THOMAS A. FREDELLA AND KELLY A. KEARNY, Plaintiffs,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
V.	:	DOCKET NO: A-001299-24T4
TOWNSHIP OF TOMS RIVER AND/OR ABC CORPORATION, STATE OF NEW JERSEY DEPARTMENT OF TRANSPORTATION, STATE OF NEW JERSEY DEPARTMENT OF THE TREASURY-FLEET MANAGEMENT AND/OR DEF CORPORATION, (A FICTITIOUS NAME), RICHARD ROE 1-5, (A FICTITIOUS NAME), Defendants.	:	ON APPEAL FROM: LAW DIVISION, OCEAN COUNTY DOCKET NO: OCN-L-3198-17 Civil Action SAT BELOW: Hon. James Den Uyl

BRIEF ON BEHALF OF PLAINTIFFS/ APPELLANTS

Amended: March 26, 2025

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Preliminary Statement

Prior to trial, after the Plaintiffs filed numerous Motions to Bar Dr. Lawrence Guzzardi's trial testimony, the trial judge ruled that Dr. Guzzardi could testify at trial because, in the doctor's June 1, 2020 narrative report, he opined that Thomas Fredella was under the influence of heroin at the time of his accident which impaired his ability to operate a motor vehicle. Significantly, at trial and at the recent Daubert hearing, perhaps because he was placed under oath before he testified and subject to the state's perjury law, Dr. Guzzardi modified those opinions.

The first appellate panel that reviewed this case took issue with many of the trial court's decisions and, in its February 22, 2024 per curiam opinion, asked the trial court to revisit the Defendant's expert's qualifications to render ophthalmological opinions; asked the trial court to determine whether the Defendant's expert's opinions---even if he was qualified to render them---constituted "net opinions;" asked the trial court to determine whether the Defendant's expert could satisfy the "supplemental evidence" requirement of Gustavson and also asked the trial court to determine whether the Defendant's opinions violated Evidence Rule 403.

At the August 27, 2024 Daubert hearing, Dr. Guzzardi testified that he could not quantify the amount of opiates in Mr. Fredella's system at the time of his

accident. Therefore, he could not opine that Mr. Fredella's judgment or reflexes were affected by his heroin use; he could not opine that Mr. Fredella's heroin use made him unfit to operate a motor vehicle on the night of his accident and he could not opine that his heroin use contributed to his accident.

In reviewing the trial court's December 20, 2024 letter-opinion, it is clear that the trial court never fully addressed the Defendant's expert's ophthalmological qualifications; never critically analyzed the New Jersey "net opinion" rule or the "supplemental evidence" requirement of Gustavson and provided a superficial analysis of N.J.E.R. 403. Clearly, the trial court's letter opinion did not comply with the prior Appellate panel's mandate.

When all of the issues the prior appellate panel addressed are thoroughly reviewed and critically analyzed, there is no doubt that the Defendant's expert did not satisfy his burden of proof on any of the referenced issues. Therefore, the Plaintiffs should be awarded a new trial.

Prior Appellate Decision

The above-referenced case was remanded by a prior appellate panel because it had serious concerns that Dr. Lawrence Guzzardi's trial testimony was not scientifically reliable and/or a net opinion and/or inconsistent with the holding of Gustavson v. Gaynor, 206 N.J. 540 at 545-546, (App. Div. 1985) and/or unduly prejudicial. (Pa624-654.) At the August 27, 2024 Daubert hearing, on remand, the Defendant argued that the only issue presently before the Court was Dr. Lawrence Guzzardi's qualifications to opine that heroin use can affect vision. The Defendant's argument was inconsistent with the clear mandate of the prior appellate panel and New Jersey law because such an opinion—standing alone—violated the "net opinion" rule, was inconsistent with the holding in Gustavson and was in derogation of Evidence Rules 401 and 403.

In that regard, the Plaintiff has never disputed that heroin use can affect vision. Rather, he has always contended that the heroin he ingested 8-10 hours prior to his accident did not cause him to have pinpoint pupils on the night of his accident; it did not affect his judgment or reflexes that evening: it did not render him "under the influence" of heroin that night; it did not render him unfit to drive on the evening in question and it did not contribute to his accident. As such, the jury should never have been given the opportunity to consider Dr. Guzzardi's unsupported, biased, scientifically unreliable, irrelevant, unduly prejudicial, speculative net opinions.

The prior appellate panel's opinion, states:

> On appeal, plaintiff does not dispute that heroin can cause pinpoint pupils but rather challenges the definition of pinpoint pupils, whether his presentation fit this definition, whether the presence of pinpoint pupils was an accurate estimator that he remained under the influence of heroin and whether his pinpoint pupils impacted his vision. Our review of the record reveals the trial court did not consider these arguments, all of which challenge the reliability of Dr. Guzzardi's opinion. (Pa642)

Thereafter, the prior appellate panel discussed what is necessary to establish scientifically reliable testimony; what is necessary to establish an admissible fact-supported opinion—as opposed to a net opinion—the legal standard for admitting alcohol and drug testimony in New Jersey, under Gustavson, and the balancing act required by the trial court, under N.J.E.R. 403, when such evidence is relevant, probative and highly prejudicial. (Pa624-654.)

In its opinion, the prior appellate panel directed the trial court to conduct a Daubert hearing to determine if Dr. Guzzardi had the requisite qualifications to opine that the Plaintiff had (abnormal) pinpoint pupils—not just constricted pupils because everyone's pupils constrict at night--on the evening in question. It also directed the trial court on remand, after giving the doctor an opportunity to supplement the record, to determine whether Dr. Guzzardi had the ability to present scientifically reliable evidence that Mr. Fredella's ingestion of heroin prior to his accident rendered him under the influence of heroin at the time of his accident, unfit to safely operate a motor vehicle on the evening in question and prove that his heroin use was a substantial contributing factor in his accident. The

Defendant, as the proponent of the subject evidence, had the burden of proof on these issues. (N.J.E.R. 104(a) and Smith v. Estate of Kelly, 343, N. J. Super 480, at 497, A.D. 2001.)

Specifically, the prior appellate panel's opinion stated that if Dr. Guzzardi could not explain in a scientifically reliable manner how the ingestion of heroin caused Mr. Fredella to have abnormal, pinpoint pupils, that substantially affected his vision, and rendered him "under the influence" of heroin at the time of his accident, the expert's opinion could very well be a "net opinion." (Pa644.)

The prior appellate panel wrote:

> The trial court did not address whether Dr. Guzzardi's expertise as a toxicologist and emergency room physician—extended to how opioids impact one's vision, despite his lack of qualification as an ophthalmologist. In retrospect, Dr. Guzzardi's lack of expertise in the area of ophthalmology may constitute a flawed analysis, and the trial court failed to properly assess Dr. Guzzardi's qualifications to testify on this point. We add that Dr. Guzzardi's testimony to the jury that Plaintiff's heroin use adversely impacted his vision, without being able to quantify to what extent it impacted Plaintiff's vision, may constitute speculation and a net opinion.

Later, in the same opinion, at Pa654, the prior appellate panel wrote:

> Plaintiff also maintains that Dr. Guzzardi's opinion should have been excluded because he could not conclusively determine whether Plaintiff's heroin use was a significant contributing factor for the accident. In Gustavson…we addressed admissibility of intoxication evidence and its potential for prejudice in a personal injury action where a party purportedly drank alcohol prior to his car accident. We held the party's consumption of alcohol could not be admitted unless there was "supporting evidence" that the driver was unfit to drive the vehicle due to his or her intoxication at the time of the accident…Our Supreme Court recently commented that where a driver's ingestion of drugs is alleged to have cause the driver's impairment, the impairment

> "must be proven by the State with independent evident." State v. Olenowski, 255 N.J. 529, at 609, (2023.)

As such, the trial court was required to address the Defendant's expert's qualifications to render ophthalmologic opinions; the expert's opinions were required to be supported in accordance with N.J.E.R. 702; his opinions were required to address the Gustavson "supplemental evidence" holding and his opinions were required to be more probative than prejudicial in accordance with N.J.E.R 403. As detailed infra., the expert's qualifications and testimony failed to satisfy any of those requirements.

Procedural History[1]

In November of 2017, Plaintiffs filed a Complaint against multiple Defendants and, on December 10, 2018, amended their complaint to add the Township of Toms River as a Defendant. (Pa1-10.)

In the winter of 2021, the Plaintiffs filed a Motion to Bar the Testimony of the Defendant's toxicologist, Dr. Lawrence Guzzardi. (Pa36.) On April 28, 2021, the Honorable James Den Uyl denied the Plaintiffs' Motion. (Pa48.) The judge wrote written decisions. (Pa36-42.)

In February and March 2022, over the course of five (5) hours, Dr. Lawrence Guzzardi was deposed. As part of their pre-trial submissions, in light of some of the statements/admissions Dr. Guzzardi made during his depositions, the Plaintiffs filed a second Motion to Bar the doctor's testimony. (Pa278-284) On April 14, 2022, that Motion was also denied. A written decision was filed. (Pa43-49.)

At the pre-trial conference in this case, on April 21, 2022, the Plaintiffs specifically requested a Frye hearing because they did not believe there was any scientific evidence to support Dr. Guzzardi's opinions. (Pa617-618.) On April 21,

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[1] The transcripts are cited herein chronologically, as follows: 1T - 4/16/2021 Motion Hearing, 2T - 4/13/2022 Motion Hearing, 3T -4/21/2022 Pre-Trial Conference, 4T-4/26/2022 Trial Transcript, 5T- 4/27/2022 Trial Transcript (Volume One), 6T-4/27/2022 Trial Transcript (Volume 2), 7T- 4/28/2022 Trial Transcript, 8T-4/29/2022 Trial Transcript, 9T - 5/3/2022 Trial Transcript, l0T - 5/4/2022 Trial Transcript, 11T - 5/6/2022 Trial Transcript, 12T - 5/9/2022 Trial Transcript, 13T-01/31/22 De Bene Esse Deposition of Dr. David Polonet, 14T-03/14/2022 De Bene Esse Deposition of Nicholas Belizzi, P.E., and 15T-8/27/24 transcript of Daubert hearing.

2022, that request was also denied. The judge's reasons were also memorialized in a written opinion dated April 28, 2022. (Pa50-54.)

After a nine (9) day trial, the jury found all parties at fault. It found all parties' negligence proximately caused the accident and it apportioned liability twenty percent (20%) against Toms River, twenty percent (20%) against the N.J. D.O.T. and sixty percent (60%) against Thomas Fredella. (Pa619-621.) The Plaintiffs wholeheartedly believed the trial judge's wrongful decision to allow Dr. Guzzardi to testify tainted the jury. An initial appeal was filed on June 21, 2022. (Pa63-67.)

On February 22, 2024, the Appellate Division affirmed in part and remanded this matter for a Daubert hearing. (Pa624-654.) A Daubert hearing was conducted on August 27, 2024. On January 16, 2025, the trial judge entered an Order denying a new trial to the Plaintiffs. (Pa62.) The Judge wrote a short letter-opinion in support of his decision. (Pa55-61) An appeal was timely filed. (Pa68-75.)

Statement of Facts

On November 5, 2016, at approximately 7:00 p.m., Ruth Rogan struck a deer on Rt. 37W in Toms River, N.J. (4T80-3 to 19.) The Toms River police were promptly called to the accident scene and, despite a written requirement to remove the deer carcass from the roadway, the responding police officer did not do so. (4Tl26-6 to 9, 4Tl32-8 to 25 and 4Tl38-1 to 6.) The Toms River police department also, despite a clear policy to the contrary, did not promptly notify the N.J. D.O.T. to remove the deer for over an hour after the accident. (4Tl40-l 7 to 21, 4Tl20-18 to 21.) The same evening, shortly after 8:35 p.m., another motorist called the Toms River police department and advised the deer carcass was still in the roadway. (8T51-12 to 52-19.) Yet, when the D.O.T. employees arrived at the accident scene, and at the time of Mr. Fredella's accident, there were still no police officers at the scene. (5T39-20-23.)

At approximately 8:45 p.m. on the evening in question, two N.J. D.O.T. trucks, with three (3) employees in the trucks, arrived at the accident scene to remove the deer carcass. (5T27-10 to 24.) One of the trucks, however, with two D.O.T. employees inside, drove approximately four car lengths past the deer carcass to assist the good samaritan who called the police shortly after 8:35 p.m. (5T44-19 to 45-20.) As such, only one D.O.T. employee, driving one safety truck, attempted to remove the deer carcass. To do so, he "parked" his

safety truck in the slow lane of Rt. 37W. (5T122-4 to 16.) The employee alleges a 4 x 8 yellow arrow board was illuminated on top of his truck. (5Tl20-25 to 121-3.) The Plaintiff denies the arrow board was illuminated. (5T220-4 to 9.) All parties admit there were no warning signs, cones, flares, etc. to alert motorists, including Mr. Fredella, of the stopped/parked truck. (5T196-12 to 197-8.)

At approximately 6:30 p.m. the same evening, the Plaintiff drove approximately twenty (20) miles, from Bayville to Eatontown, to provide a painting estimate. (5T189-16 to 195-25.) This accident happened on Mr. Fredella's way home over an hour later. Specifically, less than six (6) seconds after exiting the Garden State Parkway, Mr. Fredella, after successfully changing lanes on Rt. 37W, crashed his vehicle into the rear of the D.O.T.'s safety truck. Plaintiff's accident reconstruction expert testified that, once Mr. Fredella completed his lane change, no driver in the world would have had enough time to stop or avoid the accident. (7T12- 16 TO 15-8.) Mr. Fredella sustained multiple compound fractures to his lower right leg in the accident. (9Tl04-15 TO 21.) By the time the case proceeded to trial, he had undergone fourteen (14) surgeries on his leg and his treating surgeon had recommended an above-the-knee amputation. (9T188-9 to 17.)

At least seven (7) hours before his accident, Mr. Fredella self-injected two

(2) small $10.00 bags of heroin. (5T187-1 to 188-17.) This testimony was elicited because ambulance personnel could not intubate the Plaintiff on his way to the hospital. (6T220-20 to 221-22.) Significantly, after his accident, the investigating police officer, multiple EMTs, the triage nurse and the trauma team at Jersey Shore Medical Center did not believe Mr. Fredella was under the influence of heroin/drugs. (7T61-10 to 62-8, 7T89-9 to 81-2 and 7Tl36-10-18.) Open surgery was performed, without incident, hours after the accident. (9T29-13 to 30-8.) The hospital did not conduct blood or urine tests, even though those tests could have been ordered if they suspected drug use. (7Tl53-16 to 154-19.) As such, there was no objective evidence of heroin in the Plaintiffs system at the time of his accident.

Nonetheless, the Defendant's toxicologist, without citing any literature to support his position, despite acknowledging the American Ophthalmologic Society's objective standard to the contrary, and despite acknowledging other contrary peer-reviewed medical literature, was allowed to testify at trial without offering any scientific support for his opinions at a Frye hearing. (Pa43-47, 7T155-21 to 156-16 and Pa313-335.) Thereafter, despite never examining the Plaintiff, despite not knowing how the accident happened, and despite acknowledging he could not opine Mr. Fredella's opiate use affected his reflexes or judgment, rendering him unsafe to drive, the Defendant's toxicologist was still allowed to

testify. At trial, he testified that the Plaintiff had "pinpoint pupils" at the time of his accident[2], that his constricted pupils may have affected his ability to see in darkness and/or peripherally - although he could not quantify the affect -- and his (alleged) problem vision "may have" contributed to his accident. (7Tl09-6-23; 7Tl15-13 to 24; 7T141-4 to 24; and 7T171-1 to 17.)

Once the trial judge allowed the jury to hear about the Plaintiff's heroin use on the day of the accident, Mr. Fredella was compelled to explain to the jury that he was a "recreational" heroin user and that, in his experience, the affect of two (2) bags of heroin wore off in less than one hour. (5T185-8 to 186-20.) As such, at the time of his accident, he was 100% sober. Even the Defendant's expert conceded Mr. Fredella's testimony may have been credible. (7T107-14 to 109-23.)

Clearly, the trial judge's admission of heroin into the case affected the jury as, toward the end of the case, during redundant damage testimony, the Plaintiffs wife's friend, who was sitting in the bench seats behind the Plaintiffs' attorney's table, was checking his Instagram account in the courtroom. At the conclusion of the witness' testimony, one juror advised the Court that the jury was "scared" by the friend's actions as it appeared he might be trying to photograph and/or intimidate the jury. (11T169-13 to 174-12 and 12T-4 to 9 to

[2] The witness testified "normal pupils" are 3 ½ - 7mm. Since the Plaintiffs pupils were less than 3 ½mm, they were smaller than “normal” and---in his opinion--- pinpoint pupils.

28-12.) It is very unlikely the juror would have sent that note if Mr. Fredella's heroin use was not part of this case. Obviously, the juror was concerned because he thought Mr. Fredella was a low-life heroin user/drug dealer and his friends were potentially violent. Clearly, the improperly admitted evidence had a clear capacity to produce an unjust result.

After the Appellate Division rendered its decision, the trial judge Ordered the Defendant's expert to forward any treatises, articles, textbooks, etc. he intended to rely upon at the Daubert hearing that addressed the Appellate Division's concerns. Numerous articles were forwarded and relied upon at the hearing. (Pa661-703.) Significantly, however, none of the learned treatises, textbooks, etc. addressed the definition of pinpoint pupils or whether pinpoint pupils alone—because there is no other evidence of the presence of opioids in Tom Fredella's system at the time of his accident—can establish the presence of sufficient opioids in his system to render him under the influence of heroin. Additionally, the Defendant also did not present any learned treatises, etc., or other evidence, to establish that Mr. Fredella's prior heroin use made him unfit to operate a motor vehicle on the night of his accident or that said heroin use contributed to his collision.

The Plaintiff, on the other hand, produced undisputed evidence, which was submitted without objection under the judicial notice evidence rule, to

establish that the Defendant's proffered expert did not even have a first-year medical student's understanding of ophthalmology. (Pa313-335 and Pa655-660.) Yet, the trial judge chose to ignore it. (Pa55-62.)

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT CONCLUDED THAT DR. LAWRENCE GUZZARDI WAS QUALIFIED TO RENDER OPHTALMOLOGIC OPINIONS AT TRIAL. (Pa55-62)

All of Dr. Lawrence Guzzardi's opinions are predicated on the "fact" that Thomas Fredella had "pinpoint pupils" at the time of his accident. However, according to all relevant, reliable scientific literature produced at trial and at the Daubert hearing, Mr. Fredella did not have "pinpoint pupils" at the time of his accident. (Pa313-335 and Pa655-660.) In that regard, as Dr. Guzzardi acknowledged at the Daubert hearing, pinpoint pupils is a lay term. The scientific term, from the Greed work "meiotic," is "miosis". (See 15T61-62.) Under New Jersey Law, the trial judge was allowed to take Judicial Notice of commonly accepted facts, including undisputed medical facts/terms. See N.J.E.R. 201(b) and State v. Johnson, 42 N.J. 146, at 181 (1981.)[3] Miosis is defined, by definition, as "excessive constriction of the pupil of the eye" which is further defined as "less than 2mm in diameter." (Pa657.) Additionally, Dr. Guzzardi admitted at the Daubert hearing in the instant case that the American Ophthalmologic Society's Guidelines define "pinpoint pupils" as pupils that are less than 2mm in diameter. (15T82-19 to 23.) Significantly, at no time on the evening of his accident did Thomas Fredella

[3] The trial judge took such judicial notice when it accepted, without objection,

have pupils that measured less than 2mm in diameter. As such, by definition, Mr. Fredella had "normal" pupils on the evening of his accident. As such, the Defendant's proffer should end right here because—at all relevant times---Thomas Fredella did not have pinpoint, abnormal pupils.

Apparently, Dr. Guzzardi convinced the trial court that Mr. Fredella had "pinpoint pupils" on the night of his accident, even though the only "evidence" the doctor presented on this subject was his own personal opinion, because all of the doctor's other (speculative) opinions were predicated on this unproved "fact." In that regard, in support of his position, Dr. Guzzardi testified that it is his personal belief/opinion that normal pupils range in size from 3 1/2mm-7mm. (Pa482 at pg.13- 8-21.) Subsequently, however, at the August 27, Daubert hearing in the instant case, Dr. Guzzardi changed his opinion and testified that normal pupils range in size between 3mm and 5 1/2mm. (15T91-1 to 14.) Thereafter, while still testifying at the Daubert hearing, Dr. Guzzardi changed his opinion again and testified that normal pupils range in size between 3mm-7mm. (15T91-1 to 16.) Significantly, the Defendant's expert did not cite any standards, guidelines or literature to support his (changing) opinions. He simply made reference to his own prior Supreme Court testimony and some unknown DRE guideline he never produced. (15T91-1 to

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Plaintiff's post-hearing brief and exhibits. (See Pa55-62 and Pa655-660.)

16.)

The prior appellate panel remanded this matter to give the Defendant an opportunity to have its expert produce evidence to establish that his opinions were not personal opinions but rather scientifically reliable opinions supported by studies and data pursuant to N.J.E.R. 702. Significantly, the Defendant's expert failed to produce any evidence to support his personal opinions. Dr. Guzzardi admitted this fact at the Daubert hearing. (15T98.) The prior appellate panel cautioned against this practice advising the trial court to be careful "to distinguish scientifically sound reasoning from that of the self-validating expert, who uses scientific terminology to present unsubstantiated personal beliefs." (Pa637.) That is exactly what Dr. Guzzardi presented. Clearly, Dr. Guzzardi's testimony did not meet the Daubert standards outlined by the prior appellate panel at Pa624-654. Furthermore, a careful review of the doctor's testimony reveals that Dr. Guzzardi does not even have a basic understanding of the anatomy of the human pupil.

At the Daubert hearing, Dr. Guzzardi, often in a mocking and condescending tone, testified five times that the human pupil cannot constrict less than 2mm. (15T, 52,93,101, 102 and 131.) In fact, at one point in the hearing, he testified that obtaining a pupil diameter reading less than 2mm would be like recording a "blood pressure below zero." He repeatedly testified

that it was impossible to obtain a pupil diameter reading below 2mm. He also testified similarly at his discovery deposition. (15T52-9 to 22.) To quote the doctor: "You can't get below 2 millimeters. Two millimeters is the absolute limit." (15T131-19 to 20.)

As discussed earlier, the very definition of miosis is a pupil diameter "measuring less than 2mm." However, it is a generally accepted scientific fact that, in bright lights, pupils can constrict to 1mm in diameter. In fact, a simple google search asking: can a human pupil measure 1mm in bright light? reveals the following answer: "In bright light, a human pupil's diameter can range from 1mm-4mm. (Pa658.) Additionally, at trial, Dr. Guzzardi testified that medical personnel measure pupils with a Rosenbaum gauge. Specifically, the doctor testified at trial that Dr. Rosenbaum's gauge contains various pupil sizes and medical technicians compare the sizes on the gauge to the size of the patient's pupil. (7T157-14 to 160-3) Please note a standard Rosenbaum gauge, readily available on the internet today, measures pupils from 1.5mm-10mm. (Pa659.) Moreover, a standard optometrist's eye chart measures pupils from 1mm-10mm. (Pa660.)

Finally, even a review of the learned treatises that Dr. Guzzardi himself provided supports this uncontroverted medical fact. In that regard, Pa675-682 is a peer reviewed article Dr. Guzzardi produced from Autonomic

Neuroscience about the most effective way to measure pupils after the study's volunteers were given heavy doses of opioids. While the study's conclusions are irrelevant to any issue in this case, the article includes a damning chart at the bottom of page 2. The chart shows that, while the study's volunteers had initial pupil sizes as large as 4.5mm, after being given significant doses of heroin, their pupils constricted as much as 3.5mm and, at one time, measured 1mm. (Pa 676)

As such, it is clear that Dr. Guzzardi, while perhaps a fine toxicologist and emergency room physician, is not qualified to render expert opinions in the field of ophthalmology. In fact, he probably does not even have a first-year ophthalmology student's knowledge of the human pupil. Clearly, his personal opinions are not supported by the relevant medical literature and evidence and the trial court committed reversible error when it concluded the Defendant met its burden of proof regarding Dr. Guzzardi's proffered ophthalmological testimony. As such, a new trial should be Ordered.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT CONCLUDED DR. LAWRENCE GUZZARDI'S OPINIONS WERE NOT NET OPINIONS. (Pa55-62)

In its lengthy, well-reasoned opinion, as previously referenced, the prior appellate panel cautioned that, even if Dr. Guzzardi had the requisite qualifications to provide ophthalmological opinions, his opinions—since he could not quantify the affect Mr. Fredella's pupils had on his peripheral vision, etc.—still needed to be analyzed because they could still be stricken as net opinions. (Pa624-654 at 644.)

The net opinion rule forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or data. Townsend v. Pierre, 221 N.J. 36, at 53-54 (2015.) It mandates that experts be able to identify the factual basis of their conclusions, explain their methodology and demonstrate that both their factual bases and their methodology are reliable. Landrigan v. Celotex Corp., 127 N.J. 234 (1990.)

An expert's conclusion should be excluded if it is based merely on unfounded speculation and unquantified possibilities. Grzanka v. Pfiefer, 301 N.J. Super 563, at 580 (App. Div. 1997.) Such an opinion is excluded because "when an expert speculates he ceases to be an aid to the trier of fact and becomes nothing more than an additional juror." Jimenez v. GNOC Corp., 286 N.J. Super 533, at 540, (App. Div. 1996.), overruled on other grounds, Jerista

v. Murray, 185 N.J. 175 (2005.) Significantly, the net opinion rule focuses upon the "failure of the expert to explain the causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom." Bucklew v. Grossbard, 87 N.J. 512, at 524 (1981.)

In the instant case, Dr. Guzzardi acknowledged at the Daubert hearing that his sole basis for concluding that Mr. Fredella had opioids in his system at the time of his accident was his "pinpoint pupils." (15T73.) Furthermore, he also admitted at the Daubert hearing that he could not quantify the amount of opioids in Mr. Fredella's system at the time of his accident or how his alleged pinpoint pupils affected his peripheral vision or his ability to see bright lights. (15T109 and 117.)

Dr. Guzzardi also conceded an accident reconstruction expert would need to provide that information and he further acknowledged that he was not qualified to render such an opinion. (15T120.) Finally, Dr. Guzzardi also admitted at the Daubert hearing that, since he could not quantify the amount of opioids in Mr. Fredella's system and since he could not testify as to the extent the Plaintiff's (alleged) pinpoint pupils affected his peripheral vision and ability to see bright lights on the evening in question, he could not opine that Mr. Fredella's judgment or reflexes were affected by his heroin use or that he was incapable of safely driving a motor vehicle on the night of his accident. (15T110 and 117.)

In light of the above, the trial court committed reversible error even when it allowed Dr. Guzzardi to testify even though he could not provide the necessary causal connection between the Plaintiff's heroin use, his driving and the subject motor vehicle accident.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT CONCLUDED DR. LAWRENCE GUZZARDI'S OPINON SATISFIED THE "SUPPLEMENTAL EVIDENCE" REQUIREMENT OF GUSTAVSON V. GAYNOR, 206 N.J. SUPER 540 AT545-546 (A. D. 1985) (Pa55-62)

In addition to the general net opinion rule, the prior Appellate Division panel advised that, in order to allow the jury to hear the Defendant's expert's opinions in this case, Dr. Guzzardi—because this is a drug case—also had to satisfy the requirements mandated by Gustavson. (Pa624-654 at 790.) See also, Black v. Seabrooke Associates, Ltd., 298 N.J. Super 630 A.D. 1197) and Salemke v. Sarvetruck, 352 N.J. Super 319 (A.D. 2002, applying the Gustavson standard to drug cases in New Jersey.)

In Gustavson, supra., Andrew Gustavson, an underage 17-year-old, admitted to illegally drinking 2-3 beers at a local park five-to-six hours before he was involved in a motor vehicle accident. He also admitted going to a nearby nightclub before he was involved in his accident, a head-on accident that resulted from north and south bound vehicles attempted to pass each other. Each driver claimed the other driver veered into his lane. Significantly, the investigating police officer—as in the Fredella case—did not believe the consumption of alcohol (in our case, drugs) contributed to the accident. Id. At 543.

Prior to trial, the Gustavson Defendant filed a motion to bar the

admission of any testimony related to his consumption of alcohol. The trial court denied the motion holding that the Defendant's activities, including his alcohol consumption, could be discussed at trial to provide "continuity" leading up the accident. At trial, after hearing evidence of the Defendant's alcohol consumption, the jury found for the Plaintiff. The Defendant appealed.

On appeal, the Appellate Division held that evidence of intoxication is relevant to the issue of negligent driving. However, it held that "a reference to liquor with respect to a driver is relevant only if it is asserted that it affected his ability to drive." (Emphasis added) Id. At 544. It went on to hold that "the mere fact that a driver consumed some alcoholic beverages is by itself insufficient to warrant an inference that the driver was intoxicated and that such intoxication was of such a degree as to render him unfit to drive at the time of accident." Id. At 545. It also held that, in order to admit alcohol evidence in the future, the proponent would have to submit "supplemental evidence" that alcohol was a substantial contributing factor in the accident. Since 1985, this holding has come to be known as the "supplemental evidence" requirement. As will be discussed infra., the Gustavson court also concluded that "the admission of such testimony without supporting evidence is unduly prejudicial in view of its capacity to inflame the jury." (Emphasis Added) Id. As such, it vacated the jury's verdict and remanded the case for a new trial.

In the instant case, even if Dr. Guzzardi was qualified to testify about the

Plaintiff's pinpoint pupils and their effect on vision, that testimony is still irrelevant in the Fredella case because Dr. Guzzardi admitted on multiple occasions, at trial and at the Daubert hearing, that he could not opine that Mr. Fredella's heroin use 8-10 hours before his accident made him unfit to drive a motor vehicle on the night of his accident. (15T133.) Furthermore, as the prior appellate panel noted in its opinion, "under the influence" means a "substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be to intoxicating liquor, narcotic, hallucinogenic or habit producing drug." (Pa624-654 at 646 footnote 9.) Significantly, Dr. Guzzardi, based on his training, skill and experience, could not testify that Mr. Fredella's physical capabilities were "substantially deteriorated" on the night in question. In fact, he testified at the Daubert hearing that Mr. Fredella's heroin use—even if he had pinpoint pupils—may only have had a trivial effect on him. (15T133.) Additionally, the Defendant did not meet the "supplemental evidence" requirement as Dr. Guzzardi could not opine that Mr. Fredella's heroin use was a substantial contributing factor in his accident.

In light of the above, the Defendant clearly did not meet the burden of proof mandated by Gustavson. The Defendant simply could not and did not establish that Mr. Fredella's heroin use substantially diminished his physical capabilities, that his diminished capabilities affected his ability to drive on the

night of his accident and that his opioid use substantially contributed to his accident. As such, given the Appellate Division's holding in Gustavon, the trial court clearly committed reversible error when it allowed Dr. Guzzardi to testify—and failed to Order a new trial--because the doctor's testimony did not have "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.E.R. 401.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT CONCLUDED THAT PROBATIVE VALUE OF DR. LAWRENCE GUZZARDI'S TESTIMONY WAS NOT SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.

(Pa55-62.)

Pursuant to Evidence Rule 403, even relevant evidence can be excluded if its probative value is substantially outweighed by the risk of undue prejudice. As discussed in Gustavson, evidence of alcohol consumption prior to driving can clearly inflame a jury. If alcohol consumption can inflame a jury, there is no doubt that heroin consumption can greatly inflame a jury. I suspect even Dr. Guzzardi would agree with that statement.

In New Jersey, other judges have excluded much greater evidence of intoxication/impairment under Rule 403. For example, in Straley v. U.S., 886 F. Supp. 728 (D.N.J. 1995), a case I personally worked on while an associate at Bongiovanni, Collins and Warden, Senior District Judge Dickinson Debevoise denied the trier of fact from hearing about the Plaintiff's consumption of four beers within an hour of his catastrophic accident, even though he smelled of alcohol immediately after his accident and had a blood alcohol concentration slightly below the legal limit hours after the accident. Relying on the fact that the investigating police officer felt Mr. Straley did not appear to be under the influence of alcohol shortly after the accident, Senior Judge Debevoise barred

the jury from hearing any alcohol testimony even though the Defendant had an expert ready to testify that Mr. Staley was under the influence of alcohol at the time of his accident. Id. at 739. Weighing the various competing interests, Senior Judge Debevoise held the probative value of the alcohol evidence was substantially outweighed by the risk of undue prejudice.

Similarly, in Malik v. Cooper Tire & Rubber Co., 59 F. Supp. 3d 686 (D.N.J.) 2014), Raheel Malik was paralyzed in a motor vehicle accident when his host's vehicle's tire blew out and the subject vehicle rolled over multiple times. The Plaintiff sued the tire manufacturer who attempted to blame the accident on the host driver. Subsequent to the accident, the host driver admitted smoking marijuana the night before the accident and a test of his urine three hours after the crash revealed the presence of Delta-9 Carboxy THC, a chemical in marijuana. During discovery, the tire manufacturer retained a forensic toxicologist, a clinical psychiatrist and an accident reconstruction expert. Together, they were prepared to testify that the host driver was significantly impaired at the time of the accident—because marijuana can affect complex tasks for at least 24 hours after it is ingested—and that the host's marijuana use contributed to the accident because his drug use made him slow to initially react and then to overreact to the blowout. The accident reconstruction expert was prepared to testify how a sober person would have reacted and how a sober person would have safely stopped the

vehicle after the blowout.

Prior to trial, the Plaintiff filed a motion to bar all such testimony. After reviewing the facts of the case, and acknowledging the Appellate Division holding in Gustavson, Senior Judge William Walls held the Defendant tire manufacturer could not offer any of the proffered testimony—and barred all three expert witnesses from testifying—because he held the Defendant could not meet the "supplemental evidence" requirement of Gustavson. Specifically, Senior Judge Wells rendered his ruling because he felt (1) there was significant time between the host driver's marijuana use and the accident, (2) there was little evidence about how much marijuana the host driver consumed, (3) it was difficult objectively determining the host driver's level of impairment, and (4) there was no evidence that he host driver's reflexes or cognitive abilities were deficient immediately before the accident. Id. At 11.

As in the instant case, the Defendant's toxicologist admitted there was no quantifiable level of impairment of the host driver. As such, he could not opine what impact the host driver's marijuana use had on his driving. Nonetheless, it was the toxicologist's intention to testify that it was his personal opinion, based on his training, skill and experience, that the host driver's marijuana use made him "severely intoxicated" at the time of the subject accident. As in the instant case, the Defendant's toxicologist also admitted there were no studies to support his opinion. Id. at 11-12.

Significantly, as previously indicated, Sr. Judge Wells refused to admit the proffered toxicologist's testimony because it did not comply with N.J.E.R. 702 (Daubert/Frye) and he also held it was unduly prejudicial under N.J.E.R. 403.

Consequently, even if Dr. Guzzardi was qualified to offer ophthalmological opinions in this case, and even if those opinions met the legal requirements of New Jersey law—under the influence, net opinion, supplemental evidence, substantial contributing factor—the doctor's testimony should still have been excluded under N.J.E.R. 403.

At its best, Dr. Guzzardi's proffered testimony only addresses the reason why the Plaintiff failed to look right prior to his accident—peripheral vision issues—and failed to see the brightly lit vehicle directly in front of him. However, this is a simple negligence case. The Defendant does not have to prove why the Plaintiff drove the way he drove. It only has to prove that a reasonable, prudent person would not have driven the way Mr. Fredella drove on the night in question. (Model Jury Charge 5.10.) Consequently, even without Dr. Guzzardi's testimony, the Defendant can still argue to the jury that Mr. Fredella should have turned his head to see what was to his right before he changed lanes and he should have noticed the large, brightly lit truck/arrow board before he crashed into the back of the NJDOT's truck. As such, the probative value of Dr. Guzzardi's proffered testimony is minimal, at best, but it is clearly highly prejudicial and extremely inflammatory. There is no doubt

that the admission of such evidence had a clear capacity to produce an unjust result.

As such, the trial court abused its discretion and committed reversible error when it concluded the probative value of Dr. Guzzardi's testimony was not substantially outweighed by the risk of undue prejudice. As such, the Plaintiffs should be awarded a new trial.

Conclusion

The Defendant, who proffered Dr. Lawrence Guzzardi's testimony, had the burden of proving that Dr. Guzzardi was qualified to render his opinions, that his opinions were scientifically reliable, consistent with New Jersey law, relevant, probative and not unduly prejudicial. The Defendant's proffer—for many reasons—was woefully insufficient to meet its burden of proof. While Dr. Guzzardi may very well be a competent toxicologist and emergency room physician, his lack of knowledge of ophthalmology alone should have disqualified him from testifying. Clearly, Dr. Guzzardi does not even possess a first-year medical student's knowledge of the human pupil. As such, the trial court should never have allowed any of his personal, unsupported ophthalmological opinions to be heard by the jury. Moreover, his opinions—even if accepted—were net opinions that also did not satisfy the "under the influence" or "supplemental evidence" requirements of New Jersey law, in general, and Gustavson, in particular. Finally, even if otherwise fully admissible, Dr. Guzzardi's testimony/opinions should have been barred as they were marginally probative and highly prejudicial and inflammatory.

In my 40 years practicing law, the trial court's decision to admit heroin evidence in this case was the most unfair, egregious decision of my career. In light of the above, the Plaintiffs clearly deserve a new trial.

Respectfully Submitted,
Gelman Gelman Wiskow
& McCarthy LLC

/s/ Phillip C. Wiskow
PHILLIP C. WISKOW, ESQ.

THOMAS A. FREDELLA AND KELLY A. KEARNY Plaintiffs, vs. TOWNSHIP OF TOMS RIVER AND/OR ABC CORPORATION, STATE OF NEW JERSEY DEPARTMENT OF TRANSPORTATION, STATE OF NEW JERSEY DEPARTMENT OF THE TREASURY—FLEET MANAGMEENT AND/OR DEF CORPORATION, (A FICTITIOUS NAME), RICHARD ROE 1-5, A FICTICIOUS NAME) Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001299-24T4 ON APPEAL FROM: LAW DIVISION, OCEAN COUNTY DOCKET NO.: OCN-L-3198-17 *CIVIL ACTION* SAT BELOW: Hon. James Den Uyl, J.S.C.

BRIEF OF DEFENDANT/RESPONDENT TOWNSHIP OF TOMS RIVER

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PRELIMINARY STATEMENT

To agree with Plaintiff and reverse the Trail Court's decision admitting the testimony of Dr. Lawrence Guzzardi would be a reversable departure of the Supreme Court's holdings in State v. Olenowski 253 N.J. 133 (2023) (Olenowski I) and State v. Olenwoski, 255 N.J. 529 (2023) (Olenowski II), wherein the Court recognized that pinpoint pupils are common toxidromes and the use of psychophysicals to determine whether an individual is under the influence of drugs is scientifically reliable and thus admissible. Important for this Court's consideration, is Judge Den Uyl while evaluating Dr. Guzzardi's testimony, there was no contradictory admissible evidence for the Court's consideration.

To this point, and unlike what occurred in Re Accutane litigation 235 N.J. 340 (2018) and Olenowski, the plaintiff during the 104 hearing did not call his own expert toxicologist to contradict Dr. Guzzardi's testimony as to (1) whether the scientific theory can be, or at anytime has been tested; (2) whether the scientific theory has been subjected to peer review and publication; (3) whether there is any known or potential rate of error and whether there exist any standards for maintaining or controlling the techniques operation; and (4) whether there does exist a general acceptance in the scientific community about scientific theory.

Consequently, Judge Den Uyl was presented with testimony only as to the admissibility and reliability of Dr. Guzzardi's testimony without any contradictory evidence to balance the reliability of Dr. Guzzardi's opinions against. Therefore, for this reason, and as developed below, Judge Den Uyl did not abuse his discretion in accepting Dr. Guzzardi's opinions.

PROCEDURAL HISTORY

Defendant relies upon and incorporate by reference the procedural history set forth by the Plaintiffs.

STATEMENT OF FACTS

At approximately 7:00 p.m. on November 5, 2016, Ruth Rogan struck a deer on Rt. 37w in toms River New Jersey ("the deer accident"). (4T80:3-19). Route 37 is a state road, and is under the jurisdiction of the NJDOT. (5T141:22-24). The Toms River police department were promptly called to the accident scene by Ms. Rogan. (4T:126:6-9l; 4T:132:8-25 and 4T138:1-6). Patrolman Justin Lammer of the Toms River Police Department responded to the Deer accident. (4T122-178). There was a dispute that Officer Lammer did not remove the deer properly out of the road. However, the facts of this case establish that deer was decapitated, with guts, bones, and its body all over the road. (4T113:7-10; 5T164:17-18; 5T100:6-8). It was "a mess." At approximately 8:06 p.m. the

Toms River Police Department contacted the NJDOT requesting the carcass be removed from the roadway. (4T:18-21; Da61).

Approximately twenty minutes after the call that the NJDOT employees be dispatched, James Nunn, Dwayne Livezey and Rodolfo Cacopardo met at the NJDOT yard in Toms River New Jersey. (Pa61; 5T17:22-25). While there, Mr. Nunn, the crew supervisor chose to not use a truck mounted attenuator, electing to use just the pickup truck and work vehicle. (5T:1-25; Pa300-302). At approximately 8:45 p.m. the NJDOT arrive on site and park their vehicles in a staggered position. (5T44:19-5T:45-20; 5T122:4-16). Mr. Nunn described the roadway as a mess, with deer parts everywhere. The work vehicle was equipped with a 4x8 yellow arrow board. (5T120:25-5T121:3; Da058). Mr. Livezey claims the yellow arrow board was illuminated. (5T 121:2-3). Officer Karkovice of the Toms River Police Department claims the yellow arrow board was illuminated when he arrived responding to Plaintiff's Accident. (7T 89:8-10). Plaintiff denies the arrow board was illuminated. (5T:220:4-9).

The NJDOT did not place any additional cones, flares, or other safety devices in the roadway. (Pa288-Pa310; 5T196:12-197:8).

Just before 9:00 p.m. Mr. Fredella exited Parkway South onto Route 37 west. He proceeded to drive on Route 37 West for a period just under six (6)

seconds, when he crashed into the rear of the D.O.T.'s work truck with the illuminated yellow arrow board. (Pa117).

Officer Karkovice of the Toms River Police Department responded to the accident scene. (Pa117). Officer Karkovice reported that the Plaintiff while traveling west on Rt. 37 was accelerating and checking for traffic in the center lane. (Pa117). He was trying to change lanes and was not watching the traffic in front of his vehicle. Which caused him to collide with the rear of the NJDOT. (Pa117; 7T88:3-10).

Plaintiff was immediately treated by EMS. (Pa121). During that treatment, Plaintiff informed the EMS personnel that he used heroin earlier that day. (Pa121; 5T:187:1-188:17).

Defendant retained the services of Dr. Lawrence Guzzardi, M.D. Dr. Guzzardi prepared two expert opinions. (Pa90-Pa107 & Pa111-Pa112). Dr. Guzzardi is a Board Certified Toxicologist. (Id.). Dr. Guzzardi reviewed Plaintiff's medical records and noted that the initial evaluation by EMS revealed that the Plaintiff "admitted to using two bags of heroin 'early in the afternoon.' Mr. Fredella's physical examination revealed scars compatible with long term heroin abuse and 2 mm pupils, as well as significant orthopedic injuries." (id). Based off the clinical and physical examination of the Plaintiff, and Dr.

Guzzardi's extensive experience, training and expertise in toxicology and emergency medicine, he opined with certainty that Mr. Fredella was still suffering from adverse effects of heroin use at the time of the accident. (Id).[1]

A nine-day trial began on April 26, 2022 and concluded on May 6, 2022. The Jury found all parties negligence proximately caused the accident and it apportioned liability 20% against Toms River; 20 % against the NJDOT; and 60% against Thomas Fredella. (Pa625-627 verdict sheet).

STANDARD OF REVIEW

A reviewing court must apply an abuse of discretion standard to a trial court's determination, after a full Rule 104 hearing, to exclude expert testimony on unreliability grounds. Hisenaj v. Kuehner, 194 N.J. 6, 12, 16, 942 A.2d 769 (2008). In re Accutane Litig., 234 N.J. 340, 391 (2018). Under that deferential standard, an appellate court, such as this Honorable Panel reviews a trial court's evidentiary ruling only for a "clear error in judgment." State v. Scott, 229 N.J. 469, 479 (2017) (quoting State v. Perry, 225 N.J. 222, 233 (2016)). An Appellate Court does not substitute its own judgment for the trial court's unless its "ruling 'was so wide of the mark that a manifest denial of justice resulted.' " State v.

[1] For the sake of brevity, the entirety of Dr. Guzzardi's expert reports are incorporated herein by reference, as his opinions and the basis for the same are the focal point of Plaintiff's appeal.

Brown, 170 N.J. 138, 147 (2001) (quoting State v. Marrero, 148 N.J. 469, 484 (1997); State v. Medina, 242 N.J. 397, 412 (2020).

Here, as we will demonstrate below this case is devoid of any abuse by the Lower Court. The Court had the opportunity to evaluate Defendant, Township of Toms River's expert toxicologist and his opinions on five separate occasions, including a full 104 hearing. On each of these occasions, the Court properly found sufficient evidence to support the opinions he offered, and as a result appropriated denied each of Plaintiff's evidentiary motions seeking to strike or invalidate his opinions.

As a result, and as we will more thoroughly demonstrate herein below, this is the perfect example of the trial judge properly utilizing his discretion as gatekeeper to permit relevant and probative evidence to be presented to the jury.

LEGAL ARGUMENT

POINT ONE

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING DR. GUZZARDI TO TESTIFY AFTER A 104 HEARING FINDING HIS TESTIMONY TO BE BOTH RELIABLE AND ADMISSIBLE. (Pa55-62).

Dr. Guzzardi's expert opinion was the subject of four separate motions by the Plaintiff and thoroughly evaluated in a 104 hearing. Each time the Lower

Court evaluated the arguments made by the Plaintiff and found each to be wanting.

Plaintiffs' first motion was returnable April 28, 2021. The Second, was returnable April 14, 2022, and was procedurally filed in violation of R. 4:25-8; and thus, should have been denied on that ground alone. Next, on the eve of trial at the pretrial conference, the Plaintiff made a third motion to bar Dr. Guzzardi in violation of R. 4:25-8 and Seoung Ouk Cho v. Trinitas Reg., 443 N.J.Super. 461, 470-471 (App. Div. 2015), and requested the Court conduct a N.J.R.E. 104 hearing. The Court denied the application on April 25, 2022 and uploaded a written opinion on April 28, 2022. Plaintiffs' next attempt occurred after Dr. Guzzardi testified on direct examination on April 28, 2022. (7T116:17 to 7T:119:19). At that time, the Court again ruled that Dr. Guzzardi's testimony on the effect of heroin use by Mr. Fredella goes to weight and not admissibility. (7T119:16-18). After this had occurred, and on remand, which is the subject of the instant appeal Dr. Guzzardi appeared for a full 104 Hearing.

Importantly, Plaintiff does not dispute that heroin can affect vision. Pb. 3. Rather, Plaintiff challenges the definition of pinpoint pupils and whether pinpoint pupils are an accurate estimator/toxidrome that he remained under the influence of heroin. (See Pb. 4, Pa 642).

To this point, the Appellate Division criticized the trial court and opined that when it originally admitted Dr. Guzzardi's testimony it failed to address whether Dr. Guzzardi's expertise as a toxicologist and emergency room physician extended to how opioids impact one's vision, despite his lack of qualifications as an ophthalmologist. (Pb 5. See also Pa644, Pa 654).

The Appellate Division instructed the Trial Court to conduct a 104 Hearing and apply the factors enunciated in Daubert to assess the reliability and admissibility of Dr. Guzzardi's testimony.

To this Point, the Supreme Court has instructed in determining the admissibility of scientific expert testimony the standards requires the court not to "substitute its judgment for that of the relevant scientific community" but to "distinguish scientifically sound reasoning from that of the self-validating expert who uses scientific terminology to present unsubstantiated personal beliefs." In re Accutane, 234 N.J. 340, 101 (2018). Thus, experts "must be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are scientifically reliable." Id. at 417. Moreover, when an expert relies on scientific or medical studies, "the trial court should review the studies, as well as other information proffered by the parties, to determine if they are of a kind on which such experts ordinarily rely," and if they are "derived from a sound and well-

founded methodology that is supported by some expert consensus in the appropriate field." Ibid.

The Court explained, that when applying this standard, judges should now address the multiple Daubert factors, a "'helpful—but not necessary or definitive—guide' for trial courts in New Jersey" to follow when assessing the reliability of scientific or technical expert testimony. State v. Olenowski, 253 N.J. 133, 149 (2023) (quoting In re Accutane, 234 N.J. at 398). These factors are as follows::

> (1) Whether the scientific theory can be, or at any time has been, tested;
>
> (2) Whether the scientific theory has been subjected to peer review and publication, noting that publication is one form of peer review but is not a "sine qua non";
>
> (3) Whether there is any known or potential rate of error and whether there exist any standards for maintaining or controlling the technique's operation; and
>
> (4) Whether there does exist a general acceptance in the scientific community about the scientific theory.

[In re Accutane, 234 N.J. at 398 (citing Daubert, 509 U.S. at 593-95).]

The first enumerated Daubert factor—testability—relates closely to the dual components of the third factor, error rate and standards. Testability is "a key question" that entails whether a theory or technique "can be (and has been) tested." Daubert, 509 U.S. at 593.

The second Daubert factor—peer review and publication—is significant because submission of a methodology "to the scrutiny of the scientific community is a component of 'good science'" and "increases the likelihood that substantive flaws in methodology will be detected." Id.

The third Daubert factor concerns both the known or potential rate of error in testing the methodology as well as any standards for maintaining or controlling the methodology's operation. Id. at 594. As the Court noted in Daubert, a trial court "ordinarily" should account for the "known or potential rate of error" of a methodology. Ibid. In addition, a methodology is more reliable if it is governed by well-established standards for operation. Ibid. See also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 154-57 (1999) (rejecting as inadmissible an expert who had not consistently adhered to a protocol with appropriate standards).

Lastly, the fourth Daubert factor—general acceptance—(being the former test of Frye is no longer the dispositive test since the Court has adopted the multifactor Daubert approach) is still pertinent. Daubert, 509 U.S. at 594-96; In re Accutane, 234 N.J. at 398.

As the Supreme Court stated in In re Accutane, 234 N.J. at 398, and again in Olenowski I and Olenwoski II, these specific factors are not a rigid set of

considerations for ascertaining the reliability of a proffered expert's methodology. Olenwoski, 253 N.J. at 149.

During the 104 hearing, Plaintiff failed to call any witnesses to contradict Dr. Guzzardi's testimony as to whether the theory or technique has been or can be tested; whether it was subject to peer review, rate of error, or if Dr. Guzzardi's testimony his opinions are generally accepted because it is based off common practices and education all doctors, and medical school students are aware of. (*Compare State v. Olenowski, Report of the Findings of Fact and Conclusions of Law,* at 129-150*, August 18, 2022,* recognizing Dr. Guzzardi's testimony among other experts, that Toxidrome recognition is widely used in most medical specialties, including emergency medicine, by nurses, and technicians in particular and that a reasonable accurate diagnosis can be made based off the toxidrome; and id. at 329-331, concluding based off the testimony of toxicologists, that the DRE protocol replicates generally accepted medical practices by emergency physicians, nurses, and technicians for identifying the presence of impairing drugs and their likely identity through a toxidrome recognition process).

In fact, in Plaintiff's brief on appeal, Plaintiff similarly failed to present any arguments as to the four factors listed by Daubert and rather summarily argues that the Court erred in permitting Dr. Guzzardi to testify that 2 mm pupils

are an accurate toxidrome indicative of heroin use and intoxication consequently effecting his peripheral vision. See Pb. 15-19.

Due to Plaintiff's failure, any argument as to each of the four factors enunciated in Daubert must be rejected by this Court if raised in response on reply as they have been waived. See Jefferson Loan Co v. Session, 397 N.J.Super. 520, 525 n.4 (App. Div. 2008); Zabodnick v. Leven, 340 N.J.Super. 94, 103 (App. Div. 2001).

A. The medical literature disclosed Plaintiff supports Dr. Guzzardi's Opinion.

Plaintiff argues to this Honorable Panel that Dr. Guzzardi's opinion that pinpoint pupils are a sign of circulating opiates; and that having pinpoint pupils effect an individual's vision at night, are both respectively unsupported by any scientific literature.

First, Plaintiff at cites to Medical Literature regarding pinpoint Pupils, entitled: About Normal Pupil Size. (Pa319-Pa332). Therein, the article comments that a "fully dilated pupil is typically in the 4-8 millimeters in size, while a constructed pupil is in the 2 to 4 mm range." (Pa320). "According to the American Academy of Ophthalmology, pupils generally range in size from 2 to 8 mm." (Pa320). This article thereafter opines that "Certain drugs can dilate pupils while others constrict them. Some drugs that affect pupil size include: []

Opiates. These are powerful drugs to treat pain. Both legal opioids (like prescription oxycodone) and illegal (heroin) can construct pupils." (Pa325).

Second, the next article the Plaintiff cites is medical literature from WebMD titled "What to Know about Normal Pupil Size" which was medically reviewed by Dan Brennan, MD, on June 16, 2021. (Pa333). This article similarly opines that "[t]he most commonly abused drugs that affect pupil size include cocaine, LSD, MDMA, **heroin**, methamphetamines, and ketamine." (Pa335).

Lastly, Plaintiff cites *Pinpoint Pupils*, which was medically reviewed by Graham Rogers, M.D. and written by Ann Pietrangelo (Pa338). This article supports that the pupil is part of the eye that controls how much light gets in. (Pa338). When it is bright out, the pupil is constricted, which permits less light to get in; however, in the dark your pupils will get bigger (dilate), thus permitting more light to get in, "which improves night vision." (Pa338). The article further indicates that "some drugs can cause your pupils to get bigger, while others make them get smaller." (Pa338). "In adults, pupils normally measure between 2 and 4 millimeters in bright light. In the dark, they usually measure between 4 and 8 millimeters." (Pa338). It further opines that pinpoint pupils could be a symptom of a disease and thereafter transitions into opioid use and responding to opioid overdoses. (Pa339). In that vein, the article explicitly finds that "one of the most likely reasons someone might have pinpoint pupils

is the use of narcotic pain medications and other drugs in the opioid family such as: [] morphine… [and] heroin." (Pa340).

These articles, as cited by the Plaintiff serve as a foundational basis demonstrating the reliability of Dr. Guzzardi's opinions.

B. The Court did not abuse its discretion when it found Dr. Guzzardi's testimony was reliable and consequently admissible after the 104 hearing.

Dr. Guzzardi is a Board Certified Doctor and has practiced medicine for the past forty years serving in both academic and professional capacities. (Pa90-107). Based off his vast experience as an Emergency Physician and Medical Toxicologist, having examined and treated about 100,000 patients during the course of practice, many of whom were under the influence of alcohol or other drugs subject or abuse, as well as having reviewed the (1) New Jersey Police Crash Investigation Report; (2) Medical records Monmouth Ocean Hospital; (3) medical Records Thomas Fredella JSUMC 11/5/2016-11/13/2016; (4) Report of David Polonet; (5) Thomas Fredella's Deposition dated July 16, 2018; and (6) Various Photographs, prepared an Expert Report dated June 1, 2020 and July 27, 2020.(Pa90-Pa107; Pa111-Pa114).

Based off his review of the file, and his synopsis of the "facts of the instant matter." He reported with confidence that the presence of 2 mm pinpoint pupils

indicated that Mr. Fredella was under the influence of an opiate at the time of his accident. (Pa92). Significantly, the Plaintiff admitted to using not one but two bags of heroin earlier in the day to the responding EMS personnel. (Pa121). Moreover, as indicated in ***Point Two (A)*** s*upra.,* the medical literature cited by the Plaintiff to the trial court demonstrates that pupils are constricted if they are from 2mm to 4mm; and one of the causes of constricted pupils is heroin/opioid use.

To this point, Dr. Guzzardi opined and the Court recognized that only four things cause pinpoint pupils, one of which is opiate use. (Pa57; Pa92). Dr. Guzzardi distinguishes the difference in life span from morphine to heroin and justifies his determination that heroin utilized in the morning or early afternoon would be present in the Plaintiff's body at the time of his accident thereby affecting the central nervous system. (Pa57;Pa92). Dr. Guzzardi then correlates the side effects of opiate use with Mr. Fredella's actions on the date of the subject accident. Leading to his conclusion, which states in relevant part: "[a]t this time, it is not possible to quantify the amount of [opiates] present in the blood and central nervous system of Mr. Fredella at the time of his accident. However, Mr. Fredella would not have had pinpoint pupils if there were not circulating opiates in his system. Therefore, I can state unequivocally that Mr.

Fredella was under the influence of opiates at the time of his accident."(Pa57; Pa92).

Dr. Guzzardi reaffirms his opinion in a supplemental report July 27, 2020. (Pa111-114). Therein, Dr. Guzzardi explains how Heroin metabolizes into morphine once it crosses the "blood brain barrier." (Pa112). Once converted, morphine has effects on "impulse control, alertness, reaction time and reflexes." (Pa112). However, the extent of the effect depends on tolerance and the levels of morphine present. (Pa112).

Notwithstanding that concession, he explains "what is not subject to tolerance are the pupillary muscles which cause pupillary contraction when morphine is present." (Pa112). Here, he opines, regardless of any effects on impulse control, alertness, reaction time or reflexes, there was diminution of peripheral vision and impaired vision in darkness by virtues of the diminished/constricted pupils. (Pa112).

His analysis of dilated pupils and the causative effect of heroin use on pupils is identical to the medical literature that was provided by the Plaintiff.

Based on the foregoing, it is inarguable that Dr. Guzzardi reviewed the file, and based off his review of the file, his vast and extensive history as an Emergency Physician, Medical toxicologist, and having been qualified as an

expert in this field of expertise over 300 times, including within the State of New Jersey. Rendered the expert opinion that Mr. Fredella was under the influence of opiates at the time of the accident. Clearly, Dr. Guzzardi's report does not qualify as "net opinion" because it is not factually supported, or is based on unfounded speculation or unquantified possibilities, which Plaintiff wishes this Honorable Panel Court accept as true.

During the 104 Hearing, Dr. Guzzardi testified that it is a common medical practice to check pupil size to monitor opioid effect. Further, establishing that it is commonly accepted in the field of emergency medicine and toxicology that variable pupil size impacts an individual's peripheral vision. In doing so, and as recognized by the trial court, he introduced several medical articles marked D3-D8 to establish he was not a "self-validating expert". See Pa59-Pa60.

The trial court recognized that Dr. Guzzardi did not opine on a scientific theory, rather, he testified on the psychological effect of heroin causing pinpoint pupils and how and why pinpoint pupils would affect night vision and peripheral vision by explaining the basis structure and mechanism of the eye. Pa60. The reliability and admissibility of Dr. Guzzardi's testimony was outlined during the 104 hearing evaluating the five articles.

Reviewing D-3 he explained that it is a common medical practice to evaluate the size of pupils to gauge whether an individual remains under the influence of an opioid. 15T61:7-63:4.

Reviewing D4 he explained t how opioids work, and how it is generally accepted in the medical field that opioids constrict pupils and how doctors use pupillary size to determine the impact of opioid use on the body. Further explaining how it was scientifically studied to utilize the toxidrome of opioid size to determine if opioid have worn off or remain present. 15T:63:5-67:1.

Reviewing D5, he explained based off scientific studies that it is commonly accepted in the medical field, that pupillary unrest means pupils get larger or smaller depending on light, and the article discuses, when you are on morphine, there is no pupillary variability, and the pupils remain constricted. 15T67:2-69:11.

Reviewing D6 he explains the studies that were performed, and the detection of opioid use based on pupil size and provides exact numbers and results. This in turn, demonstrates that a constricted pupil, in this case, 2 mm, does not permit adequate light to come in, and affects the plaintiff's peripheral vision. 15T69:12-T70:10.

Reviewing D7, Dr. Guzzardi explained that it is commonly accepted in the medical field that opioid use causes pupillary constriction and it stays constricted even in dark situations, and this is information that you learn as a second-year medical school student. That it is further demonstrative that when pupils are constricted, it is commonly understood that individuals such as plaintiff, loses peripheral vision. 15T70:11-T71:16.

Finally, reviewing D8, he explained that it is generally accepted in the medical field that increased pupil size is associated with improved detection in peripheral vision, and conversely that because of opioids impacting the size of the pupil, the plaintiff lost the ability to detect things in his peripheral vision. 15T:71:17-T72:11.

During the entire 104 hearing, Plaintiff failed to call any witness or demonstrate through admissible evidence that Dr. Guzzardi's opinion as a toxicologist was not reliable. There was no evidence submitted to refute his testimony that his opinions on the peripheral vision and variable pupil size as a positive indicator of heroin use because it was of such an elementary nature in the medical field, that it was reliable based off his background as both a toxicologist and emergency physician. Which, as recognized by the Special Master in Olenowski, was an important factor in determining the admissibility and use of toxidromes to determine intoxication.

C. Dr. Guzzardi's testimony should not be barred by Gustavson v. Gaynor, 206 N.J. Super. 540 (App. Div. 1985)

In support of Plaintiff's appeal, he continues to rely entirely on the case Gustavson v. Gaynor, 206 N.J. Super. 540 (App. Div. 1985). However, Gustavson is factually distinctive. First, Gustavson appears to procedurally follow a Trial Court's decision at a Rule 104 hearing to permit the testimony regarding the Defendant's consumption of two to three beers six hours before the accident during cross-examination. Id. at 545. Second, in reviewing the Trial Judge's decision the Court recognized the general rule that drinking alone, cannot be equated with intoxication. Id. at 545-46. Thereby finding, that merely "veering [] two or three feet out of one's lane while driving on a curving road at night is not so erratic as to suggest that the driver was probably intoxicated." Id. Justifying this determination because, there was no supplemental evidence other than admission that the Defendant drank a couple of beers several hours earlier to correlate an inference that he was intoxicated, when the accident could just as easily be attributed to a sober miscalculation. Id. Therefore, by permitting the jury to hear such testimony without any supplemental evidence to corroborate the Defendant's consumption to driving while intoxicated, the prejudicial effect clearly outweighed its probative value.

It is important to note that the consumption of alcohol in and of itself does not qualify an individual as intoxicated; rather, the person must have a Blood Alcohol Content of over a .08. N.J.S.A. 39:4-50. There is no similar threshold for intoxication with heroin.

Here, there is ample evidence in the record as cited by Dr. Guzzardi to support the finding that Mr. Fredella was under the influence of Heroine at the time of accident. First, while being treated by First Responders, Mr. Fredella admitted to using two bags of heroin earlier that day. (Pa92; Pa121). Significantly, at this time his physical examination revealed scars compatible with long term heroin abuse and 2 mm pupils ("pinpoint pupils"). This was immediately after the accident. It was also noted that Mr. Fredella did not experience a head injury or a concussion. (Pa92). Following his evaluation with first responders, Mr. Fredella was transported to JSUMC, upon arrival it was again noted that his pupils were constricted.

Defendant's expert, Dr. Guzzardi, a certified and respected medical provider opined with certainty that Mr. Fredella was under the influence of an opiate at the time of his accident. Conversely, no expert was present in Gustavson to comment upon the nexus between alcohol use and the Defendant's conduct. Rather, it was the scope of the Defendant's own permitted testimony

which was examined. And it was the scope of the Defendant's permitted testimony which was explicitly condemned under N.J.R.E. 403.

Here, before this Honorable Panel is the question of whether the Lower Court abused its discretion when it did not bar Dr. Guzzardi's opinion as a net opinion. In that vein, the Lower Court authored three opinions on this topic. In the Lower Court's opinions, Judge Den Uyl evaluated the standard for what qualifies as a net opinion. (Pa32 & Pa40). Judge Den Uyl, thereafter reaffirmed a Court's reluctance to bar expert testimony. (Pa32 & Pa40). After establishing the relevant controlling principles governing the Lower Court's review of the matter, Judge Den Uyl engaged in an extensive factual and legal analysis of the cases argued by the Plaintiff, including Gustavson. (Pa32-Pa35 & Pa40-42). In reviewing these facts, the Lower Court definitively found under N.J.R.E. 702 that Dr. Guzzardi is qualified to testify; his testimony is not excludable under N.J.RE. 403; and that he provided sufficient "why's and wherefores" to support the opinions expressed in his report. (Pa34; Pa40-Pa42). Furthermore, on remand for a 104 hearing, the Trial Court similarly found that Dr. Guzzardi's opinions under N.J.R.E. 403 was relevant and the probative value was not substantially outweighed by the risk of undue prejudice. Pa61. In so finding, the Court recognized that the plaintiff did not call his own toxicologist to contract Dr. Guzzardi's testimony. Pa61. The Court further recognized that defendants

in fact would have been unduly prejudiced had they not been able to call Dr. Guzzardi, because his testimony goes squarely to Plaintiff's liability in failing to operate a motor vehicle as a reasonable person would, because the use of heroin eliminated his ability to see peripherally, and the consequently the giant blinking sign on the back of the NJDOT truck.

Based, off the foregoing, it is respectfully submitted that the Plaintiff has failed to demonstrate that the Lower Court abused its discretion in failing to find Dr. Guzzardi's opinions qualify as net opinion and thus should be barred. As a result, this Honorable Court is respectfully requested to affirm the trial courts Order.

D. Expert testimony relying upon toxidromes is generally accepted by the Courts.

Physical indicators and psycho-physicals are routinely accepted in DUI cases involving drugs and Drug Recognition Experts ("DRE"), who are little more than police officers with specialized training. Not doctors with 40 years of experience and over 100,000 patients, many of whom were under the influence of alcohol or drugs.

That being said, the term "under the influence" in our DUI jurisprudence means:

> a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit-producing drugs.... [A] condition which so affects the judgment or control of a motor vehicle operator as to make it improper for him to drive on the highway .... [or] if the drug produced a narcotic effect "so altering his or her normal physical coordination and mental faculties as to render such person a danger to himself as well as to other persons on the highway.
> [State v. Tamburro, 68 N.J. 414, 421 (1975)].

Establishing whether the drug was the proximate cause of the defendant's behavior can be done in a number of ways. The New Jersey Supreme Court explained in Tamburro, that "a qualified expert" can opine that a defendant is "under the influence" of a drug or narcotic" from the subject's conduct, physical and mental condition and the symptoms displayed. Tamburro, supra at 421. In another Supreme Court case the Court explained that "where a qualified expert testifies as to the characteristics of a drug and its effect on an individual, that testimony will be sufficient to establish that the drug will render a person a danger to himself or others on the highway. State v. Dicarlo, 67 N.J. 321, 328 (1975). Alternatively, a non-expert witness, such as police officer who has had "specific schooling and training in the field of narcotics … if sufficiently experienced and trained may testify generally as to the observable reaction of drug users." State v. Jackson, 124 N.J. Super. 1, 4 (App. Div.) certify. denied. 63 N.J. 553 (1973).

With respect to using pinpoint pupils as an indicator of intoxication based off drug use, the Supreme Court in Tamburro, and Olenwosky 2 answered this question. There, the Defendant was pulled over and asked to get out of the car, when the defendant did so, the officer noticed that the defendant's eyes were bloodshot and glazed **with pinpoint pupils**. Tamburro at 417. That officer, who had undergone special training and education in the drug detection and drug abuse field, said to the defendant that he appeared to be under the influence of drugs, whereupon the defendant stated that he had taken 120 milligrams of methadone earlier that day. Id. at 418. The Defendant was thereafter asked to perform a walk in turn test and eye test which he failed. Id. Notably no blood or urine tests were given. Id.

The Supreme Court accepting those facts found that the State met its burden of proving beyond a reasonable doubt that the Defendant was guilty of driving under the influence. Id.

There is a significantly less burden of proof in civil matters then in criminal matters, nevertheless DUI jurisprudence is relevant in evaluating Dr. Guzzardi's opinion and the nexus he has developed. Thus, despite the arguments advanced by Plaintiff that physical indicators is not sufficient to establish heroin use, the truth is just the opposite, when coupled with Dr. Guzzardi's vast experience, expertise, and Plaintiff's express admission to heroin use.

With this in mind, N.J.R.E. 702 provides that: "if scientific, technical, or otherwise specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert, by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." N.J.R.E. 702.

To satisfy the rule, the Supreme Court has explained, requires the proponent of expert establish three things:

> (1) the subject matter of the testimony must be "beyond the ken of the average juror;" (2) the field of inquiry "must be at a state of the art such that an expert's testimony could be sufficiently reliable;" and (3) "the witness must have sufficient expertise to offer the testimony."
>
> State v. Kelly, 97 N.J. 178, 208 (1984).

The second requirement – assuring that the proposed expert testimony is "sufficiently reliable" is the issue in this matter on appeal. Evidence is sufficiently reliable, if "it is generally accepted." id. at 213 n. 19. Evidence can prove its general acceptance and reliability in ore of more of three ways: (1) through expert testimony; (2) by authoritative and legal writings; and (3) by judicial opinions. Id. at 209-10. However, the general acceptance standard, "does not mean that there must be complete agreement in the scientific community about the techniques, methodology, or procedures that underlies the scientific evidence." State v. Chun, 194 N.J. 54, 91-92 (2008).

Consistent with the foregoing principles, and explained herein above, Dr. Guzzardi's testimony, that constricted pupils, of 2 mm in size, that he calls pinpoint pupils, is a reliable toxidrome of heroin use, and that based off having constricted pupils at the time of the accident it is commonly accepted that an individual, such as the plaintiff, loses his ability to see peripherally.

In summation, the above demonstrates: (1) that Dr. Guzzardi is a qualified and experienced toxicologist; (2) the record before this Honorable Court through medical literature demonstrates Heroin use causes constricted (pin-point pupils) and that constricted pupils effect an individual peripheral vision/ability to see in the dark; (3) that the opinions by Dr. Guzzardi based off the presence of a toxidrome, can be testified, has been tested, has been reviewed by peers and published, has been statistically evaluated to determine the rate of error in the analysis, and importantly is generally accepted by the medical community; and (4) Courts have consistently permitted experts to rely upon physical indicators-toxidromes-to establish the presence of the presence alcohol/narcotics in an individual.

POINT TWO

THE LOWER COURT DID NOT ABUSE ITS DISCRETION WHEN IT FAILED TO EXCLUDE DR. LAWRENCE GUZZARDI'S TESTIMONY UNDER N.J.R.E. 403. (Pa55-Pa62)

By its very nature, all adverse evidence is prejudicial to a party's case. However, just because evidence is prejudicial does not mean it should be barred.

N.J.R.E. 401 instructs that "'relevant evidence' means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. The rule on its faces references two elements that must be satisfied. First, the evidence must have a "a tendency in reason to prove or disprove" a fact[]" also referred to as "probative value." State v. Burr, 195 N.J. 119, 127(2008); Simon v. Graham Bakery, 17 N.J. 525, 530 (1955). Second, is that fact to be proved must be a fact of consequence in the matter. Marsh v. Newark Heating, & C. Machine Co., 57 N.J.L. 36, 42 (Sup. Ct. 1894) (stating that the evidence must touch upon an issue made by the parties in their pleadings).

In determining the probative value of evidence, the inquiry must focus upon "the logical connection between the proffered evidence and a fact in issue[.]" Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 15 (2004). By contrast, evidence is not relevant in the sense that it lacks probative value when it does

not justify any reasonable inference as to the fact. State v. Allison, 208 N.J. Super. 9, 17 (App. Div.) cert. den. 102 N.J. 370 (1985). Whether a logical connection exists rests in the discretion of the Court. State v. Sturdivant, 31 N.J. 165, 179 (1959).

With respect to the second prong, the phrase "facts of consequence" is derived from the federal rule which eschewed the word "materiality." State v. Hutchins, 241 N.J. Super. 353, 359 (App. Div. 1990). This phrase looks at the relations between the propositions for which the evidence is offered and the issues in the case. Allison, supra at 17; see for example Hall v. St. Joseph's Hosp., 343 N.J. Super. 88, 106 (App. Div. 2001) Certif. Den. 171 N.J. 336 (2002)(finding in a discrimination case based on a hospitals failure to provide an interpreter for a deaf person that evidence of the person's request during prior hospitalizations for an interpreter was not needed to establish notice because notice was not an element of the claim.).

In the event proffered evidence is deemed relevant within the meaning of N.J.R.E. 401, N.J.R.E. 402 provides that "all relevant evidence is admissible, except provided in these rules or by law." N.J.R.E. 402. Consequently, under the provisions of N.J.R.E. 403 a trial court may exercise its discretion to exclude admissible evidence if it finds that the probative value of such evidence is

outweighed by the counterfactors enumerated in that rule Miller v. Muscarelle, 67 N.J. Super. 305, 318-319 (App. Div.) cert. den. 36 N.J. 140 (1961).

N.J.R.E. 403 states that the court may exclude evidence if its probative value is substantially outweighed by "the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence." See State v. Gallicchio, 51 N.J. 313, 321 (1968) (trial judge has discretion to exclude evidence if he finds probative value is substantially outweighed by risk that admission will create substantial danger of confusing issues or misleading jury). See also Green v. New Jersey Mfrs. Ins. Co., 160 N.J. 480, 492 (1999). The New Jersey Rules of Evidence indicates that the only evidence that may be produced in order to impeach or attack the credibility of a witness is that which contradicts or calls into question the witness' version of the facts. See comment 1, N.J.R.E. 607. See also Green v. N.J. Manufacturers, supra. Irrelevant evidence which might improperly affect the credibility of a witness should not be admitted. State v. Hutchins, 241 N. J. Super. 353 (App. Div. 1990) Further, the trial court ultimately maintains broad discretion under N.J.R.E. 403 to exclude relevant impeachment evidence if the court finds the probative value of the evidence is substantially outweighed by its prejudice or any of the counter-factors mentioned in that Rule. See comment 1, N.J.R.E.607.

Keeping these principles in mind, Model Jury Charge 5.30L *Effect of Intoxication on Duty Owing (By Automobile Driver)* requires the jury evaluate, based off the testimony presented, and determine, if the Plaintiff was under the influence of heroin at the time of accident, and if the heroin impaired his ability to drive. This charge was also read to the Jury. (11T 26:18-27:7; 11T 138:18-139:6).

It would be the quintessential example of a fallacy to argue that evidence regarding Plaintiff's heroin use prior to the accident and its adverse effect is not prejudicial. However, being prejudicial alone is not the standard that this Honorable Court must apply. Rather, the aforementioned case law requires this Court determine if the Law Division abused its discretion in finding testimony regarding Plaintiff's heroin use was properly admissible under N.J.R.E. 403. This analysis requires this Court further evaluate the evidence under N.J.R.E. 403, and make a finding that that the Law Division's decision to permit testimony regarding Plaintiff's heroin use was so wide off the mark that it resulted in a manifest miscarriage of justice, because its probative value was substantially outweighed by its prejudice.

Consequently, the facts of this case are significant. As presented by the Plaintiff the Jury could believe that the NJDOT failed to turn the giant 4x8 flashing yellow arrow board on the night of Plaintiff's accident which caused

him to fail to see it; or the Jury could agree with the Defendant that the NJDOT did turn the giant 4x8 flashing yellow arrow board on, and the plaintiff failed to operate his motor vehicle with due care which resulted in his accident. This analysis at its heart calls into question Plaintiff's conduct in driving his vehicle.

The undisputed facts here established that the Plaintiff took heroin. The undisputed facts here established that the Defendant's Expert toxicologist Dr. Guzzardi unequivocally opined that based off the Plaintiff's medical records, namely pinpoint pupils, and his admission to taking heroin, that the Plaintiff was still under the adverse effects of heroin at the time of the accident. The only question is whether there was enough evidence to tie the admission of heroin and the pinpoint pupils into the case. That tie came by way of Dr. Guzzardi, who for the sake of not beating the horse anymore is clearly a qualified expert to connect all the dots together.

Further, this evidence goes directly to Model Jury Charge 5.30L, which charges the jury to determine, based off the evidence presented, if the Plaintiff was under the influence of heroin and if that influence effected his ability to drive.

As a result, it is clear that the testimony regarding Plaintiff's heroin use certainly satisfied N.J.R.E. 401 and 402. As a result, the foregoing makes clear

that the subject testimony did not violate N.J.R.E. 403 because there was sufficient evidence to directly tie Plaintiff's heroin use to affecting his ability to drive at night, because as Dr. Guzzardi's opinion makes clear, the presence of pinpoint/constricted pupils diminishes a person's ability to see at night, including their peripheral vision.

Therefore, it is respectfully submitted that the Law Division did not abuse its discretion in permitting testimony pertaining to Plaintiff's heroin use at the time of trial. The Plaintiff has simply failed to meet his burden and demonstrate otherwise.

CONCLUSION

For the aforementioned reasons it is respectfully requested that this Honorable Court affirm the findings of the Lower Court.

Respectfully submitted,

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Attorneys for Defendant

Dated: May 9, 2025

/s/ Patrick F. Varga
PATRICK F. VARGA, ESQ
For the firm

THOMAS A. FREDELLA AND KELLY A. KEARNY, Plaintiffs,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
V.	:	DOCKET NO: A-001299-24T4
TOWNSHIP OF TOMS RIVER AND/OR ABC CORPORATION, STATE OF NEW JERSEY DEPARTMENT OF TRANSPORTATION, STATE OF NEW JERSEY DEPARTMENT OF THE TREASURY-FLEET MANAGEMENT AND/OR DEF CORPORATION, (A FICTITIOUS NAME), RICHARD ROE 1-5, (A FICTITIOUS NAME), Defendants.	:	ON APPEAL FROM: LAW DIVISION, OCEAN COUNTY DOCKET NO: OCN-L-3198-17 Civil Action SAT BELOW: Hon. James Den Uyl

REPLY BRIEF OF PLAINTIFFS/ APPELLANTS

Amended: May 20, 2025

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POINT ONE

THE TRIAL COURT AND THE DEFENDANT'S REPLY BRIEF DID NOT ADDRESS THE MAIN ISSUE THE PRIOR APPELLATE PANEL ASKED THE TRIAL COURT AND THE PARTIES TO ADDRESS.

In its Reply brief, the Defendant strenuously argued that Dr. Lawrence Guzzardi was qualified to render ophthalmological opinions about how the human pupil functions while on opiates. It repeatedly argued that Dr. Guzzardi was qualified to render opinions about how the human pupil constricts in darkness, while on opiates, and how that constriction limits peripheral vision, the ability of the pupil to fully open and the ability to see well at night. Significantly, the Plaintiff has never disputed those basic facts. In fact, the Plaintiff has admitted that all human pupils constrict, often significantly, in darkness.

As the first Appellate panel noted, the Plaintiff challenged--and continues to challenge-- whether his pupils were ABNORMALLY constricted at the time of his accident and, if so, whether evidence about the size of his pupils was relevant to any issue in this case. In that regard, in its prior opinion, the first Appellate panel wrote:

> On appeal, Plaintiff does not dispute that heroin can cause pinpoint pupils but rather challenges the definition of pinpoint pupils, whether his presentation fit that definition, whether the presence of pinpoint pupils was an accurate estimate that he remained under the influence of heroin and whether his pinpoint pupil impacted his vision. (Pa642 and Pa645-Pa646, which addresses the substantial contributing factor element referenced above.)

As such, the first question that the trial court needed to address was whether the

Plaintiff had pinpoint pupils at the time of his accident. Significantly, the trial court never addressed this issue. Rather, once it concluded the Defendant's expert had more than a lay person's understanding of the human pupil, the trial court allowed the Defendant's expert to offer any opinion he thought relevant (or helpful), even if it did not meet the requirements of Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993) or N.J.E.R. 702.

While this subject was discussed at length in the Plaintiff's initial brief---see Pb15-19—the Defendant never addressed this subject in its Reply brief. Plaintiff believes the Defendant did not address this subject in its Reply brief because there are no studies, tests, texts or treatises that support Dr. Lawrence Guzzardi's personal opinions. Specifically, there are no studies, tests, texts or treatises that stand for the proposition that a normal human pupil is 3mm-7mm, that a 2mm pupil is an abnormal, "pinpoint pupil" and that a human pupil cannot contract to a diameter of less than 2mm's.

As detailed in the Plaintiff's initial brief, pinpoint pupils is a lay term. The medical term is miosis. (Pb15) In its initial brief, the Plaintiff cited generally accepted medical definitions of miosis that the Defendant never challenged in its Reply brief. As such, this Court should accept the definitions cited in the Plaintiff's initial brief. That is, miosis is defined as "EXCESSIVE constriction of the pupil of the eye," (emphasis added) which is further defined as "less than 2mm in diameter." (Pa657 and Pb15)

Additionally, even though the Defendant has the burden of proof on the evidence it proffers, the Plaintiff cited the American Ophthalmologic Society's Guidelines on this subject and other peer revealed articles in support of his position. (Pb15) All of the referenced guidelines and peer reviewed literature stand for the proposition that normal people, who have not consumed heroin and are not under the influence of any drug, can still have 2mm pupils at night.

Significantly, the Plaintiff's pupils were never less than 2mm at any time on the evening in question and most of his pupil readings at Community Hospital were 3mm or greater. (Pa124-Pa208). Consequently, the trial court should never have allowed any heroin evidence to be submitted to the jury in this case because the Defendant never offered any proof that the Plaintiff's heroin consumption on the day of his accident caused his pupils to become ABNORMALLY constricted. It also never provided any evidence that the Plaintiff's heroin use contributed to his accident.

Throughout the course of this litigation, the Defendant's expert admitted that the trained, veteran investigating police officer, the experienced EMT's who came to the accident scene, the supervising triage nurse at the hospital and all other hospital personnel---including the anesthesiologist who sedated the Plaintiff before his surgery within 24 hours of his accident--- did not believe that the Plaintiff exhibited any signs of intoxication. As such, there was no blood drawn and the Defendant cannot point to any objective test to establish that the Plaintiff was

intoxicated on the evening in question. (15T-78-16 to 24 and 7T154016-23) Therefore, the only "evidence" the Defendant relied upon for its proffer was the Plaintiff's alleged pinpoint pupils. Significantly, the Plaintiff never had "pinpoint pupils," as that term is defined in the medical literature, on the night of his accident.

As discussed in the Plaintiff's initial brief, the human pupil can constrict to 1mm in size. (Pb18) The Defendant did not challenge this fact in its Reply brief. This is important because the expert the Defendant proffered to offer nuanced ophthalmological opinions at trial clearly does not understand the basic function and anatomy of the human pupil. In that regard, Dr. Lawrence Guzzardi repeatedly testified at trial and at the Daubert hearing that the human pupil is only capable of constricting to 2mm. (Pb17-18) He repeatedly testified that it was impossible for the human pupil to constrict to less than 2mm. In fact, he testified at the Daubert hearing that obtaining a pupil reading below 2mm would be like obtaining a blood pressure level below zero. (15T52-19-22). This testimony is absurd. It is even contradicted by one of the (irrelevant) learned treatises the Defendant cited at the Daubert hearing. Specifically, Pa676 contains a chart documenting that the author's study noted some of the volunteers who participated in the study had pupils that measured 1.5mm in size. (Pb18-19 citing Defendant's article at Pa676)

At the Daubert hearing, admittedly without citing any studies, tests, texts or treatises in support of his personal opinions, Dr. Lawrence Guzzardi, after changing his testimony/range three times, testified that normal human pupils range in size

from 3mm-7mm. (Pb16) And, since the Plaintiff's pupils were guesstimated by an EMT, without the use of a Rosenbaum gauge, to be 2mm in diameter, the Plaintiff had "pinpoint pupils" at the time of his accident. There is no scientific basis for this conclusion.

In the first Appellate panel's opinion, it instructed the trial court to determine if Dr. Guzzardi correctly defined pinpoint pupils and, if he did, to then determine if there was scientific support for the proposition that pinpoint pupils are a sign a person is under the influence of opiates. (Pa640 and Pa642) The trial judge never addressed those issues in his December 30, 2024 letter opinion. (Pa55-Pa61)

As previously noted, the Defendant has the burden of proving that its proffered evidence is admissible. N.J.E.R. 104(a) and Smith v Estate of Kelly, 343 N.J. Super 480 at 7 (A.D. 2001) In the instant case, therefore, in accordance with the second prong of N.J.E.R. 702, the Defendant had the burden of proving that a normal human pupil is at least 3mm in diameter (so that the Plaintiff's 2mm pupil would constitute an abnormally constricted pupil and/or evidence of active opiates in his system.)

Under N.J.E.R. 702 and Daubert, as interpreted by State v Olenowski, 253 N.J. 133 at 149 (2023) citing In re Accutane, 234 N.J. 340 (2018), the Defendant had the obligation at the Daubert hearing to produce any and all studies, tests, texts and treatises that supported its expert's personal opinion that a normal human pupil is at least 3mm in diameter. At the Daubert hearing, Dr. Guzzardi admitted he did not

produce any such studies, tests, texts or treatises. (7T98-16 to 99-9) Moreover, Dr. Guzzardi did not produce any literature, document or caselaw to establish that it is generally accepted in the scientific community that a normal human pupil is at least 3mm in diameter. On the contrary, he acknowledged his opinions were based solely on his personal experience.

In the first Appellate panel's opinion, the prior Appellate panel emphasized the importance of "testability" in determining whether a theory is scientifically reliable. (Pa638). Clearly, the diameter of a human pupil in various lighting conditions can easily be tested. Yet, Dr. Guzzardi did not produce any study or test to support his personal opinion. The first Appellate panel, when remanding this case, cautioned the trial judge not to substitute his personal opinion, or the Defendant's self-serving expert's personal opinion, for that of the scientific community. (Pa637) Frankly, that is exactly what the trial judge did as his December 20, 2024 letter opinion does not even address the court's basis for accepting Dr. Guzzardi's self-serving opinion that 2mm pupils are abnormal. The trial court also did not address Dr. Guzzardi's obvious lack of expertise on this subject.

Furthermore, for what it is worth, even though the Plaintiff does not have any burden of proof on this issue, it is important to note that the facts in this case also support the Plaintiff's position. At the Daubert hearing, Dr. Guzzardi testified that a person's eyes, if they are under the influence of opiates, do not have the ability to dilate because the opiates keep their pupils artificially small regardless of the amount

of light coming into the eye. (7T50-21 to 51-11). Significantly, in the instant case, in the minutes/hours after the accident, the Plaintiff's pupils were measured at 2mm, 3mm and 4mm. (Pa120-Pa208.) As such, his eyes did have the ability to dilate and they did dilate.

In conclusion, the Defendant's proffered ophthalmological expert only cited his personal opinions at trial, and at the Daubert hearing, regarding normal and abnormal pupil size. He did not cite one study, test, text or treatise that supported his opinions and he did not provide any documentation/proof that his personal opinions were generally supported by the medical community. In short, his proffer was woefully insufficient to meet the requirements of Daubert and N.J.E.R. 702. As such, this trial court abused its discretion when it allowed Dr. Guzzardi to share unsupported, unreliable, personal ophthalmological opinions with the jury. Therefore, the Plaintiff should be awarded a new trial.

EVEN IF THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING DR. LAWRENCE GUZZARDI TO OFFER OPHTHALMOLOGICAL OPINIONS AT TRIAL, HIS OPINIONS SHOULD STILL HAVE BEEN BARRED AS THEY WERE IRREVELANT TO ANY ISSUE IN THE CASE AND/OR NET OPINIONS.

In the first Appellate panel's decision, the panel cautioned that even if Dr. Guzzardi's testimony was accepted as scientifically reliable, and even if the Defendant's expert could establish that the Plaintiff's heroin use affected his vision, his testimony could still be barred as an inadmissible net opinion unless the doctor could reliably testify about how the Plaintiff's impaired vision

contributed to his accident. (Pa644)

In the instance case, Dr. Guzzardi admitted that he could not quantify the amount of opiates in the Plaintiff's system at the time of his accident; he admitted that the amount of opiates could have been trivial; he admitted he could not testify any opiates in the Plaintiff's system affected his reflexes or judgment; he admitted that he could not testify the Plaintiff's heroin use contributed to his accident; he admitted he could not testify a totally sober person would have driven differently on the evening in question and he admitted that he could not testify the Plaintiff's opiate use was a substantial contributing factor in his accident. (15T109012 to 117-21 and 121-17 to 21)

All evidence offered at trial must be relevant. N.J.E.R. 401 defines relevant evidence as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." In light of Dr. Guzzardi's admissions, since he could not connect the Plaintiff's heroin use and/or lack of vision to his accident, his testimony – even if accepted by Daubert and N.J.E.R. 702 standards -- is irrelevant to any fact in this case because it does not have any tendency in reason to prove anything.

To phrase it more bluntly, the Defendant should not have been allowed to advise the jury that the Plaintiff injected heroin 8-10 hours before his accident if it could not prove his heroin use rendered him "under the influence" of opiates at the time of his accident and if it could not prove that his heroin use was a

substantial contributing factor in his accident. Significantly, the Defendant could not prove either of those things, as Dr. Guzzardi admitted that an accident reconstruction expert was necessary to establish such a connection. (15T 120-3 to 121-20)

Consequently, regardless of the strength of his opinions, Dr. Guzzardi's opinions were irrelevant to any issue in the case and/or net opinions as they were not supported by factual evidence and they did not "explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom. "Kaplan v Skoloff Wolfe, P.C., 330 N.J. Super 102 (A.D. 2001) (quoting Bucklew v. Grossbard, 87 N.J. 512, at 524 (1981.))

EVEN IF THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED DR. LAWRENCE GUZZARDI TO OFFER OPHTHALMOLOGICAL OPINIONS AT TRIAL, HIS OPINIONS SHOULD HAVE BEEN BARRED BECAUSE THEY DID NOT SATISFY THE SUPPLEMENTAL EVIDENCE REQUIREMENT OF GUSTAVSON V GAYNOR, 206 N.J. SUPER 540 (A.D. 1985)

In Gustavson, the Appellate Division held that, while evidence of intoxication is relevant to the issue of negligent driving, a reference to liquor is only relevant "if it is asserted that it affected his ability to drive." Id. At 544. Moreover, it held that, in order to admit alcohol evidence into evidence in the future, the proponent would have to submit "supplemental evidence" that alcohol was a substantial contributing factor in the accident. Id. at 545. In the instant case, the Defendant has not submitted any supplemental evidence of intoxication and

its expert admitted that he could not prove that the Plaintiff's heroin use substantially contributed to his accident. (15T121-1 to 20)

Furthermore, as the prior Appellate panel noted, "under the influence" means a "substantial deterioration or diminution of the mental facilities or physical capabilities of a person whether it be intoxicating liquor, narcotic, hallucinogenic or habit produced drug." (Pa624-Pa654 at Pa646 footnote 9) At the Daubert hearing, Dr. Guzzardi admitted that he could not quantify the level of the Plaintiff's impairment and conceded it may have been trivial. (15T132-14 to 133-4) As such, the trial court should have barred Dr. Guzzardi's testimony because it did not meet the supplemental evidence requirement of Gustavson.

The Defendant, in its Reply brief, attempted to distinguish Gustavson by pointing out that the Defendant in that case did not have an expert witness to support its proffer. (Db21) The Defendant's argument is a distinction without a difference because Dr. Guzzardi could not meet the requirements of the case's holding. That is, even he could not provide the necessary causal connection (between Plaintiff's heroin use and his accident) mandated by the Gustavson holding. Dr. Guzzardi could not establish the Plaintiff's heroin use rendered him under the influence of opiates at the time of his accident and/or unable to safely operate a motor vehicle. He also could not establish that the Plaintiff's heroin use substantially contributed to his accident. Consequently, the Defendant's expert's testimony should have been barred.

THE DEFENDANT'S RELIANCE ON DRUG RECOGNITION EXERT CASES IS MISPLACED AND ACTUALLY SUPPORTS THE PLAINTIFF'S POSITION

In its Reply brief, the Defendant cites various caselaw standing for the proposition that New Jersey Courts recognize Drug Recognition Experts (DRE), who have specialized training, to offer opinions about intoxication. (Db23) Significantly, New Jersey DRE are allowed to testify, after they are qualified, about the physical testing they performed and the results of that testing. State v Tamburro, 68 N.J. 414 at 421 (1925)

In the instant case, the investigating police officer, two experienced EMT's, the hospital's triage nurse and all pre-and post op medical personnel, including the anesthesiologist who prepared the Plaintiff for surgery, did not believe the Plaintiff was under the influence of alcohol or drugs on the evening in question. (7T61-10 to 62-8, 7T89-9 to 91-2 and 7T136-10 to 18) Additionally, the veteran police officer who thoroughly investigated the Plaintiff's horrific accident did not document "pinpoint pupils" in his accident report and he also testified, at deposition, that he did not believe the Plaintiff was under the influence of alcohol or drugs on the evening of his accident. (Pa116-119 and Pa209-Pa276.) Consequently, this is no DRE evidence in this case.

Additionally, Dr. Guzzardi never reviewed the Plaintiff's prior ophthalmological records and he never examined the Plaintiff. (15T107-25-108-

1 and 120-124) As such, there was no DRE, EMT or contemporaneous medical evidence in this case to establish that the Plaintiff exhibited any signs of intoxication on the night of his accident. Consequently, the DRE evidence in this case, or rather the lack thereof, supports the Plaintiff's position.

REGARDLESS OF THE STRENGTH OR WEAKNESS OF THE TRIAL COURT'S OPINION REGARDING THE DAUBERT CRITERIA, N.J.E.R. 702, THE RELEVANCE OF THE PROFFERED EVIDENCE, THE NET OPINION RULE, AND THE GUSTAVSON HOLDING, THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT CONCLUDED THE PROBATIVE VALUE OF DR. GUZZARDI'S TESTIMONY WAS NOT SUBSTANTIALLY OUTWEIGHTED BY THE DANGER OF UNFAIR PREJUDICE.

With all due respect to the trial court, its bias is clear from its written opinion. (Pa55-61) Specifically, while attempting to justify its opinion that the probative value of the Plaintiff's unquantifiable limited vision outweighed the prejudice of advising the jury that the Plaintiff injected heroin almost ten hours before his accident, the trial court wrote: it would have been unduly prejudicial to Defendant to withhold (the heroin) testimony from the jury. (Pa55-61) Really? Again, with all due respect to the trial court, the Plaintiff believes that sentence is absurd and exhibits a clear defense bias.

Stated another way, despite the very similar and undistinguishable federal court case law cited by the Plaintiff in his initial brief, at Pb27-29 -- which the Defendant did not even attempt to distinguish in its Reply brief -- the trial judge still concluded a toxicologist's personal opinions on complicated

ophthalmological issues, which he admitted he could not relate to the actual happening of the accident, outweighed the prejudice of advising the jury that the Plaintiff was a heroin addict. (The tangential evidence about the EMT's inability to locate a vein in the Plaintiff's arm and track marks on his arm on the night of his accident screamed heroin addict and not heroin user.) Clearly, the trial court abused its discretion regarding N.J.E.R. 403.

The trial court's abuse of discretion is also apparent when Model Jury Charge 5.30 is reviewed. The charge reads, in pertinent part, as follows:

> If a person, although intoxicated, drives his/her vehicle in a proper manner and as a reasonably prudent sober man would, he/she cannot be held liable for damage inflicted by his/her vehicle merely because he/she was intoxicated at the time.

In the instant case, the Defendant did not offer any evidence that the Plaintiff's alleged heroin use contributed to his accident. In fact, its expert conceded he could not quantify the amount of opiates in the Plaintiff's system at the time of his accident, whether said opiates made it unsafe for him to operate a motor vehicle and/or contributed to his accident. As such, there was no basis for the trial judge to give this jury charge. There was no basis, in light of the Defendant's failure to put forth evidence relevant to this jury charge, to conclude that any of the proffered "heroin evidence" was relevant or probative. Yet, the trial court allowed the jury to hear it. Regardless, the probative value of this "evidence" was greatly outweighed by its prejudice and the trial court clearly abused its discretion when it abandoned its gatekeeping duties and allowed the

jury to consider such irrelevant, prejudicial evidence in this case.

CONCLUSION

There are at least six good reasons to grant the Plaintiff a new trial. First, the Defendant's expert was not qualified to render complex ophthalmological opinions. Second, the Defendant's expert offered personal opinions that did not satisfy the Daubert criteria or N.J.E.R. 702. Third, the Defendant's opinions were irrelevant and/or net opinions. Fourth, the Defendant's expert could not prove the Plaintiff was "under the influence" of opiates at the time of his accident or otherwise satisfy the supplemental evidence requirement of Gustavson. Fifth, the Defendant could not establish the Plaintiff's heroin use contributed to his accident. Finally, the heroin evidence the trial judge allowed into evidence in this case was substantially prejudicial and irrelevant or marginally relevant to any issue in the case. Therefore, it should have been barred by N.J.E.R. 403.

Consequently, the Plaintiff should be awarded a new, fair trial.

Respectfully Submitted,
Gelman Gelman Wiskow
& McCarthy LLC

/s/ Phillip C. Wiskow
PHILLIP C. WISKOW, ESQ.