Superior Court of New Jersey
Appellate Division
Docket No. A-002181-23

BRENDA ZADJEIKA,

PLAINTIFF-APPELLANT,

v. CIVIL ACTION

NJ AMERICAN WATER,
BOROUGH OF HADDONFIELD,
HADDONFIELD SHADE TREE
COMMISSIONS, JOHN DOES 1-10,
AND ABC COMPANIES 1-10,

DEFENDANTS-RESPONDENTS.

On appeal from a final judgment
entered in the Superior Court
of New Jersey, Law Division,
Camden County, CAM-L-1057-21
John S. Kennedy, J.S.C. and a jury

BRIEF OF APPELLANT

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Procedural History[1]

Plaintiff sued (1) public entities, Haddonfield and its Shade Tree Commission, and (2) private entity, New Jersey American Water, for negligence, negligence *per se*, and maintaining a dangerous condition, after a black oak tree located on a neighboring property struck a pin oak tree located on a curb strip next to plaintiff's property, and both trees crashed onto the roof of Plaintiff's home, demolishing it, in June 2020. A1-13. Defendants filed Answers denying plaintiff's claims. A14, 23.

All defendants moved for summary judgment; plaintiff opposed. A3, 183. By February 3, 2023 Order, the trial court granted summary judgment for the Haddonfield defendants but denied summary judgment for American Water. A219.

Before trial on plaintiff's claims against American Water began, the court issued orders deciding various *in limine* motions -- permitting American Water to present testimony at trial about the management of the tree by another entity

[1] References to transcripts are as follows:

1T 2/3/23 (summary judgment motion)
2T 1/8/24 (trial)
3T 1/9/24 (trial)
4T 1/10/24 (trial)
5T 1/11/24 (trial)
6T 1/12/24 (trial)
7T 1/17/24 (trial)
8T 1/18/24 (trial)
9T 3/1/24 (new trial/additur)

(PSE&G), precluding plaintiff from presenting testimony from medical providers and other evidence about the permanent injuries and wage losses she had sustained and other rulings (A269-76).

Plaintiff's claims against American Water were then tried before a jury, which returned a verdict for plaintiff but for only $173,000 -- despite the extensive property and personal loss that plaintiff had suffered. A278. The court denied plaintiff's motion for new trial or additur by Order of March 1, 2024, then entered a final judgment on March 6, 2024. A348-49. Plaintiff appeals; defendant American Water cross-appeals. A351, 356.

Statement of Facts

Haddonfield acknowledged that it was responsible for all trees located on property that it owned, and that it cared for all such trees, through its Shade Tree Commission and other efforts – including a tree inventory program from ArborPro (A38) that complied an inventory of Borough-owned trees. A144.

The pin oak that crashed onto plaintiff's home was located on a curb strip, next to plaintiff's home, that Haddonfield owned.

The black oak that crashed onto plaintiff's home was located on private property, 263 Lake Street, that Haddonfield did not own when the tree fell. The record showed, however, that Haddonfield had owned the property for many years prior – until it sold the property to American Water in 2015. Page 60 of

Haddonfield's tree inventory list referenced the black oak tree, in fact (Haddonfield's counsel said that the black oak's designation of "NA" on the inventory list because the Lake Street property was no longer owned by the Borough, though the record does not clarify when this "NA" designation was placed on the inventory list or what it meant). Id.

Haddonfield acknowledged responsibility for the pin oak on its property, but said it was not responsible for the black oak once it sold the Lake Street property to American Water in 2015. A36-383.

Plaintiff, however, contended that Haddonfield was estopped from disclaiming responsibility for the black oak because Haddonfield had misled plaintiff, for years, into understanding that Haddonfield continued to own the Lake Street property and continued to be responsible for maintaining the black oak on it. In her responses to interrogatories and later in her trial testimony, Plaintiff affirmed that she had many communications with Haddonfield about the two trees that ultimately destroyed her home (A50). "I made several attempts to reach the Borough of Haddonfield relating to the condition of the tree prior to the incident. Some attempts were oral, and some attempts were in writing. One particular verbal discussion occurred between myself and Bill Ober, the town arborist sometime in 2015 or 2016, after I had raised the concern over the competing branches from the Black Oak tree and the sidewalk tree causing the sidewalk tree to lean toward the

our home. During that discussion Mr. Ober said there is nothing wrong and warned me about being fined if I attempted to cut any part of the sidewalk tree. During that discussion, Mr. Ober advised me that all the trees were on GPS and that they would be aware if one was missing." A54.

Haddonfield acknowledged one email that plaintiff sent on May 16, 2020 – just 18 days before the trees fell and demolished plaintiff's home. In this email to Grey Ley, the Borough's Superintendent of Public Works, plaintiff advised that she was concerned about the black oak on the Lake Street property. A39. Neither Ley nor anyone else responded to plaintiff's concern, however, and they never told plaintiff – at any time until it was too late -- that Haddonfield did not own the Lake Street property, and that the new owner was American Water, or that American Water, not Haddonfield, was responsible for caring for the black oak tree. Haddonfield never advised plaintiff of any of that despite her emails about the danger the black oak tree presented. Only by email of August 24, 2020 did anybody from Haddonfield respond. By then it was too late (the response came from none other than Mr. Ober, moreover, who suddenly told plaintiff that the Borough was responsible only for the trees between the curb and sidewalk along Lake Street, and that the black oak tree was not on property that Haddonfield owned but on property that American Water owned). A39.

An arborist, Jason Miller, testified as an expert at trial. He told the jury about the dangerous condition of the black oak and described the things that should have been done to mitigate the significant risk that the tree would fall. The tree was hallowed and had areas of missing bark; its roots were rotted and decayed – as shown by the tree having broken off at ground level, Miller explained. 5T71, 80.

Another town resident, Ms. Pederzani, testified about the black oak tree as well, telling the jury that she walked by the tree almost daily on her way to the train station since moving to the Borough in 2014, and she avoided the tree because of its obviously dangerous condition. 4T32-33. Ms. Pederzani described the tree as being "under distress," with leaves not coming in evenly and some limbs not growing foliage at all. Some limbs were broken off, leaving stumps extending from the trunk, and she observed that the tree would drop limbs and sticks on the ground and street. 4T38-39. The height and size of the tree made it a dangerous condition, and that she would take precautions to avoid it during storms or windy conditions in particular. 4T41-42. Ms. Pederzani and her husband took precautions to avoid the tree, such as crossing the street to walk on the other side. The tree became a more pressing concern over time, with limbs falling more frequently. The tree was a common topic of conversation among her neighbors as well. 4T43-44. She affirmed photographic evidence showing the tree's dangerous condition. 4T45-46.

Ms. Pederzani recalled having conversations with plaintiff about the dangerous black oak tree. 4T46-47. Ms. Pederzani noted a fungus or growth on the tree, which she observed before the tree fell, describing them as "semi-circular mushrooms." 4T48-49. Ms. Pederzani never saw anyone from American Water taking care of the tree, she affirmed. 4T50-51.

Plaintiff's daughter, Madisyn Zadjeika, also testified about the black oak. She observed growths on the black oak as well, which she believed to be mushrooms. She saw fallen branches around the tree, too. 4T68-69. Madisyn was aware of her mother's concerns about the tree. 4T68-69. Madisyn recounted her mother's concerns about the tree's branches pushing on another tree, and her worry about falling branches. Id.

On the day of the incident, Madisyn came home from work to have lunch. She was sitting at the dining room table. Her mother asked her to pick up a girl's bike from the road. 4T72-73. Madisyn went outside. When the storm hit, Madisyn was engulfed in branches and leaves; the trees fell and split the home in half. That this occurred mid pandemic made it that much worse. Neighbors tried to help but did not have the required masks on; electricity was out for a week; extra crews from different parts of the country had to be called in because of the extensive damage and resulting fire on Lake Street from the electrical poles crashing along with the trees. 4T74-77.

Regarding the damages that her mother had suffered, Madisyn described their home as "basically brand new" with a new kitchen, white walls, and wood floor. 4T68-69. She described a couch her mother bought from an antique store. There was a baby grand piano that Madisyn played. The landscaping around the house was peaceful and beautiful, with a rose garden and tomato plants. The home was demolished and took a year to rebuild – having to be gutted from top to bottom and home and landscape rebuilt entirely. 4T68-71.

After the home was demolished, Madisyn and her mother had to live with a family member in Glassboro, in a retirement community. 5T4-7. Madisyn's uncle lent her a car. Madisyn and her mom had to buy new clothes. 4T76-77. They received help from neighbors. 5T8-11. Madisyn and her mother eventually moved into the carriage house on the property while their home was being rebuilt. 5T12-15. Madisyn's uncle performed a lot of work to refurbish the carriage house, including adding an extension for a bathroom. The uncle hired people to dig electrical, sewage, and water lines. Madisyn and her mother stored their belongings in a pod during this time. Madisyn and her mother lived in the carriage house for almost a year before her mother moved to a different property. 5T28-29. Madisyn and her mother moved the furniture by themselves. They purchased a sleeper sofa for the carriage house and furnished it so plaintiff could live upstairs and Madisyn downstairs – depriving plaintiff of rental income in this regard as well. Id.

Pat Santorsola, an adjuster, testified about the losses that plaintiff sustained, which included $407,000 for the loss of the home and $40,700 for loss of use. 5T80-83. $5,000 was assigned for personal property loss, but this was only because of the limit of plaintiff's coverage; plaintiff's actual loss for personal property was much higher, Santorsola affirmed. 5T102-03

Regarding plaintiff's claim for emotional distress damages, daughter Madisyn affirmed that, before the tree fell, her mother was hardworking and able to handle anything. 4T70-71. After the incident, her mother began screaming in her sleep and having sleep terrors. 5T11-14. These sleeping terrors happened at least once a week. Plaintiff continued to scream occasionally while she and Madisyn lived in the carriage house as well. 5T29-31. Her mother was experiencing problems at work, too. 5T32-33. Madisyn said that her mother's sleeping habits have improved since the tree fell (by time of trial, though Madisyn was unable to speak to her mother's day-to-day habits as they no longer lived together). The incident took an emotional toll on her mother (and herself in part), Madisyn affirmed, exacerbated by the Covid-19 pandemic that was happening at the time. 5T31-33.

Plaintiff herself told the jury that the falling trees not only resulted in the destruction of her home and her belongings inside, it caused her great emotional distress that impacted her life. Plaintiff eventually never returned to work due to the stressors and had to retire. Plaintiff was always fearful of the large, old black oak

tree on her neighbor's property, then the tree indeed fell and destroyed her home – while she and her daughter were inside. Before the incident, plaintiff was taking thyroid medication and vitamins. She was never diagnosed with depression from work issues or anything ese. She obtained her Doctorate and owned up to three houses at one time. Plaintiff had a strong constitution and resolve. After the incident, plaintiff fell apart. She began taking medication for depression due to the emotional toll the incident took on her. 6T18-21. Plaintiff had to take various medications, including Hydroxy, Trintellix, and an anxiety medication. She did not tolerate the medications well and eventually had to discontinue using them. By time of trial, plaintiff still suffered from depression but was not taking antidepressants. Id.

After hearing the evidence, the jury returned a verdict in plaintiff's favor but for only $173,000 -- despite the great personal and property loss that plaintiff had suffered (A278), and the trial court denied plaintiff's motion for new trial or at least additur to rectify the zero dollars awarded for plaintiff's extensive property loss. A348-49. Plaintiff now asks the Court to grant relief to her in this appeal for the following reasons.

ARGUMENT

Point 1

The trial court erred in granting the Haddonfield defendants' motion for summary judgment dismissing plaintiff's claims (A219).

Summary judgment for the Haddonfield defendants was improper because one of the trees that demolished plaintiff's home -- the pin oak tree -- was located on a curb strip next to plaintiff's home that Haddonfield owned and was responsible for maintaining. Plaintiff made complaints to Haddonfield about this pin oak and how the black oak tree was encroaching onto the pin oak, asking for the trees to be cared for and to guard against the danger of falling.

Plaintiff made a complaint to Haddonfield about the pin oak tree in November 2014. Plaintiff never received any response from Haddonfield. Plaintiff followed up with another email in April 2015, to which Susan Nelson responded that Bill Ober would look at the tree and get back to her. 6T40-43. Plaintiff asked for the pin oak tree to be looked at as soon as possible. The tree was not taken down or secured against falling; only put on a list to be removed. 6T45-46. Instead of substantively responding to Ms. Zadjeika, Haddonfield's Ober warned her about potential fines relating to cutting trees without the Borough's knowledge or permission (A41, Plaintiff's Response to Borough of Haddonfield's Uniform Interrogatory No. 20). Plaintiff followed up with Haddonfield in 2019, noting that the pin oak tree had not

been taken down, and citing her prior emails in which she expressed concern about the tree's proximity to her home. In April 2020, plaintiff communicated with Haddonfield about both the black oak and pin oak trees, including complaints about fallen branches from the black oak. 6T46-47. The last email that plaintiff sent on May 16, 2020, just 18 days before the incident, again told Haddonfield (the Borough's Superintendent of Public Works, Greg Ley) that plaintiff was concerned about the black oak tree on the Lake Street property. A35-4 (at para. 21, Ex I).

These emails advised Haddonfield about the black oak tree encroaching into the pin oak tree located beside plaintiff's home. Plaintiff advised that the limbs of the black oak would encroach into the limbs of the pin oak, pushing the pin oak to lean toward the Zadjeika home. Plaintiff warned Haddonfield about these dangers and asked for Haddonfield to care for the pin oak (and the black oak) and safeguard it from falling. These complaints to Haddonfield about the pin oak tree located on the curb strip that Haddonfield owned permit a jury to find that Haddonfield had actual or constructive notice of the dangerous condition of the tree and failed to take appropriate action -- culminating in the tree's collapse onto plaintiff's home, Hayden v. Curley, 34 N.J. 420 (1961) (city was found liable because it had exclusive control over the tree, and the dangerous condition of the sidewalk caused by the tree roots was observable and traceable to the tree). Municipalities can be held liable under nuisance principles if they knowingly expose adjoining landowners to hazards

caused by falling branches or other dangerous conditions from trees on municipal property, Black v. Borough of Atlantic Highlands, 263 N.J. Super. 445 (1993) (liability can arise from dangerous conditions created by overhanging branches).

Regarding the black oak tree, Haddonfield argued that it "never assumed any overall maintenance and/or inspection responsibilities for any conditions that may exist on NJAWC property, specifically including anything to do with the black oak tree." But the record permits a jury to find that Haddonfield has assumed responsibility for the black oak tree for many years, while it owned the Lake Street property. Haddonfield has a Shade Tree Commission, moreover, under which it assumed control of trees within its boundaries (Deberjeois v. Schneider, 254 N.J. Super. 694 (Law. Div. 1991), aff'd, 260 N.J. Super. 518 (App. Div. 1992); N.J.S.A. 40:64-5) and was thus responsible for their maintenance and any resulting damages (Sims v. City of Newark, 244 N.J. Super. 32 (1990)). New Jersey law provides that a Shade Tree Commission has power (among other things) to, "Move or require the removal of any tree, or part thereof, dangerous to public safety…" N.J.S.A. 40:64-5.

The evidence permits a reasonable jury to find that Haddonfield is estopped from disclaiming responsibility for maintenance and care of the black oak tree (contrary to the trial court's ruling, 1T28), because Haddonfield's actions led plaintiff to believe that Haddonfield continued to be responsible for this tree on the

236 Lake Street property that Haddonfield had owned for so many years and never told plaintiff, despite her inquiries, that Haddonfield no longer owned. Though there is presumptive immunity for public entities (Petrocelli v. Sayreville Shade Tree Comm'n, 297 N.J. Super. 544, 547 (App. Div. 1997)), a public entity can be estopped from disclaiming ownership of property, Twp. of Fairfield v. Likanchuk's, Inc., 274 N.J. Super. 320, 331–32 (App. Div. 1994) ("The doctrine of equitable estoppel is 'hesitantly applied against public entities but it will be invoked against them where interests of justice, morality and common fairness dictate,'" *citing* Lehen v. Atl. Highlands Zoning Bd. of Adjustment, 252 N.J. Super. 392, 400 (App. Div. 1991), Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 131 (1965); O'Malley v. Dep't of Energy, 109 N.J. 309, 316–17 (1987). The doctrine can be applied "in very compelling circumstances," Palatine I v. Planning Bd. of Twp. of Montville, 133 N.J. 546, 560 (1993), disapproved of by D.L. Real Estate Holdings, L.L.C. v. Point Pleasant Beach Planning Bd., 176 N.J. 126 (2003); Timber Properties, Inc. v. Chester Twp., 205 N.J. Super. 273, 278 (Law. Div. 1984).

This was not property that Haddonfield never owned, or a tree for which it was never responsible. The record showed that Haddonfield owned the Lake Street property containing the black oak for years, and Haddonfield acknowledged that it was responsible for the tree. As part of its efforts to care for the trees for which it was responsible, Haddonfield, in 2010, purchased a tree inventory program from

ArborPro (as noted above, A35-40), and the inventory of Borough-owned trees identified the black oak on page 60.

As noted above, plaintiff consistently emailed Haddonfield to complain about the dangerous condition of both the pin oak and black oak trees, noting that the black oak was encroaching onto the pin oak and made both trees dangerous for falling. Haddonfield never told plaintiff, in response to her communications or otherwise, that Haddonfield no longer owned the Lake Steet property, that Haddonfield was not responsible for the black oak tree, or that American Water was responsible for it instead. Instead of substantively responding to Ms. Zadjeika, Haddonfield's Ober warned her about potential fines relating to cutting trees without the Borough's knowledge or permission (A41, Plaintiff's Response to Borough of Haddonfield's Uniform Interrogatory No. 20). The last email that plaintiff sent was on May 16, 2020 -- just 18 days before the incident; plaintiff again told the Borough's Superintendent of Public Works, Greg Ley, that she was concerned about the black oak tree on the Lake Street property. A35-4 (at para. 21, Ex I). Neither Mr. Ley nor anyone else responded to plaintiff's concern; both trees then fell and demolished plaintiff's home. Only on August 24, 2020, nearly three months later, by email, did anybody from Haddonfield respond – and by then it was too late. A35-4 (at para. 22, Ex. J); A54 (plaintiff's response to No. 20 of Haddonfield's interrogatories).

All that time, the Borough never told plaintiff, "We don't own that property; New Jersey American Water owns it. We are not responsible for the tree on that property," etc. Instead, Haddonfield's responses suggested that the tree remained under Haddonfield's control and responsibility. All that time, therefore, plaintiff believed that Haddonfield was responsible and was handling the issue. 6T48-49. Plaintiff did not have an inkling that Haddonfield did not own the property and thus never knew to contact American Water or anyone else. Even appraiser Santorsola, during his subsequent trial testimony, noted that Haddonfield had promised to remove the downed tree at Haddonfield's expense (5T117). Plaintiff confirmed this in her subsequent trial testimony, stating that she did not reach out to American Water because she was never told by Haddonfield that the property has been sold or that the Borough was not responsible for the tree. 6T15-17. These facts permit a jury to find that Haddonfield is estopped from disclaiming ownership of the property and responsibility for the black oak under these circumstances involving the complete destruction of plaintiff's home and displacement of plaintiff and her daughter from it for a long time.

Regarding the injury required to be shown under the Torts Claims Act, the trial court said that plaintiff's injuries do not qualify (1T24-28), but a reasonable jury can find that plaintiff's injuries satisfy the permanent injury requirement of the Act. An injury qualifies as permanent if it meets several criteria based on objective

medical evidence, Gerber ex rel. Gerber v. Springfield Bd. of Educ., 328 N.J. Super. 24 (App. Div. 2000); Gilhooley v. Cnty. of Union, 164 N.J. 533 (2000). The injury must result in the permanent loss of a bodily function that is substantial, not necessarily total, Gerber ex rel. Gerber, supra, 328 N.J. Super. 24; Gilhooley, supra, 164 N.J. 533. The injury must impair the body part or organ to a degree that it cannot function normally and will not heal to function normally even with further medical treatment, Rogozinski v. Turs, 351 N.J. Super. 536 (Law. Div. 2002); Jacques v. Kinsey, 347 N.J. Super. 112 (Law. Div. 2001).

The injury must be an objective impairment, Gilhooley, supra, 164 N.J. 533; Hammer v. Twp. of Livingston, 318 N.J. Super. 298 (App. Div. 1999). To recover damages for emotional distress under the Act, the emotional distress must be severe and result in a permanent loss of a bodily function, permanent disfigurement, or permanent physical sequelae, Srebnik v. State, 245 N.J. Super. 344 (1991).

Severe emotional distress is defined as a severe and disabling emotional or mental condition that can be generally recognized and diagnosed by professionals, Innes v. Marzano-Lesnevich, 435 N.J. Super. 198 (2014); Clark v. Nenna, 465 N.J. Super. 505 (2020). This includes conditions such as post-traumatic stress disorder, Maldonado v. Leeds, 374 N.J. Super. 523 (2005). Emotional distress resulting in disabling depression and anxiety can satisfy the injury requirement of the Act, therefore, where resulting in a permanent and severe psychological condition that is

recognized and diagnosed by professionals, Lascurain v. City of Newark, 349 N.J. Super. 251 (2002). A jury can find this in plaintiff's case. Plaintiff affirmed in her responses to Haddonfield's interrogatories (A41), "I returned to work after June 6, 2020. I had to take a Leave of Absence from work from February 13, 2021 to May 10, 2021 after visiting the Emergency Room at Jefferson University Hospital in Cherry Hill, NJ. I am currently on temporary disability due to anxiety, depression/stress." A48. Plaintiff said that she experienced "no direct physical injuries" but "I continue to suffer mental anguish and anxiety over the fact that my daughter and I narrowly escaped harm as the trees landed on the room where she had been studying just moments before the trees fell. As well as mental anguish, anxiety and inconvenience owing to this event, including our displacement from our home until we could find adequate alternative housing. Having to relocate several times, and the uncertainty of the future of my living space and property, all during a global pandemic, caused me further stress and anxiety and exacerbated depression I was encountering from a work-related issue. The home was completely destroyed, resulting in the necessity to rebuild the home from the ground up. Significant personal property was lost, and we were forced to find alternative living arrangements during the time the home was rebuilt." A43.

Though plaintiff said, "At this time, there is not permanent physical injury claimed," she also affirmed, "I am currently undergoing psychiatric evaluations for

anxiety and stress. I continue to have major depression related to a work-related issue, but this has been exacerbated by this incident. During the period of February 13, 2021 to May 10, 2021, I had to take a Leave of Absence from work due to experiencing an episode of stress/anxiety and chest pain that led to a visit to the Emergency Room at Jefferson. At that time, we were in the midst of attempting to find new living arrangements as the coverage by our homeowner's insurance for alternative living arrangements was about to end." A44.

Regarding her treatment, "While I was not confined to the hospital, I did visit the Emergency Room at Jefferson University Hospital in Cherry Hill, NJ on February 13, 2021 due to chest pain… While in the Emergency Room, I had to undergo an EKG and blood tests to rule out a heart attack. Upon advice of my attorney, the medical records are being requested from the various healthcare providers I have seen for treatment." A44. Plaintiff detailed the various providers with whom she had treated. A45. She affirmed, "I continue to see doctor Gregory Wallace on a bi-weekly and monthly basis. On December 17, 2021, I was seen by Dr. Mark Famador from the UPenn Anxiety and Stress Center, who has issued a diagnosis of Post Traumatic Stress Disorder ('PTSD') and has recommended Trauma Therapy. I am currently waitlisted with treatment providers for the therapy recommended. There are very few providers still taking in new patients at this time.

In the meantime, I am currently on temporary disability due to anxiety, depression/stress until April 2022." A46.

Plaintiff further affirmed, "I have been experiencing a work-related issue wherein I have been bullied by my supervisor at work. This issue has caused much stress and depression for me. The tree incident has compounded and exacerbated this condition as I have been displaced from my home, experienced a period of homelessness as the insurance coverage for alternative living expenses ran out, and now live under the uncertainty related to being able to return and rebuild the home I lost given the current market conditions (in a global pandemic) and the cost of rebuilding far exceeding what is covered by my homeowner's insurance policy. This incident also brings back to mind the stress and anxiety we experienced during the time we lost a previous home due to a fire 17 years ago." A46. "Plaintiff further believes the incident at issue has exacerbated and/or compounded her mental anguish and anxiety and depression she has experienced related to the employment issue she is currently involved in." A50.

For these reasons, the trial court erred in granting summary judgment for the Haddonfield defendants, warranting reversal and reinstatement of plaintiff's claims for trial before a jury.

Point 2

The cumulative effect of several trial court rulings deprived plaintiff of a fair trial on her claims against New Jersey American Water (A269-274).

The jury was asked to determine whether the plaintiff had proven that the defendant was negligent and a proximate cause of the incident – which the jury answered in the affirmative.

The jury was then asked to determine whether the plaintiff sustained damages because of the incident; the dollar amount that would fairly compensate the plaintiff for damages; and the breakdown of damages into dwelling property, personal property, loss of use, and mental anguish/ inconvenience (A278; A333). The jury answered "yes" to the first three questions but awarded plaintiff only $173,000 in total damages. 8T120. The jury awarded zero damages for personal property loss, moreover. 8T121-22.

We submit that the following trial court rulings were erroneous and cumulatively deprived plaintiff of a fair trial on the damages questions the jury had to determine, warranting remand for a new damages trial against American Water.

A. The trial court erred in denying plaintiff's motion to preclude defendant from telling the jury about PSE&G's management of the tree (2T19-23)

Defendant argued that the jury should be allowed to hear evidence that PSE&G managed the tree. Defendant wanted to present evidence that it (American

Water) was not allowed to touch the tree without PSE&G's knowledge. The trial court permitted this, denying plaintiff's *in limine* motion to preclude the testimony. 2T19-23. American Water's expert, Webber, then testified at trial that the party responsible for managing the tree was PSE&G, and that American Water was not responsible for the tree's failure. 7T70. Defendant's attorney argued this in closing argument, noting the role of PSE&G in managing the tree and that PSE&G was responsible for pruning and removing leaves and branches to prevent interference with electrical conductors. 8T13

The trial court erred in denying plaintiff's motion to preclude this evidence and permitting defendant to present this evidence and argument before the jury, because this evidence threatened to confuse the jury, and defendant's argument about PSE&G misrepresented New Jersey law, under which the property owner (American Water) is under the duty to care for the tree on its property. 2T18-23. As plaintiff's counsel argued, the utility company has a right of way, but the homeowner has the ultimate responsibility for a tree on its property. PSE&G had no responsibility to report dangerous or failing trees; the property owner, American Water, had this duty. The jury should not have been allowed to hear evidence that PSE&G managed the tree, also, because no evidence showed they actually did so, and legally they were not required to do so. 2T18. Permitting American Water's witness, Weber, to testify that PSE&G managed the tree misstated American

Water's legal responsibility for the black oak tree, distorted the factual circumstances, and was unfairly prejudicial to plaintiff before the jury at trial. 2T20-22. Permitting this evidence and argument distorted the legal issue that the jury was tasked with determining and contributed, we submit, to the jury's award of the paltry $173,000 in damages, warranting remand for a new damages trial (cumulatively along with the other errors set forth below).

B. The trial court erred in precluding plaintiff from presenting testimony from medical providers about the permanent injuries she suffered, and about her wage loss (A270, 272)

Thes errors by the trial court relate directly to the damages that the jury awarded. A plaintiff is entitled to present evidence of permanent injury and wage loss at trial (Quinlan v. Curtiss-Wright Corp., 425 N.J. Super. 335 (App. Div. 2012)). Specifically, if the plaintiff can introduce evidence demonstrating a reasonable probability that their injuries will impair future earning capacity and provide sufficient factual matter on which the quantum of diminishment can reasonably be determined, then the jury may properly be instructed to consider this in establishing damages (Lesniak v. Cnty. of Bergen, 117 N.J. 12 (1989); Coll v. Sherry, 29 N.J. 166 (1959)).

Plaintiff Zadjeika affirmed, "I returned to work after June 6, 2020. I had to take a Leave of Absence from work from February 13, 2021 to May 10, 2021 after visiting the Emergency Room at Jefferson University Hospital in Cherry Hill, NJ. I

am currently on temporary disability due to anxiety, depression/stress." A48. "To my person and my daughter, no direct physical injuries were experienced. I continue to suffer mental anguish and anxiety over the fact that my daughter and I narrowly escaped harm as the trees landed on the room where she had been studying just moments before the trees fell. As well as mental anguish, anxiety and inconvenience owing to this event including our displacement from our home until we could find adequate alternative housing. Having to relocate several times, and the uncertainty of the future of my living space and property, all during a global pandemic, caused me further stress and anxiety and exacerbated depression I was encountering from a work-related issue."

> The home was completely destroyed, resulting in the necessity to rebuild the home from the ground up. Significant personal property was lost, and we were forced to find alternative living arrangements during the time the home was rebuilt. The costs to rebuild the property far exceed the coverage afforded by my homeowner's insurance policy, as well as the costs related to replace my personal property. My daughter and I are now currently living temporarily in the repaired carriage house which was part of our property. The main house has not yet been rebuilt. A43

Though plaintiff said, "At this time, there is not permanent physical injury claimed," she affirmed, "I am currently undergoing psychiatric evaluations for anxiety and stress. I continue to have major depression related to a work-related issue, but this has been exacerbated by this incident. During the period of February 13, 2021 to May 10, 2021, I had to take a Leave of Absence from work due to

experiencing an episode of stress/anxiety and chest pain that led to a visit to the Emergency Room at Jefferson. At that time, we were in the midst of attempting to find new living arrangements as the coverage by our homeowner's insurance for alternative living arrangements was about to end. A44.

Regarding treatment, plaintiff affirmed, "While I was not confined to the hospital, I did visit the Emergency Room at Jefferson University Hospital in Cherry Hill, NJ on February 13, 2021 due to chest pain… While in the Emergency Room, I had to undergo an EKG and blood tests to rule out a heart attack. Upon advice of my attorney, the medical records are being requested from the various healthcare providers I have seen for treatment." A44. Plaintiff detailed the various providers with whom she had treated. A45. Plaintiff affirmed further, "I continue to see doctor Gregory Wallace on a bi-weekly and monthly basis. On December 17, 2021, I was seen by Dr. Mark Famador from the UPenn Anxiety and Stress Center, who has issued a diagnosis of Post Traumatic Stress Disorder ('PTSD') and has recommended Trauma Therapy. I am currently waitlisted with treatment providers for the therapy recommended. There are very few providers still taking in new patients at this time. In the meantime, I am currently on temporary disability due to anxiety, depression/stress until April 2022." A46.

Plaintiff further affirmed, "I have been experiencing a work-related issue wherein I have been bullied by my supervisor at work. This issue has caused much

stress and depression for me. The tree incident has compounded and exacerbated this condition as I have been displaced from my home, experienced a period of homelessness as the insurance coverage for alternative living expenses ran out, and now live under the uncertainty related to being able to return and rebuild the home I lost given the current market conditions (in a global pandemic) and the cost of rebuilding far exceeding what is covered by my homeowner's insurance policy. This incident also brings back to mind the stress and anxiety we experienced during the time we lost a previous home due to a fire 17 years ago." A46. "Plaintiff further believes the incident at issue has exacerbated and/or compounded her mental anguish and anxiety and depression she has experienced related to the employment issue she is currently involved in." A50. All this testimony showed that it was error for the trial court to deny plaintiff the right to present testimony from medical providers about the permanent injuries she had suffered, and testimony about her wage loss, showing further the ground for granting a new damages trial here.

C. The trial court permitted too much cross-examination before the jury about various hardships plaintiff endured that were unrelated to the tree incident and separated by many years – all of which unfairly prejudiced plaintiff in the jury's eyes (not raised below; raised as plain error on appeal).

This testimony included various problems at work, issues with plaintiff's daughter, and even an unrelated assault upon plaintiff from years ago – none of which were sufficiently relevant to any legitimate issue the jury had to decide.

Though plaintiff was seeking emotional distress damages, the type and amount of questioning that the judge permitted was too much and overwhelmed the jury in their assessment of the discrete questions of whether American Water was responsible for the tree falling and causing the harm that plaintiff suffered.

Right in opening statement, American Water's counsel,

- argued that Plaintiff's employer retaliated against her by assigning her to different counties.
- noted that Plaintiff was bullied by her supervisor prior to Covid-19, and that the bullying worsened during the pandemic.
- discussed Plaintiff's mental health, noting that she was unable to return to work due to stressors related to her job and Covid-19. 3T50-53

In cross examination of plaintiff's daughter, defendant's counsel, permitted by the trial court, asked Madisyn \ about a fire that had occurred at their previous home at 127 Colonial Avenue during which the home suffered significant damage. 5T 42-43, 54-57.

During cross-examination of plaintiff (6T32-33), defendant's counsel, permitted by the trial court, questioned Plaintiff extensively regarding her relationship with her boss, Stephanie, whom she has been bullied by for years. 6T58-59.

Defense counsel asked plaintiff about (6T60-61), the following subjects as well – all permitted by the trial court:

- Plaintiff's experience as a child with an absent mother who worked as a real estate professional.
- Plaintiff's non-consensual sexual encounter with a doctor who was her supervisor at the time.
- Plaintiff's role as a single mother after the father of her child left her life.

The trial court even allowed questioning regarding Plaintiff's daughter being involved in an online relationship with a man who was posing as a 20-year-old but was actually in his 40s. The man statutorily raped Plaintiff's daughter, which caused issues between plaintiff and her daughter. There were also questions regarding the fact that Plaintiff's daughter twice attempted suicide. (6T62-63).

None of this was relevant to trial of this case – and any relevance was outweighed by the danger of unfair prejudice to plaintiff before the jury. During summation, defense counsel reiterated these issues, moreover, noting that plaintiff had experienced stressors in her life unrelated to the storm, such as problems with her boss and her fears regarding COVID-19. 8T36-37. Finally, compounding the unfair prejudice, the trial court did not provide the jury with any instruction explaining the limited relevance of this evidence – further risking that the jury would

indeed use the testimony they had heard to conclude that plaintiff was unworthy of a larger damages award. The plain error in admitting this evidence further warrants granting a new damages trial here on appeal, we submit.

D. The trial court erred by not instructing the jury on *per se* negligence (7T235-237)

American Water argued there was no evidence of a violation of the municipal code, since American Water was never cited for a violation (7T235-36). As plaintiff's counsel argued, however, New Jersey law allows a judge to charge negligence *per se* claim based on the existence of a town ordinance. 7T235-37. This charge should have been given, therefore; its absence skewed the jury's assessment of defendant's liability and contributed to the low damages verdict.

E. The trial court erred in precluding the jury from being instructed on "highly destructive agency" and recklessness (7T240-42)

The court expressed concern over the inclusion of the phrase "highly destructive agency" in the jury charge, stating it had not been established in this case. The defense argued that the phrase "highly destructive agency" is prejudicial, as the black oak was not visibly deteriorating. As plaintiff's counsel noted, however, the arborist testified to the plain and obvious risk posed by the tree, and plaintiff's daughter and neighbor, in addition to plaintiff herself, all affirmed that the black oak was obviously dangerous and to be avoided. There was a reasonable basis in the

evidence for the jury to make a "highly destructive agency" finding, therefore; the court erred in denying this charge. 7T242-43.

The court relatedly erred in not charging the jury on whether American Water's failure to inspect the tree was reckless. Again, the evidence showed that the black oak was in an obviously unhealthy and dangerous condition for many years before it finally fell in June 2020. A reasonable jury could find that American Water's failure to take the tree down, or safeguard it from falling, constituted an extreme departure from ordinary care in a situation where a high degree of danger is apparent, or disregard of a known or obvious risk that is so great as to make it highly probable that harm will follow, usually accompanied by a conscious indifference to the consequences (Schick v. Ferolito, 167 N.J. 7 (2001); Dare v. Freefall Adventures, Inc., 349 N.J. Super. 205 (2002)).

F. The trial court erred in permitting defendant's attorney to tell the jury about the amount of money that plaintiff received from her insurance company and permitting the jury to hear testimony about plaintiff's prior insurance coverage; the court erred in denying plaintiff's motion for a new trial on this ground (not raised during trial but raised on motion for new trial, A277; 9T)

In a civil case, it is generally improper to inform the jury that the plaintiff had insurance to cover her loss. Krohn v. New Jersey Full Ins. Underwriters Ass'n, 316 N.J. Super. 477 (1998). New Jersey courts have held that references to insurance coverage are generally impermissible because they can distract jurors from a fair evaluation of the evidence and may lead to decisions based on sympathy or prejudice

rather than facts. Pickett v. Bevacqua, 273 N.J. Super. 1 (1994). A jury's verdict must be based solely on legal evidence and free from extraneous considerations such as a party's insurance status, Brandimarte v. Green, 37 N.J. 557 (1962); cf. N.J.S.A. 39:6A-12 (evidence of amounts collectible or paid under personal injury protection coverage inadmissible in civil action for recovery of damages for bodily injury).

In this case, defendant's counsel discussed before the jury the insurance proceeds that plaintiff had already received, telling the jury that the insurance company paid the plaintiff $364,000 to replace and rebuild her home, plus $5,000 for the personal property loss. 5T72-73. In examination, both Plaintiff and her daughter were asked if insurance covered damages to the home and possessions. 5T73. Defense counsel asked Plaintiff to identify the coverages section of her insurance policy, specifically Coverage C for personal property and the coverage limits for personal property, which plaintiff said was $5,000. 6T51-52.

Plaintiff was also asked to discuss the fact that she did not increase the policy limits for personal property coverage only a month or so before the trees fall, around May 2020. It was brought out before the jury that plaintiff spoke with insurance agent about increasing the coverage to return it to residential coverage. Because there was no proof in writing of the conversation, however, plaintiff did not bring a legal action against the insurance agent for negligence. 6T51-52.

In his closing argument, defendant's counsel (Mr. Johnson) addressed the plaintiff's claim for dwelling damages, pointing out that the insurance company had already paid her $364,000 to replace and rebuild her home. He referenced testimony from Joseph Stavola, a construction worker, who estimated the cost to rebuild the home at $405,000. Counsel discussed the plaintiff's claim for personal property damages, noting that the insurance company paid plaintiff the full $5,000 in coverage for personal property losses, thereby fulfilling its obligations under the policy. 8T30-31. Permitting this evidence was further error that, along with the other errors set forth above, cumulatively warrant granting plaintiff a new trial on her damages claim.

Point 3

The trial court erred in denying plaintiff's motion for a new trial or for additur (A348; 9T11-13)

As argued above, the trial court erred by not *sua sponte* restricting testimony about plaintiff's insurance coverage (incorporated by reference), and, further, by failing to grant plaintiff relief on this ground raised in her motion for a new trial (A348). The court ruled as follows in denying a new trial on this ground:

> Mr. Crawford indicates that there could only be one reason why the jury did not provide a -- an award for personal property and that was because of the introduction of her prior insurance policy. However, there are, at least this Court can think of any number of reasons why they didn't do it: Perhaps, they didn't believe her testimony; perhaps, they felt that there needed to be more information submitted with regard to what the market value was; or, perhaps, they relied upon the

> itemization of information that -- or doc -- items that she obtained after the fact as being not replacement values.
>
> There's no reas -- no way for this Court to know why they made the decision that they made. What this Court has to determine is whether that decision was a manifest denial of justice. And the Court does not find that there has been a clear and convincing argument that there is a manifest denial of justice in this jury award. Therefore, motion for a new trial's denied. [9T11-13]

This was erroneous. As plaintiff's counsel argued on the new trial motion, the award of $0.00 for personal property resulted in a miscarriage of justice. The jury was allowed to be guided by plaintiff's prior insurance coverage and decided that the fault rested with the plaintiff for not reinstating her personal property coverage to an amount in excess of $200,000.00 when she moved back into her home. The policy limit at the time of the incident was only $5,000, which was the coverage she had when the property was still a rental property. As plaintiff's counsel argued below, the only purpose for the introduction of plaintiff's prior declarations page, which showed a higher personal property coverage limit (in excess of $200,000), was to suggest that plaintiff had "dropped the ball" and if she had done what she was "supposed to do," there would be no claim for personal property damage against American Water. The result was a jury pronouncing that the plaintiff should not be rewarded for her mistake that American Water unfairly argued. Contrary to the trial court's ruling below, there was a miscarriage of justice on the personal property aspect of, considering that plaintiff total personal property

damages was approximately $100,000, and adjuster Santorsola confirmed that a baby grand piano, which was present in plaintiff's home, was worth more than $5,000 alone.

The trial court at least erred in failing to grant plaintiff's Motion for Additur. "[A] trial judge should not interfere with the quantum of damages assessed by a jury unless it is so disproportionate to the injury and resulting disability shown as to shock his conscience and to convince him that to sustain the award would be manifestly unjust." Baxter v. Fairmont Food Co., 74 N.J. 588, 596 (1977). In other words, "the judge cannot validly intrude unless 'it clearly and convincingly appears that there was a miscarriage of justice under the law.'" Ibid. (quoting R. 4:49–1(a)). On appeal, the Court considers as follows:

> The judgment of the initial factfinder ... whether it be a jury ... or a judge as in a non-jury case, is entitled to very considerable respect. It should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination, after canvassing the record and weighing the evidence, that the continued viability of the judgment would constitute a manifest denial of justice. The process of "weighing" the evidence is not to encourage the judge to "evaluate the evidence as would a jury to ascertain in whose favor the evidence preponderates" and on that basis to decide upon disruption of the jury's finding. "[T]he judge may not substitute his judgment for that of the jury merely because he would have reached the opposite conclusion; he is not a thirteenth and decisive juror." ...
>
> [W]e think the appellate court must be concerned with the same norm of decision, since that is basic to its ultimate conclusion as to whether justice has miscarried by dint of the trial judge's invasion of the jury's province, where he was not justified in doing so.

Baxter, supra, 74 N.J. 597.

The "principal goal of damages in personal injury actions is to compensate fairly the injured party." Caldwell v. Haynes, 136 N.J. 422, 433 (1994). While a jury's verdict is presumed correct, this presumption may be overcome if it clearly and convincingly appears that there was a miscarriage of justice under the law. Cuevas v. Wentworth Grp., 226 N.J. 480, 501 (2016), holding modified by Orientale v. Jennings, 239 N.J. 569 (2019), holding modified by Orientale v. Jennings, 239 N.J. 569 (2019); R. 4:49-l(a). Thus, if a trial court determines that an award is inadequate, a new trial on damages is warranted or, in the alternative, the court may determine an amount that a reasonable jury would have awarded and grant additur. Orientale v. Jennings, 239 N.J. 569, 574 (2019).

The trial court misapplied that governing law and abused its discretion in denying plaintiff's motion for additur in plaintiff Zadjeika's case. The verdict returned by the jury was so against the evidence that it constituted a clear miscarriage of justice. Because the entirety of plaintiff's lifetime worth of furniture, clothes and other personal property items plainly exceeds the paltry $5,000 award, the jury's award on this issue shocks the judicial conscience and additur should have been granted for the personal property damages.

The damages award did not fully and fairly compensate plaintiff for the losses she suffered. In his closing argument, plaintiff's counsel discussed the personal

property loss that plaintiff had suffered. 8T60-61. Counsel recommended a total personal property value of $75,000, based on adjustments and the condition of the items. 8T60-6. Grant of additur somewhere between that figure and the paltry $5,000 awarded by the jury should have been entered by the trial court below.

Conclusion

The Court should (1) reverse the Law Division's grant of summary judgment for the Haddonfield defendants and remand for trial on plaintiff's claim against these defendants, and (2) remand for a new damages trial on plaintiff's claim against Defendant New Jersey American Water or, at least, for grant of additur on the property damages awarded.

Respectfully submitted,

/s/ Michael Confusione
Hegge & Confusione, LLC
Counsel for Appellant,
Brenda Zadjeika

Dated: November 15, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-002181-23

Date Filed: January 6, 2025
Amendment Filed: January 10, 2025

BRENDA ZADJEIKA,
Plaintiff/Appellant,

v.

NJ AMERICAN WATER,
Defendant/Respondent/Cross-Appellant

BOROUGH OF HADDONFIELD, HADDONFIELD SHADE TREE COMMISSION, JOHN DOES 1-10, and ABC COMPANIES 1-10,
Defendants/Respondents

On Appeal From:
Superior Court of New Jersey,
Law Division, Camden County
Docket No.: CAM-L-1057-21

Sat Below:
Hon. John S. Kennedy, J.S.C.

BRIEF OF RESPONDENT/CROSS-APPELLANT, NEW JERSEY AMERICAN WATER CO., INC.

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Preliminary Statement

In this case, Plaintiff sued several defendants including New Jersey American Water Company, Inc. ("New Jersey American Water"). On June 3, 2020, an intense, straight-line windstorm, known as a derecho, toppled an oak tree located across the street from Plaintiff's house into a tree adjacent to her property, crashing them down into her home, resulting in marked damage. The jury found in favor of Plaintiff and awarded her $173,000.00 in damages. New Jersey American Water paid the judgment, which Plaintiff accepted.

In this appeal, Plaintiff argues that the dismissal of the municipality in which she lives and its tree commission was erroneous. New Jersey American Water takes no position on that issue.

However, the jury's verdict on damages dissatisfied Plaintiff and she now argues that the trial judge denied her a fair trial. She therefore demands a new trial on damages. However, the law bars Plaintiff from obtaining a new trial on damages generally because she accepted the payment on the judgment. Moreover, there is no merit to Plaintiff's assertion of error on any of the issues she raised, either individually or in the aggregate.

In addition, there is also no merit to Plaintiff's argument that she is entitled to a new trial on damages limited to her claim for personal property damages. The law entrusts the jury to decide whether Plaintiff fulfilled her

burden of proving the fair market value of the personal property she supposedly lost in the incident. Because the Plaintiff did not support her claim for personal property damages with any evidence other than her own testimony, the jury clearly gave that testimony no consideration and found that Plaintiff did not meet her burden. There was no error in this determination, as it is the jury's place to give whatever weight it deems appropriate to the evidence before it and there is no error if the jury found Plaintiff's testimony to lack credibility and disregarded it accordingly.

Finally, in the alternative, if this court were to somehow find Plaintiff was entitled to a new trial even though she accepted payment on the judgment, the new trial must be on all issues including liability and not limited to damages. Further, in that new trial, the Plaintiff should be barred from presenting the testimony of two witnesses who were not adequately identified during discovery and whose testimony was highly prejudicial to the defense.

Statement of Procedural History

On April 8, 2021, Plaintiff Brenda Zadjeika filed her complaint against New Jersey American Water, the Borough of Haddonfield, and the Haddonfield Shade Tree Commission. (Pa1-13) On June 1, 2021, New Jersey American Water filed its answer with a crossclaim, and the Haddonfield Defendants filed their answer on July 30, 2021. (Pa14-32)

On December 23, 2022, New Jersey American Water and the Haddonfield Defendants filed motions for summary judgment on separate grounds. (Pa33-182) On February 3, 2023, the Honorable Daniel A. Bernardin, J.S.C., denied New Jersey American Water's motion but granted the motion of the Haddonfield Defendants. (Pa219-220; 1T[1])

The matter then proceeded to trial against New Jersey American Water. (2T-8T) On January 8, 2024, the Honorable John S. Kennedy, J.S.C. resolved several motions *in limine* filed by both parties. (2T4:2-48:9) However, Judge Kennedy did not enter orders on several of New Jersey American Water's motions *in limine*, including a motion to preclude a claim for wage loss, a motion to preclude reference to permanent injury, and a motion to preclude testimony from certain medical providers. (Pa221-251) Plaintiff's counsel stipulated to those motions. (Da1-2)

On January 10, 2024, in response to request from Judge Kennedy, New Jersey American Water's counsel wrote to the court indicating that the plaintiff

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[1] 1T= February 3, 2023 summary judgment hearing transcript
2T= January 8, 2024 trial transcript
3T= January 9, 2024 trial transcript
4T= January 10, 2024 trial transcript
5T= January 11, 2024 trial transcript
6T= January 12, 2024 trial transcript
7T= January 17, 2024 trial transcript
8T= January 18, 2024 trial transcript
9T= March 1, 2024 new trial motion hearing transcript

had stipulated to those three motions and concluded the letter with the sentence, "Plaintiff's counsel is copied and should notify the Court if they disagree with [the statement that Plaintiff stipulated to the motions.]" (Da2) Plaintiff lodged no disagreement, and Judge Kennedy granted the three motions *in limine*. (Pa270-275)

One of the motions in limine which were decided on January 8, 2024 was a motion by New Jersey American Water, which sought to bar the testimony of two witnesses, Jeanette Glennon and Courtney Pederzani, who Plaintiff failed to identify during the discovery period. Judge Kennedy denied the motion in limine and permitted them to testify. (Da45-46)

The case then proceeded to trial before a jury from January 9, 2024 through January 18, 2024. (2T-8T) On January 18, 2024, the jury returned a verdict. (8T119:19-121:1) The jury first found that Plaintiff proved that New Jersey American Water's conduct was negligent. (Id.) Next, the jury found that New Jersey American Water's negligence was a proximate cause of the incident. (Id.) Third, the jury found that the Plaintiff sustained damages because of the incident. (Id.) Finally, the jury found that the total damages proven by Plaintiff amounted to $173,000.00, with $48,000.00 for dwelling property damages, $0.00 for personal property damages, $50,000.00 for loss of

use damages, and $75,000.00 for mental anguish and inconvenience damages. (Id.)

After Judge Kennedy denied a posttrial motion filed by Plaintiff, he entered a final judgment order which totaled $173,000.00 for the jury verdict, $12,682.22 in prejudgment interest, $616.51 in costs, and post-judgment interest accruing at a rate of $26.00 per day. (Pa349-350)

On March 6, 2024, payment was issued by check to the Plaintiff in the amount of $187,494.73, representing the amount of the judgment order and forty-five days' worth of interest. (See, Motion to Mark Judgment Satisfied, at Exhibit B.) Plaintiff accepted the check, and it was duly cashed. (Id.)

After Plaintiff's motion for a new trial was denied, her notice of appeal followed. (Pa356-359) Defendant then filed a cross-appeal. (Pa351-355)

Statement of Facts

The present appeal stems from a June 3, 2020 derecho storm, in which a tree on the property of New Jersey American Water toppled another tree adjacent to Plaintiff's home, causing significant damages. (5T77:20-25; 112:24-113:4;)

The question of liability at trial and asked whether New Jersey American Water was negligent in caring for the tree and whether it knew or had reason to

know that the tree posed the potential to collapse and cause damages. (See, e.g., 8T85:8-88:5)

Prior to trial, several issues or claims were dismissed from the case. These included a motion to preclude Plaintiff's wage loss claim, to preclude reference to permanent injuries, and do preclude testimony from certain medical providers. (Pa270-275) Plaintiff's counsel stipulated to motions *in limine* on these three subjects and the trial judge granted the New Jersey American Waters motions *in limine* on them as unopposed. (Da1-2; Pa270-275)

The case proceeded to trial against New Jersey American Water alone before Judge Kennedy and a jury. (2T-8T) Included in the witnesses at trial were Jeanette Glennon (3T53:9-17) and Courtney Pederzani (4T31:15-51:7),via taped deposition, who Plaintiff had not identified during the discovery period but who Judge Kennedy allowed to testify as to the alleged condition of the tree owned by New Jersey American Water prior to the storm. (Da45-46)

Plaintiff also testified at trial about her insurance coverage. Plaintiff, at one point, had rented out her home and, at that time, reduced her insurance coverage for personal property to $5,000.00. (6T32:1-33:3) When she resumed living at the property, she did not increase the personal property coverage so

that at the time of the storm, her coverage limit was still $5,000.00. (Id.) Plaintiff was the first at trial to broach the subject of her insurance coverage limits. (3T35:7-18)

At trial, Plaintiff sought to support her claim for personal property damages but presented nothing but her own testimony as to her loss and a value, supposedly representing the "fair market value," which she assigned herself. (6T75:17-85:18) While Plaintiff then factored in a discount of 20%, supposedly to account for depreciation, there was no expert testimony that either of these—the amounts she believed the items were worth or that the depreciation would be 20%—actually constitute the "fair market value" of the alleged lost personal property. (See, 6T85:14-18)

Several other evidentiary issues arose at trial. For example, New Jersey American Water's expert was permitted to express his opinion about the management of the pruning of the tree in question by nonparty Public Service Electric & Gas Co., ("PSE&G"), who had an easement in light of power lines in the area and New Jersey American Water's expert was permitted to testify that PSE&G required its approval before any pruning of the trees in the vicinity of its power lines. (2T15:16-24:3)

Additionally, the trial judge properly allowed New Jersey American Water to cross-examine Plaintiff on several different possible causes for

trauma and mental anguish which Plaintiff allegedly suffered and which she alleged the tree incident caused. (3T50-53; 6T32-33; 6T58-63; 8T36-37) The cross-examination merely identified several different possible causes which the jury could find were causally related to any trauma or mental anguish that they might determine Plaintiff suffered.

During the charge conference, Judge Kennedy properly rejected Plaintiff's attempt to include a charge for negligence *per se* and a charge concerning the duty when using a highly destructive agency. (7T234-235:237:20; 242:23)

On January 18, 2024, the jury returned a verdict for Plaintiff and against New Jersey American Water. (8T119:19-121:1) They found New Jersey American Water to have been negligent and that it was a proximate cause of the incident. (8T119:21-120:10) The jury awarded Plaintiff $173,000.00 (8T120:24-25): $48,000.00 for dwelling property damages (8T120:15-16), $0.00 for personal property damages (8T120:17-18), $50,000.00 for loss of use damages (8T120:19-20), and $75,000.00 for mental anguish and inconvenience damages (8T120:-23).

On March 6, 2024, payment was issued by check to the Plaintiff for $187,494.73, representing the amount of the verdict, prejudgment interest, costs and forty-five days' worth of interest. (See, Motion to Mark Judgment

Satisfied, at Exhibit B.) Plaintiff accepted the check, and it was duly cashed. (Id.)

This appeal follows. (Pa356-359; 351-355)

Legal Argument.

ISSUE I: PLAINTIFF'S FIRST ARGUMENT IS NOT ASSERTED AGAINST NEW JERSEY AMERICAN WATER COMPANY.

The arguments put forth in this section of Plaintiff's brief addresses the dismissal of the Haddonfield defendants, who were dismissed due to Tort Claims Act immunity. New Jersey American Water takes no position on the correctness of Judge Bernardin's decision.

ISSUE II: PLAINTIFF WAS NOT DEPRIVED OF A FAIR TRIAL AND MAY NOT SEEK A NEW TRIAL ON DAMAGES.

Next, Plaintiff argues that Judge Kennedy deprived her of a fair trial by the accumulation of what she believes were trial errors. However, she is barred from seeking a new trial on damages because she accepted payment of the judgment. Moreover, the issues upon which Plaintiff bases this argument were not reversible error, either individually or in the aggregate.

A) Plaintiff Is Barred From Seeking A New Trial Or A New Trial On Damages.

As an initial matter, Plaintiff is barred from raising any issue which would result in granting a new damages trial or a new trial on all issues

because she accepted payment in the amount of $187,494.73 as payment of the jury's verdict, costs, and pre- and post-judgment interest, and subsequently cashed the check in that amount. Under New Jersey law, the acceptance of that payment precludes her from attacking the propriety of that judgment on appeal.

"It is a well recognized rule that a litigant who voluntarily accepts the benefits of a judgment is estopped from attacking it on appeal." Tassie v. Tassie, 140 N.J. Super. 517, 524–25 (App. Div. 1976).[2] The rule is "a corollary to the established principle that any act upon the part of a litigant by which he expressly or impliedly recognizes the validity of a judgment operates as a waiver or surrender of his right to appeal therefrom." Id. at 525 (citing Sturdivant v. General Brass & Machine Corp., 115 N.J. Super. 224, 227–28 (App. Div. 1971)).

> [A]ny act on the part of a party by which he impliedly recognizes the validity of a judgment against him operates as a waiver of his right to appeal therefrom, or to bring error to reverse it, and clearly one who voluntarily acquiesces in or ratifies a judgment against him cannot appeal from it. The acquiescence which prohibits an appeal, or destroys it when taken, is the

[2] This rule was recognized by this Court as recently as 2018, albeit in an unpublished decision. G.M. v. R.M., A-1341-16T4, 2018 WL 672284, at *7 (App. Div. Feb. 2, 2018). See, also, State v. K.P.S., 221 N.J. 266, 279 fn.7 (2015) (affirming that unpublished decisions may be relied upon for their "persuasive value.")

> doing or giving of the thing which the decree commands to be done or given.
>
> [Sturdivant v. Gen. Brass & Mach. Corp., 115 N.J. Super. 224, 227 (App. Div. 1971) (quoting 4 Am.Jur.2d, Appeal and Error, § 242 at 737.)]

In Adolph Gottscho, Inc. v. Am. Marking Corp., 26 N.J. 229 (1958), the Supreme Court distinguished the situation which exists when the appealing party's appellate issue seeks to "increase but not to reduce the amount of the judgment." Gottscho, 26 N.J. at 242. In that situation, the law in Tassie does not apply.

Thus, the law in this area bars Plaintiff from seeking a new trial on liability or for a new trial on damages generally because, by accepting the payment of the judgment on the jury's verdict, Plaintiff has implicitly recognized the validity of that judgment. A retrial either as to liability or to damages generally could result, on the retrial, with a verdict either in favor of Defendant or in an amount less than the verdict previously awarded by the jury. The rule in Tassie bars plaintiff from repudiating that jury award, as she had voluntarily accepted payment fulfilling the judgment previously entered.

Thus, no argument which seeks a new trial or new trial on damages, generally, is meritorious, as Plaintiff is estopped from asserting those claims.[3]

[3] It should be noted, however, that, under Gottscho, Plaintiff's argument at Point 3 of her brief—seeking a new trial on damages ***limited to the damages for personal***

B) Plaintiff Has Not Demonstrated A Deprivation Of A Fair Trial Based On Cumulative Rulings.

Plaintiff asserted that six alleged minor errors cumulatively led to a deprivation of a fair trial. Even if Plaintiff were not barred from seeking a new trial on damages, there is no merit to these claims.

1) PSE&G's Management Of The Tree

First, Plaintiff argues that there was somehow error in New Jersey American Water's expert being allowed to express his opinion that PSE&G managed the pruning of the tree in question, and that New Jersey American Water was not allowed to remove or prune the subject tree without the knowledge of PSE&G.

This issue went solely to the question of New Jersey American Water's negligence, as even Plaintiff's counsel conceded at trial. (2T16:18-17:5) However, because the jury nevertheless found New Jersey American Water negligent, even with the admission of that evidence, the admission of the testimony could amount to no more than harmless error.

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property—would not be barred, as that seeks only to increase the amount of the verdict, and there is no chance that a subsequent award could be less than the $0 awarded by the jury already.

To the extent Plaintiff argues that it somehow played a role in the amount of the jury's award, there is simply no evidence to support that argument, and it is nothing but speculation which this Court should reject.

Furthermore, admitting this evidence was not an abuse of discretion in any event. The information provided by the defense expert properly, and truthfully, detailed the extent to which PSE&G managed the tree pursuant to its right of way, which even Plaintiff's trial counsel conceded that PSE&G enjoyed. (2T16:1-12; 20:11-12) The notion that this testimony "threatened to confuse the jury" or "misrepresented New Jersey law" is without basis. Nothing in the testimony did anything more than discuss PSE&G's right of way, and the fact that New Jersey America Water had to coordinate with PSE&G about any maintenance of the tree, which the jury was free to consider as it wished. Considering that the evidence went solely to liability and the jury found in favor of Plaintiff on liability proves that the jury clearly found it inconsequential.

Finally, there is simply nothing connecting the inclusion of the testimony with the amount of damages awarded by the jury other than via fanciful speculation. This Court should reject this argument in toto.

2) Motion *In limine* For Wage Loss And Medical Injury Claims

Next, Plaintiff argues that there was somehow error in the Court barring the wage loss and medical injury claims. This argument is without merit because Plaintiff waived any such recovery by stipulating to the motions *in limine*.

On January 8, 2024, Plaintiff's counsel stipulated to Defendant New Jersey American Water's motions *in limine* #1, to preclude the wage loss claim; #3, precluding reference to permanent injury; and #4 precluding testimony from certain medical providers. Counsel for New Jersey American Water sent a letter to Judge Kennedy, as per his request, on January 10, 2024, detailing Plaintiff's stipulation. The letter, filed of record with the Court at transaction LCV202480215, stated as follows:

> On Monday, January 8, 2024, Plaintiff stipulated to the the [*sic*] following Motions *in limine* so, in effect, those orders can be granted.
>
> NJAW's Motion *in limine* #1 to preclude a claim for wage loss, LCV20232284883;
>
> NJAW's Motion *in limine* #3 to preclude reference to permanent injury, LCV20232284990
>
> NJAW's Motion *in limine* #4 to preclude testimony from certain medical providers, LCV20232286165
>
> * * *
>
> Plaintiff's counsel is copied and should notify the Court if they

disagree with the above statements.

(Da1-2)

Nowhere on the record did Plaintiff's counsel lodge any disagreement with defense counsel's statement. Accordingly Judge Kennedy granted the motions as unopposed.

Plaintiff has waived any consideration of this issue and is now barred from arguing that Judge Kennedy committed error by granting these motions. "Under the invited error doctrine, trial errors that were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal." State v. Clark, 251 N.J. 266, 298 n.9 (2022) (internal quotes omitted.) See, also, Brett v. Great Am. Recreation, 144 N.J. 479, 503 (1996) ("The doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error.")

In this case, Plaintiff consented to and acquiesced in Judge Kennedy granting these motions *in limine*. Plaintiff has therefore waived any objection to them and cannot raise them as trial error now.

3) Cross Examination On Plaintiff's Trauma

Next, Plaintiff argues that the trial judge erred by permitting too much cross examination on the potential sources of Plaintiff's mental anguish. However, because these subjects were relevant to Plaintiff's claims for mental anguish damages, they were not improper nor was it error to permit the cross-examination. It was certainly not plain error.

Because Plaintiff did not lodge any objection to this testimony and the statements made in opening and closing arguments at trial, the plain error standard applies. See, Rule 2:10-2 ("Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interest of justice, notice plain error not brought to the attention of the trial... court.") Under that doctrine, an appellate court should disregard errors unless they are "clearly capable of producing an unjust result." Id. "This is a 'high bar,' requiring reversal only where the possibility of an injustice is 'real' and 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" State v. Garcia, 245 N.J. 412, 437 (2021), (quoting State v. Trinidad, 241 N.J. 425, 445 (2020))

In this case, Plaintiff made a claim for damages for mental anguish and inconvenience. (8T120:21-23) The testimony of Plaintiff, herself, her daughter, and her expert, Dr. Michael Natal, supported her claim.

It was the jury's job to determine whether Plaintiff had, in fact, suffered the mental anguish, post-traumatic stress disorder, and emotional distress as she claimed, and, if she did, whether the tree incident proximately caused that mental anguish. See, Reichert v. Vegholm, 366 N.J. Super. 209, 214 (App. Div. 2004) ("[T]he general rule is that the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff." Internal quotes omitted.)

However, if the jury believes that Plaintiff did, indeed, suffer mental anguish and post-traumatic stress disorder, as she claimed, the defense may properly defend the case by presenting evidence—including the very cross examination that Plaintiff now states was plain error—that something other Defendant's negligence caused that mental anguish. It was on that basis that the cross-examination was proper and not an abuse of discretion. In each instance, the subject matter addressed with Plaintiff went directly to alternative causes for any mental anguish that Plaintiff alleged.

Finally, this Court should note that defense counsel handled the questioning on these alternative potential causes of mental distress in a

professional, measured, sensitive, noncombative, and non-exploitive manner which informed the jury of the essential information they needed to resolve the causation issues without prejudicial effect.

As such, there is no plain error in permitting this cross examination.

4) Denial Of Instruction On *Per se* Negligence

Next, Plaintiff argues that it was error for Judge Kennedy not to give a jury instruction on negligence *per se*, based on the supposed Haddonfield ordinance which addressed trees whose branches overhang the street. However, this claim is without merit because it can amount to no more than harmless error. This issue solely addresses the question of liability, but the jury found for the plaintiff on liability so therefore any claim that the jury instruction was insufficient regarding liability could not have had any effect on the jury's verdict and it is therefore irrelevant.

Any claimed connection between this lack of instruction and the amount of the jury's verdict is frivolous and nothing but rank speculation.

Moreover, there was no error in denying this instruction. First, the violation of a local ordinance is not negligence *per se* nor evidence of negligence. It is a "well-settled principle that municipal ordinances do not create a tort duty, as a matter of law." Brown v. Saint Venantius Sch., 111 N.J. 325, 335 (1988). Municipal ordinances are not adopted to protect individual

members of the public, but "to impose upon those regulated 'the public burdens of the municipal government.'" Luchejko v. City of Hoboken, 207 N.J. 191, 200-201 (2011).

Thus, it is not a valid basis for a charge of negligence *per se* under the particular facts of this case because nothing in the case made trimming overhanging branches relevant to the claims.

Furthermore, as Judge Kennedy noted, there was simply no evidence of record indicating that New Jersey American Water violated this ordinance. (2T237:2-12)

As such, this argument is without merit.

5) Refusal To Instruct Jury On Duty Concerning A "Highly Destructive Agency."

Next, Plaintiff asserts that the trial court's refusal to give the jury charge on "highly destructive agency" was erroneous. However, this argument also can amount to no more than harmless error because the only thing that the charge addresses is liability—specifically the increased duty owed by a defendant using such an agency—and the jury's verdict on liability was for Plaintiff.

Furthermore, Judge Kennedy was correct in not giving the charge, because there is nothing in the law which would apply this heightened duty to the facts present in this case. The "highly destructive agency" charge is

appropriate in cases such as those dealing with electricity, gas, explosives demolition of the building, firearms, x-ray machines, roller coaster and similar devices, and fireworks, as set out as examples in the model jury charge itself.

Here, a tree—even an old tree—is not a highly destructive agency, as the term is used in the instruction. Therefore, the trial judge properly excluded the instruction.

6) Testimony Concerning The Insurance Coverage.

Finally, Plaintiff argues that it was improper to inform the jury that the plaintiff had insurance to cover her loss, citing Brandimarte v. Green, 37 N.J. 557 (1962); Krohn v. New Jersey Full Ins. Underwriters Ass'n, 316 N.J. Super. 477 (App. Div. 1998); Pickett v. Bevacqua, 273 N.J. Super. 1, 3 (App. Div. 1994).

However, in this case, it was ***Plaintiff's counsel*** who raised the fact of Plaintiff's insurance and the amount of her contents coverage in her policy in his opening statement.

> Number two, because of mold, rot, rain water, storm water, she lost all her contents, furniture, destroyed. So she had rented this house out, came back in. ***Her insurance agent gave her the building coverage but neglected to put her contents back on the insurance policy when she moved back in from having went to (inaudible). So she only had $5,000 of contents coverage, which is normal with a renter's policy.*** So we're going to ask for the difference between what it

> cost to get her personal property back, this is category number two, and subtract it by 1,000 that she got from her insurance company.
>
> (3T35:7-18)

The next mention of insurance was through Plaintiff's witness, Pat Santorsola, the independent adjuster who investigated Plaintiff's claim. (5T76:7-10; 79:24-82:4) In that testimony, Plaintiff's counsel asked Mr. Santorsola all about Plaintiff's insurance coverage and the limits of her personal property coverage. (5T93:24-94:5; 95:14-96:3) That subject was also, naturally, addressed in cross examination, as well. (5T101:14-105:23) Next, Plaintiff, herself, testified to the extent of her coverage in her direct testimony. (6T32:3-33:3) The subject was addressed again during cross examination. (6T119:20-126:24) Finally, it was discussed in closing argument. (8T31:3-8; 8T58:20-62:5)

It was not reversible error for the court to have admitted that testimony.

The mere mention of insurance coverage is not *per se* erroneous. Krohn, 316 N.J. Super. at 482 (stating that "[t]he mere mention of [insurance] coverage has been held not to be prejudicial error.") See, also, N.J.R.E. 411, (noting that the exclusion of evidence of insurance against liability does not apply when offered for another purpose.) The admission of such testimony might be erroneous when offered or used to show that defendants were

negligent or engaged in culpable conduct, or was cited as a basis to increase or decrease the damages. Krohn, 316 N.J. Super. at 482. No such use was made of the insurance coverage issue in this case.[4]

Rather, Plaintiff used the Plaintiff's insurance coverage information to explain why the payment from her carrier for the loss of personal property was in the amount she received. She wished the jury to consider her explanation for the fact that her coverage was only $5,000.00, in determining the totality of any verdict. It should also be noted that at no time did Plaintiff seek a limiting instruction of any kind about insurance.

Thus, because Plaintiff was the party who initially raised the question of her own insurance and her limits for personal property coverage, she opened the door to Defendant addressing the issue. Thus, if the admission of the evidence of Plaintiff's insurance coverage was somehow found to be

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[4] It should be noted that Defendant moved *in limine* to permit the argument under the doctrine of avoidable consequences to limit the property loss claim. (2T31:9-37:5) Basically, the motion sought to permit Defendant to argue that damages for personal property could not be recovered to the extent she could have avoided the loss through reasonable efforts without undue risk, which Defendant argued should be held to include obtaining increased levels of personal property coverage under her insurance policy.

However, this motion was denied, so it cannot be the basis for any argument that permitting the introduction of the insurance information was somehow reversible error under Krohn, supra.

erroneous—which Defendant does not believe it was, because it was admitted for a benign purpose—it would not be reversible error, because Plaintiff, herself, opened the door to its admission. Hrymoc v. Ethicon, Inc., 254 N.J. 446, 473 (2023) ("The doctrine of opening the door allows a party to elicit otherwise inadmissible evidence when the opposing party has made unfair prejudicial use of related evidence.") The "doctrine operates to prevent a [party] from successfully excluding from the [opposing party's] case-in-chief inadmissible evidence and then selectively introducing pieces of this evidence for the [initial party's] own advantage, without allowing the [opposing party] to place the evidence in its proper context." State v. James, 144 N.J. 538, 554 (1996).

Here, by introducing evidence about her insurance coverage for purposes of bolstering her claim, Plaintiff opened the door to the introduction by Defendant of the testimony, evidence and argument which Plaintiff now claims as error. There was no reversible error in Defendant introducing that testimony and Defendant asks this Court to reject Plaintiff's arguments.

ISSUE III: PLAINTIFF IS NOT ENTITLED TO ADDITUR OF A NEW TRIAL ON DAMAGES CONCERNING PERSONAL PROPERTY.

Next, Plaintiff argues that the trial judge erred by denying the motion for new trial or additur. Plaintiff's motion only sought a new trial and additur on the specific question of the Plaintiff's claim to damages for personal property.

A plaintiff seeking a new trial on damages or for additur must demonstrate that the jury's verdict was so "grossly inadequate that it shocks the judicial conscience." Orientale v. Jennings, 239 N.J. 569, 593 (2019). "A jury's verdict, including an award of damages, is cloaked with a 'presumption of correctness.'" Cuevas v. Wentworth Grp., 226 N.J. 480, 501 (2016) (quoting Baxter v. Fairmont Food Co., 74 N.J. 588, 598 (1977)). Further, in reviewing the jury's award, this Court must view the evidence in the light most favorable to Defendant as the verdict-winner on this issue and as the non-moving party. Monheit v. Rottenberg, 295 N.J. Super. 320, 327 (App. Div. 1996).

In this case, Plaintiff speculates that the reason for the jury's verdict wsa related to the issue of insurance, discussed above. However, that argument is merely speculation and also improperly views the evidence in the light favorable to Plaintiff. However, properly viewing the evidence of the case in the light most favorable to New Jersey American Water, the jury's verdict

stemmed from their rejection of the evidence Plaintiff presented to support her claim for damages for personal property.

In this case, it was Plaintiff's burden to demonstrate both the loss and the fair market value of the property for which she sought recovery. Hyland v. Borras, 316 N.J. Super. 22, 24-25 (App. Div. 1998); Douches v. Royal, 1 N.J. Super. 45, 47 (App. Div. 1948); Model Jury Charge (Civil), 8.44, "Personal Property"

However, Plaintiff's evidence on this point consisted of lists which she, herself, amassed, with dollar values which she generated. (6T75:17-85:18) There was no evidence from an economist or economic expert to substantiate her figures. While Plaintiff's testimony on this subject was admissible, Rodgers v. Reid Oldsmobile, Inc., 58 N.J. Super. 375, 385 (App. Div. 1959), the jury was not bound to accept the values which Plaintiff placed on these figures, as Judge Kennedy instruction to the jury demonstrated:

> You also heard discussions about personal property, so I'm going to explain that. If you ultimately find the plaintiff -- plaintiff's personal property was damaged as a result of the defendant's negligence, plaintiff would be entitled to your verdict. Plaintiff would be entitled to money damages from the defendant for the loss suffered. The measure of damages for such loss is the difference between the market value of the personal property before and the market value after the damage occurred.

> If the personal property has no market value in its damaged condition, the measure of damages is the difference between the market value of the personal property before the damages occurred and its salvage value in its damaged condition. If the personal property is not substantially damaged and it can be repaired at a cost less than the difference between the market value before and its market value after the damage occurred, the plaintiff's damage would be limited to the cost of the repairs.
>
> ***In determining the amount of money, if any, to be awarded for damages to the plaintiff, you may consider, but are not bind -- bound by her testimony as to her opinion of the value of the property before and after it was damaged.***
>
> (8T 94:4-95:3, emphasis added.)

In this case, the jury's verdict would be fully explained by the conclusion that the jury simply rejected Plaintiff's testimony on valuation and concluding that Plaintiff did not adequately meet her burden to establish the amount of her loss as to her personal property claim. There is nothing inappropriate or erroneous in a jury doing so, as that is the jury's primary responsibility.

As such, there was no error in the jury's verdict and no basis to grant either additur or a new trial on damages limited to personal property.

Cross Appeal Legal Argument

ISSUE I: IN THE ALTERNATIVE, IF THIS COURT SOMEHOW ORDERS A NEW TRIAL, IT SHOULD BE ON ALL ISSUES AND PLAINTIFF SHOULD BE BARRED FROM

INTRODUCING THE TESTIMONY OF CERTAIN WITNESSES. (RAISED DA5-44; 2T37:17-46:22)

In a previous section of this brief, Defendant demonstrated that because Plaintiff accepted payment on the judgment, Plaintiff is estopped from seeking a new trial on all issues or a new trial on damages generally.

However, if this Court somehow finds that Plaintiff is entitled to a new trial, it must be a new trial on all issues because the jury verdict finding liability in favor of Plaintiff and against Defendant arose due to the erroneous decision to permit the testimony of two witnesses, Jeanette Glennon and Courtney Pederzani.

On October 4, 2023, New Jersey American Water filed its motion *in limine* seeking to preclude the testimony of the two witnesses. In her answers to Interrogatories, Plaintiff identified numerous potential lay witnesses, however, her answers to Interrogatories did not identify Jeannette Glennon or Courtney Pederzani as witnesses with personal knowledge pertaining to the facts of this case. (Da7-25).

Plaintiff was also deposed in connection with this lawsuit on August 25, 2022. Despite being asked questions about potential witnesses who may have had knowledge of the facts pertaining to her lawsuit, Plaintiff did not identify Jeannette Glennon or Courtney Pederzani as potential fact witnesses. (Da26-29)

The case was originally listed for a September 5, 2023 trial. On August 29, 2023, plaintiff filed a third revised Trial Information Exchange (Da30-34) in which plaintiff, for the first time, identified Jeannette Glennon as well as Jason and Courtney Pederzani as fact witnesses in this case. Neither of these witnesses had ever been identified by plaintiff's counsel prior to August 29, 2023, literally one week before the September 5, 2023 trial date. Fact discovery had been closed on December 23, 2022. Thus, Plaintiff identified these witnesses for the first time nine months after the close of fact discovery and one week before the Trial date.

Plaintiff presented the witnesses to offer testimony regarding what the condition of the black oak tree was prior to the June 3, 2020 storm. Plaintiff did not identify any potential witnesses in Interrogatory No. 16 as witnesses to the condition of the black oak prior to June 3, 2020.

Plaintiff, in opposition to the motion *in limine*, relied upon Kilhullen v. ABM Industries, 2009 N.J. Super. Unpub. LEXIS 2289, 2009 W.L. 2568006 (App. Div. 2009) (Da35-44) in opposition to this Motion. Plaintiff's reliance on this case is misplaced for several reasons. The facts in Kilhullen are inconsistent with the facts of the present case. In Kilhullen, the defendant identified the witness by name and provided the last known address for that fact witness to opposing counsel. Here, plaintiff never identified Jeannette

Glennon or Courtney Pederzani as fact witnesses at any point during the discovery period in this case. Plaintiff did not identify these witnesses until the week before trial.

Plaintiff also relied upon Brown v. Mortimer, 100 N.J. Super. 395 (App. Div. 1968)("Mortimer") and D.G. ex rel. J.G. v. N. Plainfield Bd. of Educ., 400 N.J. Super. 1 (App. Div. 2008). In those cases, this Court affirmed that parties to litigation may elicit the names of witnesses their adversaries propose to use at the trial, and that sanctions including exclusion of the testimony of those witnesses are proper when a party fails to provide the names of potential witnesses.

The Mortimer Court further recognized that withholding that sanction is only appropriate where there is (1) the absence of a design to mislead, (2) absence of the element of surprise if the evidence is admitted, and (3) absence of prejudice which would result from the admission of the evidence. Mortimer, 100 N.J. Super. at 401-02.

Here, there was a clear design to mislead. Jeannette Glennon has testified that she has been a close social friend of the plaintiff for as much as 20 years. Ms. Pederzani had also been a neighbor of the plaintiff for several years as well. Plaintiff was certainly aware of Ms. Glennon and Ms. Pederzani and should have been aware of any evidence that they may provide during

discovery. There was also an element of surprise, as New Jersey American Water had no possible way of knowing of the existence of these witnesses. Finally, given that their testimony concerning the crucial issue of the status of the tree prior to the derecho storm, and the clear implication of that information on the jury's liability verdict, prejudice is patent.

For those reasons, New Jersey American Water respectfully submits that Judge Kennedy improperly denied the motion *in limine* and permitted Glennon and Pederzani to testify. This was an abuse of discretion.

As such, the decision to permit the testimony of these two witnesses was clearly error and if this court should somehow order a new trial, it must be a new trial on all issues including liability, and the testimony Glennon and Pederzani must be barred.

Conclusion

For the foregoing reasons, Defendant New Jersey American Water asks this Court to affirm the jury's verdict.

Respectfully Submitted,
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	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
BRENDA ZADJEIKA, Plaintiff/Appellant, vs. NJ AMERICAN WATER, BOROUGH OF HADDONFIELD, HADDONFIELD SHADE TREE COMMISSION, JOHN DOES 1-10, and ABC COMPANIES 1-10, Defendants/Respondents.	Docket No. A-2181-23 **CIVIL ACTION** **ON APPEAL FROM:** THE FEBRUARY 3, 2023 ORDER AND DECISION FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CAMDEN COUNTY DOCKET NUMBER: CAM-L-1057-21 SAT BELOW: Hon. Daniel A. Bernardin, J.S.C.

BRIEF OF DEFENDANTS-RESPONDENTS, BOROUGH OF HADDONFIELD AND HADDONFIELD SHADE TREE COMMISSION

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PRELIMINARY STATEMENT

The trial court's decision to grant summary judgment to the defendants/respondents, Borough of Haddonfield (the "Borough" or "Haddonfield") and the Haddonfield Shade Tree Commission ("HSTC") should be affirmed, as the trial court correctly found the undisputed facts conclusively showed that liability in this case could not lie against either the Borough or the HSTC based upon specific provisions of New Jersey's Tort Claims Act.

First, the trial court properly determined the evidential record did not establish liability pursuant to N.J.S.A. 59:4-2 against the Borough with respect to the black oak tree which toppled over in the June 3, 2020 storm as the black oak tree was not on public property as defined by the Tort Claims Act. Further, the trial court properly rejected the Plaintiff's attempts to argue that the Borough should be equitably estopped from denying ownership or control of the black oak tree.

Second, the trial court properly dismissed Plaintiff's claims for pain and suffering damages against the Borough and the HSTC because her alleged injuries failed to meet the injury threshold provision of N.J.S.A. 59:9-2(d).

Third, the trial court correctly found that the HSTC is immune from liability caused directly or indirectly by a tree or any part thereof pursuant to N.J.S.A. 59:4-10. Plaintiff has waived any challenge to this determination by the trial court by failing to raise the issue in this appeal.

Finally, the trial court properly determined that to the extent Plaintiff alleged that the Borough failed to enforce its own ordinances regarding trees or failed to inspect the black oak tree located on defendant, New Jersey American Water Company's property, the Borough enjoys immunity from such claims under N.J.S.A. 59:2-4 and N.J.S.A. 59:2-6. Plaintiff has also waived any challenge to this determination by the trial court by failing to raise the issue in this appeal.

The trial court's February 3, 2023 decision granting summary judgment both to the Borough and to the HSTC in all respects is well-reasoned, legally sound, and consistent with the Tort Claims Act and its stated objectives, as well as New Jersey Supreme Court and Appellate Division decisions interpreting the Tort Claims Act.

Plaintiff further improperly attempts to raise for the first time in this appeal a contention that the pin oak tree near her property was (in addition to the black oak tree) a separate dangerous condition under N.J.S.A. 59:4-2. Not only is such an argument improperly raised at this time, never having been raised below to the trial court, the argument is meritless.

There is nothing in either the evidential record or the law to warrant overturning the trial court's decision. The trial court's grant of summary judgment in favor of the Borough and the HSTC should be affirmed.

CONCISE PROCEDURAL HISTORY

On April 8, 2021, Plaintiff filed her Complaint against the Borough, the HSTC and the co-defendant, New Jersey American Water Company ("NJAWC"). (A1). Count III of the Complaint, the sole cause of action against the Borough and the HSTC, alleged that a black oak tree located on the property of NJAWC constituted a dangerous condition and that the Borough's failure to take appropriate action with respect to the black oak tree and to protect Plaintiff and the public from the alleged dangerous condition was palpably unreasonable. (A10). Plaintiff further alleged that the Borough had a duty to compel NJWAC to take action with respect to the dangerous condition but that it failed to do so. (A10).

The Borough and the HSTC filed their Answer on July 30, 2021. (A14). In their asserted affirmative defenses, the Borough and the HSTC claimed that they were entitled to immunity under various provisions of the Tort Claims Act ("TCA"), N.J.S.A. 59:1-1 et seq. (A20).

The discovery period closed on December 23, 2022 and the Borough and the HSTC filed a motion for summary judgment the same day (as did NJAWC). (A33). Oral argument on the motions for summary judgment was heard on February 3, 2023 and the Court issued an oral opinion on the record later the same day granting the Borough's and the HSTC's motion for summary judgment. An Order issued February 3, 2023. (A219). The Court also denied NJAWC's motion for summary

judgment. The matter thereafter proceeded to a jury trial between Plaintiff and NJAWC with a final judgment being entered on March 6, 2024. (A349).

COUNTERSTATEMENT OF FACTS

On or about June 3, 2020, Plaintiff resided at 116 Colonial Avenue in Haddonfield, New Jersey. (A1, A35, A42). On that date, during a severe storm, a large black oak tree located at 263 Lake Street fell across Lake Street towards Plaintiff's home, striking another tree, a pin oak located on the curb strip next to Plaintiff's property, causing both trees to fall onto the roof of Plaintiff's home. (A35-36, A42). The damaging windstorm in question of June 3, 2020 was classified as a derecho. (A36, A60). Close to Haddonfield (9 miles away), a wind gust of 73 mph was measured in Moorestown from the June 3, 2020 storm. (A36, A60).

The 263 Lake Street property, which had previously been owned by the Borough of Haddonfield, was sold to NJAWC in 2015 as part of a larger sale of water and wastewater systems by the Borough to NJAWC. (A36, A73). Greg Ley is the Superintendent of Public Works for the Borough of Haddonfield. (A36, A104). At the time of the sale of 263 Lake Street to NJAWC, Mr. Ley was instructed by the Borough's Administrator, Sharon McCullough, that NJAWC was responsible for everything on the property from that point forward. (A36, A105). Mr. Ley

thereafter instructed his Public Works crew to remove all Borough property (tools, equipment, etc.) from the premises. (A37, A105).

For the past ten years, Bill Ober has been employed by the Department of Public Works for the Borough of Haddonfield, first as a tree crew chief, then as a foreman. (A37, A116-17). As foreman, Mr. Ober functions as the liaison from Public Works to the HSTC. (A37, A116-17). At the time of the subject incident of June 3, 2020, the Borough and the HSTC had a Community Forestry Management Plan ("CFMP") in place, a copy of which is publicly available on the Borough's website, which "outlines the programs and procedures through which public tree resources under the jurisdiction of the Borough of Haddonfield will continue to be managed through December 31, 2021." (A37, HDa006). The CFMP recognizes that "[d]espite active tree management, it is inevitable that potentially hazardous conditions will emerge" and that "[t]he Borough acknowledges that not all such hazardous conditions can or will be predicted." (A37, HDa007). The CFMP further states that "[c]omprehensive and proactive management will reduce the probability of hazards, but unpredictable events will still occur." (A37, HDa007). Thus, the CFMP cautions that "[t]he Borough's resources are limited and it may not be able to meet every need of the tree population immediately." (A38, HDa007). The CFMP sets forth the training programs that the Borough and the HSTC engage in to comply with the training and continuing education requirements under the New Jersey Shade

Tree and Community Forestry Assistance Act, N.J.S.A. 40:64-1 et seq., in order to maintain Approved Status each year. (A38, HDa008-012, HDa027-029). The CFMP also confirms that the HSTC (not the Borough), through both New Jersey State Statute and Haddonfield Borough Ordinance, "is primarily responsible for the management of all municipally controlled trees in the Borough of Haddonfield." (A38, HDa020-024).

In 2010, the Borough purchased a tree inventory software program from ArborPro. (A38, A120). ArborPro prepared an inventory of Borough owned trees which resulted in the creation of a Borough tree inventory list consisting of 139 pages. Page 60 of the inventory list references the black oak tree in question. (A38, A144). The black oak tree is designated "NA" on the tree inventory list because 263 Lake Street where it is located is no longer owned by the Borough. (A38, A105). The Borough only takes care of Borough-owned trees. (A38, A122).

On May 16, 2020, only eighteen days before the subject storm, Plaintiff sent an e-mail to Greg Ley expressing a concern about the black oak tree located across the street from her property on 263 Lake Street. (A39, A145). Following the subject incident of June 3, 2020, Mr. Ober informed Plaintiff, via email dated August 24, 2020, that the Borough of Haddonfield is only responsible for the trees between the curb and sidewalk along Lake Street and the subject black oak tree was located on

the property of NJAWC and that NJAWC, therefore, was responsible for caring for it. (A39, A146).

The Borough does not care for or trim trees on private property. (A39, A130). The CFMP provides that "[p]rivate property owners assist the [Haddonfield] Shade Tree Program to the extent that they . . . [a]re encouraged to plant and properly care for trees on private property." (A39, HDa022).

Plaintiff served an expert report of a tree expert, Jason C. Miller, RCA, BCMA, dated August 12, 2022. (A39, A148). Plaintiff's tree expert, Jason Miller, opines that had personnel working for the Borough "performed any level of inspection, multiple hazardous conditions would have been observed." (A39, A154). Nowhere in Mr. Miller's report, however, does he identify a law or regulation which would require the Borough to inspect or maintain trees on private property. (A39, A148-163).

With respect to her alleged damages, Plaintiff also served an expert report of a psychologist, Michael Natale, Ph.D., dated October 3 and 7, 2022. (A40, A164). Nowhere in Dr. Natale's report does he opine that Plaintiff suffered a permanent injury or a "permanent loss of a bodily function." (A40, A164-75). Nowhere in Dr. Natale's report does he state that Plaintiff incurred medical expenses as a direct result of the subject incident in excess of $3600.00. (A40, A164-75).

LEGAL ARGUMENT

POINT I: PLAINTIFF IMPROPERLY ATTEMPTS TO RAISE IN THIS APPEAL A CONTENTION THAT THE PIN OAK TREE CONSTITUTED A DANGEROUS CONDITION UNDER N.J.S.A. 59:4-2 FOR WHICH THE BOROUGH SHOULD BE HELD LIABLE (Not raised below).

Plaintiff's Complaint alleges that on June 3, 2020, a large black oak tree located at 263 Lake Street fell across Lake Street towards Plaintiff's home, striking another tree, a pin oak located on the curb strip next to Plaintiff's property, causing both trees to fall onto the roof of Plaintiff's home. (A2-3, ¶¶ 7-10). The Complaint goes on to contain numerous additional allegations about the allegedly dangerous nature of the black oak tree and further alleges negligence against the defendants in connection with an alleged lack of maintenance of the black oak tree. (A4-5, ¶14; A5-6, ¶¶ 17-22; A8, ¶¶ 29-30; A9-11, ¶¶ 36-43).

Plaintiff herself confirmed in her answers to interrogatories that the black oak tree fell into the pin oak tree taking it out and causing both trees to fall onto to her home. (A42). This reinforces the fact that there is no evidence that the pin oak tree itself was a dangerous condition - it was simply collateral damage which got caught up in the falling of the enormous black oak tree towards Plaintiff's home.

As Plaintiff never pled a dangerous condition of the pin oak tree, and never raised any alleged dangers of the pin oak tree during discovery, no issue as to an alleged dangerous condition of the pin oak tree was raised in the Borough's and HSTC's summary judgment motion, which properly focused on the black oak tree.

Further, Plaintiff, in her opposition to said motion, did not raise any argument that the pin oak tree presented a dangerous condition. Thus, the trial court's decision on the motion focused exclusively on the alleged dangerous condition of the black oak tree. (1T, 4:14-5:23, 18:18-25:12).

In the present appeal, Plaintiff, for the first time, alleges that the condition of the *pin* oak tree presented a dangerous condition as well (in addition to the black oak tree) and that the trial court erred by not finding genuine issues of material fact to exist as to whether the Borough could be liable under N.J.S.A. 59:4-2 for an alleged dangerous condition of the pin oak tree.

As noted, this argument is raised for the first time on appeal. An appellate court may consider allegations of errors or omissions not brought to the trial judge's attention if it meets the plain error standard under R. 2:10-2. However, the Appellate Division generally declines to consider issues that were not raised below. See J.K. v. New Jersey State Parole Bd., 247 N.J. 120, 138 n.6 (2021); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234-35 (1973). Articulated another way, "[r]elief under the plain error rule, R. 2:10-2, at least in civil cases, is discretionary and 'should be sparingly employed.' " Baker v. National State Bank, 161 N.J. 220, 226 (1999) (quoting Ford v. Reichert, 23 N.J. 429, 435 (1957)).

Here, Plaintiff fails to demonstrate plain error under R. 2:10-2. The Rule requires a party show an error or omission was "clearly capable of producing an

unjust result." Szczecina v. PV Holding Corp., 414 N.J. Super. 173, 184 (App. Div. 2010) (quoting R. 2:10-2). An alleged dangerous condition with respect to the pin oak tree was not only never raised in any of the discovery or motion briefings filed by any of the parties (including Plaintiff), the Complaint itself alleges a dangerous condition only with respect to the black oak tree, not the pin oak tree. Thus, no error can be discerned, let alone plain error, in the motion judge's decision on the summary judgment motion to the extent that it does not address any unalleged and unarticulated dangerous condition with the pin oak tree.

In addition to the plain error standard, it also is well established that appellate courts do not consider arguments which were "not properly presented to the trial court when an opportunity for such a presentation [wa]s available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (quoting State of New Jersey v. Robinson, 200 N.J. 1, 20 (2009)). Additionally, an issue not argued in a brief before the trial court is deemed abandoned. See Noye v. Hoffmann-La Roche Inc., 238 N.J. Super. 430, 432 n.2 (App. Div.), certif. denied, 122 N.J. 146 (1990) (citing Matter of Bloomingdale Conval. Ctr., 233 N.J. Super. 46, 48 n.1 (App. Div. 1989)) (explaining that appellate courts need not decide an issue that the party did not brief, but raised for the first time during oral argument). Plaintiff's argument with respect to the pin oak tree is neither jurisdictional nor does

the issue implicate a great public interest. Any such argument was also abandoned by Plaintiff by not being briefed before the trial court. Therefore, this argument need not, and should not, be considered here.

The trial court properly considered the arguments before it in granting summary judgment to the Borough and the HSTC, which arguments did not include any contention that the pin oak tree was a dangerous condition under N.J.S.A. 59:4-2. Its ruling should therefore be left undisturbed.

POINT II: THE EVIDENTIAL RECORD IS INSUFFICIENT TO SUPPORT A JURY FINDING OF DANGEROUS CONDITION LIABILITY PURSUANT TO N.J.S.A. 59:4-2 AGAINST THE BOROUGH OF HADDONFIELD WITH RESPECT TO THE PIN OAK TREE (Not raised below).

As set forth in Point I, supra, Plaintiff's Complaint does not allege dangerous condition liability pursuant to N.J.S.A. 59:4-2 against the Borough of Haddonfield or the HSTC with respect to the pin oak tree. Plaintiff also did not argue such dangerous condition liability with respect to the pin oak tree in any of the proceedings before the trial court, including the summary judgment motion brought by the Borough and the HSTC as to all claims against them. While it is the position of the Borough and the HSTC that this procedural history should bar any evaluation of the claim now raised by Plaintiff in her appeal, examination of the evidential

record nevertheless confirms that as a practical matter, Plaintiff's new claim lacks any substantive merit as well.

Under the Tort Claims Act, a party seeking to recover against a public entity for an alleged dangerous condition of public property must prove: (1) that a dangerous condition existed on the property at the time of the injury; (2) that the dangerous condition proximately caused the injury; (3) that the dangerous condition created a foreseeable risk of the kind of injury incurred; and (4) that either (a) a public employee created the dangerous condition or (b) the public entity had actual or constructive notice of the dangerous condition at a sufficient time prior to the injury to have protected against the condition. See N.J.S.A. 59:4-2. Further, under N.J.S.A. 59:4-2, the taking of action or failure to take measures to protect against the condition must have been "palpably unreasonable." See Williams v. Town of Phillipsburg, 171 N.J. Super. 278, 281 (App. Div. 1979).

Here, there was insufficient evidence adduced during discovery in this matter by which Plaintiff could have possibly proven a claim that the Borough or the HSTC were negligent in creating or maintaining a dangerous condition with respect to the pin oak tree, let alone that their conduct was palpably unreasonable. To establish a cause of action in negligence, a plaintiff must prove: "(1) a duty of care owed by defendant to plaintiff; (2) a breach of that duty by defendant; and (3) and injury to plaintiff proximately caused by defendant's breach." Endre v. Arnold, 300 N.J.

Super. 136, 142 (App. Div.), certif. denied, 150 N.J. 27 (1997). Generally, negligence is not presumed, and the burden of proving negligence rests on the plaintiff. Rocco v. New Jersey Transit Rail Operations, Inc., 330 N.J. Super. 320, 338 (App. Div. 2000). Accordingly, Plaintiff in this matter would have been required to prove that the Borough and/or the HSTC negligently created and/or maintained a dangerous condition with respect to the pin oak tree.

In this matter, expert testimony on this issue was required. "[A] jury should not be allowed to speculate without the aid of expert testimony in any area where lay persons could not be expected to have sufficient knowledge or experience." Biunno, Current N.J. Rules of Evidence, comment 1 on N.J.R.E. 702 (2024). Simply stated, "expert testimony is required when the subject matter is so esoteric that jurors of common judgment and experience cannot form a valid judgment." Ibid. Here, as Plaintiff did not proffer any expert opinions as to an alleged dangerous condition of the pin oak tree, a jury in this case would not have had any evidence to support a finding that the pin oak tree in this case in fact was deteriorating or was in a condition of failing health. Plaintiff failed to provide this guidance for a jury to be able to consider. Plaintiff's expert report of arborist Jason Miller only offers opinions as to the condition of the *black oak tree*. (A148-163). Nowhere in his report does Mr. Miller offer any opinions as to the condition of the pin oak tree, let alone opine that it was in a dangerous condition. Ibid. Without any such expert opinion testimony,

any assertion by Plaintiff that the pin oak tree was in a dangerous condition would have been based on mere speculation and thus inadmissible at trial. As the issue of whether the pin oak tree was in a dangerous condition is beyond the ken of the average juror, Plaintiff would have been required to proffer expert testimony in support of such a claim. She did not.

Given the lack of evidential support that any dangerous condition existed with respect to the pin oak tree, it is clear that Plaintiff would have been unable to satisfy the necessary criteria to defeat the Borough's immunity under the Tort Claims Act with respect to any claims concerning the pin oak tree.

For these reasons, the trial court's ruling granting summary judgment to the Borough and dismissing all claims against it was correct as a matter of law and should be left undisturbed.

POINT III: THE TRIAL COURT PROPERLY REJECTED THE PLAINTIFF'S ATTEMPTS TO ARGUE THAT THE BOROUGH SHOULD BE EQUITABLY ESTOPPED FROM DENYING OWNERSHIP OR CONTROL OF THE BLACK OAK TREE (Raised below at 1T19-20, 28).

The Appellate Division reviews a trial court's grant or denial of summary judgment de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). A motion for summary judgment must be granted "if the pleadings, depositions,

answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). "To decide whether a genuine issue of material fact exists, the trial court must 'draw [ ] all legitimate inferences from the facts in favor of the non-moving party.' " Friedman v. Martinez, 242 N.J. 450, 472 (2020) (alterations in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)). The key inquiry is whether the evidence presented, when viewed in the light most favorable to the non-moving party, "[is] sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

In this matter, in its summary judgment motion, the Borough set forth the material facts relative to its motion that are undisputed in this matter, with proper references to the record as required by R. 4:46-2(a). (A35-A40). When, as here, a motion for summary judgment is made, a party opposing that motion bears the affirmative burden of responding to the moving party's statement of material facts through a responding statement of material facts disputing the movant's statement(s) "by citation conforming to the requirements of [R. 4:46-2(a)]. See Polzo v. County of Essex, 196 N.J. 569, 586 (2008) (citing R. 4:46-2(b)). R. 4:46-2(b), by its terms, requires a party opposing a summary judgment motion to file its responding

statement with equally precise record references as the moving party to each of the moving party's assertions. That burden is not optional. See Polzo, supra, 196 N.J. at 586; Lyons v. Township of Wayne, 185 N.J. 426, 435 (2005). Further, this burden cannot be satisfied by the presentation of incompetent or incomplete proofs. Polzo, supra, 196 N.J. at 586 (citing Shelcusky v. Garjulio, 172 N.J. 185, 200-01 (2002) (explaining that "[t]he very object of the summary judgment procedure then is to separate real issues from issues about which there is no serious dispute" and that "[s]ham facts should not subject a defendant to the burden of a trial")).

In the instant matter, Plaintiff did not submit *any* responding statement of undisputed material facts to the Borough's motion as required by R. 4:46-2(b), let alone submit one with the required precise citations to the record. R. 4:46-2(b) provides that where, as here, the party opposing the summary judgment fails to specifically dispute a movant's statements of fact by citation to a portion of the motion record, all of the movant's properly-supported statements of fact will be deemed admitted. Consequently, the motion judge in this case was justified in deeming as properly admitted all of the Borough's statements of undisputed material facts. R. 4:46-2(b) provides ample support for so doing.

As Plaintiff argued during the summary judgment phase of this matter, and as again set forth here (Pb12-15), Plaintiff's sole argument on liability against the Borough is that it should somehow be estopped from any immunity because it

allegedly misled Plaintiff about what entity had control of the black oak tree. However, Plaintiff failed to set forth in the record before the motion judge any statement of undisputed material fact that could establish any alleged misrepresentation or omission by the Borough as to ownership and control of the black oak tree. To the contrary, at the time of the subject incident of June 3, 2020, the Borough and the Haddonfield Shade Tree Commission had a Community Forestry Management Plan ("CFMP") in place, a copy of which is publicly available on the Borough's website, which "outlines the programs and procedures through which public tree resources under the jurisdiction of the Borough of Haddonfield will continue to be managed through December 31, 2021." (A37, HDa006). Per R. 4:46-2(b), Plaintiff admitted this fact. At the time of the subject incident, the 263 Lake Street property, including the subject black oak tree, was indisputably private property. (A36). Per R. 4:46-2(b), Plaintiff admitted this fact as well.

The black oak tree was thus not located on public property as that term is defined by N.J.S.A. 59:4-1(c). Therefore, Plaintiff could not, and cannot, meet the threshold for attempting to establish liability against the Borough under N.J.S.A. 59:4-2 (dangerous condition liability) with respect to the black oak tree. N.J.S.A. 59:4-2 is not an immunity provision under the Tort Claims Act. It is a *liability* provision, and New Jersey law requires that Plaintiff satisfy each and every one of its requirements in order to establish liability against the Borough in this case.

Absent Plaintiff meeting the elements of Section 4-2, sovereign immunity prevails. Plaintiff failed to cite to any law before the motion judge that could support the legal argument she makes that principles of equitable estoppel should permit her to vault the requirement under N.J.S.A. 59:4-2 that *she* prove that the Borough owned or controlled the black oak tree (when the Borough, in fact, did not). In addition, Plaintiff failed to show any properly supported fact to indicate that the Borough in any way reasonably led her to believe that it owned or controlled the subject black oak tree.

For these reasons, the trial court correctly found that Plaintiff did not offer any support for her argument that the Borough should be estopped from asserting sovereign immunity under the Tort Claims Act. (1T19:22-20:10). Equitable estoppel is a doctrine used to prevent manifest injustice, but is "rarely invoked against a governmental entity." McDade v. Siazon, 208 N.J. 463, 480 (2011) (quoting County of Morris v. Fauver, 153 N.J. 80, 104 (1998)). Without being able to establish liability against the Borough under N.J.S.A. 59:4-2, the Tort Claims Act confirms the entitlement of the Borough to the defense of sovereign immunity from the claims of Plaintiff. Further, neither the United States Supreme Court nor the New Jersey Supreme Court has ever applied equitable estoppel to the defense of sovereign immunity. See Royster v. New Jersey State Police, 227 N.J. 482, 496 (2017).

This case does not involve any of the principles essential to invoking the doctrine of equitable estoppel against a public entity. That doctrine applies when one party engages in voluntary conduct, upon which another party relies in good faith and to her detriment, precluding the first party from asserting rights that he might otherwise have had. County of Morris v. Fauver, 153 N.J. 80, 104 (1998). "The essential elements of equitable estoppel are a *knowing and intentional misrepresentation* by the party sought to be estopped under circumstances in which the misrepresentation would probably induce reliance, and reliance by the party seeking estoppel to his or her detriment." O'Malley v. Department of Energy, 109 N.J. 309, 317 (1987) (emphasis added).

"The requirements of equitable estoppel are quite exacting." W.V. Pangborne & Co. v. New Jersey Dep't of Transp., 116 N.J. 543, 553 (1989). The doctrine is rarely applied against governmental entities. See Middletown Twp. Policemen's Benevolent Ass'n Local No. 124 v. Township of Middletown, 162 N.J. 361, 367 (2000). It will be applied against a governmental entity only under "compelling circumstances," County of Morris, supra, 153 N.J. at 104, to prevent a "manifest injustice." O'Malley, supra, 109 N.J. at 316.

For several reasons, Plaintiff here has shown no compelling circumstances to warrant the application of equitable estoppel against the Borough. She has offered no evidence that the Borough made any affirmative misrepresentation. Nothing in

the record suggests that the Borough affirmatively told Plaintiff that it owned or controlled the black oak tree or would otherwise take care of it.

The Borough also never represented to Plaintiff that it owned the 263 Lake Street property upon which the black oak tree sat. Plaintiff here made no inquiry of Haddonfield about the entity responsible for maintaining the black oak tree and conducted no investigation of her own. She simply assumed, incorrectly, that the Borough owned the black oak tree. The Borough was under no obligation to inform Plaintiff who owned the property that the black oak tree was located on. Moreover, the record owner of the 263 Lake Street property (New Jersey American Water Company) was a matter of public record that Plaintiff easily could have determined had she chosen to do so. She did not. The failure of Plaintiff to obtain the correct information about the ownership of the 263 Lake Street property does not provide a basis for taking away the Borough's sovereign immunity on a legal theory of estoppel.

For these reasons, the trial court's ruling granting summary judgment to the Borough and dismissing all claims against it was correct as a matter of law and should be left undisturbed.

POINT IV: THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S CLAIMS FOR PAIN AND SUFFERING DAMAGES AGAINST THE BOROUGH OF HADDONFIELD AND THE HADDONFIELD SHADE TREE COMMISSION BECAUSE HER ALLEGED INJURIES FAIL TO MEET THE NEW JERSEY TORT CLAIMS ACT INJURY THRESHOLD PROVISION OF N.J.S.A. 59:9-2(d) (Raised below at 1T25-29).

In her Complaint, Plaintiff alleges that she incurred pain and suffering damages due to the "significant mental anguish and anxiety over her and her daughter's narrow escape from serious physical harm during the incident, as well as the resultant destruction of their home." (A12, ¶ 50). Section 59:9-2 of the New Jersey Tort Claims Act establishes certain threshold requirements for the recovery of damages for pain and suffering, providing in section (d):

> No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $3,600.

The Tort Claims Act was enacted in order to reestablish the Legislature's overriding philosophy that immunity for public entities is the general rule and liability is the exception. See Pico v. State of New Jersey, 116 N.J. 55, 59 (1989); see also Brooks v. Odom, 150 N.J. 395 (1997) (discussing the legislative history and intent of N.J.S.A. 59:9-2(d)). The Task Force Comment to N.J.S.A. 59:9-2(d), which accompanied the statute through the legislative process and, therefore, has the

weight and value of legislative history, explains the Legislature's policy judgment in enacting this provision:

> The limitation on the recovery of damages in subparagraph (d) reflects the policy judgment that in view of the economic burdens presently facing public entities a claimant should not be reimbursed for non-objective types of damages, such as pain and suffering, except in aggravated circumstances – cases involving permanent loss of a bodily function, permanent disfigurement or dismemberment. . .

The phrase "permanent loss of a bodily function" is not defined in the Tort Claims Act. However, the New Jersey Supreme Court has addressed this issue in several holdings. In analyzing the question of what constitutes a permanent loss of a bodily function, the Court held that a plaintiff must satisfy a two-pronged standard by proving "(1) an objective permanent injury, and (2) a permanent loss of a bodily function that is substantial." Gilhooley v. County of Union, 164 N.J. 533, 540-41 (2000). The Supreme Court has also described injuries which, if supported by medical proof, would obviously meet both prongs of the standard, such as injuries causing blindness, disabling tremors, paralysis and loss of taste and/or smell. See Brooks, supra, 150 N.J. at 403.

To meet the threshold, a permanent loss need not be total, but it must be substantial. Brooks, supra, 150 N.J. at 406. The Tort Claims Act requires a "plaintiff to demonstrate objective, medical evidence of permanent injury to recover damages against a public entity." Gerber ex rel. Gerber v. Springfield Bd. of Educ., 328 N.J.

Super. 24, 35 (App. Div. 2000) (quoting Denis v. City of Newark, 307 N.J. Super. 304, 317 (App. Div. 1998)). A plaintiff must present objective evidence of permanent injury because damages for temporary injuries are not recoverable. Brooks, supra, 150 N.J. at 403.

The New Jersey Supreme Court, in interpreting this injury threshold, has developed a two-part test for the recovery of pain and suffering damages. Plaintiffs must first prove an objective permanent injury and, second, permanent loss of a bodily function that is substantial. See Gilhooley, supra, 164 N.J. at 541; Brooks, supra, 150 N.J. at 403-406; see also Knowles v. Mantua Twp. Soccer Ass'n, 176 N.J. 324, 329 (2003); Kahrar v. Borough of Wallington, 171 N.J. 3, 12 (2002); Ponte v. Overeem, 171 N.J. 46, 52 (2002). This test applies equally to claims for physical injury and claims for psychological injury.

Thus, where a plaintiff seeks damages for a purely psychological injury, even if alleged to be permanent, he or she may not recover unless it results in a permanent physical injury or arises out of an underlying physical violation. See, e.g., Brooks, supra, 150 N.J. at 403 (". . . a claim for emotional distress is recoverable if it results in 'permanent physical sequelae such as disabling tremors, paralysis, or loss of eyesight.' "); Gilhooley, supra, 164 N.J. at 540; see also Collins v. Union County Jail, 150 N.J. 407 (1997) (psychological and emotional injuries should be treated the same as physical injuries under the Tort Claims Act's threshold provision when the

psychological injuries arise in a context similar to that which precipitated plaintiff's physical injuries); Ayers v. Township of Jackson, 106 N.J. 557 (1987).

In Ayers, residents sued the Township for contaminating their well-water with toxic pollutants. Ayers, supra, 106 N.J. at 565. At trial, the jury awarded damages for several injury claims, including the residents' emotional distress caused by the knowledge that they had ingested contaminated water. Ibid. The Appellate Division, however, reversed the emotional distress award concluding that it "constituted 'pain and suffering' for which recovery is barred by N.J.S.A. 59:9-2(d)." Id. at 566. The New Jersey Supreme Court affirmed this reversal. Id. at 572-77.

The Ayers plaintiffs' emotional distress claims boiled down to assertions of anxiety, stress, fear, and depression related to the knowledge that they had drunk tainted water. Id. at 572. Though the plaintiffs' distress qualified as an "injury" under the Tort Claims Act, their subjective symptoms of depression, fear and anxiety were merely pain and suffering. Id. at 577. And, in the absence of a physical manifestation of injury, those claims were held to be barred by N.J.S.A. 59:9-2(d). Ibid. See also Srebnik v. State of New Jersey, 245 N.J. Super. 344, 351-352 (App. Div. 1991) (holding that plaintiff was not entitled to damages under the Tort Claims Act for emotional distress when her alleged depression and stress did not result from

physical injuries, though the cause of her psychological injuries was allegedly attributable to defendant public entities).

In the instant matter, Plaintiff served an expert report of a psychologist Michael Natale, Ph.D., dated October 3 and 7, 2022. (A163)[2]. Nowhere in Dr. Natale's report does he opine that Plaintiff suffered any kind of permanent injury or a "permanent loss of a bodily function." Ibid. Plaintiff herself did not testify at deposition as to having suffered any kind of permanent injury. Thus, there was no evidence in this matter presented to the motion judge by which a jury could find that Plaintiff suffered a permanent loss of a bodily function as required by N.J.S.A. 59:9-2(d)) for a plaintiff to recover pain and suffering damages against a public entity.

In conjunction with her opposition to the Borough's motion for summary judgment, Plaintiff served a supplemental expert report from her medical expert, Dr. Michael Natale dated January 16, 2023[3]. (A182). Plaintiff claimed the Natale Supplemental Report created a genuine issue of material fact as to whether her alleged injuries are permanent. The motion judge properly rejected such argument.

Initially, the Borough set forth the argument, although it was not specifically addressed by the motion judge, that Plaintiff violated two discovery rules by serving

[2] This document is part of the Confidential Appendix of Plaintiff/Appellant.
[3] This document is also part of the Confidential Appendix of Plaintiff/Appellant.

the late Natale Supplemental Report after the discovery end date in this matter[4]. The first rule is Rule 4:17-7, which requires a certification of due diligence by counsel whenever interrogatory amendments are served out of time. The second rule is Rule 4:24-1(c), which requires a showing of exceptional circumstances in order to extend discovery once an arbitration or trial date has been scheduled. Because Plaintiff violated both of these rules, and the spirit of the 2000 Best Practices amendments, the Borough argued that Plaintiff should be barred from serving the late addendum report in response to the Borough's summary judgment motion.

Under Rule 4:17-7, a certification of "due diligence" must be provided to allow late interrogatory amendments. That certification must set forth "a precise explanation that details the cause of the delay and what actions were taken during the elapsed time is a necessary part of proving due diligence as required by Rule 4:17-7. . ." Bender v. Adelson, 187 N.J. 411, 429 (2006).

Discovery expired in this matter on 12/23/22. Prior thereto, Plaintiff did serve an initial report from Dr. Natale in a timely fashion. (A163). However, Plaintiff then served the late addendum report of Dr. Natale (A182) after discovery ended,

[4] It is unclear from the record whether the motion judge actually did consider the Natale Supplemental Report, as the Court specifically referenced the first Natale Report, but never mentioned the Natale Supplemental Report, in its oral decision. As Plaintiff relies on the Natale Supplemental Report in this appeal (including it in the Confidential Appendix at A182), however, the Borough raises the argument here that it should not be considered.

specifically in opposition to the Borough's summary judgment motion in an attempt to thwart it. The addendum report contained no new records reviewed by Dr. Natale. In fact, 100% of the information relied upon by Dr. Natale in his supplemental report, most notably his own interview of Plaintiff, was all available for his review well prior to the 12/23/22 discovery end date. The late addendum report of Dr. Natale was served without the certification of due diligence required under Rule 4:17-7. The Rule provides that in the absence of said certification, the late amendment shall be disregarded by the Court and adverse parties. Plaintiff failed to come forward and provide an explanation for the cause of the delay as required by the New Jersey Supreme Court. As Plaintiff failed to provide any explanation for the delay, due diligence was not shown. Accordingly, the supplemental report should have been barred.

In reviewing violations of Rule 4:24-1(c), trial courts must strictly construe the phrase "exceptional circumstances." Szalontai v. Yazbo's Sports Café, 183 N.J. 386, 396 (2005) ("The mandate of Rule 4:24-1(c) could not be clearer: absent exceptional circumstances, no extension of the discovery period may be permitted after an arbitration or trial date is fixed."). The New Jersey Supreme Court in Bender, supra, has also held that a party must come forward and provide a detailed certification of the "exceptional circumstances" that prevented the party from serving discovery prior to the discovery end date. Bender, supra, 187 N.J. at 429.

Moreover, the failure to provide a detailed certification of the exceptional circumstances at issue "should always be fatal." Ibid.

Here, Plaintiff did not set forth any "exceptional circumstances" that would have required the motion judge to extend discovery in order to accommodate this late report. As indicated above, "mistakes" do not constitute exceptional circumstances. Moreover, Plaintiff failed to file a motion to extend discovery before discovery ran out. Plaintiff should, therefore, have been barred from serving the late Natale Supplemental Report in evidence as opposition to the Borough's summary judgment motion and the Natale Supplemental Report should not be considered in the context of this appeal.

Aside from the procedural deficiencies of the Natale Supplemental Report, the report also failed to correct the substantive inadequacies of his first report to be able to overcome N.J.S.A. 59:9-2(d). "[M]edical-opinion testimony must be couched in terms of reasonable medical certainty or probability; opinions as to possibility are inadmissible." State of New Jersey v. Howard-French, 468 N.J. Super. 448, 465-466 (App. Div.), certif. denied, 248 N.J. 592 (2021) (quoting Johnesee v. Stop & Shop Cos., 174 N.J. Super. 426, 431 (App. Div. 1980)). Here, however, Dr. Natale opines in his supplemental report that plaintiff's PTSD condition "is ***likely*** to be long-standing ***if not*** permanent." (A182). Dr. Natale's opinion not only fails to state that his opinion is within a reasonable degree of

medical certainty, but taken as a whole, his report does not convey the requisite degree of certainty either.

The motion judge thus correctly found that Plaintiff, through her expert, Dr. Natale, failed to satisfy *either* prong of the two-part test required to satisfy N.J.S.A. 59:9-2(d). (1T 27:12-24).

Moreover, in addition to not being able to show a "permanent loss of a bodily function" under N.J.S.A. 59:9-2(e), there was also no evidence in the record before the motion judge by which Plaintiff could prove the second requirement of the statute - that the plaintiff incurred medical treatment expenses in excess of $3,600.00. See N.J.S.A. 59:9-2(e). Thus, even if Plaintiff's alleged psychological injuries were deemed sufficient to meet the threshold requirement of the Tort Claims Act (which is denied, see supra), Plaintiff failed to set forth any evidence showing that her medical expenses exceed $3,600.00. During the course of discovery in this matter, while Plaintiff produced certain medical treatment records, Plaintiff produced no medical billing records of any kind that would be evidential towards showing medical treatment expenses incurred in excess of the statutory threshold. Indeed, when specifically asked in Uniform Form A Interrogatory #13 to "[i]temize in complete detail any and all monies expended or expenses incurred for hospitals, doctors, nurses, diagnostic tests or health care providers, x-rays, medicines, care and appliances . . .," Plaintiff declined to produce any information regarding any medical

expenses, stating that "[u]pon the advice of my attorney, this interrogatory is objected to on the grounds that I am not seeking to recover medical expenses as a result of this incident." (A48, Response #13). Plaintiff never thereafter amended her answers to interrogatories to set forth any medical expenses incurred of any amount. Accordingly, the motion court properly granted summary judgment as to Plaintiff's claims against the Borough for pain and suffering damages under New Jersey law. See N.J.S.A. 59:9-2(d); see also Ward v. Barnes, 545 F. Supp.2d 400, 417-418 (D.N.J. 2008) (noting that the monetary threshold of the Tort Claims Act is "another threshold requirement"). Further, Dr. Natale, Plaintiff's medical expert, offered no opinions and set forth no factual evidence as to any medical expenses incurred by Plaintiff. (A164). In sum, there was no evidence in the motion record for Plaintiff to be able to satisfy this statutory requirement as well in order to vault the Borough's immunity from pain and suffering damages.

For the foregoing reasons, the motion judge did not err in granting summary judgment in favor of Defendant, Borough of Haddonfield on the issue of N.J.S.A. 59:9-2(d) immunity under the Tort Claims Act for Plaintiff's alleged pain and suffering damages.

POINT V: PLAINTIFF HAS WAIVED ANY APPEAL OF THE MOTION JUDGE'S FINDING THAT THE BOROUGH OF HADDONFIELD'S SHADE TREE COMMISSION IS IMMUNE FROM LIABILITY CAUSED DIRECTLY OR INDIRECTLY BY A TREE, OR ANY PART THEREOF, PURSUANT TO N.J.S.A. 59:4-10 (Raised below at 1T20-21).

The Borough argued before the trial court that, in addition to the reasons set forth in Point II and Point III, supra, (which pertain to both the defendant, Borough of Haddonfield and the defendant, Haddonfield Shade Tree Commission), the Haddonfield Shade Tree Commission enjoys an additional immunity from liability for an injury caused directly or indirectly by a tree, or any part thereof, pursuant to N.J.S.A. 59:4-10. In the Court's oral decision of February 3, 2023, the motion judge agreed and found that N.J.S.A. 59:4-10 immunizes the defendant, Haddonfield Shade Tree Commission, from any liability in this matter. (1T 20:11-21:18).

Plaintiff did not raise this issue in her briefing to this Honorable Court. Appellate courts have the discretion to decline to consider issues not addressed in a party's initial merits brief and to deem them as being waived. See Drinker Biddle & Reath LLP v. New Jersey Dep't. of Law & Pub. Safety, 421 N.J. Super. 489, 496 n.5 (App. Div. 2011); Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived."); *accord* State of New Jersey v. Zingis, 471 N.J. Super. 590, 599 n.4 (App Div. 2022); Telebright Corp. v. Director, N.J. Div. of Tax'n, 424 N.J. Super. 384, 393 (App. Div. 2012).

For these reasons, any and all objections to the motion judge's ruling on this issue should be deemed waived by the Plaintiff.

POINT VI: PLAINTIFF HAS WAIVED ANY APPEAL OF THE MOTION JUDGE'S FINDING THAT THE NEW JERSEY TORT CLAIMS ACT PROVIDES IMMUNITY TO THE BOROUGH OF HADDONFIELD UNDER N.J.S.A. 59:2-4 AND N.J.S.A. 59:2-6 WITH RESPECT TO ANY CLAIM AGAINST IT BY PLAINTIFF ALLEGING THAT THE BOROUGH FAILED TO ENFORCE ITS ORDINANCES REGARDING TREES OR FAILED TO INSPECT THE BLACK OAK TREE LOCATED ON NEW JERSEY AMERICAN WATER COMPANY'S PROPERTY TO DETERMINE IF IT WAS DANGEROUS (Raised below at 1T22-25).

The Borough argued before the trial court that, in addition to Plaintiff not being able to prove liability under N.J.S.A. 59:4-2, the Borough was entitled to immunity under N.J.S.A. 59:2-4 and N.J.S.A. 59:2-6 with respect to any liability that Plaintiff attempted to establish on the part of the Borough for an alleged failure to take appropriate actions following her alleged complaint to the Borough about the condition of the black oak tree. Specifically, in her Complaint, Plaintiff alleged that: (1) the Borough had some sort of duty, arising from its own Shade Tree Commission ordinances, to require the property owner, NJAWC, to correct the condition (presumably meaning removal of the black oak tree), (A10, ¶39); (2) the Borough was required to initiate "enforcement proceedings" against NJAWC in order to compel it to abate the alleged dangerous condition posed by the black oak tree, (A10,

¶40); (3) the Borough engaged in palpably unreasonable conduct by disregarding the complaints and warnings of plaintiff about the black oak tree, (A10, ¶41); and (4) the Borough failed to "protect the public from an imminent threat to the public health and safety due to the condition of trees and shrubbery on property which is not Borough property" (quoting from Borough Ordinance §56-1(C)), which again Plaintiff alleges constituted palpably unreasonable conduct (A10, ¶42).

In the Court' s oral decision of February 3, 2023, the motion judge agreed with the Borough's position and found that the Borough is specifically immunized from such types of claims under the Tort Claims Act. (1T 22:21-25:12).

Plaintiff did not raise this issue in her briefing to this Honorable Court. Appellate courts have the discretion to decline to consider issues not addressed in a party's initial merits brief and to deem them as being waived. See Drinker Biddle & Reath LLP v. New Jersey Dep't. of Law & Pub. Safety, 421 N.J. Super. 489, 496 n.5 (App. Div. 2011); Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived."); *accord* State of New Jersey v. Zingis, 471 N.J. Super. 590, 599 n.4 (App Div. 2022); Telebright Corp. v. Director, N.J. Div. of Tax'n, 424 N.J. Super. 384, 393 (App. Div. 2012).

For these reasons, any and all objections to the motion judge's ruling on this issue should be deemed waived by the Plaintiff.

CONCLUSION

For the foregoing reasons, the trial court did not err in granting summary judgment in favor of the defendant, Borough of Haddonfield and the defendant, Haddonfield Shade Tree Commission. Thus, the Borough and the HSTC respectfully request the trial court's Order of February 3, 2023 be affirmed.

Respectfully submitted,

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Dated: January 24, 2025

Superior Court of New Jersey
Appellate Division
Docket No. A-002181-23

BRENDA ZADJEIKA,

PLAINTIFF-APPELLANT,

v. CIVIL ACTION

NJ AMERICAN WATER,
BOROUGH OF HADDONFIELD,
HADDONFIELD SHADE TREE
COMMISSIONS, JOHN DOES 1-10,
AND ABC COMPANIES 1-10,

DEFENDANTS-RESPONDENTS.

On appeal from a final judgment
entered in the Superior Court
of New Jersey, Law Division,
Camden County, CAM-L-1057-21
John S. Kennedy, J.S.C. and a jury

REPLY BRIEF OF APPELLANT

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BRIEF FILED ON

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ARGUMENT

Point 1

The trial court erred in granting the Haddonfield defendants' motion for summary judgment dismissing plaintiff's claims (A219).

The issue of summary judgment was presented before the lower court. Although the arguments focused on the black oak, the pin oak tree was also raised as a concern since it fell alongside the black oak on the plaintiff's property. Consequently, the impact of the pin oak tree on Haddonfield's right to judgment as a matter of law was adequately brought before the court below for the purposes of appeal. State v. Witt, 223 N.J. 409, 419 (2015) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)).

Furthermore, the Court will address errors that were not specifically raised when they are "of such a nature as to have been clearly capable of producing an unjust result," or if it serves "the interests of justice" to do so, which it would do in this appeal, we submit, Chirino v. Proud 2 Haul, Inc., 458 N.J. Super. 308, 318 (App. Div. 2017), aff'd, 237 N.J. 440 (2019). As argued in the Appellant's Brief, summary judgment for the Haddonfield defendants was improper, at least, because the pin oak tree was located on a curb strip next to plaintiff's home that Haddonfield owned and was responsible for maintaining. Plaintiff made complaints to Haddonfield about this pin oak and how the black oak tree was encroaching onto the pin oak, asking for

the trees to be cared for and to guard against the danger of falling. This began in November 2014. Plaintiff never received any response from Haddonfield. Plaintiff followed up with another email in April 2015, to which Susan Nelson responded that Bill Ober would look at the tree and get back to her. 6T40-43. Plaintiff asked for the pin oak tree to be looked at as soon as possible. The tree was not taken down or secured against falling; only put on a list to be removed. 6T45-46.

Instead of substantively responding to Ms. Zadjeika, Haddonfield's Ober warned her about potential fines relating to cutting trees without the Borough's knowledge or permission (A41, Plaintiff's Response to Borough of Haddonfield's Uniform Interrogatory No. 20). Plaintiff followed up with Haddonfield in 2019, noting that the pin oak tree had not been taken down, and citing her prior emails in which she expressed concern about the tree's proximity to her home. In April 2020, plaintiff communicated with Haddonfield about both the black oak and pin oak trees, including complaints about fallen branches from the black oak. 6T46-47. The last email that plaintiff sent on May 16, 2020, just 18 days before the incident, again told Haddonfield (the Borough's Superintendent of Public Works, Greg Ley) that plaintiff was concerned about the black oak tree on the Lake Street property. A35-4 (at para. 21, Ex I).

These emails advised Haddonfield about the black oak tree encroaching into the pin oak tree located beside plaintiff's home. Plaintiff advised that the limbs of

the black oak would encroach into the limbs of the pin oak, pushing the pin oak to lean toward the Zadjeika home. Plaintiff warned Haddonfield about these dangers and asked for Haddonfield to care for the pin oak (and the black oak) and safeguard it from falling. These complaints to Haddonfield about the pin oak tree located on the curb strip that Haddonfield owned permit a jury to find that Haddonfield had actual or constructive notice of the dangerous condition of the tree and failed to take appropriate action -- culminating in the tree's collapse onto plaintiff's home.

Haddonfield relied on its non-ownership of the black oak when the fall happened. But Haddonfield owned the tree for many years prior, and the plaintiff's expert report (A148-162) provides, "The subject tree had been hazardous for a number of years prior to its failure on June 3, 2020. Moreover, with falling debris, large dead branches, bark sloughing from the trunk, and an open cavity, I conclude: 1) the subject tree had not undergone routine maintenance for about a decade or more prior to its failure, and; 2) there were multiple indications that the subject tree was a hazard and in need of maintenance for about a decade before its failure." All this record evidence shows that a trial, not summary judgment, was warranted on the claims against Haddonfield.

Regarding the permanent nature of the plaintiff's injuries, severe emotional distress is defined as a severe and disabling emotional or mental condition that can be generally recognized and diagnosed by professionals, Innes v. Marzano-

Lesnevich, 435 N.J. Super. 198 (2014); Clark v. Nenna, 465 N.J. Super. 505 (2020). This includes conditions such as post-traumatic stress disorder, Maldonado v. Leeds, 374 N.J. Super. 523 (2005). Dr. Natale's report (A174-75) provides expert opinion evidence establishing the permanency sufficient to withstand summary judgment.

Point 2

The cumulative effect of several trial court rulings deprived plaintiff of a fair trial on her claims against New Jersey American Water (A269-274).

Regarding plaintiff's right to appeal the judgment, respondent cites Brehme v. Irwin, N.J. 089025, 2025 WL 97218 (N.J. Jan. 15, 2025), and argues that plaintiff cannot appeal. But the plaintiff is only seeking a new trial on the amount of damages awarded against NJ American Water (see Point 2 of Appellant's Brief). Prevailing on that argument would not affect the final judgment other than potentially increasing the damages award, so the plaintiff is not barred in her appeal against NJ American Water (the appellant relies on her Appellant's Brief for the remainder of her arguments in support of her appeal).

Opposition to NJ American Water's Cross-Appeal

The jury returned a verdict against defendant at trial; plaintiff only challenges the amount of the damages awarded. NJ American Water has not established a legal basis for reversing the jury's verdict on substantive liability. If the Court agrees with appellant that trial court's errors impacted the jury's assessment of damages, then the damages should be augmented, or a new trial ordered, only on the amount of damages plaintiff should be awarded. There is no legal basis to order a new trial and give NJ American Water another

bite at the apple on the liability question that the jury already determined at the first trial.

Conclusion

The Court should (1) reverse the Law Division's grant of summary judgment for the Haddonfield defendants and remand for trial on plaintiff's claim against these defendants, and (2) remand for a new damages trial on plaintiff's claim against Defendant New Jersey American Water or, at least, for grant of additur on the property damages awarded.

Respectfully submitted,

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Counsel for Appellant,
Brenda Zadjeika

Dated: February 5, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-002181-23
Date Filed: February 12, 2025

BRENDA ZADJEIKA, *Plaintiff/Appellant,* v. NJ AMERICAN WATER, *Defendant/Respondent/Cross-Appellant* BOROUGH OF HADDONFIELD, HADDONFIELD SHADE TREE COMMISSION, JOHN DOES 1-10, and ABC COMPANIES 1-10, *Defendants/Respondents*	On Appeal From: Superior Court of New Jersey, Law Division, Camden County Docket No.: CAM-L-1057-21 Sat Below: Hon. John S. Kennedy, J.S.C.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT, NEW JERSEY AMERICAN WATER CO., INC.

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Preliminary Statement

Plaintiff filed a response to the cross-appeal of New Jersey American Water Company, Inc. ("New Jersey American Water") which addressed an issue which requires specific refutation.

Cross Appeal Reply Legal Argument

ISSUE I: IF THIS COURT SOMEHOW ORDERS A NEW TRIAL, IT SHOULD BE ON ALL ISSUES AND PLAINTIFF SHOULD BE BARRED FROM INTRODUCING THE TESTIMONY OF CERTAIN WITNESSES. (RAISED DA5-44; 2T37:17-46:22)

In New Jersey American Water's argument in its cross-appeal, it argued that in the event this Court were to find that Plaintiff is entitled to a new trial on the grounds that she was deprived of a fair trial based on the cumulative effect of several trial rulings (as she set out in Point 2 of her brief), that the retrial must encompass all issues, including liability, and that the decision to permit her to present the testimony of Jeanette Glennon and Courtney Pederzani should be reversed.

In Plaintiff's response, she took no issue with the substantive argument about whether the testimony was or was not properly barred. Rather, Plaintiff argued that she was seeking merely to have the "amount of damages... augmented, or a new trial ordered, only on the amount of damages plaintiff should be awarded." (Prb4)

However, the law in New Jersey is clear that in a trial on all issues must be granted unless the issues of damages are "fairly separable" from the issues of liability. Ogborne v. Mercer Cemetery Corp., 197 N.J. 448, 462 (2009) ("When the damages award is not tainted by the error in the liability portion of the case and is fairly separable, retrial need not include the issue of damages."); Caldwell v. Haynes, 136 N.J. 422, 442 (1994).

Thus, if this Court disagrees with New Jersey American Water's arguments in its initial brief—that (1) Plaintiff waived her right to seek appellate review on her claim that several trial court rulings deprived her of a fair trial as set out in Point 2 of her brief, and (2) that matters addressed in Point 2 could amount to no worse than harmless error—than the only remedy would be a new trial on ***all issues including liability***. The reason for that is because damages would not be "fairly separable" from the issues of liability which Plaintiff addresses in Point 2 of her brief, as the "several trial court rulings" upon which her arguments are based clearly address issues of liability.

Moreover, if such a new trial is granted on all issues, then this Court should bar the testimony of Ms. Glennon and Ms. Pederzani for the unrebutted reasons set forth in New Jersey American Water's cross appeal.

Conclusion

For the foregoing reasons and those set out in its initial brief, Defendant New Jersey American Water asks this Court to affirm the jury's verdict, or, to bar the testimony of Ms. Glennon and Ms. Pederzani should this Court grant a new trial on all issues.

Respectfully Submitted,
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