JASMINE ROBINSON INDIVIDUALLY, and on behalf of her minor daughter, VANESSA ROBINSON,

Plaintiffs,

vs.

CHRISTOPHER STENGEL, MY TREE BOYZ, LIMITED LIABILITY COMPANY, RUSSELL KLINE, DISH NETWORK SERVICE L.L.C., DISH NETWORK L.L.C., JOHN DOES, MARY DOES, ABC PARTNERSHIPS AND XYZ CORPORATIONS, JOINTLY, SEVERALLY AND IN THE ALTERNATIVE,

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-1017-23-T4

Civil Action

On Appeal From:

New Jersey Superior Court
Atlantic County – Civil Part
Docket No.: ATL-L-3919-21

Sat Below:

Hon. Danielle J. Walcoff, J.S.C.

BRIEF OF DEFENDANTS-APPELLANTS, RUSSELL KLINE, DISH NETWORK SERVICE L.L.C., AND DISH NETWORK L.L.C.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES

RULES

TABLE OF ABBREVIATIONS

Pb Plaintiff-Respondent, Jasmine Robinson's, brief
Pa Plaintiff-Respondent, Jasmine Robinson's, appendix
Db Defendants-Appellants, Russell Kline, Dish Network Services, LLC, and DISH Network, LLC's, brief
Da Defendants-Appellants, Russell Kline, Dish Network Services, LLC, and DISH Network, LLC's, appendix
1T Transcript of hearing on motions in limine, dated September 26, 2023
2T Transcript of trial, dated October 3, 2023
3T Transcript of trial, dated October 4, 2023, Vol. I
4T Transcript of trial, dated October 4, 2023, Vol. II
5T Transcript of trial, dated October 5, 2023
6T Transcript of hearing on motion for new trial, dated November 16, 2023

STATEMENT OF ORDERS AND DECISIONS APPEALED

TABLE OF CONTENTS TO APPENDIX

Volume I - (Da1 to Da186)

[1] P-4 was not moved into evidence or marked during the course of the trial and is intentionally omitted.

PRELIMINARY STATEMENT

Defendant-Appellants, Russell Kline, Dish Network Service L.L.C., and DISH Network L.L.C. (collectively referred to as "Kline"), appeal from the jury's verdict and the trial court's denial of Kline's motion for a new trial, remittitur and judgment notwithstanding the verdict. Plaintiff, Jasmine Robinson, filed suit against Kline and co-Defendants, Christopher Stengel and My Tree Boyz, LLC (collectively referred to as "Stengel"), for personal injuries she sustained in a three-vehicle accident that occurred on December 29, 2019. The jury concluded that Kline was 40% at fault for the accident and that Plaintiff was 0% at fault even though both Kline and Plaintiff entered the same intersection with the same yellow light and had the same right of way. The jury concluded that Stengel was 60% at fault and awarded Plaintiff $3.5 million in damages.

The jury's allocation of fault is against the weight of the evidence and illogical. Kline was traveling north on Route 54 at the intersection of Jackson Road in Buena Vista, New Jersey at the time of the accident. Plaintiff was traveling south on Route 54. Both Plaintiff and Kline testified that the traffic signal controlling traffic on Route 54 changed from green to yellow as they approached the intersection. Both testified that they believed they were too close to the intersection when the light changed to yellow to allow them to stop safely and intended to proceed through the intersection with the yellow light. Stengel was traveling west

on Jackson Road. He claimed that he was stopped at the red light and entered the intersection when the light turned green. This testimony was inconsistent with the other evidence presented at trial and clearly rejected by the jury. The investigating police officer testified that while the light controlling traffic on Route 54 is yellow, the signal controlling traffic on Jackson Road is red. Moreover, the impact between the Kline vehicle and Plaintiff's vehicle occurred north of the intersection (i.e., before Plaintiff even entered the intersection) and both Plaintiff and Kline testified that they were traveling similar speeds, between 55 and 60 miles per hour. The jury's allocation of fault is irreconcilable and illogical. Kline and Plaintiff essentially engaged in the same conduct – although Kline reached the intersection before Plaintiff. Kline, however, was struck by Stengel as he crossed the intersection with the yellow light and after Stengel entered the intersection against a red light. There is no factual basis to support an allocation of 40% of the fault for this accident to Kline and the jury's verdict should be vacated on that ground alone.

The jury's illogical verdict is explained, at least in part, by several legal errors committed by the trial judge. The trial court relied on the incorrect legal standard and ruled that evidence of Stengel's criminal conviction from five years before the trial was inadmissible. The trial court also barred Kline from presenting the jury with a diagram prepared by the investigating police officer that depicted the points of impact between the three vehicles. The trial court also ruled that Plaintiff was

permitted to play inflammatory audio from a police dash cam video that depicted Plaintiff screaming and crying in pain and pleading for help in the moments immediately after the accident. These evidentiary rulings had a clear capacity to cause a result the jury would not otherwise have reached.

In respect of Plaintiff's damage claim, the jury awarded $3.5 million in damages. The damage award did not include any amounts for any economic loss. Plaintiff did not present a lost wage claim for either past or future wages. No medical bills were presented as an element of Plaintiff's damages. Plaintiff also did not assert an economic claim for future medical care. Although Plaintiff sustained serious orthopedic injuries that required surgery, she has made an extraordinary recovery. She is able to care for her young daughter and is returning to work. There is no dispute that Plaintiff suffered significant injuries, but an award of $3.5 million for orthopedic injuries from which Plaintiff has made a favorable recovery is excessive and the result of improper sympathy engendered by the trial court's evidentiary rulings.

Kline respectfully submits that the jury's verdict is against the weight of the evidence and that a new trial as to all issues is warranted. Alternatively, in the event the Court is not inclined to grant a new trial as to damages, Kline respectfully submits that a new trial as to liability is necessary to correct the unjust allocation of fault among the parties.

PROCEDURAL HISTORY

Plaintiff initiated this lawsuit by filing a Complaint in the New Jersey Superior Court, Atlantic County on December 8, 2021. Da1. Defendants Russell Kline, Dish Network Service L.L.C., and DISH Network L.L.C. filed an Answer generally denying the allegations of the Complaint on January 14, 2022. Da10. Defendants Christopher Stengel and My Tree Boyz, LLC, filed an Answer denying the allegations of the Complaint on March 8, 2022. Da23. Prior to the close of discovery, Defendants Stengel and My Tree Boyz moved for leave to deposit the proceeds of the automobile insurance policy covering the Stengel vehicle into court, which motion was granted by Order dated May 13, 2022. Da38. The claims filed on behalf of the minor Plaintiff, Vanessa Robinson, were settled before trial, leaving only Plaintiff Jasmine Robinson's claims. 1T:20-5 to 14.

The parties filed several pre-trial motions in limine addressing a variety of issues. The trial court heard oral argument on the parties' respective motions in limine on September 26, 2023. 1T. Plaintiff's counsel filed a motion in limine seeking a ruling that Plaintiff was permitted to play the audio portion of a police dashcam video depicting the scene of the accident immediately after the police arrived. The trial court granted Plaintiff's motion by Order dated September 26, 2023. Da41. Stengel filed a motion in limine seeking a ruling that barred from evidence at trial any information concerning Mr. Stengel's prior criminal

convictions. The trial court granted Stengel's motion by Order dated September 26, 2023. Da42. Several other motions that are not germane to this appeal were filed and ruled on by the trial court on September 26, 2023. Da43, Da44, and Da46. Kline filed a motion for reconsideration of the trial court's Order granting Stengel's motion to bar evidence of his criminal convictions. The trial court heard argument on Kline's motion for reconsideration on October 3, 2023, and denied the motion by Order dated October 3, 2023. Da45.

The matter proceeded to trial on October 3, 2023. 2T. The case was tried before a jury on October 3, 2023, October 4, 2023, and October 5, 2023.[2] During their deliberations, the jury asked the following questions: "[C]an you provide guidance on money award? Is there a range or cap? Was there an amount requested?" 5T:110-9 to 11. The trial court responded to each of the questions separately. The trial court responded to the first question by re-reading the full jury charge on damages. 5T:115-25 to 119-6. The trial court simply responded to the second question by stating "no." 5T:119-7. In response to the third question, the trial court stated, "In New Jersey attorneys and the parties are not allowed to request a certain amount." 5T:119-9 to 10. The jury returned a verdict concluding that both Kline and Stengel were negligent and that their respective negligence was a proximate cause

[2]The trial transcripts have been designated with the following abbreviations: October 3, 2023 (2T); October 4, 2023 (3T, Vol. I); October 4, 2023 (4T, Vol. II), and October 5, 2023 (5T).

of the accident. 5T:120-25 to 122-15; Da272. The jury apportioned liability between Kline and Stengel by assigning 60% of the fault to Stengel and 40% to Kline. 5T:122-19 to 123-2; Da273. The jury then awarded Plaintiff $3,500,000 in damages. 5T:123-6 to 14; Da273.

Kline and Stengel each filed motions for a new trial, remittitur, and for judgment notwithstanding the verdict following the trial. The trial court heard oral argument on the Kline's motion on November 16, 2023. 6T.[3] The trial court denied Kline's motion by Order dated November 17, 2023. Da225. The parties agreed to a stay of the judgment upon the posting of a Supersedeas Bond by Kline. Da210. This office entered an appearance as co-counsel for Kline on December 4, 2023. Da212. Kline filed a Notice of Appeal from the jury's verdict and the trial court's Order denying Kline's motion for a new trial, remittitur, and judgment notwithstanding the verdict. Da213. Stengel also filed an appeal from the jury's verdict. Da265. Stengel's appeal was dismissed following a settlement with Plaintiff. Da270.

[3] The trial court conducted a separate hearing on Stengel's motion for a new trial and denied that motion by Order dated November 3, 2023. Stengel has withdrawn his appeal, and therefore, we have not included Stengel's motion for a new trial in this appeal.

STATEMENT OF FACTS

A. The Accident of December 29, 2019

This matter involves a three-car motor vehicle accident that occurred at the intersection of State Highway 54 and Jackson Road in Buena Vista Township, Atlantic County, New Jersey. Da 136-140. Plaintiff was traveling south on Route 54 and Kline was traveling north on Route 54. Ibid. Stengel was traveling west on Jackson Road. Ibid. Stengel entered the intersection against a red traffic light and struck Kline's vehicle as it moved through the intersection with a yellow light. Ibid. The impact with the Stengel vehicle pushed the Kline vehicle to the left into oncoming traffic, specifically into Plaintiff's vehicle, which had not yet reached the intersection. Ibid. State Trooper Jonathan Morenski investigated the accident and testified at trial about his observations and how he understood the accident occurred:

> Q. And one final thing. From your video it appears sir, that the Robinson vehicle never made it to the intersection; correct?
> A. Correct.
> Q. The impact occurred before the Robinson vehicle even got there; correct?
> A. Correct.
> Q. And therefore the first collision between the Stengel vehicle and the Dish van occurred in the intersection; correct?
> A. Correct.
> Q. Okay, and then the Dish van went through the intersection and struck the second time with the Robinson vehicle; is that correct?
> A. Correct.

[3T:93-22 to 94-11.]

No witness disputed this portion of Trooper Morenski's testimony.

During cross-examination by counsel for Kline, Trooper Morenski established the points of impact between the vehicles based on his observations of the vehicles and the photographs taken at the scene of the accident. Trooper Morenski noted that P-5 depicted the damage to the Stengel vehicle, which he described as at the 11:00 position or front-driver-side headlight and bumper. 3T:96-6 to 97-6; Da160. Trooper Morenski also testified that he prepared a diagram of the accident based on his observations of the damage to each of the three vehicles involved in the accident, which is a standard protocol when investigating an accident. 3T:98-19 to 99-6. Trooper Morenski testified that the diagram he prepared was a fair and accurate depiction of the points of impact between the three vehicles. 3T:99-17 to 20; Da140. Counsel for Kline offered the diagram into evidence and counsel for Stengel interposed an objection. 3T:99-22 to 101-9. The trial court sustained the objection and would not allow counsel for Kline to publish Trooper Morenski's diagram to the jury. 3T:105-8 to 19.

Trooper Morenski was also asked about the sequence of the traffic signal that controlled the intersection of Route 54 and Jackson Road. Trooper Morenski was generally familiar with the sequencing of the traffic signal. 3T:106-7 to 11. Based on his knowledge and observation of the traffic signal, he agreed that if there was a

yellow light controlling traffic traveling on Route 54, then at that specific moment in time the traffic signal controlling traffic on Jackson Road would have to be red. 3T:108-10 to 14. This is critical, unrebutted testimony because it establishes that Kline and Plaintiff both saw the same signal when they approached the intersection.

Plaintiff testified about her recollection of the accident. Plaintiff testified that, as she approached the intersection, the traffic light changed from green to yellow. 3T:169-7 to 19. Plaintiff's intention was to continue straight through the intersection with Jackson Road. 3T:169-3 to 6. She recalled that she was "very close" to the intersection when the light changed from green to yellow and she believed she was close enough that she should proceed through the intersection with the yellow light. 3T:169-20 to 170-1. She also testified that she was traveling about 55 miles per hour as she approached the intersection and that she did not slow down as she approached the intersection. 3T:187-20 to 188-4. At the scene of the accident as recorded in Trooper Morenski's report, Plaintiff stated, "I was moving, the light was yellow, and the guy just went, whatever car was to the left (vehicle #1)." Da139. Vehicle #1 was identified in the police report as the Stengel vehicle. Da137. Notably, during cross-examination by counsel for Stengel, Plaintiff agreed that she had not yet entered the intersection when the accident occurred. 2T:186-2 to 4.

Plaintiff's testimony about the location and speed of her vehicle moments before the accident must be compared to the testimony of Kline to fully understand

the miscarriage of justice that occurred in this case. Kline testified that he initially estimated that he was about 200 feet from the intersection when the traffic light controlling traffic on Route 54 changed from green to yellow. 3T:147-1 to 7. He estimated his speed to be about 60 miles per hour. 3T:147-8 to 10. Kline denied that he increased his speed as he approached the intersection and after the light turned yellow. 3T:150-15 to 21. Kline also testified that he attempted to avoid the impact with the Stengel vehicle by turning to his left. 3T:157-16 to 24; 3T:162-12 to 18.

It cannot simultaneously be true that, when the light turned yellow, Plaintiff was "very close" to the intersection traveling 55 miles per hour southbound but did not even reach the intersection, and that Kline traveled 200 feet going 60 miles per hour northbound and made it all the way through the intersection — unless Plaintiff's "very close" proximity to the intersection was roughly equal to Kline's. In assigning her 0% fault, the jury obviously accepted that Plaintiff (and, necessarily, Kline) had a yellow light. Therefore, since the jury concluded that Plaintiff bore no fault — and Kline got further through the intersection than Plaintiff — the jury could not have logically concluded that Kline bore any fault.

Additionally, Stengel's testimony about the accident was directly contradicted by both Plaintiff's and Kline's accounts and was clearly rejected by the jury. Stengel testified that he was stopped at the red light on Jackson Road and he observed the Plaintiff's vehicle slowing down as she approached the intersection. 3T:123-3 to 21.

He claimed that the light turned green for traffic on Jackson Road and he then proceeded into the intersection. 3T:123-19 to 24. He also testified that he never saw the Kline vehicle before the impact. 3T:115-5 to 7. He claims he saw some vehicles in the distance south of the intersection and that he proceeded to enter the intersection once the light changed to green. 3T:114-19 to 25. This testimony is directly contrary to Plaintiff's account and was clearly rejected by the jury in light of allocating 0% fault to plaintiff and 60% to Stengel.

In addition to the testimony of the parties, Plaintiff offered several photographs of the vehicles and the accident scene. Exhibits P-1, P-2, and P-3 depict the Plaintiff's vehicle and the Kline van and where they came to rest at the scene. Da157-159. The photographs establish that the impact between the Kline van and the Plaintiff's vehicle was north of the intersection, which means Plaintiff never even reached the intersection. Ibid. Exhibit P-5 shows the damage to the Stengel vehicle, in the front-right portion of the vehicle. Additionally, Kline offered into evidence a portion of the police report that contained the statements each party gave to Trooper Morenski at the scene of the accident. Da171. Plaintiff also played a portion of the dashcam video taken from Trooper Morenski's patrol car, which included the audio from that video. Da170. Significantly, the trial court excluded from evidence a diagram prepared by Trooper Morenski based on his personal observations of the vehicles at the scene. 2T:99-22 to 105-23.

The totality of the evidence presented at trial simply does not support the conclusion that Kline was negligent or that any act of negligence by Kline was a proximate cause of the accident. By allocating 60% of the total fault for the accident to Stengel and zero to Plaintiff, the jury necessarily concluded that the traffic light was yellow for traffic on Route 54 and red for traffic on Jackson Road. There is no other possible conclusion. That means Kline — who undisputedly reached the intersection before Plaintiff — had a yellow light and had the right of way over Stengel. This is significant because Plaintiff's and Stengel's argument at trial was that Kline was far enough away from the intersection when the light changed to yellow that he could have and should have stopped his vehicle. Accepting Plaintiff's version of events as true, which the jury did, means that Kline and Plaintiff had to be a similar distance from the intersection when the light turned yellow. Plaintiff described that distance as "very close." 3T:169-20 to 170-1. Kline was traveling at a speed similar to Plaintiff, but the jury's verdict means Kline traveled a much further distance than Plaintiff's vehicle during the same period of time while traveling at a similar speed. This is an irreconcilable inconsistency in the jury's verdict that led to an unjust result and a grave miscarriage of justice.

B. Stengel's Criminal Convictions

Prior to trial, Stengel filed a motion in limine seeking to bar evidence of his prior criminal convictions. Stengel testified at his 2022 deposition as follows concerning his prior criminal convictions:

> Q. Yeah. Have you ever been convicted of a felony?
>
> A. Yes.
>
> Q. When and how many times – let's start at the beginning.
>
> How many times?
>
> A. I don't recall. I don't count.
>
> Q. More than one?
>
> A. What – what are we trying to get here? What, are you trying to paint a picture of what my background used to be? Yes. I'm a recovering drug addict. If you want to hear me out, yes. I'm a recovery drug addict –
>
> Q. Okay.
>
> A. -- that was over ten years clean. And I have a past. Yes. I've been convicted. I don't count. I don't hold the past behind you. So there's your picture. I painted it for you.
>
> Q. Okay. So now we'll get back to answering my questions. And I thank you for that background, but let's get to my questions.
>
> A. Okay.
>
> Q. So my question is, how many felonies?
>
> (Overlapping voices.)
>
> A. I don't know.
>
> Q. In what state or states were you convicted of these felonies?
>
> A. All in New Jersey. I live in New Jersey my whole life.
>
> Q. Okay. Were all of the felony convictions drug-related convictions?
>
> A. Yes.

> Q. Okay. Did you serve any time for any of these convictions?
> A. Inside, no. Outside, I had house arrest and on probation.
> Q. When was the last conviction – ballpark. Just give me an approximate year. I don't need the exact date.
> A. I don't recall.
> Q. Was it in the 2000 – 2010 and 2020 your last conviction?
> A. I don't recall.
> Q. Was it between 2000 and 2010?
> A. I don't recall.
>
> [Da89 at 41-1 to 42-23 (emphasis added).]

During oral argument on Stengel's motion in limine, the trial court read at length from this section of Stengel's deposition. 1T:39-20 to 41-5. The court observed that no other information about Stengel's convictions was submitted to the court for consideration and the motion to bar evidence of Stengel's prior criminal convictions was granted. 1T:44-17 to 49-2. Ultimately, the court concluded that the only evidence before the court of any criminal convictions was for drug-related convictions that were more than 10 years old and that the undue prejudice to Stengel outweighed any probative value. 1T:48-18 to 23. The court entered an Order granting the motion in limine and barring any evidence of Stengel's criminal convictions on September 26, 2023. Da42.

Following oral argument on Stengel's motion in limine, Kline submitted a brief and exhibits in support of a motion for reconsideration of the trial court's ruling. Included in that submission was a copy of a certified judgment of conviction for

Stengel dated June 1, 2018, which was entered by the New Jersey Superior Court, Camden County. Da104. The judgment of conviction revealed that Stengel was convicted of violating N.J.S.A. 2CD:35-5B(13), possession of a controlled dangerous substance with an intent to distribute, which is a crime of the third degree. Ibid. Stengel was sentenced to four years of probation with conditions. Ibid. The Camden County Prosecutor also filed a Verified Complaint to Forfeit Property Pursuant to N.J.S.A. 2C:64-1 et seq., in which the Prosecutor discloses that Stengel was found to possess marijuana and Alprazolam.[4] Da108.

The certified judgment of conviction from 2018 directly contradicted Stengel's 2022 deposition testimony that his convictions were more than 10 years old. The judgment of conviction revealed that Stengel was arrested on March 14, 2018, and that charges were filed against him on May 10, 2018. Da104. Stengel was sentenced on September 7, 2018. Ibid. The accident involved in this case occurred on December 29, 2019, less than two years after the arrest. Da136. In fact, Stengel was still on probation at the time of the accident. Da104. The conviction was only five years old on the date that the trial began and Stengel had completed his sentence of four years of probation only one year before the trial. Moreover, the date of his deposition, October 14, 2022, was less than six weeks after Stengel completed his

[4]Alprazolam is a benzodiazepine that is sometimes sold as a prescription pharmaceutical under the brand name Xanax.

four-year probation sentence. Da104. The notion that Stengel could not recall a four-year-old conviction for which he served four years of probation that ended only weeks before his deposition is absurd. Mr. Stengel misrepresented the facts about his conviction, and presumably about being clean for 10 years, while under oath at his deposition. He most certainly knew he had a recent conviction for possession of drugs with intent to distribute and that he was sentenced to four years of probation – which included random drug testing and a drug and alcohol evaluation – but he lied about it at its deposition. This was compelling evidence of lying under oath that should have been admitted at trial.

In response to Kline's motion for reconsideration, Stengel filed an opposition that included an excerpt of an email exchange between counsel for Kline and counsel for Stengel. The text of the email was copied into a letter submitted to the court and simply stated that counsel for Kline did not serve any evidence in discovery concerning Stengel's convictions. 2T:7-6 to 15. The court was also provided a copy of Stengel's answers to interrogatories, which were answered on information and belief by a claims adjuster. Da111; 2T:25-4 to 26-5. Because the answers to interrogatories were not answered by Stengel himself, they do not disclose any criminal convictions and are ultimately irrelevant.

On October 3, 2023, the trial court heard additional oral argument on the admissibility of Stengel's conviction after being provided a copy of the 2018

judgment of conviction. 2T:2-2 31-11. After hearing oral argument, the court began its analysis by acknowledging that the conviction at issue was less than 10 years old and that N.J.R.E. 609(a)(1) governed the admissibility of the conviction. 2T:26-20 to 27-7. The court rejected Kline's argument that N.J.R.E. 609 required admission of a conviction that was less than 10 years old. 2T:27-8 to 19. The court went on to note that N.J.R.E. 609(a) was subject to N.J.R.E. 403, which the court stated was "a huge consideration" for the court and that "frankly, to me, is the same as if the conviction had been ten years earlier." 2T:27-20 to 23 (emphasis added). Ultimately, the court concluded that the "potential probative value does not outweigh the prejudicial effect that this will have in this jury." 2T:28-8 to 10.

The trial court applied the incorrect standard. The court applied the balancing test applicable to convictions that are more than 10 years old on the date of the trial, which is set forth in N.J.R.E. 609(b)(1). Under that test, any prejudice that outweighs the probative value of the evidence, to any degree, requires exclusion of the evidence. The trial court was required to apply the more stringent balancing test under N.J.R.E. 403, which requires a showing that the risk of "undue prejudice" resulting from the disputed evidence "substantially outweighs" the probative value of that evidence. This is a more stringent standard applicable to a motion to exclude evidence. Although the trial court cited to N.J.R.E. 403, the record reveals that the court actually applied the more lenient standard under N.J.R.E. 609(b)(1).

Accordingly, the court applied the incorrect legal standard when ruling on the admissibility of Stengel's convictions, which under the proper standard, should have been admitted.

The court went on to explain its reasoning and why N.J.R.E. 403 barred admission of the conviction. The court began by explaining that the conviction was for possession of a controlled dangerous substance with intent to distribute. 2T:29-19 to 25. The crime was not a crime of moral turpitude. 2T:29-19 to 30-7. The court also observed that while the conviction was not 10 years old, it was five years before the trial and wasn't "something that happened yesterday that perhaps he should have been more forthright in remembering." 2T:30-8 to 9. The court also considered the fact that Stengel did not deny that he had prior convictions, he merely stated that he could not remember when they occurred. 2T:30-17 to 19. The court summarized its reasoning as follows:

> In my mind hearing somebody has been convicted of drug related charge is just so prejudicial to our laypeople jurors that I have a significant concern that that potential prejudice would outweigh the probative value. Which in my mind is small. I agree its there. Could a jury find that to have been inconsistent with the examiner at the time of the deposition? Possibly.
>
> But in my mind that prejudice just so significantly outweighs them hearing about a criminal conviction that I'm still going to bar that and its use as impeachment testimony.
>
> [2T:30-25 to 31-11.]

The above quoted statement from the court must be viewed in the context of the court's earlier statements about the applicable standard. As noted above, the court equated the analysis under N.J.R.E. 403 with the analysis applicable to a conviction that is more than ten years old. 2T:27-20 to 23. The court also stated that "potential probative value does not outweigh the prejudicial effect that this will have in this jury." 2T:28-8 to 10. The trial court conflated the standards and concepts set forth in N.J.RE. 403 and 609 and undervalued the probative value of Mr. Stengel's prior convictions.

C. Plaintiff's Damages

The jury awarded Plaintiff $3,500,000 in damages for her pain and suffering. Da273. The entirety of the damage award was for Plaintiff's physical injuries and none of the damages awarded include any form of economic loss. The only evidence presented in support of Plaintiff's damage claim was Plaintiff's testimony, the testimony of a single medical expert, which included demonstrative exhibits depicting Plaintiff's injuries and the surgeries performed, and photographs and a video from the scene of the accident. Notably, the trial court also allowed the Plaintiff to play the audio from the police dash cam video over the objection of the defendants. 1T:13-17 to 20-2; Da41. The video is inflammatory and likely engendered great sympathy for the Plaintiff. There is no question that Plaintiff suffered significant orthopedic injuries to her legs and required multiple surgeries to

address those injuries. However, the evidence presented at trial included Plaintiff's own testimony on direct examination that she was able to take care of her daughter, who was seven years old at the time of the trial. 2T:182-14 to 183-8. Although she was not working at the time of the trial, she was actively looking for work. Ibid. Although Plaintiff did not produce a psychiatric medical expert, she was permitted to testify that she takes anti-depressant medication and that she feels self-conscious about the scars on her legs. 2T:184-9 to 185-5. Moreover, although Plaintiff did not produce an economic damages expert to support a future lost wage claim and the jury was not asked to make a separate award for lost wages, she was permitted to testify that she had hoped to one day become a police officer but was not physically able to do so. 2T:185-6 to 13. Plaintiff also did not seek an award for future medical expenses.

Additionally, Plaintiff presented the testimony of Dr. Steven Zerbinsky, who performed an independent orthopedic medical examination. Dr. Zerbinsky is an orthopedic surgeon. 2T:194-5 to 6. Dr. Zerbinsky described the fractures Plaintiff suffered to her forearm and legs and the surgical procedures that she underwent to treat those injuries. 3T:203-4 to 204-17. He also discussed Plaintiff's prognosis and what likely treatment she would need in the future. 3T:220-15 to 224-22. On cross-examination, Dr. Zerbinsky acknowledged that Plaintiff had not received any medical treatment for her injuries in the 18 months preceding his independent

medical examination, which occurred in February of 2023. 3T:230-9 to 231-2. Dr. Zerbinsky also agreed that Plaintiff made a good recovery and stated that given the nature of her injuries the fact that she is able to walk with a slight limp and some pain "is nothing short of a miracle." 3T:231-3 to 24.

Based on this record, the jury awarded $3,500,000, with no award for any economic damages. The jury was not asked to make damage awards for lost wages or future medical expenses. While acknowledging that Plaintiff's injuries were serious and required multiple surgical procedures and a prolonged hospitalization, Plaintiff made a very good recovery and has resumed many of, if not most, of her daily activities. She is looking for work and is able to care for her young daughter. An award of $3,500,000 for pain and suffering without any award for economic damages is excessive and is an unjust result.

LEGAL ARGUMENT

I. THE JURY'S ALLOCATION OF FAULT AMONG THE DEFENDANTS WAS AGAINST THE WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL AND RESULTED IN A MISCARRAIGE OF JUSTICE. (Da272; 5T:121-21 to 123-2; Da187).

The jury's verdict allocating 60% fault to Stengel, 40% fault to Kline and 0% to Plaintiff defied logic and was against the weight of the evidence presented at trial. It is illogical and contradictory for the jury to conclude that the Plaintiff was 0% at fault and Kline 40% at fault. Both Kline and Plaintiff had the right of way and a

yellow light. The collision between Kline's vehicle and Plaintiff's vehicle occurred north of the intersection with Jackson Road and both Plaintiff and Kline were traveling at similar speeds when they observed the light turn yellow. The laws of physics dictate that Kline was closer to the intersection than Plaintiff when the light turned yellow and passed through the intersection as he was hit by Stengel, who entered the intersection against a red light and caused the accident. These facts dictate that neither Plaintiff nor Kline was negligent and that 100% of the fault for the accident lies with Stengel. It is simply illogical to conclude that Kline was negligent, and Plaintiff was not.

A. Standard of Review

Where a motion for a new trial is made on the ground that the jury's verdict is against the weight of the evidence, the standard of review governing the Appellate Division's review of the trial court's decision is essentially the same standard that the trial court follows when deciding the motion for a new trial. Dolson v. Anastasia, 55 N.J. 2, 6-8 (1969). Rule 2:10-1 governs a motion for a new trial based on the contention that the jury's verdict was against the weight of the evidence. Such a motion shall not be granted "unless it clearly appears that there was a miscarriage of justice under the law." Ibid. The appellate court must make its own determination as to whether there was a miscarriage of justice under the law. Id. at 7. Deference to the trial court's ruling on a motion for a new trial is limited to the trial court's

observations of the credibility and demeanor of the witnesses, which is generally described as the trial court's "feel of the case." Ibid.

> "[A] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." State v. Russo, 333 N.J. Super. 119, 137, 754 A.2d 623 (2000). Our scope of review is limited to a determination of "whether the findings made by the trial court could reasonably have been reached on sufficient credible evidence present in the record." Ibid. Moreover, we will "give deference to the trial judge's feel for the case since he presided over [it] ... and had the opportunity to observe and hear the witnesses as they testified." Ibid.
>
> [State v. Brooks, 366 N.J. Super. 447, 454 (App. Div. 2004).]

The same standard of review for a motion for a new trial applies in both civil and criminal cases. T.L. v. Goldberg, 238 N.J. 218, 230-32 (2019).

In Frugi v. Bracigliano, 177 N.J. 250 (2003), the Court articulated the standard used to determine whether the jury's verdict is against the weight of the evidence by stating:

> As in a summary judgment motion, we must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." . . . . If, giving [the party opposing the motion] the benefit of the most favorable evidence and inferences to be drawn from that evidence, "reasonable minds could differ" as to the outcome, the contested issues must be submitted to a jury . . . . However, if the evidence and uncontradicted testimony is "so plain and complete that disbelief of the

> story could not reasonably arise in the rational process of an ordinary intelligent mind, then a question has been presented for the court to decide and not to the jury."
>
> [Id. at 269-270 (internal citations omitted).]

A jury verdict shall not be set aside unless "after canvasing the record and weighing the evidence, ... the continued viability of the judgment could manifest a denial of justice." Moreover, jury verdicts should be set aside and new trial granted sparingly in cases of a clear injustice. Dutton v. Rando, 458 N.J. Super. 213, 223-24 (App. Div. 2019). In Baxter v. Fairmont Food Co., 74 N.J. 588 (1997), the Supreme Court quoted from its earlier decision in State v. Johnson when describing what must be shown to justify vacating a jury's verdict:

> While this feeling of "wrongness" is difficult to define, because it involves the reaction of trained judges in the light of their judicial and human experience, it can well be said that that which must exist in the reviewing mind is a definite conviction that the judge (the jury) went so wide of the mark, a mistake must have been made. This sense of "wrongness" can arise in numerous ways from manifest lack of inherently credible evidence to support the finding, obvious overlooking or underevaluation of crucial evidence, a clearly unjust result, and many others.
>
> [74 N.J. at 599 (quoting State v. Johnson, 42 N.J. 146, 162 (1964) (emphasis added)).]

B. The Jury's Verdict Was Contrary to the Evidence

Applied here, the jury's verdict allocating 60% fault to Stengel, 40% fault to Kline, and 0% to Plaintiff was so far contrary to the weight of evidence presented

at trial that a miscarriage of justice occurred. The jury's unfounded allocation of fault among the parties leads to the inescapable conclusion that the jury's verdict was influenced by several improper rulings by the trial court that deprived Kline of a fair trial and the jury's perception that Kline and the DISH Network defendants had the deep pockets needed to compensate the Plaintiff. Each of those legal errors is addressed separately below. However, the principal flaw in the jury's verdict is that it simply does not make sense in light of the evidence presented at trial. It is simply illogical to conclude that Plaintiff was 0% at fault when she was traveling 55 miles per hour as she approached the intersection and was intending to pass through the intersection with a yellow light and simultaneously conclude that Kline was 40% at fault for doing the exact same thing as Plaintiff — but actually reaching the intersection before Plaintiff. As Plaintiff and Kline approached the intersection with a yellow light, Stengel entered the intersection against the red light causing the accident. In fact, Plaintiff stated at the scene of the accident that Stengel ran the red light for traffic heading west on Jackson Road. Da139. Additionally, Trooper Morenski, who reported to the scene of the accident, confirmed that if the traffic lights for northbound/southbound traffic on State Highway 54 were yellow, then the traffic light for westbound traffic on Jackson Road had to have been red at the time Stengel entered the intersection. 3T:108-10 to 14.

There is an overwhelming amount of evidence that Defendant Stengel ran the

red light. Plaintiff testified that she was "very close" to the intersection when she observed the traffic light controlling traffic on Route 54 turn from green to yellow. 3T:169-20 to 22. She was so close that she had determined that she was going to drive through the intersection with the yellow light and did not slow down or attempt to stop. 3T:187-20 to 188-4. Plaintiff also testified that she was traveling approximately 55 miles per hour as she approached the intersection. Ibid. Kline testified that he was traveling about 60 miles per hour when he observed the light controlling traffic on Route 54 turn from green to yellow. 3T:147-8 to 10. It is undisputed that the impact between Kline's vehicle and Plaintiff's vehicle occurred north of the intersection. 3T:186-2 to 4; Da158; Da159. This means that Kline had to be even closer to the intersection than Plaintiff when the light turned yellow. Kline testified that his statement that he was 200 feet from the intersection when the light changed was only an estimate. 3T:147-1 to 7. However, he also testified that when the light changed to yellow, he determined that he was too close to safely stop and decided to proceed through the intersection with the yellow light. 3T:159-25 to 160-6. He also testified that he did not speed up as he approached the intersection. 3T:150-15 to 21. Both Plaintiff's vehicle and Kline's vehicle were traveling at similar speeds and the impact occurred on the north side of the intersection. That means Kline almost completely cleared the intersection traveling south to north. Under these facts it is simply illogical to conclude that Kline was negligent, but

Plaintiff was not. The jury's verdict assigning Kline 40% of the fault for this accident is miscarriage of justice and should be vacated.

The jury was given instructions about the traffic laws that govern traffic signals. The trial court read a portion of N.J.S.A. 39:4-105 to the jury, which states in relevant part:

> Amber or yellow when shown alone following green means traffic should stop before entering the intersection . . . unless when the amber appears the vehicle . . . is so close to the intersection that with suitable brakes, it cannot be stopped in safety. . . "

Plaintiff contends that Kline was 200 feet from the intersection when the light turned yellow, a much further distance than Plaintiff testified her vehicle was from the intersection at the same moment in time, when the light turned yellow. The crux of Plaintiff's theory is that Kline was a much further distance away from the intersection when the light turned yellow, and he attempted to beat the light and get through the intersection before it turned red by speeding up as he approached the intersection. This theory, however, is not supported by the evidence. Plaintiff and Kline were traveling at similar speeds and there is no evidence to suggest that Kline was traveling any faster than what he testified to. Kline could not have traveled 200 feet to the intersection and then almost completely through the intersection while traveling at a speed similar to Plaintiff (who was "very close" to the intersection) and strike Plaintiff's vehicle on the north side of the intersection. It is simply not

physically possible. Neither Plaintiff's testimony about the accident nor Kline's testimony supports the outcome reached by the jury. Most importantly, the undisputed physical evidence makes clear that the impact between Kline's vehicle and Plaintiff's vehicle occurred north of the intersection. These facts simply do not support allocating 40% fault to Kline, and the jury determination that Kline — who reached the intersection before Plaintiff — was at fault, but Plaintiff was not, is simply contrary to the evidence and should be vacated.

Lastly, it should also be noted that the undisputed fact of this case is that the initiating cause of the accident sequence was Stengel's vehicle impacting Kline's vehicle and pushing Kline's vehicle to the left. Da171. This undisputed fact further undermines the jury's verdict. But for Stengel entering the intersection against the red light, this accident would not have occurred. By all accounts and as supported by the photographic evidence of the accident scene, Kline was almost through the intersection, proceeding under a yellow light, when he was struck by Stengel and pushed into Plaintiff's vehicle. Even Kline's attempt to avoid colliding with Stengel by turning to the left was caused by Stengel disobeying the red light. There simply is no factual basis to conclude that Kline was partially at fault for this accident and the jury's verdict allocating fault to Kline should be vacated and the case should be remanded for a new trial.

II. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE OF STENGEL'S PRIOR CRIMINAL CONVICTIONS AND IN DOING SO DENIED KLINE A FAIR TRIAL. (Da42; Da45; Da187).

The trial court relied on the incorrect legal standard when granting Stengel's motion to bar evidence of his prior criminal convictions. The trial court knew that Stengel had limited liability insurance coverage and that if Plaintiff was to recover a meaningful damage award for her injuries it would have to come from Kline and the DISH Network defendants. By excluding evidence of Stengel's criminal conviction, the trial court denied Kline the right to attack Stengel's credibility and reveal the truth about this criminal record. Such evidence is powerful. What the trial court improperly characterized as prejudicial evidence is highly probative evidence of a party's credibility. Simply put, Stengel misrepresented the truth about his criminal record during his deposition and Kline should have been permitted to confront him with evidence that confirmed his misrepresentations. In excluding this evidence, the trial court applied the incorrect legal standard and committed an abuse of discretion.

In New Jersey, a witness generally may be impeached with evidence of a prior criminal conviction. See State v. T.J.M., 220 N.J. 220 (2015); N.J.R.E. 609 ("For the purpose of affecting the credibility of any witness, the witness'[s] conviction of a crime shall be admitted unless excluded by the judge as remote or for other causes."); see also State v. Sands 76 N.J. 127, 147 (1978) (holding prior criminal

convictions are admissible evidence for impeachment purposes unless the danger of undue prejudice substantially outweighs the probative value). The rationale behind N.J.R.E. 609 is that a person who has lived contrary to society's rules and laws by committing crimes should not be afforded the opportunity to shield his credibility from the jury and present himself as a law-abiding citizen. State v. Sinclair, 57 N.J. 56, 64 (1970). Even though a defendant plainly experiences prejudice from such evidence, prior convictions are normally admissible for impeachment purposes, subject to the court's discretion. See State v. Harris, 209 N.J. 431, 442 (2012) (citing State v. Hamilton, 193 N.J. 255, 256 (2008).

N.J.R.E. 609 provides a clearly defined framework for determining the admissibility of a witness's or party's criminal convictions.

> (a) In General.
> (1) For the purpose of attacking the credibility of any witness, the witness's conviction of a crime, subject to Rule 403, shall be admitted unless excluded by the court pursuant to paragraph (b) of this rule.
>
> * * *
>
> (b) Use of Prior Conviction Evidence After Ten Years.
> (1) If, on the date the trial begins, more than ten years have passed since the witness's conviction of a crime or release from confinement for it, whichever is later, then evidence of the conviction is admissible only if the court determines that its probative value outweighs its prejudicial effect, with the proponent of that evidence having the burden of proof.

N.J.R.E. 403 states:

> Except as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of:
>
> (a) Undue prejudice, confusion of issues, or misleading the jury; or
>
> (b) Undue delay, waste of time, or needless presentation of cumulative evidence.

Pursuant to N.J.R.E., evidence of a witness's criminal conviction "shall be" admissible unless it is a conviction that is more than ten years old on the date the trial begins. If the conviction is more than ten years old on the day the trial begins the party seeking to admit the evidence has the burden of demonstrating that the probative value of the conviction outweighs the prejudicial effect. N.J.R.E. 609(b)(1). However, N.J.R.E. 403 requires a showing that the probative value of the disputed evidence is substantially outweighed by undue prejudice. N.J.R.E. 403(a). Only "undue prejudice" will support application of N.J.R.E. 403 to exclude otherwise admissible evidence and only if the undue prejudice "substantially outweighs" the probative value of the evidence. Ibid.; see also State v. Cole, 229 N.J. 430, 448, 452-453 (2017); State v. Balthrop, 92 N.J. 542, 546 (1983) (holding that the trial court must state on the record the basis for concluding that there was a "substantial danger of undue prejudice, or an absence thereof, that would accrue to the objecting party if the proffered evidence were introduced").

"Considerable latitude is afforded a trial court in determining whether to admit evidence, and that determination will be reversed only if it constitutes an abuse of

discretion." State v. Feaster, 156 N.J. 1, 82 (1998), cert. den., 532 U.S. 932 (2001). Although subject to an abuse of discretion standard of review, a trial court's discretion is not unlimited. Where the court applies the wrong legal standard in deciding to exclude evidence, the decision to exclude evidence is subject to a de novo standard of review. State v. Garrison, 228 N.J. 182 (2017); Villanueva v. Zimmer, 431 N.J. Super. 301 (App. Div.), certif. den., 216 N.J. 430 (2013). "A trial court's interpretations of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty v Township Committee, 140 N.J. 366, 378 (1995). An abuse of discretion is present where the trial court's decision "was without basis in law or fact, or both, with the result that there was a denial of justice under the law." Hartpence v. Grouleff, 15 N.J. 545, 548 (1954). "[A]buse of discretion is demonstrated if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005).

The trial court applied the incorrect legal standard when ruling on the admissibility of Stengel's criminal conviction. It was undisputed that Stengel's criminal conviction was less than ten years before the trial began. Da108. Stengel was convicted of drug related charges on June 1, 2018. Ibid. The trial began on October 3, 2023. 2T. That means N.J.R.E. 609(b) had no application. Pursuant to

N.J.R.E. 609(a) Stengel's conviction could be excluded from evidence at trial only if the court determined that evidence of Stengel's criminal convictions would result in "undue prejudice" to Stengel and that the undue prejudice substantially outweighed any probative value. The trial court stated the following basis for its ruling:

> The rule says to me, for purposes of attacking the credibility of any witness, the witness' conviction, subject to Rule 403, it says that before it says anything else. Then it says shall be admitted.
>
> So, in my mind, it saying 403 is a huge consideration for you, Judge. Which frankly, to me, is the same as if the conviction had been ten years earlier.
>
> So, my original decision was based on 609 and 403. And this decision is still based on 403 and 609.
>
> I'm going to exercise my discretion because that's what the Rule tells me to do. It tells me I have to look at 403. This Rule is subject to Rule 403 which we all know is the balancing that the probative value outweighs any prejudicial effect.
>
> And I'm gonna be honest with you, in my mind, it's still clear to me that the potential probative value does not outweigh the prejudicial effect that this will have in this jury. And for the following reasons, Mr. Pinter, I'm gonna deny your motion for reconsideration.
>
> [2T:27-15 to 28-12 (emphasis added).]

The quoted statements from the trial court demonstrate that the court applied the wrong legal standard when addressing the admissibility of Stengel's conviction. The court determined that the probative value of the conviction did not outweigh "any" prejudicial effect of the evidence. The court also equated the analysis under N.J.R.E.

403 with the analysis applicable to convictions that are more than 10 years old under N.J.R.E. 609(b). All convictions that are less than ten years old on the date of the trial are admissible unless there is a risk that "undue prejudice" from the convictions will substantially outweigh the probative value. The court applied the test under N.J.R.E. 609(b), which favors exclusion of the evidence, rather than the more stringent test under N.J.R.E. 403. The court applied the wrong legal standard, and its decision is not subject to a discretionary standard of review. Villanueva, 431 N.J. Super. 301.

The trial court further attempted to justify its ruling based on several factual findings. First, the court noted that Stengel never personally answered interrogatories, and therefore, the answers to form C interrogatories did not include a sworn statement by Stengel concerning any criminal convictions. 2T:28-20 to 23. Second, the court noted that Stengel acknowledged in his deposition that he did have drug-related felony convictions, but that he could not recall how many there were or when they occurred. 2T:28-24 to 29-4. The court also observed that the conviction that was presented to the court, while only four years before Stengel's deposition, did not involve a crime of moral turpitude. 2T:29-5 to 25. The court even acknowledged that a jury could conclude that Stengel was "misleading the questioner during the deposition" when he stated he did not know how old the convictions were. 2T:29-10 to 13. The court then concluded as follows:

> In my mind hearing somebody has been convicted of a drug related charge is just so prejudicial to our laypeople jurors that I have a significant concern that that potential prejudice would outweigh the probative value. Which in my mind is small. I agree its there. Could a jury find that to have been inconsistent with the examiner at the time of the deposition? Possibly.
>
> B[ut] in my mind that prejudice just so significantly outweighs them hearing about a criminal conviction that I'm still going to bar that and its use as impeachment testimony.
>
> [2T:30-25 to 31-11.]

The trial court's decision is premised on an incorrect application of the law and the incorrect legal standard. The question to be answered by the court was not whether "any" prejudicial effect of the conviction outweighed the probative value of the conviction. The correct legal standard that the court was required the court to determine whether evidence of the conviction created a risk of undue prejudice to Stengel that substantially outweighed the probative value of the conviction. N.J.R.E. 609(a); N.J.R.E. 403. Moreover, the probative value of the evidence was Stengel's evasive and misleading deposition testimony about his criminal convictions more so than the convictions themselves. The court undervalued the significance of Stengel's deposition testimony in which he said he could not recall when his convictions occurred. Da89 at 41-1 to 42-23. The trial court's reasoning also means that a criminal conviction for possession of drugs is never admissible because it is not a crime of moral turpitude. Kline should have been permitted to confront Stengel at

trial with evidence that his deposition testimony in October of 2022 about his criminal convictions was at best evasive and likely a flat out lie. The truth is that Stengel was convicted of possession of controlled dangerous substances with an intent to distribute on June 1, 2018, just over five years before the trial began. Da104. Stengel was sentenced to four years of probation. Ibid. That means Stengel's period of probation – including the random drug testing, meetings with his probation officer, and drug and alcohol evaluations – ended only weeks before his deposition. Kline should have been permitted to confront Stengel with this evidence at trial and the trial court's refusal to allow this evidence at trial deprived Kline of a fair trial.

It must also be noted that the trial court's rulings on the admissibility of Stengel's criminal convictions, in part, were made in the context of a motion for reconsideration. The appellate standard of review governing an appellate court's review of a decision to grant or deny a motion for reconsideration is an abuse of discretion standard. Kornbleuth v. Westover, 241 N.J. 289, 301 (2020) ("We will not disturb the trial court's reconsideration decision 'unless it represents a clear abuse of discretion.'"). "Reconsideration under Rule 4:49-2 is a matter within the sound discretion of the court and is to be exercised 'for good cause shown and in the service of the ultimate goal of substantial justice.'" Casino Reinvestment v. Teller, 384 N.J. Super. 408, 413 (App. Div. 2006) (quoting Johnson, 220 N.J. Super. at 264); see also Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996)

(quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401-402 (Ch. Div. 1990)). As noted by our Supreme Court,

> a reconsideration motion is primarily an opportunity to seek to convince the court that either 1) it has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the court either did not consider, or failed to appreciate the significance of probative, competent evidence.
>
> [Kornbleuth, 241 N.J. at 301 (quoting Guido v. Duane Morris LLP, 202 N.J. 79, 87-88 (2010) (internal quotation marks omitted)).]

Kline respectfully submits that the trial court overlooked and undervalued the probative value of Stengel's deposition testimony and the contradiction established by the judgment of conviction. Despite having a full record with all of the relevant facts that demonstrated unequivocally that Stengel was not truthful in his deposition testimony, the court nevertheless barred evidence of Stengel's criminal conviction. This ruling deprived Kline of a fair trial and is one reason the jury ultimately allocated fault between both Kline and Stengel rather than conclude, as the evidence established, that Stengel was solely at fault for the accident.

III. THE TRIAL COURT ERRED BY EXCLUDING TROOPER MORENSKI'S DIAGRAM OF THE ACCIDENT. (2T:99-22 to 105-23).

During Kline's cross-examination of Trooper Morenski, counsel offered into evidence the diagram of the accident prepared by Trooper Morenski as part of his accident investigation. (2T:99-17 to 23). The diagram was prepared by Trooper

Morenski based on his observations of the vehicles at the scene of the accident in an effort to illustrate what he concluded were the points of impact between the three vehicles. 2T:98-23 to 99-2. The trooper also noted that his understanding of the points of impact was informed by his observation of the damage to the three vehicles. 2T:98-19 to 22. He further noted that preparation of such a diagram is commonly part of a vehicle accident investigation. 2T:99-3 to 6. The trooper also testified that the diagram he prepared was intended to be a fair and accurate representation of the points of impact between the three vehicles. 2T:99-17 to 20.

The diagram at issue is located at page 4 of Trooper Morenski's accident investigation report. Da140. The diagram includes multiple images of each vehicle and labels the vehicles according to the identity assigned to them in the report. Ibid. The diagram does not depict or describe the distances between the vehicles or offer any conclusions about the color of the traffic signal at the time of impact. Ibid. The only information contained in the diagram is information related to the points of impact between the three vehicles. Ibid. The diagram is fully consistent with the photographic evidence depicting the final resting place of each vehicle and the statements given by each of the drivers, each of whom was a party to this lawsuit. Indeed, the statements of each of the drivers contained in the report were admitted into evidence as D-Kline-1. Da171.

When counsel for Kline offered the diagram into evidence counsel for Stengel objected. Counsel argued that the diagram was not to scale, and that Trooper Morenski testified that he did not take any measurements of the roadway or the positions of the vehicles. 2T:100-16 to 24. Counsel argued that the diagram would be misleading to the jury and that "its prejudice outweighs is probative value." Ibid. The trial court sustained the objection concluding that what was depicted in the diagram was not just points of impact. 2T:102-6 to 13. The court found that the diagram also depicted

> the movement of those vehicles, or how far they were or were not from the intersection is a problem for me. Particularly no – Defendant Stengel testified stopped – was stopped at the red light and that's – much further back from the Jackson Road intersection in this diagram. But also vehicle two, which I believe is the Dish Network van is shown maybe a finger length from the intersection at the time . . . you know before impact.
>
> [2T:102-15 to 25.]

The court concluded that it should not allow the diagram into evidence because Trooper Morenski did not observe where the vehicles were prior to impact. 2T:103-4 to 7. The court was particularly concerned with the fact that the diagram appears to show the Stengel vehicle traveling as it approached the intersection and not stopped, as Stengel testified. 2T:105-11 to 18. The court ultimately concluded that "[a] jury's going to be confused." 2T:105-17 to 18.

Contrary to the court's findings, the diagram does not depict anything other than points of impact. The diagram necessarily must show generally where the vehicles were prior to impact in order to establish the precise points of impact. However, the obvious purpose of the diagram is to show the points of impact, which could easily be determined by Trooper Morenski's observations of the vehicles at the scene of the accident. Moreover, the court could and should have admitted the diagram with a limiting instruction that informed the jury that they could consider the diagram in their deliberations but only in respect of the issue of determining the points of impact between the three vehicles. The diagram was an important piece of evidence that would allow the jury to fully understand how the three vehicles collided.

The trial court did not apply the correct legal standard in excluding the diagram. Accordingly, its decision in respect of the admissibility of the diagram is not entitled to deference. Villanueva, 431 N.J. Super. 301. In State v. LaBrutto, 114 N.J. 187 (1989), the New Jersey Supreme Court concluded, "We find no reason why an investigating police officer should not be allowed to testify as a non-expert based on his own observations regarding the point of impact of two vehicles in an automobile accident case." Id. at 199. The Court specifically rejected the contention that only a qualified accident reconstruction expert may offer such testimony. Moreover, the Supreme Court's subsequent decision in Neno v. Clinton, 167 N.J.

573, 585 (2001), merely holds that a testifying police officer may not offer a lay opinion that is based on inadmissible hearsay statements and does not justify the trial court's ruling. However, the Neno Court readily acknowledged that an investigating police officer may offer lay opinion testimony about points of impact if that opinion testimony is based on personal observations at the scene. Id. at 582 (citations omitted). The Court expressly noted that the decision in Labrutto overruled the earlier decision in Rogalsky v. Plymouth Homes Inc., 100 N.J. Super. 501 (App. Div. 1968), which held that an investigating police officer's testimony about points of impact was expert testimony that was not admissible unless the officer was properly qualified as an expert. Neno, 167 N.J. at 583 (citing LaBrutto, 114 N.J. at 199). In Neno, the investigating police officer was permitted to testify about hearsay statements of eyewitnesses who were scheduled to testify at trial and to offer the opinion that the plaintiff pedestrians that were struck by defendants "failed to properly cross the intersection." Id. at 578-579. The Court concluded that this testimony, which was based primarily on inadmissible hearsay, was not admissible and did not constitute lay opinion testimony based on the officer's personal observations at the scene of the accident. Id. at 585.

The diagram prepared by Trooper Morenski was based on his personal observations at the scene of the accident and provides a clear and easily understood depiction of the accident and the points of impact. Counsel for Kline did not attempt

to ask Trooper Morenski to offer an opinion about who was at fault or who caused the accident. The nature of the evidence offered by Kline's counsel in this case is entirely different than the opinion testimony that was excluded in Neno. Kline simply sought to offer a diagram that showed the points of impact of the vehicles and their respective direction of travel. The diagram does not suggest who entered the intersection first or how fast the vehicles were traveling. Da140. The primary basis of the diagram is Trooper Morenski's personal observations of the damage to the vehicles and where they came to rest at the scene. 2T:98-19 to 99-2. Without this diagram the jury could have easily been confused about the direction of the three different vehicles and where each vehicle was located in proximity to the intersection at the time of the impact. This error, in combination with the exclusion of evidence of Stengel's prior criminal convictions led directly to an unjust result and a grave miscarriage of justice.

Additionally, the trial court's ruling ignores the fact that Trooper Morenski was permitted to testify during cross-examination by counsel for Stengel about his understanding of how the accident occurred.

> Q. And one final thing. From your video it appears sir, that the Robinson vehicle never made it to the intersection; correct?
> A. Correct.
> Q. The impact occurred before the Robinson vehicle even got there; correct?
> A. Correct.

> Q. And therefore the first collision between the Stengel vehicle and the Dish van occurred in the intersection; correct?
> A. Correct.
> Q. Okay, and then the Dish van went through the intersection and struck the second time with the Robinson vehicle; is that correct?
> A. Correct.
>
> [2T:93-22 to 94-11.]

This testimony explains exactly what is depicted in the diagram. It demonstrates that the point of impact between the Kline vehicle and the Stengel vehicle occurred in the intersection with the left-front corner of the Stengel vehicle striking the right-front corner of the Kline vehicle and the Kline vehicle then striking the left-front portion of the Plaintiff's vehicle. Da140. The trial court's concern that the diagram depicts or represents conditions other than the points of impact between the vehicles is simply not accurate and did not justify excluding this critical piece of evidence. This trial error combined with the other trial errors deprived Kline of a fair trial and resulted in a miscarriage of justice in which the jury allocated 40% of the fault to Kline without basis.

"For a hearsay error to mandate reversal, '[t]he possibility [of an unjust verdict] 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.'" Neno, 197 N.J. at 586 (quoting State v. Hightower, 120 N.J. 378, 410 (1990)). Moreover, the trial court's failure to apply the correct legal standard is not subject to a discretionary

standard of review. Villanueva, 431 N.J. Super. 301. Kline respectfully submits that the trial court failed to apply the correct legal standard and did not properly analyze the nature of the evidence that Kline sought to admit. Trooper Morenski's diagram was not based on hearsay and did not contain any information that was not based on his personal observations of the vehicles at the scene of the accident. If the court was concerned about the jury's consideration of the diagram, a limiting instruction could have been given explaining the purpose for which the diagram could be used. N.J.R.E. 105. Trooper Morenski's diagram was critically important evidence that would have helped the jury understand how the vehicles collided. Without that diagram, the jury was left to speculate about where exactly the precise points of impact were between the three vehicles. The trial court's ruling excluding this evidence denied Kline a fair trial and resulted in an unjust allocation of fault against Kline.

IV. THE TRIAL COURT ERRED BY ALLOWING THE JURY TO HEAR THE AUDIO PORTION OF THE POLICE DASH CAM VIDEO. (Da41; 1T:16-3 to 20-2).

Evidence should be excluded under N.J.R.E. 403 where its "probative value i[s] substantially outweighed by the risk of undue prejudice." State v. Alston, 312 N.J. Super. 102, 114 (App. Div. 1998). To determine whether undue prejudice exists, the inquiry is "whether the probative value of the evidence 'is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity

to divert the minds of the jurors from a reasonable and fair evaluation of the 'issues.'" State v. Cole, 229 N.J. 430, 448 (2017) (quoting State v. Thompson, 59 N.J. 396, 421 (1971). "It is not enough for the opposing party to show that the evidence could be prejudicial; '[d]amaging evidence usually is very prejudicial but the question here is whether the risk of undue prejudice was too high.'" Cole, 229 N.J. at 448. The Appellate Division standard of review is an abuse of discretion in respect of an evidentiary ruling. Feaster, 156 N.J. at 82.

Here, the dash camera video Plaintiff introduced at trial is the type of evidence that should have been precluded under N.J.R.E. 403 because the video's probative value was substantially outweighed by the risk of undue prejudice. The trial judge's ruling that the dash camera video was not inflammatory under N.J.R.E. 403 was erroneous. The video portrayed Plaintiff crying in pain for approximately several minutes. Da170. Plaintiff is heard pleading for help and repeatedly telling Trooper Morenski how much pain she was in. Contrary to the trial court's comments, the audio portion of the video is difficult to listen to and is upsetting. The inflammatory nature of the audio had a clear capacity to cause the jury to feel extraordinary sympathy for the Plaintiff. The jury was clearly tainted by the admission of this video because it attributed 0% allocation of fault to Plaintiff and 40% of fault to Defendant Kline who were under the same exact set of circumstances, proceeding into an intersection with a yellow light. It does not logically follow that two individuals

operating vehicles under the same exact set of circumstances were apportioned significantly different percentages of fault. Moreover, the amount of the jury's damage award, which did not include any amounts for any economic damages was excessive and clearly influenced by the audio portion of the video.

Under N.J.R.E. 403 the dash camera video should have been precluded from evidence in trial because its probative value was substantially outweighed by its undue prejudice. Moreover, the admission of this evidence had a clear capacity to cause the jury to return a verdict it otherwise likely would not have, both in respect of liability and damages. Neno, 197 N.J. at 586.

V. THE AMOUNT OF DAMAGES AWARDED BY THE JURY WAS EXCESSIVE AND WARRANTS A NEW TRIAL ON DAMAGES. (Da187).

The jury's award of $3.5 million in damages was clearly excessive and shocked the conscience such that a new trial should have been granted or remittitur employed to reduce the jury's award. The purpose of damages in a personal injury action is to fairly compensate the injured party for its losses. Deemer v. Silk City Textile, 193 N.J. Super. 643, 651 (App. Div. 1984). Fair compensatory damages resulting from the tortious infliction of injury should be calculated as no more than the amount that will make the plaintiff whole, also calculated as an injured party's actual loss. Ruff v. Weintraub, 105 N.J. 233, 238 (1987). Remittitur is applied to reduce excessive damages awarded by a jury to an appropriate value that is within

the limits of a proper verdict to avoid expending additional judicial resources for a second trial. Historically, remittitur has been used by courts to eliminate retrials for excessive verdicts. Fertile v. St. Michael's Medical Center, 169 N.J. 481 (2001). A damage award that is "so disproportionate to the injury and resulting disability shown as to shock 'the trial judge's' conscience and to convince him that to sustain the award would be manifestly unjust" warrants a new trial." Baxter, 74 N.J. 588, 596 (1977).

Baxter illustrates that the jury's award of $3.5 million was excessive and shocked the conscious because the award was greatly disproportionate to the injuries Plaintiff sustained. Although Plaintiff suffered significant orthopedic injuries, Plaintiff testified that she was actively seeking work and she was able to physically care for her daughter. Plaintiff's injury is not so extreme that she cannot work or take care of her daughter. Moreover, Plaintiff offered no evidence she was actively receiving any psychological treatment or that she had received such treatment in the past. Moreover, she acknowledged that she was able to resume normal daily activities. Plaintiff was also searching for work and did not submit any claim for economic damages of any kind to the jury. Although Plaintiff's orthopedic injuries were serious and required multiple surgeries, an award of $3.5 million for those injuries is excessive.

Alternatively, if the Court is not inclined to vacate the jury's damage award, Kline respectfully requests that a new trial be granted on liability. Kline respectfully submits that both the allocation of fault to Kline and the amount of damages awarded were against the weight of the evidence presented at trial and the result of multiple improper rulings by the trial court.

CONCLUSION

For all the foregoing reasons, Defendants-Appellants, Russell Kline, DISH Network Service L.L.C., and DISH Network L.L.C., respectfully request that this Court overturn the jury verdict because it was against the weight of the evidence presented at trial and grant a new trial on all issues.

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Dated: June 19, 2024

JASMINE ROBINSON, INDIVIDUALLY, and on behalf of her minor daughter, VANESSA ROBINSON, PLAINTIFFS, **VS.** **CHRISTOPHER STENGEL, MY TREE BOYZ, LIMITED LIABILITY COMPANY, RUSSELL KLINE, DISH NETWORK SERVICE, L.L.C., DISH NETWORK L.L.C., JOHN DOES MARY DOES, ABC PARTNERSHIPS, AND XYZ CORPORATIONS, JOINTLY, SEVERALLY AND IN THE ALTERNATIVE,** DEFENDANTS.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET No. A-1017-23-T4 CIVIL ACTION ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION - ATLANTIC COUNTY DOCKET NUMBER: ATL-L-3919-21 SAT BELOW: Hon. Danielle J. Walcoff, J.S.C.

BRIEF OF PLAINTIFF JASMINE ROBINSON

ON THE BRIEF:

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Table of Contents

Table of Citations

Cases

Statutes

Rules of Court

Rules of Evidence

Other Authorities

PRELIMINARY STATEMENT

This personal injury action arises out of a 3-vehicle motor vehicle accident in which Plaintiff suffered severe personal injuries.

At trial, the jury heard testimony from both liability and damages witnesses. Plaintiff called five witnesses. Defendants called zero witness. The eight-person Jury returned a unanimous verdict on each question and awarded Plaintiff non-economic damages in the amount of $3.5 million.

Plaintiff was 22 years old at the time of the accident. As a result of the significant impact, she was entrapped in the driver's seat with her legs pinned in the vehicle. Emergency responders extracted Plaintiff from the vehicle with special equipment. Plaintiff sustained numerous injuries including (1) a fracture of a the left forearm causing a dislocation of her left elbow, (2) an open fracture of her right femur, (3) an open fracture of her right kneecap, (4) an open fracture of right tibia, (5) a complex, comminuted fracture of the left femur, (6) a fracture of the left kneecap, (7) a left quadriceps tendon tear, and (8) and a left ankle inflammation, tendinitis, and chronic contracture.

Plaintiff underwent multiple surgeries including (1) open reduction, internal fixation to the left forearm, (2) external fixation and subsequent open reduction, internal fixation to the right femur with intramedullary rod, (3) external fixation and subsequent open reduction, internal fixation to the right

knee cap, (4) external fixation and subsequent open reduction, internal fixation to the right tibia with intramedullary rod, and (5) external fixation and subsequent open reduction internal fixation of the left femur with repair of the quadriceps tendon.

Defendants Kline and Dish Network contend (1) the Jury's allocation of fault is against the weight of the evidence, (2) that the Trial Court abused its discretion in making three separate evidentiary rulings, and (3) that the Jury's damages award shocks the judicial conscience. Defendants seek a new trial or, in the alternative, a remittitur.

Defendants claim the Jury "should have" assessed a greater liability percentage against co-defendant. Defendants claim the Jury "should have" awarded less money for Plaintiff's pain and suffering damages.

In bringing this appeal, Defendants place great weight on facts which the Jury clearly disbelieved and ask this Court to substitute its judgment for that of the Jury. Plaintiff requests that the Court affirm the Orders of the Trial Court below.

PROCEDURAL HISTORY

On December 8, 2021, Plaintiff filed a Complaint against Defendants Russell Kline, Dish Network Service, LLC and Dish Network LLC, Christopher Stengel and My Tree Boyz, LLC. Da1.

On January 14, 2022, Defendants Russell Kline, Dish Network Service, LLC and Dish Network LLC filed an Answer. Da10. On March 8, 2022, Defendants Christopher Stengel and My Tree Boyz, LLC filed an Answer. Da23.

In advance of trial, the Trial Court heard oral argument on motions *in limine* on September 26, 2023. 1T. By way of Order entered on September 25, 2023, the Trial Court granted Plaintiff's motion in limine seeking to admit the audio portion of the NJSP dashcam video depicting the scene of the accident immediately after the police arrived. Da41. The Trial Court also entered an Order barring evidence of Defendant Stengel's prior drug-related criminal conviction. Da42.

Defendant Kline filed a motion for reconsideration of the trial court's Order granting Stengel's motion to bar evidence of his criminal convictions, which the Trial Court denied by way of Order dated October 3, 2023. Da45.

The matter proceeded to trial on October 3, 2023. 2T. The case was tried before a jury on October 3, 2023, October 4, 2023, and October 5, 2023. 2T; 3T; 4T; 5T.

During the Charge Conference, all counsel agreed the Jury should not consider any Comparative Fault of Plaintiff and that "the only liability question on the verdict sheet would be as to the two Defendants." 4T256-257.

The Jury returned a verdict assessing 40% liability against Defendants Stengel and My Tree Boyz and 60% against Defendants Kline and Dish Network. Da273. The jury awarded $3.5 million in damages. Da273.

Defendant Kline and Defendant Stengel each filed motions for a new trial, remittitur, and for judgment notwithstanding the verdict. Da173; Da179.

The trial court denied Kline's motion by Order dated November 17, 2023. Da225. The parties agreed to a stay of the judgment upon the posting of a Supersedeas Bond by Kline. Da210.

Defendant Kline filed a Notice of Appeal from the jury's verdict and the trial court's Order denying Kline's motion for a new trial, remittitur, and judgment notwithstanding the verdict. Da213. Stengel also filed an appeal from the jury's verdict. Da265. Stengel's appeal was later dismissed. Da270.

STATEMENT OF MATERIAL FACTS

Plaintiff relies upon the following facts in opposition to Defendants' appeal:

Defendant Kline was about 200 feet away from the intersection when he observed the yellow/amber traffic signal. 3T149. Defendant Kline admitted that he was driving in excess of the 55 MPH speed limit when he observed the yellow light. 3T147. He made no effort to stop at the intersection nor did he slow at any point before entering the intersection. 3T149-150. Defendant Kline "wanted to try to get through that light before it turned red." 3T150. He did nothing to see if he could stop safely before getting to that intersection. 3T150. The Stengel vehicle spun 180 degrees before coming to rest as a result of the impact with Kline's Dish Network van. 3T129.

Plaintiff was entrapped in the vehicle for a significant duration. She offered this testimony at trial on direct examination:

> Q [...] But at some point do you remember the EMTs and the firefighters being on the scene?
>
> A Yes.
>
> Q And did they have to use any type of special equipment or measures to extract you from the vehicle?
>
> A Yes.
>
> Q Did that take some time?
>
> A Yes.
>
> Q Were you in pain while this is going on?

A Yes.

Q If it's possible can you try to describe for us what that pain was like?

A I want to say like something's just crushing your legs.

Q Were you able to move at all inside of the car until they freed you?

A No.

[3T170-171.]

Responding State Trooper Morenski testified at trial. He made observations as to the damage to the vehicles and the final resting points, and combined that with the statements he took from the 3 parties involved in the crash. Morenski did not make observations of the points of impact as the accident occurred. He did not take measurements, make speed estimations, or access any on board vehicle information. At trial, the jury saw the photos depicting property damage to the vehicles, they watched the dash cam video, they heard and read from the admitted portion of the police report limited to what the parties told Trooper Morenski.

The Trial Court offered this explanation of the NJSP dash-cam MVR video with audio:

> I watched it the first time without the audio, then I watched it a second time with the audio, and I thought it was going to be this constant stream of screaming and chaos and yelling, and it was none of that. It is, in my mind, a little bit more controlled than I would have expected for that type of injury

> and that type of accident. It was -- it was not shocking in my mind at all, and it was pretty controlled.
>
> [1T16.]

With regard to the video's probative value, the Trial Court noted:

> I find the video's audio to be highly probative. The audio is probative of exactly what was going on in the Plaintiff's mind and body in terms of pain immediately upon police arrival at the scene of the crash on -- back in December of 2019. That's four years earlier than this Plaintiff will have an opportunity to testify at trial, and memories sometimes fade.
>
> The video's audio is the best evidence of what the Plaintiff was feeling in terms of pain immediately at the crash. It's the best evidence of her conscious pain and suffering at that time and really perhaps the only evidence that could accurately reflect in realtime her pain and discomfort and distress at that moment.
>
> The video's audio depicts a crash scene with the responding Trooper speaking with the people involved in the accident. The audio depicts some whimpering and crying out of a person who was injured in a significant impact motor vehicle crash. There's nothing in my mind that's shocking at all about the video.
>
> [1T17.]

Regarding any prejudicial effect, the Trial Court noted, "[i]n the Court's mind, there's nothing that could be considered prejudicial other than perhaps the Plaintiff's scream, 'Oh, my God. My legs, they hurt so bad.'" 1T17-18. Ultimately, the Trial Court held "the probative value... outweighs the potential risk of undue prejudice." 1T18.

At trial, the jury was charged on N.J.S.A. 39:4-105. 5T87.

The Jury was not asked to assess any fault to Plaintiff. The Jury Verdict Sheet concerns only the negligence of Defendants Kline/Dish Network and Defendants Stengle/My Tree Boyz. Da272; Da273. All counsel agreed on the record during the Charge Conference that the Jury should not consider any Comparative Fault of Plaintiff and that "the only liability question on the verdict sheet would be as to the two Defendants." 4T256-257.

In denying defendant's motion for a new trial, the Court explained its decision to bar evidence of Defendant Stengel's 2018 conviction in its Memorandum of Decision as follows:

> The Court took into consideration that pursuant to the certified criminal record, codefendant Stengel's last conviction was in September of 2018, which was fifteen (15) months prior to the subject accident. Co-defendant Stengel's deposition was taken in October of 2022, which was just shy of four (4) years since his last conviction. The trial took place five (5) years after codefendant Stengel's conviction. The Court specifically reference that N.J.R.E. 609(b)(1) did not apply as co-defendant Stengel's conviction was within ten years of the start of the trial. As such, the Court went back to the beginning of N.J.R.E. 609 and noted that N.J.R.E 609(a)(1) notes that for the purpose of attacking the credibility of any witness, the witness's conviction of a crime, subject to Rule 403, shall be admitted unless excluded by the court pursuant to paragraph (b) of this rule. The Court noted the Court's prior ruling granting co-defendant Stengel's motion for to bar his criminal convictions relied upon Rule 403 and the Court still finds upon reconsideration that Rule 403 needs to be applied.

> The Court went through R. 403 and exercised the Court's discretion and denied Defendants' Kline and Dish Networks motion for reconsideration for the following reasons. CoDefendant Stengel did not answer interrogatories. The Court had to rely solely upon Co-Defendant Stengel's deposition testimony wherein he acknowledged he had prior drug related felony convictions in the State of New Jersey, but he did not recall the timeline nor the number of convictions. The certified criminal conviction record was from September of 2018, four (4) years prior to co-defendant Stengel's deposition testimony. The Court specifically noted that perhaps the certified criminal conviction could be used for impeachment of co-defendant Stengel. In other words, a jury could potentially find that during his deposition, co-defendant Stengel was misleading the examiner. The Court noted that same would be within the province of the jury and is specifically not a decision for the Court to determine. However, the Court found that the minimal probative value, for impeachment and credibility purposes, was substantially outweighed by the undue prejudice to co-defendant Stengel. The Court further noted that the conviction was for drug related charges which conviction does not go to the issue of moral turpitude nor veracity and was four years prior to co-defendant Stengel's deposition and five years prior to trial.
>
> After reviewing all of the above, as well as the arguments set forth in the current motion and opposition, for all of the reasons set forth above, the Court concludes that the Court properly exercised its discretion in excluding co-Defendant Stengel's prior conviction.
>
> [Da241-Da243.]

The Trial Court also explained its decision to bar the admission of Trooper Merenski's not-to-scale crash diagram as follows in its Memorandum of Decision:

The diagram, as an exact rendering of what happened is misleading to the jury and its prejudice outweighs its probative value. The Court heard the objection at sidebar and sustained the objection, ruling that page 4 of the police report was not admissible. The Court noted that the trooper testified that he has no indicator as to distances, nor the timing of the light, particularly with regard to Stengel's vehicle. The deposition testimony of Stengel leads the Court to believe that Stengel is going to testify at trial that he was stopped at a red light and that the light then turned green. However, the diagram does not depict same. The diagram shows Stengel's vehicle as a moving vehicle, in motion, and does not show Stengel stopped for the light. The Court further noted the Court's concern with the diagram showing Stengel moving/in motion because same was not based on the trooper's observation. The diagram also depicted the two other vehicles coming down the other roadway.

The Court did note that the diagram had two X's in circles that depicted the point of impact, but the diagram also contained the movement of the vehicles, how far the vehicles were from the intersection, Stengel is depicted farther back from the intersection versus stopped at the light/intersection, and the Kline van is depicted a finger length from the intersection and Plaintiff's vehicle is shown four finger lengths away and the trooper has no basis upon which to have put the vehicles in those locations. Because the trooper did not make those observations, the probative value of the diagram for the points of impact of the vehicles did not weight the undue prejudice to the other parties with regard to the depictions of the vehicles prior to impact.

Further, there was no prejudice to Defendants Kline and Dish Network because several photographs of the scene of the accident were entered into evidence, so the jury could see the points of impacts on the vehicles in the photographs, just as the trooper observed when he arrived at the scene. The Court disagreed with Defendants Kline and Dish Network that the proper foundation for the diagram had been laid as the trooper had testified that he had no idea the distances of the vehicles

> from the intersection prior to impact and same were not based upon his personal observations.
>
> After reviewing all of the above, as well as the arguments set forth in the current motion and opposition, for all of the reasons set forth above, the Court concludes that the Court properly exercised its discretion in excluding the trooper's opinion as to who caused the accident and in excluding the diagram contained in his police report.
>
> [Da248-Da250]

Regarding damages, Plaintiff was admitted to Cooper Hospital for 13 days during which time she had 3 surgeries. 3T172. The Jury saw operative photos depicting external fixators applied to her legs. Da165; Da166. During that time, she could not move and was afraid to move her legs at all. 3T172. Plaintiff spent over a month at an in-patient rehabilitation facility. 3T175. She spent most of her time in one room. 3T177. During this time, her left arm was in a cast. 3T176.

The dressings for Plaintiff's leg wounds had to be changed 2-3 times per week while she was at Cooper and at in-patient rehabilitation. 3T176. This was a painful procedure. 3T176.

When she was discharged to home, she went to stay with her Aunt Joan. 3T178. For the first week she was there, she could not go upstairs to her room on the second floor because she did not have any equipment to get up the steps. 3T179. Plaintiff stayed downstairs for the first week. 3T179. After the first week, Plaintiff was able to get upstairs only by using her hands to push herself

up and put her butt on the next step while some other person held her legs so they wouldn't fall. 3T179. Her legs were casted. 3T179.

Plaintiff is now 26 years old. 3T184. She still has plates and scares in her left arm and both her legs. 3T173. She can still feel the metal. 3T173. In terms of restrictions, Plaintiff is limited in bending one knee because the surgical hardware. 3T174. Plaintiff has pain when she walks which she describes as a "sore feelings through her legs." 3T183. She testified she never not has that sore feeling when she's moving around. 3T183. Plaintiff also testified she has a loss of feeling in some places in her legs which have been numb since the accident. 3T184. Plaintiff has scarring on her legs from the surgeries. 3T174. The Jury saw photos depicting the scarring. Da163; Da164. Plaintiff does not wear shorts as much anymore because she doesn't like to show her legs at all. 3T184.

Defendants' cross-examination of Plaintiff relative to damages was limited to the following 5 questions:

Q [...] I understand you sustained some pretty severe injuries to your legs; correct?

A Yes, Sir.

Q All right a number of surgeries?

A Yes.

Q Okay and some PT and recovery time; correct?

A Yes.

Q Has the condition gotten any better since way back when you first had the surgeries? Has it improved a little bit?

A Yes.

Q Okay. Has any doctor recommended that you undergo an additional surgery in the near future for your legs?

A As of right now, no.

[3T188-189.]

Orthopedic surgeon Dr. Stephen Zabinski testified about the injuries Plaintiff sustained as a result of this crash, her medical treatment including surgeries, the permanency of her injuries, and her prognosis. Dr. Zabinski identified Plaintiff's injuries as follows:

Q.· · ·Let's do this if we can, Dr. Zabinski, can you give the jury a summary of the injuries that Jasmine suffered from this car accident and then we'll go back and discuss each with some more specifics and we'll use some demonstrative exhibits to assist you explaining to the jury what the injuries were and the treatment was that was received.· Is that okay with you?

A.· · ·That's fine.· I'll do the best I can because there is a lot of stuff that happened here.· She sustained to her arm -- we can focus just on her left elbow.· She sustained a fracture of a forearm with a subluxation which is a dislocation, a joint coming out of place of her left elbow that required surgical treatment. So that was the upper extremities and then in regard to lower extremities on her right side she broke her thigh bone, her kneecap and her leg bone and those were very complex injuries in that her right femur bone or thigh bone was an open fracture where the skin tears and therefore, the bone and the fracture exposed to the environment.

> The kneecap fracture which was broken up in to a lot of pieces on the right side was also an open fracture again with the outside communicating with the fracture. The leg bone, the fracture of the tibia bone was broken up in to a lot of pieces and associated with a significant soft tissue injury so that again, the skin was open, the bone exposed.· And that injury ultimately ended up requiring multiple surgeries, not just to fix the bone but to release tension in the leg which is called a fasciotomy.· And then undergo multiple procedures trying to get the wound to heal which took many months to finally heal.
>
> On her left side, her left leg she sustained a very complex, comminuted, broken up in to a lot of pieces fracture of her thigh bone extending in to the knee joint basically separating the upper portion of the knee part -- knee joint in to two pieces.· Also having a smaller fracture of her kneecap and tearing her quadriceps tendon basically where the bone went through the quadriceps tendon.· The tendon of the thigh muscle and ripped it.
>
> And that was treated with first stabilization and multiple surgeries and as a sequela of all these injuries she also had an injury to her ankle where she's developed basically inflammation, tendinitis and some chronic contracture and pain due to the alteration of her right leg function above her ankle.
>
> [3T200; 4T203-204.]

Dr. Zabinski testified Plaintiff's injuries are permanent and significant. 4T216.

The jury saw one anatomic drawing depicting Plaintiff's injuries, Da167, and two anatomic drawings depicting Plaintiff's surgeries, Da168; Da169. Dr. Zabinski testified that these surgeries, as well as all of Plaintiff's accident-related medical treatment, was reasonable, necessary and causally related to the subject accident. 4T216.

Dr. Zabinski testified Plaintiff's recovery was "nothing short of a miracle" and that she could have lost both her legs in the accident or died because of her injuries. 4T231. Dr. Zabinski also testified at length about Plaintiff's poor prognosis. 4T220-224.

During closing argument, plaintiff's counsel used the time unit rule. Plaintiff's counsel pointed out that plaintiff, then 26 years old, had a life expectancy of 55 years. 4T70.

Here, in denying Defendants' motion for a remittitur, the Trial Court examined the damages evidence heard by the Jury over the course of 8 pages in its Memorandum of Decision including the testimony of Trooper Morenski, the dash-cam video, the property damage photos, Plaintiff's testimony, body photos showing Plaintiff's scarring, and the expert medical testimony of Dr. Zabinski including the operative photos and medical illustrations. Da251-Da258. Ultimately, the Trial Court concluded as follows:

> No defendant in the case presented any medical expert. As such, there was no medical expert that contradicted any of Dr. Zabinski's testimony.
>
> The jury verdict in the case at bar was $3.5 million dollars. The accident occurred on December 29, 2019. Plaintiff's life expectancy at the time of trial was 54.7 years. Plaintiff utilized a time unit argument during closing. $3.5 million dollars divided by 57 (Plaintiff's life expectancy using 54 years, plus three years from the time of the accident to the time of trial) is less than $61,500 per year. The entire verdict was unanimous.

> Based on the all the foregoing, the verdict of $3.5 million dollars does not shock the Court's conscious. All of the evidence supported a reasonable factfinder's determination as to the amount of the damages. Accordingly, Defendants' motion for remittitur is DENIED.
>
> [Da258; Da259]

Defendants called no live witnesses – liability or damages - in their case in chief.

LEGAL ARGUMENT

Plaintiff makes three arguments in opposition to the appeal filed by Defendant Russell Kline, Defendant Dish Network Service LLC, and Defendant Dish Network LLC. First, Defendants are not entitled to a new trial because the jury's allocation of fault against Defendant Kline for his negligent operation of the Dish Network van is adequately supported by the evidence.

Second, the trial court below did not abuse its discretion in (1) excluding evidence of Stengel's prior criminal conviction, (2) excluding Trooper Morenski's not-to-scale crash diagram, or (3) admitting the audio portion of the police dash cam video. The trial court properly exercised its discretion in making these evidentiary rulings.

Finally, Defendants are not entitled to a remittitur because the damages award does not shock the judicial conscience.

POINT ONE

Defendants are not entitled to a New Trial because the jury's allocation of fault against Defendant Kline for his negligent operation of the Dish Network van is adequately supported by the evidence

Defendants contend that the jury's allocation of fault was against the weight of the evidence, contrary to the evidence, and illogical.

"The standard of review on appeal from decisions on motions for a new trial is the same as that governing the trial judge—whether there was a miscarriage of justice under the law." Hayes v. Delamotte, 231 N.J. 373, 386 (2018) (quoting Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 522 (2011)). See Twp. of Manalapan v. Gentile, 242 N.J. 295, 304 (2020). "[A] 'miscarriage of justice' can arise when there is a 'manifest lack of inherently credible evidence to support the finding,' when there has been an 'obvious overlooking or under-valuation of crucial evidence,' or when the case culminates in 'a clearly unjust result.'" Hayes v. Delamotte, 231 N.J. at 386 (2018) (quoting Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. at 521-22). In evaluating the trial court's decision to grant or deny a new trial, "an appellate court must give 'due deference' to the trial court's 'feel of the case,'" however, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Hayes v. Delamotte, 231 N.J. at 386 (first quoting Risko v. Thompson Muller Auto.

Grp., Inc., 206 N.J. at 521) (second quoting Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

The standard for a motion for a new trial is found in R. 4:49-1(a) which provides, "The trial judge shall grant the motion if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." The Supreme Court has explained, "a 'miscarriage of justice' can arise when there is a 'manifest lack of inherently credible evidence to support the finding,' when there has been an 'obvious overlooking or under-valuation of crucial evidence,' or when the case culminates in 'a clearly unjust result.'" Hayes v. Delamotte, 231 N.J. 373, 386 (2018) (citations omitted).

"On a motion for a new trial, all evidence supporting the verdict must be accepted as true, and all reasonable inferences must be drawn in favor of upholding the verdict." Boryszewski ex rel. Boryszewski v. Burke, 380 N.J. Super. 361, 391 (App. Div. 2005). The Court's function on a new trial motion is not mechanical. "The court is to take into account, not only tangible factors relative to the proofs as shown by the record, but also appropriate matters of credibility, generally peculiarly within the jury's domain, and the intangible 'feel of the case' which it has gained by presiding over the trial." Kita v. Borough of Lindenwold, 305 N.J. Super. 43, 49 (App. Div. 1997) (citations omitted). The

question a motion judge must answer is whether the result strikes the judicial mind as a miscarriage of justice. See Kulbacki v. Sobchinsky, 38 N.J. 435, 459 (1962).

Here, Defendant Kline and Defendant Dish Network contend the jury should have assessed 100% fault to Defendant Stengel. Db22. ("100% of the fault for the accident lies with Stengel."). However, the evidence presented at trial, along with all legitimate inferences therefrom, unequivocally support a judgment in favor of Plaintiff against Defendant Kline.

Defendants fail to acknowledge that Defendant Kline admitted to the jury that he violated the law in two ways: (1) he was speeding in excess of the speed limit, and (2) he did nothing to try to stop safely when he clearly saw the light change to yellow when he was approximately 200 feet from the intersection. Again, he was about 200 feet away from the intersection when he observed the yellow/amber traffic signal. 3T149. Defendant Kline also admitted that he was traveling in excess of the 55 MPH speed limit when he observed the yellow light. 3T147. He further admitted that he made no effort to stop at the intersection nor did he slow at any point before entering the intersection. 3T149-150. Defendant Kline "wanted to try to get through that light before it turned red." 3T150. He did nothing to see if he could stop safely before getting to that intersection. 3T150. This testimony undoubtedly led the jury to conclude that a reasonable

driver in Defendant Kline's position should have brought his vehicle to a stop at the intersection. Certainly a reasonable inference is that he actually sped up to beat the light. Indeed, the Stengel vehicle spun 180 degrees before coming to rest as a result of the impact with Kline's Dish Network van. 3T129. A jury verdict that Kline was negligent and that his negligence was a proximate cause of the accident is well supported by the evidence presented to the jury.

This is not a case where Defendant Stengel was found 100% at fault and Defendant Kline was found 0% at fault. Rather, the jury heard the testimony from all the drivers and reached the rational conclusion to apportion fault between both negligent defendants. It is not a miscarriage of justice to say that – based on the facts of this case – both drivers share responsibility for the happening of this crash.

Additionally, Defendants Kline/Dish Network base most of their arguments on the palpably incorrect assertion that the Jury found Plaintiff to be 0% at fault. To be sure, the Jury was not asked to assess any fault to Plaintiff. The Jury Verdict Sheet concerns only the negligence of Defendants Kline/Dish Network and Defendants Stengle/My Tree Boyz. Da272; Da273. In fact, all counsel – including all defense counsel – agreed on the record during the Charge Conference that the Jury should not consider any Comparative Fault of Plaintiff and that "the only liability question on the verdict sheet would be as to the two

Defendants." 4T256-257. Accordingly, any arguments that the Jury "should have" found Defendants Kline/Dish Network 0% at fault because Plaintiff was found to be 0% at fault is not based in law or in fact.

At trial, the jury was charged on N.J.S.A. 39:4-105. 5T87. This statute imposes a duty to stop when faced with a yellow/amber traffic control light, except when it would be dangerous to do so. Defendant violated his duty by not stopping. Defendant Kline admitted he was travelling in excess of the 55 MPH speed limit when he observed the yellow light. 3T147. He was 200 feet away, nearly the length of a football field. Despite this, he made no effort to stop at the intersection nor did he slow at any point before entering the intersection. 3T149-150. He did nothing to see if he could stop safely before getting to that intersection. 3T150. In short, Defendant Kline "wanted to try to get through that light before it turned red." 3T150. Kline's failure to stop as required by the statute, his driving in excess of the speed limit, and his attempt to beat the light was negligent and the jury's verdict assessing 40% against Kline was adequately supported by the facts. Kline could have readily been assessed a majority of fault as opposed to just 40%. Defendants are therefore are not entitled to the requested relief.

POINT TWO

The trial court below did not abuse its discretion in (1) excluding evidence of Stengel's prior criminal conviction, (2) excluding Trooper Morenski's not-to-scale crash diagram, or (3) admitting the audio portion of the police dash cam video.

The trial court properly exercised its discretion in making its evidentiary rulings excluding Stengel's prior criminal conviction, excluding Trooper Morenski's not-to-scale crash diagram, and admitting the audio portion of the police dash cam video.

An appellate court defers to a trial court's evidentiary ruling absent an abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021). Appellate courts "review the trial court's evidentiary ruling '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.'" State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). Under that deferential standard, appellate courts "review a trial court's evidentiary ruling only for a 'clear error in judgment.'" State v. Medina, 242 N.J. 397, 412 (2020) (quoting State v. Scott, 229 N.J. 469, 479 (2017)). An appellate court "will not substitute [its] judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in

judgment.'" State v. Garcia, 245 N.J. at 430 (quoting State v. Medina, 242 N.J. at 412).

Defendants challenge three evidentiary rulings made by the trial court and contend each ruling singularly had the effect of denying Defendants a fair trial. Each ruling with be discussed in turn.

A. The Trial Court properly excluded evidence of Defendant Stengel's criminal conviction.

The trial court properly excluded evidence of Defendant Stengel's 2018 drug-related conviction.

Introduction of prior convictions for impeachment purposes is governed by N.J.R.E. 609(a), which provides: "For the purpose of affecting the credibility of any witness, the witness's conviction of a crime, subject to Rule 403, must be admitted unless excluded by the judge pursuant to Section (b) of this rule." Pursuant to N.J.R.E. 403, "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence."

Here, in denying Defendants' motion for a new trial, the Court explained as follows in its Memorandum of Decision:

> The Court took into consideration that pursuant to the certified criminal record, codefendant Stengel's last

conviction was in September of 2018, which was fifteen (15) months prior to the subject accident. Co-defendant Stengel's deposition was taken in October of 2022, which was just shy of four (4) years since his last conviction. The trial took place five (5) years after codefendant Stengel's conviction. The Court specifically reference that N.J.R.E. 609(b)(1) did not apply as co-defendant Stengel's conviction was within ten years of the start of the trial. As such, the Court went back to the beginning of N.J.R.E. 609 and noted that N.J.R.E 609(a)(1) notes that for the purpose of attacking the credibility of any witness, the witness's conviction of a crime, subject to Rule 403, shall be admitted unless excluded by the court pursuant to paragraph (b) of this rule. The Court noted the Court's prior ruling granting co-defendant Stengel's motion for to bar his criminal convictions relied upon Rule 403 and the Court still finds upon reconsideration that Rule 403 needs to be applied.

The Court went through R. 403 and exercised the Court's discretion and denied Defendants' Kline and Dish Networks motion for reconsideration for the following reasons. CoDefendant Stengel did not answer interrogatories. The Court had to rely solely upon Co-Defendant Stengel's deposition testimony wherein he acknowledged he had prior drug related felony convictions in the State of New Jersey, but he did not recall the timeline nor the number of convictions. The certified criminal conviction record was from September of 2018, four (4) years prior to co-defendant Stengel's deposition testimony. The Court specifically noted that perhaps the certified criminal conviction could be used for impeachment of co-defendant Stengel. In other words, a jury could potentially find that during his deposition, co-defendant Stengel was misleading the examiner. The Court noted that same would be within the province of the jury and is specifically not a decision for the Court to determine. However, the Court found that the minimal probative value, for impeachment and credibility purposes, was substantially outweighed by the undue prejudice to co-defendant Stengel. The Court further noted that the conviction was for drug related charges which conviction does not go to the issue of

> moral turpitude nor veracity and was four years prior to co-defendant Stengel's deposition and five years prior to trial.
>
> After reviewing all of the above, as well as the arguments set forth in the current motion and opposition, for all of the reasons set forth above, the Court concludes that the Court properly exercised its discretion in excluding co-Defendant Stengel's prior conviction.
>
> [Da241-Da243.]

The Trial Court's ruling concerning the exclusion of evidence of Stengel's criminal conviction was cogent, concise, and comprehensive. The Court did not abuse its discretion in finding that N.J.R.E. 609 did not require admission of this evidence.

The Trial Court additionally did not abuse its discretion in determining that a Rule 403 balancing test weighed in favor of exclusion. The Court properly determined that evidence of the 2018 conviction had minimal probative value. Recognizing that Defendant Stengel testified in his deposition that he did not recall when the last conviction occurred, the trial court rejected Defendants' over-the-top characterization that Defendant Stengel had been "intentionally dishonest about his conviction history at [his] deposition[.]" The Court determined that the nature of the conviction as a drug conviction was unduly prejudicial and likely to inflame the jury. The trial court correctly weighed these factors under Rule 403, as it was permitted to do under the plain language of

N.J.R.E. 609(a). The trial court did not abuse its discretion is barring the admission of this drug conviction.

In any event, even if the court had admitted the precluded evidence concerning Stengel's 2018 conviction, the effect on the jury's verdict would have been nonexistent because the jury clearly disbelieved Stengel's testimony anyhow. Defendants fail to appreciate that the jury did not find Defendant Stengel credible when he testified that he entered the intersection only after the light turned green. The jury clearly determined Stengel had a red light when he entered the intersection. Had they believed his testimony that he had a green light, then they would have apportioned 100% of the fault to Kline. However, this jury accepted the facts applied to the law that both defendants acted in a negligent manner and that the negligence of both defendant-drivers were proximate causes of the accident. The jury disbelieved Stengel and they could not have disbelieved him more had they heard about this drug conviction.

B. The Trial Court properly excluded Trooper Morenski's not-to-scale crash diagram

The trial court properly excluded the net lay opinion testimony of Trooper Morenski, as set forth in a not-to-scale diagram of the scene.

The testimony of police officers is unique. "Police officers are usually the first witnesses to arrive at the scene of an automobile accident. Before physical

evidence at the scene is removed, distorted, or tampered with, they have the unique opportunity to observe it." State v. Labrutto, 114 N.J. 187, 191 (1988). Through mere fact testimony, "an officer is permitted to set forth what he or she perceived through one or more of the senses. Fact testimony has always consisted of a description of what the officer did and saw, including, for example, that defendant stood on a corner, engaged in a brief conversation, looked around, reached into a bag, handed another person an item, accepted paper currency in exchange, threw the bag aside as the officer approached, and that the officer found drugs in the bag... Testimony of that type includes no opinion, lay or expert, and does not convey information about what the officer "believed," "thought" or "suspected," but instead is an ordinary fact-based recitation by a witness with first-hand knowledge." State v. McLean, 205 N.J. 438, 460 (2011) (citations omitted).

Under certain circumstances, however, a police officer may give lay opinion testimony. "Courts in New Jersey have permitted police officers to testify as lay witnesses, based on their personal observations and their long experience in areas where expert testimony might otherwise be deemed necessary." State v. Labrutto, 114 N.J. at 198. Generally, a non-expert may give his opinion on matters of common knowledge and observation. See State v. Bealor, 187 N.J. 574, 586 (2006). Under N.J.R.E. 701, "[i]f a witness is not

testifying as an expert, the witness' testimony in the form of opinions or inference may be admitted if it (a) is rationally based on the perception of the witnesses and (b) will assist in understanding the witness' testimony or in determining a fact in issue." "Perception ... rests on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing." State v. McLean, 205 N.J. at 457. "It is the duty of the judge to find whether a witness could rationally arrive at a given opinion form the external facts which the witness perceived." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, Comment 1 to N.J.R.E. 701 (Gann). Lay opinion testimony may not be based on inadmissible hearsay. See Neno v. Clinton, 167 N.J. 573, 585-86 (2001).

Defendants contend the trial court abused its discretion in barring evidence of Trooper Morenski's not-to-scale crash diagram. The fatal flaw of Defendants' arguments is that Trooper Morenski was not a first-hand observer of (a) the accident, (b) the speeds and directions of the vehicles, or (c) the impacts by and between the vehicles. Trooper Morenski responded only after the crash had occurred.

Here, in denying defendant's motion for a new trial, the Court explained as follows in its Memorandum of Decision:

> The diagram, as an exact rendering of what happened is misleading to the jury and its prejudice outweighs its

probative value. The Court heard the objection at sidebar and sustained the objection, ruling that page 4 of the police report was not admissible. The Court noted that the trooper testified that he has no indicator as to distances, nor the timing of the light, particularly with regard to Stengel's vehicle. The deposition testimony of Stengel leads the Court to believe that Stengel is going to testify at trial that he was stopped at a red light and that the light then turned green. However, the diagram does not depict same. The diagram shows Stengel's vehicle as a moving vehicle, in motion, and does not show Stengel stopped for the light. The Court further noted the Court's concern with the diagram showing Stengel moving/in motion because same was not based on the trooper's observation. The diagram also depicted the two other vehicles coming down the other roadway.

The Court did note that the diagram had two X's in circles that depicted the point of impact, but the diagram also contained the movement of the vehicles, how far the vehicles were from the intersection, Stengel is depicted farther back from the intersection versus stopped at the light/intersection, and the Kline van is depicted a finger length from the intersection and Plaintiff's vehicle is shown four finger lengths away and the trooper has no basis upon which to have put the vehicles in those locations. Because the trooper did not make those observations, the probative value of the diagram for the points of impact of the vehicles did not weight the undue prejudice to the other parties with regard to the depictions of the vehicles prior to impact.

Further, there was no prejudice to Defendants Kline and Dish Network because several photographs of the scene of the accident were entered into evidence, so the jury could see the points of impacts on the vehicles in the photographs, just as the trooper observed when he arrived at the scene. The Court disagreed with Defendants Kline and Dish Network that the proper foundation for the diagram had been laid as the trooper had testified that he had no idea the distances of the vehicles from the intersection prior to impact and same were not based upon his personal observations.

> After reviewing all of the above, as well as the arguments set forth in the current motion and opposition, for all of the reasons set forth above, the Court concludes that the Court properly exercised its discretion in excluding the trooper's opinion as to who caused the accident and in excluding the diagram contained in his police report.
>
> [Da248-Da250]

The Trial Court's ruling barring the admission of the not-to-scale diagram was cogent, concise, and comprehensive. The Court did not abuse its discretion.

Trooper Morenski did not make observations of the points of impact as the accident occurred. He did not take measurements, make speed estimations, or access any on board vehicle information. He made observations as to the damage to the vehicles and the final resting points, and combined that with the statements he took from the 3 parties involved in the crash. That is all the very same information that our jury considered. The jury saw the photos, they watched the dash cam video, they heard and read from the admitted portion of the police report limited to what the parties told Trooper Morenski. Therefore, the Trooper's not-to-scale drawing – which was not based on personal observation of the crash – offered nothing of probative value.

With regard to the second prong of NJ.R.E. 701, the requirement that the opinion will assist in understanding the witness' testimony or in determining a fact in issue, lay opinion testimony is not permitted if the jury can reach its own

conclusions without the aid of opinion testimony. "[T]estimony in the form of an opinion, whether offered by a lay or an expert witness, is only permitted if it will assist the jury in performing its function. Opinion testimony of either sort is not a vehicle for offering the view of the witness about a series of facts that the jury can evaluate for itself or, [in the context of criminal law], an opportunity to express a view on guilt or innocence." State v. McLean, 205 NJ. at 462.

Ultimately, the Trooper's after-the-fact estimations as depicted on his not-to-scale drawing would not have assisted the jury. Both Stengel and Kline testified they did not attempt to break prior to impact and that the impact occurred in their respective lanes of travel. Additionally, the sequence of the impacts is not in dispute: After the impact between Stengel and Kline, the Kline vehicle impacted with the Plaintiff's vehicle. Finally, the jury observed both MVR dash-cam footage as well as photographs depicting the damage to the vehicles and the final resting point of the vehicles. For these reasons, the Trooper's personal estimations of the points-of-impact is irrelevant and not helpful to the jury. In the language of N.J.R.E. 401, the Trooper's estimations of the points-of-impact as depicted on the not-to-scale drawing have no "tendency in reason to prove or disprove any fact of consequence[.]" Lastly, no one prohibited to or objected to the Trooper testifying to his observations at the scene as to the points of impact on the vehicles and final resting points.

The Trooper's admittedly not-to-scale diagram which purported to indicate the direction of travel, the conduct of the vehicles before the impact and the final resting points were not based on the Trooper's observations of the collision. They were based on the statements of the witnesses for which he was allowed to testify to and his observations after the fact as to the final resting points of the vehicles. The jury was able to see that information in the photos admitted into evidence and the dash cam video. The Court correctly noted that the not-to-scale drawing presented vehicles travelling in certain directions. It did not show the Stengel vehicle in a stopped position and had the real probability of confusing the jury since it presented an unsupported version of the conduct of the vehicles. Since it was not to scale and not based on personal observation of the accident, it offered nothing of value particularly considering the proper evidence summarized above that was admitted into evidence (testimony of the parties; photos of the scene; dash cam video). The trial court properly barred the not-to-scale diagram's admission. This ruling was certainly not an abuse of discretion.

C. The Trial Court properly admitted the police dash cam video with audio

Defendants argue the Trial Court abused its discretion in holding that a Rule 403 balancing test did require the exclusion of the police dash cam audio.

To be sure, Defendants do not argue on appeal that the video with audio is not relevant. Rather, the Defense contends only that the purported inflammatory nature of the audio made it prejudicial such that this prejudice outweighed the probative value. The Court cannot, however, look only at the prejudicial nature of the evidence to determine if Rule 403 requires its exclusion. As required by the Rule, the Court must weigh the probative value against the risk of undue prejudice.

i. The MVR dash cam video with audio is relevant evidence concerning her pain and suffering damages

Under New Jersey law, a tortfeasor is liable for all damages that naturally and proximately flow from his tort. Ciluffo v. Middlesex Gen'l Hosp., 146 N.J. Super. 476, 482 (App. Div. 1977). To this end, "a civil plaintiff has a constitutional right to have a jury decide the merits and worth of her case." Johnson v. Scaccetti, 192 N.J. 256, 279 (2007).

"[T]he standard for measuring damages for personal injuries to be reasonable compensation and has entrusted the administration of this criterion to the impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence." Botta v. Brunner, 26 N.J. 82, 94 (1958) (citations omitted). "[P]ain and suffering have no known dimensions, mathematical or financial. There is no exact correspondence

between money and physical or mental injury or suffering, and the various factors involved are not capable of proof in dollars and cents." Id at 95. "Determining just compensation for an accident victim, particularly when the damages are not susceptible to scientific precision, as in the case of pain and suffering damages, necessarily requires a high degree of discretion." Johnson v. Scaccetti, 192 N.J. at 279. Accordingly, our jury system "places trust in ordinary men and women of varying experiences and backgrounds, who serve as jurors" and gives them "wide latitude in which to operate." Id at 279-80.

Because the jury as the finder of fact is the arbiter of the value of Plaintiff's personal injury claim, the Court properly exercised its gatekeeping function to admit the dash-cam video with accompanying audio.

ii. The dash-cam MVR audio-video recording is the best evidence of Plaintiff's pain and suffering

The audio which accompanies the NJSP dash cam video is the best evidence for the jury to appreciate Plaintiff's contemporaneous emotional distress, physical pain, mental anguish, fear, fright, helplessness, suffering, and loss of enjoyment of life.

A video with accompanying audio that depicts the pain and suffering experienced by an injured-plaintiff is the best, most accurate evidence for the jury's consideration in determining the value of that injured-plaintiff's

compensatory damages. "Paramount is the obvious benefit derived from a recording that creates an objective, reviewable record." State v. Cook, 179 N.J. 533, 555-556 (2004).

Here, the dash-cam video with audio captured Plaintiff Jasmine Robinson's actual pain and suffering "in real time" as it happened and the video allowed the trier of fact to hear for themselves what Plaintiff experienced in the aftermath of the crash. The dash-cam video evidence may be more accurate, complete, objective, credible and persuasive than witness testimony alone. The dash-cam video is "an invaluable tool for the jury to consider in deciding the truth in this case." State v. Harte, 395 N.J. Super. 162, 172-174 (Law Div. 2006).

The video and accompanying audio was probative, not only of Plaintiff's pain and suffering, but also of her consciousness and awareness of her pain and suffering. A plaintiff must be conscious of the loss in order to recover compensation for certain types of non-pecuniary damages. See Lanzet v. Greenberg, 222 N.J. Super. 540, 542 (App. Div. 1988) (citing Lewis v. Read, 80 N.J. Super. 148, 174 (App. Div.), certif. granted, 41 N.J. 121 (1963)); Paladino v. Campos, 145 N.J. Super. 555 (Law Div. 1976). The Appellate Division in Lewis v. Read stressed that damages for pain and suffering must be "limited to compensation and compensation alone," and therefore "conscious suffering is

the only proper basis for pain and suffering." Lewis v. Read, 80 N.J. Super. at 174; see Lanzet, 222 N.J. Super. at 543.

Admission of the audio-video recording also enhanced the jury's assessment of credibility. It is one thing to have the responding Trooper testify to hearing Ms. Robinson's distress. It is another thing completely to allow the jury to hear same. "Because '[e]ven the most scrupulous of witnesses is subject to forgetfulness,' [...] a recording.... [will] also provide judges and juries with a more accurate picture of what was said, as words can convey different meanings depending on the tone of voice or nuance used." State v. Cook, 179 N.J. at 556 (citations omitted).

The Rules of Evidence supported the admission of the dash-cam MVR video. First, N.J.R.E. 803(C)(3), entitled "Then-existing mental, emotional, or physical condition," excludes from the definition of hearsay "[a] statement made in good faith of the declarant's then-existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." Under this rule, "[a] non-expert witness may testify to such exclamations and complaints as indicate present existing pain and suffering." De Palma v. Economy Auto Supply Co., 3 N.J.

Misc. 827, 828 (Sup. Ct. 1925) (citations omitted). "Such statements are deemed trustworthy[.]" Biunno Weissbard & Zegas, *Current N.J. Rules of Evidence*, Comment 3 to N.J.R.E. 803(c)(3) (Gann).

iii. Rule 403 did not bar the admission of the dash-cam MVR audio-video recording

Rule 403 did not bar the admission of the dash-cam MVR audio-video recording. Pursuant to N.J.R.E. 403, "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence." The "mere possibility that evidence could be prejudicial does not justify its exclusion." State v. Morton, 155 N.J. 383, 453-54 (1998). Damaging evidence is generally prejudicial; however the inquiry is not simply whether the evidence is prejudicial, but rather whether the risk of prejudice is too high that it outweighs the probative value of the evidence. State v. Swint, 328 N.J. Super. 236, 253 (App. Div. 2000), certif. den. 165 N.J. 492 (2000). It is the burden of the party seeking to preclude the admission of evidence pursuant to N.J.R.E. 403 to convince the trial judge that the factors favoring exclusion substantially outweigh the probative value of the contested evidence. State v. Morton, 155 N.J. at 453 (citing State v. Carter, 91 N.J. 86, 106 (1982)).

Here, the highly relevant and probative value of the dash-cam MVR video recording is not outweighed by any undue prejudice to defendants. A careful Rule 403 balancing test weighs in favor of admitting this critical and highly probative evidence.

The Trial Court offered this explanation of this video with audio at the time of the motion hearing:

> I watched it the first time without the audio, then I watched it a second time with the audio, and I thought it was going to be this constant stream of screaming and chaos and yelling, and it was none of that. It is, in my mind, a little bit more controlled than I would have expected for that type of injury and that type of accident. It was -- it was not shocking in my mind at all, and it was pretty controlled.
>
> [1T16.]

With regard to the video's probative value, the Trial Court noted:

> I find the video's audio to be highly probative. The audio is probative of exactly what was going on in the Plaintiff's mind and body in terms of pain immediately upon police arrival at the scene of the crash on -- back in December of 2019. That's four years earlier than this Plaintiff will have an opportunity to testify at trial, and memories sometimes fade.
>
> The video's audio is the best evidence of what the Plaintiff was feeling in terms of pain immediately at the crash. It's the best evidence of her conscious pain and suffering at that time and really perhaps the only evidence that could accurately reflect in realtime her pain and discomfort and distress at that moment.
>
> The video's audio depicts a crash scene with the responding Trooper speaking with the people involved in the accident.

> The audio depicts some whimpering and crying out of a person who was injured in a significant impact motor vehicle crash. There's nothing in my mind that's shocking at all about the video.
>
> [1T17.]

Regarding any prejudicial effect, the Trial Court noted, "[i]n the Court's mind, there's nothing that could be considered prejudicial other than perhaps the Plaintiff's scream, 'Oh, my God. My legs, they hurt so bad.'" 1T17-18.

Ultimately, the Trial Court held "the probative value... outweighs the potential risk of undue prejudice." 1T18.

The video with audio was played only once during the trial; during the direct examination of Trooper Morenski. It was not played again in closing. That the jury only heard the audio only one time, it was not cumulative evidence nor was any undue weight placed on the audio.

Rule 403 did not bar the admission of the dash-cam audio. The Trial Court did not abuse its discretion in holding that a balancing of the Rule 403 factors weighed in favor of admitting this critical and highly probative evidence.

POINT THREE

Defendants are not entitled to a Remittitur

There is no reason to disturb the amount of the jury's verdict on appeal because the jury's award does not shock the judicial conscience. Defendants are not entitled to a new trial or to remittitur.

"A jury's verdict, including an award of damages, is cloaked with a 'presumption of correctness.'" Cuevas v. Wentworth Grp., 226 N.J. 480, 501 (2016) (quoting Baxter v. Fairmont Food Co., 74 N.J. 588, 598 (1977)). "[T]he trial court may not disturb a damages award entered by a jury unless it is so grossly excessive or so grossly inadequate 'that it shocks the judicial conscience.'" Orientale v. Jennings, 239 N.J. 569, 595 (2019). "Judicial review of the correctness of a jury's damages award requires that the trial record be viewed in the light most favorable to plaintiffs." Cuevas, 226 N.J. at 485.

As a primary matter, although Defendants refer to plaintiff's injuries simply as "orthopedic injuries" resulting in "fractures" and "surgeries" – without describing the nature and extent of her fractures, surgeries, or recovery – the Court should be aware Plaintiff suffered much more than broken bones.

Plaintiff was entrapped in the vehicle for a significant duration. She offered this testimony at trial on direct examination:

Q [...] But at some point do you remember the EMTs and the firefighters being on the scene?

A Yes.

Q And did they have to use any type of special equipment or measures to extract you from the vehicle?

A Yes.

Q Did that take some time?

A Yes.

Q Were you in pain while this is going on?

A Yes.

Q If it's possible can you try to describe for us what that pain was like?

A I want to say like something's just crushing your legs.

Q Were you able to move at all inside of the car until they freed you?

A No.

[3T170-171.]

Plaintiff was admitted to Cooper Hospital for 13 days during which time she had 3 surgeries. 3T172. The Jury saw operative photos depicting external fixators applied to her legs. Da165; Da166. During that time, she could not move and was afraid to move her legs at all. 3T172. Plaintiff spent over a month at an in-patient rehabilitation facility. 3T175. She spent most of her time in one room. 3T177. During this time, her left arm was in a cast. 3T176.The dressings for

Plaintiff's leg wounds had to be changed 2-3 times per week while she was at Cooper and at in-patient rehabilitation. 3T176. This was painful. 3T176.

When she was discharged to home, she went to stay with her Aunt Joan. 3T178. For the first week she was there, she could not go upstairs to her room on the second floor because she did not have any equipment to get up the steps. 3T179. Plaintiff stayed downstairs for the first week. 3T179. After the first week, Plaintiff was able to get upstairs only by using her hands to push herself up and put her butt on the next step while some other person held her legs so they wouldn't fall. 3T179. Her legs were casted. 3T179.

Plaintiff is now 26 years old. 3T184. She still has plates and scares in her left arm and both her legs. 3T173. She can still feel the metal. 3T173.

In terms of restrictions, Plaintiff is limited in bending one knee because the surgical hardware. 3T174. Plaintiff has pain when she walks which she describes as a "sore feelings through her legs." 3T183. She testified she never not has that sore feeling when she's moving around. 3T183. Plaintiff also testified she has a loss of feeling in some places in her legs which have been numb since the accident. 3T184.

Plaintiff has scarring on her legs from the surgeries. 3T174. The Jury saw photos depicting the scarring. Da163; Da164. Plaintiff does not wear shorts as much anymore because she doesn't like to show her legs at all. 3T184.

Defendants' cross-examination of Plaintiff relative to damages was limited to the following 5 questions:

> Q [...] I understand you sustained some pretty severe injuries to your legs; correct?
>
> A Yes, Sir.
>
> Q All right a number of surgeries?
>
> A Yes.
>
> Q Okay and some PT and recovery time; correct?
>
> A Yes.
>
> Q Has the condition gotten any better since way back when you first had the surgeries? Has it improved a little bit?
>
> A Yes.
>
> Q Okay. Has any doctor recommended that you undergo an additional surgery in the near future for your legs?
>
> A As of right now, no.
>
> [3T188-189.]

Defendants called no live witnesses – liability or damages - in their case in chief.

Here, the record is devoid of any indication that the jury impermissibly rendered an excessive damages award. The record demonstrates the jury was instructed, in accordance with the model jury charge, to determine the reasonable amount of damages due to plaintiff and not to speculate upon or include medical expenses or lost wages as a part of the damages. This court

should "presume the jury followed the court's instructions." State v. Smith, 212 N.J. 365, 409 (2012) (citing State v. Loftin, 146 N.J. 295, 390 (1996)).

The jury heard a substantial amount of medical testimony from Plaintiff's damages expert, Orthopedic surgeon Dr. Stephen Zabinski, who testified about the injuries Plaintiff sustained as a result of this crash, her medical treatment including surgeries, the permanency of her injuries, and her prognosis. Insofar as Defendants did not present defense medical expert testimony to the jury, Dr. Zabinski's medical testimony was unchallenged and unrebutted.

Dr. Zabinski identified Plaintiff's injuries as follows:

> **Q.· · ·Let's do this if we can, Dr. Zabinski, can you give the jury a summary of the injuries that Jasmine suffered from this car accident and then we'll go back and discuss each with some more specifics and we'll use some demonstrative exhibits to assist you explaining to the jury what the injuries were and the treatment was that was received.· Is that okay with you?**
>
> A.· · ·That's fine.· I'll do the best I can because there is a lot of stuff that happened here.· She sustained to her arm -- we can focus just on her left elbow.· She sustained a fracture of a forearm with a subluxation which is a dislocation, a joint coming out of place of her left elbow that required surgical treatment. So that was the upper extremities and then in regard to lower extremities on her right side she broke her thigh bone, her kneecap and her leg bone and those were very complex injuries in that her right femur bone or thigh bone was an open fracture where the skin tears and therefore, the bone and the fracture exposed to the environment.
>
> The kneecap fracture which was broken up in to a lot of pieces on the right side was also an open fracture

> again with the outside communicating with the fracture. The leg bone, the fracture of the tibia bone was broken up in to a lot of pieces and associated with a significant soft tissue injury so that again, the skin was open, the bone exposed.· And that injury ultimately ended up requiring multiple surgeries, not just to fix the bone but to release tension in the leg which is called a fasciotomy.· And then undergo multiple procedures trying to get the wound to heal which took many months to finally heal.
>
> On her left side, her left leg she sustained a very complex, comminuted, broken up in to a lot of pieces fracture of her thigh bone extending in to the knee joint basically separating the upper portion of the knee part -- knee joint in to two pieces.· Also having a smaller fracture of her kneecap and tearing her quadriceps tendon basically where the bone went through the quadriceps tendon.· The tendon of the thigh muscle and ripped it.
>
> And that was treated with first stabilization and multiple surgeries and as a sequela of all these injuries she also had an injury to her ankle where she's developed basically inflammation, tendinitis and some chronic contracture and pain due to the alteration of her right leg function above her ankle.
>
> [3T200; 4T203-204.]

Dr. Zabinski testified Plaintiff's injuries are permanent and significant. 4T216. The jury saw one anatomic drawing depicting Plaintiff's injuries, Da167, and two anatomic drawings depicting Plaintiff's surgeries, Da168; Da169. Dr. Zabinski testified that these surgeries, as well as all of Plaintiff's accident-related medical treatment, was reasonable, necessary and causally related to the subject accident. 4T216. Dr. Zabinski also testified at length about Plaintiff's poor prognosis. 4T220-224.

Despite these significant injuries, Defendant attempted on cross-examination to make it seem that Plaintiff "made a good recovery." Dr. Zabinski testified Plaintiff's recovery was "nothing short of a miracle" and that she could have lost both her legs in the accident or died because of her injuries. 4T231.

Again, the jury was also shown and had in evidence the Cooper Hospital photos showing the extensive devastating open wounds to her leg, the external fixators applied to both legs, the photographs of the extensive hardware that remains in the plaintiff's body and the disfiguring scarring on plaintiff's legs (both in person in trial and with the admitted photographs). Moreover, the jury observed the dash cam video which provided them a first-hand real time observation of the devastation of this crash and plaintiffs anguish at the scene which video was only a very small sample of what plaintiff went through at the scene which was also confirmed by the property damage photos in evidence.

During closing argument, plaintiff's counsel used the time unit rule. The time-unit rule, see R. 1:7-1(b), permits an attorney to "suggest to the trier of fact, with respect to any element of damages, that unliquidated damages be calculated on a time-unit basis without reference to a specific sum." Plaintiff's counsel pointed out that plaintiff, then 26 years old, had a life expectancy of 55 years. 4T70. Moreover, the jury was to award damages for what she went through at the scene, during the two weeks in the hospital and multiple surgeries,

the five weeks in the in-patient rehabilitation center, the dozens and dozens of treatments and bandage changes for the open wounds on her legs; the grueling physical therapy to learn to walk again, the permanent pain and physical limitations she suffers every single day and last but no least having to live with these disfiguring scars when she is still so young. Over the past 4 years and the 55 years to come, the award only comes to a very modest $59,322 per year.

Here, in denying Defendants' motion for a remittitur, the Trial Court examined the damages evidence heard by the Jury over the course of 8 pages in its Memorandum of Decision. Da251-Da258. Ultimately, the Trial Court concluded as follows:

> No defendant in the case presented any medical expert. As such, there was no medical expert that contradicted any of Dr. Zabinski's testimony.
>
> The jury verdict in the case at bar was $3.5 million dollars. The accident occurred on December 29, 2019. Plaintiff's life expectancy at the time of trial was 54.7 years. Plaintiff utilized a time unit argument during closing. $3.5 million dollars divided by 57 (Plaintiff's life expectancy using 54 years, plus three years from the time of the accident to the time of trial) is less than $61,500 per year. The entire verdict was unanimous.
>
> Based on the all the foregoing, the verdict of $3.5 million dollars does not shock the Court's conscious. All of the evidence supported a reasonable factfinder's determination as to the amount of the damages. Accordingly, Defendants' motion for remittitur is DENIED.
>
> [Da258; Da259]

Viewing the evidence in the light most favorably to plaintiff, there is no reason to disturb the amount of the jury's verdict because this award does not shock the judicial conscience. Defendants are not entitled to remittitur. Defendants' motion should be denied.

CONCLUSION

For these reasons, Plaintiff respectfully requests that the Court affirm the Orders of the Trial Court below.

D'ARCY JOHNSON DAY

By: _____
Richard J. Albuquerque, Esquire

DATED: July 17, 2024

D'ARCY JOHNSON DAY

By: _____
Dominic R. DePamphilis, Esquire

DATED: July 17, 2024

Superior Court of New Jersey

Appellate Division Letter Brief

Appellate Division Docket Number: A-001017-23

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July 16, 2024

Letter Brief on behalf of: My Tree Boyz, LLC and Christopher Stengel

JASMINE ROBINSON INDIVIDUALLY, AND ON BEHALF OF HER MINOR DAUGHTER, VANESSA ROBINSON

v.

CHRISTOPHER STENGEL, MY TREE BOYZ, LIMITED LIABILITY COMPANY, RUSSELL KLINE, DISH NETWORK SERVICE L.L.C., DISH NETWORK, L.L.C., JOHN DOES, MARY DOES, ABC PARTNERSHIPS AND XYZ CORPORATIONS, JOINTLY, SEVERALLY AND IN THE ALTERNATIVE,

Case Type: Civil

Civil County/Agency: Atlantic

Trial Court/Agency Docket No: ATL-L-3919-21

Trial Court Judge/Agency Name: Honorable Danielle J. Walcoff, J.S.C

Dear Judges

Pursuant to R. 2:6-2(b), please accept this letter brief in Response to Appellant's brief in this matter.

TABLE OF CONTENTS

TABLE OF JUDGMENT(S), ORDER(S), RULING(S), AND DECISION(S) ON APPEAL

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases:

Statues & Other Authorities:

LIST OF PARTIES

Party Name	Appellate Party Designation	Trial Court/ Agency Party Role	Trial Court/Agency Party Status
Jasmine Robinson	Respondent	Plaintiff	Participated
Christopher Stengel	Respondent	Defendant	Participated
My Tree Boyz, LLC	Respondent	Defendant	Participated
Russell Kline	Appellant	Defendant	Participated
Dish Network Service, L.L.C.	Appellant	Defendant	Participated
Dish Network, L.L.C.	Appellant	Defendant	Participated

PRELIMINARY STATEMENT

The Jury Verdict Questionnaire in this case asked the jury to access liability as to the defendants only. As such, the jury could not have assessed any liability for the accident on the plaintiff. There were no objections by any party to the form of the Jury Verdict Questionnaire as submitted to the jury. (3T:257-2 to 5; 5T:19-15 to 22) As such, Appellants statements that the jury found the plaintiff 0% is inaccurate. Moreover, Appellants arguments regarding inconsistencies between the jury verdict accessing 0% liability on plaintiff and 40% on Appellant are nonsensible.

The Honorable Danielle J. Walcoff, J.S.C correctly held that evidence regarding Appellee Stengle's criminal convictions were inadmissible as the probative value was significantly outweighed by the prejudicial effect.

The Honorable Danielle J. Walcoff, J.S.C correctly held that the diagram of the accident scene prepared by Officer Morenski was not admissible as the diagram was misleading and would confuse the jury.

The appellee asks that Judge Walcoff's well-reasoned decisions as to the criminal convictions and the diagram of the accident scene be affirmed and that the jury verdict not be disturbed.

STATEMENT OF FACTS

For the purposes of this appeal, Appellee accepts Appellant's statement of facts but notes additional facts below.

It was undisputed that Appellant Kline was 200 feet away from the intersection when it turned yellow, yet he did not slow his vehicle or bring it to a stop before entering the intersection. (3T:147-1 to 10; 3T:150-2 to 4)

PROCEDURAL HISTORY

For the purposes of this appeal, Appellee accepts Appellant's Procedural History statement of facts but notes additional history below.

In addition, Appellant erroneously references Jury Verdict Questionnaire at Da154 of his Appendix. The correct Jury Verdict Questionnaire can be found in Appellant's Appendix at Da272, 273 and at Db1-2.

Lastly, Appellant erroneously states that Appellee Stengel/My Tree Boyz has settled with plaintiff; there has been no settlement.

LEGAL ARGUMENT

POINT I

THE JURY'S FINDING THE APPELLANT KLINE WAS 40% AT FAULT FOR THE ACCIDENT WAS REASONABLE AND SHOULD NOT BE DISTURBED (Da272, 273; Db1,2)

The controlling principle regarding setting aside a jury verdict is as follows:

> A verdict of a jury shall be set aside as against the weight of the evidence if, having given due regard to the opportunity of the trial court and the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that the verdict was the result of mistake, partiality, prejudice or passion. careful.

Flexmir, Inc. v. Lindeman & Company 8 N.J. 602 (1952). "A jury verdict is entitled to considerable deference and 'should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination, after canvassing the record and weighing the evidence, that the continued viability of the judgment would constitute a manifest denial of justice.'" Hayes v. Delamotte, 231 N.J. 373, 385-86 (2018) (quoting Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 521 (2011)). "The standard of review on appeal from decisions on motions for a new trial is the same as that governing the trial judge—whether there was a miscarriage of justice under the law." Hayes v. Delamotte, 231 N.J. 373, 386 (2018) (quoting Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 522 (2011)). See Twp. of Manalapan v. Gentile, 242 N.J. 295, 304 (2020). "[A] 'miscarriage of justice' can arise when there is a 'manifest lack of inherently credible evidence to support the finding,' when there has been an 'obvious overlooking or under-valuation of crucial evidence,' or when the case culminates in 'a clearly unjust result.'" Hayes v. Delamotte, 231 N.J. 373, 386 (2018) (quoting Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 521-22 (2011)).

In the case of hand, there was no miscarriage of justice. Appellant argues that the jury verdict was inconsistent in the plaintiff was found 0% at fault while the Appellant was found 40% at fault.

There was no inconsistency in the jury's findings. The jury was not asked to decide if there was any liability attributable to the plaintiff. The Appellant did not object to be Jury Verdict Questionnaire at the time of trial and cannot raise such an objection at this time. Nor does Appellant he try to object at the time of this appeal. The undisputed testimony from Appellant Kline was that he was 200 feet from the intersection when he saw the light turn yellow, yet he did not slow his vehicle nor bring it to a stop before the impact. (3T 147-1 to 10; 3T:150-2 to 4).

The charge that was read to the jury as follows:

> Amber or yellow when shown alone following green means traffic should stop before entering the intersection…unless when the amber appears the vehicle …is so close to the intersection that with suitable brakes, it cannot be stopped in safety.

(5T:89 14 to 19)

Clearly, given Appellant Kline's undisputed testimony and the jury charge on proceeding when a yellow light is shown, a jury can and did reasonably find that Appellant Kline was 40% at fault for the accident. They could have found more or less but 40% is certainly reasonable. In the 200 feet he transversed, he should have brought his vehicle to a stop and thereby avoided the accident. Alternatively, even if he had slowed his vehicle, the accident would not have been as severe, and he very well may not have collided with plaintiff's vehicle. He did neither.

POINT II

THERE WAS NO ABUSE OF DISCRETION; THE TRIAL COURT CORRECTLY EXCLUDED EVIDENCE OF APPELLEE'S PRIOR CRIMINAL CONVICTION

It is well settled in New Jersey that an appellate court defers to a trial court's evidentiary ruling absent an abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021); State v. Jackson, 243 N.J. 52, 64 (2020); Rowe v. Bell & Gossett Co., 239 N.J. 531, 551 (2019); State v. Scott, 229 N.J. 469, 479 (2017); State v. Nantambu, 221 N.J. 390, 402 (2015); State v. Rochat, 470 N.J. Super. 392, 453 (App. Div. 2022). Appellate courts "review the trial court's evidentiary ruling '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.'" State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). Under that deferential standard, appellate courts "review a trial court's evidentiary ruling only for a 'clear error in judgment.'" State v. Medina, 242 N.J. 397, 412 (2020) (quoting State v. Scott, 229 N.J. 469, 479 (2017)).

Appellant argues that Judge Walcoff incorrectly ruled that evidence of Appellee's prior criminal convictions were inadmissible at the time of trial. Appellant further argues that Judge Walcoff failed to apply New Jersey Rules of Evidence 609 but instead relied solely on New Jersey Rules of Evidence 403.

A review of the record indicates that Judge Walcoff considered both New Jersey Rule of Evidence 403 and 609 when correctly deciding the Motion in Limine to bar evidence of Appellee's prior criminal convictions on September 26, 2023.

Judge Walcoff reasoned as follows:

> When I look at 609, and I take the guidance that 609 gives me, all I have to evaluate is drug-related and house arrest and probation. I don't have any clue if it's for things that involve dishonesty, lack of voracity, fraud. For example, you know, was a bad check written? Was there theft by deception? I have no information in that regard. I have nothing that tells me -- he says he's been clean for over 10 years -- that there has been anything within the last 10 years. And, again, that would be readily discoverable information in my mind. So then I have to say if there is any probative value to that whatsoever, which in my mind, based on that limited information, there is not, the only probative value may be if something turned up that it would go to the credibility of the witness. But then I have to do the 403 balance, would that be outweighed by the risk of undue prejudice, which in my mind it greatly would. And, again, I can't guess on what's out there.

1T:47- 27 to 35;1T:48 - 1 to 11

At issue was Appellant's testimony at deposition that he did not recall the date of his last conviction. Prior to trial, Appellee had asked Appellant for any information it might have regarding recent convictions, but none were forthcoming. Following Judge Walcoff's Order of September 26, 2023 granting the motion, Appellant filed a Motion for Reconsideration which for the first time disclosed evidence of a felony conviction for a drug related offence in March of 2018. Judge Walcoff once again considered both New Jersey Rule of Evidence 403 and 609. 2T: 27-24 to 25; 2T:28-2 to 6. Judge Walcoff noted that the 2018 conviction is a drug related conviction that does not go to moral turpitude. 2T:29-19 to 25. Judge Walcoff also noted that Mr. Stengle did not deny more recent convictions; but simply testified that he doesn't remember the year. 2T:30-13 to19. Judge Walcoff concluded that a juror hearing of a drug related charge is "just so prejudicial" that "I have a "significant concern that the potential prejudice would outweigh the probative value" 2T:31 -1 to 11.

POINT III

THERE WAS NO ABUSE OF DISCRETION; THE TRIAL COURT CORRECTLY EXCLUDED SUBMISSION OF THE DIAGRAM ON THE POLICE REPORT

The standard for appellate review of evidentiary rulings is set forth above.

In the case at hand, Judge Walcoff correctly excluded the submission of the diagram of the accident contained in the police report.

In ruling that the diagram would not be admitted into evidence, Judge Walcoff reasoned that the diagram showed the Appellee Stengel vehicle moving while it appeared that Stengle would testified that he was stopped 3T:101-20 to 25; 3T:102-1 to 4; That the officer did not observe the accident and does not know how far the vehicles were or were not from the intersection before the impact 3T:102- 15 to 23; that the diagram showing the path of travel of the vehicles up until the point of impact was not based on anything the police officer observed or had knowledge of; 3T:103-4 to 8 and that the diagram is not an accurate depiction of what the officer observed and that will confuse the jury; 3T:105-8 to 23.

This well-reasoned decision was within the trial Judge's sound discretion and there simply is no evidence of any abuse of discretion.

CONCLUSION

There has been no miscarriage of justice here. The evidence supports the jury verdict on liability and should not be disturbed. Judge Danielle Walcoff's rulings on the admission of the criminal convictions and the diagram contained in the police report did not constitute a "clear error in judgment' and should be upheld.

Respectfully submitted,

Lori Klinger

Dated: July 16, 2024

Lori S. Klinger, Esquire

JASMINE ROBINSON, INDIVIDUALLY, and on behalf of her minor daughter, VANESSA ROBINSON,

Plaintiff-Respondent,

v.

RUSSELL KLINE, DISH NETWORK SERVICE, L.L.C, DISH NETWORK, L.L.C.,

Defendants-Appellants,

and

CHRISTOPHER STENGEL, MY TREE BOYZ, LLC,JOHN DOES, MARY DOES, ABC PARTNERSHIPS AND XYZ COPORATIONS, jointly, severally and in the alternative,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET No. A-1017-23T4

Civil Action

On Appeal from the Law Division - Monmouth County

Docket No.: ATL-L-3919-21

Sat Below:
Hon. Danielle J. Walcoff, J.S.C.

DEFENDANTS-APPELLANTS, RUSSELL KLINE'S, DISH NETWORK SERVICE L.L.C.'S AND DISH NETWORK L.L.C.'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

RULES

TABLE OF ABBREVIATIONS

Pb Plaintiff-Respondent, Jasmine Robinson's, brief
Pa Plaintiff-Respondent, Jasmine Robinson's, appendix
Db Defendants-Appellants, Russell Kline, Dish Network Services, LLC, and DISH Network, LLC's, brief
Da Defendants-Appellants, Russell Kline, Dish Network Services, LLC, and DISH Network, LLC's, appendix
1T Transcript of hearing on motions in limine, dated September 26, 2023
2T Transcript of trial, dated October 3, 2023
3T Transcript of trial, dated October 4, 2023, Vol. I
4T Transcript of trial, dated October 4, 2023, Vol. II
5T Transcript of trial, dated October 5, 2023
6T Transcript of hearing on motion for new trial, dated November 16, 2023

STATEMENT OF ORDERS AND DECISIONS APPEALED

TABLE OF CONTENTS TO APPENDIX

Volume I - (Da1 to Da186)

[1] P-4 was not moved into evidence or marked during the course of the trial and is intentionally omitted.

PRELIMINARY STATEMENT

Defendants-Appellants, Russell Kline, Dish Network Service, L.L.C., and DISH Network, L.L.C. (collectively "Kline"), submit this reply brief in support of their appeal from the jury's verdict and the trial court's denial of Defendants' motion for a new trial. Plaintiff's and Co-Defendant's opposition ignores the clear and inexplicable contradiction that is the jury's verdict. While it is true that the jury was not asked to consider Plaintiff's negligence, the jury did not consider the Plaintiff's comparative fault because there was no factual basis to conclude that the Plaintiff was negligent. However, Kline engaged in the exact same conduct as Plaintiff and was assessed 40% fault for the accident. Both Plaintiff and Co-Defendant mischaracterize the testimony and facts. Kline did not unequivocally state that he was 200 feet from the intersection when the light changed to yellow, and he denied that he was attempting to beat the light. Plaintiff's brief purports to quote Kline admitting that he attempted to beat the light, which is a misrepresentation of the testimony.

The simple fact of this case is that Kline and the DISH Network defendants were the "deep pockets" Plaintiff needed to achieve a meaningful recovery. The trial court's evidentiary rulings in favor of the Plaintiff tilted the playing field in Plaintiff's favor and ensured that Plaintiff would receive a meaningful recovery. In doing so, the trial court deprived Kline a fair trial.

STATEMENT OF FACTS

Plaintiff and Co-Defendant mischaracterize, if not misrepresent, several aspects of the trial testimony. The primary basis of Plaintiff's and Co-Defendant's opposition to Kline's appeal is the contention that it was an undisputed fact that Kline was 200 feet from the intersection when the light turned yellow. This is simply not true. Kline did not unequivocally concede that he was 200 feet from the intersection when he observed the light change from green to yellow. Kline testified that he "estimated" that he may have been around 200 feet away from the intersection. Kline's actual trial testimony is as follows:

> Q. And am I correct that it was about 200 feet before you go to the intersection that you did see the yellow light for the first time?
> A. That was an estimate sir.
> Q. Yeah. And your best estimate at the time was about 200 feet; correct?
> A. Right.
>
> [3T:147-1 to 7 (emphasis added).]

Plaintiff glosses over the details of this testimony and does not even provide the Court with a proper page-and-line citation to the record, leaving the Court to guess at what portions of the transcript Plaintiff is citing to. In fact, throughout Plaintiff's brief, Plaintiff fails to provide any proper page-and-line citations and fails to identify any specific trial testimony to support any of her arguments. The truth is that Kline was uncertain of his distance from the intersection when the light turned yellow and

gave an estimate. Plaintiff and Co-Defendant ignore the physical evidence and the testimony of the other witnesses, which makes it impossible for Kline to have been 200 feet from the intersection when the light turned yellow.

Plaintiff also suggests that Kline admitted that he was trying to beat the light before it changed from yellow to red. The language quoted in Plaintiff's brief is from Plaintiff's counsel's question, not Kline's answer. Kline testified as follows:

> Q. You didn't know when that was going to turn red did you?
> A. No, Sir.
> Q. You wanted to try to get through that light before it turned red; true?
> A. Probably, yes.
> Q. So you probably speeded up a little bit from the 60 miles an hour you were already going to try to get through that intersection; isn't that true?
> A. No, Sir.
> Q. Did you remember whether you speeded up or not?
> A. I did not speed up.
>
> [3T:150-9 to 21 (emphasis added).]

Kline denied that he increased his speed as he approached the intersection. Plaintiff has misrepresented the facts to this Cout by suggesting that Kline admitted he was attempting to "beat the light." Pb5, Pb20-21. All Kline stated is that he wanted to be through the intersection before the light turned red. Of course, Kline intended to get through the intersection before the light turned red, that is not an admission that he was accelerating as he approached the intersection. Plaintiff was attempting to

accomplish the exact same thing from a similar distance while traveling at a similar speed. Moreover, Plaintiff and Stengel ignore Kline's testimony that he believed he was too close to the intersection to stop safely, 3T:159-25 to 160-6, exactly the same observation and decision made by Plaintiff. Simply put, if Plaintiff's conduct did not constitute negligence, neither did Kline's.

Plaintiff and Co-defendant completely ignore Plaintiff's testimony describing how the accident occurred. Plaintiff and Kline were both traveling on Route 54, one north and one south. Accordingly, both were subject to the same traffic signal. The jury clearly rejected Stengel's version of the accident and accepted Plaintiff's version. Having accepted the Plaintiff's version of the accident, the jury could not logically conclude that Kline was negligent because Kline necessarily entered the intersection before Plaintiff with the same yellow light while traveling at a similar speed.

Plaintiff also contends that Kline was speeding at the time of the accident. Kline again estimated his speed to be about 60 miles per hour and that he did not increase his speed or accelerate as he approached the intersection. 3T:147-8 to10; 3T:150-15 to 21. Plaintiff testified that she was traveling about 55 miles per hour as she approached the intersection and that she did not slow down as she approached the intersection. 3T:187-20 to 188-5. According to the police report, the speed limit on Route 54 in the area of the accident was 55 miles per hour. Da136. This means

both Plaintiff and Kline may have been traveling slightly in excess of the speed limit at the time of the accident. Plaintiff cannot in one breath contend that Kline traveling as much as five miles an hour above the speed limit constitutes a basis for a finding of negligence against Kline when Plaintiff was very likely traveling at the same or almost the same speed. This is yet another example of Plaintiff ignoring the facts and manipulating the testimony to fit a narrative that supports the Plaintiff's position. Plaintiff's and Co-Defendant's position simply ignores the objective truth and indisputable evidence. Accepting Kline's testimony about his speed as true, as Plaintiff has done, it was not physically possible for Kline to be 200 feet from the intersection when the light turned yellow and ultimately collide with Plaintiff's vehicle on the north side of the intersection after being struck by the Stengel vehicle. The accident simply could not have happened that way and the jury's conclusion that it did constitute a miscarriage of justice.

Other than misrepresenting Kline's testimony, neither Plaintiff nor Co-defendant provides any meaningful analysis of the evidence concerning the allocation of fault. In Plaintiff's 11-page Statement of Facts, she devotes one paragraph to a discussion of Kline's testimony about what he was doing in the moments before the accident and misrepresents what he stated. Pb5. The remainder of Plaintiff's discussion of the facts is devoted almost entirely to a discussion of Plaintiff's injuries and damages. Plaintiff provides lengthy block quotes from the

trial court's written decision denying Defendant's motion for a new trial in respect of the evidentiary rulings made during the trial. Pb8-11. Plaintiff never discusses her own testimony or the contradiction between the physical evidence and the suggestion that Kline was 200 feet from the intersection when the light turned green. Neither Plaintiff nor Stengel has even attempted to explain how it could be physically possible for Kline to be farther away from the intersection than Plaintiff when the light turned yellow and travel a farther distance than Plaintiff while traveling at a similar speed. They make no effort to address this fundamental flaw in the jury's verdict because they have no way of credibly explaining the inherent contradiction in the jury's verdict.

LEGAL ARGUMENT

I. THE JURY'S ALLOCATION OF 40% FAULT TO KLINE CONSTITUTES A MISCARRIAGE OF JUSTICE AND REQUIRES A NEW TRIAL. (Da272; 5T:121-21 to 123-2; Da187).

Plaintiff's position glosses over the details of the evidence and ignores the core factual argument advanced by Kline. The jury's verdict is against the weight of the evidence because there is no rational basis for the jury to have concluded that Kline acted negligently. A motion for a new trial and an appeal from the denial of a new trial motion requires a showing that the jury's verdict constituted a miscarriage of justice. The Supreme Court in Baxter v. Fairmont Food Co., 74 N.J. 588 (1997), quoting from its earlier decision in State v. Johnson, articulated the standard best:

> While this feeling of "wrongness" is difficult to define, because it involves the reaction of trained judges in the light of their judicial and human experience, it can well be said that that which must exist in the reviewing mind is a definite conviction that the judge (the jury) went so wide of the mark, a mistake must have been made. This sense of "wrongness" can arise in numerous ways from manifest lack of inherently credible evidence to support the finding, obvious overlooking or underevaluation of crucial evidence, a clearly unjust result, and many others.
>
> [74 N.J. at 599 (quoting State v. Johnson, 42 N.J. 146, 162 (1964) (emphasis added)).]

The jury clearly got it wrong in this case. There is simply no possible way Kline's conduct can be deemed negligent. Kline could not have been 200 feet from the intersection and traveled a significantly further distance than Plaintiff while traveling at a similar speed to Plaintiff. Even if Kline was traveling a few miles an hour over the speed limit, there is no evidence to support the suggestion that his doing so was somehow a proximate cause of the accident. The sole proximate cause of this accident was Stengel's entering the intersection against the light and entering Kline's lane of travel, an occurrence that the jury necessarily found to have happened.

Plaintiff and Stengel also make much of the fact that the jury was not asked to consider the Plaintiff's fault. It is true that Plaintiff's negligence was not submitted to the jury; all parties implicitly agreed that she bore no fault. However, that agreement highlights, rather than cures, the inherent contradiction in the jury's verdict. The jury was still required to pass judgment on the Plaintiff's version of the

accident versus Stengel's version. Kline essentially agreed with Plaintiff's version of the accident because Kline acted in substantially the same manner as Plaintiff. The jury was required to decide who had the right of the way and determine the status of the traffic signal at the moment of the initial impact between Kline and Stengel. The jury obviously concluded that the light was yellow as Plaintiff approached the intersection, and therefore, was yellow when Kline entered the intersection. Having made that determination there was no factual basis for the jury to conclude that Kline acted negligently.

II. THE TRIAL COURT'S EXCLUSION OF EVIDENCE OF STENGEL'S CRIMINAL CONVICATIONS DEPRIVED DEFENDANTS OF A FAIR TRIAL. (Da42; Da45; Da187).

Plaintiff and Stengel both ignore the words used by the trial court to express the legal standard applied by the court when deciding to exclude evidence of Stengel's criminal convictions. The trial court expressly stated that it equated the analysis under N.J.R.E. 403 with the analysis applicable to a conviction that was more than 10 years old on the date of the trial. 2T:27-15 to 28-12. At the time of the motion hearing on Kline's motion for reconsideration the trial court stated that "the potential probative value does not outweigh the prejudicial effect." 2T:28-8 to 9. N.J.R.E. 609(b) governs the admissibility of convictions that are more than 10 years old at the time of trial and requires a showing that the "probative value outweighs its prejudicial effect, with the proponent of that evidence having the burden of

proof." That is the standard the trial court applied to exclude evidence of Stengel's convictions.

N.J.R.E. 609(a)(1) provides that convictions that are less than 10 years old on the date of the trial are admissible unless excluded under N.J.R.E. 403. N.J.R.E. 403 provides that otherwise admissible evidence may be excluded "if its probative value is substantially outweighed by the risk of . . . [u]ndue prejudice . . . ." Ibid. (emphasis added). Unlike the analysis under N.J.R.E. 609(b), the burden of establishing that the risk of "undue prejudice" "substantially outweight[s]" the probative value of the disputed evidence rests with the party that seeks to exclude the evidence. Rosenblit v. Zimmerman, 166 N.J. 391, 410 (2001).

The analysis under N.J.R.E. 609(a)(1) favors the admissibility of evidence of a conviction by imposing the stringent standard for exclusion of the evidence set forth in N.J.R.E. 403 and places that burden on the party seeking to exclude the evidence. N.J.R.E. 609(b) establishes a legal standard that favors exclusion by excluding such evidence unless the probative value of the evidence outweighs the prejudicial effect of the evidence to any degree and places the burden of proving that on the party seeking to admit the evidence. Stated differently, if the prejudicial effect of the evidence outweighs the probative value to any degree the evidence is inadmissible under N.J.R.E. 609(b). Under N.J.R.E. 403, only where the risk of undue prejudice substantially outweighs the probative value of the evidence may it

be excluded. These are two very different standards. The trial court incorrectly equated the analysis under N.J.R.E. 403 with the analysis applicable to a conviction that was more than 10 years old. 2T:27-15 to 28-12.

More importantly, Plaintiff and Stengel ignore the fact that Stengel lied about his convictions at the time of his depositions. The real probative value of Stengel's convictions was not the convictions themselves. Rather, the true probative value rests in the misrepresentations he made under oath at the time of his deposition. See Da89 at 41-1 to 42-23. The trial court focused exclusively on the probative value of the convictions themselves and undervalued the probative value of Stengel's clear and undisputed misrepresentations at the time of his deposition. The application of the incorrect legal standard and the undervaluing of the evidence of Stengel's misrepresentations at this deposition are exactly the type of error that our courts have characterized as an abuse of discretion. See Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005) ("[A]buse of discretion is demonstrated if the discretionary act was not premised upon consideration of all the relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment."); Manalapan Realty v. Township Committee, 140 N.J. 366, 378 (1995) ("A trial court's interpretations of the law and the legal consequences that flow from established facts are not entitled to any special deference.").

It is also incorrect to state that the exclusion of this evidence had no impact on the jury's verdict. While it is true that the jury rejected Stengel's version of the accident, that was likely due to the jury's acceptance of the Plaintiff's version of the accident, which was supported by the physical evidence. Had the jury known that Stengel lied at his deposition about prior criminal convictions, it is very likely that the jury would have had a very different view of Kline and Stengel and their respective versions of the accident. It would seem that the jury understood that DISH Network represented the deep pocket and that allocating some percentage of fault to Kline was necessary to ensure that Plaintiff received a meaningful recovery. That is not a proper basis for a verdict and constitutes a miscarriage of justice.

III. THE EXCLUSION OF TROOPER MORENSKI'S DIAGRAM CONSTITUTED AN ABUSE OF DISCRETION AND DENIED KLINE A FAIR TRIAL. (2T:99-22 to 105-23).

Plaintiff and Stengel argue that the trial court properly excluded from evidence the diagram of the accident prepared by Trooper Morenski because the diagram was not based on Trooper Morenski's personal observation of the accident itself. In support of this argument Plaintiff argues that all of the evidence on which the diagram was based, statements of the parties, damages to the vehicles, and the final resting place of each vehicle, was all admitted, and therefore, it was not error to omit the diagram. This argument ignores the correct legal standard that governed the admissibility of the diagram and is illogical.

A police officer's lay opinions are admissible if based on personal observations at the scene of the accident. Neno v. Clinton, 167 N.J. 573, 585 (2001); State v. LaBrutto, 114 N.J. 187, 199 (1989). The decisional law makes clear that a police officer may offer lay opinion testimony about the points of impact based on the officer's observations at the scene of the accident after the accident has already occurred. Neno, 167 N.J. at 582.

The diagram that Trooper Morenski prepared is based on Trooper Morenski's observations at the scene and clearly depicts the points of impact between the three vehicles. Da140. Once again, Plaintiff mischaracterizes the evidence. There is nothing in the diagram prepared by Trooper Morenski that suggests how fast any of the vehicles were traveling or even who entered the intersection first. The diagram does not show the movement of vehicles other than to show that Kline was initially struck by Stengel and then pushed to the left at which point he struck Plaintiff. Da140. That movement is easily determined from the admissible statements made by the parties at the scene, the damage to the vehicles, and the final resting place of each vehicle. These are all observations made by Trooper Morenski at the scene of the accident. 2T:98-19 to 99-2.

Additionally, Plaintiff suggests that the diagram was of little value and would not have assisted the jury. This is simply not true. The accident involved three vehicles and two separate impacts. Understanding the configuration of the

intersection and exactly how the vehicles impacted one another was critical to a full and complete understanding of how the accident occurred. The diagram correctly shows that Kline was struck by Stengel in the right front bumper and pushed to the left causing Kline to then collide with Plaintiff. Da140. Had the jury seen the diagram, they likely would have better understood that Kline did not act negligently and that the sole proximate cause of the accident was Stengel's entering the intersection against the light. The diagram was critically important evidence and its exclusion was an abuse of discretion that deprived Kline of a fair trial and resulted in a miscarriage of justice.

IV. THE ADMISSION OF THE AUDIO PORTION OF THE DASHCAM VIDEO WAS IMPROPER AND GARNERED INAPPROPRIATE SYMPATHY THAT DEPRIVED KLINE OF A FAIR TRIAL (Da41; 1T:16-3 to 20-2).

Plaintiff and the trial court both mischaracterize the content of the audio portion of Trooper Morenski's dashcam video and in doing so undervalue the potential sympathy that evidence garnered in the jury and its shocking and upsetting content. Although the video was played only once, it is three minutes and forty-four seconds long. For almost two full minutes from approximately 1:50 to the end of the video, Trooper Morenski is standing next to Plaintiff's vehicle and she is heard crying and begging for help because her legs hurt so badly. Da170. The fear in Plaintiff's voice is palpable and her cries for help and pleas to the Trooper to help

her are difficult to listen to. The suggestion that the audio portion of the video was not shocking or upsetting to listen to is simply not an honest and fair characterization of the video. The video had a very significant impact on the jury and garnered significant sympathy for the Plaintiff. It is difficult to imagine any individual listening to that video and not feeling sympathy for the Plaintiff; a factor that should play no role in the jury's deliberations. Defendants respectfully submit that the audio portion of the dashcam video was inflammatory and had the "'probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the issues.'" State v. Cole, 229 N.J. Super. 430, 448 (2017) (quoting State v. Thompson, 59 N.J. 396, 421 (1971)).

V. THE VERDICT WAS EXCESSIVE AND SHOULD EITHER BE REMANED FOR A NEW TRIAL OR REMITTITUR. (Da187).

The majority of Plaintiff's brief is devoted to arguing that the Plaintiff suffered significant injuries that support the jury's damage award. As noted in Defendant's initial brief, there is no dispute that Plaintiff suffered significant injuries. However, the amount of damages awarded far exceeds what would typically be awarded for purely orthopedic injuries that were appropriately treated and from which the Plaintiff has made a very good recovery. Defendants do not intend to callously undervalue Plaintiff's injuries or the pain and suffering she experienced. However, a jury's verdict must be based on a purely objective view of the evidence,

untarnished by passion, prejudice, bias, or sympathy. See Model Civil Jury Charge 1.12. The significant amount of damages awarded coupled with the allocation of 40% fault to Kline is an obvious indication that the jury wanted to award a certain amount of damages to Plaintiff and knew that it had to tap into DISH Network's perceived deep pockets to accomplish that end. That is not an impartial, unbiased verdict based on an objective assessment of the evidence. That is a result-oriented verdict based on sympathy for the Plaintiff and constitutes a miscarriage of justice. Accordingly, Defendants are entitled to either a new trial on damages as well as liability or, alternatively, a remand to reconsider Defendants' motion for remittitur.

CONCLUSION

For all the foregoing reasons, Defendants-Appellants, Russell Kline, Dish Network Service L.L.C., and DISH Network L.L.C. respectfully request that the Court vacate the jury's verdict and order a new trial on all issues, or in the alternative, grant a new trial on liability only and remand for reconsideration of Defendants' motion for remittitur.

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