SHANI HARRELL, Plaintiff-Appellant, v. MODY MANAGEMENT, LLC D/B/A DUNKIN'; DUNKIN' BRANDS GROUP, INC.; DUNKIN' BRANDS, INC.; INSPIRE BRANDS; DUNKIN' DONUTS FRANCHISING, LLC; AND XYZ CORP. AND JOHN DOE, (FICTITIOUS NAMES), AND PROGRESSIVE GARDEN STATE INSURANCE COMPANY, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APP.DIV. NO. A-001679-23 Civil Action **On Appeal From:** **Superior Court of New Jersey** **Law Division, Essex County:** **ESX-L-3202-22** **Sat Below:** **Hon. Bridget A. Stecher, J.S.C.** **ESX-L-3202-22**

PLAINTIFF-APPELLANT'S BRIEF IN SUPPORT OF APPEAL

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TABLE OF CONTENTS

PAGE

TABLE OF TRANSCRIPTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

TABLE OF AUTHORITIES

Cases

Statutes

Legal Treatises

Rules

PRELIMINARY STATEMENT

On June 26, 2020, Plaintiff Shani Harrell (hereafter "Plaintiff") was injured at a Dunkin' Donuts drive-thru, while occupying her motor vehicle, a 1997 Ford Expedition. On that date, her motor vehicle was insured by the Defendant Progressive Garden State Insurance Company (hereafter "Defendant"). Plaintiff filed a claim for No-Fault Personal Injury Protection benefits (hereafter "PIP benefits") which was denied by the Defendant. Litigation ensued and after summary judgment motion practice, on reconsideration, the Trial Court granted the Defendant's request to dismiss the Plaintiff's statutory claim for PIP benefits.

The Plaintiff asserts that the Trial Court failed to apply the plain language of N.J.S.A. § 39:6A-4 to the undisputed facts in accordance with well-established case law resulting in erroneous findings. In its oral statement of reasons, the Trial Court summarized the undisputed facts as follows:

> On June 26, 2020 Shani Harrell had an incident at the Dunkin' Donuts drive-thru while stopped with her foot on the brake, car immobile, receiving a hot beverage through the drive-thru window. The lid came off the cup spilling liquid -- hot liquid and burning the plaintiff….
>
> [T]he plaintiff was stopped in the drive-thru receiving a hot beverage through the window of the vehicle when the top was dislodged, causing the hot liquid to spill and

burn the plaintiff. (1T11-12).

Here, the Trial Court found that Plaintiff "was not operating a motor vehicle at the time the injury occurred" and there was "no causal relationship between the plaintiff's use and occupancy of the vehicle and the injuries sustained." (1T11-12). As a result, the Trial Court improperly granted Defendant's Motion for Reconsideration of its denial of Defendant's Motion for Partial Summary Judgment and denied Plaintiff's claim for PIP benefits.

The Plaintiff seeks appellate review of the Trial Court's ruling denying PIP benefits. Indeed, the ruling is inconsistent with the plain language of N.J.S.A. § 39:6A-4, requiring the Plaintiff "sustain bodily injury as a result of an accident while occupying, entering into, alighting from or using an automobile…" as well as established case law holding that only a "**substantial nexus"** between the injury and motor vehicle must be found, not that the motor vehicle "**caused"** the injury.

STATEMENT OF FACTS

On June 26, 2020, the Plaintiff was occupying and using her vehicle at a Dunkin' Donuts drive-thru owned and managed by Mody Management, LLC (hereafter "Mody"), located in Hillside, NJ (Pa 001). The Plaintiff drove her vehicle up to the drive-thru window to receive her order (Pa 060, 062). She

had her foot on the brake while the vehicle remained fully operational with its engine engaged (Pa 060, 062). She grabbed the tray containing two beverages with both hands and as she was bringing the tray into the vehicle, the lid on the hot tea came off, and the cup spilled (Pa 060, 062). The Plaintiff was burned when the hot tea spilled between her legs, to her buttocks area, and directly to her perineal area, between her vagina and anus (Pa 062, 094).

At the time of the spill, the Plaintiff was sitting in the driver's seat, the vehicle was "in drive", engine was running, and her foot was on the brake (Pa 060, 062). The driver's seat had a seat cover on it, made partially of metal, which became very hot when the tea spilled (Pa 108). She lifted her foot from the brake at the moment the hot tea hit her, but quickly placed her foot back on the brake to prevent the vehicle from moving forward (Pa 062, 094-95). The Plaintiff was forced to sit in the hot tea, tried to move her body forward ("scoot"), and was only able to move a couple of inches, by holding herself up on the steering wheel until she stopped the vehicle and got out. (Pa 095-96). She got back in the vehicle to drive it out of the drive-thru driveway into a spot in the parking lot. (Pa 096).

As a result of her burn injuries, the Plaintiff required medical attention and treatment. (Pa 005, Pa 010). On the date of the accident, the Plaintiff was

the named insured of an automobile insurance policy issued by Defendant (Pa 064). Plaintiff's insurance policy with the Defendant provided for $250,000 in PIP benefits (subject to a $250.00 deductible and 20% co-insurance on the next $4,750.00), to be paid for any bodily injury the Plaintiff sustained as a result of an incident while occupying, entering into, alighting from, or using the insured automobile (Pa 065).

Pursuant to N.J.S.A. § 39:6A-4, as well as the terms of its own policy, the Defendant was required to provide PIP coverage to the Plaintiff once she sustained injuries as a result of this incident while she was using and/or occupying her vehicle (Pa 124, Pa 132).

Accordingly, the Plaintiff filed a PIP application with the Defendant, and a claim number and PIP adjuster were assigned (Pa 069). She provided a recorded statement to the Defendant and described how her injuries occurred. (Pa 060). On August 20, 2020, the Defendant found that the Plaintiff was ineligible for PIP benefits under its policy, wrongfully claiming that she did not meet the requirements of N.J.S.A. § 39:6A-4 as her injuries were not "caused" by the automobile and refused to extend PIP benefits to the Plaintiff (Pa 069, 071, 074).

STATEMENT OF PROCEDURAL HISTORY

On June 1, 2022, the Plaintiff filed a Complaint[1] in the New Jersey Superior Court, Essex County, against the Dunkin Defendants alleging tort claims, Count 1 through 4 (Pa 001). Further, relevant to this appeal, Count 5 alleged the Plaintiff was entitled to statutory PIP benefits, counsel fees and interest, against the Defendant-Respondent (Pa 009). Defendant filed an Answer on July 15, 2022 (Pa 023).

On March 24, 2023, the Plaintiff filed a Motion for Partial Summary Judgement, seeking a determination as a matter of law from the Court that the Plaintiff is eligible for PIP benefits for injuries related to the subject June 26, 2020 accident, pursuant to N.J.S.A. 39:6A-1.1, *et seq* (Pa 033). On May 2, 2023, the Defendant filed its Opposition and a Cross-Motion for Partial Summary Judgment, requesting that the Trial Court find that the Plaintiff was not entitled to PIP coverage (Pa 099). On May 8, 2023, the Plaintiff filed a reply to Defendant's opposition (Pa 077).

[1] The Plaintiff filed a lawsuit against Defendants Mody Management, LLC d/b/a Dunkin', Dunkin' Brands Group, Inc., Dunkin' Brands, Inc., Inspire Brands, Dunkin' Donuts Franchising, LLC, and XYZ CORP. and JOHN DOE, (fictitious names), (collectively "Dunkin Defendants") and Progressive Garden State Insurance Company (Defendant-Respondent) (Pa 001). At mediation with the Hon. Rachelle L. Harz, J.S.C., Ret., the Plaintiff settled her claims against the Dunkin Defendants.

On November 9, 2023, the parties' counsel presented oral argument[2] before the Trial Court. (2T). The Trial Court denied both motions and set forth its reasoning on the record (Pa 097, Pa 159, 2T18). The Court ruled that there was an issue of material fact for a jury to determine, i.e., whether the involvement of Plaintiff's automobile was consequential (as asserted by the Plaintiff) or merely incidental (as argued by the Defendant) to the Plaintiff's injuries. (2T18). Specifically, the Trial Court held: "A fact finder could determine that the injuries resulted on June 26th were either incidental or not to the occupancy or use of the vehicle, thus establishing a claim for PIP payment." (2T18).

On November 15, 2023, the Plaintiff filed a Motion for Reconsideration, citing the Appellate Division decision in Manetti V. Prudential Property & Casualty Ins. Co., 196 N.J. Super. 317 (App. Div. 1984) (Pa 161). The Plaintiff asserted that the Trial Court was incorrect in concluding that the determination of whether she is entitled to PIP benefits is a jury question (Pa 163, 1T5-7). To the contrary, the Plaintiff argued that the Trial Court, not a jury, was tasked with reviewing the undisputed facts and determining whether the Plaintiff was

[2] 1T – Transcript of November 9, 2023 Oral Argument on Motions for Partial Summary Judgment.
2T – Transcript of January 10, 2024 Oral Argument on Motions for Reconsideration.

entitled to the claimed, statutory PIP benefits (Pa 163, 1T5-7). The Plaintiff also asserted that there was a substantial nexus between her injuries and the motor vehicle, thereby entitling her to statutory PIP benefits (Pa 163, 1T5-7).

On November 17, 2023, the Defendant also filed a Motion for Reconsideration, agreeing that the Trial Court, not a jury, was required to make the determination of whether the Plaintiff is eligible for statutory PIP benefits (Pa 168, 1T7-9). The Defendant asserted that although the Plaintiff was occupying her motor vehicle at the time of the injury, the motor vehicle was incidental to her injuries and so, she was not entitled to PIP benefits (Pa 170, 1T7-9).

Argument on the two Motions for Reconsideration was held on January 10, 2024, during which the Trial Court highlighted the following facts: "On June 26, 2020 Shani Harrell had an incident at the Dunkin' Donuts drive-thru while stopped with her foot on the brake, car immobile, receiving a hot beverage through the drive-thru window." (2T11). The Trial Court denied the Plaintiff's motion and granted the Defendant's motion finding the Plaintiff was not entitled to statutory PIP benefits as she was "not operating a motor vehicle at the time of the injury…" and "there is no causal relationship between the plaintiff's use and occupancy of the vehicle and the injuries sustained." (2T:12). In summary,

the Court found "there is no nexus between the use of the automobile and the injuries that have subsequently occurred and that the car was not being operated at the time of the injury." (2T12-13). The Court entered Orders reflecting its rulings on January 10, 2024 (Pa 166, Pa 172).

Plaintiff filed a Notice of Appeal, on February 7, 2024, appealing the November 9, 2023 Order denying the Plaintiff's Motion for Partial Summary Judgment; January 10, 2024 Order granting the Defendant Progressive's Motion for Reconsideration; and January 10, 2024 Order denying the Plaintiff's Motion for Reconsideration (Pa 174). The Plaintiff respectfully submits that on reconsideration, the Trial Court failed to apply the plain language of N.J.S.A. § 39:6A-4 and well-established law setting forth the "substantial nexus" test. Accordingly, the Trial Court's ruling must be reversed by the Appellate Division, and remanded to a new judge for a calculation of the statutory damages and counsel fees to which the Plaintiff is entitled.

STANDARD OF REVIEW

In reviewing a Trial Court's decision on summary judgment, the Appellate Division applies the same standard as the Trial Court by first deciding whether there was a genuine issue of fact, and if none, whether the Trial Court's application of the law and ruling was correct. Prudential Prop. & Cas. Ins. Co.

v. Boylan, 307 N.J. Super. 162, 167 (App. Div. YEAR) *certif. denied*, 154 N.J. 608 (1998). The Trial Court's rulings of law and issues regarding the applicability, validity, or interpretation of laws and statutes require a *de novo* standard of review. Kocanowski v. Twp. of Bridgewater, 237 N.J. 3, 9 (2019); State v. Fuqua, 234 N.J. 583, 591 (2018). "In interpreting a legislative enactment, the starting point is the language of the statute itself. If the language is clear, 'the sole function of the courts is to enforce it according to its terms.'" Velazquez v. Jiminez, 172 N.J. 240, 256 (2002) (*quoting* Hubbard ex rel. Hubbard v. Reed, 168 N.J. 387, 392 (2001)).

Notably, the Trial Court's interpretation of the law and legal consequences that stem from established, undisputed facts are not entitled to any deference. State v. Brown, 118 N.J. 595, 604, 573 A.2d 886 (1990); Dolson v. Anastasia, 55 N.J. 2, 7, 258 A.2d 706 (1969); Pearl Assurance Co. Ltd. v. Watts, 69 N.J. Super. 198, 205, 174 A.2d 90 (App.Div.1961); Manalapan Realty, Ltd. P'ship v. Twp. Comm., 140 N.J. 366, 378, 658 A.2d 1230, 1236-37 (1995); Hayes v. Delamotte, 231 N.J. 373, 386-87, 175 A.3d 953, 961 (2018). Accordingly, "the appellate court is not bound by the trial court's application of law to the facts or its evaluation of the legal implications of facts where credibility is not in issue." Pressler, Current N.J. Court Rules, Comment 3.1 to R. 2:10-2.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT FAILED TO ENFORCE THE PLAIN LANGUAGE OF N.J.S.A. 39:6A-4, AND ERRED IN APPLYING WELL-ESTABLISHED CASE LAW, THEREBY UNLAWFULLY DENYING PLAINTIFF HER RIGHT TO NO-FAULT PIP BENEFITS (Opinion from Transcript, 2T12-13)

"In interpreting a legislative enactment, the starting point is the language of the statute itself. If the language is clear, the sole function of the courts is to enforce it according to its terms." Velazquez v. Jiminez, 172 N.J. 240, 256, 798 A.2d 51 (2002) (*quoting* Hubbard ex rel. Hubbard v. Reed, 168 N.J. 387, 392, 774 A.2d 495 (2001) (*quoting* Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442, 452 (1917))). "All terms in a statute should be accorded their normal sense and significance." Id. at 256, 798 A.2d 51 (*quoting* Stryker Corp. v. Dir., Div. of Taxation, 168 N.J. 138, 156, 773 A.2d 674 (2001)). DeVivo v. Anderson, 410 N.J. Super. 175, 179, 980 A.2d 498, 500 (Super. Ct. 2009).

Here, the Trial Court failed to apply the plain meaning of N.J.S.A. 39:6A-4. Eligibility for PIP benefits in the State of New Jersey is governed by the provisions of the Automobile Insurance Cost Reduction Act (AICRA) of 1996. N.J.S.A. 39:6A-1.1, *et seq.* (hereinafter "the Act"). The Act, in pertinent part,

states that the following individuals are eligible for PIP benefits, regardless of liability:

> "…the named insured and members of his family residing in his household *who sustain bodily injury as a result of an accident while occupying, entering into, alighting from or using an automobile*, or as a pedestrian, caused by an automobile or by an object propelled by or from an automobile, and to other persons sustaining bodily injury while occupying, entering into, alighting from or using the automobile of the named insured, with permission of the named insured." N.J.S.A. 39:6A-4 (*emphasis added*).

Courts are to apply the Act liberally so as to afford victims the "broadest possible coverage." Palisades Safety & Ins. Ass'n v. Bastein, 175 N.J. 144, 148 (2003). Indeed, the Act itself requires that it be liberally construed by courts in an effort to promote "its intended remedial purpose of effecting broad protection for accident victims." N.J. Mfrs. Ins. Co. v. Hardy, 178 N.J. 327, 332 (2004); See also N.J.S.A. 39:6A-16.

A plain reading of the Act suffices to reveal that any named insured injured in an accident while occupying or using one's vehicle is entitled to PIP benefits. The Act does not require that the claimant's injuries are caused by an automobile; rather that they are the "result of an accident while occupying…or using an automobile." N.J.S.A. 39:6A-4. In determining whether an "accident" qualifies for the purposes of PIP eligibility, courts have required that there be a

"substantial nexus" between the injury and use of the vehicle. Lindstrom by Lindstrom v. Hanover Ins. Co. ex rel. N.J. Auto Full Ins. Underwriting Ass'n, 138 N.J. 242, 250 (1994); See also Bowe v. N.J. Mfrs. Ins. Co., 367 N.J. Super 128, 137 (App. Div. 2004). A substantial nexus is found where the injury, though unexpected, was a natural or reasonable incident or consequence of the automobile's use. Lindstrom, 138 N.J. at 250 (*citing* Westchester Fire Ins. Co. v. Continental Ins. Co., 126 N.J. Super. 29, 28 (App. Div. 1973)).

In applying the substantial nexus test, courts have done so liberally, consistent with the aim of providing the broadest possible coverage to claimants. See Palisades Safety, 175 N.J. at 144; See also Hardy, 178 N.J. at 332. The New Jersey Supreme Court, in Penn Nat'l Ins. Co. v. Costa, 198 N.J. 229 (2009), has held that the determination of whether a substantial nexus exists depends upon the circumstances of a particular case:

> [T]here need be shown only a substantial nexus between the injury and the use of the vehicle in order for the obligation to provide coverage to arise. The inquiry should be whether the negligent act which caused the injury, although not foreseen or expected, was in the contemplation of the parties to the insurance contract a natural and reasonable incident or consequence of the use of the automobile, and this a risk against which they might reasonably expect those insured under the policy would be protected.
>
> Penn, 198 N.J. at 240.

Notably, "[t]he act causing the injury need not be actually foreseen but it must be both a reasonable consequence of the use of an automobile and one against which the parties would expect protection." Lindstrom, 138 N.J. at 250.

PIP benefits have been extended to an insured injured while riding in a tow truck which was transporting his vehicle after an accident as the towing of the insured vehicle constituted a "use" of that vehicle. Svenson v. Nat'l Consumer Ins. Co., 322 N.J. Super. 410, 416 (App. Div. 1999). Likewise, PIP benefits were extended to a man who was bitten in the face by a dog being transported in the open cab of an insured pickup truck. Diehl v. Cumberland Mut. Fire Ins. Co., 296 N.J. Super. 231, 236 (App. Div. 1997). In Westchester, the Appellate Division concluded a substantial nexus existed for an injured bicyclist who was struck by a stick thrown from a moving vehicle as it "was a sufficiently foreseeable consequence of the use of the vehicle." Westchester, 126 N.J. Super. at 39.

In the aforementioned Lindstrom case, the Supreme Court found that PIP benefits extended to a pedestrian injured in a drive-by shooting as the assailant's "automobile did more than provide a setting or enhanced opportunity for the assault" but also allowed "the assailant to be at the place of attack" and provided him with "both anonymity and a means of escape." Lindstrom, 138 N.J. at 252.

Although the Lindstrom case dealt with injuries to a pedestrian, the Court's reasoning of what constitutes an "accident" indicated that a driver or passenger injured in a random drive-by shooting would likely recover PIP benefits. Craig & Pomeroy, New Jersey Auto Insurance Law, § 6:2-3(b), p.133 (Gann, 2021).

Notably, the Appellate Division has found a substantial nexus even when the injuries at issue were not directly or proximately caused by the automobile, or its motion or operation. Smaul v. Irvington General Hosp., 209 N.J. Super. 592, 595 (App. Div. 1986) *certif. granted* Smaul v. Irvington General Hosp., 108 N.J. 474, 477 (1987) (*citing* Westchester, 126 N.J. Super. at 37-38). In Smaul, the plaintiff had stopped his vehicle to ask for directions and was subsequently pulled from it and assaulted. Smaul, 209 N.J. Super. at 594. Despite the vehicle being stopped, or "immobile," the Appellate Division found a substantial nexus to award PIP benefits. Id. at 596.

Recently, the Appellate Division reviewed New Jersey's No-Fault PIP statute and the issue of establishing a substantial nexus between the insured vehicle and the injury sustained. Edwin Silva v. Selective Fire and Casualty Insurance Co., Docket No. A-3300-21 (*decided* April 24, 2023). (Pa 083). In Silva, the Appellate Division noted additional cases where coverage has been found for an injured plaintiff, including:

> [When] adding water to their vehicle's radiator, Newcomb Hospital v. Fountain, 141 N.J. Super. 291, 295 (Law Div. 1976); retrieving a roadway sign they were loading, along with cones, onto their employer's vehicle, De Almeida v. General Accident Insurance Company, 314 N.J. Super. 312, 314, 317 (App. Div. 1998); by a hit and run driver while leaning on a vehicle, Mondelli v. State Farm Mut. Auto. Ins. Co., 102 N.J. 167 (1986) at 168-73; walking back to a vehicle they left running, Torres v. Travelers Indem. Co., 171 N.J. 147 (2002), at 149-50; and stopping to help another driver involved in an accident, leaving their car running, and telling their child they "would be right back[,]" Macchi v. Connecticut General Insurance Company, 354 N.J. Super. 64, 68, 72 (App. Div. 2002).
>
> See Edwin Silva v. Selective Fire and Casualty Insurance Co., Docket No. A-3300-21, pg. 7 (*decided* April 24, 2023). (Pa 083).

Unlike the injured party in Kordell v. Allstate Ins. Co., a case cited by the Defendant's in their Trial Court submissions, the Plaintiff's injury was not due to natural causes. Kordell v. Allstate Ins. Co., 230 N.J. Super. 505, 509 (App. Div.), *cert. den.* 117 N.J. 43 (1989). In contrast, Foss v. Cignarella, 196 N.J. Super 3718 (Law Division, 1984), which was also cited by the Defendant in its trial brief, is a 40-year-old Law Division case involving an injury caused by an intentional act, distinguishable from the present case.

Moreover, since Foss, the New Jersey Supreme Court has affirmed the Appellate Division decision to afford PIP benefits for injuries a driver sustained

when he merely stopped his vehicle, was seated in it, and asking for directions. Smaul, 108 N.J. 474 (1987). The Court found that the statutory requirement of an "accident involving an automobile" is satisfied where the role of an automobile is central to the incident. Smaul, 108 N.J. at 478.

In this case, summary judgment is appropriate as there are no disputed issues of material fact. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Notably, the Defendant agreed that the Plaintiff was occupying her vehicle at the time she was injured by the spilled hot tea; this material fact was undisputed:

- Relevant Excerpt from *Plaintiff's* Statement of Material Facts:
    - This matter concerns injuries sustained by the Plaintiff, Shani Harrell, in an incident occurring on June 26, 2020 at a drive-thru location at a Dunkin' Donuts premises, while occupying her insured motor vehicle. (Pa 035).
- Relevant Excerpt from *Defendant's* Responses to Plaintiff's Statement of Material Facts:
    - Defendant agrees that Plaintiff Shani Harrell was seated in the front seat of her vehicle at the time that the tea spilled on her lap. However, there is no dispute that the vehicle was not moving at the time of the incident and that there is no allegation that the vehicle had anything to do with the cause of the spill. The vehicle merely provided the setting where the incident occurred. (Pa 101).

Additional undisputed material facts considered by the Trial Court

include: Plaintiff's vehicle was not moving at the time that the beverage given by the Dunkin' Donuts employee spilled on her lap (Pa 060, Pa 062); her foot was on the brake while the vehicle remained in drive. (Pa 060, Pa 062); and at the time of her accident, the Plaintiff was the named insured of an active automobile insurance policy with $250,000 in PIP coverage through the Defendant insurer, Progressive. (Pa 064-65).

Indeed, at oral argument, Plaintiff's counsel asserted that the undisputed facts included:

> "On June 26, 2020, Shani Harrell was driving her vehicle in Hillside, New Jersey at a Dunkin' Donuts drive-thru. She literally had to drive her vehicle through and up to the drive-thru.…She was stopped…" (1T7-8).
>
> [P]laintiff was occupying her vehicle specifically in a drive-thru. But for being in her vehicle, occupying and operating it, she would not have been able to use the drive-thru. She drove up to the drive-thru window. At that point put her foot on the brake and her car was still in drive, with her foot on the brake, key in the ignition…" (2T:5-6).

Defendant's counsel argued: "As counsel stated, we pretty much agree to the facts in this situation, which is that at the time of the spill the vehicle was stopped…" (2T7-8).

Essentially, the parties' arguments on summary judgment and

reconsideration focused on the application of the facts to the statute and well-established case law (1T7-12, 2T5-9). Whereas the Plaintiff asserted that the facts demonstrated that the Plaintiff's motor vehicle was "consequential" to her injury, the Defendant asserted that her motor vehicle was "incidental." (1T7-12, 2T5-9). When the Defendant originally denied her PIP application, it wrongfully concluded that "her injuries were not caused by an automobile as required by N.J.S.A. 39:6A-4; and there is no causal nexus between an automobile and Plaintiff's injuries." (Pa 068).

At oral argument on January 10, 2024, the Trial Judge noted: "On June 26, 2020 Shani Harrell had an incident at the Dunkin' Donuts drive-thru while stopped with her foot on the brake, car immobile, receiving a hot beverage through the drive-thru window." (2T11). On reconsideration, the Trial Court made findings and held that the Plaintiff was not entitled to PIP benefits, concluding that: 1) Plaintiff was not "operating a motor vehicle at the time the injury occurred"; and 2) "there is no causal relationship between the plaintiff's use and occupancy of the vehicle and the injuries sustained." (2T12). Based on this flawed analysis, the Court found "there is no nexus between the use of the automobile and the injuries that have subsequently occurred and that the car was not being operated at the time of the injury." (2T12-13).

It appears that the Trial Court was erroneously focused on whether or not the vehicle was in motion, i.e. "proximately caused" the hot tea to spill into the Plaintiff's lap. Indeed, at oral argument on the initial motions for partial summary judgment on November 9, 2023, the Trial Court interjected seeking confirmation that the Plaintiff's vehicle was "stopped", evidencing the misplaced focus. (1T8). This reasoning is clearly erroneous given the well-established case law cited herein, including the Smaul case in which this court held that a substantial nexus is found even when the injuries at issue were not directly or proximately caused by the automobile, or its motion or operation. Smaul, 209 N.J. Super. at 595.

The Trial Court's reasoning that the Plaintiff's vehicle was not being operated, simply because it was not in motion, is illogical and incorrect. Clearly, the Plaintiff was "operating" her vehicle when she drove to the drive-thru, arrived at the drive-thru window, and placed her foot on the brake while her vehicle was in drive, engine still running, as she waited to receive her beverages (Pa 060, Pa 062).

Notably, the negligent act of a Dunkin' Donuts employee in serving hot beverages through a drive-thru window, although not foreseeable, is undoubtedly a "natural and reasonable incident or consequence of the use of [an]

automobile" in this setting. Penn, 198 N.J. at 240. Quite literally, the Plaintiff was required to drive her vehicle through a lane to reach the drive-thru window.

In summary, the plaintiff was occupying the driver's seat of her insured vehicle at the time she was injured. Indeed, she was an active, seated driver occupying and operating her vehicle, with her foot on the brake at the drive-thru window while her vehicle was in drive. The Plaintiff would not have received service at the drive-thru window, but for the fact that she was occupying and using her vehicle. While unexpected, the spillage of a hot beverage (indeed, any beverage or food item) at a drive-thru window is a foreseeable consequence of the automobile's use. Lindstrom, 138 N.J. at 250.

Based on the facts of this case, a "substantial nexus" exists between the Plaintiff's injuries and the use and occupancy of her vehicle at the time of her accident.

CONCLUSION

Accordingly, the Plaintiff respectfully requests this Court to reverse the Trial Court's failure to enforce the statute and compel the Defendant to provide PIP benefits to the Plaintiff. Upon reversal, the action will require a remand to a new judge to address the PIP benefits to which Plaintiff is entitled and the award of counsel fees and costs for the Defendant's unlawful denial of PIP benefits.

Respectfully submitted,
Starr, Gern, Davison & Rubin, P.C.
Attorneys for Plaintiff

Dated: May 21, 2024

/s/ Ana Rita Ferreira
By:_____
Ana Rita Ferreira, Esq.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001679-23
CIVIL ACTION

SHANI HARRELL, Plaintiff-Appellant, v. MODY MANAGEMENT, LLC D/B/A DUNKIN'; DUNKIN' BRANDS, INC.; INSPIRE BRANDS; DUNKIN' DONUTS FRANCHISING, LLC; AND XYZ CORP. AND JOHN DOE, (FICTITIOUS NAMES), AND PROGRESSIVE GARDEN STATE INSURANCE COMPANY, Defendants-Respondents.	ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY LAW DIVISION, ESSEX COUNTY Docket No. ESX-L-3203-22 APPEAL OF ORDER ENTERED ON JANUARY 10, 2024 SAT BELOW: HON. BRIDGET A. STECHER, J.S.C.

APPELLATE BRIEF AND APPENDIX SUBMITTED ON BEHALF OF DEFENDANT-RESPONDENT, PROGRESSIVE GARDEN STATE INSURANCE COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

COURT RULES/STATUTES

PRELIMINARY STATEMENT

The issues presented in this matter are whether an individual who was injured by the negligence of a restaurant employee while seated in her stopped automobile is entitled to New Jersey No Fault Personal Injury Protection medical expense benefits payments under and her automobile insurance policy and in accordance with N.J.S.A. 39:6A-4 and applicable law.

Plaintiff/Appellant contends that once an individual is occupying a vehicle, N.J.S.A. 39:6A-4 requires that personal injury protection coverage apply. Defendant/Appellant disputes this position. N.J.A.C. 11:3-4.3 outlines that "[p]ersonal injury protection coverage shall provide reimbursement for all medically necessary expenses for the diagnosis and treatment of **injuries sustained from a covered automobile accident…**" (emphasis added). Defendant/Respondent maintains that since the injuries Plaintiff/Appellant sustained were not due to an "automobile accident," she is not entitled to recovery of PIP benefits. The undisputed facts are that Plaintiff's injuries resulted from a spill that was caused by the negligence of a Dunkin Donuts employee. The automobile was simply the location of the incident. There is no substantial causal nexus between the

injury and a qualifying vehicle. The nature of that accident is separate and apart from the automobile. The injuries undisputedly occurred because of the negligence of the Dunkin Donuts employee.

Defendant/Respondent maintains that the applicable statutory and regulatory authority, as well as the applicable case law and policy language support the conclusion that Plaintiff/Appellant is not entitled to personal injury protection medical expense benefits coverage for the injuries sustained in this matter.

The Honorable Bridget A. Stecher, J.S.C. ultimately entered judgment in favor of Defendant/Respondent, finding that based upon the facts of the instant matter, Plaintiff/Appellant was not entitled to personal injury protection medical expense benefits coverage for treatment of the injuries that she sustained in the June 26, 2020, incident. Plaintiff/Appellant now seeks to reverse the ruling of the Trial Court. Defendant/Respondent submits that the ruling of the Trial Court should be affirmed. The clear and undisputed facts of this matter when applied to the law evidence that there is no PIP coverage for Plaintiff/Appellant Shani Harrell for the injuries she sustained in the June 26, 2020, accident.

STATEMENT OF PROCEDURAL HISTORY

On June 1, 2022, Plaintiff/Appellant Shani Harrell (hereinafter referred to as "Harrell") filed a Complaint in the Superior Court, Law Division, Essex County against Mody Management, LLC d/b/a Dunkin'; Dunkin' Brands, Inc., Inspire Brands, Dunkin Donuts Franchising, LLC and Defendant/Respondent, Progressive Garden State Insurance Company ("Progressive") . (Pa. 001- 019) The Complaint alleged in the First Count that Defendants Mody Management ("Mody") and Dunkin "negligently and carelessly sold and served the aforesaid hot beverages by employing its server/employee at the drive-through location of the premises, where he improperly secured the lid and the hot tea beverage cup, containing the aforesaid hot tea drink, causing it to become dislodged when handed to the plaintiff. Spilling its contents on plaintiff's lap." (Pa. 003-004) Plaintiff/Appellant alleged that as a direct and proximate result of the negligent actions by Defendants Mody and Dunkin' that Plaintiff/Appellant Shani Harrell was severely injured. (Pa. 005). In the Fifth Count of the Complaint, Plaintiff/Appellant sought to compel Defendant/respondent Progressive to pay personal injury protection benefits for the injuries she sustained on June 26, 2020. (Pa. 009-010).

On July 15, 2022, Defendant/Respondent Progressive filed an Answer to Plaintiff/Appellant's Complaint. (Pa. 023) In the Answer, Defendant/respondent Progressive denied that PIP benefits were due and owing to Plaintiff/Appellant noting that Plaintiff/Appellant was not eligible for personal injury protection coverage under the policy as there was no causal nexus between Plaintiff/Appellant's injuries and an automobile and also that her injuries were not caused by an automobile as required by N.J.S.A. 39:6A-4. (Pa. 025-028).

After considerable discovery including the deposition of Plaintiff Shani Harrell, on March 24, 2023, Plaintiff/Appellant filed a Motion for Partial Summary Judgement asking the court to find as a matter of law that Plaintiff/Appellant was entitled to PIP benefits for the injuries she sustained in the June 26, 2020, incident. (Pa. 033) Defendant/Respondent Progressive filed a Notice of Cross Motion for Summary Judgment and Opposition to Plaintiff/Appellant's Motion for Summary Judgment on May 2, 2023. Defendant/Respondent requested that the trial court deny Plaintiff's Motion and enter Summary Judgment in favor of Progressive finding that Plaintiff is not entitled to any personal injury protection benefits for the injuries arising out of the June 26, 2020, incident.

Defendant/Respondent argued that in order to be entitled to PIP coverage for an injury sustained while occupying an automobile, "[t]he injury must be a natural or reasonable incident of consequence of the use of the automobile. Kordell v. Allstate Ins. Co., 230 N.J. Super. 505, 509 (App. Div.), certify. Den. 117 N.J. 43 (1989). Defendant/Respondent argued that Plaintiff/Appellant's injuries did not arise as a consequence of the automobile and that the automobile which Plaintiff/Appellant was occupying at the time of that the beverages spilled was merely incidental to the injury and does not constitute any legal cause. (Pa. 099-106).

By Orders dated November 9, 2023, the Hon. Bridget A. Stecher, J.S.C., denied both Plaintiff/Appellant's Motion for Partial Summary Judgment) and Defendant/Respondent's Cross-Motion for Summary Judgment (Pa. 097-098 and Pa. 159-160). At the hearing, the Hon. Bridget A. Stecher noted that she was denying both motions since she found there to be a question of fact as to whether or not the injuries sustained by Plaintiff/Appellant in the June 26, 2020, loss were or were not incidental to the occupancy of the vehicle. (Transcript from November 9, 2023, Oral Argument on Plaintiff/Appellant's Motion for

Partial Summary Judgment and Defendant/Respondent's Cross Motion for Summary Judgment, Page 18) (1T18)

Plaintiff/Appellant filed a Motion for Reconsideration on November 15, 2023, asking the Trial Court to Reconsider the denial of Plaintiff/Appellant's Motion for Summary Judgment and again asking that an Order be entered declaring that Plaintiff/Appellant was eligible for personal injury protection benefits. (Pa. 161-165). Defendant/Respondent filed a Cross-Motion for Reconsideration asking that the November 9, 2023, Order denying Defendant/Respondent's Cross Motion for Summary Judgment be vacated, requesting that the Summary Judgment be entered in favor of Defendant/Respondent Progressive and that Plaintiff/Appellant's Complaint against Defendant/Respondent be dismissed with prejudice. (Pa. 161-178). Defendant/Respondent argued that the Trial Court should reconsider the denial of Summary Judgment as there were no questions of fact that remained in the case, just the issue of a legal analysis based upon the agreed upon facts. Defendant/Respondent argued that the resolution of the issues in this matter via Summary Judgment was appropriate since there were no disputes between the parties as to the facts of the case. Defendant/Respondent further argued that Summary Judgment should be

entered in Progressive's favor since there was no causal connection between the vehicle and Plaintiff's injuries. Defendant/Respondent again argued that the vehicle was incidental to Plaintiff/Appellant's injuries and therefore personal injury protection did not apply.

On January 10, 2024, Oral Argument was held before the Honorable Bridget A. Stecher, J.S.C. in the Essex County Superior Court (T2). Judge Stecher noted that since the parties agreed that there was no question of material fact, that she would make a ruling in the case as a matter of law. While reading the decision into the record, Judge Stecher noted

> On June 26, 2020 Shani Harrell had an incident at the Dunkin' Donuts drive-thru while stopped with her foot on the brake, car immobile, receiving a hot beverage through the drive-thru window. The lid came off the cup spilling liquid -- hot liquid and burning the plaintiff.

(2T11) Judge Stecher went on to find

> Since the parties have agreed as to the facts, the plaintiff was stopped in the drive-thru receiving a hot beverage through the window of the vehicle when the top was dislodged, causing the hot liquid to spill and burn the plaintiff.
>
> The Court now finds that are no genuine issues of material fact as to the issues as to how the accident occurred, so these summary judgement motions can be decided as a matter of law.

> Two, the plaintiff was not operating a motor vehicle at the time the injury occurred.
>
> And three, there is no causal relationship between the plaintiff's use and occupancy of the vehicle and the injuries sustained.
>
> The Court finds that Progressive -- Defendant Progressive is entitled to summary judgement as a matter of law.
>
> Plaintiff's motion for partial summary judgement is denied.
>
> The summary of all your submissions has not changed from the last time that it was submitted and reviewed by the Court as to the filing for summary judgment on both of your parts, the oppositions that you filed and the replies that you filed, but the Court does find that there is no nexus between the use of the automobile and the injuries that have subsequently occurred and that the car was not being operated at the time of the injury

(2T12-13)

An order was entered by the Honorable Bridget A. Stecher, J.S.C., on January 10, 2024, denying Plaintiff/Appellant's Motion for Reconsideration and Ordering that the November 9, 2023, Order denying Plaintiff/Appellant's Motion for Partial Summary Judgment would remain in effect. (Pa. 166 -167) On January 10, 2024, an Order was also entered

by the Honorable Bridget A. Stecher, J.S.C., granting Defendant/Respondent's Motion for Reconsideration, granting Summary Judgment in favor of Defendant/Respondent and dismissing with prejudice Plaintiff/Appellant's Complaint against Defendant/Respondent Progressive Garden State Insurance Company. (Pa. 172-173). A Notice of Appeal was then filed by Plaintiff/Appellant asking for reversal of the Orders of the Honorable Bridget A. Stecher, J.S.C., dated January 10, 2024. Defendant/Respondent is asking that Plaintiff/Appellant's request for relief be denied and the lower court Order be Affirmed in its entirety.

STATEMENT OF FACTS

The Complaint in this matter arises out of an incident that occurred on June 26, 2020, at the Dunkin' Donuts located in Hillside, New Jersey. (Pa. 003). Plaintiff/Appellant alleged in her Complaint that she was injured when an employee of Mody Management and Dunkin "improperly secured the lid and the hot tea beverage cup, containing the aforesaid hot tea drink, causing it to become dislodged when handed to the plaintiff, spilling its contents on the plaintiff's lap." (Pa. 003-004) Plaintiff/Appellant expounded in her Answers to Interrogatories that "[a]s the male Dunkin employee handed [her] the large cups in a caron tray, the plastic top for the tea came loose from the rest of the cup holding the boiling hot tea, thereby spilling the contents on [her] lap. This also caused the cup of tea to come out of the carton cup holder and spill into [her] lap. " (Pa. 108) Plaintiff/Appellant sustained severe burns and permanent injuries "[a]s a result of the defendant Dunkin's negligence and inattention in serving and/or handling" the beverages. (Pa. 108)

Plaintiff/Appellant confirmed in her recorded statement to Defendant/Respondent Progressive that the lid came off of the beverage causing it to spill in her lap. (Pa. 60). It was confirmed that

Plaintiff/Appellant's vehicle was in a stationary position when she received the hot beverages from the employee. (Pa. 60)

Plaintiff/Appellant again confirmed at her deposition that her foot was on the brake and that her vehicle was not moving at the time that the beverage spilled. (Pa. 062) The tea spilled because it wasn't fully in the cup holder and because the lid came off when the beverages were handed to her. The lid came off and the cup fell causing the tea to spill on her. (Pa. 113-116)

The policy of insurance issued to Plaintiff provides that personal injury protection medical expense benefuts will be provided for "benefits incurred because of bodily injury caused by an accident." (Pa. 124) Defendant/Respondent denied Plaintiff/Appellant's claim for personal injury proteciton benefits under her policy with Progressive Garden State Insurance Company since there was no causal connection between the injuries being claimed and any qualifying automobile. (Pa. 069; Pa. 071)

LEGAL ARGUMENT

POINT I

THERE IS NO CAUSAL NEXUS BETWEEN THE VEHICLE AND PLAINTIFF/APPELLANT'S INJURIES AND THEREFORE, PERSONAL INJURY PROTECTION MEDICAL EXPENSE BENEFITS DO NOT APPLY

The automobile which Plaintiff/Appellant was occupying at the time of her injury was incidental to the injuries sustained and therefore, Progressive is not responsible for payment of PIP medical expense benefits for the claims at issue in this matter. The policy of insurance applicable to this matter states that

> Subject to the Limits of Liability, if you pay the premium for Personal Injury Protection - Medical Expense Coverage, we will pay benefits incurred because of bodily injury caused by an accident.

(Pa. 124)

N.J.S.A. 39:6A-4 provides that

> every standard automobile liability insurance policy issued or renewed on or after the effective date of P.L. 1998, c. 21 (C.39:6A-1.1 et. al.) shall contain personal injury protection benefits for the payment of benefits without regard to negligence, liability or fault of any kind, to the named insured and members of his family residing in his household who sustain bodily injury as a result of an accident while occupying, entering into, alighting from or using an automobile, or as a pedestrian, caused by an automobile or by an object propelled by or from an automobile, and to other persons sustaining bodily injury while occupying, entering into, alighting

> from or using the automobile of the named insured, with permission of the named insured.

N.J.A.C. 11:3-4.3 outlines that "[p]ersonal injury protection coverage shall provide reimbursement for all medically necessary expenses for the diagnosis and treatment of **injuries sustained from a covered automobile accident…**" (emphasis added). Defendant/Respondent maintains that since the injuries Plaintiff/Appellant sustained were not due to an "automobile accident," she is not entitled to recovery of PIP benefits. The accident that caused Plaintiff/Appellant's injuries was an accidental spill due to the negligence of the Dunkin' employee. The nature of that accident is separate and apart from the automobile. This is an accident that happened while Plaintiff/Appellant was seated in an automobile, not an automobile accident.

The relationship between the alleged injury and an automobile is described in terms of legal causation and requires a substantial nexus between the injury and a qualifying vehicle. See e.g. Morgan v. Prudential, 242 N.J. Super. 638 (App. Div.), certif. den. 122 N.J. 370 (1990). For these benefits to be recoverable no-fault benefits, the burden is upon the claimant to show that the treatment is linked to an injury suffered ***as a result of*** the

claimant's occupation of an automobile. There must be some nexus between the subject automobile and injury for treatment of same to be recoverable PIP benefits. The mere fact that Plaintiff was seated within the vehicle at the time of the accident is insufficient to create a basis for coverage.

In Westchester Fire Ins. Co. v. Continental Ins. Companies, 126 N.J. Super. 29; 312 A.2d 664 (App. Div, 1973), these terms and their impact.

> The automobile insurance carriers maintain that the motor vehicle in this case was simply the situs of an accident which could have occurred anywhere.
>
> ***
>
> We agree with the automobile carriers' contention that the phrase 'arising out of the * * * use' is not synonymous with 'while riding.' As one court commented, such a construction would write from the contract the words 'arising out of.' See Speziale v. Kohnke, 194 So.2d 485 (La.App. 1967).
>
> ***
>
> We consider that the phrase 'arising out of' must be interpreted in a broad and comprehensive sense to mean 'originating from' or 'growing out of' the use of the automobile. So interpreted, there need be shown only a substantial nexus between the injury and the use of the vehicle in order for the obligation to provide coverage to arise. The inquiry should be whether the negligent act which caused the injury, although not foreseen or

> expected, was in the contemplation of the parties to the insurance contract a natural and reasonable incident or consequence of the use of the automobile, and thus a risk against which they might reasonably expect those insured under the policy would be protected. See 7 Am.Jur.2d, s 82 at 387 (1963). Whether the requisite connection or degree of relationship exists depends upon the circumstances of the particular case.

Westchester, supra. at Page 37-38.

A PIP carrier is not responsible for medical payments when an automobile is incidental to the injury claimed. It is established that PIP coverage is not afforded to a person whose injury or death resulted from a condition unrelated to the motor vehicle, despite the fact that the person was inside the motor vehicle when the incident occurred. In Kordell v. Allstate Ins. Co., 230 N.J. Super. 505, 509 (App. Div.), certify. Den. 117 N.J. 43 (1989), the Court held: "… The injury must be a natural or reasonable incident of consequence of the use of the automobile… A death from coronary infarction fortuitously occurring in an insured vehicle is not a natural or reasonable incident or consequence of the use of the vehicle and is therefore not an occasion for PIP benefits." Accordingly, coverage is not afforded where the injury occurs in an automobile but results from natural

causes. See also JFK Memorial Hosp. v. Kendal, 205 N.J. Super.456 (Law Div. 1986).

In the matter of Foss v. Cignarella, 196 N.J. Super 3718 (Law Division, 1984) the court was asked a similar question as to whether mere presence in a vehicle was sufficient to require PIP coverage. In that case, the Foss vehicle rolled forward and bumped the Cignarella vehicle. Cignarella then got out of his vehicle and approached Foss' vehicle which was at that time stopped with the door closed and the window opened. Cignarella proceeded to stab Foss. Foss sought PIP benefits from Travelers for the injuries he sustained from the stabbing. The court in Foss v. Cignarella found that the claims were not recoverable PIP benefits since the act was not causally connected with the automobile and since it did not originate or arise out of the use of the vehicle. The court found that even though Foss was occupying the vehicle at the time, the injury.

> was not causally connected with his operation of the automobile. It did not originate from the use of the vehicle as such, nor can it be said that it arose out of, or was connected with, the inherent nature of the automobile. At best, the connection between plaintiff's injury and the insured vehicle was that Cignarella's use of the car permitted him to be at the place where he committed his attack upon plaintiff, or, "but for" his use of the automobile and the ensuing accident, the assault

> upon the plaintiff would not have occurred. This is not the substantial nexus required between the use of the insured vehicle and the injury to impose liability upon the insurer.

Id. at 386.

Here, just like in Foss, supra., Defendant/Respondent submits that the proofs show that the vehicle merely provided the setting for the injury. There is nothing about the vehicle itself that contributed to the happening of the accident. Plaintiff/Appellant herself has confirmed time and time again that her vehicle was at a complete stop at the time the beverages spilled. By Plaintiff/Appellant's own allegations and testimony, the vehicle has nothing to do with the "why" she was injured – it only has to do with the "where" that injury happened. The same result would have occurred if Plaintiff/Appellant was walking past the window or if she was handed the beverage tray at the counter. The beverage did not spill because of the car. The beverage spilled because the lid was not on properly and since the beverage was not secure within the tray. PIP benefits are not recoverable since the vehicle is only the incidental location of the injury and was in no way a contributor to the cause. Having hot tea spill due to an improperly placed lid is not something that is within the contemplation of the parties to

the insurance contract. It is not a natural and probable consequence of the use of an automobile and therefore not coverage under the PIP benefits.

Plaintiff/Appellant has argued that the plain reading of N.J.S.A. 39:6A-4 requires that personal injury protection benefits be provided to any named insured while occupying their automobile without any consideration to the particular facts of the incident. This interpretation is clearly contrary to the Administrative Code provisions and the wealth of case law outlined herein as well as by Plaintiff Appellant. As noted in Edwin Silva v. Selective Fire and Casualty Insurance Co., Docket No. A-3300-21 (decided April 24, 2023) (Pa 083) as cited to by Plaintiff/Appellant,

> the plaintiff bears the burden to "establish a substantial nexus between the insured vehicle and the injury sustained." Torres v. Travelers Indem. Co., 171 N.J. 147, 149 (2002).

Id. at Page 2.

The Trial Court utilized the correct legal standard and came to a determination based upon the facts as they exist in this matter. As evidenced by the cases cited by both parties, there are cases where the analysis leads to the conclusion that injuries in a stopped vehicle are covered and there are injuries that are not. The analysis is very fact specific

as to the type of injury and whether such injury has a substantial nexus to vehicle. Plaintiff/Appellant's dissatisfaction with the outcome does not invalidate the analysis or ultimate result.

Plaintiff/Appellant also tries to distinguish the finding in Foss v. Cignarella, supra., by arguing that the act that caused the injury in that matter was an intentional act. However, in the numerous cases on both sides of the argument, the intentional or negligent nature of the cause of the injury did not control the outcome. Rather, the analysis revolves around whether the injury was a natural consequence of the use of the automobile and was an injury that was in the contemplation of the parties at the time of the insurance contract. A spilled beverage due to the negligence of a restaurant employee was not the type of risk that was foreseeable and taken into consideration when the policy contract was created.

Following with N.J.A.C. 11:3-4.3, the policy language and the line of cases outlined herein, Defendant/Respondent submits that it properly denied Plaintiff/Appellant's claims for personal injury protection medical expense benefits coverage. Defendant/Respondent maintains that the decision of the trial court should be affirmed, and that Plaintiff/Appellant's request should be denied in its entirety.

POINT II

SUMMARY JUDGMENT WAS APPROPRIATELY GRANTED AS THERE IS NO GENUINE ISSUE OF MATERIAL FACT

Rule 4:46-2 provides that a court should grant Summary Judgment if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *See,* Brill v. Guardian Life Insurance Company of American, 142 N.J. 520, 528-529 (1995). Moreover, an issue of fact is only genuine if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inference therefrom favoring the non-moving party, would require submission of the issue of the trier of fact. R. 4:46-2. Brill, 142 N.J. at 538.

The less stringent standard set forth in Brill represented a departure from the prior Summary Judgment standard applied pursuant to Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 73-35 (1954).

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential

> materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Liberty, supra, 477 U.S. at 249, 106 S. Ct. at 2511, 91 L. Ed. 2d at 212. Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. Liberty Lobby, supra, 477 U.S. at 250, 105 S. Ct. at 2511, 91 L. Ed. 2d at 213. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214, the trial court should not hesitate to grant summary judgment.

Brill, 142 N.J. at 540.

As the Court stated, "To send a case to trial, knowing that a rational jury can reach but one conclusion is indeed 'worthless' and will 'serve no useful purpose.'" Id. At 541.

The parties agreed that the material facts are not in dispute and therefore, the case could be decided as a matter of law. See Fogel v. S.S.R. Realty Associates, 183 N.J. Super. 303, 443 A.2d 1093 (Ch. Div. 1981), order aff'd, 190 N.J. Super. 47, 461 A.2d 1190 (App. Div. 1983).

Since there is no genuine issue of material fact, it was appropriate for the matter to be resolved on the Cross-Motions for summary judgment that were filed. See Associates Discount Corp. v. Fidelity Union Trust Co., 111 N.J. Super. 353, 268 A.2d 330, 7 U.C.C. Rep. Serv. 1350 (Law Div. 1970).The issue in dispute is the legal interpretation of those facts and therefore, summary judgment was appropriately granted.

CONCLUSION

For the reasons outlined herein, the Order of the Trial Court must be affirmed. Summary Judgment was appropriately granted in favor of Defendant/Respondent as the facts show no sufficient nexus between the vehicle and Plaintiff/Appellant's injuries.

Respectfully Submitted,

VELLA & MAREN

Attorneys for
Defendant/Respondent Progressive
Garden State Insurance Company

DATE: June 18, 2024

ALLISON L. SILVERSTEIN