**SUPERIOR COURT OF NEW JERSEY**
**APPELLATE DIVISION**

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| MELISSA PRESBERY | : | Civil Action Docket No.: |
| | : | A-001360-23 |
| Plaintiff-Respondent | : | |
| | : | On Appeal from Superior Court |
| vs. | : | of New Jersey, Law Division |
| | : | Burlington County |
| JASON WILLITTS | : | Docket No.: BUR-L-2295-21 |
| | : | |
| Defendant-Appellant | : | Sat Below: |
| | : | Honorable M. Patricia Richmond, J.S.C |

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# DEFENDANT/APPELLANT JASON WILLITTS' BRIEF IN SUPPORT OF APPEAL TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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**ON THE BRIEF:** Robert M. Kaplan, Esquire 026091980
Jeanine D. Clark, Esquire 016331998

Attorneys for Defendant/Appellant,
Jason Willitts
**MARGOLIS EDELSTEIN**
100 Century Parkway, Suite 200
Mount Laurel, NJ 08054
856-727-6008
rkaplan@margolisedelstein.com
jclark@margolisedelstein.com

Dated: May 16, 2024

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## PRELIMINARY STATEMENT

This matter arises out of a two-vehicle accident which occurred on March 2, 2020. Plaintiff/Respondent Melissa Presbery (hereinafter "Respondent") alleged permanent injuries as a result of the accident and filed suit in the Superior Court of New Jersey, Law Division, Burlington County. The matter ultimately proceeded to trial. Defendant/Appellant Jason Willitts (hereinafter "Appellant") requested a charge pursuant to Mockler v. Russman, 102 N.J. Super. 582 (App. Div. 1968) as the record established that he hydroplaned and was unable to stop his vehicle as a result of unexpected road surface conditions. The court declined to grant the request for a charge on the Mockler defense. Further, after both counsel had given their closing arguments, counsel for the Respondent realized that they had not discussed the aggravation charge under Model Civil Jury Charge 8.11F. Counsel for Respondent had at the start of the day addressed an additional unrelated charge issue which had not been raised during the prior evening's charge conference. Over the objection of counsel for Appellant, the court agreed to provide the additional charge, and allowed each counsel to provide a limited supplemental closing argument. Appellant maintains that the court erred both in declining to provide the charge on the Mockler defense and in providing the supplemental aggravation charge.

## PROCEDURAL HISTORY

This matter arises out of a two-vehicle accident occurring on March 2, 2020. On November 3, 2021, Plaintiff, Melissa Presbery (hereinafter "Respondent"), filed a Complaint and jury demand in the Superior Court of New Jersey, Law Division, Burlington County. (Da1-Da8). Defendant/Appellant filed an answer on December 22, 2021 asserting among other defenses, AICRA and Respondent's failure to demonstrate that she sustained a permanent injury as a result of the accident. (Da9-Da12). On November 8, 2023 Respondent filed an offer of judgment**.** (Da13). On July 26, 2023, Respondent submitted her amended pre-trial memorandum. (Da14-Da20). On August 16, 2023, Appellant submitted his pre-trial memorandum. (Da21-Da28). The court conducted a pre-trial conference on August 18, 2023. Trial commenced before the Honorable M. Patricia Richmond, J.S.C. on October 3, 2023. (T1). A charge conference was conducted on October 5, 2023 wherein Appellant requested a charge pursuant to Mockler v. Russman, 102 N.J. Super. 582 (App. Div. 1968). (T3 297-25 through T3 319-24). In addition to declining to grant a request for a specific charge consistent with Mockler, the court essentially shifted the burden to the Defendant to disprove negligence. (T3 319-8 through 319-24).

At trial, the Appellant testified that he observed ponding and accumulated water with unexpected road surface conditions and that his vehicle hydroplaned. As a result of the hydroplaning and unexpected weather conditions, he was unable to

fully stop his vehicle before it made contact with the rear of the Respondent's vehicle, resulting in the subject accident. (T2 871-22 through T2 191-15). The court declined to grant Appellant's charge request and thus the Appellant was denied the opportunity to effectively pursue the Mockler defense.

Respondent initially submitted her pre-trial exchange requesting an aggravation charge under Model Civil Jury Charge 8.11F. (Da14-Da19). As discussed substantively below, such charge was not warranted under the facts and the record in this matter. The charge conference took place on October 5, 2023. (T3). Closing arguments, first on behalf of the Respondent and second on behalf of the Appellant, went forward on October 6, 2023. After closing arguments were completed, counsel for Respondent requested an aggravation charge. Over the objection of Appellant, the court granted Respondent's request for the additional charge, and provided an opportunity for a brief supplemental closing as to both sides. (T4 95-8 through T4 101-23).

Appellant objected as the parties had already closed and as the charge was not warranted on the record before the court. The jury subsequently returned a verdict in favor of the Respondent in the amount of $240,000. (Da29-Da30). The court subsequently entered judgment in the amount of $250,885.48 in favor of Respondent and against Appellant. (Da29-Da30). Same represented the initial award of $240,000 plus $10,885.48 in pre-judgment interest. Judgment was initially entered

on October 17, 2023. (Da29-Da30). Thereafter, on October 19, 2023 Respondent filed a motion to pay counsel fees, enhanced interest, and legal expenses based upon the non-acceptance of the previously filed offer of judgment. (Da47-Da48). The court placed its decision on both motions on the record. (T5). Thereafter, Appellant's counsel filed a partial opposition to the motion. Respondent sought attorney's fees at the rate of $650 per hour and Appellant argued that a more reasonable hourly rate for Plaintiff's counsel in the geographic area was $250-$350 per hour.

On October 24, 2023, Appellant filed a motion for a new trial ostensibly on the issues raised in this appeal. Respondent filed opposition to the motion for a new trial on October 25, 2023 and Appellant filed a Reply Brief on or about October 8, 2023. On November 27, 2023 the court granted oral argument on Appellant's motion for a new trial. However, on December 8, 2023, the court issued a written opinion denying the Appellant's motion for a new trial. (T5). The parties were afforded an opportunity to request oral argument after issuance of the preliminary determination but did not pursue oral argument in light of the court's written decision. (Da31-Da44). No order was entered at that time.

The within Notice of Appeal was filed on January 5, 2024. Respondent noted in its case information statement that its motion on fees remained outstanding. On November 18, 2024, counsel for Appellant uploaded a letter to eCourts Law Division

requesting that the trial judge enter an order memorializing her prior decision of December 8, 2023 so that the appeal could proceed. Thereafter, the court entered an order which was docketed on December 8, 2023 but dated January 19, 2024 confirming its prior decision to deny the Defendant/Appellant's motion for a new trial. (Da45-Da46). On the same date, January 19, 2024, the court entered and docketed an order granting in large part Respondent's motion on costs, fees and interest. (Da47-Da48). The court granted the application on costs and on enhanced pre-judgment interest, but reduced the requested award on attorney's fees from $39,065 to $31,800. (Da47-Da48). The result is an attorney's fee award with an hourly rate of about $530 per hour. The order and attorney fee award was entered after Defendant/Appellant filed its Notice of Appeal and case information statement. The lower court has addressed all pending motions and applications which were before it and this matter is ripe for appeal.[1]

[1] T1 – Transcript of Jury Trial October 3, 2023
T2 – Transcript of Jury Trial Volume 1 October 5, 2023
T3 – Transcript of Jury Trial Volume 2 October 5, 2023
T4 – Transcript of Jury Trial October 6, 2023
T5 – Transcript of Disposition December 8, 2023

## STATEMENT OF FACTS

1. This matter arises out of a two-vehicle accident occurring on March 2, 2020. (Da1-Da8, Da49-Da50).

2. Plaintiff/Respondent, Melissa Presbery (hereinafter "Respondent"), alleged that she sustained permanent injuries as a result of the accident of March 2, 2020. (Da1-Da8).

3. Respondent filed a Complaint in the Superior Court of New Jersey, Law Division, Burlington County under Docket No. BUR-L-2295-21 on November 3, 2021. (Da1-Da8).

4. Appellant filed an Answer to the Complaint on December 22, 2021 (Da9-Da12). Among other defenses asserted was the New Jersey Limitation on Lawsuit Option, N.J.S.A. § 39:6A-1.1, et seq. and the Appellant's position that the Respondent had not surmounted the threshold and had not sustained a permanent injury. (Da9-Da12).

5. Trial proceeded in this matter with both Appellant and Respondent testifying regarding the happening of the accident.

6. Appellant Jason Willitts testified that he was unable to prevent his vehicle from coming into contact with the rear of the Respondent's vehicle as a result of road surface conditions. Specifically, he testified that he had seen puddled or ponded water earlier in the day as well as precipitation. He attempted to stop his

vehicle but it hydroplaned and failed to stop before coming into contact with the rear of the Respondent's vehicle. (T2 187-2 through T2 199-22). Specifically, Mr. Willitts testified that the roads were wet when he left the house. It was raining. He went on to testify:

> A. Um-hmm, like I said it was wet out, my car was wet. Obviously, there was water everywhere. There were puddles that I drove through, so it clearly had rained at some point.
> Q. Okay. Did you have any problems controlling your car at any point in time prior to getting on Route 73?
>
> A. No.
>
> Q. So you get over to Route 73, can you take us through what happened?
>
> A. Sure. So I was in the right lane, um-hmm, there was clearly a red light. So I was going, I was in the right lane and I was slowing down. I don't recall if I had stopped completely or if I was like crawling. And at that point I saw there was a lot less vehicles in the left lane, probably like 8 to 10 less vehicles. So I moved over to the left lane.
>
> And when obviously, you know, I was still in the left lane like we were saying, so I was slowing down coming to a stop and I just was coming to a stop and I just couldn't control it. My foot was on the floor at that point. And I just was hydroplaning and I just could not stop. I lost control. (T2 189-18 through T2 190-15).

7. Respondent admitted at trial that she did not see the Appellant's vehicle prior to the accident and thus was unable to offer any testimony whatsoever

regarding the role played by weather, ponding water and hydroplaning in the happening of the accident. That is, Respondent offered no testimony or evidence to contradict the Appellant's version of the happening of the accident and the key facts that supported a defense under Mockler v. Russman, 102 N.J. Super. 582 (App. Div. 1968). (T2 14-4 through T2 16-24).

8. Plaintiff relied upon three physicians who offered testimony at trial. Specifically, Plaintiff relied upon Dr. Gerald Dworkin, Dr. Scott Pello and Dr. Nirav Shah. All three physicians provided testimony regarding Respondent's injuries and their opinions regarding those injuries having resulted from the March 3, 2020 accident. The Respondent's physicians also offered testimony regarding their opinion on whether or not the Respondent suffered a permanent injury. Only Dr. Shah mentioned that Respondent suffered an aggravation or exacerbation of a pre-existing condition to her cervical spine. (T2 161-1 through 161-6). Similarly, Dr. Shah's reports did not provide a proper comparative analysis as is required by New Jersey law. (Da51-Da54; Da55-Da62; T2 165-7 through T2 166-14).

9. Neither Dr. Pello nor Dr. Dworkin offered any opinion that Respondent had a pre-existing condition or suffered any aggravation. They testified that there were minor age-appropriate degenerative changes of the cervical spine but offered no testimony that there was aggravation of pre-existing conditions. Dworkin and

Pello opined that the findings on the Respondent's cervical MRI were the result of the March 3, 2020 accident.

10. Dr. Shah, who was called as a treating physician as distinguished from an expert, testified that the Respondent sustained a herniation at C6-7 of her cervical spine but also that she suffered an aggravation of pre-existing degenerative disc bulges at multiple levels within her cervical spine. Dr. Shah only saw the Respondent on one occasion, January 13, 2023. (T2 161-1 through 161-6; T2 at 163-23 through T2 164-3; T2 165-1 through 165-23). Dr. Shah's testimony regarding "aggravation" is not an analysis under Polk, but rather simply an attempt to explain away the prior objective findings. Thus, there was no true analysis to support an aggravation charge.

11. Plaintiff did not provide expert testimony setting forth the comparative analysis as to Ms. Presbery's pre- and post-accident condition which would meet the standard of Polk v. Daconceicao, 268 N.J. Super. 568, 575 (App. Div. 1993). Plaintiff argued aggravation but conversely, counsel for the Plaintiff/Respondent and Dr. Shah took the position that Plaintiff had no symptoms or limitations despite her pre-accident objective findings. Thus, there is no comparative analysis. (T2 161-1 through 161-6; T2 163-23 through T2 164-3; T2 165-1 through 165-23).

12. Although Respondent's counsel initially listed Model Civil Jury Charge 8.11F (aggravation of pre-existing disability) on the Respondent's Pre-trial

Information Exchange, the record at trial did not support a finding of aggravation attributable to the subject accident. (Da14-Da19).

13. No follow-up request for an aggravation charge consistent with Model Civil Jury Charge 8.11F was made at the charge conference on October 5, 2023 (T3).

14. No follow-up request for a charge of aggravation of a pre-existing disability under 8.11F was made the following morning when counsel for Plaintiff/Respondent made an additional charge request. No such request was made until after both Appellant and Respondent had completed their respective closing arguments. Thereafter, counsel for Respondent requested an additional charge consistent with the Model Civil Jury Charge 8.11F regarding aggravation of a pre-existing disability. (T3 8-4 through T3 13-20).

15. After argument outside of the presence of the jury, and over the objection of Appellant's counsel, the court granted the Respondent's request for the supplemental charge. (T4 95-11 through T4 105-4).

16. The court provided Appellant and Respondent an opportunity to provide a brief supplemental closing. However, the parties had already provided their closings and Defendant/Appellant structured his closing arguments based upon the case that was presented to the jury, and the charges that had been agreed upon and finalized the prior evening. (T4 95-11 through T4 105-4).

17. Over the objection of counsel for Defendant/Appellant, the court allowed supplemental closing for both Plaintiff-Respondent and Appellant-Defendant. Counsel for Appellant-Defendant argued that as Plaintiff-Respondent had envisioned the charge, they had already addressed any aggravation issues in their closing. Nevertheless, the court afforded counsel for Plaintiff-Respondent an additional brief closing. Counsel for the Defendant-Appellant gave only a very brief closing without sufficient time to prepare or restructure. (T4 101-17 through T4 107-25).

18. The court went on to charge the jury with respect to a claim of aggravation of a pre-existing disability as follows:

> In this case evidence has been presented that the Plaintiff had a condition before the accident; that is, age-appropriate degenerative disc disease. I will refer to this condition as the pre-existing condition.
>
> There are different rules for awarding damages depending upon whether the pre-existing condition was or was not causing Plaintiff any harm or symptoms at the time of this accident.
>
> Obviously, the Defendant in this case is not responsible for any pre-existing condition of the Plaintiff. As a result, you may not award any money in this case for damages attributable solely to any pre-existing condition.
>
> If you find that Plaintiff's pre-existing condition was not causing her any harm or symptoms at the time of the accident, but that the pre-existing condition combined with injuries occurred in the accident to cause or damage,

> then the Plaintiff is entitled to recover to the full extent of the damages she sustained. (T4 125-3 through 125-23).

19. The jury then returned a verdict in favor of the Respondent and against the Appellant in the amount of $240,000. (Da29-Da30). The court subsequently entered judgment in the amount of $250,085.48 in favor of Respondent and against Appellant, which included $10,885.48 in pre-judgment interest. (Da29-Da30). Judgment was initially entered on October 17, 2023. (Da29-Da30).

20. On October 19, 2023, Respondent filed a motion to pay counsel fees, enhanced interest and legal expenses based upon the non-acceptance of the previously filed offer of judgment.

21. Subsequent to the filing of the within Notice of Appeal, the court granted in large part the Respondent's motion for costs, enhanced prejudgment interest and attorney's fees. (Da47-Da48).

22. Defendant/Appellant Willitts was insured under a policy of automobile liability insurance with a $100,000 limit. (Da63).

23. The revised judgment docketed by the court on January 19, 2024 included an additional award of costs in the amount of $13,937.54. They were also awarded an additional $7,675.07 in additional pre-judgment interest. Finally, the order awarded attorney's fees in the amount of $31,800. Thus, under the January 19, 2024 order in response to Respondent's motion for costs, fees and enhanced interest, the overall judgment was increased by a total of $53,412.61. (Da47-Da48).

## LEGAL ARGUMENT

### I. THE COURT BELOW ERRED IN DECLINING TO PROVIDE A MOCKLER CHARGE.

**(Raised Below: T2 187 through 191; T3 310 through 319; T4 8 through 13)**

Appellant Jason Willitts testified at trial that he was unable to prevent his vehicle from coming into contact with the rear of the Respondent's vehicle as a result of road surface conditions. (T2 187-22 through T2 191-15). At trial, Mr. Willitts testified that he had seen puddled water earlier in the day as well as precipitation. (T2 187-22 through T2 191-15). Appellant Willitts testified that he attempted to stop his vehicle but it hydroplaned causing him to lose contact with the road surface and control of the vehicle. (T2 187-22 through T2 191-15). As a consequence, the Willitts' vehicle came into contact with the rear of the Presbery vehicle, resulting in the accident. (T2 187-22 through T2 191-15). Appellant met each and every element necessary for the Mockler charge.

The court allowed Appellant's counsel to argue these facts to the jury, but did not provide the jury with a legal mechanism by which to find that the Appellant's inability to stop his vehicle before it came into contact with the rear of the Respondent's vehicle was anything other than negligence. Further, review of the charge conference and subsequent discussions regarding Plaintiff's motion for a directed verdict and Defendant's request for a charge consistent with Mockler may have resulted in confusion as to which party bore the burden regarding the initial

determination as to whether or not Mr. Willitts was negligent. Ultimately, the court charged that Plaintiff bore the burden of proving by a preponderance of the evidence that the Defendant was negligent. However, the discussions amongst counsel and the court, as well as a reading of the charge as a whole, may have created further ambiguities. Specifically, as part of the charge conference, the court held oral argument on the Defendant/Appellant's motion to have a charge consistent with the holding in Mockler v. Russman, 102 N.J. Super. 582 (App. Div. 1968). (T3). The Defendant-Appellant had raised the issue of a Mockler charge prior to the trial and the court had held a decision on the request until after the trial. (Da64-Da69). Counsel for Defendant-Appellant argued:

> The testimony was specifically that he was aware of the conditions of the roadway, he was taking his time, he was doing what a reasonably prudent person would have done in a situation that was presented to him. And unfortunately he hit water, he hydroplaned, lost control of his car and hit the rear of her car. (T3 303-2 through 303-8).

That's exactly what Mockler is.

The court held that Mockler did not apply. (T3 310-7 through T3 311-18). The argument continued through T3 319. (T3 311 through T3 319). As a corollary, Plaintiff/Respondent argued in favor of a directed verdict on liability. The court ultimately denied that motion.

Further discussion was had regarding the liability issues and Mockler when counsel for Plaintiff/Respondent requested a charge stating that the Defendant was

following too closely, the following day. (T4 8-4 through T4 13-6). There was further discussion and confusion about the burden in light of the court's decision denying the request for a charge consistent with Mockler. (T4 10-13 through T4 13-20).

The Mockler charge provides that legal mechanism and instruction. Counsel for the Appellant requested a charge pursuant to Mockler v. Russman, 102 N.J. Super. 582 (App. Div. 1968) at the October 5, 2023 charge conference. Specifically, the Appellant requested a charge consistent with Mockler.

The Mockler case involved a motor vehicle accident wherein Plaintiff Mockler was injured when a school bus owned by Defendant Russman and operated by Larusso struck the rear of the Plaintiff's vehicle. The accident occurred in the morning and it was undisputed that a thin layer of snow covered the roads in the area causing them to be slippery. Plaintiff Mockler stopped her car in the intersection and was prepared to turn left into her employer's parking lot at the time of the accident. Her turn signal was operating and she was awaiting a break in the southbound traffic on Washington Avenue before making her turn. While stopped, she observed through her rearview mirror the Defendant's bus as it approached and struck her car in the rear. There was evidence in the case that the school bus was going about 15 to 20 miles per hour. The Defendant driver testified that he had been driving the school bus since 7:00 a.m. and that he knew the roads were slippery due

to the covering of a thin layer of snow. He testified that he had not skidded when he had stopped previously and that he was driving at a speed of about 10 miles per hour. When he reached the point of about 50 feet from the rear of the Plaintiff's vehicle, he applied his brakes, but the bus skidded. He turned his wheel to the right in an attempt to avoid the Mockler vehicle, but the bus kept going straight and struck Plaintiff Mockler's vehicle in the rear.

As in the Mockler case, the Appellant here was aware of the precipitation and wet roads, but had not previously encountered any loss of control or slippery conditions. The first time the Appellant experienced any slipping, hydroplaning or loss of control was as he applied the brakes just before the subject accident. Mr. Willitts testified at trial that he was traveling slowly and in the process of reducing his speed when the accident occurred. Contrary to arguments made by counsel for Plaintiff/Respondent in connection with motion practice, the charge conferences, and in his closing, there is absolutely no evidence that Mr. Willitts was traveling at an excessive speed. The Mockler defense is not limited to frozen precipitation. In Universal Underwriters v. Heibel, 386 N.J. Super. 307, (App. Div. 2006), the court recognized the applicability of the Mockler defense to unexpected gravel in the roadway. The court in Heibel, in reliance upon Mockler noted:

> We held that skidding of an automobile is not in itself sufficient to justify an inference of negligence on the part of the operator of a motor vehicle. Id. We stated:

> Should the rule be otherwise every automobile driver would be compelled to stay off the public roads when such roads happen to be slippery. It is common knowledge that the sudden and unexpected skidding of an automobile is one of the natural hazards of driving on icy roads and that it may befall even the most cautious of drivers. If such a driver is operating his car as would a reasonably prudent person under the circumstances, he is not to be held negligent merely because his car skidded, resulting in damage or injury to another. However, skidding may be evidence of negligence if it appears that it was caused by the failure of the driver to take reasonable precautions to avoid it, when the conditions of which he knew or should have known made such a result probable in the absence of such precautions. Universal Underwriters v. Heibel, 386 N.J. Su. 307, (App. Div. 2006) citing Mockler v. Russman, 102 N.J. Super. 582 (App. Div. 1968).

The court in Heibel went on to hold that the rationale expressed in Mockler applied although the issue was loose gravel as distinguished from ice. Similarly, in the unpublished decision of Calabree v. DiCristino, 2009 N.J. Super. Unpub. LEXIS 2548 (Da70-Da71), the court recognized that the Mockler defense was also available when a vehicle skidded due to antifreeze being present on the roadway. The mere possibility that a Defendant may have been negligent is insufficient for a Plaintiff to meet their burden. Hansen v. Eagle-Picher Lead Co., 8 N.J. 133, 141, 84 A.2d 281,

285 (1951), cited in, Raritan Trucking Corp. v. Aero Commander, Inc., 458 F.2d 1106 (3d Cir.1972).

The decision not to provide the Mockler charge is particularly problematic given that the Respondent's own testimony at trial failed to raise any question as to the Appellant's version of the happening of the accident. That is, Ms. Presbery could not refute Mr. Willitts' testimony that he lost control of his vehicle due to weather-related hydroplaning. As such, the jury should have been instructed consistent with Mockler v. Russman, 102 N.J. Super. 582 (App. Div. 1968).

The decision not to provide a charge consistent with Mockler is particularly problematic in that it created some level of confusion with respect to which party bore the burden of proving versus disproving negligence. In essence, the Defendant was saddled with the burden of proving an affirmative defense but the Defendant was not afforded the opportunity to have the jury instructed about that legal defense.

Although in the context of a quasi-criminal action, the Appellate Division in State v. Wenzel, 113, N.J. Super. 215 recognized that there was insufficient evidence that the Defendant drove carelessly notwithstanding that, "on a wet roadway in a construction area marked by a dozen signs warning of danger, Defendant's vehicle (according to the trooper's hearsay testimony) jackknifed, crossed into the opposite lane and struck another vehicle." State v. Wenzel, 113 N.J. Super. 215, 273 A.2d 395 (App Div. 1971). Where there are facts to support a Mockler charge, the failure

to provide such a charge unfairly alleviates the Plaintiff's burden of proof and production on negligence. Mockler v. Russman, 102 N.J. Super. 582 (App. Div. 1968) has been cited in the context of the doctrine of *res ipsa loquitur*. That is, where there is evidence that a Defendant was operating its vehicle as a reasonably prudent person under the circumstances but nevertheless lost control due to an unexpected road condition, failure to provide the Mockler charge is akin to allowing the Plaintiff to proceed under a theory of *res ipsa loquitur*.

In Hing Lee v. Gray, 456 F.2d 1276, 1972 U.S. App. LEXIS 10847 (3d Cir. 1972), the Third Circuit Court of Appeals in reliance upon Mockler affirmed the trial court's denial of Plaintiff's request for a new trial. In Hing Lee, the Defendant's vehicle was traveling northbound on the New Jersey Turnpike in a rainstorm when it skidded from the right lane into the center lane and stopped. After the Defendant's car stopped, it was struck by Plaintiff's vehicle. Defendant in Hing Lee, testified that he lost control of his car when the front-end started to shake violently and it was difficult for him to maintain control over the steering mechanism. The Defendant testified that on one prior occasion he had a similar mechanical problem with the same vehicle and that he had repairs made. The jury accepted this evidence, consistent with Mockler. Evidence of unfrozen precipitation and mechanical defect were sufficient to warrant the charge. Id.

In the present action, the Appellant testified that he was aware of precipitation and weather concerns including puddling or ponding of water. He testified that he had not experienced any issues with controlling the vehicle or breaking until immediately before the subject accident. Notably, Mr. Willits testified that his vehicle hydroplaned. Thus, the Appellant's testimony and the record before the court established all the elements necessary for the Mockler defense and the appropriate charge should have been given. Failure to provide the charge improperly reduced the Plaintiff/Respondent's burden and eliminated the Defendant/Appellant's viable defense. The court below erred in declining to provide the Mockler charge. A new trial is warranted.

## II. THE COURT BELOW ERRED IN PROVIDING AN AGGRAVATION CHARGE UNDER MODEL CIVIL CHARGE 8.11F

**(Raised Below: T2 161 through 166; T4 95 through 107; T4 125)**

### A. The Court Erred in Providing an Aggravation Charge over the Objection of the Defendant/Appellant as Plaintiff/Respondent did not Provide a Comparative Analysis Through Expert Testimony as Required by New Jersey Law.

**(Raised Below: T2 161 through 166; T4 95 through 107; T4 125)**

Respondent referenced Model Civil Jury Charge 8.11F regarding aggravation of a pre-existing disability in her pre-trial exchange but made no further mention of it during the course of trial. Respondent produced three expert medical witnesses at trial. Individually and when taken cumulatively, Respondent's experts did not

establish the necessary prerequisites for an aggravation charge. Following the conclusion of testimony, the court did not include a charge under 8.11F in the proposed jury charges provided to both counsel prior to closing arguments. Counsel for respondent did not raise the issue of a request for an aggravation charge during the initial charge conference. He failed to raise the issue the following morning when he sought a charge that the Defendant/Appellant had been following too closely. Rather, after both parties had completed their closing arguments, counsel for Plaintiff/Respondent realized that the aggravation charge was not part of the proposed charge to be read to the jury. Counsel for Respondent requested that the charge be read to the jury and counsel for the Appellant objected. Ultimately, the charge was included and both parties given an opportunity to provide a brief supplemental closing.

Respondent relied upon three physicians, Dr. Gerald Dworkin, Dr. Scott Pello and Dr. Nirav Shah. All three physicians provided testimony regarding Respondent's injuries and their opinions regarding those injuries having resulted from the March 3, 2020 accident. Notably, Dr. Shah's reports did not contain a comparative analysis sufficient to satisfy Polk v. Daconceicao, 268 N.J. Super. 568, 575 (App. Div. 1993). Although Dr. Shah spoke about aggravation and so-called age-appropriate degenerative changes, he did not offer a true comparative analysis of the Plaintiff's condition pre- versus post-accident. Thus, there was no analysis

provided to the jury from which they could consider a claim that the Plaintiff had a pre-existing disability which was aggravated by the subject accident.

The Respondent's physicians also offered testimony regarding their opinion on whether or not the Respondent suffered a permanent injury. Only Dr. Shah mentioned that the Respondent suffered an aggravation or exacerbation of a pre-existing condition to her cervical spine. Neither Dr. Pello nor Dr. Dworkin offered any opinion that the Respondent had a pre-existing condition much less than she suffered an aggravation. Drs. Dworkin and Pello testified that there were minor age-appropriate degenerative changes visible in the studies of Respondent's cervical spine but offered no testimony that there was aggravation of a pre-existing condition. Drs. Dworkin and Pello further opined that the findings on the Respondent's MRI of her cervical spine were the result of the March 3, 2020 accident.

Dr. Shah, who was called as a treating physician as distinguished from an expert, testified that Respondent sustained a herniation at C6-7 of her cervical spine. Dr. Shah also testified that in his opinion, the Respondent suffered an aggravation to pre-existing degenerative disc bulges at multiple levels within her cervical spine. Dr. Shah had only seen the Respondent on one occasion, January 13, 2023. (T2 161-1 through T2 165-18).

The Respondent failed to provide the requisite comparative analysis. Specifically, in order for a physician to provide an opinion that a pre-existing

condition was aggravated or exacerbated as a result of an accident, a comparative analysis must be performed. Specifically, "comparative medical evidence is [a] necessary part of Plaintiff's *prima facie* case." Davidson v. Slater, 189 N.J. 166, 185 (2007).

Under Model Civil Jury Charge 8.11F the Plaintiff has the burden of proving what portion of her condition is due to her pre-existing injury. Model Civil Jury Charge 8.11F. The Respondent must have proof of causation with respect to a claim of aggravation of a pre-existing injury or a new independent injury to an already injured part of the body. Davidson v. Slater, 189 N.J. 166, 185 (2007). Accordingly, Respondent "bears the burden of production in respect to demonstrating that the accident was the proximate cause of the injury, aggravation or new permanent injury to the previously injured body part." Davidson, at 185, citing, O'Brien Cogeneration, Inc. v. Automatic Sprinkler Corp. of Am., 361 N.J. Super. 264, 274-75 (App. Div. 2003). A Plaintiff's failure to produce a comparative medical analysis can be fatal to a Plaintiff's case. Reichert v. Vegholm, 366 N.J. 209, 213-14, (App. Div. 2004). Where, as in the present case, a Plaintiff does not raise sufficient comparative medical evidence, Plaintiff faces dismissal. See, Davidson at 188.

Dr. Shah's testimony and Plaintiff/Respondent's argument were not of aggravation of a pre-existing disability or a comparative analysis. Rather, the

testimony and argument were used to attempt to persuade the jury that despite objective findings to the contrary, Ms. Presbery did not have a pre-disability.

New Jersey Courts have followed the long-standing principle as set forth in Polk v. Daconceicao, 268 N.J. Super. 568, 575 (App. Div. 1993), that "a diagnosis of aggravation of a pre-existing injury or condition must be based upon . . . an evaluation of the medical records of the patient prior to the trauma with the objective medical evidence existence post-trauma." Id. The Polk analysis is required to differentiate a subsequent injury to a body part that was previously injured, whether aggravation of the prior injury is alleged or not. Bennett v. Lugo, 368 N.J. Super. 466, 473 (App. Div. 2004). Similarly, the court in Sherry v. Buonansonti, 287 N.J. Super. 518 (1996), in reliance upon Polk, found Plaintiff failed to meet their burden in surmounting the verbal threshold due to the absence of a comparative medical analysis. As the court in Polk v. Daconceicao, 268 N.J. Super. 568, 575 (App. Div. 1993) recognized:

> A diagnosis of aggravation of a pre-existing injury or condition must be based upon a comparative analysis of the Plaintiff's residuals prior to the accident with the injuries suffered in the automobile accident at issue. This must encompass an evaluation of the medical records of the patient prior to the trauma with the objective medical evidence existent post-trauma. Without a comparative analysis, the conclusion of the pre-accident condition has been aggravated must be deemed insufficient to overcome the threshold of N.J.S.A. § 39:6A-8.

It is the Plaintiff who is in the best position to present evidence as to aggravation or exacerbation and to establish what, if any, damages were caused by the particular Defendant. Reichert v. Vegholm, 366 N.J. 209, 213-14, (App. Div. 2004); O'Brien (Newark) Congregation, Inc. v. Automatic Sprinkler Corp. of America, 361 N.J. Super. 274, 825 A.2d 524. It is the Plaintiff who bears the burden of proof in separating out damages caused by a particular Defendant's accident from any prior injuries or conditions. e.g. Blanks v. Murphy, 268 N.J. Super. 152, 162, 632 A.2d 1264 (App. Div. 1993). A Plaintiff bears the burden of coming forward with sufficient and specific evidence "for a jury to reasonably apportion responsibility for the injuries" claimed in the action. Dziedzic v. St. John's Cleaners & Shirt Launderers, Inc., 53 N.J. Super. 157, 161 (1969). See also Boryszewski v. Burke, 380 N.J. Super. 361, 375 (App. Div. 2005); Campione v. Soden, 150 N.J. 163, 184 (1997), cert. denied, 186 N.J. 242 (2006).

In the present action, Dr. Shah who saw Respondent only once, provides an opinion that as a result of the accident she suffered an aggravation of a pre-existing degenerative condition. Nowhere in his report or his trial testimony, however, did he apportion what injury, symptom or condition was pre-existing versus that which was specifically caused by the March 3, 2020 motor vehicle accident. That counsel for the Respondent argued below that Ms. Presbery was asymptomatic prior to the subject accident is insufficient to meet the Respondent's burden of producing

competent expert opinion in the form of a comparative analysis. Counsel's representations are not evidence and they are certainly not expert testimony. Similarly, neither Dr. Shah nor any other treating expert physician on behalf of the Respondent offered competent testimony that Respondent was effectively asymptomatic prior to the accident. Respondent argued in opposition to Appellant's motion for a new trial that there were no records indicating that she treated for her pre-existing conditions and thus no analysis was necessary. This is in error. Even where a Plaintiff argues that they were asymptomatic prior to an accident, an analysis was and is required in order to support an aggravation charge.

Failure to provide such analysis constitutes failure of the Respondent to meet her burden in establishing the Appellant was a proximate cause of her injuries. As Dr. Shah failed to apportion damages between each responsible party (i.e. the pre-existing conditions and the March 3, 2020 motor vehicle accident), he does not meet the standard as required in Polk, or Davidson. Polk requires that a diagnosis of aggravation of a pre-existing injury or condition be based upon evaluation of the medical records of a patient prior to the trauma with objective medical records that exist post-trauma.

Dr. Shah did not testify that he reviewed any prior medical records other than the records of Dr. Dworkin who had referred Respondent to Dr. Shah. Thus, Dr. Shah did not even have the ability to perform a comparative analysis. As Respondent

did not provide the appropriate analysis of pre- and post-accident treatment and causation, an aggravation charge was improper. Accordingly, a new trial is warranted. Paramel v. Martinez, 2017 N.J. Super. Unpub. LEXIS 1701 (Da72-Da74).[2]

### B. The Court Erred in Providing an Aggravation Charge as the Parties Completed Closing Arguments and the Supplemental Charge was Unduly Prejudicial to the Defendant.

In addition to the aforementioned, the court erred in allowing the aggravation charge after the parties had completed the initial charge conference and had completed closing arguments. Counsel for Defendant/Appellant had structured its case and in particular its closing argument on the record that was submitted at trial. This record did not include an apportionment or aggravation claim. Similarly, this record did not support an aggravation charge. Most significantly, the court had not included an aggravation charge prior to Defendant/Appellant's closing argument so that counsel could have cohesively and effectively crafted his closing statements to the jury to address the allegations of aggravation of a pre-existing condition. Similarly, counsel for Defendant/Appellant only had a brief period of time to attempt to address an unsupported and for all intents and purposes a new issue in the case.

On the contrary, the court allowed brief supplemental closings which created a disjointed argument. The supplemental argument could only be perceived by the

[2] Appellant is not aware of other unpublished opinions with contrary holdings.

jury as inconsistent with the Defendant/Appellant's primary argument on the absence of evidence that Ms. Presbery had sustained a permanent injury. The court's decision to allow the aggravation charge after the parties had completed closing arguments created undue prejudice for the Defendant/Appellant. The court's decision to allow supplemental closings did not mitigate or adequately address that undue prejudice. The supplemental closings created the risk of confusion and in fact placed undue weight on the Respondent's allegations that she sustained an aggravation injury. N.J.R.E. 403. Thus, the timing of the court's decision to allow the aggravation charge also constituted error warranting a new trial.

## III. NEW JERSEY COURT RULE 4:58-2(C) MANDATES THAT THE ADDITIONAL AWARD OF PRE-JUDGMENT INTEREST, ATTORNEY'S FEES AND COSTS BE VACATED.

**(Not Raised Below)**

New Jersey Court Rule 4.58-2(C) provides:

> No allowances shall be granted pursuant to paragraphs (a) or (b) if they would impose undue hardship or otherwise result in unfairness to the offeree. If undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly. The burden is on the offeree to establish the offeree's claim of undue hardship or lack of fairness.

Rule 4.58-2(C).

Respondent in this matter claimed injuries as a result of the subject motor vehicle accident. Defendant/Appellant provided a medical defense. The medical defense was undermined by the late addition of the aggravation charge and the ability of the Respondent's counsel to argue aggravation. Defendant/Appellant had a policy of automobile liability insurance with a $100,000 limit. The initial judgment was two and a half times the Appellant's available policy limits. Thus, any enhanced interest, costs and attorney's fees as entered pursuant to the supplemental order and judgment would constitute an undue hardship on Appellant Jason Willitts. While this issue is not specifically argued below, the court may nevertheless address it at this time. First, at the time the Notice of Appeal in the within action was filed, the court had not yet decided the motion on enhanced interest, costs and fees and thus it could not have been raised in the Notice of Appeal. More significantly, the court's decision under the facts and circumstances of this matter constitutes plain error. New Jersey Court Rule 2:10-2 provides:

> Any error or omission shall be disregarded by the Appellate Court unless it is of such nature as to have been clearly capable of producing an unjust result, but the Appellate Court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court. The court's entry of a supplemental judgment including enhanced interest, costs and attorney's fees created an unjust result in light of the undue financial burden it places upon the Appellant.

As set forth in greater detail in other sections of this brief, Appellant maintains that a new trial must be granted and the judgement vacated. In the alternative, at a minimum, the supplemental judgment on enhanced interest, costs and fees must be vacated as it would present undue financial burden to the Appellant.

## CONCLUSION

For the aforementioned reasons, it is respectfully submitted that Defendant/Appellant Jason Willitts' appeal must be granted, remanding the matter for a new trial and vacating the previously entered judgments.

**MARGOLIS EDELSTEIN**
Attorneys for Defendant/Appellant,
Jason Willitts

BY: s/ Jeanine D. Clark
Robert M. Kaplan, Esquire
Jeanine D. Clark, Esquire

Dated: May 16, 2024

| | |
|---|---|
| MELISSA PRESBERY,<br>*PLAINTIFF/RESPONDENT*<br><br>v.<br><br>JASON WILLITTS;<br>JOHN DOE #1-10 (fictitious names designating the owner and/or operator);<br>ABC CORP. #1-10 (fictitious corporations designated as owners and/or operators)<br>*DEFENDANTS/APPELLANTS* | § SUPERIOR COURT OF NEW JERSEY<br>§ APPELLATE DIVISION<br>§<br>§ CIVIL ACTION<br>§<br>§ APPEAL FROM FINAL JUDGMENT<br>§ OF THE SUPERIOR COURT OF NEW<br>§ JERSEY - BURLINGTON COUNTY<br>§ DOCKET NO. BUR-L-2295-21<br>§<br>§ APPELLATE<br>§ DOCKET NO. A-001360-23<br>§<br>§ SAT BELOW:<br>§ THE HON. M. PATRICIA RICHMOND,<br>§ J.S.C. RETIRED ON RECALL<br>§<br>§ SUBMITTED: JUNE 14, 2024 |

# RESPONDENT'S AMENDED BRIEF IN SUPPORT OF AFFIRMING FINAL JUDGMENT, JURY VERDICT AND POST-TRIAL ORDERS, THE HON. M. PATRICIA RICHMOND, J.S.C. RET. ON RECALL, PRESIDING

ON THE BRIEF:
Jeremy M. Weitz, Esquire
jweitz@injurylin.com
ID# 018842009
SPEAR, GREENFIELD, RICHMAN, WEITZ & TAGGART, P.C.
10,000 Lincoln Drive East
One Greentree Centre, Suite 201
Marlton, New Jersey 08053
(856) 985-4663
Attorney for Plaintiff/Respondent, Melissa Presbery

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# APPENDIX



[1] Brief(s) attached pursuant to R. 2:6-1(c)(2), as the issue of the Verdict amount and Offer of Judgment penalties has been brought into issue, although not raised below, by the instant appeal.

[2] Brief attached, without exhibits, pursuant to R. 2:6-1(c)(2), only to evidence the issue of the verdict amount and/or Offer of Judgment penalties was not raised below.

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# TABLE OF JUDGMENTS, ORDERS AND/OR RULINGS ON APPEAL

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**New Jersey Model Civil Jury Charges**

# I

## PRELIMINARY STATEMENT

The instant appeal concerns two (2) rulings made by the Trial Court concerning the jury charge in this matter; as well as a new and unsubstantiated allegation of hardship relative to the damages assessment, interest and penalties, not raised below.

The first issue brought forth by Appellant relates to the Trial Court's denial of Appellant's request for a non-standard jury charge, that read "If a driver is operating his/her car as would a reasonably prudent person under the circumstances, he/she is not to be held negligent merely because his/her car skidded or slid, resulting in damage or injury to another." Appellant substantiated this request upon the holding in Mockler v. Russman, 102 N.J. Super. 582 (App. Div. 1968), which affirmed a jury verdict of "no negligence" in a case involving a rear-end motor vehicle collision. At the conclusion of the evidence in this matter, the Trial Court ruled the requested non-standard jury charge was not-warranted, based upon the facts in evidence.

The Trial Court subsequently denied Respondent's Motion for a Directed Verdict on the issue of Appellant's negligence, made pursuant to Dolson v. Anastasia, 55 N.J. 2 (1969). The jury was therefore instructed as to the Model Civil Jury Charges concerning Negligence, Foreseeability and Proximate

Cause; and ultimately returned a unanimous verdict finding Appellant to have been both negligent and a proximate cause of the collision.

The second issue brought forth on appeal relates to the Trial Court's reading of Model Civil Jury Charge 8.11F "Aggravation of the Pre-Existing Disability". Respondent, via discovery responses, physician/expert reports and pre-trial submissions, had placed Appellant upon notice of a claim for Aggravation in this case. Respondent's filed pre-trial submissions contained a request to charge the jury as to Aggravation. Respondent called Dr. Nirav Shah for trial testimony via *de bene esse* deposition two (2) months prior to trial, who explicitly opined that Respondent aggravated pre-existing but asymptomatic degenerative changes in her cervical spine; corroborated by objective evidence including both physical exam and an EMG finding of acute radiculopathy at a level Dr. Shah called an Aggravation. This evidence was admitted without objection; no objection at the time the testimony was proffered, not *in limine* prior to trial and not prior to or even after the presentation of the evidence to the jury, at trial.

Respondent represented to all of her physicians and at the time of trial, to have never had injuries, pain or problems to her cervical spine, such that would warrant medical treatment or testing. Appellant's medical expert, Dr. Larry Rosenberg, reviewed Respondent's primary care physician's records pre-

dating the subject collision and acknowledged they were devoid of any relevant history to the cervical spine.

Appellant alleges legal error in charging the jury as to Aggravation, because Dr. Shah did not perform a comparative analysis of prior medical records. Not only is such an objection waived by not making it at the time the evidence was presented; the objection is meritless based upon the established evidence that there was nothing to compare. Appellant further argues prejudice in the timing the charge was ruled to be given, in that closing arguments had been completed and the request was made immediately prior to the jury charge. As previously indicated, there was no surprise that the Aggravation charge was being requested and a part of this case. The charge was mistakenly missed by the parties and the Court during the charge conference. The Court further provided the parties with supplemental closing argument to address the charge.

The last issue raised for the first time on appeal concerns the verdict amount and offer of judgment penalties. These issues are both waived and meritless, as will be demonstrated; in particular, it is the insurance carrier responsible to satisfy Offer of Judgment penalties.

## II

## PROCEDURAL HISTORY

On November 3, 2021, Respondent, Melissa Presbery, initiated litigation against Appellant, Jason Willitts, relative to allegations of personal injuries sustained, as the result of a March 3, 2020[7] automobile collision. Da001. Appellant's Answer was filed on December 22, 2021. Da009. Thereafter, discovery ensued.

Under cover letter dated March 16, 2022, Respondent served responses to Appellant's request for written discovery, including answers to Form A interrogatories. Pa001. In response to Form A Interrogatory number nine (9), which reads "If a previous injury, disease, injury, or condition is claimed to have been aggravated, accelerated, or exacerbated, specify in detail the nature of each…", Respondent answered "To the extent Plaintiff had any pre-existing or degenerative conditions, relative to the body part injured herein, same were asymptomatic prior to the instant accident and as such, were aggravated/exacerbated as a result." Pa003.

On November 8, 2022, immediately following the parties' depositions, Respondent filed an Offer of Judgment seeking the entire amount of bodily

[7] Underlining designates the correct date, erroneous within Appellant's Procedural History

injury coverage available under Appellant's applicable automobile insurance policy[8], underwritten by New Jersey Manufacturers Insurance Company. Da013.

On January 26, 2023, Respondent supplemented her discovery responses with the January 13, 2023 neurosurgical evaluation from Dr. Nirav Shah, M.D. Da051 (report), Pa010 (cover letter evidencing service). Within said report, Dr. Nirav Shah specifies his opinion that "…Personal review of the cervical MRI does show multilevel age-appropriate changes that were aggravated by the injury with superimposed herniation at C6-C7 with clinically correlating neural compression." Da053. Dr. Shah further notes that "…Prior to this accident, the patient has not had prior medical care or imaging relating to these complaints." Da051.

Discovery ended in this matter on March 17, 2022.

On March 22, 2023, this matter submitted to court-ordered non-binding Arbitration, which resulted in a finding in favor of Respondent; determining Appellant to be causally negligent, Respondent having overcome the Verbal Threshold and assessing damages in an amount in excess of Appellant's

[8] At no time was it ever revealed by Appellant, Appellant's counsel and/or Appellant's insurer, how much if any of the policy proceeds from the $100,000.00 combined single limit policy, had been paid toward property damage claim(s); until post-verdict.

insurance liability coverage. Pa011. The Arbitration Award was subsequently appealed by Appellant. Pa012.

On July 26, 2023, Respondent filed a Pre-Trial Memorandum (incorrectly titled as "Amended"), identifying requests for jury instructions including 8.11F "Aggravation of Pre-Existing Disability". Da014 at Da015-16.

In anticipation of trial, Respondent noticed and completed the *de bene esse* depositions of Dr. Gerald Dworkin (2T: 75:22 – 144:04)[9] on August 10, 2023, Dr. Scott Pello (1T: 75:24 – 129:25) on August 15, 2023 and Dr. Nirav Shah (2T: 146:05 – 184:05) on August 16, 2023. Dr. Shah explicitly opined as to his opinion regarding Aggravation, without objection. (T2: 163:18 – 164:03, 164:19 – 166:14).

A Pre-Trial Conference was held before the Hon. Eric G. Fikry, J.S.C., on August 18, 2023; in anticipation of Trial to commence August 21, 2023. Immediately thereafter, Trial was adjourned upon Appellant's request. Trial was re-listed and a Pre-Trial Conference held on September 28, 2023 before the Hon. M. Patricia Richmond, J.S.C. Ret. on recall. Trial subsequently commenced with jury selection on October 2, 2023.

[9] Respondent hereby adopts the Transcript Designations footnoted in Appellant's Brief at page five (5).

A charge conference was held on October 5, 2023, relative to the Jury Charge that would be instructed at the conclusion of the case; anticipatedly the following day, October 6, 2023. (3T: 295:02 – 326:06). During said conference, the Court heard argument relative to Appellant's request for a non-standard jury charge, specifically " If a driver is operating his/her car as would a reasonably prudent person under the circumstances, he/she is not to be held negligent merely because his/her car skidded or slid, resulting in damage or injury to another." (3T: 298:09 – 315:21). The Court ultimately denied this request. Id. Respondent also made a Motion for Directed Verdict on the issue of Appellant's negligence, which was also denied by the Court. (3T: 315:22 – 318:07). During the conference, the parties and the Court all missed the fact that Appellant's request for the Aggravation Charge had been skipped.

On October 6, 2023, the parties' attorneys delivered closing arguments. At the conclusion of closing arguments, Respondent's counsel realized the error with respect to the Aggravation Charge request and brought it to the attention of the Court. (4T: 95:24 – 100:11). The Court ruled the Aggravation Charge warranted based upon the evidence and afforded both counsel the opportunity for supplemental closing argument, in order to address the Aggravation jury charge. Id. Relative to negligence, foreseeability and

proximate cause, the jury was instructed pursuant to the Model Civil Jury Instructions. (4T: 113:05 – 119:18).

The jury returned a Verdict in favor of Respondent; determining Appellant to have been causally negligent, Respondent to have overcome the Verbal Threshold and assessing non-economic damages of two hundred forty thousand dollars ($240,000.00). (4T: 142:01 – 145:19).

On October 9, 2023, Respondent submitted a proposed Order for Judgment in accordance with the *Five-Day* rule. Pa013. On October 17, 2023, said Order was entered by the Court, without objection; assessing pre-judgment interest in the amount of ten thousand eight hundred eighty-five dollars and forty-eight cents ($10,885.48). Da029.

On October 19, 2023, Respondent filed a Motion to assess costs, fees and Offer of Judgment penalties against Appellant, based upon the triggered Offer of Judgment. Pa014[10]. On October 24, 2023, Appellant filed a Motion for New Trial; only as to the Mockler charge and Aggravation charge issue(s).

[10] Brief(s) attached pursuant to R. 2:6-1(c)(2), as the issue of the Verdict amount and Offer of Judgment penalties has been brought into issue, although not raised below, by the instant appeal.

Pa050[11]. No request for remittitur and/or challenge to the assessment of damages was raised. Id.

On October 25, 2023, Respondent filed Certification as to additional attorneys' fees incurred, opposing Appellant's Motion for New Trial. Pa078.

On November 8, 2023, Appellant filed an Opposition to Respondent's Motion regarding the triggered Offer of Judgment. Pa082. Appellant objected only to the requested hourly rate sought by Respondent's counsel; indicating specifically that Appellant "…has no objection to Plaintiff's counsel's calculation of the interest and the litigation expenses." Pa082, second paragraph. On November 8, 2023, Respondent filed a Reply Brief relative to the Motion for Offer of Judgment penalties, further emphasizing the basis for the requested attorneys' fee. Pa084.

On December 7, 2023, the Court circulated a tentative disposition in lieu of oral argument, relative to the Motion for New Trial. Da031. Upon receipt of the tentative decision, Appellant's counsel declined the opportunity for oral argument. Pa158.

On December 19, 2023, Respondent filed a Reply Brief to the Motion for Offer of Judgment penalties, seeking the penalties to be specifically

[11] Brief attached, without exhibits, pursuant to R. 2:6-1(c)(2), only to evidence the issue of the verdict amount and/or Offer of Judgment penalties was not raised below.

Ordered against New Jersey Manufacturers Insurance Company, in lieu of Appellant. Pa159.

On January 4, 2024, Appellant's current counsel substituted an appearance in lieu of Appellant's trial counsel. Pa167.

On January 8, 2024, Notice of the instant Appeal was filed by Appellant. Pa168. Also on January 8, 2024, Respondent filed her Case Information Statement in response to the Notice of Appeal, indicating that this matter was not yet final due to the still outstanding Post-Trial Motions. Pa170.

On January 19, 2024, the Trial Court entered an Order denying Appellant's Motion for a New Trial. Da045. Also on January 19, 2024, the Trial Court entered an Order granting Respondent's Motion for Offer of Judgment penalties, after a comprehensive opinion set forth upon the record. Da047, *see also* (5T: 03:01 – 14:03, Trial Court opinion).

An Amended Notice of Appeal was thereafter filed by Appellant, on January 19, 2024. Da077.

# III

## STATEMENT OF FACTS

1. On March 3, 2020, Plaintiff/Respondent, Melissa Presbery, was the owner and operator of a motor vehicle, stopped in a line of traffic due to a red-traffic signal ahead; when she was rear-ended by a vehicle owned and operated by Defendant/Appellant, Jason Willitts. (2T: 11-23 – 15:04, Respondent's testimony)

2. It is undisputed that at the time of the collision that there was no active precipitation falling; and it was admitted by Appellant that any rainfall had occurred overnight and/or prior to his leaving his abode, the morning of the collision. (2T: 187:19 – 188:23, Appellant's testimony).

3. Throughout his commute, Appellant observed puddles within the roadway and otherwise generally wet road conditions. (2T: 189:16 – 189:25, Appellant's testimony).

4. Appellant was driving in the right lane of Route 73, in Maple Shade, New Jersey, when he came upon stopped traffic; due to the traffic control being red, at the intersection with High Street. (2T: 190:01 – 190:15, Appellant's testimony).

5. Appellant, observing the line of stopped-traffic in the left-travel lane to be shorter, chose to merge into the left-travel lane, rather than come to a stop behind traffic in the right-travel lane. Id.

6. Appellant estimated a distance of approximately eight (8) to ten (10) cars, between where he entered the left-travel lane and the rear of Respondent's stopped vehicle within the same lane. (2T: 190:16 – 191:01, Appellant's testimony).

7. Appellant does not recall at what point or distance he began to apply his brakes to stop behind Respondent's vehicle. (2T: 191:02 – 191:18, Appellant's testimony).

8. Appellant alleges that upon braking, his vehicle "hydroplaned". (2T: 190:14-15, Appellant's testimony).

9. Appellant recognized generally wet conditions and made what he believed to be necessary modifications to his driving, due to the wet roadways and the potential to "hydroplane". (2T: 198:08 – 198:23, Appellant's testimony).

10. Appellant acknowledges having no issue with maintaining control of his vehicle upon the wet roadways during his drive leading up to the collision. (2T: 189:22 – 189:25, Appellant's testimony).

11. Appellant could not cite to a specific road condition that caused his vehicle to "hydroplane" on the roadway immediately behind the Respondent's vehicle. (3T: 203:02 – 203:12, Appellant's testimony).

12. Within Appellant's Pre-Trial submissions, Appellant requested a non-standard jury instruction pursuant to Mockler v. Russman, 102 N.J. Super. 582 (App. Div. 1968) and presented the Court with language that read "If a driver is operating his/her car as would a reasonably prudent person under the circumstances, he/she is not to be held negligent merely because his/her car skidded or slid, resulting in damage or injury to another." Da021 at Da023.

13. Following the presentation of evidence consistent with the above, the Trial Court ruled that the facts herein were not akin to those in Mockler and that the proposed non-standard jury charge was both inapplicable and not-warranted. (3T: 298:09 – 315:21).

14. The Trial Court also denied Respondent's Motion for a directed verdict as to Appellant's negligence, pursuant to Dolson v. Anastasia, 55 N.J. 2 (1969). (3T: 315:22 – 318:07).

15. Accordingly, the jury was left to determine Appellant's negligence based upon Model Civil Jury Instructions 5.10A and 5.10B, which required the jury to determine whether Appellant acted as a reasonably prudent person; or if Appellant deviated from said standard. (4T: 113:05 – 119:18).

16. As a result of the subject collision, Respondent alleged personal injuries, including but not limited to an acute and permanent disc herniation in the cervical spine at C6-7, an acute and permanent radiculopathy found by EMG at C5-6 and an aggravation of pre-existing but asymptomatic degenerative findings in the cervical spine, most notably at C4-5 and C5-6. (2T: 168:17 – 169:08, Dr. Shah's testimony); *see also* Da051, Dr. Shah's January 13, 2023 evaluation note. *Also see* (2T: 112:22 – 113:04, Dr. Dworkin's testimony).

17. This diagnosis and others were offered into evidence through three (3) physicians; Dr. Gerald Dworkin, Dr. Scott Pello, and Dr. Nirav Shah; Dr. Shah who specifically opined to the aggravation injury, without objection. Id.

18. Furthermore, Respondent had no prior medical history relevant to her cervical spine, which was corroborated by the defense medical expert's review of Respondent's primary care records, predating the subject collision. (3T: 275:10 – 277:15, Dr. Rosenberg's testimony).

19. Despite the admission of said evidence without any objection, Appellant objects to the reading of Model Civil Jury Charge 8.11F, *the Aggravation charge*, on the bases that: 1) Respondent did not present sufficient comparative analysis to support the diagnosis of an aggravation; and 2) that the timing of the charge being added, specifically after closing arguments, was unduly

prejudicial to the defense. (4T: 95:24 – 100:11). *See also* Pa050, Appellant's Motion for New Trial.

20. The charge, although requested in pre-trial submissions, was erroneously missed by the parties and the Court, during the charging conference the prior evening and not realized until closing arguments. Id.

21. The subject testimony at issue from the *de bene esse* deposition of neurosurgeon, Dr. Nirav Shah, M.D, was taken nearly two (2) months prior to trial. There was no objection to Dr. Shah's testimony at the time it was provided, no objection in the period leading up to trial and no objection when the testimony was played for the jury at trial. It was not until the discussion regarding the reading of the aggravation charge, that an objection was made. At that point, the jury had heard the evidence of Dr. Shah's opinion as to aggravation. (2T: 146:05 – 184:05, Dr. Shah's trial testimony).

22. Respondent testified consistent with the records, denying any similar problems or complaints. (2T: 28:02 – 29:06, Respondent's testimony).

23. Furthermore, Model Civil Jury Charge 8.11F mandates that in a situation where the injured party had been previously asymptomatic, the offending party may be held **wholly liable** for the resulting condition. Model Civil Jury Instruction 8.11F, "Aggravation of the Pre-Existing Disability" (January 1997).

24. Appellant raises an issue as to the hardship associated with the Offer of Judgment penalties assessed. This argument was not raised at the trial court level. *See* Pa050, Defendant's Motion for New Trial. *See also* Da077, Appellant's Notice of Appeal.

25. Appellant **agreed** to the amounts sought for costs and interest; and did not dispute counsel's calculation of **hours** relative to attorney's fee. Pa082.

26. The determination of attorney's fee, which was upon certifications of experience and qualifications, as well as Court Ordered determination in another matter, relative to trial counsel with similar credentials. In other words, the amount was not arbitrary. (5T: 03:01 – 14:03, Trial Court's opinion upon record).

27. The trial level having decided the Motion on December 8, 2023, although not uploading an Order until January 17, 2024, did not consider Respondent's amended proposed Order, submitted December 19, 2023, which was to enter the Offer of Judgment penalties against Appellant's insurer, New Jersey Manufacturers Insurance Company; who did not make a single settlement offer in this matter despite an arbitration award in excess of the liability coverage and an Offer of Judgment. Pa159.

31. It is the insurer who made all relevant decisions in this matter relative to this litigation. Respondent has every intention of obtaining an assignment of rights from Appellant Willis and pursuing *Bad Faith* claims against New Jersey Manufacturers Insurance Company, should the trial court Orders be affirmed and the judgment not satisfied by New Jersey Manufacturers Insurance Company.

## IV

## JURISDICTIONAL AUTHORITY

Appeals may be taken to the Appellate Division as of right, from final judgments of the Superior Court trial divisions, or the judges thereof sitting as statutory agents; the Tax Court; and in summary contempt proceedings in all trial courts except municipal courts. N.J. R. 2:2-3(a)(1).

An appellate court's review of rulings of law and issues regarding the applicability, validity (including constitutionality) or interpretation of laws, statutes, or rules is de novo. *See* In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020) (agency's interpretation of a statute); State v. Courtney, 243 N.J. 77, 85 (2020) (interpretation of sentencing provisions in the Criminal Code); State v. G.E.P., 243 N.J. 362, 382 (2020) (retroactivity of statute); State v. Hemenway, 239 N.J. 111, 125 (2019) (constitutionality of a statute); State v. Hyland, 238 N.J. 135, 143 (2019) (appealability of a sentence); Kocanowski v. Twp. of Bridgewater, 237 N.J. 3, 9 (2019) (statutory interpretation); Green v. Monmouth Univ., 237 N.J. 516, 529 (2019) (applicability of charitable immunity); State v. Fuqua, 234 N.J. 583, 591 (2018) (statutory interpretation); State v. Dickerson, 232 N.J. 2, 17 (2018) (interpretation of court rules).

Appellate courts apply a deferential standard in reviewing factual findings by a judge. Balducci v. Cige, 240 N.J. 574, 595 (2020); State v. McNeil-Thomas, 238 N.J. 256, 271 (2019). "Appellate courts owe deference to the trial court's credibility determinations as well because it has 'a better perspective than a reviewing court in evaluating the veracity of a witness.'" C.R. v. M.T., 248 N.J. 428, 440 (2021) (*quoting* Gnall v. Gnall, 222 N.J. 414, 428 (2015)). "A reviewing court must accept the factual findings of a trial court that are 'supported by sufficient credible evidence in the record.'" State v. Mohammed, 226 N.J. 71, 88 (2016) (quoting State v. Gamble, 218 N.J. 412, 424 (2014)). "Reviewing appellate courts should 'not disturb the factual findings and legal conclusions of the trial judge' unless convinced that those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)).

"The general rule is that findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence." Gnall v. Gnall, 222 N.J. 414, 428 (2015) (*quoting* Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). *See* State v. Camey, 239 N.J. 282, 306 (2019)

("[w]e will not disturb the trial court's findings; in an appeal, we defer to findings that are supported in the record and find roots in credibility assessments by the trial court"); Motorworld, Inc. v. Benkendorf, 228 N.J. 311, 329 (2017) ("[w]e review the trial court's factual findings under a deferential standard: those findings must be upheld if they are based on credible evidence in the record"); Thieme v. Aucoin-Thieme, 227 N.J. 269, 283 (2016) (findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence); State v. K.W., 214 N.J. 499, 507 (2013) ("[w]e defer to the trial court's factual findings 'so long as those findings are supported by sufficient credible evidence in the record").

The deferential standard is applied "because an appellate court's review of a cold record is no substitute for the trial court's opportunity to hear and see the witnesses who testified on the stand." Balducci v. Cige, 240 N.J. 574, 595 (2020). And "[l]imiting the role of a reviewing court is necessary because '[p]ermitting appellate courts to substitute their factual findings for equally plausible trial court findings is likely to undermine the legitimacy of the [trial] courts in the eyes of litigants.'" State v. McNeil-Thomas, 238 N.J. 256, 272 (2019) (alterations in

original) (*quoting* State v. S.S., 229 N.J. 360, 380-81 (2017)). Note that many issues on appeal present mixed questions of law and fact. Under those circumstances the appellate court gives deference to the supported factual findings of the trial court, but reviews de novo the trial court's application of legal rules to the factual findings. State v. Pierre, 223 N.J. 560, 576 (2015); State v. Nantambu, 221 N.J. 390, 404 (2015); State v. Harris, 181 N.J. 391, 416 (2004).

In the context of a jury charge, "plain error requires demonstration of 'legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Montalvo, 229 N.J. 300, 321 (2017) (*quoting* State v. Chapland, 187 N.J. 275, 289 (2006). *See* State v. Burns, 192 N.J. 312, 341 (2007); State v. Jordan, 147 N.J. 409, 422 (1997). "The error must be evaluated 'in light of the overall strength of the State's case.'" State v. Sanchez-Medina, 231 N.J. 452, 468 (2018) (*quoting* State v. Galicia, 210 N.J. 364, 388 (2012)). The appellate court reviews a trial court's instruction on the law de novo. Fowler v. Akzo Nobel Chemicals, Inc., 251 N.J. 300, (2022) (slip op. at 28); State ex rel. Comm'r of Transp. v. Marlton Plaza

Assocs., L.P., 426 N.J. Super. 337, 347 (App. Div. 2012). Appropriate and proper jury instructions are essential for a fair trial. State v. Scharf, 225 N.J. 547, 581 (2016); Prioleau v. Ky. Fried Chicken, Inc., 223 N.J. 245, 256 (2015); Velazquez v. Portadin, 163 N.J. 677, 688 (2000); State v. Green, 86 N.J. 281, 287 (1981). "Erroneous instructions are poor candidates for rehabilitation as harmless, and are ordinarily presumed to be reversible error." State v. McKinney, 223 N.J. 475, 495-96 (2015) (quoting State v. Afanador, 151 N.J. 41, 54 (1997)). Certain jury instructions are so crucial to a jury's deliberations that error is presumed to be reversible. State v. McKinney, 223 N.J. 475, 495 (2015); State v. Jordan, 147 N.J. 409, 422 (1997). For example, the failure to charge the jury on an element of an offense is presumed to be prejudicial error, even in the absence of a request by defense counsel. State v. Afanador, 151 N.J. 41, 56 (1997); State v. Hodde, 181 N.J. 375, 384 (2004). "An erroneous jury charge 'when the subject matter is fundamental and essential or is substantially material' is almost always considered prejudicial." State v. Maloney, 216 N.J. 91, 104-05 (2013) (*quoting* State v. Green, 86 N.J. 281, 288 (1981)).

"Nonetheless, not every improper jury charge warrants reversal and a new trial. 'As a general matter, [appellate courts] will not reverse if an

erroneous jury instruction was 'incapable of producing an unjust result or prejudicing substantial rights.'" Prioleau v. Ky. Fried Chicken, Inc., 223 N.J. 245, 257 (2015) (alteration in original) (*quoting* Mandal v. Port Auth. of N.Y. & N.J., 430 N.J. Super. 287, 296 (App. Div. 2013)). The charge must be read as a whole, and not just the challenged portion, to determine its overall effect. State v. Garrison, 228 N.J. 182, 201 (2017); State v. McKinney, 223 N.J. 475, 494 (2015); State v. Wilbely, 63 N.J. 420, 422 (1973). No party is entitled to have the jury charged in his or her own words. State v. LaBrutto, 114 N.J. 187, 204 (1989). "The test to be applied . . . is whether the charge as a whole is misleading, or sets forth accurately and fairly the controlling principles of law." State v. Baum, 224 N.J. 147, 159 (2016) (*quoting* State v. Jackmon, 305 N.J. Super. 274, 299 (App. Div. 1997). See State v. Walker, 322 N.J. Super. 535, 546-53 (App. Div. 1999) (reviewing the types of general and special instructions that should be given in a criminal case).

Instructions given in accordance with the model jury charge, or which closely track the model jury charge, are generally not considered erroneous. Mogull v. CB Com. Real Est. Grp., Inc., 162 N.J. 449, 466 (2000). See State v. Ramirez, 246 N.J. 61, 70 (2021) (Court found no plain error where the judge

read the model charge verbatim, and no objection to the endangering instruction was made at trial).

The Scope of Review in this matter is governed by N.J. R. 2:10-2, the de novo standard, with respect to the application of law; however, deference must be given to the trial Court relative to its determination of fact.

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

evaluating the trial court's decision to grant or deny a new trial, "an appellate court must give 'due deference' to the trial court's 'feel of the case,'" however, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Hayes, 231 N.J. 373 at 386 (2018) (first *quoting* Risko, 206 N.J. 506, 521 (2011) (*second quoting* Manalapan Realty, LP v. Twp. Comm. Of Manalapan, 140 N.J. 366, 378 (1995)).

# V

## LEGAL ARGUMENT

The instant Appeal stems from the assertion that the Trial Court erred by denying Appellant's request for a non-standard jury instruction pursuant to Mockler v. Russman, 102 N.J. Super. 582 (App. Div. 1968); and the assertion that the Trial Court erred by instructing the jury as to Aggravation. With respect to Appellant's negligence, the jury considered Appellant's actions and/or inactions in the context of the model civil jury instructions relating to negligence in a motor vehicle collision; and adjudicated Appellant as negligent under the reasonable and/or ordinary person standard, unanimously. With respect to the Aggravation charge, evidence of the Aggravation diagnosis was already placed in evidence without objection, at the time Appellant first raised the objection; which is as to the alleged lack of comparative analysis necessary to apportion damages. Nevertheless, the undisputed evidence is that Respondent was asymptomatic relative to the potentially pre-existing degenerative disc issues viewed upon MRI and had never sought medical care for any similar issue; thereby making it impossible to conduct a comparison to that which never existed in the first place.

## Point 1: The Trial Court Did Not Err in Denying Appellant's Request for Non-Standard Jury Charge Pursuant to Mockler.

Appellant's argument that the Court erred by not giving the requested non-standard jury charge, submitted in accordance with the holding from Mockler v. Russman, fails both procedurally and meritoriously.

### I. Appellant is Not Entitled to a Non-Standard Jury Charge; Which is Based Upon Case Law Taken Out-of-Context

First and foremost, there is no such thing as a "Mockler charge". Not a single case cited by Appellant, including Mockler itself, involved a jury charge consistent with that which was requested by Appellant in this matter; specifically, that a defendant who skids or slides when operating a vehicle otherwise reasonably, is not guilty of negligence. Rather, these rear-end motor vehicle collision cases involved the denial of directed verdict(s) on the issue of negligence (as does the instant matter), the juries being instructed as to the legal definition of negligence and ultimately, returning verdicts of **no negligence**; the no negligence finding being later upheld upon appeal. It is for this reason why the instant Appeal fails, as the issue of Defendant's negligence was in fact left to the jury, to decide the matter on its merits; and whose verdict should not be disturbed, based upon the determination of negligence being supported by the factual record; just as it was in Mockler, Heibel, Calabree and Paramel {supra}. No party is entitled to have the

jury charged in his or her own words. State v. LaBrutto, 114 N.J. 187, 204 (1989).

The Trial Court's negligence charge to the jury is contained at (4T: 113:05 – 119:18) and in most relevant part, reads "If an ordinary person under similar circumstances and by the use of ordinary care could have foreseen the result, that is that some injury or damage would probably result and either would not have acted, or if the person did act would have taken precaution to avoid the result, then the performance of the act or the failure to take such precautions would constitute negligence." Id. at (4T: 114:03 – 114:10). In the instant matter, Appellant admitted to merging from the right travel lane to the left travel lane as he approached stopped traffic, because the traffic-line in the left-lane was shorter. (2T: 190:01 – 190:15). Appellant made choices from which the jury had the opportunity to determine Appellant's reasonableness or lack thereof.

More importantly is the language comparison of the negligence charge read to the jury, to that of the requested charge pursuant to Mockler; mainly in its instruction as to the ordinary/reasonable person standard. Appellant's requested charge begins with the phrase "If a driver is operating his/her car as a reasonable person would under the circumstances, he/she is not to be held negligent merely because his/her car skidded or slid…". In other words, the jury would first have to find that Appellant had operated his vehicle as would a reasonably prudent person

under the same circumstances; which based upon the jury's verdict, was not the case. Furthermore, skidding and/or sliding can certainly be viewed as evidence of negligence, in the context of all of the facts; including but not limited to speed, driver action/inaction and the overall conditions involved.

In the cases cited to and relied upon by Appellant, the juries were not instructed that a driver is not to be held negligent for skidding if they were operating a vehicle in a reasonably prudent matter; rather, said cases upheld jury verdicts of no negligence in rear-end automobile collision cases. Mockler v. Russman, 102 N.J. Super. 582 (App. Div. 1968), is a case often-relied upon by defendants in litigation resulting from rear-end motor vehicle collisions, as it held that an affirmative explanation can be brought forth by the defendant to alleviate oneself from negligence; where the defendant acted reasonably and the collision would not have occurred, but for an issue out-of-the defendant's control.

However, the very next year our Supreme Court decided Dolson v. Anastasia, and held a jury's verdict to have been against the weight of the evidence where the defendant acknowledged the presence of the plaintiff on the highway, in front of the defendant and coming to a stop; yet the jury found no negligence as to the defendant who testified that he had attempted to stop and for 'some reason', maybe an oil slick, he was unable to stop before contacting the plaintiff's vehicle. Dolson v. Anastasia, 55 N.J. 2, 11 (1969). The Dolson Court further addressed the

defendant's testimony that "…my car was slowing down and then for some reason or other it hit a slipping spot which could have been an oil slick. That automatically crashed me into Mr. Dolson's car." Id. at 9-10. The Court held such testimony to be **conclusory** and although not objected to, indicated that 'it had no place in the trial.' Id. Dolson is not in conflict with Mockler but rather, affirms that a defendant who is claiming to be free from negligence in the context of a rear-end motor vehicle collision must come forward with some evidence as to how a collision occurred, despite the defendant's assertion that he/she was acting as a reasonable person would; essentially an affirmative defense. The Court in this matter did not shift any burden upon the defense to prove negligence; rather, the Court afforded the opportunity to Appellant to offer an explanation as to why he should not be found negligent, in an otherwise clear-cut negligence situation. Plaintiff had already established a prima facie negligence case against Appellant, by virtue of establishing she was stopped in traffic when Appellant rear-ended her.

Appellant argues that "each element" was met to warrant the requested Mockler charge: 1) Appellant observed puddles earlier in the day "…as well as precipitation" (this is incorrect as Appellant specifically testified to not observing active precipitation); 2) Appellant attempted to stop his vehicle but it hydroplaned causing him to lose contact with the road surface and control of the vehicle; 3) as a consequence, Appellant's vehicle came into contact with the rear of Respondent's

vehicle. *See* Appellant's brief, page 13. Appellant, however, does not address the genesis of the 'elements necessary for the Mockler charge'; specifically, where these alleged elements are even taken from. Again, Appellant does not cite to a single case that says 'a jury should be instructed that a reasonable driver who skids is not negligent'. Rather, in every rear-end motor vehicle collision case cited to by Appellant, the jury was permitted to decide the defendant's negligence despite the nature of the collision; and had their verdicts of no negligence upheld thereafter. That does not mean a verdict of negligence is incorrect and/or deserving of being disturbed; rather, the jury in this matter determined that Appellant was not reasonable in his actions/inactions leading up to the collision. If a driver operates a vehicle too fast for road conditions and as such, skids when he/she attempts to stop, a jury verdict of negligence is not against the weight of the evidence. In fact, instructing the jury that a defendant who skids is not to be found negligent would be against the applicable law and prejudicial to the plaintiff bringing the claim.

In the instant matter, the jury was instructed as to legal negligence and determined Appellant's negligence based upon the facts presented and in accordance with the law instructed; as opposed to the issue having been taken from the jury on Directed Verdict pursuant to Dolson. Ironically, Appellant testified he saw and was aware of Respondent's vehicle stopped within the left lane, when he made the decision to merge into the left lane to proceed towards the front of traffic.

(2T: 190:01 – 191:01). Therefore, in accordance with Dolson, Respondent has arguably met 'each and every element necessary' for the Directed Verdict; especially in light of the conclusory nature of Appellant's affirmative testimony in his defense.

There is no standard and/or model civil jury instruction indicating that a driver of a motor vehicle who slides/skids is not negligent, if the person's actions/inactions were otherwise reasonable. Appellant has no right to a self-serving and non-standard blurb out-of-context to be read as the applicable law to the factfinder; especially where the namesake for the requested charge involved a case **where no such charge was given**. Mockler stands for the proposition that had the jury in this matter returned a finding of 'no negligence' as to the Appellant, such a verdict would be upheld upon appeal; not a 'general excuse' to be utilized by alleged tortfeasors in litigation. Accordingly, and since the jury was charged as to and decided the issue of Appellant's negligence, the instant appeal fails.

## II. Meritoriously, The Court was within its Discretion and Correctly Declined to Charge the Jury as to Mockler, based upon the Factual Record made at Trial

The cases cited by Appellant can be easily differentiated from the instant matter. Most notably, the instant matter deals with rain that by all accounts, had occurred overnight and was stopped for some time, prior to Appellant's alleged skid. To the contrary, Mockler dealt with **snow** and **corroborating evidence** from

an independent witness that established reasonable and careful action on the part of the driver. Universal Underwriters v. Heibel, 386 N.J. Super. 307 (App. Div. 2006) dealt with gravel in the roadway that was unnoticed by the motorcycle operator who slid but recognized and identified after the fact by the driver. Calabree v. DiCristino, 2009 N.J. Super. Unpub. LEXIS 2548, dealt with antifreeze that was unnoticed prior to the slid, but recognized by both drivers after the fact. Finally, Paramel v. Martinez, 2017 N.J. Super. Unpub. LEXIS 1701, dealt with sewage sludge that had been discharged upon the roadway, ultimately resulting in the roadway's closure for clean-up, due to the hazard. All of these conditions are transient, but this Court must recognize the foreseeability factor in weighing the unexpected or unanticipated natures of the condition(s); gravel, sewage and antifreeze not expected to be within the roadway, snow that occurs in our State sporadically over an approximate three (3) to four (4) month period per year, versus rainfall that occurs much more frequently and regularly. However, even more importantly than the condition alleged is that in the cases cited by Appellant, the defendants were able to establish a condition of the roadway they alleged to be responsible for the skid; as opposed to conclusory testimony about wet roadway conditions.

Notably, the Court in Heibel relied upon Stackenwalt v. Washburn, 42 N.J. 15 (1964), holding "Questions of proper speed and control of a vehicle are pre-

eminently questions of fact for the jury to determine. Heibel, 386 N.J. Super. 307, 321 (App. Div. 2006) *citing* Stackenwalt v. Washburn, 42 N.J. 15 (1964).

Appellant did not provide any expert opinion relative to his conclusory testimony that he "hydroplaned" or for that matter, to establish any factual basis for a condition upon the roadway that 'but for' said condition, Appellant would have been able to bring his vehicle to a stop without rear-ending Respondent. See (2T: 190:01 – 191:01). It is apparent that if Appellant did in fact "hydroplane", he was traveling too fast for the conditions.

Furthermore, the jury was able to consider the other relevant testimony on the issue of road conditions; specifically, it was admitted and undisputed that no rainfall had occurred at least from the time Appellant began his drive through the time of the collision and that Appellant was coming upon multiple stopped vehicles, including that of Respondent, who had absolutely no issue bringing her vehicle to a complete stop while traversing the same exact area of roadway. The jury was able to consider Appellant's conscious decision to switch from the right lane to the left lane due to a shorter line of traffic, as opposed to coming to a stop behind traffic in the right lane; in light of Appellant's testimony he was taking *extra care* due to the wet roadways. The jury was able to weigh Appellant's testimony regarding a complete loss of control of his vehicle, against Appellant's testimony that the collision with the rear of Respondent's vehicle was a mere "tap".

The jury was able to consider Appellant's admission that he cannot describe a condition within the roadway, other than they were generally wet from previous rainfall, that caused his vehicle to slide and/or skid at the precise location of the subject collision. See (3T: 203:02 – 203:12). All of these factors are sufficient to support the jury's verdict as to Appellant's negligent conduct and should not be disturbed on the basis that the individual they determined to have acted unreasonably, could have been legally free from negligence had he acted reasonably but skidded due to a roadway condition; a condition that was never sufficiently established by the evidence.

In fact, and to the contrary, instructing the jury that they could determine Appellant not to be negligent based on a skid and/or slid, would have caused the jury to speculate and utilize conjecture in coming to such a verdict. Appellant could never establish why his vehicle slid in this particular area and rather, assumed it to have been caused by the wet roadway. The instant trial testimony from Appellant is no different than that of the defendant in Dolson, with respect to the conclusory nature as to the testimony regarding the cause of the skid. If the Trial Court erred at all, it was in denying Respondent's Motion for a Directed Verdict as to Appellant's negligence pursuant to Dolson, on the basis that the only affirmative evidence of 'skid despite reasonable action' was Appellant's self-serving and conclusory testimony. It was this denial, however, that permitted the

jury to determine Appellant's negligence and therefore render the instant issue on appeal as moot.

Interestingly, Appellant's requested charge is taken from Mockler at 587-588; and the quote begins with "If **such** a driver…" as opposed to "If a driver…". This is important because of the sentence that immediately precedes said quote: "It is common knowledge that the sudden and unexpected skidding of an automobile is one of the natural hazards of driving on **icy** roads and that it may befall even the most cautious of drivers." Id., at 587. The Court in Mockler was not dealing with a situation where a driver was operating a vehicle in regular, weekday morning rush-hour traffic, following an overnight rain storm; a common and regular occurrence throughout the State of New Jersey.

Nevertheless, Mockler also involved corroborating testimony by a crossing-guard, relative to the bus operator's low speed of operation and attempt to brake/slide beginning fifty (50) feet from the vehicle that was ultimately struck. Here, there is no corroborating evidence of Appellant's 'reasonable' action(s) and moreover, Appellant's own testimony fails to establish he took the reasonable action that the defendant in Mockler was found to have taken. In the instant matter, Appellant could not even answer the question as to when he first applied his brakes, as he proceeded past the eight (8) to ten (10) vehicles he estimated were stopped within the right lane. (2T: 191:02 – 191:08).

In sum, had the Trial Court granted Respondent's Motion for Directed Verdict as to Appellant's negligence, the Trial Court would have been well within its right based upon established Supreme Court case law in Dolson as applied to the factual record herein; however, the Trial Court denied said Motion and permitted the jury to determine Appellant's negligence, just as the Courts did in Mockler, Heibel, Calabree and Paramel. None of those cases relied upon by Appellant suggest that the jury should specifically be instructed that skidding and/or sliding in and of itself does not equate to negligence. Accordingly, there is simply nothing for Appellant to appeal, on the issue of negligence.

## III. Overturning a Verdict Against the Weight of the Evidence

Mockler actually provides a very relevant discussion as to setting aside a jury's verdict for being against the weight of the evidence; which is precisely what Appellant is seeking to do herein. The verdict of the jury may not be set aside as against the weight of the evidence unless it clearly and convincingly appears that it is the result of mistake, partiality, prejudice or passion. Mockler, 102 N.J. Super. 582, 588 (1968); citing R. 4:61-1. "We, too, may not set aside a verdict as against the weight of the evidence unless, having given due regard to the opportunity of the trial court and the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that the verdict was the result of mistake, partiality, prejudice or passion." Id., at 589.

In the instant matter, the jury was given the opportunity to judge the credibility of Appellant's testimony and to determine those facts to exist as true, to then apply the legal definition of negligence and determine whether Appellant's conduct constituted negligence. The jury determined based upon the factual record and the model civil jury instructions that Appellant was negligent; even though they had the opportunity to decide to the contrary had they felt Appellant's actions were that of a reasonable and/or ordinary person in the same position. The jury was never instructed that a rear-end collision is negligence and/or that skidding/sliding of a vehicle implies negligence.

There are numerous actions on the part of Appellant, which the jury had to consider: including but not limited to the merge into the left lane and the decision of when to apply his brakes. There are numerous inactions on the part of Appellant, which the jury had to consider: including but not limited to the failure to brake earlier and/or coming to a stop in traffic as opposed to merging into a shorter line. Simply put, there is no scenario where it becomes clear and convincing that the jury's verdict was against the weight of the evidence. Even had the jury been charged with the exact language sought by Appellant, the verdict could have (and likely would have) been the same. As such, even if by some measure it is determined the Trial Court erred by not instructing the jury as to Appellant's requested charge, it was harmless error.

Even, however, analyzing the issue under the *plain error* standard of R. 2:10-2, the mere possibility of an unjust result is not enough; and in the context of a jury trial, the possibility must be 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached. *See* State v. Funderburg, 225 N.J. 66, 79 (2016); *see also* State v. G.E.P., 243 N.J. 362, 389 (2020). Thus, the plain error standard requires a determination of: "(1) whether there was error; and (2) whether that error was 'clearly capable of producing an unjust result,' R. 2:10-2; that is, whether there is 'a reasonable doubt . . . as to whether the error led the jury to a result it otherwise might not have reached.'" State v. Dunbrack, 245 N.J. 531, 544 (2021). Given the abundance of evidence in this matter from which the jury could have determined Appellant's negligence, regardless of whether the Court read Appellant's requested charge; even if this Court were to determine it to be plain error not to have given the requested charge, a reversal would not be warranted.

## IV. The Instant Appeal on the Mockler Issue Fails

Appellant was not entitled to any specific instruction to 'offset' liability determined based upon recognized and observed weather conditions, as well as Respondent's stopped vehicle. Appellant presented no evidence other than a conclusory statement as to why his vehicle suddenly slid to cause the subject collision. Appellant could not testify as to the distance he began braking, which is

contrary to the defendant in Mockler who established a distance of fifty (50) feet. Despite Appellant being unable to establish the type of facts the defendant established in Mockler and the other cases cited by Appellant, the Court nevertheless permitted the jury to decide the issue of negligence; rather than decide the issue as a matter of law pursuant to Dolson. The jury in this matter therefore received the same jury charge with respect to negligence, as that which was given in Mockler.

There is no such thing as a "Mockler Charge," such that would warrant the reversal of a jury verdict based on an incomplete jury charge. Appellant is not entitled to have the jury charged in his own words. LaBrutto, 114 N.J. 187, 204 (1989). Notably, there does exist a model civil jury charge relative to "Duty as to Obstacles and/or Defects in the Roadway", which was not requested by Appellant in this matter; and interestingly does not cite to Mockler in the committee notes, as basis for the charge. *See* Model Civil Jury 5.30G(6), "Duty as to Obstacles and/or Defects in the Roadway" (March 2021). One must presume that if the Courts and/or the Legislature wished for the jury instructions to include language relative to skidding and/or sliding of vehicles based upon road conditions, they would have done so.

Accordingly, this matter was subject to a fair and just determination of the facts relative to Appellant's negligence and a jury verdict rendered in accordance

with those facts and the applicable law regarding negligence. The jury verdict cannot be viewed as against the weight of the evidence, considering the rear-end nature of the collision. Furthermore, it is not clear and convincing that the verdict was against the weight of the evidence that included testimony of the slide, skid and/or hydroplane. The denial of Appellant's requested non-standard charge was proper and had no impact upon the jury's ultimate verdict. For all of these reasons, the instant Appeal must be denied, and the jury's verdict affirmed.

## Point 2: The Court Did Not Err in Providing an Aggravation Charge Under Model Civil Jury Charge 8.11F

Appellant next raises the issue of the Aggravation Charge, Model Civil Jury Charge 8.11F, having been read over objection. Appellant first objects meritoriously, on the alleged basis that Respondent did not provide the necessary comparative analysis to warrant the Aggravation Charge. Appellant further objects relative to the timing the Trial Court agreed to give the Aggravation Charge, based upon alleged prejudice. Both arguments fail. First, Respondent presented medical testimony through Dr. Nirav Shah, a neurosurgeon, who explicitly opined that Respondent had aggravated previously asymptomatic and unknown degenerative conditions in her cervical spine in the subject incident, rendering said conditions as symptomatic; as well as new injuries. (2T: 163:18 – 164:03, 164:19 – 166:14). The Aggravation

opinion is objectively substantiated, by correlating the objective MRI study and objective EMG/NCV study; wherein the acute disc finding according to Dr. Shah was below the level from which the acute EMG confirmed radiculopathy had occurred. In other words, Dr. Shah opined to an acute disc herniation in the lower cervical, and an aggravation of a pre-existing but previously asymptomatic degenerative finding, such that it was rendered symptomatic and causing an acute radiculopathy. (2T: 168:17 – 169:08).

Appellant never objected to Dr. Shah's testimony at any point, relative to his diagnosing an aggravation. The objection only was raised upon discussion of the Aggravation Charge being given.

## I. Objections Not Timely Made/Preserved are Waived

Appellant's objection to the Aggravation Charge was waived, when Appellant failed to make the objection at the time of testimony; but further waived when he failed to move to strike the testimony prior to trial and/or move in limine to bar Dr. Shah's known recorded testimony relative to his opinion regarding 'aggravation'. Jury Instructions/Charges dictate how a jury is to view and weigh the evidence it has been presented. In the instant matter, the jury had been presented with evidence of Aggravation, without objection; and as such, required an instruction as to how to treat such evidence.

Pursuant to N.J. R. 1:7-2:

> "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. Except as otherwise provided by R. 1:7-5 and R. 2:10-2 (plain error), no party may urge as error any portion of the charge to the jury or omissions therefrom unless objections are made thereto before the jury retires to consider its verdict, but opportunity shall be given to make the objection in open court, in the absence of the jury. 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."

Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court. N.J. R. 2:10-2.

In the instant appeal, Appellant first objected to the issue of 'Aggravation' at the time the charge was brought to the Court's attention as having been requested in pre-trial submissions, necessitated by the evidence, but inadvertently missed by the Court and the parties during the charge conference. Appellant objects based upon the 'timing of the request for the charge', the charge itself and supplemental closing arguments, pursuant to N.J.R.E. 403; and meritoriously based upon the holding in Polk v.

Daconceicao, 268 N.J.Super. 568 (App. Div. 1993), requiring the plaintiff to provide a comparative analysis to substantiate a claim for aggravation.

## II. Appellant was Not Required to Present a Comparative Analysis Given No Prior or Subsequent Issues of Relevance; and the Claim of a Previously Asymptomatic Condition Becoming Symptomatic

New Jersey Model Civil Jury instruction 8.11F, reads in relevant part, "If you find that [plaintiff's] preexisting illness/injury(ies)/condition was not causing him/her any harm or symptoms at the time of the accident, but that the preexisting condition combined with injuries incurred in the accident to cause him/her damage, then [plaintiff] is entitled to recover for the full extent of the damages he/she sustained." Where the plaintiff is making a specific claim for an aggravation/exacerbation of a pre-existing condition, the plaintiff bears the burden of proving what portion of his/her condition is attributable to the underlying incident; and in cases involving the verbal threshold, an opinion as to permanent aggravation being offered to vault the threshold must be based upon objective credible medical evidence. See Davidson v. Slater, 189 N.J. 166 (2007); Polk , 268 N.J. Super. 568 (App. Div. 1993). An allegation of a new permanent injury does not require the plaintiff to present evidence of a comparative analysis. Davidson, 189 N.J. 166, 188 (2007).

In the instant matter, the evidence at issue is the trial testimony of Dr. Nirav Shah, M.D., a neurosurgeon, which is identified in relevant part within

Respondent's statement of facts. Dr. Shah opined that the subject collision caused an acute disc herniation at C6-7 and aggravations of previously asymptomatic areas of the cervical spine above the C6-7 level, now causing cervicalgia and cervical radiculopathy. As further indicated within Respondent's statement of facts, the EMG that Dr. Shah relied upon, for his diagnosis of radiculopathy now caused by the subject incident's worsening of a pre-existing asymptomatic finding, was offered into evidence through Dr. Gerald Dworkin, D.O.; who testified the radiculopathy finding was an acute finding upon the objective EMG, consistent with the time of the collision.

First and foremost, Respondent's claim survives the verbal threshold, on the basis that Dr. Shah opines to a new permanent injury directly caused by the collision; as well as the diagnoses of new permanent injuries offered by Dr. Dworkin and Dr. Pello. Davidson, 189 N.J. 166 (2007). Accordingly, the failure to prove a permanent aggravation by objective credible medical evidence would in no way be fatal to Respondent's case. The issue then boils down to whether the Aggravation charge should have been given, in light of clear and unambiguous testimony of aggravation presented to the jury, without objection.

Appellant's citation to and reliance upon Reichert v. Vegholm is misplaced, as that case involved a plaintiff alleging injuries from both an

automobile collision and a separate slip-and-fall incident, one-month apart and involving the same areas of the body. Reichert v. Vegholm, 366 N.J. 209 (App. Div. 2004). The Court held that the plaintiff has the burden of proof relative to apportioning damages from an aggravation; and dismissed the damages claim based upon the plaintiff's medical expert's testimony that 'he was unable to apportion the plaintiff's damages between the automobile collision and the slip-and-fall. Id. The instant matter is differentiated from Reichert in that there is no other incident or for that matter, any relevant medical records for comparison. Consistent with Model Civil Jury Charge 8.11F, this is a case where "…if you find that [plaintiff's] preexisting illness/injury(ies)/condition was not causing him/her any harm or symptoms at the time of the accident, but that the preexisting condition combined with injuries incurred in the accident to cause him/her damage, then [plaintiff] is entitled to recover for the full extent of the damages he/she sustained…" Model Civil Jury Charge 8.11F "Aggravation of the Preexisting Disability" (January 1997).

Appellant also cites to Sherry v. Buonansonti, a case where the plaintiff had two (2) incidents approximately three (3) months apart, again with overlapping injuries, which was dismissed on grounds irrelevant to the instant Appeal; specifically, lack of objective evidence to vault the (pre-AICRA) verbal threshold. Sherry v. Buonansonti, 287 N.J. Super. 518 (App. Div. 1996).

In Sherry, The Court simply noted that the plaintiff had *also* failed to present a comparative analysis to apportion damages between the incident at issue and the subsequent re-injury. Id. The same applies to Blanks v. Murphy, 268 N.J. Super. 562 (App. Div. 1993), a case involving pre-existing injuries and a discussion of the language contained in the old model civil jury charge 6.10 regarding aggravation. Reichert, Sherry and Blanks are the exact opposite from the instant matter, wherein the undisputed evidence establishes the plaintiff to have been asymptomatic at all relevant times prior to the subject incident and having not been subject to any re-injury in any superseding event since the subject incident. In accordance with New Jersey Model Civil Jury instruction 8.11F, there was nothing for Respondent and/or her medical expert(s)/physician(s) to apportion and/or compare. This was further confirmed by Appellant's medical expert, who testified that records he reviewed predating the subject incident were devoid of relevant complaints.

Likewise, Appellant incorrectly relies upon Bennett v. Lugo, a case where again, the plaintiff claimed a lower back injury and failed to produce expert testimony relative to a comparative analysis of the plaintiff's "…several injuries to his low back prior to the accident." Bennett v. Lugo, 368 N.J. Super. 466 (App. Div. 2004). The Bennett plaintiff was alleging a permanent lower back injury to vault the Verbal Threshold. Id.

A case which is on point, albeit unpublished, where this Court has already decided this issue is the matter of Morgan v. Progressive Insurance Co., A-2964-15T2 (App. Div. Nov. 8, 2017). In Morgan, the plaintiff's medical expert, Dr. Gary Goldstein, offered testimony that herniated disc(s) seen upon post-incident MRI study were 'caused by or rendered symptomatic from an asymptomatic state, by the subject collision'. The defense medical expert, Dr. Brian Zell, offered an opinion that the findings upon the plaintiff's MRI study were all degenerative and that there was no objective evidence of injury attributable to the subject collision. This Court, relying upon Davidson, held that the trial Judge did not err by charging the jury as to aggravation when considering the evidence as a whole, where both medical experts agreed the plaintiff has pre-existent degenerative changes and disagreed relative to injury. Morgan, A-2964-15T2 at 15 (App. Div. Nov. 8, 2017). In the instant matter, Defense medical expert, Dr. Larry Rosenberg, did in fact opine that Respondent's MRI showed degenerative findings with no sign of acute trauma.

In fact, the only difference between Dr. Goldstein's opinion in Morgan and Dr. Shah's opinion herein is that Dr. Shah **utilized the word "aggravation" in his opinion**.

This Court in Morgan further considered the argument relative to the plaintiff's medical expert's comparative analysis and the alleged lack thereof.

As in this matter, the plaintiff in Morgan testified that before the subject incident, she had been asymptomatic with respect to the areas of alleged injuries, her neck and back. Unlike in this matter, however, the plaintiff testified to suffering a prior injury, about one year before the subject incident, that resulted in neck and back pain that 'completely recovered'. Dr. Goldstein was not afforded the opportunity to review the prior treatment records, that existed, but was able to base his opinion upon the objective post-collision medical testing, coupled with physical examination and the patient's subjective history, to offer his diagnosis of incident-related injury. Morgan, A-2964-15T2 at 3 (App. Div. Nov. 8, 2017).

In the instant matter, there is no prior history of similar complaints and as such, there are no records that exist for the medical expert to compare. While Appellant argues that Dr. Shah did not review prior medical records in order to establish his opinion relative to aggravation, the only prior medical records that exist are those of Respondent's primary care physician, which were reviewed by Appellant's medical expert, Dr. Larry Rosenberg; who acknowledges no prior similar complaints to be noted in the records.

Appellant is seeking to have Respondent prove a negative, where in reality, this is precisely why we ask the factfinder to be the Judge of credibility. Respondent testified under oath that she had no history of neck

pain and/or upper extremity radicular symptoms, prior to the subject incident. Respondent's primary care physician records, the only records pre-dating the subject incident, are devoid of any neck and/or upper extremity complaints. It is unclear therefore what else Appellant is suggesting that Dr. Shah could have reviewed, to satisfy Appellant's objection. It is Appellant who called into question the issue of traumatic injury versus unrelated degenerative findings that pre-existed the subject collision, via Dr. Rosenberg's testimony; just as did Dr. Zell in Morgan.

Even, however, analyzing the issue under the *plain error* standard, which requires a determination of: "(1) whether there was error; and (2) whether that error was 'clearly capable of producing an unjust result, it is inconceivable that the jury would have come to a different conclusion based upon the undisputed evidence that there were no prior or subsequent medical records of relevance to compare.

## III. There was No Prejudice by Granting the Request for Aggravation Charge After Closing Arguments, Upon Realization of the Mistake; and further, any Prejudice was Cured by Affording Supplemental Closing Argument(s)

Relative to the issue of prejudice, Appellant objects pursuant to N.J.R.E. 403, which is an evidentiary rule regarding relevancy and undue prejudice of evidence. As should be abundantly clear at this point is the fact that Appellant never lodged a single objection to the evidence that was presented to the jury; specifically, Dr. Shah's explicit opinion of an aggravation.

Furthermore, Appellant was placed upon notice of Respondent's potential claim for aggravation, prior to trial. Respondent answered Form A interrogatories on March 16, 2022, indicating in response to number nine (9) regarding the worsening of a prior condition, "To the extent Plaintiff had any pre-existing or degenerative conditions, relative to the body part injured herein, same were asymptomatic prior to the instant accident and as such, were aggravated and/or exacerbated as a result." Respondent served the January 13, 2023, office note of Dr. Shah, wherein his opinion of aggravation is explicitly listed. Respondent listed the aggravation charge in her requests for jury instructions as part of her Pre-Trial submissions, filed July 26, 2023. Dr. Shah offered his trial testimony via de bene esse deposition taken August 14, 2023, again, explicitly opining to "aggravation". Trial did not occur until October 3, 2023, and in the interim, Appellant filed two (2) Motions in Limine; neither of which related to Dr. Shah's testimony and/or opinion relative to aggravation. On October 5, 2023, Dr. Shah's opinion relative to aggravation was presented to the jury, without objection.

Clearly, not only is the objection waived given the above, but there can be absolutely no claim of prejudice by the Appellant who was on notice of the aggravation claim for a year-and-a-half prior to the trial. The mere fact that the charge was overlooked and realized at the conclusion of the jury charge, and

after closing arguments, does not establish prejudice; especially where both parties were given equal opportunity to address the charge in supplemental closing. Review of counsels' closing arguments should establish Appellant would be hard pressed to establish his closing arguments would have been any different, had the charge been discussed during the initial conference. In other words, the timing of the charge was and is of no consequence.

Pursuant to N.J. R. 1:7-2, Respondent raised an objection at the conclusion of the charge conference, prior to the retirement of the jury for deliberations and upon the Court's invitation for objections and omissions. The Court Rules and Model Jury Charges literally provide for the exact type of action taken by both Respondent and the Court, that Appellant brings to issue herein.

To be clear, R. 1:7-2 permits objection to the jury charge prior to the jury's retirement for deliberations. The same rule requires a party to make objections at the time rulings or orders are made; and anticipating Appellant's sur-reply, R. 1:7-2 would not therefore permit Appellant to make objections to evidence already admitted, after the conclusion of the jury charge.

## IV. The Instant Appeal on the Aggravation Charge Issue Fails

The instant Appeal relative to the Aggravation Charge fails both procedurally and upon the merits. Appellant failed to object to evidence of

aggravation coming into the case and as such, waived any objection to said evidence to be raised at the Appellate level. The jury, who had been given evidence of aggravation in the form of an explicit expert opinion, required the Aggravation charge to be read, to understand how to treat such evidence. There was no surprise relative to the Charge's request, which was made months prior to trial in Appellant's pre-trial submission statement. The timing of the Court's agreeing to read the charge is of no consequence, as the parties were provided additional opportunity to address the charge in supplemental closing; but moreover, it did not change the evidential record which was already closed at that point. Rather, the decision to read the charge was necessitated by the evidential record.

Moreover, the appeal upon meritorious grounds lacks merit, in that Appellant is arguing that Respondent needed to prove a negative to warrant the Aggravation Charge. The evidence established that Respondent had no relevant past medical history relative to the injuries alleged in this matter, nor did she re-injure herself in any subsequent incidents. Appellant's medical expert even reviewed primary care records that predated the subject collision and confirmed they were devoid of any similar complaints. There was simply nothing for Respondent's physicians and/or experts to compare, other than the undisputed medical history of no prior relevant problems.

Accordingly, not only was the issue of Aggravation not properly preserved for appeal; even a determination upon the merits establishes that the instant Appeal must be denied, and the jury's verdict affirmed.

## Point 3: The Offer of Judgment Penalties and/or Verdict Should Not be Reduced Based Upon Hardship and Are the Liability of New Jersey Manufacturers Insurance Company

The instant issue brought forth in this Appeal must be disregarded by this Court, as it was never previously raised at the Trial Court below. In fact, during the pendency of Respondent's Motion for Offer of Judgment penalties, counsel for Appellant advised the Trial Court he had no objection to the calculation of pre-judgment interest and costs; and his only objection was as to the hourly rate sought by Respondent's counsel. Appellant's Motion for a New Trial did not raise the issue of the Verdict being excessive and/or shocking the judicial conscience; nor was a request and/or Motion for remittitur ever made. Most glaring is the fact that Appellant blankly asserts financial hardship upon Appellant Willitts, without anything to substantiate such representations.

While not directly relevant to the underlying appeal, Appellant has made the issue relevant to warrant discussion. This matter involves a claim where New Jersey Manufacturers Insurance Company (NJM), on behalf of its insured, took a 'No Pay' position from day one. An offer was never made to resolve this claim prior to the jury's verdict; despite an expired Offer of

Judgment for the available insurance proceeds and despite an Arbitration assessment that was in excess of the subject insurance policy proceeds. Counsel for Appellant even advised the Trial Court, at pre-trial conference, that this was a 'No Pay' and would have to proceed to trial.

In Crudup v. Marrero, 57 N.J. 353, 356-57 (1971), the New Jersey Supreme Court stated the rationale for the Offer of Judgment Rule:

> "The Offer of Judgment Rules, and particularly Rule 4:58-2, cast as it is in unqualified mandatory terms, were adopted deliberately by the Supreme Court. They were designed particularly as a mechanism to encourage, promote and stimulate early out-of-court settlement of negligence and unliquidated damage claims that in justice and reason ought to be settled without trial. It is a matter of common knowledge that the vast majority of such cases are ultimately settled. Unfortunately, the disposition too often takes place on the "courthouse steps" or just before or after a jury is drawn, rather than in the many months that intervene between the institution of the suit and the ultimate trial date. The failure to make earlier adjustments is a major cause of the clogging of the trial lists and the tremendous backlog of automobile negligence cases that burden our judicial system." [Ibid.]

As the Supreme Court further elaborated in Schettino v. Roizman Development, Inc., 158 N.J. 476, 482 (1999): "To fulfill its purpose, the rule imposes financial consequences on a party who rejects a settlement offer that turns out to be more favorable than the ultimate judgment." *See also*, Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 125 (2005)(indicating that "[t]he rule was intended to penalize 'a party who rejects a settlement offer that turns out to be more favorable than the ultimate judgment'").

It is not Appellant Willitts, but rather his insurer, NJM, that must pay the R. 4:58-2 sanctions for its unilateral decision not to accept Plaintiff's Offer to Take Judgment. Feliciano v. Faldetta, 434 N.J. Super. 543, 547-48 (App. Div. 2014); McMahon v. New Jersey Mfrs. Ins. Co., 364 N.J. Super. 188, 193-94 (App. Div. 2003).

In McMahon v. New Jersey Mfrs. Ins. Co., 364 N.J. Super. 188, 190 (App. Div. 2003), the Appellate Division determined that "a carrier is subject to the consequences of [R. 4:58-2], namely, exposure to reasonable litigation expenses, reasonable attorney's fees, and interest, even though the cost of those consequences, following a de novo jury damage award, subjects the carrier to a judgment in excess of the liability limits of the policy." The Court was "satisfied that the policy limits…are not so 'sacrosanct' to afford protection to a carrier where it chooses not to participate, despite having the

opportunity and ability to do so, in the activity fostered by the rule to avoid the very sanction imposed for non-participation." Id. at 193.

This matter went to arbitration on March 22, 2023. An award of $150,000 was entered. Respondent had previously filed, on November 8, 2022, an Offer of Judgment for the NJM bodily injury coverage policy limit of $100,000. On April 5, 2023, Appellant filed their appeal of the Arbitration Award, which exceeded the applicable policy limits. Nevertheless, NJM never even made a single offer to settle this claim, advising Plaintiff's counsel, the Hon. Eric Fikry, J.S.C. and the Hon. M. Patricia Richmond, J.S.C. retired on recall, on multiple occasions, that NJM considered this matter to be a 'No Pay' case.

As the trial progressed in this case, NJM made the unilateral decision not to make any settlement offers, despite an NJM adjuster observing the trial and numerous prompts by the trial judge, during breaks and outside the presence of the jury, for the parties to discuss settlement. NJM stubbornly refused to attempt to settle this case. Knowing now that NJM took such a risk with its insured's assets after having already reduced its insured's available coverage by settling the related property damage claims, and then disputing liability at trial, was reckless and in bad faith to their insured.

Appellant Willitts' carrier, NJM, exerted total control over settlement negotiations and decisions in this matter. NJM unilaterally exposed its insured to an excess judgment in this matter, despite Respondent advising NJM of the serious risk of an excess judgment nearly a year before the trial. NJM chose to gamble with Appellant Willitts' assets. It is NJM – not Appellant Willitts – that must bear responsibility for its bad gamble.

Not only is NJM responsible to pay the R. 4:58-2 sanctions in this case, but it is also exposed to a bad faith claim by its insured. Presumably, Appellant Willitts has been advised of his right to seek relief against NJM for the company's decision to place him and his assets at significant risk. To the extent Appellant Willitts "questions his financial security at this juncture," those questions are properly posed to NJM. To eliminate R. 4:58-2 sanctions here would be to subvert the purpose of the Rule. Such relief would penalize Respondent and reward NJM for making bad bets. Ultimately, NJM must be held accountable to pay the entire judgment plus R. 4:58-2 sanctions. Feliciano v. Faldetta, 434 N.J. Super. 543, 547-48 (App. Div. 2014).

## VI

## CONCLUSION

In sum, Mockler stands for the proposition that an operator of an automobile who is driving as a reasonably prudent and ordinary person would in the same situation, can be found not liable for causing a collision that occurs despite such reasonable and ordinary action/inaction, due to a condition outside of the driver's control. Mockler applies to skidding and sliding as much as it applies to the healthy individual with no medical history that suffers a seizure, causing them to rear-end another vehicle. Mockler does not entitle a defendant to slant the negligence instruction in their favor; rather it permits the factfinder to make a determination as to negligence, where otherwise negligence would be determined as a matter of law. The jury determines whether or not the factual recitation comports with reasonable versus unreasonable action/inaction, as well as the credibility of such factual recitation. The defendant is not entitled to an instruction telling the jury that skidding and/or sliding is 'not negligent', as this is not the law. Rather, the jury determines negligence based upon the reasonable person standard, as instructed in the Model Civil Jury Charges relative to negligence and causation; which are the most balanced and fair instruction of the applicable law, to both parties. To imply that a jury is not intelligent enough to realize

that if they determine a collision was outside of the control of a defendant, they can determine the defendant to have been reasonable and not negligent, insults the jury system. In the instant matter, Appellant 'had his day-in-court' on the negligence issue and was determined liable, unanimously, by a jury of his peers; in a factual scenario where the Trial Court would have been well within its right to determine the issue as a matter of law.

Relative to the Aggravation Charge, the jury literally heard a medical opinion diagnosing "Aggravation" of previously asymptomatic degenerative changes; without objection. Appellant seeks to subject Respondent to the impossible standard of proving a negative, by arguing a comparative analysis of a non-existent past medical history needed to occur in order to warrant the charge. A comparative analysis is only required where there is an issue of apportioning damages between a defendant that is on trial and that which the defendant should not be held liable for; based upon already existent damages at the time the liability arose. Incorporated in the Aggravation Charge is the 'egg-shell plaintiff' theory, relative to foreseeability of harm due to an underlying condition; which mandates a tortfeasor to be held liable for the full-harm, even if greater than could have been foreseen due to an underlying condition. More importantly and in the context of this case, Respondent presented medical expert testimony through three (3) physicians, all of whom

opined to acute permanent injuries caused by the subject collision. The Aggravation opinion was of no consequence as to whether or not Respondent vaulted the Verbal Threshold, but was certainly compensable nonetheless based upon the instructions as to recoverable damages. Furthermore, although missed during the charge conference and realized after the closing arguments, Respondent's request for the Aggravation charge was proper in accordance with R. 1:7-2, having been raised before the jury retired for deliberations. The Court cured any potential prejudice by affording the parties supplemental closing arguments to address the Aggravation charge issue. Aggravation was in the case and the jury required an instruction as to how to treat the evidence.

Lastly, although waived as not raised below or even in the Notice of the instant Appeal, the issue relative to the Verdict and Offer of Judgment amount as either excessive and/or a financial hardship upon Appellant, has not and cannot be substantiated. Appellant's insurer, New Jersey Manufacturers Insurance Company, had the opportunity to resolve this matter in the best interest of their insured, but **refused** to even make a settlement offer; **any** settlement offer. The insurer called all-of-the shots relative to the defense of this matter, including to force Respondent and her counsel to incur significant litigation costs and to expend significant attorney hours litigating this issue. It should further be noted that despite entry of judgment against Appellant, no

bond has been posted on his behalf and Respondent continues to suffer from the damages she incurred, without justice and/or compensation. This Court should not alter a justly determined damages award, which is not excessive or even argued to be shocking of the judicial conscience, based upon an unsubstantiated allegation of financial hardship; where ultimately the insurance carrier will be liable for satisfying the judgment and/or face the potential for *Bad Faith*.

Based upon the foregoing, Respondent, Melissa Presbery, respectfully requests that this Honorable Court affirm the Jury's verdict, Order for Judgment, Order to Pay Counsel/Offer of Judgment Fees and the Order denying Appellant a new trial.

Respectfully submitted,

**SPEAR, GREENFIELD**
**RICHMAN, WEITZ & TAGGART, P.C.**

/s/ Jeremy M. Weitz

**JEREMY M. WEITZ, ESQUIRE**

Dated: June 14, 2024

# CERTIFICATION OF SERVICE

I, Jeremy M. Weitz, Esquire, of full age, hereby certifies as follows:

1. On June 14, 2024, the original of the within Respondent's Brief in Opposition of Appeal from Final Judgment, the Hon. M. Patricia Richmond, J.S.C. retired on recall presiding, was filed with the Clerk of the Superior Court, Appellate Division, 25 W. Market Street, Trenton, New Jersey, via the E-Courts system.

2. On June 14, 2024, A COPY of the within Respondent's Brief in Opposition of Appeal from Final Judgment, the Hon. M. Patricia Richmond, J.S.C. retired on recall presiding, was served via the E-Courts system to the following:

Robert M. Kaplan, Esquire
Jeanine D. Clark, Esquire

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

**SPEAR, GREENFIELD**
**RICHMAN, WEITZ & TAGGART, P.C.**

/s/ Jeremy M. Weitz, Esquire

**JEREMY M. WEITZ, ESQUIRE**

**SUPERIOR COURT OF NEW JERSEY**
**APPELLATE DIVISION, BURLINGTON COUNTY**

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|---|---|
| MELISSA PRESBERY | : Civil Action Docket No.: |
| | : A-001360-23 |
| Plaintiff-Respondent | : |
| | : On Appeal from Superior Court |
| vs. | : of New Jersey, Law Division |
| | : Docket No.: BUR-L-2295-21 |
| JASON WILLITTS | : |
| | : Sat Below: |
| Defendant-Appellant | : Honorable M. Patricia Richmond, J.S.C. |
| | : |

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# DEFENDANT/APPELLANT JASON WILLITTS' BRIEF IN REPLY TO PLAINTIFF/RESPONDENT'S OPPOSITION TO THE APPEAL TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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**ON THE BRIEF:** Robert M. Kaplan, Esquire 026091980
Jeanine D. Clark, Esquire 016331998

**MARGOLIS EDELSTEIN**
Attorneys for Defendant/Appellant,
Jason Willitts
100 Century Parkway, Suite 200
Mount Laurel, NJ 08054
856-727-6000
rkaplan@margolisedelstein.com
jclark@margolisedelstein.com

Dated: July 9, 2024

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## LEGAL ARGUMENT

### I. THE COURT BELOW ERRED IN DECLINING TO PROVIDE A MOCKLER CHARGE.

**(Raised Below: T2 187 through 191; T3 310 through 319; T4 8 through 13)**

Plaintiff/Respondent makes much of the notion that a Mockler charge does not appear in the Model Civil Jury Charges. A charge or jury instruction may be perfectly proper notwithstanding that is not part of the Model Civil Jury Charges**.** Conversely, it can be reversible error to fail to give a necessary instruction. This can be so whether or not the instruction is part of the Model Civil Jury Charges. The matter before this Court is somewhat unique. It is undisputed that Mr. Willitts testified at trial that there had been rain that day and he experienced puddling or ponding of water without incident prior to this accident. He testified that he was taking all due care and was operating his vehicle at an appropriate speed. Mr. Willitts also testified that as a result of his vehicle hydroplaning behind the rear of the Plaintiff/Respondent's vehicle, he was unable to bring the vehicle to a complete stop prior to the time the front of his vehicle contacted the rear of the Plaintiff/Respondent's vehicle. Mr. Willitts' testimony regarding the happening of the accident, as well as the hydroplaning, is undisputed. Plaintiff/Respondent offered no contrary version regarding the happening of the accident or any other

evidence which would refute Mr. Willitts' account of the accident including the unexpected weather-related hydroplaning.

As set forth in greater detail in Defendant/Appellant's initial brief, the holding in Mockler v. Russman, 102 N.J. Super. 582 (App. Div. 1968) and instruction consistent with same is not limited to snow and ice. See, Universal Underwriters v. Heibel, 386 N.J. Super. 307 (App. Div. 2006); Hansen v. Eagle-Picher Lead Co., 8 N.J. 133, 141, 84 A.2d 281, 285 (1951); Raritan Trucking Corp. v. Aero Commander, Inc., 458 F.2d 1106 (3d Cir. 1972); Calabree v. DiCristino, 2009 (N.J. Super. Unpub. LEXIS 2548 (DA70 - DA71); State v. Wenzel, 113 N.J. Super. 215, 273 A.2d 395 (App. Div. 1971). Accordingly, it is respectfully submitted that the Court below should have given a charge consistent with the holding in Mockler, and failure to provide the appropriate charge improperly reduced or eliminated the Plaintiff/Respondent's burden. As the Court noted in Hayes v. Delamotte, 231 N.J. 373 (2018) citing, Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 521 (2011); Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995), while an Appellate Court must give due deference to the trial court's "feel of the case", the Trial Court's interpretation of the law and legal consequences, "are not entitled to any special deference." Id. The Court's decision below also

eliminated the Defendant/Appellant's liable defense. The Court's below denial of the requested Mockler charge was harmful error warranting a new trial.

## II. THE COURT BELOW ERRED IN PROVIDING AN AGGRAVATION CHARGE UNDER MODEL CIVIL CHARGE 8.11F

**(Raised Below: T2 161 through 166; T4 95 through 107; T4 125)**

### A. The Court Erred in Providing an Aggravation Charge Over the Objection of the Defendant/Appellant as Plaintiff/Respondent Did Not Provide a Comparative Analysis Through Expert Testimony as Required by New Jersey Law.

It was the Plaintiff/Respondent's burden to come forward with sufficient evidence to warrant an aggravation charge consistent with Model Civil Jury Charge 8.11F. Plaintiff/Respondent urges that as there were no prior medical records indicating Ms. Presbery was symptomatic, there was no need for an analysis. This is in error. To follow Plaintiff/Respondent's logic would allow an Aggravation charge in every case without regard to whether the standard had been met. Plaintiff/Respondent decided to pursue the aggravation charge and the notion that Ms. Presbery was asymptomatic prior to the accident and was made symptomatic as a result of the subject accident. Thus, it was Plaintiff/Respondent's burden to come forward with a comparative analysis consistent with Polk v. Daconceicao, 268 N.J. Super. 568, 575 (App. Div. 1993). Plaintiff/Respondent concedes that no such analysis was provided. A few sentences from Dr. Shah regarding age-appropriate

degenerative changes did not meet the standard for the requisite analysis. To the extent it was Plaintiff/Respondent's position that there were no records, evidence of treatment, or symptoms reported prior to the subject accident, Dr. Shah or some other expert should have provided a more comprehensive analysis sufficient to allow the jury to understand the issues and weigh the evaluation. As Plaintiff/Respondent failed to provide the necessary comparative medical evidence to establish her *prima facie* case, it was harmful error for the Court below to have provided the aggravation charge. See, Davidson v. Slater, 189 N.J. 166, 185 (2007). Failure to produce a comparative analysis can be fatal to a Plaintiff/Respondent's case and it is always the Plaintiff/Respondent who bears the burden of production with respect to demonstrating that an accident was the proximate cause of any aggravation. See, Davidson at 185 citing O'Brien Cogeneration, Inc. v. Automatic Sprinkler Corp. of Am., 361 N.J. Super. 264, 274-75 (App. Div. 2003); Reichert v. Vegholm, 366 N.J. 209, 213-14, (App. Div. 2004). Where the subject matter is fundamental or essential, an erroneous jury charge is almost always considered prejudicial. See, State v. Maloney, 216 N.J. 91, 104-05 (2013). Similarly, "erroneous instructions are poor candidates for rehabilitation as harmless, and are ordinarily presumed to be reversible error." See, State v. McKinney, 223 N.J. 475, 495-96 (2015) citing, State v. Afanador, 151 N.J. 41, 54 (1997).

In addition to the Court's error in permitting the instruction and the resulting elimination of Plaintiff/Respondent's burden on a key issue in the case, the Court's attempt to remedy the situation through allowing supplemental closings was improper, harmful error, and unduly prejudicial to the Defendant/Appellant.

Contrary to the Plaintiff/Respondent's assertion, plain error is not the standard to be applied to Defendant/Appellant's arguments on aggravation or indeed the arguments on the Mockler charge. As these issues were raised in detail with the Court below, the harmful versus harmless error standard is appropriate. Plaintiff/Respondent argues that Defendant/Appellant waived any objection by allowing Dr. Shah's testimony wherein he briefly mentions aggravation and age-appropriate degenerative changes. No specific analysis was provided by Dr. Shah nor any additional detail which would necessarily have warranted an objection at that stage. Defendant/Appellant clearly and vociferously objected to the aggravation charge when it was ultimately requested subsequent to the initial charge conference. New Jersey Court Rule 1:7-2 which speaks to waiver of objections and applicability of the plain error standard speaks to objections not made with respect to instructions to the jury. It is undisputed that Defendant/Appellant made an objection during the course of the trial.

Plaintiff/Respondent's timing of the request and the Court's decision to allow supplemental closings were also particularly problematic. Plaintiff/Respondent argues that the generic reference to a statement in Answers to Interrogatories which provided, "to the extent Plaintiff had any pre-existing or degenerative conditions, relative to the body part injured herein, same were asymptomatic prior to the instant accident and as such, were aggravated/exacerbated as a result" is sufficient notice to the Defendant/Appellant that the Plaintiff/Respondent would ultimately request an aggravation charge. Similarly, Plaintiff/Respondent relies upon its initial pretrial exchange. Notably, Plaintiff/Respondent's counsel states in his brief, "at the conclusion of closing arguments, Plaintiff/Respondent's counsel realized the error with respect to the Aggravation Charge request and brought it to the attention of the Court." (See Plaintiff/Respondent's brief at p. 7). The corollary of the statement is that Plaintiff/Respondent's counsel was aware of the aggravation issue and anticipated such a charge at the time he delivered his closing statement. Thus, any supplemental statement gave the Plaintiff/Respondent a second bite at the apple. Conversely, with no aggravation charge contained within the proposed instructions or discussed at the charge conference, counsel for Defendant/Appellant would have entered the closing arguments phase of the case anticipating that no aggravation charge was going to be given to the jury. Accordingly, the supplemental closing

improperly highlighted Plaintiff/Respondent's argument on aggravation resulting in harmful error to the Defendant/Appellant. Further, allowing Plaintiff/Respondent additional time to discuss the aggravation issue in a supplemental closing compounded the undue prejudice to the Defendant/Appellant.

## III. NEW JERSEY COURT RULE 4:58-2(c) MANDATES THAT THE ADDITIONAL AWARD OF PRE-JUDGMENT INTEREST, ATTORNEY'S FEES AND COSTS BE VACATED.

Plaintiff/Respondent argues that the Defendant/Appellant is barred from raising the issue of the verdict against the weight of the evidence, as well as the argument that the award of enhanced prejudgment interest and attorney's fees and cost be vacated under New Jersey Court Rule 4:58-2(c). The Court's decision and order on enhanced interest, costs and fees had not been entered by the time the Defendant/Appellant filed the within Notice of Appeal and the same was not included in the Notice of Appeal. New Jersey Court Rule 2:10-2 provides that where an issue is not raised below it must be included in the Table of Contents of the Appellate Brief. This was noted in Defendant/Appellant's initial brief. Where there was no objection below, the plain error rule applies. The plain error standard requires a determination of:

1. Whether there was an error; and

2. Whether that error was 'clearly capable of producing an unjust result.' R.2:10-2. See also,

State v. Donbrack, 245 N.J. 531, 544 (2021); State v. Funderburg, 225 N.J. 66, 79 (2016).

Defendant/Appellant respectfully submits that the Court's order granting enhanced prejudgment interest, attorney's fees and costs constitutes plain error. Defendant/Appellant objected to the amount of the fees below and this issue is subject to the harmful error standard. It is respectfully submitted that the record does not support a finding of an attorney fee award in the amount in excess of $500 per hour.

As to the enhanced interest, attorney's fees and costs under the offer of judgment rule, the rule provides that the Court "shall reduce the amount of the allowance" where the imposition of such fees, costs and enhanced interest "would impose undue hardship or otherwise result in unfairness to the offeree." See, N.J.R. 4:58-2(c) (emphasis supplied). Defendant/Appellant had a personal automobile liability policy with a $100,000 limit. Enhanced interest, attorney's fees and costs impose a significant additional burden and undue hardship on the Defendant/Appellant. Plaintiff/Respondent goes on at length arguing that some or all of the damages award under N.J.R. 4:58-2(c) would be the responsibility of the Defendant/Appellant's insurer. This issue is not before the Court. Plaintiff/Respondent's argument is improper and immaterial to any issue before this Court. Moreover, Defendant/Appellant's insurer is not a party to the underlying case

or to this appeal. Even if the Court were to consider the Plaintiff/Respondent's arguments, the order and judgments as entered are against the Defendant/Appellant Jason Willitts, not his insurer. Plaintiff/Respondent's reliance upon McMahon v. New Jersey Mfrs. Ins. Co. 364 N.J. Super. 188 (App. Div. 2003) is misplaced. In this matter, Plaintiff/Respondent brings suit against Appellant/Defendant Jason Willitts. In McMahon, a first-party UM/UIM case, the insurer was a party. The cases are factually, legally and procedurally distinct. McMahon is not analogous or on point as it relates to Plaintiff/Respondent's third-party claims against Defendant/Appellant Jason Willitts. Accordingly, it would be inappropriate to consider any arguments in reliance upon McMahon. Thus, the present undue hardship envisioned by N.J.R. 4:58-2(c) relates to Mr. Willitts. Accordingly, at a minimum, this Court should reverse the order awarding enhanced interest, attorney's fees and costs of suit.

## CONCLUSION

For the aforementioned reasons and as set forth in Defendant/Appellant's Brief, it is respectfully submitted that a new trial is warranted and this matter should be remanded with instructions for a new trial.

Respectfully submitted,

**MARGOLIS EDELSTEIN**
Attorneys for Defendant/Appellant,
Jason Willitts

BY: s/ Robert M. Kaplan
Robert M. Kaplan, Esquire
Jeanine D. Clark, Esquire

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