SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

SONIA COLON and LUIS REINOSO, Plaintiffs-Respondents, v. DELAWARE RIVER PORT AUTHORITY; PORT AUTHORITY TRANSIT CORPORATION a/k/a PATCO; AP CONSTRUCTION, INC.; AE STONE, INC.; S. BATATA CONSTRUCTION, INC., and JOHN DOES III through X, Defendants-Appellants, and DELAWARE RIVER PORT AUTHORITY and PORT AUTHORITY TRANSIT CORPORATION a/k/a PATCO, Defendants/Third-Party Plaintiffs-Appellants, v. AE STONE, INC., Third-Party Defendant/Fourth-Party Plaintiff-Respondent, v. S. BATATA CONSTRUCTION, INC., Fourth-Party Defendant-Respondent.	DOCKET NO. A-3375-22 On appeal from the Superior Court of New Jersey, Law Division, Civil Part, Camden County Docket No. CAM-L-4463-19 SAT BELOW: Anthony M. Pugliese, J.S.C. and Daniel A. Bernardin, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS/THIRD-PARTY PLAINTIFFS-APPELLANTS, DELAWARE RIVER PORT AUTHORITY AND PORT AUTHORITY TRANSIT CORPORATION a/k/a PATCO

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ORDERS BEING APPEALED

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2. Order dated October 22, 2021 granting summary judgment to fourth-party defendant, S. Batata Construction, Inc.

3. Order dated March 20, 2023 granting in part and denying in part Defendants' motion in limine to exclude lay testimony at trial that the location of Plaintiff's fall was unreasonably hazardous and/or dangerous

4. Order dated March 20, 2023 denying Defendants' motion in limine to preclude at trial the testimony and report(s) of Plaintiffs' proposed medical cost projection expert, Linda Lajterman of ADM Consulting Group

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PRELIMINARY STATEMENT

This is a multi-pronged appeal from: (1) the trial court's decision to grant Defendants A.E. Stone, Inc.'s and S. Batata Construction, Inc.'s summary judgment motions and (2) the trial court's decisions to deny Defendants Delaware River Port Authority and Port Authority Transit Corporation's (collectively, "Defendants"): (a) two motions in limine; (b) request for a mistrial; and (c) motion for a new trial. Further, Defendants appeal the trial court's Order for Judgment, after a jury trial which resulted in a grossly excessive verdict in favor of Plaintiffs Sonia Colon and Luis Reinoso (collectively, "Plaintiffs").

This Court should reverse the trial court on the summary judgment motions and remand the matter for a new trial because the trial court improperly: (1) determined an expert's deposition testimony was a net opinion; (2) injected the issue of liability expert testimony into the case without permitting the parties to address the issue; and (3) ignored Defendants' pending claims for breach of contract, contribution, and indemnification.

This Court should also reverse the trial court on the motions in limine and remand for a new trial because: (1) both lay and expert opinion testimony was improperly considered by the jury, while (2) significant factual evidence was

improperly kept from the jury. This, in turn, caused the jury to decide the case on improper evidence necessitating a new trial.

Furthermore, Plaintiffs' counsel's closing argument: (1) violated the "golden rule"; (2) urged the jury to improperly draw an adverse inference for failing to call an expert witness; (3) disparaged Defendants and their counsel, seeking to incite the jury to "send a message" to Defendants with their verdict; (4) misstated the evidence; and (5) impermissibly appealed to the jury's emotions. As such, this Court should reverse the trial's denial of Defendants' motion for a mistrial and remand the matter for a new trial.

Finally, this Court should reverse the trial court on Defendants' new-trial motion because the verdict was shocking given the evidence presented and likely a direct result of Plaintiffs' counsel's improper closing.

At the very least, and as Plaintiffs agree, this Court should vacate the Order for Judgment and remand the matter to the trial court since the interest on the judgment was calculated incorrectly.

Put simply, the sheer number of errors below warrants a reversal and a new trial in this matter under any standard of review.

CONCISE STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Plaintiff-Respondent Sonia Colon ("Ms. Colon") alleges she injured her arm in a trip and fall on May 30, 2018 on a sidewalk at the Collingswood Speedline Station in Collingswood, New Jersey. (Da134, ¶¶ 8-10). Ms. Colon's husband, Plaintiff-Respondent Luis Reinoso ("Mr. Reinoso"), alleges loss of consortium. (Da136-37, ¶¶ 11-14). The DRPA owns the sidewalk and PATCO maintains it. (Da55, ¶ 5). The DRPA had previously contracted Third-Party Defendant/Fourth-Party Plaintiff-Respondent, AE Stone, Inc. ("AE Stone"), to install the sidewalk. (Da55, ¶ 6). AE Stone then subcontracted the work to Fourth-Party Defendant-Respondent, S. Batata Construction, Inc. ("S. Batata"). (Da120, ¶ 2).

Ms. Colon and Mr. Reinoso (collectively, "Plaintiffs") filed their Complaint on November 5, 2019 against the DRPA, PATCO, and AP Construction, Inc. ("AP Construction"), alleging improper installation of the sidewalk. (Da37). After filing an Answer to the Complaint on December 18, 2019, (Da45), Defendants filed a Third-Party Complaint against AE Stone on March 11, 2020, asserting claims for breach of contract and contractual indemnification. (Da54). AE Stone filed its Answer on April 13, 2020 along

[1] Defendants have combined the Statement of Facts and Statement of Procedural History for the sake of convenience to the Court to best describe the record of events in this matter.

with a Fourth-Party Complaint against S. Batata. (Da116). S. Batata filed its Answer on May 1, 2020. (Da125).

After successfully moving to Amend the Complaint (Da132), Plaintiffs filed an Amended Complaint on August 20, 2020, adding AE Stone and S. Batata as direct defendants. (Da134). Defendants filed an Answer to Plaintiffs' Amended Complaint on September 3, 2020, asserting common law claims for contribution and indemnification against AE Stone and S. Batata. (Da142). AE Stone and S. Batata filed their Answers to the Amended Complaint on September 21, 2020 and April 19, 2021, respectively. (Da151, Da158). AP Construction was dismissed from this action without prejudice on January 28, 2021. (Da164).

Following discovery, AE Stone and S. Batata moved for summary judgment, arguing there was no evidence that they violated any standard of care. The motion judge ruled that the testimony of PATCO employee Adam Jacurak ("Mr. Jacurak"), upon which Defendants intended to rely in support of their claims and defenses, constituted a net opinion and, therefore, granted the motions. (Da 233, Da 277) (1T23-14 to 26-21).[2] AE Stone and S. Batata were dismissed from the litigation on October 22, 2021, despite Defendants' pending claims for breach of contract, contribution and indemnification.

[2] See Index of Transcripts above.

Prior to trial, Defendants filed two motions in limine. One motion in limine was to exclude lay testimony at trial stating that the location of Ms. Colon's fall was unreasonably hazardous and/or dangerous. (Da279). On March 20, 2023, the trial court granted the motion in part and denied it in part. (Da279). The net effect was the read-in of portions of the deposition testimony of Mr. Jacurak for purposes of establishing negligence on the part of Defendants. This was the same testimony which a different trial court judge, in connection with the summary judgment motions of AE Stone and S. Batata, had ruled constituted a net opinion. (1T23-14 to 26-21).

The second motion in limine sought to exclude the testimony and report of Linda Lajterman, Plaintiffs' proposed medical cost projection expert. (Da283). The motion was denied, which resulted in Ms. Lajterman's unsupported testimony regarding the alleged future medical expenses to be incurred by Ms. Colon. (Da283).

The matter was tried to a jury from March 21-24, 2023 (3T to 6T), with the jury returning a verdict in Plaintiffs' favor and attributing 100% of the negligence to Defendants. (Da319). Ms. Colon was awarded $1,250,000 (inclusive of $500,000 for pain and suffering and $750,000 for future medical expenses); Mr. Reinoso was awarded $300,000. Id. An Order for Judgment was entered against Defendants on March 31, 2023. (Da322). On April 12, 2023,

Defendants filed a motion for a new trial, which was denied on June 9, 2023. (Da284; 8T). This appeal followed.

STANDARDS OF REVIEW

A. Summary Judgment

"In reviewing the dismissal of a complaint on summary judgment, [the Appellate Division] appl[ies] the same legal standards as the Law Division." Singer v. Beach Trading Co., 379 N.J. Super. 63, 72-73 (App. Div. 2005). That is, it must determine whether the competent evidential materials presented, when viewed in the light most favorable to the nonmoving party, are sufficient to permit a rational fact finder to resolve the disputed issues in favor of the non-moving party. Id. (citing R. 4:46-2(c); Brill v. Guardian Life Ins. Co., 142 N.J. 520, 539-41 (1995)). While it "cannot weigh the credibility of the evidence." Petersen v. Township of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011), it is "not obligated to defer to the trial court's legal rulings." Singer, 379 N.J. Super. at 80 (citing Manalapan Realty, L.P. v. Manalapan Tp. Comm., 140 N.J. 366, 378 (1995)).

B. Closing Arguments/Plain Error

"The trial court has broad discretion in the conduct of the trial, including the scope of counsel's summation." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 392 (2009). "The abuse of discretion standard applies to the trial

court's rulings during counsel's summation." Id. at 392-93. When no objection was made to the comments, the appellate court applies the plain error standard. R. 2:10-2; State v. Santamaria, 236 N.J. 390, 404 (2019); Fertile v. St. Michael's Med. Ctr., 169 N.J. 481, 493 (2001).

Rule 2:10-2 provides that "[a]ny error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court." The Rule applies to criminal, civil, and administrative appeals. See Pressler & Verniero, Current N.J. Court Rules, cmt. 2.1 on R. 2:10-2 (2024). All error, including both plain error and harmful error, is tested by the standard set forth in Rule 2:10-2. That is, whether the error is "clearly capable of producing an unjust result." When a party does not object to an alleged trial error or otherwise properly preserve the issue for appeal, it may nonetheless be considered by the appellate court if it meets the plain error standard of Rule 2:10-2. State v. Clark, 251 N.J. 266, 286-87 (2022); State v. Singh, 245 N.J. 1, 13 (2021); State v. Gore, 205 N.J. 363, 383 (2011). In the context of a jury trial, the test is whether the error was "'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" State v. G.E.P., 243 N.J. 362, 389-90 (2020) (quotations omitted).

C. In Limine Motions

The Appellate Division applies "the same abuse of discretion standard of review as the trial court to in limine motions adjudicating the admissibility of evidence." Primmer v. Harrison, 472 N.J. Super. 173, 187 (App. Div. 2022), certif. denied, 253 N.J. 47 (2023). Nonetheless, "courts generally disfavor in limine rulings on evidence questions." State v. Cordero, 438 N.J. Super. 472, 484 (App. Div. 2014), certif. denied, 221 N.J. 287 (2015). "[A] trial judge generally should not rule on the admissibility of particular evidence until a party offers it at trial." State v. Cary, 49 N.J. 343, 352 (1967).

D. Evidentiary Rulings

An appellate court "will not substitute [its] judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" State v. Garcia, 245 N.J. 412, 430 (2021) (quoting State v. Medina, 242 N.J. 397, 412 (2020)). However, "[a] trial court's 'discretion is abused when relevant evidence offered by the defense and necessary for a fair trial is kept from the jury.'" State v. R.Y., 242 N.J. 48, 65 (2020) (citation omitted).

E. Mistrial

A decision to grant or deny a motion for mistrial is addressed to the sound discretion of the trial judge. State v. Smith, 224 N.J. 36, 47 (2016). However, a mistral can be granted in the event of a clear showing of an abuse of discretion

that results in a manifest injustice. Id.; State v. Jackson, 211 N.J. 394, 407 (2012); McKenney v. Jersey City Med. Ctr., 167 N.J. 359, 376 (2001).

F. Damages Against The Weight Of The Evidence

The standard of appellate review when considering a "weight of the evidence" argument is essentially the same standard that applies to a trial court's review of a new-trial motion: to determine whether there was a miscarriage of justice under the law. See Dolson v. Anastasia, 55 N.J. 2, 7 (1969); R. 2:10-1. While the appellate court must give deference to the trial court's view of criteria not transmitted by the written record (i.e., witness credibility, demeanor and the "feel of the case"), it owes no deference to the trial court's decisions resting on the "worth, plausibility, consistency or other tangible considerations apparent from the face of the record with respect to which [the trial court] is no more peculiarly situated to decide than the appellate court." Dolson, 55 N.J. at 7; see also Baxter v. Fairmont Food Co., 74 N.J. 588, 597-98 (1977) (judgment following jury verdict may be overturned if, "after canvassing the record and weighing the evidence . . . the continued viability of the judgment would constitute a manifest denial of justice"). Indeed, a new trial is appropriate where "to do otherwise would result in a miscarriage of justice shocking to the conscience of the court." Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 521 (2011) (citing Kulbacki v. Sobchinsky, 38 N.J. 435, 456

(1962)). A miscarriage of justice is "a pervading sense of wrongness needed to justify an appellate or trial judge undoing of a jury verdict which can arise from manifest lack of inherently credible evidence to support the finding, obvious overlooking or undervaluation of crucial evidence, or a clearly unjust result." Id. at 521-22 (internal quotations and citations omitted).

Appellate courts will not consider a "weight of the evidence" argument unless a new-trial motion asserting the argument was first made in the trial court. See R. 2:10-1. Here, Defendants moved for a new trial based on, among other things, the excessive judgment as against the weight of the evidence. (7T; 8T). Defendants' motion was denied, making this argument cognizable on appeal. See R. 2:10-1. (Da 284).

G. Motion for New Trial

"The standard of review on appeal from decisions on motions for a new trial is the same as that governing the trial judge—whether there was a miscarriage of justice under the law." Hayes v. Delamotte, 231 N.J. 373, 386 (2018) (quoting Risko, 206 N.J. at 522). See Township of Manalapan v. Gentile, 242 N.J. 295, 304-05 (2020). "[A] 'miscarriage of justice' can arise when there is a 'manifest lack of inherently credible evidence to support the finding,' when there has been an 'obvious overlooking or under-valuation of crucial evidence,'

or when the case culminates in 'a clearly unjust result.'" Hayes, 231 N.J. at 386 (quoting Risko, 206 N.J. at 521-22).

LEGAL ARGUMENT

I. THE MOTION JUDGE ERRED IN GRANTING SUMMARY JUDGMENT TO AE STONE AND S. BATATA (Da277 and Da233).

The motion judge's improper grant of summary judgment to AE Stone and S. Batata resulted in an improper allocation of liability by the jury thereby creating reversible error. See Hoelz v. Bowers, 473 N.J. Super. 42, 64-65 (App. Div. 2022) (discussing the importance of the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1 to -5, and the Comparative Negligence Act, N.J.S.A. 2A:15-5.1 to 5.8, in seeking to have a jury apportion fault amongst all negligent parties).

Adam Jacurak, a professional engineer and, at various times, the Director of Track and Facilities for PATCO and the Manager for Construction and Maintenance for the DRPA, was produced for his deposition as the Rule 4:14-2(c) representative on behalf of PATCO. (Da301, 14-24 to 15-25). He testified in his deposition that based on his prior experience, large settlements which create gaps sufficient to create a tripping hazard do not normally occur when sidewalks are properly installed. Id. at 27-10 to 24 (Da304). This testimony was sufficient to create a fact issue which should have been resolved by a jury

assessing Mr. Jacurak's credibility, among other things, thereby prohibiting summary judgment.

Both AE Stone and S. Batata argued in their written summary judgment motions that the claims against them must be dismissed because there was no evidence that either of them had failed to adhere to a relevant standard of care that was a proximate cause of the incident. Of note, neither argued that Mr. Jacurak was an expert whose deposition testimony was an inadmissible net opinion. In opposition, Defendants, joined by Plaintiffs, argued that Mr. Jacurak's deposition testimony had created a fact issue sufficient to survive summary judgment.

At the conclusion of oral argument, the motion judge sua sponte assumed Mr. Jacurak was a qualified expert, but nonetheless ruled his deposition testimony was an inadmissible "net opinion." (1T23-22 to 24-4). As such, the motion judge concluded and without citing a single case despite the requirements of Rule 1:7-4, Defendants and Plaintiffs failed to show a fact issue as to any competent evidence establishing AE Stone and S. Batata violated a standard of care. (Id. at 23-14 to 26-20). The judge then granted the motions for summary judgment. (Id. at 26-21). This, alone, was reversible error. See, e.g., In re Doerfler, 454 N.J. Super. 298, 301 (App. Div. 2018) (reversing trial court's grant of summary judgment for failure to comply with Rule 1:7-4 because

"[n]either the parties nor [the appellate court] are well-served by an opinion devoid of analysis or citation to even a single case").

A. Mr. Jacurak's Opinion Was Not An Inadmissible Net Opinion (1T23-12 to 26-21).

"Under the 'net opinion' rule, an opinion lacking in . . . foundation and consisting of bare conclusions unsupported by factual evidence is inadmissible." Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002) (citations omitted). To be admissible, an expert must "give the why and wherefore of [their] opinion, rather than a mere conclusion." Id. (quotation and citation omitted).

Here, the motion judge based his decision, in part, on Mr. Jacurak not visiting the incident site and instead only seeing a photo of the sidewalk. (1T24-4 to 5). However, it is unnecessary for an expert to visit the site in order to admit their opinion. See, e.g., Savoia v. F.W. Woolworth Co., 88 N.J. Super. 153 (App. Div. 1965) (reversing appellate court and permitting expert familiar with such devices to opine on a mechanical hobby horse even though the expert did not inspect it and only saw a photo of it).

The motion judge also based his decision on Mr. Jacurak's failure to cite any standards. (1T24-19 to 23). Though Jacurak testified about his experience with sidewalk installs in his capacity as an engineer, Jacurak Dep. at 25-5 to 14 (Da303), he was not asked about any relevant standards, see Jacurak Dep.

(Da297 to Da318). The failure to cite any standards does not render an expert's opinion inadmissible since the expert's prior similar experience alone is sufficient. See, e.g., Rosenberg, 352 N.J. Super. at 402-03 (reversing trial court and permitting expert's opinion in medical malpractice case where expert based their opinion on their prior experience in such situations without citation to certain standards or "any treatises, articles, protocols or the like in support of [their] opinion"); Coutts v. Madden, A-3455-13T1, 2015 N.J. Super. Unpub. LEXIS 2095, *21-*22 (N.J. Super. App. Div. Aug. 28, 2015)[3] (unpublished) (Da324) (upholding trial judge's decision to allow expert testimony in a raised sidewalk slab case like ours where: (1) Expert's failure to cite certain ADA standards "did not reduce [the expert's] opinion to a net opinion"; (2) Adverse party objected to the expert's opinion because the expert "failed to explain how, why[,] or when the slab became elevated, and therefore failed to explain any cause for the condition"; and (3) The expert's "*essential* opinion as an engineering expert [was] that the walkway was a tripping hazard likely caused by seasonal thermal changes that elevated one of the slabs").

[3] Though not precedential or binding on the Court, all unpublished opinions cited herein are submitted as secondary research for the Court's consideration. See R. 1:36-3; National Union Fire Ins. Co. v. Jeffers, 381 N.J. Super. 13, 18 (App. Div. 2005). Pursuant to Rule 1:36-3, counsel is unaware of any contrary unpublished opinions.

Put simply, Mr. Jacurak's expert opinion was not an inadmissible net opinion. As such, "[a]ny perceived deficiencies in his [opinion] should have been left to the consideration of a jury to determine the credibility, weight[,] and probative value of [his] testimony." Rosenberg, 352 N.J. Super. at 400-01 (quotation and citation omitted); see, e.g., Rosenberg (reversing trial court's granting of an involuntary dismissal and remanding for trial because, in part, trial judge incorrectly determined that liability expert's opinion was a net opinion where trial judge should have allowed the jury to evaluate the expert's opinion).

B. The Motion Judge Sua Sponte Unfairly Created The Issue Of Liability Experts (1T23-12 to 26-21).

None of the parties briefed or orally argued Mr. Jacurak's expert status or the net opinion issue. Further, Mr. Jacurak did not draft an expert report and none of the parties submitted any liability expert reports. The issue of liability experts was not an issue in the case until the motion judge made it one at oral argument. Thus, at the very least, the motion judge should have either adjourned the summary judgment motions or granted them without prejudice to allow the parties to address those issues.

This is particularly true since "summary judgment is an extraordinary measure to be taken only with extreme caution, especially where a cause of action rests upon expert testimony." Vassallo v. American Coding & Marking

Ink. Co., 345 N.J. Super. 207, 216 (App. Div. 2001) (quotation and citation omitted) (emphasis added). "The preferred course [wa]s to deny summary judgment and permit the matter to proceed, so that [Mr. Jacurak]'s opinion can be fleshed out." Id. (quotation and citation omitted).

C. The Motion Judge Ignored Defendants' Breach of Contract, Contribution, and Indemnification Claims (1T23-12 to 26-21).

In addition, Defendants asserted claims for contribution and indemnification against AE Stone and S. Batata, along with a claim for breach of contract against AE Stone. (Da142; Da54). The motion judge failed to address these claims when dismissing AE Stone and S. Batata, (1T23-14 to 26-21). This violated Rule 1:7-4, thereby necessitating a reversal.

In conclusion, upon de novo review, the Appellate Division should reverse the trial court's orders granting summary judgment and remand for a new trial including both AE Stone and S. Batata for a proper allocation of liability, if any. Defendants' claims for breach of contract, contribution, and indemnification should also be reinstated.

II. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR MISTRIAL AFTER PLAINTIFFS' COUNSEL'S CLOSING (5T143-24 to 149-6).

A. Plaintiffs' Counsel Violated The Golden Rule (5T136-3 to 140-5).

> As early as 1910, our courts recognized that in determining damages, jurors were not free to adopt what they would want as

> compensation for injury, pain and suffering, but were instead required to base their verdict upon what a reasonable person would find to be fair and adequate in the circumstances.
>
> [Geler v. Akawie, 358 N.J. Super. 437, 464 (App. Div.) (citation omitted), certif. denied, 177 N.J. 223 (2003).]

"The Old Testament's 'golden rule' that you should do unto others as you would wish them to do unto you may not be applied in this context." Id. (citing Botta v. Brunner, 26 N.J. 82, 94 (1958) (other citations omitted)). When counsel argues or suggests the golden rule they "encourage[] the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." Id. (quotation and citation omitted).

See, e.g., Geler (reversing and remanding for new trial on liability and damages where counsel invoked the golden rule with language similar to our case); Henker v. Preybylowski, 216 N.J. Super. 513 (App. Div. 1987) (reversing and remanding for new trial on damages where same); Morgan v. Maxwell, A-3157-19, 2021 N.J. Super. Unpub. LEXIS 718 (N.J. Super. Ct. App. Div. Apr. 26, 2021) (unpublished)[4] (Da331) (reversing and remanding for new trial on damages where same).

Here, in an effort to get the jury to place themselves in Plaintiffs' shoes, counsel repeatedly violated the golden rule with the following arguments:

[4] Pursuant to Rule 1:36-3, counsel is unaware of any contrary unpublished opinions.

- Think about everything you've been through in your life till now. And I'd like to believe if you think about half of that spent unable to use your dominant hand the way you want to, having to learn to write. I was thinking -- I was grabbing my phone to text someone, and I, you know, I was texting and I thought to myself, my God, if I couldn't use my dominant hand to text and I had to try it with the hand that I don't use to text, it's awkward, it's hard, it's annoying. If I couldn't button the button of my shirt today and I had – and I had to ask my husband or my granddaughter or my daughter for help it's embarrassing.

  [(5T136-3 to 15).]

- So I want to ask you something. I want to ask you to go in the back and I want to ask you to really think this through. And I have a hard time for a lot of people thinking about how do you determine this. Well, she's got 28 years – 28.7 years of life left. Where were you 28.7 years ago? What was going on in your life? How much has happened in 28.7 years? Did you get married, did you have kids, did you have grandkids, did you change jobs?

  [(Id. at 138-6 to 14).]

- What would one hour be worth? What's it worth for one hour in Sonia Colon's shoes? Would you want to be there for an hour? Would you want to be there for a week? Would you want to be there for 8,700 plus hours times 28?

  [(Id. at 139-12 to 17).]

- [Referencing Mr. Colon:] He had found his dream job. He had worked from small auto sales shops to be able to work at the Acura in Maple Shade, which, listen, that's his dream job. I don't know what your dream jobs were, but he was forced to make a decision.

  [(Id. at 140-1 to 5).]

Similar to the above caselaw, such comments were designed to impermissibly invoke the golden rule such that a new trial is warranted.

B. Plaintiffs' Counsel Improperly Commented On Defendants Not Calling Their Expert Doctor At Trial (5T129-24 to 130-4).

"There are . . . many explanations for a party's decision not to call a particular expert that may have nothing to do with a party's fear that the expert will reveal prejudicial information." Washington v. Perez, 219 N.J. 338, 363 (2014). As such, an adverse inference "charge will rarely be warranted when the missing witness is not a fact witness, but an expert." Id. at 364 (referencing State v. Clawans, 38 N.J. 162 (1962)). It therefore follows that "[i]f [such] a . . . jury instruction is not given with respect to a witness, counsel should not be permitted to argue to the jury that it should draw an adverse inference from the absence of the witness." Id. at 364 n.7 (citation omitted).

Here, counsel improperly sought for the jury to draw an adverse inference when Defendants did not call their expert doctor at trial: "I told you at the beginning that there was a deposition that was taken of a defense doctor and we would see if it was taken. . . . It wasn't. Why do you think that was? Because there's no debate here about the severity of this injury." (5T129-24 to 130-4). Such a comment also incorrectly suggested to the jury that they were not free to ignore Plaintiffs' expert doctor's testimony. See Model Jury Charges (Civil), 1.13 "Expert Testimony" (approved Apr. 1995).

C. Plaintiffs' Counsel Made Disparaging Remarks About Defendant PATCO And Defendants' Counsel To Incite The Jury To "Send A Message" By Their Verdict (5T122-1 to 129-2).

"An attack by counsel upon a litigant's character or morals, when they are not an issue, is a particularly reprehensible type of impropriety." Henker, 216 N.J. Super. at 518; see, e.g., Henker (reversing trial court and granting new trial on damages where counsel accused adverse party of acting in bad faith and verbally attacked adverse counsel).

While counsel's arguments are expected to be passionate, those arguments should be fair, grounded in the evidence, and free from any potential to cause injustice, such as unfair and prejudicial appeals to emotion. Jackowitz v. Lang, 408 N.J. Super. 495, 504-05 (App. Div. 2009) (citing Geler, 358 N.J. Super. at 463); see also State v. Black, 380 N.J. Super. 581, 594 (App. Div. 2005) ("[It is] improper to construct a summation that appeals to the emotions and sympathy of the jury."), certif. denied, 186 N.J. 244 (2006). In Jackowitz, this Court affirmed a trial court's grant of a new trial, reasoning that while counsel in that case did not overly implore the jury to "send a message," the thematic overtones of his summation advanced the same prohibited message. Id. at 508. This Court in Jackowitz found that a careful review of the summation by counsel concentrated on what the defendant did wrong and was designed to exact punishment. Id.; see also Szczecina v. PV Holding Corp., 414 N.J. Super.

173 (App. Div. 2010) (reversing and remanding for new trial where counsel urged jury to send a message with its verdict); Morgan, 2021 N.J. Super. Unpub. LEXIS 718 (reversing and remanding for new trial on damages where counsel indirectly asked jurors to send a message to defendant).

Here, in an effort to anger the jury and appeal to their emotions to get them to send a message to Defendants, Plaintiffs' counsel inappropriately pointed out that Defendant PATCO "didn't send a corporate representative" to the trial but "sent an investigator" instead. (5T122-1 to 3). Counsel continued: "They didn't have someone come down here who was willing to actually stand up for what they want." (Id. at 122-13 to 15). Implying that Defendant PATCO did not care about Plaintiffs when PATCO had counsel and a representative present for the trial.

Then counsel turned his focus to Defendants' counsel: "And so the question becomes where are these inspections? Remember, I showed you the language. I specifically requested these inspection records. Did you see them? . . . Did they show you a single thing? Doesn't it make you wonder why?" (Id. at 123-1 to 4 and 9 to 10). Suggesting that defense counsel was hiding such records and acting in bad faith. But the facts were that counsel never sent a formal discovery request for the records nor did counsel move to compel their production.

But counsel did not stop there, implying Defendants acted in bad faith and put forth a dishonest defense: "So instead, you know what we're going to do? We're going to add insult to injury. . . . First, the marching orders to argue to you is . . . Ms. Colon[] was obviously distracted and not paying attention. Those are the marching orders." (Id. at 123-10 to 17 (emphasis added)). Later, counsel added: "We're here because PATCO didn't give us a choice, cause PATCO has said from the beginning that they're not at fault and they shouldn't be held accountable." (Id. at 128-24 to 129-2). Again, impermissibly suggesting that Defendants never made a pretrial settlement offer. While N.J.R.E. 408 prohibits the admissibility of settlement discussions, counsel should not be permitted to imply to the jury that no such settlement offer was made.

These arguments were inappropriate. While they did not explicitly exhort the jury to "send a message," their thematic overtones advanced the same message – that the conduct of Defendants should not be tolerated, and they should be punished for it. It is highly likely that these arguments, along with the golden rule invocation, contributed to the clearly excessive amounts of damages awarded in this case.

D. Plaintiffs' Counsel Misstated The Evidence (5T118-11 to 20).

While enjoying broad latitude in summation, "counsel's comments must be confined to the facts shown or reasonably suggested by the evidence

introduced during the course of the trial." Hayes, 231 N.J. at 387 (quotation and citations omitted). "Further, counsel should not misstate the evidence nor distort the factual picture." Id. at 387-88 (quotation and citations omitted). The remedy for such a violation "may . . . [be] a mistrial." Bender v. Adelson, 187 N.J. 411, 433 (2006); see, e.g., Bender (agreeing new trial was appropriate where counsel misstated the evidence).

Here, Plaintiffs' counsel misstated the evidence and distorted the facts when he told the jury that Defendants "installed" the sidewalk and "created" the claimed dangerous condition. (5T118-11 to 20). The actual facts were that S. Batata, at A.E. Stone's request, negligently installed the sidewalk slab and created the alleged defect.

E. Plaintiffs' Counsel Appealed To The Jury's Emotion By Relating Personal Stories And Offering His Personal Opinions (5T124-7 to 134-20).

Although acknowledging it was irrelevant, counsel improperly told a story about his three daughters and personal responsibility in an effort to appeal to the jury's emotions since Ms. Colon, a female, was walking with her family members, two other females, at the time of the incident. (Id. at 124-7 to 125-8).

He also told the jury that he "personally" did not "love cleaning" but that he did "like cooking." (5T133-9 to 10). Counsel's personal opinions are

improper at trial. See Morales-Hurtado v. Reinoso, 457 N.J. Super. 170 (App. Div. 2018), aff'd o.b., 214 N.J. 590 (2020).

Later, counsel told stories about people commenting on how young he appeared, that his kids thought he should be "counting calories," and being at "Skyzone." (Id. at 134-6 to 20). All of which was unrelated to the evidence at trial and improper. See, e.g., Tartaglia v. UBS PaineWebber, Inc., 197 N.J. 81, 128-30 (2008) (reversing and remanding for a new trial where counsel told story about a "hard-working immigrant woman" which was "entirely unsupported by the record"); Henker, 216 N.J. Super. 513 (reversing trial court and granting new trial on damages where counsel accused adverse party of acting in bad faith and verbally attacked adverse counsel).

In sum, though Defendants' counsel did not object during Plaintiffs' counsel's closing, she immediately moved for a mistrial when it ended (5T143-24 to 144-1) and the trial judge should have granted it. See Szczecina, 414 N.J. Super. at 185 ("It is the responsibility of the judge to ensure that a fair trial is received by the parties, notwithstanding that counsel fails to object."). The cumulative effect of all of these violations compels a reversal and remand for a new trial, even under the plain error standard of Rule 2:10-2. See, e.g., Risko, 206 N.J. at 510 (reversing in part and remanding for a new trial on damages under plain error standard (counsel did not object) because the Court could "not

allow the award of damages to stand in light of plaintiff's summation"); Tartaglia, 197 N.J. at 128-30 (reversing and remanding for a new trial under plain error standard (counsel did not object) because "there was no place . . . for [counsel's closing] remarks"); Morales-Hurtado, 457 N.J. Super. at 179 (reversing and remanding for a new trial under plain error standard (counsel did not object) because "the cumulative effect of many errors tainted the verdict").

III. THE TRIAL COURT ERRED IN RESOLVING THE MOTIONS IN LIMINE (Da279, Da283, 2T).

A. The Trial Court Erred in Resolving Defendants' Motion In Limine To Exclude Lay Testimony At Trial Stating That The Location Of Ms. Colon's Fall Was Unreasonably Hazardous And/Or Dangerous (Da279, 2T3-9 to 59-23).

The trial court erred in denying Defendants' motion in limine seeking to bar lay opinion testimony at trial that the location of the fall was unreasonably hazardous and/or dangerous. The admission of lay witness testimony is governed by N.J.R.E. 701. The Appellate Division reviews a decision to exclude a lay witness's testimony for an abuse of discretion capable of creating a manifest denial of justice. State v. Sanchez, 247 N.J. 450, 465 (2021); Singh, 245 N.J. at 12. In this matter, as a result of the trial court's ruling, the jury improperly heard lay opinion testimony regarding whether the sidewalk repairs in 2014 were possibly improperly performed and resulted in settlement of the concrete.

The mere fact that Ms. Colon fell and was injured on Defendants' property does not render Defendants automatically liable for the fall and the injuries. The mere happening of an accident which caused injuries is not alone sufficient to infer negligence. Vander Groef v. Great Atlantic & Pacific Tea Co., 32 N.J. Super. 365, 370 (App. Div. 1954) (citing Hansen v. Eagle-Picher Lead Co., 8 N.J. 133, 139 (1951)). Like all plaintiffs, Ms. Colon had the burden of overcoming a presumption against the Defendants' negligence and was required to prove circumstances from which the Defendants' lack of due care could be legitimately inferred. Id.

Plaintiffs did not allege that the location where Ms. Colon fell was wet, covered with debris, or not well lit. Instead, Plaintiffs alleged in their Amended Complaint that Ms. Colon fell due to "uneven and improperly installed pavement" and that she was injured as a result of this "dangerous condition." (Da 0155-0156, ¶¶ 9-10). Thus, Plaintiffs' Amended Complaint was based on improper construction and implies that construction standards may have been violated.

In connection with their motion in limine, Defendants argued that, since Plaintiffs pled that construction standards had been violated: (a) expert testimony was necessary because the proper construction of a sidewalk is not a matter of common knowledge; and (b) Plaintiffs therefore should not be able to

satisfy that burden with lay opinion testimony. (2T3-9 to 59-23). Plaintiffs argued in opposition to the motion in limine that, as a professional engineer and a Rule 4:14-2(c) representative, Adam Jacurak should be permitted to testify that a ¾-inch settling of the concrete will not occur unless it was installed improperly. (2T3-9 to 59-23). In reply, Defendants argued that there was no evidence in the record showing that Mr. Jacurak had specialized knowledge or experience in the field of construction and installation of sidewalks and, therefore, Plaintiffs should be prohibited at trial from offering Mr. Jacurak's testimony to establish that the location of Ms. Colon's fall was improperly constructed or violated standards of the sidewalk construction industry. (2T3-9 to 59-23). Notably, a different trial court judge had already ruled that Mr. Jacurak's testimony in this regard was a net opinion. (1T23-14 to 26-21).

The significance of this issue at trial was presented through the deposition read-ins of Mr. Jacurak. A professional engineer and, at various times, the Director of Track and Facilities for PATCO and the Manager for Construction and Maintenance for the DRPA, Mr. Jacurak was produced for his deposition as the Rule 4:14-2(c) representative on behalf of PATCO. (2T4-1 to 3). Shortly before trial started and oral argument on the motion in limine, it was confirmed that Mr. Jacurak was out on disability and was not available for trial testimony. (2T4-4 to 14 and 3T7-15 to 19). Therefore, Plaintiffs' counsel stated his

intention to read in designated portions of Mr. Jacurak's deposition testimony while simultaneously presenting the testimony on the screen for the jury.[5]

Oral argument devolved into a review of the proposed read-ins and the trial judge overruling in large part Defendants' objections to the read-ins.[6] The Court should have sustained Defendants' objections consistent with N.J.R.E. 403 because the deposition testimony was unduly prejudicial, confused the issues and, therefore, misled the jury.

The trial court stated its rulings were designed to limit lay opinion testimony. It did so based upon its belief that certain decisions in this matter should be left to the jury:

> I'm not inclined, Mr. Chacker, to go back. I think my feeling is the same. You established the point that you're, you know, want to establish, the not being supervised properly. You know, that's - - that's a determination I think ultimately for the jury. I mean we start getting into opinions from admitted representatives. But, you know, for that reason I - - I've wanted to limit that and I'm going to continue precluding those passages . . . .
> [(4T7-8 to 16).]

But the trial court then equivocated:

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[5] In addition to the read-ins of Mr. Jacurak's testimony, Plaintiffs' counsel was permitted to display the transcript on the screen over the objection of the Defendants. (3T7-2 to 11 and 4T3-10 to 4-5 and 7-20 to 8-2).

[6] Since the trial court's motion in limine transformed into a ruling on objections regarding the proposed read-ins of Mr. Jacurak's deposition testimony, Defendants address both point headings set forth in their Case Information Statement in this one section.

> Mr. Jacurak is going to testify per - - per the deposition and - - and say a lot of things that (indiscernable) kind of limit some of the areas that I - - I think are maybe beyond the scope of what he should be testifying to. But I think we're clear on what those are. But so, you know, we - - we're going to, you know, we're going to permit - - permit that.
>
> [(Id. at 24-22 to 25-4).]

The harm in the trial court's error becomes manifest when the testimony presented at trial is reviewed. First, Mr. Jacurak was not presented as an expert:

> Q: Do you know why you're here today?
> A: Yes
> Q: Why is that?
> A: To provide answers to questions relating to maintenance or I guess the station of Collingswood. (Id. at 32-15 to 19).

However, despite that Mr. Jacurak was presented as a fact witness, the trial court's rulings resulted in the improper admission of lay opinion testimony. For example, the following selection of colloquies was presented:

On the topic of improper installation:

> Q: Can settling occur even if it's installed properly?
> A: Yes, it can occur if it's installed properly, but normally some - - when something - - when sidewalks are properly installed you will not get large settlements, you get negligible settlement between the two.
> Q: What would be a large settlement?
> A: Anything that would basically pose a tripping hazard.
> Q: So a half inch or bigger?
> A: If you had a half inch - - if you have a half inch difference between the two concrete or put in that concrete section it should have never been put in. It should have been ripped out and redone because that's not acceptable.

[(Id. at 42-19 to 43-8).]

On the topic of the speed at which concrete can settle:

Q: If the morning diff - - if the elevation difference between the two slabs is a half inch can we agree that it took more than a month to occur?
A: Yeah, I would have to say it would take more than a month to occur. (Id. at 43-16 to 20).

Mr. Jacurak did not observe the rate at which the elevation difference occurred. Thus, this the testimony was mere speculation.

Finally, most significantly, the jury was permitted to hear improper opinion testimony of whether or not the location of the accident constituted a tripping hazard:

Q: So do you have an opinion as the corporate designee for PATCO what are [sic] the condition on [sic] Ms. Colon fell [sic] was a tripping hazard. Did you review the photographs of that condition - - of the condition? [sic]
A: Yes, I have.
Q: Did you see the photographs that were - - did you see all the documents that were produced by PATCO in this case?
A: I believe I had, yes.
Q: Did you see the measurements taken of the slab?
A: I believe - - is that the photo with somebody using a stick ruler measuring it?
Q: Yes.
A: I have seen the photo, yes.

[(Id. at 45-1 to 15).]

Q: So that three–quarter inch difference between the slabs should have been seen on inspection, is that correct?
A: That is correct.

> Q: All right. So in this case that three-quarter inch settling in 2018 had been there for more than a month, is that fair?
> A: That's fair.
>
> [(Id. at 47-8 to 16).]

Mr. Jacurak's deposition testimony was also used to proffer improper expert opinion testimony on whether people see depressions in sidewalks:

> Q: As an engineer you understand the depressions in sidewalks could be something that people might not see as they're walking, correct?
> A: That is correct. (Id. at 50-2 to 5).

This is improper expert opinion testimony that should only have been introduced by a properly qualified expert in the field of biomechanics or trip and fall analysis.

The net result is that the jury heard this opinion testimony from a witness who was not qualified as an expert. The precise impact on the jury cannot be known, but there was certainly the potential for the jury to conclude that the concrete repairs in the area of Ms. Colon's fall were improperly performed, not properly inspected, and the reason for the fall. The jury could have been swayed into concluding that it was the opinion of an expert that the allegedly improperly installed concrete or an alleged failure to notice the differential in the sidewalk caused Ms. Colon's accident.

In light of the evidence record, the motion in limine should have been granted in its entirety and any ruling regarding admissibility of any portion of

the proposed read-ins was in error. Since there is no way to ascertain the impact of the improper admission of Mr. Jacurak's lay opinion testimony, the trial court's error necessitates vacating the judgment and a remanding for retrial.

B. The Trial Court Erred in Denying Defendants' Motion In Limine To Preclude The Testimony And Report Of Plaintiffs' Medical Cost Projection Expert (Da283, 2T59-24 to 65-23).

The opinions of Plaintiffs' proposed medical cost projection expert are conclusions without supporting evidence. Consequently, they constitute net opinions which should not have been admissible in the trial of this case. Therefore, the trial court should have granted Defendants' motion in limine.

During discovery, Ms. Colon produced evidence that she fractured her right distal radius which was surgically repaired by open reduction and internal fixation, followed by a course of physical therapy before being cleared to perform normal activities. (4T72-10 to 20). Plaintiff eventually sought additional treatment for her right hand. (Id. at 89-12 to 16). According to Dr. Trager, there is a risk, but no certainty, that Ms. Colon will continue to need treatment for her injuries. (Id. at 121-20 to 122-18).

Plaintiffs retained Linda Lajterman, who submitted a September 22, 2021 report detailing her estimates of the future costs of these treatments in the amount of $108,461. (Da285). Following Ms. Colon's additional treatment in 2022, Ms. Lajterman submitted an amended report dated January 18, 2023 in

which she reduced her future cost estimate to $58,100. (Da290). This latter report does not contain evidence to support Ms. Lajterman's conclusion that Ms. Colon will require future treatment.

Prior to Ms. Lajterman's testimony at trial, and consistent with the arguments presented in their motion in limine, Defendants argued that her testimony amounted to nothing more than mere speculation. (5T32-23 to 33-6). The trial court overruled counsel's objection and allowed the testimony. (Id. at 34-5 to 35-6).

Ms. Lajterman testified at trial via Zoom and confirmed the speculative nature of her opinions:

> Q: Can you please explain for us what goes into cost - - medical cost projection and what information is considered in reaching your projections, your conclusions?
> A: . . . I then take the medical records that are provided and I review them and I try to calculate out and identify what treating doctors or examining doctors have identified as future care.
>
> [(Id. at 55-12 to 22).]
>
> Q: All right. So that's the first part is finding the fees and then using the multiplier. And then what was the second part? I – and I apologize for interrupting.
> A: That's okay. The - - in the review of the medical records I identify what physicians are recommending as future care.
>
> [(Id. at 58-1 to 7).]

Q: Do you include - - I got to - - you mentioned surgery. Would a surgery be included if one of the treating physicians hadn't said this is something she's at an increased risk for or at risk of in the future given her history?
A: Yes.
Q: You - - it would be necessary for that - - for the record to show that for you to include it?
A: Oh, yes, because we don't want to - - if - - if she doesn't or if someone does not have a surgery at this moment, they may have it somewhere down that line and that money has to be identified so all the parties involved can - - can know this is something that she's at risk for and could possibly happen and this is what it's going to cost.
Q: Are you're here today to offer any opinions about what treatment will absolutely be rendered?
A: No. Only what the doctors put in the medical records.

[(Id. at 58-15 to 59-8).]

Thus, Ms. Lajterman's opinions are highly speculative. She included costs for future doctor's visits by assuming one visit per year even though there might be years when there is more than one visit and years when there might not be any. (Id. at 61-6 to 23). Furthermore, this number was included because Ms. Colon was at risk for arthritis, not that she has or will in fact develop arthritis. (Id. at 61-19 to 23). Ms. Lajterman further testified that she included a line item in her report as "a catch all in case there's something that comes up that is not accounted for directly." (Id. at 66-19 to 20). She also included a line item drawn from the "official disability guideline" because one of the doctors said Ms. Colon was "at risk" of needing a fusion down the road. (Id. at 68-20 to 69-5).

On cross examination, Ms. Lajterman admitted that, in formulating her opinion, she did not review billing records from Ms. Colon's second surgery. (Id. at 72-16 to 73-1).

The net result, the jury was permitted to hear Ms. Lajterman testify about potential future medical costs without ever opining that they will in fact be needed:

> Q: Your projections are based on your review of the medical reports and what the doctors say Ms. Colon may need treatment, may need infusion [sic], is that correct?
> A: That's correct, yes. (Id. at 88-7 to 11).

Ms. Lajterman did not give the why and wherefore that supported her opinions; rather, she provided mere conclusions. This resulted in net opinions which the trial court should not have allowed the jury to hear. See N.J.R.E. 703; Townsend v. Pierre, 221 N.J. 36, 53-54 (2015) (citing Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)). Defendants' motion in limine, therefore, should have been granted and Ms. Lajterman should not have been permitted to testify at trial. Since there is no way to ascertain the impact of the improper admission of Ms. Lajterman's opinion testimony, the trial court's error necessitates vacating the judgment and remanding for retrial on damages.

IV. THE TRIAL COURT ERRED IN REFUSING TO ADMIT DEFENDANTS' PROFFERED TESTIMONY THAT THEY HAD NOT RECEIVED ANY COMPLAINTS OF A DANGEROUS CONDITION AT THE INCIDENT LOCATION PRIOR TO MS. COLON'S FALL (4T208-16 to 214-22).

In a premises liability case, the incidence or absence of other accidents is not admissible to show the dangerousness or safety of a particular condition. Muscato v. St. Mary's Catholic Church, 109 N.J. Super. 508, 510 (App. Div. 1970) (citing Karmazin v. Pennsylvania R.R. Co., 82 N.J. Super. 123, 129 (App. Div. 1964)). However, subject to proper cautionary instructions, evidence of prior accidents may be shown when calculated to show the existence of a condition long enough to establish notice to the owner. Muscato, 109 N.J. Super. at 510. By the same token, evidence that there had been no previous accidents arising out of the alleged condition should be admissible to negate knowledge to the defendant of an alleged defective condition. Id. (citations omitted).

In this case, Defendants sought to call Ms. Anne Kubiak as a witness. (4T208-16 to 25). Ms. Kubiak was the claims administrator on the day of the accident. Id. The proffered testimony would be that there were no other claims that occurred based upon the area of Ms. Colon's accident. (Id. at 209- 4 to 9). This evidence would have been highly relevant because it would have shown that despite how many people walk that area of the sidewalk every day, there were no other reports of any trips and falls. (Id. at 209-21 to 210-2). The

proffered evidence also would have been highly relevant to the issue of notice and whether the alleged defect was reasonable or unreasonable. (Id. at 211-22 to 212-2).

The trial court disallowed the proffered evidence. The trial court characterized the proffer as an attempt to say that the fact the there were no other claims was because Ms. Colon was at fault for her trip. (Id. at 213-3 to 6). By way of further explanation, in resolving the motion for a new trial on this issue, the trial court held that Defendants were attempting to "suggest to the jury that there was nothing dangerous or defective about the condition that caused the plaintiff to fall." (8T25-19 to 27-7).

This decision was error. The trial court should have allowed this testimony to be heard by the jury, subject to any cautionary instructions as required in Muscato and Karmazin. The trial court's failure to allow this testimony was an abuse of discretion and warrants a new trial.

V. THE JURY VERDICT IS EXCESSIVE AND AGAINST THE WEIGHT OF THE EVIDENCE (7T5 to 20; 8T3, 8 to 15).

The jury's award of: (a) $750,000 to Ms. Colon for future medical expenses; (b) $500,000 to Ms. Colon for pain, suffering, disability, impairment, and loss of enjoyment of life; and (c) $300,000 to Mr. Reinoso for loss of consortium are so excessive in light of the evidence presented at trial that upholding them will constitute a miscarriage of justice. Therefore, the Appellate

Division should offer a remittitur, or this matter should be remanded for a new trial on damages.

A. Plaintiffs' Compensatory Damages Are Excessive In Light Of The Evidence And Constitute A Miscarriage Of Justice (7T5 to 20; 8T16 to 21).

"The principal goal of damages in personal-injury actions is to compensate fairly the injured party." Caldwell v. Haynes, 136 N.J. 422, 433 (1994) (citing Deemer v. Silk City Textile Mach. Co., 193 N.J. Super. 643, 651 (App. Div. 1984)). Damages awards based upon speculation, passion, prejudice, or any other arbitrary consideration are impermissible under the law. See Boryszewski v. Burke, 380 N.J. Super. 361, 393 (App. Div. 2005) (citation omitted). "Fair compensatory damages resulting from the tortious infliction of injury encompass no more than the amount that will make the plaintiff whole, that is, the actual loss." Caldwell, 136 N.J. at 433 (citing Ruff v. Weintraub, 105 N.J. 233, 238 (1987)). "The purpose, then[,] of personal injury compensation is neither to reward the plaintiff, nor to punish the defendant, but to replace plaintiff's losses." Caldwell, 136 N.J. at 433 (quoting Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1250 (3d Cir.), cert. denied, 404 U.S. 883 (1971)). When this principle is not met and the damages are so excessive as to constitute a miscarriage of justice, a judgment must be set aside for a retrial of those damages. Caldwell, 136 N.J. at 439-40.

Alternatively, the New Jersey Supreme has deemed remittitur a practice to be encouraged at both trial and appellate levels for cases involving grossly excessive or inadequate damages. Id. at 422 (citing Baxter, 74 N.J. at 595); Orientale v. Jennings, 239 N.J. 569, 594-96 (2019) (holding that, where damages award entered by a jury is so grossly excessive or grossly inadequate that it shocks the judicial conscience, the court must grant a new trial or recommend a remittitur or an additur) (internal quotations and citations omitted)[7]; see also Hudgins v. Serrano, 186 N.J. Super. 465, 479-83 (App. Div. 1982) (finding economic damages of $1,150,000 shocking where evidence supported economic award of $650,000 only and offering plaintiff remittitur for all damages not to exceed $750,000, or a new trial on damages only).

1. The award for Ms. Colon's economic damages is against the weight of the evidence (7T5, 7, 11 to 20; 8T 3, 8 to 15).

In this matter, Ms. Colon was awarded $750,000 for future medical expenses. (Da 322). This figure is entirely unsupported by the evidence presented to the jury. The evidence supporting Ms. Colon's future medical expenses was presented through the reports and testimony of her cost projection

[7] In recommending a remittitur or an additur, the court determines "the amount that a reasonable jury, properly instructed, would have awarded. The acceptance of a remittitur or an additur requires the mutual consent of the parties. If either party rejects a remittitur or an additur, the case must proceed to a new trial on damages." Orientale, 239 N.J. at 596 (internal citations and quotations omitted).

expert, Linda Lajterman. (5T40-3 to 88-24). Ms. Lajterman wrote two reports, one dated September 22, 2021 and (Da 285) ("Lajterman Report #1") and one dated January 18, 2023 (Da 290) ("Lajterman Report #2").[8] In Lajterman Report #1, Ms. Lajterman opined that Ms. Colon's future medical expenses could approximate $108,461. (Da 289). Ms. Colon underwent surgery on May 22, 2022, after Lajterman Report #1 was issued. (Da292). In Lajterman Report #2, Ms. Lajterman discounted the expense of the intervening surgery accordingly and opined that Ms. Colon's future medical expenses could approximate $58,100.[9] (Da 295). Inexplicably, the jury awarded Ms. Colon $750,000 – nearly **13 times** the amount estimated by Ms. Lajterman – for future medical expenses. (Da 322). Ms. Lajterman did not testify to any projected costs anywhere close to three-quarters of a million dollars. (4T40-3 to 88-24). The "troubling disparity, by degrees of magnitude, between the proofs on the . . . damages claim and the . . . verdict reached" should have compelled the trial court to vacate the verdict and either offer remittitur or remand for a new trial. Boryszewski, 380 N.J. Super. at 393, 395 (affirming trial court's vacation of jury verdict on

[8] Each of Ms. Lajterman's reports contains a table appended as the last page thereto. (Da289; Da295). The tables were given to the jury for deliberation and redacted in part. (5T193-10 to 15)

[9] Defendants moved in limine to exclude the reports and testimony of Ms. Lajterman. The motion was improperly denied by the trial court. See Section III.B., supra. Had Defendants' motion in limine been granted as it should have been, Defendants would not be before the Court on this point.

economic damages more than 10 times the amount estimated by the plaintiffs' expert); Hudgins, 186 N.J. Super. at 482 (holding that jury verdict on economic loss close to twice the reasonable amount of the plaintiff's actual loss constituted manifest injustice and offering remittitur).

In Boryszewski, despite the plaintiffs' expert's estimation of approximately $479,000 in economic losses in a draft report that was not shown to the jury, the jury awarded $5 million in wrongful death damages – more than 10 times the amount estimated by the plaintiffs' expert. Id. at 393. As stated by the Appellate Division, the award "was unsupported by direct evidence in the record" and "represents so great a departure from the proofs actually adduced at trial as to justify the reconsideration ordered by the trial judge." Id. at 393-94. Following the trial court's vacation of the award and remand for a new trial on damages, a second jury awarded $800,000 in wrongful death damages following the plaintiffs' expert's estimation of approximately $1.5 million in economic losses. Id. at 396. The Appellate Division found the second jury's award to be "much closer to the evidentiary mark" when considering the cross-examination by defense counsel that undermined the credibility of the $1.5 million damages assessment. Id.

Similarly, in Hudgins, the Appellate Division found that the jury's award of $1,150,000 in wrongful death damages shocked the conscience of the court

such that sustaining the award would be "manifestly unjust." 186 N.J. Super. at 468, 477. In Hudgins, the Appellate Division astutely analyzed the record evidence concerning economic losses, including the plaintiff's expert's opinion, and found $645,597 to be a reasonable economic loss figure, recognizing that a deviation as much as 20% might be easily understood and justified. Id. at 481. In the Court's judgment, the jury's deviation of nearly 200% was "a disproportion so gross as to constitute a manifest injustice." Id.

Like the first jury in Boryszewski (where the award was more than **10 times** the amount opined by the plaintiffs' expert) and the jury in Hudgins (where the award was nearly **double** the amount deemed reasonable by the Appellate Division), the jury's verdict of $750,000 in the instant matter (nearly **13 times** the $58,100 projected by Ms. Lajterman) was "a disproportion so gross as to constitute a manifest injustice[,]" "unsupported by direct evidence in the record . . . [and] . . . so great a departure from the proofs actually adduced at trial" that the trial court should have vacated the award and offered a remittitur or ordered a new trial on damages. Hudgins, 186 N.J. Super. at 481-82; Boryszewski, 380 N.J. Super. at 393-95.

Curiously, during oral argument on Defendants' new-trial motion on May 26, 2023, the trial judge stated that the $750,000 award for future medical expenses "shocks the conscience a little . . . is pretty far afield . . . is a little

outrageous . . . is against the grain . . . [is] a heavy lift . . . [and] is an issue." (7T15-6 to 12, 19 to 23; 16-2 to 6; 20-20 to 21). It appears the trial judge struggled at oral argument with whether he had authority to alter the judgment with respect to the future medical expenses award only:

> [THE COURT:] The question for me is I do find the $750,000 is out of line. The question is whether that makes the 500 – the 300 out of line as well or whether I can look at it and say they missed the boat on – the future medical expenses and whether I can have authority and whether . . . it's appropriate for me to – to correct that and . . . alter the judgment that way. These are my . . . thoughts at this point.
> MR. CHACKER: Just the reason that these different items of damages are separated out is so that the [sic] Your Honor can address whatever specifically needs to be addressed.
> THE COURT: I . . . think that's true.
> MR. CHACKER: Yes.
> THE COURT: And . . . I offer that question of you is, you know, what can I do I guess thinking that I can.
>
> [(7T19-15 to 25; 20-5 to 13).]

The trial judge was well within his authority to remit or grant a new trial on future medical expenses only. See, e.g., Hudgins, 186 N.J. Super. at 479-83 (upholding pain-and-suffering award of $7,500, but finding lost-wages award of $1,150,000 shocking because evidence supported lost-wages award of $650,000 only; offering plaintiff remittitur for *all* damages not to exceed $750,000 or a new trial on damages only).

Notwithstanding his observations during oral argument that the award for future medical expenses "shocks the conscience a little . . . is pretty far afield . . . is a little outrageous . . . is against the grain . . . [is] a heavy lift . . . [and] is an issue" (7T15-6 to 12, 19 to 23; 16-2 to 6; 20-20 to 21), the trial judge placed oral findings on the record on June 7, 2023 outside the presence of counsel, finding the opposite. (8T13-9 to14-19). The trial court entered an order denying the new-trial motion on June 9, 2023. (Da 284). In terms of Ms. Colon's future medical expenses, this was in error.

2. The award for Ms. Colon's non-economic damages is against the weight of the evidence (7T6, 8, 9, 14 to 16; 8T3, 8, 15 to 16).

With respect to the jury's award to Ms. Colon for pain and suffering in the amount of $500,000, her injuries were limited to a distal radius fracture of the right wrist (the space between her right thumb and wrist, closest to her wrist). (Da291). Ms. Colon underwent a successful open reduction with internal fixation surgery on June 8, 2018. (Da291). Nearly four years later, on May 22, 2022, Ms. Colon sought additional treatment (trigger release and carpal tunnel surgery) for numbness, tingling, and soreness. (Da292). She also had three injections and participated in physical therapy. (Da292). Though Ms. Colon claims to have residual pain and limitations, she has not had any treatment since August 31, 2022. (4T144-13 to 18; 149-1 to 153-12; 172-18 to 24).

Ms. Colon's injuries, relatively minimal treatment, and successful recovery simply do not warrant a pain and suffering award of $500,000. See, e.g., Albert v. Monarch Fed. Sav. and Loan Ass'n, 327 N.J. Super. 462 (App. Div. 2000) (finding $50,000 jury award was not against the weight of the evidence or a miscarriage of justice where the plaintiff fractured her wrist following a fall, requiring surgery for carpal tunnel syndrome caused by the fall).

3. The award for Mr. Reinoso's non-economic damages is against the weight of the evidence (7T5, 6, 8, 10, 14, 15; 8T3, 8, 16 to 18).

With respect to the jury's award to Mr. Reinoso for loss of consortium in the amount of $300,000, he testified at trial that, since the time of his wife's injury, he has had to learn how to help do the laundry, which he enjoys doing. (4T150-1 to 7; 161-1 to 2; 188-12 to 189-2; 200-18 to 201-5). He, along with his daughters, also help Ms. Colon with household chores and shopping. (4T150-8 to 11; 190-5 to 6).

With respect to his job, Mr. Reinoso testified that he worked at various car dealerships prior to Ms. Colon's fall. (4T178-23 to 180-14). He began driving for Uber/Lyft in 2017 and was still driving for Uber/Lyft at the time of Ms. Colon's fall. (4T178-20 to 22; 197-9 to 12). Mr. Reinoso testified that, after Ms. Colon's fall, he had to leave his job as a salesperson at a car dealership and began driving for Uber/Lyft full time in order to have a flexible schedule to take

his wife to her medical appointments. (4T179-5 to 18; 180-15 to 22; 187-13 to 188-8). Mr. Reinoso and has not worked anywhere else full time since then. (4T199-8 to 12).

In his oral decision denying Defendants' new-trial motion, the trial judge stated, "The jury heard from [Mr. Reinoso] regarding . . . the impact on his economic life concerning used car sales as noted and determining there was . . . valuable relationship between the two[.]" (8T20-23 to 24-3). On the contrary, Plaintiffs did not present **any** evidence or offer **any** testimony of economic loss incurred by Mr. Reinoso as a result of having to leave the car dealership, or any other "valuable relationship" concerning his economic life. (4T177-9 to 204-7).

With no evidence to attribute economic losses toward the award, $300,000 is against the weight of the evidence, or lack thereof, concerning Mr. Reinoso's claim for loss of consortium, constituting a miscarriage of justice. See Risko, 206 N.J. at 521-22 (miscarriage of justice results where a jury verdict arises from a manifest lack of inherently credible evidence to support the finding). The trial court's consideration of economic loss to justify the $300,000 award to Mr. Reinoso likewise lacks any merit, since there was no evidence of economic loss incurred by Mr. Reinoso in the record upon which the trial court could reach that conclusion.

4. The excessive damages awards are the result of Plaintiffs' counsel's comments during his summation, and to affirm the awards would constitute a miscarriage of justice (7T8; 8T28 to 31).

Based on the documentary evidence and testimony presented to the jury, the only explanation for Plaintiffs' grossly excessive damages awards is that the jury was persuaded by Plaintiffs' attorney's violation of the "golden rule," his disparaging remarks against the defense and other improper commentary during his closing statement. See Section II, supra. Plaintiffs' attorney's summation incited the jury to "send a message" by their verdict, and, unfortunately, they did exactly that.

Under the standard established by the New Jersey Supreme Court as set forth above, the compensatory damages awarded by the jury to Plaintiffs are clearly against the weight of the evidence, constituting a miscarriage of justice. See Baxter, 74 N.J. at 596; Caldwell, 136 N.J. at 439-40; Risko, 206 N.J. at 521-22; Hudgins, 186 N.J. Super. at 481; Boryszewski, 380 N.J. Super. at 393-95. Therefore, these awards should be vacated and a remittitur should be recommended or a new trial on damages ordered. Orientale, 239 N.J. at 596.

VI. THE TRIAL COURT ERRED IN ITS CALCULATION OF PREJUDGMENT INTEREST (Da322; 8T4-14 to 18).

Even if this Court declines a remittitur or new trial, the Order for Judgment should be vacated and the matter should be remanded for entry of a

new Judgment reflecting the accurate amount of prejudgment interest. Importantly, **Plaintiffs do not dispute this point.**

On March 31, 2023, the trial court entered an Order for Judgment ("Judgment") confirming the jury verdict and adding Plaintiffs' calculation of prejudgment interest, which improperly included Ms. Colon's $750,000 future medical expenses award. (Da322). It is undisputed that prejudgment interest cannot be awarded for future medical expenses. See R. 4:42-11(b) ("Prejudgment interest shall not . . . be allowed on any recovery for future economic losses"). Accordingly, any prejudgment interest awarded to Ms. Colon should be based only on the $500,000 awarded for pain and suffering, for a total of $56,602.50 (not $143,972.60 as awarded). (Da322). In addition, the amount of interest calculated on Mr. Reinoso's award for loss of consortium ($300,000) is incorrect. Prejudgment interest on Mr. Reinoso's award should be $33,926.20 (not $34,553.42 as awarded). (Da322). Thus, the total prejudgment interest awarded should have been $90,528.70 (not $178,526 as awarded).

Curiously, in his oral findings on Defendants' new-trial motion, the trial judge recited the improper calculation of prejudgment interest as one of the bases for Defendants' motion, specifically recognizing that Plaintiffs conceded and offered to correct the incorrect calculation. (8T4-14 to 18). For reasons

unknown, the trial judge never made a ruling on the incorrect prejudgment interest calculation. (8T3 to 31).

Therefore, the trial court's award of prejudgment interest was in error and this Court should remand for the trial court to enter an Amended Order for Judgment correcting the amount of prejudgment interest awarded.

Furthermore, in exceptional cases, like those here, the Court may suspend the running of allowable prejudgment interest. See R. 4:42-11(b). Prejudgment interest should be disallowed here due to the exceptional circumstances of the delays caused by the COVID-19 pandemic. See, e.g., Avatar Capital Fin., LLC v. Nassau Marina Holdings, LLC, No. A-0423-20, 2022 N.J. Super. Unpub. LEXIS 787, at *11, 20-21 (N.J. Super. Ct. App. Div. May 12, 2022) (unpublished) (Da 341)[10] (holding that delays caused by COVID-19 pandemic may constitute an equity supporting post-judgment interest at the legal rate as opposed to rate set by contract) (citing Brown v. Davkee Inc., 324 N.J. Super. 145, 147 (App. Div. 1999)).

VII. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR A NEW TRIAL (Da284).

Applying the new trial motion standard set forth previously, and for all of the reasons cited in sections I-VI above, there has been a clear miscarriage

[10] Pursuant to Rule 1:36-3, counsel is unaware of any contrary unpublished opinions.

justice under the law in this matter. The trial court should have granted Defendants' motion for a new trial. Likewise, this Court should grant Defendants' appeal and remand this case to the trial court for a new trial.

CONCLUSION

The errors in this case began with the summary judgment motions and continued through trial, judgment and a post-trial motion. The incorrect trial court decisions prevented the jury from considering the negligence of joint tortfeasors and other material facts while being allowed to improperly consider lay and expert opinion testimony. To make matters worse, the jury was then impermissibly influenced by Plaintiffs' counsel's improper statements during summation, which resulted in a shockingly high verdict. Defendants attempted to address these errors several times below without success. Thus, it is up to this Court to right those wrongs.

For all of the foregoing reasons, this Court should reverse the trial court and remand this matter for a new trial or offer a remittitur.

Respectfully submitted,
BROWN & CONNERY, LLP
Attorneys for Defendants/Third-Party Plaintiffs-Appellants

Dated: October 26, 2023

By: */s/ Shawn C. Huber*
Shawn C. Huber, Esquire
Joseph T. Carney, Esquire
Gina M. Roswell, Esquire

SONIA COLON and LUIS REINOSO, Plaintiffs, vs. DELAWARE RIVER PORT AUTHORITY; PORT AUTHORITY TRANSIT CORPORATION a/k/a PATCO, AE STONE, INC and S BATATA CONSTRUCTION and JOHN DOES I through X, Defendants,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3375-22 *CIVIL ACTION* ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY DOCKET NO. L-4463-19 Sat Below: HONORABLE Anthony M. Pugliese, J.S.C. and HONORABLE Daniel A. Bernardin, J.S.C.

RESPONDENT BRIEF OF DEFENDANTS/RESPONDENT AE STONE, INC.

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CONCISE PROCEDURAL HISTORY

The Plaintiff/Respondent's complaint in the above captioned matter alleges that on or about May 30, 2019, the Plaintiff/Respondent was injured at the Collingswood Speedline Station in Collingswood, NJ. (Da037) Plaintiff/Respondent's original complaint included Delaware River Port Authority (hereinafter referred to as DRPA), Port Authority Transit Corporation (hereinafter referred to as PATCO) and AP Construction. (Da037) On December 18, 2019, Appellants filed an answer to Plaintiff/Respondent's original complaint. (Da045)

On March 11, 2020, The DRPA and PATCO filed a third-party complaint against this Respondent, AE Stone, Inc. (Da054) The Third-Party complaint sought a defense and indemnification. (Da057) Count I of the complaint did allege a breach of contract, but that breach was associated with AE Stone, Inc.'s failure to provide a defense and to indemnify DRPA and PATCO. (Da056)

On April 13, 2020, an answer was filed to the Third-Party complaint on behalf of AE Stone, Inc. (Da116) That answer to the Third-Party complaint included a Fourth-Party Complaint against S. Batata Construction, Inc. (Da120) On May 1, 2020, an answer to the Fourth-Party Complaint was filed on behalf of Respondent S. Batata Construction, Inc. (Da125)

On August 7, 2020, Plaintiff/Respondent was granted leave to file an amended complaint adding AE Stone, Inc. and S Batata Construction, Inc. as direct defendants. (Da132) On August 20, 2020, Plaintiff/Respondent filed her amended complaint. (Da134) On September 3, 2020, an answer was filed on behalf of DRPA and PATCO to the amended complaint. (Da142) On September 21, 2020, an answer to the amended complaint on behalf of AE Stone, Inc. (Da151) On April 19, 2021, an answer to the amended complaint was filed on behalf of S Batata Construction, Inc. (Da158) On January 27, 2021, A.P. Construction was voluntarily dismissed from the suit. (Da164)

The discovery end date for this matter was August 1, 2021. (Da168). On September 21, 2021, Respondent S. Batata Construction filed for summary judgment. (Da167) On October 8, 2021, DRPA and PATCO filed opposition to the S Batata Construction, Inc.'s summary judgment motion. (Da203) On October 8, 2021, Plaintiff/Respondent filed a letter brief joining in on DRPA and PATCO's opposition to S Batata Construction Inc.'s summary judgment motion. (Da232) On September 23, 2023, a cross-motion for summary judgment on behalf of AE Stone, Inc. (Da235). On October 8, 2021, DRPA and PATCO filed opposition to the AE Stone summary judgment motion. (Da251) On October 8, 2021, Plaintiff/Respondent filed a letter brief joining in on the opposition of DRPA and PATCO. (Da275)

On October 22, 2021, The Honorable Anthony M Pugliese conducted oral argument on both motions for summary judgment. (1T) On that same day, Judge Pugliese granted both motions for summary judgment. (Da233 and Da277) (T1 P25-27)

The matter proceeded to trial which began on March 21, 2023, and ended on March 24, 2023. (3T to 6T). Prior to trial, the Trial Judge, The Honorable Daniel Bernardin ruled on several motions in limine (2T). The jury ultimately returned a verdict in favor of the plaintiff and attributed 100% of the liability against Appellants. (Da319) Mrs. Colon was awarded $1,250,000 in damages. Her husband was awarded $300,000 in consortium damages. An order of Judgment was entered against defendants on March 31, 2023. (Da322) On April 12, 2023, defendants filed a motion for a new trial, which was denied on June 9, 2023. DRPA and PATCO then filed this notice of appeal.

CONCISE STATEMENT OF THE FACTS

The Plaintiff/Respondent's complaint alleged that on May 30, 2018, the plaintiff was lawfully on the premises known as the Collingswood PATCO Train Station, near lot #4. (Da038) The complaint goes on to state that the Plaintiff/Respondent was walking towards the station to take the train when she tripped and fell due to uneven and improperly installed pavement. (Da038) According to the EMS report, the plaintiff started running and tripped on her right side. (Da176). According to the Police report, the plaintiff was in the company of her daughter and granddaughter when she started running and fell. (Da179)

At her deposition, the plaintiff stated that she was returning home after taking her daughter and granddaughter to martial arts class and was on her way to the train station in Collingswood. She stated that she was walking normally and then suddenly her foot tripped, and she fell. She added that she lost her balance. (Da184) She was asked what caused her to fall and she responded, "The sidewalk". (Da184) She realized this after she fell. (Da184) The plaintiff produced photos depicting the area where she fell. (Da181-183) The photos all depict an area where there is one newer concrete block, which is between two older concrete blocks. (Da181-183)

Christopher Canderan testified on behalf of Respondent AE Stone, Inc. He explained that AE Stone Inc was awarded a contract by the DRPA to perform work at the Collingswood PATCO train station. (Da248) Mr. Canderan confirmed that the new concrete work shown in the photos was part of the agreement and the actual concrete work was performed by AE Stone Inc's subcontractor, S Batata Construction, Inc. (Da247) Mr. Canderan confirmed that it was only one concrete block that was replaced pursuant to the contract and shown in the photo shown to him by plaintiff's attorney. (Da201)

Joe Zargo was deposed on behalf of S. Batata Construction, Inc. Mr. Zargo stated that S Batata Construction performed concrete work in 2014 at the Collingswood PATCO station pursuant to a contract with AE Stone Inc. (Da225) Mr. Zargo also identified the concrete block shown in plaintiff's photos as a block that was replaced pursuant to the contract. (Da185-187) Mr. Zargo and Mr. Canderan both confirmed that S Batata Construction's work was inspected by a representative of the owner, DRPA/PATCO. (Da195 and 270) Mr. Canderan confirmed that the owner never contacted AE Stone Inc. after their work was completed to return and perform any additional work or repairs. (Da198) At oral argument, the fact that S Batata

Construction only replaced one slab of concrete shown in plaintiff's photo was clarified for Judge Pugliese, as Judge Pugliese was originally under the impression that the work in 2014 included the entire length of sidewalk. (T1 P22)

Adam Jacurak was the Director of Traffic Facilities for the DRPA and was produced for deposition as the representative for the DRPA and PATCO. Mr. Jacurak testified that when the DRPA/PATCO employees realized that there was a lip between the new concrete slab and an old concrete slab, no effort was made to rip out either slab, but rather, the higher slab was ground down to make it even with the lower slab. (Da308) He testified that he was not aware if the height differential was due to the older slab heaving or the newer slab sinking. (Da308) Mr. Jacurak did provide his opinion as to why a concrete slab may sink. He speculated that a concrete slab could sink if there was poor compaction. (Da309) This speculation was made immediately after stating that without additional information, he cannot say in this situation if the height differential was caused by one slab heaving or the other slab sinking. (Da309) At no point did either the Appellant or the Plaintiff/Respondent ever produce a liability expert report that provided an opinion that stated that the one concrete slab poured by S Batta Construction pursuant to their contract with AE Stone was poured in a

negligent manner. At no point did anyone from DRPA/PATCO every attempt to determine if poor compaction under the newer slab caused it to sink as opposes to the adjoining older slab heaving. There were never any tests performed.

At oral argument on the summary judgment motions filed by S Batata Construction and AE Stone, Appellant and Plaintiff/Respondent attempted to rely upon Mr. Jacurak' s speculation as to what might cause a concrete slab to sink. (T1 P19) At no point in the opposing papers statement of facts, had the DRPA/PATCO ever refer to Mr. Jacurak as an expert or even mentioned the fact that he was an engineer. (Da206) It was not until oral argument, when Judge Pugliese speculated that even if he was an expert, he had done no testing or investigation. (T1 P19). At that point, it was pointed out that Mr. Jacurak is a civil engineer. (T1 P20) This is curious since later, during oral argument on the motions in limine, The Appellant specifically stated that Mr. Jacurak was not an expert and objected to plaintiff trying to use him as an expert. (T2 P35) (I also note that during that argument, Plaintiff/Respondent's attorney made it clear that he was not presenting Mr. Jacurak' s deposition testimony as a liability expert (T2 PP35 and 36)) Ultimately. Judge Pugliese ruled that the opposing parties presented no evidence to establish any negligence on behalf of the moving parties and even if Mr. Jacurak was being offered as an expert, his opinions fail as they are clearly net opinions. (T1 PP23-26)

Finally, while Appellant did set forth in their counterstatement of facts in opposition to the summary judgment motions that their third-party complaint and eventually crossclaims contained claims for contribution and indemnification, their opposition papers only included the actual pleadings and not the contract in question. (Da206) At no point were there any arguments made in the papers (Ra1) or at oral argument indicating that the contribution and indemnification allegations must survive oral argument. (T1) Nor were there any arguments made in the legal argument section of their opposition papers regarding the contractual and indemnification claims or that they met specific legal requirements that would make them enforceable. (Ra1, Da203 and Da251)

LEGAL ARGUMENT

I. SUMMARY JUDGMENT WAS APPROPRIATE AS A MATTER OF LAW AS NEITHER THE PLAINTIFF/RESPONDENT NOR THE APPELLANT PROVIDED PROOF THAT THE ONE SLAB POURED AS PART OF THE 2014 PROJECT WAS NEGLIGENTLY POURED

The summary judgment motions were made pursuant to R.4:46-2 for summary judgment as to the Complaint. The Rule is clearly designed to provide a prompt, businesslike and inexpensive method of disposing of any case in which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavit submitted on the motion, clearly shows not to present

any genuine issue of material fact requiring disposition at trial. Judson v Peoples Bank and Trust Co., of Westfield, 17 N.J. 67, 74 (1954); Benner v Jackson Twp., 94 N.J. Super 445 (App. Div. 1967).

When the Appellate Division reviews the granting of summary judgment, they are to employ the same standards used by the motion judge under Rule 4:46. Prudential Prop. & Cas. Ins. Co. V Boylan, 307 NJ Super 162,167 (App Div.) Certif. denied 154 NJ 608 (1998). First, the court is to determine whether, affording the non-moving party the benefit of all reasonable inferences, the moving party has demonstrated there were no genuine disputes as to material facts, and then the court decides whether the motion judge's application of the law was correct. Atl. Mut. Ins. Co. v Hillside Bottling Co., 387 NJ Super. 224 (App Div.) certify. Denied, 189 NJ 912 (2006).

The main basis for the lower's court ruling came down to the premise that neither the Plaintiff/Appellant, nor the Respondent, provided any competent evidence to support the allegation that the one slab poured as part of the 2014 project was poured in a negligent manner. Negligence requires a showing of a duty, breach of the duty and a foreseeable injury proximately caused by that breach. Anderson v. Sammy Redd & Associates, 278 N.J. Super. 50 cert. denied, 139 N.J. 441 (App. Div. 1994). For a

defendant to be found negligent, there must be a finding that the defendant owed some duty to the party complaining and that there was a breach of that duty by the defendant. Globe Motor Company v. First Fidelity Bank, N.J., 273 N.J. Super. 388 (Law Div. 1993) and Driscoll v. State Department of Treasury, Division of Lottery, 265 N.J. Super. 503 (Law Div. 1993). To prove a claim of negligence, a plaintiff must show that the defendant's actions breached the duty of care and were the proximate cause of the injury. Creanga v Jardal, 185 NJ 345 (2005). Summary judgment is appropriate when no reasonable jury could find that the defendant breached his duty of care or proximately caused plaintiff's injuries. Vega v Piedilaio, 154 NJ 496, 509 (1998).

In the case at bar, neither the Plaintiff/Respondent nor the Appellant provided any proof as to why or how there was a lip between two pieces of concrete on the sidewalk, leading to the Collingswood PATCO station on the date in question. While the mere existence of a lip was enough to prove liability against the DRPA/PATCO, it was not enough to prove negligence against the general contractor or the subcontractor who only installed one of the slabs of concrete. In order to prove liability against these defendants, the Plaintiff/Respondent or the Appellant needed to show that the slab of concrete that was poured in 2014 by AE Stone and S Batata either

heaved or sank. No one ever attempted to determine if the new piece of concrete sank, as alleged, or if the old piece of concrete heaved. Simply providing evidence that the new piece of concrete sank would also not be enough. The Plaintiff/Respondent or the Appellant would also need to show why the new slab of concrete sank. No competent evidence was provided to show, if the new slab sank, why it sank and if the sinking was related to negligence on behalf of either AE Stone or S Batata. Since no such proof was ever provided, summary judgement on behalf of the GC, AE Stone Inc. was appropriate as a matter of law.

In response to the summary judgment motions, the oppositions relied upon the deposition testimony of DRPA/PATCO representative, Adam Jacurak concerning what may cause a slab of concrete to settle. In essence, Mr. Jacurak testified that the usual cause of settlement is poorly repaired subbase. (Da309) First, this argument fails to answer the first question as to whether the old slab heaved or the new slab sank. This argument ignores Mr. Jacurak' s earlier testimony. Mr. Jacurak testified that no effort was made to determine whether one slab heaved, or the other slab settled. (Da308) He specifically admitted that he has no idea if one heaved or the other settled. (Da308) Without answering the first question, going on to the second question is not relevant. Despite the irrelevance, the argument was made that Mr. Jacurak's

speculation was enough to defeat summary judgment. While this argument is irrelevant, it is still important to point out that the entirety of Mr. Jacurak' s answer shows just how much it is pure speculation. The relied upon colloquy reads in full as follows:

> BY MS. LA ROC
>
> Q. I have a couple of questions.
> You testified earlier that the sidewalk could have either settled or raised up, but you don't know what happened in this particular case do you?
> A. Without more information, we can't tell what happened.
> Q. Okay. Now, if the sidewalk, you know, lower like settled, the one—the new block of sidewalk settled, what would have caused that to happen?
> A. The usual cause of settlement is poorly repaired subbase. Either the subbase is not compacted or the base stone wasn't compacted well and then usually the weight of the concrete will cause settlement. That's the most common. Other ones could be leaking water pipes in the area, storm pipes in the area. Basically water could cause damage and undermine sidewalks if there's a for water to get in, but you'd have to look in the area to see for some type of leak or pipe or other evidence. (Da309)

This exact exchange sets forth the exact two reasons why summary judgment was properly granted. The person that the opposition relied upon in two answers stated that he has no idea if the new slab settled or if the old slab heaved and then testified to two different scenarios that could cause a slab to settle. One scenario would have nothing to do with the possible negligence of either AE Stone or S Batata. The Plaintiff/Respondent or the Appellant had to show both and could show neither.

Appellant's brief attempts to confuse the court by arguing that the decision granting summary judgment came down to the Judge's decision that if Mr. Jacurak' s was accepted as an expert, his opinions would fail as they were net opinions. First, it must be pointed out that neither the Plaintiff/Respondent nor the appellant ever named a liability expert or provided a liability expert report during the course of discovery. Neither opposition papers argued that Mr. Jacurak was a liability expert. It was not until oral argument that the fact that Mr. Jacurak was an engineer came up at all. Even had the Judge accepted Mr. Jacurak as an expert and had he accepted his opinion regarding the usual cause of a sunken slab of concrete, it still would not have changed the fact that Mr. Jacurak could still not state if the old slab heaved or if the new slab sunk.

Judgment shall be rendered in favor of a moving party if the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment or order as a matter of law. *Rule 4:46-2;* Brill v. The Guardian Life Insurance Company of America*, l42 N.J. 520 (l995).* The test is two-fold. The threshold issue is whether there are any genuine and material factual issues. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence

submitted by the parties on the motion, together with all legitimate inferences there from favoring the non-moving party, would require submission of the issue to the trier of fact. *Id.* Absent such factual issues, "the judgment or order sought shall be rendered forthwith", only so long as the movant is entitled to the same as a matter of law. *Id.* Here there were no genuine issues of material fact. It was clear that Mr. Jacurak' s testimony has insufficient to establish that a breach of duty occurred during the pouring of the single slab of concrete five years prior to the Plaintiff/Respondent's fall.

II. THE COURT PROPERLY RULED THAT IF THE OPPOSITION WAS RELYING UPON MR. JACURAK AS AN EXPERT, HIS OPINIONS SHOULD NOT BE CONSIDERED AS THOSE OPINIONS WERE A NET OPINION

As argued above, it is this respondent's position that whether Judge Pugliese ruled that Mr. Jacurak' s testimony regarding one possible reason for a slab of concrete to sink was poor subbase compaction could be considered a valid expert opinion, that still would not have saved the case from summary judgment. Providing an explanation as to a possible reason for a slab to sink fails to answer the question of whether it was the new slab that sank or was it the old slab that heaved. Without first answering that question, we cannot get to the second question regarding

possible evidence that the new slab was poured negligently and thus was the cause of the lip. Mr. Jacurak specifically testified that he has no idea if it was the new slab that sunk or the old slab that heaved. (Da308 and 309)

For purposes of argument, this Respondent also takes the position that the opinions provided by Mr. Jacurak were in fact net opinions and therefore should not have been considered for purposes of opposing the summary judgment motions. Initially, it must be pointed out that neither the Appellant nor the Plaintiff/Respondent ever named Mr. Jacurak as a liability expert in their answers to interrogatories or provided a report from him that set forth the facts that he relied upon and the opinions he has as required by Rule 4:10-2(d)(1) and Rule 4:17-4(c). In addition, Appellant's opposition papers did refer to Mr. Jacurak' s deposition testimony, but at no point, did they ever offer that deposition testimony as an expert's opinion within those opposition papers. It was not until oral argument that the appellant made it known to the court that Mr. Jacurak was an engineer, thus prompting the discussion of his testimony and whether it could be considered expert testimony. (T1 P19 and 20)

In New Jersey, a jury should not be allowed to proceed without the aid of expert testimony on issues which are outside of a layperson's realm of sufficient

knowledge or experience. Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997). Testimony from expert witnesses is required because such witnesses are often uniquely qualified to assist the trier of fact to navigate through the often-complicated morass of specialized terms and concepts particular to a particular field. United States v. Bilzerian, 926 F.2d. 1285, 1294 (2nd Cir.), cert. denied. 502 U.S. 813 (1991).

Only a qualified expert opinion will assist the jury, and that opinion must be supported by a factual and scientific basis. Rubanick v. Witco Chemical Corp., 242 N.J. Super. 36, 45 (App. Div. 1990), modified on other grounds, 125 N.J. 421 (1991). Indeed, an opinion unsupported by factual and scientific basis is utterly devoid of any probative value. Stanley Co. of America v. Hercules Powder Co, 16 N.J. 295,305 (1954).

An expert must delineate the standard of care in the profession, which can be done by referring to the Court Rules, seminars, teachings, treatises, or other authorities supporting the opinion. The reasons for an expert's opinion are often more important than the opinion itself. See Dwyer v. Ford Motor Co., 36 N.J. 487 (1962). Where an expert's opinion contains conclusions unsupported by factual or scientific evidence and is not related to generally accepted standards in the profession, it is

inadmissible. Buckelew v. Grossbard, 87 NJ. 512 (1981). Indeed, qualified expert testimony must be based upon a factual and scientific basis. Rubanick, Id at 45. Expert testimony must relate to accepted standards within the specialized knowledge of the expert and generally accepted within the expert's profession. Fernandez v. Baruch, 52 N.J. 127, 131 (1968). In other words, plaintiff must produce expert testimony upon which the jury could find that the consensus of the particular profession involved recognized the existence of the standard defined by the expert. Fernandez, id. at 131. As such, without foundation, an expert opinion is considered worthless. Stanley Co. of America v. Hercules Powder Co., id. at 305. Thus, when an expert's opinion amounts to nothing more than a conclusion unsupported by factual evidence, it is deemed an inadmissible net opinion. Buckelew, id. at 524; In re Yaccarino, 117 N.J. 175, 196 (1989).

Here the court rightfully pointed out that at no point, did Mr. Jacurak' s deposition testimony ever set forth the factual or scientific basis for providing his opinion that the main reason that a slab of concrete sinks is poor subbase compaction. In addition, as set forth in the previous argument, his own deposition testimony provides an alternative explanation for the possible cause of a concrete slab sinking. Mr. Jacurak specifically testified that water infiltration could also cause damage to

the subbase which would also cause a concrete slab to sink. Since he never went to the scene and investigated this loss, he could not say the cause of the slab sinking, if it in fact, did sink. Without the appropriate specificity or the establishment of a factual and scientific basis, Mr. Jacurak' s opinion testimony was nothing but a net opinion.

It is interesting to note that Appellant's counsel, during oral arguments for the motions in limine, made it clear that Mr. Jacurak was not an expert. Specifically, she pointed out to the court that a person does not have to be an expert to hold Mr. Jacurak' s position at the DRPA/PATCO. (T2 P14). She argued that the plaintiff should not be allowed to use a backdoor method to us. Mr. Jacurak as a liability expert. (T2 P35) In response to that objection, Plaintiff/Respondent's attorney specifically stated that he did not want to use Mr. Jacurak as an expert and suggested that references to the fact that he is an engineer could be removed when portions of his deposition testimony are read to the court. (T2 PP 35 & 36)

Finally, the Appellant also argues that the Judge Pugliese' s ruling at the time of the summary judgment motions added confusion in comparison to Judge Bernardin's ruling during the motions in limine. In fact, a review of the motion's in limine transcript appears to show that Judge Bernardin's ruling is consistent with the

previous finding that Mr. Jacurak is not an expert. Specifically, Judge Bernardin stated that he saw Mr. Jacurak as a fact witness with information about practices and procedures of the DRPA/PATCO relative to maintenance of facilities in general. (T2 PP5 & 6)

III. RESPONDENT WAIVED CLAIMS FOR INDEMNIFICATION BY NOT MAKING ARGUMENTS IN SUPPORT THERE OF IN THEIR OPPOSITION BRIEF OR AT ORAL ARGUMENT

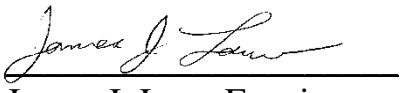
Because it is relevant to the argument, this Respondent has created a two-page Respondent's Appendix that contains the argument portion of Appellant's brief in opposition to AE Stone's motion for summary judgment. While the Appellant's Counterstatement of Material facts does describe their third-party allegation against AE Stone, Inc in general terms that includes a breach of contract claim and a claim for indemnification, Appellant did not include any arguments to support their claim for breach of contract or indemnification in their brief or at oral argument for the summary judgment motions. (Da252, Ra 1 &2 and T1)

Courts should decline to consider questions or issues not properly presented to the trial when an opportunity for such presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest. Nieder v Royal Indem. Ins. Co., 62 NJ 229, 234 (1973). In the case at

bar, simply stating in the counterstatement of facts that the DRPA/PATCO filed a third-party complaint that alleged breach of contract and sought indemnity is not enough to now seek an overturn of a properly granted summary judgment. DRPA/PATCO did not provide the court with the actual contract that was alleged to have been breached or the alleged language that entitled DRPA/PATCO to indemnification. Further, DRPA/PATCO failed to put forth any arguments in support of the allegations for breach of contract or indemnification in their legal argument section or at oral argument. Having failed to do so, that argument is waived and cannot now be made to this court.

CONCLUSION

It is respectfully requested that summary judgment be kept in favor of defendants, A E Stone, Inc. based on the case law and the foregoing, Plaintiff has no cause of action against Defendant, AE Stone, Inc., and her Complaint was properly dismissed with prejudice.



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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

SONIA COLON AND LUIS REINOSO, Plaintiffs-Respondent v. DELAWARE RIVER PORT AUTHORITY, PORT AUTHORITY TRANSIT CORPORATION, a/k/a PATCO, AP CONSTRUCTION, INC, AE STONE, INC., S. BATATA CONSTRUCTION, INC. Defendants-Appellants, DELAWARE RIVER PORT AUTHORITY, PORT AUTHORITY TRANSIT CORPORATION, a/k/a PATCO Defendant/3rd Party Plaintiffs-Appellants, v. AE STONE, INC., 3rd-Party Defendant/4th Party Plaintiff Respondent, v. S. BATATA CONSTRUCTION, INC., 4th Party Defendant-Respondent	DOCKET NO. A-3375-22 On Appeal from the Superior Court of New Jersey – Law Division, Civil Part CAMDEN COUNTY CAM-L-4463-19 Sat Below: Anthony M. Pugliese, J.S.C. Daniel A. Bernardin, J.S.C.

BRIEF ON BEHALF OF PLAINTIFFS/RESPONDENTS SONIA COLON AND LUIS REINOSO

Submitted: November 22, 2023

On the Brief: Brian S. Chacker, Esquire

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PRELIMINARY STATEMENT

This is a personal injury negligence action arising from a trip and fall incident that occurred on May 30, 2018, at the PATCO Collingswood Station lot #4 train station in Collingswood, New Jersey. Plaintiff Sonia Colon ("Sonia") was walking toward the PATCO Collingwood Station when she tripped and fell due to the uneven and dangerous condition of the sidewalk that defendants/appellants Delaware River Port Authority and Port Authority Transit Corporation (collectively "defendants") admitted they allowed to exist and should have addressed prior to Sonia's fall. Sonia suffered a distal radius fracture to the right wrist requiring open surgery with the placement of a metal plate and screws, multiple rounds of physical therapy, three additional surgical procedures to remove the hardware, address post-traumatic carpal tunnel and address trigger fingers in her thumb and small finger. She also endured multiple injections. Uncontroverted medical testimony established the need for significant future medical care. Sonia also is left with permanent and disfiguring scars.

Sonia's husband, Luis Reinoso ("Luis"), has taken on many household responsibilities he did not have previously. His relationship with Sonia has changed significantly as well. Luis had to leave his dream job, which he only recently had obtained, to care for Sonia.

Plaintiffs initiated this action against a number of parties beyond defendants, stating claims against A.E. Stone, Inc. and S. Batata Construction, Inc.

(collectively "construction defendants"). Neither plaintiffs nor defendants presented evidence that the construction defendants breached the standard of care for replacing a concrete slab, and neither obtained any expert opinion criticizing the manner of the construction defendants' work. Consequently, the construction defendants' motions for summary judgment properly were granted by the motion judge following argument during which it was clear there was no factual support for any claim against the construction defendants.

With respect to defendants' motions *in limine* addressing the use of defendants' corporate designee's deposition transcript at trial, and the testimony of plaintiffs' medical cost projection expert, Nurse Linda Lajterman, the trial court properly denied those motions. Defendants ignore that their corporate designee, Adam Jacurak, was speaking as defendants' agent, describing defendants' policies, procedures and practices related to conditions defendants consider tripping hazards which must be addressed by their staff as well as the reasoning behind those policies, procedures and practices.

With respect to Nurse Lajterman, her report and testimony clearly described her methodology and opinions which the trial court properly determined were admissible. The trial court properly used its discretion to permit appropriate portions of Mr. Jacurak's deposition and Nurse Lajterman's opinions at trial.

With respect to defendants' criticism of plaintiffs' closing argument, their

argument falls flat. First, defendants did not object once during plaintiffs' summation. Second, defendants raise in their appeal new issues with respect to plaintiffs' closing argument that were neither objected to at trial nor raised in defendants' motion for a new trial. Those issues are waived. Finally, in support of their arguments, defendants' cherry pick statements made during summation, presenting them out of context to create a purported violation of the law where none exists. Plaintiffs' summation addressed issues that defendants brought into the case and disputed throughout. The trial court properly used its discretion when it denied defendants' request for a mistrial.

Finally, defendants' motion for a new trial/remittitur based on the purported shocking nature of the verdict should be rejected. The trial court properly considered the trial evidence, the nature of the injuries and the impact on plaintiffs' lives and uncontroverted evidence of future medical needs. The trial court, using its feel for the case and viewing evidence in a light most favorable to plaintiffs properly determined the verdict was supported by the evidence and did not shock the court's conscience. Put simply, the trial court properly and appropriately ruled on all issues before it and its rulings should be affirmed.

CONCISE PROCEDURAL HISTORY

Sonia and Luis (collectively "Plaintiffs") filed their Complaint on November 5, 2019 against defendants and AP Construction (Da37). Defendants answered on

December 18, 2019 (Da45). Defendants filed a Third Party Complaint against AE Stone on March 11, 2020 (Da54). AE Stone answered and filed a Fourth Party Complaint against S. Batata Construction, Inc. on April 13, 2020 (Da116). S. Batata Construction, Inc. answered on May 1, 2020 (Da125).

Plaintiffs filed an Amended Complaint on August 20, 2020 (Da 134). Defendants answered on September 3, 2020 (Da142). AE Stone and S. Batata Construction, Inc. filed their respective Answers on September 21, 2020 and April 19, 2021 (Da151, Da158).

On September 21, 2021, S. Batata Construction, Inc. filed a motion for summary judgment (Da167). AE Stone, Inc. file a motion for summary judgment on September 23, 2021 (Da235). Following argument on October 22, 2021, the motion judge properly granted the construction defendants' motions (1T23-26).

On January 30, 2023, defendants filed a motion to preclude the testimony/report of plaintiffs' medical cost projection expert contending the report was speculative (Da283). On March 3, 2023, Plaintiffs filed their opposition noting the reports identify the methodology and sources for her opinions. On March 8, 2023, defendants filed a motion *in limine* to preclude plaintiffs from presenting evidence that the area of Sonia's fall was "improperly constructed or violated standards of construction industry." (Da279). Plaintiffs filed their opposition on the same date.

Argument on the motions occurred on March 20, 2023. The trial court reviewed the disputed portions of the corporate designee's deposition transcript, ruling which portions were admissible (2T59-67). The trial court also properly denied defendants' motion *in limine* as Nurse Lajterman's reports identify the methodology/sources for her opinions (Id).

This matter was tried from March 20-24, 2023, resulting in a verdict as follows: Sonia compensatory verdict - $500,000, Sonia future medical costs - $750,000; Luis loss of consortium - $300,000. Judgment was entered March 31, 2023 (Da322). Defendants' motion for a new trial and/or remittitur was denied June 9, 2023 following briefing and argument (Da284). This appeal followed.

CONCISE STATEMENT OF THE FACTS

This is a personal injury negligence action arising from a trip and fall incident that occurred on May 30, 2018 at the PATCO Collingswood Station lot #4 train station in Collingswood, New Jersey (Da37, Da13). Sonia was walking toward the PATCO Collingwood Station with her daughter and granddaughter when she tripped and fell due to the uneven/dangerous condition of the sidewalk that defendants admitted they allowed to exist and should have addressed prior to Sonia's fall (3T252, 255-257, 259-260); (4T38-39, 41-43, 44, 47-49, 139-140); (5T11). As Sonia fell forward, she extended her right arm to brace her fall (3T215-16); (4T139-140). On impact, Sonia suffered a distal radius fracture to the right

wrist requiring open surgery with placement of a metal plate and screws (4T74). Following surgery, Sonia was placed in a splint and a hard cast followed by months of physical therapy (4T86-87).

On January 14, 2021, because of continuing pain, limitation and numbness and tingling Sonia endured daily, she saw Andrew B. Sattel, M.D. (4T89). Dr. Sattel diagnosed Sonia with trigger finger of the right thumb and carpal tunnel syndrome of the right upper limb (Id). Sonia underwent a hand/upper extremity arthrocentesis procedure that provided limited relief (4T93). Dr. Sattel noted (1) persistent/ increased paresthesias in the right hand, (2) clicking and locking in the right thumb and pinky, (3) intermittent swelling and pain localized to the distal forearm and wrist, (4) positive Tinels and Phalens signs, and (5) triggering/ pain at A-1 pulley for thumb and tenderness for A-1 pulley for pinky (4T92). He recommended surgery to remove the metal and screws, a carpal tunnel release, and trigger release for Sonia's thumb and pinky. Those surgical procedures occurred on May 20, 2022 (4T92-101). Following surgery, two additional thumb injections occurred July 22, 2022 and August 9, 2022 (4T103-111).

In August, 2022, Sonia sought a second opinion from Dr. Stuart Trager who examined her and determined that she had reached maximum medical improvement (Id). Dr. Trager testified that Sonia is at an increased risk of arthritis

which will require additional treatment including pain management, prescription medications to control pain and swelling, and for 1-2 injections per year (Id).

Furthermore Sonia will require future physical therapy to strengthen her arm, regular over-the-counter medications, and is at an increased risk for fusion surgery (Id). Dr. Trager, the only medical expert to testify at trial opined that Sonia suffered permanent loss of function in her dominant right wrist and hand and will pain and physical limitations requiring medical care for the rest of her life (Id). Dr. Trager also testified regarding his review of the report and opinions of the defense expert, Dr. Stephen Horowitz and his agreement with Dr. Horowitz's opinion that Sonia's carpal tunnel was related to her fall (4T126-127).

Sonia, her daughter, granddaughter and husband all testified regarding the change in her physical function and in her personality. Where Sonia previously would rearrange furniture, paint the house (mostly the living room), cook, do her kids' hair, help with school projects and spend time hosting barbeques, now, she is not able to do those things without assistance and does not enjoy social activities because she does not feel well (3T210-213, 227-233, 242); (4T141-143, 149-154, 161-164, 167-169, 173-175, 181-183, 188-189, 191-196); (5T13-17).

Sonia cannot do her own hair and needs help buttoning a blouse (Id). She has started learning to write with her nondominant left hand (Id). In addition to her functional limitations, Sonia is left with permanent and disfiguring surgical scars

along her wrist and hand. The scars are a constant reminder of what she has been through and will live with permanently (4T143, 151-152).

As to future medical costs, medical cost projection expert, Nurse Linda Lajterman, testified to her medical cost projection experience and the methodology used to offer her opinions (5T54-60). Importantly, any totaling of medical costs within her reports was redacted from the jury's view and was not part of the trial record leaving the jury to make its own determination of future costs (7T10-14).

Luis' life also has been dramatically impacted. Not only has he taken on many household responsibilities he did not have prior, but he has endured changes in Sonia's personality, ability to function, and the loss of a dream job at a large car dealership he had worked very hard to obtain (4T178-183, 186-189, 190-196; 197-198). After the fall, Luis tried to help Sonia and keep his job but chose to leave the job he loved when given an ultimatum in order to ensure Sonia had he help she needed at home and with his kids (Id). While Luis' relationship with Sonia is permanently changed, he remains faithful and dedicated to Sonia (Id).

STANDARDS OF REVIEW

A. Appellate Review of Summary Judgment

Plaintiffs agree with defendants' summary judgment standard of review.

B. Appellate Review of Issues Not Raised Below/Plain Error

Throughout their Brief, defendants argue issues not objected to or raised at

trial. While appellate courts may consider allegations of errors not brought to the trial court's attention under the plain error standard (Rule 2:10-2), generally, unless an issue goes to the trial court's jurisdiction or concerns matters of substantial public interest, appellate courts do not consider it. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959), cert. denied 31 N.J. 554 (1960).

"Relief under the plain error rule, R. 2:10-2, at least in civil cases, is discretionary and 'should be sparingly employed.'" Baker v. Nat'l State Bank, 161 N.J. 220, 226 (1999) (quoting Ford v. Reichert, 23 N.J. 429, 435 (1957).

> A defendant who does not raise an issue before a trial court bears the burden of establishing that the trial court's actions constituted plain error because 'to rerun a trial when the error could easily have been cured on request[] would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal.'

State v. Santamaria, 236 N.J. 390, 404-05 (2019) (alteration in original)(citation omitted). This is of import because, "when counsel does not make a timely objection at trial, it is a sign 'that defense counsel did not believe the remarks were prejudicial' when they were made." State v. Pressley, 232 N.J. 587, 594 (2018) (quoting State v. Echols, 199 N.J. 344, 360 (2009)).

To meet the plain error standard, "[t]he mere possibility of an unjust result is not enough." State v. Funderburg, 225 N.J. 66, 79 (2016). "In the context of a jury trial, the possibility must be 'sufficient to raise a reasonable doubt as to whether

the error led the jury to a result it otherwise might not have reached.'" State v. G.E.P., 243 N.J. 362, 389 (2020) (citations omitted). Thus, the plain error standard requires a determination of (1) whether there was error; and (2) whether that error was "clearly capable of producing an unjust result". R. 2:10-2. "To determine whether an alleged error rises to the level of plain error, it 'must be evaluated in light of the overall strength of the [defendant's] case.'" State v. Sanchez-Medina, 231 N.J. 452, 468(2018) (citation omitted).

C. Appellate Review of *Limine* Motions and Evidentiary Rulings

Appellate courts defer to a trial court's evidentiary ruling absent an abuse of discretion that amounts to a clear error of judgment. State v. Garcia, 245 N.J. 412, 430 (2021); Rowe v. Bell & Gossett Co., 239 N.J. 531, 551 (2019).

> Put another way, an abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571, 796 A.2d 182 (2002) (quoting Achacoso-Sanchez v. INS, 779 F.2d 1260, 1265 (7th Cir. 1985)). "[A] functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue." Ibid.

State v. R.Y., 242 N.J. 48, 65 (2020). The same standard applied for evidentiary rulings applies to rulings on motions *in limne* as well. Primmer v. Harrison, 472 N.J. Supr. 173, 187 (app. Div. 2022), cert. denied, 253 N.J. 47 (2023).

D. Appellate Review of Motion for Mistrial

A decision to grant or deny a motion for mistrial is addressed to the sound

discretion of the trial judge and will not be disturbed on appeal absent a clear showing of abuse of discretion that results in manifest injustice. State v. Smith, 224 N.J. 36, 47 (2016); State v. Jackson, 211 N.J. 394, 407 (2012); State v. Yough, 208 N.J. 385, 397 (2011) ("The grant of a mistrial is an extraordinary remedy to be exercised only when necessary 'to prevent an obvious failure of justice.'").

E. Appellate Review for Motion for a New Trial

A motion for a new trial should be granted only after "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." *R.* 4:49–1(a). A jury verdict is entitled to considerable deference and

> should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination, after canvassing the record and weighing the evidence, that the continued viability of the judgment would constitute a manifest denial of justice.

Baxter v. Fairmont Food Co., 74 N.J. 588, 597–98 (1977). That is, a motion for a new trial "should be granted only where to do otherwise would result in a miscarriage of justice shocking to the conscience of the court." Kulbacki v. Sobchinsky, 38 N.J. 435, 456 (1962). A trial judge is "not [to] substitute his judgment for that of the jury merely because he would have reached the opposite conclusion...." Dolson v. Anastasia, 55 N.J. 2, 6 (1969).

A "miscarriage of justice" has been described as a "'pervading sense of "wrongness" needed to justify [an] appellate or trial judge undoing of a jury verdict ... [which] can arise ... from manifest lack of inherently credible evidence to support the finding, obvious overlooking or undervaluation of crucial evidence, [or] a clearly unjust result....'" Lindenmuth v. Holden, 296 N.J. Super. 42, 48 (App. Div. 1996) (quoting Baxter, supra, 74 N.J. at 599).

The appellate standard of review from decisions on motions for a new trial is the same as that governing the trial court. Bender v. Adelson, 187 N.J. 411, 435 (2006). However, in deciding the issue, appellate courts must give "due deference" to the trial court's "feel of the case," including its regard for "the jury to pass upon the credibility of the witnesses" and whether "it clearly and convincingly appears that there was a miscarriage of justice under the law." Carrino v. Novotny, 78 N.J. 355, 361 (1979) see also Dolson v. Anastasia, 55 N.J. 2, 7 (1969).

F. Appellate Review of Motion for Remittitur

> The 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 Group, 226 N.J. 480, 485 (N.J. 2016).

In considering a motion for remittitur, the jury's verdict is presumed to be correct and is entitled to substantial deference. Id. Furthermore, the trial record

underlying a remittitur motion must be viewed in a light most favorable to the plaintiff as the prevailing party. Id. A judge should not overturn a damages award falling within a wide acceptable range – a range that accounts for the fact that different juries might return very different awards even in the same case. Id. "The standard for reviewing a damages award that is claimed to be excessive is the same for trial and appellate courts, with one exception – an appellate court must pay some deference to a trial judge's ''feel of the case.'" Cuevas v. Wentworth Grp., 226 N.J. 480, 501 (2016) (citations omitted).

LEGAL ARGUMENT

I. SUMMARY JUDGMENT SHOULD BE AFFIRMED

Contrary to defendants' contention that summary should not have been granted, the record evidence at that time wholly lacked any factual evidence or even a disputed issue of fact that would support the denial of summary judgment. The premise of defendants' argument is that defendants' corporate representative, Mr. Jacurak, ". . . testified at deposition that, based on his prior experience, large settlements do not normally occur when sidewalks are properly installed. Id. at 27-10 to 24 (Da304)." (Db11). Mr. Jacurak's actual testimony was that settling does not always occur if cement is installed properly (Id). However, Mr. Jacurak also testified that settling can occur when concrete is installed properly (Id. at 27-10 to 24 (Da304)). Importantly, that testimony is the only evidence from any source

addressing how the concrete slab at issue was installed. There was no basis given for that opinion testimony, no photos or other evidence of the work that was performed and no evidence suggesting how the construction defendants performed their work negligently. Considering the arguments and lack of evidence of negligence or causation, summary judgment was properly granted.

Defendants somehow argue that the motion judge's failure to cite a case in granting summary judgment was not in compliance with Rule 1:7-4. There is nothing in Rule 1:7-4 requiring a case citation in granting summary judgment; particularly where there were no facts supporting the claims against the construction defendants. A review of the very transcript cited by defendants illustrates the thorough explanation for the grant of summary judgment (1T23-26).

A. The Motion Court Properly Determined Mr. Jacurak's Opinion Was An Inadmissible Net Opinion.

Defendants appear to argue Mr. Jacurak should not be considered an expert and consequently his opinion is not a net opinion despite arguing his qualifications as a civil engineer before the motion judge (T1-20) and despite arguing that expert testimony it required to pursue a claim for negligent construction elsewhere in their Brief (Db26-27). Furthermore, rather than address evidence that might contradict the motion judge's net opinion determination, defendants cite dissimilar cases.

For example, Savoia v. F.W. Woolworth Co., 88 N.J. Super. 153 (app. Div. 1965) involved an infant child injured because of the negligent maintenance and operation of a mechanical hobby horse. Plaintiff's engineering expert opined that the hobby horse required a "three -point stabilizing affect" to protect against the violent action and "dissonance" of the horse when it moved up and down explaining the science behind the "dissonance" and its impact on a child. The expert then examined a photo of the hobby horse at issue and noted that there had been no three-point stabilization. This Court held that, because (1) the expert had properly described the science behind his opinions and (2) his opinions were not just supported by the photograph, but also by a fact witness, it was proper to admit the testimony.

The opinions presented in Savoia are nothing like Mr. Jacurak's blanket statement in this case. Mr. Jacurak offered testimony on one hand that settling of concrete should not occur if installed correctly based on his experience, but on the other hand admitted that settling can occur even if the concrete is installed properly (Da304 at 27, lines 10-24). He essentially offered no opinion at all. To the extent he offered an opinion that the installation was improper, he offered nothing more than it should not happen which is a quintessential "net opinion".

Defendants also rely on the unpublished opinion Coutts v. Madden, erroneously contending the facts of that case are somehow similar to Mr. Jacurak's

baseless statement in this case. In Coutts, the plaintiff tripped and fell over uneven sidewalk. The condition of the sidewalk at the time of the fall was a contested issue at trial. The installation of the sidewalk was not at issue in the case. The plaintiff's engineering expert offered an opinion that according to the Americans with Disability Act, any vertical change of ¼" or more at an expansion joint was a "trip hazard". However, the expert did not cite the specific ADA code section. This Court found that the failure to name the specific section of the ADA did not make the expert's opinion a "net opinion".

As with Savoia, Coutts is dissimilar to the issues defendants' now raise. First, defendants have to make a decision whether Mr. Jacurak should be considered an expert. Second, and more importantly, the motion judge properly noted there was no actual evidence presented supporting any claim that the construction defendants improperly installed the concrete slab. Other than Mr. Jacurak's "opinion", there was no basis offered for that conclusion. This is not a case where the witness described a general standard that was not complied with. This is a case where, if Mr. Jacurak is considered an expert, he offered absolutely no basis for his conclusion. If he is not an expert, his opinion is an improper lay opinion; not a basis for any factual dispute that would justify reversing summary judgment. Summary judgment was proper and should be affirmed.

B. The Motion Judge Did Not "Create" A Liability Expert Issue And Defendants Never Raised An Objection To The Motion Court Considering Its Sole Witness An Expert.

Defendants inaccurately argue the motion judge "*sua sponte*" created an issue of whether Mr. Jacurak was an expert. Defendants argued that Mr. Jacurak was a civil engineer (T1-20). Thus, it was reasonable for the motion judge to treat argument based on that fact as arguing his testimony is expert opinion.

If defendants prefer Mr. Jacurak not be considered an expert, the lack of expert opinion addressing the construction defendants' work is fatal. Allegations of construction defects without evidentiary support will not defeat a meritorious summary judgment motion. N.J. Mortg. & Inv. Corp. v Calvetti, 68 N.J. Super. 18, 25 (App. Div. 1961). Expert testimony of construction deficiencies is required when "the matter under consideration is so esoteric or specialized that jurors of common judgment and experience cannot form a valid conclusion." D'Alessandro v. Hartzel, 422 N.J. Super. 575, 580-81 (App. Div. 2011) (quoting Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 450 (1993).

If Mr. Jacurak were not considered an expert, any claims against the construction defendants for failure to properly construct the concrete slab would have to be dismissed regardless.[1] Consequently, the motion judge's consideration

[1] Importantly, plaintiffs' claims against the construction defendants for improperly constructing the concrete slab are different from the claims against defendants for allowing a dangerous

of Mr. Jacurak as an expert is, at worst, harmless error to defendants' benefit. It is not a basis to reverse summary judgment based upon an utter lack of evidence.

Finally, defendants raise for the first time on appeal that the motion judge should have adjourned the motions or granted them without prejudice. Defendants did not request adjournment and could have sought reconsideration making the same argument but did not. Accordingly, summary judgment should be affirmed.

C. Defendants Breach Of Contract And Contribution/ Indemnification Claims Are A Red Herring.

Defendants suggest that, despite there being no evidence or viable claim for negligence against the construction defendants, they still should be entitled to a reversal of summary judgment. In cases where more than one tortfeasor is responsible for an injury, the tortfeasors may make crossclaims against each other for contribution and indemnification under the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1 to -5. "Joint tortfeasors" is defined as "two or more persons jointly or severally liable in tort for the same injury." N.J.S.A. 2A:53A-1.

As the motion judge determined there was no evidence supporting a claim against the construction defendants, they are not joint tortfeasors. By extension, there can be no claim for contribution or indemnification. The same is true of

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tripping hazard to exist for a significant period of time prior to Sonia's fall. There was ample evidence presented at trial of the dangerous nature of the tripping hazard over which Sonia fell.

defendants' breach of contract claim against A.E. Stone. Accordingly, summary judgment should be affirmed.

II. THE TRIAL COURT PROPERLY DENIED DEFENDANTS' MOTION FOR MISTRIAL

A. Defendants' Motion For Mistrial/New Trial Properly Was Denied As Plaintiffs' Counsel's Comments During Summation Did Not Cross The Line Of Appropriate Advocacy.

Preliminarily, defense counsel did not object during plaintiffs' closing argument. Had defense counsel believed anything plaintiffs' counsel was inappropriate or "crossing the line", defense counsel could and should have objected at the time. Instead, defense counsel waited until closing were completed and a lunch break had been taken. Only then did she move for a mistrial which the trial court properly denied.

Closing arguments are permitted pursuant to Rule 1:7–1(b). Attorneys are generally afforded broad latitude in making such statements. Fertile v. St. Michael's Med. Ctr., 169 N.J. 481, 495 (2001); Geler v. Akawie, 358 N.J. Super. 437, 467 (App. Div.), cert. denied, 177 N.J. 223 (2003). "Counsel may draw conclusions even if the inferences that the jury is asked to make are improbable, perhaps illogical, erroneous or even absurd..." Colucci v. Oppenheim, 326 N.J. Super. 166, 177 (App. Div. 1999), cert. denied, 163 N.J. 395 (2000). Arguments "must be based in truth, and counsel may not 'misstate the evidence

nor distort the factual picture.'" Bender v Adelson, 187 N.J. 411, 431 (2006) (quoting Colucci, supra, 326 N.J. Super. at 177). It is "improper to construct a summation that appeals to the emotions and sympathy of the jury." State v. Black, 380 N.J. Super. 581, 594 (App. Div. 2005), cert. denied, 186 N.J. 244 (2006). However, "a clear and firm jury charge may cure any prejudice created by counsel's improper remarks during opening or closing argument." City of Linden v. Benedict Motel Corp., 370 N.J. Super. 372 (App. Div.), cert. denied, 180 N.J. 356 (2004). Juries are presumed to follow such instructions. State v. Winter, 96 N.J. 640, 649 (1984). "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, supra, 187 N.J. at 431 (quoting R. 4:49–1(a)).

> Fleeting comments, even if improper, may not warrant a new trial, particularly when the verdict is fair. See, e.g., Dolan v. Sea Transfer Corp., 398 N.J. Super. 313, 332, 942 A.2d 29 (App.Div.), certif. denied, 195 N.J. 520, 950 A.2d 907 (2008). Moreover, the '[f]ailure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made,' and it 'also deprives the court of the opportunity to take curative action.' State v. Timmendequas, 161 N.J. 515, 576, 737 A.2d 55 (1999). Where defense counsel has not objected, we generally will not reverse unless plain error is shown. R. 2:10-2.

Jackowitz, 408 N.J. Super at 505.

Contrary to defendants' argument, there was nothing about plaintiffs' summation that was so prejudicial that it transgressed the boundaries of the broad latitude otherwise afforded to counsel; particularly when considered in whole and in light of the evidence. As the Jackowitz Court noted, defendants' failure to raise any objection at closing "indicates that defense counsel did not believe the remarks were prejudicial at the time they were made." With that said, each argument will be addressed individually.

1. Not only was there no Golden Rule violation, but as defendants raise this issue for the first time on appeal, the argument is waived and should not be considered.

There was nothing about plaintiffs' summation that violated the Golden Rule. Further, defendants did not raise any alleged Golden Rule violation either in their mistrial motion at trial or in their post-trial motion. This appeal is the first time the issue has been raised. As a purported Golden Rule violation pertains neither to the trial court's jurisdiction nor concerns a matter of great public interest, the issue should be deemed waived. State v. Alexander, 233 N.J. 132, 148 (2018) (citing DYFS v. M.C. III, 201 N.J. 328, 339 (2010)).

Should the Court consider this issue, any purported remarks must be reviewed under the plain error standard. See Fertile v. St. Michael's Med. Ctr., 169 N.J. 481, 493 (2001). As none of the comments, when viewed in the context of the entire summation and the trial evidence had the "'clear capacity for producing

an unjust result'", the trial court's denial of a mistrial should be affirmed. Id.; R. 2:10-2. This is particularly true as a full review of plaintiffs' summation reveals no violation of the Golden Rule.

Attempting to create a violation where none exists, defendants cherry pick portions of plaintiffs' summation without providing context. For example,

> - So I want to ask you something. I want to ask you to go in the back and I want to ask you to really think this through. And I have a hard time for a lot of people thinking about how do you determine this. Well, she's got 28 years – 28.7 years of life left. Where were you 28.7 years ago? What was going on in your life? How much has happened in 28.7 years? Did you get married, did you have kids, did you have grandkids, did you change jobs?

(Db18 (citing 5T at 138-6 to 14)).

Defendants fail to include everything that was said before and after (including a reference to a 1993 commercial showing the significant changes in technology over time). This portion of the summation addressed life expectancy and future pain and suffering. Asking the jury that they should consider how old they are and what has happened throughout the course of years as a perspective of the passage of time is not suggesting they put themselves in Sonia's shoes. The same failure to provide context is repeated in the quote below:

> - Think about everything you've been through in your life till now. And I'd like to believe if you think about half of that spent unable to use your dominant hand the way you want to, having to learn to write. I was thinking -- I was grabbing my phone to text someone, and I, you know, I was texting and I thought to myself, my God, if I couldn't use

> my dominant hand to text and I had to try it with the hand that I don't use to text, it's awkward, it's hard, it's annoying. If I couldn't button the button of my shirt today and I had – and I had to ask my husband or my granddaughter or my daughter for help it's embarrassing.

(5T136-3-15). Defendants omit is the very next sentence:

> This is someone who took care of her house and now for the rest of her life she has to say can you help me button this. That's her life. That's the reminder she gets every day and will get every day for the rest of her life.

(5T136-15-19).

What becomes clear from reviewing the entire closing is that defendants are selectively ignoring any statement that would provide context. With respect to arguing the time-value of money, plaintiffs argued:

> So, again, it's a hard thing to do. And I put Mr. Spinelli on the stand because, you know, how much would it have cost PATCO if it was doing its job to fix this before May 18th of 2000 -- May 30th, 2018? A couple hundred bucks? A couple hundred bucks. Grind it down, spread some spackle over there, concrete, and we're not sitting here today for a couple hundred bucks. He gets paid $104,000 a year to work 50 hours, 60 hours a week on a bad week. Most weeks it's 42-1/2 hours. I don't know how much that comes out to (indiscernible), but there are 24 hours in a day, 365 days in a year. And if you do the math, it comes to be almost 8,700 hours in a year. What would one hour be worth? What's it worth for one hour in Sonia Colon's shoes? Would you want to be there for an hour? Would you want to be there for a week? Would you want to be there for 8,700 plus hours times 28? $104,000 for 40 hours. I don't know what that comes out to. I didn't do the math. She's going to live with this for the rest of her life.

(5T138-25; 139-19). Interestingly, defendants only cited the underlined portion of the quote because to do otherwise undermines their position.

With respect to Mr. Colon, plaintiff's counsel argued:

> He had found his dream job. He had worked from small auto sales shops to be able to work at the Acura in Maple Shade, which, listen, that's his dream job. I don't know what your dream jobs were, but he was forced to make a decision. And what did he decide? He said, you know what, my wife comes first, my family comes first, I'm not – I don't care. If that means I have to go drive Uber late at night after she does her doctors visits, that's fine. And you know what kudos to Maple Shade Acura because they tried to work with his schedule, but at some point a business is a business and it has to be run. And they had -- he had to choose and he chose.

(5T140-1-14). Rather than provide the full argument, defendants relay two sentences trying to recharacterize proper argument into a nonexistent rule violation. The simple fact is plaintiffs' summation did not ask the jury to "do unto others as you would have them do unto you." It was proper argument related to time passage and a spouse who loves and cares for his severely injured wife.

2. Defendants waive issues related to alleged improper comments regarding defendants' decision not to call Dr. Horowitz because they did not raise the issue prior to appeal; To the extent the issues are not waived, unlike choosing not to call a retained expert to testify, defendants took Dr. Horowitz's trial testimony and only decided after trial started not to present it to the jury.

As with their arguments related to Golden Rule, defendants never objected to or raised any issue with plaintiffs' comments about defendant expert Dr.

Stephen Horowitz's opinions either at trial or in their post-trial motion. Thus, this Court should not consider the issue.

With respect to the defendants' argument that there are many explanations for a party's decision not to call an expert, in this case the reason Dr. Horowitz's testimony was not presented is clear; particularly because Dr. Horowitz's testimony was taken for trial and it was not until the third day of trial as plaintiffs were resting their case and after both Ms. Colon and Dr. Trager had testified regarding Dr. Horowitz's examination and opinions that defendants decided not to present it to the jury (4T218-11). Only after Dr. Horowitz agreed that Sonia's injuries are related to the fall under oath that defendants made the decision at trial not to actually play the video (Id).

Furthermore, defendants ignore that Sonia testified about her exam with Dr. Horowitz and Dr. Trager, plaintiff's expert, was asked to comment on Dr. Horowitz's report without objection. Dr. Trager testified to the jury that Dr. Horowitz agreed with his diagnoses (4T126-127, 158). Thus, not only did the jurors hear that Dr. Horowitz's deposition had been taken early on with no objection, they also knew that the defense expert's opinions were the same as those of plaintiff's medical expert. Under those circumstances, it was entirely appropriate to mention that there was no debate about the severity of the injuries. Put simply, there can be no adverse inference when the evidence establishes there

is no dispute about the severity of the injury.

Regardless, the trial court specifically instructed the jury that they were free to judge the credibility of the witnesses and to disregard any testimony they do not believe (5T157-160). Thus, any prejudice defendants believe they may have suffered – which presumably is not much as they chose not to object at trial – is harmless at worst. Accordingly, if the Court considers this issue as not waived, the trial court's decision to deny a mistrial should be affirmed.

3. Plaintiffs' counsel neither made disparaging remarks about defendants and defense counsel, nor misstated the evidence.

Nothing about counsel's comments was either disparaging or outside of what the evidence supported. As the Court noted at the time of defendants' motion for a mistrial:

> You know, in -- you know, in terms of, you know, the comments on closing by plaintiff's attorney that, you know, indicates somehow it's the fault of the -- of the defendants and coupled with the contention or assertion that defense counsel had her marching orders to I guess come in and defend that, yeah, I mean that's not a secret here to anybody. That's what it's all about. It's a determination by the DRPA.
>
> . . .
>
> I think it's been a fair presentation. I don't think the comments made by plaintiff's counsel in any way, its argument, its argument in closing I believe that these – these matters are -- are supported by the facts of the case as -- as we come in here and fully understood by the jury.

(5T147-148).

As with all of their arguments, defendants continue to present the facts from their point of view rather than in a light favorable to the plaintiff. A perfect example is defendants' conversion of a factual statement into a "disparaging remark". Defendants argue that it was inappropriate to point out to the jury (1) that defendants "didn't send a corporate representative" to trial and instead sent an investigator and (2) that defendants did not have a witness who was willing to testify there was no tripping hazard. While defendants contend this is disparaging, those statements are factually accurate. Phil Spinelli is a PATCO investigator who sat through trial. He specifically was not identified as a corporate representative.

Defense counsel told the jury in both opening and closing that defendants were not responsible for Sonia's fall and that the condition was not a tripping hazard (3T202-205); (5T105-106). She made these arguments despite Mr. Spinelli and Mr. Jacurak both testifying defendants considered the condition causing Sonia's fall was a tripping hazard (3T252, 255-257) and Mr. Spinelli disagreeing with defendants' position that they bear no responsibility for the tripping hazard (3T259-260). For defendants to speculate the purpose of those comments was to imply that defendants did not care about plaintiffs is inaccurate and clearly does not view the evidence in a light favorable to plaintiffs.

With respect to the inspection reports, the jury was shown Mr. Jacurak's deposition testimony which included a request for the inspection reports (4T37).

There was nothing preventing defendants from producing those reports at any time, including at trial. To argue now, for the first time, that a reference to the inspection reports not being produced despite a clear request and their being in defendants' sole control strains credulity and is in no way disparaging.

With respect to "marching orders", defendants have not said that statement is inaccurate. Defendants possess security video showing that Sonia was looking where she was walking prior to her fall yet still argued she was not paying attention. Why would they do such a thing? It is not disparaging to argue a fact. Ultimately, the trial court considered these statements and defense counsel's arguments that plaintiffs were asking the jury to send a message, but properly determined that was not the case. In fact, defendants acknowledge that plaintiffs never asked the jury to send a message (Db22).

Finally, plaintiffs accurately relayed that the repair work was performed at defendants' request, that this was "their project" (5T118). The fact that there were other companies performing work does not change that the work was done for defendants. There is nothing inaccurate about the facts relayed in plaintiffs' closing. Accordingly, the trial court's mistrial denial should be affirmed.

4. Plaintiffs' counsel's use of anecdotes to communicate the severity of plaintiffs' limitations and loss was within the broad latitude permitted in closing arguments.

As set forth above, parties are afforded broad latitude in closing arguments. See Bender v. Adelson, 187 N.J. 411, 431 (2006). The cases defendants cite hoping this Court will reject the trial court's determination that plaintiffs' closing argument was within the broad latitude permitted contain parentheticals that do not accurately relay the case holding and are not applicable here. In citing Tartaglia v. UBS PaineWeber, Inc., 197 N.J. 81, 128-30 (2008), defendants reference a story told about a "hard-working immigrant woman" which was unsupported by the record (Db24). In Tartaglia, the attorney told the story of a hard-working immigrant woman referencing the plaintiff. There was no evidence related to that in the record. Unlike Tartaglia, here, the anecdotes referenced by plaintiff's counsel were part of communicating legal arguments about defendants' breach of duty and about communicating real injuries and limitations suffered by plaintiffs. There was nothing improper about those anecdotes and the trial court agreed. Accordingly, the trial court's denial of a mistrial and a new trial should be affirmed.

III. THE TRIAL COURT PROPERLY DENIED DEFENDANTS' MOTIONS *IN LIMINE*

A. The Trial Court Properly Denied Defendants' Motion *In Limine*/Objections To Allowing Excerpts Of Adam Jacurak's Deposition Being Read Into Evidence.

Defendants are correct that the mere fact of a fall and an injury do not render defendants liable. However, where defendants' corporate designee, speaking on behalf of defendants admitted that any difference in height between two slabs of concrete of an half inch or greater is considered a tripping hazard, and where Phil Spinelli, defendants' investigator who examined the specific area of Sonia's fall on defendants' behalf, measured the height differential between the two slabs of concrete as ¾" and described what he saw with his own eyes as a tripping hazard, there is little doubt that the condition posed a danger.

Defendants, in their motion *in limine* and again in their post-trial motion, focus their argument on the belief that an expert was necessary to discuss whether the construction and installation of the sidewalk block was negligent. Plaintiffs did not present any evidence related to the construction of the concrete block. The focus of plaintiffs' case was that the concrete block had settled over time, that defendants had inspection policies specifically in place to detect tripping hazards, that defendants failed to follow their own policies and that, if they had followed their own policies and actually conducted inspections, then the hazard that caused

Sonia's fall would have been discovered and addressed prior to her fall.

Defendants quote an allegation from plaintiffs' Amended Complaint and interpret that allegation to their benefit rather than as it should be interpreted. Plaintiffs' alleged in the Amended Complaint that Sonia fell due to "uneven and improperly installed pavement". A proper reading of that allegation is that Sonia fell due to uneven pavement and improperly installed pavement. It was entirely appropriate for Sonia to pursue a theory that she fell because of uneven pavement and not to address how that uneven and dangerous condition came to exist. That is what happened at trial.[2]

Defendants advised plaintiff's counsel just a week before trial that Mr. Jacurak was unavailable for trial because he was on medical leave. As a result, plaintiff properly was permitted to read portions of Mr. Jacurak's deposition to the jury. The Court restricted many portions of Mr. Jacurak's testimony from being presented to the jury but did permit those areas that addressed defendants' corporate practices and procedures including what defendants considered tripping hazards and what defendants should have done had they complied with their own policies and procedures. That testimony was not expert testimony. Rather it was proper use of admissions by defendants' corporate designee:

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[2] Interestingly, defendants ignore the need for an expert when arguing summary judgment was granted in error.

- Policies and procedures require monthly inspections (4T36-37).

- Differences in height between cement blocks should be seen by the maintenance staff or whoever is performing the inspection (4T37-38).

- Defendants understand that if concrete slabs settle, that means that they could end up being lower than the blocks on either side of them and pose a tripping hazard (4T38-39).

- A half an inch or greater of a depression between two concrete slabs should have been seen should have been addressed (4T41).

- It would be unacceptable and violates the rules of PATCO if the half inch or greater defect was allowed to exist for any period of time and was not noted on an inspection (4T44).

- In this case, the ¾" settling in 2018 had been there for more than a month, should have been seen and probably was there for multiple months before July 10th, at least, and possibly was there for years (4T47-48).

- Q. Okay. So the bottom line, this incident could have been prevented if people had been doing their inspections and repairs properly; do you agree with that?

  A. If they were doing their inspections properly, this would have been addressed. That part I can agree with. Whether or not this accident occurred it doesn't mean it did happen between inspections. So I would say that this incident should have been recorded and addressed somewhere in the inspection reports.

  Q. And some point before May 30th of 2018; fair?

  A. Most likely, yes. (4T49).

Put simply, the Court did not permit plaintiffs to present any lay witness as an expert. The Court properly permitted plaintiff to present evidence from

defendants own representative as to what defendants considered a dangerous condition, whether defendants believed the condition should have been discovered before Sonia's fall and why they believed it.

Defendants' real contention is that expert testimony was necessary despite the trial court properly determined that it was not. "In general, expert testimony is required when a subject is so esoteric that jurors of common judgment and experience cannot form a valid conclusion. Wyatt by Caldwell v. Wyatt, 217 N.J. Super 580 (App. Div. 1987) (holding that testimony of cause of accident was defective brakes inadmissible without expert testimony). However, in Hopkins v. Fox and Lazo Realtors, 132 N.J. 426 (1993), the Supreme Court applied the rule outlined in Wyatt to a matter involving a defective step on which the Plaintiff tripped and ruled that in that instance: "some hazards are relatively commonplace and ordinary and do not require the explanation of experts in order for their danger to be understood by average persons. We find that this case is one that can be comprehended by persons of ordinary experience." Id. at 450.

Here, the Court properly permitted admissible testimony from defendants' corporate designee to be presented to the jury. Under the circumstances of this case, Mr. Jacurak spoke as defendants' representative describing defendants' view of what constituted a tripping hazard and why it was important for defendants to inspect and find what it considers to be tripping hazards. Among those reasons was

because defendants understood that pedestrians might not appreciate the danger the tripping hazard posed and defendants' knowledge of when settling can occur. If defendants did not want Mr. Jacurak to offer testimony or if he was not stating defendants' position correctly, the fault rests with defendants for choosing him as their corporate representative. Plaintiff should not be punished for presenting defendants' own representative to address defendants' policies, procedures and practices. There was absolutely no need for an expert to testify regarding the tripping hazard that defendants allowed to exist. Accordingly, as defendants' corporate representative was not available at trial and the trial court properly permitted appropriate portions of Mr. Jacurak's deposition testimony to be presented to the jury, the trial court's motion *in limine* rulings should be affirmed.

B. The Trial Court Properly Denied Defendants' Motion *In Limine* To Preclude Plaintiffs' Medical Cost Projection Expert.

Contrary to defendants' contention, Nurse Lajterman's expert reports provide the sources of Sonia's future needs and the pricing for that treatment. While the net opinion rule requires experts "to provide the factual basis and analysis that support their opinion, rather than stating a mere conclusion," it "does not require experts to organize or support their own opinions in a specific manner 'that opposing counsel deems preferable.'" In re Civ. Commitment of A.Y., 458 N.J. Super. 147, 169 (App. Div. 2019) (quoting Townsend v. Pierre, 221 N.J. 36,

54 (2015). Trial courts therefore should not exclude expert testimony "merely 'because it fails to account for some particular condition or fact which the adversary considers relevant.'" Id. (quoting Townsend, 221 N.J. at 54). If the expert "otherwise offers sufficient reasons which logically support his [or her] opinion," then the failure to consider or weigh a factor the adversary believes is important does not render the testimony an inadmissible net opinion. Id. Any omissions can be explored during cross-examination at trial. Id.

Nurse Lajterman's reports specifically identified the sources which were used to determine medical costs and who identified the future medical care (Da285; Da290). Further, page 4 of her reports detailed the sources of cost factoring (Da287; Da293). Finally, in the list of medical costs following her narrative report provides the sources used as basis for her opinions (Id at cost projection list).

Thus, contrary to defendants' contention that Nurse Lajterman's report "lists future medical costs without providing sources of the pricing information or showing how those costs were calculated", her reports are clear about where she obtained the pricing information and specifically how she calculated the prices. Indeed, she specifically cited the doctor and record on which she relied to calculate future medical costs. Accordingly, the trial court properly denied defendants'

motion *in limine* and permitted Nurse Lajterman to testify at trial.[3]

IV. THE TRIAL COURT PROPERLY EXCLUDED TESTIMONY REGARDING A LACK OF REPORTS OF PRIOR INCIDENTS

Defendants properly were precluded from introducing evidence at trial about purported "lack of reports" of prior incidents occurring at the location of Sonia's fall. As this Court noted in Muscato v. St. Mary's Catholic Church, 109 N.J. Super. 508, 510 (App. Div. 1970):

> . . . the incidence or absence of other accidents is not admissible to show the dangerousness or safety of a particular condition. Karmazin v. Pennsylvania R.R. Co., 82 N.J. Super. 123, 129 (App. Div. 1964). See Annotation, 70 *A.L.R.* 2d 167 (1960); Annotation, 31 A.L.R. 2d 190 (1953); 29 Am. Jur. 2d, §§ 305, 310, at 350, 355 (1967). Cf. DiDomenico v. Pennsylvania-Reading Seashore Lines, 36 N.J. 455, 464-465 (1962). However, subject to proper cautionary instructions, evidence of prior accidents may be shown when calculated to show the existence of a condition long enough to bespeak notice thereof to the owner or occupant. Karmazin, supra. By the same token, evidence that there had been no previous accidents arising out of the alleged condition should be admissible to negate knowledge to the defendant of an alleged defective condition. (citations omitted).

Id.

At trial, the trial court properly sustained plaintiff's objection to defendants presenting Anne Kubiak, a PATCO claim adjustor, to testify that defendants had

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[3] Defendants spend a great deal of time addressing Nurse Lajterman's trial testimony in arguing the motion *in limine* ruling was inaccurate. Rather than address the substance of Nurse Lajterman's testimony here – as it has no bearing on the trial court's decision to deny defendants' motion – plaintiffs will address the substance of her testimony in responding to defendants' request for a new trial/remittitur below.

not previously received any reports or claims of injury at the location of Sonia's fall (4T208-209). Defendants' true purpose in eliciting such "evidence" as argued to the trial court was to suggest to the jury that there was nothing dangerous or defective about the condition that caused Sonia to trip and fall (4T211-212). Defendants did not argue the evidence was being elicited to prove lack of notice (Id). Nor could they make such an argument given Mr. Jacurak's admission that the tripping hazard should have been seen and addressed before Sonia's fall (Id).

Considering the above factors, the Court properly used its discretion and sustained plaintiffs' objection to such evidence. Accordingly, the trial court's ruling precluding such evidence should be affirmed.

V. THE TRIAL COURT'S DENIAL OF DEFENDANTS' MOTION FOR A NEW TRIAL AND REMITTITUR ON THE BASIS THAT THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE WAS PROPER AND SHOULD BE AFFIRMED

A. The Jury's Compensatory Verdict In Favor Of Sonia Was Fair And Reasonable.

As defendants note, the jury entered a verdict for compensatory damages in favor of Sonia in the amount of $500,000.00. Defendants have taken the tack of belittling Sonia's injury and subsequent treatment as well as her permanent physical limitations and the impact her injuries have had on her life. Sonia, who is right-hand dominant, suffered a fracture of her right wrist requiring open surgery with the placement of metal plates and screws. Defendants do not dispute that

Sonia required physical therapy and follow-up appointments. They choose to ignore evidence that, because her functional limitations did not improve and because she developed numbness and tingling in her right hand, she required additional treatment, ultimately including, surgery for removal of the hardware from the initial post-fall surgery, a carpal tunnel release and tenovaginotomy of the right thumb and right small finger because of triggering in those fingers.

Defendants ignore the record evidence that Sonia has suffered (1) continuous pain/weakness in her right hand, (2) problems with personal grooming/ dressing, (3) difficulty with housework, (4) inability to participate in (i) family social events, (ii) braiding her children's hair, (iii) family game time, (iv) bowling and (v) visits to the park (3T210-213, 227-233, 242); (4T141-143, 149-154, 161-164, 167-169, 173-175, 181-183, 188-189, 191-196); (5T13-17). They also ignore Sonia's (1) permanent scarring which is readily visible and a constant reminder of her trauma and loss, (2) inability to write with her right hand and effort to learn to write with her left, (3) significant personality change, and (4) her fear of additional loss of independence and what will happen as the condition continues to deteriorate in the future (Id).

Perhaps most importantly, defendants do not provide a single argument explaining how or why a verdict of $500,000.00 under these facts shocks the conscious. Other than citing a single case from over 23 years ago where the

treatment and outcome were different, defendants provide nothing more than blanket statements that a $500,000.00 verdict is a "miscarriage of justice".

It is important to consider the jury's verdict, in light of Dr. Trager's testimony that Sonia's condition and limitations are permanent and the jury charge that Sonia's life expectancy is 28.7 years. Sonia already had lived through and with her medical condition/limitations for almost five years by the time trial was completed. Thus, if the jury accepted the statistical life-expectancy and did not add any time, the total time for which Sonia would be compensated is 33.7 years. Considering those factors, the jury's award of $500,000.00 or $40.65 a day in no way shocks the conscience.

Had defendants truly considered the totality of the damages evidence which included testimony from Sonia, Luis, Stephanie Reinoso (Sonia's daughter) and Samantha Reinoso (Sonia's granddaughter), as well as the testimony from Dr. Trager regarding her permanent functional limitations and her future prognosis, they in good conscience could not believe that a compensatory verdict of $500,000 shocks the conscious.

The only people to whom the verdict was shocking were defendants and their counsel. Indeed, the jury's verdict was a fair and reasonable reflection of the severity of Sonia's physical and emotional injuries.

Indeed, those injuries alone are more than sufficient to justify the jury's

$500,000.00 verdict. Yet those injuries do not consider Sonia's embarrassment, humiliation and loss of life's pleasures, which only add to the severity of her loss. That defendants did not present one iota of evidence to dispute Sonia's injuries and future medical needs was considered as well. The jury, following the instructions given to them by the Court, made a determination of the fair and reasonable compensation to which Sonia was entitled and rendered a verdict accordingly.

B. The Jury's Compensatory Verdict In Favor Of Luis Was Fair And Reasonable.

In addition to Sonia's verdict, the jury fairly and reasonably acknowledged the impact that Sonia's injuries, need for assistance and loss of independence has had upon Luis in entering a verdict in his favor for $300,000.00 on his claim for loss of spouse's services, society and consortium. The jury was charged that:

It is well settled that a spouse is entitled to "fair and reasonable compensation for any loss or impairment of her husband's services, society or consortium because of injuries sustained by him as a proximate result of defendant's wrongdoing." Zalewski v. Gallagher, 150 N.J. Super. 360, 372 (App. Div. 1977). The severity of the loss is dependent on the quality of the pre-injury relationship. Dunphy v. Gregor, 136 N.J. 99, 111 (1994). Impairment of consortium includes not only the loss of the injured spouse's services but also its reciprocal burdening of the other spouse.

In Ekalo v. Constructive Serv. Corp. of America, 46 N.J. 82, 93 (1965), Justice Jacobs provided the following description of a consortium loss:

> When a man is injured by another's wrong, separate injuries occur to him and his wife. The husband is often, because of an injury, reduced to a physical and psychological skeleton; the wife, because of the same injury, is deprived of the affection, society and comfort that only her husband can give. While the husband suffers physical pain, the loss to the wife is often more significant. If damages are to be awarded to the wife, they are to compensate her for *her* loss. This loss of the wife should outweigh any concern for the additional imposition of liability upon the wrongdoer.

Id. at 93-94 (quoting Joseph J. Simeone, *The Wife's Action for Loss of Consortium--Progress or No?,* 4 St. Louis U. L.J. 424, 438 (1957)). Ekalo suggests that a spouse may be compensated for having been transformed by a tortfeasor's negligence "from a loving wife into a lonely nurse." Id. at 84.

Luis and Sonia have been together for over 35 years. They had four children and have multiple grandchildren. Defendants do not dispute the many ways in which Luis's life has changed as a result of Sonia's injuries and again list the many ways Sonia's injuries have impacted her relationship with Luis and Luis' life (i.e., he has taken on more household chores because Sonia cannot complete them, his decision to leave his dream job because he wanted to make sure that she had the care she needed and could get to her medical appointments as she does not drive) (4T178-183, 186-189, 190-196; 197-198). Indeed, the jury heard that in order to make sure Sonia is cared for and is able to get to her appointments, Luis now drives for Uber

and LYFT at odd hours so that he can be present when needed (Id). Instead of working a standard 9-5 job at a car dealership, he works early in the morning and at night which clearly has an additional impact on his life and relationship with Sonia. All of that is to say nothing of the fact that the activities he once loved such as bowling with the family, socializing with Sonia and others, hosting barbeques are a thing of the past. Certainly, this impairment of the value of Sonia's society and consortium is a compensable loss to Luis (Id). Somehow, defendants contend there was an economic loss included. Such an argument is pure speculation and most certainly does not view the evidence in a light most favorable to Luis.

As with Sonia, if the jury accepted her statistical life-expectancy and did not add any time, the total time for which Luis would be compensated for his claim is 33.7 years. Considering those factors, the jury's award of $300,000.00 or $24.39 a day in no way shocks the conscience.

C. The Jury's Verdict For Sonia's Future Medical Expenses Was Fair And Reasonable And In Accordance With The Court's Instruction On The Law.

Defendants' final objection to the jury's verdict relates to its award of future medical expenses in the amount of $750,000.00. As with the other purported bases for new trial or remittitur, defendants fail to address the trial evidence, and the evidence they do consider fails is not viewed in a light favorable to Sonia.

What is clear from a review of the totality of the evidence relating to Sonia's future medical needs is that a verdict of $750,000.00 does not shock the conscious and is in no way a miscarriage of justice under the law. Bender v. Adelson, 187 N.J. 411, 435 (2006); Diakamopoulos v. Monmouth Med. Ctr., 312 N.J. Super. 20, 36–37 (App. Div. 1998).

Preliminarily, it should be noted that defendants did not at any point in their Brief acknowledge the amount and severity of the future medical care that will be required for Sonia to maintain her present condition and to address her inevitable deterioration as she gets older. Defendants further do not accurately consider the nature of the testimony presented by plaintiff's medical cost projection expert, Nurse Linda Lajterman. Finally, defendants fail to address the Court's charge to the jury which instructs the jury to account for inflation in its verdict. Put simply, defendants saying the evidence does not support the jury's future medical cost verdict does not make it true; particularly when the record evidence is ignored.

At trial, plaintiffs presented the uncontroverted testimony of Dr. Stuart Trager, a Board Certified orthopedic surgeon who specializes in upper extremities. Dr. Trager testified regarding the nature and extent of Sonia's injuries and the nature of the treatment she will require in the future (4T103-111). Dr. Trager testified regarding the need for injections going forward as arthritis develops and her pain and weakness progress (Id). He discussed the need for future medical

visits as well as taking pain medication (Id). Additionally, Sonia is at an increased risk for additional surgery in the form of wrist fusion (Id). The frequency of her treatments will depend on her symptoms and pain tolerance (Id).

In addition to Dr. Trager, plaintiffs presented the expert testimony of Nurse Lajterman, a qualified medical cost projection expert related to the costs associated with the difference potential medical treatments that Sonia will require in the future (5T40-88).[4] Nurse Lajterman testified at trial based upon the costs projected in her January 9, 2023 and May 30, 2018 reports (5T54-55).[5]

Nurse Lajterman explained that her opinions of the costs of potential future medical care was based the opinions of Sonia's treating doctors, Drs. McMillan and Trager (5T59). She also stressed that her projections were conservative midrange projections with potential costs higher and lower; essentially, the 50th percentile (5T57, 62). Thus, viewing the evidence in Sonia's favor, the jury was

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[4] Defendants note they filed a motion *in limine* to preclude Nurse Lajterman from testifying and that the motion was denied. Defendants' motion for post-trial relief did not include a motion for a new trial based upon the denial of that motion. Furthermore, defendants' counsel specially told the trial court she did not object to Nurse Lajterman being qualified as an expert in life care planning and medical cost projection (5T53).

[5] Defendants repeatedly reference that Nurse Lajterman's reports included total calculations. No only were those calculations inaccurate, they were not presented to the jury to prevent any suggestion of a "net opinion". The jury was free to calculate its own total future medical cost verdict based upon the record evidence at trial as well as considering the trial court's jury instructions on calculating future medical expenses.

free to consider that the costs projected could be twice the projected cost to ensure Sonia would be able to cover the price.

Nurse Lajterman explained that for future orthopedic office visits she used a conservative figure of one visit per year. Depending on Sonia's condition, Nurse Lajterman gave the example that it could be five visits per year noting the amount in the report was only a "guide" (5T61-62). If the jury believed there was potential for more than five visits per year, it was free to calculate based on its findings. Five visits per year would be $1,300 annually or $36,400 and over her 28 year life expectancy (5T171). Using the high projection, the number doubles to $72,800.00.

Future cortisone injections cost $375.00 per injection. Although the doctors indicated she could get up to two a year, Nurse Lajterman conservatively included the cost for one (5T62-63). Two injections per year at the full potential cost is $42,000.00. The same logic and calculations can be used for each of the items about which Nurse Lajterman testified.

Over-the-counter medications which Sonia testified takes medication nightly is projected at $25 per year for 1-2 bottles (5T63-64). Yet, testimony also addressed sleep aids or creams which could double or triple the amount estimated to $2,100 at the mid-range and to a high of $4,200.00 (5T63-64).

Future "catch all" office visits (physical therapy, injections, x-rays, MRI for surgical planning) included a conservative cost of $260 per visit; up to $14,560.00

on the high end (5T66-67). If the jury believes Sonia will require multiple rounds of physical therapy, this cost increases (Id). If sent for an MRI, the cost would be $2,000 or more (Id). Adding three MRIs over Sonia's lifetime increases the projection by another $12,000.00 (on the high end).

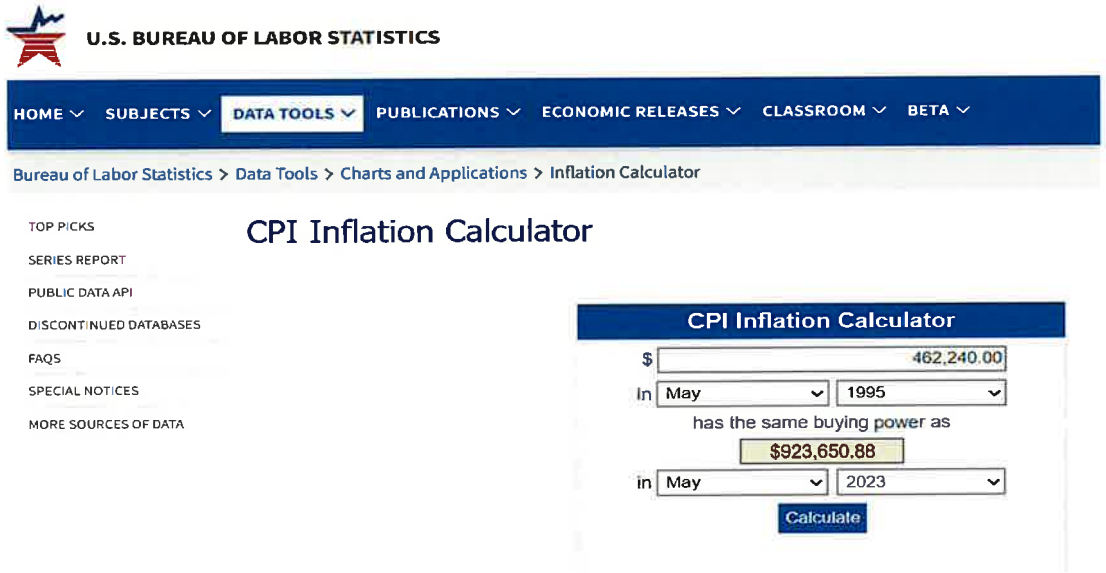
Pre-op medical clearance for future wrist fusion includes an internist visit, x-ray, bloodwork and an EKG (5T68). If there are other risk factors and more tests required (e.g., for cardiac issues), those costs would be higher (Id). The midrange cost is $846.00 and $1,692.00 at its highest (Id).

The projected wrist fusion cost is $24,174.00 which, if taken at the high end is $48,348.00 (5T68-69). Post-operative PT (24 sessions) at $305.00 totals $7,320.00; $14,640.00 at highest. The cost would increase if additional therapy is required depending on the surgical outcome (5T69-70).

On cross-examination, *defense counsel* elicited that there were other injection options available to Sonia including platelet rich plasma injections and stem cell injections (5T81). These range from $950.00 up to $4,500.00 per injection with Sonia able to receive two injections per year for a total of $9,000 per year and $252,000 over Sonia's life expectancy (5T85-87). Overall, if one were to take the total future expenses of the high end of the Nurse Lajterman' s projections rather than midrange, the total is $462,240.00.

However, that is not where the jury's calculation would end. The Court charged the jury that Sonia has a 28.7-year life expectancy from trial and that the jury may determine she would live longer (5T171). The Court further charged that (1) the law does not require mathematical exactness, (2) once they decide how much future medical care Sonia will need, they must consider the effects of inflation and interest increasing for inflation and decreasing for interest earned and taxes charged (5T172-175).

Using an online CPI inflation calculator, and looking back in time is a helpful guide to show that the jury's award is not excessive when accounting for inflation. According to the Bureau of Labor and Statistics[6], $462,240.00 in May, 1995 (28 years ago) has the same buying power as $923,650.88 today, significantly higher than the $750,000.00 jury verdict:



While not dispositive, this information illustrates that the jury clearly listened to the Nurse Lajterman' s testimony and the Court's jury instruction in arriving at a figure they believed would accommodate Sonia's future medical needs.

Defendants' opposition to the future medical cost verdict is premised upon Boryszewski v. Burke, 380 N.J. Super. 361, 393 (App. Div. 2005), a wrongful death and survival product liability action arising from a motor vehicle collision. The trial judge set aside a $5,000,000.00 wrongful death award because he viewed the verdict was not supported by the evidence. Id. An economic expert had testified that the family suffered $125,054 in lost earnings. He also conceded at trial that, in a draft report, he had opined the family's total economic loss was $479,000. Id. The court determined that a $5,000,000.00 verdict with economic loss evidence of $479,000 represented "so great a departure from the proofs actually adduced at trial as to justify the reconsideration ordered by the trial judge. Id. at 394.

Similarly, defendants rely on Hudgins v. Serrano, 186 N.J. Super. 465, 479-83 (App. Div. 1982) where the trial court determined that an award of twice the economic loss presented as evidence should be remitted or a new trial on damages should be held. The evidence being addressed in Hudgins related to lost income and benefits. Like Boryszewski, there was no evidence to support the jury's verdict under the evidence presented at trial.

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[6] www.bls.gov/data/inflation_calculator.htm

The record evidence here is not like that in either Boryszewski or Hudgins. Here, the evidence, viewed in a light favoring Sonia, supports the jury's future medical cost verdict. Defendants, in an effort to equate Boryszewski and Hudgins to this case, have ignored the trial court's "feel for the case" and the record evidence. See Caldwell v. Haynes, 136 N.J. 422, 432 (1994); Baxter v. Fairmont Food Co., 74 N.J. at 597-600 (1977). Furthermore, defendants repeated reference to erroneous calculations contained in Nurse Lajterman's reports *which were redacted and not presented to the jury* as if that evidence that should be considered is another example of failing to view the evidence in a light favorable to Sonia. Finally, defendants utterly fail to address in any way the trial court's instruction to the jury to consider inflation and reduction for interest.

Defendants chose not to present their medical expert and chose not to retain or present an opposing medical cost projection expert. Thus, the jury was left only with plaintiffs' uncontroverted and uncontradicted evidence. Viewing the evidence in plaintiffs' favor, the jury used the higher medical costs to provide the maximum future medical compensation they could provide. They reasonably accounted for inflation and reduced for interest which resulted in a future medical cost verdict that is not grossly excessive such that it shocks the conscious of the court. The trial judge, using his feel for the case and reviewing the evidence carefully and

appropriately, determined there was no basis for remittitur or a new trial. Accordingly, the trial court's ruling should be affirmed.

VI. PLAINTIFFS DO NOT DISPUTE THE ERROR IN CALCULATING PREJUDGMENT INTEREST

Plaintiffs concede prejudgment interest should not have been calculated on the jury's future medical expense award, that the proper prejudgment Sonia's verdict should be $56,543.94 and on Luis's verdict favor should be $33,926.20.

VII. THE TRIAL COURT PROPERLY DENIED DEFENDANTS' MOTION FOR A NEW TRIAL

For all of the reason set forth throughout this Brief and incorporated herein, the trial court's denial of defendants' motion for a new trial should be affirmed.

CONCLUSION

For the foregoing reasons, plaintiffs-appellees, Sonia Colon and Luis Reinoso, respectfully request that this Honorable Court affirm the motion court's granting of summary judgment, the trial court's denial of defendants' motions *in limine*, rulings during trial and denial of defendants' motion for post-trial relief.

Respectfully Submitted,

GAY & CHACKER, PC

Date: November 22, 2023

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Attorneys for plaintiffs-appellees,
Sonia Colon and Luis Reinoso

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET No. A-3375-22

SONIA COLON and LUIS REINOSO,

Plaintiffs-Respondents

v.

DELAWARE RIVER PORT AUTHORITY; PORT AUTHORITY TRANSIT CORPORATION a/k/a PATCO;

Defendants-Appellants

and AP CONSTRUCTION, INC.; AE STONE, INC.; S. BATATA CONSTRUCTION, INC.; and JOHN DOES III THROUGH X

Defendants-Respondents

CIVIL ACTION

On Appeal from Orders entered by the Superior Court Law Division Camden County:

Order dated October 22, 2021, granting Summary Judgement to S. Batata Construction Inc.

Sat Below:
Hon Anthony M. Pugliese J.S.C.
Hon Daniel A Bernardin J.S.C

BRIEF ON BEHALF OF RESPONDENT S. BATATA CONSTRUCTION, INC.

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Cases

Court Rules

PRELIMINARY STATEMENT

Appellants have filed a multi-pronged appeal from numerous orders. The only order that applies to S. Batata Construction Inc. is the order dated October 22, 2021, granting summary judgment to S. Batata Construction Inc. Therefore, this brief only addresses that order.

S. Batata's involvement in the location where the plaintiff's accident happened was limited and short. In 2014 or 2015 S. Batata Construction poured one sidewalk slab of concrete between two other existing slabs of concrete on the sidewalk outside the Collingswood Station of the PATCO system. Sometime after that, a height differential developed between the older slab and the slab poured by S. Batata. On October 30, 2018, plaintiff, while traversing the sidewalk, caught her foot on the height differential and fell, sustaining personal injury.

No expert opined that this height differential was caused by the improper installation of the new sidewalk slab by Respondent. In fact, no one has established which sidewalk slab moved to cause the height differential - ie did the older slab heave or the new slab sink?

It is respectfully submitted that the trial court correctly granted summary judgment to S. Batata since no one established a prima facie case of negligence against it.

PROCEDURAL HISTORY

Respondent S. Batata Construction Inc. adopts the Concise Procedural History as set forth in the Respondent Brief filed by Respondent A.E. Stone on November 21, 2023.

STATEMENT OF FACTS

Respondent S. Batata Construction Inc. adopts the Concise Statement of Facts as set forth in the Respondent Brief filed by Respondent A.E. Stone on November 21, 2023.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY GRANTED THE MOTION FOR SUMMARY JUDGEMENT IN FAVOR OF THE RESPONDENT S. BATATA CONSTRUCTION INC AS DEFENDANTS/ APPELLANTS FAILED TO PRESENT ANY EVIDENCE THAT ESTABLISHED A PRIMA FACIE CASE OF NEGLIGENCE AGAINST RESPONDENT S BATATA CONSTRUCTION INC.

I. STANDARD OF REVIEW

The Appellate Court employs the same standard that governs trial courts in reviewing summary judgment orders. *Antheunisse v. Tiffany & Co., Inc.,* 229 *N.J.Super.* 399, 402, (App.Div.1988), *certif. denied,* 115 *N.J.* 59, 556 *A.*2d 1206 (1989). See *Brill v. Guardian Life Ins. Co. of America,*142 *N.J.* 520, 539–540, (1995). Thus, the movant must show that there does not exist a "genuine issue" as to a material fact and not simply one "of an insubstantial nature"; a non-movant will be unsuccessful "merely by pointing to *any* fact in dispute." *Id.* at 529–530.

Rule 4:46-1, et seq., governs the grant or denial of Motions for Summary Judgment. The Rule states plainly that the party opposing the Motion for Summary Judgment "shall file a responding statement either admitting or disputing each of the facts in the movant's statement." R. 4:46-2(b). In other words, the party opposing the Motion for Summary Judgment must present evidence in

opposition to the Motion that creates a genuine issue as to any material fact challenged.

In this case, the Appellants did not present any evidence that created a material question of fact. Nor did the Appellants present any evidence that established a prima facie case of negligence against the Respondent S. Batata Construction Inc. That being the case, Respondent was entitled - as a matter of law - to dismissal of any and all claims contained in the Complaint and Crossclaims. Therefore, the trial court correctly granted Respondent's motion for summary judgment and the Appellate Court should affirm this decision.

II. IN ORDER TO CREATE A PRIMA FACIE CASE OF NEGLIGENCE AGAINST S. BATATA CONSTRUCTION INC., APPELLANTS HAD TO ESTABLISH THAT THE DIFFERENCE IN ELEVATION BETWEEN THE SLAB OF CONCRETE POURED BY S. BATATA IN 2014 AND AN OLDER SECTION OF CONCRETE, WAS DUE TO IMPROPER INSTALLATION TECHNIQUES UTILIZED BY S. BATATA IN 2014. NO SUCH EVIDENCE WAS PRESENTED AND THEREFORE SUMMARY JUDGEMENT WAS APPROPRIATELY GRANTED.

A. There is no question of material fact in this case.

It is undisputed that S. Batata contracted with AE Stone in 2014 to perform some concrete work as part of a larger project AE Stone was retained to perform by Appellants. (Da225) Included in this larger project was one work order to replace one slab of concrete in between two pre-existing slabs of concrete at the Collingwood PATCO station.(Da185-187). Representatives of both S. Batata and

AE Stone confirmed that after completion, S Batata Construction's work was inspected by a representative of the owner, DRPA/PATCO.(Da195 and 270) Mr. Christopher Canderan, a representative of AE Stone, confirmed that the owner never contacted AE Stone Inc., after the work was completed to return and perform any additional work or repairs. (Da198)

Adam Jacurak was the Director of Traffic Facilities for the DRPA and was produced for depositions as the representative for the DRPA and PATCO. Although apparently a civil engineer, Appellants never named Mr. Jacurak as an expert in its answers to interrogatories. In fact, neither Appellants nor Plaintiff/Respondent ever produced a liability expert report that opined that S. Batata Construction breached any standards of care when it poured the one concrete slab at the Collingwood PATCO station in 2014.

Mr. Jacurak testified that his knowledge of the incident involving plaintiff was based solely on documents. (Da301 T 16:1-4) Mr. Jacurak testified that he did not conduct any investigations relating to the incident and he did not know of any other person who had conducted an investigation. (Da301 T 16:5-9)

Mr. Jacurak testified that after the accident the Appellants repaired the height differential between the old sidewalk slab and the sidewalk slab installed by S. Batata by griding down the old sidewalk slab. No repairs were made to the sidewalk slab installed by S. Batata. (Da307 T 41:20-25 and Da 308 T 42:10-14.)

During his testimony, Mr. Jacurak testified generally about how two sidewalk slabs can become uneven over time. One way involves one slab sinking. The other way involves one slab raising. (Da308 T 42:16-25 and T 43:1-7) Thereafter, Mr. Jacurak candidly admitted that he did not know whether in the case of the particular sidewalk slabs involved in plaintiff's accident, the old block had raised, or the block installed by S. Batata had sunk. All he could say for sure was that there was a height differential between the two slabs of concrete. (Da308 T 43:8-15) Mr. Jacurak concluded by stating as follows: "I can't tell you why either way if it's – if heaving or settlement. Basically, there's just an elevation difference between the two." (Da308 T 43:24-25 and 44:1-2.)

Mr. Jacurak never testified that, within a reasonable degree of engineering certainty, the height differential between the two slabs of concrete was caused by improper installation of the one sidewalk slab by S. Batata Construction.

B. In order to prove a prima facie case against Respondent, Appellants needed to proffer expert testimony that opined within a reasonable degree of engineering certainty, that the cause of the height differential between the two slabs of concrete was the negligent installation of the one sidewalk slab by S. Batata Construction.

In considering claims of negligence, "[w]e start with the basic proposition that ordinarily negligence must be proved and will never be presumed, that indeed there is a presumption against it, and that the burden of proving negligence is on the plaintiff." *Buckelew v. Grossbard,* 87 N.J. 512, 525 (1981); *Hansen v. Eagle-*

Picher Lead Co., 8 N.J. 133, 139(1951). The three elements of a negligence cause of action in New Jersey are: 1) a duty of care owed by defendant to the plaintiff; 2) a breach of that duty by defendant; and 3) an injury to plaintiff proximately caused by defendant's breach. *Endre v. Arnold*, 300 N.J. Super 136, 142 (App Div) certif.. denied, 150 N.J. 27 (1997).

To show negligence, the plaintiff must prove the breach of a duty of care owed to the plaintiff by defendant. The question of whether a duty to exercise reasonable care to avoid the risk of harm to another exists is one of fairness and policy that implicates many factors. *Dunphy v. Gregor,* 136 N.J. 99, 110 (1994). The determination of such a duty is generally considered a matter of law properly decided by the court. *Wang v. Allstate* Insurance Co., 125 N.J. 2, 15 (1991).

Furthermore, to prove a claim of negligence, a plaintiff must show that the defendant's actions breached the duty of care and were the proximate cause of his injury. See *Creanga v. Jardal*, 185 N.J. 345 (2005) Summary judgment is appropriate when no reasonable jury could find that the defendant breached his duty of care or proximately caused plaintiff's injuries. See *Vega v. Piedilato* 154 N.J. 496, 509 (1998) "To be a proximate cause…. conduct need only be a cause which sets off a foreseeable sequence of consequences, unbroken by an superseding cause, and which is a substantial factor in producing the particular injury." *Bender v. Rosen*, 247 N.J. Super 219, 229 (App. Div. 1991)

In the present case the only established fact about the Respondent S. Batata is that it installed one sidewalk slab between two existing sidewalk slabs in 2014 or 2015 and its work was inspected and approved by the Appellants shortly after installation.

There is no proof that the Respondent negligently installed the sidewalk slab. In fact, no one has established why the sidewalk slabs were uneven. Appellant's corporate representative testified that the unevenness could have been caused by the older slab heaving.

Most importantly, there is no expert establishing that 1) the height differential was caused by the sinking of the one slab installed by S. Batata or 2) that the slab sunk because of improper construction techniques employed by the Respondent S. Batata.

The test for determining whether expert testimony is required is whether the matter under consideration is so esoteric or specialized that jurors of common judgment and experience cannot form a valid conclusion. (See *Giantonnio v. Taccard* 291 N.J.Super. 31, (App.Div., 1996). In *Giantonnio* the plaintiff, a funeral procession participant, alleged that defendant Funeral Home's failure to procure a police escort for a procession caused the collision that occurred when plaintiff drove through the red light and was struck by a motorist who drove through green light. The Funeral Home argued that the plaintiff needed expert

testimony to establish the requisite standard of care and the defendant's deviation therefrom. The Appellate Court agreed with the defendant stating that the safe conduct of a funeral procession was a complex process involving assessment of myriad of factors such as traffic conditions, particular road hazards, length of procession, time constraints, distances involved, traffic volume and availability of police escort services.

In the current case, an ordinary juror has insufficient knowledge of proper installation techniques of a concrete sidewalk, and the various reasons why a sidewalk slab may either sink or raise. Neither counsel for Ms. Colon nor Appellants retained an expert to provide the jury with this crucial information. Without expert testimony, any conclusion a jury reached regarding how S. Batata Construction installed the subject sidewalk would be mere speculation. In addition, without expert testimony and additional facts regarding why the concrete slabs are uneven, a jury cannot determine whether any actions by S. Batata Construction proximately caused the sidewalk slabs to become uneven.

Since neither Plaintiff/Respondent nor Appellants established a standard of care on the part of S. Batata Construction, a breach of that standard of care, and proof that that breach proximately caused the uneven sidewalk, the trial court correctly ruled that a prima facie case of negligence was not established and

correctly granted Respondent S. Batata summary judgment and its decision should be affirmed.

C. The testimony of Adam Jacurak was insufficient to establish a prima facie case against Respondent S. Batata Construction Inc.

Appellants argue that the testimony of its corporate representative, Adam Jacurak, establishes a question of fact that required the case against S. Batata to be resolved by a jury. Specifically, Appellants argue that a question of fact is established by Mr. Jacurak's testimony that large settlements which create gaps sufficient to create a tripping hazard do not normally occur when sidewalks are properly installed. This argument fails for numerous reasons.

First, as established above, in order to prove a prima facie case against S. Batata Construction, Appellants needed expert testimony to establish two points: 1) that the height differential was caused by the sinking of the slab installed by S. Batata and 2) that the sinking was caused by the negligence of S. Batata. The statement the Appellants rely on to create a question of fact, skips over any proof of whether the height differential was caused by the raising of one slab or the sinking of the other, and assumes without any basis, that the height differential was caused by the sinking of sidewalk slab installed by Respondent. However, Mr. Jacurak candidly admitted that he had no knowledge of whether in the current case the height differential was caused by the sinking of a slab or the heaving of the

older slab.(Da308 T 43:8-15, 43:24-25 and 44:1-2) If one does not know what caused the height differential, speculation about why a sidewalk slab might sink is completely irrelevant.

Secondly, the Appellant's have selectively quoted Mr. Jacurak's testimony. At his deposition, Mr. Jacurak was asked the following questions:

> Q. I have a couple of questions.
>
> You testified earlier that the sidewalk could have either settled or raised up, but you don't know what happened in this particular case do you?
>
> A. Without more information, we can't tell what happened.
> Q. Okay. Without more information, we can't tell what happened. One – the new block of sidewalk, you know, lower like settled, the one – the new block or sidewalk settled, what would have caused that to happen?
> A. The usual cause of settlement is poorly repaired subbase. Either the subbase is not compacted, or the base stone wasn't compacted well and then usually the weight of the concrete will cause settlement. That's the most common. Other ones could be leaking water pipes in the area, storm pipes in the area. Basically, water could cause damage and undermine sidewalks if there's room for water to get in, but you'd have to look in the area to see for some type of leak or pipe or other evidence. (Da 309)

Thus, the witness again admitted he had no idea what caused the height differential in the first place. In addition, he admitted that even if he assumed the one slab had settled there were multiple reasons why this might happen. In the end, since no investigation was done, the witness had no knowledge of what actually occurred in

this case. Clearly, Mr. Jacurak's testimony does not establish a prima facie case of negligence against S. Batata Construction.

Finally, although Appellants cited cases regarding net opinion in their brief, it appears based on Appellant's arguments in Point III Section A of Appellants brief, that Appellants were submitting Mr. Jacurak's testimony as the testimony of a layman not the testimony of an expert. If Mr. Jacurak is not testifying as an expert, then any testimony about his prior experience is completely inadmissible lay opinion. If Appellants were submitting his testimony as expert testimony about the work performed by S. Batata, then Mr. Jacurak is required to give the why and the wherefore of his opinions which he did not do. None of the cases cited by the Appellants in an apparent attempt to demonstrate that Mr. Jacurak's opinion was not a net opinion are not on point and in fact support the Respondent's position not the Appellants' position.

Either way, Mr. Jacurak's testimony does not establish a prima facie case of negligence on the part of S. Batata and the trial court correctly granted summary judgment to Respondent.

POINT II

THE APPELLANTS WAIVED ANY CLAIMS FOR CONTRACTUAL INDEMNIFICAIOTN BY NOT MAKING ANY ARGUMENTS IN SUPPORT OF SUCH A CLAIM IN THEIR OPPOSITION BRIEF OF AT ORAL ARGUMENT.

The motion for summary judgment filed on behalf of S Batata Construction Inc. sought an order dismissing the plaintiff's complaint and all crossclaims with prejudice. At no time, either in her written opposition to the motion or during oral argument, did counsel for Appellants ever argue that it had contractual crossclaims that would survive a grant of summary judgment on liability. In addition, no contracts were submitted to the trial court in support of such a claim. Thus, there are no documents supporting any contractual crossclaim before the court on this appeal.

It is well settled that Courts generally should decline to consider questions or issues that were not properly presented to the trial court when an opportunity for such presentation is available unless the new questions or issues raised on appeal go to the jurisdiction of the trial court or concern matters of public interest. *Nieder v. Royal Indem. Ins. Co.,* 62 N.J. 229, 234 (1973).

Opposition that merely recited in a counter statement of fact, that a crossclaim for contribution and indemnification was filed against S. Batata

Construction, Inc., cannot be considered properly presenting an issue to the trial court. This is especially true when no contracts were given to the court and no legal arguments regarding the provisions in those contracts was submitted.

Appellants have still failed to put forth any arguments in support of an alleged crossclaim for contractual indemnification against S. Batata Construction Inc that would survive a grant of summary judgment on liability.

It is respectfully submitted that the Appellants waived any claim of contractual indemnification from Respondent when Appellants failed to address this with the trial court at the time the motion was filed and decided.

CONCLUSION

It is respectfully submitted for the reasons set forth above that the trial court correctly granted the Respondent summary judgment as no party establish a prima facie case of negligence against the Respondent S. Batata Construction Inc. Therefore, it is respectfully submitted that the decision below should be affirmed.

Respectfully Submitted,

ZIRULNICK, DEMILLE & VILACHÁ

By:_____
Virginia E. Hughes, Esq.

Date: December 19, 2023