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Date Submitted: April 19, 2024

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The Honorable Judges of the
Superior Court of New Jersey
Appellate Division
25 West Market Street
Trenton, New Jersey 08626

Re Jeffrey Todd and Gina Todd (Plaintiffs-Appellants)
v. William J. Bauder, III, Police & Firemen's Insurance
Associates, John Does 1-10 (said names fictitious, real names
unknown) and ABC Corps. 1-10 (said names fictitious, real names
unknown) (Defendants-Respondents)

Docket No. A-000350-23

Monmouth County Docket No. MON-L-2730-15

Civil Action: On Appeal from a Final Judgment of the Superior Court
Of New Jersey, Law Division, Civil Part, Monmouth County

Sat Below: The Honorable Owen C. McCarthy, J.S.C.

Honorable Judges:

Please accept this letter memorandum, pursuant to Rule 2:6-2(b), in lieu of a
more formal brief submitted on behalf of the plaintiffs.

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** The Worker’s Compensation Listing, attached hereto as Pa35-44, is attached in the format and manner in which it was submitted to the trial court and also as submitted by Defense in its appendix to its Appellate response brief for Leave to appeal.

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- 1T refers to the transcript of June 13, 2022
- 2T refers to the transcript of June 14, 2022
- 3T refers to the transcript of June 15, 2022
- 4T refers to the transcript of June 16, 2022
- 5T refers to the transcript of June 20, 2022
- 6T refers to the transcript of June 21, 2022
- 7T refers to the transcript of August 25, 2022
- 8T refers to the transcript of April 13, 2023

PRELIMINARY STATEMENT

This is an Appeal arising out of the Trial Court's decision not to mold the Jury's verdict pursuant to a pre-trial agreement between counsel that the verdict would be molded to include lost wages and medical bills in accordance with N.J.S.A. 34:15-40.

Plaintiff filed a complaint in the Superior Court Law Division Monmouth County on July 21, 2015. Pa14-24. The defendant filed its answer on August 13, 2015. Paxx. The within matter was tried before a jury in the Superior Court Law Division, Monmouth County, from June 13, 2022, until June 21, 2022. There were issues regarding liability, causal, relationship and totality of damages. It should be noted that Plaintiff/Appellant is not appealing the jury's verdict, nor any evidential rulings that were rendered during the trial. The sole issue in this appeal is the lower Court ruling that the agreement between Counsel to mold the Jury's verdict to include the Plaintiff/Appellant's lost wages and medical bills should not be enforced.

Plaintiff filed a motion to file notice of appeal as within time and Notice of Appeal on October 4, 2023. Pa1-5. The motion to file the notice of appeal as within time was granted on October 23, 2023. Pa9. Plaintiff filed a letter and two motions for an extension of time to file its brief; all which were granted, making the plaintiff's brief due on April 19, 2024. Pa10-13.

STATEMENT OF PROCEDURAL HISTORY
AND STATEMENT OF FACTS¹

Plaintiff/Appellant in this matter, Jeffrey Todd, at the time of the accident in question was a patrolman with the Holmdel Township Police Department. Pa14-24. Plaintiff/Appellant was injured in an altercation with the defendant William Bauder Pa17-22. Because patrolman Todd sustained injuries in the course of his employment, his medical bills and lost wages were paid for by his Worker's Compensation carrier. Pa35-44. The parties agreed that regarding any lost wages and medical bills, that in lieu of evidence being submitted to the jury, the Trial Court would mold the verdict to include the lost wages and medical bills as outlined in the Worker's Compensation lien. (2T:30-6 to 9; 32-12-13).

The issue of the plaintiff's outstanding medical bills and lost wages was initially addressed by the Trial Court, as a result of a Motions in Limine filed by the defendant. The Trial Court's Order stated in part:

“the issue of medical bills to be addressed by the court at the time of trial. Reimbursement of medical bills is limited to the amount paid by the Worker's Compensation carrier. Amount of lien to be molded at trial, depending upon jury's verdict. Pa53.

On June 14, 2022, during opening arguments, counsel for defendant raised an objection regarding plaintiff's counsel's, opening argument. In that objection, it was stated that plaintiff's counsel's reference to retiring, was violative of what was

¹ Statement of Procedural History and Statement of Facts are combined because they are integrally intertwined.

agreed to between counsel albeit in chambers. (2T:24-21; 25-1 to 9). It was clear that the agreement was that there would be no evidence in terms of permanent wage loss. The agreement was if he produced the records and documentation regarding the Worker's Compensation lien then The Court would mold the verdict. (2T:30-1 to 10). In defense counsel's argument he indicated that it was improper to address retirement because "there is an agreement that we had the only thing we were stipulating to was the temporary disability payments. 2T:33-5 to 9). As a result, The Court instructed the jury during opening arguments as follows:

Assuming you find the plaintiff is entitled to a verdict, the plaintiff is not pursuing any claim for lost wages of any sort in this matter. His claims are for pain, suffering, disability, and the loss of enjoyment of life, and I'll explain what that means to you next week. But there are no claims for lost wages, either past or future wages, in this matter. So don't speculate about any lost wages that the plaintiff may have incurred. The issue is pain, suffering, disability, and the loss of enjoyment of life; and I will explain what that means in greater detail.

(2T:38-7 to 20).

The parties further put some housekeeping issues on the record on June 15, 2022, at the end of the trial day. The court stated:

"Mr. Levine a couple of things that we have discussed previously during prior and in limine applications as well as during the course of this trial would be the molding of the verdict afterwards. Assuming the plaintiff does get a verdict, the court will address the issue of any liens that may be asserted. For the medical and temporary benefits. That would be subject to any comparative negligence, assuming that the plaintiff does get a verdict and the jury does allocate

liability 55/45, whatever amount of liability is ultimately attributed to the plaintiff will affect any award that he may be entitled to.

(3T:114-20 to 115-7).

The court further noted that:

as I've instructed the jury on multiple occasions, this case is about pain, suffering, disability, loss of enjoyment of life, and there are no economic claims, either past and/or future economic claims being asserted other than the limited issue and the court will mold any potential verdict.

(3T:115-20 to 25).

The within matter was tried before a jury in the Superior Court Law Division, Monmouth County, from June 13, 2022, until June 21, 2022. The Jury rendered a verdict finding the Defendant 85% responsible for the happening of this altercation and awarded the Plaintiff \$25,000.00 for his pain, suffering, disability, loss of enjoyment of life. Pa6. **(8T:4-1 to 2; 7-4 to 5).**

By letter dated June 30, 2022, counsel for the plaintiff submitted a Form of Order in accordance with the jury's verdict including the Plaintiff's/Appellant's lost wages, medical bills, and prejudgment interest pursuant to Court Rule. Pa30-44. Counsel for Defendant objected, by letter dated July 6, 2022, and exhibits. Pa45-60.

In August of 2022, the Court heard argument regarding the parties' respective positions. On April 13, 2023, the Court placed its opinion on the record, denying the plaintiff's request to include the medical bills and lost wages. 8T. The

Courts decision was memorialized in the Court's order of July 25, 2023. Pa6-8. Given that a trial court should not mold a jury verdict according to its perception of the jury's view this appeal was filed on October 4, 2023. Pa105.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO ENFORCE THE PRE-TRIAL AGREEMENT OF COUNSEL (Pa6-8; 8T)

It is well settled law in the State of New Jersey that our judicial framework accepts that there is a presumption of correctness in jury verdicts. Baxter v Fairmont Food Co. 74 N. J. 588, 598, (1977). Jury verdicts should be set aside in favor of a new trial sparingly and only in cases of clear injustice. See Borszewski v. Burke, 380 N.J. Super. 361, 391 (App. Div. 2005). Jury verdicts carry the presumption of correctness. See Romano v. Galaxy Toyota, 399 N.J Super. 470, 477 (App. Div. 2008). As such, a Trial Judge may not substitute his judgment for that of the jury merely because he would have reached a different conclusion. Dolson v. Anastasia, 55 N.J. 2,6, (1969). In the within matter, the Trial Judge substituted his judgment for that of the jury. The jury in this matter found that the defendant was 85% responsible for the plaintiff's pain, suffering, disability, loss of enjoyment of life. The jury found that the defendant was negligent, and that the defendant's negligence was a proximate cause of the accident and the plaintiff's

damages. The issue of the plaintiff's damages regarding wages and medical bills we're not left to the jury as it was agreed amongst counsel, and placed on the record with the Court that any verdict in favor of the plaintiff would be molded to include the Statutory Workers Compensation Lien.

Although the jury's verdict was arguably low, the verdict was not inconsistent with the totality of the jury's findings. The jury found the defendant liable for the plaintiff's injuries. Plaintiff's claim was for a one-sided hearing loss. For whatever reason, and for reasons that we will never know, the jury felt that \$25,000 was appropriate.

In New Jersey there is a general rule that a Trial Court may not mold a jury verdict according to its perception of the jury's view. Kassick v Milwaukee Electric Tool Corp. 120 N.J. 130 (1990).

The Trial Court placed its ruling on the record on April 13, 2023. After indicating the general law on the purpose of damages, the Court found that based upon the award of \$25,000 that it was clear that the jury rejected the plaintiff's argument that his pre-existing Ménière's disease, was aggravated in anyway by the subject accident. (8T:8-8 to 12). The Court went on to note that as a preliminary matter, the credibility of the plaintiff was questioned throughout the entire jury trial, including his version of the events. (8T:8-13 to 15). The Court further found that the plaintiff had provided the jury with inconsistent versions of the accident,

and his testimony of striking his head on the ground, was disputed by the MVR recording from his police vehicle. (8T:8-15 to 19). However, the Court did not provide any basis as to how it was clear that the jury rejected the plaintiff's claim in its entirety when the jury did in fact award the plaintiff \$25,000 in damages. There was no claim at trial for anything other than an aggravation of pre-existing Ménière's disease. There were no sprains, strains, or any other soft tissue injuries alleged by the plaintiff. The jury knew that there was no claim being presented for lost wages, or medical bills. This was the very purpose of the pretrial agreement between counsel that the Court would mold any verdict to include the medical bills and lost wages paid for by the Worker's Compensation Carrier.

The Court further determined that had the jury accepted the aggravation of the Ménière's disease by the accident, the jury would have undeniably rendered an award exceeding \$25,000. Moreover, The Court further found that the award would have potentially been 10, 20 or even 30 times more than the jury's actual award. It is submitted that The Trial Court's finding is inconsistent. If the jury had clearly rejected the plaintiff's argument that he had sustained pain and suffering damages as a result of this accident, they would not have found that he was entitled to anything.

The Trial Court further found that clearly this jury rejected plaintiff argument and chose to award a modest amount to the plaintiff and disputed the

causal relationship of the aggravation of the Ménière's disease and resulting surgeries to the subject accident. (8T:9-14-18).

The Trial Court's analysis begs the question of what amount of money awarded by the jury would satisfy this imaginary threshold. Fifty Thousand; One Hundred Thousand; One Million?

The Trial Court concluded that the plaintiff failed to demonstrate, by a preponderance of the credible evidence, that the treatment included in the Worker's Compensation lien, and the temporary disability benefits were proximately caused by the event in question. It is respectfully submitted that the Trial Court's finding that the plaintiff failed to prove his case by preponderance of the credible evidence, is tantamount to the Trial Court substituting its opinion for that of the jury. This case was vehemently denied by the defendant both as to liability and damages. The jury did indeed find that the plaintiff had shown by a preponderance of the evidence that the defendant was 85% liable, and that Plaintiff sustained damages proximately caused by this accident. As stated, had the jury rejected these arguments, they would have no caused the Plaintiff as to either liability, or damages. Certainly, that did not occur.

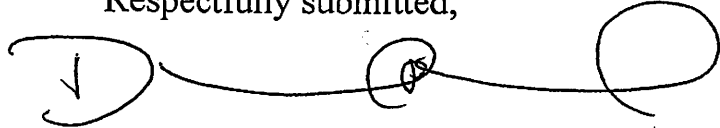
As the Trial Court indicated, there was no objection raised to the verdict sheet and the jury instructions on the record by either counsel. (8T:7-21 to 23). Moreover, the Trial Court indicated that the defense had every opportunity to

request additional jury interrogatories on medical expenses and wages. (8T:7-23 to 25). As the party with the burden of proof, there would be no reason for the plaintiff to request additional jury interrogatories. Each additional jury question is an opportunity for the defense to argue that the plaintiff's claim should be rejected. There would be no reason for the plaintiff to ask for additional interrogatories with regard to whether, or not, the actual medical bills were causally related to the accident, especially in light of the fact that plaintiff's counsel was trying this case, based upon a pre-trial agreement between the parties that the verdict would be molded to include the temporary disability benefits, and medical bills paid by the Worker's Compensation carrier. The Trial Court's finding that the jury rejected an argument that was not before them, is the Trial Court substituting its opinion for that of the jury and constitutes error warranting reversal.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Trial Court's decision of April 13, 2023, and memorialized in the Trial Court's Order of July 25, 2023, must be reversed.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large initial 'D' followed by a series of loops and a final flourish.

DAVID P. LEVINE, ESQ.
Hanus & Parsons, LLC
Attorneys for Plaintiff
Attorney ID No. 047681991

Dated: April 19, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000350-23

Plaintiff/Appellant,

JEFFREY TODD AND GINA TODD

vs.

Defendants/Respondents,

WILLIAM J. BAUDER, III, POLICE &
FIREMEN'S INSURANCE ASSOCIATES,
JOHN DOES 1-10 (SAID NAMES
FICTITIOUS, REAL NAMES UNKNOWN)
AND ABC CORPS 1-10 (SAID NAMES
FICTITIOUS, REAL NAMES UNKNOWN)

On Appeal From Final Judgment Entered in the
Superior Court, Law Division,
Monmouth County

Sat Below:

Honorable Owen C. McCarthy, J.S.C.
Monmouth County Superior Court
Docket No. MON-L-2730-15

**RESPONDENT'S BRIEF ON BEHALF
OF DEFENDANT/RESPONDENT, WILLIAM J. BAUDER, III**

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Date submitted: July 3, 2024

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PRELIMINARY STATEMENT

This is an action for bodily injuries that arose from an altercation between Plaintiff, Jeffrey Todd, a Township of Holmdel police officer, and Defendant, William J. Bauder, III, that occurred during a traffic stop on July 29, 2013. Plaintiff suffered from Meniere's disease for many years prior to the incident in question. Plaintiff, nevertheless, claimed that he struck his head during the altercation with Mr. Bauder and that the head strike aggravated his pre-existing Meniere's disease.

The case was tried in Superior Court, Law Division, Monmouth County, from June 13 to June 21, 2022. The trial involved issues of liability, causal relationship and damages, but the critical issue concerned the causal relationship between the alleged head injury and the alleged aggravation of Plaintiff's Meniere's disease, which resulted in several surgeries and ultimately a complete loss of hearing in his right ear, impaired balance, and other problems. Plaintiff's credibility was called into question on all issues and especially the issue of causation.

The jury returned a verdict for Plaintiff in the amount of \$25,000 and assessed 15% comparative negligence to Plaintiff. This resulted in a "net" award of \$21,500 plus interest. Plaintiff did not move for a new trial or for an

additur, there are no alleged trial errors, and there is no appeal from the jury verdict.

Plaintiff's appeal asserts that the trial Court failed to enforce an alleged pre-trial agreement between counsel to "mold" the verdict to include medical expenses and temporary disability benefits paid by Workers Compensation. "The sole issue in this appeal is the lower Court ruling that the agreement between Counsel to mold the Jury's verdict to include the Plaintiff/Appellant's lost wages and medical bills should not be enforced." (Pb1). However, there was no such agreement. Defense counsel only agreed to have the verdict molded to include the medical bills and disability payments *if* the jury found that Plaintiff's Meniere's disease was aggravated due to the incident of July 29, 2013.

The medical bills and disability payments total \$207,875.40. Thus, had the trial Court accepted Plaintiff's position, the jury award of \$25,000 less 15% comparative negligence (i.e., \$21,500) would have been "molded" to a judgment for \$232,875.40 plus interest. The issue was briefed and argued before the Hon. Owen McCarthy, J.S.C. The Court refused to mold the verdict because it was clear that the jury had rejected Plaintiff's aggravation claim. The facts demonstrate unequivocally that the Court's determination was correct and should be affirmed.

PROCEDURAL HISTORY

The altercation between Plaintiff and Defendant that occurred in the Township of Holmdel on July 29, 2013. Plaintiffs, Jeffrey Todd and his wife, Gina Todd, filed the Complaint in Superior Court, Law Division, Monmouth County, on July 21, 2015. (Pa14-Pa24) Defendant, William J. Bauder, III, filed an Answer on August 13, 2015. (Pa25).

Plaintiff's medical expert, Dr. Gerald West, videotaped deposition *de bene esse* was taken on September 9, 2019. Defendant subsequently moved to redact portions of Dr. West's testimony concerning the reasonableness and necessity of medical bills allegedly related to the incident of July 29, 2013 and to bar admission of evidence of medical expenses or liens at the time of trial. The motions were argued before Judge Owen McCarthy on September 3, 2021. (9T)¹ The Court granted both motions and entered separate Orders redacting portions of Dr. West's testimony and barring evidence of "any incurred medical expenses or liens at the time of trial. (Pa50; Pa52).

¹ 1T refers to the transcript of June 13, 2022
2T refers to the transcript of June 14, 2022
3T refers to the transcript of June 15, 2022
4T refers to the transcript of June 16, 2022
5T refers to the transcript of June 20, 2022
6T refers to the transcript of June 21, 2022
7T refers to the transcript of August 25, 2022
8T refers to the transcript of April 13, 2023
9T refers to the transcript of September 3, 2021

The case was tried to a jury before the Hon. Owen McCarthy, J.S.C., from June 13, 2022 to June 21, 2002. The jury returned a verdict for Plaintiff, Jeffrey Todd, in the amount of \$25,000 and assessed 15% comparative negligence against him. Plaintiff, Gina Todd, was awarded zero dollars on her per quod claim. (6T102 to 105) On June 30, 2022, Plaintiff's counsel submitted a proposed Order for Judgment for \$239,156.09, which included 85% of the \$25,000 jury award, medical expenses and disability payments, plus prejudgment interest. (Pa32-Pa33). Defense counsel objected and requested a hearing on the issue by correspondence filed on July 6, 2022. (Pa45-Pa49)

The issue was argued before Judge McCarthy on August 25, 2022. (7T) The Court's decision *not* to mold the judgment to include the medical bills and disability payments was placed on the record on April 13, 2023. (8T). The Court entered an Order for Judgment for \$26,002.60, inclusive of prejudgment interest, on July 25, 2023. (Pa6).

STATEMENT OF FACTS

Plaintiff, Jeffrey Todd, suffered from Meniere's disease for many years prior to the incident involving Defendant, William J. Bauder, III, that occurred in the course of his duties as a police officer on July 29, 2013. Plaintiff's claim that he struck his head during the altercation and that the head injury caused an aggravation of his pre-existing Meniere's disease, ultimately resulting in surgical removal of the inner ear mechanism and total hearing loss in his right ear was the central contention in this case.

The issue regarding Plaintiff's medical bills first arose during Dr. West's videotaped *de bene esse* deposition on September 9, 2019. Defense counsel objected to portions of Dr. West's testimony as surprise and net opinion. Defense counsel subsequently filed motions *in limine* to redact the testimony dealing with reasonableness and necessity and to bar evidence as to medical expenses or liens at the time of trial. (Pa45)

The motions *in limine* were argued before Judge McCarthy on September 3, 2021. (9T)² The Court, and counsel, discussed on the record that the causal relationship of the July 29, 2013 incident and the alleged aggravation of Meniere's disease has been in dispute in the case throughout and that recovery of medical expenses for treatment of Meniere's disease

² Note that Plaintiffs did not include the transcript of September 3, 2021 in their appeal.

depends upon a finding of causation. (9T10-12 to 13-3) Plaintiff's counsel openly acknowledged that: "There's no argument ... that the treatment, the surgery that this man had was unreasonable, unnecessary. It's a causal relationship argument. *So, obviously, if a jury found that these injuries are not causally related to the accident, then everything falls.*" (9T16-11 to 16) (emphasis added).

Defense counsel agreed that Plaintiff is entitled to recover medical expenses if they are causally related to the incident in question. The verdict would be molded to include the medical bills only if the jury finds that the injuries are causally related. (9T18-17 to 19-14) Plaintiff's counsel said "okay. ... that's all I'm asking for. (9T19-16 to 17) The Court explained that the orders would include notations to the effect that the issue of reimbursement of medical expenses under the Workers' Compensation lien would be addressed at trial based upon the jury findings as to the issue of causation. (9T19-18 to 20-15; 9T24-25 to 25-6)

The Court granted the defense motions by two orders dated September 3, 2021. The Order redacting Dr. West's testimony as to the reasonableness and necessity of the medical bills includes a notation stating that: "Motion granted for the reasons stated on the Record. Issue of medical bills to be addressed at Trial per terms of companion Order based upon jury verdict." (Pa51) The

Order barring evidence of medical bills and liens includes a notation stating that: “The issue of medical bills to be addressed by the Court at the time of Trial. Reimbursement of medical bills is limited to the amount paid by the Workers’ Compensation carrier. Amount of lien to be molded at Trial depending upon Jury’s Verdict.” (Pa53)

Thus, Plaintiff’s assertion that there was a pre-trial agreement between counsel to mold the verdict automatically to include the full amount of the medical bills is false. The agreement to mold the verdict was always conditioned on proof of causal relationship between the July 29, 2013 incident and aggravation of Plaintiff’s Meniere’s disease (5T18 to 19; 5T42-16 to 43-6) Plaintiff failed to meet that burden. The jury verdict as to liability and its award of \$25,000 damages (reduced by 15% comparative negligence to \$21,500) is not inconsistent with the facts of the case.

Plaintiff, Jeffrey Todd, testified that on July 29, 2013 stopped Defendant William Bauder, III’s vehicle after having seen it exit from a residential street in Holmdel at a high rate of speed. (2T60 to 66) Plaintiff and Defendant became involved in an altercation when, according to Plaintiff, Defendant behaved in a confrontational manner and refused to remain in his vehicle while Plaintiff wrote out a traffic summons. (2T66 to 69) Plaintiff, for some reason, decided to take Defendant down to the ground, put him in handcuffs behind his

back and place him under arrest. Plaintiff grabbed Defendant around the midsection, tripped him, and threw him to the pavement, but Plaintiff fell to the ground as well. (2T69 to 71) Plaintiff claimed that he struck the left side of his face and forehead on the back of Defendant's head (2T71-11 to 17). He also struck his elbow and his knee on the pavement. "My knee and my elbow struck the pavement. I had a raspberry and like a grapefruit like swelled up." (2T71-9 to 10) He had cuts and scrapes from the pavement. (2T73-16 to 21) First aid showed up and bandaged his elbow (2T73-4 to 6). He did not complain of a head injury at the time. (2T73-8 to 10)

The incident was captured on a dash cam video from Plaintiff's vehicle that was shown to the jury during his testimony and again at the Jury's request during their deliberations. (2T57; 6T98 to 101) Defense counsel also presented a series of clips from the dash cam video in order to focus on specific portions of the incident. (2T133 to 163). Cross examination in conjunction with the dash cam video revealed numerous inconsistencies in Plaintiff's version of events. For example, Plaintiff claimed that he was calm, not angry, when he stopped Defendant and when he told Defendant to get back in his car. The dash cam video showed him shouting and swearing at Defendant. (2T138) Plaintiff claimed in answers to interrogatories that it was Defendant who initiated physical contact. The dash cam video showed that in fact it was Plaintiff who

initiated physical contact, first pushing Defendant toward his car, then grabbing him and throwing him to the ground. (2T147-2 to 15; 2T149-3 to 150-3) Plaintiff claimed that he struck his head, either on the ground or on the back of Defendant's head (2T71-3 to 17; 2T159-162-19), but the dash cam video does not show him hitting his head at all. (2T160-3 to 162-2) Plaintiff denied that – but he did admit that the video does not show him hitting his head on the pavement which is what he told Dr. Freifeld. (2T162-11 to 13; 2T161-8 to 19)(5T12).

Plaintiff testified that Dr. Shah diagnosed Meniere's disease in his right ear in 1997. (2T74 to 76) Meniere's disease is a buildup of fluid in the inner ear. (2T76) Plaintiff was first treated with medications, but later, in 1999, Plaintiff underwent a surgical procedure that involved shaving part of the bone in his right ear. (2T76 to 78) The surgery helped, but the symptoms of dizziness, vertigo, lightheadedness and vision problems eventually returned. (2T79 to 80)(2T75-9 to 15; 2T165-24 to 166-11) Dr. Shah performed another surgical procedure involving insertion of a tube in the inner ear to relieve the fluid build up on July 7, 2009. The tube had to be re-inserted on May 18, 2010, August 11, 2011, and again on March 14, 2013, which was only 4 and ½ months before the July 29, 2013 incident. (2T80 to 82; 2T168-8 to 169-17).

Plaintiff testified that he was essentially symptom free after the tube was inserted into his ear, except that it came out and had to be re-inserted several times. (2T169-1 to 10; 2T170-21 to 171-9) He was contradicted by Dr. Shah's notes regarding an office visit on February 20, 2013. Dr. Shah's note states "[p]re-op, he is complaining of increasing symptoms of his Meniere's disease." (2T170-16 to 18). Plaintiff claimed he did not recall saying that to Dr. Shah. (2T170-18 to 20).

Plaintiff returned to Dr. Shah on August 7, 2013 and August 19, 2013. Dr. Shah's records do not contain any reference to the incident of July 29, 2013. (2T173 to 173-14) Dr. Shah's notes for August 7, 2013 state that: "He's a gentleman with Meniere's disease. (2T173-6) On August 19, 2013, Dr. Shah wrote that: "He's got unremitting Meniere's disease. He has persistent symptoms despite the dyazide, low salt diet, valium and steroids." (2T173-7 to 11)

Dr. Shah referred Plaintiff to Dr. Smouha on August 19, 2013. This was approximately three weeks after the incident with Defendant Bauder. (2T171-92; 2T171-10 to 13; 2T171-19) Dr. Shah's referral to Dr. Smouha states that Plaintiff had been having increasing attacks of Meniere's disease for 18 to 24 months. (2T171-14 to 20) Plaintiff claimed he did not remember that. (2T171-21 to 172-7)

Plaintiff testified that *after* the July 29, 2013 incident he was experiencing “intense” symptoms of Meniere’s disease, including dizziness, spinning, blurred vision, and that his wife had to help him get up to go to the bathroom to be sick. He said he needed help just to stand up and move around and he could not do his normal activities from the July 2013 through February 2014. (2T93 to 95) Dr. Smouha performed a vestibular nerve section in Mt. Sinai hospital, New York, in February 2014. Plaintiff testified he spent two days in Mt. Sinai followed by three months recovery period. (2T95) Plaintiff claimed he had many symptoms of dizziness, lack of balance and being “sick” after the surgery. (2T96 to 98)

Plaintiff started to have difficulty breathing and he was coughing a lot a few weeks after the February 2014 surgery. He returned to Dr. Smouha, a CT scan was done that revealed a spinal fluid leak, and that led to emergency surgery at Mt. Sinai. A drain was inserted into Plaintiff’s spine in order to drain fluid every hour for four days. He was immobilized and catharized during this period. (2T99-1 to 101-18) The at home recovery took seven months during which time he was out of work, limited in his ability to move around and do things, and his wife had to help him with many activities of daily living. (2T101-19 to 103-11; 2T104-5 to 12)

Plaintiff had another surgery performed by Dr. Smouha at Mt. Sinai in November, 2014. He was hospitalized for about three days (2T104-13 to 18). Dr. Smouha performed a labyrinthectomy, which severs the balance nerve in the ear, which results in deafness. (2T105-1 to 8) This relieved his symptoms of Meniere's disease (dizziness, spinning, nausea, etc), but he had to do 2-3 years of physical therapy to regain his balance, as well as visual therapy, and he is completely deaf in his right ear. (2T105-21 to 108-9) He claims to have constant "ringing in his ear, visual "tracking" problems, he wears "prism" glasses, he has headaches every day and occasional balance problems when he stands up or moves too quickly. (2T108 to 108, 2T110 to 112)

Dr. Eric Smouha treated Plaintiff from approximately August 21, 2013 through April 13, 2016. (3T95) Dr. Smouha did not recall if he had Dr. Shah's treatment records, but he agreed that his report and testimony was not based on Dr. Shah's records. (3T15 to 23) Dr. Smouha did not see the dash cam video. (3T105-19 to 25) He relied on the truthfulness and accuracy of Plaintiff's reporting. (3T100-13 to 21)

Dr. Smouha's office notes from August 21, 2013 indicate that Plaintiff told him he had been "wrestling with a perpetrator" (regarding the July 29, 2013 incident). Plaintiff's chief complaint was vertigo. "***Duration three weeks.***" (3T96-1 to 22)(emphasis added) Dr. Smouha's November 13, 2014

operative report states in part that: “The patient is well known to me. He developed refractory vertigo following a blunt trauma.” (3T103-23 to 104-24) Dr. Shah’s referral report, dated August 19, 2013, which was addressed to Dr. Smouha, but not part of his file, states that *“[i]n the last 18 to 24 months, he [Plaintiff] has had increasing spells of Meniere’s attacks.”* (3T97-2 to 13)(emphasis added).

Dr. Gerald West testified as Plaintiffs’ medical legal expert. (3T7 to 12) He saw Plaintiff once on June 14, 2016. (3T59-20 to 22) Plaintiff told Dr. West at that time that “[h]e hit his head and became dazed.” (3T61-2 to 9; 3T62-2 to 6) The same history of Plaintiff hitting his head was repeated in Dr. West’s August 22, 2016 report. (3T63-9 to 12).

Dr. West’s June 29, 2016 report states his opinion that Plaintiff’s disability is “predominantly secondary to the trauma that occurred when he hit his head.” (3T62-7 to 63-3) However, Dr. West he relied on the truthfulness and accuracy of the history Plaintiff reported to him. (3T60-3 to 6; 3T60-13 to 17; 3T63-4 to 64-13) Dr. West was not even aware of the dash cam video when he prepared his reports. (3T70-23 to 71-11).

Dr. West also admitted that his reports do not analyze Dr. Shah’s records; there is no analysis as to Plaintiff’s treatment for Meniere’s disease prior to the incident in question; he did not know when Plaintiff was last

treated for Meniere's disease prior to the July 29, 2013 incident; and, indeed, *he had no information about Plaintiff's Meniere's disease prior to the incident other than what Plaintiff told him.* (3T67-19 to 70-2)

Dr. Stephen Freifeld testified for the defense. Dr. Freifeld is an otolaryngology surgeon (5T8) Dr. Freifeld's report under "History of Incident" recites that Plaintiff reported that he was "'taking down a perpetrator, physical altercation, struck head on ground.' He said he was not unconscious, but he was dazed." (5T12-13 to 21; 5T12-24 to 13-20) Plaintiff told Dr. Freifeld that prior to the July 29, 2013 incident he was not having any specific problems and he had been stable for many years. (5T14-2 to 7)

Dr. Freifeld's review of Plaintiff's medical records led him to conclude that Plaintiff's Meniere's disease was *not* stable prior to the incident in question. (5T14-13 to 21) Dr. Shah's records from February and March of 2013 show that Plaintiff's condition "was definitely not stable at that time." (5T15-8 to 24) Dr. Shah's records from February 20, 2013 noted that Plaintiff was complaining of "increasing symptoms of his Meniere's disease. (5T16-7 to 11) There were audiograms showing fluctuating hearing loss as well. (5T16-18 to 21)

Dr. Freifeld also reviewed Plaintiff's medical records post July 29, 2013, which included records from Dr. Joseph Imbesi, Meridian Occupational

Health, dated August 28, 2013. Plaintiff told Dr. Imbesi that “*he struck his left elbow and knee, but did not hit his head and did not have any loss of consciousness.*” (5T17-7 to 18)(emphasis added) Dr. Imbesi’s records were contrary to what Plaintiff reported to Dr. Freifeld, i.e, that he hit his head on the ground. (5T17-23 to 24)

Dr. Freifeld explained that Meniere’s disease is a chronic process, there is no cure, and that it typically goes through several worsening stages, and in some people, like Plaintiff, it requires surgical intervention to relieve the symptoms. (5T18 to 20) Meniere’s is a progressive disease that gets worse over time. (5T42) Plaintiff ultimately had a labyrinthectomy, which was the result of the chronic process of his Meniere’s disease. (5T20 to 21)

Dr. Freifeld also reviewed the dashcam video to conclude that Plaintiff “did not strike his head on the ground. In fact, after taking the perpetrator down, he got up, he walked around, and he called for backup. And he did not appear to that he was significantly injured ... after he completed the arrest of the perpetrator.” (5T21-19 to 25). Dr. Freifeld testified further that if Plaintiff had hit his head, the force required to affect his Meniere’s disease would have had to be “concussive” so as to cause a loss of consciousness or to leave the individual dazed significantly because the inner ear is protected by some of the hardest bone in the body. (5T22-18 to 23-6) Dr. Freifeld opined that nothing in

the dash cam video supports claim that Plaintiff struck his head and certainly not hard enough to affect the Meniere's disease. (5T24-8 to 11) Dr. Freifeld opined further that "from what I've seen in the medical records, he [Plaintiff] did not sustain an incident sufficient to aggravate his underlying, already significant Meniere's disease." (5T24-12 to 20) Dr. Freifeld concluded that Plaintiff probably would have had to undergo the surgeries performed by Dr. Smouha regardless of the July 29, 2013 incident. (5T43)

On June 21, 2022, The Jury rendered a verdict for Plaintiff, Jeffrey Todd, in the amount of \$25,000. The Jury apportioned comparative negligence 85% to Defendant and 15% to Plaintiff, which reduces the damages award to \$21,500. Plaintiff, Gina Todd, was awarded zero dollars on her per quod claim. (6T102 to 105)

The controversy with respect to "molding" the verdict did not arise until after the trial, on June 30, 2022, when Plaintiff's counsel submitted a proposed form of order for judgment which included \$207,875.40 of medical bills and temporary disability payments on June 30, 2022 (Pa30) Defense counsel objected and requested a hearing by correspondence filed on July 6, 2022. (Pa45)

The issue was briefed and argued before the trial Court on August 25, 2022 (7T) A decision was placed on the record on April 13, 2023. (8T) Judge

McCarthy listened to the trial through CourtSmart and reviewed the pretrial submissions and the post-trial submissions. (8T4-12 to 19) The Court noted that Defendant had disputed the causal relationship of the subject incident to the alleged aggravation of Meniere's disease as well as the medical bills and disability payments from the inception of the case and that the agreement to mold the verdict was contingent upon proof of causation. (8T7-4 to 20) The Court determined that Plaintiffs failed to meet their burden to prove to establish that the July 29, 2013 incident caused an aggravation of Plaintiff Jeffrey Todd's pre-existing Meniere's disease. Thus, the Court declined to mold the verdict to include medical bills or temporary disability benefits paid by Workers Compensation. (8T9-18 to 10-1)

The Court reasoned in part as follows:

The award should do no more than -- do no more than the plaintiff -- make the plaintiff whole based on the evidence that was presented to this jury. ***Here, based upon the minimal award of \$25,000, the Court finds that it is clear, the jury rejected plaintiff's argument that the pre-existing Meniere's disease was aggravated in any way by the subject accident.***

As a preliminary matter, the credibility of Plaintiff Todd was questioned throughout the entire jury trial, including his version of events. Plaintiff Todd provided the jury with inconsistent versions of the accident and his testimony of his striking the head on the ground was disputed by his own MVR recording from his police vehicle.

Furthermore, there were multiple additional areas and examples of inconsistencies throughout the questioning and testimony of

Plaintiff Todd concerning his pre-incident health and post-incident health that disputed his credibility before this jury. Moreover, his recollection of the vents (sic) -- the events and the mechanism of his injury were disputed by the MVR video that was presented to this jury and perhaps provided the best evidence of the manner in which this incident occurred.

Further, the defense presented medical evidence disputing the causal relationship of the alleged injuries. Had the jury accepted the aggravation of the Meniere's disease was caused by this incident, as was the resulting three surgeries and extensive missed times from work was caused by this event, the resulting compensatory damage would have undeniably exceeded \$25,000, potentially being 10, 20, or even 30 times more than this award.

Clearly, this jury rejected plaintiff's argument and chose to award a modest amount to the plaintiff and disputed the causal relationship of the aggravation of the Meniere's disease and resulting surgeries to the subject incident. The Court finds the plaintiff failed to demonstrate, by a preponderance of the credible evidence, that the treatment included in the worker's compensation lien and the temporary disability benefits were proximately caused by the event in question. (emphasis added)

(8T8-5 to 9-23)

LEGAL ARGUMENT

THE TRIAL COURT’S DECISION NOT TO MOLD THE VERDICT TO INCLUDE MEDICAL BILLS AND TEMPORARY DISABILITY PAYMENTS WAS CORRECT AND SHOULD BE AFFIRMED

Plaintiff argues on appeal that counsel for both sides had agreed before trial that the Court would mold the verdict to include medical bills and disability benefits paid by Workers Compensation. Plaintiff asserts that the trial Court’s decision not to mold the jury verdict to include those sums was contrary to the agreement of counsel; inconsistent with the jury verdict as to liability and its award of \$25,000 damages; and that the trial Court erred in substituting its opinion for the jury’s. However, the facts of the case belie those assertions.

Plaintiff mis-states the nature of the “agreement.” Between counsel. The trial Court made it clear on the record that Defense counsel agreed only to mold the verdict to include the amount of medical bills and temporary disability benefits paid by Workers Compensation if – but only if – the jury found that the incident of July 29, 2018 caused an aggravation of Plaintiff’s pre-existing Meniere’s disease. (5T18 to 19; 5T42 to 43;9T10; 9T16; 9T24 to 25)

The trial Court observed, accurately, that issue of causal relationship between the July 29, 2013 incident and the alleged aggravation of Plaintiff’s

Meniere's disease was ever present in this case. (8T13-22 to 14-6) Proximate cause, clearly, is inextricably tied to the "reasonableness and necessity" of Plaintiff's medical expenses. If the Meniere's was not aggravated or exacerbated by Defendants negligent act – then the medical bills incurred for its treatment and/or lost wages or temporary disability payments for time lost from work are not recoverable as damages.

The Court determined that the Jury's award of \$25,000 ("net" \$21,500) clearly evinces that it rejected the alleged causal relationship and for good reason. Plaintiff's credibility was shredded on all aspects of the case – from his version of the altercation with Defendant, his claim of a head injury as the causal mechanism for aggravated Meniere's disease, to the medical history he represented to the medical witnesses and to the jury. The Jury undoubtedly concluded that Plaintiff's claim of aggravation of Meniere's disease due to the incident in question simply was not credible and that finding is reflected in the damages award.

Plaintiff's argument to the contrary, the damages award was more than fair, even generous, based on Plaintiff's actual, proven injuries. There was evidence that Plaintiff struck his elbow and his knee when he fell. "My knee and my elbow struck the pavement. I had a raspberry and like a grapefruit like swelled up." (2T71-9 to 10) He had cuts and scrapes from the pavement.

(2T73-16 to 21) First aid showed up and bandaged his elbow (2T73-4 to 6) The jury also could have believed that Plaintiff struck his head on Defendant's body, as he claimed, but that the strike was not sufficient to aggravate the pre-existing condition.

The Jury was instructed that Plaintiff sought damages for pain, suffering, disability and impairment, and the loss of enjoyment of life. “ (6T74-23 to 75-1) “The law recognizes that proper items for recovery, the pain, physical and mental suffering, discomfort, and distress that a person may endure as a natural consequence of an injury.” (6T76-3 to 6) The jury was instructed to consider not just the physical injuries, but the emotional distress that an emotionally charged encounter such as that which took place on July 29, 2013 would entail. ”It is presumed that the jury understood and followed the trial court's instructions.” State v. Nelson, 173 N.J.417, 478 (2002). The Jury also had the benefit of the dash cam video which it viewed twice before rendering its verdict. Thus, the verdict is not inconsistent with the evidence.

Plaintiff's argument that Defendant should have asked for an additional jury interrogatory regarding proximate cause is but an attempt to blame the defense for Plaintiff's failure to follow through on their prior agreement at the time of trial. Defense counsel pointed out as much in his correspondence of July 6, 2022 (Pa45). Plaintiff bears the burden of proof of causation as a matter

of law – and pursuant to the agreement of counsel – it was *Plaintiff's* obligation to address the issue at trial since, among other things, the agreement was to Plaintiffs benefit by sparing them from having to produce medical records and prove the reasonableness and necessity of the bills by expert testimony, which Plaintiffs were not in a position to do given the problems with their expert and the Orders entered on September 3, 2021. In addition, it is noted that if the trial Court's decision is to be set aside because of a perceived flaw in the jury verdict form, then the appropriate remedy would be to remand for a new trial – not to mold the verdict in the manner sought by Plaintiffs. Plaintiffs did not move for a new trial and their appeal is not based upon a request for a new trial.

The trial Court found that Plaintiffs failed to meet their burden of proof as to causal relationship, and that:

“Had the jury accepted the aggravation of the Meniere's disease was caused by this incident, as was the resulting three surgeries and extensive missed times from work was caused by this event, the resulting compensatory damage would have undeniably exceeded \$25,000, potentially being 10, 20, or even 30 times more than this award.” (8T9-7 to 13).

Defendant respectfully submits that this Court owes substantial deference to the trial Court's findings and conclusions so long as they are supported by sufficient credible evidence in the record. This Court's function is limited in that it should not disturb the trial Court's findings of fact and

conclusions of law unless it is convinced that they are “so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.” Mt. Hill v. Twp. Comm. of Middletown, 403 N.J. Super. 146, 192-193 (App. Div. 2008) (quoting Rova Farms Resort, Inc. v. Inv s. Ins. Co. of America, 65 N.J. 474, 484 (1974)). Plainly that is not the case here. Quite the contrary – the trial Court’s findings and conclusions followed ineluctably from the evidence presented. Furthermore, to the extent that the decision not to mold the verdict involves an exercise of discretion, it cannot be said to have been an abuse of discretion in this case and thus there is no basis to disturb it. See Hisjenaj v. Kuehner, 194 N.J.6, 16 (2008).

Plaintiff cites Kassick v Milwaukee Electric Tool Corp. 120 N.J. 130 (1990) for the proposition that “[i]n New Jersey there is a general rule that a Trial Court may not mold a jury verdict according to its perception of the jury's view” (Pb6), but the argument is “backwards.” Plaintiff seeks to mold the verdict – not Defendant. Kassick explains that “[a] jury’s verdict may be ‘molded’ only where the court can decipher the ‘plainly manifested intention of the jury.’” 120 N.J. 130, 135 (quoting Turon v. J. & L. Constr. Co., 8 N.J. 543, 552 (1952)). However, “[t]he verdict may not . . . be molded if the result reached might contravene the jury's intention.” Buteas v. Raritan Lodge # 61 F. & A.M., 248 N.J. Super. 351, 366, 591 A.2d 623 (App. Div. 1991). Here, as the trial Court concluded, all of the

evidence points in the same direction. The jury rejected Plaintiff's claim of aggravation of Meniere's disease, thus the trial Court's decision was correct and should be affirmed.

CONCLUSION

Based upon the foregoing, Defendant William J. Bauder, III, respectfully submitted that the trial Court's decision not to mold the jury verdict to include medical bills and disability payments was correct. The order for judgment should be affirmed as entered. Plaintiffs' Jeffrey Todd and Gina Todd's appeal should be denied.

Respectfully submitted,

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By: *Richard J. Mirra /s/*
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Dated: July 3, 2024

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The Honorable Judges of the
Superior Court of New Jersey
Appellate Division
25 West Market Street
Trenton, New Jersey 08626

Re Jeffrey Todd and Gina Todd (Plaintiffs-Appellants)
v. William J. Bauder, III, Police & Firemen's Insurance
Associates, John Does 1-10 (said names fictitious, real names
unknown) and ABC Corps. 1-10 (said names fictitious, real names
unknown) (Defendants-Respondents)

Docket No. A-000350-23

Monmouth County Docket No. MON-L-2730-15

Civil Action: On Appeal from a Final Judgment of the Superior Court
Of New Jersey, Law Division, Civil Part, Monmouth County

Sat Below: The Honorable Owen C. McCarthy, J.S.C.

Honorable Judges:

Please accept this letter memorandum, pursuant to R. 2:6-2(b), in lieu of a more formal reply brief submitted on behalf of the plaintiffs in support of their pending appeal.

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**STATEMENT OF PROCEDURAL HISTORY
AND STATEMENT OF FACTS¹**

Plaintiffs rely upon the Statement of Procedural History and Statement of Facts set forth in their initial brief, with these addendums.

Defendant William J. Bauder, III, filed his response brief on July 3, 2024. Pursuant to the scheduling order plaintiffs' reply brief was due by July 19, 2024. With the consent of the defendant, plaintiffs requested a fourteen-day extension of time in which to file their reply brief. Plaintiffs submit the following in reply.

Plaintiffs-appellants note that the statement of facts from the defendant-respondent supports the plaintiffs position that the parties had an agreement for the Court to mold the jury's verdict to include the medical bills and temporary disability benefits paid for by the Worker's Compensation carrier pursuant to N.J.S.A. 34:15-40.

LEGAL ARGUMENT

POINT I

**THE TRIAL COURT ERRED BY SUBSTITUTING ITS
JUDGMENT FOR THAT OF THE JURY (Pa6-8; 8T)**

The parties agree that the sole issue on this appeal is the Trial Court's failure to enforce the pre-trial agreement between counsel to mold the Jury's verdict to

¹ Statement of Procedural History and Statement of Facts were combined in the plaintiffs' initial brief because they are integrally intertwined.

include medical expenses, and temporary disability benefits, paid pursuant to the Worker's Compensation Act.

Respondent argues that the jury's award of \$25,000 clearly indicates that they rejected the plaintiff's argument that his Ménière's was in any way aggravated by the defendant's negligence. (RB20). Of course this begs the question. What if the jury found \$50,000? What if the jury found \$100,000? What if the jury found \$250,000? What would be the amount of money awarded that would pierce this imaginary threshold created by the respondent, where the parties, and the Court would accept that the jury automatically found causal relationship? It is undisputed that the defense never requested specific jury interrogatories. Therefore, any conclusion that the jury did not find any causal connection between the aggravation of the plaintiff's Ménière's disease and the defendant's negligence is mere conjecture and speculation.

The jury's verdict, albeit low, does not automatically trigger a conclusion that the jury rejected all of the plaintiffs' arguments. Clearly the jury found that the defendant was substantially liable for the accident in question. The speculation of defense counsel with respect to the reasons behind the jury's awarding \$25,000 is unpersuasive. Respondent contends that "plaintiff mis- states the nature of the agreement between counsel. The trial Court made it clear on the record that defense counsel agreed only to mold the verdict to include the amount of medical bills and

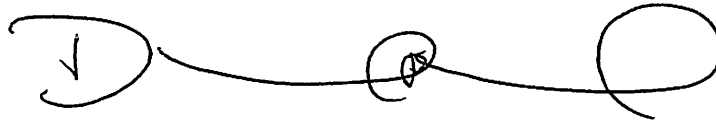
temporary disability benefits paid by Worker's Compensation if- but only if- the jury found that the incident of July 29, 2018 (sic) , caused an aggravation of Plaintiff's pre-existing disease". (RB19). Had the jury not found that the plaintiff Ménière's disease was aggravated by this accident, they would not have awarded plaintiff any money for his damages. Clearly the opposite occurred. We can certainly go back and forth in order to guess what was in the minds of the individual jurors, and ultimately the collective jury. However, at the end of the day, that's all it would be, guessing.

The fact remains that the Trial Court's finding that the jury rejected an argument that was not individually carved out and presented to them is the Trial Court substituting its opinion for that of the jury and constitutes error warranting reversal.

CONCLUSION

The brief submitted by the defendant-respondent fails to significantly address the major concerns raised by the plaintiffs with respect to the Trial Court substituting its opinion for that of the jury. For these reasons, and those expressed in the original brief of the plaintiffs-appellants, the Trial Court's failure to mold the jury's verdict in accordance with the pre-trial agreement of counsel must be reversed.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large loop on the left, a horizontal line, a small circle, and a larger loop on the right.

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Dated: August 1, 2024