IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-002567-23

NEIL CAIN Plaintiff vs. ROSE DIMEGLIO, ANDREW WALACHY AND JOHN DOE 1-3 Defendants	On Appeal from: Verdict Following Trial in the Superior Court of New Jersey Law Division – Burlington County Docket No. BUR-L-826-10 Sat Below: Hon. James J. Ferrelli, JSC

AMENDED BRIEF OF DEFENDANT/APPELLANT, ROSE DiMEGLIO

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Submitted: November 5, 2024

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PROCEDURAL HISTORY

Plaintiff, Neil Cain initiated this matter by filing a Complaint on April 4, 2020. Discovery concluded in the matter on April 1, 2022. After the close of discovery, Defendant DiMeglio filed a motion for summary judgment on liability on June 22, 2021. The trial court heard oral argument on the motion on August 5, 2021 and entered an Order denying the motion on August 6, 2021. (001a)

In the meantime, the case proceeded to mandatory, non-binding arbitration on May 4, 2022. Immediately following the entry of the arbitration award, Plaintiff rejected the award and requested trial de novo. Trial began on October 16, 2023 and the jury returned its verdict on October 24, 2023.[1] 2T– 6T.

The jury found in the Plaintiff's favor and awarded a sum of $500,000. Liability was apportioned between the Defendant/Appellant, Rose DiMeglio at 65% and Defendant, Andrew Walachy at 35%. No comparative liability was apportioned as to the Plaintiff. 6T, p. 80-83.

Defendant DiMeglio filed a motion for new trial which the trial court denied by way of Order dated December 4, 2023. (003a) Thereafter, Defendant Walachy

[1] The trial and motion transcripts are designated as follows:
1T – August 5, 2021 (Summary Judgment Motion)
2T October 17, 2023
3T – October 18, 2023
4T – October 19, 2023
5T – October 23, 2023
6T – October 24, 2023
7T – December 1, 2023 (Motion for New Trial)
8T – March 15, 2024 (Motion for Final Judgment)

was dismissed from the suit, and Plaintiff filed a motion to set attorneys fees on which the trial court heard argument on March 15, 2024. The trial court granted the Plaintiff's Motion and entered an Order for Judgment on March 18, 2024. (005a)

Defendant DiMeglio now appeals from the trial court's denial of her motions for summary judgment and for new trial as well as from the Order for Final Judgment. In her notice of appeal, DiMeglio identified thirteen (13) areas in which the trial court erred. For purposes of briefing, where these issues overlap, they have been combined.

STATEMENT OF FACTS

This case arises out of a three-vehicle-chain-reaction-type motor vehicle accident that occurred on June 9, 2018, on southbound Route 130 in Mansfield Township, New Jersey. Plaintiff Neil Cain was operating a vehicle in the left lane and struck the rear of a vehicle operated by Defendant Rosa DiMeglio. Shortly thereafter, co-defendant Andrew Walachy who was operating a vehicle directly behind plaintiff's vehicle, struck the rear of plaintiff's vehicle pushing it into the rear of defendant's vehicle which was pushed across the northbound lanes and onto the grassy shoulder. See, 026a (police report.)

Defendant DiMeglio was not familiar with the area and was following the automated directions of the global positioning system ["GPS"] program on her cell phone which directed her to make a left or U-turn. Defendant slowed from 50 to

25 miles per hour and, although she observed an opening separating the southbound from the northbound lanes of Route 130, she also noticed a sign prohibiting left and U-turns. See, 032a-0033a (DiMeglio's Answer for Form C Interrogatory No. 2.) Defendant DiMeglio, who had already slowed, looked in her mirrors intending to merge into the right lane, when she was struck in the rear by plaintiff. Id.

At trial, on direct examination, the plaintiff testified regarding the accident as follows:

> Q. Let's talk about the collision. Let's talk about the collision. June 9, 2018, five and a half years ago?
> A. Yes.
> Q. All right. So it's been a minute. What type of car were you driving on that day?
> A. A 2016 Chevy Silverado, full cab.
> Q. That's a big pickup truck?
> A. Yes. It was less than one years old.
> Q. All right. And before the collision, where were you going?
> A. I ordered some tools that I could pick up in Trenton and I was excited to go get them, so I got up early in the morning to go pick them up and just was coming right back to go to my house.
> Q. And what was it -- it was morning time --
> A. Yes, it was.
> Q. -- when this crash took place?
> A. Yes.
> Q. What was the weather like?
> A. It was beautiful. It was a very nice day. Dry.
> Q. So you're coming back on 130 south; correct?
> A. Yes.
> Q. Are you familiar with the stretch of road where this crash took place?
> A. Yes. I've taken that road for 23 years.
> Q. All right. So maybe more familiar than you want to be; right?

A. Yes.
Q. And you were headed back home or to work? Where were you going?
A. Back home.
Q. You were in which lane of Route 130 south?
A. I was in the left lane, the -- yes, the left lane.
Q. And there's two lanes in each direction; right?
A. Yes.
Q. And how fast were you going?
A. No more than 50.
Q. And 50's the speed limit there?
A. Yes.
Q. How would you describe traffic? There's other cars around I guess in the morning on 130?
A. There was a little congestion. It was more big trucks than cars.
Q. How long were you on 130 before the collision took place?
A. I just got off the exit off of 295.
Q. So you get off 295, get on 130 south. You're headed down 130 south and then the collision happens?
A. Yes, two lights.
Q. So tell the jurors in your own words as best you can, what happens that day as you're coming down 130 south?
A. Well, as I was approaching the vehicle, I was coming up the hill and I was doing the speed limit and it -- everything just happened so fast, you know. I see her slowing down, but I have a nice distance on her so I'm beginning to decelerate. Not completely hitting my brakes. I just take my foot off the gas to see what's going on. I know there's a no U-turn sign there I'm like, is she going to turn or what? So as I'm approaching I'm saying, oh, I can just go around but big trucks are on my right and I -- at that point, we're doing like 50 miles per hour. And I'm trying to stop and it was just impossible to stop completely, but I was able to just touch her car. I'm screaming on my brakes real hard. I'm holding on my steering wheel and as I get to her car, I gently tap her car and I'm sighing relief.

See, 4T, pp. 90-93.

On cross-examination by counsel for Defendant DiMeglio, plaintiff testified:

Q. Okay. All right. So let's talk about the area of this accident and your familiarity with it. I believe you said that back in June of 9 -- June 19, I'm sorry, 2018, you were very familiar with this area?
A. Yes.
Q. And you knew that day as you were behind my client Ms. DiMeglio southbound on Route 130, that there was this space or this area with this no U-turn sign up ahead?
A. Correct.
Q. And I think in response to counsel's question when he asked had you seen people attempt to make turns in that area prior to the date of the accident, I believe you said, yeah, it happens. Do you remember saying that?
A. Yes.
Q. Okay. So again, prior to this accident in your experience of driving in this area, you knew that whether correct or incorrect, people accessed that, stopped or slowed in the left lane and accessed that area to the left, that space between the medians; correct?
A. Yes.
Q. Okay. Now, let's talk the day of the accident. You agree that you're in the left lane doing 50 miles an hour behind Ms. DiMeglio?
A. Correct.
Q. And before she gets to that area where this is the open area and that stop sign, you agree that she started to flash her brakes?
A. Yes.
Q. And I think you said, I believe your testimony was that you knew or were thinking, uh-oh, I hope she's not trying to make a turn up there. Do you remember saying something to that effect?
A. Yes. Yes.
Q. Okay. And so then you know she's slowing down and you know there's that space up there, and you'd seen people do it before and you were concerned that this person in front of you may do that; correct?
A. Yes.
Q. And then Ms. DiMeglio started to stomp her brakes even harder, as she got closer to that area. Would you agree with that?
A. Yes.
Q. And she's slowing down; agreed?
A. Yes.
Q. Her vehicle is slowing from when you first see her braking before she even gets to that area; correct?
A. She was there already.

Q. Well, wasn't she beginning to brake about 100 feet or a couple -- I apologize -- about 50 feet prior to that area?
A. It was a little less than 50 feet.
Q. Okay. But she wasn't at the area when she first applied her brakes. You would agree with that?
A. Yes.
Q. Okay. And it's your testimony that at some point, her vehicle comes to a stop?
A. Correct.
Q. Now, you had been about two car lengths behind her?
A. I wouldn't -- I was traveling a safe distance. I don't --
Q. Okay.
A. I'm not sure if it was two cars, but I was definitely traveling a safe distance.

See, 4T, p. 133, l. 25 – p. 136, l. 16.

On cross-examination by counsel for Defendant, Walachy, plaintiff also testified:

Q. Okay. Now, I believe you testified that you got off the ramp at 295 to get on the –
A. 130.
Q. To get on 130; right?
A. Yes.
Q. Okay. So how long were you traveling on Route 130 before the accident occurred?
A. It's just two lights.
Q. Two lights?
A. Two lights, so it's a mile, if that, a mile and a half.
Q. And what was the traffic like on Route 130 south at that time?
A. There was cars. It wasn't congested like going to work in the morning or getting -- coming from work.
Q. Okay. Would you describe it light, medium heavy?
A. It was light traffic.
Q. Light traffic? Okay. So you're traveling about 50 miles an hour in the left lane; right?
A. Yes.
Q. The passing lane? And were there any cars in front of you?

A. Just the Camry.
Q. The Camry?
A. The red Camry, Ms. DiMeglio's car.
Q. Okay. Okay. There's a red Toyota Camry?
A. Yes.
Q. That's a small, compact car. Am I correct?
A. It's a – it's not a small compact. It's the mid size.
Q. Mid size?
A. Yes.
Q. The Camry is mid size? Okay. And so when you got off 295, the ramp and you were on 130 south, she was in front of you the whole time?
A. No. I didn't see her until I got to I think the second light.
Q. The second light? Okay.
A. Approaching the hill.
Q. Okay. Approaching the hill, and that's about how far from the accident scene?
A. Two hundred yards, if that.
Q. Really, 200 yards?
A. A hundred yards, some -- I don't -- it's about that, around that much…
Q. …All right. So you see her about 200 yards; okay? At the second light, she's about 200 yards in front of you and you said as you were approaching the hill?
A. Yes, I'm coming up.
Q. Okay. And how fast is she going, if you can estimate?
A. I have no idea.
Q. Well, you -- how far were you behind her when you saw her?
A. I was some ways behind her.
Q. Can you give me an estimate? Two, three, four car lengths?
A. (No audible response)
Q. I mean, if you can't, you can't. Just --
A. Well, it was a few car lengths. I'm trying to remember when I was at the light. She was already past the light so --
Q. Oh, she was already past the light?
A. Yeah. The light just turned green and we were going.
Q. Okay. Was she stopped at the light when you saw her or you just (inaudible - crosstalk)?
A. No, she was already --
Q. Past that?

A. When we were approaching the light, the light was red.
Q. Okay.
A. By the time we got up there, the light was green, but I could see her from afar.
Q. Okay. All right. So as you -- you said there's a hill?
A. A small hill.
Q. A small hill?
A. Yeah.
Q. Is anything blocking your vision as you go over the hill?
A. Well, you really, you can see it but you -- it's -- going 50, it comes quick, you know.
Q. Okay. Okay. So if you're on top of the hill, it would have been an incline? A small decline or how does it look?
A. Well, you're at the bottom of the hill, so you're coming up.
Q. Right.
A. And then it's just a straight ride after that.
Q. Oh. Oh, a straight run off the -- so it goes up on a hill and then goes straight?
A. Yes.
Q. Okay. So there's an incline and then it goes straight. Am I correct?
A. Yes.
Q. Okay. Was there any time that you lost sight of her?
A. No.
Q. Okay. So she's doing the same thing. Am I correct?
A. Yes.
Q. Now, you go up and then you start to go straight. How far is the area that is cut out from that top of that hill where you start to go straight?
A. That is the top of the hill, where the --
Q. So the cutout is --
A. -- cutout is.
Q. -- at the top of the hill?
A. Yes.
Q. Okay. But as you're going up the hill, you didn't lose sight of her. Am I correct?
A. I don't recall.
Q. Because you're really not --
A. Yeah, I wasn't --
Q. -- paying attention, other than driving to make sure of where you're traveling; right?

A. Right. Correct.
Q. Like normal people do when they drive; right?
A. (No audible response)
Q. Okay. And then when did you see her brake come on? How far away were you from her?
A. By that time, that's when I was about a few car lengths from her, as I was --
Q. How many car lengths?
A. About probably two, if that.
Q. Two car lengths?
A. About that.
Q. And you saw her apply her brakes?
A. It wasn't a complete apply. They were flickering.
Q. Flickering, okay. Like on and off and --
A. Yeah.
Q. Okay. Okay. And did she ever put her turn signal on?
A. No.
Q. Did you have any indication that she was going to make that turn?
A. It was hard to say. When I -- the only way I thought she would, because she was slowing down. I see no other reason why for her to slow down.
Q. Okay. So she was slowing down and in your mind then, you thought she may be trying to make a U-turn?
A. Yes. That was my assumption.
Q. Okay. And you're about two car lengths away. Am I correct?
2 A. Yes

See, 4T, p. 156, .25 – p. 163, l. 2

Co-defendant Walachy testified at trial that he was driving south on Route 130 coming up a slight hill. See, 5T, p. 60, ll. 9-19. He stated that all of a sudden the pick-up in front of him slammed on its brakes. Mr. Walachy picked up off the gas, put his foot on the brake and looked to go right. He could not move to his right due to traffic. He also could not go left as that would put him into the northbound lanes. He slammed on is brakes but it was not enough to stop the

collision. Id. On cross examination, Mr. Walachy stated he had been on Route 130 for a couple of miles, having just got off 295, and was traveling at 50 mph. 5T, p. 64, ll. 14-19. He estimated plaintiff was traveling at the same speed in front of him because he "wasn't catching up on him." Id, at ll. 20-23. Mr. Walachy stated he was two car lengths behind the plaintiff. 5T, p. 65, ll. 5-7. Mr. Walachy further testified that plaintiff was stopped when he struck the rear of plaintiff's vehicle which he agreed was a heavy impact. 5T, p. 65, ll. 14-25. Importantly, Mr. Walachy also testified that not only did he not see the DiMeglio vehicle prior to the incident, when he spoke to plaintiff at the scene, plaintiff did not tell Mr. Walachy that the DiMeglio vehicle came to a sudden stop in front of plaintiff. 5T, p. 68, l. 17 – p. 69, l. 4.

To summarize, Defendant DiMeglio's vehicle was rear-ended by Plaintiff's vehicle before Plaintiff's vehicle was rear-ended by Co-defendant Walachy's vehicle causing Plaintiff to strike DiMeglio's vehicle a second time.

LEGAL ARGUMENT

Point I. The trial court erred in denying summary judgment to defendant Rose DiMeglio; there was no issue of fact to support a finding that plaintiff, operating a following vehicle behind defendant and who failed to avoid striking the rear of defendant's vehicle, was 50% negligent or less (001a, 1T).

In reviewing an order for summary judgment, Appellate Courts employ the same standard that governs the trial court. Busciglio v. DellaFave, 366 N.J. Super.

135, 139, 840 A.2d 897, 899 (App. Div. 2004). Pursuant to R. 4:26-2(d), summary judgment shall be rendered forthwith if the parties depositions, answers to interrogatories and admissions on file, together with the affidavits if any showing that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or Order as a matter of law. An issue of fact is genuine only if considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom, favoring the non-moving party, would require submission of the issue to the trier of fact.

The standard for determining when summary judgment is appropriate was set forth in Brill v. The Guardian Life Ins. Co. of America, 142, N.J. 520, 523 (1995), where the Court held that:

> [T]he determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. This assessment of the evidence is to be conducted in the same manner as that required under R.4:37-2(b).

The Court explained " if there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a genuine issue of material fact for purposes of R. 4:46-2." Id. At 540 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511,

91 L.Ed. 2d 202, 213 (1986)). ("The import of our holding is that when the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment.") Brill, 142, N.J. at 540.

Here, there was no question that the plaintiff was following too closely behind the defendant DiMeglio. In a case involving a rear-end collision, there exists a presumption of negligence against the party who initiated the contact. Additionally, there is no question that the co-defendant, Walachy, was following too closely behind the plaintiff to avoid impacting the rear of plaintiff's vehicle.

In Dolson v. Anastasia, 55 N.J. 2 (1969), the Supreme Court reaffirmed its position in Stackenwalt v. Washburn, 42 N.J. 15 (1954).

> It is elemental that a following car in the same lane of traffic is obligated to maintain a reasonably safe distance behind the car ahead, having due regard to the speed of the preceding vehicle and the traffic upon and condition of the highway. . . . . Failure to do so resulting in collision, is negligence and a jury should be so instructed.

Dolson v. Anastasia, *supra* 55 N.J. at 10 (citation omitted).

In addition, in Stackenwalt, the Court observed, "Nonetheless, we have here a type of event which does not ordinarily occur without negligence on the part of one situated as was Washburn. What we mean is that a driver is obligated to maintain a reasonably safe distance behind the car ahead and usually he is at fault if he collides with that car." See Stackenwalt v. Washburn, 42 N.J. 5, 30 (1964). The Dolson court opined that the common law standard regarding motor vehicle liability law incorporated N.J.S.A. 39:4-89 incorporates the common law standard

in the motor vehicle law to authorize penal sanctions for a violation. See id at 11. Further, the court in Jones v. Bennett, 306 N.J. Super. 476, 485 (App. Div. 1998) affirmed Dolson and stated that "[e]ven if they stopped in front of him, Dolson . . . covers that. You're supposed to maintain a safe following distance so that even if someone does do a sudden stop, you're able to avoid them ...."

Drivers are confronted daily with situations which require them to quickly apply their brakes. Examples of such situations include drivers disregarding stop signs, drivers suddenly changing lanes without warning, and children darting into streets. Drivers making proper observations, and maintaining a safe distance behind vehicles travelling in front of them, may have to apply their brakes quickly under a variety of circumstances. The fact that Ms. DiMeglio was slowing or stopped attempting to turn in an area that did not allow for it was not enough to overcome plaintiff's and Walachy's negligence for following so closely in traffic that they were not able to stop in time. Consequently, the trial judge erred in not granting DiMeglio's motion for summary judgment. The order of the trial court denying the motion should be reversed.

Point II. The trial court erred in denying defendant's motion for a new trial because the evidence presented at trial warrants a finding in favor of defendant on liability and damages or a new trial in the interest of justice (004a, 7T).

R. 4:49-1(a) states a new trial may be granted to all or any of the parties and as to all or part of the issues on motion made to the trial judge. The rule further

provides [t]he trial judge shall grant the motion if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law. Id. As explained by Kita v. Borough of Lindenwold, 305 N.J. Super. 43, 49 (App. Div. 1997), the judge's function on a new trial motion is not mechanical. Rather the court is to consider both tangible and credibility factors and the feel of the case to determine if the jury's verdict was a clear error or mistake. The standard of review on appeal from the trial court's decision to deny the motion for a new trial is the same as that governing the trial judge. See, Tp. Of Manalapan v. Gentile, 242 N.J. 295, 304-305 (2020). Thus, to determine whether Ms. DiMeglio is entitled to a new trial based on the record, the Appellate Division must consider whether denying a new trial "would result in a miscarriage of justice shocking to the conscience of the court." Id. (citations omitted). For the following reasons, a miscarriage of justice occurred warranting a new trial in this matter.

A. Evidence at trial demonstrated that plaintiff observed defendant slow down yet failed to avoid striking the rear of defendant's vehicle before plaintiff's vehicle was struck in the rear by co-defendant's vehicle (4T, pp. 90-163).

B. The jury's finding of no negligence on the part of plaintiff is against the weight of the evidence as plaintiff admittedly failed to avoid striking the rear of defendant's vehicle after plaintiff observed defendant slow down (4T, pp. 90-163; 7T) .

The evidence adduced at the trial demonstrated that the plaintiff failed to maintain a safe distance from the Defendant DiMeglio's vehicle. He had been following behind her at a rate of 50 mph and a distance of approximately two car lengths. The jury had been instructed that a driver is obligated to maintain a reasonably safe following distance behind the vehicle, so that even if someone does do a sudden stop, the driver is able to avoid them. 6T p.29, ll. 3-14 (Jury Instructions.) Yet, the jury did not find liability, in any measure, on the plaintiff, which was clearly against the weight of the evidence and a failure to follow the law. Most importantly, the evidence at issue, which directs a finding of liability on him, is the plaintiff's own testimony.

The plaintiff had testified that he was driving his pick up on Route 130 south on June 9, 2018. He stated it was a beautiful day and he was on his way home. He stated he was familiar with that stretch of the road having driven through it for 23 years. He was in the left lane and was traveling 50 mph. He stated that there was a little congestion on the road. As he was coming up a hill, he approached the DiMeglio vehicle when he saw her slowing down. He decelerated though he did not completely hit the brakes. He speculated that she might be attempting a U-turn up ahead, though there was a "no U-turn" sign there. He could not go around her because of traffic on his right. So instead he tried to stop but could not do so completely. He stated he "was able to just touch her car." He stated he applied the

brakes "real hard." As he got to the DiMeglio car, he gently tapped her and was "sighing relief." See, 4T, pp. 90-93.

On cross-examination by counsel for Defendant DiMeglio, plaintiff testified that as he was traveling behind Ms. DiMeglio, he knew there was a "no U-turn" sign up ahead. He admitted knowing that despite this signage, motorists would attempt to make turns (right or wrong) in that area. Again, he was going 50 mph in the left lane behind Ms. DiMeglio when she started to flash her brakes. Again, he testified he suspected she was going to attempt to turn. She started to stomp her brakes even harder as she got closer to the area. Plaintiff agreed Ms. DiMeglio was slowing down. She was approximately 50 feet from the area of the impact when she first began to apply her brakes, and at some point she came to a stop. See, 4T, p. 133, l. 25 – p. 136, l. 16.

On cross-examination by counsel for Defendant, Walachy, plaintiff testified that he got off the 295 ramp onto Route 130. He was on Route 130 for "two lights" prior to the accident, which he estimated was a mile to a mile and a half. He described the traffic as "light." The only vehicle in front of him as he proceeded was Ms. DiMeglio's Camry. He stated he first encountered her at the second light approaching the hill. He stated this as about 200 yards from the point of impact. He could not estimate how fast she as going but was a few car lengths behind her when he first saw her. As they approached the hill, there was nothing

blocking his view and he did not lose sight of Ms. DiMeglio at any time. When he saw her first apply her brakes, he was a few car lengths from her, "probably two, if that." He stated Ms. DiMeglio's brakes were flickering on and off. She did not engage a turn signal. Still, he assumed she was going to attempt the U-turn. See, 4T, 156, .25 – p. 163, l. 2

It is clear from this testimony that plaintiff was traveling 50 mph on Route 130 South following behind Ms. DiMeglio in the left lane in light traffic. He had a clear unobstructed view of her vehicle from when he first encountered her to the point of the accident. While he claimed to be traveling "a safe distance" from Ms. DiMeglio, ultimately, plaintiff admitted he was two car lengths away from her when she first began to apply her brakes. Not only that, but plaintiff was familiar with the area and knew that motorists often tried to turn in the area where Ms. DiMeglio slowed, and according to plaintiff, ultimately stopped. In fact, he suspected at the time that this is what Ms. DiMeglio intended to do when he saw her "flashing" her brakes. It could be reasonably inferred from this testimony that plaintiff was traveling too close behind Ms. DiMeglio to safely stop his vehicle without impacting the rear of her car and that he failed to make proper observations of her actions. By his own testimony, he was not a reasonably safe distance from Ms. DiMeglio in order to avoid an impact even if she stopped suddenly.

These were conditions that motorists can expect to encounter every day. There was nothing in plaintiff's testimony that suggested that Ms. DiMeglio's actions were entirely unexpected. A finding of no liability on the part of the plaintiff by the jury was clearly against the weight of this evidence.

Defendant DiMeglio moved for directed verdict at the close of the plaintiff's evidence as well as at the close of all evidence which the trial court erroneously denied. Following the verdict, in which the jury found no liability against the plaintiff, Defendant DiMeglio moved for a new trial which the trial court also improperly denied.

Reasonable minds could not differ as to the inescapable conclusion that plaintiff was following Defendant DiMeglio so closely that he was unable to bring his vehicle to a safe stop behind her without striking the rear of her vehicle. The trial court should have directed the jury to find liability upon the plaintiff under the circumstances or otherwise should have granted a new trial since the liability findings of the jury were manifestly against the weight of the evidence, to wit, plaintiff's own testimony that he was traveling 50 mph and was about two car lengths behind the DiMeglio vehicle when he saw her apply her brakes, slow down and then stop.

In fact, it can be concluded that in not placing any liability on the plaintiff, the jury did not follow the law as instructed. See, 6T, p. 29 (Jury Instructions –

The Court). See, also, Dolson v. Anastasia, 55 N.J. at 30 (…a driver is obligated to maintain a reasonably safe distance behind the car ahead and usually is at fault if he collides with that car); also see, Jones v. Bennett, 306 N.J. Super. 476 (App. Div. 1998). Consequently, a new trial is warranted.

C. The jury's finding that defendant was the proximate cause of plaintiff's injuries was against the weight of the evidence based on plaintiff's testimony that after his vehicle struck the rear of defendant's vehicle, plaintiff removed his hands from the steering wheel and only after co-defendant Walachy's vehicle struck the rear of plaintiff's vehicle did plaintiff's right arm become twisted in the steering wheel causing plaintiff's injuries (4T, pp. 94, 96, 144).

Even if the Court were to find that Defendant DiMeglio's actions caused the accident. By the plaintiff's own testimony, such actions were not the cause of the plaintiff's injuries. The jury's finding in this regard was against the weight of the evidence.

During his direct testimony, the plaintiff testified that the impact between his vehicle and Ms. DiMeglio's vehicle was "pretty light," and was "like parking your car and tap somebody in the back." See, 4T, p. 96, ll. 2-5. He took his hands off the wheel. 4T, p. 96, ll.6-8. The following exchange then occurred:

> 9 Q. How long is it between when you impact the back of Ms. DiMeglio's bumper to when you get slammed in the back?
> A. Not even three or four seconds.
> Q. Did you see the vehicle behind you coming at all --
> A. That, I --

> Q. -- Mr. Walachy's vehicle?
> A. I had no reason to look behind me.
> Q. Can you describe the force and what it felt like when your vehicle got slammed from behind?
> A. Well, as I released my hands from my steering wheel, I relaxed my entire body and then it's just like you're being caught off guard. Somebody just tackling you from behind without you even -- you're not even bracing for that impact. And my whole body just, it was -- it's hard to explain…

See, 4T, p. 96, ll. 9-25.

Plaintiff also testified that his arm suffered a "real quick jerk motion" and "got caught up in [the] steering wheel." See, 4T, p. 94, ll. 5-6. In fact, on cross examination, plaintiff testified that after his contact with the DiMeglio vehicle, he was struck from behind and that was when his right arm got twisted in the steering wheel and he was injured. See, 4T, p. 144, ll. 11-15.

By plaintiff's own testimony, the force of the impact between his vehicle and Ms. DiMeglio's vehicle did not cause him any injury. Clearly, it was the impact from behind that caused plaintiff to sustain his bodily injuries. Given the force of the impact to the rear of his vehicle, and in light of plaintiff's testimony that the time between impacts was just a few seconds, the only reasonable inference to be drawn is that Defendant Walachy was following too closely behind plaintiff to avoid a collision under the circumstances. Given that, it was manifestly unjust for the jury to find DiMeglio was a proximate cause of the injury. Had

Walachy been maintaining a proper distance, the impact to the plaintiff's vehicle, and therefore, his injuries would not have occurred.

Proximate cause consists of "any cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of and without which the result would not have occurred." See, e.g., Gilbert v. Stewart, 247 N.J. 421, 443 (2021). A superseding or intervening act is one that breaks the "chain of causation" linking a defendant's wrongful act and an injury or harm suffered by a plaintiff. A superseding or intervening act is one that is "the immediate and sole cause of the" injury or harm. See, Komlodi v. Picciano, 217 N.J. 387, 418 (2014)(citations omitted). Here, the sole cause of the plaintiff's injury was the impact to the rear of his vehicle by Defendant, Walachy, per the plaintiff's own testimony at trial. Moreover, Walachy was obviously traveling too closely behind the plaintiff to avoid an impact to the rear of plaintiff's vehicle. Consequently, the jury's finding that Defendant DiMeglio's actions were the proximate cause of the injuries was against the weight of this evidence and judgment should have been entered in DiMeglio's favor on this question and/or a new trial is warranted.

D. The trial court erred in denying defendant's motion for a new trial because the introduction of evidence of plaintiff's lost earning capacity, over defendant's objection, resulted in a miscarriage of justice as the information was irrelevant and prejudicial to defendant (7T; 2T, pp. 14-17).

New Jersey Ev.R. 401 defines relevant evidence as "evidence having a tendency in reason to provide or disprove any fact of consequence to the determination of the action. Plaintiffs in personal injury actions bear the burden of proving net income when seeking recovery for diminished earning capacity based on lost wages. In fact, the proper measure of damages for lost income in personal-injury cases is net income after taxes. See, Caldwell v. Haynes, 136 N.J. 422, 434, (1994)(citation omitted).

In this case, the plaintiff was allowed to testify that he had to hire two additional employees and to "sub-out" work as a result of limitations he suffered as a result of his accident related injuries. This testimony was misleading insofar as it may have suggested to the jury that the plaintiff's income was reduced. 4T, p.88, l. 25 – p. 90, l. 3. Therefore, the testimony was prejudicial to the defense.

As the evidence rules point out, though potentially relevant, this evidence should have been excluded because its probative value was substantially outweighed by the risk of undue prejudice, confusion of issues, or misleading the jury. See, Ev.R. 403. The question is not whether the challenged testimony will be

prejudicial to the objecting party, but whether it will be unfairly so. Griffin v. City of East Orange, 225 N.J. 400, 421 (2016).

Furthermore, the trial court should have properly weighed the potential for this evidence to mislead the jury. Where the probative value of the evidence is substantially outweighed by its capacity to mislead the jury or confuse the issues it must be excluded. That is, relevant evidence may broach immaterial or unrelated issues that would only confuse the jury. The trial court was tasked with balancing the probative value of the evidence against the potential confusion it created.

The failure to exclude this prejudicial evidence warrants a new trial as it may have caused the jury to unduly speculate on the economic damages the plaintiff sustained as a result of the accident leading to a disproportionate damages award.

Point III. The trial court erred in denying defendant's motion in limine to redact portions of the de bene esse deposition of plaintiff's second medical expert, Dr. Goldstein, where Dr. Goldstein explained plaintiff's surgery using visual aids where plaintiff's first medical expert, Dr. Paiste, already explained the surgery using the same visual aids, because the testimony was cumulative and prejudicial to defendant (003a).

As noted previously, Ev.R. 403 provides the court with discretion to preclude relevant evidence where it constitutes an undue delay, waste of time, or needless presentation of cumulative evidence. The testimony presented at trial by Dr. Goldstein was just that. It was entirely repetitive of Dr. Paiste's testimony.

Dr. Paiste testified by way of de bene esse video which was played for the jury on October 19, 2023. See, 4T, beginning at p. 195. Plaintiff offered Dr. Paiste as an expert in orthopedic surgery without objection. Id., p, 198, l. 14. Dr. Paiste stated that the focus of his treatment of the plaintiff, and therefore his testimony was the plaintiff's right arm. He stated that plaintiff had bilateral carpal tunnel syndrome, right forearm sprain and strain, and right forearm radial tunnel syndrome. 4T, p. 199, ll. 3-10.

Dr. Paiste further discussed what the radial tunnel is and what could result if there was an injury at great length. 4T, p. 205-206. Thereafter, he was examined through the use of a visual aid marked as "P-1." Id., p. 208, ll. 15-21. The doctor testified this as a simplified version of the surgery performed on the plaintiff. Id. at ll. 20-25. Dr. Paiste described the surgery through the use of this exhibit in great detail. 4T, p. 209 – p. 215, l. 23.

Dr. Goldstein also testified by way of de bene esse deposition and his testimony was played for the jury on October 23, 2023. See, 5T, beginning at p. 8. Dr. Goldstein was offered as an expert in orthopedic surgery and plastic surgery. See, 5T, p. 11, ll. 22-25. Dr. Goldstein saw Mr. Cain once on July 5, 2021. Id, at p. 12, ll.11-13. Beginning on p. 14 of the transcript, Dr. Goldstein described the injury to plaintiff's right arm. He described that plaintiff had suffered an injury to his radial nerve and median nerve.

Dr. Goldstein was then asked to describe the radial nerve and its function. 5T, p. 14, l. 22 – p. 15, l. 24. This is exactly the same testimony given by Dr. Paiste. While Dr. Goldstein also opined from his expertise in plastic surgery regarding the pain surrounding the scar plaintiff had from surgery, he was asked to use the same visual aid that Dr. Paiste used. See, 5T, p. 17. The same exhibit "P-1" was used. Id., p. 18, ll. 11-13. Dr. Goldstein then proceeded to testify at length about the surgery that was performed by Dr. Paiste, and which Dr. Paiste previously described. 5T, p. 18 – p. 23, l. 10.

This testimony was entirely cumulative and unnecessary. Dr. Paiste had given extensive verbal testimony with respect to the plaintiff's condition and the level of care that he received. There was no need to present this repetitive testimony. Videotape evidence may be excluded when photographic evidence and descripted testimony make the video tape cumulative. See, Velazquez v. Jiminez, 336 N.J. Super. 10, 43 (App. Div. 2000). In Velazquez, it was held that the trial court did not abuse its discretion in excluding videotape evidence because "the jurors were given the substance of the relevant and material information contained in the videotapes, even though they were not allowed to see them." Id. The Court reasoned that because "extensive" testimony was given, and photographs from the video tape were admitted into evidence, the playing of the videotape would be cumulative, and the jury could place "inordinate weight" on the cumulative

evidence. Velazquez, 336 N.J. Super. at 43, quoting Suanez v. Egeland, 330 N.J. Super. 190, 195-196 (App. Div. 2000). This is exactly what happened at the trial of this matter when the trial court allowed Dr. Goldstein to give the same repetitive testimony that was given by Dr. Paiste.

Dr. Goldstein's duplicative testimony also created undue prejudice to the defendant. See, Ev.R. 403. The Rule grants considerable discretion to the trial judge to make such determinations. "To demonstrate an abuse of such discretion, the danger of undue prejudice must outweigh probative value so as to divert jurors from a reasonable and fair evaluation of the basic issues" of the case. See, e.g., State v. Moore, 122 N.J. 420, 467 (1991), quoting State v. Sanchez, 224 N.J. Super. 231, 249-250 (App. Div.), certif. den. 111 N.J. 653 (1988).

Here the danger to the defendant by presenting the evidence regarding plaintiff's injury and surgery twice placed undue emphasis on the medical testimony and therefore, Dr. Goldstein's testimony in this regard should have been precluded. Cf., State v. Thompson, 50 N.J. 396, 421 (1971)(video tapes and photos should be excluded when their probative value is so significantly outweighed by their inherently inflammatory potential.)

Because Dr. Goldstein's testimony was improperly admitted into evidence, the defendant is entitled to a new trial during which the trial court should be instructed to exclude such duplicative and prejudicial testimony.

Point IV. The trial court erred in denying defendant's motion for a mistrial after plaintiff's counsel made improper comments during closing statements about defendant's medical expert, Dr. Ponzio in a tone that was meant to demean the doctor before the jury which resulted in prejudice to the defendant (5T, pp. 230-231).

In his summation to the jury, plaintiff's counsel discussed the testimony given by the defense expert, Dr. Ponzio. See, 5T, beginning at p. 210, l. 4. The defense objected to counsel playing only portions of the doctor's testimony which objection was overruled. 5T, p. 211 – p. 212. Counsel then presented several points regarding Dr. Ponzio's testimony on the nature of plaintiff's injury and whether it could be related to the accident, essentially arguing that Dr. Ponzio's opinions were unsupported by the evidence. Then counsel discussed Dr. Ponzio's retention as a defense expert, how often he is retained and how much he is paid. 5T, p. 218.

The defendants objected to the nature and tone of the argument stating that counsel was "besmirching" Dr. Ponzio. 5T, p. 219. The trial court overruled the objection despite counsel's reference to the case of Rodd v. Raritan Radiologic Assocs., P.A., 373 N.J. Super. 154 (App. Div. 2004). In that case, the Appellate Division stated:

> Although attorneys are given broad latitude in summation, they may not use disparaging language to discredit the opposing party, or witness, …or accuse a party's attorney of wanting the jury to evaluate the evidence unfairly, of trying to deceive the jury, or of deliberately distorting the evidence.

> Here, counsel's comments in summation were unduly harsh and amounted to an attack on defendant's character and his witness's integrity. They occupy no rightful place in proper commentary on the evidence and the credibility of testimony. They are not to be repeated on retrial.

Rodd v. Raritan Radiologic Assocs., P.A., 373 N.J. Super. at 171–72.

The defendant's request for a mistrial following the closing argument was improperly denied because of the inappropriate and dismissive comments plaintiff's counsel made about the defense expert. Counsel's summation "far exceeded the bounds of proper comment and argument." Tabor v. O'Grady, 59 N.J. Super. 330, 340 (App. Div. 1960).

The standard of conduct expected of counsel during summation has been established by the courts as follows:

> We commence with the obvious proposition that trials must be conducted fairly and with courtesy toward the parties, witnesses, counsel, and the court. They need not be passionless, for indeed it is the duty of a trial attorney to advocate. Nonetheless, our jurisprudence has long ago set boundaries for advocacy, and unequivocally defined conduct that, by its potential to cause injustice, will not be tolerated. The longstanding nature and clarity of our rules in this regard render their violation of particular concern, since that violation can only reflect adversely on the character and motives of the violator, particularly in instances such as this in which the violations are flagrant, multiple and continuing. There is no harm in seeking to maximize a recovery, even when incidental benefit is thereby achieved. There is enormous harm to the judicial process and to the public's perception of the profession when maximization is attempted unfairly as it was here.

Geller v. Akawie, 358 N.J. Super. 437, 463–64 (App. Div. 2003).

Plaintiff's counsel's summation intimated to the jury that Dr. Ponzio was well known to him in ways that suggested Dr. Ponzio's testimony was not to be trusted or believed. The trial transcript cannot convey the sarcastic tone counsel employed throughout his description of the doctor's testimony. Finally, in arguing that Dr. Ponzio was paid for his examination and testimony, plaintiff engaged in a calculation that he claimed indicated Dr. Ponzio made a million dollars as an expert before even seeing a patient, improperly implying that Dr. Ponzio had a "million reasons" to find that plaintiff's injuries were not related to nor caused by the accident.

The remarks intended to disparage the defendant's expert should not be condoned or tolerated. By allowing these remarks and by denying the motion for mistrial, the trial court deprived defendant of a fair trial. The result was a miscarriage of justice and a new trial should be ordered.

Point V. The trial court erred in denying defendant's motion for a remittitur or a new trial because the jury's award of $500,000, $325,000 attributable to defendant, is excessive, disproportionate to the injury, and shocks the conscience of the court (7T).

Following entry of the verdict, in her motion for a new trial, Defendant DiMeglio sought remittitur of the verdict. The jury awarded $500,000 in damages. With 65% liability found on DiMeglio, her portion of the judgment was $325,000.

In a personal injury action, the goal to be accomplished is to fairly compensate the injured party. See, Deemer v. Silk City Textile Mach. Co., 193 N.J.

Super. 643, 651 (App. Div. 1984). In Caldwell v. Haynes, 136 N.J. 422, 433 (1994), the Supreme Court cited with approval, Domeracki v. Humbler Oil & Ref. Co., 443 F. 2d 1245, 1250 (3d. Cir.), cert. denied, 404 U.S. 883 (1971) for the proposition that the purpose of a personal injury award is to neither reward the plaintiff nor to punish the defendant, but to replace the plaintiff's losses. Fair compensatory damages resulting from the tortious infliction of injury encompass no more than the amount that will make the plaintiff whole, that is, the actual loss. Caldwell v. Haynes, 136 N.J. at 433

A court should not grant a remittitur except in the unusual case in which the jury's award is so patently excessive, so pervaded by a sense of wrongness, that it shocks the judicial conscience. To justify judicial interference, "[t]he verdict must be 'wide of the mark' and pervaded by a sense of 'wrongness.' Jastram ex rel. Jastram v. Kruse, 197 N.J. 216, 229 (2008), abrogated by Cuevas v. Wentworth Grp., 226 N.J. 480, (2016). The standard for reviewing a damages award that is claimed to be excessive is the same for trial and appellate courts, with one exception—an appellate court must pay some deference to a trial judge's "feel of the case Cuevas v. Wentworth Grp., 226 N.J. at 501, holding modified by Orientale v. Jennings, 239 N.J. 569 (2019).

Where it is found that the award of damage is so grossly excessive to demonstrate prejudice, partiality or passion, and thus to generate a feeling that the

entire verdict was tainted, remittitur is improper and a new trial is warranted on all issues. See, Fertile v. St. Michael's Medical Center, 169 N.J. 481, 496-98 (2001). Here, the trial judge should have determined what the jury, properly instructed, would have awarded, and should have reached a fair damage verdict based on the evidence it saw and heard. See, Orientale v. Jennings, 239 N.J. at 594; see also, Fertile, 169 N.J. at 499-501; and Jadlowski v. Owens-Corning, 283 N.J. Super. 199 (App. Div. 1995).

The verdict must also be overturned where there has been a miscarriage of justice. See, Baxter v. Fairmont Food Co., 74 N.J. 588 (1977). Here the verdict was clearly disproportionate and was not fair or reasonable based on a totality of the evidence. See, Jastram, 197 N.J. 229.

Plaintiff sustained injury in his non-dominant arm. 4T, p. 90, l. 8. He was able to return to work on a full time basis and did not testify that there were any activities of daily living he was unable to perform. Consequently, the verdict was so contrary to the weight of the evidence, that remittitur and/or a new trial should have been ordered.

Point VI. The trial court improperly granted plaintiff's motion for final judgment, making improper awards as to interest and attorney's fees (8T).

Plaintiff moved for final judgment to include attorneys' fees and costs and interest on the amount awarded by the jury. The Court granted plaintiff's request

and entered final judgment on March 18, 2024. The final judgment included pre-judgment interest which the judge calculated based on the offer of judgment rule and attorneys' fees. The taxed costs awarded were $13,226.05. The pre-judgment interest as of March 15, 2024 was $74,727.52, and the attorney's fees in the amount of $60,420 were awarded based on an hourly rate of $475/hour. These amounts were ordered in error as more fully set forth below.

A. The trial court erred in granting plaintiff's motion for enhanced prejudgment interest, costs of suit, and attorney's fees because the offer of judgment filed by plaintiff five months after the answer was filed had expired and was never renewed prior to trial (076a, 8T).

R. 4:58-1 states any party may, at any time more than 20 days before the actual trial date, serve on any adverse party, without prejudice, and file with the court, an offer to take a monetary judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein (including costs). The offer shall not be effective unless, at the time the offer is extended, the relief sought by the parties in the case is exclusively monetary in nature. Any offer made under this rule shall not be withdrawn except as provided by the Rule.

The rule goes on to state that if the offer is not accepted on or prior to the 10th day before the actual trial date or within 90 days of its service, whichever period first expires, it shall be deemed withdrawn and evidence thereof shall not be

admissible except in a proceeding after the trial to fix costs, interest, and attorney's fee. Rule 4:58-1(b). The offer was not accepted and therefore it was deemed to be withdrawn. Consequently, there is no basis upon which to allow the fees and costs.

B. The trial court erred in granting plaintiff's motion for enhanced prejudgment interest, costs of suit, and attorney's fees because the allowances sought constitute an undue hardship to defendant under Rule 4:58-2 (c) and should not be allowed (8T).

R. 4:58-2 while providing for the consequences of non-acceptance of an offer of judgment, allows for relaxation of the rule. Specifically, R.4:58-2(c) states no allowances shall be granted pursuant to paragraphs (a) or (b) if they would impose undue hardship or otherwise result in unfairness to the offeree. If undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly. The burden is on the offeree to establish the offeree's claim of undue hardship or lack of fairness.

At the time the offer was made, depositions had yet been taken and the defendant had incomplete information upon which to evaluate the risks of non-acceptance of the offer. Moreover, the evidence suggested at the time that plaintiff was liable for the accident, and that his comparative negligence could outweigh that of the defendant, since he struck the rear of the defendant's car. The damages aspect of the case was further complicated by the fact that the co-defendant struck the rear of the plaintiff's vehicle with such force it pushed the plaintiff's vehicle

into the DiMeglio vehicle causing the DiMeglio vehicle to be pushed forward as well. Plaintiff had testified at trial that it was the force of this second impact that caused the injury to his right arm. It would be patently unfair to the defendant to hold her responsible for the interest and attorneys' fees allowed by the rule and would create an undue hardship on her since the jury verdict, and therefore, the interest and attorneys' fees are in excess of her insurance policy limits.

C. The trial court erred in granting plaintiff's motion for enhanced prejudgment interest, costs of suit, and attorney's fees because adherence to Rule 4:58-2 would result in injustice to defendant (8T).

The purpose of the offer of judgment rule is promote early settlement by creating disincentives for litigants to reject reasonable offers of settlement made pursuant to the time constraints set forth in the Rule. See, Palmer v. Kovacs, 385 N.J. Super. 419, 425 (App. Div. 2006); Schettino v. Roizman Dev. Inc., 158 N.J. 476, 482 (1999).

Plaintiff had the right under the Rule to tender additional offers of judgment upon defendants up until twenty days before the trial. That right to present subsequent offers of judgment promotes the goals of settlement. As a case progresses, a litigant presumably will become better informed—through discovery, motion practice, and arbitration or other alternative dispute resolution events—of the merits and weaknesses of his or her case or defenses. Hence, the Rule sensibly allows a litigant to recalibrate his or her original settlement position with the

insights gained through that pretrial phase. Palmer v. Kovacs, 385 N.J. Super. at 425–26.

R.1:1-2 permits the Court to relax any rule if adherence would result in injustice. In Romagnola v. Gillespie, 194 N.J. 596, 598 (2008), the court granted a plaintiff relief from the application of the offer of judgment rule who properly invoked the rule in its pre-amendment form but was unable to conform its earlier compliance with the amended rule. At the time, the rule allowed an award of expenses and attorney's fees if the money judgment was at least as favorable as the rejected offer. Now – and in the post-trial phase in Romagnola -- the rule requires the qualifying judgment to be in an amount that is 120% more than the offer. The court in Romagnola, in allowing resort to the sanctions of the rule, despite the change in the triggering conditions, found that an examination and balancing of the interests at stake compelled relaxation of the rule. Id. at 604, 606-07.

In the instant matter, plaintiff filed an offer of judgment only five months after defendant filed her answer, before depositions had occurred and where initial discovery revealed that plaintiff struck the rear of defendant's vehicle. The trial court should have relaxed the rule under the circumstances and denied the request for attorney's fees and heightened interest because it was manifestly unjust. The court should have awarded simply pre-judgment interest under R.4:42-11(b) only. Therefore, the final judgment should be reversed and remanded for further

proceedings with direction that the trial court relax this rule and apply simple interest only.

D. The trial court erred in granting plaintiff's motion for attorney's fees of $60,420.00 because the amount is unreasonable under Rule of Professional Conduct 1.5(a) (8T).

The attorneys fee plaintiff's counsel originally sought was in the amount of $75,240 at a rate of $600 per hour for 125.4 hours. This fee request was unreasonable insofar as it violated the standards of the rules of professional conduct, which the trial court at least somewhat recognized when it reduced the hourly rate to $475/hour. This was still excessive and the award overall should not have been allowed.

In a fee shifting setting is inappropriate for an attorney to recover all the fees charged. Only reasonable fees may be allowed. See, Kellam Assoc. Inc. v. Angel Projects, LLC, 357 N.J. Super. 132, 142 (App. Div. 2003). The determination of reasonableness requires consideration of the time and labor required, the novelty and difficulty of the issues involved, the skill required to deal was such issues, likelihood the acceptance of the case will preclude other employment by the lawyer, the fee customarily charged the locality for similar legal services involved and results obtained. RPC 1.5(a).

In addition factors such as the insurer's good faith and refusing to pay the claim, the excessiveness of plaintiff's demands, the bona fides of the parties, the

insurer's justification in litigating the issues, the insured's conduct as it contributes substantially to the need for litigation, the general conduct of the parties and the totality of the circumstances must be considered. See Scullion v. State Farm, 345 N.J. Super. 431 (App. Div. 2001); Enright v. Lubow, 215 N.J. Super. 306 (App. Div.), cert. denied 108 N.J. 193 (1987).

The proper determination the amount of council fees required the trial judge to make a line-by-line analysis of the affidavit of service. In calculating the amount of reasonable attorney's fees, the trial judge needed to determine the "lode star," which was the number of hours reasonably expended by plaintiff's attorney multiplied by a reasonable hourly rate See, Feleciano v. Fadetta, 434 N.J. Super. 543, 549 (App. Div. 2014)(quoting Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004)). The trial court should not have included excessive unnecessary hours spent on the case in calculating the lodestar. Furst, 182 N.J. at 22. The amount of the fee ordered should have been consistent with the amount award.

This was a standard three vehicle automobile, verbal threshold and negligence case involving three parties and three witnesses. In contrast to complex cases such as toxic torts, products liability, or medical malpractice cases, this case provided no novel or difficult issues a high level of skill or special expertise was not required to deal with the issues The high hourly rate awarded was

disproportionate to an hourly rate that is reasonable for the demands of this relatively simple negligence case.

Acceptance of the case by plaintiff's attorney did not preclude him from accepting other cases, nor did the acceptance of this particular case preclude other employment by the plaintiff's council as on his motion, council certified he had handled some1000 civil matters, primarily personal injury ligation, from which it can be inferred, he has an active case load at any given time.

As argued above the defendant had a good faith basis to not accept an offer to take judgment in the amount of her policy limits made five months after the answer was filed, given the questionable liability on the part of the defendant at the time the offer was received and the comparative negligence on the part of the plaintiff at that same time.

Moreover the counsel fees by the plaintiff are duplicative, because is counsel is entitled to contingent fee of 1/3 of the amount of the judgment. The amount awarded by the trial judge was excessive given such resulted in the fees totaling more than 50% of the amount of the judgment. This is a windfall plaintiff's council and an inequity to the plaintiff himself. Because plaintiff did not establish a reasonable attorneys fee, the award was excessive given the considerations 1.5 of the rules of professional conduct, and should be disallowed.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the trial court's ruling on liability on summary judgment be reversed since it is clear that both plaintiff and co-defendant, Walachy failed to maintain a safe following distance, thereby causing the accident. Alternatively, the verdict in this matter be set aside and that the case be reversed and remanded for a new trial based on the numerous trial errors set forth above.

Respectfully,
CIPRIANI & WERNER, P.C.

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ON THE BRIEF

Submitted: November 5, 2024

NEIL CAIN Plaintiff-Respondent vs. ROSA DIMEGLIO, ANDREW WALACHY AND JOHN DOE I-III Defendants-Appellant	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-002567-23 CIVIL ACTION ON APPEAL FROM SUPERIOR COURT, LAW DIVISION BURLINGTON COUNTY Sat Below: Honorable James J. Ferrelli, JSC

BRIEF AND APPENDIX
FOR
PLAINTIFF/RESPONDENT NEIL CAIN

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PRELIMINARY STATEMENT

This matter comes before the court following a trial which culminated in the jury returning a verdict on October 24, 2023 in the amount of $500,000.00 in favor of Plaintiff Neil Cain and against both Defendant Rosa DiMeglio and Defendant Andrew Walachy. The jury found Defendant DiMeglio negligent and 65% liable while Defendant Walachy was found negligent and 35% liable.

After considering testimony from all parties as well as that of investigating police officer James Flakker, the jury concluded that Plaintiff Neil Cain was not negligent.

The verdict was supported by the weight of the credible evidence.

Defendant DiMeglio now appeals the verdict as well as the imposition of costs and attorneys' fees by the trial court pursuant to R. 4:58-1, et. seq. Defendant also appeals the trial court's denial of DiMeglio's Motions for Summary Judgment and to Bar Expert Testimony.

Defendant DiMeglio's objection to the amount of attorneys' fees awarded by the trial court is unsupported and provides no basis to grant any of the relief sought. The undersigned worked extremely hard on the case, did an excellent job for the Plaintiff and obtained a favorable verdict.

It is submitted that all motions were properly decided by the trial court and that there is no reason to disturb the verdict. There is no basis to grant any of the relief sought by Defendant.

PROCEDURAL HISTORY

Plaintiff/Respondent relies upon the Procedural History submitted by Appellant with one clarification.

Defendant/Appellant DiMeglio indicates that, following the verdict in this matter, Defendant Walachy was "dismissed" from the matter. For purposes of clarity, Defendant Walachy settled with Plaintiff Neil Cain following the verdict which resulted in his dismissal from the matter.

STANDARD OF REVIEW

Summary Judgment will be granted only when the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits... 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). Whether the issues of material fact are in dispute is ascertained by examining "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party", to determine whether they "are 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).

"As only a legal issue is involved in the absence of a genuine factual dispute, [the] standard is *de novo*, and the trial court rulings 'are not entitled to any special deference.'" Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). (citation omitted). "Thus, the appellate court should first decide whether there was a genuine issue of material fact, and if none exists, then decide whether the trial court's ruling on the law was correct." Id. (citations omitted).

A new trial may be granted if, "having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." R. 4:49-1(a). The standard of review on an appeal from decisions on motions for a new trial is the same

as that governing the trial judge. Risko v. Thompson Muller Auto Grp., Inc., 206 N.J. 506, 522 (2011). The Appellate Division must determine whether denying a new trial would result in a "miscarriage of justice shocking to the conscious of the court". Id. at 521 (quoting Kulbacki v. Sobchinsky 38 N.J. 435, 456 (1992)).

COUNTERSTATEMENT OF FACTS

Defendant's recitation of facts is essentially correct, and Plaintiff agrees that most of the facts pertinent to this court's determination are undisputed. Therefore, pursuant to R. 2:6-4(a), Plaintiff's Counterstatement of Facts will be limited to those facts Plaintiff believes pertinent that were omitted by Defendant and will expound upon those facts insufficiently explained in Defendant's Statement of Facts.

Defendant Rosa DiMeglio was traveling in the left lane of Rt. 130 southbound at 50 miles per hour and endeavored to make a U-turn. 3T, p.122, ll. 6-16. Defendant DiMeglio testified that her GPS told her to make a U-turn approximately 100 feet before a cutout in the highway separating north and southbound lanes of travel. 3T, p. 124, ll. 11-16. DiMeglio claimed at trial that the GPS continued to advise her to make a U-turn at the cutout which was marked by a sign forbidding U-turns. 3T, p. 126, ll. 3-23.

Officer James Flakker of the Mansfield Township Police Department testified that the "No U-Turn" sign is located at the cutout to prevent accidents. Officer Flakker observed that the "No U-turn" sign is located just after a hill which affects the visibility of motorists approaching the area where the collision took place. 4T, p. 14, l.20 – p. 15, l. 8 and p. 40, ll. 13-17. See also, 001Ra.

Plaintiff Neil Cain was also in the left lane of Rt. 130 South behind the DiMeglio vehicle. He was traveling the speed limit as he headed up a hill just before

the location of the crash. 4T, p.93, ll. 6-10 and p. 136, ll.11-16. Plaintiff Neil Cain noticed defendant DiMeglio's car begin to decelerate and wondered whether she was going to try a U-turn at the cutout where the "No U-Turn" sign was placed. 4T, p.93, ll. 9-14. Plaintiff indicated that DiMeglio did not completely apply brakes but rather he noted them flickering on and off so he began to decelerate also. 4T, p. 162, ll. 9-12 and p. 93, ll. 6-12.

Mr. Cain testified that he considered moving his pickup truck to the right lane but there were large trucks there preventing a lane change. 4T, p. 93, ll. 14-17 and p. 137, ll. 4-7. Defendant Andrew Walachy confirmed that a lane change was not possible as there were vehicles occupying the right lane. 5T, p. 62, ll 7-9.

Suddenly, Defendant DiMeglio came to complete stop on the highway where the No U-turn sign was located. Plaintiff Neil Cain was very surprised by defendant DiMeglio's sudden stop in the left lane. 4T, p. 163, l. 11 – p. 164, l. 1. Mr. Cain slammed on his brakes and almost avoided any impact with the DiMeglio vehicle noting that the front drivers' side of his truck "gently" tapped or touched the rear passenger side of DiMeglio's car. 4T, p. 93, ll. 18-22 and p. 138, ll. 6-9.

Mr. Cain testified that Defendant DiMeglio had already begun to move to the left for the U-turn before she aborted the turn and stopped suddenly in the left lane of highway. 4T, p. 97, ll. 4-13. At no time did Ms. DiMeglio utilize her turn signal prior to veering to commence her intended U-turn. 4T, p. 162, ll. 12-15.

A few seconds later Defendant Walachy's vehicle slammed into the back of plaintiff Neil Cain's truck pushing it into defendant DiMeglio's car sending it across the median toward the northbound lanes of travel. 4T, p. 93, l. 23 – p. 94, l. 2.

Ms. DiMeglio felt only one impact which she described as "really heavy". 3T, p. 141, l. 25 – p. 142, l. 4.

Defendant DiMeglio denied during the trial that she had come to a complete stop in the left lane, acknowledging that "it obviously wasn't safe to stop in the middle of the road". DiMeglio contended that she had simply slowed to 25 mph when her car was hit from behind. 3T, p. 129, l. 20 – p. 130, l. 12.

DiMeglio insisted that she had not spoken to a police officer at the scene as she was unconscious. 3T, p. 130, ll. 20-23. Officer James Flakker of the Mansfield Township Police Department, however, testified that Ms. DiMeglio had, in fact, spoken to him at the scene. Officer Flacker reported that Defendant DiMeglio was conscious and informed him that she had stopped her vehicle in the left lane before any impact or collision. 4T, p. 22, ll. 9-12 and p. 19, l. 21 – p. 20, l. 2.

Following the collision, Defendant DiMeglio advised Mr. Cain that she was "sorry" and that her GPS told her to make a U-turn. 4T, p.97, ll. 14-24.

LEGAL ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT DIMEGLIO'S MOTION FOR SUMMARY JUDGMENT AS A MATERIAL ISSUE OF FACT EXISTED WHICH WAS PROPERLY SUBMITTED TO THE JURY (001a, 1T).

R. 4:46-2 provides that summary judgment should only be granted where there is no genuine issue of any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. Brill v. Guardian Life Ins. Co. of Am.,142 N.J. 520, 539-540 (1995). Where a genuine issue of material fact exists, summary judgment should be denied. Id. at 540. Essentially, the analysis is whether, when the facts are viewed in light most favorable to the non-moving party, there is sufficient evidence to permit a rational finder of fact to resolve dispute in favor of the non-moving party. Id. at 540.

Under the standard applied to applications for Summary Judgment the non-moving party is given the benefit of all reasonable inferences of the facts. Miller v. the Estate of Walter Sperling, 326 N.J. Super. 576 (App. Div. 1999).

Defendant DiMeglio filed a Motion for Summary Judgment seeking to be dismissed from the case. That motion was presented before the Honorable Sander Friedman, J.S.C. on August 5, 2021. 1T.

The facts as presented to the motion judge indicated Ms. DiMeglio made some attempt to execute a U-turn from the left lane of a highway. The U-turn was undisputably not permitted in the area of the collision. DiMeglio then stopped her

car suddenly in the left lane of Rt. 130 South. 064a. The rear passenger side of her car was then tapped by plaintiff Neil Cain's pickup truck.

Honorable Sander D. Friedman, J.S.C., denied the motion finding that a jury could reasonably determine that Defendant DiMeglio was negligent in attempting an illegal U-turn from the left lane of the highway. 1T, p.21.

Appellant's argument focuses on the actions of Plaintiff Cain and Defendant Walachy. As Defendant DiMeglio was the party seeking summary judgment, the issue presented is whether any facts could support a conclusion that DiMeglio's actions amounted to negligence. Defendant DiMeglio was attempting a U-turn with no turn signal where one was not permitted. Ultimately, she stopped suddenly in the left lane of the highway. 1T. A reasonable jury could surely conclude that DiMeglio's actions amounted to negligence.

It is respectfully submitted that the Court did not err in denying Defendant DiMeglio's Motion for Summary Judgment as a material issue of fact existed which required a jury determination.

II. DEFENDANT DIMEGLIO'S MOTION FOR NEW TRIAL WAS PROPERLY DENIED BY THE TRIAL COURT AS THERE WAS NO MISCARRIAGE OF JUSTICE (004a, 7T).

R. 4:49-1 (a) provides that a trial judge may grant a new trial if, "having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses,

it clearly and convincingly appears that there was a miscarriage of justice under the law." In this instance, there was no miscarriage of justice. Dissatisfaction with the verdict is not a basis for a new trial. It is well-settled that jury verdicts should be set aside in favor of a new trial sparingly and only in cases of clear injustice. Jacobs v. Jersey Power & Light, 452 N. J. Super. 494, 502 (App. Div. 2017). See also, Roman v. Galaxy Toyota, 399 N.J. Super. 470, 477 (App. Div. 2008), noting that jury verdicts carry a presumption of correctness.

Following a jury verdict in favor of Plaintiff Neil Cain and against both defendants, counsel for Defendant DiMeglio moved for a new trial. The burden was on Defendant DiMeglio in this instance to demonstrate that a new trial was warranted. The burden to overturn the jury's verdict is a high one. Aiello v. Myzie, 88 N.J. Super. 187, 194 (App. Div. 1965), certif. denied, 45 N.J. 594 (1965).

DiMeglio's motion for a new trial was argued on December 1, 2023 (7T) and denied by order of the trial judge, the Honorable James J. Ferrelli, J.S.C., on December 4, 2023. (004a)

The Supreme Court of New Jersey in Hartpence v. Grouleff, 15 N.J. 545 (1954), held that a trial judge is in a better position than an appellate court to decide whether justice has been done under the circumstances of the case and the weight of the credible evidence. The Hartpence Court opined that the trial judge's actions

"should not be disturbed unless it clearly and unequivocally appears there was a manifest denial of justice under the law." Id. at 549.

A. There Was Ample Evidence at Trial to Support a Finding of Negligence on The Part of Defendant DiMeglio, and a Finding that Plaintiff Neil Cain Was Not Negligent (3T, pp. 121-150 and 4T, pp. 9-187 and 6T , pp. 80-81 and 7T, pp. 12-15).

In the case at bar, there was overwhelming evidence of DiMeglio's negligence. There was also plenty of evidence which tended to indicate that Plaintiff Neil Cain was not negligent.

Defendant DiMeglio testified that she was completely unfamiliar with Rt. 130 in the area where the collision occurred. 3T, p.122, ll. 5-7. Defendant DiMeglio was traveling at 50 mph in the left lane of the highway and seeking to make a U-turn. 3T, p122, ll. 6-16. Per her own admission, she was reliant upon the instructions provided by her GPS. 3T, p.122, ll. 17-21. According to DiMeglio, her GPS first alerted her to make a U-turn approximately 100 feet before a cutout in the road between the southbound and northbound lanes of Rt. 130. 3T, p. 124, ll.11-16.

Defendant DiMeglio testified that after the GPS instructed her to turn at the cutout in the highway, she noticed a sign that read "No U-Turn". Defendant testified that the GPS was telling her to U-turn where the sign indicated that such a turn was not permitted. 3T, p. 126, ll. 3-23.

Plaintiff Neil Cain testified that he was traveling behind DiMeglio in the left lane of Rt. 130 South maintaining a safe following distance. 4T, p.136, ll.10-16. He was traveling no more than the speed limit of 50 miles per hour. 4T, p.92, ll.14-17.

Mr. Cain described that he was coming up the hill preceding the location of the accident and doing the speed limit. He saw Ms. DiMeglio's vehicle flash the brake lights. Mr. Cain stated, "I see her slowing down, but I have a nice distance on her so I'm beginning to decelerate". 4T, p.93, ll. 6-10. See also 4T, p. 136, ll. 11-16.

When he first saw DiMeglio start to decelerate, Plaintiff wondered if she was going to try and make an illegal U-turn at the cutout where the "No U-Turn" sign was placed. 4T, p. 93, ll. 9-14. Neil Cain then considered moving into the right lane to move his pickup around DiMeglio's vehicle but there were large trucks in the right lane which prevented him from doing so. Mr. Cain's passenger side view mirror blind spot detection started alerting him to the presence of vehicles immediately to his right. 4T, p. 93, ll. 14-16; p. 94, ll .19-25 and p.137, ll. 4-7. Defendant Andrew Walachy's testimony confirmed that it was not possible for Plaintiff to move to the right as there were other vehicles occupying the right lane. 5T, p. 62, ll. 7-9.

Ms. DiMeglio never utilized her turn signal prior to veering to commence her intended U-turn. 4T, p. 162, ll. 13-15.

When Plaintiff saw the DiMeglio vehicle slowing a bit, Neil Cain also began to slow his vehicle. Thereafter, Defendant DiMeglio's vehicle suddenly came to a stop on

the highway right at the no U-turn zone. Neil Cain testified that he was "very surprised" that DiMeglio stopped suddenly in the left lane of the highway. 4T, p. 163, l.11 – p. 164, l.1

At trial, DiMeglio claimed that she had not come to a stop at all. Rather, Defendant DiMeglio testified that she had slowed to 25 miles per hour when she was hit from behind. In denying that she had suddenly stopped in the left lane, Ms. DiMeglio acknowledged that "it obviously wasn't safe to stop in the middle of the road." 3T p. 129, l.20 – p. 130, l.12.

DiMeglio's testimony was disputed by Plaintiff who testified that DiMeglio suddenly stopped in the left lane of the highway. 4T, p. 163, l.11 – p. 164, l.1. Ms. DiMeglio's statement was also refuted by responding Officer James Flakker of the Mansfield Township Police Department who testified that Ms. DiMeglio advised him at the scene that she had stopped her vehicle before the collision. 4T, p.22, ll 9-12.

DiMeglio had also insisted that she did not speak to any police officer at the scene as she claimed to be "completely unconscious". 3T, p.130, ll. 20-23. DiMeglio's credibility as a witness was further eroded as Officer Flakker confirmed that Ms. DiMeglio had, in fact, spoken to him at the scene of the collision and that he documented same in his police report. T4, p.19, l. 21 – p. 20, l. 2. Any reasonable jury could have concluded Ms. DiMeglio's story that she never stopped her car was simply not credible.

Credibility determinations are to be made by the jury. The courts have long adhered to the principle that it is within the sole and exclusive province of the jury to determine the credibility of the testimony of a witness. Rodriguez v. Wal-Mart Stores, 449 N. J. Super. 577, 590 (App. Div. 2017) (citing, State v. Vandeweaghe, 351 N.J. Super. 467, 481 (App. Div. 2002) aff'd 177 N. J. 229 (2003), certif. granted 230 N. J. 584 (2017)). Clearly, the jury found Plaintiff Cain's testimony credible that the front of his vehicle barely touched the back of DiMeglio's car before his truck was struck from behind at a high rate of speed by Defendant Walachy's SUV. 4T, p.93, ll. 18-22 and p. 138, ll. 6-9. It is equally apparent that the jury found Defendant DiMeglio's testimony that she never stopped and never started the U-turn to lack credibility and be untrue.

Defendant DiMeglio's actions appear even more ill-advised, based on Officer Flakker's testimony that the reason for the "No U-turn" sign is to prevent accidents. The officer noted that the no "No U-turn" is located just after a hill which affects the visibility of motorists approaching the area of the collision. 4T, p. 14, l.20 – p. 15, l.8. See also, 001Ra, diagram of area of collision utilized during Officer Flakker's testimony.

DiMeglio had at least begun to make an illegal U-turn before deciding to stop suddenly in the left lane. Clearly, such actions by DiMeglio amounted to negligence, as the jury determined.

On the other hand, the credible evidence was that Plaintiff Neil Cain did not act negligently. He was traveling on Route 130 at 50 miles per hour, the speed limit. 4T, p.92, ll.14-17. As DiMeglio began to flash her brake lights as she approached the "No U-turn" sign, Neil Cain slowed his vehicle. Plaintiff noted that the DiMeglio vehicle then suddenly stopped in the left lane of the highway, which he described as very surprising. 4T, p. 163, l.11 – p. 164, l.1. Plaintiff Neil Cain testified that DiMeglio had already begun to move to the left for the U-turn before she aborted the turn and stopped. 4T, p.97, ll. 4-13.

Mr. Cain testified that he could not move to the right lane due to the presence of other vehicles, leaving his only option to slam on the brakes. Plaintiff did so and nearly came to a complete stop, although his vehicle did "touch" DiMeglio's car. 4T, p. 93, ll. 18-22. Neil Cain stated that the drivers' side front of his truck merely "tapped" the rear passenger side of DiMeglio's vehicle. 4T, p. 138, ll. 6-9.

Plaintiff Cain then breathed a sigh of relief before his truck was struck from behind by defendant Walachy's vehicle. 4T, p.93, ll. 18-25. The extreme force of being rear-ended by the Walachy vehicle pushed the Cain truck into the back of DiMeglio's car sending it forward and to the left across the median of the road and into the northbound lanes of travel. 4T, p. 93, l. 23 – p. 94, l. 2; p.96, ll. 4-13. Defendant Andrew Walachy admitted that when his SUV crashed into the rear of Plaintiff Cain's stopped pickup truck, it was like he was "hitting a brick wall." 5T, p.65, ll.11-25. See

also, 003Ra (photo of Walachy vehicle). Plaintiff Neil Cain went to check on Defendant DiMeglio after the collision. At that time, DiMeglio admitted her mistake to Cain, noting "I'm so sorry. My GPS said make a U-turn." 4T, p.97, ll.14-24.

Defendant DiMeglio reinforced the accuracy of Mr. Cain's testimony that his pickup barely touched the back of her car. Specifically, Ms. DiMeglio testified that she only felt one impact and that impact was "really heavy." 3T, p.141, l.25 – p.142, l.4. From defendant's own testimony it is obvious that Mr. Cain's pickup "touching" the back of her car was not even felt by Ms. DiMeglio. The heavy impact which she felt and which drove her car across the median toward northbound traffic was Defendant Walachy crashing into the back of Neil Cain's pickup and forcing it into the back of Ms. DiMeglio's vehicle.

It is respectfully submitted that Plaintiff's actions did not amount to negligence and certainly would not be a basis to remove the issue from the jury.

Movant's reliance of the cases of Dolson v. Anastasia, 55 N.J. 2 (1969) and Jones v. Bennett, 306 N.J. Super. 476 (App. Div. 1998) is misplaced. Both cases involve entirely different factual scenarios than the one at bar and are easily distinguishable.

In Dolson, the plaintiff was driving southbound down a multi-lane road approaching an intersection where she was permitted to and intended to make a left turn. She came to a complete stop at the intersection and waited for northbound traffic to pass before she could make her left. After she stopped, she looked in her rearview

mirror and saw no car. She testified that a few seconds later, she was rear-ended. Dolson, supra at 9.

Defendant Anastasia described a scenario where he clearly should have been able to stop had he been driving carefully. Anastasia testified that he noticed plaintiff Dolson slowing and reducing her velocity to almost a "stopped speed". Anastasia eventually hit his brakes and claims his car slipped or slid and hit Dolson's vehicle. Id. at 9-10. The Supreme Court of New Jersey emphasized that defendant Anastasia did not testify that Dolson came to a sudden stop such that he could not apply his brakes in time to avoid a collision. Id. at 10. Further, unlike in the case before the court, there was no evidence of any negligence on the part of Dolson in operating her vehicle. Id. at 11.

The facts of Dolson paint a far different picture than in the matter before the court. Critically, in Dolson, there was no testimony from either party that Dolson had stopped suddenly making it difficult for Anastasia to avoid a collision. Dolson gradually stopped to make a legal turn and was waiting for oncoming traffic to pass. Further, Dolson described the passing of a relatively significant period of time before she was struck. She gradually came to a complete stop where a left turn was permitted. She then waited for northbound traffic to pass. She then looked in her rearview mirror and a few seconds later her vehicle was struck. Id. at 9-11.

Likewise, the facts in the matter of Jones v. Bennett, 306 N.J. Super. 476 (App. Div. 1998) can be distinguished from our case. The Jones matter involved a rear end collision where Plaintiff Jones was a passenger in an automobile operated by Defendant Bennett which shut off unexpectedly and "coasted" to a complete stop on the highway. Jones, supra, at 480. Bennett had coasted to a stop in the center lane of the highway with lanes on either side which apparently were not occupied by traffic. Id. at 485. Bennett put her hazard lights on as soon as the car began to have difficulty. Nonetheless, defendant Hoover's car crashed into the rear of the Bennett vehicle. Hoover could not remember anything about the accident as he claimed "amnesia." Id. at 482-483.

One witness, a passenger, testified that it was approximately five (5) seconds after the car had coasted to a complete stop when it was hit from behind by Hoover's vehicle. Jones, supra, at 481. Another witness testified that it was "less than a minute" from when the Bennett vehicle stopped to when it was hit from behind. Traffic was noted to be "light" when the accident occurred at 1:15 A.M. Id.

The investigating officer noted that there were no skid marks from Hoover's vehicle prior to where it hit Bennett's car from behind. Id. at 482. Further, an accident reconstruction expert testified that Hoover's vehicle was traveling at an excessive rate of speed, approximately 87 miles per hour, when it struck the rear of Bennett's car. Id.

In agreeing with the trial judge, the Jones court, in applying Dolson, noted that given that the Bennett car had coasted to a stop and been stopped for five (5) seconds, that there is enough time for a following vehicle to avoid an impact "especially where there is no traffic in either other lane". Jones, supra, at 485.

The Jones facts are completely different from those in the case at bar. The vehicle in Jones applied its hazard lights before it "coasted" to a stop in the middle lane on the highway. Id. at 480. Additionally, the vehicle in Jones was at a complete stop for at least five (5) seconds before being rear-ended by the Hoover car. Id. at 481. There was apparently no traffic in either lane to the left or right of the stopped vehicle which would preclude defendant Hoover from executing a lane change. Id. at 485. There was no indication that the driver of the stopped vehicle had done anything negligent in operating the vehicle. Finally, the Hoover vehicle was traveling approximately 87 miles per hour when it crashed into the stopped vehicle. Id. at 482.

Thus, in both the Dolson and Jones cases, it was obvious that both drivers were negligent and that a reasonable driver would have been able to avoid a collision. It was further clear that the driver of the vehicle that got hit from behind in each case had neither acted negligently nor taken any action which would make it difficult for a following vehicle to avoid a collision.

The facts of Dolson and Jones provide a stark contrast to those in the case at bar. Defendant DiMeglio attempted to make an illegal U-turn in an area just after a hill which affected visibility of drivers approaching the area of the crash. After aborting the U-turn, Defendant DiMeglio suddenly stopped her car in the left lane of the highway. There was no evidence that Plaintiff Neil Cain was speeding. All parties agreed that it was not possible to move to the right lane to avoid a collision as it was occupied by other vehicles. Finally, Plaintiff Neil Cain's vehicle barely touched the back of DiMeglio's car and was stopped before getting slammed from behind at a high rate of speed by Defendant Walachy's SUV.

Given the facts presented, the jury appropriately found that Plaintiff Neil Cain was not negligent.

Unlike the Jones and Dolson cases, the facts of the case at bar do not warrant any automatic imposition of negligence upon Plaintiff Neil Cain. It is submitted that the verdict reflected that the jurors concluded that Neil Cain took all reasonable measures to avoid an accident. The jurors finding no negligence on the part of Plaintiff was not against the weight of the evidence. Accordingly, the verdict was not a miscarriage of justice and Defendant DiMeglio's motion for a new trial was properly denied by the trial court.

B. The Jury's Finding that Defendant Rosa DiMeglio Was a Proximate Cause of the Collision of June 9, 2018 Was Not Against the Weight of The Evidence Presented at Trial (6T, p. 80-81).

Defendant DiMeglio's negligence was obviously a proximate cause of the accident of June 9, 2018 as well as plaintiff's injuries.

Generally, issues of proximate cause are left to the jury. Yun v. Ford Motor Co., 276 N.J. Super. 142, 160 (App. Div. 1994). It has been long-established that the concepts of proximate cause and foreseeability are intertwined. To be a proximate cause a party's conduct need only be a cause which sets off a foreseeable sequence of events, unbroken by any superseding cause, and which is a substantial factor in producing the plaintiff's injury. Id. at 159.

There was no superseding cause following Defendant DiMeglio's negligent acts in beginning an illegal U-turn and then deciding to come to a sudden stop in the left lane of the highway. A superseding cause is one that "so entirely supersedes the operation of the first tortfeasor's negligence that it alone caused the injury, without the first tortfeasor's negligence contributing thereto in any material way." Davis v. Brooks, 280 N.J. Super. 406, 412 (App. Div. 1993). Plaintiff Neil Cain stopped his truck in response to Defendant DiMeglio's partially attempted illegal U-turn and sudden stop on the highway. Then getting rear-ended by Walachy's vehicle did not constitute a superseding cause.

While there may be multiple causes intervening between a negligent act and a plaintiff's injury, if those acts are reasonably foreseeable, each intermediate cause may be deemed a proximate result of the first negligent act. Davis v. Brooks, supra, at 412. The first act of negligence, in this case that of Defendant DiMeglio, is deemed to continue and be contemporaneous with all intervening acts of negligence. Id. Thus, multiple defendants may be considered to be a proximate cause of a plaintiff's injury.

As set forth by the Appellate Division in Davis, "where the original tortfeasor's negligence is an essential link in the chain of causation, such a casual connection is not broken if the intervening cause is one which might, in the natural and ordinary course of things, be anticipated as not entirely improbable." Id. at 412. Plaintiff's vehicle getting hit from behind by Defendant Walachy's vehicle cannot be considered "entirely improbable" and, thus the chain of causation was not broken. The scenario which unfolded following Defendant DiMeglio's actions was ultimately foreseeable and, arguably, expected.

C. There Was No Improper Introduction of Evidence Pertaining to Plaintiff's Lost Earning Capacity (7T, p. 15).

No testimony regarding lost wages was presented during the trial. None of the testimony elicited from Plaintiff Neil Cain conferred any prejudice upon Defendant DiMeglio. Plaintiff's brief mention that his injury caused him to sub out work was

not improper. 4T, p.89, l.23 -p.90, l.2. Surely, there is relevance in a Plaintiff with a significant arm injury testifying how it affected his ability to perform work-related activities. Said testimony was not prejudicial in any way. Clearly, Plaintiff is entitled to testify as to how his arm injury affects his ability to perform his job or any other activity.

The jury was not instructed on providing an award for lost wages. There is zero indication that the jury's calculation of damages included an element of lost wages. No prejudice was visited upon the defendant.

III. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO REDACT THE TESTIMONY OF PLAINTIFF'S EXPERT, GARY NEIL GOLDSTEIN, M.D. (003a, 7T, pp. 15-16).

This identical argument was previously asserted by defendant DiMeglio in a pre-trial motion following Dr. Goldstein's de bene esse testimony. The motion was denied by Honorable Richard L. Hertzberg, J.S.C. (003a). The application currently filed is simply an attempt to re-argue a previously decided issue and should be denied.

Contrary to the assertions of the Appellant, no prejudice resulted from Dr. Goldstein's testimony. There was nothing prejudicial or inflammatory in the use of a medical illustration which depicts the procedure performed on June 22, 2020.

Further, Dr. Goldstein's testimony as to the illustration was not the same as Dr. Paiste's. The testimony was not cumulative.

Defendant DiMeglio suffered no prejudice despite the claims of her counsel. Defendant provides no legitimate concern of the "prejudice" that Dr. Goldstein's testimony allegedly caused Defendant DiMeglio. The reality is that multiple medical experts are utilized in many personal injury cases. Because said medical experts are testifying regarding the same injury and plaintiff there inevitably will be some overlap. Both Judge Hertzberg and Judge Ferrelli appropriately found that none of the testimony should be redacted.

N.J.R.E. 403 allows that relevant evidence can only be excluded if its probative value is "substantially" outweighed by factors such as "undue prejudice" or the "needless presentation of cumulative evidence". Dr. Goldstein's testimony was clearly relevant to Mr. Cain's medical care and condition.

Further, while the Appellant claims that the admission of Dr. Goldstein's testimony prejudiced Defendant DiMeglio, one is left to wonder how. The Appellant's brief contends that Dr. Goldstein's testimony somehow inflamed the jury. This is an allegation wholly unsupported by fact. There is no explanation as to "how" the jury was inflamed. There is nothing inflammatory or prejudicial in the disputed testimony. Rather, same is simply the testimony of a second physician who

has different insights and outlook on Mr. Cain's surgery and condition. Defendant DiMeglio suffered no prejudice at all and the motions were appropriately denied.

Dr. Goldstein's testimony is clearly relevant to Mr. Cain's medical care and condition. There is no reason why both experts cannot reference the same illustration to help explain their opinions regarding a complex surgery and injury to the jurors. See Goldstein testimony, 5T, p.8-p.32, 1.6. Defense counsel has provided zero evidence that admission of the testimony would result in either "undue prejudice" to Defendant DiMeglio or was the needless presentation of cumulative evidence.

While, inevitably there is some overlap between the testimony of two medical experts discussing the same injury, the testimony was not cumulative. In fact, there were many differences in the testimony of Plaintiff's two medical witnesses. It should be noted that, unlike Dr. Paiste, in addition to his work in orthopedics, Dr. Goldstein is also board-certified in plastic surgery. 5T, p.8, ll. 8-9. Unlike Dr. Paiste, Dr. Goldstein opined regarding the nature of ongoing symptomatology related to the large scar on Neil Cain's arm testifying that the scar remains tender and is permanent. 5T, p.17, ll. 7-17. Dr. Goldstein added that it was his opinion, as a plastic surgeon, that the scars were not amenable to aesthetic revision. 5T, p.17, ll.18-22.

Dr. Goldstein provided an in-depth discussion and opinion regarding the scar tissue that resulted from the surgery performed by Dr. Paiste, the effect of same on Neil Cain and why further surgery was not a good option for the patient. 5T, p.21,

l.25 -p. 22, l. 8. See also, 5T, p.24, ll. 7-13. Dr. Goldstein also testified that any future surgery to improve Neil Cain's radial tunnel condition would be ill-advised as each subsequent surgical procedure in the area would produce more scar tissue and described scar tissue as the "enemy." 5T, p.26, ll. 5-15.

Dr. Goldstein also discussed how, as a contractor who works with his hands, Neil Cain's radial tunnel injury would likely result in "adaptive behavior, meaning more force being taken by the neck or the shoulder or other body part joint, as he tries to shift the stress off the injured elbow." 5T, p.25, ll. 5-13.

Dr. Goldstein testified regarding Mr. Cain's visit to the emergency room at Virtua Hospital which Dr. Paiste did not discuss. 5T, p.13, ll. 10-13 and p.14, ll. 9-21.

Dr. Goldstein also addresses the dangers in not properly treating a radial tunnel injury such as that suffered by Mr. Cain. The doctor noted that failing to properly care for a radial tunnel injury would cause increased pain and an "inflammatory reaction" which begets scarring. 5T, p.19, ll.15-21. The opinion is not simply a restatement of Dr. Paiste's opinions.

Further, while Dr. Paiste's testimony referenced all of the lettered "boxes" (A-G) on the illustration, Dr. Goldstein's focus was narrower and only commented on four (4) boxes, B through E. See 004Ra (medical illustration). It is important to note that Dr. Goldstein's testimony regarding the exhibit is neither identical nor

substantially similar to that of Dr. Paiste. Dr. Goldstein's testimony regarding the medical illustration can be found at 5T, p.18, l. 11 – p. 21, l.9. See also, 004Ra. Both doctors reference box "D" however their discussion of same is wholly different. The surgeon, Dr. Paiste, provides a detailed description of the radial tunnel release he performed while also stressing the length of the radial tunnel and discusses the "arcade of Frohse," a band of fibrous tissue in the area of the radial tunnel that can become problematic for the patient. 4T, p.212, l. 13 – p.213, l.18. Dr. Goldstein, on the other hand, testifies briefly regarding box D explaining that the illustration shows the nerve "free." Dr. Goldstein notes that if the nerve were not properly freed, the danger is that the nerve will always be "pinned" and will be rubbing against scar tissue every time the patient moves his wrist. 5T, p.19, ll. 6-10.

Simply put, the contention that Dr. Goldstein's testimony was cumulative or prejudicial is wrong. It is also obvious that while each of the two doctors utilize the same exhibit during their de bene esse depositions, the testimony of each is substantially different.

Defendant's reliance upon the case of Velazquez v. Jiminez, 336 N.J. Super. 10, 43 (App. Div. 2000) is misplaced. Velazquez was a medical malpractice matter. The trial judge refused to admit into evidence two videotapes depicting a day in the life of minor decedent Conor Velazquez. In finding that the trial judge did not abuse his discretion in barring the videotapes, the Velazquez Court noted that there is a

"danger that a jury will place inordinate weight on moving pictures." Id. (citing Suanez v. Egeland 330, N.J. Super. 190, 195-196 (App. Div. 2000)). The court also noted that the videotapes were cumulative considering that the jury had already heard extensive testimony from the Conor's parents and nurses regarding the boy's condition, treatment and the extraordinary care which was required to keep Conor alive. Id. In addition, the judge allowed the jury to see still photographs made from the videotapes. In short, the jurors were given the substance of the relevant and material information contained in the videotapes, even though they were not allowed to see them.

The facts and circumstances of Velazquez were wholly different from those in the matter at bar. There are no videos at issue. There is one medical illustration that two surgeons commented on. As noted above there are a plethora of differences in the testimony of the two medical witnesses. The Velasquez opinion has no bearing here. Appellant has not cited any caselaw which is either on point or persuasive.

There is no indication that the relevance of Dr. Goldstein's testimony was outweighed by any prejudice as suggested by the Appellant. In performing such an analysis, the trial judge has broad discretion. State v. Sands, 76 N.J. 127, 144 (1978). Determinations by the trial court pursuant to N.J.R.E. 403 will not be overturned on appeal unless it can be shown that there was a palpable abuse of discretion. Green

v. New Jersey Mfrs. Co. 160 N.J. 480, 492 (1999). No such circumstances exist here.

Defense counsel's brief claims the testimony inflamed the jury. This is an allegation wholly unsupported by fact. There is no explanation as to "how" the jury was inflamed by Dr. Goldstein's testimony. Rather, Goldstein's is the testimony of a second physician who has different insights and outlook on Mr. Cain's injury, surgery and condition.

Given the above, it is obvious that Dr. Goldstein's testimony was not cumulative, prejudicial or inflammatory and was properly admitted without redaction.

IV. COMMENTS MADE BY PLAINTIFF'S COUNSEL IN CLOSING WERE APPROPRIATE AND DID NOT WARRANT A MISTRIAL (7T, pp. 16-17, 004a).

It is well-settled that counsel is afforded wide latitude to argue any legitimate inference which may be drawn from the evidence. Colucci v. Oppenheim, 326 N.J. Super. 166, 177 (App. Div. 1990), certif. den., 163 N.J. 395 (2000). Likewise, counsel is permitted broad latitude in closing statements. Diakamopoulos v. Monmouth Med. Ctr., 312 N.J. Super. 20, 32 (App. Div. 1998). Further, a jury's verdict, including an award of damages, is cloaked with a "presumption of correctness." Baxter v. Fairmont Food Co., 74 N.J. 588, 593 (1977). It is

respectfully submitted that there was no "miscarriage of justice" in the court's rulings nor in the verdict returned in favor of the plaintiff.

DiMeglio's counsel contends that a mistrial should have been granted by the trial court and that the verdict was the result of remarks made by Plaintiff's counsel in his closing. Same is simply untrue. There was nothing excessive about the $500,000 verdict.

Initially, it must be noted that the comments of counsel for Defendant DiMeglio regarding an alleged improper "tone" of plaintiff's counsel's closing comments should be disregarded. Those allegations are unfounded. While the closing comments did point out the plethora of deficiencies in Dr. Ponzio's testimony, there was never any improper "tone." More troubling are the allegations regarding "tone" coming from an attorney who was not even present at the trial. Counsel on the appellate brief for Defendant DiMeglio was neither present at nor participated in the trial in any manner. Seemingly, the issue of "tone" would be more appropriately addressed by the trial judge than via a review of the transcript.

The undersigned pointed out in detail the shortcomings of Dr. Ponzio's opinions and addressed the defense doctor's credibility during the closing. Dr. Ponzio contended several times during his testimony that one of the reasons he felt that Neil Cain's arm injury was not caused by the accident of June 9, 2018 was because the accident did not appear to be particularly significant in terms of damage

to the vehicles. Dr. Ponzio testified "and I looked at the photographs and it wasn't very impressive in terms of damage to the vehicle". 5T, p.84, l.24 to p.85, l. 1. Dr. Ponzio, on cross examination further noted that because he believed there was not a significant amount of impact in the collision it contributed to his opinion that the accident did not cause Mr. Cain's arm injury. 5T, p.94, ll.13-19. Dr. Ponzio continued to reference his written report noting "A review of the accident photographs did not show significant vehicular damage to Mr. Cain's vehicle. It is common knowledge that the amount of damage to a vehicle is related to the degree of impact or degree of force". 5T, p.97, l. 24 – p.98, l.3.

It was obvious that Dr. Ponzio did not even review the photos of the defendants' cars which had been destroyed in the collision before offering his opinions. After being shown those two photographs depicting severely damaged vehicles for the first time on cross examination, Dr. Ponzio then admitted that the collision did, in fact, involve a significant impact between the vehicles. 5T, p.99, l.13 – p.100, l.9. See also, 002Ra (photo of Demeglio vehicle) and 003Ra (photo of Walachy vehicle). Naturally, counsel for the plaintiff emphasized in closing that Dr. Ponzio had based his opinion that the injury was unrelated to the accident at least in part on his faulty belief that the accident was not a significant one. Counsel for plaintiff properly pointed out that Dr. Ponzio generated the opinion without ever

having seen photographs of the Walachy or DiMeglio vehicle which had been severely damaged in the crash.

Dr. Ponzio opined that Mr. Cain's injury was from repetitive use even though there was no evidence that Plaintiff had ever had any symptoms or medical treatment related to his right arm before the collision of June 9, 2018. On cross examination, Dr. Ponzio admitted that he had no evidence that Mr. Cain ever had complained of or been treated for an arm injury before the collision. 5T, p. 107, l. 4 – p.108, l. 9. Naturally, the undersigned argued against Dr. Ponzio's "repetitive use" theory during the closing, pointing out to the jury that Dr. Ponzio's conclusion was not based on any facts and should be disregarded.

Finally, as provided for in New Jersey Civil Jury Charge 1.13C, the charges of Dr. Ponzio were appropriately discussed. None of the comments made by Plaintiff's counsel during closing were improper nor do they constitute the basis for a new trial. Comments that Dr. Ponzio was earning $20,000.00 per week and $1,000,000.00 per year performing defense examinations were based upon his own testimony.

Appellant relies upon the opinion in Geller v. Akawie, 358 N.J. Super. 437 (App. Div. 2003). In that matter, the plaintiff's attorney repeatedly violated the "golden rule" in asking the jury to put themselves in the shoes of the plaintiff. No similar comments were made in the case at bar. Rather, Plaintiff's counsel

commented on the lack of credibility of the opinions of Dr. Ponzio and the absence of any factual basis for same. Said comments are permissible. As noted in Geller, trials "need not be passionless" and it is, in fact, the attorney's duty to advocate for his or her client. Geller, supra, at 464.

Defendant DiMeglio also seeks to rely upon the opinion in Rodd v. Raritan Radiological Assoc., 373 N.J. Super. 154 (App. Div. 2004). Said reliance is misplaced. The Rodd court did discuss comments made by plaintiff's counsel which were described as "unduly harsh." The comments had nothing to do with the evidence and facts of that case. Those comments are not similar to anything stated by Plaintiff's counsel during closing statement in the case at bar. Further, the remand and reversal in Rodd was not due to any comments made by plaintiff's counsel, but rather due to the improper admission into evidence of some computer imagery presented by plaintiff. Id. at 170.

There was nothing improper in Plaintiff's counsel's tone at trial. There was nothing improper in pointing out the amount which Dr., Ponzio earned performing defense exams nor was there anything untoward in arguing that Dr. Ponzio's opinions were not at all based on fact. The trial judge charged the jury that they must decide whether the facts that an expert relied upon actually exist and that they may reject all or part of any expert opinion. 6T, p. 24, ll. 16-25.

It is respectfully suggested that the statements of plaintiff's counsel during closing constituted argument and are not the basis for a new trial. There has been no miscarriage of justice in any fashion.

V. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S APPLICATION FOR A REMITTITUR (7T, pp. 16-17, 004a).

A jury's verdict, including an award of damages, is cloaked with a "presumption of correctness." Baxter v. Fairmont Food Co., 74 N.J. 588, 593 (1977). The Supreme Court of New Jersey has specifically stated that a Trial Judge should not interfere with a quantum of damages assessed by a jury unless it is so disproportionate to the injury and resulting disability as to shock the conscience and to convince him or her that to sustain the award would be manifestly unjust. R. 4:49-1. See also, Baxter, supra, at 599.

Clearly, the verdict of $500,000.00 does not shock the conscience. Neil Cain suffered several injuries in the collision of June 9, 2018 and required years of medical care. The injuries were deemed permanent by two orthopedic surgeons who testified. Mr. Cain still performs regular home exercises in an attempt to maintain function in his right arm. 4T, p.126, l. 15 – p. 127, l.2.

Plaintiff suffered injuries to his radial tunnel nerve, carpal tunnel nerve and lateral epicondylitis in his right arm. Following the collision and despite receiving an initial round of physical therapy, Neil Cain testified that he was experiencing "a

lot of pain" in his right arm. 4T, p.110, ll. 7-9 and ll. 20-25. Specifically, Neil was experiencing a burning sensation in the arm and elbow along with intermittent numbness in his fingers. 4T, p.111, ll.1-9.

Neil initially underwent a three-month course of physical therapy while also being cared for at Regional Orthopedics. 4T, p.114, ll. 9-14. During the following year, Mr. Cain endured a second course of physical therapy at Regional Orthopedics in Cherry Hill, New Jersey which lasted over one year before Plaintiff was referred to hand surgeon, Dr. Paiste. 4T, p. 115, ll. 4-15.

Because Neil Cain was still experiencing throbbing pain in his arm, Dr. Paiste administered two cortisone injections to Plaintiff's right arm which provided temporary relief but later wore off. Plaintiff testified that the pain felt worse after the cortisone injections wore off than it had previously. 4T, p.117, l.11-p.1187, l.5.

In 2020, Dr. Paiste performed surgery on plaintiff's arm. Neil Cain recalled a difficult and painful recovery noting that his arm was throbbing and burning in the period after the surgery. He also described a seven-inch scar on his forearm following the surgery. 4T, p.199, ll. 8-23. The pain following the surgery was described as intense. 4T, p.124, ll.4-9.

Thereafter, Plaintiff Neil Cain embarked on a third round of physical therapy at Regional Orthopedics in Cherry Hill. Plaintiff would travel from his home in Burlington, New Jersey to Cherry Hill for each session. The third round of therapy

lasted ten months and each session lasted approximately one hour and fifteen minutes. Plaintiff Neil Cain testified that the therapy was painful. 4T, p.125, ll. 6-24.

Despite the passage of over five years since the accident as well as three (3) long rounds of physical therapy, multiple cortisone injections and a surgery on his wrist, forearm and elbow, plaintiff Neil Cain testified at trial that he still experiences pain and difficulties with his arm. Plaintiff testified that he tries not to lift anything at work for fear of increasing the pain and he is bothered by the "annoying" pain in his arm. 4T, p. 127, l. 7- p.129, l. 5.

At trial over five (5) years post-injury, plaintiff testified that he still performs home exercises for his arm twice per week for 20-30 minutes. Nonetheless, he does not have the same strength in his right hand and arm as his left. 4T, p. 126, l. 6 - p.127, l.2.

Mr. Cain was 50 years old at the time of trial in October of 2023. By the time of trial, Neil Cain had endured the pain, suffering, disability and inconvenience related to the arm injury for nearly five and one half (5 ½) years. The jury was instructed by that he is expected to live another 31.4 years. 6T, p.44, ll. 19-25. Thus, the $500,000 award is modest for an individual who is expected to endure a significant arm injury for some 36 years. Simple math provides that the award provides only for $13,888.88 per annum that Mr. Cain continues to suffer pain, weakness and disability in his right arm.

There are multiple examples of verdicts that have not been disturbed by the Appellate Division or the Supreme Court as rising to the level of "shock the conscience". In Glowaki v. Underwood Memorial Hospital, 270 N. J. Super. 1 (App. Div. 1994), the Appellate Division upheld a $908,000.00 verdict for a neck and back sprain case in Gloucester County. The testimony was limited to an argument that the plaintiff sustained a herniated disc and the herniation was contested by the defendants. The Appellate Division in Glowaki stated that a Trial Judge should not interfere with the quantum of damages unless it is convincing to the Judge that to sustain the award would be manifestly unjust. Id. at 14. In making this determination, the Appellate Division advised that the Judge must accept the medical evidence in light most favorable to the plaintiff and he must presume the jury believed the plaintiff's claims and the testimony of the supporting witnesses. Id. Also, the Appellate Division found that a jury's decision cannot be gauged by the label the defendant chose to put on a plaintiff's condition. Id. at 15.

Courts must exercise the power of remittitur with great restraint. Cuevas v. Wentworth Group, 226 N. J. 480, 500 (2016). As articulated by the New Jersey Supreme Court:

> That is so because in our constitutional system of civil justice, the jury-not a judge-is charged with the responsibility of deciding the merits of a civil claim and the quantum of damages to be awarded a plaintiff... The drafters of our Constitution placed their trust in ordinary

> men and women of varying experiences and backgrounds, who serve as jurors, to render judgments concerning liability and damages. Id. at 500 (citing Johnson v. Scaccetti, 192 N. J. 256, 279 (2007) (internal cites and quotation marks omitted)).

In Cuevas, the Court noted that because no two juries likely will award the same damages, a permissible award may fall within a wide spectrum of acceptable outcomes. Id. at 500. "Within that acceptable broad range, even a seemingly high award should not be disturbed; only if the award is one no rational jury could have returned, one so grossly excessive, so wide of the mark and pervaded by a sense of wrongness that it shocks the judicial conscience, should a court grant remittitur." Id. (citations omitted).

In evaluating a motion for a remittitur, courts may not rely on personal experience or a comparison of supposedly similar verdicts, but rather, "should focus their attention on the record of the case at issue in determining whether a damages award is so grossly excessive that it falls outside of the wide range of acceptable outcomes." Id. at 503-505.

For all of the espoused reasons, there was no basis to grant a remittitur.

VI. THE TRIAL COURT PROPERLY GRANTED PLAINTIFF'S MOTION FOR FINAL JUDGMENT INCLUDING INTEREST, COSTS ACCRUED AND ATTORNEY'S FEES (8T, 005a-006a).

Final judgment in favor of Plaintiff Neil Cain and against Defendant DiMeglio in the amount of $473,373.57 was entered by the trial court on March 18, 2024. 005a. The amount of judgment included the $325,000.00 awarded by the jury against DiMeglio (65% of $500,000.00) plus $74,727.52 in prejudgment interest which had accrued by that point. Also awarded were legal costs in the amount of $13,226.05 and attorneys' fees totaling $60,420.00. The costs and fees were awarded by the trial judge pursuant to R. 4:58-1 governing Offers of Judgment. 8T.

Plaintiff had filed an Offer to Take Judgment against Defendant Demeglio in the amount of $100,000.00 during the discovery period of the case. 076a. Defendant did not respond to the Offer to Take Judgment. Accordingly, after considering submissions and argument from both parties, pursuant to R. 4:58-1, et. seq., the Honorable James J. Ferrelli, J.S.C. awarded Plaintiff attorneys' fees, costs and accelerated interest from April 1, 2022 (the date when discovery ended) to March 18, 2024 when the Order for Final Judgment was executed. 8T.

A. R. 4:58-1, et. seq., The Offer of Judgment Rule, Was Properly Applied by The Trial Court (8T, pp. 3-35 and 005a-006a).

There is no basis for defense counsel's contention that plaintiff is not entitled to application of the Offer of Judgment pursuant to R. 4:58-1. Counsel's interpretation of the rule is erroneous and makes no sense.

R. 4:58-2(a) sets forth the consequences of non-acceptance of the plaintiff's offer. Specifically, the rule provides as follows:

> "if the offer of the claimant is not accepted and the claimant obtains a money judgment in an amount that is 120% of the offer or more...the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on any amount of money recovery from the date of the offer or the date of completion of discovery, whichever is later...and (3) a reasonable attorney's fee for such subsequent services...

The plain reading of the rule makes clear that the verdict in this matter triggered the provisions of R. 4:58-1, et. seq. Plaintiff was entitled to the accelerated 8% interest rate beginning April 1, 2022, the date when discovery ended. Further, defendant is obligated to reimburse plaintiff all attorney's fees and litigation costs incurred after the expiration of the discovery deadline.

Defense counsel argues that the Offer of Judgment was "withdrawn" as it was not accepted within ninety (90) days. The defense seems to contend that they are somehow off the hook because the Offer was not "accepted" within ninety (90) days.

This makes no sense. If defendant's interpretation were accurate, why would any defendant ever "accept" or pay the Offer of Judgment amount? By defendant's interpretation the Offer would simply have no effect after the ninety (90) days regardless of verdict amount. If so, why would R. 4:58-1, et. seq. even exists if it provided no encouragement or inducement to the defense to settle the case?

The result of the "withdrawal" referenced in the Rule is that plaintiff who made the offer no longer must accept said amount after the passing of the ninety (90) days. In fact, R. 4:58-1(b) reads that, if not accepted, the Offer is deemed withdrawn and evidence of same may not be admissible "except in a proceeding after the trial to fix costs, interest and attorneys' fee". Thus, when an Offer of Judgment is not accepted within ninety (90) days, it is withdrawn in the sense that plaintiff need not thereafter accept an offer from defendant of that amount. Expiration of the ninety (90) days has no effect on plaintiff's entitlement to increased interest, fees and costs in the event of a verdict in an amount more than 120% of the amount sought in the Offer of Judgment.

The defense position on this issue is wrong and ignores critical language in R. 4:58-1, et., seq. as noted here.

Defendant's brief seems to also suggest that the Offer of Judgment is not effective because it was issued before the end of discovery. There is no authority which nullifies an Offer of Judgment because it was filed before the end of discovery.

The rule clearly states that an Offer to Take Judgment may be filed "at any time more than 20 days before the actual trial date". R. 4:58-1. The rule mandates that the increased interest and calculation of reimbursable attorneys' fees, etc. will begin at the completion of discovery (April 1, 2022 in this instance) where the Offer of Judgment has been previously filed.

The plain language of R. 4:58-2 makes clear that plaintiff's interest calculation including 8% annual interest from the date of the discovery deadline to the date when a final judgment was entered was accurate. Same is the obvious consequence of non-acceptance of the Offer of Judgment.

Defendant's reliance upon the opinion in Romagnola v. Gillespie, 194 N.J. 596 (N.J. 2008) is misplaced. Nothing in the Romagnola matter would support a "relaxation" of the Offer of Judgment rule here. In Romagnola, the court noted the unique circumstances which led to the relaxation of the rule. Romagnola, supra, at 606. Specifically, R. 4:58-1 et. seq. had been amended between the time when plaintiff properly filed an Offer to Take Judgment and the time of trial. The rule was amended shortly before trial, preventing plaintiff from filing a new Offer to Take Judgment. The rule was amended to require a verdict 120% greater than the amount of the Offer to Take Judgment. Previously, the rule had only required a verdict "more than" the amount of the Offer. By chance, the verdict in Romagnola was more than the Offer but less than 120%.

The Romagnola Court found that the rule would be relaxed on that limited instance based solely on "circumstances as unique as those presented here---where a party fully complies with the letter and spirit of a Rule but the Rule changes after the party can no longer alter or modify its position to comply with the amended Rule." Romagnola, supra, at 606. The Romagnola case is not at all pertinent to the case at bar. No such unique circumstances are present in our case.

Accordingly, the Offer of Judgment was properly applied and there was no basis to relax the Rule.

B. The Application of The Offer of Judgment Rule Placed Neither Undue Hardship or Injustice on Defendant DiMeglio (8T, p. 11 and 005a-006a).

Defense counsel also contends that applying the Offer of Judgment would somehow impose an "undue hardship" on defendant. Db33. This argument is without merit and certainly not a basis to preclude the application of R. 4:58-1, et. seq.

First, Defendant's insurer, Progressive, had every opportunity to settle this matter by offering its liability policy limits of $100,000 yet refused to do so. Plaintiff's counsel filed an Offer to Take Judgment and served three (3) letters on defense counsel on December 8, 2021, August 5, 2022 and May 23, 2023, putting Defendant on notice per Rova Farms v. Investors Ins. Co., 65 N.J. 474 (1974). See 005Ra, 008Ra and 011Ra (Rova Farms letters). Despite these and other verbal

overtures to resolve the case, Defendant refused to do so. Thus, Appellant cannot now, when a verdict has come in above the policy limit, claim some vague "undue hardship" to avoid the penalties provided by the Offer of Judgment rule.

Defendant's argument that Plaintiff could have filed subsequent Offers to Take Judgment is irrelevant. In reality, there is zero reason for a party to file a second Offer to Take Judgment where the first offer has been ignored by the adversary.

Plaintiff fully intends to pursue a claim for bad faith versus Progressive. Plaintiff's counsel has been in touch with Ms. DiMeglio's private counsel and on July 16, 2024 obtained an assignment of rights signed by the defendant to allow plaintiff to pursue a claim for bad faith versus Progressive to collect the excess verdict pursuant to the holding in Rova Farms v. Investors Ins. Co., 65 N.J. 474 (1974). See, 030Ra (affidavit of Demeglio assigning rights). Thus, there has been and will be no undue hardship or injustice imposed upon Defendant DiMeglio.

Applying the Offer of Judgment rule, R. 4:58-1, et. seq., would in any event not result in any injustice as claimed by defendant.

C. The Trial Court Did Not Err in Awarding $60,420.00 in Attorneys' Fees to Plaintiff's Counsel (8T, pp. 25-25).

Defense counsel's unsupported attempts to attack plaintiff's counsel's fee request do not carry water. Defendant vaguely claims that the trial judge should not have awarded attorneys' fees for "excessive unnecessary hours spent on the case."

Db36-37. There is no indication as to what time claimed is either excessive or unnecessary.

Pursuant to R. 4:58-1, et. seq. the trial judge awarded 127.2 hours of time. That time accrued over the course of nearly two years from the end of discovery in April of 2022 to the entry of final judgment on March 18, 2024. See 014Ra and 020Ra (Plaintiff's certification and ledger of attorney time submitted in support of fee application). Trial judge Honorable James J. Ferrelli, J.S.C., noted that he had, in fact, reviewed all of plaintiff's time entries for tasks performed from the end of discovery through the end of trial and analyzed them to ensure that they were reasonable. 8T, p.13, ll. 12-22.

Defense counsel contends that the $475.00 per hour awarded to plaintiff's counsel is somehow unfair. As noted in the certification submitted along with plaintiff's motion to enter final judgment, plaintiff's counsel's hourly rate is actually $600.00. I have been practicing law in New Jersey for over thirty (30) years and have been Certified by the Supreme Court of New Jersey as a Civil Trial Attorney for over 20 years. I have tried over seventy (70) cases before a jury. Plaintiff's motion papers included certifications of two experienced attorneys in the area attesting to my skill and experience. See 026Ra and 028Ra.

The undersigned stands behind every single time entry submitted with the motion to enter final judgment.

The trial judge did not err in awarding $60,420.00 in attorneys' fees.

CONCLUSION

For all reasons set forth, there has been no miscarriage of justice or any basis to disturb the jury's verdict or the trial judge's rulings on any motions.

Respectfully submitted,
COSTELLO LAW FIRM
Attorney for Plaintiff, Neil Cain

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DATED: January 2, 2025

SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION
Brief

Appellate Division Docket No. A-002576-23

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January 21, 2025

REPLY BRIEF ON BEHALF OF DEFENDANT/APPELLANT, ROSA DiMEGLIO

Neil Cain, Plaintiff vs. Rosa DiMeglio, Andrew Walachy, and John Doe I-III Defendants	Case Type: Civil County: Burlington Trial Court Docket #: BUR-L-826-20 Sat Below: Hon. James J. Ferrelli, JSC

Dear Judges:

Pursuant to R. 2:6-2(b), please accept this brief in reply to Plaintiff/Appellee's opposition of Defendant/Appellant Rosa DiMeglio's appeal in this matter.

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TABLE OF JUDGMENTS

PROCEDURAL HISTORY

The Defendant/Appellant relies on and incorporates her statement as to the procedural history of this matter contained in her original brief.

Defendant/Appellant agrees with the Plaintiff/Appellee's clarification insofar as the Defendant Walachy settled with Plaintiff/Appellee after the verdict prior to being dismissed from the lawsuit.

COUNTER STATEMENT OF FACTS

In response to the Plaintiff/Appellee's Statement of Facts, Defendant/Appellant directs this Honorable Court to the following additional facts. At trial, Ms. DiMeglio testified that she was unfamiliar with the area where the accident occurred and had not driven there before the accident. 3T, p. 122, ll. 5-10. She was relying on her GPS to guide her. 3T, p. 122, ll. 17-21.

Officer Flakker admitted on cross examination that Defendant DiMeglio was rear-ended and pushed across the two northbound lanes of Route 130 and onto the grass shoulder of Crystal Lake Park. 4T, p. 38, ll. 13-22.

Neil Cain admitted in answers to interrogatories that he struck the rear of Ms. DiMeglio's vehicle before being struck in the rear by the Defendant Walachy's vehicle. 046a, Interrogatory No. 2. At his deposition, Plaintiff stated that the contact between his vehicle and Ms. DiMeglio's car "was really no impact" and that he tapped the back passenger side of her car. He described it as a

"nothing." 064a, l. 24 – 065a, l. 3. Mr. Cain also stated he saw Ms. DiMeglio slow down before any impact occurred. 065a, ll. 22-23.

Defendant Walachy admitted in answers to interrogatories striking the rear of the plaintiff's vehicle. 057a, Interrogatory No. 2. He stated that all parties were traveling in the same southbound lane on Route 130 with Ms. DiMeglio in the lead, followed by plaintiff and then by Walachy. Id. Mr. Walachy also admitted that even though he applied his brakes, he could not stop in time to avoid an impact with the rear of the plaintiff's vehicle.. 057a, Interrogatory No. 2.

LEGAL ARGUMENT

Point I. There was no question that the plaintiff rear-ended Defendant DiMeglio and that plaintiff was rear-ended by Defendant Walachy. The fact that the two following vehicles rear-ended those in front of them – as they were following too closely - was enough to warrant summary judgment and/or dismissal in Defendant DiMeglio's favor.

A. The plaintiff and Defendant Walachy were negligent in that they were the rearending drivers.

The plaintiff essentially argues that it was clear Defendant DiMeglio was attempting to make a U-turn (or left turn) from the left lane of Route 130 and that no turn was permitted in that area. Therefore, it was proper to deny the motion for summary judgment. But this argument highlights that the plaintiff in his appellate brief, and the trial court in ruling on the summary judgment motion improperly failed to focus their attention on the following vehicles who had the primary

obligation to maintain a safe following distance. The same was also true when the trial court ruled on the motion for dismissal at the close of plaintiff's case, motion at the close of all the evidence, as well as the motion for a new trial.

Plaintiff argues that the summary judgment motion was denied because "a reasonable jury could surely conclude DiMeglio's actions amounted to negligence." Pb. 10. Regardless of whether Ms. DiMeglio began making a turn, was slowing down or was completely stopped, her actions were to be anticipated by a following vehicle and that is why it was improper to deny her summary judgment motion.

Mr. Cain and Mr. Walachy were also subject to New Jersey's motor vehicle statutes and relevant case law principles applicable to other motorists. One of those core principles is that a motorist ***is at fault*** when he or she follows another vehicle at an unsafe distance, and a rear-end collision ensues. See N.J.S.A. 39:4-89; Dolson v. Anastasia, 55 N.J . 2, 10 (1969); Pavia v. Pfeiffer, 229 N.J.Super. 276, 280 (App.Div.1988). Even in scenarios in which a vehicle in the lead stops abruptly, the motorist who is following that vehicle must foresee the possibility of such a quick stop and allow sufficient braking space ahead of his own vehicle. Pavia, supra, 229 N.J.Super. at 283, 551 A.2d 201.

In fact, Mr. Cain submitted his deposition in opposition to the motion in which he testified that he saw Ms. DiMeglio slow down. He was able to say that

she did not have a signal on. He had driven through this area previously. In his experience, people turned in that area (or attempted to turn in that area) even though they were not supposed to do so. See, 044a-053a, and 062a-065a. He was aware of the possibility that another motorist might attempt to turn in this location and yet, he was so close to Ms. DiMeglio as he proceeded on the roadway, that he was unable to stop behind here without making contact.

The facts presented in the motion for summary judgment, and later adduced at trial clearly indicate that Mr. Cain was following too closely.[1] The testimony in deposition and at trial revealed that Mr. Cain observed Ms. DiMeglio flashing her breaks, and yet he was unable to stop behind her without "tapping" the rear of her vehicle. The only reasonable inference is that if he had maintained a safe following distance, Mr. Cain's vehicle would not have made contact with Ms. DiMeglio's vehicle because he would have been able to stop in time.

The Appellate Division has said that the issue of negligence when someone is following too closely should not be submitted to the jury. In Pagano v. McClammy, 159 N.J. Super. 581, 585 (App. Div. 1978), the defendant had gotten a

[1] The same is true of Defendant Walachy. That defendant was following so closely and at such a speed that the impact between his vehicle and plaintiff's vehicle caused plaintiff's vehicle to be pushed into Ms. DiMeglio's car, sending Ms. DiMeglio's car further ahead. See, 5T, p. 64-65, 68-69. It was that impact that actually caused the damage and those facts equally supported a finding that judgment should have been entered in Ms. DiMeglio's favor.

"no cause" when the matter of his negligence regarding a rear-end collision was submitted to a jury. By his own testimony, the defendant in the case was travelling at least 40 miles an hour and distant only 15 or 20 feet behind plaintiff when he decided to pass him. Defendant sped up to about 45 or 50 miles an hour to pass plaintiff. While passing plaintiff, something blew into his left eye, and this resulted in his closing both eyes and causing him to strike "the rear end of his (plaintiff's) car on the left side."

Notably, the testimony in the case at bar was that the following vehicles were traveling at 50 miles per hour and were maintaining a distance of only two car lengths. In determining whether the issue of the defendant's negligence should have gone to the jury, the Appellate Division in Pagano stated:

> No reasonable man can say, having due regard to the speed of the respective vehicles on this superhighway, that defendant had proper control of his car. The short of it is that he "tailgated" plaintiff's car in violation of N.J.S.A. 39:4-89. Such driving is negligence, and the issue should not have been submitted to the jury.

Pagano, 159 N.J. Super. at 585. Further, the Appellate Division in its ruling in Pagano indicated whether plaintiff was in the extreme right lane when he was struck in the rear as he contended, or whether he was in the center lane when struck as defendant contended, the result did not change. The rear-ending driver was guilty of negligence as a matter of law. Id. The Pagano Court found that the motion for judgment on liability should have been granted in the plaintiff's favor.

The only difference between Pagano and this case is that the party asking for judgment in her favor was a defendant in the suit, rather than the plaintiff. The inescapable fact is that Ms. DiMeglio was struck in the rear. It does not matter what she may have been doing before that as Mr. Cain admitted he saw her slow down, and even wondered if she was going to attempt a turn. Pb. 13 According to Mr. Cain, he also observed Ms. DiMeglio flash her brakes and come to a stop. He was aware of the fact that motorists attempted this turn and should have maintained a safe following distance. His failure to do so was negligence. Mr. Walachy's failure to do so was negligence. The issue of Ms. DiMeglio's negligence should not have gone to the jury as she was entitled to judgment in her favor.

The fact that Plaintiff "disputed" Ms. DiMeglio's testimony at trial as to how the accident occurred is of no moment. In fact, her credibility should not have been called into question at all because the Plaintiff was faced with no more than an everyday traffic problem for which he should have been prepared. Finley v. Wiley, 103 N.J.Super. 95, 103 (App.Div.1968). It was his own failure to maintain a safe following distance, even as he was making observations that led him to conclude Ms. DiMeglio might attempt an illegal turn, which resulted in his being unable to stop in time to avoid the collision.

B. Ms. DiMeglio's actions were not the proximate cause of plaintiff's injuries.

Plaintiff suggests that Ms. DiMeglio's supposed negligence was the proximate cause of his injuries. However, by his own testimony, that is not the case. According to him, he "breathed a sigh of relief before his truck was struck from behind…Pb 16 citing 4T, p. 93, ll. 18-25. He notes that the extreme force of that impact pushed his vehicle into the back of the DiMeglio vehicle sending it forward and to the left across the median and into the northbound travel lanes.

This testimony highlights the fact, that like Plaintiff, Defendant Walachy failed to keep a safe distance. Walachy was also faced with an ordinary traffic situation that one may encounter on the roadway. A motorist (the plaintiff) stopped in front of him. Because he was so close, Walachy could not stop and he struck the plaintiff's vehicle so hard, it caused a chain reaction that significantly moved the DiMeglio vehicle. It was that impact that was the sole cause of the damage. Mr. Cain testified he was injured from the impact with the Walachy vehicle. He described the impact between his vehicle and Ms. DiMeglio's as a "nothing." Ms. DiMeglio's actions were not a cause because she was not a tortfeasor. She was a person who was rear-ended and who was entitled to a finding that she was not responsible for the accident long before the matter was submitted to the jury.

The failure to grant the summary judgment motion was an error that was compounded by the denial of the motion to dismiss at the close of plaintiff's case,

motion to dismiss at the close of all the evidence, as well as the denial of the motion for a new trial.

Consequently, the judgment should be reversed and the trial court should be directed to enter judgment in Defendant/Appellant's favor.

Point II. It was improper to admit duplicative, cumulative testimony of Dr. Goldstein, and the failure to focus his testimony on issues which Dr. Paiste did not expound was prejudicial as it resulted in a disproportionate award.

Plaintiff is not incorrect when he argues that multiple experts may be used in a personal injury trial. However, while some issues may "overlap" as plaintiff suggests, the Rules of Evidence do not permit a party to put on duplicative, cumulative testimony. Dr. Goldstein's testimony should have been limited to his opinions on the scarring and not a repeat of Dr. Paiste's testimony. By hearing the same thing twice, the jury may have placed undue weight on the experts' opinions which in turn resulted in a disproportionate award.

Plaintiff, in his opposition brief, makes a point of suggesting that Dr. Goldstein's testimony was different than Dr. Paiste's testimony because Dr. Goldstein is board certified in plastic surgery while Dr. Paiste is not. However, the issue is not that simple because Dr. Goldstein's testimony went beyond an opinion as to the scarring and the sequelae that might be expected from the surgery.

In fact, Dr. Goldstein was allowed to repeat the testimony that Dr. Paiste gave, using the same visual aids. Cumulative evidence is defined as additional

evidence to support the same point, and of the same character as the evidence already produced. See, State v. Murphy, 87 N.J.L. 515, 521 (1915)(citation omitted). Dr. Goldstein's testimony regarding the surgery was just that, additional evidence supporting the same point, and of the same character as evidence already produced. If the purpose of Dr. Goldstein's testimony was to describe the scarring and how that might affect the plaintiff or how it might be treated in the future, then beyond laying a foundation for such testimony, his detailed, repetitive recitation of the surgery was additional evidence supporting the same point that the actual treating surgeon already provided. By plaintiff's own argument, to wit, Dr. Goldstein was testifying about a different topic, Dr. Goldstein's testimony should have been limited to that topic, and it was error for the trial court not to do so.

Should this matter be remanded for a new trial, then the trial court should be directed to limit the scope of Dr. Goldstein's testimony.

Point III. Defendant was entitled to remittitur and/or to a new trial because the damages award was against the weight of the evidence.

Plaintiff suggests in his brief that the verdict was not against the weight of the evidence. Yet the verdict was rendered based on testimony that the injury and surgery plaintiff had was to his non-dominant arm. He was able to return to work full time, and did not testify to any activities of daily living which he could no longer perform. Plaintiff admitted that he did not suffer lost wages and did not

submit proofs of economic losses in this regard. Still, that testimony did influence the jury. The verdict was also improperly inflated by the duplicative and cumulative testimony of Dr. Goldstein, which defendant contends should not have been allowed. The trial court should have allowed the remittitur or new trial and its failure to do so requires that this matter be reversed and remanded for findings consistent with the evidence.

Point IV. The application of the Offer of Judgment rule, and the award of counsel fees were improper.

A. Despite the trial court's reduction of the hourly amount claimed by the plaintiff's counsel, in the fee award, the fee was excessive.

The plaintiff's fee application requested an hourly rate of $600 per hour which the trial court reduced to $475/hour. With all due respect to counsel's years of experience, there was nothing particularly unique about the case that would warrant an enhanced fee. The average hourly rate of a personal injury attorney in New Jersey is lower even than the amount the judge allowed. The judge did not give a reason for the reduction other than he was taking into account the locale where the trial took place without citing to other fee awards While the award was supported by certifications from other counsel that the hourly rate sought was reasonable, there was nothing submitted that suggested the judge's applied rate was the average rate charged in the county. The matter should be remanded and

the trial court directed to apply an hourly rate that is in line with the county average.

B. Plaintiff's arguments regarding purported insurance bad faith are improper and have no place in this appeal by an individual from a verdict against her.

This appeal was brought by an individual faced with a verdict against her, not her insurance company. The primary focus of the appeal is that the Defendant/Appellant should not have been determined to be liable for the accident, nor have had the question of her liability submitted to the jury, because she was the one that was rear-ended under circumstances that constituted nothing more than what could typically be expected on this State's highways. Addressing the consequences of the offer of judgment rule is made necessary because the trial court erred in its rulings regarding the Appellant's liability both pre- and post-trial and during the trial itself. There was a patently evident miscarriage of justice in as much as no liability was found by the jury on the part of the plaintiff, a rear-ending driver.[2]

To suggest that her insurance company acted in bad faith by not offering a settlement in response to Defendant/Appellant's argument on the effect that the offer of judgment rule may have on her as an individual, is improper especially

[2] The miscarriage of just is also evident as Defendant Walachy escaped with a relatively low percentage of the liability even though he was the driver that rear-ended the plaintiff, and who by plaintiff's account caused his damages.

since any alleged bad faith on the part of the Defendant/Appellant's insurance company would have to be the subject of a separate action against that entity, which plaintiff's counsel well knows. See, e.g. Taddei v. State Farm Indem. Co., 401 N.J. Super. 449, 465 (App. Div. 2008)(noting that in the context of third party bad faith, the insurer is not a party to the underlying litigation against the insured, and only after an excess verdict does the claim ripen necessitating a new lawsuit regarding the bad faith allegations.) Therefore, all such arguments should be stricken.

C. Ms. DiMeglio's assignment of her rights does not relieve her of responsibility for the excess judgment.

Plaintiff suggests that the impact of the offer of judgment rule does not adversely affect Ms. DiMeglio because she assigned her rights against her insurance company to the Plaintiff. However, the assignment does not indicate that the Plaintiff will not attempt to collect the excess as against her. See, 030Ra, plaintiff's appendix. The affidavit simply states that Ms. DiMeglio understands there was a verdict against her in excess of her policy limits and that her insurance company did not offer to settle with the plaintiff prior to the verdict. The plaintiff has not submitted evidence that the consideration for the agreement is the promise not to pursue Ms. DiMeglio for the excess and thus, there is nothing that mitigates the potential harsh application of the offer of judgment rule.

CONCLUSION

In conclusion, the verdict in this case should be overturned. All of the issues in this appeal flow from the fact that the trial court improperly submitted the question of Ms. DiMeglio's negligence to the jury. She was a motorist who was rear-ended by the plaintiff. Defendant Walachy, in turn rear-ended the plaintiff. They both failed to maintain a reasonably safe following distance which failure was negligence and the proximate cause of the accident and damages. In fact, Mr. Cain's injuries were caused by the impact from the Walachy vehicle. As a result, the trial court erred by allowing the issue of Ms. DiMeglio's negligence to go to the jury which error requires that the verdict be reversed and the matter remanded with instruction to the trial court to enter judgment in favor of Defendant/Appellant DiMeglio.

Respectfully,

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