FILED, Clerk of the Supreme Court, 23 Aug 2024, **089025**

	:	**SUPREME COURT OF NEW JERSEY**
LINDA B. BREHME	:	
	:	**Docket No.: 089025**
Plaintiff/Appellant/Petitioner	:	
	:	**Civil Action**
	:	
vs.	:	**AMICUS CURIAE BRIEF FOR**
	:	**NEW JERSEY DEFENSE ASSOCIATION**
THOMAS IRWIN; NEW JERSEY	:	
MANUFACTURERS INSURANCE	:	**ON APPEAL FROM:**
COMPANY; JOHN DOES 1-5; ABC	:	
CORPORATIONS 1-5,	:	**SUPERIOR COURT OF NEW JERSEY**
	:	**APPELLATE DIVISION**
Defendants/Respondents	:	
	:	**Docket No.: A-3760-21**
	:	
	:	**Sat Below:**
	:	**Hon. Mary Whipple, P.J.A.D.**
	:	**Hon. Jessica Mayer, J.A.D.**
----------	:	**Hon. Catherine Enright, J.A.D.**

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CIVIL ACTION

AMICUS CURIAE BRIEF FOR NEW JERSEY DEFENSE ASSOCIATION

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TABLE OF CONTENTS

TABLE OF CITATIONS

RULES CITED: **PAGE**

STATUTES CITED: **PAGE**

SESSION LAWS CITED: **PAGE**

NJAC PROVISIONS CITED: **PAGE**

PRELIMINARY STATEMENT

Amicus Curiae New Jersey Defense Association (NJDA) is an association of managerial level insurance industry personnel and insurance defense counsel throughout the State of New Jersey. NJDA is primarily an educational association organized to encourage the prompt, fair and just disposition of tort claims, promote improvements in the administration of justice, enhance the service of the legal profession to the public and work for the elimination of court congestion and delays in civil litigation. The members of the NJDA have a great deal of collective experience in the conduct of jury trials and a high level of expertise in applying constitutional, statutory and common law in such trials. The matter presently before the Court involves issues of fundamental concern to the Association and the thousands of individuals represented on a daily basis by its members.

Among the NJDA's concerns is the manner in which claims for future medical expenses made by plaintiffs who have not exhausted the medical expense benefits provided by the personal injury protection ("PIP") coverage limits of their personal automobile insurance policies are addressed. It is NJDA's view that the trial court in this case correctly determined that evidence of such future expenses was barred by N.J.S.A. 39:6A-12. Plaintiff, however, argues that in 2019, the legislative response to this Court's decision in Haines v. Taft created a "new law" permitting both the admission of evidence of such expenses and their recovery as

damages. In fact, the Legislature did not create such a law but instead made clear its intention that motorists opting for reduced levels of PIP medical expense coverage be permitted to recover the costs of care in excess of those limits from tortfeasors. When doing so, it retained the rule of inadmissibility at issue herein and gave no indication of an intent to return the cost of medical care arising from automobile accidents to the fault-based system from which it was removed in 1972. Because the "new law" proposed by plaintiff threatens the underpinnings of the legislative scheme and if endorsed by this Court, will drive-up jury awards for both economic and non-economic damages thereby exponentially increasing the cost of automobile insurance for New Jersey's drivers and their families, the NJDA has requested the opportunity to participate herein and present its views to the Court.

The NJDA takes no position on the issue presented by the Appellate Division's according dispositive effect to the warrant to satisfy judgment given to defendant prior to plaintiff filing her notice of appeal.

PROCEDURAL HISTORY[1]

This case came on for trial on June 20, 2022, at which time the defense moved to bar evidence of the projected costs of medical care plaintiff's medical experts opined would be required in the future. The trial court granted the defense's motion. Thereafter, the case proceeded to trial. The jury returned its verdict on June 28, 2022. By its verdict, the jury awarded plaintiff $225,000.00 for non-economic damages/pain and suffering and $50,000.00 for past lost wages. The jury awarded nothing for future lost wages. On July 7, 2022, the trial court entered judgment for plaintiff $311,435.59, inclusive of interest and costs. Defendant paid the amount of that judgment and thereafter received and filed plaintiff's warrant to satisfy judgment. Plaintiff's notice of appeal from the trial court's in limine order barring proof of future medical expenses was filed thereafter on August 12, 2022. On December 27, 2023, in an unpublished opinion, the Appellate Division dismissed plaintiff's appeal as moot based upon the filed warrant to satisfy judgment. On May 17, 2024, this Court granted plaintiff's petition for certification. On May 20, 2024, this Court posted notice of its grant of certification and indicated that it would consider whether under the circumstances presented, the filing of plaintiff's warrant to satisfy judgment under R.4:48-1 barred her from

[1] The NJDA has not had an opportunity to review the briefs and appendices filed in the Appellate Division. This Procedural History is based upon the trial court pleadings available for review on eCourts and the unpublished decision of the Appellate Division.

filing an appeal; and if not, "could plaintiff seek future medical expenses that exceed her personal injury protection coverage under N.J.S.A. 39:6A-12." As noted above, the NJDA now addresses only the second of those questions.

STATEMENT OF FACTS[2]

The accident in this case occurred on December 16, 2016. At that time, plaintiff was 64 years old and had a 20.7 year life expectancy. At the time of the accident, she was insured under the terms of a standard personal automobile insurance policy issued to her by New Jersey Manufacturers Insurance Company ("NJM"). Her personal injury protection ("PIP") medical expense benefit limit under that policy was $250,000.00. NJM paid for plaintiff's post-accident medical treatment through June 24, 2019. Although there is no indication in the record as to the basis for NJM's decision to discontinue payments, for the purposes of this submission, it is assumed that it was based upon the results of an independent medical examination. Plaintiff did not challenge NJM's decision through the procedures prescribed by the No-Fault Act. Moreover, despite the fact that she obtained no treatment between the date her benefits were discontinued and the date of trial three years later, the "future" expenses she sought to introduce as evidence at trial were calculated from June 2019 forward.

At the time this matter was tried, the parties agreed that plaintiff's medical expense benefit limit with NJM had not been exhausted and there was a balance of $100,000.00 to $107,000.00 available thereunder. Plaintiff, however, sought to

[2] This Statement of Facts is based upon a review of the trial court pleadings available on eCourts and is drawn from the submissions of the parties on the defense's in limine motion to bar evidence of future medical expenses at trial.

introduce evidence of the costs of future care as calculated by her medical experts, Dr. Kim and Dr. Landa, each of whom testified prior to trial by way of videotaped de bene esse depositions. Dr. Kim's testimony was taken on January 26, 2022, and Dr. Landa testified on March 24, 2022. Dr. Kim testified that plaintiff "likely" would need carpal tunnel surgery on her right wrist. Over the defense's objection, he opined that the cost thereof would be approximately $5,000.00 to $10,000.00. Dr. Landa testified that, in the future, plaintiff would require 2 to 3 courses of physical therapy per year, three injections per year, an MRI "every couple years" and yearly follow-ups with her treating physician, Dr. Cammisa. Over the defense's further objection, Dr. Landa estimated that the annual cost of physical therapy would be approximately $5,000.00, the cost of the injections to be approximately $4,500.00 per year and the cost of follow-up care with Dr. Cammisa to be approximately $2,500.00 per year. He estimated the cost of future bi-annual MRIs to be $1,000.00. In the aggregate, those costs would be $12,500.00 per year. Neither Dr. Kim nor Dr. Landa offered any opinion as to the amounts allowed by the No Fault Act's fee schedules for the treatment they described. As it related to the cost of future care with Dr. Cammisa, Dr. Landa acknowledged that he did not "know exactly" what that doctor's charges would be but could "ballpark" them.

Using the figures provided by Drs. Kim and Landa, plaintiff argues that the cost of future medical care is $236,250.00, which represents the total cost of the

care forecast by Dr. Landa, $226,250.00, plus $10,000.00 as the cost for carpal tunnel surgery. To calculate the total cost of care forecast by Dr. Landa, plaintiff multiplies $12,500.00, the aggregate annual cost, by 18.1, the number of years remaining on her life expectancy as of the date NJM terminated benefits (July 2019). As noted, in doing so, plaintiff includes as "future expenses" the pre-trial period between July 2019 and July 2022 when she had no treatment, essentially arguing she should be paid the cost of treatment she did not have.

LEGAL ARGUMENT

POINT I

BECAUSE PLAINTIFF'S PIP MEDICAL EXPENSE BENEFIT WAS NOT EXHAUSTED, IT WAS HER BURDEN TO PROVE THAT FUTURE PAYMENTS MADE IN ACCORDANCE WITH THE PIP FEE SCHEDULES WOULD EXHAUST THOSE LIMITS. AS NO SUCH PROOFS WERE PRESENTED, NJSA 39:6A-12 PRECLUDED THE INTRODUCTION OF EVIDENCE OF MEDICAL EXPENSES AT TRIAL.

At the time the accident occurred, N.J.S.A. 39:6A-12 provided as follows:

> Except as may be required in an action brought pursuant to [N.J.S.A. 39:6A-9.1], evidence of the amounts collectible or paid under a standard automobile insurance policy pursuant to [N.J.S.A. 39:6A-4 and 39:6A-10], amounts collectible or paid for medical expense benefits under a basic automobile insurance policy pursuant to [N.J.S.A. 39:6A-3.1] and amounts collectible or paid for benefits under a special automobile insurance policy pursuant to [N.J.S.A. 39:6A-3.3], to an injured person, including the amounts of any deductibles, copayments or exclusions, including exclusions pursuant to subsection d. of [N.J.S.A. 39:6A-4.3], otherwise compensated is inadmissible in a civil action for recovery of damages for bodily injury by such injured person.
>
> The court shall instruct the jury that, in arriving at a verdict as to the amount of the damages for noneconomic loss to be recovered by the injured person, the jury shall not speculate as to the amount of the medical expense benefits paid or payable by an automobile insurer under personal injury protection coverage payable under a standard automobile insurance policy pursuant to [N.J.S.A. 39:6A-4 and 39:6A-10], medical expense benefits under a basic

> automobile insurance policy pursuant to [N.J.S.A. 39:6A-3.1] or benefits under a special automobile insurance policy pursuant to [N.J.S.A. 39:6A-3.3] to the injured person, nor shall they speculate as to the amount of benefits paid or payable by a health insurer, health maintenance organization or governmental agency under subsection d. of [N.J.S.A. 39:6A-4.3].
>
> Nothing in this section shall be construed to limit the right of recovery, against the tortfeasor, of uncompensated economic loss sustained by the injured party.

N.J.S.A. 39:6A-12, is entitled "[i]nadmissibility of evidence of losses collectible under personal injury protection coverage" (emphasis added). It embodies the prohibition against pursuing insured tortfeasors for the amounts of benefits "reimbursable" by a PIP carrier. It precludes suits against insured tortfeasors for medical expenses reimbursable through PIP in two ways. First, it establishes an evidential rule. Pursuant thereto, "[e]xcept as may be required in an action brought pursuant to [N.J.S.A. 39:6A-9.1] evidence of the amounts collectible or paid under a standard automobile insurance policy pursuant to [N.J.S.A. 39:6A-4 and N.J.S.A.39:6A-10], …. to an injured person, including the amounts of any deductibles, copayments or exclusions, including exclusions pursuant to subsection d. of [N.J.S.A. 39:6A-4.3], otherwise compensated is inadmissible in a civil action for recovery of damages for bodily injury by such injured person." (emphasis added). By making evidence of amounts "collectible or paid" by PIP inadmissible at trial, the statutory rule prevents a jury from

including such amounts within any damage award rendered. The second way the statute addresses PIP reimbursable medical expenses is to require a specific jury charge relating thereto. Thus, trial courts are required to instruct jurors "that, in arriving at a verdict as to the amount of the damages for noneconomic loss to be recovered by the injured person, the jury shall not speculate as to the amount of the medical expense benefits paid or payable by an automobile insurer under personal injury protection coverage payable under a standard automobile insurance policy" (emphasis added). The charge not only reinforces for jurors that PIP reimbursable medical expenses are not recoverable but it instructs them as well that the amounts of such expenses are not evidence to be considered in evaluating the nature or extent of a Plaintiff's non-economic losses. See Rybeck v. Rybeck, 141 N.J. Super. 481, 510 (Law Div. 1976) app. dism. on other grounds 150 N.J. Super. 151 (App. Div. 1977) (evidence of medical expenses does not bear on severity of injury, intensity or length of treatment, pain and discomfort involved or extent of temporary or permanent disability); see also Pitti v. Astegher, 133 N.J. Super. 145, 149 (Law Div. 1975) (evidence of future treatment costs collectible through PIP inadmissible; evidence of recommended future treatment admissible). The charge is required whenever there is testimony that a plaintiff received medical treatment following an accident. Espinal v. Arias, 391 N.J. Super. 49, 62-63 (App. Div. 2007). The failure to give it has

been found to constitute error even when not requested by the defense. Torres v. Pabon, 225 N.J. 167, 190 (2016). The statute, therefore, establishes a rule of inadmissibility from which plaintiff in this case seeks an exception. That such exceptions should be rarely granted is readily apparent from this Court's prior treatment of the statute and the important public policies advanced by its enforcement.

In Haines v. Taft, 237 N.J. 271 (2019), this Court considered whether the statute barred a Plaintiff opting for a reduced level of PIP medical expense benefit coverage pursuant to N.J.S.A. 39:6A-4.3 from recovering the amounts of medical expenses in excess of that reduced coverage. Concluding that such expenses were non-recoverable, the Court held

> [w]e cannot conclude that there is evidence of a clear intention on the part of the Legislature to deviate from the carefully constructed no-fault first-party PIP system of regulated coverage of contained medical expenses and return to fault-based suits consisting solely of economic damages claims for medical expenses in excess of an elected lesser amount of available PIP coverage. Unless the Legislature makes such an intent clearly known, we will not assume that such a change was intended. (emphasis added)

Id., at 274.

In coming to its decision, the Court recognized that the Legislature created "a highly regulated no-fault system of first-party self-insurance to cover medical expenses arising from automobile accidents" when it adopted the New Jersey

Automobile Reparation and Reform Act in 1972. 271 N.J. at 273. Tracing the history of the Act's legislative amendments over the ensuing decades, the Court noted a history of "changing priorities, shifting from full coverage to cost containment." Id., at 284. In reviewing the provisions of the 1998 Automobile Insurance Cost Reduction Act ("AICRA") at the heart of the dispute, the Court cited the Legislature's avowed goal "to preserve the no-fault system, while at the same time reducing unnecessary costs which drive premiums higher." Id., at 287 (quoting N.J.S.A. 39:6A-1.1(b). Among the "unnecessary costs" the Legislature sought to address was the overutilization of PIP medical expense benefits "for the purpose of gaining standing to sue for pain and suffering." Ibid.; see also Coalition for Quality Health Care v. New Jersey Dept. of Banking and Insurance, 348 N.J. Super. 272, 303 (App. Div. 2002) (AICRA designed to reduce unnecessary PIP medical costs and reduce payments on bodily injury component of auto policies). To do so, the Legislature "changed the arbitration process used for benefit disputes, established bases for determining whether treatments and diagnostic tests are medically necessary, and created insurance options with decreased coverage in exchange for lower premiums." (internal citations omitted) Ibid. In furtherance of those goals, "disputes about benefits payable under an insured's PIP policy were kept out of the courts and were instead required to proceed through a dispute resolution process established by

the Commissioner of Banking and Insurance" thereby maintaining a regulatory scheme which "ensured that benefits were paid according to their medical necessity, keeping premiums at a manageable level, while preventing such claims from inundating the court system." (emphasis added) Id., at 289-90.

Although the Legislature responded to the Haines decision by amending the final paragraph of N.J.S.A.39:6A-12 to permit the recovery of medical expenses exceeding a voluntarily reduced PIP limit, it did not alter or amend any other provision of the statute and left intact both the regulatory scheme for the resolution of disputes relating to PIP coverage and the rule of inadmissibility at issue in this case. Moreover, despite the Legislature's disagreement with the result reached in Haines, the long-standing goals of the No-Fault Act identified by the Court continue to be recognized as determinative of legislative intent. See New Jersey Transit Corp. v. Sanchez, 242 N.J. 78, 90-94 (2020); Cooper Hosp. University Med. Ctr. v. Selective Ins. Co., 249 N.J. 174, 177-180 (2021); Goyco v. Progressive Ins. Co., 257 N.J. 313, 320-21, 329 (2024).

Since 1990, the maximum amounts providers may charge for services payable through PIP have been fixed by fee schedules promulgated by the Commissioner of Banking and Insurance. Thus, pursuant to N.J.S.A. 39:6A-4.6(c), "[n]o health care provider may demand or request any payment in excess of those permitted by the medical fee schedules established pursuant to this

section, nor shall any person be liable to any health care provider for any amount of money which results from the charging of fees in excess of those permitted by the medical fee schedules." The current medical fee schedules are set out in N.J.A.C.11:3-29. That the fee schedules remain a primary component of the legislative plan to reduce automobile insurance costs is evident from the post-Haines amendment to N.J.S.A. 39:6A-12 providing that for accidents occurring on or after August 1, 2019, expenses incurred in excess of a motorist's PIP limits are subject to the fee schedules. By subjecting those expenses to the schedules, the Legislature clearly and unambiguously signaled its intention to continue to control costs by adherence to statutory measures which have long been in place, including both the fee schedules and the arbitration of disputes surrounding the payment of PIP benefits, both of which plaintiff herein has ignored.

Because the accident in this case occurred before August 1, 2019, medical expenses in excess of plaintiff's $250,000.00 PIP limit, if incurred, would not be subject to the fee schedules. Medical expenses incurred, or to be incurred, within that limit, however, are subject to those schedules. Plaintiff's PIP medical expense benefit has not been exhausted. She has approximately $100,000.00 in additional coverage available to her. Absent proof that the total of the amounts allowed by the fee schedules for the treatment described by Drs. Kim and Landa will exceed the balance of that coverage, plaintiff has no basis in law or fact to

assert a third-party tort claim for the costs of future care. Given the paramount importance of the public policies served by N.J.S.A. 39:6A-12, to warrant an exception therefrom, it is not sufficient to simply estimate or "ballpark" the costs of future care. Plaintiff must present evidence of the amounts payable for those services pursuant to the current fee schedules, and in this regard, it respectfully is submitted that this Court's decision in Caldwell v. Haynes, 136 N.J. 422 (1994) is instructive.

In Caldwell, the Court considered whether a claim for diminished earning capacity/future lost wages was to be based on "gross" or "net" earnings. Observing that "[f]air compensatory damages … encompass no more than the amount that will make the plaintiff whole, that is, the actual loss," and guided by the principle that "[t]he purpose … of personal injury compensation is neither to reward the plaintiff, nor to punish the defendant, but to replace plaintiff's losses," the Court concluded that "the proper measure of damages for lost income in personal-injury cases is net income after taxes." Id., at 433-34 (internal quotations omitted). Thereafter, it went on to consider the "rather loose" practice at the time for presenting proof of net income. Id., at 435-36. That is, at that time, either party was permitted, but neither was required, to introduce evidence of plaintiff's tax obligation. Id., at 436. Convinced that the "uncertainties and confusion" surrounding that practice required that it be

"clarified and modified," the Court placed the burden of proving net income on plaintiffs. Ibid. In coming to that decision, the Court reasoned that although plaintiffs "[g]enerally … have the burden of proving damages," under the practice then followed, "plaintiffs often shun[ned] and defendants tend[ed] to assume the 'permissive' burden of presenting net-income evidence in establishing lost wages." Ibid. Moreover, the Court recognized that under the former practice, "[p]laintiffs ha[d] an incentive to withhold such evidence and exaggerate their actual or real earnings." Id., at 437. The parallels to the practice followed by plaintiff herein are obvious. Eschewing consideration of the PIP fee schedules, plaintiff exaggerates her damages by employing experts to "ballpark" medical costs rather than to calculate them in accordance with the controlling provisions of the statute and the Administrative Code.

The Caldwell Court's decision also is instructive in its recognition that the burden placed on plaintiffs to prove net earnings "should not be difficult to sustain because [they] should have easy access to" the proofs necessary to prove such a claim. Ibid. Similarly, experts retained by plaintiffs to opine as to the need for future treatment and the costs associated therewith presumably are familiar with the PIP fee schedules[3] and capable of describing any services being

[3] Permitting experts unfamiliar with the PIP fee schedules to offer opinions concerning the costs of medical services would facilitate the "exaggeration" of damage claims the Caldwell Court sought to discourage.

recommended according to the procedure codes and other criteria set forth therein. See N.J.A.C. 11:3-29.

Recognizing plaintiff's burden to prove the fee schedule costs of future care as a prerequisite to considering whether to grant an exception to N.J.S.A. 39:6A-12's rule of inadmissibility arguably is more important than it was for the Caldwell Court to recognize plaintiff's burden in that case. In Caldwell, the Court was principally concerned with devising a means to calculate plaintiff's actual lost earnings "as nearly as possible." 136 N.J. at 434. By contrast, in this case, the Court must be conscious not only of the means by which to calculate plaintiff's actual losses, but it also must be cognizant of the impact any exception to the statutory rule of inadmissibility will have on the important public policies it serves. Permitting plaintiffs to shift the cost of their accident-related medical care out of the No Fault Act's highly regulated first-party benefit system runs directly counter to the Act's primary purposes of reducing tort litigation and controlling the costs of accident-related medical care. Allowing plaintiffs to recover damages based upon opinions as to future costs which bear no relationship to the Act's fee schedules, in fact, will encourage plaintiffs to pursue third-party rather than first-party claims and put a further drain on the resources intended by the Legislature to fund the payment of accident related medical expenses. Moreover, in this case, the Legislature has prescribed

procedures for resolving disputes which were not available to the parties in Caldwell. The role those procedures play in serving the purposes of the Act also must be considered in light of plaintiff's refusal to follow them and attempt instead to return her claims to the forum from which they were removed long ago. See Allstate Ins. Co. v. Sabato, 380 N.J. Super. 463, 470 (App. Div. 2005) (steering PIP disputes to dispute resolution consistent with policy goals fostering prompt resolution without protracted litigation, easing court congestion and reducing costs to automobile insurance system).

POINT II

TO BE "COLLECTIBLE," AND THEREFORE INADMISSIBLE PURSUANT TO N.J.S.A.39:6A-12, THE COST OF FUTURE MEDICAL CARE NEED NOT BE SHOWN TO BE CAPABLE OF ACTUAL COLLECTION BY PLAINTIFF.

In Caviglia v. Royal Tours of America, 178 N.J. 460, 466-67 (2004), the Court recognized that "[t]he No Fault Act was intended to serve as the exclusive remedy for payment of out-of-pocket expenses arising from an automobile accident." (citing Roig v. Kelsey, 135 N.J. 500, 503 (1994)). "[E]nacted in response to a long and widely held belief that the traditional court-oriented 'fault' system had failed badly in providing prompt compensation for accident victims, whose medical bills and other accident-related costs remained unpaid for years while their lawsuits lumbered through an overburdened court system," the Act contained restrictions on the right to sue including the prohibition of an injured driver's suit against a tortfeasor "for the very PIP benefits reimbursable through his own insurance carrier." Caviglia, 178 N.J. at 466-67. Thus, as a part of the "trade-off" for the prompt payment of medical bills regardless of fault, the No Fault Act barred claims for medical expenses reimbursable by a PIP carrier. Although plaintiff does not dispute that the Act bars her presentation of any claim for past medical expenses, whether paid or not, she argues that the statutory bar does not extend to future medical expenses for which she

anticipates being denied "coverage" based upon her PIP carrier's prior, unchallenged termination of benefits. Her argument, however, defies both the clear language of the statute precluding evidence of amounts "collectible" or "payable" by PIP and the well-established body of law which recognizes that medical expenses need not be actually "recoverable" to be considered "collectible" or "payable."

N.J.S.A. 39:6A-12's rule of inadmissibility applies to amounts "collectible" under PIP coverage. It is not limited to amounts "collected" or "paid" thereunder. The first paragraph of the statute refers to amounts "collectible or paid" by PIP. The second paragraph refers to amounts "paid or payable" through that coverage. In discussing the No Fault Act's history and purpose, the Caviglia Court recognized that it prohibits suits for PIP benefits "reimbursable" by an injured party's insurer. 178 N.J. at 466-67. Neither the statute nor the case law interpreting it provides any support for the argument made by plaintiff that N.J.S.A. 39:6A-12's rule of inadmissibility does not apply to medical expenses otherwise "reimbursable," "collectible" or "payable" by PIP when a plaintiff fails to avail herself of the statutory procedures for challenging an insurer's termination of benefits. Nor is there any basis for her further argument that her future medical expenses should be considered "unpaid" because she has failed to perfect her PIP claim.

In Tullis v. Teial, 182 N.J. Super. 553, 555 (App. Div. 1982), the Appellate Division considered

> whether evidence of medical bills incurred by a person injured in an automobile accident for which [PIP]benefits may be collectible may, as a matter of law, be introduced in a damage action against another party brought by the injured person if payment of the bills is refused under PIP coverage on the ground that the medical procedures for which the bills were rendered were for conditions unrelated to the accident.

In that case, Plaintiff's PIP carrier refused to pay for treatment related to an alleged neck injury based upon a medical opinion that the neck injury was not related to the accident. Ibid. Over the defense's objection, plaintiff was permitted to "prove" the bills denied by her PIP carrier as an element of damages against the tortfeasor. Id., at 556. The Court reversed, stating plainly that "[t]he result reached in the Law Division was wrong." Ibid. In coming to that conclusion, the Court noted that "[c]ompensation for medical expenses can be recovered from a defendant in a damage action only if related to the injury for which damages are sought." Id., at 557-58. Based thereon, it concluded that "if the medical expenses as a matter of evidence in the absence of the No Fault Act would be admissible in a damage action, they would qualify for payment under" PIP. Id., at 558. Thus, the Court held that a Plaintiff proving that the costs of treatment were related to the automobile accident out of which his or her suit arose "necessarily" established thereby that those costs were "collectible" under

PIP, and therefore were non-recoverable, even though they had not been paid by the PIP carrier. Ibid. Explaining its decision, the Court went on to say

> [i]t is manifest that money need not be paid for proof of the bill to be barred. This is so because the words "collectible or paid" are written in the disjunctive. The Legislature must have contemplated that in some instances a carrier would not make a payment of a claim legally due. This could be because the injured person simply did not make a timely request for payment or because the carrier refused a proper demand. **But regardless of who was responsible for the failure of the carrier to pay, the amount would have been collectible as a matter of law**. **It simply would not have been collected**. (emphasis added).

Ibid. It is clear, therefore, that for medical expenses to be "collectible" under PIP, they need not be capable of collection under the particular circumstances of plaintiff's case. Thus, the law requires that plaintiff follow the procedures established by the No Fault Act for the "collection" of benefits. Her failure to do so does not give rise to a third-party cause of action in lieu thereof. The Legislature very clearly removed her claim from the tort system, and she cannot return it there by ignoring the procedures put in place to resolve disputes between PIP claimants and their insurers. See Haines v. Taft, 237 N.J. at 289-90.

The United States District Court approved and adopted the reasoning of the Tullis Court in DiOrio v. West Jersey Health Systems, 797 F. Supp. 371, 374-75 (D.N.J. 1992). In that case, Plaintiff, a Pennsylvania resident involved

in an accident in New Jersey while operating a vehicle insured by an insurer authorized to do business in New Jersey, failed to avail herself of the benefits legally due to her pursuant to New Jersey's "deemer" statute. N.J.S.A. 17:28-1.4. As a result, at the time her personal injury lawsuit came to trial, Plaintiff had unpaid medical expenses in excess of her Pennsylvania policy's $10,000.00 medical expense benefit limit. As in the present case, defendants moved in limine for an order barring evidence of plaintiff's medical expenses. Granting the motion, the District Court focused upon N.J.S.A. 39:6A-12's use of the term "collectible" and agreed with the Tullis Court that its use "contemplated the possibility that a carrier would not make payments of amounts "legally due." DiOrio, 797 F. Supp., at 374-75. Coming to that conclusion, the Court observed that

> [t]here may be many reasons that a carrier disputes the payment of PIP benefits to its insured. Such refusal may center on a legal dispute… or it may deal with issues of causation or reasonableness. **It is even possible that a refusal to pay in some manner results from a failure on the part of the insured to properly press the claim.** (emphasis added).

Ibid. Whatever the reason for a PIP carrier's refusal to pay benefits which are "legally due," the Courts in both Tullis and DiOrio made clear that plaintiff's remedy is to take action against her or his insurer, not the tortfeasor in a personal injury lawsuit. See also, Ochs v. Federal Ins. Co., 90 N.J. 108, 116-17 (1982)

(plaintiff failing to timely avail himself of available remedy against PIP carrier precluded from pursuing claim).

PIP claims and tort claims are "mutually exclusive." DiOrio, 797 F. Supp., at 375 (citing Amaru v. Stratton, 209 N.J. Super. 1 (App. Div. 1985)). Proper procedure requires prosecution of a plaintiff's medical expense claim against his or her PIP insurer and a negligence action against the tortfeasor for damages not encompassed by PIP. Tullis, 182 N.J. Super. at 560. Plaintiffs cannot avoid PIP's exclusivity by failing to perfect a claim for benefits. In Tullis, the Court cautioned against the very decision made by plaintiff in this case, warning that "in many automobile accidents an injured party depending upon his assessment of a likely verdict on liability might prefer to waive PIP benefits and instead seek in a negligence action to prove those losses. In cases of high expenses a plaintiff's attorney could well conclude that proof of medical expenses might enhance the recovery for pain and suffering and disability and impairment." Id., at 558-59. That choice, however, is not available. As Tullis made clear, whether wrongfully withheld or unavailable based upon plaintiff's failure to pursue her PIP claim, "collectible" expenses are those which are provided for by the No Fault Act regardless of whether they are actually recoverable in this case. Id., at 560-61.

In the present case, plaintiff applied for and received PIP medical expense benefits under the terms of her personal automobile insurance policy. It is undisputed that the amount of medical expense benefits "collectible" thereunder is $250,000.00. It similarly is undisputed that plaintiff has not exhausted those benefits. Nonetheless, plaintiff takes the position that because her PIP insurer is expected to deny any future claim she makes, either upon grounds that further treatment is not necessary or that her claim is time-barred, those expenses will be "uncovered" and therefore, recoverable as damages from the defendant. That argument, however, is inconsistent with both the language of the post-Haines amendments upon which plaintiff relies and the context within which they were passed.

By its 2019 amendments to N.J.S.A. 39:6A-12, the Legislature "reversed" the Haines Court's decision barring introduction of evidence of "medical expenses in excess of an elected lesser amount of available PIP coverage." (emphasis added) Haines v. Taft, 237 N.J. at 274. The language the Legislature chose to do so related to medical expenses not covered by the personal injury protection limits applicable to the injured party" and "medical expenses that exceed, or are unpaid or uncovered by any injured party's medical expense personal injury protection limits." (emphasis added) L.2019 c.244 sec.1. Thus, the Legislature made clear that it was addressing "uncompensated medical

expenses" in excess of an injured party's "personal injury protection limits." Its use of the terms "not covered," "that exceed," "are unpaid" and "uncovered" relate to the "limits" of coverage provided by the claimant's policy. They do not relate to expenses within the limits of coverage which may be "unpaid" or "uncovered" based upon the particular circumstances of an individual claimant's case. To conclude otherwise would permit the type of forum shopping sought by plaintiff herein and return PIP disputes to tort suits simply by ignoring the statutory remedies put in place to resolve them. The Haines Court concluded from its analysis of the purposes and policies of the No Fault Act that there was no "evidence of a clear intention on the part of the Legislature to deviate from the carefully constructed no-fault first party PIP system of regulated coverage of contained medical expenses and return to fault-based suits" when it permitted motorists to elect reduced levels of PIP coverage. Haines v. Taft, 237 N.J. at 274. That same conclusion must be reached in this case. If the Legislature had intended by its 2019 amendments to discard the first-party system in favor of fault-based adjudication, N.J.S.A. 39:6A-12's rule of inadmissibility for evidence of amounts "collectible" or "payable" by PIP would be meaningless. The retention thereof clearly signifies a contrary intent.

In addition to the foregoing, permitting the award of future medical expenses in this case raises the potential for a "windfall" for plaintiff. That is, if

awarded damages for future medical expenses, plaintiff is under no obligation to use any of the money awarded to pay for future medical treatment. As a result, if she chooses not to undergo the treatment described by her experts, she would have received an award for damages she has not suffered (i.e., the cost of medical care). In this regard, it is telling that plaintiff's claim for "future" expenses includes the three-year period between the termination of her PIP benefits and the time of trial during which she had no treatment but for which she seeks an award of $37,500.00. Permitting a claim for future medical expenses under the circumstances of this case also raises the potential for a "double recovery" by plaintiff. Thus, if plaintiff is awarded future medical expense damages and thereafter has the costs of future care paid by her PIP carrier or another insurer, she will have received a double recovery. Either result is inconsistent with the purposes and procedures of the No Fault Act and cannot be countenanced. See Haines, 237 N.J. at 296, (Albin, J., dissenting, N.J.S.A.39:6A-12 intended to prevent double recovery).

CONCLUSION

In adopting the No Fault Act in 1972, the Legislature established a first-party system for the payment of medical bills arising from accidents involving private passenger automobiles. Doing so, it removed medical expense claims from tort litigation. On the present appeal, plaintiff seeks to return to the former practice. Eschewing the statutory remedies available to her to resolve her dispute with her PIP carrier, she seeks instead the far more lucrative path of enlisting experts to "ballpark" medical costs for treatment she has not pursued for over three years and translate those "costs" into damages payable by the defendant. Such efforts have been rebuffed consistently in the past and must be rejected in this case. The determination to bar the introduction of the proofs proffered by plaintiff, based upon N.J.S.A. 39:6A-12's longstanding and clear rule of inadmissibility, was correct, and for the reasons set forth herein, the NJDA respectfully submits that the trial court's decision to do so should be upheld.

Respectfully submitted,
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