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MARTCHELA V. POPOVA-
MLADENOV and MLADEN
MLADENOV, wife and husband,

Appellants,

vs.

JASON M. COIGNE, JOHN DOE
PHANTOM VEHICLE 1-10
(fictitiously named defendants), NJM
INSURANCE GROUP and/or NEW
JERSEY MANUFACTURERS
INSURANCE COMPANY, John Doe
Insurance Company 1-10 (fictitiously
named defendants), Jane Doe 1-10
(fictitiously named defendants), ABC
Corporation 1-10 (fictitiously named
defendants) and XYZ Partnership 1-10
(fictitiously named defendants),

Respondents.

SUPERIOR COURT OF NEW
JERSEY
APPELLATE DIVISION
DOCKET NO.: A-000675-24

CIVIL ACTION

ON APPEAL FROM

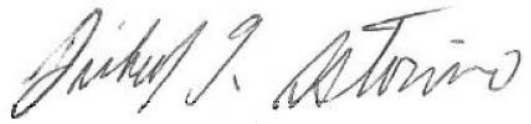
SUPERIOR COURT OF NEW
JERSEY
MIDDLESEX COUNTY
DOCKET NO.: MID-L-0387-21

SAT BELOW:

HONORABLE JOSEPH L. REA,
J.S.C.

APPELLANT'S BRIEF

**APPELLANT'S BRIEF IN SUPPORT OF APPEAL TO VACATE THE
ORDER OF INVOLUNTARY DISMISSAL AND FOR A NEW TRIAL**

A handwritten signature in dark ink, appearing to read "Richard T. Astorino", is positioned above a horizontal line.

Of Counsel and on the Brief
Richard T. Astorino, Esquire

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PLAINTIFFS MET THE STANDARD TO DENY THE DEFENSE MOTION FOR INVOLUNTARY DISMISSAL PURSUANT TO R. 4:37-2(B) AND THE ORDER OF DISMISSAL SHOULD BE REVERSED AND A NEW TRIAL GRANTED.

(Raised Below: 1T 8-36, 49-78, 83-98, 109-144; Pa 98, 109-144)

<u>POINT II</u>	PB26
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THE COURT SHOULD VACATE THE ORDER OF INVOLUNTARY DISMISSAL AND DENYING RECONSIDERATION BASED UPON OVERLOOKING PLAINTIFF’S TESTIMONIAL MEDICAL EVIDENCE AND ERROR IN INTERPRETING THE LAWSUIT THRESHOLD LAW AS TO PROOF OF PERMANENT INJURY.

(Raised Below: 1T 56-70, 2T 4-15; Pa116)

POINT III PB27

A NEW TRIAL IS WARRANTED AS IT CLEARLY AND CONVINCINGLY APPEARS THERE WAS A MISCARRIAGE OF JUSTICE UNDER LAW, PURSUANT T R. 4:49.

(Raised Below: 1T 83, 84)

POINT IV PB28

A NEW TRIAL IS WARRANTED BASED ON PRESSURE BY THE COURT ON PLAINTIFF TO SETTLE WHEN THE RULING ON THE DISMISSAL MOTION WAS IMMINENT.

(Raised Below: 1T 54-55, 78-80)

CONCLUSION PB30

TABLE OF ORDERS BEING APPEALED

Orders Dismissing Case 11/30/23, 12/05/23	Pa109, Pa114
Order Denying Motion for Reconsideration 10/28/24	Pa171

TABLE OF CITATIONS

New Jersey Court Rules:

R. 4:37-2(b) – Involuntary Dismissal at Trial PB16

Caselaw:

Continental Ins. Co. v. First Wyoming Bank, 771 P.2d 374, 376 PB30

Cummings v. Bahr 295 N.J. Super. 384 (App. Div. 1996)..... PB24

Peskin v. Peskin 271 N.J. Super. 261 (App, Div. 1994) PB24, PB29, PB30

Verdicchio v. Ricca, 179 N.J. 1 (2004)..... PB21, PB24, PB26

PRELIMINARY STATEMENT

This suit for personal injuries arises from a motor vehicle accident on Highway I-295 in Mount Laurel, New Jersey on January 23, 2019. Defendant Coigne entered Plaintiff Popova's lane and a violent crash ensued. Both cars were towed and totaled and vehicle photos in evidence at trial showed dramatic damage.

The case was heard at a mandatory, non-binding arbitration on November 15, 2022. The arbitrator found Defendant 100% at fault and awarded \$87,500. The defense rejected the award.

Defendant filed for Summary Judgment claiming Plaintiff could not meet the verbal threshold with a permanent injury. Plaintiff opposed the motion relying on a certification from Dr. Arik Mizrachi and a report from Dr. Joshua Landa, both orthopedic surgeons. Dr. Mizrachi was a treating physician and Dr. Landa was an examining physician.

On December 19, 2022, the Honorable Christopher Rafano, J.S.C. entered an Order denying this Motion and finding that a reasonable fact finder could find that the Plaintiff has demonstrated through objective, credible medical

evidence that her alleged injuries are both permanent and related to this accident as required by the lawsuit threshold.

After nearly five (5) years, the case was assigned to trial. The trial was assigned to the Honorable Joseph L. Rea, J.S.C. on November 27, 2023. A jury was selected the next day. Plaintiff, a 51-year-old woman from Dayton, Middlesex County, New Jersey testified along with Dr. Landa and Dr. Edward Alexeev. Both are Board Certified medical doctors. Dr. Alexeev is a physical rehabilitation and pain management doctor who treated the Plaintiff. The Plaintiff testified of continuing, frequent low back pain. After nearly three (3) days of trial, the Plaintiff rested, and the defense made a Motion for Involuntary Dismissal. Such motions are routinely made with little expectation that they will be granted.

Plaintiff's counsel vigorously opposed this motion citing numerous sections of the sworn testimony of Drs. Landa and Alexeev - including multiple references to objective credible medical evidence of permanent injury: spasms upon palpation, MRI reading and diagnosis of swollen facet joints in the low back and diagnostic injection of the facet joints confirming injury location.

Despite Judge Rafano's prior Order on the same issue, and with the added benefit of sworn medical testimony, the trial Court granted the Motion and dismissed the jury and the suit.

Plaintiff filed a Motion to Reconsider this Order of November 30, 2023 and to vacate it and order a new trial before a second jury. The Court adjourned oral argument on this Motion several times and heard argument on October 28, 2024, nearly a year after it was filed. The Court denied the Motion on the argument date. Plaintiff now appeals.

PROCEDURAL HISTORY

This suit for personal injuries from a motor vehicle accident was filed on January 19, 2021 (Pa4). Answers were duly filed (Pa16, Pa34). Since the Defendant Coigne claimed an unknown vehicle forced him into Plaintiff's lane, Plaintiff also sued NJM, Plaintiff's uninsured motorist carrier. This was based upon Defendant's claim against the "phantom" driver who fled the scene. After jury selection, the Plaintiff, Martchela Popova-Mladen, dismissed the claim against NJM. Her husband, Mladen Mladenov, asserted a loss of consortium claim (Pa11-Pa12).

The case went to arbitration on November 15, 2022, and an award was entered: 100% negligence against Coigne, verbal threshold permanency standard met and \$87,500 in damages awarded (Pa46). The defense rejected the award (Pa48). The Defendant Coigne never conceded liability but conceded at trial that Plaintiff was not negligent.

The Defense filed a Motion for Summary Judgment on November 15, 2022, claiming the Plaintiff could not prove a permanent injury as a matter of law (Pa50). Plaintiff opposed and argued this motion (Pa56, Pa59, Pa97) and it was denied on December 19, 2022 by the Honorable Christopher D. Rafano, J.S.C. (Pa98).

The case went forward. After several adjournments, mostly because defense counsel had older cases to try, this case was assigned to trial on November 27, 2023.

The Honorable Joseph L. Rea, J.S.C. and counsel selected a jury of eight (8) people the next day. On November 29 and 30, 2023 the Plaintiffs presented their case. Plaintiff, Mrs. Popova, testified at length. Dr. Landa and Dr. Alexeev testified by video. These Board-Certified medical doctors supported

Plaintiff's claims - both doctors as to objective medical evidence of permanent injury (1T 8-36, Pa144). Dr. Landa, an examining orthopedic surgeon, also testified as to causation and permanency (Pa144). Dr. Alexeev is a physical rehabilitation and pain management doctor. He treated the Plaintiff and administered facet joint injections to the low back (1T 8-36).

Once the Plaintiff rested, the defense moved for an involuntary dismissal. On November 30, 2023, the Court granted this Motion, dismissed the jury and ended the trial (Pa109 to Pa144) (1T 96) .

The arguments of counsel and the basis for the Court's ruling and Order are set forth in the transcript. (1T 49-78), (1T 83-98) Plaintiff filed a Motion to Reconsider and vacate this Order and order a new trial before a second jury (Pa116). On October 28, 2024, nearly a year later, the Court heard arguments and denied this Motion. (2T 4-15) The Plaintiff now appeals (Pa173).

1T Transcript of Defense Motion to Dismiss, argument and ruling on November 30, 2023.

2T Transcript of Plaintiff's Motion for Reconsideration argument and ruling, October 28, 2024.

STATEMENT OF FACTS

This suit for personal injuries arises from a motor vehicle accident on January 23, 2019 (Pa1). Defendant Coigne entered Plaintiff Popova's lane (Pa1) and a crash ensued. Both vehicles were towed (Pa1). The photographs in evidence at trial showed substantial visible damage (Pa92 to Pa96). Plaintiff's vehicle, a 2017 Mazda, sustained a loss with \$23,442.54 of damage (Pa88).

On November 15, 2022, the case was heard at an arbitration hearing. The arbitrator found that Defendant Coigne was 100% at fault, that Plaintiff met the verbal threshold with a permanent injury and that damages were \$87,500 (Pa46). The defense rejected the award (Pa48) and filed a Motion for Summary Judgment claiming the Plaintiff did not have a permanent injury as a matter of law (Pa50). The Plaintiff opposed this motion, relying upon narrative reports from Joshua Landa, M.D. dated August 26, 2021 (Pa72) and November 4, 2021 (Pa75).

Dr. Landa is a Board-Certified orthopedic surgeon and acted as Plaintiff's examining doctor. Plaintiff also relied upon a certification dated July 2, 2020, from Plaintiff's treating orthopedic surgeon, Arik Mizrachi, M.D. (Pa65). Plaintiff also relied upon selected treatment records from Dr. Mizrachi (Pa68

to Pa70). Judge Rafano rejected the defense claims and found on December 19, 2022, that, "a reasonable fact finder could find that Plaintiff has demonstrated through objective, credible medical evidence that her alleged injuries are both permanent and related to this accident as required by the lawsuit threshold." Thus, the court denied this defense motion (Pa98).

Plaintiff filed an Amended Pretrial Information Exchange on November 8, 2023 (Pa103), including a notice that Plaintiff planned to argue the "Time Unit Rule" in summations (Pa106). Plaintiff's counsel noted Plaintiff was 51 with a life expectancy of approximately 35 years (Pa106).

The case proceeded to trial. It was assigned to the Honorable Joseph L. Rae, J.S.C. on November 27, 2023, a jury of eight (8) people was selected the next day and testimony was taken in Plaintiff's case on November 29 and November 30, 2023. Before the end of that day, the trial was ended by a ruling on a defense motion, without the defense case, jury charge, summations, jury deliberations, or verdict (Pa109 to Pa114).

When the Plaintiff testified, she described growing up in Bulgaria, her status as a U.S. citizen, her family life with her husband and 10-year-old daughter

and her education including a Masters Degree in Environmental Science. She also testified about her position as an Environmental Specialist for the New Jersey Department of Education, her office and field duties and her years of service there. She described her activities before and after this car crash, her decade before the accident of a symptom-free low back and the aftermath of the accident. This included nearly five years of weekly and continuing low back pain and her numerous efforts to relieve the pain-long after diagnosis and treatment by the doctors ended, along with significant limitations attempting to engage in multiple activities at home, work and during family, social, and recreational activities. She also explained why she continued to work full time through this pain and these limitations.

Prior to ruling on the defense motion that ended the trial, the Court observed:

"All right. So, well, let me start out with this. I heard the testimony of Mrs. Mladenov... and I found her to be a very credible witness, you know, with regard to everything that happened and, yeah, the fact that, you know, before this, regardless of any arthritis she may or may not have had that she may not even know about, she was fine, and then after this accident low and behold, she's had - she started out with neck and shoulder pain. That relented but the back pain never went away. And I find it particularly significant, as far as

enhancing her credibility, the lengths that she has been going to, to try to the seek relief, you know, the various things that - that she's been doing, the - that go into the really cold environment, I mean, all kinds of things --- I mean going out of her way, to me, that enhances her credence that she obviously is suffering pain and given the timing of everything, which I accept from her, as far as the timing of when this all started, I think it's reasonable to infer that this all dates back to this accident. In other words, but for this accident, she wouldn't be in these straits with regard to back pain. So I accept that and I certainly think the jury could accept that..." (1T 83, 84)

Plaintiff's expert witnesses, both medical doctors, also testified on videotape: Dr. Edward Alexeev, treating doctor, and Dr. Joshua Landa, examining doctor.

Dr. Alexeev testified. He is Board-Certified in physical rehabilitation and pain medicine. His videotaped deposition was taken on April 7, 2023. His testimony was played to the court and jury, and the transcript was provided to the Court before the involuntary dismissal motion (1T 8-36). Additionally, several references to his testimony were read into the record by Plaintiff's counsel in opposition to the defense motion for involuntary dismissal (1T 53, 54-70).

At the outset, Plaintiff's counsel asked him, "... when you get to the point where you provide opinions, will you express them within a reasonable degree of medical probability? Absolutely. All right. By that, I mean two things. First, more likely than not and, second, within the consensus of the community of doctors in your field, not just some fringe opinion that you hold, okay? Absolutely." (1T 15)

Dr. Alexeev testified in pertinent part, "And how about spasm, when you palpate and actually feel the spasm, is that subjective or objective? That is objective because spasm you can feel difference in the presentation of the muscle, the texture, it's usually hard to the touch and you can feel the difference with the surrounding tissue, so it's objective ... my diagnosis was Facet Joint Syndrome." (1T 20, 21, 32, 33) Dr. Alexeev also discussed the two (2) facet joint injections her have Mrs. Popova in the low back (1T 22, 23).

Returning to spasm, Plaintiff's counsel asked Dr. Alexeev, "I'm going to refer you now to your note of February 14, 2020, we can go right to page 2, and what happened at that point after the injection, not getting into causation, just in terms of time, how was she doing with the muscle spasm? ... Spasms decreased, pain decreased..." (1T 26).

In terms of nature of spasm over time, this question and answer ensued:

"... You initially found spasm here. There was improvement, I guess. Once a physician palpates and ascertains there is spasm, does that mean a patient always has it constantly for the rest of their life? Answer: They can. It depends on the individual. Unfortunately, with the facet syndrome, most of the time if something like that happens, you may have to have some sort of therapy or injections lifelong. That is the nature, and the spasms can come back as well, too, with time. Absolutely. Question: Okay. So, spasm can come-and-go if I'm understanding correctly? Answer: Yes, absolutely, comes and goes a lot of the time. We cannot control that..." (1T 26, 27).

On cross-examination, Dr. Alexeev testified:

"And, that was when you first diagnosed her with the spasm about 10 months after the accident, correct? Answer: That is correct. Okay. And would you agree that there were many, many things that can cause somebody to have a muscle spasm? ... Answer: Many things can cause as well, anything can cause, but usually something, usually some trauma or some physical injury more so will cause it than other things. Usually, you know, to that extent, you don't get spasm just out-of-the-blue, it's some sort of a trigger..." (1T 31, 32).

Dr. Alexeev also testified on cross-examination:

"Question: Okay. And that is arthritis, right? Answer: She has some arthritis before, preexisting, but it's two different things. You can still have arthritis and be totally asymptomatic and something happens to you physically or it can turn into facet syndrome as well." (1T 33)

Joshua Landa, M.D. testified as well. He is a Board-Certified orthopedic surgeon specializing in spine surgery. His videotaped deposition was taken on January 26, 2023. His testimony was played to the court and jury and the transcript was provided to the Court before the involuntary dismissal motion. Additionally, references to his testimony were read into the record by Plaintiff's counsel in opposition to the defense motion for involuntary dismissal (1T 73-78).

In addition to the lengthy citations of medical testimony, Plaintiff's counsel made these arguments in opposition to the defense motion for involuntary dismissal:

"Thank you, Your Honor. The opposition to the dismissal motion, which I think is, as a matter of law, no reasonable jury could conclude that there is a

permanent injury or as we sometimes speak less formally, that the verbal threshold is met..." (1T 53).

Defense counsel argues that Dr. Alexeev does not opine on causation and permanency. She also states that Dr. Landa does not cite to any objective evidence in his testimony. She then concludes that the legal standard of proving a permanent injury by credible, objective medical evidence was not met (1T 70, 71).

The Court then stated that the threshold argument is, "Has the Plaintiff proven by a preponderance of the credible, objective medical evidence, that she sustained a permanent injury as a proximate result of the automobile accident of January 23, 2019 ... that's the question." (1T 72).

Plaintiff's counsel then argued, "Now, here's the answer. Not only do we have the precise words the doctor said, and this is the point I'm trying to make with the argument - the argument that is made by defense counsel is much too narrow, because as I remember another one of the jury charges, which I'm confident the judge will give, is that it is not only direct evidence, it's the whole thing with the snowflakes, and you go to bed and it wasn't snowing at

night, but there's snow in the morning, reasonable inferences that could be drawn to the evidence. So, does a doctor have to stand up and parrot the law on verbal threshold? Of course not. The doctors testify, the jury hears it and with all that evidence of these four objectives as to permanency, they could certainly, and it go the other way, they'd say no, no permanent injury. But they could certainly, a reasonable - any reasonable jury could certainly say, yes that standard that Judge Rae just gave us is met. Candidly, I think it is well met." (1T 72-73).

The Court then asked, "What is your position as to what the permanent injury is?" (1T 73). This exchange ensued:

"Plaintiff's counsel: The permanent injury, your Honor –

The Court: Is what?

Plaintiff's counsel: Well, let me back up a minute because I think -

The Court: No, no, just answer that question. What's the plaintiff's position as to what is the permanent injury?

Plaintiff's counsel: The damage, the damage the permanent damage to the facet joints that were enlarged on MRI and were diagnosed by injection.

The Court: And who testified that those were permanent?

Plaintiff's counsel: They ultimately, he ultimately - Dr. Landa ultimately concluded the permanency. Judge, and again, and I'm gonna back up a minute, Judge. I answered your question but now I'm going to have something to say.

"Plaintiff's counsel (continued)

I think the entire problem with this case from the get-go that continues to this day, is those of us that are in this profession, that handle and try auto cases day-in and day-out, 90 to 95 percent of the time the issue is, is it a bulging disc? Is it a herniated disc? The discs are always our focus. But you know what? There's other parts of the body. Bulging disc, herniated disc, no, no, no. There's other parts of the body. And here's the facet joints. Does a doctor really have to parrot the verbal threshold? Clearly not. And you know, we're not just messing around at a conference. We're talking about after almost five years, depriving this lady of a jury verdict, extraordinary and I strongly oppose any decision in that direction." (1T 73-74).

Finally, Plaintiff's counsel acknowledged that Dr. Alexeev did not comment on causation and permanency. Plaintiff's counsel also cited Dr. Landa's testimony as to objective evidence:

"Plaintiff's counsel: The MRI, it's enlarged, he sees it and it's objective. They can foo-foo it, but a jury could say, yeah, it's bigger, it's enlarged, it's swollen.

That's a problem. And he also says, diagnostic with the injection, even though he didn't give the injection. You know, if that isn't objective, I don't know what is. You can put in a needle and gives you information. That's not - that's not Mrs. Popova saying, oh, I heard [sic, hurt] I hurt, I hurt, I hurt. That's not that at all." (1T 76, 77, 78).

After a break, the Court dismissed the jury and dismissed the case (1T 83-96). An initial Order was entered orally on November 30, 2023. It was followed by a written order filed on December 5, 2023 (Pa114). In that Order the Court granted the defense motion for involuntary dismissal citing R. 4:37-2(b) (Pa114).

The Court stated in this Order:

"This was an auto/negligence/verbal threshold trial. The case was dismissed at the conclusion of the Plaintiff's case because no objective evidence (as opposed to only subjective – i.e., reports of pain or no pain) was presented to support a finding of a permanent injury. As a matter of law - Plaintiff could not vault the verbal threshold. Reasons were set forth orally on the record on November 30, 2023 when the Court ruled on the motion." (Pa114, Pa115).

The Court had provided more detail in the ruling at trial, just before the trial ended. The Court quoted from the verbal threshold permanent injury model jury charge:

"... Objective proof means the injury must be verified with physical examination or medical testing and cannot be based solely upon the plaintiff's subjective complaints." (1T 86-87). The Court then referred to Plaintiff's doctors and referred to their reports (as opposed to their testimony) (1T 87). The Court then characterized a portion of Plaintiff's counsel's argument against granting the dismissal motion this way:

Now, before we broke yet, Mr. Astorino very candidly streamlined things a bit, you know, by saying, look, this case turns on Joshua Landa's testimony, not Dr. Alexeev. Because he says, even though Dr. Alexeev mentions spasm, well, I'm not sure --- well, he mentions spasm, and spasm can certainly be considered objective evidence, what he didn't do, and I guess, couldn't do was say that spasm was causally related to this accident." (1T 87). Continuing with the ruling, the court then commented as to the opinions expressed by Dr. Alexeev: "But very candidly, he says, look, what caused this spasm, and he clearly, he would be speculating, and he could not say that it was tied to any reasonable

degree of certainty to this accident, so I guess, you know, what that all means is, Dr. Alexeev is, he's not part of this. It's all on Dr. Landa..." (1T 87-88)

But see Dr. Alexeev's actual transcribed testimony: "Question. Okay and how about spasm, when you palpate and actually feel the spasm, is that subjective or objective? Answer. That is objective because spasm you can feel the difference in the presentation of the muscle, the texture, it is usually hard to the touch and can feel the difference with the surrounding tissue, so it's objective." (1T 20).

Dr. Alexeev also testified: "Question. Let me ask you this, Doctor, going back to spasm a minute, you initially found spasm here there was improvement, I guess. Once a physician palpates and ascertains there is spasm, does that mean a patient always has it constantly for the rest of their life? Answer. They can, it depends on individual. Unfortunately, with the facet syndrome, most of the time if something like this happens, you may have to have some sort of therapy or injections lifelong, that is the nature, and the spasms can come back as well, too, with time, absolutely. Question. Okay, so spasm can come and go if I am understanding you correctly? Answer. Yes, absolutely, comes and goes and a lot of times we cannot control that." (1T 26-27).

During argument in opposition to the Dismissal Motion, Plaintiff's counsel highlighted these portions of Dr. Alexeev's testimony for the Court: (1T 55-70)

On cross-examination Dr. Alexeev testified: "Question. Okay. So, the first time you saw Plaintiff was November 17, 2019, right? Answer. Yes.

Question. And, that was when you first diagnosed her with the spasm about ten months after the accident, correct? Answer. That is correct. Question.

Okay. And would you agree that there are many, many things that can cause somebody to have a muscle spasm? Answer. Many things can cause as well, anything can cause, but usually something, usually some trauma or some physical injury more so will cause than other things. Usually, you know, to that extent, you don't get spasm just out-of-the-blue, it's some sort of trigger." (1T 31-32).

As to the Court's characterization of the testimony of the doctors, now as to Dr. Landa, the Court stated: "And basically, what he concludes is that, in his opinion, to a reasonable degree of medical probability, he says that she has a permanent aggravation of degenerative changes and goes on to say well, what is that? Pain, she's got pain and functional limitations. And again, I don't doubt that that's so ... in other words, the basis of the doctor's opinion can't be

what the patient told the doctor subjectively. It's got to be objectively verified. How do you do that? Well, films, MRI's,..." (1T 89) "And if the patient reports excellent temporary relief, in other words, when the joint was numb, they didn't have any pain, that really gives very strong confirmatory evidence supporting that those joints are in fact, the source of the pain. Question. All right. And, again, the crash that brings us together is January 25, 2019. Can you just briefly relate your opinion as to causation of her problems." Dr. Landa had testified that it was the accident that caused her problems, and they are permanent.

Plaintiff's counsel highlighted key portions of Dr. Landa's testimony during argument on the Dismissal Motion (1T 63-70).

Going back to the Court's ruling, after a discussion of the typical automobile cases with bulging and herniated discs, the Court stated: "... [T]he MRI, the films you know, they don't show any injury related to this accident. They showed degenerative changes. And that's his ultimate opinion. And in his testimony, in his report he said, I think earlier in his testimony he says, it's my opinion that - this is on page 70, that the damage to her lumbar spine, which includes a permanent aggravation of degenerative changes which resulted in

pain and functional limitations as a result of the accident... his opinions aren't supported by objective proof..." (1T 92-95). And with that, the Court dismissed the case.

In the course of the argument by counsel of the Motion, the Court also brought up settlement on the record. While Plaintiff's counsel was arguing against the dismissal motion, the Court broke in and stated to Plaintiff's counsel:

"Before you do that, let me ask you this. Oh, wait, actually before we even get into that, let me - there's no jury, my understanding is that there is a final, revised final, that's it, offer, correct me if I'm wrong, Mrs. Tosk, of \$22,500.

Defense counsel: Yes. The Court: Okay. So that's on the table. Defense counsel: That's right. The Court: And if it was at all acceptable, fine, your client can accept that and leave and the case is over or we can continue.

Plaintiff's counsel: I'd have to - thank you. I'd have to speak to my clients, she has to speak to her husband, so I just assume we deal with these motions, and then we'll give a response. Because I expect --- The Court: Well, if I rule on this motion --- Plaintiff's counsel: I get that. The Court: -- and if I rule in favor of the defense - Plaintiff's counsel: Yeah. The Court: -- that money is not going to be there. Plaintiff's counsel: No, I get that, Your Honor, but I've also got to say what I've seen done and what I think is the better way to do it,

because it's so extraordinary, at this stage, with this evidence, to essentially deprive someone of their constitutional right to a jury, I've seen judges defer on the motion till post-verdict, till post-verdict and then sometimes it's not necessary to rule.

The Court: That's illegal.

Plaintiff's counsel: I'm sorry?

The Court: It's illegal.

Plaintiff's counsel: Then I guess every judge I've seen do it has violated the law. Thank you.

The Court: There's a case Verdicchio vs. Ricca, which is a med mal case which was tolerated but was strongly disfavored, and the reason is because it imposes on the defense to put on a defense where it wouldn't otherwise have had to do that. Unlike a motion at the end of the trial, that a decision can be reserved until after the verdict, this decision cannot be reserved as a matter of law. I got to decide it now. Plaintiff's counsel: Thank you, Your Honor." (1T 54-55).

Plaintiff's counsel then continued to cite to the transcripts of the testimony of Plaintiff's doctors. (1T 56-70). Plaintiff's counsel then provided the court with the transcripts of the testimony of Plaintiff's doctors, Drs. Landa and Alexeev

(T76). Before taking a break, the Court again initiated settlement discussions on the record, this time addressing the Plaintiff directly:

"The Court: Okay. All right, so, I'm going to take some time. We'll look this over. So, Mrs. Mladenov, you understand right now there's a motion pending, obviously, and I've got to the rule on it. I have to rule on it now as opposed to sometime - you don't have to stand up. If I grant a motion for an involuntary dismissal, that's the end of the case. I mean, you can always seek appellate relief so, as far as the trial. There is \$22,000, Mr. Williams [the claims adjuster for Progressive Insurance Company], there's 22,500 dollars. So sitting in front of you there's a pile of cash, 22,5. You could say okay, client, don't make your decision, Judge, I'm taking it and we're done. I'm gonna walk out of here on my terms, as opposed to either your terms or the terms the jury imposes on me, and that's it. Finality. It's over, because the case would be settled, there's no appeals or anything like that, it's done, it's over, the litigation is over. You got that money, do what you want, you know, with it. And so that's one. It's like the old, you're probably too young, Let's Make a Deal with Monte Hall, pick door number one, door number two, you know. I don't know, you probably don't remember that. But any way you're younger than me. He probably - he remembers.

Plaintiff's counsel: I do.

The Court: But life is about choices, right? So, do you let it ride and you push away that money and you say, no, I'm taking my chances, I'll take my chances, Judge with you on this motion, and then if I get past that, I'm taking my chances with the jury. Okay. That's your prerogative, you know, that's solely your right. But you need to understand that, if it doesn't work out with me, it doesn't work out with the jury, that 22,5, poof, it's gone. So, you know, I'm going to go back and I'm going to look at some of these things and come back and give you a decision. In the meantime, you know, talk to Mr. Astorino and figure out what you want to do. You know, he can't - he can't make decisions for you. You have to make the decision yourself. His job is to make you as informed as possible so that you can make a sound decision. Right? Like, he can't say, I don't care what you think, Mrs. Mladenov. We're telling the judge X. No, no. His job is to explain everything to you so you understand and have a pretty good grasp of what's going on, so you can make as informed a decision as possible. Right? So while I go back why don't you take some time and speak to your attorney. Okay?" (1T 78-80). Plaintiff did not respond. The Court then granted the dismissal motion by the defense (1T 96).

On December 19, 2023, Plaintiff timely filed a Motion for Reconsideration if Dismissal and for a new trial Pa116). The Plaintiff requested oral argument.

After several adjournments by the Court, Plaintiff's Motion was argued on October 28, 2024 (2T 1-16).

Plaintiff's counsel argued that the Cummings case cited by the defense actually supports Plaintiff's position. Cummings v. Bahr 295 N.J. Super. 384 (App. Div. 1996). (2T 5). Specifically, Plaintiff's counsel argued that the court did not consider or failed to appreciate the significance of probative competent evidence. (2T 5). Plaintiff's counsel also argued that the Court should have deferred granting the defense Dismissal Motion until after the verdict (2T 6,7). In the course of this argument, Plaintiff's counsel cited Verdicchio v. Ricca, 179 N.J. 1 (2004) (2T 6). Plaintiff's counsel also cited Peskin v. Peskin 271 N.J. Super. 261 (App. Div. 1994). For the proportion that settlement must be brought by the parties, not the Court (2T 7). Finally, Plaintiff's counsel concluded, "Lastly and ultimately, the Plaintiff should've been afforded the benefit of every doubt before being deprived of a jury verdict when the trial was almost over. In this matter, respectfully, that did not happen. Thank you." (2T 7). The defense offered arguments (2T 7, 8). The Court then denied Plaintiff's Motions for Reconsideration and for a new trial. (2T 14). In short, the Court concluded that Plaintiff's case rested on subjective complaints of pain. (2T 9, 10).

LEGAL ARGUMENTS

Point I

Plaintiffs met the standard to deny the defense Motion for Involuntary Dismissal pursuant to R. 4:37-2(b) and the Order of Dismissal should be reversed and a new trial granted.

(Raised Below: 1T 8-36, 49-78, 83-98, 109-144; Pa 98, 109-144)

In this case, the Court erred in disregarding the entire testimony of Plaintiff's treating doctor, Dr. Alexeev. Dr. Alexeev provided key testimony as to objective evidence of permanent injury - spasm upon palpation. The Court mistakenly characterized Dr. Alexeev's testimony as speculative. As to Dr. Landa, Plaintiff's examining orthopedic surgeon, the Court erred in rejecting the objective evidence of permanent injury in his testimony as to the MRI results and diagnostic aspect of the facet joint injections. Dr. Landa reviewed the lumbar MRI and testified that the facet joints were enlarged at multiple levels. Dr. Landa also testified that the injections confirm that the facet joints are the source of the pain. Finally, Dr. Landa finds permanent injury in Plaintiff's low back, causally related to the subject accident.

Rather than rely upon this testimony by both doctors as evidence of objective proof of permanent injury, along with reasonable inferences in favor of

Plaintiff, the Court separated these aspects and granted an involuntary dismissal. The Court mistakenly concluded, essentially, that each doctor standing alone had to repeat the verbal threshold standard verbatim, in order to survive the defense motion. This is clearly not what is contemplated by R. 4:37-2(b), the involuntary dismissal rule, or the verbal threshold statute captured in Civil Model Jury Charge 5.33.

Point II

The Court should vacate the Order of Involuntary Dismissal and denying Reconsideration based upon overlooking Plaintiff's testimonial medical evidence and error in interpreting the Lawsuit Threshold Law as to proof of Permanent Injury.

(Raised Below: 1T 56-70, 2T 4-15; Pa116)

The arguments set forth in Point 1 supra, are repeated and incorporated herein by reference. Additionally, at a minimum, the Court should have reserved on the defense dismissal motion until after the verdict, rather than deprive Plaintiff of her constitutional right to a jury trial. The Court mistakenly concluded that reserving was illegal. The Court relied upon Verdicchio v. Ricca, 179 N.J. 1 (2004). However, neither Verdicchio, supra, nor the Court rules mandate that a Court must

decide a dismissal motion prior to verdict.

The Court in this Popova matter reasoned, in deciding against deferring the ruling until after the verdict: "[T]he reason is because it imposes upon the defense to put on a defense where it wouldn't otherwise have had to do that."

However, the defense only had two (2) witnesses that could have easily been completed on the day the Plaintiff rested. The defense doctor, Dr. Haussman, was on videotape and the Defendant Coigne was in the courtroom. Moreover, Plaintiff's counsel had read at length from Coigne's deposition during Plaintiff's case and Coigne's trial testimony would have been very brief. The Court could have and should have reserved on the dismissal motion. The refusal to do so warrants the grant of a new trial.

Point III

A new trial is warranted as it clearly and convincingly appears there was a miscarriage of justice under law, pursuant to R. 4:49.

(Raised Below: 1T 83, 84)

The arguments set forth in Points I and II, Supra, are repeated and incorporated herein by reference.

Moreover, the Court's observation as to the credibility of the Plaintiff as to her injuries is entirely inconsistent with the involuntary dismissal of the case (See PB8, PB9) (1T 83, 84).

Point IV

A new trial is warranted based on pressure by the Court on Plaintiff to settle when the ruling on the Dismissal Motion was imminent.

(Raised Below: 1T 54-55, 78-80)

While Plaintiff's counsel understood and appreciated the Court's efforts to settle, Plaintiff, as a lay person, was not in a position to do so. During argument on the Dismissal Motion, the Court noted an offer of \$22,500 and encouraged Plaintiff -through counsel - to accept it and end the case before the ruling. Moreover, just prior to the ruling, the Court addressed the Plaintiff directly and at length in a similar fashion. Actually, the Court was even more forceful: "But you need to understand that, if it doesn't work out with me, it doesn't work out with the jury, that 22,5, poof, it's gone." The Court also made remarks to the Plaintiff on the role of her counsel: "He can't make decisions for you ... Like he can't say, I don't care what you think, Mrs. Mladenov. We're telling the judge X. No, no." While Plaintiff's counsel appreciated what the Court was trying to do and did not interpret these remarks as undermining him

on the record in front of his client, the Plaintiff herself may not have appreciated the subtleties of these remarks.

Ordinarily, the particulars and numbers involved in settlement negotiations are not included in motions such as this. However, since they were introduced here, a broader historical context is required. On September 14, 2021, defendant Coigne's carrier offered \$3,000. Through the years, they increased this number in small increments - but never enough to net any recovery for Plaintiff. An arbitrator awarded \$87,500. Once the trial started, the defense announced that the offer was zero. They revisited this peculiar decision and made a final offer of \$22,500 before the Dismissal Motion. At that point, the costs of litigation were \$14,000 and Plaintiff would have netted less than \$6,000, even with a reduced counsel fee. Based on these figures, Plaintiff's counsel recommended a gross settlement of \$37,500 with a high degree of confidence that Plaintiff would accept it. An impasse on settlement was reached and the Court dismissed the case.

In Peskin v. Peskin, 271 N.J. Super. 261 (App. Div. 1994), the Court stated, "Courts play an important role in effecting settlement. However, that role must always be exercised appropriately and with full recognition that the court

must remain fair and impartial in order to ensure that the settlement is wrought by the parties, not by the Court." [citations omitted] 271 N.J. Super. at 275.

While Peskin was a family law case and the Court's remarks were particularly egregious, the principles stated have some application in this appeal.

The Peskin court referred to another case: "Analogously, in Continental Ins. Co. v. First Wyoming Bank, 771 P.2d 374, 376 (Wyo.1989)..., the Wyoming Supreme Court vacated a judgment on the merits and reassigned the case to a different trial judge after the trial judge advised the parties and their attorneys that, if they did not make an effort to take care of this case and settle the matter, "I can guarantee you much pain." Peskin 271 N.J. Super. at 278.

Plaintiff's counsel has no doubt that the court intended in good faith to foster a settlement so that Plaintiff, Popova, would recover something, despite the Court's perception that it was a weak case from a proof of permanency standpoint. However, based on the arguably coercive effects of these efforts, the Plaintiff respectfully seeks a new trial .

CONCLUSION

For the foregoing reasons, an Order vacating the Order of Involuntary Dismissal is warranted, along with a new trial.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Richard T. Astorino".

Kotlar, Hernandez & Cohen, LLC
By Richard T. Astorino

AMENDED

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MARTCHELA V. POPOVA-MLADENOV and
MLADEN MLADENOV, wife and husband,

Appellants,

vs.

JASON M. COIGNE, JOHN DOE PHANTOM
VEHICLE 1-10 (fictitiously named
defendants), NJM INSURANCE GROUP
and/or NEW JERSEY MANUFACTURERS
INSURANCE COMPANY, John Doe
Insurance Company 1-10
(fictitiously named defendants),
Jane Doe 1-10 (fictitiously named
defendants), ABC Corporation 1-10
(fictitiously named defendants)
and XYZ Partnership 1-10
(fictitiously named defendants),

Respondents.

APPELLATE DIVISION

DOCKET NO.: A000675-24

CIVIL ACTION

ON APPEAL FROM FINAL ORDER OF THE
SUPERIOR COURT OF NEW JERSEY,
LAW DIVISION, MIDDLESEX COUNTY
DOCKET NO.: MID-L-387-21

SAT BELOW:

Honorable Joseph L. Rea, J.S.C.

AMENDED BRIEF OF DEFENDANT/RESPONDENT, JASON M. COIGNE

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PRELIMINARY STATEMENT

This appeal arises out of a directed verdict which was granted on November 30, 2023 after this matter was litigated by counsel. The directed verdict was based upon the premise that Plaintiff/Appellant's counsel failed to provide any credible objective medical evidence of a permanent injury in regard to Plaintiff/Appellant Martchella V. Popova-Mladenov (hereinafter referred to as Plaintiff/Appellant).

By way of history, this matter arises out of a January 23, 2019 motor vehicle accident wherein Plaintiff/Appellant alleged she sustained permanent injuries to her back. Plaintiff/Appellant was at the time of the accident insured with New Jersey Manufacturers Insurance Company with the verbal threshold. Plaintiff/Appellant had the burden to prove that she in fact sustained a permanent injury pursuant to N.J.S.A. 39:6A-8(a), but failed to do so, even at the time of Trial, which is the basis for this Appeal.

PROCEDURAL HISTORY

Plaintiff/Appellant filed a Complaint on January 19, 2021 bearing Docket No.: MID-L-387-21 against Defendant/Respondent, Jason M. Coigne (hereinafter referred to as Defendant/Respondent). Pa004-Pa014. An Answer on behalf of Defendant/Respondent was filed on March 25, 2021. Pa034-Pa041. Discovery took place thereafter and

expired on October 10, 2022. Several motions were filed on behalf of Mr. Coigne throughout the litigation of this matter.

On November 15, 2022, at the close of discovery, a Motion for Summary Judgment was filed, wherein counsel for Defendant/Respondent argued that Plaintiff/Appellant did not sustain a permanency injury resulting from this accident. Da01-Da16.¹ Plaintiff/Appellant's counsel opposed the Motion for Summary Judgment relying on Plaintiff's treating doctor, Dr. Mizrachi's Certification (who was not a named expert and was not called to testify at trial), as well as Dr. Landa's narrative report. Pa099-Pa103. The Motion for Summary Judgment was denied on December 19, 2022. Da28-Da30. This matter then was scheduled to go to Trial on November 30, 2023.

A Motion in Limine was filed by Defendant/Respondent on March 8, 2023 by Defendant/Respondent, to bar the testimony of Dr. Landa referencing the radiologist's conclusion and to bar the cost of rhizotomy as PIP was not exhausted. Da31-Da41.² Plaintiff/Appellant filed Opposition. Da42-Da43.

Prior to the start of trial, a Motion in Limine was filed by Defendant/Respondent on May 17, 2023 to bar Dr. Aleexev from testifying as to permanency or causation as he did not provide a

¹ Motion for Summary Judgment submitted with Brief (without exhibits) as Defendant/Respondent relies upon its contents for the purpose of this Appeal. R.2:6-1(a)(2).

² Motion in Limine submitted with Brief (without exhibits) as Defendant/Respondent relies upon its contents for the purpose of this Appeal. R.2:6-1(a)(2).

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narrative report. Da46-Da53.³ Plaintiff/Appellant filed Opposition. Da54.

This matter proceeded to Trial on November 27, 2023 in front of Honorable Judge Joseph Rea. Judge Rea decided all previously filed Motions in Limine in his chambers. All Motions in Limine filed by Defendant/Respondent were granted.

Once the trial began, and after the Plaintiff/Appellant presented and rested their case, Defendant/Respondent made an oral motion for a directed verdict. An Order for dismissal was entered by the Court on November 30, 2023. Pa152.

A Motion to Reconsider the Court's Order was filed on December 19, 2023. Pa159-Pa186. Counsel for Defendant/Respondent filed an opposition on January 11, 2024. Pa207-Pa213. After several adjournments, the Plaintiff/ Appellant's Motion to Reconsider was heard on October 28, 2024 and denied. Pa214-Pa215. This Notice of Appeal was filed on November 7, 2024.

COUNTER STATEMENT OF FACTS

The within cause of action stems from an automobile accident occurring on January 23, 2019 motor vehicle accident. Pa001-Pa003. At the time of the accident, Plaintiffs/Appellant was insured under

³ Motion in Limine submitted with Brief (without exhibits) as Defendant/Respondent relies upon its contents for the purpose of this Appeal. R.2:6-1(a)(2).

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a policy of insurance issued by New Jersey Manufacturers Insurance Company with the verbal threshold. Pa61-Pa62. Plaintiff/Appellant alleges she sustained permanent injuries to her back as a result of that accident. Pa65-Pa77. Plaintiff/Appellant failed to prove that she sustained a permanent injury pursuant to N.J.S.A. 39:6A-8(a) as amended by AICRA.

On February 7, 2019, X-rays of the thoracic and lumbar spine were performed which revealed mild mid-thoracic degenerative disc disease. On April 7, 2019, an MRI of the lumbar spine was performed which revealed mild facet joint atrophy and possible osteophyte extending into the lateral right neural foramen at T12-L1; no disc herniations were seen. Pa084-Pa085.

Plaintiff/Appellant's expert, Dr. Landa opined that Plaintiff had a permanent injury, but his opinion was only based upon Plaintiff's subjective complaints. Pa087-Pa088. In addition, Dr. Landa opined that Plaintiff had "permanent aggravation of degenerative changes with resultant pain." Pa088.

Plaintiff/Appellant's expert, Dr. Alexeev did not provide a narrative report and was therefore not permitted to give an opinion on permanency and/or causation. Dr. Alexeev opined that Plaintiff had spasm, but he was not permitted to testify as to what caused the spasm.

The defense expert, Dr. Hausmann opined that Plaintiff has degenerative disc disease in her lumbar spine, at multiple levels.

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Dal37. Dr. Hausmann opined that the Plaintiff suffered from age related degenerative spondylosis which "based on the degeneration seen on the MRI scan, would be a longstanding finding, and not something that would have come on between the accident" and the MRI on April 7, 2019. Pa090-Pa096. Dr. Hausman further opined that while it is possible that Plaintiff sustained a strain injury that exacerbated the degenerative findings in the spine, including the facet joint findings, they were already arthritic at the time of the accident. Pa095. Dr. Hausmann did not find any permanent injury. Pa095. It should be noted that Dr. Landa agreed with Dr. Hausmann "that her facet joints are the likely cause of her pain," and that "there were pre-existing degenerative changes. ..."Pa098.

Plaintiff/Appellant, who was seeking non-economic damages has failed to show that her injury(ies) fall within certain categories. Category 6 states "a permanent injury within a reasonable degree of medical probability other than scarring or disfigurement" N.J.S.A. 39:6A-8(a).

The issues in this matter were litigated at length and when Plaintiff/Appellant's Counsel rested his case, Defendant/Appellant moved for a directed verdict, based upon the premise that there was no credible objective evidence of a permanent injury(ies), which was granted. This appeal followed.

LEGAL ARGUMENT**Standard of Review**

This matter comes before the Appellate Division upon Plaintiff/Appellant's application to the Court for a review of a Trial Court Order granting a directed verdict in favor of the Defendant/Respondent. In an appeal of an order granting summary judgment, or on a directed verdict, the "appellate courts employ the same standard of review that governs the trial court." Henry v. New Jersey Dept. of Human Services, 204 N.J. 320, 330 (2010), citing to Busciglio v. DellaFave, 366 N.J. Super. 135, 139 (App. Div. 2004). In the absence of a genuine factual dispute, the standard of review of the trial Court Order is de novo. Id.

"[A]n appellate court should not disturb the 'factual findings and legal conclusions of the trial judge unless [it is] convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Cesare v. Cesare, 154 N.J. 394, 412 (1998) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)). When the Appellate Court considers a Trial Court's legal conclusions on the law, the Court reviews those conclusions de novo. Litwin v. Whirlpool Corp., 436 N.J. Super. 80, 86 (App. Div. 2014) citing

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Henry at 330. See also, Halvorsen v. Villamil, 429 N.J. Super. 568, 576 (App. Div. 2013).

On a motion for a directed verdict we look to see if "the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor." See R. 4:37-2(b) Involuntary Dismissal; Effect Thereof which states:

(b) At Trial-Generally. After having completed the presentation of the evidence on all matters other than the matter of damages (if that is an issue), the plaintiff shall so announce to the court, and thereupon the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal of the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief. Whether the action is tried with or without a jury, such motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor.

In the instant action, Plaintiff/Appellant argues the Trial Court erred in dismissing the Complaint in its entirety based upon the premise that the Plaintiff/Appellant did not overcome the verbal threshold. After a lengthy procedural history, this matter proceeded to Trial on November 30, 2023. Counsel for Plaintiff/Appellant presented their case in its entirety. When counsel for Plaintiff/Appellant rested his case, counsel for Defendant/Appellant moved for a direct Order of Dismissal.

POINT I

Plaintiff/Appellant has failed to prove that the Trial Court erred in dismissing this matter via directed Order. In addition, the Trial Court's Order of Dismissal was appropriate based on the evidence on the record and the arguments presented at Trial.

Plaintiff/Appellant's first expert, Dr. Landa opined that the she suffered a permanent injury, but his opinion was only based on subjective complaints. Plaintiff'/Appellant's "subjective feelings of discomfort" together with subjective complaints are not sufficient to overcome the verbal threshold. Ayers v. Township of Jackson, 106 N.J. 557, 571 (1987) and Brooks v. Odom, 150 N.J. 395, 403, (1997).

Plaintiff/Appellant has the burden to "show a material dispute of fact by credible, objective medical evidence;" subjective complaints of pain unsupported by credible medical evidence will not suffice to create a factual dispute. Oswin v. Shaw, 129 N.J. 290, 314 (1992) The Oswin court explained:

We understand that one might view the "serious impact on plaintiff's life" test as somewhat subjective. To ensure uniform application of that test, we emphasize that plaintiffs must submit *objective, credible* evidence that could support a jury finding in his or her favor. We respect the abilities of medical professionals to ascertain the presence of a genuine, disabling injury, but we nevertheless are satisfied that the Legislature sought to guard against a finding of "serious injury" when plaintiff's proofs are based solely on subjective complaints of pain. *Id.* at 319.

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In addition, Dr. Landa opined that Plaintiff had "permanent aggravation of degenerative changes with resultant pain," but that statement is not based on any objective evidence as pain is objective in nature. Dr. Landa's findings were in the IME Report, testified to as his de bene esse and specifically addressed by the Judge when arguments were made for directed verdict. Dr. Landa's findings were litigated at length. Dr. Landa was specifically questioned about his findings and he agreed that they were all subjective. Pa195 (T33:18-T35:2). He also testified that all of the findings on the MRI (which are objective) were pre-existing. Pa195(T33:7-10).

The Court asked Plaintiff/Appellant's counsel what the permanent injury was, to which he responded "permanent damage to facet joints" 1T73:17-T74:4. The Court then asked "and who testified that those were permanent, to which he replied, Dr. Landa. 1T74:5-25. Plaintiff/Appellant's counsel stated: "does a doctor really have to parrot the verbal threshold? Clearly not." Id. Plaintiff's counsel continued to attempt to combine the opinions of Dr. Alexeev and Dr. Landa despite the courts prior ruling that Dr. Alexev could not give an opinion to permanency/causation. Defendant/Respondent's counsel replied:

So, the fact that he's saying you don't have to say something is permanent, it may not be the exact rule that we need to follow in this case, there are rules for everybody to follow in a lawsuit. And I don't see anywhere where anybody says that

the facet injection - the facet joints were permanent or caused by the accident. I don't think that it's a fair position that you can take one expert who didn't give any opinion on permanency or caution and tack it onto another expert. It doesn't work like that.

1T75:18-T76:3.

The Court responded by stating that Plaintiff/Appellant's counsel "very candidly streamlined things a bit, you know, by saying look this case turns on Joshua Landa's testimony (not Dr. Alexeev) ..." 1T87:14-17.

The Court noted that Dr. Landa opined that the Plaintiff/Appellant had permanent aggravation of degenerative changes which is pain, and pain is subjective. 1T88:22-T89:24. The Court went on to say that the doctor's opinion cannot be based upon subjective feelings, and that the standard is objective proof. *Id.* If the Court allowed this to be presented to a jury, it would result in speculation. *Id.* Without an opinion by a medical expert, a jury would be left to pure speculation as to the cause of Plaintiff's injuries. Such speculation by a jury is not permitted. "A factfinder should not be allowed to speculate without the assistance of expert testimony in an area where the average person could not be expected to have sufficient knowledge or experience." State v. Doriguzzi, 334 N.J. Super. 530 (App. Div. 2000). "The law abhors damages based on mere speculation." Caldwell v. Haynes, 136 N.J. 422, 442 (1994).

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The only objective proof that the Court was presented with was muscle spasms noted by Plaintiff/Appellant's second expert, Dr. Alexeev. However, Dr. Alexeev did not provide a narrative report and was not permitted to give an opinion on permanency and/or causation as a result. 1T77:1-4. Counsel for Plaintiff/Appellant consented to this during oral argument on the Motion in Limine and again during oral argument for the directed verdict. Dr. Alexeev opined that Plaintiff had spasm, but he was not permitted to testify on what caused the spasm, and that it could have come from anywhere. 1T89:25-T90:9. In this case, there was no objective proof provided to meet the standard for a verbal threshold case.

The Court further notes that Dr. Alexeev "is not really a part of this," and that Dr. Landa's testimony is the focus point. 1T94:5-15. It should be noted that Dr. Landa did not provide any testimony as to muscle spasm. 1T90:10-20. Dr. Landa only testified as to degenerative changes causing the Plaintiff/Appellant to experience pain in her low back. Pa191-Pa192 (T17:2-13 and T22:4-7); 1T90:21-23 and 1T94:16-T95:7. The Court did not dispute these findings. However, the Court noted that same must be substantiated by objective proof and verified via examination and medical testing. 1T90:21-T91:1.

Further, it is unclear why counsel for Plaintiff/Appellant stated that he relied on the Certification and medical records from Dr. Mizrachi when he failed to name him as a witness and never

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called him as an expert at the time of Trial. Counsel for Plaintiff/Appellant cannot rely on non-testifying experts' records and/or opinions pursuant to N.J.R.E. 703 which states: "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the proceeding. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." James v. Ruiz, 440 N.J. Super. 45 (App.Div. 2015). As a result, bootstrapping the opinions of Dr. Mizrachi through his Certification and medical records were not permitted.

The Court, in James found that a Plaintiff's attempt to have an expert testify as to a non-testifying expert's opinion was improper and directed the jury to consider only the opinions offered by the *experts actually testifying before them*. N.J.R.E. 808 directs as follows:

Expert opinion which is included in an admissible hearsay statement shall be excluded if the declarant has not been produced as a witness unless the trial judge finds that the circumstances involved in rendering the opinion, including the motive, duty, and interest of the declarant, whether litigation was contemplated by the declarant, the complexity of the subject matter, and the likelihood of accuracy of the opinion, tend to establish its trustworthiness. Id. at 62.

As the Rule instructs, the non-testifying expert's opinions must be excluded, unless the trial judge finds that the "circumstances

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involved in rendering the opinion ... tend to establish its trustworthiness." Id. If the requirements of Rule 808 are met, and a testifying expert has reasonably relied upon the non-testifying expert's opinions, then the testifying expert may be permitted to refer to that absent expert's opinions in the course of explaining his or her own opinions in court. Id. at 64 citing Macaluso v. Pleskin, 329 N.J.Super. 346, 355, (App.Div.), *certif. denied*, 165 N.J. 138, (2000).

Although the rule permits a hearsay statement, such as a medical report by a non-testifying expert, to be referred to by a testifying expert for the purpose of apprising the jury of the basis for his opinion, it does not allow expert testimony to serve as "a vehicle for the 'wholesale [introduction] of otherwise inadmissible evidence.'" Agha v. Feiner, 198 N.J. 50, 63, (2009). The Court stated that "[w]hen the purpose of [Rule 703] is taken into consideration, the only fair interpretation is that it was not intended as a conduit through which the jury may be provided the results of contested out-of-court expert reports." James at. 69. Thus, "an expert may give the reasons for his opinion and the sources on which he relies, but that testimony does not establish the substance of the report of a non-testifying physician." Id. at 64.

The New Jersey Supreme Court has stated that under N.J.R.E. 703, "a testifying physician may apprise the trier of fact of the

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bases for his or her opinion, including the opinions of other experts," but has cautioned that that does not "entitle a litigant to introduce an out-of-court expert's report for its 'truth,' where it is critical to the primary issue in the case and the adversary objects." Agha v. Feiner, 198 N.J. 50, 67, (2009).

The combined impact of Rules 703 and 808 is to limit the ability of a testifying expert to convey to a jury either (1) objective "facts or data" or (2) subjective "opinions" based upon such facts, which have been set forth in a hearsay report issued by a non-testifying expert. James at 66. There is a significant difference between basing an opinion on inadmissible evidence and testifying to it directly. If a party seeks to show that its expert's opinion is valid because it is consistent with other non-testifying experts' opinions, this represents inadmissible hearsay evidence and therefore cannot be relied upon at the time of Trial. The Court has cautioned a litigant is not entitled "to introduce an out-of-court expert's report for its 'truth,' where it is critical to the primary issue in the case and the adversary objects.'" James at 65 citing Agha at 67. Further, the Court in Maurio v. Mereck Const. Co., 162 N.J.Super. 566, 569 (App. Div. 1978).

In addition, while Dr. Landa and Dr. Alexeev were named experts, counsel for Plaintiff/Appellant cannot be permitted to combine their two partial opinions (as noted above) to form one

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opinion to overcome the verbal threshold. The jury cannot be left to speculate as to the allowable testimony provided by both Dr. Landa and Dr. Alexeev, as they are two separate opinions from two separate doctors.

POINT II

Plaintiff/Appellant is not a medical expert and therefore her testimony cannot be used to bolster the argument on permanency and/or causation.

Counsel for Plaintiff/Appellant argued that the Court erred in not considering the Plaintiff/Appellant's own testimony regarding her alleged injuries. Plaintiff/Appellant is not a medical doctor nor is she an expert in the field of medicine. Plaintiff/Appellant's testimony was based on her subjective complaints and therefore she has no standing to comment on permanency and/or causation as it relates to this matter, as same is reserved for medical experts.

In addition, Plaintiff/Appellant's counsel argues that the Judge made statements to the Plaintiff that he believed her testimony and the she was credible. Any statements made to Plaintiff/Appellant were made outside of the jury being present and therefore cannot be entertained in this appeal. In addition, one could be credible, but that does not entitle them to damages where they do not meet the threshold.

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Discovery has disclosed that there was insufficient objective medical evidence on the record that would support a reasonable jury's determination that Plaintiff/Appellant, as a result of the January 23, 2019, motor vehicle accident, suffered a permanent injury as that term is described in N.J.S.A.39:6A-8. Under N.J.S.A. 39:6A-8(a) as amended by AICRA, a Plaintiff/Appellant seeking non-economic damages from an alleged automobile tortfeasor must show that his or her bodily injuries fall within one of the following categories to sustain such an action:

- (1) death;
- (2) dismemberment;
- (3) significant disfigurement or significant scarring;
- (4) displaced fractures;
- (5) loss of fetus;

(6) a permanent injury within a reasonable degree of medical probability other than scarring or disfigurement. N.J.S.A. 39:6A-8(a).

According to AICRA, proof of permanency or serious injury "shall be based on objective clinical evidence, which may include medical testing and the use of valid diagnostic tests that are performed in accordance with medical protocols that are not experimental and not dependent entirely upon subjective patient response." N.J.S.A. 39:6A-8. With the passage of the AICRA threshold, the Legislature intended to impose, "... a restriction on

the right of persons who have non-permanent or non-serious injuries to sue for pain and suffering..." N.J.S.A. 39:6A-1.1 (b).

The New Jersey Supreme Court has held the correct procedure for deciding cases where the injuries are challenged as being insufficient to meet the lawsuit threshold will follow the summary judgment model. Oswin at 294. The Oswin court reached the conclusion that under the 1988 version of N.J.S.A. 39:6A-8, the plaintiff was required to demonstrate through "credible, objective medical evidence," a material dispute as to the existence of an injury that would fall under one of the threshold categories. Id.

Plaintiff has failed to establish the requisite credible "objective medical evidence" of permanency to qualify as a category 6 permanent injury(ies). For Category 6, the statute provides that "[a]n injury shall be considered permanent when the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment." N.J.S.A. 39:6A-8(a).

In addition, Plaintiff has failed to provide an expert report certifying that Plaintiff's injuries qualify as a permanent injury under any category, as their expert, Dr. Landa, opined that the Plaintiff had bilateral facet hypertrophy at L2-3, L3-4, L4-5 and L5-S1, to which he opined was "likely" a permanent injury, which, by statute, is not a permanent injury. In addition, Dr. Landa opined that Plaintiff/Appellant suffered from "permanent aggravation

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degenerative changes with resultant pain." Further, no disc herniations were seen on the Plaintiff's MRI.

Further, the defense expert, Dr. Hausmann opined that Plaintiff has degenerative disc disease in her lumbar spine, at multiple levels. Dr. Hausmann opined that the Plaintiff suffered from age related degenerative spondylosis which "based on the degeneration seen on the MRI scan, would be a longstanding finding, and not something that would have come on between the accident" and the MRI on April 7, 2019. Dr. Hausman further opined that while it is possible that Plaintiff sustained a strain injury that exacerbated the degenerative findings in the spine, including the facet joint findings, they were already arthritic at the time of the accident. Dr. Hausmann did not find any permanent injury.

The Trial Court did not overlook any evidence as it related to the permanency of the Plaintiff/Appellant's injuries as they relate to this matter. The ruling of the directed verdict was therefore appropriate.

POINT III

There was no miscarriage of justice regarding the Plaintiff/Appellant's own testimony and/or credibility and therefore a new Trial is not warranted.

As noted above, the Court did not disregard the testimony of Plaintiff/Appellant but was not in a position to consider it in proving a permanent injury, and therefore there was not in error in granting the Order of Dismissal. In addition,

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Plaintiff/Appellant's counsel argues that the Judge made statements to the Plaintiff that he believed her testimony and the she was credible. Any statements made to Plaintiff/Appellant were made outside of the jury being present and therefore cannot be entertained in this appeal.

POINT IV

There was no miscarriage of justice and therefore a new Trial is not warranted based upon the Trial Judge's conversation with the Plaintiff/Appellant regarding settlement.

Counsel for Plaintiff/Appellant's argues that his client was prejudiced because the Trial Judge was urging her to take the Defendant/Respondent's settlement offer even though the Order for a directed verdict was going to be granted. Plaintiff/Appellant was not prejudiced by this. From Plaintiff/Appellant reasoning, the only party which would have been prejudiced is the Defendant/Respondent since the Judge knew he was ruling in favor of the defense, yet still urged Plaintiff/Appellant to take the settlement offer. However, it should be noted that Defendant/Respondent submits that the Judge merely placed the settlement offer on the table and explained same to the Plaintiff/Appellant.

Plaintiff/Appellant's counsel erroneously relies upon the family law case of case of Peskin v. Peskin wherein the Defendant

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was coerced into agreeing to an extraordinary settlement agreement. 271 N.J. Super 261, 263 (App. Div) It should be noted that the Defendant was unable to make a decision and suffering from severe clinical depression and taking powerful anti-depression medication at the time the settlement was negotiated. Id. at 263. The Court countered the Defendant's expressed reservations about the settlement agreement with threats to hold him in contempt. The Judge then told the Defendant that if he asked any more clarifying questions about the proposed settlement, that he would be held in contempt, which imposed impermissible pressure to settle. Id. at 278.

The Peskin case should not be considered when looking at the facts in the case at bar. In this matter, the Judge did not coerce Plaintiff/Appellant into taking the settlement offer. As the record reflects, he simply made the information available to the Plaintiff/Appellant.

CONCLUSION

Plaintiff/Appellant has failed to establish any Trial Court error made by The Honorable Judge Joseph L. Rea in granting a directed verdict in favor of Defendant/Respondent and therefore Judge Joseph L. Rea's decision must be affirmed.

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Dated: May 20, 2025

/s/Amanda B. Tosk

Amanda B. Tosk, Esq.