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LINDA B. BREHME;

Plaintiff/Appellant/Petitioner,

v.

THOMAS IRWIN; NEW JERSEY MANUFACTURERS INSURANCE COMPANY; JOHN DOES 1-5; ABC CORPORATIONS 1-5;

Defendant/Respondent

SUPREME COURT OF NEW JERSEY

Docket No:

PETITION FOR CERTIFICATION AND APPENDIX

ON APPEAL FROM:

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

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.

PETITION OF PLAINTIFF/PETITIONER LINDA BREHME

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STATEMENT OF THE MATTER INVOLVED

This Court decided in *Haines v. Taft*, 237 N.J. 271 (2019) that *N.J.S.A.* 39:6A-12 bars an auto crash plaintiff from seeking future medical expenses at trial, even if those medical expenses exceed any available PIP auto insurance. This Court recognized the inherent unfairness of not allowing a crash victim to seek this uncompensated loss at trial and thus invited the Legislature to amend the statute. *Haines*, 237 N.J. at 294 ("Should the Legislature disagree with our restrained interpretation of its statutory scheme, we invite the Legislature to [amend it].") Later that same year the Legislature accepted this invitation and amended *N.J.S.A.* 39:6A-12 to unambiguously state that any medical bills beyond available PIP benefits are collectible at trial.

But in June 2022, before hearing any evidence, the trial court here disregarded the statute as amended and instead applied the superseded version to bar plaintiff Linda Brehme's claim for $236,000 in future medical expenses. In doing so the trial judge expressed a general disagreement with ever allowing a plaintiff to seek future medical expenses at trial, despite it being allowed under Model Jury Charge 811(I) and case law. The jury thereafter awarded $275,000 in disability and lost income damages.

The Appellate Division chose not to correct this obvious mistake, nor even address the fact that the trial court disregarded the law. Instead, it took the drastic

measure of dismissing the appeal because the defense filed a Warrant to Satisfy Judgment under *Rule* 4:48 before plaintiff filed its Notice of Appeal on the limited issue of future medical bills. In other words, the Appellate Division ruled a party cannot appeal a discreet issue unless it first announces its intention to do so, regardless of the 45-day notice of appeal period under *Rule* 2:4-1, thereby encouraging all other parties to file appeals rather than accept jury decisions. This rather alarming decision discourages resolution.

In deciding that a party must first decide and announce its decision to appeal a clearly mistaken decision in advance of the time requirements of *Rule* 2:4-1 and before a warrant to satisfy is filed, the Appellate Division mis-distinguished long standing Supreme Court precedent on the issue. *Adolph Gottscho, Inc., v. American Marking Corp.*, 26 N.J. 229, 242 (1958). ("A party may accept the sum to which he is in any event entitled and still pursue a request for a determination on appeal which would increase that sum."). Instead, the Court relied on a conflicting Appellate Division case- *Sturdivant v. General Brass & Machine Corp.*, 115 N.J. Super. 224, 227 (1971) and mis-distinguished another Appellate Division decision that properly follows *Gottscho*, *Guarantee Ins. Co. v. Saltman*, 217 N.J. Super. 604, 609 (App. Div. 1987) ("[W]e reject Guarantee's contention that defendants, having executed upon and obtained satisfaction of the judgment in the amount of $11,248.80 is estopped from pursuing this appeal…A party may accept the sum to which he is in

any event entitled and still pursue a request for a determination on appeal which would increase that sum.", *citing Adolph Gottscho, Inc. v. American Marking Corp.*, 26 N.J. 229, 242 (1958)).

This rather startling decision to dismiss an otherwise perfected appeal counters longstanding policy favoring issue and dispute resolution. *See e.g. Brundage v. Estate of Carambio*, 195 N.J. 575, 601 (2008). The litigation and trial of the instant matter presented numerous issues. All of them were resolved except one, future medical bills. But this ruling states that before that discreet issue can be appealed, it must be decided and announced long before the 45 day notice of appeal period of *Rule* 2:4-1. This discourages acceptance of the jury verdict which resolves all other issues and encourages any other parties to appeal any issues they might have. This is counter to long standing Supreme Court policy and precedent and is particularly disconcerting in these times of unprecedented judicial vacancies.

While this decision may have abbreviated the analysis here by side stepping altogether the issue about future medical bills, it has created an unsettling precedent that if allowed to stand will undoubtedly cause more work for the courts by way of discouraging dispute resolution and the filing of more appeals. And the future medical bills issue here would not have taken much more analysis because there is a statute directly on point which says the exact opposite of what the trial judge ruled. That trial court ruling should have been summarily reversed.

QUESTION PRESENTED

1. When the Legislature amends a statute at the recommendation of the Supreme Court, should a trial court have the discretion to apply the previous version because of a disagreement with the amendment?

2. Does the filing of a warrant to satisfy judgment pursuant to *Rule* 4:48 constitute a waiver of appellate issues outside that judgment?

3. Must a party decide and give notice of intent to appeal prior to the 45-day period set forth in *Rule* 2:4-1 and before the adverse party files a warrant to satisfy judgment or waive its right to appeal other issues?

ERRORS COMPLAINED OF

The trial court was clearly wrong in disregarding the amended statute which provides that uncompensated medical bills are recoverable at trial. The controlling statute was amended at this Court's urging in the *Haines* decision. But the trial judge disregarded that because of a disagreement with the concept of awarding future medical bills, even though the Model Jury Charge and case law provides for it. This decision should have been summarily reversed by the Appellate Division.

Instead, this plain error was allowed to stand by dismissing the appeal because plaintiff did not make the decision to appeal and announce it before she would otherwise have to under *Rule* 2:4-1, and before the defense filed the Warrant to Satisfy Judgment under *Rule* 4:48. Notably neither *Rule* 2:4-1 nor *Rule* 4:48 say anything about shortening the 45-day period by announcement, nor that failure to do so constitutes a waiver of the right to appeal. This unsettling decision discourages issue resolution and contradicts both *Adolph Gottscho, Inc., v. American Marking Corp.*, 26 N.J. 229, 242 (1958) and *Guarantee Ins. Co., v. Saltman*, 217 N.J. Super. 604, 609 (App. Div. 1987). It was the defense's decision to file the Warrant to Satisfy Judgment and had there been any concern they certainly could have held it until expiration of the 45-day notice of appeal period.

As such, the Appellate Division decision that plaintiff needed to "advance [], either on the record or in writing, that she intended to pursue her claim for future

medical expenses after the judge's in limine ruling" was an error. (*Decision at 5*). It is further impractical to impose on a litigant an expectation to tell a trial judge he or she is going to be appealed while still presiding over a trial, or any time before the 45 day window of *Rule* 2:4-1 for that matter.[1] Certainly the record is devoid anything indicating that plaintiff would not appeal the judge disregarding the controlling statute on future medical bills and plaintiff had a right to rely on the controlling precedent of this Court that, "A party may accept the sum to which he is in any event entitled and still pursue a request for a determination on appeal which would increase that sum." *Adolph Gottscho, Inc., v. American Marking Corp.*, 26 N.J. 229, 242 (1958).

REASONS WHY CERTIFICATION SHOULD BE ALLOWED

Certification should be granted because when a statute is amended at this Court's urging, trial judges who disagree with it should not be free to apply the superseded version. Certification should also be granted because the decision below contradicts a published decision of both this Court, *Gottscho,* and one from the Appellate Division, *Guarantee Ins. Co.* The decision below also relied upon a

[1] The Court also erred in finding plaintiff accepted judgment "from defendant New Jersey Manufacturers Insurance." NJM had long been dismissed from the case. (*LCV20191614531*). The judgment was paid by Defendant Thomas Irwin (via his insurance carrier, State Farm). (*Pa84*).

published decision of the Appellate Division, *Sturdivant*, which conflicts with both *Gottscho* and *Guarantee Ins. Co.*

Pursuant to *Rule* 2:12-4, this Court will grant certification "if the decision under review is in conflict with any other decision of the same or a higher court…" *See also In re Route 280 Contract*, 89 N.J. 1 (1992) (setting forth reasons for granting certification, including conflict of appellate decisions). This Court has recently recognized the fundamental importance attendant to the doctrine of *stare decisis*: the promotion of settled expectations on the part of litigants. *See Luchejko v. City of Hoboken*, 207 N.J. 191, 208 (2011). Thus, departure from precedent must be accompanied by some "special justification." *Id.* (*citations omitted*).

Here the ruling of the trial judge conflicted with the controlling statute. The appellate decision relies on a published Appellate Division case which conflicts with other controlling precedent from both this Court and the Appellate Division. This leaves an unsettling and confusing situation where a plaintiff accepted a judgment in reliance on the controlling law that an appeal of a separate issue is allowed. It also discourages resolution and encourages multiple appellate issues at a time of unprecedented judicial shortages. This Petition should be granted.

The Appellate Division mis-applied and mis-distinguished *Adolph Gottscho, Inc. v. American Marking Corp.,* 26 N.J. 229 (1958). There are also contradictory Appellate Division decisions. The Appellate Division below found that *Tassie v.*

Tassie, 140 N.J. Super. 517 (App. Div. 1976) and *Sturdivant v. General Brass & Machine Corp.,* 115 N.J. Super. 224 (App. Div. 1971) stand for the proposition that the filing of a warrant to satisfy acts as a waiver to an appeal, contrary to *Gottscho.*

Over a decade later the Appellate Division found in *Guarantee* that a plaintiff can accept a partial judgment and appeal the denial of a different element of a damages claim. *Guarantee Ins. Co., v. Saltman*, 217 N.J. Super. 604, 609 (App. Div. 1987). The Appellate Division below found otherwise and erroneously mis-distinguished *Guarantee*, which properly follows *Gottscho* and conflicts with *Sturdivant*. *Guarantee Insurance Co. v. Saltman*, 217 N.J. Super. 604 (App. Div. 1987) ("[W]e reject Guarantee's contention that defendants, having executed upon and obtained satisfaction of the judgment in the amount of $11,248.80 is estopped from pursuing this appeal. The 'acceptance of the sum found by the trial court to be due, and [the]delivery of a warrant for satisfaction while [defendants] at all times continued to assert that an additional sum was due, was in no wise inconsistent and furnished no real basis for an estoppel.)

Here, just like in *Gottscho,* while a Warrant of Satisfaction was filed on the pain and suffering claim, there was no "compromise or settlement or any express waiver or abandonment of...the appeal..." as to the future medical expenses, which is an entirely distinct issue. *Gottscho, Inc., v. American Marking Corp.*, 26 N.J. 229, 242 (1958). Notably, Defendant/Respondent could have held the Warrant to Satisfy

until the 45-day appeal period expired. Plaintiff has always maintained her wholly separate claim for future medical expenses. (*Pa7-73-1T52:3-53:7*) (*Pa74-224 - 4T8:19-22*). In fact, after it was denied *in limine*, plaintiff renewed the issue again with full briefing at the charge conference. (*4T:4:13-9:9*).

The Appellate Division's reliance on matrimonial cases where appellants contest the equitable distribution that was awarded by the trial court is misplaced. (*Db3*). Here Appellant never contested the jury verdict. (*Pb3*)(*Pa7-73 - 1T52:3-53:7*) (*Pa74-224 - 4T8:19-22*). Neither *Tassie v. Tassie* nor *Sturdivant v. General Brass & Machine Corp.*, in any way overrule the Supreme Court decision in *Gottscho v. Am. Marking Corp.,* which held that the acceptance of "the sum found by the trial court to be due, and its delivery of the warrant of satisfaction while it, at all times, continued to assert that an additional sum was due, was in nowise inconsistent and furnished no real basis for an estoppel." *Gottscho v. Am. Marking Corp.*, 26 N.J. 229, 242 (1958).

Moreover, *Sturdivant*- a workers compensation case- is substantively different from both this case and *Gottscho*. In *Sturdivant*, both parties recognized "the validity of the judgement and...voluntarily entered into a contract to waive or surrender their respective right to appeal." *Sturdivant v. General Brass & Machine Corp.*, 115 N.J. Super. 224, 227 (1971). That is not the case here, as

Appellant/Petitioner contested the trial court's ruling regarding future medical expenses. (*Pa7-73 - 1T52:3-53:7*) (*Pa74-224 - 4T8:19-22*).

Furthermore, the divorce action of *Tassie v. Tassie* has no effect on the instant matter. In *Tassie* the plaintiff accepted all the benefits of the judgment and complied with the financial obligations imposed upon her. *Tassie v. Tassie*, 140 N.J. Super. 517, 525 (1976). *Tassie* was distinctly unique to the divorce context:

> The overwhelming weight of authority is to the effect that an appellant having recognized the validity of a judgment and decree of divorce rendered in a court of competent jurisdiction and having jurisdiction of the persons by accepting the favorable and/or beneficial provisions thereof, financial and/or marital, accruing to him thereunder, in the absence of fraud, is estopped from questioning the validity of such judgment or decree from and after the acceptance of such benefit...from and after such acceptance, an appellant is prohibited from proceeding to perfect or maintain any appeal from the same.
>
> ...
>
> If the outcome of the appeal could have no effect on the appellant's right to the benefit accepted, its acceptance does not preclude the appeal. There is no acceptance of benefits under a judgment, and hence no waiver of rights of appeal, where a party exercises a right which existed prior to the judgment and which, though recognized or confirmed by the judgment, is not merged in it.

Tassie v. Tassie, 140 N.J. Super. 517, 527, 528 (App. Div. 1976) (underlined added). Here, Petitioner Linda Brehme did not in any way accept the court decision barring future medical expenses; she always objected to it and filed her appeal in accordance with the Rules of Court. This is not a divorce matter where the plaintiff signed off on the divorce decree, accepted the marital property distribution, and then later

appealed it. The Appellate Division's references and citations to these divorce matters are misplaced. *Gottscho v. Am. Marking Corp.*, 26 N.J. 229, 242 (1958) controls- "the plaintiff's acceptance of the sum found by the trial court to be due, and its delivery of the warrant of satisfaction...was in nowise inconsistent...for an estoppel." Notably, in *Gottscho* - as in here - the appeal is confined to a single issue "and its outcome could serve to increase but not to reduce the amount of the judgment." *Gottscho v. Am. Marking Corp.*, 26 N.J. 229, 242 (1958).

The Appellate Division's decision compounds the existing Appellate conflict on this issue and, most importantly, conflicts with longstanding Supreme Court precedent. It also engrafts new procedural requirements where none exist in the applicable court rules and as a practical matter greatly shortens the 45-day period in *Rule* 2:4-1. The decision even suggests a good practice would be to tell the judge "on the record" at trial that he or she will be appealed. (*Decision at 5*)

The new rule bars accepting the jury decision without first making a decision about appealing other issues and announcing it, thereby inviting the other side to reject the verdict and appeal issues that would have otherwise remained resolved. This discourages resolution and neglects a party's right to have 45 days to think about whether or not they will appeal. *Rule* 2:4-1(a). The Appellate Division took the drastic measure of dismissing the appeal because the defense filed a Warrant to

Satisfy without any support in the controlling *Rule* 4:48 (Execution and Delivery of Warrant of Satisfaction). This Petition should be granted.

CONCLUSION

We respectfully thank the Court for considering this Petition which I certify presents substantial questions and is filed in good faith.

Respectfully submitted,

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Counsel for Plaintiff/Petitioner
Linda Brehme

By: _____
GERALD H. CLARK

DATED: JAN. 16, 2024

By: _____
LAZARO BERENGUER

cc: Clerk of the Appellate Division (Via Electronic Filing)
The Honorable Robert C. Wilson, J.S.C. (Via Electronic Filing)
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