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| YOUNG A. KWON,<br><br>*Plaintiff/Appellant*,<br><br>*- against -*<br><br>JOHN DOE (1-10), NEW JERSEY TRANSIT CORPORATION, AND NEW JERSEY TRANSIT OPERATIONS, INC.,<br><br>*Defendants/Respondents*. | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br>Docket No. A-002606-22T4<br><br>*Civil Action*<br><br>*On appeal from* HUD-L-1523-21<br>Hudson County Law Division<br>*Sat Below*: Hon. ANTHONY V. D'ELIA, J.S.C. |

# PLAINTIFF/APPELLANT'S BRIEF AND APPENDIX

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## STATEMENT OF ALL ITEMS SUBMITTED ON SUMMARY JUDGMENT

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## PRELIMINARY STATEMENT

Under the summary judgment standard, plaintiff's evidence concerning liability –- her deposition testimony, her answers to interrogatories, and the sworn statement of an eyewitness – all should have been accepted as true, and Ms. Kwon should have been accorded the benefit of all the favorable and legitimate inferences deduced therefrom. Had that occurred, summary judgment would have been denied and the negligent operation of the bus that day remained a genuine fact that must be decided by a jury of Plaintiff's peers. There was no certification from the bus driver or any evidence for that matter remotely suggesting that the operator of the bus suddenly encountered an emergency situation requiring the driver to bring the bus to an abrupt stop to avoid a collision. Simply put, the motion record is bereft of any evidence suggesting that the operator abruptly stopped for any reason favorable to the defendant. The decisions of the trial court must be reversed, and the summary judgment denied so Plaintiff may have her day in court.

Plaintiff sustained multiple disc herniations that are permanent, painful, and robbed her of an active life at the age of 70. Her golden years have been sullied by depression and a substantial loss of enjoyment of life as she can no longer take the long walks she was accustomed to before the accident. Plaintiff's injuries are clearly not insubstantial. Ms. Kwon has a fundamental right to have the nature and scope of her injuries be determined by a jury of her peers after all the evidence is set forth

before them at trial. Anything less would be contrary to the teachings of Brill and its progeny.

## PROCEDURAL HISTORY

Plaintiff initiated a lawsuit on April 16, 2021, after she was injured when a bus she was lawfully aboard suddenly came to an abrupt and violent stop, without any emergency present or even suspected, causing her to fall on her back and strike her head on the floor of the bus. (1a) In response to being served with the summons and Complaint, Defendant NEW JERSEY TRANSIT CORPORATION (the "Defendant") filed an answer on July 2nd, 2021, and the litigation thereafter proceeded through discovery. (7a) On February 3rd, 2023, the Defendant filed a motion for summary judgment[2], that was timely opposed by Plaintiff. (20a, 72a) Oral argument was held before the Honorable Anthony V. D'Elia, J.S.C. on March 31st, 2023. (T1)

Immediately after both counsel appeared formally before the lower court, but prior to any oral arguments taking place, Judge D'Elia queried of Plaintiff's counsel, "Motion by the defendant to dismiss. Plaintiff has no evidence of negligence. At best, at best if you accept the -- I think the plaintiff's opposition paper says we have

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[2] Defendant movant did **not** upload on e-Courts, and therefore did **not** file a supporting certification, nor did Defendant serve Plaintiff's counsel with the any Certification in support of the motion for summary judgment.

Meyang Kim (phonetic) who signed the certification -Would she be a witness in this case? We can stipulate for that for the purposes of this motion?" (1T[3]4:10-16) Plaintiff's counsel answered in the affirmative. The trial court continued, "And she said I was on the bus. I was in the process of sitting down when the bus suddenly, violently, and abruptly made a sudden stop. That's the best that the plaintiff will be able to establish, correct, Counsel?" (1T4:18-22) Again, Plaintiff's counsel responded affirmatively. (1T4:23) The trial court then posited, "All right. How does that prove negligence?" (1T4:24-25)

Plaintiff's counsel promptly answered His Honor, stating "Because buses aren't supposed to suddenly stop, Your Honor." (1T5:1-2) To which the lower court replied, "Buses are not supposed -- that doesn't happen **in the normal course** of a bus operation? *Somebody runs in front of the bus, they're not supposed to stop? A cat runs in front of the bus, they're not supposed to stop?*" (1T5:3-7) (Emphasis added.) His Honor is casually but clearly conflating "**normal course**" with the separate and contrary "**sudden emergency doctrine**." Judge D'Elia then turned to counsel for the Defendant, and asked if he would like to "make your argument on that issue?" (1T5:21-22) Counsel for the Defendant candidly stated to the lower

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[3] For purposes of this Brief, "**1T**" shall refer to the transcript of the oral argument that took place on March 31st, 2023, to decide the Defendant's motion for summary judgment. "**2T**" shall refer to the transcript of the oral argument that took place on April 28th, 2023, to decide Plaintiff's motion for reconsideration.

court that "[a]ctually, Your Honor, that -as far as the liability argument, I mean, based on the Mason (phonetic) case, that, that was -- **I don't feel like that was our strongest argument**." (1T5:23 to 6:1)(Emphasis added.) The trial court asked counsel for the Defendant, "So you want to give up your argument about, about the negligence?" (1T6:24-25) To which counsel promptly replied, "I don't want to give it up. I'm just going to rely on the papers on that argument." (1T7:1-2) The lower court thus found that "this motion record plaintiff will prove the bus was driving along and it stopped suddenly and it caused her to fall." (1T7:6-8)

Turning next to the presence of disk herniations demonstrated by an MRI, counsel for the defendant conceded that "because of that they have satisfied the first prong of the Brooks (phonetic) test, the objective, medical evidence." (1T7:11-14; 1T9:7-8)("he candidly admits you met the objective standard") Judge D'Elia acknowledged the response, and noted, "like I'm going to be Solomon and decide the subjective prong on a, on a motion for summary judgment. I just love that with the tort claims act, that I'm supposed to do that." (1T7:17-21) His Honor further noted:

> Yeah, the cases are all over the place on that argument, Gilhooly -- apparently the Appellate Division knows what is a substantial, permanent loss of a bodily function, i.e. substantial is the key word there. And . . . has made it very clear for us in their various rulings what they mean by that word. And I say that by adding the word "not" at the end of that sentence." (1T8:3-12)

Plaintiff's counsel added that Plaintiff sustained serious and permanent injuries, as set forth in the motion record:

> herniated disks at L3/4, L5/S1 and at C3/4 (indiscernible) herniation, a positive spurling test, a positive tonal (phonetic) sign. She's a 70-year-old retired woman whose sole enjoyment was taking one and a half hour walks every day, which she cannot do anymore. She's got as a result of this insomnia. She was found positive for insomnia and anxiety and depression. I think all those meet the substantial test. The fact that she's unable to do these things because of her depression is a substantial injury. (1T9:13-23)

A certification was submitted by an independent witness, Me Yang Kim, who stated the stop was sudden and abrupt, and described Plaintiff falling violently to the floor of the bus as a result of that sudden stop. (60a) Plaintiff's counsel argued, "It was such a violent stop that it caused her to go backwards and caused a number of herniated disks." (1T13:19-20) The bus driver did **not** submit a certification or affidavit claiming there was emergency confronting the driver at that moment. But the lower court, in this motion for summary judgment, nonetheless weighed the evidence and the credibility of this independent witness for the non-moving party, and stated, "She just says it was suddenly and abruptly made a sudden stop. And then she -- the word 'violently', I'm sure this was drafted by you. But the word 'violently' was put into paragraphs five and six by, by the witness Ms. Kim. 'I

witnessed the claimant fall violently to the floor of the bus.' I don't know how you fall violently." (1T11:20 to 1T12:1)

Ultimately, the lower court ruled that "**I do agree with the plaintiff that they have satisfied the subjective test for the injuries sustained in this accident**. It is a close call. However, there are genuine issues of material fact." (1T12:10-13) In support, the court found that Plaintiff "suffered two herniations via MRI and three disk bulges on her cervical spine and two herniations and two bulges on her lumbar spine when she fell on the bus when it stopped." (1T13:18-23) However, the lower court nonetheless granted summary judgment on liability alone because His Honor did not believe

> that a plaintiff can simply stay on a bus and say it suddenly stopped in ten mile an hour traffic going down into the Lincoln Tunnel -- and that's the plaintiff's testimony. It suddenly stopped in ten mile an hour traffic going down on the viaduct leading into the Lincoln Tunnel causing me to fall, not breaking anything, not breaking a window or anything like that. And therefore that is in and of itself enough facts to go to the jury on whether the operator was negligent, even under the common carrier standard, which I am applying under the Mason case, the Supreme Court case from February of 2021. I am going to grant the motion for summary judgment on that issue only. (1T13:1-14)

The lower court entered an Order granting the Defendant summary judgment on the issue of liability. (63a)

Plaintiff then moved for reconsideration, which was opposed. (66a) At oral argument, held on April 28th, 2023, before Judge D'Elia, Plaintiff's counsel argued that "[t]here is an independent witness statement saying that the stop was abrupt, sudden and violent, that the fall from, as a result of the stop, was abrupt, sudden and violent, sufficient to cause herniations in her spine." (2T5:3-7) Plaintiff's counsel also pointed out that the motion record was bereft of any evidence that there was a sudden emergency that caused the bus driver to slam the brakes – the bus driver did **not** submit a certification detailing any such emergency. (2T5:8-13) The lower court denied the motion for reconsideration. (73a) This appeal followed. (75a; 78a)

## STATEMENT OF FACTS

On February 24th, 2020, Ms. Kwon was a passenger on the NJT bus that suddenly, violently and abruptly made a sudden stop, causing her to violently strike the floor of the bus. (1a) This was not simply a jerking motion that at times expectedly accompanies the movement of a bus in traffic. However, there was no evidence presented here that the driver was attempting to avoid a collision or was otherwise required to make a sudden and abrupt stop as an explanation for the forceful stop. As a result of the sudden and strong stop, Ms. Kwon fell backwards and sustained serious and permanent injuries, herniating multiple discs in her spine, and because of these injuries became depressed, and required medical intervention.

The Defendant submitted a Statement of Material Facts ("SMF") in support of its motion for summary judgment. (22a) At paragraph 1 of its SMF, the Defendant admitted as true that the plaintiff was a passenger on the New Jersey Transit bus on February 24th, 2020. That after boarding the bus, she walked towards the back to find a seat, and suddenly there was a "bang" and she fell to the floor of the bus near the rear door. Id. at ¶¶ 3 and 4. The defendant admitted as true that as a result of the stop, the plaintiff sustained injuries to her neck, back, knees and shoulder. Ibid. The defendant also stated at paragraph 12 of its SMF that Ms. Kwon, who was retired at the time, was depressed as a result of her injuries, more specifically, that she became "uninterested in exercise or socializing with other people due to depression." Ibid.

In Plaintiff's responding SMF, she denied certain of the material facts relied upon by the Defendant and elaborated on others. (58a) In particular, at her deposition which was attached to the opposing papers, Plaintiff described the force of the stop as "**heavy**" (emphasis added), and that's why her body went backwards, striking the floor of the bus with such force sufficient to herniate a number of discs in her spine, and cause injury to her knees and shoulder as well. (47a, 20:5-9) In her answer to Uniform Form "A" interrogatory number 2, Ms. Kwon stated the bus "abruptly stopped" causing her to sustain severe and permanent injuries. (28a) There was an independent eyewitness to this event -- ME YANG KIM –- who stated in her sworn statement made on February 26th, 2020, just two days after the incident, that the bus

"**suddenly, violently and abruptly made a sudden stop**," causing Plaintiff to fall backwards with pronounced force. (60a)(Emphasis added.) Ibid.

Plaintiff described the stop as abrupt and sudden. The eyewitness described the stop in her sworn statement as violent, abrupt, and sudden. The force of the stop caused Ms. Kwon to fall to the floor of the bus, violently as further described by the eyewitness, sufficient to cause multiple herniations in her spine. The plaintiff and the eyewitness certainly did not describe a typical "jerk or jolt" that may and should be anticipated by a passenger. Under Brill and it progeny, and the mandate of Rule 4:46, the Court was not free to weigh the evidence, but instead should have accepted it as true, and accorded Ms. Kwon all legitimate inferences therefrom. Those inferences would include the negligent operation of the bus.

# LEGAL ARGUMENT

**POINT 1. BASED UPON PLAINTIFF'S SWORN DEPOSITION TESTIMONY, HER CERTIFIED ANSWERS TO INTERROGATORIES, AND THE SWORN STATEMENT OF AN INDEPENDENT EYEWITNESS, ALL SUCH MUST BE ACCEPTED AS TRUE, AND TOGETHER WITH THE BENEFIT OF ALL FAVORABLE AND LEGITIMATE INFERENCES THEREFROM, SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY SHOULD HAVE BEEN DENIED** (2T4:24-5:13; 2T7:2-10; 1T12:25-13:12; 114a, 123a)

*A. Standard of Review.*

Since Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995), our Courts have consistently held that "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference," and, hence, an "issue of law [is] subject to *de novo* plenary appellate review." City of Atl. City v. Trupos, 201 N.J. 447, 463 (2010) (citations omitted). The review *de novo* but the Court applies the same standard as the trial court. Lapidoth v. Telcordia Tech., Inc., 420 N.J. Super. 411, 417 (App. Div.), certif. denied, 208 N.J. 600 (2011); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998).

When reviewing a summary judgment motion, a court must determine whether the party opposing the motion has demonstrated the existence of disputed material facts. *R*. 4:46-2(c). Pursuant to Rule 4:46-2, the Court considers "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." Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995). Even if no genuine issue of material fact exists, the inquiry must still turn to whether the trial court correctly interpreted the law. DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007)). This Court accords no deference to the trial judge's conclusions on issues of law. Ibid.

The Court's standard of review of an order denying reconsideration on the other hand is deferential. "Motions for reconsideration are governed by Rule 4:49-2, which provides that the decision to grant or deny a motion for reconsideration rests within the sound discretion of the trial court." Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015). Rule 4:49-2 provides for reconsideration of a trial court's decision if the aggrieved party "state[s] with specificity the basis on which [the motion for reconsideration] is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred." *R.* 4:49-2; Kornbleuth v. Westover, 241 N.J. 289, 301 (2020). Thus, a trial judge's denial of a motion for reconsideration will not be disturbed absent "a clear abuse of discretion." Pitney Bowes, *supra*, 440 N.J. Super. at 382 (citing Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994)).

A reconsideration motion is primarily an opportunity to seek to convince the court that either 1) it has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the court either did not consider, or failed to appreciate the significance of probative, competent evidence. *See R.* 4:49-2. There is a genuine issue of material fact as to whether the bus stopped suddenly, abruptly, violently, and with enough force to throw Ms. Kwon to the floor of the bus and cause multiple herniations in her spine. Plaintiff's deposition testimony coupled with the sworn statement from an eyewitness, together with all beneficial inferences therefrom, created a genuine issue of material fact making summary judgment on liability a question of fact for the jury to determine.

*B. Summary Judgment Standard under Rule 4:46*

This Court's review of the trial court's grant of summary judgment is *de novo* under the same standard as the trial court. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). Our Supreme Court reviewed the history of summary judgment practice and the evolving standard in the seminal case of Brill, *supra*. In 1986, the United States Supreme Court upheld summary judgments in three cases: Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Read together, Matsushita, Anderson, and Celotex adopted a standard that requires the motion judge to engage

in an analytical process to determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, *supra*, 477 U.S. at 251-52. That weighing process requires the court to be guided by the same evidentiary standard of proof — by a preponderance of the evidence or clear and convincing evidence — that would apply at the trial on the merits when deciding whether there exists a "genuine" issue of material fact. Id. at 254-56.

Of course, there is in this process a kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials. This process, however, is not the same kind of weighing that a factfinder (judge or jury) engages in when assessing the preponderance or credibility of evidence. In each case, "the court must accept as true all the evidence which supports the position of the party defending against the motion and must accord him [or her] the benefit of all legitimate inferences which can be deduced therefrom, and if reasonable minds could differ, the motion must be denied. Brill, *supra*, 142 N.J. at 535. "A jury resolves factual, not legal, disputes. If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party on the issue of liability or damages or both." Id. at 537.

A dispute of fact is genuine if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate

inferences therefrom, could sustain a judgment in favor of the non-moving party. 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." Anderson, *supra*, 477 U.S. at 249. Credibility determinations will continue to be made by a jury and not the judge. Only if there exists a single, unavoidable resolution of the alleged disputed issue of fact, which does not exist here, then and only then should that issue be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. Anderson, *supra*, 477 U.S. at 250.

Here, there remains the genuine issue of material fact of whether the driver of the bus merely "jerked or jolted" incident to starting or stopping, or if on the other hand, viewed in the light most favorable to Ms. Kwon, the driver abruptly, violently, and suddenly stopped as testified to by the plaintiff and the independent eyewitness. Because that evidence must be accepted as true, and all legitimate inferences accorded the plaintiff's version of what happened, reasonable minds could obviously differ, and the motion for summary judgment should have been denied. It is critical

that a trial court ruling on a summary judgment motion not "shut a deserving litigant from his [or her] trial." Judson v. Peoples Bank Trust Co. of Westfield, 17 N.J. 67, 77 (1954) (citation omitted).

In sworn testimony, Ms. Kwon and the independent eyewitness Ms. Kim both provided competent evidence that described the sudden stop of the bus as "heavy," "abrupt," and sufficiently forceful to violently toss Plaintiff to the floor of the bus on her back, not surprisingly causing her serious and permanent injuries, but the lower court nonetheless impermissibly weighed that evidence. The trial court did *not* accept as true all that evidence, and did *not* accord Plaintiff the benefit of all legitimate inferences which could be deduced from that evidence, thereby depriving Plaintiff of her fundamental right to have a jury determine whether the bus driver drove in a negligent manner that day.

At her deposition, Plaintiff described the force of the stop as "**heavy**" (emphasis added), and that's why her body went backwards, striking the floor of the bus with such force sufficient to herniate a number of discs in her spine, and cause injury to her knees and shoulder as well. (47a, 20:5-9) In her answer to Uniform Form "A" interrogatory number 2, Ms. Kwon consistently certified, under penalty of perjury, that the bus "abruptly stopped" causing her to sustain severe and permanent injuries. (28a) An independent eyewitness to this event -- ME YANG KIM -- confirmed in her sworn statement made on February 26th, 2020, just two days

after the incident, that the bus **suddenly and "abruptly made a sudden stop**." (60a)(Emphasis added.) Eyewitness ME YANG KIM further certified under oath that she observed Ms. Kwon fall "**violently to the floor as a result of the sudden stop.**" Ibid. (Emphasis added.) The legion of case law and Rule 4:46 collectively make clear that this evidence must be accepted as true and all legitimate inferences flowing therefrom should have been accorded to Plaintiff. See Brill, *supra*. There was no evidence offered by the Defendant, and the motion record is noticeably bereft of any, to suggest that the driver of the bus stopped suddenly and abruptly in an effort to avoid a collision or hitting someone running in front of it. This was not the case of the bus merely "jerking and jolting."

In Cohn v. Public Service Co-Ordinated Transport, 109 N.J.L. 387 (1932), the plaintiff sustained personal injury by the sudden starting of a motor bus operated by the defendant, in which bus he had just become a passenger. He claimed that his injury was due to negligence in the starting of the bus. Id. at 388. That Court found that, even after giving due allowance that jerks and jolts in the operation of a vehicle carrying passengers operated by a common carrier should be shown to have been of such an unusual character as to speak of negligence in that operation, the testimony for plaintiff fairly satisfied that requirement. Ibid. The plaintiff was a passenger and had just boarded the bus and was about to take his seat. David Ginsberg, a witness for the plaintiff, was a fellow passenger on the same bus, and testified that "before

he had any chance to reach the seat, the driver pulled so fast his car -- I couldn't express it." Id. at 389. Another passenger testified that "[a]s soon as Mr. Cohen stepped on the bus, the chauffeur had started his car off with such a jerk that it threw him against the window, and he went right through with his elbow and cut his side there." Ibid.

Based upon the evidence presented on the motion for summary judgment, keeping in mind of course that this was a case decided well before Brill and the changes made to the summary judgment analytical framework, the Court then held that "the trial judge is required to decide whether or not the evidence tends to indicate the occurrence of such a violent or unusual jerk or jolt as to speak of negligence in operation." Ibid. The Court believed "that to start the bus with such a violent jerk as practically to throw the plaintiff off his feet and against a window with such violence as to break it, would not only justify, but require the trial judge to leave to the jury the question whether there was negligence in the operation of the bus whereby plaintiff sustained his injury." Ibid.

The evidence presented by Ms. Kwon and the Eyewitness to the incident, accepted as true under Brill and its progeny, makes it abundantly clear that the sudden stop was anything but usual – it was a **forceful**, **abrupt**, and **sudden** stop, and based upon the motion record, it was most certainly **not** merely an ordinary jerk or jolt. Coupled with the legitimate inferences flowing from these facts, creates a

recognizable basis to find the driver negligent in the operation of the bus that day -- by a jury of Plaintiff's peers, not as a matter of law. The Court was not free to weigh the evidence and the credibility of the eyewitness based upon her sworn written statement, and certainly a jury could find that the stop was **violent** and **unusual** under the circumstances as described by Ms. Kwon and the eyewitness, Ms. Kim. The Court did not accept as true the deposition testimony given by Ms. Kwon, nor the sworn statement made by the eyewitness, ME YANG KIM, given two days after the incident. Whether the stop was merely a "jerk or jolt" or whether it was violent in nature is a material fact to be determined by the jury. Ms. Kwon is entitled to her day in court and have that genuine issue of material fact decided by a jury of her peers.

**POINT 2. PLAINTIFF SUSTAINED SERIOUS INJURIES, INCLUDING MULTIPLE DISC HERNIATIONS AND CHRONIC DEPRESSION, AND HER FUNDAMENTAL RIGHT TO HAVE A JURY OF HER PEERS DETERMINE THE NATURE AND SCOPE OF THOSE PERMANENT INJURIES THAT WERE CAUSED BY THE BUS DRIVER'S NEGLIGENT DRIVING MUST BE SAFEGUARDED** (1T9:13-23; 1T12:10-13; 1T13:18-23)

The New Jersey Supreme Court set forth a two-pronged test for determining whether or not a plaintiff's claim for pain and suffering is compensable under the Tort Claims Act, N.J.S.A. 59:9-2(d). For a claim to be compensable, a plaintiff must show "(1) an objective permanent injury, and (2) a permanent loss of bodily function that is substantial." Gilhooley v. Cnty. of Union, 164 N.J. 533, 541 (2000).

Furthermore, "[w]here plaintiff's medical proofs support a claim of permanent injury that is based on objective evidence and not merely on subjective complaints, such evidence raises an issue for the jury, and removes the case from the realm of summary judgment." Knowles v. Mantua Tp. Soccer Ass'n., 176 N.J. 324, 335 (2003) (citation omitted).

The lower court found that Plaintiff demonstrated an objective permanent injury and a permanent loss of bodily function that was substantial, rendering her claims compensable, the nature and scope of which must be determined by a jury of Ms. Kwon's peers; material facts are in dispute that simply cannot be determined as a matter of law without paying lip service to Brill and its progeny.

The determination of whether a plaintiff's injury satisfies the aforesaid two-part test depends on a fact-sensitive analysis. Gilhooley, *supra*, 164 N.J. at 541. It is "the nature or degree of the ongoing impairment that determines whether a specific injury meets the threshold requirement under the Tort Claims Act." Knowles at 331. (citation omitted). To meet the threshold, a permanent loss need not be total, but it must be substantial. Gerber v. Springfield Bd. of Educ., 328 N.J. Super. 24, 35 (App. Div. 2000) (citation omitted). A plaintiff must present objective evidence of permanent injury because damages for temporary injuries are not recoverable. Id. at 35. (citation omitted).

In Fine v. City of Margate, 48 F. Supp. 3d 772 (D.N.J. 2014), the plaintiff fell

on a beach access ramp and sustained an injury to his knee, which later required surgery to repair a torn tendon. The Court found that plaintiff clearly suffered objective permanent injuries from this fall, thus satisfying the first prong of the Gilhooley test. Concerning the second prong requiring plaintiff to provide evidence of a permanent loss of bodily function that is substantial, the Court noted that plaintiff's knee buckled at times, but he could still drive, work, and even golf. Plaintiff continued to have areas of numbness in his leg and weakness in his foot which caused some difficulty with ambulation. In denying defendant's motion for summary judgment, the Court held that Plaintiff had presented evidence sufficient for a reasonable jury to conclude that his injuries were substantial. The Court noted that although plaintiff was now able to walk unassisted and engage in many of the activities he performed before his trauma, this "does not mean his injuries are insubstantial as a matter of law. A reasonable jury could find his injuries to be substantial." Fine, *supra*, 48 F. Supp. 3d at 786.

The plaintiff in Knowles sustained soft tissue injuries to his neck, lower back, and shoulder when his car was struck by a gate located in a township park. An MRI confirmed lumbar disc herniations and an EMG revealed lumbosacral radiculopathy. Plaintiff's ongoing complaints included neck pain, back pain that radiated into his lower back, severe lower back pain, and numbness and tingling in his foot. He also claimed that he was unable to sit for more than 30 minutes or

stand for more than 15 to 30 minutes without experiencing pain and could not walk for more than a quarter mile. He also only missed approximately one week of work. In reversing the decision of the trial court and the Appellate Division, the Knowles Court held that summary judgement was not warranted, and determined that the plaintiff provided objective evidence of a permanent injury and his injuries constituted a permanent loss of bodily function that was substantial.

The Court found that such ongoing problems as lack of feeling in his leg and the inability to stand, sit, or walk comfortable for a substantial amount of time, engage in athletics, and complete household chores was sufficient evidence that plaintiff's injuries satisfied the substantial permanent loss of bodily function requirement. Although the plaintiff was able to continue working as a teacher, the Court "declined to adopt the ability to work as a litmus test for recovery of pain and suffering damages," citing Kahrar v. Borough of Wallington, 171 N.J. 3, 14-15 (2002). The Knowles Court further noted that plaintiff's job was fairly sedentary, and distinctions between sedentary and non-sedentary plaintiffs in applying the Tort Claims Act standard are inappropriate. Rather, ***the appropriate focus is on the degree of injury and impairment***.... If the loss of bodily function is permanent and substantial, as in this case, a plaintiff's eligibility to recover pain and suffering damages will not be defeated merely because she can perform some routine functions almost as well as she could prior to her injury. 176 N.J. at 333-334.

(Emphasis added.)

In addition, the Court stated that "neither an absence of pain nor a plaintiff's ability to resume some of his or her normal activities is dispositive of whether he or she is entitled to pain and suffering damages under the TCA." Id. at 332 (citing Kahrar, *supra*, 171 N.J. at 15-16). In Kahrar, plaintiff severely injured her left shoulder when she tripped and fell. Surgery was needed to repair a torn rotator cuff. In holding that plaintiff's injuries satisfied the required standard, the Court noted the evidence provided by plaintiff which supported her assertion that she sustained a substantial loss of bodily function included: (i) it took longer for plaintiff to perform her normal responsibilities as a secretary; (ii) plaintiff, who was left hand dominant, had to compensate for the weakness and loss of mobility in her injured arm by using her right arm more, which often caused her (uninjured) right shoulder to swell; (iii) she especially experienced great difficulty when performing normal household tasks, requiring her husband's or her children's help to clean, vacuum or move furniture; and (iv) she had difficulty driving. The Court held that these injuries vaulted the TCA threshold.

Ultimately, the lower court agreed that the threshold was met, "that they have satisfied the subjective test for the injuries sustained in this accident. It is a close call. However, there are genuine issues of material fact." (1T12:10-13) In further support, the trial court found that Plaintiff "suffered two herniations via MRI and

three disk bulges on her cervical spine and two herniations and two bulges on her lumbar spine when she fell on the bus when it stopped." (1T13:18-23) All of these findings were confirmed by objective diagnostic tests and by the treating physicians. (77a-111a) Based upon the evidence contained in the motion record, Ms. Kwon sustained compensable injuries, including:

> herniated disks at L3/4, L5/S1 and at C3/4 (indiscernible) herniation, a positive spurling test, a positive tonal (phonetic) sign. She's a 70-year-old retired woman whose sole enjoyment was taking one and a half hour walks every day, which she cannot do anymore. She's got as a result of this insomnia. She was found positive for insomnia and anxiety and depression. I think all those meet the substantial test. The fact that she's unable to do these things because of her depression is a substantial injury. (1T9:13-23; 77a-111a)

Plaintiff has a fundamental right to have the nature and scope of her injuries determined by a jury of her peers as it cannot be said as a matter of law that her injuries are not permanent, because based upon the evidence in the record, it is reasonably inferred, and a jury could easily decide that the herniated disks are indeed a permanent condition. Likewise, a jury could infer based upon the evidence in this motion record, and easily decide that her injuries are substantial, because she indeed suffers from depression, she is unable to complete a number of her daily tasks of living as she could before, and 70-year-old Ms. Kwon can no longer take daily walks that she enjoyed doing before this accident.

## CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Court overlooked the probative, competent evidence offered by Ms. Kwon and the eyewitness to the incident, Ms. Kim, and did not accept as true all the evidence which supported Ms. Kwon's position that the bus driver operated the bus in a negligent manner by abruptly and forcefully stopping the bus when there was no clear present danger, causing her to fall backwards and strike her head on the floor of the bus. Ms. Kwon sustained numerous disk herniations that remain permanent and chronic, and which likewise caused her to lose many of the activities she enjoyed at 70-years-old. Not surprisingly, the constant pain and loss of enjoyment are substantial and have taken their toll by causing depression. The evidence in this motion record, together with the benefit of all the legitimate inferences which may be deduced therefrom, as required by Brill and Rule 4:46, prohibit summary judgment because **it cannot be said as a matter of law** that Plaintiff's injuries are temporary or insubstantial – those hotly disputed issues are for the jury to decide. For the reasons set forth herein, the trial court's rulings must be reversed, and this case remanded back to the active trial calendar so Ms. Kwon may have her day in court.

Respectfully submitted,

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May 9, 2024

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Re: Young A. Kwon v. John Does (1-10), New Jersey Transit Corporation and New Jersey Transit Operations, Inc.
Docket No. A-2606-22

On Appeal from a Final Order Entered in the Superior Court of New Jersey, Law Division, Hudson County
Docket No. HUD-L-1523-21

Sat Below: Hon. Anthony V. D'Elia, J.S.C.

Letter Brief on behalf of Defendant-Respondent, New Jersey Transit Corporation

Dear Mr. Orlando:

Please accept this letter response brief on behalf of Defendant-Respondent, New Jersey Transit Corporation (NJT), in opposition to the merits

brief of Plaintiff-Appellant, Young A. Kwon, in this matter.

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## STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

On February 24, 2020, Kwon, then seventy years old, boarded a New Jersey Transit bus while it was traveling on Bergenline Avenue heading toward John F. Kennedy Boulevard in Hudson County. (Pa28, Pa42).[2] Kwon paid her fare and walked toward the back of the bus. (Pa46). According to Kwon, the bus was "moving slowly" as she walked down the aisle but before she reached her seat, "all of a sudden there was a bang" and that she fell. (Pa46-47). Kwon further testified, "Well, I think bus [sic] made a sudden stop, I think." (Pa47). She did not know what might have caused the bus to come to a stop. (Pa47).

[1] For purposes of clarity and brevity, the facts and procedural history have been combined.

[2] "Pa" refers to Kwon's appendix.

Kwon did not know how much time had passed between when she boarded the bus and when she fell. (Pa47). She did not recall whether she was holding onto anything as she walked through the bus but that she might have been holding "the seat handle." (Pa47). Kwon did recall, however, that she took about five or six steps backward before falling to the floor. (Pa47).

After her fall, Kwon got up without assistance and took a seat. (Pa48). She sat on the bus as it continued its route for about twenty minutes, and then she went home. (Pa48).

Me Yang Kim, Kwon's friend who was with her on the bus that day, later provided a written statement indicating that she "witness[ed] the bus stopping abruptly," and that she was in the process of sitting down "when the bus suddenly, violently and abruptly made a sudden stop." (Pa46, Pa60). Kim provided, "I witnessed the Claimant fall violently to the floor of the bus as a result of the sudden stop." (Pa60). Kim did not dispute Kwon's description of the slow movement of the bus prior to the stop. (Pa60).

As a result of this incident, Kwon alleged to have sustained injuries to her neck, back, and knees for which she underwent a course of physical therapy and acupuncture treatment, all of which ended within seven months of the incident in September 2020. (Pa28-Pa30).

On April 16, 2021, Kwon filed a complaint alleging negligence by New Jersey Transit (NJT). (Pa01-Pa06). NJT filed an answer, and the parties proceeded with discovery. (Pa07-Pa19). After the close of discovery, NJT moved for summary judgment, arguing that: (1) the ordinary "jerks and jolts" associated with the operation of an NJT bus were not negligence; and (2) Kwon failed to meet the threshold for recovery of non-economic damages as set forth in the New Jersey Tort Claims Act (TCA). (Pa20-Pa25).

On March 31, 2023, the trial court heard oral argument and granted NJT's motion for summary judgment. (Pa64-Pa65). Applying the common-carrier standard as set forth in Maison v. New Jersey Transit Corp., 245 N.J. 270 (2021), the trial court found that Kwon failed to present sufficient evidence to establish negligence on the part of NJT or its bus operator. (1T12:24-13:15).[3] The trial court noted that Kwon herself testified that the bus was moving slowly just prior to the alleged sudden stop, and that Kwon presented no evidence to show the stop was particularly unusual. (1T11:4-12:4, 1T12:24-13:12:). The trial court

[3] "1T" is used to refer to the transcript of oral argument of NJT's motion for summary judgment, heard on March 31, 2023; "2T" is used to refer to the transcript of oral argument of Kwon's motion for reconsideration of the March 31, 2023, Order, which was heard on April 28, 2023.

also reasoned that the parroting of the word "violent" by Kwon's friend, without more, does not suffice to demonstrate that the stopping of the bus was beyond the ordinary jerking and jolting to be expected, particularly when that statement was inconsistent with the other evidence. (1T11:17-12:4). Explaining that "there are normal jerks and jolts and stops and starts" on a commercial vehicle that are unavoidable, the trial court held that the evidence presented could not support a finding that the stop at issue here rose to the level of negligence. (1T6:15-19, 1T11:10-16).

As to NJT's second argument, that Kwon failed to meet the threshold for recovery of non-economic damages against a public entity, the trial court found that a genuine issue of material fact existed and declined to grant summary judgement on that basis. (1T12:10-23).[4] The Complaint was dismissed in its entirety, however, based on the court's finding that Kwon failed to establish a viable claim on the issue of liability. (Pa64-Pa65).

Kwon subsequently moved for reconsideration of the order granting summary judgment, which NJT opposed. (Pa66-Pa72). After hearing oral

[4] Although Kwon addresses this issue in Point 2 of her appellate brief, no response to same is provided herein because the trial court found in Kwon's favor on this point and NJT did not file a cross-appeal.

argument, the trial court denied the motion. (Pa73-Pa74). Noting that reconsideration should only be granted where the court's prior decision was made on a palpably incorrect or irrational basis, or where the court failed to consider probative competent evidence, the trial court concluded that the granting of summary judgment was proper. (2T6:7-15, 2T6:23-7:1). The trial court emphasized that even with "all of the benefit of the doubt on all witnesses and credibility issues in favor of the plaintiff," the decision was not palpably incorrect or irrational or without consideration of the competent evidence. (2T6:20-7:12).

This appeal followed. (Pa75-Pa77).

## ARGUMENT

### THE TRIAL COURT PROPERLY HELD THAT NJT WAS NOT NEGLIGENT BASED ON THE UNDISPUTED FACTS HERE.

Appellate review of a trial court's determination on a motion for summary judgment is de novo, and an appellate court will apply the same standard as the trial court. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014). Summary judgment is appropriate when "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." R. 4:46-2(c). On summary judgment, the court must view the facts in the light most favorable to the non-moving party. Estate of Hanges v. Metropolitan Prop. & Cas. Ins. Co., 202 N.J. 369, 374 (2010). The non-moving party may not simply allege any disputed fact; to defeat summary judgment, the non-movant must identify genuine disputes of material fact that a rational factfinder could resolve in the non-movant's favor. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995). If there are no such disputes of material fact, an appellate court must next decide whether the trial court properly applied the law to the facts. Walker v. Atl. Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987).

Under the New Jersey TCA, a public entity is liable for injuries proximately caused by acts or omissions of a public employee within the scope of his or her employment in the same manner and to the same extent as a private individual under like circumstances. N.J.S.A. 59:2-2a. It follows that a public entity is not liable for injuries resulting from a public employee's acts or omissions where the public employee is not liable. N.J.S.A. 59:2-2b. A public entity is also entitled to any available defenses that are available to a private person. N.J.S.A. 59:2-1b; see also N.J.S.A. 59:2-2a (providing that public entity not liable for injury resulting from act or omission of public employee where

public employee not liable).

Negligence is defined as "conduct which falls below the standard established by law for the protection of others against an unreasonable risk of harm." Pfenninger v. Hunterdon Cent. Reg'l High Sch., 167 N.J. 230, 240 (2001) (quoting Restatement (Second) of Torts § 282 (1965)). To establish an ordinary negligence claim, a plaintiff must show four things: (1) the defendant owed a duty of care; (2) the defendant breached that duty; (3) actual and proximate causation; and (4) damages. Fernandes v. DAR Dev. Corp., Inc., 222 N.J. 390, 403-04 (2015). That burden rests squarely on the plaintiff. Id. at 404.

It is well-settled that the mere happenstance of an accident and resulting injuries do not simultaneously evoke a presumption of negligence. Khan v. Singh, 200 N.J. 82, 91 (2009); Snell v. Coast Cities Coaches, 15 N.J. Super. 595, 598 (App. Div. 1951). A defendant is not presumed negligent unless proven otherwise. See McKinney v. Pub. Serv. Interstate Transp. Co., 4 N.J. 229, 241 (1950) ("[N]egligence is a fact which must be shown" and will not be presumed.); Long v. Landy, 35 N.J. 44, 54 (1961) (observing that negligence cannot be premised upon "a foundation of pure conjecture, speculation, surmise or guess").

Common carriers, like NJT and its bus operators, have a heightened duty

of care to "exercise the utmost caution to protect their passengers as would a very careful and prudent person under similar circumstances." Maison v. N.J. Transit Corp., 245 N.J. 270, 275 (2021); see also Miller v. Pub. Serv. Coordinated Transp., 7 N.J. 185, 187 (1951) ("[A] common carrier of passengers is under a duty to exercise a high degree of care in transportation of its passengers."); Burke v. Lincoln Transit Co., 37 N.J. Super. 433, 436 (App. Div. 1955) (affirming that a common carrier's duty of care is "one of exercising a high degree of care for [patrons'] safety").

However, longstanding principles instruct that common carriers "are not absolute guarantors of their passengers' safety and they cannot protect against all possible dangers." Maison, 245 N.J. at 297; see also Gaglio v. Yellow Cab Co., 63 N.J. Super. 206, 212 (App. Div. 1960) ("The common carrier is not an insurer of the safety of its passengers."). NJT is not liable for the ordinary "jerks and jolts" incident to the starting and stopping of a bus's conveyances in the usual and customary manner. Cohn v. Pub. Serv. Co-Ordinated Transp., 109 N.J.L. 387, 388 (E. & A. 1932).

Because the "jerks and jolts" in the operation of a bus "should be shown to have been of such an unusual character as to speak of negligence in that operation," New Jersey courts have set a high bar for a plaintiff to submit the

question of liability to a jury. Id. at 388.

For instance, in Cohn, the plaintiff was a bus passenger, and as he was about to sit down, "the bus started with a jerk and threw [him] against the window." Ibid. The plaintiff broke the window with his right elbow, and the top glass fell out when his head struck the window. Ibid. Glass stuck to the plaintiff's body, causing the plaintiff to bleed. Ibid. Two witnesses characterized the bus's movement as unusual. Id. at 388-89. The court in Cohn thus found that the evidence tended to indicate "the occurrence of such a violent or unusual jerk or jolt as to speak of negligence in operation."[5] Id. at 389. In rebuffing the defendant's jerks-and-jolts defense, the court noted that the plaintiff was thrown "off his feet and against a window with such violence as to break it." Cohn, 109 N.J.L. at 389.

But in circumstances involving much less violent movements of a bus or train, courts have held that simply characterizing jerky movements as "unusual" or out of the ordinary are not enough to overcome the entry of summary

[5] This court is bound by the decisions of the former Court of Errors and Appeals, unless "more recent decisions of the Supreme Court clearly undermine the authority of a prior decision." Burrell v. Quaranta, 259 N.J. Super. 243, 252 (App. Div. 1992). In this appeal, Kwon does not cite to any authority holding that any of the referenced Court of Errors and Appeals decisions have been expressly and or implicitly overturned, abrogated, or modified.

judgment in a defendant's favor. See Shimp v. Pa. R.R. Co., 8 N.J. 1, 3 (1951) (reasoning that plaintiff's "unamplified and uncorroborated statement" that common carrier vehicle gave "a jerk," "a severe jerk," or "sudden lurch" gave "no proof that the motion was unnecessary or unusual," particularly when plaintiff not holding any railing while walking when train expected to begin moving).

Likewise, in Raeuber v. Public Service Railway Co., 89 N.J.L. 366 (E. & A. 1916), the plaintiff-passenger advised a trolley car conductor that he wished to disembark. Raeuber, 89 N.J.L. at 366-67. As he attempted to alight, the trolley car "gave a jerk, which threw [the plaintiff] into the street." Ibid. The court held there was no evidence that the alleged jerk was abnormal or "anything more than was merely incidental to the proper operation of the car." Ibid. The court observed that the plaintiff needed to show abnormality in the car's operation, and his failure to do so was fatal to his negligence claim. Ibid. The court further emphasized that the plaintiff assumed the risk of an accident that may flow from the vehicle's normal operation. Ibid.

Here, because Kwon failed to demonstrate that the NJT bus was operated in such an unusual manner to support negligence, the trial court properly dismissed her claim on summary judgment. As her only evidence concerning

the operation of the bus, Kwon relies on her own, self-serving characterization of the bus's movement and that of her friend. Notably, Kwon herself was not certain whether that movement was even a sudden stop, stating, ""Well, I think bus [sic] made a sudden stop, I think." (Pa47) (emphasis added). Kwon also admitted that the bus was moving slowly prior to this incident, negating any suggestion that the deceleration of the bus was substantial or unusual. (Pa47). Kwon also explained that she took about five or six steps backward before she fell, demonstrating that she was not thrown by the bus's movement but rather lost her balance. (Pa47).

Although Kwon's friend offered a statement that the bus "violently and abruptly made a sudden stop," she likewise provided no explanation or factual basis as to how that movement was "violent" or beyond that which is to be expected. (Pa60). As noted by the trial judge, the parroting of the word "violent," without more, does not suffice to demonstrate that the stopping of the bus was beyond the ordinary "jerking and jolting" to be expected, particularly when that statement was inconsistent with the other evidence. (1T11:17-12:4).

Furthermore, Kwon's friend did not dispute Kwon's characterization of the slow rate of speed of the bus, again negating the possibility that the bus's movement was of an extreme nature. (Pa60). Moreover, there is no evidence

that Kwon's friend or any other passenger was caused to fall or become injured as a result of the bus's motion.

Thus, unlike in Cohn, where the plaintiff-passenger offered evidence that he was thrown with such force to break a window, evincing a highly unusual motion, Kwon here did not present any comparable evidence supporting her allegation of negligence. Rather, she admitted that she took a number of steps backward before she fell, losing her balance as opposed to being violently thrown by the bus's movement. (Pa47). Just as the court in Raeuber found the plaintiff-passenger's unsupported assertions of unusual jerking to be insufficient there, Kwon's characterization here of a sudden "violent" stop without corroborative proofs, and with contradictory evidence, should also be rejected.

Without more, the alleged movement of this NJT bus amounts to nothing more than an event incidental to the normal operation of a bus along an urban Hudson County roadway, where sudden bus movements and braking are reasonably foreseeable and certainly expected. Absent unique, egregious facts like those catalogued in Cohn, the trial court rightly adjudicated and dismissed Kwon's negligence claims on summary judgment, supporting affirmance of the trial court's decision.

A holding to the contrary would allow a claimant to proceed against a

common carrier any time she falls on a bus, train, or light rail—tantamount to imposing strict liability against all common carriers. New Jersey law rejects such a tenuous legal principle because common carriers, although held to a heightened duty of care, cannot be held to ensure the unconditional safety of their patrons. Therefore, the trial court properly entered an order summarily dismissing Kwon's Complaint against NJT, and that decision should be affirmed.

## CONCLUSION

For these reasons, the trial court's order granting NJT's motion for summary judgment should be affirmed.

Respectfully submitted,

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