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<u>New Jersey Transit Corporation, a/s/o</u>	:	SUPERIOR COURT OF NEW JERSEY
David Mercogliano,	:	LAW DIVISION: BERGEN COUNTY
	:	DOCKET NO.: BER-L-8504-16
Plaintiff(s),	:	
	:	
v.	:	
	:	ORDER
Sandra Sanchez and Chad Smith,	:	
	:	
Defendant(s).	:	
	:	

Decided: January 15, 2021

Honorable Robert L. Polifroni, P.J.Cv.

Shawn C. Huber, Esq., attorney for plaintiff (Brown & Connery LLP, attorneys).

Ryan J. Gaffney, Esq., attorney for defendants (Chasan Lamparello Mallon & Cappuzzo, attorneys).

MOTIONS TO BE CONSIDERED

This matter comes to the court by way of defendants Sandra Sanchez’s and Chad Smith’s motion for partial summary judgment and plaintiff New Jersey Transit Corporation a/s/o David Mercogliano’s cross-motion for partial summary judgment. Oral argument was heard on December 7, 2020.

BACKGROUND

On December 2, 2014, a motor vehicle accident occurred in which a vehicle owned by defendant Chad Smith and operated by defendant Sandra Sanchez (“defendants”) allegedly struck a vehicle owned by New Jersey Transit Corporation and operated by its employee, David Mercogliano. New Jersey Transit, as subrogee of Mercogliano (“plaintiff”), now seeks reimbursement from defendants for workers’ compensation benefits that it paid to Mercogliano.¹

Procedural History

This matter is a subrogation action initiated by New Jersey Transit Corporation as subrogee of David Mercogliano, an employee of New Jersey Transit, injured in a motor vehicle accident while in the course of is employment. New Jersey Transit seeks to recoup the benefits paid by New Jersey Transit in a workers’ compensation settlement. On September 11, 2017, this court

¹ Reimbursement is sought under N.J.S.A. 34:15-40(f).

issued a written opinion, primarily relying upon the holding in Continental Ins. Co. v. McClellan, 288 N.J. Super. 185 (App. Div. 1996), and language within Lefkin v. Venturini, 229 N.J. Super. 1 (App. Div. 1998) and distinguished Lampert v. Travelers Indemnity Co. of America, 447 N.J. Super. 61 (App. Div. 2016), ruling, in part, that the injured employee Mercogliano did not sustain uncompensated economic loss. Plaintiff stipulated Mercogliano did not sustain permanent injuries which would have vaulted the no-lawsuit threshold he selected on his motor vehicle policy. Finding that New Jersey Transit stood in the shoes of Mercogliano, and further finding that Mercogliano had not sustained an uncompensated economic loss, this court dismissed the New Jersey Transit claims. The Appellate Division reversed said ruling at 457 N.J. Super. 98 (App. Div. 2018), holding, in part, that the Automobile Insurance Cost Reduction Act of 1998 (“AICRA”) did not bar the rights of the workers’ compensation insurer to be reimbursed for the appropriate portion of the medical expenses it already paid. New Jersey Transit v. Sanchez, 457 N.J. Super. at 111. The Appellate Division panel noted New Jersey Transit seeks to recover **benefits paid to Mercogliano for economic loss comprised of medical expenses and wage loss**, not non-economic loss. Id. at 112 (emphasis added). The New Jersey Supreme Court granted defendants’ petition for certification (New Jersey Transit v. Sanchez, 237 N.J. 317 (2019)), and as the consequence of a three-three split, issued a concurring opinion on May 12, 2020.

The Supreme Court concurred with the Appellate Division’s ruling and held:

We find no evidence that when the Legislature enacted AICRA, it intended to bar employers and insurers that have paid workers’ compensation benefits for economic loss from seeking reimbursement from third-party tortfeasors in cases such as this, in which the employee’s losses were covered by workers’ compensation benefits and he neither sought nor received PIP benefits. We do not view New Jersey Transit’s subrogation action – limited to workers’ compensation benefits paid for economic losses – to contravene AICRA’s provisions or to undermine its goals.

N.J. Transit Co. v. Sanchez, 242 N.J., 78, 79-80 (2020).²

The Supreme Court also held that New Jersey Transit’s subrogation action comports with the objectives and terms of the Workers’ Compensation Act. Id., at 88. Finally, this court was given discretion to expand the record on remand to resolve any factual dispute about whether any or all of the partial permanent disability benefits were for a noneconomic loss. Id., at 100.

Within said opinion, Justice Patterson wrote:

² “[T]he Legislature made clear that when an employee injured in a work-related accident is entitled to benefits under the Workers’ Compensation Act, that statute – not AICRA – provides his or her primary source of recovery for medical expenses and lost wages. N.J.S.A. 39:6A-6. It envisioned that the employer or its workers’ compensation carrier will pay medical and disability benefits to the injured employee, and that the employee will neither seek nor receive PIP benefits under his automobile policy, thus obviating the need for his or her automobile insurer to pay those benefits. Ibid. Significantly, when it enacted AICRA, the Legislature did not amend the Workers’ Compensation Act to eliminate or circumscribe the statutory right of subrogation in cases involving injuries to employees in motor vehicle accidents. N.J.S.A. 34:15-40. It left that provision intact.” N.J. Transit Co., 242 N.J., at 93-94.

The trial court viewed the workers' compensation benefits at issue to compensate Mercogliano only for his economic loss in the form of medical expenses and lost wages. The Appellate Division agreed; it expressly assumed that this appeal implicates only benefits for economic loss. Sanchez, 457 N.J. Super. at 112 (noting that New Jersey Transit "seeks to recover benefits from Mercogliano for economic loss comprised of medical expenses and wage loss, not non-economic loss.") The record on appeal reveals no details about the partial permanent disability benefits that would contravene the trial court's and Appellate Division's conclusion that those benefits exclusively related to economic loss.

Should the trial court deem it appropriate, it has the discretion to expand the record on remand and resolve any factual dispute about the partial permanent disability payments made in this case. As did the Appellate Division, we confine our analysis to workers' compensation subrogation based upon payments made for economic loss.

N.J. Transit Corp. v. Sanchez, 242 N.J. 78, 99-100 (2020).

The Supreme Court held that Mercogliano's medical payments and lost wages constituted economic loss and considered New Jersey Transit's payment of workers' compensation benefits for medical expenses and lost wages to derive from that loss. Id. at 104.

The issue presented in competing summary judgment motions is whether or not the partial permanent disability payment made by New Jersey Transit to Mercogliano, separate and apart for the payments of medical bills and lost wages, constitute economic loss.

On remand, this court exercised its discretion and permitted limited discovery as to how the partial permanent disability benefit was calculated in the underlying workers' compensation matter. The parties' instant motions for partial summary judgment followed. Defendants seek partial summary judgment barring any claim for reimbursement of the partial permanent disability award because the award was given for a noneconomic loss. Plaintiff seeks partial summary judgment that the claim for reimbursement is entirely economic.

LEGAL ARGUMENTS

Defendants' Motion for Summary Judgment

Plaintiff's Partial Permanent Disability Award Represents Noneconomic Loss Because David Mercogliano Was Compensated for Impairment of "Ordinary Pursuits of Life"

Defendants argue that New Jersey Transit seeks reimbursement of workers' compensation by characterizing Mercogliano's headaches and fewer trips to the gym as an "economic loss." Defendants argue that the partial permanent disability award represents noneconomic loss because the evidence shows only that Mercogliano's ordinary life pursuits have been impaired – not that

Mercogliano's working ability or earning capacity materially diminished, i.e. Mercogliano did not sustain economic loss beyond medical bills and two month's lost wages.

The benefits available under the workers' compensation system generally fall into three categories: medical care, lost wages, and permanent disability awards. N.J.S.A. 34:15-15; N.J.S.A. 34:15-12; N.J.S.A. 34:15-36.³ Permanent disability benefits are distinguishable from the first two categories. Permanent disability is awarded to injured workers pursuant to a statutory schedule specified in the Worker's Compensation Act. N.J.S.A. 34:15-12. Such awards are based on the criteria of N.J.S.A. 34:15-36 and the interpretation of that criteria in Perez v. Pantasote, 95 N.J. 105 (1984). The statutory schedule calculating said awards provides "'for a specific number of weeks' compensation for the loss of certain members of the body.'" Pantasote, at 111. Further, defendant points out that, "... although the amount of the award was measured by the employee's wages, the award was designed to compensate the employee for his physical impairment.'" Id.

Defendants state the Pantasote court set forth two "essentials" to recover partial permanent disability benefits: (1) a showing of demonstrable objective medical evidence of a functional bodily restriction; AND (2) whether the injury is minor or serious enough to merit compensation. Id. at 116-17. One of the factors to be considered when analyzing the second prong is "'whether there has been a disability in the broader sense of impairment in carrying on the ordinary pursuits of life.'" Id., at 117. Therefore, under the Worker's Compensation Act, future wage loss is not determined by economic projections of earning capacity because partial permanent disability awards are not necessarily based on "impairment of earnings or earning capacity." Id. Partial permanency awards may also be based on impairment of "ordinary life pursuits" unrelated to earnings or earning capacity. Id. In a workers' compensation claim, evidence of impairment of ordinary life includes "complaints of pain, numbness" and loss of range of motion. Perez v. Monmouth, 278 N.J. Super. 275, 286 (App. Div. 1994).

Defendants argue that New Jersey Transit has not produced evidence that Mercogliano suffered material impairment of an economic asset, or that the partial permanent disability award represents compensation for such impairment. There is also no evidence that Mercogliano's wages were reduced or his earning capacity impaired as a result of the subject accident. There is no evidence in the record that Mercogliano's working ability or hours were materially reduced after the subject accident. There is no evidence in the discovery record of any economic impact on Mercogliano's employment. Regarding Mercogliano's testimony that he needs to take breaks at work, defendants state Mercogliano was approved to return to work without restrictions and plaintiff has failed to produce any document regarding approval for, or the length and frequency of, any breaks. Defendants point out that Mercogliano only testified as to experiencing pain, weakness, loss of strength, and a reduced ability to exercise. Further, Mercogliano remains in the same employment position. In conclusion for this argument, defendants state that partial permanent benefits can be awarded for impairment of ordinary life pursuits as evidenced by pain or loss of range of motion; however, such hedonic damages are "textbook" noneconomic damages. See Eyoma v. Falco, 247 N.J. Super. 435, 446 (App. Div. 1991).

³ Defendants state that: (1) Medical benefits furnish to the injured worker emergency services, conservative treatment, and, if necessary, surgical and other invasive procedures to cure and relieve the worker of the effects of the injury and to restore the functions of the injured member or organ; and (2) short-term lost wage benefits compensate workers when they are unable to perform due to a temporary disability from a work related injury.

Partial Permanent Disability Awards Are Not Economic Loss Because the Workers' Compensation Act Prohibits the Use of Liens as a Measure of Damages and Permits a Lesser Recovery

In their subsequent argument, defendants contend that the legislative intent and historical provisions of the Workers' Compensation Act do not anticipate the introduction of partial permanent disability benefits as a liquidated sum in Superior Court. First, defendants argue that section 40 of the Workers' Compensation Act has been consistent on the inadmissibility of workers' compensation benefits against third-party tortfeasors and the resulting possibility of recovery less than the total lien. In enacting the Workers' Compensation Act, the Legislature abolished the employers' common law defenses and eliminated liability as an element for dispute. See Dudley v. Victor Lynn Lines, Inc., 32 N.J. 479 (1960). In discussing the legislative history of the act, defendants point out that the legislative intent from the 1913 revision, pertaining to liability for third parties, is still applicable today. Specifically, defendants argue that N.J.S.A. 34:15-40 still anticipates that a third-party recovery may be less than or greater than the benefits paid by an employer.

Second, defendants argue that Section 40 of the Workers' Compensation Act consistently acknowledges the distinction between workers' compensation and Superior Court damages. The laws and procedures governing tort actions in Superior Court do not give way to the expedited system established by the statute. If the negligence of a party is alleged to have caused some loss, they are entitled to defend the quantum of damages. An injured employee retains the ability to bring a common law action against a third party tortfeasor and the outcome of said action may result in greater damages than the compensation awarded under the statutory formula when applying the common law rule for the assessment of damages. U. S. Cas. Co. v. Hercules Powder Co., 4 N.J. 157, 165 (1950). The statute is neutral as to the third party tortfeasor and retains common law liability for the employee or statutory liability for the subrogated employer if the employee was compensated. Schweizer v. Elox Div. of Colt Indus., 70 N.J. 280, 287-88 (1976).

In the case at bar, defendants reiterate that a third-party recovery may be less than or greater than the benefits received via workers' compensation proceedings. If plaintiff was automatically entitled to admit into evidence the full amount of the workers' compensation benefits – including the partial permanency award – the role of the jury in assessing damages would be undermined alongside the purpose of calculations prescribed N.J.S.A. 34:15-40(c). The Workers' Compensation Act does not create a cap nor a floor on third party recoveries.

Plaintiff's Partial Permanent Disability Award Represents Noneconomic Loss Because David Mercogliano's Damages Are Hedonic and Do Not Meet Case Law and Statutory Definitions of Liquidated Economic Loss

Defendant first argues that plaintiff is bound by Superior Court case law and statutes governing damages in motor vehicle negligence actions. Damages for commission of a tort are normally measure by all damages proximately caused by the injury. Schroeder v. Perkel, 87 N.J. 53, 66 (1981). Juries are generally asked to pin a monetary cost to the victim's disability, pain, and suffering. Camaraza v. Bellavia Buick Corp., 216 N.J. Super. 263, 266 (App. Div. 1987). Further

noneconomic loss resulting from a motor vehicle accident is defined as: (1) pain; (2) suffering; and (3) inconvenience. N.J.S.A. 39:6A-2(i). In contrast economic loss is defined as “uncompensated loss of income or property, or other uncompensated expenses, including, but not limited to, medical expenses.” N.J.S.A. 39:6A-2(k). Defendants in this action are not presumed to owe a debt to the plaintiff. The sole count of plaintiff’s complaint is titled simply, “Negligence.” (Exhibit D, Filed Complaint). Therefore, plaintiff is subject to the Court Rules, case law, and statutory authority governing such a claim. Further, the partial permanent disability award does not meet these authorities’ definitions of economic loss; rather, the award represents only noneconomic loss.

Second, defendant argue that the partial permanent disability award at issue is noneconomic loss because it is based on hedonic damages. Defendants rely on Eyoma v. Falco to point out that hedonic damages are generally equated to disability and impairment. Eyoma v. Falco 247 N.J. Super. 435, 450 (App. Div. 1991); Verni ex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 205 (App. Div. 2006). Damages for disability address compensation for permanent or temporary injury resulting in impairment of plaintiff’s faculties, health or ability to participate in activities. Simmel v. N.J. Coop. Co., 28 N.J. 1, 15, (1958). Defendants further argue that Eyoma arose in the context of a wrongful death action, which operates under a statutory framework. Eyoma, at 450. Similarly, motor vehicle torts are also regulated by a statutory scheme with guardrails, prohibitions, and definitions. See N.J.S.A. 39:6A-1 et. seq. Further, the Workers’ Compensation Act defines partial permanency awards as including hedonic damages or impairment of the “ordinary pursuits of life.” Pantasote, 95 N.J. at 117 (citing N.J.S.A. 34:15-46).

Evidence from Mercogliano’s compensation claim is that he experiences pain and is forced to visit the gym less frequently. (Exhibit N, Workers’ Compensation Transcript at 7:2–8:9). He also takes breaks at work. Id. at 8:25–9:7. These are not economic losses. Instead, they are inconveniences and represent lost enjoyment of life.

Third, defendants argue that plaintiff’s partial permanent disability award is noneconomic loss because it is not a liquidated damage and it is not prospective lost wages. Damages in a motor vehicle negligence action may only qualify as economic loss if they are lost income, lost property, or other uncompensated expenses. The partial permanency award does qualify as any of these three. N.J.S.A. 39:6A-2(k). There must be a permanent injury to sustain a recovery beyond wages lost during the recuperation period and must be limited to a time within a reasonable period of recuperation. Miskelly v. Lorence, 380 N.J. Super. 574, 577 (App. Div. 2005); Haywood v. Harris, 414 N.J. Super. 204, 212 (App. Div. 2010) (quoting Miskelly, at 579).

In the instant case, Mercogliano was compensated for his lost wages. (See Exhibit P, Schedule of Lost Wage Benefits and Partial Permanent Disability Payments). These payments compensated his lost time from work during his recuperation and recovery. After he recuperated, he returned to work without restrictions. He returned without any reduced time or opportunity. He returned without any accommodation. The record reflects no further lost wages. While plaintiff concedes that Mercogliano did not suffer a permanent injury, it has also failed to produce evidence that Mercogliano’s earning capacity was impaired in any way beyond his brief absence. Plaintiff therefore satisfies neither of the two elements discussed in Miskelly.

Partial Permanent Disability Awards Are Not Admissible Evidence Because They Result from an Administrative Determination or Settlement

First defendant argues that the admissibility standards applied to Mercogliano's compensation claim are distinguishable from and irrelevant to a Superior Court negligence action. A judge conducting a hearing in the Division of Workers' Compensation is generally not bound by the rules of evidence. Allord v. Henry Muhs Co., 10 N.J. Misc. 1230 (1932). The partial permanency award resulted in a money damages number calculated based on a "percentage" of purported partial permanent injury. However, number was reached by New Jersey Transit and Mercogliano in a settlement. (Exhibit N, Workers' Compensation Transcript, 4:1-3). It was a compromise percentage of disability reached by the parties, in seeming acknowledgement of the three different percentages offered by their experts. (**Compare** Exhibit I, Canario Report **with** Exhibit K, Flood Report **and** Exhibit L, Dane Report). Therefore, that percentage and the resulting monetary award is not an adjudication binding on any other party, court, or jury. That non-binding number implicates inapplicable legal principles, is irrelevant to a jury's calculation of noneconomic damages, and is vastly more prejudicial than probative.

Second, the Superior Court has found inadmissible many other proofs originating from Workers' Compensation court. References to workers' compensation insurance benefits in a third-party tort action, where there is no relevance to an issue before the court, are generally improper and prejudicial. Joy v. Barget, 215 N.J. Super. 268, 271 (App. Div. 1987). Further, defendant argues that the Appellate Division requires the trial court to explain the object of workers' compensation remedy without regard to the award a plaintiff may have received in the administrative proceeding. Id., at 272. However, there are occasions when references to workers' compensation proceedings are appropriate. See Mazzuchelli v. Silberberg, 29 N.J. 15, 26 (1959) (finding no error where court admitted evidence that plaintiff obtained workers' compensation because it supported defense of limited remedy); see also Reinhart v. E.I. Dupont De Nemours, 147 N.J. 156 (1996) (discussing the admissibility of workers' compensation hearing transcript to impeach credibility).

Defendant discusses the holding of Wunschel v. City of Jersey City, 96 N.J. 651 (1984), where the Supreme Court addressed the admissibility of certain workers' compensation findings in Superior Court. In that case, when a police officer was accidentally shot by a fellow officer, the Division of Workers' Compensation found that the death was not in the scope of his employment as an officer, while a Superior Court Judge ruled that it was within the employment scope. Id., at 657. That court established criteria for analyzing the weight that Superior Court should give to the Workers' Compensation court's findings: (1) evidence submitted; (2) the procedures used for admitting evidence; (3) the employee's standing to contest the issues; (4) whether the employer represented the employee's interests; and (5) whether the award itself was well-reasoned and intrinsically persuasive. Id., at 667. The New Jersey Supreme Court later noted that the enforceability of findings in a workers' compensation action depends on whether the Division of Workers' Compensation is conferred with the power to enter a binding judgment on that issue. Kristiansen v. Morgan, 153 N.J. 298, 310 (1998).

Summary Judgment is Appropriate Because there Are No Genuine Issues of Material Fact and Plaintiff's Claim for Noneconomic Loss Fails to Satisfy the Limitation on Lawsuit Threshold

Summary judgment is proper when there are no genuine disputes to any issues of material fact. Conversely, the party opposing the motion must come forward with facts demonstrating a genuine issue to defeat such a motion. R. 4:46-2(c). Our Supreme Court held that non-moving parties cannot defeat summary judgment motions by simply pointing to any disputed issue of fact that is “of an insubstantial nature.” Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995). Instead, the non-moving party must present evidence that raises “sufficient disagreement [as] to require submission to the jury.” Id. at 536.

Here, Mercogliano is subject to the limitation-on-lawsuit threshold, commonly referred to as the verbal threshold. (Exhibit Q, Policy Declarations). The threshold requires a plaintiff to prove they sustained a permanent injury to recover noneconomic damages. N.J.S.A. 39:6A-8(a). Plaintiff has conceded that Mercogliano's injuries do not satisfy the verbal threshold. (Exhibit R, Prior MSJ Response). Plaintiff has also conceded that the verbal threshold defense is available and still applies to noneconomic damages. (Exhibit S, Plaintiff's Opposition to Petition for Certification). For the reasons discussed in Points I – IV, defendants argue that the partial permanent disability award is not an economic loss and represents noneconomic damages. Because Mercogliano does not satisfy the threshold and cannot recover noneconomic damages, there are no issues of material fact and defendants are entitled to judgment as a matter of law barring any claim for reimbursement of the partial permanent disability award.

Plaintiff's Cross-Motion for Summary Judgment

Plaintiff argues that case law should warrant denial of defendants' summary judgment motion and grant plaintiff's cross-motion for summary judgment.

How The Partial Permanent Disability Benefit Was Calculated

Plaintiff points out that the partial permanent disability benefit was a liquidated sum entered by the Workers' Compensation judge in accordance with N.J.S.A. 34:15-12 and the associated Schedule of Disabilities and Maximum Benefits, and N.J.S.A. 34:15-36. In that proceeding, the objective evidence presented was that Mercogliano underwent a cervical MRI which showed a disc bulge at C6-C7. (See MRI Report, Ex. E). He was examined by multiple experts who apparently agreed that Mercogliano was injured in the crash and suffered an injury to his spine to some varying percentage. (See Expert Reports, Ex. F). The only issue was the extent of Mercogliano's disability, which the parties settled at 15% of partial permanent disability.⁴ At the hearing to approve the settlement (see Transcript, Ex. G), Mercogliano testified as to the headaches he suffers, not attending the gym as often, and taking more breaks at work. The workers' compensation judge concluded that Mercogliano sustained a permanent injury entitling him to compensation.

⁴ At oral argument, counsel noted the petitioner's medical expert opined petitioner Mercogliano was calculated at 33-1/3% partial permanent disability, and respondent NJ Transit's expert opined the partial permanent disability was 2%. The settlement reached between the parties, and approved by the Workers' Compensation court, effectively “split the difference.”

Plaintiff addresses defendants' criticism of the proof offered in the Workers' Compensation court hearing. Defendants "fail" to realize that the hearing was conducted procedurally in accordance with N.J.S.A. 34:15-22. Plaintiff then argues that workers' compensation judges are regarded as experts, and their findings are entitled to deference. Lewicki v. New Jersey Art Foundry, 88 N.J. 75, 89 (1981). Therefore, the Workers' Compensation court hearing was "fair and just." Plaintiff then attempt to refocus this court on the specific issue at hand: whether any or all of the partial permanent disability benefit paid to Mercogliano was for noneconomic loss, i.e., pain and suffering, as that term is defined in N.J.S.A. 39:6A-2(i).

Plaintiff's Claim For Reimbursement Of The Partial Permanent Disability Benefit Is Entirely Economic

Plaintiff transitions to its substantive legal arguments for the instant motions by starting with an opposing argument to defendants' motion for partial summary judgment. First, plaintiff argues that workers' compensation disability payments are in lieu of wages and are paid weekly, like wages. There are three types of compensation payments: (1) temporary disability; (2) partial permanent disability; and (3) total permanent disability. See N.J.S.A. 34:15-12(a)-(c). Temporary disability "benefits are payable [weekly] to an injured worker during the period of such disability, to a maximum of 400 weeks." Portnoff, at 385 (citing N.J.S.A. 34:15-12(a)); see Sanchez, 242 N.J. at 87. "The purpose of [these] benefits is to provide a partial substitute for loss of current wages." Portnoff, 392 N.J. Super. at 385. Partial permanent disability benefits are defined under the Workers' Compensation Act as a permanent impairment caused by a compensable accident or compensable occupational disease which restricts the function of the body or of its members or organs. N.J.S.A. 34:15-36; see Sanchez, 242 N.J. at 87-88. This includes consideration of whether there has been a lessening, to a material degree, of an employee's working ability. N.J.S.A. 34:15-36; see Sanchez, 242 N.J. at 87-88. Further, a partial permanent disability award is intended to compensate for loss of earning capacity (i.e. diminution of future earning power). Katsoris v. South Jersey Pub. Co., 131 N.J. 535, 544, 546 (1993). Finally, total permanent disability in workers' compensation is a physical or neuropsychiatric total permanent impairment caused by a compensable accident or compensable occupational disease, where no fundamental or marked improvement in such condition can be reasonably expected. Portnoff, at 387; N.J.S.A. 34:15-36; see Sanchez, 242 N.J. at 87 n.1.

Focusing on partial permanent benefits, plaintiff argues that an injured worker who returns to work at the same wages is not precluded from receiving partial permanent disability benefits, Portnoff, at 388; N.J.S.A. 34:15-36. "Indeed, typically partially permanent disabled workers return to work," Portnoff, at 388. Plaintiff also states that both total and partial permanent disability benefits have the same weekly benefit formula and are unquestionably a partial wage loss benefit. Id., at 390.

Addressing defendants' argument on consideration of the "ordinary pursuits of life," plaintiff states that partial permanent disability benefits can include a consideration of an employee's ordinary pursuits of life; however, said consideration is not a prerequisite to receiving partial permanent benefits. Pantasote, at 117. It only becomes necessary to resort to this consideration if the employee cannot prove an appreciable impairment of their ability to work. Id. Therefore, plaintiff contends that an employee whose injury had no effect whatsoever on their

ordinary pursuits of life can still be compensated under the Workers' Compensation Act if they can prove the injury caused an appreciable impairment of their ability to work.

In the instant matter, Mercogliano testified about how his injury impaired his ability to work when he said he must take more frequent breaks from driving at work. (See Transcript at 8:7-9). The only "ordinary life pursuit" about which he testified was that he was unable to go to the gym as before. (See Transcript at 7:24-8:3).

Plaintiff then argues that defendants misunderstand the purpose of N.J.S.A. 34:15-40 recognizing the varying amounts of potential recoveries for an employee in a third-party matter. This provision operates to overcome the inequity of double recovery, which could occur if an injured employee were permitted to keep both workers' compensation benefits and damages from a third-party tortfeasor. Sanchez, 242 N.J. at 89.

Plaintiff also argues defendants misunderstand the "measure of damage" language in the Workers' Compensation Act. Such language is necessary since third-party matters can include claims for pain and suffering, which are prohibited in workers' compensation matters. Further, there may be strategic reasons why a plaintiff in a third-party matter may choose to not tell the jury about a nominal workers' compensation lien for fear it may cause the jury to think the entire case is nominal. Additionally, a defendant may successfully present a comparative negligence case against a plaintiff, thereby reducing the jury verdict.⁵

Plaintiff argues that pain and suffering benefits do not exist in workers' compensation cases. Similar to the benefits provided to injured workers via the Workers' Compensation Act, "economic loss" under AICRA means "uncompensated loss of income or property, or other uncompensated expenses, including, but not limited to, medical expenses." N.J.S.A. 39:6A-2(k); see also Medical Diag. Assocs. v. Hawryluk, 317 N.J. Super. 338, 343 (App. Div. 1998). Contrary to defendants' claim on page 24 of their brief,⁶ AICRA defines noneconomic loss as "pain, suffering and inconvenience." N.J.S.A. 39:6A-2(i). Further, the Supreme Court held there are no specific allowances for pain and suffering in the Workers' Compensation Act. Bello v. Commissioner, 56 N.J. 41, 50-51 (1970). This holds true even if the third party recovery may include items such as pain and suffering, which are not compensable under the statute. See also Szpera v. Mohican Refining Corp., 121 N.J. Super. 569, 576 (App. Div. 1972). An employee's third party recovery is not out of reach of the employer's lien on the grounds that some or all of it was accounted for by damages for pain and suffering. Bello v. Commissioner, 56 N.J. 41, 50-51 (1970); DeLane v. City of Newark, 343 N.J. Super. 225, 235 (App. Div. 2001).

Additionally, noneconomic damages are typically grouped together under the category of pain and suffering and account for one's "pain, suffering, disability, impairment, and loss of enjoyment of life." See Model Jury Charges (Civil), 8.11E, "Disability, Impairment and Loss of

⁵ At oral argument, plaintiff's attorney conceded that a jury would be empowered to evaluate the percentage of partial permanent disability as assessed in the workers' compensation settlement, while acknowledging counsel was unsure of how the instructions to the jury would be constructed by the court.

⁶ Defendants argued that partial permanent benefits can be awarded for impairment of ordinary life pursuits as evidenced by pain or loss of range of motion; however, such hedonic damages are "textbook" noneconomic damages. See Eyoma v. Falco, 247 N.J. Super. 435, 446 (App. Div. 1991).

the Enjoyment of Life, Pain and Suffering” (approved Dec. 1996; rev. May 2017). Further, jurors are instructed to award such damages in a lump sum. This is in contrast to the weekly economic benefits under the Workers’ Compensation Act section N.J.S.A. 34:15-12(a)(c).⁷ Further, in workers’ compensation matters an employee’s partial permanent disability is measured by a percentage. However, an automobile negligence matter involving the verbal threshold defense either meets the threshold, or does not. See N.J.S.A. 39:6A-8(a). In the case at bar, plaintiff argues that Mercogliano was “partially permanently disabled” in this crash as that term is defined in N.J.S.A. 34:15-36, as found by the Workers’ Compensation judge. Plaintiff also argues that defendants’ general concern that plaintiff will change strategy at trial and decide to present “pain and suffering” proofs is of no moment. This is because a jury is unlikely to award such damages because plaintiff does not seek them. Rather, plaintiff intends to inform the jury during opening statements that it seeks the liquidated sum of \$30,926.44 and how that figure is comprised.

Defendants’ Reply

Defendants filed a brief in further support of their summary judgment motion and in opposition to plaintiff’s cross-motion for summary judgment.

Statutory Prohibition from Using Partial Permanent Disability Benefits as a Measure of Damages

Defendants argue that no legal authority surmounts the statutory prohibition from using partial permanent disability benefits as a measure of damages because third parties are entitled to common law tort defenses in Superior Court. Plaintiff fails to cite a rule, case, or statute disputing the plain language in Section 40 of the Workers’ Compensation Act prohibiting compensation benefits from establishing a measure of damage in a third-party action. Partial permanent disability awards are not economic loss because the statute prohibits the use of liens as a measure of damages and anticipates a lesser recovery. The legislative intent and historical provisions of the Workers’ Compensation Act do not expect or permit the introduction of partial permanent disability benefits as a liquidated sum in Superior Court. There is no language in Section 40 that assumes the employee is entitled to automatic and complete recovery of all workers’ compensation benefits. Section 40 provides reimbursement calculations where a third-party recovery is less than the total benefits. N.J.S.A. 34:15-40.

Decisions on subrogation actions generally – and Section 40 in particular – conform to the principle that a third-party recovery may be lower than benefits conveyed because of defenses available in Superior Court. Subrogation rights are created in one of three ways: (1) an agreement between the insurer and the insured; (2) a right created by statute; or (3) a judicial device of equity to compel the ultimate discharge of an obligation by the one who in good conscience ought to pay it. Culver v. Ins. Co. of N. Am., 115 N.J. 451, 455 (1989). subrogation is not an absolute right. Instead, it is applied under equitable standards with regard to the legal and equitable rights of others. Weinberg v. Dinger, 106 N.J. 469, 489-90 (1987). Similarly, judicial interpretations of Section 40 do not subjugate the rights of any third party that happens to injure someone in the scope of their employment. See U. S. Cas. Co. v. Hercules Powder Co., 4 N.J. 157, 165 (1950); Schweizer v. Elox Div. of Colt Indus., 70 N.J. 280, 287-88 (1976).

⁷ The court notes the \$20,250 partial permanent award, although calculated using weekly wages, was directed to be paid in a lump sum by plaintiff to petitioner.

In the instant case, plaintiff's discussion of the measure of damages prohibition offers the conclusory rebuttal that defendants "misunderstand ... the language in the statute." (Pl. Br. at 15). No caselaw, court rule, or statutory authority is cited to explain this "misunderstanding." Plaintiff merely poses a hypothetical that ignores the underlying point: partial permanency benefits are prohibited from use as a measure of damages because third parties are not subject to the workers' compensation system and thus retain the right to defend a matter without regard to workers' compensation standards of proof (e.g., the Pantasote standard for partial permanent disability).

Further, plaintiff attempts to characterize the defense argument on the measure of damages prohibition as a blanket prohibition on the recovery of workers' compensation benefits in third-party automobile negligence claims. (Pl. Br. at 16). This is an incorrect characterization of the argument. The law of the case after appeal is that medical expenses and lost wages are admissible against a third party, which is acknowledged by this motion seeking only to bar the partial permanency award. More importantly, Plaintiff also misstates the legal authority for their position in Lambert v. Travelers, 447 N.J. Super. 61 (App. Div. 2016).⁸ Lambert did not rule that a workers' compensation lien was admissible evidence in a third-party claim. That court held that the evidence bar for collectible PIP benefits did not apply in third-party actions by injured employees because PIP was not "collectible." Lambert at 71. Additionally, plaintiff made no mention of the standards for admissibility under the New Jersey Rules of Evidence because the lien itself is irrelevant. See N.J.R.E. 401. The fact that a workers' compensation insurance carrier holds some encumbrance on a potential recovery is not a fact of consequence for consideration by the jury. Instead the fact of consequence in the case of medical expenses is the reasonableness and necessity of any amount expended for treatment, testing, or procedures performed on the injured worker. This misstatement highlights the core issue of this application: medical expenses and out-of-pocket lost wages are objective, quantifiable expenditures, while a partial permanency award is not based on any objective loss. Such an award is based instead on imprecise factors requiring expert opinion. A calculation of benefits does not represent wages actually lost, even if the former is tied to an employee's wages.

Defendants then dispute plaintiff's support for the procedures used in the Workers' Compensation court. In rebuttal to plaintiff's contention that a Workers' Compensation judge is entitled to deference, defendants point out that such deference is by the Appellate Division to fact finding and credibility assessments, not to the importation of other judgments into a completely separate action. Compare Lindquist v. City of Jersey City Fire Dep't., 175 N.J. 244, 262 (2003) with Kristiansen v. Morgan, 153 N.J. 298, 310 (1998). The Workers' Compensation court has no authority to bind the Superior Court, or its jury, to a quantum of noneconomic damages.

Plaintiff Does Not Satisfy Their Burden Of Proof Because There Is No Evidence That David Mercogliano Suffered An Uncompensated Loss Of Income Or Other Expense

First, defendants reiterate their argument that plaintiff has failed to show any economic loss. New Jersey Transit – as the subrogee of Mercogliano in an automobile negligence action –

⁸ On Pg. 16 of the Cross-motion brief, plaintiff cites to Lambert for the proposition that Lambert held that workers' compensation liens for medical bills are admissible in third-party automobile negligence cases. See Lambert v. Travelers Indemn. Co., 447 N.J. Super. 61 (App. Div. 2016).

must show that Mercogliano suffered an “uncompensated loss of income or property, or other uncompensated expense” to prove a case for economic loss. N.J.S.A. 39:6A-2(k). The partial permanent disability benefits did not compensate Mercogliano for lost income or diminished earning capacity. Instead, they compensated the more nebulous standard of “impairment of the employee’s ability to work.” See Perez v. Pantasote, Inc., 95 N.J. 117 (1984). Defendant also point out that the compensation was for ordinary life pursuits, like a reduced ability to go to the gym. Plaintiff apparently ignores or distract from this element because they cannot deny that such complaints are hedonic damages that are noneconomic under the applicable statute.

Second, plaintiff fails to dispute that this loss is not equivalent to hedonic damages and that hedonic damages are noneconomic loss. Without evidence of uncompensated loss of income or property, plaintiff has insufficient proofs to present to a jury. General complaints of “disability” detached from a quantifiable economic impact are considered a noneconomic loss. Camaraza v. Bellavia Buick Corp., 216 N.J. Super. 263, 266 (App. Div. 1987). Noneconomic loss is statutorily defined to include inconvenience. N.J.S.A. 39:6A-2(i). To prove economic loss, a plaintiff must provide evidence of “uncompensated loss of income or property.” N.J.S.A. 39:6A-2(k). While the noneconomic loss of “inconvenience” is not statutorily defined, the analogous concept of hedonic damages addresses lost enjoyment of life. See Eyoma v. Falco, 247 N.J. Super. 435, 446 (App. Div. 1991).

In the case at bar, plaintiff failed to produce evidence that the partial permanency award is lost income, lost property, or some other expense under N.J.S.A. 39:6A-2(k). Further, plaintiff did not produce evidence of any quantifiable lost income. See Donelson v. DuPont Chambers Works, 206 N.J. 243, 258 (2011). Absent these proofs, plaintiff’s valuation of Mercogliano’s ill-defined work breaks as amounting to \$20,250 is a legal fiction. The fact that Mercogliano takes breaks sometimes is not evidence of anything, let alone sufficient to satisfy the standard for economic loss under N.J.S.A. 39:6A-2(k). Additionally, plaintiff misquotes Portnoff v. New Jersey Mfrs. Ins. Co., 392 N.J. Super. 377 (App. Div. 2007) by arguing that the partial permanency award is itself evidence of lost wages. The true holding of Portnoff is therefore the opposite of plaintiff’s claim: total permanent disability is unquestionably a “wage loss” benefit while partial permanent disability is not. Portnoff, at 390. Therefore, plaintiff’s claim that both total and partial permanent disability awards “are unquestionably a partial wage loss benefit” is completely inaccurate.

Third, defendants argue that plaintiff’s constructions of Workers’ Compensation Act Section 40 and the New Jersey Rules of Evidence encroach on a jury’s measure of damages because it relies on inadmissible evidence. More specifically, plaintiff “admits” that they intend to ask the jury for a liquidated sum, including the precise amount of \$20,250, for the partial permanency award. (Pl. Br. at 19). This request is based on their: (1) interpretation that Section 40 does not prohibit using the award as a measure of damages before a jury; and their interpretation of the New Jersey Rules of Evidence, that a liquidated sum formulated after a settlement in an administrative agency proceeding is relevant and not unduly prejudicial. Defendants argue that these interpretations of the applicable authority are incorrect because it is the jury’s province to determine damages. Any evidence of the amount of the partial permanency award is inadmissible. Defendants cite to various case law and the New Jersey Constitution to state that juries are left to determine the quantum of damages, and to point out that our Supreme Court narrowed the applicability of additur and remittitur. Oriente v. Jennings, 239 N.J. 569, 589 (2019).

The sole count of plaintiff's complaint is one for negligence. Plaintiff is subject to the court rules governing such a claim and to constitutional protections of the right to a jury. Defendants are entitled to a jury trial because this action, brought by the subrogee of an employee, is one for common law negligence seeking a common law remedy. Jersey Cent., 212 N.J. at 589. Where a jury hears such a case, they are responsible for determining the quantum of damages. Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 589 (2013).

DECISION

Plaintiff argues the permanent partial disability award was an economic loss and therefore subject to full reimbursement by the tortfeasor in the Superior Court action. Plaintiff argues that workers' compensation disability payments are in lieu of wages and that there are three types of compensation payments: (1) temporary disability; (2) partial permanent disability; and (3) total permanent disability. Plaintiff argues partial permanent disability benefits are defined under the Workers' Compensation Act as a permanent impairment caused by a compensable accident which restricts the function of the body or of its members or organs. This includes consideration of whether there has been a lessening, to a material degree, of an employee's working ability. Further, citing to Katsoris v. South Jersey Pub. Co., 131 N.J. 535 (1993), plaintiff notes that a partial permanent disability award is intended to compensate the loss of earning capacity, i.e. the diminution of future earning power. Citing to Portnoff, 392 N.J. Super. at 387, plaintiff argues that an injured worker who returns to work at the same wages not precluded from receiving partial permanent disability benefits since typically partially permanent disabled workers return to work. Id. at 288. Plaintiff argues that both total and partial permanent disability benefits have the same weekly benefit formula and are unquestionably a partial wage loss benefit. Id. at 390. In deference to the defense argument that the award was in compensation for plaintiff's challenges in pursuing "ordinary pursuits of life," plaintiff's counter that partial permanent disability benefits can include a consideration of an employee's ordinary pursuits of life but it becomes necessary to resort to this consideration if the employee cannot prove an appreciable impairment of their ability to work. Therefore, plaintiff argues an employee whose injury had no effect whatsoever on their ordinary pursuits of life can still be compensated under the Workers' Compensation Act if they can prove the injury caused an appreciable impairment of their ability to work.

Plaintiff misapprehends the role of this court in this Superior Court action. It is not, in any way, to question the decisions made in the Workers' Compensation court. Rather, this court is to evaluate standards of proof in this automobile negligence action, and determine if there are material issues of fact to be determined by a jury. The uncontradicted facts in this case could not lead any reasonable jury to find that Mercogliano had any wage loss beyond the initial two months which were compensated in the Workers' Compensation court. Any projection of future work impairment has not come to fruition after the initial two month period following the accident in 2014. Simply put, Mercogliano lost no time from work after the initial two months. Therefore, it is impossible for plaintiff in this case to prove the loss of future wages or a diminution of future earning power and, therefore, impossible to establish future economic loss under the AICRA statute. In this regard, plaintiff fundamentally mischaracterizes the concept of economic loss. The AICRA statute refers to economic loss by the **injured party**, in this case Mercogliano, and not the entity who paid workers' compensation benefits, i.e. New Jersey Transit. The claim for reimbursement of New Jersey Transit's payment for partial permanent disability is distinguished

from New Jersey Transit's claim for reimbursement of lost wages and medical bills. The actual medical bills paid, and the reimbursement for lost wages paid, are provable economic losses in Superior Court (although the fairness and reasonableness of same are still subject to challenge by the defense). Put differently, despite the no-lawsuit threshold selected by Mercogliano in his automobile policy, he would have been entitled to sue to be reimbursed for medical bills and loss of wages caused by defendants' negligence. The appellate courts have ruled New Jersey may seek reimbursement of these costs paid by it in the workers' compensation matter. For reasons set forth below, Mercogliano would not be permitted to sue for inconveniences or speculative future wage loss or impairment.

The evidence produced in discovery demonstrates the basis for the workers' compensation award was Mercogliano's claims of neck pain, headaches, fewer trips to the gym and more breaks at work. There was no loss of actual income or earning capacity beyond the first two months. As to the claims of neck pain and headaches, plaintiff here has conceded that the personal injuries cannot vault the "lawsuit limitation" a/k/a the verbal threshold requirements of AICRA. Mercogliano's claims of visiting the gym less frequently, and taking a few more breaks at work, are not measures of damages in a tort action as economic loss. Said losses, despite their ambiguity, nevertheless can only be considered as "inconveniences," specifically barred as a measure of damages in an automobile negligence case controlled by the limitation on lawsuit threshold. See N.J.S.A. 39:6A-2(i): "non-economic loss means pain, suffering and inconvenience."

The uncontested evidence produced through discovery is that after Mercogliano's two-month period of recuperation from the accident, he returned to work without restrictions, without any reduced time or opportunity to work, and without any need for an accommodation due to any physical impairment. Plaintiff here failed to produce any evidence whatsoever that Mercogliano's earning capacity was impaired in any way beyond his two-month absence.

The workers' compensation order of April 5, 2016 approved the workers' compensation settlement where the parties agreed to "15% of partial total resulting from cervical disk bulge at C6-C7." The Workers' Compensation court issued an amended order on April 12, 2016 confirming the permanent disability award was calculated at ninety weeks at \$225 per week for a total of \$20,250. Although calculated as future lost wages per week, the Workers' Compensation judge, at Page 9 of the transcript, advised petitioner Mercogliano "sir, they have sixty days to issue you your check. You will be netting to yourself tax free \$18,030." Although the calculations were per week, the petitioner was awarded a lump sum amount in advance of any actual lost time from work. (There were allowances deducted from the \$20,250 amount.)

The fact that said payment was a "liquidated sum" as argued by plaintiff's attorney does not make it a provable, economic loss in a Superior Court trial. The fact that it is appropriate for the Workers' Compensation court to approve a settlement for projected impairment of work does not make the claim compensable in a Superior Court automobile negligence action.

As persuasively set forth in defendant's brief, the fact of compensation under the workers' compensation statute is not to be regarded as establishing a measure of damages in a common law tort action filed against a tortfeasor. N.J.S.A. 34:15-40 is not to be regarded as establishing a measure of damages in a third-party action, and a Workers' Compensation judge does not have the

authority to bind the Superior Court, or it jury, to a quantum of damages. Plaintiff concedes this subrogation action is a negligence action subject to all available defenses and it is therefore inappropriate to consider subrogation claim a mere “collection suit” wherein the tortfeasor is obligated to reimburse the payments made in the Workers’ Compensation court. The right to subrogation is not an absolute right but rather is applied under equitable standards with due regard to the legal and equitable rights of others. Weinberg v. Dinger, 106 N.J. 469, 489-90 (1987). Judicial interpretations of Section 40 do not subjugate the rights of any third-party who injures someone in the scope of their employment. See U.S. Cas. Co. v. Hercules Powder Co., 4 N.J. 157, 165 (1950), applying the “common law rule for assessment of damages” to injured employees in the third-party actions; Schweizer v. Elox Div. of Colt Indus., 70 N.J. 280, 287–88 (1976). As appropriately argued by the defense, medical expenses and out-of-pocket lost wages are objective, quantifiable expenditures, while the partial permanency award was not based on any objective loss. In Superior Court, a calculation of future wage loss requires evidential proof, often requiring an expert opinion, as it does not represent wages actually lost.

Plaintiff’s reliance upon the holding in Lampert Indemnity Co. of America, 447 N.J. Super. 61 (App. Div. 2016), is misplaced. The Lampert court did not rule the workers’ compensation lien was admissible evidence in the third-party claim. Rather, that court held the evidence bar for collectible personal injury protection benefits did not apply in third-party actions. The Lampert decision did not eviscerate the Rules of Evidence in assessment of damages in the Superior Court action. The Lampert court made clear that a workers’ compensation insurance carrier’s payment to an injured employee is an incumbrance on the potential recovery for the employee, but said incumbrance must be based on the measure of damages proved pursuant to the Rules of Evidence. As set forth above, medical expenses and out-of-pocket lost wages are objective, quantifiable expenditures, while the partial permanency award is not. Although the workers’ compensation calculation is based upon employee’s projected limitation on wages, the payment clearly did not represent actual future lost wages, and there are no experts produced in this Superior Court action opining on an expectation of future lost wages or work opportunities.

The workers’ compensation approval of a settlement based upon an assessment of future wage loss is not res judicata or otherwise binding in a Superior Court action. There can be no deference to the permanent partial disability award as the tortfeasors in the Superior Court action had no standing to be involved in the workers’ compensation proceeding, and had no right in that proceeding to contest the reasonableness of the medical treatment, the medical bills, and certainly no ability to contest the future wage loss and impairment which was the basis of the lump sum award of \$20,250, less allowances. To rule otherwise would violate the fundamental due process rights of the tortfeasors in this action to challenge the measure of damages. Simply put, there is no wage loss beyond the two months, and no expert proofs that plaintiff’s injuries were such to create a diminution of future earning power, beyond the two-month period. In this regard, plaintiff’s attorney conceded at oral argument that any factfinder in a Superior Court trial would not be obligated to follow the workers’ compensation determination of the percentage of permanent partial disability.⁹

⁹ Plaintiff’s counsel offers no insight as to the mechanics of having a Superior Court jury evaluate the standards of a workers’ compensation award wherein partial permanent disability of an injured employee is established.

Plaintiff cites applicable law to support its argument that the \$20,250 award was not for pain and suffering. Rather, plaintiff's argument is that the award was based on the workers' compensation calculation of disability which is designed to compensate the employee for the inroad upon the full time earning capacity, which in turn depends upon the calculation of the lessening **to a material degree of an employee's work ability**. (N.J.S.A. 34:15-36, emphasis added.) Plaintiff cites to Portnoff for the principle the the primary focus of the partial permanency award is wage-based, not impairment based. Portnoff, 392 N.J. Super. at 390. That said, plaintiff, in its brief, argues that an employee whose injury had no effect whatsoever on their ordinary pursuits of life can still be compensated under the Workers' Compensation Act if they can prove the injuries caused an **appreciable** impairment of their ability to work. (Emphasis added.) The standards of the Workers' Compensation court on this issue is of no moment to plaintiff's obligation to prove an "appreciable impairment" of Mercogliano's ability to work beyond his two-month absence. Again, there are no proofs whatsoever to support said claim in this Superior Court action.

As set forth above, the settlement approval by the Workers' Compensation court cannot be considered res judicata as the tortfeasor defendants had no opportunity to contest the findings therein. In the context of this subrogation action, it cannot be said there was a true adversarial proceeding in the Workers' Compensation court. Plaintiff here, New Jersey Transit, was the respondent to petitioner Mercogliano's workers' compensation claim, and was the party who agreed to settle the disability percentage at 15%, despite the fact its expert calculated the disability at 2%.¹⁰

New Jersey Transit is a subrogee of its employee, David Mercogliano. In the concurring Supreme Court opinion, Justice Patterson, citing to N.J.S.A. 35:5-40(f), stated that the statute mimics the employer or the workers' compensation carrier's right of recovery to the "same action" that the injured employee would have against a third-party tortfeasor "in accordance with traditional principles of subrogation." New Jersey Transit Co. v. Sanchez, 242 N.J. 78, 89-90 (2020). In Continental Ins. v. McClellan, 288 N.J. Super. 185, 189-90 (App. Div. 1996), overturned on other grounds, noted that although N.J.S.A. 34:15-40 authorized an employer to institute the action against the tortfeasor if the injured person did not do so, "the third-party shall

¹⁰ If plaintiff's argument here is accepted as applicable law, New Jersey Transit would have few reasons to restrict payments to an employee if it could confidently secure reimbursement against a tortfeasor, despite the tortfeasor's various defenses as set forth within AICRA. New Jersey Transit could support a generous accommodation to the employee, as a showing of good will to employees, and avoid criticism from commuters who pay bus and train fares and taxpayers who support subsidies to public transportation, if the payments are automatically borne by an alleged tortfeasor. Plaintiff's attorney disputes that concern by noting it is the responsibility of the Workers' Compensation judge to approve settlements as fair and reasonable. That said, the judge can only decide upon the evidence before him or her. If the petitioner produces proofs of a high percentage of partial permanent disability, and the respondent is less motivated to contest the petitioner's claim with the confidence it will be reimbursed by a tortfeasor, the judge will have only that limited information before him/her in the evaluation of the reasonableness of the settlement. Further, the entire point of workers' compensation is to provide fair compensation to the employee. A judge in Workers' Compensation court is hardly concerned with fairness of the payment from the employer's side. As an analogy, in a Superior Court hearing to approve a settlement in a case involving a minor or an incompetent, the focus is on the reasonableness of the settlement on behalf of the minor or incompetent, taking into consideration the risks of the results of a trial. The Superior Court judge's consideration of the settlement does not include an analysis of whether or not the defendant is paying too much money to the minor to settle the case.

be liable only to the same extent as he would have been liable had the employee himself instituted suit..." (quoting Bello v. Commissioner, 56 N.J. 41, 46-47 (1970)).

This longstanding principle has been cited in various subrogation actions unrelated to workers' compensation issues. In Standard Acc. Ins. Co. v. Pellecchia, 15 N.J. 162, 172 (1954), the Supreme Court held the subrogee in effect steps into the shoes of the insured and can recover only if the insured likewise could have recovered and he is subject to all legal and equitable defenses that the third-party may have either against him or against the insured and there can be recovery only if the cause is just and enforcement is consonant with right and justice. See also Culver v. Insurance Co. of No. Amer., 115 N.J. 451, 456 (1989); Foster Estates, Inc. v. Wolek, 105 N.J. Super. 339, 341 (App. Div. 1969); Andelora v. R.D. Mech. Corp., 448 N.J. Super. 229, 236-37 (App. Div. 2017).

Plaintiff's counsel misstates the law when he argues – in effect – the subrogee of the petitioner in Workers' Compensation court is to be reimbursed beyond which the injured employee would have been able to recover if he had been a plaintiff in the tort action. The payment of ninety weeks of future wage losses is a calculation acceptable in the world of workers' compensation, but not in the Superior Court when said calculations are not supported by competent evidence. The uncontradicted facts reveal petitioner's alleged injuries do not materially impact the employee's working ability beyond the two months immediately following the accident and, as a matter of fact and law, plaintiff has no proofs to establish any diminution of the ability to earn wages after his return to work. As a matter of law, a Superior Court jury could not award \$20,250 based upon the speculative projection of impairment and a speculative wage loss which would accompany it, since in fact Mercogliano has not lost time from work beyond the two months and there are no expert proofs to his earning power will be diminished in the future.

Simply put, Mercogliano would not be able to recover for future wage loss or impairment if he sued the tortfeasors directly. New Jersey Transit cannot be in better shoes than Mercogliano. Indeed, accepting plaintiff's attorney's creative argument would serve to put injured employees in the better position than other persons injured as a result of negligence in an automobile accident who were not in the course of their employment when the accident occurred. Although public policy, articulated through legislation, supports a standard of compensation to injured employees as a trade-off for denying the employees the right to sue employers for negligence, there is no such public policy supporting enhanced compensation to injured employees in the tort action. A workers' compensation carrier, or a self-insured provider of workers' compensation benefits such as New Jersey Transit, cannot manipulate the standards of workers' compensation to vault them into a superior position in establishing compensable damages in a Superior Court tort action.

The "economic loss" to be established in this Superior Court action is the "economic loss" to the injured party – Mercogliano – **not** the "economic loss" incurred by the plaintiff New Jersey Transit in making payments to the injured employee pursuant to the Workers' Compensation statute.¹¹

¹¹ The Supreme Court concurred with the Appellate Division's view that the tortfeasor's reimbursement to the workers' compensation carrier of payments for wage loss and medical bills made on behalf of the injured employee, i.e. objective economic loss, was not contrary to the Legislature's public policy of cost containment in automobile insurance through the establishment of the No Fault Act of 1972, through and including the enactment of AICRA in

CONCLUSION

For all the foregoing reasons, defendants' motion for partial summary judgment is GRANTED, and the motion filed by plaintiff New Jersey Transit Corporation a/s/o David Mercogliano for partial summary judgment is DENIED.

1998. Justice Albin, in his dissenting opinion, expressed concern that the Court's concurring opinion would lead to increased automobile insurance premiums and increased litigation over economic damages incurred in work related automobile accidents. N.J. Transit Corp. v. Sanchez, 242 N.J. at 108-112. Said comment is particularly noteworthy if plaintiff's interpretation of "economic loss," i.e. economic loss of the workers' compensation carrier rather than the injured person, is adopted as the law in this state.

Indeed, it occurs to this court that a person who sustains soft tissue injuries in the course of his/her employment would be better off retaining an attorney to simply pursue a workers' compensation claim and an aggressive award of partial permanent disability rather than retain an attorney to sue the tortfeasor and try to vault the no-lawsuit threshold, when applicable, in Superior Court. In the case at bar, Mercogliano secured \$20,250 for his soft tissue injury, including a radiology finding of mild degenerative disk disease, with no hospitalization, no surgeries, and conservative medical treatment. He returned to work after two months without restrictions. It is uncontested that Mercogliano's injuries would not vault the no-lawsuit threshold and in Superior Court, he cannot prove loss of future wages because he, in fact, had no wage losses beyond February 2015 (two months after the accident), and he has no expert proofs suggesting he will lose wages in the future caused by the soft tissue injuries sustained in this accident.

The legislative limitation on lawsuit threshold has had an impact on the filing of negligence automobile cases because objective medical evidence of a permanent injury is a difficult standard to meet before a jury. It is expensive and difficult to establish through expert proofs an objective permanent injury, particularly in low-impact collisions. That intended legislative impact on automobile negligence actions – purportedly reflected in reduced insurance premiums – would be eviscerated if plaintiff's view of the law were accepted, as any award of partial permanent disability would constitute economic loss in a Superior Court action.