SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MIDDLESEX COUNTY
DOCKET NO. L-3284-15
A.D.#_____

WASHINGTON MUNOZ,	)	
	)	
Plaintiff,	)	TRANSCRIPT
	)	OF
v.	)	POST-TRIAL MOTION
	)	
NEW JERSEY SPORTS AUTHORITY, ET AL.,	)	
	)	
	)	
Defendant.	)	

Place: Middlesex County Courthouse
56 Paterson Street
New Brunswick, New Jersey 08903

Date: October 13, 2017

BEFORE:

HONORABLE ANDREA G. CARTER, J.S.C.

TRANSCRIPT ORDERED BY:

JOSEPH J. GULINO, ESQ. (Nicoletti Gonson Spinner LLP)

APPEARANCES:

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I N D E X

THE COURT: All right. So this is the matter of MUNOZ V. NEW JERSEY SPORTS & EXPOSITION, ET AL. It's docket L-3284-15. The appearances of Counsel for the record.

MR. CLARK: Good morning, again, Judge Carter. It's Gerald Clark from the Clark Law Firm for plaintiff, Washington Munoz.

MR. BERENGUER: Good morning, Judge Carter. Lazaro Berenguer on behalf of the plaintiff, Washington Munoz.

MR. GULINO: Joseph J. Gulino, law firm Nicoletti Gonson & Spinner, LLP, defendants, L.P. Ciminelli and Paino Roofing, Your Honor. I think they were the only two left at the end of the case.

THE COURT: You're absolutely right. I just named the caption as it was initially, but it is, you're correct, L.P. Ciminelli and Paino Roofing. So, this matter comes before the Court on a motion filed by the defendant seeking a new trial or remittitur. There was a cross-motion filed by the plaintiff seeking reconsideration of the Court's decision with respect to the dismissal of the punitive damages count of the complaint, as well as the Court's dismissal of the future lost wage claim.

I have considered all of your papers in this

matter. Having been the trial Judge in this matter, I am intimately familiar with this matter and am prepared to hear you on your motion at this time.

MR. GULINO: Thank you, Your Honor. Before I begin on the main part of the motion, which is the retrial and remittitur, I had submitted our papers on August 4th, 2017, well within the timeframe after the July 18th verdict. I had to get transcripts transcribed, which we did. I submitted all the exhibits that were attached. I submitted all the papers. I never supplemented.

The case was on first time September 1st. It was adjourned either by the Court -- the Judge or the Court until September 15th. On or about the 7th, I got a call from my adversary, could we have additional time. Okay. I asked for additional -- he asked for additional time, vacation or whatever. I had a trial scheduled for the next time the motion would have been up, which would have been 9/29. I said, can we do 10/13? Fine.

Could you do me a favor? I've got other things to do. Can you get your papers to me two days before you're supposed to, which was on the 5th, I guess, of October? I didn't. I didn't get a reconsideration motion by the plaintiffs until after

business of the 5th when I asked for the 3rd.

Now, the reconsideration, as far as I know under 4:49 and/or the cross-motion have to be made within a certain period of time. The reconsideration, I believe, has to be made within 20 days of the verdict, July 18th, way past that time. If he cross-moves and responds to my papers, he has to do that within ten days of my papers. My papers were served on August 4th. So, before we begin arguing about mine, I'm just going to ask that the Court disregard the reconsideration motion by the plaintiffs as being way too late and any cross-motion that they may have submitted with that.

In addition, there have been exhibits attached to his opposition or reconsideration that were not part of the record at all. He had submitted last night at seven o'clock three transcripts from another trial that Dr. Decter testified to. I'm going to ask you to exclude those. I'm going to ask you to exclude various exhibits attached to his reconsideration papers.

Dr. Decter's testimony in another case called FERNANDEZ, Dr. Decter's testimony in another case called MOLINA, an SEC filing for Exam Works, Dr. -- Mr. Gallagher's PowerPoint presentation to the jury, which

was demonstrative, the defendant's pretrial exchange, the defendant's arbitration statement, Dr. Sociadad's (phonetic) report, which was not admitted into evidence, the MediVisuals of the plaintiff's injuries that were used during Dr. Helbig's testimony. That was also for demonstrative purposes and his -- Dr. Helbig's narrative report. So, now, may I begin on the --

THE COURT: Yes.

MR. GULINO: Thank you. The first point I would like to make, Your Honor, is the inconsistency of the verdict of the jury. Two of the defendants, L.P. Ciminelli and Paino Roofing, were found negligent by the jury. They were also found to be a proximate cause of that accident.

The plaintiff was found to be negligent but not a proximate cause. Now, the reason that I'm arguing that it's inconsistent is this. There are times I concede that a person can be negligent and not be a proximate cause. This isn't one of them. We saw what he tripped over, the depression. It was Exhibit 4. It was a big blowup photograph. He testified that he was looking where he was going, that he was looking down, and that he tripped over this depression.

For the jury to find that him not being able to see this was not a proximate cause but tripping over

it was negligence. It doesn't make sense and it requires a new trial just based upon the inconsistency of the verdict. Now, I understand there will be an argument that I did not make an application to the Court while the jury was still here. To have you mold the verdict and say, no, you have to find proximate cause, go back into the jury room and divvy up liability or responsibility and I didn't.

But under the case law, -- and there's one case that we've cited and I'm sure I'm not going to pronounce it correctly, so I'll spell the first name, S-c-z-e-c-i-n-a, and it's 414 N.J. Super. 173, the Court can do it. And we didn't and it wasn't done and, in the interest of justice, that is such an inconsistent verdict that it requires a retrial.

And one of the other parts of the inconsistency of the verdict is this and I'm going to come back to this later. But if we think about what the verdict sheet said, it said, L.P. Ciminelli, 70 percent. It said, Paino Roofing, 30 percent. Now, we know who the active tort feasor was. If we're conceding for the sake of argument that Paino Roofing was a tort feasor, that they created this condition because nobody else did and L.P. Ciminelli was a passive tort feasor who didn't create the condition,

the jury found the passive tort feasor over twice as liable as the active tort feasor. That goes against common sense. That is inconsistent.

I'm going to come back to that example later, if I may, Judge. Dr. Decter's income in a year, I know that was part of a motion in limine prior to trial and I know the Court cited on behalf of the plaintiff. The opposition papers to me on that said that I asked Dr. -- Mr. Gallagher his yearly salary, which I did, no question about it.

Two things about that. Number one, there was no objection to me asking him that question. Number two, the predicate was this. Mr. Gallagher stated under oath that 100 percent of his income comes from litigation -- 100 percent, not a third of my income, not I spent 80 percent of my time. One hundred percent of my income was from litigation. My question to him was entirely proper and relevant.

As to Dr. Decter, no. At the deposition then the de bene esse, they didn't ask him the percentages of his income, how many times he testifies for the defendants, what is the percentage of defense or the plaintiff? How much did he charge an hour to testify or for his time? None of those questions were posed, not at all. That goes to the issue of bias. I don't

have a problem with that.

But to ask him how much money he made in a year in front of a jury, who makes if they're lucky 20 percent of what he makes in a year. No. That's wrong and that's prejudicial and that, I think, affected the jury's verdict.

In addition, forget we're going to bundle that with this and I'll come back to that later with Dr. Helbig. They didn't touch his medicine. There wasn't one question in de bene esse from Mr. Berenguer, not one because I went through this transcript a number of times and I told the jury this in openings and I reminded them on summation, there was not one question that challenged his medicine. Not one. All they asked about was how much money he made, what was Exam Works, et cetera, et cetera.

There's the issue of past income, plaintiff's past income, which had been withdrawn before and the Court allowed it. Now, he resurrected the claim without providing any documents and -- except one, one pay stub. He had worked for 18 months. He was a member of a Union. He had one pay stub. The jury gave him $235,000, and the issue was not that he only had one pay stub. The issue was that they had more documents and they refused to hand them over, and I'm

going to give you an example of how we know that.

I'm going to quote Mr. Clark, who was on the record. I don't have exactly when it happened, Judge, but it's in the record because I found it myself. And this shows that they had possession of his tax returns the entire time. Mr. Clark: All right. I just want to supplement what Your Honor said. In chambers, I was asked, do we have the tax returned (sic) and I was candid with the Court. I said, yes. We have the tax returns but, no, I do not want to produce those tax returns because I did not feel it was in my client's best interest to produce those tax returns and I just wanted the record to be -- to state that because, as Your Honor reflected with regard to Judge Happas' orders as to whether or not the tax returns and those sort of things would be turned over and I had -- I had a long -- we had a long discussion with my client months ago around the time these letters were swirling and, based upon that, we have taken the position and maintained the position that we cannot and will not produce the tax returns.

Yet, they were allowed to go to a jury on one pay stub when he had tax returns. And if he has tax returns, Judge, they have W-2s because you don't file tax returns without W-2s. He had all the proof in the

world for his income. If he refused to produce and the jury gave him 100 percent, pretty much 100 percent, if you believe everything that he said based upon that one pay stub, they gave him about $60,000 a year for the four years.

Notwithstanding the fact that he testified that he did work and made $4,000 on the side, notwithstanding the fact that I did this one until I read the transcript, he was MC-ing -- MC-ing. That means he was healthy enough to do parties on the side and play records. Okay. But they gave him all that money on one pay stub, and they refused to hand over any of the documents. That was part and parcel of our motion before trial. That's what we said to Judge Happas. We didn't get any of these documents. But we don't have them. Yes. They had them, but we're not going to hand them over and it's your tough luck, defendants. You have to defend this case on one pay stub.

He had all of those records. He was a member of the Union for 18 months. He admitted on the stand they had all of his records. They knew who he worked for, when he worked for them, how much money he made every time he worked. And I argued that to the jury. It is, I think, a negative inference. I know I didn't

ask for the charge and to sustain a $235,000 lost wage claim for past wages and if we look at CALDWELL, CALDWELL talks about future but it also talks about economic loss and the proof that you need to bring in.

And if I may, Judge, CALDWELL says, this was talking about net income evidence, which is what it would have been anyway on past. But they still have to take out taxes and things like that. To rectify the uncertainties that surround the application of net income evidence and the confusion that arises from unstructured current practice, the burden of proving net income and personal injury and wrongful death actions should be placed clearly squarely -- clearly and squarely on the plaintiff.

In doing so, we note that the burden of the plaintiff should not be difficult to sustain because he or she should have easy access to proof of net income. Most of the evidence such as pay stubs or tax returns is readily at hand and will not involve complicated calculations. There wasn't enough proof here for a jury to come back and give $235,000 in past lost wages.

Mr. Gallagher was submitted as the first witness on behalf of the plaintiffs. He was a liability witness. On direct examination, if my memory is correct, he alleged that there were four or five

OSHA regulations that were relevant to this case and that each and every one of them were violated in some form.

On cross-examination, I think I got him to admit two or three were not violated and we had an issue as to whether or not the other ones applied. They had to do with falls, falls from heights and on cross-examination, I brought out the fact that there were six feet -- six feet was mentioned in these regulations, coupled with the other regulations that were supposed to be read together.

And Mr. Clark made a big deal about the OSHA and how it was violated and how we had to protect the workers on work sites. But not one -- not one of the OSHA regulations was charged to the jury, not one. If I may be so bold, the Court would agree that not one of them applied. That's why they weren't charged. It was a negligence case, pure and simple. Mr. Gallagher's testimony was irrelevant. We didn't need it. It's a notice case. Who produced the condition and who had notice of it and was it dangerous or unreasonable?

Mr. Gallagher's testimony shed no light on this case whatsoever. It only prejudiced the jury into thinking here is this OSHA expert who knows more than anybody in the room. Well, he says it's a violation.

It must be. The Court didn't agree to that and the jury was not given any of those regulations to consider in determining whether or not the defendants were negligent.

His testimony is what we call net opinion in that he just said, well, they're negligent. What did they do wrong? This regulation was violated. Well, we know now that they weren't because they weren't charged and he backed off on it.

At one point, there was an attempt to put in a photograph that I objected to and the Court sustained that showed some kind of a piece of plywood over a hole that had big neon words on it, warning, warning, something like that. That's about the best they were going to get. So his net opinion shouldn't be allowed. There were no regulations violated. His testimony then is irrelevant to the case at hand. Dr. Helbig also had a net opinion.

Now, when this case first started, before there was even a lawsuit, we have the plaintiff who falls or tells his employer, I fell. I landed on my shoulder and my arm -- or he tells L.P. Ciminelli. I'm sorry. He goes to a doctor when he returns the next day. He's sent to a doctor by L.P. Ciminelli and they say, you're going to go to a doctor. He tells them, I

fell on my arm or my shoulder.

Through all of his medical treatment, he fell on his arm and his shoulder. Dr. Helbig testified before Mr. Munoz did that I was told that he fell on his arm and his shoulder and that, as a result, this is all related.

Now, when I questioned him on his first surgery and which (indiscernible) to the shoulder, he admitted under oath that a subacromial decompression, which is a shaving of arthritic bone, was there before the accident, that he did an acromioplasty, I believe, on the first and the second surgeries. That is also the shaving away of bone that was there before the accident. He didn't do anything in the first surgery that was related to trauma and he didn't do any repairs.

Now, on cross-examination of the doctor, I said to him, if it's shown that he didn't have trauma -- and this was his response and I think the Judge got involved somehow and on cross-examination, his response was -- and the record can show if I'm right or wrong -- if there's no trauma, I guess what he's trying to say is correct, meaning my question to him that this accident didn't cause the need for these surgeries. He said that on the stand.

And he never gave us -- getting back to the net opinion, he never gave us the rationale for why this accident or how this accident caused his injury. What is the mechanism of the injury? Because what we found out from Mr. Munoz was not that he fell on his arm and his shoulder. See, Helbig testified before him. He should have testified after. Based upon what he testified to, he had no basis for his opinion because Mr. Munoz admitted for the first time after depositions, after seeing doctors, after filling out accident reports, I didn't fall on my own much. First time on the stand, five years post-accident.

So Dr. Helbig's testimony was a net opinion because he didn't tell this jury, this is what happened, this is what it cause, this is why I had to fix it. And in combining that, Dr. Decter, who was never challenged, as I said, on his medicine, after I gave him the new facts in his de bene esse that he never fell or if he never fell, he told you the basis of his opinion, that there was no trauma and he doesn't have this and it doesn't come from trauma and that these surgeries were for merely arthritic conditions, which have to do with repetitive stress syndrome. And so for that, I'm going to ask that Dr. Helbig's opinion as a net opinion be stricken as well.

And if we think about it, Dr. Decter was never challenged. In essence, the plaintiffs adopted what they said because they didn't challenge his medicine not once. They accepted what he said as true medically without challenging him at any time.

Past and future medical damages. Now, in the past, I believe they gave him approximately $105,000. Workers' comp. paid out $53,000 on the medical, I believe. Now, Helbig admitted on the stand that what he did was he cut out arthritic bone that was there before the accident and he did it in two places for the first surgery and he did nothing else. Yet, the jury gave him every cent for that operation when he, in fact, admitted that that was there before.

For the second surgery, he shaved away more bone. He said, he found a rotator cuff tear that did not exist at the first time. Now, he called it an interstitial tear. I think that means inside, nobody sees.

I don't know if we remember, Judge, I know it's a long time ago and we've had a lot of things in between, but we had an MRI before the first surgery that didn't show any trauma. We had an MRI before the second surgery that showed trauma to his shoulder, edema, fluid, swelling. Something happened in between

and Helbig came in and he fixed it the second time. Yet, the jury gave him 100 percent on his surgeries. It goes against the weight of the evidence.

The doctor himself admitted that he shouldn't be getting that. He didn't say that but he admitted that what I did was -- was existed before this accident and, yet, the jury paid him or had compensated the plaintiff for the cost of those medical procedures that didn't have anything to do with this accident. So, they must be drastically reduced.

For the future, they awarded him 150,000, approximately, judge. Now, Helbig -- Helbig said that -- Dr. Helbig testified that it was a small possibility that the plaintiff would require future surgery and he said, he could only give a rough estimate of the cost of future medical treatment and that is a transcript from July 12th, 2017, Volume 2, Pages 231 to 236, and that physical therapy may be necessary and he had given a cost of about $25,000. That's pure speculation, absolutely pure speculation.

Dr. Sociadad was the next medical expert. She was retained by the plaintiff's firm three years after the accident and she said -- and we have a de bene esse of her. We questioned her. And she said and she testified that there may be a need for future

psychological treatment at a cost of $170,000 based on bimonthly visits to psychiatrist and about 225-- $1,000 for bimonthly psychopharmacological treatment. But she didn't say that these were absolutely necessary, not once.

Now, I didn't put her on the stand. Plaintiffs produced her as their expert. They have the burden of proof. They have to lay a foundation. They have to show that this stuff is necessary and probable before a jury can award future medical expenses, and so I'm going to ask that that be stricken and/or drastically reduced.

Now, the biggest part of the damage case was for pain and suffering. It's $2.4 million for a man who tripped and didn't fall, $2.4 million. On the day of his accident, he finished the work day. Like I said, it happened in the morning. Mr. Mella testified.

And coming back to he finally admitted that he didn't fall on his shoulder and his arm and we're probably figuring out -- asking why he finally said that is because Mr. Mella was sitting outside for three days. He had testified at the deposition and he knew what he was going to say, and so he finally had to come clean and say, you're right, I didn't fall. I stumbled.

And so a man stumbles over a depression, one-and-a-half inches deep, four inches across, and he is awarded $2.4 million by a jury. He finishes the work day. He comes back to the next day. He is sent to a doctor. He doesn't even complain about the shoulder. He complains about his back. He doesn't seek medical treatment until he sees workers' compensation attorneys, who sent him to a series of doctors.

His surgery is performed on an outpatient basis, I believe, about a year-and-a-half later. I may be wrong. It's not the next week. It's not two months later. It's not six months later. The surgery that's performed is performed on an outpatient basis where arthritic bone is shaved away.

He has another surgery a few years later, after MRIs show that there was some trauma. Bones are shaved again. Rotator cuff is repaired. It wasn't torn the first time.

Biceps tendon injury, that was part of his claim. We didn't contest it. We didn't contest it, but there was no treatment for it. Dr. Helbig is an orthopedic surgeon. He could have operated on it by September. He didn't because it didn't make a difference in this man's life.

I don't know if the Judge recalls but on my

cross-examination to the doctor, I said, the biceps tendon deals with supination. Doesn't it? That's if you're an electrician and you want to use a screwdriver. This man is not an electrician. He doesn't need screwdrivers. He's a stucco painter. He goes like this all the time. He's been doing it for years. And both experts admitted that. Decter talked about the supination and so did Helbig.

He had no psychiatric treatment. They brought in his ex-wife and his daughter from Florida in a video. He hadn't seen them. Oh, he's different. Hadn't seen him. His testimony, Mr. Munoz' testimony that was put on by Mr. Berenguer, he didn't talk about how his life was different. He didn't talk about how he was depressed. He didn't talk about his day-to-day activities, that I cannot function, that I am in constant pain, that I cannot return to work. None of those questions were posed and none of the information was given to the jury.

He has no sight treatment. He had no therapy. At the time of this trial, he is on no medication. He is seeing no doctors, and they gave him all that money.

Now, his testimony, as I said, is devoid of any injuries today. There's nothing that he cannot do.

I mean, he's a commercial truck driver. He still has a license. He MCs to make money. He has driven to Florida to see his family. He performs all the normal activities of daily living. That $2.4 million cannot be sustained. It almost shocks the conscience as to why they would give it that.

And I think if we look and we look at numbers and years, it almost comes out or almost based upon, in my amateur opinion, on lost wages. It almost dovetails. They almost gave him that over the course of his life because they didn't give him future because they weren't allowed to.

And Helbig, -- Dr. Helbig never sat. He was never questioned on direct examination, can he go back to work? Is he permanently disabled? No. Nobody ever asked him that. I didn't on cross because it wasn't asked on direct. And so for a jury to come back with those kind of numbers based upon that kind of scanned evidence tells me one thing, they were mad. They were angry.

And it comes back to what I think is a theme that came through the whole case. I had made an application during a voir dire question about firing him because he was fired because he left. He didn't tell them about the accident, and the Court denied me.

And in opposition papers, Mr. Clark said I opened the door. I didn't open the door. He opened the door and I'll tell you when.

Going to Mr. Clark's opening statement because, you see, after you denied my application, I didn't know what I was going to do.

THE COURT: Wait. Hold on. Let's make sure this record is clear. You didn't make an application to bar any reference to the fact that he was fired.

MR. GULINO: I believe I asked --

THE COURT: You never made that application.

MR. GULINO: No. No. I'm sorry. You're right. I didn't make an application to keep it out. I did not. I did not. I did not. You're right.

THE COURT: So let's just make sure that's clear, right?

MR. GULINO: Okay. Okay. No. No. I withdraw.

THE COURT: Okay.

MR. GULINO: You are correct.

THE COURT: Okay.

MR. GULINO: I did not make an application to keep it out.

THE COURT: Okay.

MR. GULINO: I made an application for that

question.

THE COURT: To ask whether or not the jury -- somehow, the fact that he was fired would somehow influence their ability to --

MR. GULINO: I can -- I have it. Can I read it?

THE COURT: Sure.

MR. GULINO: Thanks.

THE COURT: But I just want to make sure the record is clear. Your request was not to bar.

MR. GULINO: No. I did not -- I did not make the application to keep it out. I admit that. You're right.

THE COURT: Okay.

MR. GULINO: This was where --

MR. CLARK: Where are you at, Jeff? What page are you at?

MR. GULINO: I have no idea. The question is Number 4 as a proposed voir dire question on behalf of defendants. Mr. Munoz was fired from this particular project based upon his failure to alert the proper people of his alleged acts. Knowing that, would you still be able without hesitation to separate that from the issues in the case, namely, whether the defendant is negligent and that the plaintiff's injuries resulted

from the accident. Thank you.

THE COURT: Okay.

MR. GULINO: Okay. I, again, apologize. I didn't. So, but Mr. Clark in his papers to my motion says that we opened the door. We didn't. See, he opened first. He (indiscernible) --

The worker is too banged up to work the next day, but he comes back to the job site to report the incident. He meets with L.P. Ciminelli's safety man on the job. His name is Bob Beardsley -- Joel Mella and Bob Beardsley. Joel Mella and the worker that was injured tell Bob Beardsley what happened. Bob Beardsley works -- he works with the general contractor, L.P. Ciminelli on the job. He tells him what happens and Bob Beardsley says, why didn't you report the incident within one hour and they said, we tried to and no one was here and Bob Beardsley then fires the worker for not reporting the incident within an hour. He opened the door.

So, let me get back to where I think this had an effect on the verdict.

THE COURT: Any particular reason -- before you get to that. So, any particular reason why your -- there was not an application to bar a reference to that?

MR. GULINO: I didn't and I can't tell you that right now, Judge. I didn't make an application.

THE COURT: Okay. All right. Go ahead.

MR. GULINO: Getting back to the verdict and the verdict sheet, see, Bob Beardsley was the guy who got on the stand and he's the one who said, he was let go because he failed to tell us within a day and this jury, they found him -- his company 70 percent at fault as a passive tort feasor, not as an active tort feasor, as a passive tort feasor. Mr. Paino, the active tort feasor, if you believe everything that they said, his company created that condition, only 30. And the plaintiff who is negligent, not a proximate cause because they were angry, very angry.

They gave him 100 percent on his past wages on one pay stub when they have tax returns and W-2s. A hundred percent this jury gave him. They gave him -- and the Union held all the records, and they gave him 100 percent on the past meds, even though Dr. Helbig said, I cut out some stuff there that was there before the accident. And they gave him 100 percent almost on future meds that have no basis and $2.4 million pain and suffering on a man who can live a daily life like the rest of us.

There's some undercurrent there that the jury

disregarded. They didn't apply the facts to the law, which is what they're supposed to do. I understand we all bring our little biases and prejudices into the courtroom. We know that. We try to minimize that. But to have a burden in which the plaintiff got everything when, in fact, he proved very little goes against the weight of the evidence.

The totality of the circumstances, Judge, -- the totality of the circumstances in this case, I would venture to say, in fact, there was no one more surprised at the verdict besides me on the amount than Mr. Clark. If he could have asked for $2.4 million for pain and suffering, if he was allowed to put a number on it as you can do in other states, I would venture to say he wouldn't ask for that much money. He would not have.

That verdict by that jury tells us something, that they disregarded the law, they disregarded the facts, and they disregarded their oath and with the totality of circumstances, the things coming in and proof being put in, I'm going to ask the Court because it's an inconsistent verdict on the liability and because the damages had no connection with the proof given, that the Court grant a retrial for all purposes and/or, if they don't, to grant a drastic remittitur on

the issue of damages. I want to thank you for your time, Judge.

THE COURT: Thank you.

MR. CLARK: Your Honor, we submitted our papers and we tried to be as comprehensive as possible while staying within the brief page limits, but I'll just address defense Counsel's arguments in the order that he presented them. With regard to reconsideration, the 20-day rule only applies to final orders. That's under Rule 4:49-2 and 4:50-1 and it states that in the comments as well and I think the case is CYCLOPS.

With respect to the exhibits that are attached to our motion papers, some of them were trial exhibits. Some of them were part of the pretrial submissions, and all of them are part of this motion record, so that's my only comment on that. It's part of the record. They're annexed and they've been filed with the Court.

With regard to it's an inconsistent verdict, as I understand the central argument today, I mean, the central argument was that -- in the papers, as that you can't have a finding of negligent but not the proximate cause. We had kind of laid out in our papers how that is not the law. The jury -- the form jury charges and

the form jury verdict sheet are very clear about that. You have to ask that, and we kind of laid that out in detail.

The new argument today is that the verdict is inconsistent because he said, he tripped. Do you have the section on tripping? I've got it here. Yes. So, defense Counsel is saying that the plaintiff said he tripped and, therefore, it's an inconsistent verdict because he should have been watching where he was going.

His testimony was that he was looking down and the testimony in the case and the photographs show that this depression was concealed with the black cover on it and defense Counsel said he tripped, ergo -- and he admitted he tripped, ergo, he must have been negligent and it must have been the proximate cause and, therefore, it's inconsistent. That should be rejected for the reasons we said in our brief.

In addition, on Page 130 of the transcript, the question went from the defense Counsel,

Q "Did you trip and land on your shoulder?
A No. No. No. My foot went like this and I felt the scrape here."

Q "Did you trip and land on your shoulder?
A I did not trip."

So, the argument that it's an inconsistent verdict because he clearly testified he tripped should be rejected, in addition to the other reasons in the papers.

And with regard to one party being an active negligent and a passive negligence, there was no such delineation in the case. There was no such delineation in any testimony. L.P. Ciminelli was the general contractor in charge of the project, had the ultimate responsibility for safety under the OSHA standards and under all the industry standards and their responsibility was substantial and significant. There was never any presentation that they were somehow a passive. They have ultimate responsibility to maintain safety on the job site, and that was set forth in the record in the case.

With regard to Dr. Decter, the question about Dr. Decter and that, somehow, there should be a new trial because Dr. Decter readily revealed his annual income, there's two things I want to say about that. First of all, under some case law -- and I know that defense Counsel is relying on cases from Texas, California, and I think there was even one from Ohio. Under New Jersey case law -- and there's really no dispute in this case that the income that he makes

doing what he does is relevant and goes to bias and his interest in the outcome of the case.

The -- Judge Happas was the trial Judge in the -- in the Ford products liability case that went to the Appellate Division and, in that case, there was a lot of cross-examination in closing arguments about how much the expert made and the Appellate Division had talked about how that was -- how that was proper.

But, sometimes, under New Jersey law, when you ask for an expert's tax returns or his annual income, that kind of thing, the Court says, well, it's not open season on your income just because you're an expert. So, sometimes, they'll limit it, if there's not a good showing for it, that kind of thing, for privacy purposes. But it doesn't make it any less inadmissible at trial. It still goes to bias and all that.

But we know there's no privacy issue in this case because Dr. Decter readily gives his annual income. In fact, I think, the record here and the record that's been set forth for appeal shows that he rather proudly talks about his annual income and that is shown in the FERNANDEZ case and the three other transcripts and his readily answering the question in this case on this record without it.

Secondly, the annual income that he was talking about was only his income from Exam Works and testifying in cases and that's also borne out as well. It's a little bit ambiguous, but I recall when Your Honor ruled on this issue, one thing that Your Honor had pointed out that I thought was significant was that, well, that's how he answered the question. And he answered the question by giving the annual income, tying it to Exam Works.

He said, when he gave the amount of 850 to 900 because in the other transcripts, which are part of the record, his annual income is about actually $2 million to $3 million when you add everything in. But his income at Exam Works from testifying for the defense industry is around that number and he essentially says that here. You know, he says, his annual income is 850 and 900, but he's -- if you read it, he's saying it from Exam Works and then the question is, how much of your current income comes from testifying in cases? And he says, that's all part of the Exam Work's number that I just gave you, so that's the number, sir, that being the 850 and 900.

So we didn't even get the 2 million to 3 million, which he -- is really his income, which is shown in all those other transcripts. And, by the way,

they're trial transcripts. We have not found a trial transcript where a Judge has barred that testimony, both the income and his sale of Exam Works and still testifying for Exam Works. That's the PETRI (phonetic) case, the MC COY case, and the PITCHUM (phonetic) case.

With regard to the wage claim, the papers said we were surprised by it. It was withdrawn in that letter. We didn't know about it until the day of trial and then, suddenly, at trial, it got reasserted and we have been blinded. That was the moving papers, and then we had talked about this during the trial and we had attached to the papers the letter that sets forth that it was a mistake and we had talked about it in the papers how they had many months to rectify it.

But what the defense was doing was they were like ignoring and trying to say, so that they could come up with a surprise argument or a prejudice argument at trial and we had also -- I had written in that letter, if there's anything you need as a result of this confusion, please advise and we'll promptly address it, that sort of thing, but nothing ever came of it. We had reminded the defense about that letter being a mistake. There was never any stipulation of dismissal filed with the Court, which is what the court rules requires to dismiss a claim. So, the surprise

and prejudice argument, I think, is -- is not terribly meritorious based upon the record in this case.

And with regard to the saying that there wasn't enough proof to support the wage claim, New Jersey law is clear. We said it forth in our papers, and that's sort of the genesis of our cross-motion to revisit the issue on the future wage claim. It's our position that that decision to dismiss the future wage claim based upon lack of proof was -- was -- it should be the subject of reconsideration.

And but with regard to the past wage claim, the law is quite clear of that. The testimony of the plaintiff is enough. In this case, we had more than the testimony. We had the actual pay stub from a defendant in the case, which was Cooper Plastering. They were the direct employer defendant. They were represented by the same defense Counsel. They were dismissed on the first day of trial without objection, but they were around in the case and they paid that and the pay stub went in.

And with regard to the CALDWELL case, all the CALDWELL case is that the plaintiff has to prove net lost wages and the plaintiff did prove net lost wages. And I think that the -- I think that the juror members, the seven -- or the six juror members -- well, the

eight -- the eight that were in the trial and the six that participated in the deliberations would disagree that they were somehow anger or angered, and that's borne out in several things.

Certainly, the Court can take into account the demeanor of the jury and I believe that the Court had commented that the jury was very attentive and that they had properly performed their service at the end. But we prepared a kind of memo doing the math here and the jury awarded past lost wages. Lazaro actually prepared this memo and did an excellent job of it.

But the date of the incident was June 25th of 2013. The trial ended on July 18, 2017, so it was about four years. The plaintiff had testified that his net pay was $1,150.68 during this pay period. He also testified that he would work six to seven hours of overtime and he also testified that he didn't really take much vacation or any vacation to speak of. So, the past lost wage claim, that window, encompassed 212 weeks.

What the jury did is they took the amount on the pay stub, the net amount on the pay stub, which was 1131 and they multiplied it by 208 weeks to come up with precisely $235,248. The plaintiff proved net wages through his testimony, and he did more than is

required under the case law, which we set forth in detail, including producing an actual pay stub, which demonstrates the net lost wages. And the jury awarded him no -- so there was 212 weeks, but they only awarded him 208 weeks because they took out a week vacation in every year.

That is not an angry jury. That is an attentive jury that takes their time. They took three hours. They actually asked an intelligent question, and it was our mistake that we didn't make sure that that pay stub, which was in evidence, got to the jury room. They actually asked for it. And they also didn't give him any overtime, and he had testified that he would work about six to seven hours overtime each pay period or each week. So that's not an angry jury. That is a wage claim.

And, also, with regard to -- just to address, again, because, you know, to say that the jury was angry, also, the future wage -- the future medical bills claim was about 250,000 and they awarded less than that. So that is with regard to that wage issue. But --

THE COURT: Before -- before you move on, on the wage issue. So, part of the argument put forth with respect to the lost wage claim is that you had tax

returns that were not turned over and that given your failure to turn that over, I'm assuming that the argument, essentially, is that they -- their ability to defend properly against your claim that your client was making the amount of money that he was claiming annually, their ability to do that was hampered based on your refusal to turn over records that you -- it's not that you didn't have them. You did have them and refused to turn them over.

MR. CLARK: That's true, and we were candid with the Court from that in the beginning, and I believe that was also set forth in the motion papers where they moved to dismiss the wage claim that Judge Happas had heard based upon that, and that motion was denied and that is one of the exhibits where the order denies -- denies that. So, it's true that we do have tax returns.

It's true that we said what we said, that we're not going to turn them over, and we have set forth the law starting at Page 14 of our brief that that is not required. And that was passed on by Judge Happas and Judge Happas did not order them to be turned over and did not dismiss the wage claim. They said, if you're not going to turn them over, then dismiss the wage claim and that was denied.

But, certainly, it's a subject of argument and cross-examination at trial. Well, all you have is the one pay stub. You don't have anything else. That's the route that it's supposed to go. It goes to the weight, not the admissibility of the claim and New Jersey law is clear on that and we had set forth that in four pages or so beginning at Page 14 of our papers. So that's why we think it should also be revisited with regard to the future wage claim in that regard.

You know, so in terms of fairness and everything, -- and we did kind of set that forth, you know, at the end of our papers. We actually -- we do this often times on these things as we go and we add up the objections and who won and who lost and the defense actually won 55 percent of the objections and they won significant objections, including the dismissal of a future wage claim, which if you do the math, is millions of dollars.

And with regard to me being surprised by the verdict, I was not surprised. I can't say I was upset by the verdict, but I was not surprised. The demand in this case had always been in the millions of dollars, and it was a substantial case. So that's all I have to say on the future wage -- on the wage claim, Your Honor.

THE COURT: Okay. Yes. I just wanted to make sure the record is --

MR. CLARK: It's absolutely clear. I don't hide things, and I didn't hide in the beginning that we have those records and we were not going to turn them over. And defense Counsel -- defense had cited from cases from Ohio on the Decter issue, talking about income tax returns and how they're very sensitive. You know, if one can refuse to turn over their income tax returns and become a leader of the free world, I suppose a worker who is injured in a case should at least be able to bring a claim in court when he doesn't do the same thing, the point being that the law recognizes the sensitivity of tax returns and I think that's well supported. But it goes to the -- it goes to the cross-examination point.

With regard to Vincent Gallagher, the argument that Vincent Gallagher gave a net opinion, I would just comment, it is in the papers and I don't want to belabor the papers. But net opinion ordinarily is a gatekeeping function where it's addressed before the testimony gets to the trial and a net opinion is, basically, an opinion that is not based upon the facts, but there are substantial facts in this case. The reason we attach the PowerPoint presentation, which the

jury saw as an exhibit to the record, is because it kind of succinctly summarizes the pertinent facts and the pertinent standards.

So the other thing that defense -- that defendant disagrees with is that the jury should have been charged the OSHA regulations and because they were not charged the OSHA regulations, they should get a new trial. But we had suggested some OSHA regulations be charged in this case. Some Judges elect to do some. Some don't. But most importantly, at Page 44 in the charge conference, Mr. Gulino objects to charging the OSHA regulations to the jury and that begins at Page 44. I'm objecting to the OSHA and 45. We're talking about the OSHA regs and he objects to that and the Court elected in its discretion to not charge OSHA regulations, charging voluminous OSHA regulations is not -- it's not required under the rules.

So to say that I disagree that Gallagher's testimony was irrelevant, he's a safety expert. It's generally not within the kin of an average juror to determine how safety is supposed to be done on a job site, on a construction job site, what the safety standards are, what is acceptable standard of care in the construction industry. So his testimony was relevant. It was helpful. It was based upon his

deposition testimony in the case. It was based upon the documents in the case, including the contract, including the defendant's own safety manual and safety rules, which talked about the importance of covering up holes and impressions, the importance of a general contractor managing safety from the top down.

So his testimony was helpful to the trier of fact, as it has been in many similar cases and it was relevant and it was not based upon a net opinion and, certainly, no net opinion motion was made. They did cite a case from 1960, which was a medical malpractice case that says, net opinion is not -- it is something for the trial testimony as opposed to reports, but I believe back in 1960, that was a med mal case and experts didn't really have the requirements they have with regard to reports these days, and the court rules have changed with regard to that. So contemporarily, it's ordinarily done on a pretrial motion, but I don't think the record shows that there was any kind of net opinion with regard to that.

And with regard to Dr. Helbig, it said that Dr. Helbig was a net opinion because he testified the accident did not cause the need for the surgery. But Dr. Helbig actually -- he did testify very clearly that the treatment and all the surgeries were, in fact,

necessary because of the incident and we had set that forth in our brief and he -- at Page 21 at 3T222 to 224, 232 to 233, and 282 to 284 where he very clearly testifies the incident caused and necessitated the surgeries and the treatment.

And the argument is also that he gave nothing on the mechanism of the injury. I don't think the record fairly supports that argument, and we had laid that out in block quoted the testimony in the case about -- starting at Pages 17 and he very clearly talks about how the incident occurred and he also -- they say it's a net opinion because he had no basis about how the incident occurred. But among the bases that he relied upon were the medical records and the progress note, which very clearly talks about how the incident happened, that he was carrying the tools and equipment on his shoulder, that when he stumbled, that 70 pounds of equipment went down and wrenched out his shoulder. So, there was significant basis to say that -- for Dr. Helbig's opinion as to the nature and extent of the injuries.

It's also said in the other argument -- where is the other one on Helbig? Let me see Helbig. Oh, the other -- the other testimony with regard to Dr. Helbig, the argument is that he's not under medical

care. But at 3T228, the question was, the injury -- and you're still treating him for that injury? Answer, yes. And I believe the record further reflected that his most recent appointment with Dr. Helbig was a week before trial or relatively soon before trial but, in any event, the actual testimony was, he is still treating him. So, to say that the verdict is somehow shocking to the conscience and a miscarriage of justice and that something just went really, really badly wrong because he's not currently under medical care is not supported by the record.

And, again, with regard to the medical bills claim, they had awarded 150,000 in past medical bills and the argument is that Dr. Helbig said they were not related to the fall, but that's incorrect. Dr. Helbig did say the medical bills were related to the fall. That's with regard to that.

THE COURT: Before you move on from medical expenses, --

MR. CLARK: Yes, Judge?

THE COURT: -- have you disclosed all benefits that the plaintiff has received from any source other than the tort feasors, workers' comp, so that to the extent there's a need to reduce the medical expenses verdict, the Court is able to do that?

MR. CLARK: Yes. That's a good point. We did -- whenever we get the workers' compensation lean in and the attachments, we always send that off and amend answers to interrogatories. But it's true, the collateral source rule does have to be invoked and the medical expenses, he can't double dip and get more --

THE COURT: Right.

MR. CLARK: -- and I think the lawyers, we need to put our heads together a little bit more and really drill down on that. It's not here but, yes, that's correct. That medical -- that needs to be addressed because the medical -- the lien as of June was about 52,000 in past medicals. But the full bills are 150,000 were awarded, so we do have to find out what that discrepancy is. The medical bills may have been entered on the full amount, but I guess, like is the hospital charges $100, that's what the bill says but they only paid 50 and the required -- as long as they don't -- they can't go after the plaintiff for the amount. That -- we need to do work on that --

THE COURT: Right.

MR. CLARK: -- and report back to the Court on that.

THE COURT: Okay.

MR. CLARK: And we will certainly do so

within ten days or so.

THE COURT: Yes.

MR. CLARK: All right. I will do a submission and a certification that attaches to that and so that the collateral source rule can be invoked. And my expectation is that that 150,000 should be reduced. I just need to -- I just need to get with the paralegal and get the bills and see exactly -- every bill has to be gone through and say, is he responsible for the balance for it? It hasn't been paid. If he's not responsible, it should be reduced. I agree with the Court on that.

THE COURT: Okay.

MR. CLARK: But given that, it shouldn't be reduced to the 52,000 because, obviously, that has to get paid back to comp. So it's not a double dip.

THE COURT: All right.

MR. CLARK: But, yes, we'll do that within ten days.

THE COURT: Yes.

MR. CLARK: With regard to the amount of the jury verdict for the permanent life changes, the 2.4 million, there's substantial testimony on that. There's two surgeries, and there was many treatments with the -- with the doctors for therapy. Oh, the

other thing I want to say with regard to Dr. Helbig, it's in the records, but he is a treating physician, so that's even less with regard to it being a net opinion because he's actually treated him, he's seen him, he's still treating him.

With regard to the amount of that, I don't think the record reflects that it's a shocking amount. This was a young, vibrant person who enjoyed soccer, things like -- he was vibrant. The working was very important to his quality of life. And I'm just looking at it because among the things we're talking about is, well, Dr. Sociadad didn't really say much or didn't have much. And there was substantial support for her opinion in the records, in the standards. He noticed a lot of depression. He was anxious. His work history was extensive, and he took pride in that. He enjoyed that. He was very physical. He played a lot of sports. He enjoyed soccer, volleyball, swimming. He was very active.

He was genuine in his presentation with Dr. Sociadad. He became tearful when he would describe his life prior to the accident. He has significant adjustment issues. He spent a lot of time being physically agile, playing like I mentioned, playing tennis, volleyball, soccer. These are all important

sports in our community, and he had the joy of life when he was active. He had a very healthy image of himself. He knew he could get out there and play with the young guys and found it all very rewarding. He spoke about that quite a bit.

She scored him a 57 on the global -- current global scale of the Diagnostic and Statistical Manual. He's experiencing significant depression, anxiety, adjustment difficulties, and stress syndrome.

Her diagnosis was supported by irritability, frustration, anger, sleep disturbance, fatigue, sexual impotency sometimes, poor appetite, mood swings. So there -- that was discussed in detail. It was supported by the testimony of the plaintiff himself. It was supported by his ex-wife. It was supported by his daughter. It was supported by other facts in the case.

And the argument was that -- that the future medical bills with regard to Dr. Sociadad should be stricken because she only speculated about it and said, it may be needed and he -- and, you know, she didn't say it's absolutely necessary. I'm just quoting the arguments by defense. The standard is not that it's absolutely necessary and Dr. Sociadad testified very clearly, he needs psychotherapy with a psychologist,

will need psychological care going into the future.

I strongly believe he needs treatment with both psychologists and a psychiatric for medication and, without that, you know his quality of life will continue to deteriorate in a negative way and spiral -- spiral in a negative way. So, the testimony was substantial and significant and meets the more likely than not standard under the law with that.

You know, his ability to play soccer, having the surgeries, he's got a permanent Popeye syndrome. He's got permanent scarring. He has permanent limitations in pursuing his life activities, and we had set forth -- and, by the way, none of that was disputed in any way. There was a lot of argument made that, well, Dr. Decter was never challenged on the medicine, never challenged on the medicine. Therefore, we should reduce the verdict and get a new trial because Dr. Decter was never challenged on anything.

We disagree that the record reflects that Dr. Decter was never challenged on anything. There was substantial testimony from Dr. Helbig. There was cross-examination of Dr. Decter. But if we are going to say that Dr. Dec-- if we're going to establish a rule that says, any doctor who is not challenged should result in, you know, the one party with a new trial or

remittitur or additur, Dr. Sociadad was not challenged and that's, perhaps, the strongest component of the permanent life changes is the emotional part of it.

And, you know, I don't know who we would be to say that, you know, that number is shocking where something went wildly wrong in this -- that we had some rogue angry jury that's not supported in the record, and we had set forth the case law. Under that, I had originally started doing my jury verdict research and comparisons and then we remembered the CUEVAS case and the Supreme Court, which raises the bar substantially for granting additurs or remittiturs and we're not supposed to take into what other cases do and these cases and that. That's why we have a jury in the Supreme Court and CUEVAS spoke about that recently.

With regard to my final page of notes responsive to the defense arguments is the issue about the plaintiff being fired and the reason defense did not move to bar that evidence was because it had always been a central defense in the case. We had attached to the record, beginning with the defendant's answers to interrogatories, it had always been -- or the defendant's discovery, it had always been a central defense. We attached the arbitration statement where it's right there as a central defense in the case.

It was so much of a defense that the defendant wanted to, essentially, pretry the issue and jury voir dire and the Court was well within its discretion to not permit the parties to pretry their cases. We had several questions on our proposed jury interrogatories as well and for the jury voir dire that the Court rejected based on its discretion with regard to you can't pre-try your case and you can't go and focus group all your issues and try to get a jury that's going to be receptive to your focus group issues in the case.

The Court employed the model -- the Supreme Court instructions with jury voir dire. There was no objection to doing that. There were some supplementals. Counsel was also given the opportunity to ask supplemental questions at side bar. There's no basis in this record to say that the jury voir dire was somehow unfair and to say that the issue of the plaintiff being fired was somehow so wrong and it shouldn't have gotten into the case, that a new trial should be granted is not supported in the record because it had been a central defense in the case and that's why we discussed it in our opening because we had to because we knew they were going to.

In fact, in the summary of the testimony of

the witnesses in the defendant's pretrial exchange where they summarize the testimony of the witnesses, they summarized and said that Beardsley and Mella were going to talk about how he didn't report it in an hour and, therefore, he was properly dismissed from the job and fired from the job. Every chance the defendant got in this case to insert that defense, they did.

It was also brought up in March at the deposition -- at the trial deposition, the de bene esse deposition of Dr. Sociadad, Page 57. Did he tell you he was fired as a result of this accident? Page 62 by defense Counsel on cross-examination of Dr. Sociadad. Are you telling this jury that as a result of this accident in June in which he was fired, subsequent to that, he would -- like the question -- the question on that one at Page 62 of Sociadad's trial testimony on cross was, are you telling this jury that subsequent to the incident, he would need treatment biweekly for 34 years?

So, he's addressing the future medical bills claim but happens to insert the defense that he was fired from that job in that question, which had nothing to do with it. So, to now come before the Court and say, I want a new trial because of that defense and our presentation of that defense, I think, should be

rejected and, certainly, the invited error doctrine would apply and we had set forth that as well. So that's all I have, Your Honor. Thank you very much.

THE COURT: Okay. Give me about 15 minutes or so. I'll come back out and give you my decision. If you want to get coffee or something, you can. All right?

(Break)

THE COURT: All right. So, this matter comes before the Court following the return of a jury's verdict on July 18th, 2017, against the defendants, L.P. Ciminelli and Paino Roofing, Inc.

The jury found the defendant to have been negligent and a proximate cause of the accident and injuries incurred. The jury awarded a verdict of $2.4 million for pain and suffering, impairment, disability, and loss of enjoyment of life, and $254,671 for past and future medical expenses and lost earnings of $235,248.

So in support of this motion, the defendants argue that there were -- there was an aggregate of errors that affected the outcome and, therefore, they are entitled to a new trial or, alternatively, to a substantial remittitur. The errors alleged to have been committed during the course of this trial asserted

by the defendant include what they characterize to be irrelevant evidence submitted, which would cause confusion and the wrath of the jury. That evidence, they assert, included the plaintiff's removal from his employment for not reporting the accident.

Fast enough, expert, treating orthopedists who offered -- or expert treating doctors that offered what they characterized to be only net opinion, evidence of lost wages being submitted, they characterized at the last minute, despite Counsel having withdrawn the claim and what they characterized to be irrelevant evidence of the defendant's medical expert's financial status, which they interpret or believed to have been overly prejudicial because the assertion was that his overall earnings were irrelevant.

They also argue that the jury's verdict was inconsistent. The jury's finding of both -- the jury found that the defendants were negligent -- negligent, rather, and the percentages of negligence were inconsistent given their status as the respective tort feasors. They argue further that the plaintiff was found to be negligent, yet, not a proximate cause of the accident and this in and of itself was inconsistent.

And given what they characterized to be the jury's inconsistency with respect to the finding of proximate -- I'm sorry -- finding of negligence but not proximate cause on the part of the plaintiff, that this somehow should have triggered the Court to return the jury for further consideration or order a new trial under Rule 4:50-2.

The plaintiff in response to the motion opposed the motion, obviously, and filed a cross-motion for reconsideration of the dismissal of the punitive damage claim, as well as the future loss claim. In their opposition, the plaintiff makes note, and rightfully so, that the defendants made a motion in this case for a directed verdict with much of the very same arguments that are presented as part of this motion.

So, on a motion for a new trial pursuant to Rule 4:49-1A, that rule provides in pertinent part that a trial Judge shall grant the motion if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law.

The Judge in deciding on a motion for a new trial should not -- may not substitute his judgment for

that of the jury merely because he would have reached the opposite conclusion. The Judge is not a 13th and decisive juror and that's pursuant to DOLSON V. ANASTASIA, 55 N.J. 26 (1969), and I suppose that given that that case was from 1969, it refers to the Judge as a he, and so it's safe to assume that that would be for the Judge that was not a he. So, in other words, the Court should simply not substitute their judgment for that of the jury.

The trial Judge should canvass the record and determine whether reasonable minds might accept the evidence as adequate to support the jury verdict. The trial Judge should take into account tangible factors relative to the proofs as shown by the record, appropriate matters of credibility, so-called demeanor evidence, and the intangible feel of the case that the Judge has gained in presiding over the trial. The question is whether the verdict strikes the judicial mind as a miscarriage of justice.

Now, our public policy values highly the final disposition of litigation, particularly, after the time, expense, and effort to all concerned of a jury trial. That's citing to KENT V. COUNTY OF HUDSON, 97 N.J. Super. 90, 98, Appellate Division 1967. For this reason, a jury verdict -- a jury's verdict should

be satisfied only with great reluctance and only in the clearest and most exceptional circumstances in which clear injustice is manifest, CREGO V. CARP, 295 N.J. Super. 568, 577 to 579, Appellate Division 1996.

So where the evidence is susceptible to different conclusions by reasonable people, a jury's verdict cannot be disturbed. That's HAGER V. WEBER, 7 N.J. 201, 210 (1951). So, that is, where a fair jury question is presented concerning any issue in a case, the jury's verdict is not to be nullified on a motion for a new trial. That's BLEEKER V. TRICOLO (phonetic), 89 N.J. 502, 508, Appellate Division 1965.

Again, when considering a motion for a new trial, the Court must canvass the record to determine not whether it would have reached the same conclusion as the jury but whether viewed in the light most favorable to the prevailing party, the evidence might have possibly been accepted along with all favorable inferences that might have similarly been drawn are sufficient to support the verdict. See FRANKLIN DISCOUNT COMPANY V. FORD, 21 N.J. 473 (1958).

And the court in CONRAD V. ROBBI, 341 N.J. Super. 424, Appellate Division from 2001, again, emphasized, the Court is not permitted to act as a 13th juror or to substitute its judgment for that of the

jury merely because it might view the greater weight of the believable evidence in a contrary way.

So, here, the defendants cite to the evidence concerning the expert defense -- the defense expert's earnings and the testimony introduced with respect to what is characterized as the overall earnings as testified to by the expert. This was a matter that the record will bear out. There was extensive argument presented with respect to what extent the information pertaining to the expert's earnings would be testified to. There is no need from the Court's perspective to belabor the record beyond that which was already placed on the record at the time the arguments were made.

The expert in this case, the Court found, testified and answered in response to certain questions that were being asked and, certainly, to the extent that there was any confusion about the way in which the expert testified about what he earned and what those earnings were related to, that could have been clarified through cross-examination.

The Court interpreted the witness' response to the question as responding to the exact question asked, which was what it was that he was earning with reference to his work at Exam Works. Again, to the extent that there was confusion as to whether or not

that related to his overall earnings as opposed to earnings from doing defense-type work, that could have been clarified through cross-examination. I don't find that to be a basis upon which by itself or along with all the other assertions made to be necessarily a basis for a new trial or one that would have prejudiced the jury to the point where a manifest injustice has resulted.

So the Court considered the -- again, the argument that the defendant made that the plaintiff was fired from his job for not reporting the incident. The argument being presented is that this information, essentially, is information that prejudiced this jury to the point where they were angry and that is reflected by the inconsistency in their verdict and what is being characterized as an excessive verdict and, again, here, as I pointed out during oral argument and just to be clear, there was never an application made to bar any reference to the plaintiff having been terminated from his employment as a result of his failure to report the matter within an hour.

What was before the Court on this particular issue was the issue of the defendant's request to -- from this Court's perspective what appeared to be an attempt to try the case through jury selection. The

goal of jury selection from this Court's perspective is to obtain a fair and impartial jury, not to essentially poll the jury as to how ultimately they would rule in the matter because, quite frankly, even if that were the goal, I don't know how you accomplish that to the extent that facts tend to bear out very differently than one might anticipate. Trials are fluid, and one never knows how a jury perceives necessarily the way the evidence is coming in.

And so, to that extent, jury selection is not the forum for which one uses to essentially try to try your case but, rather, to get jurors that are fair and impartial and who can agree to keep their minds open until a verdict is reached and base their verdict on the evidence and the evidence only.

The evidence in this case presented by the defendant without any request to exclude it was that the -- the -- the plaintiff in this case was fired and he was fired because he had not reported the matter with -- within a timely fashion. Quite frankly, from the Court's perspective, with all the motions that were made in this case, it was surprising to the Court that that wasn't one that was made. However, the attorneys in this case lived with this case certainly a lot longer than the Court had, and so there was no reason

for the Court to question how you try your case. That application was not made.

So, that, again, I don't find is a basis to somehow now grant a new trial and I don't find given the way the case proceeded, having had the opportunity to observe the witnesses as they testified, the demeanor of the witnesses that were presented. The jury was certainly able to make a rational decision not based upon what may be gleaned as some anger on their part but, rather, the relevant evidence as it relates to the pain and suffering the plaintiff endured as a result of the injuries he sustained. A reasonable jury could certainly decide the case based on the evidence and not on what is being characterized as some anger because of the plaintiff's firing and, again, there was no motion to exclude.

So, the other argument that's being made is the -- the net -- what is being characterized as the net opinion of the treating doctor in this case and, again, it's unclear a net opinion is being offered. For as many motions that were made in this case, a motion to bar the doctor's testimony based on the net opinion was not one that was before the Court. This was a treating doctor, who testified that the surgeries performed in this matter were a result of the

plaintiff's injury and, ultimately, the rehabilitation. So, again, that in and of itself or in combination or in aggregate does not warrant the granting of a new trial.

On the lost wage claim, this also was the subject of extensive argument. The Court entertained the argument not only as we conferenced the case in chambers, understood that this lost wage claim was an issue that had previously surfaced in the context of case management conferences that were had before the Presiding Judge. It appears at some point to have been communicated about between Counsel following arbitration where it was believed that the loss wage claim was no longer in the case and then it was in the case. But in any event, the defendant in this matter was aware following arbitration and following a follow-up letter by plaintiff's Counsel that the wage lost claim continued to be in the case.

Again, as I have indicated, there was extensive argument presented on this issue as it relates to both past lost wages and future lost wages. The Court outlined the reasons for allowing the lost wage claim to proceed and, thereafter, supplemented the record to include reasons why the Court was excluding the future lost wage claim.

I am satisfied based on my review of the record, that the reasons I outlined were warranted and so the motion now with respect to the inclusion of the lost wage claim as a basis to grant a new trial is one that the Court finds to be without merit, and so that along with all the other claims of error are not errors that the Court -- or are not matters which the Court find to be errors and ones which warrant the granting of a new trial.

So, here, as I listened to -- to all of the arguments being presented by the defendant in support of the motion for a new trial, much of the argument relies heavily on what appears to be their interpretation of the testimony presented and their disagreement with the many questions of fact and that is what is being used as the -- as -- or is being labeled as an aggregate of errors.

Motions for new trials must be viewed with all evidence in the light most favorable to, in this case, the non-moving party, the plaintiff. The granting of new trials are against public policy and will only be granted in situations where clear and convincing evidence is presented that there's been a miscarriage of justice.

The arguments, I find, that are presented

here are, essentially, grounded in a disagreement as to how the jury interpreted the evidence and to how the jury may have viewed the credibility of certain witnesses that were being presented. I am not satisfied based upon the arguments made that there has been a clear injustice that is so manifest requiring that a new trial be granted.

The evidence in this case was certainly susceptible to different conclusions by reasonable people, and so the jury's verdict for these reasons should not be disturbed.

Now, the request includes a request in the alternative for substantial remittitur. With respect to remittitur, the Court must when addressing the issue of whether a verdict is excessive and should be set aside, the Court should consider the evidence, again, in a light most favorable to the prevailing party, CALDWELL V. HAYNES, 136 N.J. 422, 432 (1994).

Jury's damages assessment is entitled to a presumption of correctness and should stand unless it is so disproportionate to the injury and resulting disability shown, so as to shock the judicial conscience and to convince the trial Court that to sustain the award would be manifestly unjust.

I've considered all the evidence presented

here. I have considered the arguments presented by Counsel. I have had the opportunity to, obviously, serve as the trial Judge in this case and, with that, comes the ability to get that intangible feel of the case to assess what the jury may be looking at in terms of the demeanor of the witnesses presented.

But what I cannot do is to substitute what this Court's judgment would be in terms of an appropriate jury's verdict but, rather, must look at that evidence and determine whether or not reasonable minds could, in fact, rule as it did and so, with that as the standard, I am not persuaded that the jury's verdict is so excessive, so shocking to the conscience that it should be set aside. So, for those reasons, the motion for a new trial, the motion for remittitur must be denied.

Now, the motion filed by the plaintiff seeking a reconsideration of the Court's decision with respect to the dismissal of the punitive damages claim, the Court outlined the reasons for dismissing that particular count and those reasons were outlined on the record on July 18th of 2017. I am satisfied based on the reasons the Court outlined that, in fact, there is no basis upon which to disturb that ruling.

The evidence before the Court, I found, as a

matter of law was insufficient to allow a jury's consideration of the claim, given the standard that -- the burden of proof that the plaintiff would have to meet on such a claim.

As to the motion to reconsider the dismissal of the future lost wage claim, it's unclear from the papers what relief the Court -- assuming the Court were inclined to even consider that and, quite frankly, the Court is not, I outlined specific reasons why the Court felt the future lost wage claim was not appropriate in the case, made a decision and then, ultimately, as I indicated the following day, supplemented the record, again, allowing both Counsel to supplement the record as well and I outlined the reasons I felt the -- the Court felt the future lost wage claim was not one that would -- should appropriately go to the jury. A review of those reasons I find to be sufficient and I stand by those reasons.

But, again, assuming the Court were to give some consideration to the request to reconsider, it's unclear from the Court's perspective what the request is, whether it is to grant a new trial and thereby have a jury consider a future lost wage claim, again, that's unclear. But I suppose that one need not reach that issue to the extent the Court finds that that motion is

not appropriately granted for the reasons I've already indicated.

So that will conclude my findings of fact and conclusions of law. The motion for a new trial or, in the alternative, a substantial remittitur, is denied and, likewise, the cross-motions are denied. Thank you.

Oh, one other thing. As for the medical expenses, as I indicated through my questions to Counsel on the record, the collateral source rule would require that the Court reduce the verdict based upon whatever benefits -- medical expense benefits the plaintiff may have received and so, in order to accomplish that, Mr. Clark, you have indicated that within ten days, you will be able to provide the Court with that information, so that I can adjust the verdict for medical expenses.

MR. CLARK: Yes. I'll submit a certification and a proposed new order for judgment --

THE COURT: Yes.

MR. CLARK: -- that incorporates the changes Your Honor had made to the -- I know just for the record, on the order for judgment, the Court had reduced our proposed interest. Defense Counsel didn't object to it or anything, but the Court had read the

interest rule correctly and all Counsel missed it and Your Honor had made changes to the proposed form of order, which reduced the amount of the judgment based on the Court sua sponte finding an error in the calculation that none of the Counsel caught.

And so we will submit the new order reducing what Your Honor has also essentially sua sponte brought out the need for the collateral source rule to reduce the medical expenses, so the new order will incorporate the medicals and Your Honor's changes previously. Thank you.

THE COURT: Okay. Great. Thank you. So, I'll look for that within ten days. Okay. All right. Thank you, Counsel.

MR. CLARK: Thank you, Your Honor.

MR. GULINO: Thank you, Your Honor.

(Proceedings concluded)

CERTIFICATION

I, SHERRY M. BACHMANN, the assigned transcriber, do hereby certify the foregoing transcript of proceedings, time from 9:38 a.m. to 10:52 a.m. and from 11:27 a.m. to 11:57 a.m., is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

Sherry Bachmann

SHERRY M. BACHMANN AOC #454
G&L TRANSCRIPTION OF NJ Date: October 16, 2017