SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3024-23

KARIM LEKHAL, Plaintiff/respondent, v. ANTHONY J. DEPASQUALE, 2ND, Defendant/appellant	:	CIVIL ACTION Docket No. A-003024-23 ON APPEAL FROM SUPERIOR COURT, LAW DIVISION BERGEN COUNTY Sat Below: Hon. Anthony Suarez, J.S.C.

BRIEF OF APPELLANT ANTHONY J. DEPASQUALE

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PRELIMINARY STATEMENT

Plaintiff/respondent Karim Lekhal filed a complaint in this matter on March 22, 2019, asserting a claim for bodily injury against defendant/Appellant Anthony J. Depasquale, 2nd arising out of a motor vehicle accident which occurred on August 7, 2017. Plaintiff Lekhal alleged inter alia that he is entitled to damages for his injuries suffered in the motor vehicle accident. Defendant Depasquale raised the defense that plaintiff failed to meet the Limitation on Lawsuit threshold to recover damages against him.

The issue at trial was whether plaintiff suffered permanent injury, and if so the value of any damages to him from the accident. The parties engaged in discovery and proceeded to trial on March 25, 2024 which concluded on March 27, 2024. Defendant's expert Dr. Berman, an orthopedic surgeon, was recorded via de bene esse deposition on July 6, 2023. Plaintiff presented Dr. Elkholy, a pain management and anesthesiologist expert, at trial. On March 26, 2024 Dr. Elkholy testified live. However, during his direct testimony Dr. Elkholy presented an undisclosed video of a purported discectomy of a different patient, not the Plaintiff. Defendant objected to the video being played for the jury, as the video was not provided in discovery or even in the two years between the end of discovery and the trial, nor was this video listed in the two pretrial exchanges served by plaintiff.

Despite this failure to disclose and the surprise during the trial and testimony

of an expert, the trial court permitted the video to be played determining it to be demonstrative evidence. The video was played with Dr. Elkholy commenting on it. Defense counsel was unable to properly prepare for cross-examination of the expert having not even seen the video before it was played to the jury, counsel was unable to show the video to her expert to criticize, comment upon, verify whether it was the same procedure, or choose to bring in the defense expert live at trial to comment on or discuss the video. Defendant was completely prejudiced by this undisclosed surprise video sprung on the defendant during trial.

During Plaintiff's summation, Plaintiff's counsel made improper statements about the testimony of Dr. Berman. Plaintiff's counsel made statements to the jury which were clearly not based in fact as they were never testified to at trial by Dr. Berman, wrongly asserting that Dr. Berman changed his testimony mid-examination from finding no herniations to a finding of insignificant herniations. This testimony never took place and was made up whole cloth by Plaintiff's counsel in summation. From which counsel then impugned Dr. Berman's credibility.

Plaintiff's counsel continued this conduct when he proceeded to make disparaging remarks about Dr. Berman's character. Plaintiff's counsel told the jury that Dr. Berman changed his opinions, manipulated the evidence to suit his opinions, claimed that doing so was deliberate by reciting what he believed Dr.

Berman was thinking at the time, and blaming such conduct on the fact that Dr. Berman was hired by defendants. All of this is predicated on counsel's fictitious recitation of the testimony of Dr. Berman, which did not exist in the first place.

The Court and plaintiff's counsel acknowledged that no such testimony took place in colloquy after defendant's objection. After approximately one hour, after the improper statements were made, the Court issued a short limiting instruction, but then shortly thereafter charged the jury with false in one-false in all. Clearly the limiting instruction was insufficient to cure the unfair prejudice which Defendant sustained due to Plaintiff's counsel's improper commentary. The jury rendered a verdict of $250,000 in favor of Plaintiff.

Defendants moved for a new trial claiming a mistrial should have been declared because the court permitted the jury to view an undisclosed video of another patient, which prejudiced the defense. Nonetheless, the Court felt that its limiting instruction was sufficient. Additionally, the trial court also erred in failing to appropriately address Plaintiff's counsel's false statements regarding the trial testimony of Dr. Berman and the unwarranted attacks on Dr. Berman and the defense. These attacks should have warranted mistrial and/or granting a new trial as requested by Defendant. Accordingly, the Court should reverse the trial court's denial of Defendant's motion for new trial, vacate the entry of judgment for $250,000.00 and remand for new trial on the issue of damages.

PROCEDURAL HISTORY

This matter arises from an August 7, 2017, motor vehicle accident, which occurred between Respondent Karim Lekhal and Appellant Anthony J. Depasquale, 2nd on State Route 35 and the Asbury Circle, in Neptune Township. Respondent filed suit on March 22, 2019. (Da.1-3–complaint). Defendant filed his Answer on April 17, 2019, raising as the 11th affirmative defense the failure to meet the applicable tort threshold. The discovery end date was November 30, 2021. (Da.4-5-Order dated July 9-2011). During discovery, plaintiff did not identify any video of any surgery or procedure intended to be used at trial. Plaintiff served two pretrial exchanges on defendant. (DA.6-10 –plaintiff's pretrial exchanges). Neither of them mentioned any video, in particular any video of any operation or surgical procedure. Id.

This matter proceeded to trial on March 25, 2024-March 27, 2024. (Da.11-Notice of Trial). Appellant admitted to liability prior to trial and the case proceeded to trial on damages only and whether plaintiff met the threshold.

At the time of trial, during the direct examination of Plaintiff's expert Dr. Elkholy, plaintiff sought to play a previously undisclosed video of an alleged percutaneous discectomy of a different person provided by Dr. Elkholy. (3T 202-6 to 204-8). The video was taken of a procedure of someone other than the plaintiff. Plaintiff did not provide the video during the discovery period despite being

required to do so by Form A interrogatories and did not disclose its existence prior to trial. The video was not provided to or even shown to defense counsel before the proffer during trial. Defendant objected to the introduction of the video; however, the Court allowed the video to be shown to the jury. (3T 202-6 to 204-8).

During summation, counsel for Plaintiff made clearly factually incorrect statements as to the testimony of defendant's orthopedic expert, Dr. Berman, i.e., that he changed his opinion as to whether herniated discs were present and attacked Dr. Berman's credibility based upon that misstatement, and defendant objected and requested a mistrial. (4T 106-20 to112-18). The Court sustained the objection because Dr. Berman had never given any such testimony but denied the motion for mistrial and instead issued a limiting instruction an hour after the remarks were made to the jury. Id. The jury returned a verdict on March 27, 2024, in favor of the Plaintiff for $250,000. (4T 173; Da.22-23-order for judgment).

Appellant filed a motion for new trial on April 10, 2024. (Da.12-14-Notice of Motion for New Trial). On May 10, 2024, the Court denied Appellant's motion for new trial. (Da.15- Order Denying Motion for New Trial). Appellant filed timely notice of appeal on June 3, 2024.

STATEMENT OF FACTS

This matter arises from an August 7, 2017, motor vehicle accident, which occurred between Plaintiff Karim Lekhal and Defendant Anthony J. Depasquale,

2nd on State Route 35 and the Asbury Circle, in Neptune Township. (Da.1-3). Defendant admitted to liability prior to the trial and the matter was tried on damages only. (1T to 4T).

The primary issue at trial was whether the plaintiff suffered a "permanent injury" in the accident in order to meet the Limitations of Lawsuit Tort Threshold, and if so, the amount of damages to compensate plaintiff for his injuries. There were 3 witnesses in the trial: plaintiff, (2T 82-133), his expert Dr. Elkholy (2T 168-1 to T3 229), and defendant's orthopedic expert, Dr. Mark Berman (4T 34 to 73).

Plaintiff claimed that he suffered permanent significant injuries in the accident, in particular, a herniated cervical discs. He testified that he had complaints of pain on my upper spine and shoulder. He saw Dr. Patel first and then Dr. Bernstein who recommended physical therapy. (2T 120-121). Plaintiff had several months of physical therapy to approximately August 2018. Id. In February or March 2019, some 18 months to 19 months after the accident, he claimed he started to develop some numbness and tingling in my fingers, about a month before seeing Dr. He. (2T 91-93,128-129). He testified that he had an injection in his neck by Dr. He with some relief. (2T 96). He then saw Dr. Elkholy for complaints of some numbness in his hands and upper spine problems, and he had a surgery which was a percutaneous disc excision. (2T 97-98). Dr. Elkholy was plaintiff's treating physician, and he who also testified as plaintiff's expert at trial. Dr. Elkholy was

qualified as an expert in pain management and anesthesiology. (2T 173-174). According to Dr. Elkholy, who never reviewed any of plaintiff's prior medical records and only relied upon plaintiff's history and his exam, in his opine Plaintiff suffered a herniated disc at C5-6 in the accident and required that he was required to have a percutaneous discectomy surgery. (3T1 94, 208-1 to 212-25). He testified that the plaintiff had multiple herniations and the discectomy surgery were proximately caused by this accident. Id. Dr. Elkholy gave the opinion that the plaintiff's cervical injuries and the discectomy surgery was a permanent injury. Id at 210-212. During his testimony, over defendant's objection, Dr. Elkholy showed a video of another patient's discectomy which had not been produced in discovery, pretrial or disclosed before his direct testimony. (3T 202-1 to 204-25).

Defendant proffered the testimony of Dr. Mark Berman, a Board Certified orthopedic surgery, as an expert witness in orthopedics at trial. (4T 34 to73). Dr. Berman had examined the plaintiff on two occasions, reviewed his medical records and his 2 MRIs, and he gave his opinion on whether plaintiff suffered a permanent injury in the August 7, 2017 accident. (4T 42-52, 63-64, 72-73). As to the plaintiff's MRIs, Dr. Berman reviewed the film of the first cervical MRI on May 5, 2018 and he saw small herniations at C2-3, C3-4 and C4-5 and he opined that they did not impinge on the nerve roots. Id. at 52-55. As a result, he opined that he did not see any significant herniations because they were not impinging on the nerve

roots. Id at 54-55. Dr. Berman also reviewed the March 25, 2019 cervical MRI of the plaintiff. (4T 58). He opined that there were no significant disc herniations. No herniation was impinging on a nerve root of the cervical spine, which was essentially the same finding as the prior cervical MRI. Id at 58-59. Dr. Berman also examined plaintiff after the discectomy. (4T59-60). He opined that plaintiff suffered a cervical strain in the accident, there was no evidence of carpal tunnel syndrome, and that plaintiff had not suffered a permanent injury in this accident. (4T63-64). He opined that since there was no significant disc herniation impinging on any nerve root, the percutaneous discectomy was not appropriate. (4T 72-73).

Without prior notice and in the middle of the testimony of plaintiff's expert Dr. Elkholy, Plaintiff's counsel show the jury an "exemplar video" of an alleged percutaneous discectomy of a different patient during Dr. Elkholy's direct examination. (3T 202-6 to 204-8). The video was not produced in discovery or in any of the 2 pretrial exchanges and was not even provided to defense counsel in advance of its proffer. It was served on defendant post-trial. (Da 38-40). The video was taken of a procedure performed on someone other than the plaintiff. (3T 203-1 to 203-8). The video was not exchanged during the discovery period despite Plaintiff requiring to provide the video in discovery pursuant to Form A interrogatories 18 and 23. (3T. 202-6 to 2048).; (Da.16-19—interrogatory answers of pl. at 17). Further, neither the video nor the existence of the video was ever

disclosed prior to trial in plaintiff's pretrial exchange or otherwise. (Da.6-10-Pretrial Exchange). Because of this nondisclosure, Defendant's expert never had the chance to review or comment upon the video, and defense counsel had no opportunity to prepare from cross-examination at trial on the issue. The trial court did not address the discovery violation and allowed the video to be played to the jury. (3T 202-203).

Upon Plaintiff attempting to present the video, Defendant immediately objected to the introduction or playing of the video, arguing that it had never been disclosed in discovery or prior to the proffer. (3T 202-6 to 203-25). Although counsel for the Plaintiff argued that the video was merely demonstrative, the trial court simply accepted that representation and permitted the video to be played. (3T 203-1 to 203-8). Defense counsel further objected to the proofer of the video as to its unknown content which had never been authenticated by the expert, i.e, whether this proposed "exemplar" was of the same surgery (cervical discectomy) or some other type of surgery, as she had not seen it. (3T 203-9 to 203-25). The court did not even view the supposed "exemplar video" nor did it rule on this part of the objection, and simply permitted the video to be played. (3T 303-1 to 303-25).

Defendant's expert, Dr. Mark S. Berman, testified via de bene esse on July 6, 2023, and his videotaped deposition was played to the jury shortly before closing arguments. (4T 34-78). The de bene esse video was taken in advance of the

trial date. (4T 34). Dr. Berman could not therefore comment on this purported exemplar video sprung upon the defense during plaintiff's expert's trial testimony. Moreover, defendant did not have the opportunity to supplement his de bene esse deposition testimony based upon the video, or to call Dr. Berman live even after his de bene esse had been taken, which could have occurred if the video had been properly served in discovery or even disclosed in either pretrial exchange.

Despite the lack of disclosure in discovery or pretrial and the surprise to the defense, the trial court allowed the video to be shown to the jury. Id. Because it was previously unknown to defendant, defendant was unable to respond to the video because Defendant's expert never had the opportunity to review and/or comment upon it. Defendant was deprived of the opportunity to properly prepare a response to this surprise video or even proper cross-examination by viewing the video before trial and after consultation with his expert. See id at 202-203.

Plaintiff's counsel in his closing argument repeatedly attacked the credibility of defendant's expert Dr. Berman, the only defense witness. (4T 106-20 to110-15). However, he did so based upon a false narrative created solely by plaintiff's counsel's improper comments made about Dr. Berman's testimony, i.e., that Dr. Berman supposedly had changed his opinion on the existence of cervical herniations when he got to court, when in fact that was never his testimony. (4T 107-23 to 108-19). In Dr. Berman's video de bene esse testimony, he testified that

he saw small herniations in the 2018 cervical MRI that were not impinging upon the nerve roots and therefore were not significant; he then testified that in his review of the 2019 cervical MRI he saw small herniations that were not impinging upon the nerve roots and therefore were not significant. (4T 58:7-22). There was no testimony from Dr. Berman at trial that there was an absence of herniations. Since the video de bene esse deposition was taken well in advance of trial, plaintiff's counsel was aware of this fact. Despite this, in summation, Plaintiff's counsel argued that Dr. Berman changed his opinion on the existence of herniations when he got to court, stating that Dr Berman came to the "realization I've got to go to court, and I've got to face this jury, and I've got to say something about this case. What am I going to say? And, he looks at those MRI films, and he says to himself -- I can only presume, I suggest to you – I can't look at that film and tell this jury that there's no problem, that there's no herniated disc. I don't -- I said it -- I say there is no herniated disc....there's no herniation then, yes, there are herniations, but they're small, but they're not causing pain? " (4T 107-23 to 108-19). However, Plaintiff's counsel did not question Dr. Berman on this issue during his de bene esse and, instead, sought to introduce it improperly during summation. The alleged testimony concerning Dr. Berman referenced by Plaintiff's Counsel in his summation never happened, rather Plaintiff's Counsel read from Dr. Berman's February 25, 2020 which was not part of the record. (4T 110-23 to 112:18).

Plaintiff's counsel went so far during this improperly based attack on Dr. Berman as to say: "Dr. Berman played fast and loose with the evidence, ladies and gentleman". (4T 110-114 to 114-15). Defense counsel objected to the improper comments and moved for a mistrial. (4T 110-23 to 112-18). The trial court did not grant the request for a mistrial but was inclined to issue a curative instruction. (4T 123-140). However, the trial court did not immediately issue any curative instruction. (4T 122-123). Rather, the court recessed for one (1) hour and 15 minutes after Plaintiff's counsel prejudicial misstatement of Dr. Berman's testimony to the jury, and then gave a purported curative instruction to the jury after the lunch recess. (4T 121-123). This delayed instruction, however, was not sufficient to overcome the prejudice. The Court instructed:

> One thing beforehand. I'm -- I'm just going to give you a -- a small limiting instruction just for your information. Plaintiff's counsel commented on Dr. Berman's not finding herniations in this first report as to the plaintiff. That was never testified to by Dr. Berman during the trial, and any comments by plaintiff's counsel during his closing in this regard is to be disregarded by you in your deliberations, okay? (Emphasis added). (4T 140-15 to-140-22).

The curative instruction was insufficient and a mistrial should have been granted. The jury returned a verdict for plaintiff in the amount of $250,000. (4T 173).

Defendant moved to set aside the jury verdict and for new trial on April 10, 2024. (Da12-14). The motion was denied on May 10, 2024. (Da.15–order denying new trial). With regard to the surgical video the Court reasoned Dr.

Elkholy used the video to compliment and illustrate his trial testimony concerning the same procedure he completed on the plaintiff, that it was short in duration, had no sound, was not marked into evidence, was not given to the jury room during deliberations, he was the doctor who performed the surgery, and that it was an exemplar video of the cervical discectomy identical to the surgery that he completed on the plaintiff. (5T 26-4 to 26-15).

With regard to Plaintiff's counsel's statements in summation on Dr. Berman allegedly not finding a herniation, the Court reasoned that its delayed limiting instruction to the jury was the best course to rectify the issue. (5T 27-10 to 11). With regard to the additional statement in summation, Dr. Berman playing "fast and loose with the evidence", the Court merely held the statement taken in context with regard to the jury verdict was not [is] enough to warrant a new trial. (5T 29-8 to 17). The Court essentially reasoned that the monetary award did not shock the conscience. (5T 28-14 to 23).

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF THE PURPORTED "EXEMPLAR" VIDEO OF A SURGERY TO ANOTHER PATIENT FIRST DISCLOSED DURING THE TRIAL, WHICH HAD NOT BEEN PROVIDED IN DISCOVERY, WAS NOT MENTIONED IN PRETRIAL EXCHANGES, AND WAS PROFFERED WITHOUT NOTICE, CONTRARY TO THE RULES OF COURT, AND THE JUDGMENT SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL ON DAMAGES. (3T. 202:6-204:8)

A. Plaintiff Failed to Provide the Surgical Video in Discovery (or Any Time before Trial) and Should Have Been Barred from Using the Purported "Exemplar" Video Under "Best Practices." (3T. 202-6 to 204-8)

In 2000 several amendments to the Rules Governing the Courts of the State of New Jersey were enacted in order to create uniformity in the state's discovery process. These amendments were known as "Best Practices." Bender v. Adelson, 187 N.J. 411(2006). Made part of these amendments, the Courts now require that amendments to answers to interrogatories must be served no later than 20 days before the end of the discovery period. R. 4:17-7. Rule 4:17-7 provides:

> Except as otherwise provided by R. 4:17-4(e), if a party who has furnished answers to interrogatories thereafter obtains information that renders such answers incomplete or inaccurate, amended answers shall be served not later than 20 days prior to the end of the discovery period, as fixed by the track assignment or subsequent order. Amendments may be allowed thereafter only if the party seeking to amend certifies therein that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date. In the absence of said certification, the late amendment shall be disregarded by the court and adverse parties. . . .

There is no dispute that Plaintiff did not provide the alleged exemplar video during the discovery period, nor did Plaintiff at any time prior to trial.(Transcript of Motion For New Trial, see 4:1-7 Form A interrogatory 18 required Plaintiff to provide a copy of "videotapes...made with respect to anything that is relevant to the subject matter of the complaint. . ." In response, Plaintiff responded "None that

I am aware of." (Da 17). Further, Form A interrogatory #23, required Plaintiff to provide the subject matter upon which the expert is expected to testify as well. In response Plaintiff certified, "See attached reports as follows, 1. 08/07/17 police report 2. 03/25/19 cervical, MRI 3. 04/26/18, 05/24/18 Adam Bernstein, MD/Garden State Orthopedic records 4. 03/23/19, 04/04/19 NingNing He, MD reports 5. CNA worker's compensation documents 6. Certified 08/12/17 Holy Name Hospital records." (Da17). None of the responses provided by Plaintiff identified or provided any reference to the video of the alleged percutaneous discectomy video, which did not depict Plaintiff's actual surgery. Indeed, throughout discovery, on many occasions, Plaintiff amended his discovery responses pursuant to R. 4:17-7. (Da 20-21). However, Plaintiff never sought to include the alleged video as a discovery amendment or place defendant on notice of the existence of the video or any intent to utilize the video. The first time the video was mentioned was at the time of trial, during the testimony of Dr. Elkholy. (3T 202-5 to 202-15).

Discovery ended on November 30, 2021. (Da 4-5). More than two years passed between the close of discovery and the start of trial. In that interim, Defendant completed the *de bene esse* deposition of his expert, Dr. Berman. Plaintiff was not subjected to unfair surprise in the completion of that deposition and did not move to restrict any of the testimony of Dr. Berman. Conversely,

Plaintiff took the opportunity to present a video and testimony about a surgery which did not depict Plaintiff's actual procedure and could not be verified as accurate by the average lay person. Plaintiff was essentially provided with a "free shot" and defendant was deprived of an opportunity to respond or challenge the legitimacy of the video or the claim that it was indeed the exact same procedure. Had Defendant been aware of the video prior to its surprise appearance, Defendants own expert could have reviewed the video, commented on the video, determined whether it was indeed the same procedure perform, and assist defense counsel on cross-examining the witness on the differences.

Plaintiff's showing an unrelated surgical video runs afoul of R:4:17-4(e):

> If an interrogatory requires a copy of the report of an expert witness or treating or examining physician as set forth in R. 4:10-2(d)(1), the answering party shall annex to the interrogatory an exact copy of the entire report or reports rendered by the expert or physician. The report shall contain a complete statement of that persons opinions and the basis therefor; the facts and data considered in forming the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; and whether compensation has been or is to be paid for the report and testimony and, if so, the terms of the compensation. . . . .

The purpose of Rule 4:17-4(e)'s requirement for a party to provide an expert report setting forth "a complete statement of that person's opinions" is to prohibit this type of discovery process and surprise to the adverse party. Moreover, it has long been held that an expert's testimony at trial should be confined to the matters of opinion

submitted in his expert report. Mauro v. Owens-Corning Fiberglas Corp., 225 N.J.Super. 196, 206 (App.Div.1988), aff'd sub nom., Mauro v. Raymark Indus ., Inc., l 16 N.J. 126 (1989); Maurio v. Mereck Construction Co ., Inc ., 162 N.J. Super. 566, 569 (App. Div. l978). In Mauro, this Court affirmed the trial court ruling to bar statistical evidence not in the expert's report or produced during discovery, and confining the expert to his opinions in his report. Mauro, 225 N.J. Super at 206-07. First, this Court recognized this as a clear discovery violation warranting discovery sanctions. Id. at 206. "While a trial judge has wide discretion in deciding the appropriate sanction for a breach of discovery rules, the sanction must be just and reasonable." Id (citing Brown v. Mortimer, 100 N.J.Super. 395, 401 (App.Div.1968). In affirming the barring of the expert from using the nondisclosed statistical evidence, the reasoning applied by this Court in affirming the exclusion of statistical evidence by plaintiff's expert which was not in his report or produced in discovery was based upon defendant's surprise and prejudice in not having this information disclosed during discovery. Id. at 206-207. The Court noted that "[w]ithout defendants having available the exact data and statistics on which Dr. Guidice relied, they were deprived of the opportunity to examine the accuracy of this particularized data or to test Dr. Guidice's opinions which were bottomed on such data by way of deposition or otherwise." Unlike Mauro, plaintiff was not given any discovery sanction at all. The expert was not

confined to the opinions in his report which did not include the video, and the court gave no sanction whatsoever for an egregious discovery violation.

The Rule is clear that a complete statement of Dr. Elkholy's opinions should have been in his expert report and it should have been during discovery and pretrial; however, his reports referenced no video of another patient, he gave no such opinions with regard to the surgery of an individual foreign to this lawsuit, nor did he offer any opinion in his report on the similarities and/or differences between the two surgeries. This video was not of Plaintiff's own surgical procedure. Additionally, because of the nondisclosure of the video and lack of any opportunity to challenge the video, the stark differences between what was depicted in the video and the operative report of Plaintiff's surgery could not have been explored, and created further issues of surprise and prejudice. Most significant was the use of a "mallet" in the video of the non-party's surgical procedure, while no mention of the use of a mallet was contained in the operative report. (5T 11-14 to 11-24). The clear discovery violation by plaintiff resulted in prejudice to the defense, warranting discovery sanctions like barring its use.

Rather than addressing the issue of surprise and plaintiff's violation of Best Practices, the Court instead blamed the defense, claiming defendant chose to put its expert on video. (5T 11-25 to 12-13). However, defendant had every right to rely on discovery that was provided and the Pretrial Exchanges in order to put his

expert on video. First, defendant had not violated any Rule of Court; plaintiff failed to disclose the video. The Court chose to ignore R.4:17-7 and the prescribed remedy of ignoring the late disclosed video at trial. The appropriate response to the plaintiff's discovery violation, especially in the middle of Plaintiff's expert's testimony is to bar the expert's use of the video as the offending party rather than blame the innocent party. Dr. Elkholy could still have testified as he performed the surgery. The Court instead simply ignored the offense of nondisclosure in discovery and deferred to plaintiff's characterization that this was demonstrative without addressing the discovery violation. (3T 202-20 to 203-8; 5T 26-3 to 26-6). This holding is based on the improper assumption that the procedures were the same, which was never established, but more importantly does not address the undisputed discovery violation. Defendant asked for videos from plaintiff during discovery, they were not provided during discovery, and dropping a video on the defense in the middle of an expert's direct examination could not have been a more egregious discovery violation and more contrary to the purpose of Best Practices. This type of ambush at trial is exactly what Best Practices sought to eliminate over 20 years ago, the video should not have been permitted. Had this video be served during discovery as required, defendant would have been able to obtain expert testimony to respond to it, have Dr. Berman comment on it in his trial testimony, move to bar the use of the video in limine and, if denied, discuss it in opening

statements and defense counsel could have prepared to cross-examined Dr. Elkholy. None of this was available to the defense due to the failure to timely disclose the video in discovery. This is reversible error as defendant was clearly prejudiced by the late proffer, and as a result, the new trial should have been granted. Accordingly, the trial court erred in permitting the video to be played at trial to the jury and a new trial is warranted.

II. THE VIDEO DISPLAYED TO THE JURY OF THE SURGERY TO A DIFFERENT PATIENT WAS UNDULY INFLUENTIAL, UNDULY PREJUDICIAL, POTENTIALLY CONFUSING, SUSCEPTIBLE OF BEING ACCEPTED AS SUBSTANTIVE EVIDENCE, AND CLEARLY CAPABLE OF PRODUCING AN UNJUST RESULT, REQUIRING A NEW TRIAL. (3T 202- 6 to 208-19).

Over defendant's objection, the trial court ruled that the video played by plaintiff's expert, which had not been previously disclosed until the middle of his trial testimony, was admissible "demonstrative" evidence. Demonstrative evidence may be evidence that replicates the actual physical evidence, demonstrates some matter material to the case, or illustrates certain aspects of an expert's opinion. State v. Scherzer, 301 N.J.Super. 363, 434 (App. Div. 1997); State v. Gear, 115 N.J.Super. 151, 153–54 (App. Div), certif. denied, 59 N.J. 270 (1971); State v. Raso, 321 N.J.Super. 5, 19 (1999). Demonstrative evidence "is in the nature of a visual aid—'a model, diagram or chart used by a witness to illustrate his or her testimony and facilitate jury understanding.'" Rodd v. Raritan Radiologic

Associates, P.A., 373 N.J.Super. 154, 165 (2004) (quoting Macaluso v. Pleskin, 329 N.J.Super. 346, 350 (App.Div.), certif. denied, 165 N.J. 138 (2000)). Videos, such as the one at issue here of another surgery to another patient with obvious differences in the procedure (i.e., using a mallet where one was not reflected in the expert's report), are substantive evidence which should be excluded. See Rodd, 373 N.J. Super at 167; Macaluso, 329 N.J.Super. at 353 (an animated video depicting the anatomy associated with various musculoskeletal injuries should not have been played for the jury because it was not used as a visual aid and it contained "speculation regarding the possible consequences of hypothetical injuries was essentially "testimonial" in nature).

First and foremost, demonstrative evidence played to the jury is, indeed, evidence. See infra. It is therefore subject to the same requirements of any piece of evidence under Best Practices. R.4:17-7 (requiring an amendment to interrogatories that takes place after the close of discovery to be accompanied by a certification of due diligence that the evidence was not available to the party prior to the discovery end date or it is to be ignored by the court and the opposing party). As stated above, this video evidence, whether demonstrative or not, which was dropped on the defendant during the middle of plaintiff's testimony at trial, should have been excluded for a violation of R.4:17-7 because it was not served in discovery and it was fundamentally unfair. Demonstrative evidence should not be

excepted from the disclosure requirements of R.4:17-7.

Although the trial court enjoys wide latitude in admitting or rejecting such replicas, illustrations and demonstrations and in controlling the manner of presentation and whether or not particular items are merely exhibited in court or actually received in evidence, "the admissibility of such evidence turns, in part, on whether it 'sufficiently duplicates the original event." Rodd, 373 N.J.Super at 165 (quoting Persley v. New Jersey Transit Bus Operations, 357 N.J.Super. 1, 14–15, (App.Div.), certif. denied, 177 N.J. 490 (2003); see also Balian v. General Motors, 121 N.J.Super. 118, 126, (App.Div.1972), certif. denied, 62 N.J. 195 (1973). Demonstrative evidence must be both authenticated and relevant. Id. (citing N.J.R.E. 901; N.J.R.E. 401). Moreover, demonstrative evidence must meet the requirement of N.J.R.E. that "its probative value must not be offset by undue prejudice, unfair surprise, undue consumption of trial time, or possible confusion of issues due to the introduction of collateral matters." Roff, 373 N.J. Super at 166 (citing Balian, 121 N.J.Super. at 127, N.J.R.E. 403). Evidence must be relevant in order for it to be admissible at the time of trial. Pursuant to N.J.R.E. 401: "'Relevant evidence' means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. However, even relevant evidence may be excluded pursuant to N.J.R.E. 403.

N.J.R.E. 403(a) provides that relevant evidence may be excluded if its probative value is substantially outweighed by the risk of undue prejudice, confusion of issues, or misleading the jury. Not only must "such evidence be authenticated, N.J.R.E. 901, and relevant, N.J.R.E. 401, its probative value must not be offset by undue prejudice, unfair surprise, undue consumption of trial time, or possible confusion of issues. As the Court cautioned in Persley v. N.J. Transit Bus Operations, 357 N.J. Super. 1, 15(App. Div. 2003)(citing Balian,121 N.J. Super. at 128-129), "notably, the danger of undue prejudice as a result of the jury's placing inordinate weight on a motion picture is always present due to the tremendous dramatic impact of motion pictures and the fact that the presentation of a motion picture is generally cumulative to the testimony of the expert who oversaw its production." due to the introduction of collateral matters." Rodd, 373 N.J. Super. at 165-166 (citations omitted).

This video was not simply demonstrative evidence but was instead substantive evidence which should have been excluded. In Rodd, plaintiff sought to admit, over defendant's objection, computerized imagery of decedent's mammogram films in a medical malpractice wrongful death action. Rodd, 373 N.J. Super at 154. For use at trial, plaintiff digitally scanned select portions of decedent's mammograms into a computer to produce super-magnified images, which were then projected onto a six-foot by eight-foot screen for the jury to view.

Plaintiff contended that this was demonstrative evidence. The demonstration was purportedly offered to aid the jury in explaining the nature of the appearance of a malignancy in a mammogram. However, the video was used, in effect, to simulate for the jury what defendant actually saw when he viewed the films using the magnifying lens, namely, clustered micro-calcifications in decedent's left breast indicative of cancer. Id. at 160-161. Defendant objected to the use of the video. Defendant objected to the use of these super-magnified computer images first because he had not received notice in discovery and only first learned of their existence at a pre-trial conference, too late to adequately test the process by which the images were created. Defendant also objected to the timeliness of the disclosure of the images and because of the potential for distortion and confusion engendered by use of the super-magnified images, which his expert was able to explain was an artificial image as it had been produced before trial. Id at 161. Defendant also complained of surprise and the lack of notice, the failure to instruct the jury as to the limited purpose of the computerized images, the absence of a sufficient foundation to support their presentation to the jury, and the highly influential and testimonial nature of the evidence. Id. at 167.

This court in Rodd reversed and remanded for a new trial due to the improper admission of the digital computer images of decedent's x-rays. Id at 167-172. The Court rejected the plaintiff's argument that the computer images were

merely demonstrative evidence and visual aids. Id. at 167. The trial court had not instructed the jury on the limited use of the video as only a visual aid. The Court held that without this, the evidence was more than demonstrative to illustrate expert testimony, but rather provided the jury with testimonial evidence. Id.

Moreover, the Rodd Court expressly stated that the lack of adequate notice afforded defense counsel of the use of this evidence "heightened" its concern on the use of this evidence, and the failure to lay a complete foundation for its introduction as a "faithful representation at the time" required a remand and retrial. Id. at 169-170. This Court had these heightened concerns due to the lack of notice, even though plaintiff in Rodd at least disclosed the existence of the digital images at the pretrial conference and defendant's expert had an opportunity to review and comment on them at trial, unlike this case where the disclosure took place during direct examination of the plaintiff's expert. The Court then held that "[b]ecause the computer imagery displayed to the jury was unduly influential, potentially confusing, susceptible of being accepted as substantive evidence, and clearly capable of producing an unjust result, we reverse and remand." Id at 170-171.

Defendant submits that Rodd applies to this case. As in Rodd, the video here was not produced in discovery but instead in the middle of the trial. The lack of notice and surprise is clear and the circumstances here are more egregious than in Rodd where defendant received notice in the pretrial conference and could at

least have its expert comment. Here, plaintiff withheld this video until the middle of his expert's testimony and knew that defendant's expert had already given his opinion via de bene esse video. Plaintiff did not proffer adequate foundation for admission of the video by having his expert merely say that the video of a surgery of another patient was the same procedure. No records of the injury of the other patient were disclosed, no operative report was available to even address that, and the video clearly contains materials beyond the plaintiff's operative report with use of a mallet in the procedure. Plaintiff failed to lay a complete foundation for its introduction as a "faithful representation at the time" of plaintiff's surgery. There was no limiting instruction as to the use of video as demonstrative only and that is was not substantive evidence. This video displayed to the jury was unduly influential, potentially confusing, susceptible of being accepted as substantive evidence, and clearly capable of producing an unjust result, requiring a new trial.

This Court has not hesitated in barring the use of video evidence of what the proponent contended was a simulation of the actual event because its probative value must not be offset by undue prejudice, unfair surprise, undue consumption of trial time, or possible confusion of issues due to the introduction of collateral matters. See, e.g., Balian, 121 N.J.Super. at 127; Suanez v. Egeland, 330 N.J.Super. 190, 196, (App.Div.2000)(same); Macaluso, 329 N.J.Super. at 353.

In Macaluso, the court found reversible error by the trial court when it allowed Plaintiff to show a video of "compilation of drawings and animation concerning soft tissue injuries. . . " 329 N.J.Super. at 349. The court stated that the video was more than a visual aid. Id. at 350. The court further found that the video tape played for the jury was testimonial in nature and that its contents were susceptible of being accepted by the jury as substantive evidence. Id. at 353. In Macaluso, the foundation for playing the video was laid by plaintiff's treating chiropractor who believed it could be of assistance in helping the jury understand the anatomy of the spine. This Court viewed the video and determined it was not a "visual aid" and went on to say "It is clear the video tape played for the jury was testimonial in nature and that its contents were susceptible of being accepted by the jury as substantive evidence…. The error in playing it for the jury was compounded when plaintiff's counsel discussed the video in his summation". Id. at 353. "Because the portions of the video played for the jury were clearly capable of producing an unjust result, we reverse and remand." Id.

In Balian, 121 N.J. Super. at 128-129 the defendant sought to admit a motion picture recreation of an automobile accident at trial. However, the motion pictures were taken without notice to plaintiff and not disclosed before trial. This Court first noted that although there was support in the record for the trial court's finding that the experiment was substantially similar to the actual facts surrounding

the accident, "[t]hat finding does not negate the fact that a motion picture of an artificial reconstruction of an occurrence may be very weak evidence. In this case the motion picture did not portray the actual automobile involved in the accident; nor did it show plaintiffs' actual operation." The Court then recognized that such powerful evidence like a motion picture may result in undue prejudice, especially when not previously disclosed. The Court stated: "The danger of undue prejudice as a result of the jury's placing inordinate weight on the moving pictures is always present in light of the tremendous dramatic impact of motion pictures. Undeserved emphasis by the jury is also understandable in that presentation of the motion picture is cumulative. The requirement for authentication inevitably adds some degree of cumulative impact on the fact-finder. That impact is considerably increased in this case since the moving pictures were not only concededly designed to lend strength and support to defendant's version of how the accident happened. They were also cumulative to defendant's expert's expressed opinion as to the cause of the accident and his description of the two sets of tests which had been filmed." Moreover, This Court found that "[t]he strongest counter-factor militating against the admission of these movies is the element of unfair surprise which was engendered by the manner in which the movies were prepared and presented." Id. at 129. Defendants were aware of plaintiff's theory all along, they were required to provide expert reports 5 day before the trial, id at 130-131, and stated that with that

knowledge "we see no reason why it could not have prepared the movie before trial and offered plaintiffs an opportunity to see it. By waiting until the eleventh hour it was thus able to prepare the movie without the knowledge of its adversaries and without giving them any opportunity to prepare a rebuttal. We cannot sanction such trial tactics, more reminiscent of the days before the present liberal discovery rules." Id. at 131. Finally, the court recognized the undue prejudice inherent in admitting nondisclosed visual evidence of motion pictures, which are essentially the same as video now, due to their powerful impact on a jury, the cumulative nature of the evidence, and there are inherent dangers in permitting them absent fairness to the opposing party:

> A motion picture in the eyes of the jury is one of the most spectacular forms of evidence. It is cumulative in nature. There are inherent dangers in its preparation and presentation. Effective rebuttal can only be had if opposing counsel and his expert are given an adequate opportunity to meet such evidence. We do not consider that cross-examination alone would ordinarily provide a sufficient avenue of rebuttal to the adverse party. Consequently, as a prerequisite to the admission into evidence of motion pictures of a reconstructed event or a posed demonstration taken during the pendency of an action, fundamental fairness dictates that the party proposing to offer such evidence give notice thereof and an opportunity to his adversary to monitor the experiment and the taking of the film. Balian, 121 N.J. Super at 131.

The same undue prejudice exists in the instant matter for the use of an undisclosed video of an operation performed on a different patient than the plaintiff. The video shown by Dr. Elkholy was never exchanged during the discovery period, despite the fact that the Rules of Court required both its

disclosure and production. The video was of a procedure conducted of someone other than the Plaintiff. The video included parts of a procedure which did not appear on the surgical report rendering it unreliable. It was clearly cumulative to the testimony of plaintiff's expert, who did not need the video to testify to the jury as to what surgical procedure he performed on plaintiff. As a matter of fundamental fairness this video should have been produced in discovery, or at a minimum disclosed pretrial in one of the two pretrial exchanges, in order to be admitted. It was not. As such, the video should never have been shown to the jury. Defendant's expert, Dr. Berman, was not provided with the opportunity to review, comment or rebut the video or the dissimilarities between the video and the expert's written report. The video was graphic in nature, depicting a surgical procedure and showing and providing intimate and gory details of an individual who has nothing to do with this case. The undue prejudice is compounded by not requiring authentication that the video was the same procedure. Just because plaintiff's counsel said it was the same procedure is not proper foundation; rather it was mere deference by the Court to plaintiff, even though legitimate issues surrounding the similarities of the video existed, i.e. use of a mallet in the video where none was described in the operative report. Given the graphic nature of the surgical video and the unreliability of the video the prejudicial value clearly outweighed the probative value of the video. The purpose for admission of the

graphic video was to depict a gruesome surgery, i.e. use of a mallet, to appeal to the emotions and passions of the jury for the purpose of inflating Plaintiff's damages. Clearly, the probative value of the video was significantly outweighed by its unduly prejudicial effect and should have been barred.

III. THE TRIAL COURT ERRED IN ONLY ISSUING A CURATIVE INSTRUCTION AND NOT GRANTING A MISTRIAL, AND IN DENYING THE MOTIN FOR A NEW TRIAL, DUE TO PLAINTIFF'S IMPROPER COMMENTS CONCERNING DR. BERMAN DURING CLOSING ARGUMENT, AS THEY WERE DISPARAGING, PREJUDICIAL AND BROUGHT IN EXTRINISIC INFORMATION NOT PART OF THE RECORD. (4T 123-12 to 140-22; 5T 18-25 to 31-20)

Within his summation, counsel for Plaintiff stated the following to the jury, with regard to Dr. Berman:

> Then he comes to a realization I've got to go to court, and I've got to face this jury, and I've got to say something about this case. What am I going to say? And, he looks at those MRI films, and he says to himself -- I can only presume, I suggest to you -- I can't look at that film and tell this jury that there's no problem, that there's no herniated disc. I don't -- I said it -- I say there is no herniated disc. But, now I'm looking at it, and I can't say that. So, what am I going to do? I got it. I'm going to tell this jury that the herniated discs are there, but they're small. They're just small, or they're not significant, or they shouldn't be causing him any pain. (4T 107-23 to 108-5).

This was never said by Dr. Berman in his testimony, nor was he cross-examined on this issue, although plaintiff had the opportunity to do so but did not. Plaintiff's counsel continued his disparaging remarks based upon this false narrative by telling the jury that Dr. Berman was "[f]ast and loose with the evidence…." (4T

110-14 to 15). Plaintiff's Counsel's statement goes beyond mere mischaracterization and can only be described as manufactured testimony designed only to inflame the jury and paint Dr. Berman as a dishonest "hired gun".

The broad latitude that counsel is allowed in summation is not without its limits and counsel's comments must be confined to the facts shown or reasonably suggested by the **evidence introduced during the trial** (emphasis added). Hayes v Delamotte, 231 N.J. 373 (2018). While discussing the parameters of permissible summation commentary, the Appellate Division held:

> [C]ounsel is allowed broad latitude in summation. That latitude is not without its limits, and counsel's comments must be confined to the facts shown or reasonably suggested by the evidence introduced during the course of the trial. Further, counsel should not misstate the evidence nor distort the factual picture. Within those limits, however, [c]ounsel may argue from the evidence any conclusion which a jury is free to reach. Indeed, counsel may draw conclusions even if the inferences that the jury is asked to make are improbable.... Summation commentary, however, must be based in truth and counsel may not 'misstate the evidence nor distort the factual picture."

Colucci v. Oppenheim 326 N.J. Super 166, 177 (App. Div. 1999)(citation omitted); Bender v Adelson, 187 N.J 411 (2006).

This Court held, in Tomeo v. Northern Valley Swim Club, 201 N.J.Super 416 (App. Div. 1985)

> When the jury learns of a fact known to be false which is irrelevant to the issues being tried but has the clear capacity to turn them for or against a party, the jury must be told the truth **promptly** and cautioned that the fact is not to be considered in their deliberations. If, however, the judge concludes that a cautionary instruction will not overcome the

> prejudicial effect of telling the jury the truth, he must declare a mistrial. Id. at 421. (Emphasis added).

This Court has held that it is "improper for an attorney to make derisive statements about parties, their counsel or their witnesses" Szczecina v. PV Holding Corp., 414 N.J. Super. 173 (App. Div. 2010)(citing Rodd 373 N.J Super at 171-72. "Although attorneys are given broad latitude in summation, they may not use disparaging language to discredit the opposing party or witness." Henker v Preybylowski, 216 N.J.Super. 513, 518-519 (App. Div. 1987). In Rodd, counsel referred to defendant's expert as a "professional witness" who "adjust(ed) his testimony for every case". Id. "An attack by counsel upon a litigant's character or morals, when they are not in issue, is a particularly reprehensible type of impropriety." Paxton v Misiuk, 54 N.J.Super.15, 22 (App. Div. 1959).

Plaintiff's counsel ran afoul of these rules, improperly manufacturing testimony of Dr. Berman about his purported change in testimony which was not in evidence and then disparaging Dr. Berman, resulting in undue prejudice which could not be cured by even a timely and thorough curative instruction.

In Rodd, this Court stated that "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." 373 N.J.Super. at 171-172; Henker, 216 N.J.Super. at 518–19; Geler v. Akawie, 358 N.J.Super. 437, 470–71 (App.Div.), certif. den., 177 N.J. 223 (2003).

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, 373 N.J.Super. at 171-172. The trial court sustained the objection of defendant as to plaintiff's counsel's improper comments. However, the court denied the request for a mistrial. The Court instead chose to give a curative instruction.

> The decision to opt for a curative or limiting instruction, instead of a mistrial or new trial, depends on at least three factors. First, a court should consider the nature of the inadmissible evidence the jury heard, and its prejudicial effect. "The adequacy of a curative instruction necessarily focuses on the capacity of the offending evidence to lead to a verdict that could not otherwise be justly reached." Winter, 96 N.J. at 647. Additionally, while a general charge may suffice to cure "only slightly improper" remarks, "a single curative instruction may not be sufficient to cure the prejudice resulting from cumulative errors at trial." State v. Vallejo, 198 N.J. 122, 136 (2009) (quoting State v. Frost, 158 N.J. 76, 86-87 (1999)).

State v. Herbert, 457 N.J. Super 490, 505 (App. Div. 2019). This Court in Herbert explained that "evidence that bears directly on the ultimate issue before the jury may be less suitable to curative or limiting instructions than evidence that is indirect and that requires additional logical linkages." Id. at 505-06. The ultimate issue in this case, a damages only trial, was whether plaintiff suffered a permanent

injury in the accident and Dr. Berman was the primary witness for the defense on that issue. The trial court made no effort to address any of these three factors and instead simply moved on immediately to the giving a curative instruction.

The curative instruction given by the trial court was not sufficient to overcome the undue prejudice caused by the plaintiff's counsel's improper comments. The Supreme Court has held that "[t]he decision on whether inadmissible evidence is of such a nature as to be susceptible of being cured by a cautionary or limiting instruction, or instead requires the more severe response of a mistrial, is one that is peculiarly within the competence of the trial judge, who has the feel of the case and is best equipped to gauge the effect of a prejudicial comment on the jury in the overall setting." State v. Winter, 96 N.J. 640, 646-647 (1984). "In an action involving the misconduct of counsel, a mistrial should not be granted absent a clear showing of prejudice to the opposing party." Amaru v. Stratton, 209 N.J. Super.1, 15(App.Div. 1985).

In making a determination as to whether a curative instruction should be given, the Supreme Court set forth three factors to consider: the nature of the inadmissible evidence the jury heard, and its prejudicial effect[;]" how "an instruction's timing and substance affect its likelihood of success[;]" and whether the jury will be unable to comply with the court's instructions. State v Herbert, 457 N.J. Super. 490, 505, 507 (App. Div. 2019). The Supreme Court "has consistently

stressed the importance of immediacy and specificity when trial judges provide curative instructions to alleviate potential prejudice to a defendant from inadmissible evidence that has seeped into a trial." State v. Vallejo, 198 N.J. 122, 135 (2009). "To be effective, a curative instruction should be clear and specific and be delivered immediately". Id., at 135.

The commentary by Plaintiff's counsel was improper and contrary to the testimony provided by Dr. Berman. Plaintiff's explanation for his conduct also failed to show any legitimate indication that his commentary was appropriate. (4T 54-7 to 54-16). Essentially, Plaintiff's counsel relied upon a clear incomplete misstatement, which Dr. Berman immediately corrected, and the court rejected that rationale. Plaintiff's counsel improperly used this misstatement during closing, when defendant had no opportunity to correct the blatant mischaracterization as a means to mislead and confuse the jury; conduct which runs contrary to N.J.R.E.403(a). Plaintiff's counsel did so to deliberate impugn the credibility to Dr. Berman to the jury and mischaracterized Dr. Berman's testimony. This was clearly misleading the jury.

Plaintiff's counsel's misleading statement was clearly wrong. Shortly after making the offending statement, Plaintiff's counsel admitted that he could not "find any direct testimony in his -- in his video that he said I didn't see any herniations on the first MRI. He says I think the MRIs are identical is -- is how he

testified ultimately at trial." (4T 125-22 to 126-1). The Court acknowledged that what Plaintiff's counsel comment about Dr,. Berman were wrong in his closing:

> THE COURT: It wasn't said. I'm not saying what you did was intentional. You were wrong. You admitted it before, and we're going to move on. You say you had a basis for it. The basis of what, that you read something that was half and then changed? But, it wasn't what was said. It's wrong. It's not what was said during the trial, right? I'm not saying you did anything wrong. I know –
>
> MR. POCCHIA: Yeah.
>
> THE COURT: -- you're saying you were doing something in your closing, it was the heat of the moment or whatever it is. If you thought that I – if you think that in any way that I look down upon that, no. It was a mistake, and basically we're going to rectify that and correct things. (4T135-15 to 136-4).

There can be no mistake, Plaintiff's counsel was not referencing testimony of Dr. Berman, rather he accused Dr. Berman of changing his opinion on the fly and told the jury Dr. Berman's purported thought process in reaching the supposed decision to change his testimony. Plaintiff's counsel essentially stated to the jury that 1) Dr. Berman changed his opinion in his testimony, which he did not; 2) that he knew what Dr. Berman was thinking with regard to this alleged change in his testimony, which he could not; and 3) that Dr. Berman manipulated the evidence to suit his own ends, which he also did not do. The comments were unduly prejudicial and attacked the credibility of defendant's only witness Dr. Berman despite no legitimate basis for such commentary. The prejudice created was not curable by an instruction; a mistrial was warranted.

Moreover, even though the Court recognized the error of Plaintiff's closing and ultimately sustained Plaintiff's objection, the court failed to take immediate action to rectify this egregious error. Unfortunately, the Court waited approximately one hour before issuing the curative instruction, allowing Plaintiff to complete his closing and then allowing the jury to take lunch, leaving the jury with a considerable amount of time to consider Plaintiff's counsel's improper remarks about Dr. Berman before being told not to consider the disparaging and erroneous remarks. The undue prejudice to Defendant had already taken root at this point. It is well settled that "[s]ummations must be 'fair and courteous, grounded in the evidence, and free from any "potential to cause injustice."'" Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 522 (2011)(citationa omitted). Here, in summation, Plaintiff's counsel crossed the line, . Plaintiff's counsel's commentary with regard to Dr. Berman was neither courteous nor fair, nor was it rooted in evidence or free from the potential to cause injustice. Plaintiff's counsel created a narrative which did not exist in the evidence, purportedly referring to testimony of Dr. Berman which did not exist, he disparaged the credibility of Dr. Berman with no basis to do so, and suggested to the jury that he was able to read Dr. Berman's mind conjuring up his counsel's idea of Dr. Berman's thought process at the time of the testimony which Plaintiff's counsel had created out of whole cloth and mischaracterized. Plaintiff's conduct created an unjust result

warranting a new trial free of Plaintiff's counsel's improper commentary in closing argument.

IV. THE TRIAL COURT ERRED IN DENYING DEFENDANT/ APPELLANT'S MOTION FOR A NEW TRIAL. (5T 18:25-31:20)

The standard for granting a motion for a new trial is governed by Rule 4:49-1. Specifically, Rule 4:49-1 states, in pertinent part, that a trial judge shall grant a party's motion for 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." Id.

The Court in Panko v. Flintkote Co., 7 N.J. 55, 61, (1951) stated:

> The fundamental right of trial by a fair and impartial jury is jealously guarded by the courts. A jury is an integral part of the court for the administration of justice and on elementary principles its verdict must be obedient to the court's charge, based solely on legal evidence produced before it and entirely free from the taint of extraneous considerations and influences. A jury can act only as a unit and its verdict is the result of the united action of all the jurors who participated therein. Therefore, the parties to the action are entitled to have each of the jurors who hears the case, impartial, unprejudiced and free from improper influences.

The Court noted that the test to determine whether a motion for a new trial should be granted because of the misconduct of the jurors or an intrusion of irregular influences is to see whether such misconduct or intrusion could have a tendency to influence the jury in arriving at its verdict in such a way that it was inconsistent with the legal proofs and court's charges. Id. at 61. If the intrusion or misconduct

has that tendency on its face, then a new trial should be granted without the determination as to its actual effect. In other words, "The test is not whether the irregular matter actually influenced the result, but whether it had the capacity of doing so." Id. at 62. The test was necessary to keep justice pure and free from all suspicion of undue influences placed on the jury. For all of the reasons set forth above at length, the trial court erred in denying the motion for a new trial.

a. The Trial Court Erred In Denying The New Trial Motion Due To The Erroneous Admission Of The Undisclosed Video Of A Surgery of a Different Patient. (5T 23-23 to 26-21)

First, the court erred in permitting plaintiff to play the video of an alleged percutaneous discectomy of another patient. The video was not produced in discovery, was not even mentioned in the 2 pretrial exchanges and it was simply sprung upon the defense during the direct examination of plaintiff's expert without affording defense the opportunity to have his expert review and comment on the video or allow defense counsel proper time to prepare cross-examination. Our Supreme Court has repeatedly recognized that cross-examination is the " 'greatest legal engine ever invented for the discovery of truth." ' " State v. Branch, 182 N.J. 338, 348 (2005) (quoting California v. Green, 399 U.S. 149, 158 (1970)). Defendant was deprived of the opportunity of conducting proper cross-examination when the video at issue was never even provided to defense counsel *until the same time it was shown to the jury*. Not only should it have been barred due to the clear

violation of the discovery rules, but it was also fundamentally unfair and unduly prejudicial to ambush defendant at trial with a video of another unidentified patient who allegedly had a similar procedure, and it led to an excess verdict. This constituted a clear miscarriage of justice and warrants a new trial.

The trial court's handling of the motion for new trial was flawed on many levels. First, the trial court should have corrected its initial error by granting a new trial due to the untimely disclosure of the video to defendant and the undue prejudice he suffered as a result of the disclosure and use at the 11th hour.

Additionally, it is apparent that the trial Court did not appreciate the fact that the video presented at trial was of an actual surgery of a person unrelated to a Plaintiff, rather than a "simulation." The Court stated "Well, that's what I was going to ask you. Like because from what I recall, the video wasn't of the person. It was just like a simulation, right?" (5T T6-7 to 10). The Court had failed to appreciate the fact that the video was more than a mere simulation but was an actual surgery to another patient. Plaintiff contended that this was provided as an exemplar; however, the video itself was of a surgical procedure which showed the gory details of surgery which is alleged to have been similar to what Plaintiff had undergone. There was no need for this cumulative evidence where the plaintiff's expert physician who performed the surgery could have discussed the actual surgery which he performed. Rather, Plaintiff's counsel opted to surprise

Defendants with this video, without prior notice or a chance to properly respond. The surgical video was more than an demonstrative and its purpose was to present the gory substantive details of a surgery to the jury in order to inflame the jury and unfairly affect the damages.

b. Counsel's Improper Comments to the Jury Regarding Defendant's Primary Witness on Damages So tainted the Jury as to Require a New Trial. (5T 26- 23 to 28:13, 29-8 to 19)

Moreover, the misconduct of Plaintiff's counsel in closing argument of creating a straw man and knocking it down, i.e., manufacturing testimony of Dr. Berman and then using that manufactured testimony to impugn his credibility, required a new trial. The comments effectively and unfairly poisoned the jury's perception of Dr. Berman resulting in a verdict which was a miscarriage of justice. However, the Court instead issued a deficient limiting instruction, which it labeled as "small," which did not cure any of the improper comments. Moreover, the limiting instruction was not given immediately and occurred over an hour later, and that delay permitted the jury to be tainted with this improper and prejudicial argument by counsel which was not supported at all in the record. The court compounded this error in failing to grant Defendant's motion for a new trial. It is clear that the verdict was significantly affected by Plaintiff's counsel's misconduct rending the verdict tainted by undue influence and a miscarriage of justice.

Further, the Court failed to appreciate the true ramifications of Plaintiff's counsel's conduct, coupled with the small and insufficient limiting instruction, and the false in one- false in all jury charge. Plaintiff's counsel sought to depict Dr. Berman as untruthful in his opinions with no basis by creating his own testimony. Dr. Berman never testified that there were no herniations and certainly did not testify about any thought process with regard to changing his opinion about the existence of herniations. The disparaging remarks solidified Plaintiff's intent to discredit Dr. Berman through non-existent testimony while at the same time blaming the alleged change in his opinion on being hired by defense counsel. A limiting instruction by the court telling the jury that Dr. Berman never testified that there were no herniations did virtually nothing to cure this undue prejudice. The jury was clearly not free from improper influences. Accordingly, the Court should have ordered a new trial as a clear miscarriage of justice.

c. The Cumulative Effect Of The Trial Court Errors In Allowing The Introduction Of The Video & Plaintiff's Improper Comments During Summation Prevented A Fair Trial And Created A Miscarriage Of Justice Requiring A New Trial On Damages. (5T 18-25 to 31-20)

The trial court's errors were three fold, 1) Plaintiff should not have been permitted to play the undisclosed surprise surgical video, of another patient to the jury which lacked relevance as the surgical procedure did not depict Plaintiff, 2) insufficiently addressing Plaintiff's counsel's disparaging and unwarranted commentary regarding Dr. Berman; and 3) misleading the jury by manufacturing

and mischaracterizing testimony which was not presented by Dr. Berman and telling the jury that he knew what Dr. Berman's thought process was in testifying. The cumulative effect of this misconduct was clearly capable of producing an unjust result and indeed did produce an unjust result and mandated a new trial.

In Risko v. Thompson Muller Automotive Group, Inc., 206 N.J. 506 (2011), the Supreme Court noted that the "cumulative impact of these comments was such as to so taint this damage verdict and warrant a new trial as to damages". Id, at 520. Justice Rivera-Soto noted, in his concurrence in part and dissent in part, that while a new trial was warranted based on the "cumulative effect" of the summation notwithstanding the final instructions to the jury, the new trial should be granted on both liability and damages. Id.

Here the cumulative effect of Plaintiff's manufactured testimony of Dr. Berman, coupled with the disparaging remarks about Dr. Berman, i.e. essentially painting him as a hired gun who manipulates evidence to suit the needs of the party paying him, clearly cast a grim shadow over the defense of this suit and making it clearly capable of producing an unjust result. Plaintiff's counsel's conduct in closing argument, which came after defense counsel had already completed her closing and was incapable of addressing any of these outrageous comments, did not simply discredit Dr. Berman, it called into question his very character by accusing him of changing his testimony and opinions to avoid scrutiny and satisfy

Defendant, next accusing him of playing "fast and loose" with the evidence to suit his need, and finally interpreting a mere misstatement during his testimony as a complex thought process designed only to change his opinion on the fly. This not only painted Dr. Berman in a poor light, but also painted the defense as the individuals pulling Dr. Berman's strings.

Plaintiff's counsel alluded that Defense counsel had essentially directed Dr. Berman to testify in the improper manner described in the closing. This is made clear by Plaintiff's improper commentary:

> Dr. Berman is all over the map. And, I can understand that. Because he's sitting there, and he sees this case, and he knows how badly Mr. Lekhal was injured. He knows the treatment that he went through, the surgery, the injections, and he's got to say something. He's been hired by the defendant in the case, the guy that rear-ended this vehicle. He's got to say something. But, saying something and making sense and making logical sense -- those are two different things. Why would he do that? One explanation could be that 85 percent of the time he's hired by defendants. Maybe that's an explanation.

(4T 108-20 to 109-7). Here plaintiff's counsel linked his manufactured testimony to the purported misconduct of defendant, thereby creating extreme prejudice to the Defense. This undue prejudice is further compounded as the jury was charged with "False In One False In All":

> Now, if you believe that any witness deliberately lied to you on any fact significant to your decision in this case, you have the right to reject all of the witness's testimony. However, in your decision you may believe some of the testimony and not believe other parts of the testimony. If you believe that any witness or party willfully or knowingly testified falsely to any fact significant to your decision in this case with intent to

> deceive you, you may give such weight to his or her testimony as you may deem it you may, in your discretion, disregard all of it.

(5T 149-20 to 150-6). Plaintiff effectively told the jury that Dr. Berman willfully testified falsely and that it was essentially at the direction of the defense which hired him as an expert witness. Nonetheless, he agreed thereafter with the trial Court that his statement in closing was incorrect and that Dr. Berman had not given that testimony, and the Court then ruled that the comments were improper.

V. THE PURPORTED "CURATIVE" INSTRUCTION GIVEN BY THE COURT TO THE JURY WAS NOT FIRM, SHARP, OR FORCEFUL AND INSTEAD MINIMIZED THE INSTRUCTION, AND DID NOT CURE THE POTENTIAL PREUDICE CREATED BY COUNSEL'S CLEARLY IMPROPER COMMENT DURING CLOSING ARGUMENT, WARRANTING A NEW TRIAL. (NOT RAISED BELOW).

Plaintiff's counsel improperly argued to the jury in closing facts not based upon the evidence, i.e., that Dr. Berman had not found herniations and then changed his testimony at trial to claim there were small herniations, and counsel claimed he knew what was in the mind of Dr. Berman in doing this, and attacked his credibility and essentially arguing he lied at trial. (4T 106-20 to 110-15). The counsel used this false narrative to spring-board into the argument that Dr. Berman was nothing more than a paid hired guy and going so far as arguing Dr. Berman was playing "[f]ast and loose with the evidence, ladies and gentlemen" when, indeed, he had never done so. (4T 110-114). Plaintiff's counsel created the false narrative to attack the credibility of defendant's only witness, Dr. Berman.

Defendant requested the mistrial but the Court instead chose to issue a curative instruction. However, the instruction was not curative at all.

The trial court asked counsel, after refusing to grant the mistrial, for language to instruct the jury. After a lengthy discussion, (4T 123 to 131), the Court proposed the instruction read: "plaintiff's counsel commented on Dr. Berman's not --what is it -- not finding a herniation in the first MRI -- . . .-- and that that was not – that testimony was never produced by the doctor during his during the trial. And, it's -- any reference to that should be disregarded by you." (4T 130-5 to 13, 131-3 to 131-12). Counsel for the defendant accepted that language. (4T at 130:16; 131-13). However, that jury instruction was modified by the trial court in a significant way, eliminating any effectiveness of that curative instruction which was intended to correct harmful error. (4T 140-14 to 140-22).

The plain error standard under Rule 2:10-2 requires the appellate court to "determine whether any error…was 'of such a nature as to have been clearly capable of producing an unjust result' ". Toto v. Ensuar, 196 N.J. 134, 144 (2000) (citing to Mogull v. CB Comm. Real Est. Grp.Inc., 162 N.J. 449, 464 (2000)). The instruction, as modified by the Court, constituted plain error.

Instead of providing the jury with the proposed instruction accepted by counsel, the Court gave the following instruction which minimized the entire concept of a curative instruction and failed to cure any prejudice:

> One thing beforehand. I'm -- **I'm just going to give you a -- a small limiting instruction just for your information.** Plaintiff's counsel commented on Dr. Berman's not finding herniations in this first report as to the plaintiff. That was never testified to by Dr. Berman during the trial, and any comments by plaintiff's counsel during his closing in this regard is to be disregarded by you in your deliberations, okay? (4T140:15-22)(Emphasis added).

For a curative instruction to be sufficient, it must be firm, clear, and accomplished without delay. State v. Winter, 96 N.J. 460 649, (1984); State v. Vallejo, 198 N.J. 122, 134 (2009). "The effect of improperly admitted evidence can be eradicated by an immediate and strong curative instruction to the jury to disregard the evidence if the instruction is 'firm, clear, and accomplished without delay.'" State v. Thomas, 2014 WL 9879777 (App. Div. 2010)(quoting Vallejo, 198 N.J. at 134; Winter, 96 N.J. at 648). The curative instruction should be couched in the strongest terms possible in order to cure any potential error. See State v. LaPorte, 62 N.J. 312, 318 (1973). To cure the potential prejudice, the curative instruction must be sharp, forceful or otherwise firm so as to instruct the jury to disregard the potentially prejudicial comment or evidence. See Winters, supra at 643, 649 ("forceful," sharp and complete instruction deemed sufficient); State v. Hernandez, 334 N.J.Super. 264, 273 (App.Div.2000) (potential prejudice from improper comments by prosecutor cured by prompt and firm curative instructions), aff'd, 170 N.J. 106 (2001); State v. Catlow, 206 N.J.Super. 186, 193 (App.Div.1985) (sharp and complete curative instruction cured error), certif.

denied, 103 N.J. 465, 648 (1986). State v. Tirado, 2009 WL 259356 (App. Div. 2009)(a prompt and emphatic curative instruction).

The trial court's instruction here, however, was not forceful, sharp, firm, or emphatic in giving this purported curative instruction. In fact, the language used minimized and neutralized the instruction completely. The trial court began its instruction by telling the jury "I'm just going to give you . . .a small limiting instruction just for your information." (4T 140:15-16). Indeed, this was the opposite of a forceful, sharp, firm, or emphatic curative instruction.

First, any potential cure to these prejudicial comments was nullified by the court in referring to its own purported curative instruction as a "small limiting instruction just for your information." Id. When attempting to cure error by instructing the jury on prejudicial closing argument which created facts not in evidence to discredit the opinion of a key defense expert witness, which could not be addressed by the defense at all, it is insufficient to minimize the importance of a curative instruction by refer to the purported curative instruction as "small." It is equaling nullify to advise the jury it is "just for your information." Curing error is neither a small thing nor is it just for the jury's information. The Court is supposed to be correcting prejudicial error with an effective instruction. Calling a jury instruction to clear prejudicial comments "small" as part of the instruction itself and further minimizing its significance by labeling it "just for your information" is

antithetical to the idea of curing error and this instruction diminished any weight and curative effect the instruction could have had from the start. It was completely ineffective and capable of producing an unjust result way.

Moreover, this limiting instruction did nothing to address the attack on the credibility of the expert and disparaging commentary nor did it address the statements related to Dr. Berman's alleged thought process or the accusation that he changed his opinions because he was hired by the defense. In short, the cumulative effect of Plaintiff's counsel's improper conduct rendered the curative instruction completely ineffective. Dr. Berman was incorrectly accused of being a liar, which was not addressed. Accordingly, self-minimizing small limiting instruction was capable of an unjust result a new trial.

CONCLUSION

For the foregoing reasons, defendant/appellant Anthony J. Depasquale, 2nd respectfully requests that this Court reverse the judgment below, and the order denying the motion for new trial, and remanded for new trial on damages.

Respectfully submitted,
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KARIM LEKHAL, Plaintiff-Respondent, vs. ANTHONY J. DEPASQUALE, 2ND, Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003024-23 **Civil Action** ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY, DOCKET NO. BER-L-2178-19 SAT BELOW: HONORABLE ANTHONY R. SUAREZ, J.S.C.

BRIEF SUBMITTED ON BEHALF OF THE PLAINTIFF-RESPONDENT

On the Brief:
John J. Pisano, Esq.

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PROCEDURAL HISTORY

A Complaint was filed on behalf of Karim Lekhal (hereinafter "the plaintiff") on March 22, 2019 seeking damages for permanent injuries he sustained as a result of an August 7, 2017 motor vehicle collision that occurred on State Highway 35 in Neptune, New Jersey. (Da1)[1]. The operator of the vehicle that crashed into the back of the plaintiff's vehicle, Anthony DePasquale 2nd (hereinafter "the defendant") was named as a defendant in the Complaint. (Da1). An Answer was filed on behalf of the defendant on April 17, 2019. (Da26).

Liability was stipulated by the defendant and this matter proceeded to a damages-only trial beginning on March 25, 2024 before the Honorable Anthony R. Suarez, J.S.C. and a jury. (1T-4T). Jury selection was completed on March 25, 2024 after which time a preliminary instruction was given to the jury by Judge Suarez. (1T50:1-14; 1T73:1-82:25). In explaining the role of attorneys at trial, Judge Suarez instructed the jury:

> During the course of the trial, you will hear from the attorneys on numerous occasions. Always bear in mind that the attorneys are not

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[1] Transcript and Appendix Reference Key
1T – Transcript of the March 25, 2024 Trial Date
2T – Transcript of the March 26, 2024 Trial Date Volume I
3T – Transcript of the March 26, 2024 Trial Date Volume II
4T – Transcript of the March 27, 2024 Trial Date
5T – Transcript of the May 10, 2024 Motion Hearing
Da – Defendant-Appellant's Appendix

> witnesses and what they say is not evidence in the case, whether they are arguing, objecting or asking questions. The attorneys are here as advocates and spokespersons for their clients' positions. (1T74:22-75:3).

Trial continued on March 26, 2024 with opening statements followed by the presentation of the testimony of the plaintiff and Wael Elkholy, MD. (2T81:19-20; 2T168:11-12).

Dr. Elkholy was one of the plaintiff's treating physicians. (2T169:7-9; 2T177:22-25). He performed a cervical discectomy surgical procedure on the plaintiff on April 22, 2021. (3T202:22-203:2). When asked to explain the procedure and how he performed it on the plaintiff, Dr. Elkholy asked if he could not show a video. (3T203:3-5). He then confirmed that he had an exemplar video that would assist him in explaining how the procedure was performed to the jury. (3T203:6-9). Defense counsel objected to Dr. Elkholy utilizing the video as a demonstrative aid during his testimony. (3T203:10-15). Judge Suarez noted that a Trial Court has wide latitude with regard to ruling on the use of demonstrative evidence and would allow Dr. Elkholy to use the video if it would assist him in describing the procedure for the jury. (3T204:3-8). Dr. Elkholy explained that the video will assist him in explaining the procedure he performed on the plaintiff to the jury. (3T205:3-8). He then played the video while testifying about how the cervical discectomy was performed. (3T205:9-209:15). He further confirmed that the video was duplicative of the procedure that he

performed on the plaintiff. (3T209:16-19). Dr. Elkholy used other demonstrative exhibits during his direct testimony including a model of a cervical spine to assist in explaining the anatomy of the plaintiff's injury and a dermatome chart to assist in explaining the nature of the plaintiff's nerve damage. (5T24:1-6; 5T25:20-23). No objections were raised to the use of those demonstrative exhibits. (2T168:16-200:25; 3T202:1-214:17).

The plaintiff rested his case on March 27, 2024 after two photographs showing the damage to the defendant's vehicle following the subject collision were moved into evidence. (4T29:1-30:4; 4T32:15-21). The defendant's case proceeded with the presentation of the video of *de bene esse* deposition testimony of the defense examining physician, Mark Berman, MD. (4T32:24-34:3). Dr. Berman first examined the plaintiff on January 7, 2020 and authored eight reports in this matter. (4T40:17-19; 4T46:18-23). He testified that he found that the plaintiff did not have any significant cervical findings following his examination. (4T46:8-14). Dr. Berman also reviewed MRI films from the May 5, 2018 and March 25, 2019 MRI diagnostic testing of the plaintiff's cervical spine. (4T49:20-25; 4T50:24-51:2; 4T58:7-10). In responding to questioning about whether he saw anything significant on the May 5, 2018 MRI films, Dr. Berman testified, "[t]his in my opinion, is a norm - - normal MRI with no disc herni - - no significant disc herniations. There are no disc herniations

impinging on any of the nerve roots." (4T54:1-16). He went on to explain that the disc herniations present are considered a normal finding. (4T54:19-22). He similarly testified that, in his opinion, the March 25, 2019 MRI was essentially a normal MRI. (4T58:7-22). Although he claims that the plaintiff's cervical MRI studies were normal, he admitted on cross-examination that he has offered an opinion in regard to his own patients that a herniated disc is a permanent condition caused by a motor vehicle collision. (4T71:18-72:3). The defense rested following the presentation of Dr. Berman's testimony. (4T74:1-6).

Trial continued with the presentation of closing arguments on March 27, 2024. (4T78:25-79:4). During plaintiff's counsel's summation, he referred to two reports authored by Dr. Berman noting that it was indicated in a January 2020 report that the mechanism of injury supports an injury to the cervical spine and then noting that it was stated in February report that there were no disc herniations. (4T106:23-107:22). No objections were raised at this time. (4T106:23-107:22). Plaintiff's counsel began to reference the January 2020 report later in his summation at which time defense counsel raised an objection. (4T110:23-25). Defense counsel explained that she let the comment go the first time but objected to further comment specifically referencing the reports on the grounds that there was no testimony about the reports or there being no herniations presented at trial. (4T111:2-112:2). She further argued for a curative

instruction to be given when plaintiff's counsel was finished. (4T111:21-22). Judge Suarez indicated that he would look at Dr. Berman's testimony again and that a curative instruction may be given. (4T112:9-16).

Judge Suarez excused the jury following summations and entertained argument regarding the objection to plaintiff's counsel's summation. (4T123:12-131:19). Defense counsel argued that there either needs to be a mistrial or curative instruction stating that plaintiff's counsel made a reference to Dr. Berman's February 25, 2020 review of an MRI and said he found no herniations but there was no testimony elicited about a February 25, 2020 report and must be disregarded. (4T124:2-24). Judge Suarez indicated that he was inclined to go along with defense counsel's requested instruction and suggested an instruction. (4T126:16-20; 4T130:5-15; 4T131:3-14). Defense counsel stated that she can live with that instruction. (4T130:116-131:15). Judge Suarez printed out the instruction for counsel to review and there was no objection to the language of the instruction. (4T138:15-25). He then gave the following instruction to the jury before giving them the full jury charge:

> One thing beforehand. I'm – I'm just going to give you a -- a small limiting instruction just for your information. Plaintiff's counsel commented on Dr. Berman's not finding herniations in this first report as to the plaintiff. That was never testified to by Dr. Berman during the trial, and any comments by plaintiff's counsel during his closing in this regard is to be disregarded by you in your deliberations, okay? (4T140:14-22).

The full jury charge was then given to the jury after which they began their deliberations. (4T168:5-173:5).

The jury returned a unanimous verdict on the afternoon of March 27, 2024 finding that the plaintiff sustained a permanent injury proximately caused by the August 7, 2017 accident and awarded him $250,000.00 in damages for his pain, suffering, disability, impairment, and loss of enjoyment of life. (4T172:17-173:5). An Order for Judgment in the amount of $291,330.00, representing the $250,000.00 in damages awarded by the jury with prejudgment interest in the amount of $41,330.00, was filed on April 8, 2024. (Da22).

A motion for a new trial pursuant to *Rule* 4:49-1 was filed on behalf of the defendant on April 10, 2024. (Da12). The defendant raised three arguments as a basis for a new trial. (5T3:25-5:10). The first two were issued that were raised during trial, specifically the Trial Court permitting the use of the video of a cervical discectomy as demonstrative evidence during Dr. Elkholy's testimony and the comment by plaintiff's counsel regarding the February 25, 2020 report of Dr. Berman. (5T3:25-4:21). The third issue concerned a comment by plaintiff's counsel that Dr. Berman was playing fast and loose with the evidence during summation. (5T4:22-5:3). No objection was raised to this comment during trial. (4T110:14-15). The plaintiff filed opposition to the motion and oral argument was heard by Judge Suarez on May 10, 2024. (5T).

Judge Suarez initially found that the jury's verdict was supported by the evidence and the damage award of $250,000.00 did not shock the conscience or represent a clear and convincing miscarriage of justice. (5T23:17-23). He then found there was no error in permitting the use of the video as demonstrative evidence to assist Dr. Elkholy in explaining the details of the surgery he performed on the plaintiff. (5T23:23-26:22). Judge Suarez next found that the curative instruction he gave the jury properly addressed the statement by plaintiff's counsel that was objected to by defense counsel and there was reason to believe that the jury disregarded or disobeyed the instruction in their deliberations. (5T26:23-29:7). Finally, Judge Suarez found that the other statement made by plaintiff's counsel to which no objection was raised did not provide a basis for granting a new trial. (5T29:8-17). An Order denying the defendant's motion for a new trial was filed on May 10, 2024. (Da15).

STATEMENT OF FACTS

The plaintiff was employed as a driver for Quest Diagnostics and was driving a company vehicle to pick up and deliver specimens on August 7, 2017. (2T84:1-14; 2T84:22-85:3; 2T89:4-7). He was stopped at a traffic circle on State Highway 35 waiting for traffic to clear when the defendant's vehicle crashed into the back of the vehicle he was driving. (2T84:22-86:8). The force of the impact propelled the vehicle he was driving about five to ten feet forward. (2T86:16-20). The plaintiff testified that he observed damage to the rear bumper of the vehicle he was driving as well as smoke coming from the defendant's vehicle, damage to the front bumper of the vehicle, and its radiator cut in half. (2T87:6-21). Photographs of the damage to the defendant's vehicle were admitted into evidence at trial. (4T29:1-30:4).

The plaintiff was wearing his seat belt at the time of the collision but he explained that his head went forward, back, and then forward again as a result of the impact. (2T86:21-87:2). He testified that he felt a little shaky after the crash and then woke up that night with pain and numbness in his upper spine and shoulders.[2] (2T87:25-88:6; 2T90:1-7). The plaintiff went to the emergency

[2] The plaintiff explained that his reference to the upper spine referred to his neck area and shoulders. (2T122:3-10).

room at Holy Name Hospital on August 7, 2017 with complaints of pain and discomfort to his upper spine and both shoulders. (2T90:21-91:12).

The plaintiff followed up with Dr. Patel for his complaints to his upper spine and shoulders after being discharged from the hospital. (2T81:19-92:1; 2T120:23-25). Dr. Patel sent him for physical therapy but the physical therapy did not resolve the problem and the plaintiff did not receive any relief from his pain. (2T92:2-13; 2T121:3-5). The plaintiff then came under the care of Dr. Adam Bernstein with the same complaints to his upper spine and shoulder. (2T92:14-23). Dr. Bernstein initially sent him for more physical therapy. (2T121:6-24). He also sent the plaintiff for an MRI of his cervical spine that was conducted on May 5, 2018. (2T122:11-20; 3T226:9-17). Dr. Bernstein then referred the plaintiff to Dr. NingNing He, a pain management physician. (2T92:24-93:6; 2T127:21-24).

The plaintiff first saw Dr. He in March of 2019. (2T128:9-12). The plaintiff was still suffering from pain to his upper spine and shoulders when he saw Dr. He as well as numbness to two of his fingers that he began to experience. (2T93:10-24; 2T128:21-129:10). Dr. He ordered another MRI of the plaintiff's cervical spine which was conducted on March 25, 2019. (2T95:18-24; 2T129:24-130:1). Dr. Elkholy testified that the first MRI was fuzzy and that is why the second MRI was ordered. (3T226:24-227:12). He further testified that

the March 25, 2019 MRI showed herniated discs at C2-3, C3-4, C4-5, and C5-6 and that the herniated disc at C5-6 was a significant herniation. (2T189:15-192:15; 2T194:2-3). Dr. He subsequently administered an epidural injection to the plaintiff's cervical spine. (2T96:7-21; 2T196:21-23). Although the injection provided a little temporary relief, the plaintiff testified that the pain returned. (2T96:22-97:1; 2T196:21-23).

The plaintiff eventually came under the care of Dr. Elkholy, a physician board certified in pain management and anesthesia, on March 18, 2020. (2T97:5-11; 2T130:2-5; 2T169:7-9; 2T172:2-3; 2T177:22-25; 3T222:1-4). He was continuing to suffer from pain to his upper spine with numbness in his fingers at that time. (2T97:12-15; 2T179:9-178:1). EMG diagnostic testing was then conducted on May 8, 2020 which indicted C6 radiculopathy. (2T186:21-25; 2T187:4-9). Dr. Elkholy testified that the MRI showing a significant disc herniation at C5-6 and the EMG diagnostic testing showing radiculopathy at C6 was indicative of trauma causing a disc herniation, pressing on the nerve, and causing nerve irritation and pain. (2T193:15-194:12). After obtaining the EMG results, Dr. Elkholy recommended a second epidural injection that was performed on November 16, 2020. (2T196:14-197:20). The injection again provided only temporary relief and the plaintiff was experiencing significant pain when he next saw Dr. Elkholy on May 26, 2021. (3T202:3-11).

Dr. Elkholy testified that the temporary relief the plaintiff received from the second epidural injection indicated that there was significant pressure on the nerves and he, therefore, recommended a cervical discectomy. (2T97:16-20; 3T202:9-24). He explained that the goal of the surgery is to remove a part of the disk then heat and shrink the disc to decrease the numbness and tingling sensation. (3T209:20-210:4). He further explained that while the surgery is good for radicular pain it does not provide much help for the facet joints of the neck. (3T210:5-18). The plaintiff was initially indecisive about undergoing the operative procedure because he never had surgery and was scared but ultimately decided to have the surgery. (2T97:22-98:1). The cervical discectomy was performed by Dr. Elkholy on April 22, 2021. (2T98:4-5; 3T202:22-203:2). Dr. Elkholy testified about how the surgery was performed on the plaintiff while using an exemplar video of the surgical procedure to assist him in describing how the surgery was performed. (3T205:3-209:15). In using the demonstrative evidence, Dr. Elkholy explained that the procedure shown on the video was duplicative of the surgery he performed on the plaintiff and that it would assist him in explaining how the procedure was performed to the jury. (3T203:6-9; 3T205:3-8; 3T209:16-19).

The plaintiff testified that the surgery removed a portion of the numbness he was experiencing but did not take away the pain at the base of his head going

into his shoulders. (2T98:9-22). Dr. Elkholy confirmed that the plaintiff received about an eight-five percent relief of his radicular complaints after the surgery but continued to suffer from neck pain. (3T211:4-9). The plaintiff remained under the care of Dr. Elkholy and his medical practice until September 22, 2022. (3T210:25-211:3; 3T224:2-8; 3T227:17-19). His post-surgery treatment included a cervical medial branch block and occipital nerve blocks performed on August 19, 2021 and September 6, 2022 to treat headaches caused by pressure on the occipital nerve. (3T224:16-23; 3T227:17-22; 3T228:14-229:12).

Dr. Elkholy testified that the multiple herniated discs to the plaintiff's cervical spine were caused by the August 7, 2017 motor vehicle collision. (3T211:20-212:9). The plaintiff testified that he never had any injuries or treatment for his upper spine prior to the subject collision and was not involved in any subsequent accidents. (2T99:8-100:3; 2T100:21-101:7; 2T101:21-102:3). Dr. Elkholy further testified that the herniated discs to the plaintiff's cervical spine are permanent injuries. (3T212:10-213:12). All of his opinions were given within a reasonable degree of medical probability. (3T211:13-19).

The plaintiff testified that while his pain is not as severe, he continues to live with pain. (2T103:6-11). He explained that he has good days where the pain is about a six out of ten and bad days when the pain is about an eight out of ten.

(2T103:6-16; 2T105:1-5). He continues to take pain medication three to four times per week. (2T103:22-104:3). The plaintiff also testified about the impact his permanent injuries and the pain he continues to suffer from has on his life such as turning his head, bending to pick something up, and his recreational activities. (2T103:17-104:25). He also experiences discomfort when doing work even though his employer has made accommodations for him by providing him with a vehicle that has a more comfortable seat. (2T99:2-10; 2T104:4-9). Dr. Elkholy testified that the plaintiff's pain will continue into the future and he will require a cervical fusion in the future. (3T213:17-214:4).

LEGAL ARGUMENT

POINT I

THE VERDICT AND JUDGMENT SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING THE DEFENDANT'S OBJECTION TO DR. ELKHOLY'S USE OF DEMONSTRATIVE EVIDENCE IN EXPLAINING THE SURGICAL PROCEDURE HE PERFORMED ON THE PLAINTIFF (3T204:3-8).

The plaintiff called his treating physician who performed his cervical discectomy procedure, Dr. Elkholy, as his medical expert witness at trial. (2T168:11-12; 2T169:7-9; 3T202:22-203:2). Dr. Elkholy brought several demonstrative exhibits with him that he used while testifying to aid the jury's understanding of his testimony. (5T24:1-6; 5T25:20-23). This included a model of a cervical spine to assist in explaining the anatomy of the plaintiff's injury and a dermatome chart to assist in explaining the nature of the plaintiff's nerve damage. (5T24:1-6; 5T25:20-23). No objections were raised to the use of these demonstrative exhibits. (2T168:16-200:25; 3T202:1-214:17).

Dr. Elholy also had an exemplar video of the cervical discectomy procedure that he performed on the plaintiff's cervical spine. (3T203:3-9). When asked to explain the procedure and how he performed it on the plaintiff, Dr. Elkholy asked if he could not show a video. (3T203:3-5). He then confirmed that he had an exemplar video that would assist him in explaining how the procedure was performed to the jury. (3T203:6-9). Defense counsel objected to Dr. Elkholy

utilizing the video as a demonstrative aid during his testimony. (3T203:10-15). Judge Suarez noted that a Trial Court has wide latitude with regard to ruling on the use of demonstrative evidence and would allow Dr. Elkholy to use the video if it would assist him in describing the procedure for the jury. (3T204:3-8). Dr. Elkholy explained that the video will assist him in explaining the procedure he performed on the plaintiff to the jury. (3T205:3-8). He then played the video while testifying about how the cervical discectomy was performed. (3T205:9-209:15). He further confirmed that the video was duplicative of the procedure that he performed on the plaintiff. (3T209:16-19).

The defendant sought a new trial, in part, on the grounds that the Trial Court erred in allowing Dr. Elkholy to use the video as demonstrative evidence during his testimony. (5T4:1-7). Judge Suarez disagreed, finding that the video was properly used as demonstrative evidence at trial. (5T26:3-22). As he explained in his ruling on the motion for a new trial:

> The video was used by Dr. Elkholy to compliment and illustrate his trial testimony concerning the same procedure he completed on the plaintiff. And it was short in duration. It had no sound. And it had no individual speaking on the video. And it was not marked -- it was not marked into evidence during the time of trial. It was not given to the jury to take into the jury deliberation room during the deliberations. And he was the doctor, that is Dr. Elkholy, who did perform and complete the plaintiff's surgery. And was best able to confirm that the exemplar video of the cervical discectomy was identical to the surgery that he completed on the plaintiff.

> He also testified that the video would assist him in explaining the details of the surgery that he completed on the plaintiff. And testified about each step of the cervical discectomy that he completed on the plaintiff while simultaneously using the video to compliment his spoken testimony. So, as much, that was properly utilized during the course of the trial. (5T26:3-22).

The defendant argues on appeal that Judge Suarez's evidentiary ruling in regard to the demonstrative evidence constitutes reversible error and warrants a new trial. The plaintiff respectfully disagrees and submits that the judgment should be affirmed.

The admissibility of evidence is left to the sound discretion of the trial court and substantial deference is given to its evidentiary rulings. *State v. Morton*, 155 N.J. 383, 453 (1998), *certif. denied*, 532 U.S. 931 (2001). This includes the use of demonstrative evidence at trial. *State v. Scherzer*, 301 N.J. Super. 363, 434 (App. Div. 1997), *certif. denied*, 151 N.J. 366 (1997). A trial court's evidentiary rulings "will be reversed only if it constitutes an abuse of discretion." *State v. Feaster*, 156 N.J. 1, 82 (1998), *certif. denied*, 532 U.S. 932 (2001). "Evidentiary decisions are reviewed under the abuse of discretion standard because . . . the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." *Estate of Hanges v. Metro. Prop. & Cas. Ins. Co.*, 202 N.J. 369, 383-384 (2010). Therefore, "[o]n appellate review, a trial court's evidentiary ruling must be upheld 'unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide off

the mark that a manifest denial of justice resulted.'" *Belmont Condominium Ass'n, Inc. v. Geibel*, 432 N.J. Super. 52, 95-96 (App. Div. 2013), *certif. denied*, 216 N.J. 366 (2013), citing, *Green v. N.J. Mfrs. Ins. Co.*, 160 N.J. 480, 492 (1999).

It is also not enough for a to show that "some legal error exists in the trial record" to have a jury verdict vacated and a new trial ordered. *Graves v. Church & Dwight Co., Inc.*, 267 N.J. Super. 445, 471 (App. Div. 1993), *certif. denied*, 134 N.J. 566 (1993). "Under *Rule* 2:10-2, a reviewing court should reverse only if a trial error is clearly capable of producing an unjust result." *Campo v. Tama*, 133 N.J. 123, 132 (1993). The same miscarriage of justice standard applies whether the disgruntled party claims that the verdict was against the weight of evidence or that improper rulings during trial resulted in prejudice. *Hill v. New Jersey Dept. of Corrections Com'r. Fauver*, 342 N.J. Super. 273, 302 (App. Div. 2001), *certif. denied*, 171 N.J. 338 (2001). That standard requires the reviewing court to determine "whether an error at issue was so grave that it caused the jury to be misled, confused, or inadequately informed." *Boland v. Dolan*, 140 N.J. 174, 189-190 (1995).

> Whether an error is reason for reversal depends upon some degree of possibility that it led to an unjust verdict. *State v. Macon*, 57 N.J. 325, 335 (1971). The possibility must be real, one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached. *Id.* at 336. *State v. Alston*, 312 N.J. Super. 102, 114-115 (App. Div. 1998).

Therefore, a new trial should not be ordered where an improper ruling amounted to only harmless error. *Kaplan v. Haines*, 96 N.J. Super. 242, 253 (App. Div. 1967), *aff'd*, 51 N.J. 404 (1968); see also; *Ryslik v. Krass*, 279 N.J. Super. 293, 302-303 (App. Div. 1995).

The defendant first contends that it was reversible error for Judge Suarez to have allowed Dr. Elkholy to utilize the exemplar video while explaining the cervical discectomy he performed on the plaintiff because the video was not produced in discovery. The defendant argues that the plaintiff was required to identify the video in response to Uniform A Interrogatory Number 23 and that Dr. Elkholy was required to identify the video in his report in response to Uniform Interrogatory Number 23. However, the video was not substantive evidence or a video of the plaintiff's April 22, 2021 surgical procedure. It was simply an exemplar video of the surgical procedure that Dr. Elkholy performed on the plaintiff. Furthermore, the subject matter of Dr. Elkholy's testimony, the facts and data upon which he was to testify, and a summary of his opinions were provided in his treatment records, surgical report, and permanency report that were provided in discovery. (Da7; Da20). The exemplar video did not alter Dr. Elkholy's substantive testimony and was simply used as an aid to assist the jury's understanding of his testimony regarding the surgery he performed. (5T26:3-22). It is respectfully submitted that under these circumstances, Judge Suarez

did not abuse his discretion in allowing Dr. Elkholy to use the demonstrative evidence at trial. *See*: *Lustig v. Reyes*, A-4881-14T3 at 18-20 (App. Div. 2018), *certif. denied*, 233 N.J. 466 (2018).

"There is nothing inherently improper in the use of demonstrative or illustrative evidence." *Scherzer*, 301 N.J. Super. at 434. New Jersey has a long-standing tradition of allowing the use of demonstrative evidence when it aids the jury in understanding relevant aspects of their case. *Cross v. Robert E. Lamb, Inc.*, 60 N.J. Super. 53, 74 (App. Div. 1960). This includes aiding the jury in understanding an expert's testimony. *Rodd v. Raritan Radiologic Associates, P.A.*, 373 N.J. Super. 154, 165 (App. Div. 2004). "It is in the nature of a visual aid-a model, diagram or chart used by a witness to illustrate his or her testimony and facilitate jury understanding." *Id.*, citing, *Macaluso v. Pleskin*, 329 N.J. Super. 346, 350 (App. Div. 2000), *certif. denied,* 165 *N.J.* 138 (2000). The test for admissibility for demonstrative evidence is whether the demonstrative illustration is an accurate reproduction of what it purportedly demonstrates. *Persely v. New Jersey Transit Bus Operations*, 357 N.J. Super. 1, 14-15 (App. Div. 2003), *certif. denied*, 177 N.J. 490 (2003).

It has also been held that demonstrative exhibits may be used by counsel in opening statements. *Renzo v. Jacobs*, A-2890-96T5 at 4 (App. Div. 1997). *Renzo* involved a medical malpractice claim where the surgery performed by the

defendant on the plaintiff's right foot resulted in a displacement of the plaintiff's great toe. *Id.* at 2. Defense counsel was permitted to use x-rays and visual aids during their opening statement. *Id.* at 3. The jury returned a verdict in the defendant's favor and the plaintiff appealed on the grounds that the trial court erred in allowing defense counsel to use the exhibits during their opening statement. *Id.* The Appellate Division disagreed and found that there was no judicial error because attorneys may use demonstrative evidence in opening statements as long as the proffered evidence is relevant, pertains to the merits of the case, and is approved by the Trial Cout. *Id.* at 4. It further explained that demonstrative exhibits that are not misleading and pertain to a subject of testimony in the case are appropriate and helpful in explaining the controversy to the jury. *Id.*

In the present matter, the exemplar video simply depicts a cervical discectomy procedure which is the surgery Dr. Elkholy performed on the plaintiff on April 22, 2021. (Da40; 3T202:22-203:2). Dr. Elkholy explained that the video would assist him in explaining the procedure he performed on the plaintiff to the jury. (3T203:6-9; 3T205:3-8). He further testified that the procedure shown on the video was duplicative of the plaintiff's surgery. (3T209:16-19). Therefore, a proper foundation was laid by Dr. Elkholy for the use of the video as a demonstrative aid at trial. *Persely*, 357 N.J. Super. at 14-

15. Furthermore, the video was properly used solely as demonstrative evidence by Dr. Elkholy as he was explaining the cervical discectomy procedure. (3T205:9-209:15; (5T26:3-22). It is respectfully submitted there was nothing improper with Dr. Elkholy's use of the demonstrative video and Judge Suarez did not abuse his discretion in allowing him to use the video to aid in the jury's understanding of his testimony explaining the surgery.

The defendant argues that Judge Suarez abuse his discretion for not barring the exemplar video under *N.J.R.E.* 403. As the party urging exclusion of relevant demonstrative evidence, the defendant was saddled with the burden of convincing the trial court that the evidence should be precluded pursuant to *N.J.R.E.* 403. *Rosenblit v. Zimmerman*, 166 N.J. 391, 410 (2001). *N.J.R.E.* 403 provides that evidence that is otherwise admissible may only be excluded if "its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence." Evidence claimed to be unduly prejudicial is excluded only when its probative value is so significantly outweighed by its inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the issues in the case. *State v. Long*, 173 N.J. 138, 163-164 (2002). Furthermore, "[t]he mere possibility that evidence could be prejudicial does not

justify its exclusion." *State v. Swint,* 328 N.J. Super. 565, 580 (App. Div. 1985), *certif. denied.* 102 N.J. 298 (1985).

The exemplar video utilized by Dr. Elkholy, which was short in duration without any sound or voiceover, was not unduly prejudicial. (Da40). There was nothing inflammatory about the video which simply showed the cervical discectomy being performed. (Da40). Dr. Elkholy did not sensationalize the video in any way during his testimony and simply used it to illustrate his testimony about how the procedure is performed. (3T205:9-209:15). Furthermore, the video was not admitted into evidence or given to the jury to review during their deliberations. Accordingly, the plaintiff respectfully submits that the defendant has not establish that the use of the exemplar video as a demonstrative aid was unduly prejudicial such that Judge Suarez abused his discretion in allowing the demonstrative evidence to be used at trial.

The defendant cites a line of cases involving accident reconstruction videos and computer enhanced exhibits in support of his argument that it was reversible error to allow the exemplar video to be used as demonstrative evidence at trial. The first is *Rodd* that involved a medical malpractice action arising out of the defendant's alleged failure to diagnose breast cancer in the plaintiff's decedent. *Rodd*, 373 N.J. Super. at 158. At trial, the plaintiff repeatedly used computerized imagery of x-ray films of the decedent's breast that were taken by the defendant

to show that a cancerous cluster was clearly visible on the x-ray. *Id.* at 167. The plaintiff had digitally scanned selected portions of different mammograms into a computer that were selectively composed to produce "super magnified" images that were projected onto a six-foot by eight-foot screen. *Id.* at 160. The computer generated exhibit magnified the images from thirty (30) to one hundred and fifty (150) times the size of the X-rays. *Id.* at 161. There was testimony that these super magnified enlargements distorted the images that existed on the X-ray films. *Id.* at 170.

The defendant also cites *Balian v. General Motors*, 121 N.J. Super. 118 (App. Div. 1972), *certif. denied*, 62 N.J. 195 (1973) in support of his argument. *Balian* was a product liability action arising out of a single vehicle accident that the plaintiff alleged was caused by the displacement of a rivet in the steering coupler. *Id.* at 121. The defendant's expert opined that the coupler was properly designed and that the vehicle would be steerable without the missing rivet. *Id.* at 124. During the course of trial, the expert conducted an experiment that was recorded in which he drove an exemplar vehicle without the rivet and claimed that he was able to drive the vehicle without any loss of steering ability. *Id.* This experiment was conducted after the results of a prior experiment had been ruled inadmissible by the Trial Court. *Id.* at 129. The Appellate Division found

that the recording of the experiment should not have been presented at trial. *Id.* at 132.

The defendant also cites *Macaluso* in support of his argument. In that case, the plaintiff was allowed to play a video entitled "Soft Tissue Animation" at trial as demonstrative evidence. *Macaluso*, 329 N.J. Super. at 349. The video contained a voiceover describing in detail what was shown on the video. *Id.* at 350. The Appellate Division found that the video was not a visual aid. *Id.* It noted that it was clear that the video was testimonial in nature and contained a great deal of information that was not relevant to plaintiff's medical condition and included speculation regarding the possible consequences of hypothetical injuries. *Id.* at 353. Furthermore, the plaintiff's expert did not use the video to explain his testimony to the jury and never even referred to the video when testifying about the plaintiff's injury and treatment. *Id.* at 350.

This matter does not involve a computer enhancement magnifying the actual diagnostic films one hundred and fifty times their size used to show that a doctor misread the diagnostic films, or a testimonial video that was not used by the testifying expert, or an accident reconstruction video. The demonstrative evidence in this matter was a video showing how a cervical discectomy procedure is performed. Dr. Elkholy's testimony establishes that it was a fair and accurate representation of the surgery that he performed on the plaintiff's

cervical spine. (3T209:16-19). It also established that it would assist the jury's understating of his testimony about how the procedure was performed. (3T203:6-9). The exemplar video was also not testimonial in nature as there was no sound or voiceover accompanying the video. (Da40). Furthermore, the video was used by Dr. Elkholy solely as a demonstrative aid to facilitate the jury's understanding of his testimony. It is, therefore, respectfully submitted that the specific rulings in *Rodd*, *Macaluso*, and *Balian* are not applicable to the case at bar and does not establish that Judge Suarez abused his discretion in the case at bar. Accordingly, the plaintiff respectfully submits that the judgment should be affirmed.

POINT II

THE COMMENT BY PLAINTIFF'S COUNSEL REGARDING THE TESTIMONY OF THE DEFENSE EXAMINING DOCTOR DURING SUMMATION DID NOT RESULT IN A MISCARRIAGE OF JUSTICE (4T106:23-108:19; 4T110:23-24).

Dr. Berman was asked about his interpretation of the MRI studies of the plaintiff's cervical spine on direct examination. (4T49:24-5:3). In explaining his findings, Dr. Berman began to testify that the MRI was normal with no disc herniations and then changed his testimony midsentence to state there were no significant disc herniations. (4T54:3-16). As the transcript provides:

> A There's some what's called hypertrophy over here. This is our age-related arthritic changes of these areas. These are commonly known as bone spurs or spondylitic changes. Just to go - -
>
> Q And, what do you mean by that, Doctor?
>
> A Those are bone - - those are normal findings where were would see, you know, - - so, these - - facet joints are larger than normal, and that would go along with just the aging process. **This, in my opinion, is a norm** - -
>
> Q Is it - -
>
> A - - **normal MRI with no disc herni** - - no significant disc herniations. There are no disc herniations impinging on any of the nerve roots. (4T54:3-16)(emphasis added).

Plaintiff's counsel then argued in summation that the jury should consider Dr. Berman's contradictory testimony in evaluating the weight of his opinions. (4T108:6-19).

While commenting upon Dr. Berman's testimony, plaintiff's counsel referred to two reports authored by Dr. Berman noting that it was indicated in a January 2020 report that the mechanism of injury supports an injury to the cervical spine and then noting that it was stated in February report that there were no disc herniations. (4T106:23-107:22). No objections were raised at this time. (4T106:23-107:22). Plaintiff's counsel began to reference the January 2020 report later in his summation at which time defense counsel raised an objection. (4T110:23-25). Defense counsel explained that she let the comment go the first time but objected to further comment specifically referencing the reports on the grounds that there was no testimony about the reports or there being no herniations presented at trial. (4T111:2-112:2). She further argued for a curative instruction to be given when plaintiff's counsel was finished. (4T111:21-22). Judge Suarez indicated that he would look at Dr. Berman's testimony again and that a curative instruction may be given. (4T112:9-16).

Judge Suarez excused the jury following summations and entertained argument regarding the objection to plaintiff's counsel's summation. (4T123:12-131:19). Defense counsel argued that there either needs to be a mistrial or curative instruction stating that plaintiff's counsel made a reference to Dr. Berman's February 25, 2020 review of an MRI and said he found no herniations but there was no testimony elicited about a February 25, 2020 report

and must be disregarded. (4T124:2-24). Judge Suarez indicated that he was inclined to go along with defense counsel's requested instruction and suggested an instruction. (4T126:16-20; 4T130:5-15; 4T131:3-14). Defense counsel stated that she can live with that instruction. (4T130:116-131:15). Judge Suarez printed out the instruction for counsel to review and there was no objection to the language of the instruction. (4T138:15-25). He then gave the following instruction to the jury before giving them the full jury charge:

> One thing beforehand. I'm – I'm just going to give you a -- a small limiting instruction just for your information. Plaintiff's counsel commented on Dr. Berman's not finding herniations in this first report as to the plaintiff. That was never testified to by Dr. Berman during the trial, and any comments by plaintiff's counsel during his closing in this regard is to be disregarded by you in your deliberations, okay? (4T140:14-22).

The full jury charge was then given to the jury after which they began their deliberations. (4T168:5-173:5). The defendant argues that the comment in summation regarding Dr. Berman's reports warrants a new trial. The plaintiff respectfully disagrees.

Summation is an important tool at trial to be used to point out important evidence for the jury to consider when deciding a case. In summation, attorneys are permitted to comment on "any evidence" presented at trial. *Iarrapino v. Dalli*, 2009 N.J. Super. Unpub. LEXIS at 9 (App. Div. 2009). Attorneys are also expected to make vigorous and forceful arguments to the jury during summation. *State v.*

Nelson, 173 N.J. 417, 460 (2002). Therefore, they are afforded broad latitude to argue any legitimate inference which may be drawn from the evidence. *Colucci v. Oppenheim,* 326 N.J. Super. 166, 177 (App. Div. 1999), *certif. denied,* 163 N.J. 395 (2000). "Counsel may draw conclusions even if the inferences that the jury is asked to make are improbable, perhaps illogical, erroneous or even absurd, unless they are couched in language transcending the bounds of legitimate argument, or there are no grounds for them in the evidence." *Spedick v. Murphy*, 266 N.J. Super. 573, 590-591 (App. Div. 1993), *certif. denied*, 134 N.J. 567 (1993).

Comments in summation do not justify reversal unless they were so egregious that they deprived the opposing party of a fair trial by substantially prejudicing the opponent's fundamental right to have a jury fairly evaluate the merits of his or her theories of the case. *State v. Papasavvas,* 163 N.J. 565, 625 (2000); see also; *State v. Ramseur,* 106 N.J. 123, 322 (1987), *cert. denied,* 508 U.S. 947 (1993). Furthermore, comments in summation are to be "viewed in the context of the entire record." *State v. Bey*, 129 N.J. 557, 622 (1992). When viewing the comments of plaintiff's counsel in the context of the entire record it cannot be said that they were improper and prejudiced the defendants' right to a fair trial such that they resulted in a miscarriage of justice.

Although Dr. Berman's reports were not presented during trial, the mere mention of the reports did not prejudice the defendant. As noted above, Dr.

Berman's testimony was equivocal on his interpretation of the MRI studies. (4T54:3-16). The transcript confirms that he changed his testimony from there being no disc herniations to there being no significant disc herniations. (4T54:3-16). Plaintiff's counsel was free to comment upon the changed testimony and argue any conclusion that the jury was free to reach. *Colucci,* 326 N.J. Super. at 177. Therefore, there is support in the evidence at trial for the argument that the jury should consider Dr. Berman's contradictory testimony in evaluating the weight of his opinions. (4T108:6-19). Furthermore, Judge Suarez properly addressed the defendant's objection to the comments regarding Dr. Berman's reports by issuing a curative instruction to the jury rather than granting a mistrial.

The grant of a mistrial is an "extraordinary remedy that should be exercised only to prevent manifest injustice." *Belmont Condominium Ass'n, Inc.*, 432 N.J. Super. at 98. The standard for granting a mistrial is:

> whether or not the error is such that manifest injustice would result from continuance of the trial and submission of the case to the jury. The consideration of the mistrial motion, however, has one additional element, namely the court's determination of whether or not the prejudice resulting from the error is of a nature which can be effectively cured by a cautionary instruction or other curative steps. *Id.* at 97-98.

A judge's ruling on a motion for a mistrial is discretionary and may not be disturbed on appeal unless there is a clear showing that the judge abused his or

her discretion. *Greenberg v. Stanley*, 30 N.J. 485, 503 (1959). "What is really meant is that such matters depend very largely on the 'feel' of the case which the trial judge has at the time and his first-hand judgment in denying such a motion will not be reversed by a reviewing tribunal on a cold record, even if the appellate court might have acted otherwise if sitting at the trial, unless it so clearly appears from the printed page alone that the happening on which the motion was based was so striking that because of it one of the parties could not thereafter have a fair trial." *Id.*

In the case at bar, Judge Suarez found that the appropriate remedy was to give the jury a curative instruction. (4T126:16-20; 4T130:5-15; 4T131:3-14). He drafted the instruction and provided it to counsel for their review. (4T138:15-25). There was no objection to the instruction. (4T138:15-25). Judge Suarez then instructed the jury that the comment by plaintiff's counsel that Dr. Berman did not find herniations in his first report was never testified to by Dr, Berman during trial and that they were to disregard any comments by plaintiff's counsel in this regard. (4T140:14-22). To the extent that there was any potential prejudice by counsel's comment, it was cured by Judge Suarez's instruction that the jury was to disregard the comments. (4T140:14-22).

The decision to provide a curative instruction is subject to the trial court's discretion who has the feel of the case. *NuWave Inv. Corp. v. Hyman Beck &*

Co., 432 N.J. Supe. 539, 567 (App. Div. 2013), *aff'd o.b.*, 221 N.J. 495 (2015). A curative instruction is sufficient when it is firm, clear, and accomplished without delay. *State v. Vallejo*, 198 N.J. 122, 134 (2009). When weighing the effectiveness of a curative instruction, a reviewing court should again give deference to the determination of the trial court. *Khan v. Singh*, 397 N.J. Super. 184, 202-203 (App. Div. 2007). Furthermore, "[t]he adequacy of a curative instruction necessarily focuses on the capacity of the offending evidence to lead to a verdict that could not otherwise be justly reached." *State v. Winter*, 96 N.J. 640, 647 (1984). Juries are generally presumed to understand and follow the Court's instructions. *State v. Loftin,* 146 N.J. 295, 390 (1996). "[T]hey are [also] presumed to follow curative instructions in the absence of evidence to the contrary, other than one side's disappointment with the verdict." *Zakrocki v. Ford Motor Co.*, 2009 N.J. Super. Unpub. LEXIS 2054 at 42 (App. Div. 2009), *certif. denied*, 200 N.J. 505 (2009), citing, *State v. Winter*, 96 N.J. 640, 649 (1984). "So long as the jury system is in vogue courts must assume that jurors possess sufficient intelligence and force of character to discharge their duty when properly directed." *Clark v. Piccillo*, 75 N.J. Super. 123, 133 (App. Div. 1962)(citation omitted).

In the present matter, Judge Suarez's curative instruction was appropriate and adequately addressed any perceived prejudice by the comments in counsel's

summation. There is also no reason to believe that that the jury either disobeyed Judge Suarez's curative instruction during their deliberations. The jury's monetary award does not shock the conscience when considered in light of the nature and extent of the medical evidence presented at trial, including the multiple cervical disc herniations, the failed conservative treatment, the cervical discectomy surgery, the need for future treatment, and the impact these permanent injuries have had on the plaintiff's life. Rather, the jury's verdict finding a permanent injury proximately caused by the defendant's negligence and award $250,000.00 in damages for his pain, suffering, disability, and loss of enjoyment of life is supported by the evidence presented at trial. The determination of the adequacy of a curative instruction will focus on the capacity of the offending evidence to lead to a verdict that could not otherwise be justly reached. *Winter*, 96 N.J. at 647. That is not the case in this matter. In this matter, there was more than enough evidence to support the jury's reasonable verdict. Accordingly, the plaintiff respectfully submits that the verdict should be affirmed.

POINT III

THE COMMENT BY PLAINTIFF'S COUNSEL TO WHICH NO OBJECTION WAS RAISED DID NOT HAVE THE CLEAR CAPCITY TO BRING ABOUT AN UNJUST RESULT (4T110:14-15).

During his summation, plaintiff's counsel discussed Dr. Berman's testimony on cross-examination regarding opinions for his own patients as opposed to those he offers when hired by a defendant and read his testimony from the transcript. (4T109:8-110:15). He specifically stated:

> And, then, at the end of his testimony, I asked him questions on cross-examination about how he would treat his own patients and what opinions he would have with regard to his own patients. And, I asked him -- and, I'm reading directly from the testimony you just heard.
>
> 'By Mr. Pocchia:
> Q In the course of treating your own patients over the years, have you ever offered an opinion to one of your own patients that they suffered a herniated disc as a result of trauma like a motor vehicle collision?
>
> A Yes.
>
> Q Okay. Doctor, let me understand this now. When it's your own patient when they have a motor vehicle accident and the MRI shows a herniated disc, you tell them, yeah, I think it was from the car accident. But, when you're hired by the defendant who did the rear end and you come to court, you say, no, no, no, it must be something else. Doctor, have you ever offered an opinion to one of your own patients that they were suffering from a herniated disc caused by a motor vehicle collision and the condition was permanent?
>
> A Yes.
>
> Q Once again, Doctor, when it comes to your own patients, you're not hesitant to tell them, listen, this herniated disc is permanent, it's not going to fix itself. But, when you're hired by a defendant and

> come to court on a rear end case, then, no, this is not a permanent condition.'
>
> Fast and loose with the evidence, ladies and gentlemen. (4T109:8-110:15).

Although defense counsel objected to another aspect of the summation regarding the contents of his report, no objection was raised to any aspect of this statement during the summation. (4T110:25-112:18). The defendant now argues that the judgment should be reversed because he contends that the passing reference to fast and loose with the evidence was improper. Again, the plaintiff respectfully disagrees.

Attorneys are "expected to make a vigorous and forceful closing argument to the jury," *State v. Nelson,* 173 N.J. 417, 460 (2002), and are permitted "wide latitude" in summation. *State v. Kelly,* 97 N.J. 178, 218 (1984). Therefore, comments in summation do not justify reversal unless they were so egregious that they deprived the opposing party of a fair trial by substantially prejudicing the opponent's fundamental right to have a jury fairly evaluate the merits of his or her theories of the case. *State v. Papasavvas,* 163 N.J. 565, 625 (2000); see also; *State v. Ramseur,* 106 N.J. 123, 322 (1987), *certif. denied,* 508 U.S. 947 (1993). Furthermore, comments in summation are to be "viewed in the context of the entire record." *State v. Bey*, 129 N.J. 557, 622 (1992). When viewing the passing fast and loose comment of plaintiff's counsel in such a way, it cannot be

said that they were improper, much less so prejudicial to the defendant's right to a fair trial that they resulted in a miscarriage of justice.

Proof that the comment by plaintiff's counsel was not inappropriate is the fact that no objection was made by experienced defense counsel when the comment was made. When a party believes that the comments made by counsel for the adverse party are prejudicial, an objection must be immediately made at trial. *Wimberly v. Paterson*, 75 N.J. Super. 584, 605 (App. Div. 1962), *certif. denied*, 38 N.J. 340 (1962). Here, defense counsel did not make any objections to the fast and loose statement that the defendant now complains about on appeal. (4T110:25-112:18). The decision of the defendant's experienced trial counsel to not make any objection speaks volumes about her belief that the comment was not prejudicial when it was made. As our Supreme Court recognized, "[g]enerally, if no objection was made to the improper remarks by counsel, the remarks will not be deemed prejudicial. Failure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made." *State v. Timmendequas*, 161 N.J. 515, 576 (1999).

By failing to make an objection, the defendant deprived Judge Suarez of the opportunity to give a curative instruction in regard to this specific statement. *State v. Murray*, 338 N.J. Super. 80, 87-88 (App. Div. 2001), *certif. denied*, 169

N.J. 608 (2001). The defendant "cannot for tactical reasons allow objectionable remarks or conduct to pass unnoticed and subsequently claim injury therefrom." *Wimberly*, 75 N.J. Super. at 605. Therefore, the jury's verdict can only be disregarded and a new trial granted on these grounds if the comment constituted plain error. *Linden v. Benedict Motel Corp.*, 370 N.J. Super. 372, 397 (App. Div. 2004), *certif. denied*, 180 N.J. 356 (2004). That means the comments must have possessed a clear capacity to bring about an unjust result. *State v. Ortisi*, 308 N.J. Super. 573, 594 (App. Div. 1998), *certif. denied*, 156 N.J. 283 (1998).

This matter did not involve a situation as occurred in the opinions cited by the defendant where the summation was replete with derogatory comments such as the defendant's case being rotten, garbage, hogwash, nonsense, etc. as occurred in *Geler v. Akawie*, 358 N.J. Super. 437, 468 (App. Div. 2003). In that matter, a new trial was granted because the repeated derogatory comments throughout the summation on a whole created an unjust result. *Id.* at 471. The other matter cited by defendant also involved repeated attacks on the opponent and the opponent's counsel that did not occur in the case at bar. *Henker v. Preybylowski*, 216 N.J. Super. 513, 518-519 (App. Div. 1987). It is respectfully submitted that the isolated fast and loose statement of plaintiff's counsel that the defendant complains about in this matter did not have the clear capacity to bring

about an unjust result. Accordingly, the plaintiff respectfully submits that the judgment should be affirmed.

POINT IV

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR A NEW TRIAL (5T19:3-29:19).

The defendant argues that the verdict should be vacated on the grounds that the cumulative effect of the alleged errors warrants a new trial. As argued above, the plaintiff respectfully submits that the trial court did not abuse its discretion in it evidentiary ruling regarding the use of demonstrative evidence or in its handling of the objected to comment by plaintiff's counsel in summation. The cumulative error doctrine is not applicable when there were no errors at trial. *State v. Rambo*, 401 N.J. Super. 506, 527 (App. Div. 2008), *certif. denied*, 197 N.J. 258 (2008). Nor is it applicable when there were errors but none were prejudicial and the trial was fair. *State v. Weaver*, 219 N.J. 131, 155 (2014). It has been recognized that "[d]evised and administered by imperfect humans, no trial can ever be entirely free of even the smallest defect." *Id.* Therefore, litigants are entitled to a fair trial but not a perfect one. *Id.*

The cumulative error doctrine was analyzed by the Supreme Court in *Pellicer v. St. Barnabas Hosp.*, 200 N.J. 22 (2009). The Supreme Court noted that, in appropriate circumstances "a new trial may be warranted when there were too many errors and the errors relate to relevant matters and in the aggregate rendered the trial unfair." *Id.* at 55 (citation omitted). It identified four factors to be considered in determining whether the doctrine applies to a given case:

whether the trial court's cumulative errors pervaded the whole trial; whether the trial court's "troubling discretionary decisions" opened the door to inflaming the jury's view of the evidence by pushing the jury to make "inappropriate and irrelevant" considerations; whether the trial court failed to treat the parties fairly and evenhandedly; and whether a "review of the complete record, including the jury selection method and the quantum of the verdict," distinctly suggested that the aggrieved party was not "accorded justice." *Id.* at 55-56.

The defendant has not established any of the factors for vacating a verdict under the cumulative error doctrine identified by the Supreme Court in the case at bar. The defendant contends that the trial court abused its discretion in a single evidentiary ruling regarding the use demonstrative evidence at trial and in its handling of the summation comment to which an objection was raised. Thus, this is not a situation where the alleged errors pervaded the entire trial. There is also no argument or proof offered establishing that Judge Suarez did treat the parties fairly and evenhandedly. Nor is there any proof showing that any of the alleged errors opened the door to inflaming the jury to make inappropriate considerations or that the verdict itself shows that the defendant was not accorded justice. In fact, the defendant does not even argue that the verdict was against the weight of the evidence or that the jury's award of damage was excessive or the improper result of passion, bias, or prejudice in its appellate

brief. Accordingly, the plaintiff respectfully submits that the cumulative error doctrine does not apply to the case at bar and the jury's verdict should stand.

Although the defendant appears to have abandoned his argument that the verdict was against the weight of evidence on appeal, the plaintiff will address this issue in the event he is misreading the defendant's brief. "Our civil system of justice places trust in ordinary men and women of varying experiences and backgrounds, who serve as jurors, to render judgments concerning liability and damages." *Johnson v. Scaccetti*, 192 N.J. 256, 279 (2007). It is the jury's "feel of the case" that ultimately controls the outcome of every case. *He v. Miller*, 207 N.J. 230, 266 (2011). "Once the jury is discharged, both trial and appellate courts are generally bound to respect its decision, lest they act as an additional and decisive juror." *Kassick v. Milwaukee Elec. Tool Corp.*, 120 N.J. 130, 135-36 (1990). In other words, a jury's verdict may not be set aside merely because a Court might have found otherwise. *Kovacs v. Everett*, 37 N.J. Super. 133, 138 (App. Div. 1955), *certif. denied*, 20 N.J. 466 (1956). Div. 1966).

The goal of a motion for a new trial is not for the Court to substitute its personal judgment for that of the jury, but to correct the jury's clear error of mistake. *McRae v. St. Michael's Medical*, 349 N.J. Super. 583, 597 (App. Div. 2002). The Supreme Court has long admonished trial courts to resist the natural impulse to substitute their decision for that of the jury. *Baxter v. Fairmont*

Foods, 74 N.J. 588, 597 (1977). Simply stated, the Court "is not the thirteenth and decisive juror." *Dolson v. Anastasia*, 55 N.J. 2, 6 (1969). The jury's verdict is entitled to considerable respect and should be set aside with great reluctance and only in the clearest cases of injustice. *Fritsche v. Westinghouse Elec. Corp.*, 55 N.J. 322, 330 (1970); see also; *Crego v. Carp*, 295 N.J. Super. 565, 577 (App. Div. 1996), *certif. denied*, 149 N.J. 34 (1997).

The Supreme Court has stressed that the Court's authority to set aside a verdict as being excessive is "limited." *Jastram v. Kruse*, 197 N.J. 216, 228 (2008). This is because a jury's verdict, including its award of damages, is cloaked with a presumption of correctness. *Cuevas v. Wentworth Group*, 226 N.J. 480, 501 (2016). Therefore, substantial deference must be accorded a damage award rendered by a jury. *Id.* at 485. "That substantial deference derives from the recognition that when a case is entrusted to a jury, the jury is responsible for determining the quantum of damages." *Orientale v. Jennings*, 239 N.J. 569, 589 (2019).

"A jury verdict, from the weight of evidence standpoint, is impregnable unless so distorted and wrong, in the objective and articulated view of the judge, as to manifest with utmost certainty a plain miscarriage of justice." *Carringo v. Novotny*, 78 N.J. 355, 360 (1979). *Rule* 4:49-1(a) instructs that a new trial may be granted only 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." (emphasis added). The same "miscarriage of justice" standard applies to the review of verdict by both trial and appellate courts. *R.* 4:49-1(a); see also; *R.* 2:10-1. A "miscarriage of justice" is a "pervading sense of wrongness needed to justify an appellate or trial judge undoing a jury verdict ... which can arise ... from manifest lack of inherently credible evidence to support the finding, obvious overlooking or underevaluation of crucial evidence, or a clearly unjust result." *Baxter*, 74 N.J. at 599, citing *State v. Johnson*, 42 N.J. 146, 162 (1964).

When determining if a damage verdict is so disproportionate to the injury and resulting disability as to shock the Court's conscience and convince it that to sustain the award would be manifestly unjust, the Court is to consider the evidence in a light most favorable to the injured plaintiff. *Spragg v. Shore Care*, 293 N.J. Super. 33, 63 (App. Div. 1996). As our Supreme Court instructed:

> A trial judge should not interfere with the quantum of damages assessed by a jury unless it is so disproportionate to the injuries and resulting disabilities shown as to shock his conscience and to convince him that to sustain the award would be manifestly unjust. In making its overview, **a court must accept the medical evidence in the most favorable light to the plaintiffs; it must accept the conclusion that the jury believed the plaintiffs' injury claims and the testimony of their supporting witness**, and if tested on such bases the verdict (even if generous) has reasonable support in the record, the jury's evaluation should be regarded as final. *Taweel v. Starn's Shopright Supermarket*, 58 N.J. 227, 236 (1971) (citation omitted)(emphasis added).

The Court must also "evaluate the nature and extent of the injury, the medical treatment that the plaintiff underwent and may be required to undergo in the future, the impact of the injury on the plaintiff's life from the date of injury through the date of trial, and the projected impact of the injury on the plaintiff in the future." *Jastram*, 197 N.J. at 229.

Our Supreme Court has further instructed that because reasonable people may disagree about inferences which may be drawn from common facts, the Court may not reweigh the evidence and impose a new verdict simply because it disagrees with the jury's decision. *Kulbacki v. Sobchinsky*, 38 N.J. 435, 444-445 (1962). "If reasonable minds might accept the evidence as adequate to support the jury verdict, it cannot be disturbed by the trial court." *Id.* at 445. Therefore, a jury's damages verdict should not be interfered with unless the overall amount is clearly against the weight of the evidence. *Horn v. Village Supermarkets, Inc.*, 260 N.J. Super. 165, 178 (App. Div. 1992), *certif. denied*, 133 N.J. 435 (1993). Furthermore, as the Supreme Court noted, there is a "wide range" in acceptable non-economic damages. *He*, 207 N.J. at 253.

The measurement of non-economic damages is an amount that reasonable persons would estimate to be fair compensation for the damages a plaintiff sustains as a result of the defendant's tortuous conduct. *Glowacki v. Underwood Mem'l Hosp.*, 270 N.J. Super. 1, 15 (App. Div. 1994). "That means such sum as

would be reasonable compensation for his [or her] bodily injuries, for the pain and suffering resulting therefrom, past, present and future, for the effect of those injuries upon his [or her] health according to their degree and probable duration, and for any permanent disability which in reasonable probability has resulted or will result." *Theobold v. Angelos*, 40 N.J. 295, 304 (1963). The reasonable compensation for such damages is left to the impartial conscience and judgment of the jurors. *Adams v. Cooper Hosp.*, 295 N.J. Super. 5, 13 (App. Div. 1996), *certif. denied*, 148 N.J. 463 (1997).

"In assessing damages in tort actions there generally is no precise correspondence between money and physical or mental suffering." *Goss v. American Cyanamid Co.*, 278 N.J. Super. 227, 240 (App. Div. 1994). Because pain and suffering do not have any known mathematical or financial dimensions, the only standard for evaluation is such amount as reasonable persons estimate to be fair compensation. *Botta v. Brunner*, 26 N.J. 82, 95 (1958). There is simply no predetermined graduated scale that is used to measure damages in a personal injury case. *Andryishyn v. Ballinger*, 61 N.J. Super. 386, 393 (App. Div. 1960), *certif. denied*, 33 N.J. 120 (1960). As the Supreme Court noted in *DeHanes v. Rothman*, 158 N.J. 90 (1999):

> The value of pain and suffering is simply beyond the reach of science. No Market place exists at which such malaise is bought and sold... It has never been suggested that a standard of value can be found and applied. The varieties and degrees of pain are almost infinite.

> Individuals differ greatly in susceptibility to pain and in capacity to withstand it. And the impossibility of recognizing or of isolating fixed levels of plateaus of suffering must be conceded. The nature of pain and suffering [thus] remains intrinsically and intractably subjective, and necessarily, any equation between pain, suffering, impairment and the like and monetary compensation remains elusive and speculative. *Id.* at 97 (internal citations omitted).

Therefore, the appraisal of the amount of non-economic damages is left to the sound discretion of the jury. *Cuevas*, 226 N.J. at 499 (2016).

In order to disregard the jury's award of damages, the defendant must establish that the damages assessed by the jury are so disproportionate to the plaintiff's permanent injuries and resulting disability that the award shocks the Court's conscience and convinces it that it would be manifestly unjust to sustain the award. *Orientale*, 239 N.J. at 589. The defendant has, however, failed to make a showing that the jury's verdict or its award of damages was in any way disproportionate to the plaintiff's permanent injuries and disabilities, never mind shocking to the conscience. It should be remembered that all evidence supporting the verdict must be accepted as true and all reasonable inferences must be drawn in favor of upholding the verdict. *Harper-Lawrence, Inc. v. United Merchants & Mfrs., Inc.*, 261 N.J. Super. 554, 559 (App. Div. 1993), *certif. denied*, 134 N.J. 478 (1993).

The evidence at trial established that the plaintiff began to experience complaints to his neck and upper shoulders the night of the collision. (2T87:25-

88:6; 2T90:1-7). He started an extensive course of treatment with an initial visit to the emergency room within days of the crash. (2T90:21-91:12). Objective MRI testing revealed that the plaintiff had multiple cervical disc herniations at C2-3, C3-4, C4-5, and C5-6 and that the herniated disc at C5-6 was a significant herniation. (2T189:15-192:15; 2T194:2-3). Objective EMG diagnostic testing also indicated C6 radiculopathy. (2T186:21-25; 2T187:4-9). Dr. Elkholy testified that these herniated discs were caused by the subject collision and are permanent injuries. (3T211:20-213:12). There is sufficient objective medical evidence supporting the jury's verdict that the plaintiff sustained a permanent injury as a result of the defendant's negligence.

The plaintiff underwent multiple pain management procedures for these permanent injuries. (2T96:7-21; 2T196:14-197:20). He also underwent a cervical discectomy on April 22, 2021. (2T98:4-5; 3T202:22-203:2). The plaintiff remained under the care of his surgeon and his medical practice for another year and a half. (3T210:25-211:3; 3T224:2-8; 3T227:17-19). His post-surgery treatment included a cervical medial branch block and occipital nerve blocks performed on August 19, 2021 and September 6, 2022 to treat headaches caused by pressure on the occipital nerve. (3T224:16-23; 3T227:17-22; 3T228:14-229:12). Although the plaintiff underwent this extensive treatment, he remains symptomatic. (2T103:6-11).

The plaintiff explained that he has good days where the pain is about a six out of ten and bad days when the pain is about an eight out of ten. (2T103:6-16; 2T105:1-5). He continues to take pain medication three to four times per week. (2T103:22-104:3). The plaintiff also testified about the impact his permanent injuries and the pain he continues to suffer from has on his life such as turning his head, bending to pick something up, and his recreational activities. (2T103:17-104:25). He also experiences discomfort when doing work even though his employer has made accommodations for him by providing him with a vehicle that has a more comfortable seat. (2T99:2-10; 2T104:4-9).

Dr. Elkholy testified that the plaintiff's pain will continue into the future and he will require a cervical fusion in the future. (3T213:17-214:4). It has long been recognized that a tortfeasor is liable for all damages that naturally and proximately flow from his or her negligence. *Ginsberg v. St. Michael's Hosp.*, 292 N.J. Super. 21, 35 (App. Div. 1996), citing, *Ciluffo v. Middlesex General Hospital*, 146 N.J. Super. 476, 482 (App. Div. 1977). This includes damages for future medical treatment. *Campo v. Tama*, 133 N.J. 123, 129 (1993). In order to recover these damages, a plaintiff is not required to establish that the future consequences are certain to occur. *Mauro v. Raymark Indus., Inc.*, 116 N.J. 126, 133 (1989). He or she only has to show that it is reasonably probable to occur. *Id.* Furthermore, "[t]he amount to be awarded [for future consequences] must

largely be left to the good judgment of the jury." *Coll v. Sherry*, 29 N.J. 166, 175 (1959).

The plaintiff's life expectancy at the time of trial was twenty-three point nine years. (4T6:3-10). He will continue to suffer from his permanent injuries for the remainder of his life. When evaluating the nature and extent of the plaintiff's permanent injuries, the impact those injuries have had on his life from the date of injury through the date of trial, and the projected impact of the injuries will have on the plaintiff over the remainder of his life, the jury's verdict of $250,000.00 for pain, suffering, disability, impairment, and loss of enjoyment of life is reasonable. The jury carefully weighed the objective medical evidence of the plaintiff's permanent injuries, the pain he has already endured and is expected to endure in the future, his loss of enjoyment of life, and the impact his permanent injuries have had on his employment and recreational activities in awarding damages. The record demonstrates neither clear error nor mistake by the jury in rendering its verdict and the defendant has failed to establish that there was a "miscarriage of justice under the law." Accordingly, the plaintiff respectfully submits that Judge Suarez properly denied the defendant's motion for a new trial and the judgment should be affirmed.

CONCLUSION

Based upon the foregoing facts and law, the plaintiff respectfully requests that the judgment be affirmed.

Respectfully submitted,

s/John J. Pisano, Esq.

By: _____

John J. Pisano, Esq.

Dated: January 13, 2025

SUPERIOR COURT OF NEW JERSEY
APPELATE DIVISION
DOCKET NO. A-3024-23

KARIM LEKHAL, Plaintiff/respondent, v. ANTHONY J. DEPASQUALE, 2ND, Defendant/appellant	:	CIVIL ACTION Docket No. A-003024-23 ON APPEAL FROM SUPERIOR COURT, LAW DIVISION BERGEN COUNTY Sat Below: Hon. Anthony Suarez, J.S.C.

REPLY BRIEF OF APPELLANT ANTHONY J. DEPASQUALE

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LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING THE UNDISCLOSED SURGICAL VIDEO DURIN PLAINTIFF'S EXPERT'S DIRECT EXAMINATION (3T. 202:6-204:8)

A. Respondent Has Not Provided Any Justification For the Failure To Disclose The Video In Discovery Or Pretrial Submissions, And Defendant Actual Prejudice (3T. 202-6 to 204-8)

The failure to disclose the surgical video in discovery as evidence to be used at trial as evidence to be used at trial violated Best Practices. The failure to disclose the video in either of the pre-trial exchanges prevented Defendant from filing an *in limine* motion or showing the video to his expert for comment. Plaintiff does not try to justify this discovery violation and the prejudice to Defendant is evident.

B. Respondent Has Failed To Demonstrate That The Sample Surgical Video Was Merely Demonstrative And An Accurate Reproduction Of The Video . (3T 202- 6 to 208- 19)

Respondent offers little in opposition to Appellants' argument, simply regurgitating the claim that the surgical video was demonstrative evidence and simply an exemplar video of a surgical procedure which was the "same" as the procedure which Respondent underwent. Respondent claims that this is supported by Dr. Elkholy's treatment records, surgical report, and permanency report. Respondent states that the exemplar video did not alter Dr. Elkholy's substantive testimony regarding the surgery he performed and that the video was simply there

to aid the jury. The problem with Respondent's position is that there is no support for these assertions. To the contrary, the surgical procedure shown on the video differed from what was contained in the operative report. Further, Dr. Elkholy's permanency report and treatment record provide no support for Respondent's argument as the records provide less detail about the procedure than the operative report itself.

Respondent failed entirely to respond to the argument that the surgery depicted in the video with Dr. Elkholy, showed the use of a mallet in the procedure, while the operative report does not describe any use of a mallet in the procedure which Plaintiff underwent. It is immaterial whether the procedure in the video and the procedure which Respondent have the same name. What is most important is that the procedures themselves were identical because if they were not, than the "exemplar" video will only mislead the jury. It cannot be argued that the surgical video is helpful for the jury's determination if the procedure shown to the jury is different than the one which Respondent underwent, which was the case here.

With regard to demonstrative evidence, "the admissibility of such evidence turns, in part, on whether it 'sufficiently duplicates the original event." Rodd, 373 N.J.Super at 165 (quoting Persley v. New Jersey Transit Bus Operations, 357 N.J.Super. 1, 14–15, (App.Div.), certif. denied, 177 N.J. 490 (2003). Many issues

can arise with regard to videotaped evidence. "Because of the indelible impressions that are likely to result from videotaped and other filmed evidence, such evidence must be subject to careful scrutiny." State v. Wilson, 135 N.J. 4, 20–21 (1994). The Court has previously held that [t]he camera itself may be an instrument of deception, capable of being misused with respect to distances, lighting, camera angles, speed, editing and splicing, and chronology. Hence, 'that which purports to be a means to reach the truth may be distorted, misleading, and false.'" Jenkins v. Rainner, 69 N.J. 50, 57 (1976) (quoting Snead v. Amer. Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 150 (E.D.Pa.1973)). Here, the film which was shown to the jury was subject to no such scrutiny. Rather, the Court merely accepted Plaintiff's counsel's representation that the surgery depicted in the video was exactly the same as the one which respondent underwent. (3T 203-6 to 204:25) The Court made no attempt to evaluate the video prior to allowing it to be played before the jury, did not conduct a N.J.R.E. 104 hearing, nor did the Court question the veracity of the assertion that the video was exactly the same as Plaintiff's surgical procedure.[1] The Court did not ask for any information of when the video was recorded; what the conditions were at the time of the recording, i.e.

[1] Appellant does not contend that counsel for Plaintiff made any willfully inaccurate assertions regarding the similarities between Plaintiff's surgical procedure and the procedure depicted in the video played for the jury. However, the record does not support the that the sample video was the exact same procedure.

whether the conditions of Plaintiff's surgery were the same or similar to those depicted in the video; whether the individual in the video has the same or similar stature as Plaintiff and whether there were any conditions which would have resulted changes in the surgical procedure. Rather the Court allowed it to be played over the timely objection of Defendant.

The Court adopted a *laissez-faire* approach in allowing the video to be played. The Court failed to appreciate the significant impact which observing a surgical procedure would have on the jury; failed to make any inquiry into the legitimacy of the video despite Defense counsel's request to make sure it was the same type, and simply accepted Plaintiff's counsel's representation that the procedure was exactly the same. (3T 204-3 to 25) These errors were compounded at the motion for new trial, when defense counsel alerted the Court to the discrepancies between the video and the surgical report and the Court merely accepted the Plaintiff's representation that the surgical procedure depicted in the video was exactly the same as the one which Plaintiff underwent. Further, the Court failed to appreciate that the video which was shown was an actual surgical procedure on an unnamed patient believing it to be a "simulation" or "model type thing." (5T 6-7 to 7-20)

Very clearly this discovery issue was not subject to any scrutiny. The Court failed to even examine the video before allowing it to be played in front of the jury.

Given the significant impact which motion pictures are considered to have on the jury, simply allowing the video to be played without even knowing what is on the video, let alone knowing whether the video would be helpful to the jury is reversible error.

II. RESPONDENT'S COMMENTS REGARDING DR. BERMAN'S REPORT IN SUMMATION AND THE COURTS FAILURE TO GIVE A FORCEFUL LIMITING INSTRUCTION CREATES A MISCARRIAGE OF JUSTICE, WARRANTING A NEW TRIAL (NOT RAISED BELOW)

The respondent initially argues that there was nothing prejudicial about his statements in summation and that Defense counsel agreed with the limiting instruction. This argument should be rejected as the Trial Court already acknowledged that the statements made in summation were improper and warranted a limiting instruction. Further, the timing and delivery of the limiting instruction rendered it ineffective as the Court essentially told the jury that the limiting instruction was inconsequential.

It is well settled that, for a curative instruction to be sufficient, it must be firm, clear, and accomplished without delay. State v. Winter, 96 N.J. 460 649, (1984); State v. Vallejo, 198 N.J. 122, 134 (2009). "The effect of improperly admitted evidence can be eradicated by an immediate and strong curative instruction to the jury to disregard the evidence if the instruction is 'firm, clear, and accomplished without delay.'" State v. Thomas, 2014 WL 9879777 (App. Div. 2010)(quoting

Vallejo, 198 N.J. at 134; Winter, 96 N.J. at 648). The curative instruction should be couched in the strongest terms possible in order to cure any potential error. See State v. LaPorte, 62 N.J. 312, 318 (1973). To cure the potential prejudice, the curative instruction must be sharp, forceful or otherwise firm so as to instruct the jury to disregard the potentially prejudicial comment or evidence. See Winters, supra at 643, 649 ("forceful," sharp and complete instruction deemed sufficient); State v. Hernandez, 334 N.J. Super. 264, 273 (App.Div.2000) (potential prejudice from improper comments by prosecutor cured by prompt and firm curative instructions), aff'd, 170 N.J. 106 (2001); State v. Catlow, 206 N.J.Super. 186, 193 (App.Div.1985) (sharp and complete curative instruction cured error), certif. denied, 103 N.J. 465, 648 (1986). State v. Tirado, 2009 WL 259356 (App. Div. 2009)(a prompt and emphatic curative instruction).

First, there can be no dispute that the necessary limiting instruction was delayed. At the time of the objection, after a brief discourse between counsel, the Court acknowledged that a curative instruction may be necessary but stated that it would have to look at it again. Defense counsel offered the index but the Court responded, "I'm not going to look at it right now." 4T 112-13 to 14. The plaintiff's counsel was permitted to continue his closing. Thereafter, the jury was excused and after colloquy the Court went into recess at 12:26:44 until 1:42:19 PM. Again, after some colloquy the Jury returned and the Court finally gave the Jury a limiting

instruction. The limiting instruction was not given until well over an hour after the offending statements by Defense counsel, after the Court recessed and the Jury was excused for lunch. There can be no dispute that the instruction which was given to the jury came with significant delay. Further, it was certainly possible to deliver the instruction sooner as the Court determined to release the Jury early for lunch:

> THE COURT: All right. Members of the jury, it's already quarter after. We have to work out one issue with the attorneys. And, when I give you the charge, I don't want you to have to be, you know, sitting here throughout -- until, like, 1:00 straight. I think it's better you take a break. You'll come back at 1:30 as we've doing, the normal lunch break. So, you have an extra 15 minutes. I'll charge you at that time, and then you can -- you'll be deliberating this afternoon. So, at this point, I'm going to excuse you until 1:30. Again, don't discuss the case amongst yourselves or with anyone else, or do any independent research on the case, or discuss the case with anyone outside of obviously the jury. When the deliberations start, that's when you'll be able to discuss the case, which will be this afternoon. So, at this point in time, have a good lunch, and I will see you at 1:30.

(4T 122-18 to 123-10) Further, shortly after the jury was excused, but before the Court recessed for lunch the Court indicated that it would be inclined to issue a limiting instruction. (4T 126-16 to 20) Accordingly, although the Court could have issued a limiting instruction without delay it elected not to.

Significantly, the instruction itself was also not forceful. At the time of the delivery of the instruction, the Court's own commentary diminished the impact of the charge to the jury and instructed them to give little weight to it. The Court delivered the following instruction:

> One thing beforehand. I'm -- I'm just going to give you a -- **a small limiting instruction just for your information.** Plaintiff's counsel commented on Dr. Berman's not finding herniations in this first report as to the plaintiff. That was never testified to by Dr. Berman during the trial, and any comments by plaintiff's counsel during his closing in this regard is to be disregarded by you in your deliberations, **okay?**

(4T 140-14 to 22) (emphasis added.) This instruction is not forceful in any way. The Court started the instruction by telling the Jury that it was a small limiting instruction for informational purposes. This language broadcasts to the jury that the instruction is small and was only being delivered for informational purposes. The Court did not emphasize the importance of the instruction and in fact downplayed it. The Court further did not command the jury to disregard Plaintiff's counsel's statements but stated generically, that Plaintiff's counsel "commented on Dr. Berman's not finding herniations in this first report as to the plaintiff" and then states "[t]hat was never testified to by Dr. Berman during the trial, and any comments by plaintiff's counsel during his closing in this regard is to be disregarded by you in your deliberations." The Courts instruction coupled with the Court's commentary downplaying the instruction neutralized any potential curative effect. When delivered this way the Court effectively broadcasted that Plaintiff's Counsel's statements should be disregarded, but leaves the jury to consider whether or not Dr. Berman did state in his report, that there were no herniations. The instruction was further weakened when the Court ended the instruction with "ok?" thereby essentially asking the Jury if they accept the instruction or not. The

Court could have been forceful in its instruction but was very clearly given in a way which let the Jury know that the Court was hesitant to give the instruction and gave little weight to the instruction. Accordingly, the limiting instruction was not forceful.

III. RESPONDENT'S DISPARAGING COMMENTARY OF DEFENDANT'S EXPERT, DR. BERMAN AND INTRODUCTION OF EXTRINISIC INFORMATION NOT PART OF THE RECORD WARRANTED NEW TRIAL. (5T 18:25-31:20)

In Respondent's brief he seeks to minimize the improper conduct which occurred in Plaintiff's closing by directing the Court only to the "fast and loose" comments which were made. Respondents limitation in his argument is rather telling as there is no explanation or excuse provided for the statements. Further, Respondent does not argue that his "fast and loose" comment was proper; rather he only argues that because there was no objection then it must have been fine; otherwise, Respondent makes no argument in opposition to Appellant's assertion that the "fast and loose" comment was improper.

Respondent also only argues that the "isolated" fast and loose comment did not bring an unjust result. The "fast and loose" comment was not isolated but was merely a part of Respondent's improper conduct during closing. First, Plaintiff's counsel stated:

> So, in the earlier report of January of 2020, -- I'm going to read this to you. This is Dr. Berman's words. "The mechanism of injury does support an injury to the cervical spine." So, his initial thought is this man was hurt. And, then he's saying to himself, okay, I'm going to go

> to court someday, and I'm going to be called as a witness for the defendant. What am I going to say when I get there, because I wrote that the mechanism of injury does support an injury to the cervical spine.
> So, he gives it some thought. And, at the same time, in February, he wrote another report. And, at the same time, in February, he wrote another report. And, he initially says, when he looks at the MRI film, the words "no disc herniations", okay? So, we have two opinions by Dr. Berman to start us off. Number one, the mechanism of injury caused injury -- the mechanism of the accident caused the injury, but I don't see any herniations.
>
> Then he comes to a realization I've got to go to court, and I've got to face this jury, and I've got to say something about this case. What am I going to say? And, he looks at those MRI films, and he says to himself -- I can only presume, I suggest to you -- I can't look at that film and tell this jury that there's no problem, that there's no herniated disc. I don't -- I said it -- I say there is no herniated disc. But, now I'm looking at it, and I can't say that. So, what am I going to do? I got it. I'm going to tell this jury that the herniated discs are there, but they're small. They're just small, or they're not significant, or they shouldn't be causing him any pain. (4T 107-23 to 108-5).

Clearly, the commentary was not isolated. Plaintiff's counsel was unrestrained in his decision to reference the contents of reports, manipulate the Jury into thinking he was providing a false or misleading opinion, manipulating the evidence, and painting Dr. Berman as being willfully dishonest with them.

It is "improper for an attorney to make derisive statements about parties, their counsel or their witnesses" Szczecina v. PV Holding Corp., 414 N.J. Super. 173 (App. Div. 2010)(citing Rodd 373 N.J Super at 171-72. "Although attorneys are given broad latitude in summation, they may not use disparaging language to discredit the opposing party or witness." Henker v Preybylowski, 216 N.J.Super.

513, 518-519 (App. Div. 1987). In Rodd, counsel referred to defendant's expert as a "professional witness" who "adjust(ed) his testimony for every case". Id. "An attack by counsel upon a litigant's character or morals, when they are not in issue, is a particularly reprehensible type of impropriety." Paxton v Misiuk, 54 N.J.Super.15, 22 (App. Div. 1959).

Respondent does not dispute that the cited commentary was improper and merely seeks to ignore the existence of the comments and direct the Court away from this argument. However, this commentary cannot be ignored as they clearly give rise to an unjust result. Respondent manufactured non-existent testimony and imputed it on Dr. Berman and then made disparaging remarks, attacking Dr. Berman's character based upon the manufactured testimony which was never made by Dr. Berman.

Counsel for Plaintiff also agreed, that he could not " find any direct testimony in his -- in his video that he said I didn't see any herniations on the first MRI. He says I think the MRIs are identical is -- is how he testified ultimately at trial." (4T 125-22 to 126-1). Thereafter, Plaintiff's counsel tried to rationalize the commentary during summation by citing to a clear incomplete misstatement, which Dr. Berman immediately corrected, and the court rejected that rationale. This was done when defendant had no opportunity to correct the blatant mischaracterization Plaintiff's counsel did so to deliberate impugn the credibility

to Dr. Berman to the jury and successfully mischaracterized Dr. Berman's testimony. This was clearly misleading the jury. Further, the Courts delay in issuing a limiting instruction allowed ample time for the offending commentary to take root in the minds of the Jurors thereby further prejudicing Defendant. Plaintiff's conduct created an unjust result warranting a new trial free of Plaintiff's counsel's improper commentary in closing argument.

IV. THE TRIAL COURT ERRED IN DENYING DEFENDANT/ APPELLANT'S MOTION FOR A NEW TRIAL. (5T 18:25-31:20)

Respondent makes little effort to respond to Appellant's argument that the Court erred in denying the motion for new trial. Respondent's only responsive argument is that the Court did not abuse its discretion without any factual or legal support for this assertion. Instead, Respondent argues that the verdict was not against the weight of the evidence. Respondent then regurgitates its argument with regard to his case on damages. Thereafter, Respondent simply argues once again that their was no "miscarriage of justice under the law" without any application of the law to his argument. Simply put Respondent's argument amounts to nothing more than Plaintiff was hurt, had treatment, so the $250,000.00 verdict should not be set aside.

First, Respondent claims that Appellant abandoned its argument that the verdict was against the weight of the evidence. First, this argument is misleading as this argument was neither the basis of this appeal nor was it the basis of the motion

for new trial. The theory asserted by Respondent which makes up the entire basis of his argument against that the motion for new trial has no relevancy to this appeal. Respondent's argument deals only with a Courts decision "to overrule a jury verdict, **not on the basis of trial error on questions of law**, but because of claimed discordance between the verdict and the evidence on which it was based. Baxter v. Fairmont Food Co., 74 N.J. 588, 594 (1977) (emphasis added.) This appeal is based on trial error, not based on the discordance between the verdict and the evidence.[2] Accordingly, this argument should be disregarded by the Court as irrelevant to its determination.

With regard to Respondent's argument against a new trial, he cites to four factors which are considered when applying the cumulative effect doctrine. The factors are whether "the matters as to which the trial court erred demonstrates that they pervaded the trial", whether "many of the troubling discretionary decisions permitted plaintiffs to shift the jury's focus from a fair evaluation of the evidence to pursue instead a course designed to inflame the jury, appealing repeatedly to inappropriate and irrelevant considerations that had no place in the courtroom", "the treatment of the parties was not even-handed, with defendants, but not plaintiffs, being limited in their proofs or criticized for their words", and "a review

[2] While the appeal does not deal with the issue of the verdict being against the weight of the evidence, Appellant does not concede that the verdict was appropriate.

of the complete record, including the jury selection method and the quantum of the verdict, engenders the distinct impression that defendants were not accorded justice." Pellicer ex rel. Pellicer v. St. Barnabas Hosp., 200 N.J. 22, 55–56 (2009)

Here all of the factors have been implicated warranting a new trial. First, it is clear that the conduct of Plaintiff pervaded the Jury. Respondent spent a great deal of his summation attacking the character and credibility of Appellant's expert without basis, telling the jury the Dr. Berman was willfully misleading them and manipulating the evidence. Second, the Courts discretionary decisions in failing to deliver a forceful and timely limiting instructions, permitting Plaintiff to play a surgical video of a stranger without requiring its disclosure in discovery or reviewing the video or subjecting it to a Rule 104 hearing allowed the jury to consider irrelevant issues, false testimony, and view a grotesque surgical procedure. None of these issues assisted the jury in their determination, rather they inflamed the jury and misled them. Third, the treatment of the parties was not even handed. While Defendant does not contend that they were criticized for their words, the Court was liberal with discretionary rulings which heavily favored the Plaintiff and unduly prejudiced Defendants. Permitting Plaintiff to play the surgical video, failing to appropriately address the significant and frequent improper comments made in summation, and refusing to consider a mistrial in light of false testimony he imputed upon Dr. Berman in his summation was an improper

exercise of discretion in favor of Plaintiff. Further, the Court did not exercise any discretion in favor of Defendants which would at least reduce the undue prejudice. The Court could have reviewed the video *in camera* outside of the view of the jury before permitting it to be played. The Court could have asked some questions of Plaintiff to determine whether the video was an accurate depiction of what it was purported to have been. The Court further, could have issued a timely and forceful limiting instruction with regard to Plaintiff's commentary in summation, rather, he permitted the summation to continue, and elected to take lunch before addressing the issue with the jury. Further, the Court treated the instruction as a small FYI as opposed to a requirement that the Jury not consider the video. Because of these erroneous rulings and their clear impact on the Jury, it is apparent that the Defendants were not accorded justice.

CONCLUSION

For the foregoing reasons, defendant/appellant Anthony J. Depasquale, 2nd respectfully requests that this Court reverse the judgment below, and the order denying the motion for new trial, and remanded for new trial on damages.

Respectfully submitted,
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BY: _/s/ William J. Martin__
WILLIAM J. MARTIN