J. 166, 174-175 (1959). The amount of the award for the expenses related to future

medical treatment is left to the good judgment of the trier of fact. *Pitti v. Astegher*, 133 N.J. Super. 145, 149 (Law Div. 1975). The defendant has not cited any legal authority limiting an award for future medical damages to the amount specified by the plaintiff's medical experts. If this were the law, the Model Jury Charge would have included such language because that principle would apply to every action. Furthermore, the absence of a projected amount for the expenses related to the future medical services in addition to the surgeon's fee such as aftercare, facility fees, anesthesia, nursing care, imaging, and therapy did not preclude the plaintiff from recovering reasonable compensation for those related expenses. *Munoz v. Langer Transp. Corp.*, 2005 N.J. Super. Unpub. LEXIS 708, 17-18 (App. Div. 2005)

The plaintiff respectfully submits that the trial court adequately conveyed the law when instructing the jury on damages for future medical expenses consistent with the Model Jury Charge. Furthermore, the instruction did not result in a miscarriage of justice as the jury awarded the plaintiff significantly less than the total amount Dr. Shah testified will be the cost for the future surgeries in its award for future medical expenses. Although the defendant does not offer any argument that the jury's award of $200,000.00 for future medical expenses was excessive or against the weight of the evidence, she suggests that the amount is proof of an unjust result because it is not a multiple of $85,000.00. The

defendant contends that the jury was required to award a multiple of $85,000.00 because that is the amount Dr. Shah offered for the anticipated amount of the surgeon's fee for each of the surgeries. However, the jury was not required to either accept or reject the opinions of Dr. Shah in their entirety. *Amaru v. Stratton*, 209 N.J. Super. 1, 20 (App. Div. 1985). A jury may accept all of the, part of the opinions, or none of the opinions of an expert witness. *Id.* Furthermore, there was proof in this matter that supports the jury's calculation of a dollar amount for future medical expenses that is not a multiple of $85,000.00.

First of all, the defense presented the testimony of a billing expert who testified that the cost for the two-level lumbar fusion surgery will be $40,764.65 and that the cost for the cervical fusion surgery will be $24,626.49. (4T170:17-18; 4T177:10-13; 4T181:24-182:4). She did not, however, offer an opinion as to the cost of the extension of the lumbar fusion at L4-L5. (4T189:18-190:14). The jury was permitted to calculate their own amount for future medical expenses by accepting portions of the testimony of the defense billing expert and Dr. Shah. *Amaru*, 209 N.J. Super. at 20. Secondly, Dr. Shah acknowledged on cross-examination that the fee charged for surgery is not necessarily the amount that will actually be paid and that doctors may accept less than the amounts he offered in full and final payment depending upon the circumstances.

(D98-Da99 at 115:16-118:6). This is additional evidence that the jury was permitted to consider when awarding damages in the amount of $200,000.00 for future medical expenses. There was, therefore, no unjust result or miscarriage of justice resulting from the jury being instructed with the Model Jury Charge for future medical expenses without any modifications. Accordingly, the plaintiff respectfully submits that the verdict should be affirmed.

POINT III

THE DEFENDANT HAS NOT ESTABLISHED THAT THE CUMULATIVE ERROR DOCTRINE APPLIES TO THE CASE AT BAR.

The defendant argues that the verdict should be vacated on the grounds that the cumulative effect of the alleged errors warrants a new trial. As argued above, the plaintiff respectfully submits that the trial court did not abuse its discretion in its evidentiary rulings or improperly instruct the jury on future medical expenses. The cumulative error doctrine is not applicable when there were no errors at trial. *State v. Rambo*, 401 N.J. Super. 506, 527 (App. Div.), *certif. denied*, 197 N.J. 258 (2008). Nor is it applicable when there were errors but none were prejudicial and the trial was fair. *State v. Weaver*, 219 N.J. 131, 155 (2014). It has been recognized that "[d]evised and administered by imperfect humans, no trial can ever be entirely free of even the smallest defect." *Id.* Therefore, litigants are entitled to a fair trial but not a perfect one. *Id.*

The cumulative error doctrine was analyzed by the Supreme Court in *Pellicer v. St. Barnabas Hosp.*, 200 N.J. 22 (2009). The Supreme Court noted that, in appropriate circumstances "a new trial may be warranted when there were too many errors and the errors relate to relevant matters and in the aggregate rendered the trial unfair." *Id.* at 55 (citation omitted). It identified four factors to be considered in determining whether the doctrine applies to a given case: whether the trial court's cumulative errors pervaded the whole trial; whether the trial court's "troubling discretionary decisions" opened the door to inflaming the jury's view of the evidence by pushing the jury to make "inappropriate and irrelevant" considerations; whether the trial court failed to treat the parties fairly and evenhandedly; and whether a "review of the complete record, including the jury selection method and the quantum of the verdict," distinctly suggested that the aggrieved party was not "accorded justice." *Id.* at 55-56.

The defendant has not established any of the factors for vacating a verdict under the cumulative error doctrine identified by the Supreme Court in the case at bar. The defendant contends that the trial court abused its discretion in only two evidentiary rulings at trial and erred in one portion of the jury charge. Thus, this is not a situation where the alleged errors pervaded the entire trial. There is also no argument or proof offered establishing that the trial court did treat the parties fairly and evenhandedly. Nor is there any proof showing that any of the

alleged errors opened the door to inflaming the jury to make inappropriate considerations or that the verdict itself shows that the defendant was not accorded justice. In fact, the defendant does not even argue that the verdict was against the weight of the evidence or that the jury's award of damage was excessive or the improper result of passion, bias, or prejudice. Accordingly, the plaintiff respectfully submits that the cumulative error doctrine does not apply to the case at bar and the jury's verdict should stand.

CONCLUSION

Based upon the foregoing, the plaintiff respectfully requests that the rulings of the trial court and the jury's verdict be affirmed.

Respectfully submitted,

Levinson Axelrod, P.A.
Attorneys for Plaintiff

s/Jessica R. Bland, Esq.
_____
Jessica R. Bland, Esq.

Dated: May 10, 2024

DARREN A. FULLMAN, Plaintiff/Respondent, vs. NANCY L. LEMMO, NICHOLAS LEMMO and JOHN DOES 1-10 (representing presently unidentified individuals, businesses, and/or corporations who owned, operated, maintained, supervised, designed, constructed, repaired and/or controlled the vehicle in question or otherwise employed the defendant), Defendant/Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000337-23 Civil Action **Submitted on: June 13, 2024** On Appeal from: Superior Court of New Jersey Law Division: Union County Docket No. UNN-L-2103-18 Sat Below: Hon. John G. Hudak, J.S.C.

AMENDED REPLY BRIEF ON BEHALF OF DEFENDANT/APPELLANT NANCY L. LEMMO

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page

Cases

Rules of Evidence

PRELIMINARY STATEMENT

Appellant/Defendant Nancy Lemmo ("Defendant") submits this brief in reply to the opposition of Plaintiff/Appellee Darren Fullman ("Plaintiff") and in further support of her appeal. On various occasions during the trial of this personal injury case, the court below departed from established legal standards, resulting in multiple and significant abuses of discretion, resulting in manifest prejudice to the Defendant. Plaintiff's opposition offers no legal basis upon which to salvage the court's erroneous rulings.

Defendant respectfully requests the matter be remanded for a new, fair trial.

LEGAL ARGUMENT

POINT I

DR. BERCIK'S OPINION REGARDING PLAINTIFF'S NEED FOR FUTURE SURGERY SHOULD HAVE BEEN ADMITTED PURSUANT TO N.J.R.E. 702

(Raised below: 5T79:9-15; 8T19:5-20:1)

Plaintiff wholly fails to controvert Defendant's argument that the trial court erred in excluding defense expert Dr. Bercik's testimony on whether Plaintiff required future surgery.

Plaintiff's opposition centers around the argument that Dr. Bercik's reports were "devoid of any foundation" for his opinion that Plaintiff would

not require surgery. Plaintiff assiduously and fatally avoids the legal framework that governs the admissibility of expert testimony, which holds that an expert's testimony need not mirror his report exactly; "the logical predicates for and conclusions from statements made in [an expert's] report are not foreclosed.'" Velazquez ex rel. Velazquez v. Jiminez, 336 N.J. Super. 10, 45 (App. Div. 2000), aff'd, 172 N.J. 240 (2002) (quoting McCalla v. Harnischfeger Corp., 215 N.J. Super. 160, 171 (1987)). Further,

> In *Westphal v. Guarino,* we identified a number of factors for a Law Division judge to consider in exercising his or her discretion [to preclude expert testimony]. The factors which would strongly urge the trial judge, in the exercise of discretion, to suspend the imposition of sanctions, are (1) the absence of a design to mislead, (2) absence of the element of surprise if the evidence is admitted, and (3) absence of prejudice which would result from the admission of evidence.
>
> * * *
>
> A party cannot claim to be surprised by expert testimony, when it contains "the logical predicates for and conclusions from statements made in the report." Limiting an expert "to a statement of bare conclusion without giving the expert a chance to explain his or her reasons in detail is not fair or reasonable."

Conrad v. Robbi, 341 N.J. Super. 424, 440–41 (App. Div. 2001)(internal citations omitted)(finding no abuse of discretion in the trial court's decision to permit a medical expert to testify regarding a plaintiff's future prognosis/deterioration where the expert's report noted simply that plaintiff reached maximum medical improvement).

Plaintiff cannot credibly claim surprise resulting from Dr. Bercik's opinion that Plaintiff was not a surgical candidate. Dr. Bercik's 2020 report

concluded that Plaintiff sustained a non-permanent cervical and lumbar sprain from the accident, and had reached "the maximum benefit of treatment." (Da29) Plaintiff deposed Dr. Bercik in March 2020 regarding that opinion. Dr. Bercik testimony was very clear that he did not believe that the Plaintiff required lumbar fusion surgery. (9T72:6 to 74:21)[1]

Following Dr. Bercik's deposition, Plaintiff's expert rendered an additional opinion that Plaintiff would require cervical and/or lumbar fusion surgeries in the future. Upon his review of that report, Dr. Bercik confirmed that his previously stated opinions – that Plaintiff had reached the maximum benefit of treatment – were unchanged. (Da33) Significantly, Plaintiff had the opportunity to take the discovery deposition of Dr. Bercik again, but made a strategic decision not to.

Plaintiff was clearly on notice from Dr. Bercik's deposition testimony that when Dr. Bercik originally reported that Plaintiff had reached the maximum benefit of treatment, it meant he did not believe Plaintiff to be a candidate for surgery. When Dr. Bercik issued a later report that his opinion was unchanged, it can only be logically concluded that he still did not believe Plaintiff to be a candidate for surgery.

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[1] The abbreviation 9T refers to the deposition transcript of Michael Bercik, M.D. taken March 10, 2020, which was attached to Defendant's reply brief in further support of Defendant's Motion for a New Trial. It has been filed separately on appeal in accordance with the Court's June 10, 2024 directive.

Plaintiff cannot be permitted to manufacture surprise or prejudice as a result of his own failed strategy in electing not to redepose Dr. Bercik. Plaintiff knew from Dr. Bercik's deposition testimony that he did not believe Plaintiff would benefit from lumbar fusion surgery. Plaintiff knew – or could have known – that Dr. Bercik would have similarly opined that Plaintiff would not be a candidate for a cervical fusion surgery. See, e.g., Gaido v. Weiser, 227 N.J. Super. 175 (App. Div. 1988), aff'd, 115 N.J. 310 (1989)(permitting defense expert to testify beyond scope of report because doctor's opinion was something for which plaintiff's counsel should have been prepared).

The trial court should have determined Dr. Bercik's testimony on whether Plaintiff was a candidate for surgery was admissible pursuant to N.J.R.E. 702. First, Defendant had no intention to mislead with Dr. Bercik's testimony discussing surgery because it was a logical extension of Dr. Bercik's opinion regarding Plaintiff having reached the maximum benefit of treatment. Dr. Bercik's testimony was intended to assist the jury in understanding what maximum benefit of treatment means, and why additional treatments were not required. Significantly, Plaintiff had ample opportunity to redepose Dr. Bercik pre-trial, but elected not to.

Second, Plaintiff failed to show how he was surprised by Dr. Bercik's proposed testimony. Dr. Bercik specifically testified at his deposition that he did not believe Plaintiff to be a candidate for lumbar fusion surgery.

Third, Plaintiff would not have been prejudiced by Dr. Bercik's opinion regarding surgery, since he had ample opportunity to depose Dr. Bercik, knew that Dr. Bercik testified that he did not believe Plaintiff to be a candidate for surgery, and prepared his own witnesses to refute Dr. Bercik's testimony.

Indeed, the prejudice rested solely with the Defendant. That prejudice was compounded when Plaintiff's counsel – knowing Dr. Bercik was prepared to opine that Plaintiff would not require surgical intervention – made incredibly disingenuous and pointed remarks to the jury about how Dr. Bercik "did not tell" the jury that the three surgeries were not needed, and that there was no evidence to suggest and no witness to testify that surgery was not required. (6T67:10-22)

The trial court's exclusion of Dr. Bercik's testimony fully disregarded established legal standards for the admission of expert testimony and undeniably constituted an abuse of discretion. Dr. Bercik's proposed testimony on the need for future surgery was neither misleading, surprising, nor prejudicial to the Plaintiff. The testimony from Dr. Bercik if allowed, would have contained the logical predicates for and conclusions from the statements

made in his expert reports, and would have provided the jury with important rebuttal evidence relating to the principal category of damages at issue.

Accordingly, Defendant respectfully requests that this Court reverse the erroneous ruling by the trial court and order a new trial.

POINT II

PLAINTIFF'S ARGUMENT THAT DEPLOYED HEADRESTS SHOULD NOT BE TREATED LIKE OTHER MECHANICAL SAFETY FEATURES IS LEGALLY UNSUPPORTED

(Raised below: 4T5:6 to 10:12; 8T18:10 to 19:4)

Plaintiff – without a shred of legal support – argues unpersuasively that the deployment of vehicle headrests should not be treated for admissibility purposes like other automotive mechanical safety features, such as airbags. Plaintiff not only fails to cite any authority in support of this contention, but failed to object or appeal the trial court's opinion which - in approving the parties' stipulation that barred any reference to airbag deployment – determined that headrests and airbags were similarly situated complex instrumentalities requiring expert testimony. (3T11:7-16; 3T12:7-12, 4T5:20-7:14)

Airbags and headrests serve an identical purpose: minimizing injury and protecting a vehicle's occupants in the event of a collision. The deployment of both airbags and headrests are typically triggered by a vehicle's collision detection system. Both safety restraint mechanisms involve complex

biomechanical dynamics that involve the sensors, triggers, and impact dynamics; matters beyond the ken of the average juror. Plaintiff assiduously ignores these intricacies and attempts to draw a comparison instead between damaged bumpers and headrests. The difference is striking, and the comparison untenable. The automobile's bumper – which contains no mechanical component – was struck in the collision. The jury does not require an explanation as to the origin of that damage. By contrast, the vehicle's headrest was not directly struck by an outside force, but was triggered mechanically, similar to an airbag.

The question on appeal is not whether existing case law governing airbags is controlling; the trial court appropriately noted such precedent would operate to bar any trial reference to headrest deployment. (Id.) The question is whether the trial court undermined the rationale contained in airbag cases by allowing the admission of photographs and testimony of the deployed head restraints in Plaintiff's vehicle following the accident. The trial court, while recognizing that expert testimony would be required to explain why or why not headrests deploy nevertheless failed to follow through to the logical conclusion: that the mere depiction of headrests in a deployed state would be prejudicial.

The caselaw – espoused in Taing v. Braisted, 456 N.J. Super. 465, 470 (Law Div. 2017) and Morales-Hurtado v. Reinoso, 457 N.J. Super. 170, 193 (App. Div. 2018), aff'd, 241 N.J. 590 (2020)- is clear: the deployment of an airbag (or here, headrest) can create a perception of a severe collision, regardless of the actual circumstances of the accident. Furthermore, airbag (or headrest) deployment does not necessarily correlate with the severity of injuries sustained by a party. Presenting deployment evidence without an expert to provide proper explanation and context can mislead jurors into drawing unfounded conclusions about the extent of any alleged injuries, or the severity of any collision. See, e.g., Taing, 456 N.J. Super. at 469–70.

That was precisely the scenario Plaintiff envisioned at trial, hoping photographs of the deployed headrests would garner juror sympathy. That much is clear from Plaintiff's opening statement and from counsel's entreaty to the jury during closing that it consider the deployment of the head restraints as a factor evincing the impact from Defendant's vehicle was significant. (3T:335-6; 6T78:10-11)

The deployment of such headrests should never have been a factor considered by the jury in the absence of expert testimony. Plaintiff articulates no persuasive basis that the holdings from Taing and Morales-Hurtado should not have been fully extended and applied here to avoid the resulting prejudice.

Accordingly, Defendant respectfully requests reversal of the trial court's denial of the motion for a new trial.

POINT III

THE ADMISSION OF ARGUMENT AND TESTIMONY RELATED TO DEFENDANT'S CELL PHONE USAGE CONTRIBUTED TO THE CUMULATIVE EFFECT OF MULTIPLE ERRORS BY THE TRIAL COURT

(Raised below: 3T15:21-25)

Plaintiff's opposition to Defendant's argument regarding the trial court's improper admission of argument and testimony related to Defendant's alleged use of a cell phone at the time of the accident is flawed in two respects. First, Plaintiff attempts to isolate and address the cellphone issue independently in arguing the admissions failed to constitute plain error, when, in fact, Defendant argued the admission of such testimony was an error that, when viewed cumulatively with other errors, had a substantial impact on the fairness of the trial. Second, Plaintiff's implication that Defendant failed to object to the admission or raise the cell phone issue below and should be barred from doing so on appeal is imprecise.

The Court should first dispense with the notion that Defendant failed to object at trial to references to Defendant's alleged cell phone use at the time of the accident. In the very initial moments of opening statements, Plaintiff referred to Defendant's "violation" of the rules of the road due to texting.

(3T31:21 to 32:11) Defense counsel objected, asking the court at sidebar to "talk about this texting . . . that was not relevant because my client admits that she caused . . . the accident. It's designed to inflame the jury, so I'm asking Your Honor to strike it." (3T15:21-25). The trial court declined to strike the reference to texting. (3T36:7-11)

Defendant cannot be faulted for later declining to object to evidence of cell phone use during Plaintiff's direct testimony, since the trial court had already made a determination to permit such evidence. Trial counsel are understandably reluctant to draw a court's ire and repeated rebukes in front of a jury by objecting to an issue upon which the court already ruled. Defendant properly preserved her objection to the admission of cell phone usage.

The prejudicial effect of cell phone usage evidence in motor vehicle accident cases cannot be overstated. Evidence of cell phone usage invokes strong societal biases regarding distracted driving, which can overshadow the actual issues in dispute at a trial. References to texting may cause jurors to focus on the perceived negligence of a party, rather than permit an objective assessment of the facts. That is particularly true in cases such as this one, where liability was not at issue. Here, Defendant accepted full responsibility for causing the collision. Any evidence regarding her alleged cell phone usage or was irrelevant, cumulative, prejudicial, and, should have been barred.

See, e.g., N.J.R.E. 403; Golnick v. Callender, 860 N.W.2d 180, 188 (Neb. 2015) (trial court determined that it would not permit the plaintiff to introduce evidence as to the defendant's cell phone use; defendant had admitted to negligently causing the collision and would be unfairly prejudiced).

Plaintiff fails to identify any probative value attendant to the evidence regarding Defendant's alleged texting. Accordingly, the irrelevance, risk of bias, prejudicial impact, and risk of confusion resulting from the admission of such evidence – even if arguably innocuous considered alone – cumulatively and significantly prejudiced Defendant, particularly when combined with the court's other errors such as, barring Defendant's expert from testifying, improperly admitting evidence of headrests, and improperly instructing the jury. Morales-Hurtado v. Reinoso, 457 N.J. Super. 170, 190–91 (App. Div. 2018), aff'd, 241 N.J. 590 (2020)("numerous small errors can accumulate so as to deprive a party of a fair trial.") These factors together justify remand, and the grant of a new trial.

POINT IV

THE TRIAL COURT COMMITTED ERROR BY FAILING TO GIVE AN APPROPRIATE LIMITING INSTRUCTION WITH RESPECT TO THE AWARD FOR FUTURE MEDICAL EXPENSES

(Raised below: 6T6:3 to 9:1; 8T20:2 to 21:6)

Plaintiff argues that the court was correct in reading the unaltered version of Model Jury Charge 8.11I. While the Model Jury Charge may be appropriate in many, if not most, trials where medical expenses are at issue, courts must be flexible when circumstances exist that call for a modification of the Model Charge. See, e.g., Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 153 (1979)(trial courts must tailor a model instruction to the "factual situation to assist the jury in performing its fact finding responsibility"); State v. Green, 318 N.J. Super. 361, 376 (App. Div. 1999), aff'd, 163 N.J. 140 (2000)("The Model Jury Charges are only guidelines, and a trial judge must modify the Model Charge when necessary so that it conforms with the facts, circumstances, and law that apply to the facts being tried"); State v. Concepcion, 111 N.J. 373, 379 (1988)("An instruction that is appropriate in one case may not be sufficient for another case. Ordinarily, the better practice is to mold the instruction in a manner that explains the law to the jury in the context of the material facts of the case.").

Defendant requested that the court modify the Model Charge to instruct the jury that they could only consider the actual anticipated charges that they heard testimony about, namely the surgeon's fee for the three procedures. (6T6:3-25) Counsel for Plaintiff suggested that the jury "can consider other factors that Dr. Shah testified to…". (6T7:2-9) The court agreed that the jury

"can consider the other factors, but can't run wild." (6T7:10-14) These "other factors" were the testimony of Dr. Shah as to undefined amounts of fees for associated medical expenses. (Da86 at T66:23 to 67:3) The court recognized that the jury had no basis as to what those numbers were, but still found it appropriate to allow the jury to speculate as to those fees, with the plan to address any excessive awards in post-trial motions. (6T7:21-23, 8:3-12). Essentially, the court was inviting the jury to rely on evidence of medical expenses not offered in court to affix an award for those associated expenses not presented during the trial.

The court should have ensured that the jury considered only the evidence submitted during the trial and not speculate as to what some undefined medical expenses might be. Allowing the jury to consider those other expenses, with the intent of fixing it after the fact hardly seems to be a good practice. It is far more practical to guide the jury to consider only those medical expenses for which plaintiff provided "some evidentiary and logical basis for calculating or at least, rationally estimating a compensatory award." Lesniak v. Cty. of Bergen, 117 N.J. 12, 25 (1989).

While the jury's award did not exceed the amount of future medical expenses forecast by Dr. Shah, it still remains problematic. While we will never know the basis for the calculation, the fact that it was greatly in excess

of the figures suggested by the Defendant's billing expert, but not at the full amount suggested by Dr. Shah, leads to the conclusion that the jury considered those associated expenses. This could have been avoided with a simple modification to the charge.

CONCLUSION

For the foregoing reasons, Defendant/Appellant Nancy Lemmo respectfully requests that this Court reverse the trial court's denial of Defendant's motion for a new trial, and remand the matter to the Law Division for a new trial.

Respectfully submitted,

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Dated: June 13, 2024