	:	*Superior Court of New Jersey*
	:	**APPELLATE DIVISION**
PASCAL LAMOTHE	:	
	:	*Docket No.: A-001342-23T1*
	:	
Plaintiff-Respondent	:	*ON APPEAL FROM*
	:	
vs.	:	Superior Court of New Jersey
	:	Law Division-Burlington County
DAJEYA HUGGINS, TEANA BYRD,	:	Docket No.: BUR-L-1918-20
DAYVON FORDE, JOHN/JANE DOE'S	:	
1-10, FICTITIOUS PERSONS AND/OR	:	
ABC CORPORATIONS, 1-10, J/S/A	:	
Defendants-Appellant	:	***SAT BELOW:***
	:	
----------	:	Hon. Aimee R. Belgard, J.S.C.

CIVIL ACTION

BRIEF AND APPENDIX ON BEHALF OF DEFENDANTS-APPELLANTS DAJEYA HUGGINS, TEANA BYRD & DAYVON FORDE

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PRELIMINARY STATEMENT

This appeal arises from a jury verdict awarding damages in an amount which the trial court considered "unexpected." Following trial, the Court was presented with unrefuted evidence that during jury selection and outside the presence of the court and counsel, Plaintiff repeatedly demonstrated signs of pain while among the array of potential jurors. The capacity of such behavior to intrude upon the jury's deliberative process should have been clear to the Court and warranted a presumption of prejudice to the defense which could only be overcome by an affirmative showing that Plaintiff's behavior did not influence the jury's decision. No such showing was made, and the trial court should have recognized that a miscarriage of justice had occurred.

The prejudice to the Defendants caused by Plaintiff's pre-trial behavior was compounded by the "theme" of the case espoused by Plaintiff's counsel on opening and in closing, the presentation of a lost wage claim without supporting expert proofs, Plaintiff's unsolicited testimony concerning a renewed course of treatment and the use of a time-unit argument in closing without prior notice to the defense.

Plaintiff's counsel began his opening by advising the jury that it was "in court" because the Defendants had refused for "nearly five years" to take responsibility for their actions. Specifically, counsel advised the jury that

Defendants had "done the easy part" by admitting their liability but had refused to do the "harder part" of compensating him for his injuries. Counsel's "theme" was repeated throughout opening and closing despite knowing that Defendants played no role in determining whether to go to trial and regardless of all parties' right to submit validly contested disputes to juries for resolution.

After advising the jury that it was its duty to make right what Defendants had refused to do, Plaintiff presented specific examples of harms for which Defendants had avoided responsibility. Thus, over Defendants' objection, Plaintiff made a lost wage claim without providing expert proofs to distinguish his admittedly unrelated and disabling medical conditions from any injury sustained in the accident. In addition, despite his expert's failure to opine that he required treatment subsequent to February 2021, during his testimony, Plaintiff "blurted out" that he recently had begun treating with a chiropractor, surprising both the defense and his own attorneys. His subsequent testimony that he had not sought treatment sooner because he did not have insurance coverage was equally problematic and inconsistent with the fact that no medical expense claim had been made on his behalf. Nonetheless, if it viewed the case in the manner directed by Plaintiff's counsel during his opening statement and again on closing, the jury was led inevitably to conclude that Defendants had wrongfully deprived Plaintiff of both earnings and the ability to obtain medical

care. Linking those claims to Defendants' alleged refusal to accept responsibility clearly had the capacity to inflame the passions of the jury, set them against the Defendants and deprive them of a fair trial.

The Defendants suffered as great, if not greater, prejudice when Plaintiff's counsel was permitted to make a time-unit argument without having advised the defense in advance of his intention to do so. As a result, the Defendants were deprived of any opportunity to counter Plaintiff's argument that the time-unit calculation was "one of the few ways available to contextualize the extent of a personal injury," practically guaranteeing that the jury would choose to use it to calculate its non-economic damage award. Wherever the fault lay for the failure to apprise the defense of Plaintiff's intention, it did not lie with the defense, and the trial court's determination to permit the argument rather than "punish" the Plaintiff unfairly added to the advantage already enjoyed by Plaintiff as the party closing last.

The errors outlined above lead inexorably to the conclusion that the jury's "unexpected" verdict was the product of such improper and irregular influences as to constitute a miscarriage of justice. Thus, and as more fully set forth in the Points of Argument addressing each of them, it respectfully is submitted that those errors require that the orders and judgments being appealed be reversed and a new trial ordered.

PROCEDURAL HISTORY

On October 9, 2020, a Complaint was filed in the Superior Court of New Jersey, Law Division, Burlington County on behalf of Plaintiff Pascal Lamothe against Defendants Dajeya Huggins, Teana Byrd, Dayvon Forde and a number of fictitiously identified parties. (Da1 to 9). In his Complaint, Plaintiff alleged that on December 1, 2018, he was driving a car which was struck from behind while stopped in the drive-through lane of a McDonalds restaurant in Mount Laurel, New Jersey. The car which struck his was driven by Defendant Huggins, owned by Defendant Byrd and entrusted to Huggins by Byrd's son, Defendant Forde. Plaintiff sought compensatory damages for injuries he allegedly suffered in the accident.

On November 17, 2020, an Answer to Plaintiffs' Complaint was filed on behalf of Defendants Huggins and Byrd. (Da10 to 14).

On April 5, 2021, an Amended Answer was filed on behalf of Defendants Huggins, Byrd and Forde. (Da15 to 20).

On January 18, 2023, Plaintiff filed a motion in limine to bar testimony at trial from Defendant Huggins. (Da21 to 22). Given the Defendants' subsequent agreement not to call Ms. Huggins as a witness at trial, the certification of counsel filed in support of this motion is not appended.

On February 8, 2023, Plaintiff filed a motion for partial summary judgment requesting a jury instruction as to Defendant Forde's duty to ensure that Defendant Huggins had a valid driver's license before entrusting his mother's car to her. (Da23 to 24). Given the stipulations subsequently made by the parties with respect to liability, the certification of counsel filed in support of this motion is not appended.

On March 7, 2023, Defendants filed a motion in limine to bar evidence of Plaintiff's medical expenses. (Da25 to 26). Given the stipulation subsequently made by Plaintiff with respect to the lack of any claim for medical expenses, the certification of counsel filed in support of this motion is not appended.

On March 31, 2023, the trial court heard oral argument on Plaintiff's motion for partial summary judgment and the parties' in limine motions. The transcript of oral argument is found at 1T. During argument, Defendants Huggins and Forde stipulated as to their full liability for the happening of the accident, and Plaintiff agreed to voluntarily dismiss his claims against Defendant Byrd. At that time, Plaintiff also withdrew his claim for medical expenses, and Defendants stipulated that no testimony would be presented from Defendant Huggins at trial.

On March 31, 2023, the trial court entered orders: (a) denying Plaintiff's motion for partial summary judgment as having been rendered moot by

Defendants' stipulation of liability, (Da27); (b) denying Plaintiff's in limine motion to bar Defendant Huggins' trial testimony as having been rendered moot by Defendants' agreement not to present such testimony, (Da28); and (c) denying Defendants' motion to bar Plaintiff's medical expense claim as having been rendered moot by Plaintiff's withdrawal thereof. (Da29).

On July 6, 2023, Plaintiff filed a motion in limine to bar admission of evidence concerning his mental and sexual health. (Da30 to 31). Plaintiff's motion was supported by a certification of counsel. (Da32 to 34).

On July 6, 2023, Plaintiff also filed a motion in limine to bar admission of evidence relating to a prior motor vehicle accident. (Da35 to 36). Plaintiff's motion was supported by a certification of counsel. (Da37 to 39).

On July 7, 2023, Defendants filed a letter brief in opposition to the in limine motions filed on July 6, 2023. Pursuant to R.2:6-1(a)(2), a copy of Defendants' brief in opposition is not appended hereto.

On July 10, 2023, Plaintiff filed a motion in limine to bar admission of evidence concerning specific trips and vacations taken following the accident. (Da40 to 41). Plaintiff's motion was supported by a certification of counsel. (Da42 to 44).

On July 11, 2023, the trial court heard oral argument on Plaintiff's in limine motions. The transcript of oral argument is found at 2T.

On July 11, 2023, the trial court entered orders: (a) denying without prejudice Plaintiff's in limine motion to bar evidence concerning a prior motor vehicle accident, (Da45 to 46); (b) denying without prejudice Plaintiff's in limine motion to bar evidence concerning specific trips and vacations taken following the accident, (Da47 to 48); and (c) granting Plaintiff's in limine motion to bar evidence concerning his mental and sexual health and his time out of work for health issues unrelated to the accident. (Da49 to 50).

On July 11, 12, 13 and 14, 2023, this action was tried before Honorable Aimee R. Belgard, P.J. Cv. and a jury. The transcripts of trial are found at 3T, 4T and 5T respectively.

During jury selection on July 11, 2023, one of the Court's officers brought actions by Plaintiff to the trial judge's attention. 6T.54:11 to 56:3. No contemporaneous record was made of the Court Officer's observations or the Court's and/or counsel's response thereto.

During Plaintiff's trial testimony on July 12, 2023, the trial court sua sponte instructed Plaintiff to limit his movements about the court room. 3T.50:22 to 51:14.

On July 14, 2023, the jury returned a verdict in favor of Plaintiff. By its verdict, the jury found that Plaintiff had sustained an injury in the accident and awarded damages of $3,500.00 for past lost wages. The jury also determined

that Plaintiff had sustained a permanent injury within the meaning of N.J.S.A. 39:6A-8(a) (the limitation on lawsuit threshold) and awarded $927,000.00 in non-economic damages.

On July 25, 2023, Defendants filed a motion for new trial. (Da51 to 52). Defendants' motion was supported by the Certification of Defendants' trial counsel. (Da53 to 55). Defendants also sought judgment notwithstanding the verdict as to defendant Forde but subsequently abandoned that argument.

On August 14, 2023, Plaintiff filed a Certification in opposition to Defendants' motion. (Da56 to 58).

On August 17, 2023, Defendants filed a letter brief in reply to Plaintiff's opposition. Pursuant to R.2:6-1(a)(2), a copy of Defendants' memorandum in opposition is not appended hereto.

On September 7, 2023, the trial court heard oral argument on and denied Defendants' motion for a new trial. The transcript of that oral argument is found at 6T.

On September 14, 2023, the trial court entered an Order for Judgment "in Plaintiff's favor" for $954,150.22. (Da59 to 61). The order did not indicate the parties against whom judgment was entered.

On September 20, 2023, Defendants filed a motion for reconsideration of the trial court's denial of their motion for a new trial. (Da62 to 63). Defendants'

motion was supported by a certification of counsel (Da64 to 66) to which was appended a certification from Defendants' insurance adjuster concerning Plaintiff's behavior during jury selection. (Da67 to 68).

On September 22, 2023, Plaintiff filed a letter brief in opposition to Defendants' motion for reconsideration. Pursuant to R.2:6-1(a)(2), a copy of Plaintiff's memorandum in opposition is not appended hereto.

On October 7, 2023, the trial court entered an order denying Defendants' motion for new trial. (Da69 to 70).

On October 12, 2023, Defendants filed a letter brief in reply to Plaintiff's opposition to their motion for reconsideration. Pursuant to R.2:6-1(a)(2), a copy of Defendants' brief in reply is not appended hereto.

On November 9, 2023, the trial court entered Final Judgment in Plaintiff's favor against Defendants Huggins, Forde and Byrd in the amount of $954,344.07. (Da71 to 73).

On December 1, 2023, the trial court heard oral argument on and denied Defendants' motion for reconsideration. The transcript of oral argument is found at 7T.

On December 1, 2023, the trial court entered an order denying Defendants' motion for reconsideration. (Da74 to 75).

On December 6, 2023, a Substitution of Attorney for Defendants was filed substituting current counsel for Defendants' trial counsel. (Da76).

On January 4, 2024, Defendants' Notice of Appeal was filed. (Da77 to 78).

On February 5, 2024, a Warrant to Satisfy the Judgment entered against Defendant Byrd was filed based upon the inadvertent inclusion of that Defendant as a party against whom judgment was entered on November 9, 2023. (Da79).

STATEMENT OF FACTS

On December 1, 2018, Plaintiff Pascal Lamothe, then 35 years-old, was the operator of a motor vehicle stopped in the drive-thru lane of a fast-food restaurant when his car was struck from behind by a vehicle driven by Defendant Dajeya Huggins. The vehicle driven by Ms. Huggins was owned by Defendant Teana Byrd who had permitted her son, Defendant Dayvon Forde, to use it. Mr. Forde, in turn, permitted Ms. Huggins to drive the car. Prior to trial, Defendants Huggins and Forde stipulated their liability for the happening of the accident, and Plaintiff agreed to voluntarily dismiss his claims against Ms. Byrd.

At trial, Plaintiff testified to having felt three impacts. 3T., at 27:16 to 25. He described the initial impact as so forceful that he was "pushed out of the window" through which he had been preparing to pay for his order. Ibid. Thereafter, his car was pushed into a fence. Id., at 28:1 to 16. Plaintiff "felt a lot of discomfort," "felt something was dislocated" and "felt pain" at the scene. Id., at 29:1 to 9. He declined transport by ambulance for treatment "[b]ecause I could not afford an ambulance at that time. An ambulance is very expensive, and I was able to bring myself to the urgent care." Id., at 31:1 to 10. At urgent care, Plaintiff complained of "discomfort" in his neck and upper back and a headache. Id., at 32:7 to 16. X-rays were taken. An examination

was conducted. Plaintiff was given Ibuprofen and referred to Dr. Gleimer for orthopedic evaluation. Id., at 32:17 to 33:11. He saw Dr. Gleimer for the first time on December 12, 2018. Id., at 33:5 to 34:4. At that time, he reported pain in his head, neck, back and radiating down his arms. Id., at 34:5 to 35:4. He also described being unable to sit for more than three hours before becoming exhausted by nerve pains in his back. Ibid. Dr. Gleimer referred Plaintiff for chiropractic care and for MRI and EMG testing. Id., at 35:5 to 25. Plaintiff saw Dr. Gleimer six further times through February 23, 2021. Id., at 35:19 to 21; 37:23 to 38:1. He received chiropractic care through Dr. Cicchini's office on "at least 84 visits" from December 17, 2018 through February 29, 2020 when his treatment stopped "because of Covid." Id., at 38:25 to 41:9. Despite his treatment, Plaintiff experienced no overall relief from his symptoms. Id., at 41:23 to 42:8. As of the time of trial, he continued to complain of neck, lower back and arm pain such that he spent 80% of his work day laying down using his lap top. Id., at 54:15 to 21. He also described an inability to play basketball and difficulties getting out of bed, cleaning up around the house, doing dishes, vacuuming, bending over, exercise and driving. Id., at 55:22 to 57:3. Plaintiff also testified that he was out of work from December 6, 2018 through January 24, 2019 sustaining a net wage loss of $2,867.31. Id., at 57:4 to 59:8.

Dr. Gleimer, a Board-Certified Orthopedic surgeon, testified as Plaintiff's expert. 4T., at 4:20 to 51:4. He opined that Plaintiff sustained "cervical disc herniations at the C5-6 and C6-7 levels" and bulging discs in his low back at the L4-5 and L5-S1 levels. Id., at 12:8 to 16. He opined further that Plaintiff's cervical injuries were permanent. Id., at 12:17 to 24. He was unable to say whether Plaintiff's low back injury was permanent. Id., at 12:25 to 13:11. His opinion with respect to Plaintiff's cervical spine was based upon his interpretation of an EMG study which he described as revealing right-sided C5, C6 nerve abnormalities which were consistent with a diminished biceps reflex detected during his physical examination. Id., at 31:19 to 33:12. According to Dr. Gleimer, Plaintiff's neck "will never return to normal," and he will have difficulty "maintaining his head and neck in fixed positions, car riding, turning, looking up, looking down, holding it in a sustained fashion." Id., at 41:9 to 42:13. Dr. Gleimer did not describe any similar ongoing limitations with Plaintiff's low back, did not opine that Plaintiff required further treatment for either his neck or his low back and did not opine that Plaintiff was unable to work at any time following the accident.

Plaintiff was examined on March 21, 2023, at the defense's request, by Dr. Ponzio, also a Board-Certified Orthopedic surgeon. 4T., at 65:25 to 66:6. Based upon that examination, Dr. Ponzio testified that Plaintiff did not sustain

a permanent injury in the accident. Id., at 65:17 to 24. Rather, he opined that plaintiff sustained a non-permanent neck strain. Id., at 90:14 to 22. Based upon his review of Plaintiff's MRIs, he described a disc herniation at C5-6, a central disc protrusion at C6-7 and a disc bulge at L4-5, and opined that each of those findings was degenerative and not caused by the accident. Id., at 81:5 to 90:13.

LEGAL ARGUMENT

POINT I

THE PLAINTIFF'S BEHAVIOR WHILE IN THE PRESENCE OF THE ARRAY OF POTENTIAL JURORS DURING JURY SELECTION HAD THE CAPACITY TO INFLUENCE THE JURY TO ARRIVE AT A VERDICT BASED UPON FACTORS OTHER THAN THE PROOFS PRESENTED AND THE COURT'S CHARGE. ABSENT AN AFFIRMATIVE SHOWING THAT IT DID NOT INFLUENCE THE JURY'S VERDICT, A NEW TRIAL MUST BE GRANTED. (6T. 5:17 to 16:7)

The damage awards in this case should have been based solely upon the facts set forth in the Statement of Facts above, the jury's evaluation of Plaintiff's credibility, the credibility of the experts' competing opinions, and the court's Charge. There is, however, a substantial basis to support the conclusion that the awards were the product of irregular and improper influences introduced during jury selection. Thus, although the facts are relatively straightforward, evaluation of the factors influencing the verdict requires more than an analysis of the amount of the award.

Plaintiff was involved in a rear end collision following which he sought emergent care, was evaluated on seven occasions by an orthopedist, treated with a chiropractor roughly 84 times over the course of 15 months and had diagnostic testing which his expert opined revealed two accident-related

herniated discs in his neck and nerve damage in his left arm. Plaintiff had no pain management procedures, and his expert offered no opinion concerning a need for future treatment. The jury's non-economic damage award of $927,000.00 based upon those proofs was "unexpected" by the trial court. 6T.62:14 to 63:19. Denying Defendants' motion for a new trial, the trial court failed to give due consideration to factors other than the amount of the award "tending to infect the verdict with prejudice, partiality or passion," see Henker v. Preybylowski, 216 N.J. Super. 513, 517-18 (App. Div. 1987), including particularly Plaintiff's behavior during jury selection.

In Panko v. Flintkote, 7 N.J. 55, 61 (1951), the New Jersey Supreme Court recognized that "[t]he fundamental right of trial by a fair and impartial jury is jealously guarded by the courts." Thus, parties "are entitled to have each of the jurors who hears the case, impartial, unprejudiced and free from improper influences." Ibid. Based thereon, "[i]t is well settled that the test for determining whether a new trial will be granted because of … the intrusion of irregular influences is whether such matters could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge." Ibid. Moreover, if the "irregular matter" has such a tendency on its face, "a new trial should be granted without further inquiry as to its actual effect." Ibid. The test, therefore, "is not whether the irregular

matter actually influenced the result, but whether it had the capacity to do so." Ibid. Such a stringent test is required to keep "the administration of justice free from all suspicion of corrupting influences." Ibid.

In Kavanaugh v. Quigley, 63 N.J. Super. 153, 161-62 (App. Div. 1960), the Court contrasted the rationale of earlier cases requiring that "irregularities" be shown affirmatively to have influenced a verdict to warrant a new trial with the modern, "far more realistic" approach adopted in Panko. In doing so, it noted that under Panko, if the record fails to establish whether or not an irregularity was prejudicial, "it is presumed to be so and cause for reversal." Ibid. Thus, "[i]t is only when the irregularity is affirmatively shown to have had no tendency to influence the verdict that reversal is not required." Ibid. In this case, the trial court utilized the pre-Panko test and rejected the defense's argument regarding Plaintiff's actions based upon its determination that the defense had not shown any demonstrable prejudice. 6T.55:20 to 56:3.

Jury voir dire in this case was conducted in the jury room of one of Burlington County's larger courtrooms. 6T.54:10 to 16. Members of the array waiting to be interviewed sat outside in the rows of the courtroom situated on either side of its center aisle. Ibid. During voir dire, a Sheriff's Officer alerted the Court to something Plaintiff had done which presumably was out of the ordinary. Id., at 54:17 to 23. No contemporaneous record was made of the

Officer's report or the Court's response. In denying Defendants' motion for a new trial, however, the Court recalled being advised that Plaintiff had walked in and out of the courtroom but was not made aware that he had interacted with or in any way attempted to influence any of the prospective jurors. Ibid. Although Plaintiff provided no certification, affidavit or other statement concerning his actions, opposing the motion, his attorney argued that it was "speculative" that his client did anything other than "just walk down the aisle to stretch his legs …[a]nd [on] some of those trips he went to the bathroom." Id., at 13:1 to 14:1. On Defendants' subsequent motion for reconsideration, the adjuster monitoring the case for Defendants' insurer submitted a certification describing her observations of Plaintiff during voir dire. Da67-68. In it, she described being seated just outside the courtroom, with full view thereof and observing:

> [o]n multiple occasions, the Plaintiff walked to the rear of the courtroom and just outside the door holding his back and grimacing in pain while walking in front of potential jurors. On several occasions, he stood at the door of the courtroom next to a juror who ended up on the panel, put his hands on the wall and did multiple stretches indicating he was in back pain.

Ibid. The adjuster certified that the officers overseeing the courtroom "were placed at the end of the hall at a desk with their backs primarily to the courtroom" and "periodically" checked the courtroom but "did not stand in or

near the courtroom for any length of time." Ibid. Plaintiff did not submit any certification or affidavit refuting the adjuster's observations.

At oral argument on Defendants' motion for reconsideration, the trial court's recollection of what had been reported during voir dire was more detailed than on the motion for new trial. Thus, the Court then recalled that during voir dire

> one of the sheriff's officers had advised me that he observed the plaintiff walking through the whole stretch of area that we have - - (indiscernible) a big courtroom. Um. You go back to the back of the courtroom and to the exit - - you exit out of the courtroom. But that it appeared to me that he observed this on a number of occasions.
>
> And so - - and I don't have the benefit of the - - transcript in from this, but my recollection is that I had instructed at that time if Mr. Lamothe felt that he needed to stretch his legs or get up and move around, that was fine. Um. But that it should be limited. And, um, that he be permitted to stay at the table or could exit through the - - back of the courtroom. But that I did not want him walking up and down through the - - um, through the array.

7T.25:9 to 26:4. Thereafter, the Court noted that it had been advised that Plaintiff "had walked up and down through that aisle on a couple of occasions." Id., at 26:12 to 16. The Court's instruction for Plaintiff to remain at counsel table or exit through the back of the courtroom was given because it "didn't want there to become a problem." Id., at 26:5 to 7.

The Court's recognition that Plaintiff walking up and down the courtroom's center aisle through the jury array could be "become a problem" is telling. Its decision to place limits on Plaintiff's movements in the presence of potential jurors is equally telling. Each acknowledges the clear potential that impressions of Plaintiff developed prior to trial could influence determinations subsequently made during deliberations. Although the Court chose to discount the accuracy of the insurance adjuster's certification, there can be no doubt that the behavior described therein was the type of "problem" it sought to avoid when it placed limits on Plaintiff's movements about the courtroom. Repeatedly grimacing in pain in front of potential jurors and stretching as if in pain while standing next to a juror ultimately chosen to hear the case have such a clear capacity to improperly influence decisions made in the jury room that if the trial court had accepted the adjuster's certification as an accurate description of Plaintiff's behavior, it would have been duty bound to assume prejudice to the defense and order a new trial. Unfortunately, despite the absence of any statement from Plaintiff or any Sheriff's officer contradicting the adjuster's descriptions of either the officers' location during voir dire or Plaintiff's behavior, the Court rejected it out of hand based upon its belief that there were two Sheriff's Officers in the courtroom at all times and neither reported the behavior described by the adjuster. Id., 26:17 to 27:9. Thus,

without anything in the record to support its conclusion that the adjuster's certification was "not exactly correct," the trial court rejected the only first-hand account of the Plaintiff's behavior it had. In doing so, it also relied upon the absence of any objection at trial based upon the adjuster's observations and the lack of any report from Court personnel indicating that Plaintiff was "attempting to influence these jurors." Id., at 27:10 to 28:4. In each instance, such reliance was misplaced.

In support of the defense's motion for reconsideration, Defendants' trial counsel submitted a certification in which he certified that the information contained in the insurance adjuster's certification was not known to him until after the motion for new trial was decided. Da64-66. As a result, it was not possible for an objection based thereon to have been made at trial. Insurance adjusters are not attorneys. They are observers rather than participants at trial. Their levels of experience vary. The failure of the adjuster to recognize the significance of Plaintiff's behavior and report it to defense counsel provides no basis to disregard the content of her certification, particularly in the absence of any certification or affidavit contradicting it.

In addition, the Court's reliance upon the failure of any member of its staff to report "attempts" by plaintiff to improperly influence the jury unduly limited the scope of the potentially corrupting influences against which courts

must guard and which the Court should have considered. The deliberative process "must be insulated from influences that could warp or undermine the jury's deliberations and its ultimate determination." Risko v. Thompson Muller Automotive Group, Inc., 206 N.J. 506, 523 (2011). Such influences include both deliberate attempts to undermine the process and unintentional acts with the capacity to improperly intrude upon it. In this case, the trial court was concerned only with the failure of anyone to report a deliberate attempt to influence the prospective jurors. Much like insurance adjusters, Sheriff's Officers and Court Attendants are not attorneys, and their levels of experience vary. Appreciating the significance of Plaintiff's conduct and its potential impact upon the ultimate outcome of the case is not their responsibility, and the failure of the Court's staff to report any deliberate attempt by Plaintiff to influence the jury did not provide a basis to reject the otherwise unrefuted observations of Defendants' insurance adjuster which, when accepted as true, clearly warrant a new trial.

Based upon the foregoing, it respectfully is submitted that the "problem" which the trial court sought to avoid by limiting Plaintiff's movements in and around the courtroom during jury selection had already occurred by the time it was brought to its attention. Impressions developed by jurors based upon Plaintiff's multiple forays among them had the clear capacity to influence

decisions subsequently made in the jury room. That capacity to improperly influence the ultimate outcome requires that prejudice to the Defendants be presumed and a new trial ordered absent an affirmative showing that no actual prejudice was suffered. Kavanaugh v. Quigley, 63 N.J. Super. at 161-62. The trial court failed to apply that standard on Defendant's motion for new trial, and thereafter, on their motion for reconsideration. As no showing was made that prejudice had not been suffered, a new trial must be ordered.

POINT II

THE TRIAL COURT SHOULD HAVE GRANTED THE DEFENDANTS' MOTION FOR RECONSIDERATION BASED UPON THE UNREFUTED CERTIFICATION OF DEFENDANTS' INSURANCE ADJUSTER DESCRIBING HER OBSERVATIONS OF PLAINTIFF DURING JURY SELECTION. (7T.4:4 to 21:1.)

As outlined in Point I above, there is no doubt that something occurred during jury selection which caused a Sheriff's Officer to bring to the trial judge's attention behavior which was out-of-the ordinary. No contemporaneous record was made thereof, and neither Plaintiff nor any member of the Court's staff subsequently provided any description of what occurred. By contrast, during the course of Plaintiff's trial testimony, the Court observed behavior which caused it to place its concerns on the record sua sponte. That is, during Plaintiff's trial testimony, video depicting his vehicle being pushed forward was shown to the jury. 3T.24:23 to 28:21. As it was being shown, Plaintiff was permitted, without objection, to leave the witness stand and approach the video screen while answering questions about what was depicted thereon. Ibid. Upon a subsequent, unrelated objection requiring the jury to leave the courtroom, id., at 45:7 to 51:15, however, the Court observed:

> We'll have them come back in if they're ready. Yeah. You know what? Let me just say too, I know the Plaintiff has had sort of free rein of the courtroom, and I know

> presumably he's in pain, but we need to keep that a little tighter. So, up at the witness - - I mean, obviously we needed to show the video and the like, but I don't want it to be a distraction for the jurors with the Plaintiff walking all around the courtroom and the like. Certainly, feel free to stand up, but - -

Id., at 50:22 to 51:26. Explaining the degree of deference appellate courts owe to a trial judge's "feel of the case," the Court in Cuevas v. Wentworth Group, 226 N.J. 480, 501-02 (2016) noted "[i]t is the judge who sees the jurors wince, weep, snicker, avert their eyes, or shake their heads in disbelief who may know whether the jury's verdict was motivated by improper influences and who may be privy to observations that could not have been made by the jury." (internal citations omitted). Having been deprived of the opportunity to make those kind of observations and assessments of the jurors' reactions to Plaintiff's conduct during jury selection, the trial court did not have the same opportunity to develop a "feel" for what occurred as it did during the trial. Instead, it was dependent on the reports of others when evaluating the potential that impressions developed before the trial began influenced the jury's verdict, and in this instance, its decision to disregard the certification of Defendants' insurance adjuster is not entitled to any deference from this Court. In the absence of any contrary evidence from any source, it was improper to have

done so, and Defendants' motion for reconsideration should have been granted based upon the conduct described therein.

POINT III

THE "THEME" OF PLAINTIFF'S TRIAL PRESENTATION AS SET FORTH IN COUNSEL'S OPENING STATEMENT AND DURING SUMMATION IMPROPERLY CHARACTERIZED THE DECISION TO GO TO TRIAL ON THE ISSUE OF DAMAGES AS A REFUSAL BY DEFENDANTS TO TAKE RESPONSIBILITY FOR THE ACCIDENT WHICH REQUIRED THE JURY TO HOLD DEFENDANTS "ACCOUNTABLE." (NOT RAISED BELOW)

At the beginning of his opening statement, Plaintiff's counsel advised the jury that the trial, "and every civil trial," was about "one thing - - "accountability." 3T.3:9 to 18. Thus, counsel advised the jury that "[o]ur entire system of civil law is based on the idea that if your conduct injures someone else, it's your responsibility to do something to make it right." Ibid. Based thereon, counsel advised the jurors that their role was to "make sure that that system functions best." Id., at 3:19 to 21. In essence, counsel advised the jury that it was its responsibility "to make it right" for the Plaintiff.

After advising the jury that the defense had stipulated liability, counsel went on as follows:

> So, you're probably wondering why am I in court today? The defendants admit they're at fault. It goes back to accountability. Because despite admitting that they caused the collision involved in this case they have for almost five years since this accident happened taken no steps to make things right. That is why we are all in court today.

Id., at 4:19 to 5:4. Thus, after introducing the concept of "accountability" as the focus of the trial, counsel advised the jury that the reason the parties were "in court" was because the Defendants had refused to do the right thing over the course of the preceding five years.

Upon previewing the evidence to be introduced concerning Plaintiff's injuries, counsel returned to his "theme" and said:

> Again, this case is about accountability. The defendants have done the easy part, put up their hands and said, yeah, we caused the accident, and yet in the almost five years since it happened they have never done the second part of what true accountability is - -.

Id., at 10:14 to 19. Defense counsel objected thereto and the trial court directed counsel to refrain from talking about accountability for the remainder of his opening which concluded almost immediately thereafter. Id., at 10:20 to 12:8.

"It is the duty of the lawyer not to make any statement in his opening remarks which he knows cannot be admitted in evidence." Paxton v. Misiuk, 54 N.J. Super. 15, 20-21 (App. Div. 1959). The reasons why a case is tried rather than settled "cannot be admitted in evidence" for consideration by a jury evaluating the type of damage claims presented in this case. It, therefore, would have been improper for Plaintiff to have attempted to introduce any evidence regarding the parties' pre-trial discussions regarding the merits of the case and the bases upon which either party's decision to go to trial was made.

Moreover, Defendants have the right to dispute claims made against them and have those disputes resolved by a jury. Henker v. Preybylowski, 216 N.J. Super. at 516. It is improper, therefore, to attack a defendant for doing so. Ibid. That, however, is exactly what Plaintiff's counsel did. He characterized Defendants' decision to go to trial as their refusal to "make it right." The remarks were all the more egregious because counsel was aware that the decision to try the case was made by the Defendants' insurer rather than the Defendants themselves and that any evidence concerning insurance was inadmissible.

Plaintiff's counsel returned to his "theme" immediately upon beginning his summation advising the jury that it had become clear during the course of the trial that "defendants must be held accountable" and again referring to the "more difficult" obligation of "doing something to make it right." 4T.156:17 to 157:5. Counsel then argued that despite their obligation "the defendants did nothing but make light of this situation and about the idea of accountability as a whole." Id., at 157:6 to 8. Continuing, counsel said:

> They started this trial with the jokes and doodles frankly, I think Pascal is right to be outraged. He's been waiting five years for his chance to get in the courtroom. Weathered a pandemic like we all have, just to get here. Five years for his chance at accountability.

Id., at 157: 8 to 14.

Addressing Plaintiff's nervousness on the stand, counsel attributed it in part to the "hostility by nature of the courtroom environment," but said "I think that can largely be explained by this idea that again, Pascal's been waiting for his chance at accountability and then he shows up in court and is shown things he has cause to see in his medical records and is told that everything that he's been led to believe about his treatment is a lie." Id., at 157:15 to 22. Recounting the proofs in Plaintiff's favor and addressing the defense's arguments concerning Plaintiff's ability to continue with his ordinary activities, counsel argued that "[i]n that world (i.e., the defense's "world"), no one is entitled to accountability because they try and live your (sic) life," id., at 192:4 to 16, arguing thereafter that "[w]e're here for accountability for the ways his life has changed." Id., at 193:15 to 20.

Counsel's "theme" was repeated once more in his final remarks to the jury:

> [S]o, I have to end on it, accountability. We live in a world governed by the idea that when you do something wrong, you take steps to make it right. That is the long and short of why we are here. Regardless of any distractions about what Pascal can and can't do or should or should not do, the reality is that the defendant should and must be held accountable for this collision, because as a direct result of that collision, Pascal Lamothe has permanent injuries which he will suffer from for the rest of his life.

Id., at 203:9 to 20.

In Jackowitz v. Lang, 408 N.J. Super. 495, 504-05 (App. Div. 2009), the Court considered "the limits of advocacy as the trial and jury system achieves resolution of disputes." In doing so, the Court recognized that although "[c]ounsel's arguments are expected to be passionate," they must be "fair and courteous, grounded in the evidence and free from any 'potential to cause injustice' such as 'unfair and prejudicial appeals to emotion' and insinuations of bad faith on the part of the defendants who sought to resolve by trial validly contested claims against them." (internal citations omitted) Ibid. Despite the lack of objection by defendant's trial counsel, the Court in Jackowitz affirmed the trial court's grant of a new trial based upon the presentation of a "theme" identical to the one presented in this case. There, on opening, Plaintiff's counsel advised the jury that it was being asked to "send a message" to the defendant and other drivers that when people suffer injuries as a result of another's bad driving, "there must be a consequence." Id., at 500. Much as Plaintiff's counsel herein, counsel in Jackowitz also cited the length of time Plaintiff had been "waiting for you to send a message … that there need to be consequences when people do the types of things" the defendant did. Ibid. Ultimately, the Jackowitz Court held that "the use of the 'sending a message' argument is inappropriate in a civil case where the only issue is compensatory damages." Id., at 509. The "theme" of the case expressed during Plaintiff's

counsel's opening statement and closing argument was equally improper and requires reversal.

Plaintiff's counsel's "theme" was the same as in Jackowitz, substituting the concept of "accountability" for "consequences" and repeatedly imploring the jury to "make right" what the Defendants had failed to do over the course of "nearly five years." In the process, counsel introduced matters which were neither admissible as evidence nor provable in the case. Specifically, the Defendants themselves played no role in determining whether the case was going to be settled or tried. Nonetheless, Plaintiff's "theme" throughout was that the trial was necessary because the Defendants had failed to accept "accountability" for the consequences of their negligence. In doing so, counsel also improperly attributed the length of time Plaintiff had waited to obtain accountability to Defendants' failure to "make things right." As the Jackowitz Court recognized, defendants are entitled to "resolve by trial validly contested claims against them" free from "insinuations of bad faith" for disputing plaintiffs' claims. In this case, Plaintiff's counsel not only insinuated bad faith but argued that the defense was based upon "jokes and doodles" about which Plaintiff had a right to be outraged. Plaintiff's counsel's remarks were neither fleeting nor isolated. They admittedly presented the "theme" of the case and

warrant a new trial on damages despite defense counsel's failure to renew his objection.

When, such as here, a showing of plain error is required to order a new trial due to counsel's failure to object at trial to the matter now argued to have been improper, it must be shown that Plaintiff's counsel's comments had the "clear capacity to produce an unjust result." Tartaglia v. UBS PaineWeber, Inc., 197 N.J. 81, 128 (2008). "To be reversible under the harmless error standard, the possibility must be real, one sufficient to raise reasonable doubt as to whether [the error] led the jury to a verdict it otherwise might not have reached." Willner v. Vertical Reality, Inc., 235 N.J. 65, 79 (2018) (internal citations omitted). Error cannot be harmless if there is some degree of possibility it led to an unjust result. Ibid. By focusing the jury on the alleged need to hold Defendants accountable for damages for which they refused to take responsibility, counsel's opening and closing remarks repeatedly implored the jury to use its verdict to right the "wrong" suffered by Plaintiff as the result of the defense's decision to contest his claim. Given the pervasiveness of the "theme" presented, there is ample reason to believe that the jury was led by it to a verdict it would not have reached otherwise, and a new trial must be ordered.

POINT IV

BY PERMITTING PLAINTIFF'S COUNSEL TO MAKE A TIME-UNIT ARGUMENT ON CLOSING WITHOUT PROVIDING THE DEFENSE WITH PRIOR NOTICE THEREOF, THE TRIAL COURT DEPRIVED THE DEFENSE OF ANY OPPORTUNITY TO ADDRESS PLAINTIFF'S ARGUMENT. (4T.194:10 TO 200:25; 6T. 17:2 to 33:11)

R.1:7-1(b) permits any party in civil litigation to suggest to a trier of fact that unliquidated damages be calculated "on a time-unit basis without reference to a specific sum." When such arguments are made to a jury, the Rule requires the trial court to instruct the jury that time-unit calculations are argument only and do not constitute evidence. In Henker v. Preybylowski, 216 N.J. Super. at 520, the Court held that "a plaintiff's attorney intending to use the time-unit argument in his closing statement must, before, closing statements begin, request the judge to give the cautionary instruction required by" the Rule. Doing so not only ensures that the Court will give the required charge "but also serves as timely notice to defense counsel so that he may deal with the argument in his closing statement if he so chooses." Ibid. The record in this case is devoid of any mention of the time-unit argument prior to summations.

At the conclusion of the testimonial phase of the trial, the trial court conducted a charge conference with the parties during which it went over the

form of the Charge it had prepared based upon the parties' pretrial exchanges. 4T.118:24 to 137:16. The proposed Charge included Model Civil Jury Charge 8.11G(i) on life expectancy. It did not include 8.11G(ii) on the time unit rule which was not referenced in Plaintiff's pretrial exchange. 6T.24:2 to 26:12. In reviewing that Charge with the parties, the Court inquired and obtained Plaintiff's life expectancy from his counsel. 4T.132:1 to 132:6. No mention was made of the time unit rule, and Plaintiff's counsel did not indicate to the Court that it had omitted a portion of the Charge he had requested. As a result, the Charge agreed upon by the parties did not contain any reference to the time unit rule, and in his summation, defense counsel did not address the time unit rule argument. When Plaintiff's counsel began to make that argument during his closing, defense counsel objected citing the lack of any prior notice of counsel's intention to make it. Id., at 194:9 to 10. At that time, the trial court acknowledged that the argument had not been discussed during the charge conference but observed that it "might" have been the Court's fault for "not catching it." Id.,199:15 to 18. Thereafter, the Court concluded that Plaintiff's request for Model Civil Jury Charge 8.11G(ii) included a request for the time unit charge and attributed the failure to address it during the charge conference or in the agreed upon Charge to its own mistake for which the Plaintiff should not have been "penalized." Id., at 200:3 to 18; 6T.58:7 to 16. As a result,

Plaintiff was permitted to proceed with the argument during which he advised the jury that the time-unit analysis "is one of the few ways under the court rules, the same rules that defense counsel have introduced during his closing, it's one of the few ways that we can contextualize the extent of a permanent injury." 4T.201:2 to 11. Based upon Plaintiff's life expectancy of 40.5 years, counsel argued that Plaintiff had 14,782 days, or 354,780 hours to live. 6T.58:17 to 25. The Charge given to the jury included the time-unit provisions of 8.11G(ii). 5T.20:24 to 21:20.

Although the trial court "fell on its sword" and accepted responsibility for not reading a request for the time-unit charge into Plaintiff's request to charge "Model Civil Jury Charge 8.11G(i): Life Expectancy," it was not the Court's or defense counsel's responsibility to do so. The Rule requires that the party intending to make the argument request the charge prior to summations. No such request was made. To the extent that any party should have been disadvantaged as a result of the failure to include that charge, it should have been Plaintiff and not the Defendants. Precluding Plaintiff's counsel from making the argument would not have had any impact upon the evidence relied on to prove his case and would not have prevented him from responding to or commenting upon any aspect of the defense's arguments. By contrast, the defense was severely disadvantaged by being deprived of the opportunity to

address the argument which included Plaintiff's counsel's reference to its sanction by the same court rules raised by defense counsel in closing. In essence, plaintiff's counsel advised the jury that the argument was permitted by the Rules and was one of the few ways the jury could "contextualize" the consequences of Plaintiff's permanent injury. The Defendants' silence on the subject and failure to offer any alternative means by which to "contextualize" Plaintiff's claims had the clear capacity to be seen as a tacit acceptance of Plaintiff's argument, practically guaranteeing that the jury would use it in calculating non-economic damages. Thus, Plaintiff's presentation of the time-unit argument "unchecked" by Defendants' counter-argument unduly prejudiced the defense, produced a miscarriage of justice and warrants reversal.

POINT V

PLAINTIFF'S PRESENTATION OF A LOST WAGE CLAIM UNSUPPORTED BY EXPERT PROOFS AND HIS UNSOLICITED TESTIMONY CONCERNING HIS RETURN TO TREATMENT COMPOUNDED THE PREJUDICIAL IMPACT OF THE "THEME" OF THE CASE PRESENTED BY PLAINTIFF'S COUNSEL. (2T.22:10 to 25:25; 3T.51:22 to 54:12; 6T.16:8 to 17:1)

By the time this case came on for trial, the parties had secured the de bene esse testimony of their medical experts. Dr. Gleimer first saw Plaintiff on December 12, 2018, less than two weeks after the accident. 3T.33:1 to 16. He saw him periodically thereafter until February 2021. Id., at 51:17 to 21. During the course of his testimony, Dr. Gleimer gave no indication that he had instructed Plaintiff not to work during that time, and he was not asked, and therefore did not offer, any opinion concerning Plaintiff's ability to work. 4T.6:12 to 51:4. As a result, it came as a surprise to defense counsel when Plaintiff amended his Pre-Trial Exchange to identify a witness to support a lost wage claim. 2T.22:10 to 23. Although the Court precluded testimony from that witness, over the defense's objection, it permitted Plaintiff to present his claim that he was unable to work from December 6, 2018 through January 24, 2019, during the majority of which time he was under Dr. Gleimer's care. 3T.57:18 to 59:8. Plaintiff admittedly applied for disability before and after the accident for conditions unrelated to it. Id., at 58:9 to 20. Without expert proofs

distinguishing between the accident-related and unrelated causes of those disability applications, Plaintiff presented a net wage loss claim of $2,867.31. Ibid. The jury awarded $3,500.00. 5T.33:18 to 34:2. The discrepancy between the amount proven and the amount awarded is not known. Assuming, however, that the jury accepted Plaintiff's counsel's repeated entreaties to "make right" that which Defendants had refused to do for "nearly five years," whatever the amount awarded, the presentation of the claim compounded the prejudice to Defendants caused by counsel's "theme" by giving the jury the impression that the Defendants had wrongfully deprived Plaintiff of earnings due him. Similarly, and despite the lack of any testimony from Dr. Gleimer concerning the need for any treatment subsequent to February 2021, during the course of his direct testimony, Plaintiff "blurted out" that he had recently returned to treatment. 3T.51:22 to 52:4. In an equally unresponsive answer to a question posed on cross-examination, Plaintiff testified that he had not gone back for treatment sooner because he had been without insurance for one-and-one-half years. Id., at 108:19 to 22. In essence, despite the lack of any claim for medical expenses, Plaintiff portrayed himself as having been in need of treatment for a significant period of time but unable to obtain it based upon a lack of insurance which he presumably could not afford due to Defendants' failure to accept accountability for his damages. Thus, as presented, by failing to "make

it right", Defendants not only deprived Plaintiff of two months of earnings, they also deprived him of the ability to seek needed medical care.

"The purpose of … personal injury compensation is neither to reward the plaintiff nor to punish the defendant but to replace plaintiff's losses." Caldwell v. Haynes, 136 N.J. 422, 433 (1994). Plaintiff's "theme" in this case asked the jury to do more than compensate him. The "wrong" which Plaintiff tasked the jury with "righting" was not the physical harm done to him, but rather, the wrongful behavior of the Defendants over the course of nearly five years in refusing to compensate him. Righting the "wrong" done by that behavior had nothing to do with compensating Plaintiff for his injuries and everything to do with punishing the Defendants for disputing their nature and extent. Attributing Plaintiff's lost wages and inability to obtain treatment to the Defendants' failure to "do the right thing" compounded the prejudice inherent in the argument by giving the jury bases to attribute economic as well as non-economic harms to Defendants' alleged failure to take responsibility for their actions.

CONCLUSION

Based upon the foregoing Statement of Facts and legal arguments, it respectfully is submitted that the orders and judgments which are the subject of this appeal must be reversed and the matter remanded for a new trial on the issue of damages.

Respectfully submitted,
CAMPBELL FOLEY DELANO & ADAMS

Stephen J. Foley, Jr., Esq.

Dated: May 3, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-001342-23

PASCAL LAMOTHE,

Plaintiff-Respondent,

v.

DAJEYA HUGGINS; TEANA BYRD; DAYVON FORDE; JOHN/JANE DOES 1-10, Fictitious Persons; and ABC CORPORATIONS 1-10, Fictitious Entities, j/s/a

Defendants-Appellants.

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT, LAW DIVISION
BURLINGTON COUNTY

Docket No.: BUR-L-1918-20

Honorable Aimee R. Belgard, P.J.Cv.
Sat Below

BRIEF
FOR
PLAINTIFF-RESPONDENT, PASCAL LAMOTHE

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PRELIMINARY STATEMENT

On July 14, 2023, six citizens of Burlington County were asked to adjudicate claims of personal injury asserted by Plaintiff-Respondent, Pascal Lamothe, against Defendants-Appellants, Dajeya Huggins and Dayvon Forde. In the preceding days, they had heard testimony from Pascal, watched recorded testimony from competing expert witnesses, and considered arguments made by counsel. These jurors were repeatedly instructed to divorce themselves from any passion, prejudice, or sympathy, and to consider only those facts presented at trial. The Honorable Aimee R. Belgard ensured that the trial commenced fairly, timely, and in adherence to the Rules of Court.

Those six jurors determined that Pascal Lamothe sustained permanent injuries in a motor vehicle collision caused by Defendants. They considered the severity of his injuries, the radical upheaval in his quality of life, and his life expectancy. And upon this consideration, the jury rendered a reasonable award meant to compensate Pascal for the lifetime of suffering he will endure.

Incensed by a result different than their expected "no cause," Defendants desperately endeavor to claw back this lawfully entered verdict.

Defendants accuse Judge Belgard of admitting the verdict to be "unexpected." While it is true that Judge Belgard noted that the verdict - $3,500.00 for lost wages, and $927,000.00 for pain, suffering, and loss of

enjoyment of life – was "unexpected," she also conclusively held that the award was not at all shocking to her conscience. Judge Belgard found the verdict to be fair and reasonable given the evidence presented, and additional factors observed by the Court. Most convincingly, Judge Belgard upheld this verdict not once, or twice, but on three separate occasions.

This appeal constitutes the fourth attempt by Defendants to overturn this verdict, with the first three all being unequivocally denied by Judge Belgard. First, Judge Belgard addressed most of the issues argued herein when they originally appeared at trial. Second, Her Honor entertained them on Defendants' Motion for New Trial. Third, she dispensed with them on Defendants' Motion for Reconsideration. Defendants had three, separate opportunities to present a single meritorious argument now on appeal, and all three times, they failed.

As the Court will see in the following Brief, Defendants still fail to present a single valid reason why the verdict in Plaintiff's favor should be overturned. Some of the arguments they present are works of legal alchemy, where mundane aspects of trial are transmutated into grave transgressions on their rights as litigants. Other arguments stem from moments at trial where Defendants never objected, and, quite curiously, only seem to realize any alleged prejudice now that they have heard the jury's verdict. Still, other

arguments were not only never objected to at trial, but never included in either of Defendants' prior pleas for post-trial relief.

As many litigants do when their arguments lack substance, Defendants resort to selective quotation and convenient mischaracterization to portray this trial as some kind of circus. It is telling that Defendants' Statement of Facts is only three and a quarter pages long, and deals so flippantly with the voluminous record in this case. That is why Plaintiff presents such an exhaustive summary of trial, with direct reference to actual quotations, their important contexts, and the findings of Judge Belgard.

Defendants' rampant inconsistency belies any professed sense of "justice" paraded in their appeal. This appeal is an assault on justice. A man was left permanently injured in a motor vehicle collision. A jury of his peers found in his favor, awarding him compensation that will never remediate his lifetime of suffering. In response, Defendants spare no expense, and pay no mind to the resources of the judiciary, to see this justice undone.

PROCEDURAL HISTORY

On December 1, 2018, Plaintiff-Respondent, Pascal Lamothe, sustained permanent injuries in a motor vehicle collision with Defendants-Appellants, Dajeya Huggins and Dayvon Forde (Da1-9). On October 9, 2020, Plaintiff filed the Complaint that initiated this action (Da1-9). Defendants' Answer,

and Amended Answer, were filed on November 17, 2020, and April 5, 2021, respectively (Da10-20).

On February 8, 2023, Plaintiff filed a Motion for Partial Summary Judgment seeking a jury instruction on negligent entrustment (Da23-24). This Motion was predicated on the fact that Defendant Forde had entrusted his vehicle, which was owned by his mother, Teana Byrd (who is no longer a party in this matter), to Defendant Huggins, who was underage and did not possess a driver's license (1T, at 4:6-5:4). At oral argument, Defense counsel was adamant that they would stipulate liability at trial (1T, at 10:25-12:17). Based on this averment, the Motion was denied as moot (1T, at 16:11-23).

Trial began on July 11, 2023, before the Honorable Aimee R. Belgard, P.J.Cv. (2T). Judge Belgard heard Motions in Limine, and reviewed with counsel relevant logistics for the following days (2T).

It is at this point in Defendants' Brief that they discuss factual elements of trial. Plaintiff reserves any rebuttal or clarification of the factual record for the following Statement of Facts.

Procedurally, voir dire began on July 12, 2023 (3T). A jury was empanelled, and counsel for both parties introduced that jury to the case through their opening statements (3T, at 3:9-16:7). What followed was an uneventful trial. Plaintiff took the stand, followed by expert witnesses for both

sides, and closing argument (3T; 4T). On July 14, 2023, at the conclusion of the evidence and argument, the jury found that Plaintiff sustained a permanent injury proximately caused by the December 1, 2018 collision (5T, at 33:5-34:17). Based on the evidence presented, the jury rendered a verdict of $3,500.00 in lost wages, and $927,000.00 in compensatory damages for Plaintiff's pain, suffering, and loss of enjoyment of life (5T, at 33:5-34:17).

On July 25, 2023, Defendants filed a Motion for New Trial (Da51-52). After reviewing the papers submitted by counsel, and hearing oral argument on September 7, 2023, Judge Belgard denied the Motion for New Trial on all grounds (Da69-70; 6T).

Defendants soon followed this denial by filing a Motion for Reconsideration on September 19, 2023 (Da62-63). As with Defendants' prior plea for relief, Judge Belgard carefully reviewed the briefs and arguments of the parties, and denied Defendants' Motion for Reconsideration on December 1, 2023 (Da74-75).

Defendants retained appellate counsel on December 6, 2023 (Da76). This counsel neither participated in, nor was present for, any portion of trial or post-trial motions. Defendants filed their Notice of Appeal on January 4, 2024, bringing the matter before this Court (Da77-81).

STATEMENT OF FACTS

On December 1, 2018, Plaintiff-Respondent, Pascal Lamothe, was in line at a McDonald's drive-thru in Mount Laurel, New Jersey (Da2; 2T, at 23:15-19). While Plaintiff was waiting at the last window to get his food, he was forcefully struck in the rear by the vehicle behind him (2T, at 25:24-27:25). Despite having his foot on the brake, Plaintiff's vehicle was pushed forward, then struck two more times as it was barreled through the drive-thru (2T, at 27:16-28:8). Immediately after the impact, Plaintiff felt discomfort, pain, and a sensation that "something was dislocated." (3T, at 29:1-5).

The vehicle that struck Plaintiff was owned by Teana Byrd, who is no longer a party in this matter (Da1-2). Ms. Byrd entrusted the vehicle to her son, Defendant, Dayvon Forde, who in turn permitted Defendant, Dajeya Huggins, to drive it (Da1-2). At the time, Huggins was underage and unlicensed (Da2).

Voir dire began on July 12, 2023. As with every trial, civil or criminal, the jury was instructed to notify the Court if any party or counsel tried to communicate with or influence them in any way (7T, at 9:25-10:10). Jury selection was then conducted by having each prospective juror join Judge Belgard and counsel in the jury deliberation room connected to the courtroom,

where they would be screened for selection (6T, at 54:5-16; 7T, at 24:21-25:20).

At some point during this process, after Judge Belgard and counsel emerged from the deliberation room after questioning a potential juror, one of the in-court sheriff's officers notified Her Honor that Plaintiff had walked in and out of the courtroom a number of times (6T, at 54:17-23; 7T, at 24:21-25:20). Judge Belgard's courtroom is one of the largest in the county, with the door located at the rear behind the gallery (6T, at 54:5-16; 7T, at 24:21-25:20). The sheriff's officer did *not* inform Her Honor that Plaintiff had "circulated" the array; only that he left and came back, which entailed walking down the aisle to get to the door (6T, at 6:11-21). Judge Belgard told Plaintiff that he was free to stretch his legs or get up to move around if he needed, but if he did, he should either do so at his seat at counsel table, or out in the hallway, rather than going back and forth (7T, at 25:21-26:4).

In addition to that sheriff's officer, multiple other individuals observed voir dire, including when Judge Belgard and counsel were in the jury deliberation room. Among them were: a second sheriff's officer, the court clerk, Defendants, the Defense insurance adjuster, and various other court

personnel (6T, at 55:8-19; 7T, at 14:7-12; 26:8-16; 27:22-25).[1] None of these individuals, and none of the members of the jury array, reported that Plaintiff attempted to speak to, interact with, or in any way influence any member of the jury pool (6T, at 55:8-19; 7T, at 25:21-4; 26:8-16).

Defense counsel never objected to Plaintiff's actions, either then during voir dire, or at any other time during the course of trial (7T, at 27:10-22). Interestingly, at the conclusion of Motions in Limine just the day prior, Defense counsel himself, on the topic of objections, stated, "Pursuant to the rules, if I don't make it I lose it…." (2T, at 44:24-45:5).

In his opening statement, Plaintiff's counsel introduced the jury to the function of civil law in America, and its inherent dependence on the concept of accountability (3T, at 3:9-21). "Our entire system of civil law is based on the idea that if your conduct injures someone else, it's your responsibility to do something to make it right. It's a pretty simple concept." (3T, at 15-18).

Plaintiff's counsel then related this notion of accountability to the present case as a means of explaining the peculiarity of stipulated liability (3T, at 4:19-22). Posed rhetorically, Plaintiff's counsel asked:

> So you're probably wondering why am I in the court here today? The defendants admit they're at fault. It goes back to accountability. Because despite

[1] This included Judge Belgard's law clerk, and three observing judicial interns (7T, at 14:7-12).

> admitting that they caused the collision involved in this case they have for the almost five years since this accident happened taken no steps to make things right. That is why we are all in court today.

(3T, at 4:22-24).

When Plaintiff's counsel first introduced this theme of accountability, Defense counsel never objected. However, at the end of Plaintiff's opening, when they circled back around to their theme, Defense counsel did object (3T, 10:20). Defense counsel admitted that they "let it go the first time," but argued, "That's not part of an opening statement… That's a closing argument." (3T, at 10:24-11:9; 11:22-25).

To this, Judge Belgard instructed Plaintiff's counsel to refrain from discussing accountability any further (3T, at 12:1-3). Because Plaintiff's counsel was about to conclude his opening, there was no issue.

Defense counsel began their opening statement with an anecdote about how he bears a resemblance to George Washington (3T, at 13:1-12). Then, Defense counsel presented to the jury his own theme of the case. Counsel drew two doodles on the courtroom easel – one of a juror with a dunce cap, and another of a juror labeled "common sense" – explaining:

> Now, many times – many times a juror comes to trial, and they think that – they think that when they come to trial there is a special hat they have to wear, that they have to think differently because they are now a juror. Well, no one is wearing a juror hat. What you

> have – what you have is common sense. And that's why we have a jury of our peers.

(Pa25-26; 3T, at 13:13-22).

Similar to Plaintiff's counsel, Defense counsel addressed the stipulated liability of the case in relation to their theme. "Yeah. It was our fault," they admitted, before imploring the jury to compare the footage of the collision, and photographs of the damage, to Plaintiff's claimed injuries, and to "[u]se your common sense." (3T, at 14:18-21).

Plaintiff was called as the first witness, and requested to stand as an accommodation for his injuries (3T, at 16:24-17:2). Neither counsel, nor Judge Belgard, found this request objectionable, so Plaintiff was permitted to testify standing up in the witness box.

Plaintiff testified to his account of the collision, above, and did so with the assistance of security camera footage from the drive-thru (3T, at 24:23-28:19). Stepping into the well of the courtroom to gesture to the TV monitor, Plaintiff identified his vehicle and walked the jury through the happening of the collision (3T, at 24:23-28:19).

Plaintiff next explained to the jury the treatment he received. He underwent orthopedic care from Dr. Barry Gleimer, to whom Plaintiff expressed not only neck and back pain, but also the development of a radiating pain into his arms (3T, at 33:5-34:9). Plaintiff also saw a chiropractor named

Dr. Cicchini, with whom he treated for roughly two years until the COVID pandemic prevented him from attending any further (3T, at 35:5-18; 40:7-41:9).

Plaintiff also testified that immediately after the collision, he had to take a two-month leave from work because of his injuries (3T, 38:8-17). Even when he returned to work, Plaintiff had to take "consecutive leave," and leave work midday because of his inability to work a full day (3T, 38:8-17). Later in his testimony, Plaintiff expounded upon this situation (3T, at 57:4-58:6). In total, Plaintiff estimated that he incurred $2,867.31 in lost wages, in addition to having to exhaust all of his sick and vacation time to take the leave he needed (3T, at 58:7-59:8).

It was at this point in the trial that the jury was excused for a brief recess so Judge Belgard could address an objection with counsel.[2] After a lengthy discussion of the objection, just before the jury was brought back into the courtroom, Judge Belgard noted:

> Okay. All right. We'll have them come back out if they're ready. Yeah. You know what? Let me just say too, I know the plaintiff has had sort of free rein of the courtroom, and I know presumably he's in pain, but we need to keep that a little tighter. So, up at the witness – I mean obviously we needed to show the video and the like, but I don't want it to be a distraction for the jurors with the plaintiff walking all

[2] This objection does not relate to any of the issues on appeal.

> around the courtroom and the like. Certainly feel free to stand up, but – [interjection] – Okay. That's fine. Thank you.

(3T, at 50:22-8). This request was prompted by the fact that after Plaintiff's reference to the TV monitor, he continued to answer questions without returning to the witness box. Plaintiff understood Judge Belgard's request, and remained in the witness box for the remainder of his testimony.

When testimony resumed, Plaintiff mentioned that he had recently visited another chiropractor (3T, at 52:2-4). Defense counsel objected, as this information was unknown to both counsel in this case (3T, at 52:5-12). In discussing the comment at side bar, Plaintiff's counsel suggested a different way of asking the question, to which Defense counsel replied, "That works for me. I know it's a difficult situation to be in, and I don't want to draw unnecessary attention to it." (3T, at 53:3-8). Judge Belgard agreed with this course of action, and decided to let trial progress without shining a spotlight on the comment (3T, at 53:9-12).

Plaintiff concluded his direct testimony by expressing the pervasiveness with which his injuries affect his life. This included mention that he worked 80% of his day on his laptop laying down (3T, at 55:12-21). Plaintiff shared that he can no longer play basketball, which he called "one of my biggest passions." (3T, at 56:1-4). And Plaintiff expressed similar frustration with his

dramatically diminished lifestyle, and inability to perform even menial household chores (3T, at 56:5-57:3). Critically, at the time of trial, Plaintiff was only 40 years old (3T, 1t 18:17-18).

Defense counsel began their cross-examination by attacking Plaintiff's decision to stand while giving testimony. "You were just seated, right? Am I correct? And you were seated outside in the hall?" (3T, at 64:21-22). From there, Defense counsel pursued lines of questioning common on cross-examination in motor vehicle collision cases. This included a heated exchange where Plaintiff disagreed with characterizations of his condition contained in treatment records he had never seen before (3T, at 90:21-106:14; 113:16-24).[3]

The next day, the jury heard testimony from experts on behalf of both parties. Dr. Gleimer's ultimate conclusion was that, as a direct result of the December 1, 2018 collision, Plaintiff sustained: cervical disk herniations at C5-6 and C6-7; lumbar bulges at L4-5 and L5-S1; and a cervical radiculopathy (4T, at 12:8-13:11). Dr. Gleimer concluded that the cervical injuries were permanent, and that all of Plaintiff's injuries would get worse over time (4T, at 12:8-13:11; 13:17-14:8). Dr. Gleimer also corroborated the extent to which these injuries will affect Plaintiff's quality of life (4T, at 13:17-14:8). Defense

[3] At one point, Defense counsel's questioning became so argumentative that Plaintiff's counsel objected, which was sustained by Judge Belgard (3T114:25-117:8).

expert, Dr. Robert Ponzio, disagreed with this conclusion, and testified that he believed Plaintiff did not sustain any permanent injury in the subject collision (4T, at 92:12-23).

With cases in chief completed, the trial moved to its charge conference. When the issue of life expectancy arose, Judge Belgard offered, "And then it's just the standard charge. For life expectancy, I don't know what that is." (4T, at 132:24-133:2). Plaintiff's counsel responded with Plaintiff's life expectancy at the time, which was 40.5 years (4T, at 133:3). Judge Belgard then asked Defense counsel, "Sound okay to you, Mr. Young?," to which he replied, "Sounds all right." (4T, at 133:4-6).

Defendants' closing began by reminding the jury that they "can't decide this case using passion, prejudice, bias or sympathy." (4T, at 143:11-15). From there, Defense counsel openly mocked Plaintiff's testimony:

> We saw him testify during direct examination. We saw machinations that he was going through. His testimony, I have to sleep when I do – I have to lay down when I'm doing my work. I can't and he had several jobs after this – he was going, ah, ah, ah, I can't sleep, ah, ah, ah, all related to his back. Okay. Hmm.
>
> But he couldn't sit down in court, but there were several times – or at least two times that he did sit down in court. Once, before the jury came in and he was talking to his attorney and he was sitting in that chair. Another time, because I asked him, he was

> sitting on the bench outside, but yet in here, always standing.

(4T, at 144:14-145:2). Defense counsel then concluded by reasserting their theme of common sense (4T, at 155:14-18).

In Plaintiff's closing argument, counsel began by rearticulating their theme of accountability, specifically the notion that although Defendants stipulated liability, they must still be held accountable for the damages they caused (4T, at 156:24-5). Next, counsel attempted to rehabilitate Plaintiff's agitated composition on the stand, particularly as a response to the argumentative tactics of Defense counsel:

> Now, in light of that, the defendants did nothing but make light of this situation and about the idea of accountability as a whole. They started this trial with the jokes and the doodles frankly, I think Pascal is right to be outraged. He's been waiting five years for his chance to get in the courtroom. Weathered a pandemic like we all have. And the circumstances of life, just to get here. Five years for his chance at accountability.
>
> And I recognize he was nervous on the stand. He was met with some hostility by nature of the courtroom environment. But I think that can largely be explained by this idea that again, Pascal's been waiting for his chance at accountability and then he shows up in court and is shown things he has [no] cause to see in medical records and is told that everything he's been led to believe about his treatment is a lie.

(4T, at 157:6-22).

The argument that followed highlighted the medical conclusions supporting Plaintiff's claims, and then discussed each facet of Plaintiff's life that had been upended by this collision (4T, at 165:8-181:24; 190:18-193:20).

Since Plaintiff suffered permanent injuries, Plaintiff's counsel naturally focused the jury's attention on Plaintiff's life expectancy (4T, at 194:21-194:2). For a 40-year old like Plaintiff, life expectancy was calculated at 40.5 years (4T, at 194:21-194:2). To expound upon this argument, Plaintiff's counsel showed the jury how 40.5 years extrapolated into days (4T, at 194:3-8).

Defense counsel objected to this presentation on grounds that Plaintiff's counsel never indicated their intent to make a time-unit argument (4T, at 194:10-14). Plaintiff's counsel immediately responded that it was included in their pretrial submission, and that it was their belief that the charge was included for use at trial (4T, at 194:15-16).

Judge Belgard noted that the parties did not discuss the time-unit rule during the charge conference, but that "it might have been my mistake of not including it when it's requested." (4T, 196:14-15). Her Honor and counsel reviewed the language of the model charge and Plaintiff's pretrial memorandum, and concluded that the entirety of Model Civil Jury Charge 8.11G was requested by Plaintiff, which included the time-unit rule (4T, at

199:3-18). Judge Belgard asked Plaintiff's counsel what they planned to argue next (4T, at 199:16-18). Counsel explained that they only intended to extrapolate the life expectancy into hours, then argue that this was one of the few ways Plaintiff could convey to the jury the extent of his permanent injury (4T, at 199:19-23).

Judge Belgard held that counsel could present to the jury Plaintiff's life expectancy, including how it broke down into smaller units of time, because this was something the jury could easily determine themselves. As a compromise, Plaintiff's counsel was precluded from entering into any time-unit argument (4T, at 200:3-18).

When they resumed argument, Plaintiff's counsel argued exactly what was indicated to the Court (4T, at 201:2-11). At no point during closing argument did Plaintiff's counsel ever suggest to the jury that they should award compensation based on a function of any unit of time (4T, at 194:3-203:24).

The jury was then charged and released for deliberation (5T, at 29:11-14). Defense counsel, unprompted, congratulated all participants on a fair trial:

> Thank you, Your Honor. At this time, I'd also on the record, like to thank Your Honor and your staff. It was a really well conducted trial, and I really appreciate that. And also I'd like to thank my

> adversaries, and the gentlemen (indiscernible), and I appreciate it.

(5T, at 30:11-16).

When the jury returned, they unanimously found that: (1) Plaintiff suffered injuries proximately caused by the subject collision; (2) Plaintiff was entitled to $3,500.00 for lost earnings proximately caused by the collision; (3) Plaintiff suffered a permanent injury as a result of the collision; and (4) Plaintiff was entitled to $927,000.00 in compensatory damages (5T, at 33:9-34:17).

Defendants moved for a new trial on July 25, 2023 (Da51-52). In this Motion, Defendants raised many of the issues featured in the present appeal, including:

- Plaintiff's stretching during voir dire (6T, at 6:2-16:7);
- Plaintiff's reference to continuing treatment with a new chiropractor (6T, at 16:8-24:1);
- The dispute around the time-unit rule (6T, at 24:2-35:18); and
- Plaintiff's presentation of a wage loss claim (6T, at 35:19-46:3).

In addition to these arguments, Defendants also contended that the verdict was invalidly entered because they never intended to stipulate liability on behalf of Defendant Forde (6T, at 46:4-53:3). This argument is not included in the present appeal, likely because it was Defense counsel who,

during the February 8, 2023 oral argument, vehemently insisted that liability was being stipulated as to all Defendants (Da23-24; 1T, at 10:25-12:17; 16:11-23).

Judge Belgard denied Defendants' Motion on all grounds (Da69-70; 6T, at 64:6-10). Specifically, Her Honor dispensed with each of Defendants' arguments as follows:

- There was no indication from anyone involved with the trial that Plaintiff attempted to influence or interact with the jury during voir dire. Judge Belgard noted that voir dire can take a long time, and potential jurors and litigants alike are free to move, stretch, and use the restroom at their leisure. Her Honor explained that the Courts accommodate witnesses as needed, which in this case included Defense Counsel's consent to let Plaintiff stand during his testimony. She also found that Defense counsel used Plaintiff's condition to their advantage during cross-examination by drawing to the jury's attention times during the trial when Plaintiff elected to sit (6T, at 54:5-57:8);

- Defense counsel quickly and effectively objected to Plaintiff's testimony regarding resuming treatment with a chiropractor, which was properly handled by the Court. Defense counsel never moved for a mistrial at that point, which Judge Belgard noted would have been improper given how the objection was addressed (6T, at 57:9-58:8); and

- Plaintiff did, in fact, request the time-unit charge prior to trial, which was never brought up during the charge conference. Upon Defendants' objection, Plaintiff was permitted to present to the jury the extrapolated units of life expectancy – something they could easily deduce on their own – but was precluded from arguing anything beyond that. Therefore, "the plaintiff did not actually go into any sort of unit analysis," or suggest that the jury should "allocate some amount of money of their choosing to that time."

> Defendants were thus in no way prejudiced by a time-unit argument that was never made (6T, at 58:7-59:23).

After finding that none of the foregoing constituted a miscarriage of justice, Judge Belgard turned her attention toward the jury's verdict. Her Honor concluded that while the verdict was "unexpected" when compared to other verbal threshold cases, she found that it was in no way shocking to the conscience (6T, at 62:14-63:9). She reasoned that there has been a noticeable trend of large verdicts in soft tissue verbal threshold cases post-COVID, and that the evidentiary proofs submitted by Plaintiff supported the award (6T, at 62:14-63:19). Plaintiff at the time was only 40 years old, with most of his life left to live (6T, at 63:10-19). Dividing the compensatory award by the number of years left to live, Plaintiff would receive less than $23,000.00 per year – again, a proper amount given the injuries proven (6T, at 63:10-19).

On September 19, 2023, Defendants filed their second attempt at post-trial relief in the form of a Motion for Reconsideration (Da62-63). This Motion was predicated on a Certification from the Defense insurance adjuster, Caitlin Short, which was dated September 20, 2023 – one day *after* the Notice of Motion (Da67-68). Defense counsel argued that the Certification revealed that Plaintiff had stretched at the rear of the courtroom in view of some of the array (7T, at 5:2-7:19).

In denying the Motion, Judge Belgard was concerned by the factual inaccuracy of the Certification (7T, at 26:17-27:9). The Certification insinuated that the courtroom was unsupervised while voir dire was conducted because sheriff's officers were only located at the end of the hallway (Da62-63; 7T, at 26:21-27:9). However, the reality was that there were two sheriff's officers present in the courtroom at all times (7T, at 27:3-9).

Judge Belgard also expressed incredulity with the timing of the Certification. Ms. Short observed the entire trial, but never alerted Defense counsel to any potential prejudice such that Defense counsel could have objected during voir dire (7T, at 27:10-18). In Her Honor's own words:

> But that was not done on day one of the jury selection. It was not done on day two, three or four of the trial.
>
> It was never brought to the Court's attention that there was any concern here. And, again, none of the Court personnel ever indicated that the plaintiff was potentially doing something, um, impermissible in attempting to in any way influence these jurors.

(7T, at 27:18-25).

From there, Judge Belgard reaffirmed how plaintiffs may conduct themselves in the courtroom. "We have to take parties as they come." (7T, at 28:5). Litigants who are in pain, such as Plaintiff, may limp, or grimace, or require accommodations from the Court; and the Court has no power to rid them of these afflictions (7T, at 28:5-28:24). Such manifestations of pain,

absent any further, inappropriate conduct, are in no way prejudicial (7T, at 28:5-28:24). And again, in this case, "There was never indication – any indication – I state there's still no indication that [Plaintiff] was acting inappropriately or acting out before the jurors." (7T, at 28:25-29:3).

In concluding her opinion, Judge Belgard reminded Defendants that rather than objecting to Plaintiff's actions or on-stand demeanor, Defendants tried to use them against him in their argument (7T, at 29:3-11). For these reasons, Her Honor found that the Certification presented no new evidence, and therefore, she reaffirmed her decision to preserve the jury's verdict in this case (7T, at 29:12-25).

ARGUMENT

I. STANDARD OF REVIEW

Plaintiff finds it telling that despite being the party who filed this appeal and shoulders the burden of proof, Defendants never provide a standard of review. Any serious request for relief, regardless of before which body it is made, must acknowledge the bar over which they attempt to hurdle. This is especially true when the bar for relief is as high as it is in the present case.

Defendant's omission is an indictment of the inherent vapidity of their appeal. The failure to include a standard of review reminds Plaintiff of the faults with Defendant's earlier attempts at gaining a new trial, which were

untimely made, often unsupported by objection, and in defiance of the factual record.

An appellate court cannot reverse a trial court's decision to deny a motion for new trial unless it is clear that there was a miscarriage of justice under the law. R. 2:10-1; Caicedo v. Caicedo, 429 N.J. Super. 615, 627-28 (App. Div. 2016). Juries are afforded wide latitude in deciding cases, including the amounts they decide to award for pain and suffering; latitude so sweeping that jury verdicts are presumed correct. Jackowitz v. Lang, 408 N.J. Super. 495, 504 (App. Div. 2009); Baxter v. Fairmount Food Co., 74 N.J. 588, 598 (1977). For this reason, judges may not substitute their own judgment for that of the jury simply because they might have reached a different conclusion. Jackowitz, 408 N.J. Super., at 504 (citing Johnson v. Scaccetti, 192 N.J. 256, 279 (2007)). The only situation in which the Court may grant remittitur or a new trial is if the verdict is so clearly disproportionate with the proofs that it shocks the Court's conscience. Caicedo, 429 N.J. Super., at 628 (citing Johnson, 192 N.J., at 281).

In engaging with this standard, an appellate court must afford deference to the trial court's "feel of the case." Caicedo, 429 N.J. Super., at 628 (citing Jastram v. Kruse, 197 N.J. 216, 230 (2008)). The idea of deferring to the trial judge's perspective "is not just an empty shibboleth." Jastram, 197 N.J., at

230. The trial judge is the only member of the judiciary who gets to see and hear what actually occurs at trial, including what, if any, effect it has on the jury. Id.

Clearly, the standard of review does not provide disgruntled appellants with a second bite at the apple (or a third, or a fourth). Rather, it provides relief to litigants only in those cases where justice is so betrayed, the judiciary so offended, and the trial judge so dubious, that the jury's verdict must be vacated.

This is not one of those cases. Judge Belgard presided over the entirety of trial and post-trial motions, and her "feel" of the case remained resolute that no miscarriage of justice occurred. None of the arguments pushed by Defendants resulted in any prejudice. None of these issues led to any impermissible impact on the jury. And in no way was the jury's verdict shocking to her conscience, or incongruous with the evidence presented.

For these reasons, this Court cannot reach any decision other than to preserve the jury's verdict in this case, and deny the present appeal.

II. PLAINTIFF'S NEED TO STRETCH AND USE THE RESTROOM IN NO WAY INFLUENCED THE JURY, AND IN FACT, WAS FULLY PERMISSIBLE UNDER THE RULES OF THE COURTROOM. IT IS APPELLANTS' BURDEN TO PROVE THAT THERE WAS ACTUAL IMPACT ON THE JURY TO OBTAIN A NEW TRIAL, NOT RESPONDENT'S BURDEN TO DO THE OPPOSITE.
(Raised Below: 6T, at 54:5-57:8)

Defendants begin their argument by insisting that the jury's verdict should have been solely based on the facts presented at trial, the jury's evaluation of credibility, and the charges of the Court. This is likely the only facet of this case on which the parties agree. Where the parties diverge, however, is in Defendant's inability to accept that the jury *did* exactly that, but reached a verdict that was not in their favor.

Plaintiff was involved in a forceful rear end collision in which his vehicle was propelled through a McDonald's drive-thru, despite having his foot on the brake (2T, at 27:16-28:8). Plaintiff immediately felt like "something was dislocated." (3T, at 29:1-5). He drove to urgent care after the collision, concerned for the cost of taking an ambulance (3T, at 31:3-24). Then he treated for about two years with a chiropractor to manage his pain (3T, at 35:5-18; 40:7-41:9).

The jury heard this in conjunction with objective, credible medical evidence presented by Plaintiff's treating orthopedist, Dr. Barry Gleimer. The diagnostic tests performed by Dr. Gleimer revealed two herniated disks in

Plaintiff's neck, an associated nerve injury in his neck, and two bulging disks in his low back (4T, at 12:8-13:11). Dr. Gleimer concluded that the first two of these injuries were permanent, and that all of Plaintiff's injuries would only get worse as he aged (4T, at 12:8-13:11; 13:17-14:8).

Perhaps most convincing to their verdict, the jury was shown each and every way these injuries have corrupted Plaintiff's life. The time missed from work; having to work 80% of his day laying down; the inability to play basketball, one of Plaintiff's biggest passions; the issues sitting, and standing, and inescapable tingling radiating down his arms; and the fact that Plaintiff's life expectancy of 40.5 years was longer than the time he had already been alive (3T, 38:8-17; 54:24-8; 55:12-21; 4T, at 193:21-194:2).

The jury distilled this evidence, the credibility of the witnesses, and the charges of Judge Belgard – which included charges to remove passion, prejudice, bias, and empathy from their consideration – and decided that Plaintiff was entitled to a sum that would reasonably compensate him for the rest of his life (5T, at 33:9-34:17).

Defendants now scapegoat Plaintiff's need to stretch and use the restroom during voir dire as a way out of this verdict. But in trying to bootstrap this mundane aspect of trial with case law condemning improper influences, Defendants highlight the canyon of difference between Plaintiff's

actions during voir dire, and the type of irregular conduct that actually warrants a new trial.

Defendants rely on Panko v. Flintkote, in which the Supreme Court of New Jersey overturned a verdict in the plaintiff's favor. 7 N.J. 55, 62-63 (1951). But the Court did not reach that decision because the plaintiff happened to be in visible pain, or needed to stretch, or permissibly walked through the courtroom. The Court vacated the jury's verdict because it was revealed that on the second day of trial, a juror's brother-in-law placed a call to the president of the corporate defendant, from the juror's home, in which he asked about the defendant's policy limits. Id. at 58-61. The brother-in-law actually learned these limits, and then discussed the case with the juror. Id.

Kavanaugh v. Quigley, the second case relied upon by Defendants, featured a similarly startling irregularity. 63 N.J. Super. 153 (App. Div. 1960). There, the deliberating jury informed the bailiff that they needed additional instructions from the Court. Id. at 156. According to one juror, the bailiff told the jury they had to "bring in a verdict one way or another." Id. The bailiff insisted that he instead told the jurors to write down whatever information they desired, and that he would convey it to the judge. Id. at 156-57. He claimed that he never received any written request, so he never reported to the trial judge that the jurors had requested additional instruction. Id. In granting the

plaintiff a new trial, the Appellate Division ruled that the bailiff had violated his oath, and that doing so had tainted the jury. Id, at 158-62.

Clearly, the actions of Plaintiff during voir dire are totally eclipsed by the irregularities in these cases. Not only was Plaintiff's conduct not equally egregious, but it was so pedestrian that it does not even register as irregular.

During voir dire, litigants and jurors are fully permitted to get up from their seats, stretch, and even leave the courtroom, so long as they report to court staff (6T, at 55:6-19). This is especially the case for a litigant who is actively in pain and in need of relief.

A civil plaintiff may limp to the stand, or need to be wheeled there, or bear the visible scars of their injuries. They might wince, grimace, or cry on the stand as they testify. These are all human realities of litigation that no court has the ability to censor. Defendants have to take their plaintiffs as they come, and Judge Belgard made this point very clear when she twice rejected Defendants' argument (6T, at 55:8-19; 7T, at 28:5; 28:5-28:24). This is also why, repeatedly throughout the trial, both Judge Belgard and Defense counsel instructed the jury to decide this case free from passion, prejudice, bias, or sympathy (4T, at 143:11-15; 5T, at 22:1-23:7).

Importantly, Judge Belgard also instructed all members of the jury array to notify the Court if any party or their counsel attempted to speak to them,

interact with them, or influence them in any way (7T, at 9:25-10:10). And yet, not a single juror alerted the Court of any improper conduct (6T, at 55:8-19; 7T, at 25:21-4; 26:8-16). Neither did any of the other court personnel who were present in the courtroom, including: both in-court sheriff's officers; the court clerk; Defendant Forde; Defendant Forde's mother, Teana Byrd; the Defense insurance adjuster; Judge Belgard's law clerk; and three observing interns (6T, at 55:8-19; 7T, at 14:7-12; 26:8-16; 27:22-25).

Due to the glaring absence of any contemporary allegations of improper influence, Plaintiff strongly contests Defendants assertion that it is incumbent upon Plaintiff to affirmatively prove none occurred. Much like how Defendants neglect to provide a Standard of Review, they cite no authority that shifts the burden of *their* plea for relief to Plaintiff.

Returning to the banality of Plaintiff's actions, jurors are free to consider a litigant's body language and presentation in their appraisal of credibility. A litigant may blush and avert their eyes when confronted on cross-examination. They might exhibit physical traits that contradict their allegations of injury. And sometimes, they are just victims who cannot help but suffer from the injuries they sustained as a result of another's negligence.

To find proof of this trial tactic, the Court need look no further than Defense counsel. They employed a deliberate strategy of trying to paint

Plaintiff as incredible in their characterization of Plaintiff's delivery and body language. On cross-examination and closing argument, Defense counsel highlighted how Plaintiff requested an accommodation to stand during his testimony, but then decided to sit at other points of the trial (3T, at 64:21-22). Defense counsel also ridiculed times Plaintiff winced during his testimony and complained of pain (4T, at 144:14-145:2). Clearly, Plaintiff's need to stretch or grimaces of pain, during voir dire and throughout the rest of the trial, were not impermissible irregularities, but ammunition Defense counsel was happy to use for argument.

This naturally leads to the most confounding question in Defendants' contention of improper influence: Why did they not object?

When one of the in-court sheriff's officers dutifully notified Judge Belgard of the events of the courtroom in her absence, Defendants never objected (6T, at 54:17-23; 7T, at 24:21-25:20). When Judge Belgard politely asked Plaintiff to either stretch at counsel table or in the hallway, Defendants never objected (7T, at 25:21-26:4). When Plaintiff requested to stand during his direct testimony, Defendants never objected (3T, at 16:24-17:2). When Plaintiff entered the well to gesture to the TV monitor and continued to testify without returning to the witness box, Defendants never objected (3T, at 50:22-

8).[4] Throughout two more full days of trial, Defendants never objected. When Judge Belgard prepared charges to the jury, which included those regarding improper influence, Defendants never objected (4T, at 117:6-135:13). Before their closing argument, where they attempted to use Plaintiff's actions and expressions to their benefit, Defendants never objected. And after the jury was released for deliberations, and Defense counsel placed on the record their congratulations to Judge Belgard for presiding over a fair trial, they still never objected (5T, at 30:11-16).

If Plaintiff's conduct during voir dire was truly so prejudicial, with such capacity to influence the jury, how could Defendants possibly have failed, at every stage of trial, to object on the record, or even voice the smallest shred of dissatisfaction? Or, is it more likely that Defendants not only never saw it as a problem, but even considered it a potential boon to their case? And that it is only now that they have heard the jury's verdict that Defendants scramble to reverse engineer a possible ground for a new trial?

[4] Defendants attempt to conflate Judge Belgard's comment on "free rein" with Plaintiff's actions during voir dire to create the impression that Plaintiff was a Tasmanian devil in the courtroom. However, as the Court can readily see in the record, Judge Belgard only referenced Plaintiff's use of the TV monitor, and never mentioned voir dire. Moreover, Judge Belgard's statement was not an admonishment of Plaintiff, but a simple request that, when heeded, never came up again at trial (and was especially never brought up by Defense counsel).

Regardless of their true intentions here, Defendants must be barred from even challenging voir dire due to their failure to object. New Jersey Court Rule 1:7-2 clearly states that:

> For the purpose of reserving questions for review or appeal relating to rulings or orders of the court or instructions to the jury, a party, at the time the ruling or order is made or sought, shall make known to the court specifically the action which the party desires the court to take or the party's objection to the action taken and the grounds therefor…. A party shall only be prejudiced by the absence of an objection if there was an opportunity to object to a ruling, order or charge.

R. 1:7-2. Defense counsel summarized the rule on objections best when he stated, "Pursuant to the rules, if I don't make it I lose it…" (2T, at 44:24-45:5). Defendants had ample opportunity to object to Plaintiff's actions, and chose not to. Therefore, they have lost the right to challenge it.

III. THE TRIAL COURT CORRECTLY DENIED DEFENDANTS' MOTION FOR RECONSIDERATION AFTER DULY ANALYZING THE ENTIRELY SELF-SERVING, FACTUALLY INCORRECT, AND TEMPORALLY SUSPECT CERTIFICATION OF THE DEFENSE ADJUSTER.
(Raised Below: 7T, at 24:13-30:2)

Defendants begin their next argument with an allusion to the "feel of the case" doctrine cited in Plaintiff's Standard of Review. This is puzzling, first, because Judge Belgard made her feel of the case so undeniably clear when she repeatedly denied Defendants' post-trial motions. And it is puzzling, second,

because of how thoroughly Judge Belgard analyzed the Defense adjuster's Certification in doing so.

Judge Belgard disregarded the Defense adjuster's Certification for three reasons: (1) it was factually incorrect regarding the location of sheriff's officers in relation to the courtroom; (2) it was suspiciously timed; and (3) it was uncorroborated by the accounts of anyone else who was present in the courtroom at the time, none of whom reported any improper conduct by Plaintiff (7T, at 26:17-27:25).

Defendants now refute the first reason by alleging that there is nothing in the record to support that the Certification was factually incorrect. Plaintiff struggles to see how it is possible that no sheriff's officer was present in the courtroom, but it was still a sheriff's officer who notified Judge Belgard of what occurred in the courtroom while she was absent.

Defendants contest the second reason by professing that the Defense adjuster is not an attorney, and failed to see the significance of Plaintiff's actions. However, this argument ignores the very purpose for which the adjuster was present in the courtroom, which was *to observe and report*.

Defendants' insurance carrier, New Jersey Manufacturers Insurance Company, is arguably the most vigilant insurance carrier in the State. This is

evidenced by the fact that they are the only one of their major competitors who deploys adjusters to monitor the entirety of trials in-person.

Defendants expect the Court to believe that Caitlin Short, who lists herself in the Certification as a "litigation adjuster," observed this trial for three whole days, and not once mentioned to Defense counsel what she witnessed? Defendants expect the Court to believe that Defendants prepared their first Motion for New Trial without ever speaking to the Defense adjuster? And Defendants expect the Court to believe that this Certification, dated one day *after* Defendants' Notice of Motion, is not so laughably self-serving that the Presiding Judge of Burlington County did not properly weigh its effect?

As for the third reason Judge Belgard denied Defendants' Motion for Reconsideration, Defendants suggest that the Court must effectively incorporate the allegations of the Certification absent any competing accounts. Again, Defendants fail to provide any case law supporting a shifting of the burden of proof to Plaintiff. More critically, this argument discredits the fact that there already *are* competing accounts of what occurred. Out of all of the other individuals monitoring the courtroom with the Defense adjuster, not a single one alerted the Court to anything improper (7T, at 27:18-25). All of them were explicitly instructed to do so by the Court, with some being judiciary employees well-versed in the rules and protocols of the courtroom

(7T, at 9:25-10:10). Their silence speaks with more veracity than anything the Defense adjuster could put into words.

IV. ALL STATEMENTS AND SUMMATIONS PRESENTED BY PLAINTIFF'S COUNSEL WERE PROPER AND WELL WITHIN THE BOUNDS OF THE APPLICABLE CASE LAW AND GENERAL STRATEGIES OF SUCCESSFUL TRIAL ADVOCACY.
(Not Raised Below)

Similar to their arguments above, Defendants' attack on Plaintiff's counsel's rhetorical theme of the case is suspiciously untimely and unaccompanied by any formal objection. Therefore, only after exploring what actually occurred at trial can Plaintiff respond to Defendants' substantive arguments.

Plaintiff's counsel opened trial, as many lawyers do, with an aphoristic explanation of the American civil jury system (3T, at 3:9-21). As part of that explanation, Plaintiff's counsel noted this system's inherent reliance on the idea of accountability (3T, at 3:9-21). Plaintiff's counsel then adopted a trial tactic common among litigators, which is to assign a theme to the case to help the jury digest all of the issues presented. Piggybacking on their opening, Plaintiff's counsel prompted the jury that this case was about accountability, particularly in light of the peculiar circumstance of Defendants' stipulated liability (3T, at 4:22-24).

The only objection related to this issue came at the conclusion of Plaintiff's opening statement, and on grounds that counsel was making an argument more appropriate for closing (3T, at 10:24-11:9; 11:22-25).

In closing, Plaintiff's counsel obviously returned to this theme of accountability as a way to guide the jury through what was proven at trial (4T, at 156:24-5). This was done when Plaintiff's counsel started, and during his conclusion. Yet, at no point during Plaintiff's closing did Defense counsel object. Defense counsel, as they themselves stated during opening statements, recognized that Plaintiff's thematic strategy was appropriate for closing argument (3T, at 10:24-11:9; 11:22-25).

This recognition is exactly why Defendants never moved for a mistrial prior to the jury being released for deliberation. It is also why Defendants never included this argument in either their Motion for New Trial or their Motion for Reconsideration (Da51-55; Da62-66). Forgive Plaintiff for sounding like a broken record, but surely if introducing the theme of accountability were so prejudicial to Defendants' case, it would have been included in a post-trial motion, or at the very least objected to.

In fact, in Jackowitz v. Lang, the case most integral to Defendants' position, the Appellate Division held that if defense counsel fails to make a timely objection, it signifies that they did not believe the remarks in question

were prejudicial, and deprives the court of the opportunity to take curative action. 408 N.J. Super., at 505 (citing State v. Timmendequas, 161 N.J. 515, 576 (1999)). The Court Rules also support the proposition that absent an objection from defense counsel, the Appellate Division will not reverse unless there is a showing of plain error. Jackowitz, 408 N.J. Super., at 505 (citing R. 2:10-2).

Turning to the substantive failings of Defendants' complaints, there are four reasons Plaintiff's counsel's use of the theme of accountability was permissible and posed no threat to influence the jury.

First, Defendants' argument ignores the reality that effective litigation requires passion, imagery, and rhetoric. In fact, "it is the duty of a trial attorney to advocate." Geler v. Akawie, 358 N.J. Super. 437, 463 (App. Div. 2003). Young lawyers are taught, both pedagogically and in practice, to find creative ways to engage the jury and convey their narrative. Plaintiff attorneys in particular are encouraged to maximize the recovery of their clients, even if only incidentally, so long as they remain within the boundaries of fairness. Id.

Again, one way in which many lawyers advocate is by assigning their case a theme. For reasons that will be elaborated further, Plaintiff's counsel chose the theme of accountability. Defense counsel also chose a theme for their case, which was common sense (3T, at 13:13-22, 14:18-21). Just like

Plaintiff's counsel, Defense counsel repeated this theme throughout their opening statement and closing argument so that the jury would view the case from their perspective.

Second, the record reveals that the purpose of the theme of accountability was not to call for punitive action against Defendants, but to safeguard Plaintiff's interests. Defendants stress that they have a right to dispute claims against them, but equally so does Plaintiff have the burden of proving these claims.

This was a stipulated liability case, and so Plaintiff had an obligation to orient the jury's understanding of what this meant. Most Americans have no familiarity with civil procedure. They would be confused as to how Plaintiff could bring a personal injury claim without any discussion of liability. If left unaddressed, this could have been severely detrimental to Plaintiff's case.

For this reason, Plaintiff's counsel took great care to explain to the jury how civil law works, and how this case ended up before them, using the notion of accountability. Looking at Plaintiff's counsel's summation in context, they were not blindly imploring the jury to punish Defendants for their negligent conduct, but were clarifying the terms of why, and how, Plaintiff was requesting compensation.

Plaintiff is confounded by how Defendants find the idea of requesting accountability so offensive, since all civil plaintiffs inherently seek monetary compensation. A monetary award is, by its very definition, an exercise in accountability. It is the law's way of, dare we say, "making right" an injury inflicted by another.

Plaintiff's counsel likewise had an obligation to rehabilitate Plaintiff during their closing argument. Plaintiff grew agitated throughout cross-examination, and this frustration boiled over when Defense counsel confronted Plaintiff with medical records he had never seen before, and characterized them as depicting Plaintiff as untruthful (3T, at 90:21-106:14; 113:16-24). In their Brief, Defendants tactfully include only part of the quote in which Plaintiff's counsel attempted to justify Plaintiff's outrage. But looking at it as a whole (please see Plaintiff's Statement of Facts), it is clear that Plaintiff's counsel was explaining why Plaintiff was heated on the stand, and not imploring the jury to be outraged at Defendants (4T, at 157:6-22).

Third, the facts and impermissible argument that led to a new trial in Jackowitz v. Lang are conspicuously distinct from those of the present case. In Jackowitz, the trial judge raised the issue of plaintiff's counsel's "send a message" refrain as early as a pretrial colloquy. 408 N.J. Super., at 500. Routinely throughout their opening statement, they urged the jury to "send a

message" against the defendant's driving behavior – specifically and generally of all drivers – despite the case having stipulated liability. Id. at 499-500.

Prior to closing arguments, the trial judge gave an instruction to the jury about the difference between evidence and argument, with specific reference to plaintiff's counsel's tactics. Id. at 500-01. On closing, plaintiff's counsel still belabored the jury with argument about the defendant's actions, the duty she breached, and how it applied to all New Jersey drivers. Id. at 501-02. To that, the trial judge interjected sua sponte to instruct the jury to disregard this argument on negligence, since the trial was solely about damages. Id. at 502.

After the jury found in favor of plaintiff, the defendant moved for a new trial. Id. In granting this motion, the trial judge found that although the law permits some mention of how an accident happened, plaintiff's counsel "went far beyond the permissible standards for talking about the case." Id. at 502-03.

The Appellate Division also condemned plaintiff's counsel's use of the "send a message" motif, ruling that counsel's references to the defendant's liability – "running a red light," "abusing the privilege," etc. – were not relevant to the happening of the collision, and were only included to "exact punishment." Id. at 508.

Defendants surgically excerpt lines from Plaintiff's counsel's opening and closing to make it seem like they called for the jury to "send a message."

That phrase was never used at trial. More importantly, the core of the impermissible argument in Jackowitz was plaintiff's counsel's insistence on discussing liability in a stipulated liability case. See id. at 501-02, 08. The call for the jury to "send a message" was merely the vehicle through which counsel in Jackowitz attempted to incriminate the defendant's negligent driving.

By contrast, Plaintiff's counsel here never called for a referendum on Defendants' negligence. The only discussion of Defendants' liability was either to explain the mechanics of the collision, which is entirely permissible, or to note that Defendants stipulated liability. Defendants can insist that to "send a message" is tantamount to holding someone accountable, but the context of the argument begs to differ. Plaintiff's counsel only discussed accountability as it related to the award of damages in a civil case, *not* as a means to demonize Defendants in the jury's eyes.

What is also incongruous between Defendants' fiction of what transpired in this case, and the reality, is the disposition of the trial judge. The trial judge in Jackowitz felt compelled to interrupt the proceedings on multiple occasions to issue curative instructions to the jury. See id. at 500-02. Here, Judge Belgard made no sua sponte rulings regarding Plaintiff's counsel's theme of accountability. Her Honor never interrupted during Plaintiff's opening or

closing to instruct the jury to disregard the argument. When Defendants moved for a new trial, Judge Belgard denied it free from even an insinuation that Plaintiff's counsel's advocacy was inappropriate. This case could not be more different than Jackowitz.

Fourth, and finally, Plaintiff has already proven that the verdict was fully supported by the evidence. The jury was not duped into finding for Plaintiff because of any argument of Plaintiff's counsel. And they did not render the award solely to punish Defendants for the collision. The jury found as they did because of the objective medical evidence proving Plaintiff sustained a permanent injury, and Plaintiff's own, credible testimony about how it has usurped his life.

V. PLAINTIFF NEVER MADE A TIME-UNIT ARGUMENT AT TRIAL, AND WAS ACTUALLY PRECLUDED FROM DOING SO BY THE TRIAL COURT. REGARDLESS, PLAINTIFF PLACED DEFENDANTS ON NOTICE OF THEIR INTENT TO MAKE SUCH AN ARGUMENT IN THEIR PRETRIAL MEMORANDUM.
(Raised Below: 6T, at 58:7-59:23)

Defendants suggest that Plaintiff never requested Model Civil Jury Charge 8.11G(ii), the subpart for the time-unit rule. Likely without realizing it, Defendants' dissection of 8.11G actually explains how the confusion at the charge conference occurred. And this explanation only proves that Plaintiff

did, in fact, notify Defendants of their intent to make a time-unit argument, which was never actually made at trial.

Section 8.1 of the New Jersey Model Civil Jury Charges is titled "Damages – General" (Pa11). Within that section, each general rule has its own title. As the Court can readily see, 8.11G is titled "Life Expectancy" (Pa11). Charge 8.11G then has two subparts: 8.11G(i), also titled "Life Expectancy;" and 8.11G(ii), titled "Time Unit Rule" (Pa23-24).

In their July 7, 2023 pretrial memorandum, Plaintiff requested "Model Civil Jury Charge 8.11G: Life Expectancy," verbatim (Pa4). By requesting the charge in this way, without specific reference to subparts, Plaintiff requested the entirety of the charge: both life expectancy, and the time-unit rule. Defendants were therefore placed on notice of Plaintiff's intent to make a time-unit argument at trial.

The fact that the general rule and its first subpart share the same title is what caused the confusion at the charge conference with Judge Belgard. When the issue of life expectancy arose, Judge Belgard asked, "And then it's just the standard charge. For life expectancy, I don't know what that is." (4T, at 132:24-133:2). Plaintiff's counsel provided Plaintiff's life expectancy of 40.5 years, and then Defense counsel agreed to the "standard charge." (4T, at 133:3-6).

This is why, upon Defense counsel's objection during closing, Plaintiff's counsel immediately protested, "It's on the pretrial. And it's in the jury charge." (4T, at 194:15-16). After Judge Belgard and counsel investigated the confusion further, Her Honor concluded that Plaintiff requested the entirety of 8.11G, and that the exclusion of the time-unit rule, which had slipped past all counsel, was on the Court (4T, at 199:3-18).

Regardless of the fact that Plaintiff requested the time-unit rule, no time-unit argument was ever made. After clearing the confusion surrounding the charge, Judge Belgard probed Plaintiff's counsel as to what they intended to argue next (4T, at 199:16-18). Plaintiff's counsel obliged that they only intended to present Plaintiff's life expectancy in increments of days and hours, and then argue that doing so was one of the few ways counsel could convey the full extent of a permanent injury (4T, at 199:19-23). When they returned to their closing, Plaintiff's counsel argued exactly that – with no mention of the time-unit rule by name, or any suggestion that the jury should award damages based on a time-unit calculation (4T, at 194:3-203:24).

Both during the objection at trial, and on Defendants' Motion for New Trial, Judge Belgard concluded that these extrapolated figures were something the jury could easily deduce on their own (4T, at 200:3-18; 6T, at 59:1-15). And again, because "plaintiff did not actually go into any sort of unit

analysis," Her Honor found that there was no miscarriage of justice (4T, at 59:16-23).

VI. PLAINTIFF PROPERLY ASSERTED AND SUPPORTED A WAGE LOSS CLAIM UNDER THE RULES OF COURT. PLAINTIFF'S TESTIMONY REGARDING A RETURN TO TREATMENT CONSTITUTED A MINOR ERROR THAT WAS IMMEDIATELY AND FULLY ADDRESSED BY THE TRIAL COURT, AND AFTERWARD, WAS NEVER AGAIN BROUGHT UP BY DEFENSE COUNSEL. NEITHER OF THESE ASPECTS OF THE TRIAL HAD A PREJUDICIAL EFFECT ON THE JURY, AND CERTAINLY NOT A COMPOUNDING ONE, AS THERE WAS NO PRIOR PREJUDICE TO COMPOUND.
(Raised Below: 6T, at 57:9-58:6; 59:24-61:8)

In challenging Plaintiff's award for lost wages, Defendants attempt to relitigate pretrial issues before the Appellate Division. Model Civil Jury Charge 8.11C, titled "Loss of Earnings," makes no mention of experts in instructing the jury on how to award past lost earnings (Pa13-15). In fact, the Charge states that jurors must only determine "the amount of earnings that were **probably lost**." (Pa15). They are instructed to use their "sound judgment," and are explicitly told that "[plaintiff] *does not* have to prove the amount of lost earnings with precision, but only with reasonable probability." (Pa15).

Plaintiff proved his lost wages through his own testimony on the time he missed from work, his recollection of his wage at that time, and the fact that he was forced to exhaust his sick and vacation time to take leave (3T, 38:8-17;

57:4-59:8). Far from doing so with precision, Plaintiff reasonably estimated his lost wages to be $2,867.32 through his on-the-stand arithmetic (3T, at 58:7-59:8).

With an award of $3,500.00, Defendants make the reach of asserting that the jury awarded an extra $632.69 because of some kind of prejudice. This fallacy has already been sufficiently debunked throughout this Brief. However, one aspect of Defendants' argument not yet addressed deals with Plaintiff's comment regarding continuing treatment.

During his direct examination, Plaintiff, unprompted, stated that he had recently visited a new chiropractor (3T, at 52:2-4). Defense counsel objected, since both he and Plaintiff's own counsel were unaware of this fact (3T, at 52:5-12). But rather than becoming a major incident in this case, this relatively basic objection was fully addressed by the Court. Judge Belgard suggested that the best course of action was to move on from the comment without drawing any further attention to it, and both parties agreed (3T, at 53:3-12).

Defendants only mentioned this comment as possible support for a larger argument of cumulative effect. Like lashing together bundles of sticks to make a raft, Defendants hope that by stringing enough harmless statements together, they can create something that floats. But anything multiplied by zero is still zero. And

since this Brief has already dispelled all of Defendants' allegations of prejudice, they are incapable of crafting any kind of cumulative argument.

All of Defendants' theories for how the jury reached its award for lost wages are merely speculative. The truth is that no one other than the jurors themselves knows exactly how they reached that calculation. The factual record and applicable jury charge strongly indicate that the jurors decided on what was "probably lost" by Plaintiff, both the liquidatable wages and forced loss of sick and vacation time (Pa15). That, along with the arguments above, is why Plaintiff can so comfortably refute Defendants' speculation.

Even if this Court were inclined to find that Plaintiff's wage loss claim was unsupported by the evidence, this portion of the verdict must be severed, and the remainder preserved. As a general rule, if one issue in a negligence case is going to be retried, then all other issues must be retried unless they are entirely distinct and separable. Henebema v. South Jersey Transp. Auth., 219 N.J. 481, 491 (2014) (citing Ahn v. Kim, 145 N.J. 423, 434-35 (1996)). Whether certain issues are so inextricably linked that they must be remanded together is a fact-specific inquiry that differs from case-to-case. Id.

Here, there are no issues of liability because Defendants stipulated it before trial. If the Court were to accept Defendants' position on the wage loss award, then the only issue to be retried would be the amount of those damages, alone. All

other questions that the jury answered at trial are distinct, and were decided based on the weight of different pieces of evidence.

Looking to the verdict sheet, the jury independently concluded that Plaintiff suffered injuries proximately caused by the subject collision, that at least one of these injuries was permanent, and that Plaintiff was entitled to compensation for his pain, suffering, and loss of enjoyment of life (5T, at 33:9-34:17). None of those issues is so inextricably linked with the award for lost wages that they would necessitate mutual retrial.

In fact, even if Plaintiff never asserted a wage loss claim, he would have presented the exact same proofs – including his testimony about missing time from work and having to exhaust his personal days – as corroboration of the impact of his injuries on his life. To find otherwise would unnecessarily relitigate an isolated jury question.

CONCLUSION

Defendants rolled the dice going to trial. They, like all parties who do so, accepted the risk that the jury could award more than they hoped for, or less, or even nothing at all. Judges regularly rely on this refrain – more, less, or nothing at all – when speaking to litigants who choose to accept settlements. Juries are unpredictable; settlements are tangible. So when parties take that gamble and lose, they must face the consequences of their decision. There are

no do-overs, mulligans, or second chances. To entertain such would be a waste of the time, resources, and emotional investment of the litigants and judiciary alike.

In this case, Defendants themselves, entirely unprompted and intentionally on the record, admitted that Judge Belgard presided over a "really well conducted trial" (5T, at 30:11-16). Only after the verdict was read, and things did not go their way, did Defendants suddenly discover that the trial was rife with prejudice against them. They now ask that the Court pay no mind to their lack of objections, or failure to include certain arguments in their two previous attempts at post-trial relief. They urge the Court to turn a blind eye to the unshakable rulings of Judge Belgard. Ignore the logical inconsistencies, the mischaracterization, and the record. Defendants want another shot.

Pascal Lamothe was permanently injured in the December 1, 2018 collision. Accordingly, the jury awarded him sufficient compensation to last what is effectively a second lifetime.[5] This verdict was not based on any of the issues raised by Defendants. It was based on the evidence presented by Plaintiff. His account of the happening of the collision, his descriptions of his

[5] 40.5 years left to live with his injuries, despite being only 40 years old at the time of trial. Judge Belgard calculated the award as amounting to less than $23,000.00 per year for the remainder of Plaintiff's life, which aided in her finding of its reasonableness (6T, at 63:10-19).

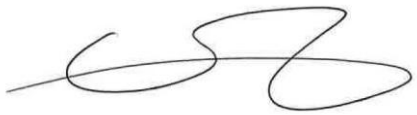
pain and daily debilitation, the expert conclusions of his treating orthopedist; this evidence, and this alone, motivated the jury's award.

Judge Belgard, the presiding trial judge, agreed. Each time Defendants tried to vacate the verdict, Judge Belgard conclusively held that it was fairly reached. Her Honor, time and time again, ruled that the verdict was supported by the weight of the evidence, and that it was not excessive or shocking to her conscience.

In the present appeal, Defendants still fail to identify a single miscarriage of justice entitling them to a new trial. Rather, by pursuing this appeal at all, Defendants seek to perpetrate a miscarriage of their own – to void the decision of one of the most inviolate institutions of our American democracy: the trial by jury.

Respectfully submitted,

GARBER LAW
A Professional Corporation



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Dated: June 1, 2024

	:	*Superior Court of New Jersey*
	:	**APPELLATE DIVISION**
PASCAL LAMOTHE	:	
	:	*Docket No.: A-001342-23T1*
	:	
Plaintiff-Respondent	:	*ON APPEAL FROM*
	:	
vs.	:	Superior Court of New Jersey
	:	Law Division-Burlington County
DAJEYA HUGGINS, TEANA BYRD,	:	Docket No.: BUR-L-1918-20
DAYVON FORDE, JOHN/JANE DOE'S	:	
1-10, FICTITIOUS PERSONS AND/OR	:	
ABC CORPORATIONS, 1-10, J/S/A	:	
Defendants-Appellant	:	***SAT BELOW:***
	:	
----------	:	Hon. Aimee R. Belgard, J.S.C.

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CIVIL ACTION

REPLY BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS DAJEYA HUGGINS, TEANA BYRD & DAYVON FORDE

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PRELIMINARY STATEMENT

Defendants appeal from a judgment entered following a jury verdict awarding damages to the Plaintiff. They submit that the verdict resulted from the intrusion of improper influences upon the deliberative process. Their arguments are made in good faith based upon the record below. In response, Plaintiff has chosen to denigrate them as "works of legal alchemy" and an "assault upon justice" portraying the trial as "some kind of circus." The tenor of that response reflects the emotional appeal made to the jury in presenting a "theme" of the case which identified Defendants' refusal to "make things right" as the reason for the parties, the jurors and the Court having to appear for trial. Reprising that theme, Plaintiff now castigates the Defendants for "spar[ing] no expense, and pay[ing] no mind to the resources of the judiciary, to see … justice undone." Attacking Defendants' trial counsel and insurance adjuster as unbelievable and "laughably self-serving" raises the ad hominem ante. Pejoratives aside, however, Plaintiff's Respondent's Brief simply misses the point.

STATEMENT OF FACTS

For the purposes of the present Reply Brief, Defendants will rely upon the Statement of Facts in their Appellants' Brief.

LEGAL ARGUMENT

POINT I

THE STANDARD OF REVIEW APPLICABLE ON THIS APPEAL IS NOT IN DISPUTE.

Defendants do not argue that the amount of the verdict, in and of itself, warrants a new trial. Rather, it is the Defendants' position that it resulted from the intrusion of improper influences into the deliberative process. Thus, Defendants accept that they bear the burden of convincing this Court that the verdict represents a miscarriage of justice. They respectfully submit that they have done so by identifying matters with "a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge." Panko v. Flintkote, 7 N.J. 55,61 (1951). Prejudice, therefore, is presumed absent an affirmative showing that the irregularities identified "had no tendency to influence the verdict." Kavanaugh v. Quigley, 63 N.J. Super. 153, 161-62 (App. Div. 1960). Plaintiff has not made such a showing.

The additional errors complained of on this Appeal include the trial court's decision to permit Plaintiff to make a lost wage claim without supporting expert testimony and its decision to permit Plaintiff's counsel to make a time-unit argument in closing. In each of those instances, it is submitted that the trial court abused its discretion in deciding upon the admissibility of evidence and the terms of the jury charge. Defendants also

complain that Plaintiff's counsel's opening and closing statements presented an impermissible and prejudicial "theme" to the jury. For the reasons set forth below, it respectfully is submitted that each of the errors identified, standing alone and/or in combination with each other, clearly was capable of producing an unjust result and that Plaintiff's appeal to the jury to "make things right" was plain error which the interests of justice require this Court to rectify.

POINT II

THE OBSERVATIONS OF DEFENDANTS'INSURANCE ADJUSTER DURING JURY SELECTION WERE UNREFUTED AND ESTABLISHED CONCLUSIVELY THAT THE BEHAVIOR OBSERVED HAD THE CLEAR CAPACITY TO IMPROPERLY INFLUENCE THE VERDICT.

There were three instances when Plaintiff's behavior was raised with the trial court. The first occurred during jury selection and involved a Sheriff's Officer's report to the Court. Because no contemporaneous record thereof was made, the parties have cited to the record made on Defendants' post-trial motions to attempt to recreate that report and the Court's response. See e.g., Defendants' Brief (Db.), at 17 to 21; Plaintiffs' Brief (Pb), at 19 to 22. The record made on those motions included nothing from the Plaintiff.

The Court next addressed Plaintiff's conduct during the course of his trial testimony. Thus, Plaintiff sought and obtained the Court's permission to leave the witness stand and approach a video screen. Plaintiff did not return to

the stand thereafter and continued testifying while standing. Without prompting from counsel, the Court subsequently observed that Plaintiff "walking all around the courtroom and the like" could distract the jury and instructed Plaintiff to "keep it a little tighter." 3T.50:22 to 51:26.

Finally, after Defendants' motion for a new trial was denied, a motion for reconsideration was filed supported by the certification of Defendants' insurance adjuster describing behavior not previously brought to the attention of counsel or the Court. Da67-68. Prepared after the adjuster was told that the Court had determined that Plaintiff did nothing more than walk through the array of potential jurors during jury selection, the certification described multiple occasions when Plaintiff walked to the rear of the courtroom holding his back, grimacing in pain and stretching, including occasions when he did so while standing next to a juror ultimately selected to hear the case. Da67-68.

Denying Defendants' reconsideration motion, the Court determined that the adjuster's certification did "not bring to light any additional information that would alter [its] prior decision." 7T. 29:23 to 25. It did so on three bases. First, the Court rejected the adjuster's description of the primary location of the Sheriff's Officers as having been outside the courtroom based upon its understanding that those Officers were to be in the courtroom at all times. 7T.26:17 to 27:9. Second, the Court felt that if the adjuster had noticed

something which she felt would be prejudicial to the defense, she could have brought it to the Court's attention at that time. Id., at 27:10 to 22. Finally, the Court the fact that "none of the Court personnel ever indicated that the plaintiff was … attempting to in any way influence these jurors" was dispositive. Id., at 27:21 to 25. Thus, without any certification or affidavit from any member of the Court's staff or anything from the Plaintiff, the Court rejected the certification. Doing so, it made unsupported assumptions concerning the experience, knowledge and sophistication of both the adjuster and the members of its staff and erroneously "read into" the certification an assertion that Plaintiff had purposely attempted to influence the jury.

The trial court's analysis failed to distinguish Plaintiff's conduct during trial from his conduct prior thereto. During trial, that conduct was observed by the Court and counsel. The defense did not object to it and does not now allege any prejudice arising from any standing, stretching or grimacing which occurred during trial. As Plaintiff has argued repeatedly, his demeanor at trial was challenged as exaggerated and/or feigned. By its verdict, the jury appears to have rejected that challenge. The potential that its decision to do so was based in any part upon observations made prior to trial, outside the presence of the Court and counsel, however, cannot be discounted. It is a potential against which the Court must guard to ensure all parties receive a fair trial. Such

vigilance is not limited to deliberate attempts to influence jurors but extends as well to otherwise innocent conduct, and the trial court's failure to consider that the behavior described was neither purposeful nor of the type that a non-lawyer would necessarily recognize as potentially harmful unduly circumscribed its analysis.

POINT III

THE TRIAL COURT ABUSED THE DISCRETION ACCORDED TO IT IN CONTROLLING THE INTRODUCTION OF EVIDENCE WHEN IT PERMITTED PLAINTIFF TO PRESENT TESTIMONY CONCERNING LOST WAGES.

Trial court determinations regarding the admissibility of evidence are reviewed for abuse of discretion. State v. R.Y., 242 N.J. 48, 64 (2020). "Although the ordinary 'abuse of' discretion' standard defies precise definition, it arises when a decision is made 'without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex County Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achascoso-Sanchez v. Immigration and Naturalization Service, 779 F.2d. 1260, 1265 (7th Cir. 1985)). Discretion "means legal discretion, in the exercise of which the judge must take account of the law applicable to the particular circumstances of the case and be governed accordingly." (emphasis in original). Summit Plaza Associates v. Kolta, 462 N.J. Super. 401, 409 (App. Div. 2020) (internal citations omitted). Consequently, if a

judge misconceives or misapplies the applicable law, "the exercise of legal discretion lacks a foundation and becomes an arbitrary act." Ibid. As a result, a trial court's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Id., at 409-10 (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). In the present matter, Defendants submit that the trial court's decision to permit Plaintiff to present a lost wage claim supported by nothing more than his own testimony misapplied the applicable law to the circumstances of this case.

Plaintiff's expert offered no opinion concerning Plaintiff's ability/inability to work following the accident. The issue was raised immediately prior to jury selection based upon a subpoena issued the evening prior by Plaintiff to his employer. 2T.22:10 to 26:14. Over Defendants' objection, the Court indicated it would permit Plaintiff to testify as to his alleged loss "and see how the testimony plays out." Id., at 1 to 13. Plaintiff thereafter testified that he had been unable to work for roughly six weeks following the accident and sustained a loss of $2,867.31. 3T.57:18 to 58:20.

The issue was raised again with the Court during its charge conference. 4T.123:2 to 124:16. At that time, Defendants objected based upon the lack of expert testimony and Plaintiff's admitted pre-accident disability. Ibid. Permitting the claim, the trial court reasoned that although an expert would be required if

Plaintiff had been out-of-work for a "significant length of time," such testimony was not required for the period of time immediately following the accident based upon an "average juror's" ability to conclude that "an individual could be in pain and have to take some time off" because of it. Id., at 124:17 to 125:4. In essence, the Court endorsed Plaintiff's subjective description of his abilities without identifying any legal basis for it or considering Plaintiff's obligation to distinguish his pre-existing disability from any disability caused by the accident. See Blanks v. Murphy, 268 N.J. Super. 152, 162 (App. Div. 1993) (plaintiff obligated to prove through his testimony and testimony of experts what part of pain, discomfort and other harms resulted from collision for which defendants responsible); see also Schwarze v. Mulrooney, 291 N.J. Super. 530, 541 (App. Div. 1996) (apportionment of damages ordinarily requires expert testimony). The Court's decision in this regard failed to take into account the law applicable to the facts of the case and was based upon an unfounded determination that the length of time allegedly lost from work is determinative when considering whether expert testimony is required.

POINT IV

A TIME-UNIT ARGUMENT WAS PRESENTED TO THE JURY WITHOUT PRIOR NOTICE TO THE DEFENSE. THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING IT.

In his Respondent's Brief, Plaintiff argues that: (a) his pre-trial information exchange placed both the Court and defense counsel on notice of his intention to make a time-unit argument; (b) the trial court restricted the scope of the argument made; and (c) no time-unit argument was presented to the jury. Plaintiff argued below that the time-unit charge and the life expectancy charge go "hand-in-hand" such that the time-unit argument is the only reason a party would request the life-expectancy charge. 6T.25:10 to 26:4. That argument defies common sense and the plain language of the charges. Plaintiff's other arguments defy the record.

Both the "Life Expectancy" and "Time Unit Rule" charges are contained within MCJC 8.11G. That section, however, is not headed "Life Expectancy" as Plaintiff argues. Pb., at 43. Rather, subsection (i) is headed "Life Expectancy." Subsection (ii) is headed "Time Unit Rule." In his pre-trial exchange, Plaintiff requested that the Court include "Model Civil Jury Charge 8.11G: Life Expectancy." Pa4. It is clear that both defense counsel and the Court understood that request to refer only to the subsection dealing with life expectancy. To the extent that plaintiff intended otherwise, his opportunity to address it was during the charge conference prior to defense counsel's closing.

The life expectancy charge addresses a known and/or stipulated fact. The time-unit charge addresses an argument counsel is permitted to make. The choice to make that argument is based upon the circumstances of the case and counsel's trial strategy. If, as Plaintiff suggests, the time-unit argument is made in every case in which the life expectancy charge is given, MCJC 8.11G would not require subsections. The reality, however, is that the argument does not follow each and every time a jury is charged as to a Plaintiff's life expectancy. The subsections provide options to be selected by counsel as the facts of a particular case warrant.

To the extent that Plaintiff argues either that the trial court limited the scope of his time-unit argument and/or that no such argument was presented to the jury, neither argument is supported by the record. During his closing, counsel advised the jury that Plaintiff's life expectancy of 40.5 years broke down to 14,782 days and 354,780 hours. 4T.194:3 to 4; 6T.58:17 to 25; 4T.5 to 8. Prior to ruling on the defense's objection thereto, the Court inquired of Plaintiff's counsel as to "how much more" he was "planning on saying." Id., at 199:16 to 18. In response, counsel indicated that he intended to refer the jury to the time extrapolated as a way of contextualizing Plaintiff's permanent injury. Id., at 199:19 to 200:2. Plaintiff, however, made no request to make any additional argument, and any limitations on the argument were of his choosing, not the Court's.

Plaintiff now argues that because he did not suggest to the jury that it "award damages based on a time-unit calculation," the jury was not told it could calculate damages by assigning a value to the time-units presented. Pb., at 44. Plaintiff also points out that the trial court agreed that counsel "did not go into any sort of unit analysis." Id., at 44-45. Ignored, however, is the fact that the Court, in its charge, specifically told the jury that Plaintiff's argument was that the jurors could "consider an amount of money in relation to an amount of time [i]n determining … damages." 5T.21:5 to 8. Similarly ignored is the Court's reasoning on defendants' motion for new trial. That is, upholding the verdict, the Court attributed an amount of money ($23,000.00) to units of time (years) remaining in Plaintiff's life. 6T.62:14 to 63:19. In essence, the Court concluded that the jury could have reached its verdict by considering the number of years left to Plaintiff and assigning a value to each without considering the no less likely possibility that it did so based upon Plaintiff's extrapolation of those years into days and hours. Whatever the source of any confusion concerning the charges requested by Plaintiff, the scope of the argument permitted by the trial court and/or the manner in which the time-unit calculation was presented to the jury, it was not the result of any action or inaction on the part of the Defendants. That the Defendants "got the short end of the stick" is equally clear. The trial court accommodated Plaintiff's

interest without giving due or equal consideration to the prejudice wrought thereby and was based upon a clear misapplication of the law warranting reversal.

POINT V

PLAINTIFF'S ARGUMENT CONCERNING THE "THEME" OF HIS CASE IGNORES COMPLETELY THE MOST OFFENSIVE ASPECT THEREOF.

Although set forth in Appellants' Brief, it bears repeating that "[i]t is the duty of the lawyer not to make any statement in his opening remarks which he knows cannot be admitted into evidence." Paxton v. Misiuk, 54 N.J. Super. 15, 20-21 (App. Div. 1959). Plaintiff's counsel breached that duty when he introduced the case to the jury by saying that it had been empaneled because, for more than five years, the Defendants had taken "no steps to make things right." 3T.4:19 to 5:4. Remarkably, although the entire "theme" of Plaintiff's case was predicated upon that completely inappropriate statement and provides the primary basis for challenging it on this Appeal, it is nowhere addressed in Respondent's Brief. Instead, Plaintiff defends his attorney's remarks as "rhetorical," "aphoristic," "pedagogic," and a means of explaining a stipulated liability case to jurors unfamiliar with civil procedure. Defendants agreed they were at fault. They did not agree Plaintiff had sustained a permanent injury. The jury was tasked with resolving that dispute. Each side was entitled to have it decide the case based upon the facts presented. It was completely unnecessary, however, for the jury to

consider which side had done the right thing in insisting upon a trial. The danger inherent in injecting concepts of right and wrong into these proceedings was that once the jury decided in Plaintiff's favor, its damage award was influenced by Defendants' alleged failure to accept "accountability" for their actions. Even in the absence of an objection by trial counsel, that harm cannot be ignored, and a new trial is warranted.

CONCLUSION

Based upon the foregoing Statement of Facts and legal arguments, it again respectfully is submitted that the orders and judgments which are the subject of this appeal must be reversed and the matter remanded for a new trial on the issue of damages.

Respectfully submitted,
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