ANGEL MAY RIDER, Plaintiff-Respondent, v. JERSEY CITY TRANSFER, INC., ALERT MOTOR FREIGHT, INC., HAIER US APPLIANCE SOLUTIONS, INC. d/b/a GE APPLIANCES, AND ANTHONY COTUGNO, AS ADMINISTRATOR OF THE ESTATE OF PAUL DEPASS, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY Sat Below: Hon. Thomas R. Vena, J.S.C. Docket No. ESX-L-2221-19

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS JERSEY CITY TRANSFER, INC., ALERT MOTOR FREIGHT, INC., AND ESTATE OF PAUL DEPASS

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PRELIMINARY STATEMENT

This appeal arises from a jury verdict for $55 million to a single plaintiff in an automobile accident case. The trial court's erroneous rulings and incorrect jury instructions, among other errors, led to the shocking verdict.

The action arises out of a series of three car accidents on Interstate 95 ("I-95") in Maryland. Despite Maryland's paramount interest in regulating conduct on roads within its territory, the trial court erroneously held that New Jersey law applied to every issue in the case, and then ignored New Jersey law; namely, that when a vehicle strikes a stationary vehicle ahead of it, the rear-driver is negligent as a matter of law and a jury should be so instructed. Dolson v. Anastasia, 55 N.J. 2, 10 (1969); Jones v. Bennett, 306 N.J. Super. 476, 484-85 (App. Div. 1998). These errors were compounded by a jury verdict form that asked the jury to decide that specific question of law, i.e., whether the plaintiff who rear-ended a vehicle ahead of her was negligent; the jury incorrectly answered, "no".

Moreover, the jury's extraordinary damages award for future medical expenses—$25 million—lacked a basis in probability. The award ignored expert testimony and projections, and was infected with sympathy and based on speculation, rather than credible evidence. In addition, the trial court also failed to bifurcate trial and then allowed unduly prejudicial exhibits into evidence.

The trial court's combination of errors resulted in an unfair trial for the

appellant-defendants and a shockingly high verdict—the highest compensatory damages award ever for an automobile accident case in New Jersey. The cascade of errors, notably the trial court's fundamental failure to rule and instruct the jury that Plaintiff was negligent as a matter of law when she struck the stationary vehicle ahead of her, requires reversal and a new trial.

PROCEDURAL HISTORY

After an automobile accident on December 21, 2018 in Maryland, Plaintiff Angel May Rider ("Ms. Rider" or "Plaintiff") filed this action in Essex County Superior Court on March 22, 2019, alleging claims sounding in negligence against Defendant-Appellants Estate of Paul DePass, Jersey City Transfer, Inc., and Alert Motor Freight, Inc. ("Appellants"), and Defendant-Respondent Haier US Appliance Solutions, Inc. d/b/a GE Appliances ("GEA").

On September 6, 2023, all of the defendants filed motions for summary judgment. Appellants' motion argued in support of a choice-of-law analysis, applying Maryland law to issues related to liability and an issue regarding damages. Specifically, Appellants argued that Maryland law applied to issues regarding whether Plaintiff was contributorily negligent and/or assumed the risk, as well as for the application of Maryland's noneconomic damages cap, i.e., Md. Code Ann., Cts. & Jud. Proc. §11-108. (1T5:3–13:23.)

On December 1, 2023, Judge Jeffrey B. Beacham, J.S.C., granted summary

judgment to GEA, (Da14-15), and denied Appellants' motion for summary judgment, (Da12-13). With respect to the application of Maryland law, the motion court held that, because each driver in all three of the accidents was a resident of New Jersey, New Jersey law would govern all issues in the case, even those regarding liability on the roads of Maryland. (1T14:1–18:18; Da13.)

On February 21, 2024, Appellants moved to bifurcate this case with respect to liability and damages, per Rule 4:38-2(b), to avoid confusing the jury and to ensure that juror sympathy regarding the tragic and gruesome nature of Plaintiff's injuries did not infect the jury's determination on liability. The motion court denied Appellant's motion to bifurcate on March 15, 2024. (Da17-18.)

After empaneling the jury, on April 2, 2024, in light of the trial court's decision denying to bifurcate trial, Appellants moved in limine to exclude two unduly prejudicial exhibits: (i) a gruesome photograph that depicts Plaintiff's mangled legs as she was taken by ambulance to the hospital, Exhibit P90, and (ii) a graphic amputation diagram that showed how and where the doctors would sever Plaintiff's legs, Exhibit P87. (2T11:20–12:22 (referring to Da31-Da32).) Appellants argued that both exhibits had a significant likelihood of severely prejudicing the jury and that such prejudice substantially outweighed whatever probative value the exhibits offered, given the anticipated testimony of Plaintiff's six medical experts, along with the presence of Plaintiff, an amputee, in the courtroom in front of the jury.

(2T12:2-22.) Further, Appellants argued that both exhibits were first disclosed at the de bene esse deposition of one of Plaintiff's doctors on March 11, 2024—less than 30 days before beginning trial—and were therefore untimely. (2T16:17-24; 2T17:12-20.) The trial judge, Judge Thomas R. Vena, J.S.C., denied Appellants' motion to exclude the two exhibits. (2T18:3-20.)

At the close of Plaintiff's case, on April 9, 2024, before beginning the charge conference, Appellants moved for reconsideration of the choice-of-law issue under Rule 4:42-2(b), seeking to have Maryland law apply to liability, i.e., Plaintiff's contributory negligence and/or assumption of the risk, and to cap noneconomic damages in accordance with Maryland law. (6T153:16–154:16; see also 6T156:6-17.) The trial court denied Appellants' motion for reconsideration. (6T156:18–157:1 ("I find that there's no basis by which this Court can, in essence, overturn what Judge Beacham did, ... All I can say is take it up with the Appellate Division --").)

Next, Defendants moved for a directed verdict, arguing that Plaintiff was negligent in causing the second accident in the three-accident-series, and that Plaintiff's negligence was a proximate cause of the third accident in the three-accident-series, involving the now-deceased driver of Appellants' truck, Paul DePass ("Mr. DePass"). (6T165:9–166:14.) Defendants argued in part:

> We have a plaintiff who admitted on the stand that she guessed so [sic] that her lack of reasonable and prudent operation was the cause of at least the middle accident, which put her into the spot that she was in. But for that, we

> don't get into an accident. ... And even if they do there's a proximate cause analysis associated with this case. An approximate [sic] cause analysis, it says, well, what's the substantial factor and the substantial factor is the plaintiff herself putting herself in a position of peril. That's the but for statement.
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> [(6T165:17–166:14.)]

After moving for a directed verdict on Plaintiff's negligence, the trial court denied Appellants' motion in an oral opinion on the record. (6T167:8–168:4.) Still, the trial court agreed that the "jury could very well find negligence on the part of the plaintiff", but reasoned that it is for the jury to determine Plaintiff's comparative negligence, not the court. (6T167:8–168:4.)

At the charging conference, after the court denied the motion for a directed verdict as to Plaintiff's negligence, Appellants urged the court to include "plaintiff and/or defendant" (not simply defendant only) in instructing the jury as to Charge 5.10B on foreseeability.[1] (6T182:6–183:4 (referring to line 2, 3, and 5 of the first

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[1] Defendants urged the Court to read Charge 5.10B as—

> In determining whether reasonable care has been exercised, you will consider whether the **plaintiff and/or defendant** ought to have foreseen, under the attending circumstances, that the natural and probable consequence of the **plaintiff's and/or defendant's** act or omission to act would have been some injury. It is not necessary that the **plaintiff and/or defendant** have anticipated the very occurrence which resulted from the defendant's wrongdoing, but it is sufficient that it was within the realm of foreseeability that some harm might occur thereby.

paragraph in Charge 5.10B).) Moving to Charge 5.30A, Appellants persisted in their argument as to Plaintiff's negligence, arguing that Charge 5.30A "should apply to both parties because both parties are saying that they are the proximate cause of the accident as a result of their respective operations of a motor vehicle."[2] (6T197:3-6;

[(See 6T182:6–183:4.)]

[2] Charge 5.30A states the following:

> The plaintiff asserts that the defendant in this case was guilty of negligence in the operation of his/her automobile. You can appreciate that when people drive their motor vehicles on our highways, they have certain rights and assume certain obligations and responsibilities. They have the right to enjoy the streets and highways but they must make proper and lawful use of this right. They must use it with reciprocal regard for the rights of others who may be driving upon the highway, and so as not to negligently injure other persons lawfully upon the streets. This simply means that the driver of an automobile upon a public highway is under the duty of exercising for the safety of others that degree of care, precaution and vigilance in the operation of his/her car which a reasonably prudent person would exercise under similar circumstances. It has sometimes been defined as care commensurate with the risk of danger. Thus, the driver of an automobile is required to use reasonable care in the control, management and operation of his/her machine. He/She is required to make such observation for traffic and road conditions and to exercise such judgment to avoid collision or injury to others on the highway, as a reasonably prudent person would have done in the circumstances. This duty of reasonable care by users of the highways is mutual and ordinarily each may assume that the other will observe that

see also 6T196:1-11.) But, while the court charged the jury with portions of the duty of automobile drivers to make observations, Charge 5.30G, it did not instruct the jury with any portion of the general duty owed by automobile drivers, Charge 5.30A. (Cf. 7T112:24–114:21.) Instead of charging the jury with the general duty owed, Charge 5.30A, the court charged the jury on the combined definition of negligence in the context of comparative negligence, Charge 7.30(C). (Cf. 7T103:2-23.)

Later in the charge conference, Appellants once more put the issue of Plaintiff's negligence as a matter of law before the court, urging the court to instruct the jury on Plaintiff's violation of N.J.S.A. 39:4-89, Charge 5.30D. (6T205:22–206:6; 6T206:18-25.) Hence, counsel for Appellants confirmed that Charge 5.30D—"[D]o you have 530(d)? [sic]"—would be included in the jury's instructions; that is, as it applied to Plaintiff, not Appellants, his own clients. (6T206:24.) But, the court did not instruct the jury on Charge 5.30D(2) as it applied to Plaintiff, and instead only instructed the jury on Charge 5.30D(1) as it applied to Appellants in regard to 49 C.F.R. § 392.14, Federal Motor Carrier Safety Regulations. (7T111:15–112:23.)

On April 11, 2024, the jury returned a verdict in favor of Plaintiff, finding no negligence attributable to Plaintiff and finding Appellants negligent. (8T4:14–8:24.)

> standard of conduct in the use thereof. Negligence is then the failure to adhere to this standard of conduct.
>
> [Model Jury Charge (Civil), § 5.30A "General Duty Owing" (Aug. 1999).]

In total, the jury awarded $55,000,000.13 in damages, distributed as follows:

a. Reasonable expenses of necessary medical care in the past: $559,413.13, a stipulated amount;
b. Past and Future Lost Wages: $2.5 Million;
c. Reasonable expenses of necessary medical care that Plaintiff will incur in the future: $25 Million;
d. Past pain and suffering, embarrassment and humiliation, disfigurement, loss of ability to enjoy life's pleasures, and disfigurement: $3 Million; and
e. Future pain and suffering, embarrassment and humiliation, disfigurement, loss of ability to enjoy life's pleasures, and disfigurement: $23,940,587.[3]

[(Da19.)]

The court molded the jury verdict to $59,301,973.04 and entered Final Judgment on May 6, 2024. (Da1-3.)

After trial but before the court entered Final Judgment, on April 30, 2024, Appellants filed a post-trial motion for a new trial on all of the issues, or in the alternative remittitur, or in the alternative judgment notwithstanding the verdict. (9T4:10-14; 9T5:11–15:18; 9T29:5–32:18.) Appellants' post-trial motion was denied by the trial court in an oral opinion after oral argument on July 11, 2024, (9T32:21–38:3), and an Order, dated July 17, 2024, (Da4-11).

In denying Appellants' post-trial motion, the court neither explained how nor why the core arguments advanced by Appellants were incorrect or distinguishable, i.e., why Dolson is distinguishable and inapplicable, but instead reasoned that all

[3] The unusual jury award of $23,940,587 for future pain and suffering, when added with the stipulated amount of expenses for past medical care, shows that the jury reverse engineered its verdict to reach a pre-determined amount of $55 million.

questions regarding negligence were for the jury. (9T33:6–34:18.) Indeed, even though Dolson mandates that, in the absence of a non-negligent excuse, a jury be instructed of a driver's negligence when he or she strikes the vehicle ahead of him or her, see Dolson, 55 N.J. at 10 ("Failure to do so resulting in a collision, **is** negligence and jury should be so instructed." (emphasis original)), the trial court held the opposite: "You can say all you want about Dolson, but Dolson does not require the Court to mandate the answer to that question to the jury. ... There was more than enough testimony that would suggest that a reasonable jury could find that there was no negligence on the plaintiff's part. It was not a determination that needed to be made as a matter of law. It was a jury function and they were adequately instructed." (9T34:2-18.) In its statement of reasons, even though Dolson applies regardless of a vehicle's speed, the trial court emphasized that Plaintiff was not speeding and as a result, in the trial court's view, Appellants did not meet their burden in seeking to have the jury instructed on Plaintiff's negligence. (Da9.)

Likewise, the court did not address Appellants' argument regarding whether the damages-related evidence and expert testimony for future medical expenses were based in terms of "reasonable probability," but rather the court insisted it was within the jury's province to decide which evidence to rely upon in awarding damages. (9T35:2–36:21; accord Da11 ("If Plaintiff were to start in-home care now, at the age of 28, the $1.8 million budgeted for in-home care **could** 'at least double' or come

close to tripling that number. ... It is **possible** that future technological developments or interventions in the next 50 years **could** affect the cost of future medical care. ... The jury chose to find Plaintiff's experts credible . . .") (emphasis added).)

STATEMENT OF FACTS

This case arises from a series of connected events and accidents that led to Plaintiff suffering injuries that resulted in the amputation of both her legs. On December 21, 2018, Ms. Rider left her mother's home in New Jersey to commute to her job at an I-95 Rest Area in Maryland. (5T179:16–181:24.) It was dark, raining steadily, and foggy—visibility was very poor. (5T179:16–181:21; 6T12:22–13:5; 3T160:10–163:8.) At about 3:30 a.m., Ms. Rider exited I-95 in Elkton, Maryland for food and then re-entered the highway by way of an entrance road. (5T181:11-24.) As she did so, she struck a stopped white Kia Forte in her lane of travel, the right lane of I-95, which was disabled from an accident moments earlier. (5T182:3-13.)

Despite the poor visibility, data from Ms. Rider's vehicle established that she reached a speed of 64.3 miles per hour two seconds before her collision with the already-stopped vehicle and that she did not apply her brakes until one second before the collision at a speed of 60.9 miles per hour. (Da39; Da59.)[4]

The already-stopped white Kia Forte had been operated by Brandon Ruzicka-

[4] Ms. Rider's testimony estimating her speed varies greatly from the actual speed as recorded by the data recorder. (See 6T34:1-7; 6T40:10-18; Da39; Da59.)

Napier ("Mr. Napier"). Mr. Napier was driving on I-95 when he was sideswiped by another vehicle, that caused his vehicle to strike the guardrail and end up disabled in the right-most travel lane of I-95—the first accident in the three-accident-series. (5T165:19–166:2.) His white vehicle was perpendicular to the roadway in the travel lane. (5T167:22–168:3; 5T184:13-15.) Mr. Napier exited his vehicle and sat next to the guardrail on the other side, described by him as the "safety side". (5T166:2-5.) As he was calling his father, after trying to start his vehicle and climbing over to the other side of the guardrail, i.e., a few minutes after the first accident in the three-accident-series, Mr. Napier's white car was struck by Ms. Rider's vehicle—the second accident in the three-accident-series. (5T166:6-9.)

After exiting her black Ford Focus, both Ms. Rider's black vehicle and Mr. Napier's white vehicle remained in the right-most travel lane of I-95. Ms. Rider walked to the right service lane, leaned up against the guardrail and spoke with 9-1-1 which was automatically called by OnStar. (5T186:1-14.) In the 9-1-1 call Ms. Rider reported her collision stating that she "didn't see" the white Napier vehicle "stopped in the middle" of the roadway before she struck it. (Da76.)

Under the same dark, rainy, and foggy conditions, Mr. DePass[5] was operating a tractor-trailer[6] in the right lane of I-95 in Elkton, Maryland. Mr. DePass noticed

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[5] Mr. DePass is now deceased from throat cancer and was an employee of Defendant Jersey City Transfer, Inc. ("Jersey City"). (5T134:22-25.)

[6] The tractor-trailer that Mr. DePass was operating was owned by Defendant

what he thought might be lights or a reflection ahead and thought that it was a moving vehicle. (6T103:6-9.) He decided to change lanes to his left, but when he looked left, he noticed another truck gaining ground on him in the left lane that prevented him from merging left. (6T103:25–104:12.) When he looked forward again, he realized there was a car completely stopped in front of him in his lane of travel, the right lane of I-95. (5T141:2-6.) Since he could not go left, he pressed his brake and merged into the service lane. (5T141:16–142:3.) As he did so, his truck jack-knifed and struck Ms. Rider, who was within the roadway next to the guardrail, facing away from traffic engaged in the 9-1-1 call. (5T189:16–190:11; Da76.) Based on the 9-1-1 call, Mr. DePass' accident, the third accident in the three-accident-series, occurred 1 minute 3 seconds after Ms. Rider's vehicle automatically dialed 9-1-1 following the second accident in the three-accident-series. (Da76.)

As a result of the truck colliding with her, Ms. Rider suffered amputation injuries to both legs. At trial, Ms. Rider presented multiple witnesses to testify to the nature and extent of her injuries and damages. Dr. Nichols Quercetti testified to the multiple surgeries resulting from her injuries. (5T84:9-13.) As part of Dr. Quercetti's testimony, Ms. Rider introduced, over objection, a graphic photograph of her legs from when she was taken to the emergency room on December 21, 2018, (Da32), as well as a demonstrative diagram of how and where Plaintiff's legs would be severed

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Alert Motor Freight, Inc. ("Alert") and leased to Jersey City. (4T141:25–142:4.)

in amputation surgery, (Da31)—both exhibits were the subject of in limine motions that were denied prior to trial, (2T11:18–18:20).

Plaintiff's medical rehabilitation expert, Dr. Guy Fried testified to his ongoing treatment of Ms. Rider and what treatment he believed she would need into the future. (3T196:3–235:4.) John Schulte, a prosthetics expert, testified to what he believed future prosthetics costs would be for Ms. Rider: $9.2 million before being discounted back to present value. (4T99:11–100:19.) Schulte arrived at his figure by adding a 30% premium to CMS costs; his 30% gross-up was supported by nothing more than his own unsubstantiated and unreasoned view of price increases. (4T103:1–104:2.)

Based on information gathered from Dr. Fried, John Schulte, and Steve Gumerman, a vocational expert (4T46:6–51:17), Alex Karras prepared a life-care plan, which projected $11,885,624.15 in total costs for all of the items and services purportedly required by Ms. Rider in the future, including the $9.2 million projection for future prosthetics. (Da34.) Andrew Verzilli, an economist, testified that the present value of the life-care plan equaled $7,741,268. (5T17:2-9; 5T21:1-4.)

As part of his testimony before trial, in February 2024, Dr. Fried agreed with the future medical costs projections contained in the life-care plan prepared by Alex Karras, i.e., $11,885,624.15 discounted to a present value of $7,741,268. (3T227:18–228:11.) However, at trial, Dr. Fried speculated that Plaintiff's future prosthetics costs (which were approximated as $9.2 million before being discounted to present

value and were included in the life-care plan) "easily could be twice the price" reflected in the life-care plan. (3T215:5-12 (emphasis added).) Dr. Fried provided no reason for why the future prosthetics costs could be twice the amount estimated by Plaintiff's expert prosthetist, John Schulte, or why his opinion from a few months earlier had changed. (Cf. 3T214:13–215:12.) And, no evidence in the record supported Dr. Fried's new opinion at trial.

Having considered these facts, after summations and being charged by the court, the jury returned a verdict on April 11, 2024, which found (1) all three defendants—Mr. DePass, Alert, and Jersey City—negligent; (2) the three defendants' negligence was a proximate cause of Ms. Rider's injuries; and (3) no negligence attributable to Plaintiff. Because the jury found Plaintiff was not negligent, it did not answer whether Plaintiff's negligence was a proximate cause to her accident and whether to allocate any percentage of fault to Plaintiff. The jury awarded damages in the total amount of $55,000,000.13, including $25 million for future medical care and $23,940,587 for future pain and suffering. (See Da19-21.)

SUMMARY OF LEGAL ARGUMENT

The trial court's rulings are incorrect as a matter of law, and this Court should reverse and remand for a new trial to enable the jury to decide the case based on the correct law, correct jury instructions, and a verdict sheet that does not ask the jury to answer a question of law.

Under well-settled New Jersey law, where a vehicle strikes a stationary vehicle in front of it, such as what happened here, the rear-ending vehicle is negligent as a matter of law. Indeed, the Court was required to determine that as a matter of law Plaintiff was negligent and required to issue a Dolson instruction, charging the jury that Plaintiff was negligent. Hence, the inclusion of special interrogatory 3 on the jury verdict form was in error.

Even if Plaintiff were not negligent as a matter of law in colliding with the already-stopped vehicle in the middle of the roadway—which she was—the jury clearly committed error in special interrogatory 3 on the jury verdict form. Plaintiff was negligent in failing to stop or otherwise avoid striking a vehicle stopped in the middle of the roadway.

In addition, Plaintiff's negligence did not end after striking the stationary vehicle belonging to Mr. Napier. It was made worse by her unreasonable decision to assume the risk of voluntarily remaining in a place of peril, thereby inviting further danger—i.e., next to the vehicles in the roadway, when she could have gone on the other side of the safety guardrail as Mr. Napier had previously done. Plaintiff knew another vehicle could have difficulty with the roadway obstacle she helped create. She testified that she wanted to leave her vehicle precisely because she feared another vehicle would be unable to see her car and would hit it just as she had hit the Napier vehicle. Despite appreciating this danger, Ms. Rider remained in the roadway.

Plaintiff's collision with the vehicle belonging to Mr. Napier, along with her decision to voluntarily place herself or remain in a position of peril, taken together, were negligence and the jury's answer to special interrogatory 3 on the jury verdict form was in error.

In the alternative, Maryland's laws on assumption of the risk or contributory negligence, or both, should have been applied here. Maryland does not allow a pedestrian-plaintiff struck by a vehicle to recover damages if she understood and assumed the risk of injury, as Ms. Rider did here by remaining in the roadway after her accident. Likewise, Maryland bars a plaintiff from recovery if the plaintiff's own negligence contributes to her injuries, i.e., Plaintiff would be barred from recovery if a jury found that either her collision with the Napier vehicle or her decision to remain in the roadway contributed to her injuries. And, on the facts of this case, Maryland law applies a presumption of negligence to the driver of a following-vehicle in rear-end accidents and requires that juries be informed of that presumption. Further, Maryland's statutory limit on a plaintiff's non-economic damages, Md. Code Ann., Cts. & Jud. Proc. §11-108, should have applied to the jury's verdict.

Additionally, the jury's damages award for future medical care was not based on probability and therefore cannot stand. Moreover, the Court's failure to bifurcate this case was error. Further compounding that error was the Court's failure to exclude the unduly prejudicial and gruesome photograph, Exhibit P90 (Da32),

depicting Plaintiff's legs when she was taken to the emergency room, as well as the amputation diagram, Exhibit P87 (Da31). Because of all of these errors cumulatively, the jury erred in its liability finding and issued its astronomical damages verdict that is untethered from the evidence adduced at trial. The verdict constitutes a miscarriage of justice and must be corrected.

I. PLAINTIFF WAS NEGLIGENT AS A MATTER OF LAW UNDER DOLSON V. ANASTASIA, 55 N.J. 2 (1969). (6T167:8-168:4; 9T32:21-38:3; Da4-11.)

The trial court erred when it denied Appellants' motion for a directed verdict. As a matter of law, Plaintiff was negligent in the operation of her vehicle when she struck the vehicle that belonged to Mr. Napier, which was stopped ahead of her vehicle in the same lane of travel.

After the first accident in the three-accident-series, Mr. Napier's white vehicle was left in the middle of the right traffic lane, turned sideways perpendicular to I-95. (5T165:15–166:5, 5T167:14–168:3; 5T184:13-15.) As Ms. Rider's vehicle traveled in the same lane of traffic blocked by Mr. Napier's vehicle, New Jersey law required that she proceed at a reasonably safe and prudent speed with due regard to roadway conditions, weather conditions, and traffic conditions. Dolson, 55 N.J. at 10 (citing N.J.S.A. 39:4-89). Without evidence of a sudden emergency, New Jersey law requires all drivers to maintain a reasonable following distance from vehicles in front of them—even if the front-vehicle is already stopped. Jones, 306 N.J. Super. at 48

(applying Dolson to an accident with an already-stopped vehicle).

Dolson, supra, is directly on point. In Dolson, the plaintiff's vehicle pulled ahead of and into the same lane as the defendant's vehicle, and the two vehicles proceeded for some time while they were "several hundred feet" apart. Dolson, 55 N.J. at 9. The plaintiff intended to turn left at an intersection and "came to a stop". Ibid. "[A]fter a few seconds", the plaintiff's vehicle "was hit in the rear by defendant." Ibid. Notably, the Supreme Court reasoned that the defendant did not state that the plaintiff "came to a sudden stop so that he could not apply his brakes in time to avoid a collision, nor did he say that he thought she intended to proceed slowly through the intersection rather than stopping or turning." Ibid. Such testimony, the Court explained, could have "negate[d] negligence" on the part of the defendant and allowed the jury to infer that the defendant may not have been negligent. Ibid. However, in the absence of an explanation to negate the presumption of negligence that follows a rear-end collision, the Court held the following:

> It is elementary that a following car in the same lane of traffic is obligated to maintain a reasonably safe distance behind the car ahead, having due regard to the speed of the preceding vehicle and the traffic upon the condition of the highway. Stackenwalt v. Washburn, 42 N.J. 15, 30 (1964). Failure to do so resulting in a collision, **is** negligence and a jury should be so instructed. N.J.S.A. 39:4-89, when it provides that '(t)he driver of a vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard to the speed of the preceding vehicle and the traffic upon, and condition of, the highway', merely incorporates the common law standard

> into the motor vehicle law to authorize penal sanctions for a violation. This does not mean, however, that such conduct is only **evidence** of negligence because it violates a statute. (It may be observed that the trial judge here charged, wrongly, although the instruction was not objected to, that following another vehicle more closely than is reasonable and prudent under the circumstances in violation of the cited statute is only **evidence** of negligence.)
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> [Dolson, 55 N.J. at 10-11 (emphasis original).]

The Dolson Court continued its reasoning by indicating the "defendant's negligence [was] apparent from his own testimony." Id. at 11. "Defendant was, or should have been, fully alerted to the fact that plaintiff was either going to stop or turn, and [the Court] can see no reason whatever for this rear-end collision other than defendant's failure to keep his car under such control as would have reasonably enabled him to avoid striking a vehicle which was at all times plainly within his view." Ibid. (quoting the Appellate Division's dissenting judge). Ultimately, the Court concluded that the trial judge erred for three reasons: (1) because the trial court neither understood its obligation on a motion for a new trial nor applied the proper standard for such consideration, it erred in denying the defendant's motion for a new trial, id. at 9-12; (2) because there was not "sufficient evidence of contributory negligence" to support a "causal connection between the [plaintiff's] alleged failure [to use her indicator] and the collision," the trial court erred in instructing the jury to consider the plaintiff's failure to use her indicator as evidence of contributory

negligence, id. at 11-12; and (3) the trial court erred in failing to charge the jury on the defendant's negligence as a matter of law for being unable to avoid striking the plaintiff's stopped vehicle, id. at 10-11, 12 (citing Jurman v. Samuel Braen, Inc., 47 N.J. 586, 591-92 (1966)). These errors, the Supreme Court explained, "may well have caused this jury to go awry" in finding the defendant not negligent and "constitute[d] a miscarriage of justice." Id. at 12.

Here, the vehicle belonging to Mr. Napier was stopped ahead of Plaintiff in her lane of traffic. For reasons that do not excuse her own negligence, Plaintiff was unable to avoid Mr. Napier's vehicle and instead drove directly into it. Immediately after the accident, in her 9-1-1 call, Plaintiff stated that she "didn't see" the vehicle "stopped in the middle" of her lane of travel. (Da64; Da76.) At trial, she testified that she saw Mr. Napier's vehicle for ten seconds but still was unable to stop before colliding into it. (6T127:11–129:21.) Thus, considering either explanation, Plaintiff presented no evidence to negate her own negligence; she should have been fully alerted to the fact that Mr. Napier's white vehicle was not moving (particularly because it was turned sideways, making it even more visible). Accordingly, there is no reason for Plaintiff's collision with Mr. Napier's vehicle, other than her failure to "hav[e] due regard to the speed of the preceding vehicle and the traffic upon the condition of the highway" and to keep her car "under such control as would have reasonably enabled h[er] to avoid striking a vehicle which was at all times plainly

within h[er] view." Dolson, 55 N.J. at 10-11.

Jones, supra, is also directly on point. In Jones, the lead-car was stopped in the center lane of the Garden State Parkway due to a malfunction. 306 N.J. Super. at 479-81. After being stopped for some time with its "hazard lights ... on", it was struck from behind by a vehicle traveling in the same lane of traffic. Ibid. The trial court directed a liability verdict against the defendant on the basis of Dolson.

On appeal, among other arguments, the defendant asserted that the vehicle stopped in the middle of the Parkway created a sudden emergency, and that it was error to direct a verdict on liability and error to issue a Dolson charge. Jones, 306 N.J. Super. at 484. The Appellate Division, however, held that such an excuse was unpersuasive because, "[t]o invoke the sudden emergency doctrine and to be entitled to that charge to the jury, a party must have been confronted by a sudden emergency over which he had no control, without fault on his part." Ibid. And so, because the defendant in Jones was speeding, he had some control over the circumstances and was at fault, and therefore could not invoke the sudden emergency doctrine.

The import of Jones to this case is the Appellate Division's application of Dolson even though the lead-car was stopped and the following-car was not tailgating in the traditional sense:

> It is well established that "the violation of motor vehicles statutes is evidence of negligence." Paiva v. Pfeiffer, 229 N.J. Super. 276, 280 (App. Div. 1988). "However, where a motor vehicle statute codifies the common law standard,

the violation of the statute is not evidence of negligence, it is negligence." Ibid. (citing Dolson, supra, 55 N.J. at 10). Thus, the failure to maintain a reasonably safe distance behind the vehicle ahead resulting in a collision is negligence as a matter of law, and a jury should be so instructed. Dolson, supra, at 10; see also Eaton v. Eaton, 119 N.J. 628, 642-43 (1990); Paiva, supra, 229 N.J. Super. at 279-80. In Paiva we stated that "[i]t is beyond dispute that had [defendant] rear-ended the [vehicle] he was following the Dolson charge would have been totally appropriate." Id. at 282.

We thus agree with the trial judge's conclusion in this case:

> if this isn't a case that fits within Dolson versus Anastasia, I don't know what is. If they were sitting there on the highway, stopped when he came along, flashers or no flashers, he had plenty of time to see them. Even if they stopped in front of him, Dolson covers that. You're supposed to maintain a safe following distance so that even if someone does do a sudden stop, you're able to avoid them.
>
> Even two to five seconds for a fully stopped vehicle is plenty of time to avoid the vehicle.
>
> Under Dolson there is more than enough time for a following vehicle to avoid them there, especially when there is no traffic in either other lane.
>
> I can't see any scenario under which a reasonable jury could not find Mr. Hoover to be negligent. So, therefore, I would have to enter a directed verdict of negligence as to Mr. Hoover . . . .

[Jones, 306 N.J. Super. at 484-85 (cleaned up).]

Thus, the Appellate Division in Jones found that it was appropriate for the trial judge to remove the issue of comparative negligence from the jury's consideration and to find the defendant-driver negligent as a matter of law. Id. at 482-84. In addition, the Appellate Division in Jones also reiterated the holding in Dolson and concluded that the defendant-driver's "failure to maintain a reasonable following distance warranted a Dolson charge." Id. at 485.

Here, like the lead-vehicle in Jones, Mr. Napier's vehicle was already stopped when Plaintiff drove into it—long enough for Mr. Napier to exit his vehicle, walk to the side of the road, climb over the guardrail to the "safety side", and call his father. (5T165:23–166:9.) Hence, the reasoning in Jones clarifies that it is still appropriate to apply Dolson because Plaintiff was obligated to identify Mr. Napier's vehicle stopped in the roadway and to avoid colliding into it. Plaintiff's failure to do so, "resulting in a collision[,] is negligence as a matter of law" and the Court is required to so instruct the jury and remove the issue of negligence from the jury's determination. Jones, 306 N.J. Super. at 484 (citing Dolson, 55 N.J. at 10; Eaton, 119 N.J. at 642-43; Paiva, 229 N.J. Super. at 279-80); see also Cermak v. Hertz Corp., 53 N.J. Super. 455, 461 (App. Div. 1958) ("Therefore, we conclude that the trial court was correct in removing the issue of negligence from the determination of the jury since the record shows that there were no disputed questions of fact nor conflicting inferences to be reasonably drawn therefrom which could be determined

by it. In similar situations the courts have often phrased this determination as a matter of law to be decided by the judge and not the jury, but it would seem to be more accurately stated that, in the absence of a factual conflict, the fact-finding function of the jury has no issue upon which it can operate so that it is the duty of the court to accept the facts as they are presented." (internal citation omitted)), aff'd, 28 N.J. 568 (1959). Indeed, based on Ms. Rider's testimony, there is no factual conflict regarding her accident with Mr. Napier's vehicle; thus, there is no fact-finding function for the jury with respect to Plaintiff's collision with Mr. Napier's vehicle. See Cermak, 53 N.J. Super. at 461. As a result, the Court should have removed from the jury's determination the issue of negligence as to Plaintiff's collision with Mr. Napier's car, and instructed the jury that Plaintiff was negligent as a matter of law.

Thus, both Dolson and Jones are directly on point to the facts of this case and, as a matter of law, Plaintiff was negligent.

II. THE COURT SHOULD HAVE INSTRUCTED THE JURY THAT PLAINTIFF WAS NEGLIGENT. (7T112:24-114:21; 7T103:2-23; 7T111:15-112:23; 9T32:21-38:3; Da4-11.)

Appellants expressly preserved their request to charge the jury on Plaintiff's negligence by moving for a directed verdict on Plaintiff's negligence and through their requests as to Charge 5.30A and 5.30D.[7] (6T196:1–197:10; 6T205:22–206:6;

[7] The trial court agreed. (Da8 ("Moving Defendants' directed verdict motion on Plaintiff's negligence sufficiently preserved Moving Defendants[']) argument that

6T206:18-25.) Despite Appellants' requests, the court did not instruct the jury on Plaintiff's negligence. The trial court's failure to give the jury a binding instruction on Plaintiff's negligence requires a new trial.

Charge 5.30D supplies the jury instruction for a violation of a traffic-related statute. If the statute that has been violated is one that "codifies the common law standard", as is true in N.J.S.A. 39:4-89, Charge 5.30D(2) instructs that such a violation is negligence as a matter of law. See Jones, 306 N.J. Super. at 484; Dolson, 55 N.J. at 10; Giantonnio v. Taccard, 291 N.J. Super. 31, 45 (App. Div. 1996). To be sure, Charge 5.30D(2) without any modification states:

> Defendant denies that he/she violated this section of the motor vehicle laws and makes the following contention concerning the operation of his/her motor vehicle: _____.
>
> The statute in question establishes a standard of conduct for motorists using our streets and highways. If you find that defendant has violated this statute by following another vehicle more closely than is reasonable and prudent, having due regard to the speed of the preceding vehicle and the traffic upon and condition of the highway, such conduct is negligence on defendant's part.
>
> [Model Jury Charge (Civil), § 5.30D(2) "Violation of Traffic Act" (Aug. 1999), Violation of Motor Vehicle Act is Negligence (Approved 6/71).]

Plaintiff was negligent as a matter of law and that the jury question on the verdict sheet should have been excluded.")

The first note in Charge 5.30D reminds the Court that it is plain error to fail to modify a model jury charge to include an applicable motor vehicle statute:

> In Ewing v. Burke, 316 N.J. Super. 287 (App. Div. 1998), the Appellate Division held that the trial court committed plain error in failing to modify the model charges to include reference to a relevant motor vehicle statute that was applicable to the facts and circumstances of the particular case. The Appellate Division stated: "Ordinarily, therefore, if there is evidence tending to establish that a vehicle was operated in violation of a motor vehicle statute, the statutory duty should be charged to the jury in order to assist the jury in arriving at the appropriate verdict." Id. at 294.
>
> [Model Jury Charge (Civil), § 5.30D "Violation of Traffic Act" (Aug. 1999) (Note to Judge).]

In regard to Charge 5.30D(2), where a violation of a motor vehicle statute is negligence as a matter of law, another note reminds the Court of when a violation is negligence and underscores the importance of so instructing the jury:

> There are some cases where the violation of a section of the motor vehicle laws is negligence as a matter of law and not merely evidence of negligence. In Dolson v. Anastasia, 55 N.J. 2, 9-11 (1969), the Court held that the failure to maintain a reasonably safe distance behind the car ahead "is negligence and a jury should be so instructed. . . . This does not mean however, that such conduct is only evidence of negligence because it violates a statute." In Dolson, defendant struck plaintiff's vehicle in the rear. The Court noted that defendant did not contend that plaintiff came to a sudden stop nor that he/she thought plaintiff intended to proceed slowly through the intersection rather than stop or turn. In the absence of any reasonable justification or explanation for striking plaintiff in the rear, the Court held the violation of the statute on

> following too closely is negligence. The Court noted further that it did not consider a binding instruction as to liability because no motion to that effect had been made at trial nor contended on appeal.
>
> In an appropriate case it would appear that no issue would be presented for the jury as to defendant's negligence, once proof of the violation of a particular motor vehicle statute has been established without evidence to explain such violation. In some cases, however, an issue may be presented for the jury as to whether a violation occurred or whether an adequate explanation is to be found in the evidence. . . .
>
> [Model Jury Charge (Civil), § 5.30D(2) "Violation of Traffic Act" (Aug. 1999) (Note to Judge).]

Here, the trial court should have instructed the jury that Plaintiff was negligent as a matter of law, consistent with Charge 5.30D, because she failed to safely operate her vehicle under such control as would have reasonably allowed her to apply her brakes in time to stop and avoid colliding with Mr. Napier's car. Dolson, 55 N.J. at 10-11. And, as Charge 5.30D explains, once it was established that Plaintiff struck Mr. Napier's vehicle, which was stationary and ahead of her in the same lane of travel, Plaintiff was required to provide a non-negligent explanation (e.g., a sudden emergency) for why she was unable to stop or avoid colliding with the Napier vehicle. Without a non-negligent excuse—i.e., "[i]n the absence of any reasonable justification or explanation"—the Court was required to instruct the jury that Plaintiff was negligent as a matter of law. Model Jury Charge (Civil), § 5.30D(2) "Violation of Traffic Act" (Aug. 1999); accord Jones, 306 N.J. Super. at 484; Dolson,

55 N.J. at 10; Eaton, 119 N.J. at 642-43; Paiva, 229 N.J. Super. at 279-80.

Indeed, at no point in her testimony did Plaintiff excuse her own negligence. Instead, Plaintiff admitted that she "probably should have reduced [her] speed" given that it was dark, rainy, and foggy on the roadway. (6T43:4-17; 5T181:16-21; 6T12:22–13:5; accord 3T162:1 – 163:8.) And, the data retrieved from the "blackbox" event recorder in Plaintiff's vehicle confirmed that Plaintiff was traveling too fast given the road conditions—e.g., she was traveling 64.3 miles per hour within two seconds of the collision. (6T40:10-18; 6T41:6-9; 6T43:4-17; Da39; Da59.) In fact, in her 9-1-1 call, Plaintiff admitted that she "didn't see" the "car stopped in the middle [of the roadway]," before she struck it. (Da64; Da76.) Thus, Plaintiff's testimony did not excuse her negligence; it all-but admitted to it.

New Jersey's Courts have repeatedly stressed that "clear and correct jury charges are essential to a fair trial." Henebema v. S. Jersey Transp. Auth., 430 N.J. Super. 485, 501 (App. Div. 2013), aff'd, 219 N.J. 481 (2014) (citation omitted). Moreover, jury charges must be properly tailored to the specific facts at issue and molded to the parties' respective contentions. Komlodi v. Picciano, 217 N.J. 387, 420 (2014). The Court's failure to "explain the parties' legal theories and the proofs in relation to the governing law" "raise[s] serious questions about the verdict" and ordinarily is reversible error. Id. at 417, 420.

In Torres v. Pabon, 225 N.J. 167, 188 (2016), the Court examined juror confusion with respect to Model Jury Charge (Civil), § 5.30D(2) "Violation of Traffic Act" (August 1999) and the trial court's errors instructing the jury on that charge.

> In the form set forth in the Model Jury Charge, the instruction envisions that the driver following behind another driver at the time of a motor vehicle collision is the defendant, not the plaintiff. Like all model charges, however, the Model Jury Charge must be adjusted, as necessary, to conform to the particular facts of a given case. See Komlodi v. Picciano, 217 N.J. 387, 420 (2014) (noting "[a]s with all jury instructions, the trial judge should tailor the charge to the facts and the parties' arguments"). Here, the driver subject to the duty set forth in N.J.S.A. 39:4-89 was plaintiff, not defendant, and the trial court should have ensured that the Model Jury Charge was tailored to reflect that fact.
>
> Instead, the trial court juxtaposed the parties in its recitation of the charge, instructing the jury that defendant had the obligation to follow plaintiff's vehicle at a safe distance, and repeated the error after being alerted to it by defendants' counsel. Although the trial court belatedly mentioned the possibility that plaintiff was negligent, the jury may have been left with the mistaken impression that defendants' vehicle followed plaintiff's vehicle too closely, when defendants' vehicle indisputably was ahead of plaintiff's vehicle prior to the collision. The trial court's charge on this important issue was contradictory and confusing, and constituted error.
>
> [Torres, 225 N.J. at 188.]

Here, based on the evidence, the trial court should have instructed the jury that Plaintiff violated N.J.S.A. 39:4-89 and was negligent. But the court did not do so.

Thus, it was error for the trial court to omit Charge 5.30D(2) as to Plaintiff's negligence from its jury instructions—the omission of this instruction was clearly capable of producing an unjust result and requires correction.

III. A NEW TRIAL IS REQUIRED BECAUSE THE JURY VERDICT ON SPECIAL INTERROGATORY 3 WAS AGAINST THE WEIGHT OF THE EVIDENCE. (9T32:21-38:3; Da4-11.)

In special interrogatory 3, the jury was asked "Do you find that Plaintiff[,] Angel Rider, was negligent?" (Da3.) The jury answered that question, "No" in a 7-1 vote. (Da3.)

There is no way in which a reasonable mind could accept all of the evidence adduced at trial and find that Plaintiff was somehow not negligent in driving her black Ford Focus into Mr. Napier's stopped white Kia Forte that was ahead of her and perpendicular in her lane of traffic. As a result, the jury's 7-1 answer to special interrogatory 3 on the jury verdict form was wrong and was not—in any way—supported by the evidence at trial. In fact, the record evidence flatly contradicts the jury's answer to special interrogatory 3, finding no negligence on the part of Plaintiff.

To be sure, Plaintiff admitted the following:

- She "should have reduced [her] speed" because it was "dark", "rainy", and "foggy" on the roadway. (6T43:17 ("I probably should have reduced the speed more."); 5T181:16-21 (A. "It was rainy, and then on the bridge it was foggy. Q. And how about as far as lighting conditions? . . . A. Dark."); 6T12:22–13:5 (stating it was raining and dark); accord 3T162:1–163:8.)

- Plaintiff was operating her car at 64.3 miles per hour within two seconds of the collision, (Da39; Da59; 6T40:10-18; 6T41:6-9; 6T43:4-17), although she testified that she saw Mr. Napier's vehicle for ten seconds before her collision with it, (6T127:11–129:21). However, in her 9-1-1 call, Plaintiff admitted that she "didn't see" the "car stopped in the middle [of the roadway]," before she struck it. (Da64; Da76.) While we note that Plaintiff's admissions regarding when or whether she saw Mr. Napier's vehicle are contradictory (that she saw it for ten seconds before her collision and that she didn't see the car before she struck it), both are admissions of negligence.

- Mr. Napier's vehicle was white and positioned across, perpendicular to, her lane of travel. (6T77:15-22.)

- Either she was at "fault" for her collision with Mr. Napier's vehicle or Mr. Napier was at fault because his "car was still in the lane", but Appellants were not at fault. (6T78:4-14.)

With all of the evidence adduced at trial that showed Plaintiff negligently drove her vehicle directly into a stationary white vehicle in the middle of the road and no evidence to explain her inability to avoid the collision, no reasonable juror could find that Plaintiff was not negligent. Yet, like in Dolson, the jury inexplicably did so—against the weight of the evidence. Accordingly, the jury's 7-1 answer on special interrogatory 3 of the verdict form is not supported by the evidence and requires a new trial.

Moreover, after negligently operating her vehicle into the stationary vehicle belonging to Mr. Napier, Plaintiff made the dangerous situation worse. Indeed, like all drivers and persons on a roadway, Plaintiff had a duty to avoid creating a dangerous situation. Cf. Wytupeck v. City of Camden, 25 N.J. 450, 460 (1957)

(discussing the "public duty" that all persons have to avoid acts that create a foreseeable danger to others); see also Saltsman v. Corazo, 317 N.J. Super. 237, 247-49 (App. Div. 1998) (explaining, in the context of the rescue doctrine, how a person who places herself in a position of peril is liable for the injuries arising out of the peril she created). Abandoning her car in the roadway created a dangerous situation. Choosing to remain in a position of peril, i.e., in the roadway while on her phone and facing away from oncoming traffic, as opposed to getting out of the roadway to the other side of the safety guardrail as Mr. Napier had previously done, compounded the dangerous condition. Plaintiff was negligent. Cf. N.J.S.A. 39:4-36 (discussing pedestrian safety and remaining in a "place of safety" in the context of vehicles yielding the right of way); N.J.S.A. 39:4-34 ("On all highways where there are no sidewalks or paths provided for pedestrian use, pedestrians shall, when practicable, walk only on the extreme left side of the roadway or its shoulder facing approaching traffic."); N.J.S.A. 39:4-32 (requiring pedestrians to stay in a "place of safety" and "us[e] due care for his safety" in the context of crossing at a controlled intersection).

Indeed, Plaintiff testified that the reason that she crashed her vehicle into the vehicle belonging to Mr. Napier was "because [she] didn't see it until [it was] too late." (5T182:11; see also 5T184:16-23.) Due to her inability to avoid Mr. Napier's vehicle because she was unable to see it, (see 3T162:1–163:8 (describing the visibility as very poor due to "rain and fog" and that it was "dark" with "no street

lamps")), Ms. Rider testified that she knew she had created a hazard and that it was critical for her get away from it, (see 5T186:21–188:6; 6T60:13-15; 6T62:11-14). She realized that because she had been unable to see Mr. Napier's car, some other driver may likely have the same problem and be unable to avoid hitting her car. (5T182:11; 5T186:21–188:6; 6T45:9–46:4; 6T60:13-15; 6T62:11-14.) Having experienced how unsafe the poor visibility made the roadway, it was unreasonable for Ms. Rider to have remained in the roadway facing away from approaching traffic upon abandoning her vehicle. See J.S. v. R.T.H., 155 N.J. 330, 338 (1998) (reasoning that foreseeability may be based on an individual's knowledge of the risk of injury, particularly if the individual has a "special reason to know"). Mr. Napier understood that, which is why he had previously gone on the "safety side" of the safety guardrail. (5T166:3-5 ("I exited out of my vehicle and sat next to the guardrail on the other side, the safety side.").) Yet, Plaintiff voluntarily remained in the roadway—in a place of peril—rather than standing on the other side of the safety guardrail. (3T168:18–169:22; 4T162:9–163:4.) To be sure, it would have been easy for Plaintiff to step over the guardrail to remove herself from a position of peril—the guardrail was only approximately three-feet in height and there was a small embankment where she could have stood on the safety side—"she just didn't want to go over the guardrail." (3T169:17–170:17.) Plaintiff's unreasonable decision to assume the risk by voluntarily remaining in a place of peril was negligent and invited

further danger. See J.S., 155 N.J. at 338-39 ("Also implicated in th[e] [foreseeability] analysis is [the individual]'s 'responsibility for conditions creating the risk of harm' and [her] control, opportunity, and ability to have avoided the risk of harm." (citations omitted)).

Accordingly, Plaintiff's negligence in striking the vehicle ahead of her combined with her further negligence in remaining in an unreasonably perilous position on the roadway shows that the jury committed error in finding no negligence on the part of Plaintiff in answering special interrogatory 3 on the jury verdict form.

IV. THIS COURT SHOULD REVERSE THE TRIAL COURT'S INCORRECT LEGAL RULING THAT NEW JERSEY LAW GOVERNED ALL ISSUES IN THIS CASE. (Da12-13; 1T14:1-18:18; 6T156:18-157:1.)

It has long been the law in New Jersey that its courts "defer[ ] to the rights of other jurisdictions to regulate conduct within their borders." P.V. ex. rel. T.V. v. Camp Jaycee, 197 N.J. 132, 153 (2008). That is particularly so when the conduct involves vehicular operation which effects residents and non-residents alike. Ibid.; e.g., Fu v. Fu, 160 N.J. 108, 129 (1999) (applying New York's law despite both parties being domiciled in New Jersey in recognition that "New York has strong governmental interests in applying Section 388 to an accident within its borders even when none of the parties is a New York resident" (citing Bray v. Cox, 39 A.D.2d 299, 301 (N.Y. App. Div. 1972))); Mellk v. Sarahson, 49 N.J. 226, 230 (1967) (In an automobile accident in Ohio, in which the parties were domiciled in New Jersey,

"the State of Ohio has a real interest in having its rules of the road apply to the conduct of the parties in the operating of a motor vehicle on the highways of that state. Under principles of comity the courts of New Jersey will recognize and follow the Ohio laws relating to traffic safety.").

No doubt, every state has a predominant interest in regulating the conduct of motor vehicle drivers operating within the state's borders and on the state's roads to ensure road safety. "Each state is desirous of promoting orderly and safe travel on its roads and highways, in order to protect the lives and the property of its citizens." White v. Smith, 398 F. Supp. 130, 138 (D.N.J. 1975). In that regard, each state has a "paramount interest in seeing its rules of the road apply because it has an undisputed right to regulate conduct or actions performed within its territory." Ibid.

Here, as discussed below, under any application of New Jersey's choice-of-law principles, Maryland's rules of the road must be applied to questions of substantive negligence, i.e., the parties' conduct at the time of the accident in Maryland. As such, where Maryland law supplies rules regarding automobile operation and rear-end accidents, those rules should be applied here. The trial court's failure to apply Maryland law to any issue requires correction and a new trial.

More than fifteen years ago the New Jersey Supreme Court formally adopted the Restatement (Second) of Conflict of Laws (hereinafter "Restatement") and the "most significant relationship" test to decide which state's law should apply to a

particular issue in a case. See Camp Jaycee, 197 N.J. at 142. The Court provided detailed, systematic instructions to trial courts analyzing New Jersey's choice of law principles. Id. at 143-47. Camp Jaycee continues to govern and guide New Jersey courts in their choice of law analyses. In re Accutane, 235 N.J. 229, 254-61 (2018); Calabotta v. Phibro Animal Health Corp., 460 N.J. Super. 38, 54 (App. Div. 2019).

"[W]hen New Jersey is the forum state, its choice-of-law rules control." Calabotta, 460 N.J. Super. at 54 (quoting Fairfax Fin. Holdings Ltd. v. S.A.C. Cap. Mgmt., L.L.C., 450 N.J. Super. 1, 34 (App. Div. 2017)). "Choice-of-law determinations present legal questions, which are subjected to de novo review." Fairfax, 450 N.J. Super. at 33 (citations omitted). And choice-of-law determinations are made "on an 'issue-by-issue' basis," Calabotta, 460 N.J. Super. at 54; Fairfax, 450 N.J. Super. 33; Cornett v. Johnson & Johnson, 211 N.J. 362, 374 (2012), and, at times, differentiated further on a "party-by-party" assessment, Fairfax, 450 N.J. Super. at 34 (citing Ginsberg ex rel. Ginsberg v. Quest Diagnostics, Inc., 441 N.J. Super. 198, 230 (App. Div. 2015), aff'd sub nom., Ginsberg v. Quest Diagnostics, Inc., 227 N.J. 7 (2016)).

The first step in a choice-of-law analysis for substantive issues of law is determining "whether an actual conflict exists," which requires an examination of "the substance of the potentially applicable laws to determine whether '"there is a distinction"' between them." Camp Jaycee, 197 N.J. at 143 (citations omitted); In re

Accutane, 235 N.J. at 254 ("A conflict of law arises when the application of one or another state's law may alter the outcome of the case."). If there is no conflict, then "there is no choice-of-law issue to be resolved." Ibid.; In re Accutane, 235 N.J. at 254; Rowe v. Hoffman–La Roche, Inc., 189 N.J. 615, 621 (2007). On the other hand, "[i]f an actual conflict exists, then New Jersey courts in cases involving claims of tortious conduct apply the choice-of-law principles described in the Second Restatement, particularly sections 6, 145, and 146." Calabotta, 460 N.J. Super. at 54-55 (footnote omitted) (citing In re Accutane, 235 N.J. at 257-63; Camp Jaycee, 197 N.J. at 135-36).

Per Camp Jaycee, the analysis begins with Restatement § 146, which underscores the presumption that the substantive law of the state of where the tort occurred, lex loci delicti, be applied to a personal injury action unless another state has a more significant relationship. Camp Jaycee, 197 N.J. at 136, 144; see also id. at 144 ("Section 146 recognizes the intuitively correct principle that the state in which the injury occurs is likely to have the predominant, if not exclusive, relationship to the parties and issues in the litigation."). After identifying the presumptively applicable law, i.e., the substantive law of the place of injury, Camp Jaycee requires that state be "tested against the contacts detailed in section 145 and the general principles outlined in section 6 of the Second Restatement." Id. at 136. To overcome the section 146 presumption, another state must have a more

significant relationship to the parties or issues. Ibid. "Absent another state having a more significant relationship, the substantive law of the injury-site state applies." McCarrell v. Hoffmann-La Roche, Inc., 227 N.J. 569, 590 (2017).

The contacts identified in Restatement § 145 that are to be taken into account are:

> a. the place where the injury occurred,
> b. the place where the conduct causing the injury occurred,
> c. the domicil, residence, nationality, place of incorporation and place of business of the parties, and
> d. the place where the relationship, if any, between the parties is centered.
>
> [Restatement, § 145(2)(a)-(d).]

Section 145 further advises that "[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue."

A. An Actual Conflict Exists Between New Jersey and Maryland Law.

Here, there is no dispute that an actual conflict exists, which the motion court acknowledged. (1T15:19-24 (noting in its oral opinion that "it's clear that there does exist the conflict between New Jersey negligence law and Maryland's law because Maryland has the one percent negligence law and also it has the cap on non-economic damages of $500,000, and there's no such monetary cap in New Jersey").)

Maryland does not allow a plaintiff to recover damages if the plaintiff's own negligence contributes to her injuries. S & S Oil, Inc. v. Jackson, 53 A.3d 1125, 1131 (Md. 2012); Poole v. Coakley & Williams Const., Inc., 31 A.3d 212, 224 (Md. 2011).

In contrast, contributory negligence is not a bar to recovery in New Jersey because New Jersey applies its comparative negligence statute which permits recovery if the plaintiff's negligence is "not greater than the combined negligence of the persons against whom recovery is sought." N.J.S.A. 2A:15–5.1.

Maryland also recognizes an assumption of the risk defense as to pedestrians. E.g., Saponari v. CSX Transp., Inc., 727 A.2d 396, 406 (Md. Ct. Spec. App. 1999) (holding, even though she was not contributorily negligent, a pedestrian who attempted to cross railroad tracks assumed the risk of being struck by a train); Wilson v. Blain, No. 01907, 2019 WL 290308, at *5 (Md. Ct. Spec. App. Jan. 3, 2019) (Da65) (holding, even though he was not contributorily negligent, a pedestrian on the shoulder of a road assumed the risk of being struck by a vehicle, and that by facing away from approaching vehicles to his rear, the danger of being struck from behind was increased). "Assumption of the risk is 'an intentional and voluntary exposure to a known danger and, therefore, consent on the part of the plaintiff to relieve the defendant of an obligation of conduct toward him and to take his chances from harm from a particular risk.'" Saponari, 727 A.2d at 399 (citation omitted). It "is a complete bar to recovery because it serves as 'a previous abandonment of the right to complain if an accident occurs.'" Ibid. (citation omitted). Three elements are required to prove a plaintiff assumed the risk:

(1) The plaintiff had knowledge of the risk of danger;
(2) The plaintiff appreciated that risk; and

(3) The plaintiff voluntarily confronted the risk of danger.

Ibid. (citing Baltimore Gas and Elec. Co. v. Flippo, 705 A.2d 1144, 1156 (Md. 1998)). It should be noted that assumption of the risk is a "separate and distinct" defense from contributory negligence in Maryland. S & S Oil, Inc., 53 A.3d at 1141. However, New Jersey does not recognize the assumption of risk defense. Ruiz v. Mero, 189 N.J. 525, 534 (2007) (citing N.J.S.A. 2A:15–5.2); Reisman v. Great Am. Recreation, Inc., 266 N.J. Super. 87, 93 (App. Div. 1993) (citing N.J.S.A. 2A:15–5.1 et seq.). On the trial record here, it is plain that by voluntarily standing on the highway-side of the guardrail, as opposed to the safety-side, in light of her own accident a moment earlier as well as the weather conditions, the jury should have been given Maryland's jury charge on assumption of risk and determined whether Plaintiff assumed the risk of being struck by another vehicle.

In regard to rear-end accidents, in New Jersey, Dolson makes clear that, absent a non-negligent excuse, the following-vehicle is negligent as a matter of law and a jury should be so instructed. Jones, 306 N.J. Super. at 484; Dolson, 55 N.J. at 10; Eaton, 119 N.J. at 642-43; Paiva, 229 N.J. Super. at 279-80. Maryland, however, applies a presumption of negligence to the driver of the following vehicle, which shifts the burden to the driver of the following vehicle to produce evidence that rebuts the presumption. Andrade v. Housein, 810 A.2d 494, 497-98 (Md. Ct. Spec. App. 2002). And, unlike in New Jersey, in Maryland, the jury must be instructed on

the presumption.[8] Murphy v. 24th St. Cadillac Corp., 727 A.2d 915, 920-21 (Md. 1999) (discussing Grier v. Rosenberg, 131 A.2d 737, 740 (Md. 1957)). Thus, had Maryland law been applied, the jury would have been instructed that Plaintiff was presumptively negligent when she struck the Napier vehicle. Failure to apply Maryland law clearly impacted the jury's decision.

As to limiting non-economic damages, Maryland has a statutory cap, Md. Code Ann., Cts. & Jud. Proc. §11-108, and New Jersey has no such cap.

Accordingly, Maryland's laws on (i) assumption of the risk, (ii) contributory negligence, (iii) rear-end accidents, and (iv) capping non-economic damages, are in conflict with New Jersey law.

B. Maryland's Interest in Regulating the Operation of Vehicles on its Roadways is More Significant Than New Jersey's Interest, and Therefore Maryland Law on (i) Assumption of the Risk, (ii) Contributory Negligence, and (iii) Rear-End Accidents, Should have been Applied by the Trial Court.

Beginning with section 146 of the Restatement, Maryland law presumptively applies to each substantive issue related to liability. That is because section 146

[8] N.J.R.E. 302 states, "In a civil proceeding, federal law or the law of another jurisdiction governs the effect of a presumption regarding a claim or defense for which such law supplies the rule of decision." (emphasis added). Thus, the effect of a presumption regarding a claim or defense is governed by New Jersey law unless another state's law supplies the rule of decision, in which case that state's law governs the effect of a presumption. Here, Maryland law supplies the law of the case, and thus Maryland law governs the effect of a presumption regarding a claim or defense (which this clearly is because it relates directly to plaintiff's burden of proof on a negligence claim).

underscores the presumption that the substantive law of where the tort occurred, i.e., Maryland, applies in a personal injury action. Camp Jaycee, 197 N.J. at 136, 144.

Next, section 145 requires the court to consider four points of contact. Here, three out of the four contacts weigh in favor of applying Maryland law. I-95 in Elkton, Maryland is the place where—

(i) Plaintiff's injuries occurred, see Restatement, § 145(2)(a) ("place where the injury occurred"),
(ii) Plaintiff's conduct at issue and Appellants' conduct at issue occurred, see Restatement, § 145(2)(b) ("place where the conduct causing the injury occurred"), and
(iii) the parties' relationship is centered, see Restatement, § 145(2)(d) ("place where the relationship, if any, between the parties is centered").

That the parties are residents of New Jersey, see Restatement, § 145(2)(c) ("the domicil, residence, nationality, place of incorporation and place of business of the parties"), is of no moment, because Maryland's "interest in having its law apply to rights and liabilities of parties to an event which occurred within its borders" is paramount. Fu, 160 N.J. at 139 (citing Melk, 49 N.J. at 229); see also Camp Jaycee, 197 N.J. at 152-53 (explaining that New Jersey courts have "continuously deferred to the rights of other jurisdictions to regulate conduct within their borders ... particularly so when the conduct is ongoing and directed towards residents and non-residents alike"). Indeed, New Jersey courts have stressed in Fu and Mellk that the residences and domiciles of the parties, i.e., Restatement, § 145(2)(c), are but a minor consideration in a choice-of-law determination as it relates to the rules of the road in

an out-of-state automobile accident. Fu, 160 N.J. at 125-34 (applying the flexible governmental-interest test to hold that New York law applied to issues of liability); Mellk, 49 N.J. at 235 (applying principles of comity and not a mechanical application of lex loci delicti to conclude that "the substantive law of Ohio governs the conduct of the parties insofar as this relates to the rules of the road"). As a result, the motion court's emphasis on the parties' residences was misplaced and it therefore erred in its application of the most significant relationship test.

Accordingly, substantive Maryland law on (i) assumption of the risk, (ii) contributory negligence, and (iii) rear-end accidents—including Maryland's rebuttable presumption of negligence—should have been applied by the trial court and been addressed in instructions to the jury.

C. *The Trial Court Should have Applied Maryland's Statutory Cap on Non-Economic Damages.*

Likewise, when testing whether Maryland's statutory cap on non-economic damages should apply, the most significant relationship test also points towards the application of Maryland law. Per Restatement § 146, Maryland law presumptively applies. As to the contacts delineated in Restatement § 145, Plaintiff was injured in Maryland, by conduct having wholly occurred in Maryland, then she was taken to a hospital in Delaware. (5T194:1-21.) Plaintiff remained in the hospital in Delaware for two months for her various surgeries. (5T194:16-21.) And, much of Plaintiff's therapy occurred at Magee Rehabilitation in Philadelphia, Pennsylvania. (3T24:1-

2.) Indeed, Plaintiff only temporarily lived in New Jersey and moved to Delaware during her rehabilitation and therapy. Hence, New Jersey's interest in Plaintiff's damages recovery is attenuated at best and does not overcome the presumption employed by Restatement § 146: Maryland has the most significant interest. But see Mellk, 49 N.J. at 235 (applying principles of comity—rather than the most significant relationship test—and holding that, that while Ohio law governed the parties' conduct, New Jersey law would govern damages questions).

D. If Maryland Law had Applied, Appellants Would Have Employed a Different Trial Strategy.

As with any jury trial, how evidence is treated and how arguments are made is dependent on the jury—how it balances its fact-finding function with other factors such as emotion and sympathy. Indeed, faced with Plaintiff's life-altering injuries, a jury may have been more willing to find that Plaintiff contributed in part to her accident or that she assumed the risk of her accident, rather than finding that she was primarily at fault for her accident. When only a small percentage of fault need be attributed to Plaintiff, such arguments can be subtle and more palatable to a jury.

Here, had Maryland law been applied, Appellants would have tried the case differently. Specifically, had Appellants merely needed to demonstrate that the Plaintiff was negligent in the operation of her vehicle or that she assumed the risk of being struck by another vehicle by voluntarily remaining in the roadway after striking the Napier vehicle, Appellants could have done so without offending the

jury. But, in attempting to demonstrate that Plaintiff was more at fault for the accident at issue than Appellants, the jury may have been offended or found Appellant's theory of defense repugnant.

In the context of assumption of the risk, for example, Appellants would have focused on the fact that Plaintiff knew and understood that by staying in the roadway, she may be hit by another motorist, and that despite the knowledge of that danger, she still chose not to climb over the guardrail to the safety-side. If a jury were to agree, then the jury must find that Plaintiff assumed the risk in this case. See MPJI-Cv 19:14. In contrast, this argument has a different feel to it, when the argument goes another step: that is, the jury must find that Plaintiff's choice to stay in the roadway made her primarily at fault.

Thus, as to each issue in which Maryland law should have been applied, Appellants would have tried this case differently.

V. THE JURY'S DAMAGES AWARD ON FUTURE MEDICAL EXPENSES LACKED A BASIS IN PROBABILITY, OR IN THE ALTERNATIVE, BECAUSE PLAINTIFF'S DAMAGES AWARD WAS GROSSLY EXCESSIVE AND SHOCKING TO THE CONSCIOUS, THIS COURT SHOULD REMIT THE AWARD. (Da20-21; 9T32:21-38:3; Da4-11.)

Instead of being based in reasonable probability, the jury's award as to future medical damages was based on speculation and conjecture. That the court failed to bifurcate trial and allowed Exhibit P90 (Da32) and Exhibit P87 (Da31) into evidence further served to exacerbate the jury's sympathies and increase its speculation. As a

result, the damages award was excessive and requires either a new trial or, because it shocked the judicial conscious, remittitur.

The evidence and expert testimony upon which a jury may base damages for future medical expenses must be based in "reasonable probability." Coll v. Sherry, 29 N.J. 166, 175 (1959); Lesniak v. Cnty. of Bergen, 117 N.J. 12, 20 (1989) (requiring recovery be based on a reasonable probability not mere possibility); Mauro v. Raymark Indus., Inc., 116 N.J. 126, 143-45 (1989) (same); accord Model Jury Charge (Civil), § 8.11I "Future Medical Expenses" (May 1997) ("If it is reasonably probable that plaintiff will incur medical expenses in the future then you should also include an amount to compensate the plaintiff for those medical expenses. ... For future medical expenses you must base your decision on the probable amount that plaintiff will incur."). In determining future medical damages, New Jersey law is designed "to restrict the element of speculation and conjecture." Coll, 29 N.J. at 174; Dombroski v. City of Atl. City, 308 N.J. Super. 459, 469 (App. Div. 1998). In this regard, "there can be no recovery for possible future consequences; they must be 'reasonably probable to follow.'" Dombroski, 308 N.J. Super. at 469 (emphasis original) (quoting Marty v. Erie R.R. Co., 62 N.J. Super. 458, 469 (App. Div.), certif. denied, 33 N.J. 387 (1960)).

Plaintiff's expert economist, Andrew Verzilli, was offered to opine on future medical costs. (5T6:12-22; 5T7:15-20.) Verzilli testified that by "multiplying out

[Alex] Karras' life-care plan," Plaintiff's future medical costs "over the course of her lifetime will be $11.2 million and some change." (5T14:13-20; see also Da34 (estimating Plaintiff's total future medical costs equaled $11,885,624.15 before discounting back to present value).) Future prosthetics costs, which were estimated to be approximately $9.2 million, made up nearly all of the future medical costs projection. (Da34; 4T91:3–97:24; 4T100:21; 3T214:13–215:4.) When Verzilli discounted his future medical costs projection to present value, he testified that her actual future medical expenses were $7,741,268. (5T17:2-15.)

In addition to Verzilli's testimony and Alex Karras' life-care plan, Plaintiff's medical rehabilitation expert, Dr. Guy Fried, offered an opinion as to Plaintiff's future medical costs. Before trial, Dr. Fried testified that he agreed with the future medical costs projections contained in the life-care plan prepared by Alex Karras, i.e., $11,885,624.15 discounted to a present value of $7,741,268. (3T227:10–228:7.) However, **at trial, Dr. Fried speculated that Plaintiff's future prosthetics costs (which the life-care plan approximated were $9.2 million before being discounted to present value) "easily could be twice the price" reflected in the life-care plan.** (3T215:5-12 (emphasis added).) Dr. Fried provided no reason for why the future prosthetics costs could be twice the amount estimated by Plaintiff's expert prosthetist, John Schulte, or why his opinion from a few months earlier had changed. (Cf. 3T214:13–215:12.) And, no evidence in the record supported Dr.

Fried's new opinion at trial; no evidence was introduced at trial on the quantum of Plaintiff's already-incurred costs for her prosthetics. Hence, there was nothing in the record based in reasonable probability that would allow the jury to extrapolate from Plaintiff's past prosthetic expenses to an amount for her future prosthetic expenses.

As such, Dr. Fried's new opinion at trial that future prosthetics costs "could be" twice the amount of Schulte's estimation was no more than impermissible "speculation and conjecture." See Coll, 29 N.J. at 174; Dombroski, 308 N.J. Super. at 469. Indeed, Dr. Fried's speculative projection at trial was a mere possibility, rather than a reasonable probability. Ibid.; see Lesniak, 117 N.J. at 20; Mauro, 116 N.J. at 143-45.

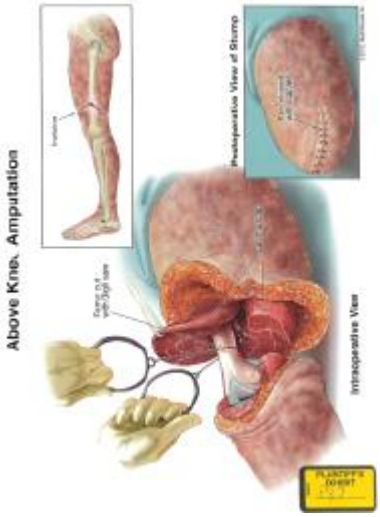
Moreover, while the parties stipulated to past medical expenses, that stipulation still did not provide the jury with a reasonable basis to extrapolate upon Plaintiff's future medical expenses and did not justify Dr. Fried's speculation. Even though the parties stipulated to past medical expenses of $559,413.13, which included 15 surgeries, that still did not provide the jury with the necessary basis in reasonable probability to determine that future medical expenses will be $25 million. Rather, the jury's award was based on sympathy from having heard testimony regarding how the accident happened and having seen Exhibit P90 (Da32) and Exhibit P87 (Da31), along with Dr. Fried's unfounded speculation.

Accordingly, the $25,000,000 award for future medical expenses cannot be sustained based on the record in this case, and a new trial should be ordered, or in the alternative, a remittitur should be entered.

VI. THE CUMULATIVE EFFECT OF THE ERRORS AT TRIAL WAS SO GREAT THAT IT LED TO A MISCARRIAGE OF JUSTICE AND REQUIRES A NEW TRIAL. (2T18:8-20; 6T156:18-157:1; 6T167:8-168:4; 7T112:24-114:21; 7T103:2-23; 7T111:15-112:23; 9T32:21-38:3; Da4-11.)

The cumulative effect of the various errors at trial warrant a new trial. In addition to the cascade of errors identified above, the court's failure to bifurcate this trial was error because it was obvious that in a case such as this, where the plaintiff sustained horrific and gruesome injuries, juror sympathy would likely infect the jury's determination on liability—which it did. That error was compounded by the Court's decision to allow Exhibit P90 (Da32) and Exhibit P87 (Da31) into evidence.

(Da32)



(Da31)

Under N.J.R.E. 403, these two exhibits unduly prejudiced the jury and such prejudice substantially outweighed whatever probative value the exhibits offered.

Plaintiff presented six medical experts to discuss her injuries, surgeries, rehabilitation, medical care, and the life she would lead as time went on. Moreover, Plaintiff was present at trial—the jury saw that she had no legs and heard six-days of testimony regarding her accident and the medical treatment that followed. Further, the jury was given the opportunity to hear an audio recording that captured the exact moment Plaintiff was struck by the truck operated by Mr. DePass. Thus, other than severely prejudicing the jury, these two exhibits offered little-to-no probative value. That Exhibit P87 (Da31) and Exhibit P90 (Da32) were produced after the close of discovery and on the eve of trial provided even more support for their exclusion at trial. Hence, the trial court's decision to admit them into evidence, in light of having denied a bifurcated trial, was error.

Accordingly, the cumulative effect of these errors is so great that it deprived Appellants of a fair trial, and therefore requires this Court to order a new trial. Torres, 225 N.J. at 190 (citing Pellicer v. St. Barnabas Hosp., 200 N.J. 22, 53, 55-57 (2009)).

CONCLUSION

For the reasons set forth herein, Appellants respectfully request that this Court remand this case for a new trial.

McCARTER & ENGLISH, LLP
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Jersey City Transfer, Inc., Alert Motor Freight, Inc. and Estate of Paul DePass

/s/ David R. Kott
By: _____
David R. Kott
A Member of the Firm

Dated: October 10, 2024

ANGEL MAY RIDER, Plaintiff-Respondent, v. JERSEY CITY TRANSFER, INC., ALERT MOTOR FREIGHT, INC., HAIER US APPLIANCE SOLUTIONS, INC., d/b/a GE APPLIANCES, and ANTHONY COTUGNO, as Administrator of the Estate of PAUL DEPASS, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003943-24 ON APPEAL FROM: SUPERIOR COURT ESSEX COUNTY, LAW DIVISION, ESX-L-2221-19 JUDGMENT ENTERED: MAY 6, 2024 HONORABLE THOMAS R. VENA, J.S.C. SAT BELOW

BRIEF FOR PLAINTIFF/RESPONDENT, ANGEL MAY RIDER

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Preliminary Statement

Respondent, Angel May Rider, suffered horrific, life-altering injuries in an auto accident caused by a tractor trailer driven by Paul DePass. The accident happened on a dark, rainy night on Interstate 95 yards from the Mason-Dixon line separating Maryland from Delaware. Ms. Rider was traveling from her home in New Jersey to her work in Maryland. She never made it. While merging onto I-95, Ms. Rider's car struck another car that had become disabled and was turned 90 degrees in the travel lane. Panicking and forced to abandon her car, Ms. Rider was standing near the guardrail on the side of the highway and on the phone with 911. Mr. DePass, who was driving his tractor trailer too fast for the dark, rainy conditions, tried to avoid Ms. Rider's disabled vehicle, and jackknifed. His tractor trailer careened out of control and crashed into Ms. Rider, smashing her lower body against the guardrail. Mr. DePass was traveling from New Jersey, where Mr. DePass lived and where his employer was headquartered. Ms. Rider nearly died. Through emergency medical intervention she survived, but she lost both legs from this preventable accident.

In deflecting responsibility for Ms. Rider's injuries, Appellants, Jersey City Transfer, Inc., Alert Motor Freight, Inc., and Estate of Paul DePass, ignore the appellate standards of review, misstate the Supreme Court's holding

in *Dolson v. Anastasia*, 55 N.J. 2 (1969), and understate the evidence in this case. They repeatedly try to blame Ms. Rider for her own injuries. At trial, they argued that Ms. Rider should have moved to the other side of the guardrail. When that strategy did not work, they advanced a new theory post-trial, raising unpreserved issues including that Ms. Rider is completely barred from recovery because she caused the first accident that disabled her car. Yet Appellants own liability expert admitted at trial that Ms. Rider was traveling at an appropriate speed before the first accident. And the jury rightly rejected Appellant's absurd theory that Ms. Rider caused her own injuries by where she was standing after fleeing her disabled vehicle.

Appellants cite nothing for their claim that this case represents the "highest compensatory damages award ever for an automobile accident in New Jersey." (Db2.) That reference is as improper as it is irrelevant to the issues before this Court. Everyone received the fair trial to which they were entitled. The facts support the jury's just result, and the trial court did not commit legal error or abuse its discretion in applying the law. This Court should affirm.

Procedural History

Plaintiff, Ms. Rider, filed suit in Essex County on March 22, 2019. (Da77 – Da89.) As defendants, she initially named Jersey City Transfer and Mr. DePass, and brought claims of negligence. (*Id.*) Ms. Rider later filed a

third amended complaint, which is the operative pleading. (Da155 – Da164.) The third amended complaint included all Appellants and others not involved in this appeal. (Da155.) Mr. DePass died from an illness during litigation, so his Estate was substituted as a defendant. Jersey City Transfer and Alert Motor Freight answered the third amended complaint on July 8, 2021. (Da165 – Da169.) DePass's Estate answered on February 3, 2022. (Da170a – Da175.)

On September 6, 2023, all defendants moved for summary judgment. Relevant here, Appellants asked the trial court to apply Maryland law to two issues in the case: contributory/comparative negligence and a statutory cap on non-economic damages. (Pa2, 5-6. 46.) Appellants also asked for judgment as a matter of law on all issues, contending that Ms. Rider was contributorily negligent as a matter of law and that Maryland's last clear chance doctrine did not apply. (Pa10-12; 1T5:3 – 8:9.) Appellants did not argue that Maryland's assumption-of-the-risk doctrine or traffic laws applied. Ms. Rider responded that New Jersey law should apply and, under any jurisdiction's laws, Appellants were not entitled to summary judgment on all issues. (Pa14; 1T8:21 – 13:6.) After a hearing, the trial court, per Jeffrey B. Beacham, J.S.C., denied Appellants' motion for summary judgment. (Da12-13.) Applying the most significant relationship test (1T15:15-18), Judge Beacham ruled that New Jersey had a greater interest in ensuring that Ms. Rider could be compensated

for her injuries, and that a jury needed to determine whether Ms. Rider was comparatively negligent (1T18:1-18.) Judge Beacham granted the motion for summary judgment of other parties not involved in this appeal. (1T59:21 – 60:7.)

The case proceeded to trial before Thomas R. Vena, J.S.C. Pretrial, Appellants moved to bifurcate trial into liability and damages phases. Judge Vena denied Appellants' motion. (Da17.) Appellants then moved in limine to preclude Ms. Rider from using Exhibits P87 (Da31) and P90 (Da32). Exhibit P87 is a diagram showing Ms. Rider's amputations, and Exhibit P90 is a photograph of Ms. Rider's legs after the accident. Appellants argued that the exhibits were "prejudicial." (2T12:2-3.) Judge Vena denied this motion, too, ruling that Ms. Rider was "entitled to have her injury observed by the jury and take into consideration its nature and extent." (2T18:14-16.)

As part of her case in chief, Ms. Rider testified. She also called several lay witnesses and experts Stephen Benati (accident reconstructionist), Dr. Guy Fried (physical medicine and rehabilitation doctor), Alex Karra (life care planner), John Schulte (certified prosthetist), Andrew Verzilli (forensic economist), Dr. Stephen Gumerman (vocational expert), and Dr. Nicholas Quercetti (orthopedic trauma surgeon). Appellants called a single witness,

Nicholas Bellizzi (an accident reconstructionist) and otherwise relied on cross examining Ms. Rider's witnesses.

After Ms. Rider rested, Judge Vena denied Appellants' *R.* 4:42-2(b) motion to reconsider Judge Beacham's ruling on the choice-of-law issues. (6T156:18 – 157:1.) Judge Vena also denied Appellants' motion for a directed verdict, Appellants having argued that Ms. Rider was comparatively negligent as a matter of law *and* that Mr. DePass was not negligent. (6T165:9 – 166:22.) Judge Vena rejected Appellants' arguments out of hand, ruling that there was "no doubt" in his mind that sufficient evidence exited for a jury to find Mr. DePass negligent. (6T167:8 – 168:4.) "The degree of that negligence and the comparativeness . . . with regard to the plaintiff's negligence, if any, is for the jury to decide." (6T167:13-16.)

The jury charging conference colloquy delves into *Model Jury Charge (Civil)* 5.30D. Appellants, however, never requested that the trial court charge the jury using *Model Charge* 5.30D(2) as to Ms. Rider's alleged comparative negligence. Ms. Rider requested that the trial court use a special charge on Mr. DePass's duties under Federal Motor Carrier Safety Regulations, which she modified as a compromise. (6T200:11 – 202:19.) The trial court then mentioned that it would give the charge on violation of a motor vehicle statute, *Model Charge* 5.30D, which Ms. Rider's counsel offered to have typed and

submitted to the trial court the next morning. (6T205:22 – 206:8.) The trial court ultimately charged the jury using *Model Charge* 5.30D as to Mr. DePass's negligence in violating 49 C.F.R. § 392.14, which requires commercial motor vehicle operators to use "[e]xtreme caution" when hazardous conditions like fog, mist, or rain affect visibility or traction. (7T111:16 – 112:24.) Appellants did not object to the jury charge as given. (7T136:24 – 137:5.)

The jury rendered a verdict for Ms. Rider, and rejected Appellants' defense of comparative negligence. The jury's verdict was $55,000,000.13, which includes, relevantly, $25,000,000.00 for future medical care. (Da19-21.)

Following trial, Appellants moved for judgment notwithstanding the verdict, a new trial, or remittitur. The trial court denied Appellants' motion in its entirety. (Da4-11.) The trial court then molded entered judgment for Ms. Rider on May 6, 2024 in the amount of $59,301,973.04. (Da1-3.) Appellants timely appealed. (Da22.)

Concise Counterstatement of the Material Facts

This case arises from an accident that happened on the shoulder of Interstate 95, a few hundred feet from the Delaware/Maryland border. (Da155-163) In the early morning hours of December 21, 2018, a dark, cold, rainy night, an out-of-control tractor trailer driven by Mr. DePass jackknifed while

trying to avoid Ms. Rider's car, which had been disabled in an earlier accident. (*Ibid*.) The collision caused life-altering injuries to Ms. Rider. (*Ibid*.)

A. Rider is nearly killed when Mr. DePass's jackknifed tractor trailer careens into her as she stands on the shoulder of Interstate 95.

On the night of the accident, Ms. Rider was driving from her home in New Jersey to her place of employment in Maryland. Two weeks before the accident, Ms. Rider moved back in with her now-deceased mother to Pennsville, New Jersey, to escape a "very hostile" ex-boyfriend. (5T178:9-24.) Ms. Rider worked as a supervisor at the Chesapeake House rest stop, along Interstate-95 in North East, Maryland. (5T179:4-12, 180:10-11.)

Ms. Rider's shift was to begin at 4:00 a.m. on December 21, 2018. She woke up, got ready, drove her 2017 Ford Focus over the Delaware Memorial Bridge, stopped at a Wawa in Elkton, Maryland for coffee and breakfast, and continued on her commute. (5T180:1-23, 181:8-15.)

Brandon Ruzicka-Napier, a U.S. Marine lance corporal, was traveling south on Interstate 95 at about the same time. Mr. Napier, also a New Jersey native, had orders to drive from New Jersey to Camp Lejune, North Carolina to pick up another Marine. (5T163:22 – 164:7.) According to Mr. Napier, it was dark and rainy. (5T163:11-20.)

While he was driving, a phantom vehicle sideswiped Mr. Napier's Kia Forte, disabling it so much that the engine would not start. (5T165:15 – 166:5.)

Mr. Napier got out of his vehicle and went to the side of the road to call his father. (5T166:2-9.) While Mr. Napier was on the phone, Ms. Rider's vehicle struck Mr. Napier's vehicle. (5T166:6-8.) Ms. Rider described Mr. Napier's vehicle as white and sideways in her lane of travel, the far-right lane of I-95. (5T182:2-15.) Ms. Rider saw Mr. Napier's vehicle, but could not avoid striking it.[1] (5T182:15-23.) Ms. Rider testified at trial that she was traveling 61 mph at the time of impact with Mr. Napier's vehicle. (5T83:14-21.)

Ms. Rider tried to get out of her car as fast as she could. (5T186:19 – 187:1.) Mr. Napier assisted Ms. Rider out of her vehicle, and described her as very frantic and in shock. (5T166:10, 169:8-22.) He went back to Ms. Rider's vehicle to retrieve her eyeglasses, and the accident with Mr. DePass's tractor trailer happened. (5T169:23-25.) Just before that collision, Ms. Rider was in communication with emergency responders. (Da64; 5T190:12-25.) The transcript of that communication shows that the collision involving Mr. DePass's tractor trailer occurred just as the 911 responder transferred Ms. Rider to highway patrol. (Da64.) When Mr. DePass's tractor trailer struck

[1] Appellants claim that Ms. Rider's testimony about her speed "varies greatly from the actual speed as recorded by the data recorder." (Db 10 n4.) Regardless, there is no evidence that she was traveling faster than the 65-mph speed limit.

them, both Ms. Rider and Mr. Napier were on the roadway side of the guardrail. (5T172:18-23.)

Mr. DePass was driving a truck tractor with an empty trailer southbound on I-95 to pick up a load in Maryland. (3T56:16-22.) Mr. DePass worked for Jersey City Transfer, which had leased the tractor trailer from Alert Motor Freight. (4T141:12 – 142:4; 5T134:22 – 135:1.) According to Mr. Depass's supervisor, Jersey City Transfer and Alert Motor Freight were essentially the same company. (4T115:19 – 116:6.) Mr. DePass confirmed[2] that the weather the night of the accident was "steady" or "heavy" rain with patchy fog. (5T135:7-17.) He claimed that he was traveling at between 55-60 mph right before the accident, a speed that he felt was safe given the weather. (5T136:1-25.) He saw Ms. Rider's vehicle at about either 2/10 mile or 1,200′, but did not realize that it was stopped in his lane of travel. (5T102:8-23, 137:23-9.) Mr. DePass saw other vehicles in his mirrors that prevented him from changing lanes to the left, so he applied his brakes at about ¾ full pressure and tried to move to the right to stop. (5T141:10 – 142:5.) Mr. DePass did not realize that the two drivers were standing by the guardrail, and he did not see them until after his tractor trailer jackknifed. (5T105:1-11.)

[2] The parties read excerpts of Mr. DePass's deposition testimony taken before his death. (5T134:1-2.)

Mr. Benati, Ms. Rider's accident reconstructionist, testified about the different requirements that applied to Mr. DePass since he was operating a tractor trailer, not a passenger vehicle. Because the trailer was unloaded, it was more difficult for Mr. DePass to stop his vehicle. (3T56:23 – 57:3.) Further, as a commercial driver, Mr. DePass should have been traveling at about 44 mph due to the wet, slippery road surface. (3T58:12-23.) Mr. Benati also told the jury about 49 C.F.R. § 319.14, the Federal Motor Carrier Safety regulation that pertains to driving in hazardous conditions. (3T62:15 – 64:14.)

Mr. DePass was traveling 58 mph, which Mr. Benati opined was too fast for conditions. (3T64:15 – 65:1.) He also addressed evidence that Mr. DePass may have been driving in I-95's center lane, in which case the accident would have been completely avoidable had Mr. DePass simply continued driving straight. (3T75:19 – 78:6.) Conversely, had Mr. DePass been traveling in the right lane (the lane obstructed by Ms. Rider's and Mr. Napier's disabled vehicles) he should have been able to stop in time to avoid striking those vehicles if he were traveling the 55-60 mph he told state police that he was. (3T79:19 – 84:25.) In fact, Mr. DePass could not stop his vehicle safely, as it jackknifed and crashed into the guardrail. In responding to Appellants' expert opinion that Mr. DePass could not have avoided the collision, Mr. Benati testified that Mr. DePass could have been traveling slower. (3T95:13-23.)

B. Ms. Rider undergoes a double leg amputation, which requires expensive lifetime care.

Ms. Rider was transported by ambulance from the accident to Christiana Hospital, where she was an inpatient for two months. (5T192:13-18, 194:16-17.) There, Dr. Nicholas Quercetti, a board-certified, orthopedic trauma surgeon amputated both Ms. Rider's legs to save her life. (5T72:3-6, 72:21 – 73:7.) Dr. Quercetti noted that the on-call physician summoned him because it was clearly apparent that both Ms. Rider's legs needed to be completely amputated since they had been partially amputated by the accident itself. (5T78:20 – 79:3.) The Doctor described to the jury how he performed surgery to amputate Mr. Rider's right leg transfemoral (through her femur), and her left leg through the knee. (5T80:21 – 81:12.) During direct examination, Dr. Quercetti used Exhibit P-87,[3] (Da31), to describe the surgeries to the jury. (5T:81:13 – 83:24.) In all, Ms. Rider underwent 15 different surgeries. (5T84:9 – 85:13.) Those subsequent surgeries included procedures to address necrosis, or tissue death, and included complete removal of Ms. Rider's right femur, a procedure called a hip disarticulation. (*Ibid.*)

Following the surgeries at Christiana Hospital, Ms. Rider underwent a week of extensive rehabilitation at Encompass Rehab in Middletown,

[3] The exhibit was mistakenly referred to as "P88" during Dr. Quercetti's questioning. (5T118:1-8.)

Delaware. (5T196:24 197:7.) Ms. Rider continues to experience phantom pain, and she is under watch for recurring infections. (5T198:4 – 200:18.) She is under the care of Dr. Fried for physical medicine and rehabilitation, and will continue to need such care for the rest of her life. (5T200:19 – 201:12.)

C. The jury renders its verdict.

The case was tried from April 2, 2024 to April 11, 2024. After hearing all testimony and evidence and listening to the parties' arguments and the trial court's charge, the jury found in favor of Ms. Rider and against Appellants. The jury rejected Appellants' argument that Ms. Rider was comparatively negligent. It awarded Ms. Rider compensation of $55,000,000.13, which the trial court molded to $59,301,973.04. (Da1-3.)

Legal Argument

The Court should affirm the judgment in Rider's favor. None of Appellants' six claims of error has merit.

I. The trial court correctly concluded that Ms. Rider was not comparatively negligent as a matter of law.

In their first argument, Appellants contend that they were entitled to a directed verdict because Ms. Rider was comparatively negligent as a matter of law under *Dolson v. Anastasia*, 55 N.J. 2 (1969), and *Jones v. Bennett*, 306 N.J. Super. 476 (App. Div. 1998). Although they do not explain, Appellants presumably contend that Ms. Rider was greater than 50% at fault for her own

injuries—as a matter of law—since any lesser percentage of comparative fault would only reduce recovery. *See* N.J.S.A. § 2A:15-5.1. The Court should reject Appellants' argument. The trial record contains ample evidence that created—at minimum—a factual issue of Ms. Rider's alleged comparative fault.

A motion for directed verdict under *R.* 4:40-1 is the same as a motion for summary judgment. *Sackman v. N.J. Mfrs. Ins.*, 445 N.J. Super. 278, 290-91 (App. Div. 2016). A party is entitled to a directed verdict only if the evidence is "so one-sided that one party must prevail as a matter of law." *Id.* at 291. A court must deny a motion for a directed verdict if the evidence, together with all legitimate inferences therefrom, could support a judgment in the non-movant's favor. *Ibid.* The same standard applies to a post-trial motion for judgment notwithstanding the verdict. *Culter v. Dorn*, 196 N.J. 419, 440 (2008). A court must view the facts in the light most favorable to the verdict winner, Ms. Rider here. *Ibid.* (citing *R.* 4:40-2).

Decided before the Comparative Negligence Act, *Dolson* was about the alleged negligence of a defendant who rear-ending a vehicle that was slowing in a left travel lane to turn left. *Dolson*, 55 N.J. at 9-10. *Dolson*'s main holding concerned the appellate standard to apply to the denial of a motion for a new trial based on weight of the evidence. *Id.* at 12. In reversing this Court, the Supreme Court discussed N.J.S.A. § 38:4-89 of the Motor Vehicle Law, which

requires vehicles to maintain a "reasonable and prudent" distance behind vehicles in front of them, "having due regard to the speed of the preceding vehicle and the traffic upon, and the condition of, the highway." The *Dolson* Court stated that a jury should be instructed that violation of this statute is negligence. *Dolson*, 55 N.J. at 10.

Dolson is distinguishable. To begin with, it did not involve a directed verdict. Nothing in the *Dolson* Court's language requires a trial judge to direct a verdict on negligence or comparative negligence anytime a litigant is alleged to have struck a vehicle or object in front of them. *Dolson* is not about judgment as a matter of law at all. Indeed, the Court expressly declined to consider whether the plaintiffs "were entitled to a binding instruction." *Id.* at 11 n.1.

To make up this gap, Appellants rely on *Jones*, but that case is distinguishable, too. In *Jones*, the plaintiff's vehicle suffered a mechanical failure, came to a stop in the center lane of the local lanes of the Garden State Parkway, and turned on its emergency flashers. *Jones*, 306 N.J. Super. at 480. The defendant "was driving well above the posted speed limit," or 87.46 mph, when he struck the disabled vehicle. *Id.* at 482, 485. The defendant tried to argue that the passengers of the broken-down vehicle were comparatively negligent for not exiting that vehicle and running across the travel lanes to the

shoulder to presumable safety. *Id.* at 483-84. This Court rejected that argument, noting that no evidence of comparative fault existed. *Id.* at 484.

Appellants overstate *Dolson*'s and *Jones*'s reach. This Court has held that N.J.S.A. § 38:4-89, "was not intended to apply indiscriminately to any case in which the front of one vehicle comes into contact with the rear of another, irrespective of how the collision occurred." *La Mandri v. Carr*, 148 N.J. Super. 566, 571 (App. Div. 1977). In *La Mandri*, this Court reversed a trial court's decision to charge contributory negligence under *Dolson*, because there was no evidence that the plaintiff was tailgating the defendant before the accident. *Id.* at 572. The accident in *La Mandri* happened on a wet roadway on which the defendant's vehicle lost control, and the plaintiff and defendant offered disputed versions of the accident. Though *Jones* later distinguished *La Mandri*, it did so on the facts of each case. *See Jones*, 305 N.J. Super. at 485. Thus, rather than an inexorable command, the "essence" of *Dolson* is that, to justify invoking the statute, a motorist must have failed to maintain a reasonably safe distance behind another vehicle "in the same lane of traffic." *La Mandri*, 148 N.J. Super. at 572.

Dolson and *Jones* do not apply. At worst, the trial record shows clear disputed issues of fact of Ms. Rider's comparative negligence. Most damning—and unacknowledged by Appellants—their own expert testified that

Ms. Rider was traveling at a reasonably prudent speed before her vehicle struck Mr. Napier's vehicle:

> Q. [By Appellants counsel] The speed limit on the highway was 65 miles per hour, correct?
>
> A. The speed limit, yes. The posted speed limit.
>
> Q. And the first speed [of Ms. Rider's vehicle] two seconds before impact you said was 64.3 miles per hour, correct?
>
> A. That's correct.
>
> Q. And when she's doing the 64.3 miles per hour, it's raining, right?
>
> A. It's raining, yes.
>
> Q. And it's dark?
>
> A. And it's dark, yes.
>
> Q. Would you consider that to be a reasonable and prudent speed under the circumstances in your professional opinion?
>
> ***
>
> THE WITNESS: She was accelerated [sic] to get onto an interstate highway where the speed is 65.
>
> You know, she's on a ramp coming in. **I think that speed is okay**. I think 64.3 or 64, she's probably trying to get to 65. I think it's okay.

(4T194:19 – 195:19 (emphasis added).)

In ruling on Appellants' motions for a directed verdict and judgment notwithstanding the verdict, the trial court and this Court must accept as true Mr. Bellizzi's testimony. His testimony that Ms. Rider was traveling at an

"okay" speed—alone—was sufficient to create a factual issue about Ms. Rider's alleged comparative fault, and to take this case out of *Dolson*'s reach.

Appellants' contention that Ms. Rider "presented no evidence to negate her own evidence," (Db20), is legally erroneous and factually untrue. Comparative negligence is an affirmative defense for which Appellants bore the burden of proof. *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 254 N.J. Super. 380, 387 (App. Div. 1992). Ms. Rider had no burden to disprove her own negligence. As for the facts, Appellants' own expert testimony provided support.

More evidence supports the trial court's decision. Ms. Rider was merging at the time of the collision between her and Mr. Napier's vehicles. So she and Mr. Napier were not in the same lane of travel, which is different from *Dolson* and *Jones*. It was also dark and rainy. Mr. Napier's vehicle was perpendicular to the path of travel. *Dolson* involved a rear-end collision between two vehicles moving in the same travel lane. *Jones* was a collision on the Garden State Parkway in which the striking vehicle was speeding. There was no evidence at trial that Ms. Rider was speeding and her vehicle was not traveling in the same lane as Mr. Napier's.

Finally, as Ms. Rider noted post-trial, Appellants switched theories and arguments. At trial, Appellants contended that Ms. Rider was comparatively

negligent for standing on the roadway side of the guardrail. After that tactic did not work, Appellants blamed Ms. Rider for not seeing Mr. Napier's disabled vehicle before she struck it—even though their own expert could not support this argument. A motion for judgment notwithstanding the verdict is no time to workshop new theories when the trial strategy did not work. In addressing Appellants argument, the trial court stated that there "was more than enough testimony that would suggest that a reasonable jury could find that there was no negligence on [Ms. Rider's] part. It was not a determination that needed to be made as a matter of law. . . ." (9T34:12-17.) The trial court was correct. Appellants were not entitled to judgment in their favor based on Mr. Rider's alleged comparative negligence.

II. Appellants did not request that the trial court charge using *Model Charge* 5.30D(2) and advanced a different theory of comparative negligence at trial, so they cannot show plain error when the trial court did not give a charge they did not request.

Appellants' second argument merely repackages their first argument under a different label. In their first argument, they claim that *Dolson* applies. In their second argument, they claim that the jury should have been instructed under *Dolson* by using *Model Jury Charge (Civil)* 5.30D(2). Appellants begin by asserting that they preserved their claim of error in the charge. Ms. Rider respectfully submits that Appellants did not, except insofar as they claim they

were entitled to a binding instruction on Ms. Rider's negligence—their first argument on appeal.[4] Ms. Rider already explained in Point I why that part of Appellants' argument fails.

This Court reviews the adequacy of jury instructions de novo. *Comprehensive Neurosurgical, P.C. v. Valley Hosp.*, 257 N.J. 33, 74 (2024). Appropriate jury charges are essential. But an improper charge must be capable of producing an unjust result or prejudicing substantial rights to constitute reversible error. *Id.* at 75. Moreover, *R.* 1:7-2 requires a party asserting error in a jury charge to object before the jury begins deliberations. The Supreme Court requires an objection of record, even if a proposed charge is submitted and rejected by the Court. *Dynasty, Inc. v. Princeton Ins.*, 165 N.J. 1, 17-18 (2000). Otherwise, courts presume that the charge was not erroneous. *Willner v. Vertical Realty, Inc.*, 235 N.J. 65, 79 (2018). "[M]erely suggesting a jury instruction to the trial judge is not sufficient to preserve an issue for appeal or to preclude plain error review—the appealing party must have objected to the instruction as given to do so." *Ibid.*

[4] A binding instruction requires the jury to find a certain way. *See* Black's Law Dictionary 1024 (12th ed. 2024). The trial court found that Appellants preserved their challenge to the jury instructions by moving for a directed verdict. (Da8.) This conclusion was correct, but again only insofar as Appellants claim to be entitled to a binding instruction.

Here, Appellants neither requested that the jury be charged using *Model Charge* 5.30D(2) nor objected to the trial court's charge as given:

> THE COURT: . . . . Does counsel wish to be heard prior to the commencement of deliberations?
>
> [Ms. Rider's counsel]: No, Your Honor. The charge is acceptable and I have exhibits for the Court.
>
> THE COURT: We'll get to that in a minute.
>
> [Appellants' counsel]: Thank You, Judge. Nothing further.

(7T136:24 – 137:5.)

The record does not support Appellants' suggestion that they requested that the trial court to use *Model Charge* 5.30D(2). Appellants cite portions of the April 9, 2024 charging conference. (Db24-25.) The colloquy reflects much back-and-forth on the appropriate charges and parts of charges. Yet, absent from the charging conference is any request to charge the jury using *Model Charge* 5.30D(2), any mention of *Dolson*, or any citation of N.J.S.A. § 39:4-89. The only discussion of *Model Charge* 5.30D occurred when Ms. Rider requested that the jury be charged that Mr. DePass's violation of federal regulations was evidence of negligence. (6T204:20 – 206:1.) In fact, Ms. Rider suggested *Model Charge* 5.30D as a compromise to her proposed modification of *Model Charge* 5.30A (General Duty Owing). (6T172:4-9, 183:25 – 184:2, 191:1 – 207:2).

Nor did Appellants object to the jury charge as given. (7T136:24 – 137:5.) Accordingly, this Court should review any challenges to the jury charge (other than the binding-instructions issue) for plain error under *R.* 2:10-2. Appellants thus must show that any error was "clearly capable of producing an unjust result." *Ibid.* They cannot meet this standard.

The failure give a revised version of *Model Charge* 5.30D(2) that Appellants never requested was not plain error. *Torres v. Pabon*, 225 N.J. 167 (2016), quoted by Appellants is distinguishable. The trial court in *Torres* "misidentified" the defendant and the plaintiff in its charge. *Id.* at 178. And—unlike here—the appellant timely objected. *Id.* at 178-79. Despite the objection, the trial court repeated its error in juxtaposing the plaintiff and defendant in the charge. *Ibid.* Because the appellant timely objected, the Supreme Court did not apply heightened plain-error review. *Id.* at 188.

A fundamental reason shows why the trial court did not charge the jury that Ms. Rider violated N.J.S.A. § 39:4-89 and was therefore comparatively negligent. Appellants did not request such a charge, because it did not fit their trial theory. At trial, Appellants claimed that Ms. Rider was comparatively negligent for a different reason: she was standing on the roadway side of guardrail. They cross-examined Ms. Rider on the "safe side" of the guardrail and asked why she did not think to move to the other side of the guardrail.

(6T60:2 – 63:1.) Indeed, in closing, Appellants' counsel characterized Ms. Rider not moving to the other side of the guardrail as "a significant part of the case." (7T43:9-21.) This strategy backfired, so Appellants try a different one on appeal. Furthermore, highlighting Ms. Rider's collision with Mr. Napier's vehicle would have only emphasized the negligence of Mr. DePass, who was subject to a higher standard and failed to avoid colliding with the disabled Rider and Napier vehicles, and ultimately with Ms. Rider herself.

The Court should reject Appellants' argument that the trial court erred in not giving a jury charge they never requested on a legal theory they did not advance at trial. Appellants cannot show that failing to give *Model Charge* 5.30D(2) was plain error.

III. The jury's verdict, including its answer to Interrogatory No. 3 does not represent a miscarriage of justice, and Appellants fail to acknowledge or apply this proper, deferential standard of review.

Appellants next assail the weight of the evidence of Ms. Rider's alleged comparative negligence. In so doing, they ignore the deferential standard of review. Courts apply "considerable deference" to jury verdicts. *Dutton v. Rando*, 458 N.J. Super. 213, 224 (App. Div. 2019). Courts also accept as true all evidence supporting the verdict, and draw all reasonable inferences in favor of upholding the verdict. *Ibid.*

Appellate review of a weight challenge is doubly deferential. Unlike the trial judge, who presided at trial and heard and saw witnesses testify, this Court conducts its review on a cold record. Thus, this Court applies an extremely limited standard of review to claims that a trial court should have granted a new trial based on the weight of the evidence. "The trial court's ruling on such a motion shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law." *R.* 2:10-1. "[A] jury verdict, from the weight of evidence standpoint, is impregnable unless so distorted and wrong, in the objective and articulated view of a judge, as to manifest with utmost certainty a plain miscarriage of justice." *Carrino v. Novotny*, 78 N.J. 355, 360 (1979).

Jury Interrogatory No. 3 asked the jury to determine whether Ms. Rider was negligent. They jury answered "no" 7-1. (Da19.) Because it answered "no," the jury did not determine whether any comparative negligence was the proximate cause of Ms. Rider's injuries, and they did not apportion negligence and comparative negligence. (Da19-20.)

Appellants fail to cite *R.* 2:10-1, and they nowhere argue how they meet this high standard. Instead, they proffer a screed against the jury's verdict and again blame Ms. Rider for their actions in causing her injuries. Appellants cherry-pick parts of the record that support their argument, ignore those that do

not, and urge the Court to improperly construe the evidence in *their* favor, not Ms. Rider's. An appeal is not a mulligan, an appellate brief is not a second chance at a closing argument, and this Court does not review verdicts for jury "error." (Db34.)

Appellants also perpetuate their incredible claim that Ms. Rider was somehow at fault for Mr. DePass nearly killing her because she chose "to remain in a position of peril." (Db32.) No statute that Appellants cite has anything remotely to do with this case. N.J.S.A. § 39:4-36 concerns a *driver's* duty to pedestrians. That statute's discussion of "place of safety" refers to a pedestrian crossing a street. Ms. Rider was not crossing I-95 when Mr. DePass's tractor trailer left the roadway and struck her. N.J.S.A. § 39:4-34 concerns pedestrians walking along roadways. Ms. Rider was not walking along I-95. She was waiting by the side of the highway for emergency responders. And N.J.S.A. § 39:4-32 concerns pedestrians crossing roadways controlled by traffic signals. The jury was apparently offended by Appellants' risible claim that Ms. Rider caused her own injuries by where she chose to flee her disabled vehicle. This argument should fare no better on appeal. By Applying appropriate deference, this Court should reject Appellants' attempt at a new trial.

IV. The trial court correctly held that New Jersey law applied to an accident involving New Jersey residents on an interstate highway yards from an interstate border.

In their fourth claim of error, Appellants argue that the trial court erred in "ruling that New Jersey law governed all issues in this case." (Db34 (all-caps and boldface removed).) This Court reviews de novo a trial court's decision on choice of laws. *Dolan v. Sea Transfer Corp.*, 398 N.J. Super. 313, 321 (App. Div. 2008).

Appellants' choice-of-law argument pertains only to four issues: (1) contributory/comparative negligence; (2) assumption of risk; (3) "rear-end accidents"; and (4) non-economic damages. (Db43.) Appellants' cases are distinguishable, they misstate Maryland law, and their argument is unconvincing. In addition, Appellants' motion for summary judgment mentioned only the comparative/contributory negligence and damages-cap issues. Appellants did not raise assumption of risk nor "rear-end accidents" in the trial court. (Pa2, 5-6. 46.).[5] Under any appellate standard, however, the trial court correctly determined that New Jersey law governed.

For conflicts of laws, New Jersey applies the Restatement (Second) Conflict of Laws' "most significant relationship" test. *P.V.* ex rel. *T.V. v. Camp*

[5] Ms. Rider has included the summary-judgment briefs in her Appendix, because they are germane to "whether an issue was raised in the trial court." *R.* 2:6-1(a)(2).

Jaycee, 197 N.J. 132, 136 (2008). The local law of the state of injury presumptively applies under Restatement § 146, tested against the contacts in § 145 and the general principles in § 6. *P.V.*, 197 N.J. at 136. Further, New Jersey choice-of-law analysis incorporate dépeçage, under which different jurisdictions' laws may govern different issues in a case. *See Grossman v. Club Med Sales*, 273 N.J. Super. 42, 50-51 (App. Div. 1994).

Camp Jaycee harmonized prior case law that had discussed, but not strictly applied, the most significant relationship test. *See P.V.*, 197 N.J. at 139-43 (discussing, among other cases, *Fu v. Fu*, 160 N.J. 108 (1999), and *Mellk v. Sarahson*, 49 N.J. 226 (1974)). Appellants cite *Fu* and *Mellk*, but this Court should refer to those decisions with caution. They predate *P.V.* and, therefore, do not accurately set forth current, proper conflict-of-laws analysis. Further, the *Fu* and *Mellk* Courts ultimately applied the law that gave *greater* protection to the injured New Jersey residents. *Fu*, 160 N.J. at 139; *Mellk*, 49 N.J. at 235. Here, by contrast, Appellants seek legal rules that would give this States' injured citizens like Ms. Rider *less* protection. Even under the most significant relationship test, New Jersey has a strong interest in ensuring just compensation for its residents injured by its residents outside its borders. *See* Restatement (Second) Conflict of Laws § 6(2)(c); *see also P.V.*, 197 N.J. at 156 (ordering application of Pennsylvania law, which favored claimants).

"[T]he first step is to determine whether an actual conflict exists." *P.V.*, 197 N.J. at 143. When no conflict exists, "the law of the forum state governs." *McCarrell v. Hoffmann-La Roche, Inc.*, 227 N.J. 569, 584 (2017). Ms. Rider agrees with Appellants that New Jersey and Maryland law differ on comparative/contributory negligence, assumption of [the] risk; and limits on non-economic damages in tort cases. Ms. Rider parts ways with Appellants when the suggest that Maryland substantive tort law is totally different than New Jersey law. In specific, New Jersey and Maryland apply the same general rules of the road for operating motor vehicles, including operating commercial motor vehicles like the tractor trailer driven by Mr. DePass.

A. New Jersey and Maryland law do not conflict on the substantive rules that govern drivers' conduct.

Appellants argue that Maryland law on the "rules of the road" and "rear-end accidents" should govern. But they fail to develop this argument. In single clause lacking citation, Appellants assert that Maryland has a "rebuttable presumption of negligence," (Db43), but they do not explain. This Court could find that Appellants' waived this part of their argument. *See, e.g.*, *Telebright Corp. v. Dir., N.J. Div. of Taxation*, 424 N.J. Super. 384, 393 (App. Div. 2012)

(finding waived argument that was limited to "one sentence in the conclusion"). Even so, the argument is meritless.

To begin with, Mr. DePass's conduct was governed by Federal Motor Carrier Safety regulations and the commercial driver's license manual. (3T48:25 – 49:9.) Mr. Benati testified that the CDL manual tells drivers to reduce their speed by one-third on wet roadways. (3T48:51:4 – 52:8.) When asked whether this standard applies differently in different states, Mr. Benati testified,

> It is not different. In—I want to say 1984 or 1986, the federal government passed the Commercial Vehicle Safety Act, which mandated that all states use the same manual and test people the same. So everyone that gets a commercial driver's license, although it's issued by a state, it's all from the same manual.

(3T51:10-16 (paragraph break omitted).) Appellants did not establish that the any Maryland CDL manual is different from New Jersey's CDL manual. And of course, federal regulations governing operation of commercial motor vehicles are the same nationwide. When those federal regulations "impose a higher standard of care" than state law, the "regulations must be complied with." 49 C.F.R. § 392.2; (7T110:16 – 111:11 (instructing the jury on 49 C.F.R. § 392.14 (Hazardous conditions; extreme caution.).)

As for Ms. Rider's conduct in operating her vehicle, New Jersey law and Maryland law are the same. Appellants insistently blame Ms. Rider for not

seeing Mr. Napier's vehicle while she was merging onto I-95 south, even though Appellants' own expert testified that Ms. Rider's speed was "okay" before her vehicle struck Mr. Napier's vehicle. (4T195:6-19.) Yet both Maryland and New Jersey have almost identical applicable statutes:

N.J.S.A. § 39:4-89 (second paragraph omitted): The driver of a vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard to the speed of the preceding vehicle and the traffic upon, and condition of, the highway	**Md. Code Transp. § 21-310(a)**: The driver of a motor vehicle may not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the other vehicle and of the traffic on and the condition of the highway.
N.J.S.A. § 39:4-98 (penultimate paragraph only): The driver of every vehicle shall, consistent with the requirements of this section, drive at an appropriate reduced speed when . . . special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.	**Md. Code Transp. § 21-801(h)**: Consistent with the requirements of this section, the driver of a vehicle shall drive at an appropriate, reduced speed when any special danger exists as to pedestrians or other traffic or because of weather or highway conditions.

Regarding rear-end accidents and their continued attempt to blame Ms. Rider for their own negligent conduct, Appellants perpetuate their misstatements about *Dolson* and *Jones*. Those cases do not render a rear-ending driver "negligent as a matter of law." (Db40.) The correct standards are the same. A party attempting to prove negligence bears the ultimate burden of

proof. *Reichert v. Velgholm*, 366 N.J. Super. 209, 214 (App. Div. 2004); *Andrade v. Housein*, 810 A.2d 494, 498 n.2 (Md. Spec. App. 2002). Ms. Rider met her burden of proving Appellants' negligence. Appellants did not meet theirs of proving Ms. Rider's alleged comparative negligence.

Finally, Appellants make no attempt to assert how Maryland and New Jersey law differ regarding Jersey City Transfer and Alert Motor Freight's conduct in hiring Mr. DePass and entrusting him with their vehicle—conduct which occurred exclusively in New Jersey.

Because the law governing the conduct of Appellants, Mr. DePass, and Ms. Rider is the same in New Jersey or Maryland, further choice-of-laws analysis on those issues is unnecessary. The trial court correctly rejected Appellants' attempt to have Maryland law apply to all issues.

B. An actual conflict of laws exists for only some issues.

Contributory/comparative negligence. Maryland's contributory negligence regime differs from New Jersey, which long ago abolished pure contributory negligence by statute. *See* N.J.S.A. § 2A:15-5.1. The New Jersey Comparative Negligence Act "was designed to ameliorate the harshness of the common law contributory negligence doctrine." *Schwarze v. Mulrooney*, 291 N.J. Super. 530, 539 (App. Div. 1996). The Act grew out of an "equitable

desire" to mitigate the unfairness of the common law's total bar to recovery. *Ibid.*

By contrast, Maryland is one of five U.S. jurisdictions that retains common law, pure contributory negligence. *See Coleman v. Soccer Ass'n of Columbia*, 69 A.3d 1149, 1160 & n.3 (Md. 2013). Because of the harshness of this rule, however, Maryland has developed alleviating doctrines which Appellants do not mention. First, contributory negligence is almost always a jury question, unless the evidence is so "distinct, prominent and decisive" that reasonable minds could not differ in declaring it negligence. *See Cador v. Yes Organic Mkt. Hyattsville Inc.*, 269 A.3d 353, 359-60 (Md. Spec. App. 2022) (quoting *Menish v. Pollinger Co.*, 356 A.2d 233, 238 (Md. 1976)). Second, the last clear chance doctrine permits contributorily negligent plaintiffs to recover if they show something new or sequential which affords defendants a fresh opportunity, which they do not take, to avert the consequences of their original negligence. *Carter v. Senate Masonry, Inc.*, 846 A.2d 50, 54 (Md. Spec. App. 2004). Thus, Appellants overstate their case by assuming that they would have invariably prevailed had pure contributory negligence applied.

Assumption of risk. New Jersey courts separate assumption of risk into two categories. Primary assumption of risk is another way of saying that a defendant was not negligent, either because it owed no duty or breached no

duty. *Crawn v. Campo*, 266 N.J. Super. 599, 606 (App. Div. 1993). Secondary assumption of the risk was an affirmative defense to an established breach of a duty. *Ibid.* Some statutes incorporate assumption of risk, for example, the Skiers' Responsibility Act, N.J.S.A. § 5:13-5. In normal negligence cases, however, a jury is not instructed on assumption of risk. *Del Tufo v. Twp. of Old Bridge*, 147 N.J. 90, 113 (1996).

By contrast, Maryland recognizes voluntary assumption of the risk as a defense. It is an intentional and voluntary exposure to a known danger which constitutes consent by the plaintiff, and relieves a defendant of a duty of care. *Balt. Gas & Elec. Co. v. Flippo*, 705 A.2d 1144, 1156 (Md. 1998). Defendants have the burden of proving assumption of the risk by showing that the plaintiff (1) knew of the risk of danger; (2) appreciated the risk; and (3) voluntarily confronted the danger. *Ibid.*

Maryland does not, however, specially apply "assumption of the risk defense as to pedestrians." (Db3.) Appellants' two cases do not support their proposition. In *Sapornari v. CSX Transp., Inc.*, 727 A.2d 396, 398 (Md. Spec. App. 1999), a woman was struck by a freight train and killed while walking across train tracks at a commuter station. *Ibid.* The woman had been dropped off on the station side opposite where she needed to board her train. She could have crossed under the tracks through a pedestrian tunnel but chose a wooden

plank walkway over the tracks. *Ibid.* Maryland's intermediate appellate court held that the woman assumed the risk of injury because she was familiar with the dangers, but proceeded voluntarily to cross the tracks. *Id.* at 406. Appellants' other case is an un-citable unreported opinion, As with this Court's unpublished decisions, *see R.* 1:36-3, Maryland law prohibits citing unreported opinions for binding or persuasive authority, *see* Md. Rule 1-104(a)(2).

Damages cap. New Jersey law requires juries to award the "the full value of the injured party's damages." N.J.S.A. § 2A:15-5.2(a)(1).

In personal injury cases, Maryland caps non-economic damages. Md. Code Cts. & Jud. Proc. § 11-108(b). Because Ms. Rider's claims arose on or after October 1, 2018, the damages cap would have been $860,000. *See id.* § 11-108(b)(2)(ii). Maryland juries are not informed of the damages cap. Rather, the trial court reduces any award in excess of the cap. *See id.* § 11-108(d).

C. New Jersey has a strong interest in applying its negligence and damages law here, to injuries caused to its residents by its residents.

Turning to *P.V.* shows that the trial court correctly rejected Appellants request to apply Maryland negligence law. Though Restatement § 146 applies a presumption for Maryland law, Ms. Rider easily overcame that presumption

using the factors in §§ 145 and 6. Before this Court, Appellants incorrectly apply the most significant relationship test, and argue for a de facto *lex loci delicti* test.

1. The Restatement § 145 factors favor New Jersey law.

Under Restatement § 146, "the state in which the injury occurs is likely to have the predominant, if not exclusive, relationship to the parties and issues in the litigation." *P.V.*, 197 N.J. at 144. But § 146's presumption is just that: rebuttable. Otherwise, the choice-of-law analysis would collapse into the long-ago discarded *lex loci deiecti* test. Turning first to § 145 shows why § 146's presumption for Maryland law is overcome.

Place of injury. The first § 145 factor is the place of injury, Maryland here. This factor is less important when the place of injury is fortuitous, or "it bears little relation to the occurrence and the parties with respect to the particular issue." *P.V.*, 197 N.J. at 146 (quoting Restatement § 145, comment e.). *Fu* (to the extent it applied the proper choice-of-law test) suggests that the place of an auto accident is fortuitous only if the driver did not intend, or could not foresee, being in the accident's jurisdiction. *Fu*, 160 N.J. at 137. As authority, however, *Fu* relied only on a New York trial court decision. Here, the accident could have easily occurred in Delaware, through which all drivers had passed mere minutes before the accident. Or, it could have happened in

New Jersey, the residence and domicile of all drivers. *Cf. P.V.*, 197 N.J. at 146 (defendant organized solely to operate camp for persons with disabilities in Pennsylvania); *Sea Transfer Corp.*, 398 N.J. Super. at 327 (concluding accident's occurrence in New Jersey was fortuitous where defendant detoured onto Palisades Parkway to avoid New York City traffic).

Place where injury-causing conduct occurred. The next § 145 factor considers where the conduct causing the injury occurred. Appellants claim that their injury-causing conduct occurred in Maryland. Mr. DePass's conduct in driving too fast for conditions (at least at the time of the accident) happened in Maryland, though that conduct likely happened in Delaware and New Jersey, too. The accident happened less than two miles from the Mason-Dixon line on an interstate highway while Mr. DePass was traveling from New Jersey (as were Ms. Rider and Mr. Napier).

Domicile, residence, nationality, place of incorporation, and place of business of the parties. This factor heavily weighed in favor of New Jersey law. Mr. Napier, Ms. Rider, Mr. DePass, and Appellants all were New Jersey residents or based in New Jersey. New Jersey has a strong interest in regulating the conduct of corporations organized in headquartered in New Jersey when their tortious conduct injures New Jersey residents elsewhere. No one disputes that Jersey City and Alert Motor Freight are New Jersey corporations

headquartered in New Jersey. *Cf. P.V.*, 197 N.J. at 146-47 (noting defendant was organized in New Jersey to run a camp in Pennsylvania). When a business organized under New Jersey law and headquartered in New Jersey employs a New Jersey resident whose conduct injures New Jersey residents elsewhere, New Jersey has a paramount interest in enforcing the protections and extending the benefits of its own laws to those involved in litigation.

Appellants note that Ms. Rider moved from Maryland shortly before the accident and moved to Delaware for rehab following the crash. This evidence is irrelevant. A person resides where they have a permanent presence. Black's Law Dictionary 1568 (12th ed. 2024). Ms. Rider permanently moved to New Jersey to escape a violent ex-boyfriend. (6T178:13 – 179:3.) So at the time of the accident, Ms. Rider was also domiciled in New Jersey, domicile being a fixed place of residence. Black's Law Dictionary 613 (12th ed. 2024). And Appellants note her move to Delaware—a move caused only by their tortious conduct. Ms. Rider did not switch residences to gain protection of more favorable laws, as she could not foresee the horrific accident giving rise to this case.

Relationship between the parties. The final § 145 factor is neutral. Ms. Rider's only contact with Appellants occurred because of the accident causing her injuries.

Appellants fault the trial court for relying on the parties' domicile and residence, and not the location of the accident, but the trial court's decision was not error. They cite *P.V.* for the need to apply the law where the injury occurred as states must be able to regulate conduct within their borders particularly "when the conduct is ongoing and directed towards residents and non-residents alike." (Db42 (quoting *P.V.*, 197 N.J. at 152-53.) With this quotation, Appellants undermine their position. The conduct here was Mr. DePass's negligent driving. Unlike the failure to prevent abuse in *P.V.*, this conduct was not "ongoing." Unlike *P.V.*, Mr. DePass's negligence was directed at Ms. Rider and, to a lesser extent, Mr. Napier—both non-residents of Maryland and residents of New Jersey. As explained below, Maryland has a much weaker interest in regulating conduct by foreigners in Maryland that injures other foreigners.

2. The Restatement § 6's factors easily overcome § 146's presumption for Maryland law.

As noted above, to determine whether Restatement § 146's presumption is overcome, a court should analyze the principles in § 6. Appellants fail to discuss the § 6 factors. Thus, they offer the Cout an incomplete analysis on choice of laws. Proper, complete analysis shows why Appellants are wrong.

"Reduced to their essence, the section 6 principles are: (1) the interests of interstate comity; (2) the interests of the parties; (3) the interests underlying

the field of tort law; (4) the interests of judicial administration; and (5) the competing interests of the states." *P.V.*, 197 N.J. at 147 (quotation omitted).

The § 6 factors implicate tort law principles of New Jersey and Maryland. To ensure equity and justice, New Jersey has legislatively abolished common law contributory negligence, so that injured plaintiffs' own partial fault does not absolutely bar recovery. New Jersey also does not cap damages in tort claims so that injured parties may recover the full value of their claims.

Maryland, by contrast, retains defendant-friendly contributory negligence (though it has softened somewhat that rule). It also legislatively established damage caps, designed to ensure the availability of liability insurance. *See Murphy v. Edmonds*, 601 A.2d 102, 115 (Md. 1992). Maryland's interest in ensuring sufficient liability insurance has no application to businesses like Jersey City and Alert Motor Freight not incorporated or headquartered in Maryland.[6] Maryland also has less interest in protecting other states' businesses when their tortious conduct causes injury in Maryland. This

[6] Ms. Rider acknowledges that she had not switched her personal auto insurance from Maryland to New Jersey at the time of the accident. This fact has little relevance to Maryland's interest in limiting tort recovery from Appellants. States typically try to limit the cost of personal auto insurance through complex statutory and regulatory regimes, not general damage caps on tort recovery.

interest is also lessened given that the accident happened on an interstate highway within walking distance from the neighboring state.

* * *

Ms. Rider does not doubt that Appellants may have modified their trial strategy had Maryland law applied to some issues in the case. Ms. Rider is much less sure that a jury would have been receptive to Appellants' persistent attempts to blame Ms. Rider for her own near-fatal injuries, no matter what jurisdiction's law applied. As it is, under New Jersey law, the jury did not find Ms. Rider to be comparatively negligent at all. Any jury applying any law would likely take a dim view of a trucking company's attempts to blame a double amputee for failing to avoid its driver's out-of-control eighteen-wheeler.

For all the above reasons, the trial court correctly found that New Jersey law applies. For those legal issues with no conflict of laws, that New Jersey law applies. For those issues with a conflict, Ms. Rider easily showed why she overcame the presumption for Maryland law.

V. Appellants fail to show that the jury's award of Ms. Rider's future medical expenses is so excessive as to shock the conscience.

In their fifth claim of error, Appellants challenge the $25,000,000.00 awarded for Ms. Rider's future medical expenses. They do not challenge the

jury's award for past medical expenses, past pain and suffering, or future pain and suffering. (Db45; Da20 – Da21.)

Appellants again fail to acknowledge the appellate standard of review that governs challenges to verdict amounts. The Appellate Division does not review de novo excessive-verdict claims. Rather, it may reverse a trial court's denial of a motion for a new trial only if it clearly appears that a miscarriage of justice under the law occurred. *Lockley v. Turner*, 344 N.J. Super. 1, 13 (App. Div. 2001) (quoting *R.* 2:10-1).

A court may remit a verdict only in the "unusual case" when the jury's award is "so patently excessive, so pervaded by a sense of wrongness, that it shocks the judicial conscience." *Orientale v. Jennings*, 239 N.J. 569, 589 (2019). Courts must exercise "great restraint" when considering whether to remit a verdict, "because in our constitutional system of civil justice, the jury—not a judge—is charged with the responsibility of deciding the merits of a civil claim and the quantum of damages to be awarded a plaintiff." *Ibid.* (internal quotation and quotation marks omitted). A trial court cannot compare a verdict with similar cases, because each personal injury case is different, making such comparisons illusory. *Cuevas v. Wentworth Gp.*, 226 N.J. 480, 505-06 (2016). Restated, a trial judge should not interfere with a jury's assessment of damages unless it is so disproportionate that it shocks the

conscience. *Baxter v. Fairmount Food Co.*, 74 N.J. 588, 599 (1977) (affirming this Court's vacatur of a trial court's remittitur).

Again, Appellants limit their challenge to the award for future medical expenses. New Jersey does not employ special rules for such damages. Rather, a plaintiff may recover damages for future medical expenses if she shows that she would probably incur those expenses. *Campo v. Tama*, 133 N.J. 123, 129 (1993). Permitting plaintiffs to recover for future medical expenses balances the inherent inability to exactly determine such expenses with the desire to avoid successive lawsuits for personal injuries. *Ibid.* All that a jury need find to award damages is that a plaintiff will "probably require" the future medical care. *Ibid.* "If the prospective consequences may, in reasonable probability, be expected to flow from the past harm, plaintiff is entitled to be indemnified for them. The amount to be awarded must largely be left to the good judgment of the jury." *Coll v. Sherry*, 29 N.J. 166, 175 (1959).

Consistent with case law, the model jury charge on future damages instructs the jury that "the law does not require . . . mathematical exactness." *Model Jury Charge (Civil)* 8.11I; *see also McRae v. St. Michael's Med. Ctr.*, 349 N.J. Super. 583, 595 (App. Div. 2002) (quoting the same jury instruction that applies to future loss of earnings, and reversing trial court's remittitur of jury award). The jury was given this *Model Charge* here. (7T122:3-21.)

Several witnesses provided testimony relevant to expected future medical expenses: Dr. Fried, Mr. Karra, Mr. Verzilli, and Dr. Gumerman. Appellants presented no damages witnesses, and offered no expert testimony to rebut the expert testimony of Ms. Rider's witnesses.

Thus, Appellants do not seriously dispute that Ms. Rider is permanently disabled, will require future medical care, or that such care will cost in the millions of dollars. Ms. Rider presented testimony from an economist, life care planner, and physiatrist all of whom testified to Ms. Rider's necessary future care and its likely costs. Indeed, Appellants acknowledge that Mr. Karras estimated that Ms. Rider's future medical costs would be "$11.2 million and some change," (Db47), which included future prosthetics costs. Discounted to present value, the cost amounted to $7,741,268.00. That said, Mr. Karras also testified that the non-reduced number was "very conservative" and "optimistic." (4T42:1-8.) As an example, Mr. Karras testified that the life-care plan accounted for in-home care beginning at age 40, and did not account for a potential extra 12 years of in-home care that might be necessary. (4T35:17 – 36:18.) Indeed, were Ms. Rider to start in-home care at age 28, the $1.8 million budgeted for in-home care could "at least double" or come close to tripling that number. (4T37:1-13.)

As for the economics, Mr. Verzilli testified that the inflation rate has increased since he authored his report in 2020, but he stuck to the reduced-to-present-value number for future medical costs. (5T16:7 – 17:9.) Mr. Verzilli noted that his report did not factor in the high inflation rate for 2022 and 2023. (5T16:7-8.) Further, Mr. Verzilli noted that Ms. Rider would have "nothing left over" if Ms. Rider exceeded her life expectancy. (5T17:7-15.)

Dr. Fried, the chief medical officer at Magee Rehabilitation Hospital, reviewed Mr. Karras's life-care plan before testifying. Similar to Mr. Karras, Dr. Fried testified that the life care plan for future medical care was "meat and potatoes as opposed to lots of frills." (3T212:20-21.) Dr. Fried explained the $9.2 million projected costs for orthopedics prosthetics number are computerized, customized devices that have to fit Ms. Rider's body and be replaced every three years. (3T214:13 – 215:4.) Dr. Fried characterized Mr. Schulte's recommendations as "standard and bare bones and conservative." (3T215:9-10.) It is also possible that future technological developments or inventions in the next 50 years could affect the cost of future medical care.

Dr. Fried also noted that he had projected one to two future surgeries for Ms. Rider, but since that projection, Ms. Rider already had two surgeries to address infections. (3T215:16 – 216:4.) Thus, the amount in the life care plan underestimated the amount needed for future surgeries.

Appellants first take issue with Dr. Fried's testimony, claiming that he offered new opinions at trial no supported by evidence, such that his new opinion was impermissible speculation and conjecture. Missing, however, is any timely objection to Dr. Fried's testimony. Appellants instead chose to cross examine him. Thus, Appellants could address the weight to be given to Dr. Fried's testimony at trial. The jury simply chose to find Dr. Fried, and by extension Messrs. Karras and Verzilli credible. Appellants proffered no alternative life care plan which the jury could have weighed. Even further, Appellants presented no damages witnesses at all. Still even further, Appellants barely addressed future medical expenses in closing argument. 7T25:1 – 26:22.) The appellate standard of review prevents Appellants from asking this Court to re-weigh the evidence supporting damages. The witnesses' credibility was for the jury.

Four experts testified about Ms. Rider's future medical expenses. Appellants presented no such witnesses. While Ms. Rider recognizes that she bore the burden of proof, Appellants' failure to rebut Ms. Rider's experts severely undermines their complaint that the amount shocks the conscience. Ms. Rider's life care plan is not a rigid number that bound the jury. Rather, it was a projection. The jury, as triers of fact, accepted evidence and found that the life-care plan was too conservative, and in its discretion awarded Ms. Rider more

money to cover her future medical expenses. The trial court did not abuse its discretion denying remittitur.

Second, Appellants claim that the parties' stipulation to the amount of Ms. Rider's past medical expenses "did not provide the jury with a reasonable basis" to extrapolate future medical expenses. This argument implicates the invited-error doctrine. Invited error "operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when the party urged the lower court to adopt the proposition now alleged to be error." *N.J. Div. of Youth & Fam. Servs. v. M.C. III*, 201 N.J. 328, 340 (2010); *see also Brett v. Great Am. Rec.*, 144 N.J. 479, 503 (1996) (holding invited-error doctrine prevented defendant from arguing against applicability of the Ski Statute since defendant had argued for its applicability in the lower courts).

Appellants and Ms. Rider stipulated that her past medical expenses were $559,413.13. (7T118:12-13; 134:21-24.) Had they not so stipulated, Ms. Rider would have needed to put on evidence to prove her past medical expenses. Now, on appeal, Appellants claim that the stipulation did not provide an adequate basis for the jury to calculate future medical expenses. Appellants cannot use their own stipulation—which streamlined trial and obviated the need for Ms. Rider to put on more evidence potentially damaging evidence—

as the basis to claim error on appeal. Indeed, had Ms. Rider known that Appellants would use this stipulation against her, (*e.g.*, Db48 (stating Ms. Rider introduced "no evidence" on the "already-incurred costs for her prosthetics"), she likely would not have agreed to it. Instead, Ms. Rider would have entered the past medical bills—which are plainly reasonable, necessary, and related—which would have showed hundreds of thousands of dollars in outstanding bills. (Pa49-50.)

Finally, without a hint of irony, Appellants speculate that the jury based its future-medicals award on sympathy, and not the evidence. "The tradition of the common law does not permit us to speculate upon the foundations of a jury verdict." *State v. Grunow*, 102 N.J. 133, 148 (1986). It is improper to speculate about how the jury might have decided the case. The jury awarded a large sum of damages. Its award represents reasonable, appropriate compensation for Ms. Rider's life-altering, near-fatal injuries.

Based on these facts, the jury's award is not so excessive that it shocks the conscience. The trial court's denial of remittitur does not present a clear miscarriage of justice such that this Court's intervention is required.

VI. Appellants cannot show error, let alone cumulative error.

In their final issue, Appellants combine the alleged "cascade" of errors with the trial court's denial of bifurcation to argue a cumulative-error claim. In

support, they contend the trial court's admission of two exhibits rendered the entire trial unfair. Ms. Rider has already explained why none of Appellants' first five issues constitute trial-court error. Her cumulative-error claim fails, too.

A cumulative-error claim requires an appellant to prove that the "cumulative effect of small errors is so great as to work prejudice[.]" *Torres*, 225 N.J. at 190 (quoting *Pellicer v. St. Barnabas Hosp.*, 200 N.J. 22 (2009)). In essence, cumulative error permits amalgamation of otherwise harmless individual errors. *See id.* at 191. But cumulative error means more than tallying mistakes, because even a "large number" of "inconsequential" errors may be harmless. *See ibid*. Rather, the combined effect of multiple errors must deprive the appellant of a fair trial. *Ibid.*

At the outset, neither denial of bifurcation nor admission of the two exhibits was error. Under *R.* 4:38-2(b), courts may bifurcate trial if a combined trial would be "complex and confusing" or when bifurcating would save "substantial" time. Bifurcation is for convenience and to avoid prejudice. *Diodato v. Roger*, 321 N.J. Super. 326, 335 (Law Div. 1998) (quotation omitted) (granting new trial, because bifurcation of liability and damages gave defendants an unfair advantage and prejudiced the plaintiff). This Court reviews trial courts' decisions to grant or deny bifurcation for an abuse of

discretion. *Thompson* ex rel. *Thompson v. Merrel Dow Pharms., Inc.*, 229 N.J. Super. 230, 255 (App. Div. 1988). Similarly, this court reviews most trial-court evidentiary rulings for an abuse of discretion. *Est. of Hanges v. Metro. Prop. & Cas. Ins.*, 202 N.J. 369, 382 (2010).

Post trial, the trial court stated that bifurcation would not have served judicial economy, because the case did not involve complex or confusing issues. (Da10.) The trial court did not abuse its discretion in so concluding. Ms. Rider sought money damages for personal injuries arising from an auto accident. The case did not involve complex claims or legal issues. The straightforward evidence showed that Ms. Rider sustained near-fatal injuries when Mr. DePass's tractor trailer struck her. Appellants alleged they were not negligent, or that Ms. Rider was at fault for her own injuries. Bifurcation would have lengthened, not shortened, trial. Several of Ms. Rider's expert witnesses appeared live at trial. Their testimony would have had to be rescheduled between multiple phases of trial. And though Appellants highlight Ms. Rider's use of six experts, the parties were able to complete testimony in four days. Further, the parties called Mr. Bellizzi, Appellants' accident reconstructionist, out of turn during Ms. Rider's case in chief to accommodate various schedules. (6T143:9-13.)

As for the exhibits, the trial court stated that they were not "unfairly prejudicial." (Da10.) Again, the trial court did not abuse its discretion, and Appellants cannot show that the admission of two exhibits was reversible error that could support a cumulative-error claim. Appellants also fail to describe the exhibits in context. They do not explain—at all—how they were used during the weeklong trial. This Court cannot grant a new trial based on discussion of discrete pieces of evidence in isolation.

To provide that missing context, Dr. Quercetti used Exhibit P87 (Da31) during direct examination to show how he performed the two amputation surgeries. (5T81:13 – 83:5.) Exhibit P90 (Da32) was not even shown to the jury during trial. (7T88:11-21.) Rather, Ms. Rider's counsel briefly described the photograph during closing argument, and told the jury it could view the photograph as relevant to prove Ms. Rider's pain and suffering. (*Ibid.*)

Appellants were not entitled to excise all bad evidence from trial. *State v. Morton*, 155 N.J. 383, 453-454 (1998) ("The mere possibility that evidence could be prejudicial does not justify its exclusion."). The testimony of all Ms. Rider's experts did not replace the exhibits, especially since Dr. Quercetti used Exhibit P87 to describe the surgeries he performed. Appellants fail to argue how the trial court abused its discretion in refusing to exclude Exhibits P87 or P90 from evidence. Further, that Appellants would point to Ms. Rider's

physical presence at trial as sufficient proof that she "had no legs" is astounding. Ms. Rider had a constitutional right to view her own trial. Her presence at trial was no reason to limit the evidence, and supports no claim of error, let alone cumulative error.

Contrast this case with *Torres*, in which the Supreme Court held that five erroneous determinations could support awarding a new trial. Those errors were patent, unlike this case. The *Torres* trial court improperly admitted evidence; issued an incorrect adverse-inference charge, made "significant errors" in instructing the jury; and failed to instruct the jury that the plaintiff could not recover medical expenses under N.J.S.A. § 39:6A-12. *Torres*, 225 N.J. at 173-74. No such errors occurred here.

No basis supports a new trial based on cumulative error. The Court should reject Appellants' final argument.

Conclusion

This Court affirm the judgment for Angel May Rider.

Respectfully submitted,

Dated: December 11, 2024

STAMPONE O'BRIEN DILSHEIMER HOLLOWAY

By: */s/ Kevin P. O'Brien*

KEVIN P. O'BRIEN, ESQUIRE

ANGEL MAY RIDER, Plaintiff-Respondent, v. JERSEY CITY TRANSFER, INC., ALERT MOTOR FREIGHT, INC., HAIER US APPLIANCE SOLUTIONS, INC. d/b/a GE APPLIANCES, AND ANTHONY COTUGNO, AS ADMINISTRATOR OF THE ESTATE OF PAUL DEPASS, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-003943-23 ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY Sat Below: Hon. Thomas R. Vena, J.S.C. Docket No. ESX-L-2221-19

REPLY BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS JERSEY CITY TRANSFER, INC., ALERT MOTOR FREIGHT, INC., AND ESTATE OF PAUL DEPASS

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PRELIMINARY STATEMENT

In 2008, the New Jersey Supreme Court decided P.V. ex. Rel. T.V. v. Camp Jaycee, 197 N.J. 132 (2008) ("Camp Jaycee"). In 1969, the New Jersey Supreme Court decided Dolson v. Anastasia, 55 N.J. 2 (1969) ("Dolson"). Both Camp Jaycee and Dolson are directly on point, and require reversal of the judgment below.

While the trial court clearly erred in failing to apply Dolson, it is plain on this record, Maryland ("MD") law on contributory negligence, assumption of the risk, and damages, rather than New Jersey ("NJ") law, should have been applied below. The motion court's holding that NJ law applied to all issues was based exclusively on the parties' NJ residences. (1T:16:4-18:16.) Similarly, in her Brief, Plaintiff argues NJ law should apply because Plaintiff and Defendants are from NJ. (Pb34-39.) However, in Camp Jaycee the plaintiff was from NJ and the defendant was a NJ corporation with its administrative office in NJ. 197 N.J. at 135-36. Despite the parties' NJ residences, the Supreme Court applied §§ 6, 145, and 146 of the Restatement (Second) of Conflicts of Law (the "Restatement") and held the law of Pennsylvania, i.e., the situs of the incident, would apply. Id. at 155-56.

Next, the trial court held that whether Plaintiff was negligent was a jury question, rejecting Defendants' argument that Plaintiff was negligent as a matter of law for striking the stationary Napier vehicle ahead of her. (6T167:8–168:4; 9T33:6–34:18; 9T34:2-18; Da9.) The trial court's holding directly conflicts with the holding

in Dolson, that when a driver strikes a vehicle stopped in front of her, the rear-ending driver is negligent as a matter of law. Dolson, 55 N.J. at 10-11. Plaintiff asserts that because there was testimony her speed was "okay", Dolson does not apply. (Pb15-17.) However, the Dolson decision expressly relies upon the NJ statute requiring drivers to keep a safe distance from cars in front of them and does not rely upon (or discuss) the speed of the rear-ending car. Dolson, 55 N.J. at 9-11. Indeed, Dolson clearly applies, and is often applied in NJ, even where a driver is going at or below the speed limit and strikes a vehicle stopped in front of her.

Plaintiff also argues the jury's future medical damages award was not excessive. However, as set forth below, even if the Court accepts all of Plaintiff's expert testimony on future medical expenses (including the wholly speculative testimony that future prosthetics "could be twice the price" estimated by Plaintiff's life-care plan, (3T215:5-12 (emphasis added))), the future medical damages award nevertheless greatly exceeded the amounts testified to by Plaintiff's damages experts.

I. THE TRIAL COURT ERRED IN RULING NJ LAW GOVERNED ALL ISSUES IN THIS CASE. (Da12-13; 1T14:1–18:18; 6T156:18–157:1.)

The arguments Plaintiff makes here were expressly rejected in Camp Jaycee, which is directly on point. Indeed, Plaintiff essentially argues the parties' citizenship is wholly, if not predominantly, determinative of NJ's choice-of-law analysis—which directly conflicts with Camp Jaycee and §§ 6, 145, and 146 of the Restatement. Applying the "most significant relationship" test, as the motion court should have

done, each choice-of-law issue on appeal should be governed by MD law.

Before trial, Defendants moved for MD law to govern choice-of-law issues as to liability and damages.[1] (1T5:3–13:23; Pa1-13; Pa40-48.) However, the motion court held NJ law would govern **all** issues because each driver was a NJ resident on the day of the accident. (1T15:25–18:18.) At trial, Defendants sought reconsideration of choice-of-law issues, but the trial court would not "overturn" the motion court. (6T153:16–157:3.) This Court must now reverse.

Choice-of-law decisions are reviewed de novo. In re Accutane, 235 N.J. 229, 254 (2018) (citing McCarrell v. Hoffmann-La Roche, Inc., 227 N.J. 569, 590 (2017)).

As to whether NJ and MD law conflict, Plaintiff concedes they "differ on comparative/contributory negligence, assumption of [the] risk[,] and the limits on non-economic damages in tort cases." (Pb27; Pb30-33[2]; accord 1T15:19-24 (noting

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[1] Plaintiff argues Defendants did not preserve their choice-of-law argument on assumption of the risk. (Pb3; Pb25.) Plaintiff is wrong. First, Defendants moved for MD law to apply to liability issues. (1T5:3–13:23; Pa1-13; Pa40-48.) Second, even if Defendants had argued Plaintiff assumed the risk, surely the motion court would have reached the same result it did on Defendants' choice-of-law motion that was focused on contributory negligence. Third, Defendants moved for a directed verdict on both Dolson and Plaintiff's decision to remain in the roadway, i.e., assumption of the risk. (6T165:9–166:22.) No doubt, each choice-of-law issue on appeal is preserved. Even if the issue were not preserved, omission as to assumption of the risk is plain error. E.g., Paiva v. Pfeiffer, 229 N.J. Super. 276, 282 (App. Div. 1988) (explaining "if the alleged error has not been brought to the trial court's attention, the appellate court will not reverse on that ground unless the appellant shows plain error, i.e., error 'capable of producing an unjust result'" (citation omitted)).

[2] Plaintiff attempts to downplay the conflict of law by arguing the Federal Motor Carrier Safety Regulations ("FMCSR"), 49 C.F.R. § 392.14, do not change

in the motion court's oral opinion that NJ and MD law conflict).)

Next, **the motion court did not apply §§ 6, 145, and 146 of the Restatement as required by Camp Jaycee**. (1T15:25–18:18; 6T156:18–157:1.) In fact, after noting the accident happened in MD and that MD law presumptively applies, (1T:15:25–16:3), the motion court ignored the Restatement and focused exclusively on the parties' residences, (1T16:14–17:20). The motion court ultimately held:

> The Court finds that the plaintiff was a resident of New Jersey at the time of the accident and the other drivers were actually residents of New Jersey at the time of the accident.
>
> So the Court finds it's in New Jersey's interest to ensure that the plaintiff can be fully compensated and fairly compensated in this case.
>
> So the Court's decision is that New Jersey law applies in this case and so the motion to order that Maryland law applies is denied.
>
> [(1T18:1-10.)]

Wholly absent from the court's opinion is any discussion of three of the four factors in § 145—(a) "the place where the injury occurred", (b) "the place where the conduct causing the injury occurred," and (d) "the place where the relationship, if any, between the parties is centered," Restatement, § 145(2)(a)-(b), and (d)—**which militate against the application of NJ law**. Further, the court entirely ignored § 6

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from state-to-state, (Pb27-28), and both NJ and MD require drivers not to follow too closely behind other vehicles and reduce speed due to weather/roadway conditions, (Pb28-29). But these arguments miss the point—Defendants challenge neither the application of the FMCSR to Mr. DePass nor that all drivers are required to reduce their speed in poor conditions regardless of the state in which they are driving.

of the Restatement. (See 1T15:1-18:18.) As is plain, **the motion court did not apply NJ's "most significant relationship" test**.

Plaintiff argues that NJ "has a strong interest in applying its negligence and damages law," and that she "easily overcame" the § 146 presumption for applying MD law. (Pb33-39.) However, Plaintiff fails to overcome the intuitively correct presumption "that the state in which the injury occurs is likely to have the predominant, if not exclusive, relationship to the parties and issues in the litigation." Camp Jaycee, 197 N.J. at 144. "That presumption may be overcome if 'some other state has a more significant relationship with the parties and the occurrence based on an assessment of each state's contacts' viewed through the prism of section 145, which sets forth general principles for tort actions, and section 6, which lists overarching choice-of-law principles." In re Accutane, 235 N.J. at 259 (quoting McCarrell, 227 N.J. at 590).

Plaintiff begins her choice-of-law analysis by minimizing the presumptive application of MD law, § 146, and the importance of the place of injury, i.e., the first factor of § 145. (Pb34.) Under her reasoning, Plaintiff would apply NJ law to every automobile accident involving NJ residents whether in NJ or elsewhere. She asserts it "is less important when the place of injury is fortuitous, or 'it bears little relation to the occurrence and the parties with respect to the particular issue.'" (Pb34 (citing Camp Jaycee, 197 N.J. at 146).) Plaintiff's reliance on Camp Jaycee is misguided.

First, Plaintiff's argument that the place of injury in MD is fortuitous ignores the facts of the case. Plaintiff was a MD resident just 10 days before the accident and was on her way to work **in MD**. (1T9:4-8; 1T16:11-24.) Plaintiff had a MD driver's license and her vehicle was registered in MD. (6T9:3-5; 6T154:6-7; Da42.) Mr. DePass was on his way to a distribution center **in MD**. (1T19:18-20:7.) Both Plaintiff and Mr. DePass were intentionally driving to MD destinations. Thus, with MD as the deliberate end-point for them both, Plaintiff's assertion that the accident's location in MD was fortuitous and not foreseeable is wrong. (Cf. Pb34-35.)

In Camp Jaycee, like this case, the defendant and plaintiff were NJ residents, and the trial court applied NJ law and was focused on the parties' citizenship and a statute that shielded the defendant-camp from liability. 197 N.J. at 135-36, 137. But, because the plaintiff's injury and the negligent conduct occurred in Pennsylvania, the Appellate Division reversed, holding the case was "not one of the 'rare exceptions' to the general rule that when both conduct and injury occur in a single jurisdiction, the local law of the state where conduct and injury occurred will be applied to determine an actor's liability." P.V. ex rel. T.V. v. Camp Jaycee, 393 N.J. Super. 19, 27 (App. Div. 2007), aff'd, 197 N.J. 132 (2008) (cleaned up).

The Supreme Court in Camp Jaycee affirmed that Pennsylvania law applied. Camp Jaycee, 197 N.J. at 142-56. In its discussion of §§ 6, 145, and 146 of the Restatement, the Camp Jaycee Court underscored the importance of applying the

presumptive local law of the state of the injury—particularly when the place of injury and conduct causing the injury occur in the same state. Id. at 144-56.

After arguing to discount the first factor in § 145, Plaintiff argues the Court should also ignore the second factor in § 145. (Pb35.) That is, Plaintiff contends that while Mr. DePass' injury-causing conduct occurred in MD, it "likely happened in Delaware and New Jersey, too." (Pb35.) Nothing in the record supports Plaintiff's speculation—it is undisputed that the three car accidents central to this lawsuit occurred in MD and no conduct outside of MD caused injuries.

Next, with no caselaw support, Plaintiff argues "[w]hen a business organized under New Jersey law and headquartered in New Jersey employs a New Jersey resident whose conduct injures New Jersey residents elsewhere, New Jersey has a paramount interest in enforcing the protection and extending the benefits of its ow laws to those involved in litigation." (Pb35-36.) Plaintiff's argument has no merit.

Indeed, in Camp Jaycee, a NJ corporation employed a NJ resident, whose conduct injured another NJ resident outside NJ. 197 N.J. at 135-37. Yet—contrary to Plaintiff's argument and despite the parties' NJ citizenship—the Court tested the facts as they relate to §§ 145 and 6 of the Restatement and held Pennsylvania law applied, where both the accident and injury-causing conduct occurred. Id. at 144-56.

Moreover, comments d and e to § 145 undermine Plaintiff's focus on the parties' residences. Comment d to § 145 explains, in tort cases, "subject only to rare

exceptions, the local law of the state where conduct and injury occurred will be applied." Restatement, § 145 cmt. d (noting rare exceptions include immunity and survival issues). Comment e to § 145 discusses another rare exception where "the place of injury [is] fortuitous or . . . bears little relation to the occurrence and the parties with respect to the particular issue." Restatement, § 145 cmt. e. Here, again, both Plaintiff and Mr. DePass were deliberately driving to MD to their respective destinations in MD, and so, the accident's location in MD was not fortuitous and this is not a "rare exception" case—no different than the Court's analyses of §§ 145 and 6 of the Restatement in Camp Jaycee and Fu v. Fu, 160 N.J. 108, 125-39 (1999).

Plaintiff argues that the last factor of § 145, i.e., "the place where the relationship, if any, between the parties is centered," is neutral. (Pb36.) Plaintiff is wrong. There is no question that the relationship between Plaintiff and Mr. DePass is centered in MD—where they both were intentionally driving for work, where the accidents occurred, and where the injury-causing conduct occurred.

Indeed, Plaintiff's entire discussion of § 145, (Pb34-37), reveals a "fundamental misstep" that diminishes the starting point in NJ's choice-of-law analysis. Camp Jaycee, 197 N.J. at 144.

The principles in § 6—"(1) the interests of interstate comity; (2) the interests of the parties; (3) the interests underlying the field of tort law; (4) the interests of judicial administration; and (5) the competing interests of the states," Camp Jaycee,

197 N.J. at 147—do not weigh in favor of NJ law either. Without addressing each § 6 principle, Plaintiff summarily concludes that NJ has the strongest interest in having its law applied here. (Pb37-39.) Once more, Plaintiff is mistaken.

Jersey City Transfer, Inc. ("Jersey City") and Alert Motor Freight, Inc. ("Alert") chose to work with a MD distribution center. (1T19:18–20:7.) Since 2002, Defendants performed roughly 2,000 shipments per year for the MD distribution center. (1T19:24-25.) Having conducted a continuous and deliberate shipping operation in MD, Jersey City and Alert should benefit from MD's pure contributory negligence system and non-economic damages cap.

Here, the interests of interstate comity and the states' competing interests both point toward the application of MD law. Applying NJ law to accidents in MD, simply because drivers reside in NJ, would frustrate MD policy. Camp Jaycee, 197 N.J. at 152-53 (citing Fu, 160 N.J. at 129). NJ can continue to protect its residents and businesses operating in NJ even if MD law is applied to the MD activities in this case. See id. at 153. The converse is not true. If NJ law is applied to activities wholly occurring in MD and where the effects of those activities are felt in MD, then MD's "ability to regulate the conduct of those who chose to operate within its borders will be substantially impaired." Ibid. (citations omitted).

The parties' expectations similarly point to the application of MD law. After all, by driving in MD, Plaintiff and Mr. DePass agreed to obey MD's rules of the

road and therefore expected MD law would apply to their MD activities. Further, Defendants chose to do business in MD and purposefully availed themselves to the rights and benefits of MD law for their MD activities. (1T19:24-25.) Likewise, even after her move to NJ days before the accidents at issue, Plaintiff chose to continue working in MD and driving into MD. (5T179:5–180:11.) Plaintiff did not change her MD driver's license, (6T9:3-5; 6T24:25–25:2; Da217), MD motor vehicle registration, (6T154:6-7; Da42), or MD automobile insurance, (Da253; Pb38).

As to the interests of judicial administration, "such as practicality and ease of application, factors that in turn further the values of uniformity and predictability," the Camp Jaycee Court stressed that the § "146 presumption in favor of the law of the state of the injury, in itself, 'furthers the choice-of-law values of certainty, predictability and uniformity of result and, since the state where the injury occurred will usually be readily ascertainable, of ease in the determination and application of the applicable law.'" 197 N.J. at 154 (citations omitted). Moreover, where, as here, the § 145 contacts and the § 6 principles "lead inexorably to the conclusion that a particular state's relationship to the parties and issues is predominant, judicial administration considerations necessarily yield." Id. at 154-55 (citations omitted).

In sum, for all of these reasons, this Court should reverse the court below and instruct it to apply MD law to the choice-of-law issues on appeal.

II. PLAINTIFF WAS NEGLIGENT AS A MATTER OF LAW UNDER DOLSON AND THE COURT WAS REQUIRED TO INSTRUCT THE

JURY THAT PLAINTIFF WAS NEGLIGENT. (6T167:8-168:4; 7T112:24-114:21; 7T103:2-23; 7T111:15-112:23; 9T32:21-38:3; Da4-11.)

Dolson also requires this Court to reverse the court below, because Plaintiff was negligent as a matter of law when she struck the Napier vehicle, which was stopped ahead of and in the same lane of travel as her vehicle, and the court was required to instruct the jury on Plaintiff's negligence.

Plaintiff repeatedly argues Dolson and Jones do not apply to her accident with the Napier vehicle and do not stand for the proposition that, without a non-negligent excuse, a rear-ending driver is negligent as a matter of law. (Pb1-2; Pb12-17; Pb29.) To make her point, Plaintiff tries to distinguish Dolson and Jones by arguing Napier's vehicle was "not in the same lane of travel" as her vehicle, (Pb17), and that she was not speeding, (Pb2; Pb8; Pb14-17; Pb29).[3] These arguments are flawed.

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[3] Plaintiff argues Defendants did not preserve their Dolson argument or request for a Dolson instruction, i.e., Jury Charge 5.30D(2). (Pb2; Pb18-22.) Plaintiff is wrong. Notably, having sat through trial, Judge Vena correctly ruled Defendants preserved their Dolson argument and request for a Dolson instruction. (Da8.) Indeed, Defendants argued throughout trial that Plaintiff was negligent for striking the Napier vehicle. (E.g., 6T15:2-20; 6T17:17–18:11; 6T31:14–34:24; 6T39:2-24; 6T40:10–44:2; 6T44:18–47:16; 6T:48:11-20; 6T49:14–50:10; 6T51:25–58:2; 7T45:11–50:9.) Defendants moved for a directed verdict on both Dolson and Plaintiff's decision to remain in the roadway. (6T165:9–166:22.) After the court denied their directed verdict motion, Defendants continued to urge the Court to give an instruction on Plaintiff's negligence. (6T182:6–183:4; 6T196:1-7; 6T197:3-10; 6T202:4-2.) Nearing the end of the charge conference, Defendants specifically asked "do you have 530(d)? [sic]" (6T206:24.) Thus, the record demonstrates Defendants expressly preserved the issues on appeal. Moreover, the failure to instruct the jury that Plaintiff was negligent would also be plain error—it possessed a clear capacity

Indeed, Plaintiff argues "she and Mr. Napier were not in the same lane of travel," but fails to provide a record citation to substantiate her point. (Pb17.) Notably, earlier in her Brief, she concedes the opposite: "Ms. Rider described Mr. Napier's vehicle as white and sideways in her lane of travel, the far-right lane of I-95. (5T182:2-15.)" (Pb8; see also 5T165:19–166:2; 5T167:22–168:3; 5T184:13-15.) Even if they were in different lanes—though the record indicates otherwise—this Court explained in Paiva that it "fail[s] to see how that slight differentiation in facts destroys the principle of Dolson." Paiva, 229 N.J. Super. at 281; see also Finley v. Wiley, 103 N.J. Super. 95, 103 (App. Div. 1968) ("[U]nder present day traffic conditions, any driver of an automobile must be prepared for the sudden appearance of obstacles in the street, . . . and his failure to act properly when they appear may be found to amount to negligence." (internal citation omitted)).

Regardless of whether Plaintiff was speeding, Dolson and Jones apply. Indeed, this Court explained in a recent unpublished decision that "speed and [following] distance alone are not determinative" of whether the rear-ending driver is negligent. Guerrier v. Lliguichuzhca, No. A-1568-17T3, 2019 WL 1422256, at *4 (App. Div. Mar. 29, 2019) (Dra1) (discussing Paiva, 229 N.J. Super. at 282; Pagano v. McClammy, 159 N.J. Super. 581, 585 (App. Div. 1978) (reversing the denial of

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to bring about an unjust result because, had the jury been required to find Plaintiff negligent, there would have been an allocation of fault to Plaintiff.

plaintiff's motion for a directed verdict after concluding the sole cause of the accident was defendant's tailgating in violation of N.J.S.A. 39:4-89)); see also Secreti v. Polish, No. A-4980-07T2, 2009 WL 804635, at *1 (App. Div. Mar. 30, 2009) (Dra5) (applying Dolson, after a collision, to a vehicle "stopp[ed] too closely behind [another] vehicle", which was negligence as a matter of law). Thus, regardless of speed, Dolson stands for the proposition that drivers are obligated to maintain a safe distance with cars in front of them, and if a driver fails to do so and strikes a vehicle ahead, it is negligence as a matter of law. Jones v. Bennett, 306 N.J. Super 476, 484-85 (App. Div. 1998).

Plaintiff misconstrues this Court's reasoning in Jones, by pointing to the rear-ending vehicle's speed. (Pb14-15.) In Jones, the rear-ending driver tried to rebut the presumption that he was negligent for striking the stationary front-vehicle by invoking the sudden emergency defense. 306 N.J. Super at 485. This Court's analysis did not indicate the rear-ending driver was negligent because he was speeding, as Plaintiff here argues. (Cf. Pb14; Pb17.) Rather, the Court said he could not invoke the sudden emergency defense because he was speeding—i.e., since he was speeding, he contributed to the emergency situation and he thus had control over the circumstances. Ibid. Hence, he could not claim there was a sudden emergency.

For all of these reasons, this Court should reverse the court below and instruct it to apply Dolson and issue a Dolson instruction.

III. THE JURY'S FUTURE MEDICAL DAMAGES AWARD LACKED A BASIS IN PROBABILITY AND WAS GROSSLY EXCESSIVE. (Da20-21; 9T32:21-38:3; Da4-11.)

Plaintiff concedes she may only recover "probable" future medical expenses. (Pb41.) However, as noted in Defendants' opening Brief, certain experts for Plaintiff relied upon possible, as opposed to probable, expenses. (Db45-48 (e.g., Dr. Fried's speculation that future prosthetics "could be twice the price" in the life-care plan); accord Pb42 (arguing Mr. Karras stated in-home care "could 'at least double'").) Even if the Court accepts (i) the speculative—"could be"—testimony from Dr. Fried regarding future prosthetics, and (ii) the highest speculative projections by Plaintiff's other experts, the jury still added an extra near-$10 million to future medical damages without any basis, let alone a probable basis. As a result, the jury's excessive future medical damages award requires either a new trial or remittitur.

Plaintiff's life-care plan projected future medical expenses of $11,885,624.15, including a future prosthetics projection of $9,261,927.74. (Da34.) At present value, the total life-care plan was $7,741,268,[4] (5T17:2-15), meaning future prosthetics discounted to present value were $6,032,419.02.

Accepting Dr. Fried's speculation that future prosthetics "could be twice the price" estimated in the life-care plan, (3T215:5-12 (emphasis added)), would amount to a total present value of $13,773,687 in future medical expenses. Yet, the jury

[4] The discount to present value shows a 34.868634% reduction.

found Plaintiff would probably incur, and awarded, nearly twice that.

Likewise, accepting Dr. Fried's speculation **and** Mr. Karras' speculative testimony still leaves an approximate $10 million gap in the jury's future medical damages award. Per Karras' testimony, Plaintiff argues if she were "to start in-home care at age 28, the $1.8 million budgeted for in-home care could 'at least double' or come close to tripling that number. (4T37:1-13.)" (Pb42 (emphasis added).) At present value, the $1.8 million in the life-care plan is $1,172,364.39. Accepting Karras' conjecture would, if doubled, mean an additional $1,172,364.39, or would, if tripled, mean an additional $2,344,728.77. Thus, doubling future prosthetics costs **and** tripling in-home care expenses, would be $16,118,415.80—which is still far-shy of the $25 million the jury awarded in future medical expenses.

Rather than being based in reasonable probability, as it must be, see Coll v. Sherry, 29 N.J. 166, 173 (1959), the jury's future medical damages award is a purely speculative figure that appears to be designed to reach a predetermined amount. The jury more than tripled the total present value of Plaintiff's life-care plan, $7.7 million. Accordingly, the $25 million award for future medical expenses cannot be sustained, and a new trial should be ordered, or in the alternative, a remittitur should be entered.

CONCLUSION

For the reasons set forth herein, and all those set forth in Defendants' opening Brief, Defendants respectfully request that this Court remand this case for a new trial.

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/s/ David R. Kott
By: _____
David R. Kott
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Dated: January 8, 2024