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SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE
LAW DIVISION - CIVIL PART

DOCKET NO. ESX-L-7293-19

JOSEPH LaMARTINO,

Plaintiff,

v.

NATIONWIDE INSURANCE COMPANY, THE TRAVELERS COMPANIES, INC., TRAVELERS INSURANCE COMPANY, MARINA HAGHOUR-VWICH, JOHN DOES 1-10 (fictitious names as identity is unknown), JANE DOES 1-10 (fictitious names as identity is unknown), ABC CORPS. 1-10 (fictitious names as entities are unknown),

Defendants.

OPINION

Decided: October 4, 2024

Law Offices of James H. Rohlfing, attorneys for Defendant St. Paul Protective Insurance Company (alleged to be improperly pled as Travelers Insurance Company) (Peter J. Dahl, Esq. on the brief)

DeFrank Law Group, LLC, attorneys for Plaintiff Joseph LaMartino (Peter J. DeFrank, Esq. on the brief)

SANTOMAURO, D., J.S.C

Defendant St. Paul Protective Insurance Company (alleged to be improperly pled as Travelers Insurance Company) ("St. Paul") moves for summary judgment pursuant to Rule 4:46-2 seeking dismissal of plaintiff Joseph LaMartino's claims against St. Paul arising out of an October 14, 2017 automobile accident in Woodland Park, New Jersey. St. Paul asserts two overarching arguments in support of its motion. First, St. Paul argues that it is entitled to judgment as a matter of law because plaintiff failed to perform a comparative analysis of the plaintiff's medical records prior to and following the accident (a "Polk analysis")[1], which St. Paul asserts is required here because plaintiff has asserted a claim that the accident aggravated plaintiff's injuries (and the medical experts in the case purportedly agree there was aggravation). Second, St. Paul argues that plaintiff's claim for Underinsured Motorists ("UIM") benefits is barred as a result of plaintiff's settlement with the underlying tortfeasor for less than the limits of the underlying tortfeasor's automobile insurance policy. Plaintiff opposes St. Paul's motion.

I. Procedural Background

Plaintiff filed a Complaint in this matter on October 14, 2019 against St. Paul, defendant Nationwide Insurance Company ("Nationwide"), and defendant Marina

[1] This type of comparative analysis is often referred to as a Polk analysis because of the Appellate Division decision mandating it when a party claims that the accident aggravated an existing condition or injury. See Polk v. Daconceicao, 268 N.J. Super. 568, 575 (App. Div. 1993).

Haghour-Vwich ("Haghour-Vwich"). See Compl. (Transaction Id. No. LCV20191813333). Plaintiff alleged that Haghour-Vwich (and/or John Doe individuals) negligently operated a motor vehicle that collided with plaintiff's motor vehicle on October 14, 2017. Plaintiff asserted that he suffered personal, permanent injuries as a result of the accident. See id. at First Count (¶¶ 1-7) and Second Count (¶¶ 1-7). Plaintiff also asserted a claim for UIM, Uninsured Motorist ("UM"), and excess/umbrella benefits against both St. Paul and Nationwide, which plaintiff alleged were his automobile insurance carriers. See id. at Third Count (¶¶ 1-10) and Fourth Count (¶¶ 1-11).

On July 29, 2020, plaintiff voluntarily dismissed his claims against Nationwide without prejudice. See Stipulation (Transaction Id. No. LCV20201311492). Thereafter, on December 14, 2024, plaintiff dismissed his claims against Haghour-Vwich with prejudice after those parties reached a settlement. See Stipulation (Transaction Id. No. LCV20212942108).

On June 5, 2023, plaintiff moved to amend the Complaint to assert a claim against St. Paul pursuant to the New Jersey Insurance Fair Conduct Act ("NJIFCA"), N.J.S.A. § 17:29BB-1. See Motion to Amend (Transaction Id. No. LCV20232009594). The court granted plaintiff's motion, and plaintiff filed an Amended Complaint on October 2, 2023. See Am. Compl. (Transaction Id. No. LCV20233009542). The Amended Complaint is the essentially the same pleading

as the Complaint except that the Amended Complaint includes the NJICFA claim against St. Paul.[2] Id. at Fifth Count (§§ 1-10). The court severed and stayed the NJICFA claim in its September 19, 2023 Order granting plaintiff's motion to amend. See Order (Transaction Id. No. CV20232958607).

II. Factual Background

A comparison of St. Paul's Statement of Undisputed Material Facts ("Statement") submitted pursuant to Rule 4:46(a) and plaintiff's response to St. Paul's Statement ("Response") reveals that the parties largely agree on the material facts, but perhaps not their import. Compare Plaintiff's Statement (Transaction Id. No. LCV20241426915) at ¶¶ 1-11 and Defendant's Response (Transaction Id. No. Trans ID: LCV20241596041) at ¶¶ 1-11. Based on these submissions, the parties agree that:

- Plaintiff settled plaintiff's claim with Hadhour-Vwich for 60 percent of Hadhour-Vwich's $100,000 insurance policy with Harleysville Insurance (i.e. $60,000). Compare St. Paul's Statement at ¶¶ 2-3 with Plaintiff's Response at ¶¶ 2-3.

- In response to an interrogatory as to whether plaintiff is claiming an aggravation of any preexisting injury or condition, plaintiff indicated that none was known to the plaintiff. Compare St. Paul's Statement at ¶¶ 4-5 with Plaintiff's Response at ¶¶ 4-5.

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[2] St. Paul's motion seemingly seeks summary judgment on the claims asserted in plaintiff's Complaint as it attaches a copy of the Complaint to its motion papers. See Certification of Filing and Service (Transaction Id. No. LCV20241426915) at Ex. A. However, the Amended Complaint is the operative pleading here.

- Plaintiff's medical expert, Joshua Landa, M.D. ("Dr. Landa"), provided an expert report in this matter. Dr. Landa's expert report does not mention degeneration or aggravation, and opined: "It is my opinion, within a reasonable degree of medical probability, that the damage to his cervical and lumbar spine, including the disc herniations and bulges noted on MRIs above, with resultant pain and functional limitations, occurred as a direct result of the accident that Mr. Lamartino sustained on 10/14/2017." Compare St. Paul's Statement at ¶¶ 6-8 with Plaintiff's Response at ¶¶ 6-8.

- During Dr. Landa's deposition in this matter the following colloquy occurred:

> Q. Some doctors review MRI spines and sometimes they see something called degeneration. Do you see that here?
>
> A. I mean, I see very, very minimal degeneration. I mean, every – look degeneration is just wear and tear that happens in the body. This person is, you know, 30 whatever, he's about 30 years old. There's going to be a slight amount. I mean he's been on this planet for three decades, but that's quite minimal. I mean this is -- I would characterize this as a young spine, with minimal, if any, degeneration.

Compare St. Paul's Statement at ¶¶ 6-8 with Plaintiff's Response at ¶¶ 9-10.

Based on these facts,[3] St. Paul asserts that it is entitled to summary judgment.

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[3] The only "fact" on which the parties appear to disagree is whether St. Paul's medical expert, Eric Fremed, M.D. ("Dr. Fremed") opined, as alleged by St. Paul, that plaintiff's condition is "degenerative" in nature. Specifically, Plaintiff asserts that Dr. Fremed's conclusion does not even mention "degeneration." Compare St. Paul's Statement at ¶ 11 with Plaintiff's Response at ¶ 11. The court has reviewed Dr. Fremed's report, which is attached as Exhibit F to the Certification of St. Paul's Counsel. See Certification of Filing and Service at Ex. F. Although the report does not reference "degeneration" in the conclusion, Dr. Fremed discussed plaintiff's MRI results that he reviewed. Dr. Fremed's report states that certain things he observed on the results were "likely" as a result of mild degeneration. See id. In

III. Summary Judgment Standard

New Jersey Court Rule 4:46-2(c) governs motions for summary judgment, and provides that granting such motions is appropriate when "'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.'"[4] Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995)

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short, each party's position exaggerates Dr. Fremed's report in opposite directions – on the one hand he certainly references degeneration in the report, but on the other hand he has not opined that plaintiff's condition "is degenerative in nature" (at least not in the report).

[4] The court comments briefly on the motion record. Each party's submission relies on various documents that they purport to include as part of the motion record. St. Paul attaches various documents to its Certification of Filing and Service. However, the certification, which is authored by St. Paul's counsel, does not identify the documents (although they are identified in St. Paul's Statement of Undisputed Material facts) or attest as to what the documents purport to constitute. See Certification of Filing and Service. In some cases, it appears that multiple, different documents are attached as one exhibit. See id. at Ex. F. The court has concerns as to whether such a certification complies with the Rule 1:6-6 requirements for affidavits submitted in connection with summary judgment motions. See, e.g., New Century Fin. Servs., Inc. v. Oughla, 437 N.J. Super. 299, 332 (App. Div. 2014) (noting that "affidavits in which the affiant fails to identify specifically his position, or explain the source of his personal knowledge of the facts to which he attests, or attempts to authenticate attached documents without explaining precisely what each is and how it came into the affiant's hands should be rejected"). Moreover, plaintiff simply attached exhibits to the opposition brief without any certification as to the authenticity of the documents in clear contravention of the Court Rules. See, e.g., Celino v. Gen. Acci. Ins., 211 N.J. Super. 538, 544 (App. Div. 1986) ("We are also constrained to comment on the manner in which defendant offered its proofs on its motion for summary judgment. As we have noted, the critical documents, namely,

(quoting R. 4:46-2). See also Samolyk v. Berthe, 251 N.J. 73, 78 (2022). In deciding whether a genuine issue of material fact exists, the court's role "is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021) (quoting Brill, 142 N.J. at 540)).

A court ruling on a summary judgment motion "must draw all legitimate inferences from the facts in favor of the non-moving party." Friedman v. Martinez, 242 N.J. 450, 472 (2020) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)). That is, a court "must 'consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.'" Samolyk, 251 N.J. at 78 (quoting Brill, 142 N.J. at 540).

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the copy of the notice of cancellation and copies of the certificates of mailing, were merely annexed to its trial brief. The function of the brief is a written presentation of legal argument. Facts intended to be relied on which do not already appear of record and which are not judicially noticeable are required to be submitted to the court by way of affidavit or testimony." (internal citation omitted)). While these procedural deficiencies provide a basis to deny the motion, the court acknowledges that the exhibits largely consist of discovery responses, expert reports, and correspondence between counsel that could typically be attested to by an attorney certification. Further, as noted above, the parties largely agree on the facts. Accordingly, the court elected to decide St. Paul's summary judgment motion on the merits.

In ruling on a summary judgment motion, a court should "not shut a deserving litigant from his [or her] trial. Brill, 142 N.J. at 540 (alteration in original) (internal quotation marks and citation omitted). However, the New Jersey Supreme Court also stressed in Brill "that it is just as important that the court not allow harassment of an equally deserving suitor for immediate relief by a long and worthless trial." Id. at 540-41 (citation omitted).

IV. Analysis

A. St. Paul's Summary Judgment Motion is Timely

As an initial matter, the Court rejects plaintiff's position that St. Paul's summary judgment motion is untimely. See Plf. Opp. Brf. (Transaction Id. No. LCV20241596041) at p. 13. Plaintiff asserts that the trial was originally scheduled for October 16, 2023, but St. Paul did not file its motion for summary judgment until after October 13, 2024 (after that trial date was adjourned). Id.

Rule 4:46-1 requires that "[a]ll motions for summary judgment shall be returnable no later than [thirty] days before the scheduled trial date, unless the court otherwise orders for good cause shown." Critically, however, the summary judgment motion clock only looks forward – that is, it simply asks whether there is a trial scheduled within 30 days of the current motion's return date. Therefore, when a trial date is adjourned it does not preclude the future filing of a summary judgment motion. See Hoelz v. Bowers, 473 N.J. Super. 42, 51-52 (App. Div. 2022) ("The

Rule does not make the 'first' trial date the trigger limiting the filing of a summary judgment motion unless the court enters an order finding good cause, as Bowers claims. The Rule could have easily contained such a limitation, but it does not. See Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 4:46-1 (2022) ('The rule requires . . . that unless the court otherwise orders, the motion must be made returnable no later than [thirty] days before trial.' (emphasis added))." (emphasis in original)).

In this case, trial was scheduled to begin on October 16, 2023, but it was adjourned. Currently, there is no scheduled trial date. Accordingly, St. Paul's motion is timely pursuant to Rule 4:46-1.

B. No Polk Analysis is Required and Summary Judgment is Not Appropriate For Plaintiff's Failure to Provide One

St. Paul's motion makes two arguments as to why St. Paul is entitled to summary judgment because plaintiff failed to provide a Polk analysis. First, St. Paul argues, based on the allegations in the Amended Complaint and plaintiff's proposed jury instructions concerning aggravation, that plaintiff has asserted a claim for aggravation of a pre-existing injury. As such, St. Paul asserts a Polk analysis is required by Davidson v. Slater, 189 N.J. 166 (2007). See St. Paul Brf. (Transaction Id. No. LCV20241426915) at pp. 2-4. Second, St. Paul argues that a Polk analysis is required because the experts from both parties agree that the alleged accident aggravated plaintiff's injuries rather than being the sole cause thereof. Id. at pp. 4-

6. The court disagrees with St. Paul's positions and declines to find that plaintiff was required to provide a Polk analysis here.

In Polk, the Appellate Division held:

> A diagnosis of aggravation of a pre-existing injury or condition must be based upon a comparative analysis of the plaintiff's residuals prior to the accident with the injuries suffered in the automobile accident at issue. This must encompass an evaluation of the medical records of the patient prior to the trauma with the objective medical evidence existent post trauma. Without a comparative analysis, the conclusion that the pre-accident condition has been aggravated must be deemed insufficient to overcome the threshold of N.J.S.A. 39:6A-8a.
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> [268 N.J. Super. at 575.]

N.J.S.A. § 39:6A-8a is New Jersey's "verbal threshold" law. The current verbal threshold law was enacted as part of the Automobile Insurance Cost Reduction Act ("AICRA"), P.L.1998, c.21. Among other things, AICRA included a new verbal threshold scheme consistent with "the philosophical basis of the no-fault system … of a trade-off of one benefit for another; in this case, providing medical benefits in return for a limitation on the right to sue for non-serious injuries." N.J.S.A. § 39:6A-1.1(b). See also DiProspero v. Penn, 183 N.J. 477, 489 (2005) (stating that AICRA included a "complete overhaul of the verbal threshold [that] was only one piece of a larger reform plan to bring down costs within the automobile tort system").

Under the verbal threshold law, if a named insured elects a limitation-on-lawsuit option in an insurance policy, "certain third-party tortfeasors are exempted 'from tort liability for noneconomic loss' unless the insured 'sustained a bodily

injury which results in death; dismemberment; significant disfigurement or significant scarring; displaced fractures; loss of a fetus; or a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.'" N.J. Transit Corp. v. Sanchez, 242 N.J. 78, 92 (2020) (quoting N.J.S.A. § 39:6A-8(a)). Thus, "to vault the verbal threshold's limitation on the right to claim non-economic damages, a plaintiff must establish that as a result of bodily injury, arising out of the . . . operation . . . or use of an automobile, [they have] sustained a bodily injury which results in one of the" categories of serious injury identified in N.J.S.A. § 39:6A-8(a). Davidson, 189 N.J. at 186 (internal quotation marks omitted).

Polk was enacted prior to AICRA's enactment in 1998. In Davidson, the New Jersey Supreme Court held that AICRA did not alter the requirements for a comparative analysis in cases involving aggravation of a pre-existing condition. 189 N.J. 166. As the Court stated:

> That said, to the extent the parties have focused their attention on a pre- versus post-AICRA substantive requirement for comparative medical evidence, their arguments are wide of the mark. The need for a plaintiff to produce a comparative medical analysis remains dependent on traditional principles of causation and burden allocation applicable to tort cases generally. Those principles are what determine the need for comparative evidence.
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> * * *
>
> When aggravation of a pre-existing injury is pled by a plaintiff, comparative medical evidence is necessary as part of a plaintiff's prima facie and concomitant verbal threshold demonstration in order to isolate the physician's diagnosis of the injury or injuries that are allegedly

> "permanent" as a result of the subject accident. Causation is germane to the plaintiff's theory of aggravation of a pre-existing injury or new independent injury to an already injured body part. In such matters, a plaintiff generally bears the burden of production in respect of demonstrating that the accident was the proximate cause of the injury aggravation or new permanent injury to the previously injured body part. See O'Brien (Newark) Cogeneration, Inc. v. Automatic Sprinkler Corp. of Am., 361 N.J. Super. 264, 274-75, 825 A.2d 524 (App. Div. 2003) (explaining that in routine personal injury aggravation claims plaintiff must bear burden of production that defendant's negligence was proximate cause of injuries and damages suffered). Such evidence provides essential support for the pled theory of a plaintiff's cause of action and a plaintiff's failure to produce such evidence can result in a directed verdict for defendant. See Reichert v. Vegholm, 366 N.J. Super. 209, 213-14, 840 A.2d 942 (App. Div. 2004).
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> [Id. at 184-186 (emphasis added).]

The Davidson Court held, however, that a plaintiff need not provide a comparative analysis in a non-aggravation case. See id. at 186 ("The rub comes when a plaintiff does not plead aggravation of pre-existing injuries, but there have been other injuries to the body part. Defendant seeks to burden Davidson with an initial obligation to produce comparative-analysis evidence excluding all other injuries from being the cause of the permanent injury on which the verbal threshold action is based. We reject the invitation to place such a burden of production on plaintiff in her AICRA non-aggravation-pled case." (emphasis added)).

1. Plaintiff has Not Asserted an Aggravation Claim

Relying upon allegations in plaintiff's Amended Complaint and a draft jury charge provided by plaintiff, St. Paul asserts that plaintiff is seeking damages for an aggravation claim. See Def. Brf. at p. 2. The court does not agree.

Plaintiff's Amended Complaint against St. Paul asserts the following:

> As a direct and proximate result of the negligence, carelessness, and/or recklessness of the Defendants, as aforesaid, Plaintiff, was caused to sustain and did sustain serious and permanent harms and losses and pursues all remedies permissible by law. These may include, but are not limited to: personal injuries requiring the care and treatment of physicians; hospitalization and medication; injuries that have and will in the future continue to affect in his daily routine; injuries that result in a loss of quality of life; economic losses; special damages; medical bills; aggravation, acceleration, and/or exacerbation of injuries that may be known or unknown; and all other harms and losses that are recoverable by law.
>
> [Am. Compl. at Fourth Count (¶ 8) (emphasis added).]

That plaintiff pled that plaintiff's harms and losses "may include … aggravation" does not mandate that plaintiff has asserted an aggravation claim requiring a Polk analysis. Indeed, the use of the word "may" connotes only that the harms and losses for which plaintiff could potentially seek to recovery include aggravation – not that plaintiff is definitively claiming aggravation. See State v. Moss, 277 N.J. Super. 545, 547 (App. Div. 1994) ("The common ordinary meaning of the word 'may' is 'to be in some degree likely to.' Webster's Third New International Dictionary 1396 (1981). As such, the key words do not project a requirement that a turn movement

must affect other traffic but merely that it has the potential of doing so." (emphasis added)).

Similarly, the court does not find the pre-trial materials submitted by plaintiff on July 12, 2023 to be dispositive as to whether plaintiff is asserting an aggravation claim. Plaintiff's July 12, 2023 submission includes a list of pre-trial submissions to the court, including the following under "List of proposed jury instructions with specific reference to Model Civil Jury Charges": "8.11(F) - Aggravation Of The Preexisting Condition." See Plf. Pre-Trial Submission (Transaction Id. No. LCV20232063675) at ¶ 8. There is nothing in the motion record to indicate why plaintiff proposed this specific jury instruction. In any event, plaintiff has disclaimed in its motion papers that it is seeking any aggravation damages.

In reviewing the motion record in a manner that provides all reasonable inferences to plaintiff, as the court is required to do, see Friedman, 242 N.J. at 472, the court does not find that the undisputed facts compel the conclusion that plaintiff has asserted a claim for aggravation. In doing so, the court relies significantly on plaintiff's response to St. Paul's interrogatories, which include the following question and response:

> 9. If a previous injury, disease, illness or condition is claimed to have been aggravated, accelerated or exacerbated, specify in detail the nature of each and the name and present address of each health care provider, if any, whoever provided treatment for the condition.

> **Upon advice of counsel, objection as this question may ask for a medical opinion/conclusion. Without waiving said objection, none known to Plaintiff.**
>
> [Certification of Filing and Service at Ex. C (Interrogatory No. 9 and Response) (bold in original).]

The best indication of plaintiff's position on whether plaintiff is claiming aggravation of an existing medical condition is plaintiff's own words in his discovery responses that he is not.

Based on the foregoing, the court rejects St. Paul's position that a Polk analysis is required because plaintiff is asserting an aggravation claim. As plaintiff has not pled, and expressly disclaims, a claim for aggravation, summary judgment cannot be granted on this ground.

2. The Expert Opinions in this Case Do Not Compel a Polk Analysis

St. Paul also asserts that a Polk analysis is required because both plaintiff's expert and St. Paul's expert "agree that there is at least some degeneration in plaintiff's spine." Def. Brf. at p. 5. St. Paul further states that while plaintiff cannot argue aggravation because there is no Polk analysis, no reasonable jury could conclude that plaintiff's injuries were caused only by the subject car accident because "as both medical experts in this case agree that the Plaintiff's injury is an aggravation, there is no question that Plaintiff's injury is an exacerbation of that degeneration." Id. Therefore, St. Paul contends, summary judgment is required. The court disagrees.

As an initial matter, the motion record does not reflect that "both medical experts in this case agree that the Plaintiff's injury is an aggravation." Plaintiff's expert, Dr. Landa opined in his report as follows:

> It is my opinion, within a reasonable degree of medical probability, that the damage to his cervical and lumbar spine, including the disc herniations and bulges noted on MRIs above, with resultant pain and functional limitations, occurred as a direct result of the accident that Mr. Lamartino sustained on 10/14/2017.
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> [Certification of Filing and Service at Ex. D (emphasis added).]

There is nothing in Dr. Landa's report to indicate that his opinion is that plaintiff's injury is an aggravation of an existing condition or injury.

In asserting to the contrary, St. Paul relies upon the following colloquy from Dr. Landa's deposition:

> Q. What's the whiteness that we see in the middle of the disc?
>
> A. Well, in this type of MRI, the whiteness we see is technically water.
>
> Q. Some doctors review MRI spines and sometimes they see something called degeneration. Do you see that here?
>
> A. I mean, I see very, very minimal degeneration. I mean, every -- look degeneration is just wear and tear that happens in the body. This person is, you know, whatever, he's about 30 years old. There's going to be a slight amount. I mean he's been on this planet for three decades, but that's quite minimal. I mean this is – I would characterize this as a young spine, with minimal, if any, degeneration.
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> [Id. at Ex. E (Tr. 33:1-16).]

As the foregoing demonstrates, Dr. Landa characterized his observation of plaintiff's MRI as reflecting "a young spine, with minimal, if any, degeneration." Id. (emphasis

added). Moreover, Dr. Landa testified that any person the age of plaintiff is going to have a "slight amount" of degeneration. Id. Considering this testimony and providing all reasonable inferences to plaintiff as the court is required to do, see Friedman, 242 N.J. at 472, the court does not find that Dr. Landa conclusively opined that plaintiff's injury is an aggravation. At most, Dr. Landa testified that all 30-year-olds have some amount of degeneration. Interpreting this testimony in the manner ascribed by St. Paul would mean that a plaintiff would always need to perform a Polk analysis to address whether the baseline condition caused the plaintiff's injuries in non-aggravation-pled cases. As noted above, the Davidson Court expressly declined to place any such burden on plaintiffs.[5] 189 N.J. at 186 ("Aside from the circumstance of medically segregating a claimed aggravation of a pre-existing injury from the fresh injury to a body part, a plaintiff need not produce affirmative medical evidence segregating what plaintiff considers to be non-causes of the alleged injury in order to avoid a directed verdict under N.J.S.A. 39:6A-8(a)'s express standards.").

[5] Of course, absent some other reason to the contrary, St. Paul can utilize Dr. Landa's deposition testimony in an attempt to undermine the merits of his opinion. But any alleged inconsistency between Dr. Landa's deposition testimony and his report is the kind of weighing of evidence that is reserved for the factfinder. See Meade v. Tp. of Livingston, 249 N.J. 310, 332 (2021) ("It is possible that a jury, upon weighing the evidence and making credibility determinations, may likewise find the remark unrelated to the Council's employment decision. But this is the summary judgment stage, and all conflicting inferences from the facts presented must be resolved in Meade's favor.")

In addition, the motion record does not clearly reflect that St. Paul's expert, Dr. Fremed, opined that plaintiff's injuries are caused by degeneration. Dr. Fremed's March 10, 2021 report concludes:

> As discussed above, review of [plaintiff's] MRI images of the cervical and lumbar spine failed to reveal evidence of acute post-traumatic disc herniation, spinal cord or nerve root impingement attributable to the single acute traumatic event in question to a degree of medical probability.
>
> He remains under treatment for local right hip and low back area paid that sometimes radiates down the thigh to the right knee cap. Today's examination does not suggest a radicular etiology for those symptoms. Should treatment records from Dr. Masella, the physician who recently gave him a right hip area injection, become available in this regard I would be interested in reviewing them, and of course would issue a supplemental report at that time.
>
> It is my conclusion at this juncture based on the history provided, records reviewed thus far, and today's examination, pending review of the additional requested material, that Mr. Lamartino sustained no permanent neurologic injury as a result of the accident in question, and that he requires no further neurologic investigation or treatment as a result.
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> [Certification of Filing and Service at Ex. F (p. 7).]

Dr. Fremed's April 26, 2021 supplemental report did not modify this opinion. Id. While Dr. Fremed's March 10, 2021 reports notes that his review of certain MRIs revealed conditions that are "likely as a result of minor degenerated disc bulges," "likely on a degenerative basis," or "[m]ild bony degenerative changes," id. (pp. 3, 5), it is not clear from the report how those observations relate to Dr. Fremed's

conclusion or that Dr. Fremed is opining that plaintiff's injuries are caused by degeneration.[6]

St. Paul asserts following: "The only disagreement between the experts is to the extent of that degeneration. Dr. Landa testified that it is minimal, while Dr. Fremed opines that it is the sole cause of Plaintiff's condition." Def. Reply Brf. at p. 4. The motion record before the court does not support this conclusion.

3. Summary Judgment is Not Appropriate Because There are Material Disputes Regarding Plaintiff's Injuries

Finally, the court does not agree with St. Paul's view that the Davidson decision mandates summary judgment here. In Davidson, the plaintiff alleged permanent injury arising out of an automobile accident, but did not assert aggravation. Instead, defendant's medical expert raised the issue of aggravation. 189 N.J. at 171-73. The trial court granted summary judgment in favor of the

[6] "[M]edical-opinion testimony must be couched in terms of reasonable medical certainty or probability; opinions as to possibility are inadmissible." Johnesee v. Stop & Shop Cos., 174 N.J. Super. 426, 431 (App. Div. 1980). However, "this requirement does not oblige experts to use talismanic or magical words, so long as the court is persuaded that the doctor was reasonably confident of the opinion." State v. Howard-French, 468 N.J. Super. 448, 466 (App. Div. 2021) (internal quotation marks and citations omitted). The court does not address whether Dr. Fremed's opinions about what is "likely" satisfy this requirement. Similarly, the court does not address whether Dr. Fremed is qualified to offer such opinions. Although plaintiff's opposition notes that Dr. Fremed is "not an orthopedist, but is board certified in psychiatry and neurology," Plf. Opp. Brf. at p. 12, plaintiff did not seek to strike Dr. Fremed's report or opinions as part of this motion.

defendant in part on the ground that the plaintiff failed to conduct a Polk analysis, but the Appellate Division reversed. Id. at 175-77.

On appeal the New Jersey Supreme Court cautioned plaintiffs that, although plaintiffs asserting non-aggravation claims do not have to provide a Polk analysis, such plaintiffs are potentially at risk if the defendant demonstrates that there are no disputed facts as to causation. Specifically, the Court observed:

> We presume that defendants routinely will inquire during discovery about a plaintiff's prior injuries. In respect of the element of causation specifically, a plaintiff will risk dismissal on summary judgment if the defendant can show that no reasonable fact-finder could conclude that the defendant's negligence caused plaintiff's alleged permanent injury. Thus, the plaintiff who does not prepare for comparative medical evidence is at risk of failing to raise a jury-worthy factual issue about whether the subject accident caused the injuries. At the very least, plaintiff will be forced to address causation before the fact-finder and properly may be held to the theory of the case as pled.
>
> [Id. at 188 (internal citations omitted)]

Nevertheless, the Court held that the Davidson plaintiff was not required to perform a Polk analysis. Instead, the Court stated it was incumbent upon the trial court to determine whether a genuine issue of proximate cause existed sufficient to defeat summary judgment in favor of defendant.

> Applying those principles to the instant matter, we hold that Davidson was under no obligation under AICRA to produce, as part of her prima facie presentation in this non-aggravation cause of action, a comparative analysis in order to satisfy the verbal threshold proof requirements. As between defendant's medical proofs and those presented by plaintiff, the trial court was obliged to determine whether

> a genuine issue of proximate cause had been presented. In that respect, we affirm the Appellate Division judgment.
>
> [Id. at 188].

Decisions following Davidson are in accord.[7] For example, in Litwin v. Whirlpool Corp., the Appellate Division reversed the trial court's grant of summary judgment in favor of defendant because there was a genuine issue of material fact as to causation. 436 N.J. Super. 80 (App. Div. 2014). Noting that it was the "defendants who raise[d] the issue of plaintiff's pre-existing mental condition as a bar to recovery," id. at 90 (alteration added), the court stated:

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[7] The court reached this determination without considering the unpublished Appellate Division identified by plaintiff in its opposition submission as purportedly on point. Plf. Opp. Brf. at pp. 9-10. Rule 1:36-3 states:

> No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel.
>
> [Id.]

Not only does Rule 1:36-3 preclude the court from citing to the unpublished opinion decided by plaintiff, but plaintiff did not submit the required Rule 1:36-3 certification in connection with plaintiff's citation to this unpublished opinion. Accordingly, the court did not consider the unpublished Appellate Division opinion identified by plaintiff.

> Here, plaintiff did not plead an aggravation of a pre-existing mental condition in asserting his Portee claim. "When a plaintiff does not plead aggravation of pre-existing injuries, a comparative analysis is not required to make that demonstration." Davidson v. Slater, 189 N.J. 166, 170, 914 A.2d 282 (2007). Plaintiff was only required to raise a genuinely disputed issue of fact that he suffers from severe emotional distress, causally related to defendants' negligence, in order to submit his Portee claim to the jury. Plaintiff met his burden by presenting evidence he suffers from PTSD as a result of witnessing the injury-producing event.
>
> Defendants, however, have raised a genuinely disputed factual issue as to whether plaintiff's claimed severe emotional distress is causally related to his witnessing the injury-producing event. They point to pre-existing mental health conditions and other injuries plaintiff may have separately experienced as a result of the fire, which defendants claim are unrelated to plaintiff witnessing the claimed injury-producing event. This disputed issue as to causation is for the fact-finder to decide.
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> [Id. at 90-91 (emphasis added).]

The circumstances here are consistent with Davidson. As the court determined above, plaintiff did not plead an aggravation claim. While St. Paul's expert opines that there is no permanent injury caused by the subject automobile accident, plaintiff's expert offers a diametrically opposite opinion. It is incumbent on the jury at trial, not this court on a summary judgment motion, to weigh these opinions and the other facts relating to plaintiff's alleged injuries to determine which party prevails.

C. Plaintiff's Claim is Not Barred by Plaintiff's Settlement with Haghour-Vwich

St. Paul argues that plaintiff cannot bring an UIM claim because of plaintiff's settlement with Haghour-Vwich. Def. Brf. at pp. 6-8. The court disagrees.

N.J.S.A. 17:28-1.1e provides in relevant part:

> A motor vehicle should not be considered an underinsured motor vehicle under this section unless the limits of all bodily injury liability insurance or bonds applicable at the time of the accident have been exhausted by payment of settlements or judgments. The limits of underinsured motorist coverage available to an injured person shall be reduced by the amount he has recovered under all bodily injury liability insurance or bonds[.]
>
> [Id. (emphasis added)]

Notwithstanding this statutory language, it is well-settled that an insured who is entitled to UIM coverage does not automatically forfeit his or her right to coverage by settling a claim against the underlying tortfeasor for an amount less than that tortfeasor's policy limits. See Longworth v. Van Houten, 223 N.J. Super. 174, 191 (App. Div. 1988). See also Rutgers Casualty Insurance Co. v. Vassas, 139 N.J. 163, 171 (1995).[8] However, as St. Paul correctly asserts, a plaintiff does not have an

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[8] In Longwood, the Appellate Division adopted the following reasoning by the trial court when it held that exhaustion clauses in the underinsured motor vehicle coverage were invalid because they violated public policy:

> The purposes of the no-fault act, noted above, include those of easing the burden of litigation and encouraging prompt payment of claims. Enforcement of policy exhaustion clauses would produce results contrary to those purposes. It could serve to force an insured to litigate the claim to final judgment in order to exhaust the policy limits. Litigation expenses would lessen the insured's net recovery, the time involved in litigation would serve to delay payment to the insured, and the litigation itself would unnecessarily burden our court system. Where the best settlement available is less than the defendant's liability limits, the insured should not be forced to forego settlement and go to trial in order to determine the issue of damages. The insured has the

unfettered right to accept a low settlement and then pursue UIM benefits. Def. Brf. at pp. 6-7. Rather, in determining whether an injured plaintiff that settled with an underlying tortfeasor can pursue UIM benefits against the plaintiff's insurance carrier courts employ a two-part test and ask whether: (1) the settlement amount is "a substantial one when compared to the tortfeasor's policy limit"; and (2) the settling party's "reasons for accepting the settlement are themselves reasonable." Ohio Cas. Ins. Co. v. Bornstein, 357 N.J. Super. 282, 287 (App. Div. 2003). See also Winner v. Revill, 382 N.J. Super. 399, 406 (App. Div. 2006) ("We are satisfied that the record supports the motion judge's conclusion that both the amount of the settlement and the reasons plaintiffs accepted the settlement were reasonable in light

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> right to accept what he or she considers the best settlement available and to proceed to arbitrate the underinsurance claim for a determination of whether the damages do indeed exceed the tortfeasor's liability limits.
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> [223 N.J. Super. at 191 (stating: "We agree completely. We agree as well with [Schmidt v. Clothier, 338 N.W.2d 256 (Minn. 1983)]'s further conclusion that if the victim does accept less than the tortfeasor's policy limits, his recovery against his UIM carrier must nevertheless be based on a deduction of the full policy limits.").]

In Vassas, the New Jersey Supreme Court adopted the Longworth approach. 139 N.J. at 171, 175 ("We essentially adopt the procedure set forth in Longworth[.] . . . The Longworth procedure balances the interests of insureds and insurers, injured victims and tortfeasors. It provides the insured victim an opportunity both to assert liability against the tortfeasor and to determine the liability of the UIM insurer. In addition, it apprises the UIM insurer of pending litigation by one of its insureds, which may obligate it to provide UIM coverage under the insured's policy.").

of Longworth and Bornstein. There is no basis to disturb those findings."). Applying this test here, the court concludes that plaintiff's UIM claims are not barred.

First, the court has little difficulty finding that the settlement amount is substantial in light of the amount of the policy. In Bornstein, the Appellate Division affirmed the trial court's finding that a settlement of $60,000 with the underlying tortfeasor, which had $100,000 in coverage, was sufficiently substantial. 357 N.J. Super. at 285, 287 (noting that "[t]he tortfeasor taxicab company had liability limits of $ 100,000," the injured party "accepted the taxicab company tortfeasors $60,000 settlement offer," and this "settlement amount was a substantial one when compared to the tortfeasor's policy limit"). Similarly, in Winner, the Appellate Division affirmed a determination that a $30,000 settlement was sufficiently substantial when compared to the $50,000 policy limits of the settling underlying tortfeasor. 382 N.J. Super. at 403 ("AIC contends a settlement of $30,000 on a $50,000 policy does not constitute exhaustion of all available liability coverage and is not 'close to' the policy limits. AIC maintains there was no basis for the motion judge to find that UIM coverage applied. We respectfully disagree."). St. Paul does not dispute here that: (1) Haghour-Vwich had $100,000 in applicable insurance coverage; and (2) plaintiff settled with Haghour-Vwich for $60,000. Compare St. Paul's Statement at ¶¶ 2-3 with Plaintiff's Response at ¶¶ 2-3. This is the same 60 percent figure that the Appellate Division endorsed as sufficiently substantial in Bornstein and Winner.

The court follows the Appellate Division's findings in those decisions that a settlement for 60 percent of the underlying tortfeasor's policy does not preclude a plaintiff from pursuing UIM benefits against the plaintiff's carrier.

Second, with respect to whether plaintiff's explanation for accepting the $60,000 settlement is reasonable under the circumstances, the Appellate Division determined that the following reasons identified by the injured party in Bornstein provided a reasonable basis for the decision to settle for less than the policy limits:

> 1) Empire Insurance Company, the tortfeasor's carrier, [a C + + company], may be going into liquidation which had the potential to cause delay, administrative obstacles, interim loss of the use of money, and "perhaps a less than dollar for dollar recovery based upon the true value of the claim."
>
> 2) Defendant's treating medical providers were located in South Jersey and he had been advised that New York courts want "live" testimony but for exceptional circumstances, which would cause additional expense and scheduling difficulties to plaintiff and his medical experts.
>
> 3) Defendant would have to pay higher legal fees to his New York counsel if the matter went to trial.
>
> 4) Defendant would incur additional costs for accommodations for himself and his witnesses if the matter went to trial.
>
> 5) Defendant feared that a New York judge and jury might be prejudiced against an out of state resident.
>
> 6) As he understood it, prejudgment interest is not allowed in New York on tort claims.
>
> 7) He was concerned about protracted appeals in a foreign jurisdiction;
>
> 8) Defendant had "an emotional need to move forward."

9) Defendant wanted to deliberate further about whether to have surgery.

[357 N.J. Super. at 285-86.]

In Winner, the Appellate Division noted the following in reaching a similar conclusion:

> Here, defendant contends plaintiffs' projected litigation costs and emotional needs of the parties are bare assertions without any support in the record. We disagree. In the answers to interrogatories, plaintiffs identified two potential experts, an economist and a liability expert. During oral argument, plaintiffs' counsel represented that the cost to produce the economist and liability expert for trial would range from $3,000 to $5,000 each. Additionally, counsel also projected that additional costs would be incurred if Winner's treating physicians were needed to rebut a potential defense claim that Winner had vision deficits at the time of the accident. Plaintiffs' counsel further represented that Evelyn Winner, who was in her mid-seventies, and Roger Winner both expressed an interest in not having to go "through any more stress than is absolutely necessary." None of these representations were challenged before the motion judge.
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> [382 N.J. Super. at 405-06.]

Plaintiff's opposition here noted the following in the opposition brief:

> The same factors that led the injured parties in Ohio Casualty and Winner to accept their respective settlements exists in this case. There are substantial costs in going to trial such as calling both expert and treating physicians to testify. Plaintiff must take time from work. For a lay person going to trial is out of the ordinary and produces anxiety and has an emotional toll.
>
> Additionally, the settlement offer from the tortfeasor was made around October 2021. This was shortly after the Covid Pandemic when significant restrictions were still in place. There were no in-person trials or court appearances at that time. Nobody knew when this case would receive an actual trial date. . .. There was value to Plaintiff in having settlement proceeds in hands years ago.

[Plf. Opp. Brf. at pp. 7-8].

Although the Winner decision arguably countenances a court relying on an attorney's representations regarding a plaintiff's reasons for settling with the underlying tortfeasor for less than the applicable policy's limits,[9] at oral argument on August 15, 2024 the court here expressed some concern that there was nothing in the record from plaintiff as to why plaintiff settled with Haghour-Vwich for less than the $100,000 policy limits.

Thereafter, the parties filed supplemental submissions, including a certification from plaintiff. See Plf.'s Certification (Transaction Id. No. LCV20242073975). Plaintiff's certification states the following:

> 4. I can confirm to the Court that my decision to resolve the direct case against Marina Haghour-Vwich was strongly influenced by the COVID-19 pandemic.
>
> 5. At the time I settled the case in October 2021 it was explained to me that due to the ongoing Covid pandemic there was a large backlog of trials throughout the State of New Jersey and especially in Essex County.

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[9] The Appellate Division noted that the representations as to the plaintiffs' reasons for settling in Winner were made by counsel during oral argument. 382 N.J. Super. at 405. Although the defendant asserted that these representations were "bare assertions without any support in the record," the court also noted that there was no objection at the time of oral argument to counsel's representations. Id. It is unclear whether, if defendant had objected to the representations made by the plaintiffs' counsel at oral argument, the Appellate Division would have determined that the explanation for plaintiffs settling for less than the value of the tortfeasor's applicable policy was reasonable based solely on counsel's representations.

6. It was further explained to me that there was a shortage of judges at that time and there was a focus on criminal trials rather than civil personal injury trials.

7. I took into consideration that it would likely take years for the Court to reach trial in my case. This in fact proved to be accurate as it is now August of 2024 and my case has not had a trial.

8. There was a benefit to me in having funds available at that time, rather than waiting for years for a potential trial.

9. It is my understanding that even if a jury were to decide the case in my favor and award me damages, that this would not necessarily end the case. The Defendant could appeal any verdict and this would further delay my receipt of any award.

10. There was also consideration of additional costs including trial costs. As I understand it, if my case proceeded to trial it would entail having various experts testify which would cost thousands of dollars that would be deducted from any verdict I received.

[Id. at ¶¶ 4-10].

While plaintiff's certification here may not include as much detail or as many reasons as the parties provided in Bornstein and Winner, the court concludes that plaintiff's explanation for settling with Haghour-Vwich for less than the $100,000 policy limits is reasonable. In particular, the impacts of the Covid-19 pandemic on civil trials in Essex County is well-known. The court is not in a position to second-guess the wisdom of plaintiff's decision to reach a settlement for $60,000 in 2021 with all of the uncertainty that existed at the time. Plaintiff need not demonstrate that the decision to agree to this settlement was required under the circumstances. Rather, the decision must only be reasonable. The court finds that it is.

V. Conclusion

For the foregoing reasons, St. Paul's motion for summary judgment is denied.