KEITH HACKER, v. CARLOS JAIME-VALDEZ; MICHELE DONATO; JOHN DOE (FICITIOUS NAMES A-Z AS EMPLOYER OR PRINCIPAL FOR DEFENDANT, CARLOS JAIME-VALDEZ) AND PROGRESSIVE INSURANCE COMPANY, I/J/S/A	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.:A-002886-22 T1 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY, OCEAN COUNTY, CIVIL DIVISION, OCN-L-003112-19 JUDGMENT ENTERED: $1,823,006.96 AGAINST CARLOS JAIME-VALDEZ SAT BELOW: HONORABLE CRAIG WELLERSON, P.J. Cv.

AMENDED BRIEF AND APPENDIX OF DEFENDANT/APPELLANT CARLOS JAIME-VALDEZ

Submitted by:

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Dated: November 28, 2023

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PRELIMINARY STATEMENT

This appeal centers on the February 28, 2023 Order issued by the Superior Court of New Jersey, Ocean County, in relation to Appellant, Carlos Jaime-Valdez's Motion to Mold, or in the alternative, Motion for New Trial, or in the alternative, Motion for Remittitur in this matter. Da23-24. On February 28, 2023, the court at the trial level denied the Appellant's Motion in full. Appellant's position is that all three requests for relief were meritorious and denied in error:

- The February 28, 2023 Order from the Superior Court of New Jersey failed to apply the U.S. District Court Order of August 18, 2021 which limited Plaintiff's recovery against Appellant to $200,000, the available liability insurance coverage limits.
- The February 28, 2023 Order from the Superior Court of New Jersey failed to apply existing legal standards concerning the excessiveness of the verdict, warranting either a new trial or remittitur.
- The February 28, 2023 Order from the Superior Court of New Jersey failed to apply existing legal standards, warranting a new trial, concerning Plaintiff's counsel's improperly prejudicial summation and improper mention of Appellant having fled the scene of the accident during direct examination of the Appellee.

PROCEDURAL HISTORY

Appellee filed a personal injury matter on December 16, 2019, against Appellant Carlos Jaime-Valdez ("State Court Action") in the Superior Court of New Jersey, Ocean County. Da6-12. The State Court Action arose out of personal injuries being claimed by Appellee from a motor vehicle accident caused by Appellant on January 27, 2018. On May 14, 2021, in the midst of discovery, Appellant filed for Chapter 7 Bankruptcy ("Bankruptcy") and listed Appellee as a creditor and identified the State Court Action as within Appellant's Voluntary Petition. Along with the Bankruptcy, an Automatic Stay was instituted and was applicable to the State Court Action.

Rather than file an adversary proceeding to except the debt under 11 U.S. Code § 523(a)(9) or seek to limit his recovery to non-dischargable debts, Appellee filed a Motion to Lift the Automatic Stay to the Extent of the Insurance Coverage on July 16, 2021. Da35-42. On August 18, 2021, the Honorable Kathryn C. Ferguson entered Appellee's proposed order which allowed Appellee's State Court Action to proceed "to the limits of the Defendant's available liability insurance coverage for the automobile accident on January 27, 2018 involving Plaintiff, Keith Hacker and Defendant, Carlos Jaime-Valdez." Da43-45. On August 20, 2021, Appellee then filed the Bankruptcy Court Order dated August 18, 2021. Da46. Without any changes to the August 18, 2021 Bankruptcy Court Order, the matter proceeded to

trial with jury selection on January 17, 2023 with the above-referenced Bankruptcy Court Order in place.

At trial, during Appellee's testimony, over objection, Appellee and his counsel alleged that Appellant fled from the accident, despite such evidence being irrelevant as liability was stipulated to prior to trial. 1T42:7-21[1]. This was insinuated to again on summation by Appellee's counsel. 3T23:23-24:25. Via Dr. Charles Rizzo, Appellee alleged permanent injuries to his left shoulder, by way of superior and anterior labrum tears, as well as permanent and constant inflammation/pressure on the nerves concerning the cervical spine. However, Dr. Rizzo's findings of objective deficits, including compromised range of motion on physical exam concerning the left shoulder was contradicted by Appellee's own physical therapy discharge exam, defense orthopedic expert, Dr. David Lopez and Appellee's other expert, Dr. Kam Momi; these three experts found no objective deficit on physical exam. Via Dr. Momi, Appellee presented evidence he sustained cervical disc herniations which caused myelopathy and radiculopathy. Appellee's treatment consisted of a six (6) month course of chiropractic care, two (2) small courses of physical therapy, an arthroscopic procedure of the left shoulder, and three

[1] 1T=January 18, 2023 Trial Transcript (Volume 1)
2T= January 18, 2023 Trial Transcript (Volume 2)
3T= January 19, 2023 Trial Transcript (Volume 3)
4T=February 28, 2023 Post-Trial Hearing Transcript
5T=April 14, 2023 Post-Trial Hearing Transcript
6T=July 11, 2023 Bankruptcy Court Hearing Transcript

(3) cervical epidural injections. Via Dr. Momi, Appellee was recommended cervical discectomy and fusion, but Appellee had declined surgical intervention. He admitted to no treatment since January 7, 2021. Appellee noted that he still took care of his father at a slower pace and was getting ready to get back into the work force. Dr. Lopez testified that Appellee suffered no permanent injury from the subject accident and, despite testifying Appellee's treatment was related to the accident at one point, corrected such testimony and clarified that although the treatment was reasonable and necessary, it was not related to the accident at issue.

During summation, Appellee flagrantly departed from Dr. Rizzo's diagnoses and told the jury the Appellee's labrum was "torn off" at two (2) different places. 3T28:17-20. Additionally, Appellee grossly mischaracterized Dr. Lopez's testimony regarding the treatment being related to the accident. 3T40:7-14. These inflammatory statements were taken out of context and inappropriately prejudiced the jury by suggesting Dr. Lopez found Appellee's injuries to be permanent and all related the accident. In reality, the record is abundantly clear that Dr. Lopez had misheard Appellee's question and cleared the issue up on redirect. 2T.

Lastly, Appellee's counsel inappropriately argued to the jury that they had the opportunity to "impose" responsibility upon the Appellant. 3T19:6-22. The trial completed on January 19, 2023 with a jury coming to a verdict in favor of the Plaintiff in the amount of $1,600,000. Accordingly, Appellant sought to mold the

verdict to $200,000 pursuant to the Bankruptcy Court Order dated August 18, 2021, or, in the alternative, either a new trial or remittitur based upon the excessive nature of the verdict, Plaintiff's counsel's improperly prejudicial summation and improper mention of Appellant having fled the scene of the accident during direct examination of the Appellee. Da47-54. The post-trial motion was denied on February 28, 2023. Da23-24. Appellant filed a Motion for Reconsideration on March 20, 2023, particularly related to the molding of the verdict in light of the of the August 18, 2021, Bankruptcy Court Order limiting Appellee's recovery to the policy limits ($200,000). Da55-61. On April 14, 2023, a hearing was held in which the trial court permitted Appellant to apply in bankruptcy court on the issues of molding. 5T. The trial court specifically ruled that the Judgment was valid unless limited by the bankruptcy court which the trial court left to the jurisdiction of the Bankruptcy Court. 5T10:3-5.

The instant appeal was instituted on May 25, 2023 by the Notice of Appeal. Da1-5. On July 11, 2023, a hearing was held in Federal Court and Judge Ferguson ruled that the Appellee had limited himself to $200,000 in recovery in this matter in light of the August 18, 2021, Bankruptcy Court Order. 6T. Accordingly, on July 12, 2023, an Order was entered by the United States Bankruptcy Court for the District of New Jersey which ordered that the Judgement was unenforceable beyond

$200,000 and the Judgment shall be molded to that amount. Da95-99. This was confirmed after a Motion for Reconsideration was denied. Da100-105.

STATEMENT OF FACTS

Appellee filed a personal injury matter on December 16, 2019, against Appellant Carlos Jaime-Valdez ("State Court Action") in the Superior Court of New Jersey, Ocean County. Da6-12. The State Court Action arose out of personal injuries being claimed by Appellee from a motor vehicle accident caused by Appellant on January 27, 2018. On May 14, 2021, in the midst of discovery, Appellant filed for Chapter 7 Bankruptcy ("Bankruptcy") and listed Appellee as a creditor and identified the State Court Action as within Appellant's Voluntary Petition. Along with the Bankruptcy, an Automatic Stay was instituted and was applicable to the State Court Action. On July 7, 2021, Appellant made formal application for a Motion to Stay the State Court Action, citing Appellant's Bankruptcy and the Automatic Stay. Da25-31. On July 14, 2021, Appellee filed an opposition to Appellant's Motion to Stay indicating that Appellee would be filing a Motion to Lift the Automatic Stay in Bankruptcy to the Extent of the Insurance Coverage. Da32-34. The associated attorney certification again noted Appellee was seeking permission to "proceed with the litigation [in the State Court Action] up to the limits of the available coverage." Further, it opposed the application for a Stay "as Plaintiff is seeking $200,000 to resolve this claim and nothing above the liability and excess coverage afforded the Defendant, Carlos Jaime-Valdez, therefore, resolution of the State civil matter will not involve property of the bankruptcy case."

Rather than file an adversary proceeding to except the debt under 11 U.S. Code § 523(a)(9) or seek to limit his recovery to non-dischargable debts, Appellee filed a Motion to Lift the Automatic Stay to the Extent of the Insurance Coverage on July 16, 2021. Da35-42. In Appellee's counsel's certification for same, the certification noted "Plaintiff now moves to remove this matter from the Automatic Stay up to the liability and excess liability policy limits in effect at the time of the accident, which total $200,000….Based upon the above, the undersigned respectfully requests the Bankruptcy Court to Lift the Automatic Stay as it applies to the underlying State Court action and permit moving party to proceed with litigation currently pending in the Superior Court of New Jersey, Ocean County, *to the limits of the available and excess liability insurance coverage*."

On August 18, 2021, the Honorable Kathryn C. Ferguson entered Appellee's proposed order which allowed Appellee's State Court Action to proceed "to the limits of the Defendant's available liability insurance coverage for the automobile accident on January 27, 2018 involving Plaintiff, Keith Hacker and Defendant, Carlos Jaime-Valdez." Da43-45. On August 20, 2021, Appellee then filed the Bankruptcy Court Order dated August 18, 2021, in the State Court Action effectively rendering Defendant's Motion to Stay as moot. Da46. Without any changes to the August 18, 2021 Bankruptcy Court Order, the matter proceeded to trial with jury

selection on January 17, 2023 with the above-referenced Bankruptcy Court Order in place.

At trial, during Appellee's testimony, over objection, Appellee and his counsel alleged that Appellant fled from the accident, despite such evidence being irrelevant as liability was stipulated to prior to trial. 1T42:7-21. This was insinuated to again on summation by Appellee's counsel. 3T23:23-24:25. Via Dr. Charles Rizzo, Appellee alleged permanent injuries to his left shoulder, by way of superior and anterior labrum tears, as well as permanent and constant inflammation/pressure on the nerves concerning the cervical spine. However, Dr. Rizzo's findings of objective deficits, including compromised range of motion on physical exam concerning the left shoulder was contradicted by Appellee's own physical therapy discharge exam, defense orthopedic expert, Dr. David Lopez and Appellee's other expert, Dr. Kam Momi; these three experts found no objective deficit on physical exam. Via Dr. Momi, Appellee presented evidence he sustained cervical disc herniations which caused myelopathy and radiculopathy. Appellee's treatment consisted of a six (6) month course of chiropractic care, two (2) small courses of physical therapy, an arthroscopic procedure of the left shoulder, and three (3) cervical epidural injections. Via Dr. Momi, Appellee was recommended cervical discectomy and fusion, but Appellee had declined surgical intervention. He admitted to no treatment since January 7, 2021. Appellee noted that he still took

care of his father at a slower pace and was getting ready to get back into the work force. Dr. Lopez testified that Appellee suffered no permanent injury from the subject accident and, despite testifying Appellee's treatment was related to the accident at one point, corrected such testimony and clarified that although the treatment was reasonable and necessary, it was not related to the accident at issue.

During summation, Appellee flagrantly departed from Dr. Rizzo's diagnoses and told the jury the Appellee's labrum was "torn off" at two (2) different places. 3T28:17-20. Additionally, Appellee grossly mischaracterized Dr. Lopez's testimony regarding the treatment being related to the accident. 3T40:7-14. These inflammatory statements were taken out of context and inappropriately prejudiced the jury by suggesting Dr. Lopez found Appellee's injuries to be permanent and all related the accident. In reality, the record is abundantly clear that Dr. Lopez had misheard Appellee's question and cleared the issue up on redirect. 2T.

Lastly, Appellee's counsel inappropriately argued to the jury that they had the opportunity to "impose" responsibility upon the Appellant. 3T19:6-22. The trial completed on January 19, 2023 with a jury coming to a verdict in favor of the Plaintiff in the amount of $1,600,000. Accordingly, Appellant sought to mold the verdict to $200,000 pursuant to the Bankruptcy Court Order dated August 18, 2021, or, in the alternative, either a new trial or remittitur. Da47-54. The post-trial motion was denied on February 28, 2023. Da23-24. Appellant filed a Motion for

Reconsideration on March 20, 2023, particularly related to the molding of the verdict in light of the of the August 18, 2021, Bankruptcy Court Order limiting Appellee's recovery to the policy limits ($200,000). Da55-61. On April 14, 2023, a hearing was held in which the trial court permitted Appellant to apply in bankruptcy court on the issues of molding. 5T. The trial court specifically ruled that the Judgment was valid unless limited by the bankruptcy court which the trial court left to the jurisdiction of the Bankruptcy Court. 5T10:3-5.

On June 1, 2023, in the United States Bankruptcy Court for the District of New Jersey, the Appellant filed a Motion Reopening Appellant's Chapter 7 Case and Determining that the Postpetition Judgment Obtained by Creditor Keith Hacker is Not Enforceable Beyond, or Alternatively Shall Be Molded to, the $200,000 Policy Limit of the Debtor's Automobile Insurance. Da62-82. On June 14, 2023, Appellee filed an Opposition and Cross-Motion for an order declaring the Judgment be enforced as a non-dischargeable debt against the Appellant. Da83-94. On July 11, 2023, a hearing was held and Judge Ferguson ruled that the Appellee had limited himself to $200,000 in recovery in this matter in light of the August 18, 2021, Bankruptcy Court Order. 6T. Accordingly, on July 12, 2023, an Order was entered by the United States Bankruptcy Court for the District of New Jersey which ordered that the Judgement was unenforceable beyond $200,000 and the Judgment shall be molded to that amount. Da95-99. On that same date,

Appellee's Cross-Motion was denied. While a Motion for Reconsideration was filed by Appellee, it was limited to the molding of the judgment. Da100-103. However, Appellee and Appellant now agree that judicial estoppel was appropriately applied by the U.S. District Court of New Jersey and that Appellee was limited in his recovery to $200,000 against the Appellant with the excess verdict being unenforceable against the Appellant. Moreover, the aforementioned Motion for Reconsideration was denied. Da104-105.

LEGAL ARGUMENT

I. APPELLEE IS JUDICIALLY ESTOPPED FROM A MONEY JUDGMENT ABOVE THE APPLICABLE LIABILITY COVERAGE(S) TOTALLING $200,000 AND A MOLDING OF THE JUDGMENT IS THE CORRECT METHOD TO REFLECT SAME (Raised below: Da43-45, Da23-24, Da95-99)

Judicial estoppel bars a party who has successfully asserted a position before a court or other tribunal from asserting an inconsistent position in the same or a subsequent proceeding. In terms of judicial estoppel, it is clear that Appellee successfully asserted and obtained a court order on his action to proceed with the State Court Action up to the policy limits--in this case $200,000. Appellee, through attorney certifications, both in Bankruptcy and in the State Court Action, attested to the same limitation in recovery. This is a limitation Appellee, not Appellant, *chose* in order to lift the automatic stay. Initially, Appellee took the position that the verdict, only involving non-economic damages, case reflected a non-dischargeable debt under 11 U.S. Code § 523(a)(9) and further took the position that the August 18, 2021 Bankruptcy Court Order only applied to economic damages. It was under this light that the Superior Court of New Jersey did not correctly apply the Bankruptcy Court's August 18, 2021 Court Order in formulating a judgment against the Appellant. However, Appellee's position concerning the Bankruptcy Court's August 18, 2021 Court Order was refuted by the Bankruptcy Court in its July 11,

2023 Court Orders. The parties now agree that judicial estoppel was appropriately applied by the U.S. District Court of New Jersey on July 11, 2023 and that Appellee was limited in his recovery to $200,000 against the Appellant pursuant to the Bankruptcy Court's August 18, 2021 Court Order prior to trial. With this now shared understanding, it is Appellant's position that molding the judgment is materially no different than a verdict being converted to a molded judgment based on a high/low agreement or in a UM case there being a molded judgment due to the UM limits. See *Taddei v. State Farm Indem. Co.*, 401 N.J. Super. 449, 459 (App. Div. 2008); *Malick v. Seaview Lincoln Mercury*, 398 N.J. Super. 182 (App. Div. 2008) (the verdict was molded in accordance with the high-low agreement). In general, a jury verdict should be transformed into a judgment when the Plaintiff can recover only a "sum certain." See *Ciechanowski v. New Jersey Mfrs. Ins. Co.*, 2009 N.J. Super. Unpub. LEXIS 2045, *14-15. Of particular note, this was a limitation on damages Appellee entered into prior to trial, not after judgement.

Moreover, R. 4:58-2 clearly provides that calculation concerning offer of judgment consequences derives from the "money judgment," not the verdict. *Wadeer v. N.J. Mfrs. Ins. Co.*, 2009 N.J. Super. Unpub. LEXIS 878, *5-6. As Plaintiff's counsel is aware, it is Defendant's position that the money judgment should be $200,000. Accordingly, no R. 4:58-2 consequences apply in this matter.

II. THE JURY VERDICT WAS A MISCARRIAGE OF JUSTICE THAT SHOCKS THE JUDICIAL CONSIENCE REQUIRING A NEW TRIAL OR, IN THE ALTERNATIVE, REMITTITUR (Raised below: Da23-24, 4T)

A motion for a new trial on the ground that the verdict was excessive is governed by R. 4:49-1, which permits the trial judge to grant the motion when, "having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." A verdict may only be set aside as excessive in "clear cases." *Jastram v. Kruse*, 2007 N.J. Super. Unpub. LEXIS 629, *8. A trial judge should not interfere with the quantum of damages assessed by a jury unless it is so disproportionate to the injury and resulting disability shown as to shock his conscience and to convince him or her that to sustain the award would be manifestly unjust. *Baxter v. Fairmont Food Co.*, 74 N.J. 588, 596, 379 A.2d 225 (1977). If it clearly and convincingly appears that a damages award is so excessive that it constitutes a miscarriage of justice, then a Court is empowered to vacate a jury verdict and grant a new trial. *Johnson v. Scaccetti*, 192 N.J. 256, 280 (2007); *Baxter v. Fairmont Food Co.*, 74 N.J. 588, 596 (1977). A trial court should order a new trial or remit a jury's damages award when the verdict is so clearly disproportionate to the injury and its *sequela* that it shocks the judicial conscience. *Johnson*, *supra*, 192 N.J. at 281; *Baxter*, *supra*, 74 N.J. at 602. The verdict must be "wide of the mark" and pervaded by a sense of "wrongness." *Johnson*, *supra*, 192 N.J. at 281;

Baxter, *supra*, 74 N.J. at 598-99. In other words, the trial court must be clearly and convincingly persuaded that it would be manifestly unjust to sustain the award. *Johnson*, *supra*, 192 N.J. at 281; *Baxter*, *supra*, 74 N.J. at 604.

Here, Appellee's damages presented, even in a light most favorable to the Appellee, compared to the verdict given of $1,600,000 is a clear shock to the judicial conscience. As a result, a new trial is warranted. In the alternative, remittitur is also appropriate. Remittitur should be governed through a thorough analysis of the case itself; of the witnesses' testimony; of the nature, extent, and duration of the plaintiff's injuries; and of the impact of those injuries on the plaintiff's life will yield the best record on which to decide a remittitur motion. *Cuevas v. Wentworth Group*, 226 N.J. 480, 510 (N.J. 2016). Again, Appellee's injuries and resulting impact on his life is disproportionate to the verdict given of $1,600,000. Accordingly, remittitur is also appropriate.

At the trial court level, a new trial or, in the alternative, remittitur, was denied seemingly due to a great weight that was given to the severity of the accident and property damage to Appellee's vehicle while ignoring that Appellee complained of no pain or injury at the scene of the accident and had no treatment for several months. The trial court's belief that the property damage photographs themselves were horrific reflects that the verdict was not so much based on the nature and extent of

the injuries being claimed, but rather improperly the nature and extent of the property damage.

III. APPELLEE'S COUNSEL'S MISCHARACTERIZATION OF APPELLEE'S INJURIES IN SUMMATION REQUIRE A NEW TRIAL (Raised below: 3T44:7-46:14)

In summation, counsel's comments at closing must be confined to the facts shown or reasonably suggested by the evidence introduced during the course of trial. *Colucci v. Oppenheim*, 326 N.J. Super. 166, 177 (App. Div. 1999). When summation commentary transgresses the boundaries of the broad latitude otherwise afforded to counsel, a trial court must grant a party's motion for a new trial if the comments are so prejudicial that it clearly and convincingly appears that there was a miscarriage of justice under the law. *Bender v. Adelson*, 187 N.J. 411, 431 (2006); see, e.g., *Geler v. Akawie*, 358 N.J. Super. 437, 466-67 (App. Div. 2003) (holding that a new trial was warranted after the plaintiff's counsel misstated material elements of the evidence).

Here, Appellee's counsel at summation remarked to the jury that "what Dr. Rizzo says, incidentally, not contradicted by Dr. Lopez, Dr. Rizzo says there's two different areas. Both the superior and interior part of the labrum were torn off…" 3T28:17-20. The comment elicited an inflammatory response viewing the labrum as completely torn at two spots. However, Dr. Rizzo only testified that the MRI and review of the left shoulder upon surgery showed a tear of the labrum called a SLAP

lesion. 1T108:3-8. Dr. Lopez testified that he had small age-related labrum tearing- a far cry from the image of the labrum being torn off. 2T206:20-25. Rather than discuss the injuries as testified by Dr. Rizzo and/or Dr. Lopez, Appellee's counsel took it upon himself to materially deviate from the experts' opinions and with no basis tell the jury that, per Dr. Rizzo, his labrum was "torn off" at two different places. When the jury deliberated, undoubtedly, when determining causality Plaintiff's counsel's remark would easily make you conclude that a torn off labrum at two spots could not be age-related.

Not only did Dr. Rizzo not opine that the labrum was "torn off" at two places, but to say that Dr. Lopez did not contradict a diagnosis of a labrum torn off at two (2) different spots was completely erroneous and materially inflammatory. As such, the jury may have additionally reasoned that Dr. Lopez also found a labrum torn off at two different places when in actuality he found just small tearing involving the labrum. The term "torn off" was simply prejudicial, beyond the evidence introduced at trial, and its undoubted effect was to create the impression that Appellee had an uncontradicted traumatic injury when in actuality the diagnosis was less severe and more complex in terms of causality. Accordingly, a new trial is the appropriate recourse.

IV. APPELLEE'S COUNSEL'S MISLEADING CITATIONS TO DR. LOPEZ'S TESTIMONY REQUIRES A NEW TRIAL (Raised below: 3T10:7-14)

In summation, counsel cherry-picked a cited portion of Dr. Lopez's testimony where Dr. Lopez agreed with Appellee's counsel during his cross-examination that Appellee's treatment was "reasonable and medically necessary directly as a result of the accident." 2T228:21-229:1. Rather than providing context to that quote, Appellee's counsel goes onto say "so when you bear it down on Dr. Lopez, when you ask the questions he can't get around, you ask him questions about medicine, you ask him questions about MRIs, surgery, he admits that it's all permanent and it's all related to the accident." 3T40:7-14. However, the reality is that Dr. Lopez clarified his testimony clearly that he meant the treatment was reasonable, but **not** related to the accident. 2T233:25-234:6.

Moreover, Dr. Lopez testified clearly that he found no permanent injury related to the accident. 2T212:14-22. Appellee's counsel's remarks on summation, if believed by the jury, would leave an undeniable impression that Dr. Lopez found the treatment was not only, causally reasonable and medically necessary which he undoubtedly misstated, but more important that "it's all permanent and it's all related to the accident." Dr. Lopez never testified that way and the prejudicial effect of a false recitation of Dr. Lopez's opinion is incalculable, especially when it was followed by actually quoting excerpts from his testimony. The trial court's response

to permit such summation over objection was clearly a violation of *Bender*. Accordingly, a new trial is the appropriate recourse.

V. APPELLEEE'S COUNSEL'S REFERENCE FOR THE JURY TO "IMPOSE RESPONSIBILITY' UPON THE APPELLANT WAS INAPPROPRIATE AND WARRANTS A NEW TRIAL (Raised below: 4T)

In summation, counsel remarked that although Appellant has taken responsibility for causing the accident itself, he had not taken full responsibility for what happened to Plaintiff and that the jury was given the opportunity to "impose" that responsibility. 3T19:6-22. It is well-settled law that arguments may not include "insinuations of bad faith" by a defendant who proceeds to trial to resolve "validly contested claims." *Geler*, *supra*, 358 N.J. Super. At 469; See, e.g. *Burket v. Holcomb Bus Serv.*, 2015 N.J. Super. Unpub. LEXIS 1095 (Court found counsel's remark that defendant refused to take responsibility was improper). The obvious result of such a remark is for the jury to consider punishing Appellant for having the gall to even appear at trial when in fact Appellant proceeded to trial to resolve validly contested claims. Accordingly, a new trial is the appropriate recourse.

VI. APPELLEE'S TESTIMONY THAT APPELLANT FLED THE SCENE OF THE ACCIDENT WAS IRRELEVANT, IMPROPER AND WARRANTS A NEW TRIAL (Raised below: 1T42:7-21)

At trial, over Appellant's objection, Appellee testified that Appellant fled the scene of the accident. 1T42:7-21. Appellee's counsel also insinuated the alleged

hit-and-run nature of the accident in his summation. 3T23:23-24:25. Liability was stipulated to prior to trial so the only substantive issue the jury decided was an assessment of causation and damages. The allegation that Appellant fled the scene of the accident was irrelevant and was obviously fraught with the potential to inflame the jury to impermissibly punish the Appellant for having allegedly fled the scene of the accident rather than determine causation and damages.

Clearly, such evidence should have been excluded under N.J.R.E. 403(a) as it's introduction serves to cause undue prejudice and confuses/misleads the jury from focusing on the true assessment at hand. See, also, *Reider v. Allstate N.J. Ins. Co.*, 2009 N.J. Super. Unpub. LEXIS 626, *3-5 (Court disallowed testimony concerning the hit-and-run nature of an accident). The undue prejudice caused during trial by the introduction of such evidence is immeasurable and warrants a new trial. The trial court took the position that the evidence was in essence part and parcel of authenticating the property damage photographs. However, testifying that the Appellant's vehicle fled the scene bears no relevance to having seen the vehicle and the damage to it. There was no allegation that Appellee did not see the vehicle or did not have sufficient time to do so.

CONCLUSION

For the foregoing reasons, the Appellant's appeal is meritorious.

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SUPERIOR COURT OF NEW JERSEY
Appellate Division
Docket No.: A-002886-22

Plaintiff-Respondent,

KEITH HACKER,

Civil Action

vs.

Defendant- Appellant,

CARLOS JAIME-VALDEZ; MICHELE DONATO; JOHN DOE (f/n A-Z as employer or principal for defendant, Carlos Jaime-Valdez) and PROGRESSIVE INSURANCE COMPANY, i/j/s/a

Sat below:
Hon. Craig L. Wellerson, J.S.C.
Superior Court of New Jersey
Ocean County
OCN-L-3112-19

PLAINTIFF-RESPONDENT, KEITH HACKER'S, BRIEF

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December 14, 2023

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PRELIMINARY STATEMENT

This case arises out of an automobile accident which caused serious permanent injuries to Plaintiff. The Defendant was insured by State Farm Insurance Company as his primary insurer, and, GEICO for excess coverage. The case was tried and resulted in a jury verdict of $1,600,000 in Plaintiff's favor. Da 23-24. Defendant has raised every possible issue to thwart the jury's determination.

Initially, it should be noted that the entirety of this Appeal has no direct relationship with the individual defendant, Carlos Jaime-Valdez. Mr. Valdez was already protected by an underlying bankruptcy ruling whereby he is not liable for the judgment over and above the insurance coverage. Da 43-45. The entire purpose of this Appeal by the defense is to protect the insurer against a bad-faith claim that is forthcoming against State Farm Insurance Company and GEICO Insurance Company for failing to make any reasonable attempt to settle the underlying case, despite the fact that the Arbitration Award was well over the available insurance policy limits, and, an Offer to Take Judgment was filed for the policy limits long before the trial took place. Pa 2; Pa 1. This entire Appeal is motivated by the defense's attempt to protect future litigation and to protect the ill-fated decisions of the insurance carriers who purposefully exposed Carlos Jaime-Valdez to an excess judgment.

The insurance companies, State Farm Insurance Company and GEICO Insurance Company, abused their obligations in failing to negotiate this case in good faith since the defendant had filed for bankruptcy. This Honorable Court cannot allow insurance carriers to blatantly commit bad faith and fail to negotiate and resolve cases any time an insured has the unfortunate circumstances of having to file for bankruptcy. Filing for bankruptcy does not give an insured's insurance carrier the license to commit bad faith and to ignore their obligations to protect an insured from a judgment whether personally collectible or not. Other jurisdictions do not allow such conduct, and nor should New Jersey.

PROCEDURAL HISTORY

In addition to the actual Procedural History provided to the Appellate Court in Defendant's brief, as opposed to the argument inappropriately contained therein, Plaintiff submits the additional pertinent history:

- On July 14, 2021, Plaintiff filed an Offer to Take Judgment in the amount of $200,000.00, Pa 1;
- On September 2, 2021 the case proceeded to arbitration which resulted in an award in favor of Plaintiff in the amount of $300,000, Pa 2;
- On September 27, 2021 Defendant filed for a trial *de novo*, Pa 3;
- On January 25, 2022 and January 20, 2023, Plaintiff sent correspondence to Defendant, advising Defendant's counsel that Defendant was being exposed to an excess verdict and that Plaintiff intended to pursue a Bad Faith claim against his insurers, Pa 4-6;
- On January 19, 2023, the jury returned a verdict for Plaintiff in the amount of $1,600,000. An Order was issued after oral arguments on February 28, 2023 and on March 3, 2023, the Order for Judgment was entered against Defendant in the amount of $1,823.006.96 which included the jury verdict, penalties and interest, Da 23-24;

- On July 19, 2023, Defendant filed a Motion to Mold Judgment, Pa 7-8;
- On September 22, 2023, Defendant's Motion to Mold Judgment was denied, Pa 9-10;
- On October 12, 2023, Defendant filed a Motion to Reconsider the denial of the Motion to Amend Judgment, Pa 11-12;
- On December 1, 2023, Defendant's Motion to Reconsider the denial of the Motion to Amend Judgment was denied, however, an Order has not yet been signed. Pa **.

RESPONDENT, KEITH HACKER'S, COUNTERSTATEMENT OF FACTS

In addition to the actual facts provided to the Appellate Court in Defendant's brief, as opposed to the argument inappropriately contained therein, Plaintiff submits the following summary of additional, pertinent facts.

Keith Hacker was driving home from work when he was violently struck by Defendant. 1T37:1-1T40:18. The Defendant was intoxicated at the time. 4T5:14 – 4T10:3. After the complaint was filed and discovery completed, Plaintiff filed an Offer to Take Judgment against Defendant for the sum of $200,000, on July 14, 2021. Pa1. On September 2, 2021, the case proceeded to arbitration which resulted in an award in Plaintiff's favor in the amount of $300,000. Pa2. On September 27, 2021 Defendant filed for a trial *de novo*. Pa3.

On January 25, 2022 Plaintiff sent correspondence to Defendant's counsel advising that Defendant was being exposed to an excess verdict and that Plaintiff intended to pursue a Bad Faith claim against his insurers. Pa4-5. The case proceeded to trial, with

the resultant jury verdict in favor of Plaintiff in the amount of $1,600,000. 3T68:2-6.

After Defendant's efforts for remittitur and/or a new trial were denied, an Order for Judgment was entered against Defendant in the amount of $1,823.006.96, which included the jury verdict, Offer to Take Judgment penalties and interest. Da23-24.

Thereafter, on July 19, 2023, Defendant filed a Motion to Amend Judgment. Pa7-8. However, on September 22, 2023, the Motion to Amend Judgment was denied. Pa9-10. On October 12, 2023, Defendant filed a Motion to Reconsider the denial of the Motion to Amend Judgment. Pa11-12. On December 1, 2023, Defendant's Motion to Reconsider the denial of the Motion to Amend Judgment was denied, however, an Order has not yet been signed.

LEGAL ARGUMENT

POINT I: PLAINTIFF IS NOT JUDICIALLY ESTOPPED FROM A MONEY JUDGMENT ABOVE THE APPLICABLE LIABILITY COVERAGES TOTALING $200,000, A MOLDING OF THE JUDGMENT IS NOT APPROPRIATE, AND PLAINTIFF IS ENTITLED TO APPLICATION OF RULE 4:58-1 SANCTIONS. (Orders located at Da23-24 and Pa5-6)

The first legal argument set forth in the Defendant's Appeal is that the Plaintiff is judicially or equitably estopped from obtaining a judgment over the Defendant's policy limits and that therefore, the verdict should be molded to the policy limits. The Defendant then argues that since the jury verdict should be molded to the policy limits of $200,000, the Offer to Take Judgment penalties do not apply.

This case was tried, resulting in the jury returning a verdict in the amount of $1,600,000.00 in favor of Plaintiff, on January 19, 2023. 3T68:2-8. On February 7, 2023 Defendant filed a Motion to Mold the Verdict, or, in the Alternative for a New Trial or Remittitur. Da47-54. On February 28, 2023 an Order was entered in favor of Plaintiff and denying Defendant's requests. Da23-24. The Order for Judgment was entered in the amount of $1,823.006.96, which includes the jury verdict of $1,600,000, plus litigation expenses awarded based upon the Offer to

Take Judgment Rule 4:58-2(a), prejudgment interest at 8% commencing from July 14, 2021 totaling $191,821.96, and counsel fees totaling $31,185.00. Da23-24.

A Motion to Reopen Bankruptcy to have the debt determined non-discharged since Defendant was driving while intoxicated was filed by Plaintiff. Da62-82. On July 14, 2023 the Bankruptcy Court determined that the Defendant was protected from liability over the $200,000 based upon its prior order. Da95-99. Therefore, on July 19, 2023 Defendant filed in the Superior Court of New Jersey a Motion to Amend the Judgment, seeking to have the Judgment Molded to the insurance proceeds of $200,000. Pa7-8. This was denied by Judge Wellerson on September 22, 2023. Pa9-10.

On October 12, 2023, Defendant filed a Motion for Reconsideration, Pa11-12. Judge Wellerson denied the Motion for Reconsideration on December 1, 2023, however, an Order has not yet been signed.

Defendant incorrectly asserts that Plaintiff "agrees" that Bankruptcy Court properly applied "judicial estoppel". The Plaintiff opposed this position, however, the Bankruptcy Court did determine that

the Defendant is not personally liable to pay the judgment over and above the policy limits of $200,000. Da95-99.

It is Plaintiff's position that Bankruptcy Court lacks authority to make any determinations regarding a judgment in State Court. In fact, it is well-settled law that Federal Courts lack jurisdiction to reverse state judgments or to reduce the amounts of judgments. *Great Western Mining and Mineral Company v. Fox Rothchild,* 613 F3D 159, 170 (3rd Cir. 2010). In addition, Bankruptcy Court is a court of limited jurisdiction and can only determine matters which affect a debtor's rights, liabilities or in which any way impacts the handling or the administration of a bankruptcy estate. 28 U.S.C. Section 134. *Celotex Corp. v. Edwards,* 514 U.S. 300, 307 (1995). As such, the Bankruptcy Court analysis and ruling have absolutely no applicability to the state court judgment, or jury verdict. The Bankruptcy Court is interested only in whether or not the Defendant is personally responsible for the judgment. Bankruptcy Court has no consideration and/or thought process when it comes to a Plaintiff pursing an insurer for bad faith pursuant to *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.,* 65 N.J. 474 (1974), or an insurance carrier's obligation to resolve claims.

In the present appeal, the Defendant is asking the Appellate Court to throw out a jury verdict that is entitled to the utmost respect. The Defendant is asking the Court to permit insurance carriers to act in bad faith whenever a defendant files for bankruptcy protection. This would totally ignore *Rova Farms* and progeny regarding an insurance company's duty to act in good faith and fair dealing and resolve claims.

There is a Judgment that has been recorded against the Defendant. This Judgment will live against this Defendant for the remainder of his life, unless a Warrant to Satisfy Judgment is executed by Plaintiff. Whether or not he personally has to pay the judgment is of no moment. The Judgment exists. This will show up anytime he attempts to buy a house, obtain a credit card, buy a car or transact any other business for the remainder of his life. This is all the result of Defendant's insurer's failure to deal in good faith and its failure to take advantage of the many opportunities it had to resolve the case within the policy limits. In particular, it should be noted that one year prior to the trial, Plaintiff warned that Defendant's primary and excess insurers, State Farm and GEICO, respectively, were committing bad faith and were exposing their insured to an excess judgment, despite the fact that bankruptcy was filed. Pa4-5.

Plaintiff has not been able to find cases in New Jersey that address the issue of proceeding to obtain a judgment against the bankruptcy protected defendant and pursuing a bad faith case against the insurers thereafter. However, other jurisdictions have clearly ruled. In Georgia, the case of *Flanders v. Jackson,* 810 S.E. 2d 656 (Ga. Ct. App. 2018) specifically recognizes Georgia law which maintains that a debtor's discharge did not preclude the personal injury creditor from seeking an excess judgment against the debtor notwithstanding that, due to the debtor's discharge, no more than the policy proceeds could be recovered personally against the debtor. *Id.* at 660. Specifically, the case stands for the fact that a bad faith claim can exist against the insurance carriers directly, even though the defendant would not be personally responsible. *Id.* In addition, in Florida, the case of *Camp v. St. Paul Fire and Marine Ins. Co.*, 616 So. 2d 12 (Fla. 1993) held that an insured's bankruptcy and discharge from liability prior to the exposure of an excess judgment via. tort claim, such that an insured was never personally liable for any judgment, did not preclude a subsequent bad faith – refusal to settle cause of action against the insurer. *Id.* at 14-15.

In addition to the above, the 5th Circuit of Appeals in *Chapman v. Bituminous Ins.* 345 F. 3d 338 (5th Cir. Ct. App. 2003), the Court

specifically held that a personal injury claimant could seek judgment in excess of the insurance policy limits, even though the personal injury creditor's claim had been discharged. *Id.* at 343. The Court reasoned that a "fresh start policy" is not intended to provide a method by which an insurer can escape its obligation based simply on the financial misfortunes of the insured. *Id.*

As a result, it is clear that other jurisdictions clearly recognize that a bad faith claim can exist even if the insured defendant files for bankruptcy.

There are very important public policy considerations which are recognized by the State of New Jersey in favor of settlements of litigation. For example, the Supreme Court stated in *Gere v. Lewis*, 209 N.J. 386 (2012) that New Jersey recognizes an extremely strong public policy in favor of settlement of cases and resolution of litigation. *Id.* at 500. In another Supreme Court case, the Court specifically stated that the settlement of litigation ranks high in our public policy. *Brundage v. Estate of Caranbio*, 195 N.J. 575, 601 (2008).

Molding the verdict would have the ill effect of giving license to every insurance carrier to try every case where the defendant has filed

for bankruptcy without any recourse or ramifications. This certainly cannot be the policy recognized by this Court or the State of New Jersey.

In addition, the Defendant cites absolutely no legal authority to "mold" a judgment. Molding of a judgment occurs in UM/UIM settings where the contractual damages are set by the insurance contract purchased by the insured. This is not the same as the case at hand -- a third-party jury trial where the jury decides damages. Here, the jury returned its verdict and the judgment was entered against the defendant. Therefore, there is no contractual limitation on damages and therefore there is no "molding".

For all the reasons set forth above, it is extremely important from a public policy standpoint, the protection of New Jersey Law, including all of the legal precedence set forth in *Rova Farms* that the judgment be preserved. It is the sanctity of the jury to determine the judgment. Whether or not the defendant was personally responsible was decided in Bankruptcy Court. However, the ramifications for the decision to try the case, specifically the clear bad faith by Defendant's insurers, is not resolved by Bankruptcy Court. It should be resolved by Superior Court in accordance with the laws set forth above, therefore, the Judgment should not be molded.

In addition to the above, since the Judgment should not be molded, the Offer of Judgment penalties were correctly applied. R. 4:58-2. In *McMahon v. NJM Ins. Co.*, 364 N.J. Super 188 (App. Div. 2003), the court specifically stated that all of the enhanced sanctions of Rule 4:58-1 are not limited in any way to insurance coverage. *Id.* at 189. The sanctions are the direct responsibility of the insurance carrier over and above the insurance policy limits. *Id.* Therefore, the Judgment should stand as is.

POINT II: THE JURY VERDICT DOES NOT SHOCK THE JUDICIAL CONSCIENCE, A NEW TRIAL IS NOT WARRANTED, REMITTITUR IS NOT WARRANTED. (Order Da23-24)

A jury's verdict, including an award of damages, is cloaked with a presumption of correctness. *Baxter v. Fairmont Food Co.*, 74 N.J. 588, 598 (1977). There, the court stated:

> In the American system of justice, the presumption of correctness of a verdict by a jury has behind it the wisdom of centuries of common law merged into our constitutional framework. Of course, such verdict is not sacrosanct and can never survive if it amounts, manifestly, to a miscarriage of justice. The resolution of the latter question is reposed in the courts. Respect for our constitutional system requires that this obligation be approached, in all contingencies, with utmost circumspection, lest the courts intrude upon

> responsibilities which have traditionally, intentionally and constitutionally been vested in a jury of citizens.

Id.

The New Jersey Supreme Court has more recently stated that "[t]he preeminent role that the jury plays in our civil justice system calls for judicial restraint in exercising the power to reduce a jury's damages award. A court should not grant a remittitur except in the unusual case in which the jury's award is so patently excessive, so pervaded by a sense of wrongness, that it shocks the judicial conscience." *Cuevas v. Wentworth Grp.*, 226 N.J. 480, 485 (2016).

The trial judge in this case correctly denied the Defendant's Motion for Remittitur. The standard which must be applied by the reviewer of the award is that "[j]udicial review of the correctness of a jury's damages award requires that the trial record be viewed in the light most favorable to plaintiffs." *Id.* at 488. In addition, a "judge may not substitute his judgment for that of the jury merely because he would have reached the opposite conclusion; he is not a ...decisive juror." *Baxter* at 598.

In this matter, the Plaintiff sustained injury to his shoulder for which he continues to have pain and limitation every day. 1T65:12-15. His orthopedic surgeon, Dr. Rizzo, testified that the left shoulder MRI arthrogram revealed a SLAP lesion "which stands for superior labral

anterior posterior tear." 1T108:22-25; 1T109:1-11. Dr. Rizzo further explained that the tearing was in two different places within the labrum. 1T110:4-11. Dr. Rizzo described that labral tears "occur when there is a sheer force across the joint..." 1T110:17.

Dr. Rizzo testified regarding three separate procedures he performed during the surgery itself which involved debridement of the inflamed tissue, removal of a portion of bone, and, removal of synovium. 1T113:18-1T116:2. Following the surgery, when last seen in November of 2020, Keith Hacker continued to have shoulder pain with restricted motion, along with neck pain. 1T117:9-23. Dr. Rizzo opined that the shoulder and neck injuries were caused by the car accident. 1T117:24–1T118:1-22. Further, Dr. Rizzo explained that the shoulder injury was permanent since tears to a structure, even with surgical repair, is forever altered, affecting how the joint works, causing limitation of range of motion, and pain. 1T119:8-18. Dr. Rizzo also testified that the injuries to the cervical spine were permanent as there was "constant inflammation or pressure under on those nerves." 1T119:19-21. In addition, Plaintiff testified that the injury to his neck causes him daily pain, symptoms which travel into the arms, and difficulty with sleep. 1T66:1-16. Keith Hacker sustained three separate levels of disc injury in the cervical spine

that are causing compression of the spinal cord for which Dr. Momi has recommended a three-level anterior cervical discectomy and fusion. 1T164:3-1T165:21. Dr. Momi explained that the surgery would involve removal of three herniated discs and implantation of artificial spacers and a small plate to help with the fusion. 1T165:3-12. Dr. Momi also testified that there could be significant progression of degeneration in the spaces above and below the surgical site which would be a permanent, lifelong problem for Mr. Hacker and could mean another surgery is necessary, that by not having the surgery, Mr. Hacker is at an increased risk for additional injury and/or significant compromise because of the instability of the levels of the cervical spine as well as the compression of the spinal cord, and generally discussed the serious risks involved. 1T166:7 – 1T169:24.

Mr. Hacker testified that he has been working as a cook since shortly after he first started working at the age of 16, and, he was 54 at the time of trial. 1T32:11 – 1T33:4. He explained that he had never had any difficulty, before the accident, performing his job duties. 1T33:23 – 1T35:2. Mr. Hacker never had any prior injuries involving his head, neck or shoulder. *Id.* Prior to the accident he took care of his father and increasingly took care of the household duties and yardwork. 1T35:7-

1T36:15. Plaintiff also testified that he has difficulty working, lifting, carrying any items due to the significant limitation and range of motion he has involving his arm due to the ongoing shoulder problems. Mr. Hacker testified to difficulty sleeping, headaches, neck pain and radiating pain into his arms all on a daily basis. 1T65:1-1T66:1-16. Mr. Hacker lives with his father, and 86 year old disabled veteran, whom he takes care of. 1T31:17-25. Mr. Hacker is limited in what he can do now and when he does do things, he pays a price with increased pain. 1T68:9 – 1T69:25.

Clearly, the jury's verdict of 1.6 million dollars does not shock the judicial conscience in light of the injuries, treatment, effect on Plaintiff's life, and permanency. The jury had the opportunity to pass upon the credibility of all of the witnesses and properly awarded what they found was fair, reasonable and in accordance with the instructions given by the Court. 3T47:19 – 3T64:14.

A jury's verdict should never be overthrown without a carefully reasoned and factually supported determination. *Baxter* at 597. The trial judge correctly denied Defendant's motion for remittitur since it did not shock the conscience and he was not able to formulate a carefully

reasoned and factually supported basis for remittitur. Therefore, this Appellate Court should uphold the jury's verdict.

As for requesting a remittitur, the Defendant's argument also falls short in all respects. In *Cuevas*, the New Jersey Supreme Court made it clear that the Court shall not grant a remittitur unless the Court must "correct a grossly disproportionate damages award, which, if left intact, would constitute a miscarriage of justice." *Cuevas* at 487. Based upon the injuries sustained, the treatment necessitated thereby, and the permanent affect they have and will continue to have on Mr. Hacker's life, the jury verdict was not such that the judicial conscience is shocked thereby. Accordingly, plaintiff respectfully requests that the trial court's denial of Defendant's application for remittitur be upheld.

POINT III: PLAINTIFF'S COUNSEL DID NOT MISCHARACTERIZE PLAINTIFF'S INJURIES IN SUMMATION AND THE MOTION FOR A NEW TRIAL WAS CORRECTLY DENIED. (Raised below: 3T44:7-3T46-:14)

The Supreme Court of New Jersey in *Bender v. Adelson*, 187 N.J. 411 (2006) specifically noted that:

> Counsel is allowed broad latitude in summation and counsel may draw conclusions even if the inference is

> that a jury is asked to make are improbable, perhaps illogical erroneous or even absurd ... When summation commentary transgresses the boundaries of the broad latitude offered to counsel, a trial court must grant a party's motion for a new trial if the comments are so prejudicial that 'it clearly and convincingly appears there is a miscarriage of justice under the law.'
>
> R.4:49-1(a); *Bender* at 431-32.

Nothing in the plaintiff's summation transgressed the boundaries of broad latitude afforded so as to warrant a new trial in this case. The defendant specifically cites to that portion of plaintiff's closing argument wherein the two areas of tearing of the labrum were discussed, however, the full picture as argued to the jury has not been pointed out by defendant. The full argument was as follows:

> Because what Dr. Rizzo says, incidentally, not contradicted by Dr. Lopez, Dr. Rizzo says there's two different areas. Both the superior and [a]nterior part of the labrum were torn off, were torn. And it showed up on the MRI. What's important to this shoulder expert, he said it's at – the mechanism of injury is absolutely consistent with what Keith said. He has left arm up there.
>
> . . .
>
> Dr. Rizzo described it as a sheering injury where you kind of come across and on both sides of that shoulder – and we discussed this – on both sides of the labrum on that shoulder, there was tearing. ...
>
> 3T28:9-20.

Plaintiff's arguments concerning the shoulder injury testified to by Dr. Rizzo were completely consistent with the actual trial testimony. It

is certainly plaintiff's position that stating that the labrum was "torn off" was appropriate since, once a portion of something is torn, it is necessarily "off". However, even if stating that it was "torn off" is incorrect, in summation, the description of that injury is immediately qualified, within the same sentence, when the argument continued after stating that the labrum was "torn off" with the description being that the area "was torn". 3T28:9-20. In addition, in the next paragraph, the injury was again described as "there was tearing." 3T28:9-20. Thus, plaintiff asserts that the trial judge correctly denied defendant's motion for a new trial on the basis of plaintiff's counsel's purported mischaracterizations of the medical testimony, since there was no mischaracterization.

In addition, even if it were to be determined that there was a mischaracterization of the medical testimony, the jury was specifically instructed that if their interpretation of the evidence was different from any argument or statement made by counsel, that they were to rely upon their own recollection and rely upon the testimony specifically of the witness. The court correctly charged the jury, pursuant to *Litton Industries v. IMO Industries*, 200 N.J. 372, 393-394 (2009), with regard

to the issue of recollection of medical testimony and counsel's argument about the testimony, as follows:

> "The lawyers are here as advocates for their clients. And throughout the course of the trial, they've given you statements as to their views of the evidence in favor of their client's position. In this case in particular, there were comments made about medical issues and the medical testimony that you heard. If any of the attorneys have said anything about the medical testimonials [sic] presented to you that isn't consistent with the testimony you heard, you should disregard it. It is your recollection of the evidence that controls, not comments made by the attorneys or the Court that would be in conflict with what you actually heard.
>
> You sit here as judges of the facts. And you alone have the responsibility of deciding the factual disputes that exist in this case. It's your recollection and evaluation of the evidence that controls. Again, if there was any statements made that conflict with the comments and the testimony before you, you must decide what the evidence brings. Your decision in the case must be based solely upon the evidence that was presented to you and my instructions on the law.
>
> The evidence in the case consist[s] of the testimony that you heard from all the witnesses, the exhibits that have now been marked into evidence, any testimony that was read to you, and any stipulations or admissions that are placed into the record. And the stipulation is an admission of facts [that] are true here. There is a stipulation as to fault and liability. There is a stipulation as [to] the date of the accident. But the contest in the case regarding medical testimony is up to you."
>
> 3T48:14-3T 49:21.

For all of these reasons, the defendant's request for a new trial was properly denied by the trial court.

POINT IV: PLAINTIFF'S COUNSEL'S CHARACTERIZATIONS OF DR. LOPEZ'S TESTIMONY WAS NOT MISLEADING AND DOES NOT WARRANT A NEW TRIAL. (Raised below 3T:45:1-3T46:12)

The defendant asserts that a new trial should have been granted or a remittitur granted as plaintiff's counsel purportedly mischaracterized the defendant's expert, Dr. Lopez's, testimony. This is simply not true. After admitting that:

- Mr. Hacker did not tell him he had any type of prior significant accident of any kind. 2T221:19-24.
- He was provided with medical records concerning Mr. Hacker's care and treatment, records which did not include any medical documentation of prior complaints or treatment involving the neck or left shoulder. 2T221:25 – 2T222:3.
- Since the shoulder and cervical MRIs were performed 14 months and 18 months post-accident, respectively, it was not surprising that evidence of trauma such as inflammation was not present. 2T223:5 – 2T225:12.
- Mr. Hacker was never diagnosed with disc injuries prior to this accident. 2T226:17-21.
- Disc material pressing on the spinal cord is generally not a good thing. 2T226:22-2T227:4.

- He agreed that Mr. Hacker had two different areas of tearing in the left shoulder. 2T227:5-10.

- He confirmed that he saw the areas of tearing on the shoulder MRI himself. 2T227:5-13.

- He confirmed with the treatment Dr. Rizzo provided but instead stated that the MRI findings were degenerative. 2T228:9-20.

Dr. Lopez specifically testified on cross-examination:

> Q: As a matter of fact, in your report, Doctor, you note that all of the medical care and treatment Mr. Hacker had that you were aware of was - - was reasonable and medically necessary directly as a result of the accident, correct?
>
> A: Yes.
>
> Q: And that includes the injections that he had into his spine, correct?
>
> A: Yes.
>
> Q: Right, Now, Doctor, do you agree with me generally that a traumatically induced disc injury is a permanent injury?
>
> A: Yes, depending on what finding of change to the disc you're - - you're indicating. Yes.

2T228:21 – 2T229:9.

In summation, plaintiff argued that Dr. Lopez did not disagree with Dr. Rizzo. The section of testimony noted above directly supports the argument. After the admission on cross-examination that the injuries and treatment were caused by the accident, Dr. Lopez contradicted himself when he was asked by the Defense:

Q: You're confident that there's no objective evidence of injury related to this accident in reviewing the diagnostic imaging?

A: Yes, that's correct.

2T232:2-5.

However, at no point did Dr. Lopez indicate why he answered one way when questioned by Plaintiff's counsel and a different way when questioned by Defendant's counsel. Dr. Lopez did not say anything such as "I didn't hear the full question" or "I misspoke."

Again, the jury was instructed repeatedly that their recollection of the testimony, and the medical testimony in particular, was what they should utilize to make their decisions. Certainly, if there was error, it was properly cured by the Court's careful and deliberate instruction, pursuant to *Litton Industries v. IMO Industries*, 200 N.J. 372, 393-394 (2009). Therefore, Defendant's request for a new trial was properly denied.

POINT V: PLAINTIFF'S COUNSEL'S CLOSING ARGUMENT STATEMENT REGARDING THE DEFENDANT'S RESPONSIBILITY DOES NOT WARRANT A NEW TRIAL.

(Raised below 4T16:17-4T17:15)

The Defendant seeks a new trial on the basis that a statement made during closing argument was so prejudicial that a new trial is the only appropriate remedy. The purportedly offending summation segment was as follows:

> It becomes clear, that even though there's an acceptance of the fault of the acts, there's clearly not a full acceptance of the responsibility of what happened that night and what happened to Keith and what he faces for his future. So, finally we're here, and finally it's going to be given to you folks where you can impose the responsibility that's legally required based upon the evidence of the case. That what's going on now.
>
> 3T19:14-22.

The argument made did not insinuate in any way that the defense was acting in bad faith. The defendant did not object, nor did he seek a curative charge. Counsel is given broad latitude in summing up, and, counsel's failure to object certainly indicates that the argument was not considered prejudicial at the time. *Fertile v. St. Michael's Med. Center*, 169 NJ 481, 495 (2001).

The trial court correctly denied the motion for a new trial. Specifically, the trial court noted that the statement that the jury should "impose responsibility" was not improper, stating that:

> Def atty: ...And he told the jury to impose responsibility upon the Defendant.
>
> First off, imposing responsibility or inferring to the jury to punish the defendant is just wrong. It's against the golden rule.
>
> Court: Well, no. Holding someone responsible for negligent acts is not punishment. The jury charge is clear on that.

> People are required to be - - operate within essentially the standard of care. Either they are, and such a departure from what a reasonable person would do under those circumstances or a failure to act when they should have acted. That is part of the jury charge, that's the jury charge this jury received. They understand that you do not have to have an evil heart in order to be held responsible and negligent in action. I told them [that]. They understood that. And I'm satisfied that that's appropriate. ...

4T16:23 – 4T17:15.

The defendant points to *Geler v. Akawie*, 358 NJ Super 437 (App. Div. 2003), in support of its position. Even a cursory review of the *Geler* case shows how different it is from the present matter. The pervasive continuous and egregious comments by Plaintiff's counsel during the trial and during summations that warranted a new trial in *Geler* are not similar in any way to this case. The Appellate Division on numerous occasions in *Geler* noted the extreme and outrageous nature of counsel's statements, such as counsel asking the jury to put themselves into the position of the Plaintiff's parents who lost their child and had to bury him, counsel's comments about placing dirt on the child's grave, and what it would be like to have to do that to your own child. These comments were extreme, outrageous and pervasive throughout the entire trial warranting multiple objections and grounds for a new trial. *Geler at 465.*

Clearly, the present case is completely dissimilar to the *Geler* case, which, therefore, has no bearing in the analysis of this matter. Instead, the argument was appropriate, and, even if deemed inappropriate, the argument was harmless given the lack of objection and appropriate jury instruction concerning the law on compensation. 3T59:8 – 3T63:25. Therefore, the trial court's denial of the motion for a new trial should be upheld.

POINT VI: PLAINTIFF'S TESTIMONY WAS PROPER AND DOES NOT WARRANT A NEW TRIAL.

(Raised below: 1T42:7-21)

At trial, the Plaintiff, Mr. Hacker, testified with regard to the damage to his vehicle. This was permitted since the defendant did not stipulate that the photographs to be used were authentic. The testimony on direct examination and court ruling at the time of defendant's objection, was as follows:

> Q.: ...My question simply is, after the impact, did you see the vehicle that hit you?
>
> A.: Yes. I stepped out of the truck. I looked at it. I - - I saw the damage to the vehicle. I saw the damage to my vehicle then he just took off.
>
> Q.: Okay. Were you able to - - so you were - - before he took off, you were able to see –
>
> Mr. Giardina: Objection. Your Honor, can we have a sidebar?

THE COURT: I'm going to permit it to the extent that it impacts his ability to make the observation. You can ask him about how long he was able to observe it and the reason why he couldn't observe it.

BY MR. BORBI:

Q. Let me ask you this, Keith. before the vehicle took off, how long were you able to see the vehicle?

A: I'd say maybe 20, 30 seconds.

Q: All right. Were you - - the important question is, were you able to observe the damage to the vehicle in that short period of time before he fled?

A: Yes. I was able to see that the whole side of his car was all messed up.

...

Q: All right. Now, based upon your testimony of seeing the other vehicle and the limited time you had to do that, I want to show you a document marked P-5 for identification. Ketith, does that appear to be the vehicle that struck yours?

A: Yes, it does.

Q: Okay. And it was an Infiniti?

A: Yes.

Q: All right. And you remember that being the damage that you observed at the scene, correct?

A: Yes.

Q: All right. Same thing, briefly, Keith, with P-6 and P-7. First, I'll show you P-6 so we stay in line and them I'm going to show you P-7. Does P-6 and P-7 also appear to

be the vehicle that struck you that you were able to see that evening?

A: Yes, it does.

Q: Does that accurately depict the damage?

A: Yes.

1T42:8 – 1T45:23.

The testimony was relevant to identifying the Defendant who caused the accident, as well as verifying the property damage in the photographs for admission into evidence.

In addition, the defendant did not seek any kind of limiting instruction concerning a reference to the fact that the defendant fled the scene of the accident. The only two objections made after the close concerned the medical testimony of Dr. Lopez, and whether argument concerning the labrum being torn or "torn off", were improper. Had the defense believed that there were prejudicial statements made concerning Defendant fleeing, a cautionary instruction should have been sought.

Further, the trial judge properly instructed the jury that they were to arrive at their determinations without sympathy, bias, or prejudice. 3T63:3-7. Thus, the jury was properly instructed and there was no error necessitating a new trial.

CONCLUSION

Plaintiff respectfully requests that the appeal be denied in its entirety. There was no error at trial, and, even if this Appellate Court finds that there was error, it should be deemed harmless. The jury's verdict should stand, and, the verdict should not be molded.

12/14/23

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Keith Hacker

KEITH HACKER, v. CARLOS JAIME-VALDEZ; MICHELE DONATO; JOHN DOE (FICITIOUS NAMES A-Z AS EMPLOYER OR PRINCIPAL FOR DEFENDANT, CARLOS JAIME-VALDEZ) AND PROGRESSIVE INSURANCE COMPANY, I/J/S/A	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.:A-002886-22 T1 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY, OCEAN COUNTY, CIVIL DIVISION, OCN-L-003112-19 JUDGMENT ENTERED: $1,823,006.96 AGAINST CARLOS JAIME-VALDEZ SAT BELOW: HONORABLE CRAIG WELLERSON, P.J. Cv.

REPLY BRIEF AND APPENDIX OF DEFENDANT/APPELLANT CARLOS JAIME-VALDEZ

Submitted by:

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PRELIMINARY STATEMENT

This appeal centers on the February 28, 2023 Order issued by the Superior Court of New Jersey, Ocean County, in relation to Appellant, Carlos Jaime-Valdez's Motion to Mold, or in the alternative, Motion for New Trial, or in the alternative, Motion for Remittitur in this matter. On February 28, 2023, the court at the trial level denied the Appellant's Motion in full. Appellant's position is that all three requests for relief were meritorious and denied in error:

- The February 28, 2023 Order from the Superior Court of New Jersey failed to apply the U.S. District Court Order of August 18, 2021 which limited Plaintiff's recovery against Appellant to $200,000, the available liability insurance coverage limits.
- The February 28, 2023 Order from the Superior Court of New Jersey failed to apply existing legal standards concerning the excessiveness of the verdict, warranting either a new trial or remittitur.
- The February 28, 2023 Order from the Superior Court of New Jersey failed to apply existing legal standards, warranting a new trial, concerning Plaintiff's counsel's improperly prejudicial summation and improper mention of Appellant having fled the scene of the accident during direct examination of the Appellee.

LEGAL ARGUMENT

I. APPELLEE IS JUDICIALLY ESTOPPED FROM A MONEY JUDGMENT ABOVE THE APPLICABLE LIABILITY COVERAGE(S) TOTALLING $200,000 AND A MOLDING OF THE JUDGMENT IS THE CORRECT METHOD TO REFLECT SAME

The Appealle appears to discuss the Bankruptcy Court determining the Appellant was protected from liability over $200,000 without any context. To be clear, the Bankruptcy Court on July 11, 2023 determined that its August 18, 2021 Court Order acted as a cap of $200,000 when this matter proceeded to trial. 6T. Appealle's argument prior to the Bankruptcy Court's July 12, 2023 ruling was that the August 18, 2021 applied only to economic damages, not non-economic damages. 6T. In interpretation of the Bankruptcy Court's August 18, 2021 Order which Appealle drafted and sought, the Trial Court in this matter refused to apply the August 18, 2021 Order and, eventually, deferred to Bankruptcy Court's interpretation. 5T. This was something Appealle's counsel felt was best left to the Bankruptcy Court's judgment in February of 2023. Dr1-3. On July 11, 2023, the Bankruptcy Court held a hearing and noted that the August 18, 2021 was not limited to economic damages vs. non-economic damages. 6T7-8:9-3. The Bankruptcy Court remarked at its July 11, 2023 hearing that "Mr. Hacker represented to this Court that he is only seeking to continue the state court litigation up to the amount of the insurance and this Court accepted that representation and granted him stay relief because of it. Mr. Hacker cannot now go the state court and argue the

inconsistent position that he wants the insurance money and to collect personally from the debtor. The Court finds that outcome here is dictated by *Fleck v. KDI Sylvan Pools*, 981 2d 107. In *Fleck* the 3rd Circuit concluded that, and I'll quote here, the Bankruptcy Court's order makes clear that the Court lifted the automatic stay because the Flecks represented that any judgment will be limited to the insurance proceeds. A party who petitions a bankruptcy court to lift the stay be agreeing to limit their recovery against the protected debtor cannot later collect (indiscernible) in its entirety on a judgment that exceeds the agreed-upon limit….What he apparently did, and many state court plaintiffs, do was to decide not to pursue a potentially judgment-proof debtor but instead limit himself to the amount of insurance." 6T8:8-24; 6T9:16-19.

The Trial Court ruled on December 1, 2023 that the judgment past $200,000 shall be discharged, but only executed an ambiguous order "acknowledging" the Bankruptcy Court's rulings. 7T; Dr4. The reality is that the February 28, 2023 Judgment in this matter should have conformed with the August 18, 2021 Bankruptcy Court Order and was in error in lacking to do so.

Appealle's allegations of bad faith litigation appear to be just as erroneous. As an initial matter, the Appeallant takes aim at Appealle's assertion that the Appellant's Appeal is simply to protect the insurance carriers from a bad faith claim and has nothing to do with the protection of Mr. Jaime-Valdez. In reality, Appealle

openly threatens to not execute a Warrant to Satisfy Judgment whether or not he personally has to pay the judgment. This is exactly why this judgment should be molded to $200,000-because that is what is recoverable against the Appeallant. Now, Appellee is taking the position that the Judgment should not be molded to the policy limits as he has a potential bad faith claim under *Rova Farms Resort, Inc. v. Investors Ins. Co. of America*, 65 N.J. 474 (1974). This is simply not the case. This duty discussed in *Rova Farms* was the importance of good faith settlement negotiations in the context of the insured being personally liable for any damages in excess of a policy limit. *Id.* at 492, 323 A.2d 495. The Court reasoned that, in essence, an insurer choosing not to settle within the limits of coverage should not be permitted to gamble with its insured's money. *Id.* at 501-02, 323 A.2d 495. One of the central reasons courts have not applied *Rova Farms* in the UM context is that the insured's assets are not placed at risk for failure to settle within the policy limits. *Taddei v. State Farm Indem. Co.*, 401 N.J. Super. 449, 459 (App. Div. 2008). However, the Bankruptcy Court and Trial Court both acknowledge that Appeallant has no personal exposure in this matter. 6T; 7T. Therefore, there is no valid bad faith claim under *Rova Farms* and looking at Georgia law or Florida law are simply red herrings. Appealle's citations to *Flanders* and *Accord Camp* are flawed to the extreme. *Flanders* concerns Georgia law. Georgia allows direct claims by a plaintiff against a defendant's insurer for the excess verdict under a bad faith claim. New

Jersey, and *Rova Farms*, does not. See *Ross v. Lowitz*, 222 N.J. 494 (N.J. 2015). *Accord Camp*, under Florida law, concerns a Bankruptcy trustee's ability to make a bad faith claim, not a plaintiff, because of actual harm made to an estate. Appealle cites to nothing that actually supports his alleged bad faith claims under New Jersey he wishes to pursue because the bases are entirely non-existent.

Molding, or amending, the judgment is materially no different than a verdict being converted to a molded judgment based on a high/low agreement or in a UM case there being a molded judgment due to the UM limits. See *Taddei v. State Farm Indem. Co.*, 401 N.J. Super. 449, 459 (App. Div. 2008); *Malick v. Seaview Lincoln Mercury*, 398 N.J. Super. 182 (App. Div. 2008) (the verdict was molded in accordance with the high-low agreement). In general, a jury verdict should be transformed into a judgment when the Plaintiff can recover only a "sum certain." See *Ciechanowski v. New Jersey Mfrs. Ins. Co.*, 2009 N.J. Super. Unpub. LEXIS 2045, *14-15.

Lastly, it is not the Appeallant who incorrectly asserts that Appealle "agrees" that the Bankruptcy Court correctly applied "judicial estoppel." From one of Appealle's own briefs[1], "The Court correctly interpreted Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107 (3rd Cir. 1992) as prohibiting Hacker from enforcing the

[1] The brief is not prohibited under R. 2:6-1(a)(2) as it was not a brief submitted for the trial court, but for federal court purposes in the Bankruptcy Division.

Judgment against the Debtor [Defendant] personally in excess of the $200,000 policy limits… Hacker acknowledges that the Court correctly determined that he was limited to recovering against Debtor [Defendant] up to his insurance policy limits in accordance with the terms of the order Hacker requested and which granted him stay relief to pursue his claim on condition that any recovery against Debtor [Defendant] was limited to the policy proceeds." Dr6.

II. THE JURY VERDICT WAS A MISCARRIAGE OF JUSTICE THAT SHOCKS THE JUDICIAL CONSIENCE REQUIRING A NEW TRIAL OR, IN THE ALTERNATIVE, REMITTITUR

The Appeallant relies on its November 28, 2023 Brief.

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III. APPELLEE'S COUNSEL'S MISCHARACTERIZATION OF APPELLEE'S INJURIES IN SUMMATION REQUIRE A NEW TRIAL

Appellee's position that there was no mischaracterization is absurd. No medical expert testified that labruem was "torn off." Tearing and complete tears are materially different and Appealle played fast and loose with the medical diagnoses in this case. Therefore, Appealle's counsel's comments at closing were not confined to the facts shown or reasonably suggested by the evidence introduced during the course of trial. Accordingly, it ran afoul of *Colucci v. Oppenheim*, 326 N.J. Super. 166, 177 (App. Div. 1999).

IV. APPELLEE'S COUNSEL'S MISLEADING CITATIONS TO DR. LOPEZ'S TESTIMONY REQUIRES A NEW TRIAL

Again, Appealle cherry-picks a cited portion of Dr. Lopez's testimony where Dr. Lopez agreed with Appellee's counsel during his cross-examination that Appellee's treatment was "reasonable and medically necessary directly as a result of the accident." 2T228:21-229:1. However, this ignores the fact that Dr. Lopez clarified his testimony clearly that he meant the treatment was reasonable, but not related to the accident. 2T233:25-234:6. Appealle even brings up testimony by Dr. Lopez where he noted the MRI results were in his opinion degenerative. It was clearly a misquote and Appealle's counsel wrongly took advantage and try to leave an undeniable impression that Dr. Lopez found the treatment was not only, causally reasonable and medically necessary which he undoubtedly misstated, but more important that "it's all permanent and it's all related to the accident." Dr. Lopez never testified that way and the prejudicial effect of a false recitation of Dr. Lopez's opinion is incalculable. Appealle's pointing that juries are to rely on their own recollections should not be a shield to cite falsities on summation.

V. APPELLEEE'S COUNSEL'S REFERENCE FOR THE JURY TO "IMPOSE RESPONSIBILITY' UPON THE APPELLANT WAS INAPPROPRIATE AND WARRANTS A NEW TRIAL

The Appeallant relies on its November 28, 2023 Brief.

VI. APPELLEE'S TESTIMONY THAT APPELLANT FLED THE SCENE OF THE ACCIDENT WAS IRRELEVANT, IMPROPER AND WARRANTS A NEW TRIAL (Raised below: 1T42:7-21)

Appealle's argument that the testimony was relevant to identifying the Appeallant as causing the accident is absurd. Appeallant stipulated to same prior to trial. Moreover, the reference to Appeallant having fled occurred before any verification of property damage photographs took place which were also undisputed.

CONCLUSION

For the foregoing reasons, the Appellant's appeal is meritorious.

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