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PRELIMINARY STATEMENT

As plaintiff Washington Munoz, a union plasterer, walked across the roof of the grandstand of the Meadowlands Race Track to reach a wall where he was directed to apply a stucco finish, he stepped into a hidden hazard. This caused him to lose balance, contort his body and fall. He immediately experienced pain in his shoulder, arm and low back.

Defendant Paino Roofing had been in the process of installing a rubber membrane on the roof. The construction plans required the membrane be cut and fitted around drains in the roof. However, as of the day plaintiff traversed the roof, that had not been done. As a result, the rubber membrane was stretched across the drain creating an unstable walking surface described by plaintiff's safety expert as a "booby trap." Neither defendant Paino Roofing nor defendant L.P. Ciminelli, the general contractor, had placed any warnings about the hazard in the walking surface.

Plaintiff's fall caused severe and permanent injuries to his left shoulder, arm and back resulting in two surgical procedures and numerous and continuing medical visits. He cannot resume any type of manual labor. In addition, plaintiff has experienced depression and anxiety directly related to the nature and extent of his injuries and his inability to work and earn a living and to participate in the recreational activities, such as soccer and swimming, that he loved.

Following a five day trial in July 2017, a jury returned a verdict in favor of plaintiff awarding him $2.9 million in total damages. Interestingly, defendants do not argue the covered drain was safe, nor that the failure to provide any warning of the hazard complied with applicable safety standards. Rather, defendants focus primarily on various elements of the damages, such as the amount of past lost wages and future medical expenses (raised for the first time on appeal). The trial record, however, belies those contentions.

The awards for past lost wages and future medical expenses were fully supported in the record. Plaintiff presented an earnings statement detailing his current pay and his year to date income. His treating surgeon and examining psychologist opined that the injuries sustained in the fall would require future care and provided estimates of the cost of that care.

The jury's finding that any failure by plaintiff to identify the covered drain and to avoid that area was not a proximate cause of the accident and his resulting injuries, is amply supported by the trial record. The very nature of the hidden and unstable hazard unaccompanied by any type of warning belies the notion that the jury's contributory negligence verdict should be considered inconsistent as a matter of law.

Furthermore, an examination of the focus, extent and significant amount of money earned by defendant's medical expert

through his almost exclusive employment by the defense industry, was evidence relevant to the jury's consideration of his credibility and well within the bounds permitted by law. Similarly, defendants' argument that plaintiff's counsel improperly invoked the "Golden Rule" and caused prejudice to them, is without any support in the record. Defendants fail to inform the Court that the questioned passage is a verbatim recitation of defendant L.P. Ciminelli's Safety Manual for the project, which was entered in evidence without objection. Notably, at no time below did defendants object to, nor raise any issue about plaintiff's summation.

Plaintiff, therefore, urges this Court to affirm the judgment entered in favor of plaintiff and the order denying defendants' motion for a new trial or remittitur.

Plaintiff has cross appealed the dismissal of the future wage loss and punitive damages claim. In this regard, plaintiff is seeking a supplemental trial limited to those two issues, with the balance of the verdict remaining intact. However, if this Court were to affirm the Law Division rulings on defendants' appeal issues, then plaintiff hereby agrees to abandon its protective cross appeal and accept the verdict.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

I. Liability Facts

This case involves injuries to a construction worker from a concealed hazard on a job site. The hazard was created by a roofing subcontractor and permitted to exist by the general contractor. The job site was the Meadowlands Racetrack Grandstand, which was undergoing renovations in advance of the 2014 Super Bowl. (Pa394, 506-508) The general contractor/construction manager is defendant LP Ciminelli, Inc. (hereinafter also referred to as "LPC"). The roofing subcontractor is defendant Paino Roofing, Co., Inc. (hereinafter also referred to as "Paino" or "Paino Roofing"). Plaintiff Washington Munoz was employed by Cooper Plastering Corp. ("Cooper"), the masonry subcontractor. Munoz was required to traverse the roof installed by Paino to do his job.

LP Ciminelli's contract with the project owner is dated March, 2012. (Pa394). Under basic federal and state law, industry standards, its safety manual, and its contract, LP Ciminelli as the general contractor/construction manager in charge of the project, has a non-delegable duty to manage safety, maintain a safe worksite, and prevent injuries to workers and anyone else that may have come on the site. This includes enforcing industry safety standards, including those set forth in the federal workplace

[1]For expediency and to avoid unnecessary duplication from Appellants' brief, we are combining the Statement of Facts and Procedural History.

safety law known as the Occupational Safety and Health Act ("OSHA"). 29 U.S.C. 652; 29 *C.F.R.* § 1926.16; *Fernandes v. DAR,* 222 N.J. 390 (2015); *Alloway v. Bradlees Inc.,* 157 N.J. 221, 237-38 (1999) (Pa199-208, 261-296, 401-403, 411) (2T 81-83, 93-99, 103-104, 109, 117-122, 124-128) (5T 117-118, 154-155, 189)[2] As the general contractor/construction manager, LP Ciminelli had involvement in all aspects of the project. (5T 167)

For example, LPC's contract for the project states:

ARTICLE 10 - PROTECTION OF PERSONS AND PROPERTY

10.1 SAFETY PRECAUTIONS AND PROGRAMS
The Contractor shall be responsible for initiating maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

10.2 SAFETY OF PERSONS AND PROPERTY

10.2.1 The Contractor [LPC] shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to

1. employees on the Work and other persons who may be

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[2]These are the transcript designations:

1T Trial Transcript 7/11/17
2T Trial Transcript 7/12/17 (Vol. 1)
3T Trial Transcript 7/12/17 (Vol. 2)
4T Trial Transcript 7/13/17
5T Trial Transcript 7/14/17 (Vol. 1)
6T Trial Transcript 7/14/17 (Vol. 2)
7T Trial Transcript 7/17/17
8T Trial Transcript 7/18/17
9T Dr. Edward Decter (defense orthopedic expert *de benne* testimony. The portions the court excluded are crossed out)
10T Dr. Paula Sociedade (plaintiff's emotional distress expert *de benne* testimony.)
11T New Trial Motion Transcript

affected thereby;

...

10.2.2 The Contractor shall comply with...applicable laws, statutes, ordinances, codes, rules and regulations...bearing on safety of persons or property or their protection from damage, injury or loss.

10.2.3 The Contractor shall erect and maintain... reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards... and notifying owners and users...

(Pa398) LPC's Safety Manual states:

STATEMENT OF POLICY

Each member of the [LPC] corporate management team is accountable for the safety, well-being, and safe work conduct of individuals at our sites.

To carry out this policy, [LPC] will:

- Maintain safe and healthful working conditions

(Pa401)

Rules of Construction between Prime and Subcontractor (Reference 29 CFR 1926 Subpart B)

Contractors are ultimately responsible for the safety of their own employees and any of their subcontractors on the jobsite. This does not relieve the prime/ subcontractor from their responsibility to their own employees and their assignment of their own competent person. Each prime/subcontractor competent person is responsible for their own scope of work as it relates to applicable safety standards.

(Pa403) LPC's Safety Manual states the purpose of these basic safety principles:

SUMMARY

It is your finger, your eye, and your life that we are concerned about. They are irreplaceable. Your means of

> livelihood is diminished, or at worst destroyed, when your are disabled. You and your family are the people to suffer the most. Safety rules help protect you.

(Pa411)

LP Ciminelli sub-contracted with Paino Roofing to install the roofing. (Pa388) As a subcontractor on the project, Paino Roofing also had the same joint, non-delegable duty for safety with respect to its portion of the work. This too is clear under basic state and federal law, its contract with LPC, industry standards and its own safety manual. *Id.* (Pa389, 390, 392, 412-413) (2T 129-133) Paino Roofing's contract with LPC states:

> **ARTICLE 3- SUBCONTRACTOR'S RESPONSIBILITIES AND CONDUCT OF THE WORK**
>
> **3.7 Clean-up.** Subcontractor shall on a daily basis remove waste materials and debris from the Project site resulting from its Work

(Pa390)

> **ARTICLE 9 - SAFETY LAWS**
>
> **9.1 Responsibility.** The Subcontractor shall be solely responsible for the safety of its Work and for the safety of is agents, employees, material men, subcontractors and any entity working on behalf of the Subcontractor. The Subcontractor...will perform all work on the Project in a safe and responsible manner...Subcontractor shall...strictly adhere to all Federal (including but not limited to OSHA), State and Local safety ...standards, rules and regulations...The Subcontractor agrees to conduct its own frequent and regular inspections of...the project site to verify compliance with the Subcontractor's safety program and all applicable safety standards, rules and regulations.

(Pa392) Paino Roofing's safety manual states, "[W]e must work to

make every workplace safe by detecting and correcting unsafe work conditions...” (Pa413)

The roof on the grandstand building is a flat walking surface. It contains HVAC and other equipment and was designed to be accessed by workers and others. (Pa506-508) In early 2013, two drain pipe holes were installed on the roof near the HVAC equipment intended to drain rain and HVAC condensation water off the roof. The holes are about 6 inches in diameter. (5T 18, 20) (2T 103) (Pa506-508)

Sometime in April or May, 2013, Paino Roofing installed a thin, flexible, rubber roof membrane on the roof. In doing so it concealed the drain holes and caused an approximate six inch depression as anyone walked across the roof at this spot, thereby creating a hazardous condition. (Pa508-510) (2T 103-104, 111-112, 128-132) (5T 17, 24, 25, 28, 31-32) It is particularly hazardous for a worker carrying heavy materials and equipment. (T2 99-100, 103-104, 111-114, 127-134). The condition was described by plaintiff’s liability expert as a “booby trap” for anyone walking in the area. (2T 134) Compounding the situation, neither Paino nor LPC had placed any warning or barrier to alert workers of the hazard. (4T 72-73) (2T 44-45) It could have caused anyone to fall. (2T 48-50)

On June 26, 2013, plaintiff Washington Munoz was working on the project as a union plasterer for Cooper Plastering Corp. At

about 3:20 p.m., he was directed to carry tools and materials to the roof to set up the work area for the next day. (4T 133) This was his first time on the roof. (4T 57)

He came through the door shown on Pa507. The most direct path to the work area is shown in Pa508. The work area is the wall shown behind the two people in the photograph. (T4 64) To get there he had to walk over the area where the drain holes are in the photograph (behind the blue redaction paper in the center left of the photo). (Pa508) (4T 57, 71-73). Pa509 and Pa510 photos depict the covered drain hole more or less as it appeared on the day of the incident. The hole area where he fell is circled in red toward the bottom of Pa509. (4T 59-60, 63-64)

As stated, this was plaintiff's first time on the grandstand roof. (4T 57) As part of plaintiff's assigned work duties, he was carrying two 65 pound buckets of plaster material. His work belt filled with tools was slung over his shoulder. As plaintiff stepped on the covered hole area, the roof membrane gave way, causing him to loose balance. As he lost balance plaintiff described that he felt his body lurch and contort. Plaintiff's tool belt slung down his arm, pulling on and injuring his shoulder and back. (4T 55-60, 68, 71-85, 95-100, 126-129, 135-136,) (Pa452-456) (3T 280-282) (Pa457-459) (5T 122) (2T 41-42)

At the time of the incident Washington Munoz was accompanied by two coworkers. One of his co-workers, Joe Mella, observed the

incident. Mella urged him to report the incident, but Washington Munoz tried to work a bit more that day to see if the pain would go away, but had to stop. (2T 47) Mella had the most seniority and was later promoted to foreman. (2T 39-42, 44-50) (4T 92-93) Plaintiff tried to report the incident to LP Ciminelli, but they had left for the day and there was noone else around he could have reported the incident to. (5T 35, 37-38, 138-139)

Plaintiff returned to the job site the next day to again try to report the incident to LP Ciminelli. Munoz met with the project safety supervisor, Bob Beardsley of LPC, and showed him where he got hurt. (4T 92-97, 123-124, 133-135) Upon seeing the hazard created and covered up by Paino Roofing, Beardsley angrily exclaimed, "that f- - - ing roofer." (4T 96-97) Beardsley then proceeded to kick the plaintiff the job for not reporting the incident within one hour. (10T 57-58) (4T 134) (5T 37, 173) (Pa 247, 249-250, 453)[3]

Both the general contractor, LP Ciminelli, and the roofing

[3]The fact that the worker was fired from the job by LP Ciminelli had always been their central defense, from their initial investigation through trial. Among other things, defendants employed this defense in their initial investigation (Pa453), in discovery, in their arbitration statement (Pa249), in the pre-trial conference (1T24), in their pre-trial submission (Pa247), in their opening statement (2T25 to 2T37), at the *de benne esse* deposition of plaintiff's emotional distress expert (10T 57-58), throughout the witnesses portion of the trial (4T123 to 4T135) (5T121 to 5T128) and in closing arguments (7T49 to 7T77). Interestingly, a central basis for their new trial motion below was that they were prejudiced by this defense. (11T 49-51)

subcontractor, Paino Roofing, have a joint, non-delegable duty to maintain a safe work site. This is to prevent injuries to both workers and anyone else that may be expected to come on the job site. *See* 29 *C.F.R.* § 1926.16; *Fernandes,* 222 N.J. 390; *Alloway,* 157 N.J. at 237-38 (Pa199-208, 261-296, 401-403, 411) (2T 81-83, 93-99, 103-104, 109, 117-122, 124-128)(Pa390, 392, 398, 401, 403, 411, 413) (5T 117-118, 154-155, 189) Vincent Gallagher, a former OSHA official, was called by the plaintiff as an expert in the field of workplace safety standards and OSHA.

Utilizing a comprehensive power point presentation (Pa 199-208), Mr. Gallagher testified that industry standards have long been unanimous and unequivocal that contractors like LPC and Paino have a duty to maintain a safe worksite. This duty includes, among other things, performing safety inspections to prevent, recognize and correct hazards and otherwise assure job site conditions comply with OSHA and other industry safety standards.[4] (2T 93-98)

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[4]The Supreme Court in *Fernandes* recently confirmed that in these kinds of cases:

> The standard of care is derived from many sources, including codes adopted by the Legislature, regulations adopted by state and federal agencies, and standards adopted by professional organizations. OSHA was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions" by "encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment." 29 *U.S.C.A.* § 651(b)(1).

Fernandes, 222 N.J. at 405.

Defendants presented no expert to counter Gallagher. (2T 192) His complete testimony is located at T2 78-196.

Gallagher testified the condition at issue was dangerous and violated OSHA safety standards because it was an unprotected hole greater than 2". Such holes on job sites have to be covered with plywood or other material capable of holding twice the expected weight. The cover should also be marked "hole" as a warning. Here, the hole was concealed with thin, flexible roofing material that gave way when walked on, causing the very kind of fall hazard the OSHA standard was meant to prevent. (2T 111-114, 117-118)

Gallagher relied on, among other things, the testimony from Bob Beardsley (LPC Safety Manager) and Stephen Paino that this concealed hazard was created by Paino Roofing. Gallagher also found it remarkable that Beardsley knew this hole was 6", knew about the OSHA standard, knew the hazard existed, knew the LPC Safety Manual which he wrote says "Holes 2 inches or more [need] Barricades or Covers Installed" (Pa410), and knew workers would be walking in the area, yet did nothing about it. (2T 99-100) Even after learning about the incident, Beardsley still testified the condition, "would not be a concern to me." (5T 19) (2T 99)

Gallagher highlighted the problems presented by Beardsley's assessment of the condition of the roof as follows:

> The deposition testimony of Mr. Beardsley, who is the corporate safety manager of Ciminelli, was important because he was a safety guy. He knows the responsibility of a general contractor and he had that responsibility at

> this job site and he said he was familiar with the roof installation process and he inspected the roof area where this incident occurred and he testified it would not be of a concern to him for somebody to say that there is going to have to be a drain hole there.
>
> It was his understanding that workers would be walking on the roof as part of their job, both construction workers and employees from the hotel, and he figures someone walking on the roof, carrying materials in an area where a hole is covered by a membrane would not raise any concerns to him as the site and safety manager.
>
> He recognizes that a hole greater than two inches in diameter has to be covered. He doesn't think that this hole should be covered. He didn't think Mr. Munoz violated any OSHA standards, and he thinks that it would be fine for there to be a hole like this, a drain hole without a cover on it and that was important testimony because he is, apparently, saying that he accepts the hazard of the membrane going over the...drain hole as being okay, and I think it's a hazard.

(2T 99-100)

> Because Mr. Beardsley, who was the safety manager, who was supposed to make sure the job site was safe, didn't consider this to be a hazard. Even after injury occurred, because of this flexible surface, in my opinion, in violation of OSHA standards, he still didn't think it was anything that should be protected.

(2T 127) Mr. Beardsley himself testified:

> Q. ...The question is, do you think that a hole 6 inch diameter covered by a rubber membrane, do you think that is on a roof where workers are going to be traveling, do you think that's a dangerous condition?
>
> A. Asked and answered, no sir.

(5T20) Gallagher further explained that LP Ciminelli did not comply with the industry standard because they failed to properly plan, monitor and make sure the work site was reasonably safe.

Gallagher explained his opinion in the following excerpt from his testimony:

> Mr. Beardsley was the safety manager to make sure that the job site program was implemented, and he inspected the roof, he inspected the drains. He knew what was there and he made an accident investigation, and it's his opinion that there was no problem, that it's acceptable to have membrane over a hole like this. And it's my opinion that this violated OSHA standards. That will be my next opinion. And the basis of my opinion that Mr. Ciminelli violated the industry standards is the facts in his deposition testimony that I had mentioned to you that the drain hole is about six inches in diameter and he thinks a person walking on that, carrying material wouldn't be of any concern to him, that is after investigating an accident where somebody stepped on it, it went down, and it caused injury. It caused him to lose balance carrying two heavy objects, the membrane, not strong enough, not meeting the OSHA standards as you'll see in a second, that was not strong enough to withstand the weight that was put on it and caused injury.

(2T 103-104) Mr. Gallagher further demonstrated how LPC did not follow the job safety requirements spelled out in its contract with the project owner. (2T 122, 124-127)

Gallagher also concluded that LP Ciminelli's decision to disregard the OSHA standard and its own contract with the owner was a cause of the plaintiff's injuries. Gallagher testified, "Had the environment been safe, had OSHA been complied with, we wouldn't be here today." (2T 128) In other words, had there been an OSHA compliant cover, the incident never would have happened. (2T 109, 119-120)

Gallagher also explained how the actions of Paino Roofing also caused the incident and injuries to plaintiff. Paino too did not

follow the applicable safety standards, including the safety requirements in their contract. Gallagher highlighted the testimony of Stephen Paino, who admitted his workers would leave the job in that condition and did not fault his employees. (2T 128-133) On this omission Gallagher explained:

> A. That made it more dangerous because an open hazard, you can see in your natural instincts that you don't step in that. When you cover over a hole with something that you can't see the hole at all, that's an inconspicuous hazard. It's much more dangerous than the hazards it's just open without a cover because you [can] easily mistakenly step on it.
>
> Q. Did you form an opinion as to whether or not violating those safety rules was a cause of the injury to the worker in this case?
> A. Yes, sir. ...it was a cause, that had it been covered properly, this incident would not have occurred.
> ...
> A. [Paino] said that he would leave the condition as it is in the photo.

(2T 132-133, 195) Indeed, Stephen Paino testified:

> Q. Would your workmen leave -- leave this in the condition that you see in Beardsley 2 [Pa510]?
> A. Yes.
>
> Q. You don't think that's unsafe?
> A. No.
>
> Q. How come?
> A. I don't see anything that's unsafe there.
>
> Q. It appears to be a hole, and you're saying there's a drain underneath it?
> A. Correct.
>
> Q. And you don't think that's unsafe if someone is walking in the area?
> A. There's a drain under there, so no.
>
> Q. Do you think someone can trip over that?

A. No.

(5T 31-32)

Gallagher also concluded Washington Munoz did not cause the incident. First, Gallagher recounted the testimony from the LPC Safety Manager (Bob Beardsley) that Washington Munoz did not violate any safety standards. (2T 100) Gallagher next emphasized Washington Munoz received no training or other notice about the hazard and risk, which was inconspicuous. Gallagher testified:

> Q. Now, with regard to blaming the worker, did you address the question of whether or not the worker should be blamed for what happened here?
> A. Yes, sir.
>
> Q. Okay. And how did you evaluate whether or not the worker should be blamed for what happened?
> A. Basically, as I was trained by OSHA, the first you say, did the worker violate any specific safety instructions and, here, Mr. Munoz didn't violate any safety instructions. Number two, what did he know through training about the hazard and the risk? The hazard is the hole. The risk is a separate thing according to safety professionals. Risks are those factors that make it more likely that the hazard will result in injury. Workers should be trained about hazard and risk. Here, the risk of falling was inconspicuous. He didn't know that, so he didn't -- he didn't know....According to Mr. Munoz' deposition testimony, he didn't see the hole and he -- he wasn't trained about hazard and risk and the next factors to consider, what was the environment in which he was working and, here, you have what I consider to be an unreasonably dangerous environment because there was a boobie trap, so to speak. There was a place where he could walk and suffer injury that he couldn't see and the other factor is, what was the safety management environment that he was in? He was in a safety management environment where the safety manager, even after the incident, said there's no reason to cover the hole. So based on those

factors, I wouldn't blame him for causing his own injury.

(2T 133-134) He further testified:

Q. And part of your conclusion that the hazard was inconspicuous and I think you had kind of said a boobie trap, in coming to that conclusion, did you also rely upon the deposition of Joe Mella?
A. Yes, sir.

Q. Okay. And without going over it in detail, what did you conclude in that regard? How did that affect your opinion or your conclusion on that issue?
A. That nobody could see the hole. It was covered with material all over the roof -- that went over the roof. It was black. Everywhere where there were covers, it was black and no indication of a hole.

(2T 191)

II. Damages Facts

Washington Munoz sustained serious injuries as a result of his fall. He injured his back and his shoulder which, as of the time of trial, required two surgeries. His treating orthopedic physician, Dr. Thomas Helbig, testified. (3T 204-285) Dr. Helbig performed the surgeries and continues to treat Washington Munoz for injuries sustained in this incident. As of trial, he had seen him some 40 times. (3T 228-229) Notably, defendants' medical expert, Edward Decter, agreed Washington Munoz sustained significant injuries from the incident that required surgery. (3T 233)

Paula Socidade, Ph.D., a psychologist who specializes in treating Latino patients, testified at length about the severe and permanent emotional distress and depression Washington Munoz

sustained as a result of this incident. She testified extensively about Washington's problems coping with the permanent life changes. (10T 4-77) She also explained the future medical treatment he needs to address these severe emotional injuries. (10T 32-36) The defense had no expert to refute any of it.

As of trial, Washington Munoz had about 155 medical appointments and incurred over $104,000 in past medical bills. (3T 229-231) He continued to treat and requires future medical treatment estimated to cost $520,000. (3T 230) (7T 104) He is unable to return to his occupation in construction or other manual labor. (4T 42-54, 87-89) (3T 225-227) (10T 24, 28-29, 36-37, 58, 66) He has a substantial past and future wage loss claim. (4T 44-45, 51-55, 87-88, 110-111, 114) (Pa197). There is a workers compensation lien currently in excess of $200,000, including wage loss indemnity; the lien is expected to approach $500,000 over time. (Pa195)

Plaintiff's treating orthopedic physician, Dr. Thomas Helbig, began treating Washington Munoz shortly after the incident and continued through the time of trial. (3T 206, 228) Dr. Helbig enumerated the injuries from the incident: shoulder torn rotator cuff, subacromial impingement, bursitis and a ruptured and displaced biceps tendon. All of the injuries occurred in his dominant arm and shoulder. Several injections did not work. As of trial he underwent two surgical procedures which included

subacromial decompression, bursectomy, acromioplasty (shaving of the bone), arthrotomy, clavicle and acromion resection with placement of anchors. He also sustained injuries to his spine including disc bulges at L3-L4 and L5 and disc protrusion with thecal sac indentation at L5-S1 which have been causing him significant pain and limitations since the incident. (3T 207-231)

Dr. Helbig utilized detailed case specific medical illustrations. (Pa298-301) He described the injuries and treatment as "major," "significant," and "permanent." (3T 217, 224) Even defense counsel characterized his rotator cuff injury and surgery as "serious stuff." (3T 244) Washington Munoz was left with a significant scar. (3T 221) (Pa460) The biceps tendon tear also left him with a significant and "very obvious" deformity of his arm called a "Popeye sign" where the muscle protrudes in a deformed fashion. (3T 222, 282)

Dr. Helbig saw Washington Munoz a week before trial, four years after the workplace incident. Plaintiff still had significant pain in the shoulder with only fair mobility which was "quite painful." According to Dr. Helbig, plaintiff's condition was "not good." (3T 225) Dr. Helbig testified:

> ... Unfortunately, his arm is weak, so trying to do any heavy work, any repetitive lifting, really, any overhead activity, which is something that really can bother a person with a shoulder problem is something he's never going to be able to do.
>
> I don't see that this shoulder issue, even though I've done the surgeries, is going to resolve to the point

where he's going to get to the point of being able to do any even medium heavy labor, any heavy work.

Q. And so what is your conclusion with regard to whether or not he can probably return to his prior employment as a Union plasterer mason?

...

A. A person who has a serious problem with the shoulder will have a lot of difficulty and probably find it impossible to perform repetitive overhead activities. I say "overhead," I don't mean reaching up to the light bulb, but anything above what we call 90 degrees approximately here. So anything that he's going to have to do, -- you know, maybe once he can go into his kitchen and unscrew and put the light bulb in, although it will probably hurt him. To go back and try to do any heavy work, repetitive up and down on walls, up and down on ceilings, it's not going to happen. It's impossible.

(3T 225-227) Dr. Helbig opined that plaintiff faced the probability of further surgery.[5] (3T 230-231)

Additionally, the permanent injury to his spine was still causing him significant pain in his back with limited mobility and difficulty bending. Dr. Helbig was still treating plaintiff for his low back impairment and opined that plaintiff would benefit from surgery. (3T 227-228, 230-231) Dr. Helbig summarized his clinical findings, his prognosis, and the causal relationship between the workplace accident and those injuries as follows:

A. Mr. Munoz sustained a partial rotator cuff tear of the right shoulder with impingement that necessitated two surgical procedures. He has a right biceps tendon rupture. He has chronic thoracic and lumbar sprains with an MRI showing

[5]The record does not reflect a third shoulder surgery Washington Munoz had because it took place after trial.

> L5/S1 disk herniation. He's had treatment for almost [four[6]] years, continues to have significant symptomatology substantiated by objective findings. The prognosis for returning to unrestrictive duties in his previous job as a construction worker is guarded at best....These are causally related to the work incident of June 25th, 2013.

(3T 282-283)

Plaintiff's emotional distress expert, Dr. Paula Sociodade, testified at length about the nature and extent of the permanent emotional harms and losses from this incident. (10T 4-77) She noticed a lot of depression and anxiety about all the changes in his life. Before those injuries he lived a full, active life. He is no longer able to do many of the things he did before including playing soccer, volleyball and swimming. He reported a loving and joyful childhood being raised in a close-knit Catholic family. He had no mental health history before this accident. Dr. Sociodade opined that plaintiff was genuine in his presentation. She noted that plaintiff became tearful in describing his life before the incident. He was particularly distraught about his inability to work and provide for his family. (10T 22, 24-28)

As a result of this incident, Dr. Sociodade diagnosed plaintiff with major depressive disorder with a score of 57 on the DSM Global Assessment of Functioning Scale, which includes symptoms of sleep disturbance, fatigue, sexual impotence, poor appetite,

[6]It was two years as of the time of his report, but four as of the time of trial.

mood swings and concentration, focus and memory issues. Plaintiff was experiencing "significant depression, anxiety, adjustment difficulties and stress symptoms." (10T 30-32) Dr. Sociodade testified:

> A. Well, I mean...just to talk about soccer, soccer's very big, and he played soccer and not being able to enjoy some of these...activities -- this is a gentleman who was very physically agile. He worked out. He took care of himself. Even though he worked construction which is very labor-intensive, he would go out and play and he would, you know, go out and engage in these sports so not being able to do so impacts his psychological state without a doubt.
>
> Q. How about if Mr. Munoz has testified that he can no longer do the construction work he was performing before he got injured? Would that be of significance to you in your findings?
> A. Yes.
>
> Q. Okay. How so?
> A. Going back to pride and -- and how Hispanic men tend to, you know, be very proud of -- of providing for their family and not being able -- this is the thing. It's not being able to take care of one's own in an Hispanic male really impacts their mental health.
>
> Q. If Mr. Munoz decides to now go into a different field and decides to go and continue his studies somewhere would his current condition psychologically impact his ability to now study and take on a different career?
> A. Absolutely...[O]ne of the cornerstones of depression is foggy brain, difficulty making decisions, insecurities, focus issues, memory -- short-term memory issues, cognitive processes, reaction time. All of that is slowed. ...I would think that in order to do something like that treatment would need to be rendered to facilitate that.

(10T 36-38)

Dr. Sociodade further testified Plaintiff will need lifelong treatment to deal with this. Plaintiff needs psychotherapy over the course of his 34 year life expectancy which comes to approximately $170,000, not adjusted for inflation. He also will need psychopharmacology treatment as well at an estimated cost of $221,000. Thus the total cost of the future treatment for his emotional injuries is $391,000. (10T 32-35) She testified:

> A. That he presents with significant depression and anxiety...the distress that he's feeling, I strongly believe he needs he needs treatment both -- definitely from a psychologist, more than likely also psychiatric for medication, and that without it, you know, unfortunately, I think the quality of his day-to-day and his psychological well-being will be affected and probably spiral in a negative way; some form of deterioration.

(10T 35) Dr. Sociodade also explained that it is commonplace in many Spanish and Portugese speaking cultures to use hyphenated, elongated surnames. Her explanation directly rebutted the ugly suggestion that Washington Munoz was a fraud because he did not always utilize this elongated surname. (10T 45-49, 69)

Defendants had no expert to refute the presentation of Dr. Sociodade.

The changes in plaintiff's levels of physical activity and mood described by plaintiff and his physicians were corroborated by Washington Munoz' ex-wife, Gina Oriana, and his daughter, Denise Munoz. (4T 25-40) Gina Oriana stated that plaintiff used to be a hardworking, active and happy father, but now he is not as active

and is sad. (4T 28-32)

Similarly, Denise Munoz related that plaintiff visited her frequently and did activities together. After the incident, however, he is unable to travel and unable to participate in activities with her like before. (4T 34-38) Denise Munoz became visibly upset when she described her father:

> A. Well, like I said when I see him it's not the same. His face is not the same. He can't do the stuff he used to do. Like that's -- before he used to be happy like we used to do stuff together but not like he can't do. He can't. Like he's more sad now like it's not the same. I'm sorry.[7]

(4T 38) The genuineness of these witnesses is reflected in Judge Carter's decision denying defendants' motion for new trial where she properly made note of the demeanor evidence and the trial court's intangible "feel of the case." (11T 55, 64)

The testimony of Washington Munoz was consistent with all the damages witnesses and evidence. (4T 42-145) He described the significant pain he has been experiencing since the incident, his injuries and extensive, ongoing treatment. (4T 56, 85-87, 92, 132, 135) He testified about how he enjoyed working but was no longer able to do so like before. He explained:

> Q. Now, how was your life before the incident? How was your life before June 25th, 2013?
> A. Well, as I said before, I come from a family that loves construction. My father is a builder and so

[7]As this point she became upset and there was a break in her testimony.

> I love construction work. I miss doing construction work and I want to go back... My entire family works in that field so --
>
> Q. How has your life been after the accident? Can you tell us a little bit about that?
> A. In my strength and my state of mind it's not just the same because in construction you need to use a lot of strength. You need to be agile. My great desire is to go back to construction. I have attempted to. I have tried, but it's just not the same.
>
> Q. You said you've tried to go back to work. Tell me a little bit more about that.
> A. Well, on occasions there have been certain occasions when I have felt, how can I say it, helpless. I have tried to do the work in construction but it's just not the same, it's not the same.

(4T 87) He testified about his lost earnings and his most recent pay stub from the time of the incident which includes his year to date earnings information. (4T 44-45, 51-55, 87-88) (Pa197)

The defense medical expert, Dr. Decter, is well-known for testifying for the insurance industry, often saying the injuries are not what the medical records show and suggesting exaggeration, faking and malingering. (Pa149) The record shows he will passively suggest these things with medical terms such as "the objective evidence does not match the subjective complaints" (i.e., faking the injury) (9T100) or the plaintiff complained of "diffuse pain all over her body" (i.e., exaggerating) (9T 45-46), or the plaintiff had "full range of motion with no pain" (i.e., nothing wrong with the body part). (9T 48)

It is also well known from deposition and trial testimony that Dr. Decter started a defense medical exam company called CFO Medical Services which expanded this "service" to its defense industry clientele. He later sold this for about $30 million and its name was changed to "Examworks." As part of that deal, Dr. Decter was guaranteed a certain amount of insurance defense medical exams ("DMEs"). (Pa 38-49, 319-320, 349-351)

Mindful of this history, our office had a nurse accompany Washington Munoz to his Examworks DME with Dr. Decter. Dr. Decter claimed Washington Munoz complained of "diffuse pain" "all over his shoulder" and "all over his body." He also claimed Washington Munoz was able to perform a back injury test (heel to toe walk) with no pain. (9T44 to 46) But the nurse witness testified Washington did not complain of pain all over his shoulder and body, was not able to raise his arm without pain, and demonstrated pain on the heel to toe walk. (7T26-28)

III. Procedural History

The First Amended Complaint was filed on June 15, 2015. (Da1). The Nicoletti Gonson Spinner, LLP law firm filed an answer on behalf of all defendants, including plaintiff's direct employer, Cooper Plastering Corp. ("Cooper"), which was named as a defendant for discovery purposes and voluntarily dismissed at trial. (1T 16-17) (Da14)

The Complaint, First Amended Complaint and answers to

interrogatories included claims for past and future lost earnings. (Da5, Pa177, 182) In October 2016, Defendants filed a motion to dismiss plaintiffs' wage claim for failure to produce supporting documentation. The motion was opposed on several bases including that under clear New Jersey law, a wage claim can be based upon testimony alone and failure to produce paper evidence goes to the weight of the claim, not its admissiblilty. The Honorable Jamie Happas, P.J. Cv. denied the motion on October 14, 2016. (Pa186).

On November 8, 2016, Lazaro Berenguer, Esq. of Clark Law Firm wrote to defense counsel, "Please note that plaintiff will not pursue a lost wage claim in this matter." (Pa189). As discussed several times on the record at trial, due to internal mis-communication, lead counsel for plaintiff, Gerald Clark, Esq., was unaware this letter had been sent and it was a mistake. (1T 101-108, 113-119) (5T70 to 5T84) (7T10 to 7T22). Once he learned about it, on March 15, 2017, Mr. Clark immediately wrote to defense counsel correcting the letter and in no uncertain terms making it clear the lost wage claim was in fact being pursued. (Pa191)(underline added). No stipulation of dismissal was ever filed in accordance with *Rule* 4:37-1(a) or otherwise, to effectuate any dismissal of the wage claim.

The case proceeded to trial before the Honorable Andrea G.

Carter from July 10 through July 18, 2017.[8] Judge Carter decided various trial motions and objections. The entire record shows 55% of her rulings were in favor of the defense, 45% for the plaintiff. Among other things, Judge Carter granted defendant's motion to dismiss the future wage claim on the basis that Washington Munoz did not specifically testify his work life expectancy had he not been injured. (5T 78)

Although after resting plaintiff was permitted to enter additional evidence about liability (5T 115-118), the trial judge would not permit Washington Munoz to be recalled to state how long we would have worked had he not been injured. (5T 79-81) Judge Carter also granted defendants' motion to dismiss the punitive damages claim (8T 64-83), did not permit the defense medical expert to be questioned on his professional medical censure for having given false testimony in an injury case (5T 110-112) and permitted comparative negligence to go to the jury. (7T 33-35) She also barred as "cumulative" five of plaintiff's seven lay damages witnesses. (4T 4-7, 20) Judge Carter also *sua sponte* made sure defendants received a credit on the verdict under the Collateral Source Rule. (11T 43-44)

In closing, plaintiff's counsel invited the jury to utilize a time-unit analysis in determining compensation for disability,

[8]The proceedings on July 10 took place in chambers, off the record.

impairment and loss of enjoyment of life, i.e., the permanent life changes. *Model Jury Charge* 8.11 G (ii), *Time Unit Rule*. The jury awarded $2.4 million, which given Washington Munoz' life expectancy calculates to $7/hr. (7T 107-109) On past medical expenses the jury awarded $104,671 which is the un-rebutted amount submitted by Dr. Helbig and entered into evidence without objection. (3T 230-231) (Pa210) The total placed "on the board" as to future medical expenses was approximately $420,000. (3T 230) (7T 104) The jury awarded $150,000. (Pa4-6- verdict sheet)

On past lost earnings, the date of incident was June 25, 2013 and the trial ended on July 18, 2017, for a total of 212 weeks. It appears that the jury multiplied the net/take home amounts shown on the pay stub and testified to; $1,131 x 208 weeks= $235,248. to derive the verdict for past lost earnings, $235,248. The jury subtracted 4 weeks vacation and did not award overtime, despite plaintiff's testimony that he did not take vacation and was paid overtime. (4T 50-54) (Pa4-6)

Defendants' motion for new trial and/or to reduce the verdict was denied on October 13, 2017. (11T)

LEGAL DISCUSSION

I. New Trial Law (11T 52-67)

A new trial shall not be granted where a jury has rendered a verdict unless "it clearly and convincingly appears that there was

a miscarriage of justice under the law." R. 4:49-1(a). "In the American system of justice the presumption of correctness of a verdict by a jury has behind it the wisdom of centuries of common law merged into our constitutional framework." *Baxter v. Fairmount Food Co.*, 74 N.J. 588, 597-598 (1977). The jury's evaluation of factual issues must be afforded "the utmost regard." *Love v. Nat'l R.R. Passenger Corp.*, 366 N.J. Super. 525, 532 (App. Div.), certif. denied, 180 N.J. 355 (2004). "Once the jury is discharged, both trial and appellate courts are generally bound to respect its decision, lest they act as an additional and decisive juror." *Kassick v. Milwaukee Elec. Tool Corp.*, 120 N.J. 130, 135-36 (1990)

In terms of its assessment of the relative strength of the proofs, a jury verdict is "'impregnable unless so distorted and wrong, in the objective and articulated view of a judge, as to manifest with utmost certainty a plain miscarriage of justice.'" *Doe v. Arts*, 360 N.J. Super. 492, 502-03 (App. Div. 2003) (quoting *Carrino v. Novotny*, 78 N.J. 355, 360 (1979)). Jury trials are a bedrock part of our system of civil justice and the fact-finding functions of a jury deserve a high degree of respect and judicial deference. *See, e.g., Caldwell v. Haynes*, 136 N.J. 422, 432 (1994). Accordingly, *Rule* 4:49-1(a) provides that a trial judge may only grant a new trial if, "having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it

clearly and convincingly appears that there was a miscarriage of justice under the law."

In reviewing a trial judge's decision on a motion for a new trial, appellate courts view the evidence in a light most favorable to the party opposing the motion, *Caldwell, supra*, 136 N.J. at 432 and give substantial deference to the trial judge who observed the same witnesses as the jurors in recognition of the importance of the "intangibles" not transmitted by the record such as credibility, demeanor and overall "feel of the case." *See, e.g., Carrino, supra*, 78 N.J. at 361; *Baxter, supra*, 74 N.J. at 597-98; *Dolson v. Anastasia*, 55 N.J. 2, 7 (1969).

Furthermore, the trial court has wide discretion on the admission of evidence. *Green v. N.J. Mfrs. Ins. Co.*, 160 N.J. 480, 492 (1999) (concluding that "[t]he trial court is granted broad discretion in determining both the relevance of the evidence to be presented and whether its probative value is substantially outweighed by its prejudicial nature"); *State v. Koedatich*, 112 N.J. 225, 313 (1988) (in making evidentiary decisions, "the trial court has been entrusted with a wide latitude of judgment [and, as a result the] trial court's ruling will not be upset unless there has been an abuse of that discretion, *i.e.*, there has been a clear error of judgment."

Applying these principles, defendants' arguments for reversal and new trial or remittur are without merit. The record simply does

not clearly and convincingly demonstrate a miscarriage of justice. Defendants' motion was properly denied. *Baxter v. Fairmount Food Co.*, 74 N.J. 588, 597-598 (1977); *Rule* 4:49-1(a).

As the facts and record shows, this verdict is well supported in the evidence. Contrary to defendants' hyperbole, and as the Court properly found, this was not an "angry" jury. (11T, 22, 26, 35-36, 49, 60) The jury returned a unanimous verdict on all questions. The verdict was well-thought out, properly grounded in the evidence, and does not constitute a "miscarriage of justice."

II. The Jury Finding That Plaintiff Was Negligent but Not the Proximate Cause of the Incident Was Perfectly Acceptable under Law, Logic and the Heightened Comparative Negligence Standard Set Forth in *Fernandes* (11T 52-67)

A. New Jersey law, the model jury charges and the model verdict sheet- to which defendants had no objection- clearly recognize that negligence and proximate cause are separate concepts

Negligence and proximate causation are separate and distinct elements. *See Camp v. Jiffy Lube*, 309 N.J. Super. 305, 309 (App. Div.), *certif. denied*, 156 N.J. 386 (1998). The questions of negligence and proximate cause of the incident are ordinarily separate questions. *Terminal Constr. Corp. v. Bergen County*, 18 N.J. 294, 341 (1955); *Correa v. Maggiore*, 196 N.J. Super. 273, 286 (App. Div. 1984); *Corridon v. City of Bayonne*, 129 N.J. Super. 393, 398 (App. Div. 1974) The determination of proximate cause is a decision for the jury to decide. *Komlodi v. Picciano*, 217 N.J. 387,

418 (2014); *Scafidi v. Seiler*, 119 N.J. 93, 101 (1990). Proximate cause is only removed from jury consideration in the most "highly extraordinary case[s]." *Fleuhr v. City of Cape May*, 159 N.J. 532, 543 (1999).

A jury may allocate fault to a party in a negligence action only where it determines that party was negligent and that party's negligence was a proximate cause of the damages suffered. *See, e.g. Fernandes*, 222 N.J. at 408 ("A jury may consider a plaintiff's negligence only when the evidence adduced at trial suggests that the plaintiff was somehow negligent and that negligence contributed to the plaintiff's damages.") (emphasis added). Indeed, when a defendant asserts a plaintiff is negligent, the defendant must first prove the plaintiff was negligent and second "that the plaintiff's negligence...was a 'substantial contributing factor to the injuries sustained.'" *Ibid.* (quoting *Waterson v. Gen Motors Corp.*, 111 N.J. 238, 252-53 (1988)); *see also, Model Jury Charge (Civil)* 6.11 & 7.32.

Whether a negligent act constitutes proximate cause of the resulting damages is a question of fact left to the jury's sound discretion. *See, e.g. Scafidi v. Seller*, 119 N.J. 93, 101 (1990); *Campos v. Firestone Tire & Rubber Co.*, 98 N.J. 198, 209-10 (1984). Determining proximate cause involves a "combination of 'logic, common sense, justice, policy and precedent' that fixes a point in

a chain of events, some foreseeable and some unforeseeable, beyond which the law will bar recovery." *People Express Airlines, Inc. v. Consol. Rail Corp.*, 100 N.J. 246, 264 (1985) (quoting *Caputzal v. Lindsay Co.*, 48 N.J. 69, 77-78 (1966)). In order to determine whether proximate cause exists, the proper inquiry is "whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff' reasonably flowed from defendant's breach of duty." *Clohesy v. Food Circus Supermarkets, Inc.*, 149 *N.J.* 496, 503 (1997) (quoting *Hill v. Yaskin*, 75 *N.J.* 139, 143 (1977)). *See also Model Jury Charges (Civil)*, 6.10, "Proximate Cause — General Charge to Be Given in All Cases" (1998) ("The basic question for you to resolve is whether [plaintiff's] injury/loss/harm is so connected with the negligent actions or inactions of [defendant] that you decide it is reasonable...that [defendant] should be held wholly or partially responsible for the injury/loss/harm."). Merely committing a negligent act does not mean the act is a proximate cause of the claimed injury; instead, the act must be a "substantial factor" in bringing about the injury. *James v. Arms Tech., Inc.*, 359 N.J. Super. 291, 311, 820 A.2d 27 (App. Div. 2003); *see also, Model Jury Charge (Civil)* 7.11.

To this end, the Model Jury Charges instruct the Court to ask negligence and proximate cause as separate questions on the verdict sheet, just like was done in this case, but which defendants claim was reversible error. (Pa3-6) Model Jury Charge 6.10 states:

> If you find that *[name of defendant or other party]* was negligent, you must find that *[name of defendant or other party]* negligence was a proximate cause of the accident/incident/event before you can find that *[name of defendant or other party]* was responsible for *[name of plaintiff or other party]'s* claimed injury/loss/harm. It is the duty of *[name of plaintiff or other party]* to establish, by the preponderance of evidence, that the negligence of *[name of defendant or other party]* was a proximate cause of the accident/incident/event and of the injury/loss/harm allegedly to have resulted from *[name of defendant or other party]* negligence.

MJC 6.10. Specifically with regard to comparative negligence, model jury charge 7.30 is clear:

> Because defendant has charged the plaintiff with negligence, it is his/her burden to prove that plaintiff was negligent and that such negligence was a proximate cause of the accident.
> ...
> Each party must not only prove the negligence of the other party by preponderance or greater weight of the credible evidence, but also that this negligence was a proximate cause of the accident.
>
> By proximate cause it is meant that the negligent conduct of a party was an efficient cause of the accident, that it necessarily set the other causes in motion and naturally and probably led to the accident in question.

Furthermore, the Model Jury Interrogatories on comparative negligence also properly separate the questions of negligence and proximate cause consistent with the law as follows (just like was properly done here):

> Question #3 deals with defendant's allegation that plaintiff was negligent. Question #3 reads as follows:
>
> Was plaintiff negligent?
>
> Yes _____
> No _____

> If, on the other hand, you find the defendant has proven the plaintiff was negligent, you will answer question #3 "Yes" and go on to deal with question #4.
>
> Question #4 deals with defendant's allegations that plaintiff's negligence was a proximate cause of the accident. Question #4 reads as follows:
>
> Was plaintiff's negligence a proximate cause of the accident?
>
> Yes _____
> No _____
>
> If you find that the defendant has met its burden of proving that the plaintiff's negligence was a proximate cause of this accident, then you will answer question #4 "Yes", check the appropriate answer on the form and return your verdict at this point. However, <u>if you find, on the other hand, that defendant has failed to prove plaintiff's negligent conduct was a proximate cause of the accident</u>, <u>then you will answer question #4 "No"</u> and go on to answer question #6, which is the question requiring evaluation of damages.

MJC 7.32 (underline added). Yet defendants argue these Supreme Court approved Model Jury Instructions and interrogatories are wrong, make no sense, and they should get a new trial because of it. Defendants are incorrect and the new trial motion was properly denied.

In fact, according to defendants' logic, there would be no need to ask about proximate cause here because once negligence is found, that would *ipso facto* mean there is proximate cause. And in fact according to that logic, the same would apply as to the interrogatories about defendants' liability.

The fallacy of defendants' contentions is illustrated by this case. Defendants urged that plaintiff was negligent because he did

not look at the surface of the roof to detect a hazard, or that having looked at the surface as he traversed the roof, his observations were deficient. Yet the un-controverted testimony demonstrated that Paino had covered and obscured the depression required for the drains with the rubber roofing membrane, and that Paino and LPC had failed to place any warning or barrier at the site of the covered drain. This created a trampoline-type effect over a 6" drain hole such that when weight, such as a foot, was applied to the site, it gave way. In other words, assuming a person did not make proper observations, that person could not reasonably appreciate the surface would give way and cause a fall on this obscured hazard.

Furthermore, the Court held thorough jury charge conferences where counsel were given the draft jury charge and verdict sheet. At no time did defendants object to the proximate cause issue as reflected in the charge and verdict sheet or otherwise. (6T218 to 231) (7T32 to 7T49) (7T113 to 7T114) (8T3 to 8T6). Furthermore, after the charge was read to the jury, Defendants again confirmed:

> THE COURT: Let me see. Counsel, anything on the charge?
> MR. GULINO: No, Your Honor.
> THE COURT: Okay. So let's swear in our court officer that will be outside of your door.

(8T, 51).

The failure to object to a charge has long been recognized as a "strong indication[] that the presentation of the case to the

jury was not considered by those closest to the litigation to be misleading." *Gaido, supra,* 115 N.J. at 315; *see also, R.* 1:7-2 ("Except as otherwise provided by R. 1:7-5 and R. 2:10-2 (plain error), "no party may urge as error any portion of the charge to the jury or omissions therefrom unless objections are made thereto before the jury retires to consider its verdict, but opportunity shall be given to make the objection in open court, in the absence of the jury.")(emphasis added). *See also Bradford v. Kupper*, 283 N.J.Super. 556, 573-74 (App.Div. 1996) (the absence of a trial objection indicates trial counsel perceived no error or prejudice and prevented the trial judge from remedying any possible confusion in a timely manner); *Rules* 1:7-2; R. 2:10-2 (failure to object precludes party from raising issue on appeal).

Based on the trial record, the jury was free to find that any negligence by plaintiff was not the proximate cause of his injuries. The record certainly permitted the jury to decide that given the respective duties of the parties and under all the attendant circumstances, the incident was not so connected to any action or inaction on the part of the plaintiff, consistent with the standard set forth in *Fernandes, supra,* and the jury charge, that he should have been found comparatively liable.

B. The injured worker does not have the same duty for jobsite safety as defendants and there is a heightened standard to prove comparative negligence in workplace injury cases.

Under the law, the general contractor and each tier of subcontractor have a non-delegable duty to manage safety, maintain a safe worksite, and prevent injuries to workers and anyone else that may come on the site. This includes enforcing industry safety standards, including those set forth in regulations implementing the federal workplace safety law known as OSHA. 29 *C.F.R.* § 1926.16; *Fernandes, supra*; *Alloway,* 157 N.J. at 237-38 Furthermore, as set forth in detail in the Statement of Facts, both defendants LP Ciminelli and Paino Roofing included those responsibilities in their respective contracts and safety manuals. While certainly all workers have a duty to watch out for their own safety, they do not have the broad duties imposed on managing contractors set forth in the law and standards.

Furthermore, under *Fernandes*, there is a heightened threshold for contractors to prevail on a "blame the worker" argument in workplace injury cases like this. Workers often have no real choice in the matter. *Green v. Sterling Extruder Corporation*, 95 N.J. 263, 271 (1984) ("The practicalities of the workday world are such that in the vast majority of cases, the employee works 'as is' or he is without a job."); *Cavanaugh v. Skil Corporation*, 331

N.J.Super. 134, 185 (App. Div. 1999) (workers on construction sites often have no real choice about working under known unsafe conditions.) In workplace cases, the worker's "behavior must be evaluated against that of a reasonably prudent person in his exact circumstances, and that evaluation includes whether he had a meaningful choice in the manner in which he performed his assigned task on that day." *Fernandes,* 222 N.J. at 413. This jury charge properly explained this rule. (8T22- "So you should consider whether or not the worker, in this case the plaintiff, had a meaningful choice in proceeding with his assigned tasks in light of the hazard.").

Here, Paino Roofing created the dangerous condition and LP Ciminelli knowingly permitted it to exist. The hazard was concealed, plaintiff had never before been on the roof, and had to walk over the hazard to get to his job site area. There were no warnings whatsoever. The worker was carrying out his assigned tasks and had no real choice in the matter. This is a job site where Defendants barred plaintiff from the worksite following his fall for allegedly not reporting the incident within an hour, even though his superior, Joe Mella, observed the accident. Certainly plaintiff could not refuse to walk on the roof, demand it be cleared of all hazards, or refuse to set up his materials for the next day. The record demonstrates the existence of the hazard and that it violated OSHA regulations and defendants' own safety rules.

But even after the incident, both defendants testified they had no issue with the condition of the roof and would not have done anything differently.

The jury may have decided Munoz could not both look forward and look down to avoid hazards as walked to his assigned work area carrying 130 pounds of tools and materials. The evidence showed he had never been on that roof before and would have had no reason to know about the hazard defendants created. Thus, while the jury may have found plaintiff was negligent for not being attentive enough, it also reasonably found the proximate cause was the actions of the defendants for creating the hidden condition, failing to make it safe, and not properly managing safety on the job site.

Occupational safety expert Vincent Gallagher specifically explained why, based upon the facts and applicable standards, the worker was not ultimately at fault for the incident. (2T 100, 133-134, 191) Even Bob Beardsley, the LPC Safety Manager, admitted Munoz did not violate any safety rules. (2T 100) Defendants presented no expert to refute Plaintiff on any of these issues. Accordingly, the jury was free to find as it did and there is no "miscarriage of justice" here to warrant throwing out the jury verdict.

Indeed, it is rather common for juries in New Jersey to find a party negligent, but not the proximate cause. There are many reported examples of this. *See, e.g. Steele v. Kerrigan*, 148 N.J.

1, 32-33 (1997) (affirming jury finding that plaintiff was negligent but that his negligence was not a proximate cause of the incident.); *Analuisa v. Weir*, 2008 N.J.Super. Unpub. LEXIS 915 (App.Div. 2008) (finding that general contractor was negligent, but that negligence was not a proximate cause of the worker's fall from ladder affirmed); *Depinto v. ABM Janitorial Servs.*, No. A-4529-12T1, 2015 N.J. Super. Unpub. LEXIS 1364, at *10 (App. Div. 2015) (jury found plaintiff negligent, but not the proximate cause of the accident.); *Frenda v. McElrone Sales, Inc.*, 2008 N.J. Super. Unpub. LEXIS 73, *10-11 (App.Div. 2008) (on new trial the negligence finding would remain intact and jury would only decide if that negligence was a proximate cause.); *see also Schwartz v. Hasbro*, 2012 N.J.Super. Unpub. LEXIS 914 (App.Div. 2012) (jury answering "No" to question of plaintiff's negligence, but then later finding plaintiff 90% at fault not sufficiently inconsistent to warrant new trial).

Defendants' argument that the verdict is inconsistent is based almost exclusively on a 1974 auto case, *Pappas v. Santiago,* 66 N.J. 140 (1974) and its progeny. None of this law was cited below. (Pa511-545) *Pappas* involved a two car collision at an intersection where drivers and passengers were injured. *Id.* at 142. After deliberations the jury found both defendants were negligent in the operation of their motor vehicles but that one of the defendant's negligence was not a proximate cause of the accident occurring.

Id. at 142. Under the specific facts of the case in which two vehicles entered an intersection and both were found negligent, the Court held:

> We do not know from the jury verdict just what negligent conduct or default it found [defendant] to be guilty of, but in the circumstances of this case we cannot conceive of any act or omission amounting to negligence on the part of [defendant] in the operation of her car that would not have contributed causally to the happening of the accident.

Id. at 143 (underline added). *Pappas* does not stand for the conclusion that a party can never be found to be negligent but not a proximate cause of damages, merely that on the particular facts of that case, such a conclusion was unwarranted.

Instead, defendants do not seem to recognize that juries are entirely permitted to find a party negligent but not a proximate cause of a plaintiff's injuries. *See, e.g. Steele*, 148 N.J. at 32-33 (affirming jury finding that plaintiff was negligent but that his negligence was not a proximate cause of the incident.); *Gaido v. Weiser,* 115 N.J. 310, 312 (1989) (upholding jury verdict in medical malpractice case in which "the jury found by a vote of 5-1 that [defendant doctor] was negligent but...that the negligence was not a proximate cause of [plaintiff's] death.").

In that regard, the remaining cases cited by Defendants- almost exclusively flowing from *Pappas*- are inapplicable to the case at hand. First, *Neno v. Clinton,* 167 N.J. 573, 587 (2001) (*Db*16), like *Pappas,* was an auto case with no imaginable scenario

in which defendant driver could have been negligent in the operation of his motor vehicle yet not a substantial factor in the happening of a collision. *Id.* at 578, 587-90. Likewise, *Giantonnio v. Taccard,* 291 N.J. Super. 31 (App. Div. 1996), *Db*. at 15, involved two vehicles entering an intersection and a jury finding one vehicle was negligent but not the proximate cause of the collision. *Id.* at 36-37.

Furthermore, Defendants' reliance on *Cepeda v. Cumberland Engineering,* 75 N.J. 152 (1978) and *Menya v Weamand Jim's Inc.*, 145 N.J. Super 40 (app. Law. 1979), design defect cases, is misplaced. Notably *Cepeda* was overruled by *Suter v San Angelo Founday and Mach. Company,* 81 N.J. 150, 177 (1979) to the extent it held that contributory negligence was a viable defense in a design defect case. *Manza* involved a claim that the defendant was negligent in maintaining adequate lighting, and/or warning of a stop that caused the plaintiff to fall and sustain injuries. *Id* at. 43. On appeal the court reversed the verdict finding defendant's negligence was not a proximate cause of plaintiff's injuries. In it's opinion, the court articulated the circumstances when the trial court could eliminate posing the questions whether a plaintiff's negligence was a proximate cause of the injuries. *Id.* at 45-46. The court emphasized that the question must be posed whenever the evidence does not clearly and conclusively support the inference that any

negligence was also the proximate cause of the accident and resulting injuries *Ibid*. As discussed, the evidence in this case does not clearly and convincingly support a finding that if there was negligence, there *ipso facto* was also proximate cause.

And similarly *Sulgia v. Sorrentino,* 2010 N.J. Super. Unpub. LEXIS 1071 at *1 (App. Div. May 20, 2010) dealt with an auto collision where the reviewing Court overturned a jury finding a defendant was negligent in the operation of his motor vehicle but not a proximate cause in the happening of the accident. *Id.* at *21-22 ("we cannot reconcile the jury's determination that there was an act or omission by [defendant in the operation of his motor vehicle] that was negligent, yet not a proximate cause of this accident.")

Unlike the cases cited by defendants, there are any number of factual scenarios in which the jury could have found the worker to have been negligent, but not a substantial factor in the happening of his injuries. This is particularly so given the heightened standard set forth in *Fernandes* where the worker's "behavior must be evaluated against that of a reasonably prudent person in his exact circumstances, and that evaluation includes whether he had a meaningful choice in the manner in which he performed his assigned task on that day." *Fernandes* 222 N.J. at 413. (Underline added) The facts of this workplace safety OSHA case are far different than the rather black and white facts involved in *Pappas* and its

progeny. Indeed, as outlined in this brief, the claims of negligence against the defendants are far more than simply "improperly covering...a drain." (Db11)

Furthermore, while it is true the plaintiff testified he was looking down when he fell, that does not do much good when the hazard was covered with the black roofing material. Moreover, even if a photo from the scene depicts a slight slope in the area of the drain, there is no testimony the plaintiff saw that nor that he knew the roof would give way in that area. As noted by Gallagher, the covered drain serves as a hazard to the un-warned:

> Q. So as Mr. Munoz is walking towards this covered hole, the roof is pitched towards the drain, correct?
> A. There's slopes around the drain that are pitched and the roof itself would be pitched a little bit, so the water would flow that way.
>
> Q. So that when you got within a few feet of the hole in 8, you know it's pitched. Don't you?
> A. You can see that it slopes down in that area, right.
>
> Q. Not only can you see it, would it be fair to say you can feel it?
> A. That's the problem. You can feel it when you stepped on it and it --
>
> Q. Which warns you about the hole?
> A. It warns you -- yes. It warns you after you fell. You can say, wow, what was that? That's a warning you get a little too late.

(2T 173-174) Bob Beardsely also does not help the defense on this issue. Indeed he too testified the worker did not violate any safety Rules in connection with the incident. (2T 100)

Moreover, defense witness Joe Mella who observed plaintiff's accident, testified that he too did not see the depression until plaintiff's foot fell in it as it was covered with material. (2T 42) Mella noted, "Anyone...could have fallen." (2T 48). This was defendants' project. They created and hid the condition. On the other hand, this was this worker's first time on the roof and he had to take that path to get to his assigned work area. Defendants' argument that the jury necessarily had to have found the worker at fault because Gallagher testified the picture shows a sloping, is without merit.

Defendants misrepresent the record on page 20 of their brief where they say the trial court only devoted 2 sentences to their inconsistent verdict point. First, the Court devoted several pages to the defendant's motion as a whole. (11T 52-67) Furthermore, the new trial motion was largely a rehashing of the same arguments defendant made in its motion for a directed verdict. (5T 39-83) While the inconsistent verdict argument was not specifically raised at that time, the very same underlying arguments- that defendants could not possibly be found at fault as this was the fault of the worker- was addressed *ad nauseam*. As such the Court appropriately noted:

> 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 [of trial] the arguments were [previously] made.

(11T 57) Indeed, in the Law Division defendants made some ten scatter shot arguments for a new trial. *See Rule* 2:11-3 (e) (1) (E) (not all arguments of error warrant belabored discussion in an opinion).

In summary, the jury's verdict that Plaintiff was negligent, but any negligence was not a substantial factor in proximately causing his injuries, was proper under the facts and law. The jury does not show confusion nor constitute an unjust result requiring reversal under the strict standards of the plain error rule or otherwise. *See, R.* 1:7-2; *R.* 2:10-2; *State v. Hock,* 54 N.J. 526, 538 (1969), *cert. den.,* 399 U.S. 930 (1970).

III. Judge Carter Correctly Declined the Invitation to Sit as a Seventh and Decisive Verdict Reducing Juror (11T 52-67)

"[I]n our constitutional system of civil justice, the jury- not a judge- is charged with the responsibility of deciding the merits of a civil claim and the quantum of damages to be awarded a plaintiff." *Cuevas v. Wentworth Grp.,* 226 N.J. 480, 499 (2016). "A jury's verdict, including an award of damages, is cloaked with a 'presumption of correctness.' The presumption of correctness that attaches to a damages award is not overcome unless a defendant can establish, 'clearly and convincingly,' that the award is 'a miscarriage of justice.'" *Id.* at 501. The standard to be employed by a Court in determining the adequacy of the quantum of damages

ordered by a jury is set forth in *Baxter v. Fairmont Food Company*, 74 N.J. 588 (1977):

> The judgment of the initial fact finder...is entitled to a very considerable respect. It should not be overthrown except upon the basis of a carefully reasoned and factually supported and articulated determination after canvassing the record and weight the evidence, that the continued viability of the judgment would constitute a manifest denial of justice. The process of weighing the evidence is not to encourage the judge to 'evaluate the evidence as would a jury to ascertain in whose favor the evidence preponderated' and on that basis to decide upon the disruption of the jury finding. The judge may not substitute his judgment for that of the jury merely because he would have reached the opposite conclusion; he is not the thirteenth and decisive juror. Nevertheless, the process of evidence evaluation called 'weighing' is not a 'a preform exercise that calls for a high degree of conscientious effort and diligent scrutiny. The object is to correct clear error or mistake by the jury. It is only upon the predicate of a determination that there has been a manifest miscarriage of justice that corrective judicial action is warranted...To us, all of this means that a trial judge, before acting in derogation of the jury's fixing of damages, must be convinced, and that very clearly, of something like this: the verdict is terribly wrong...

Baxter, 75 N.J. 597-599 (citations omitted). Washington Munoz was only 44 when he was needlessly rendered permanently injured- both physically and emotionally. We will not rehash the damages summary set forth in the statement of facts above. The verdict was supported in the record. It does not represent a "miscarriage of justice" nor something that is "terribly wrong."

In fact, Defendants' own orthopedic expert significantly agreed with the Plaintiff's treating physician, Dr. Helbig. Defendants also had no expert to refute the testimony of

Plaintiff's emotional distress expert, Dr. Paula Sociedade. The jury deliberated for three hours and asked for an important document the lawyers left out. The jury was 6-0 unanimous on all issues. The trial judge correctly declined to disturb this important exercise of our citizen democracy.

Courts must resist the urge to substitute their judgment for that of the jury. *Cuevas,* 226 N.J. at 486. In *Cuevas* the Court revised the manner by which a trial judge should evaluate motions to increase or decrease jury verdicts. In doing so a trial judge does not resort to personal experiences or standards. Because of the importance of the jury, the system requires "judicial restraint in exercising the power to reduce a jury's damages award." *Id.* at 485. A jury award should stand unless it "is so patently excessive, so pervaded by a sense of wrongness, that it shocks the judicial conscience." *Ibid.* The award must be so "disproportionate" that it would "constitute a miscarriage of justice" to allow it to stand. *Id.* at 487.

The damages in this matter are substantial. At the time of the incident Washington Munoz was only 44 with no history of back or shoulder injuries. He has a substantial life expectancy. The incident caused a herniated lumbar disc. No treatment would fix it.

He also sustained substantial shoulder injury which prevented him from doing his life's trade which he enjoyed. This included

impingement syndrome of the right shoulder, partial tear of the right rotator cuff, and proximal biceps tendon rupture. He underwent substantial medical treatment with numerous appointments, diagnostic testing, medicines, injections, 110 physical therapy sessions and other procedures. Two significant shoulder surgeries left him with significant scarring and deformity and did not fix the problem. He still had significant pain, loss of range of motion, inability to resume his normal daily activities (including working), and substantial disfigurement in the arm muscle and tendon consistent with chronic biceps rupture ("Popeye syndrome"). He continued to treat through trial.

But perhaps the most significant injuries are emotional. Prior to the incident, Washington Munoz led a pain free, active life where he played sports. Now he continues to suffer daily from pain, discomfort and substantial depression associated with the subject incident. Mr. Munoz experiences anxiety, worry and depression on a daily basis. As Dr. Sociedade testified, Washington Munoz went from a hard-working, proud and active man, to a man that feels lost, embarrassed, useless and depressed. This incident caused significant and permanent depression and anxiety. He requires substantial medical treatment into the future. His daughters who testified corroborated the substantial changes they have seen in their father since the incident. Defendants had no witnesses- expert or otherwise- to refute any of this.

The fact that Washington Munoz maintained a stoic disposition and did not "gild the lily" or portray himself as a whiner does not diminish the substantial damages evidence supporting the verdict, nor warrant a new trial. There is also no requirement for the plaintiff and other fact witnesses to repeat or restate the evidence and testimony of medical experts about the nature and extent of their injuries and limitations. Interestingly, on appeal defendants complain they did not hear enough from witnesses about the impact on the plaintiff's life, yet at trial they were successful in baring 5 of plaintiff's 7 damages witnesses because "[T]hey're going to come in and say the same things? That's cumulative testimony." (4T 16, 19)

Furthermore, the suggestion at DB24 that Dr. Sociodade's opinions should somehow have been disregarded by the jury because the plaintiff did not testify in detail about the things he did, and an expert opinion "can rise no higher than the facts and reasoning" it is based upon, is wholly misleading. Dr. Sociodade's testimony, as is nearly always the case, is not at all based upon any trial testimony, nor could it have given her videotaped testimony took place long before trial. Evidence Rule 703 is quite clear on this point. Rather her report and testimony, including her discussion of cultural differences that contribute to depression and anxiety, is based upon the things she discussed at trial, including multiple extensive examinations of Washington

Munoz and her training, knowledge and experience. This is how expert testimony works. See N.J.R.E. 703.

Defendants' advance other arguments to undercut the damage award, but many are founded on misstatements and distortions of the record. For example, at Db28 defendants urge that Dr. Helbig testified plaintiff's spinal injuries did not "cause[] any problems" for Washington, and that although these back injuries can cause pain generally, that was not the case here. Rather, Dr. Helbig testified:

> I examined his lumbar spine, which is the medical word for the lower back. He had severe tenderness and what I termed a moderate restriction of motion, difficulty bending and straightening out because it was painful.
> ...
> [A]s I said, the first day I saw Mr. Munoz, he was complaining of pains in his lower back. He had positive physical findings throughout with tenderness with limitation of mobility. He did go through physical therapy for his back, which sometimes helped and sometimes didn't. When I last saw him [last week], actually, he was still having a lot of pain in his back.
>
> He had limitation of motion, difficulty bending. He had had an MRI done of the lumbar spine. It was done at St. Barnabas in Livingston in 2016, and there was two findings.

(3T 207, 227) He further testified the back injury is permanent. (3T 230)

Similarly, while it is true the plaintiff earned about $4000 over the four year period from the time of the incident to trial, this sum is less than 2% of what he would have earned had defendants not concealed that hole on the roof. (4T 50-54) (Pa4-6) The fact that he attempted to go back to work and is not the

malingerer they tried to make him out to be, only bolsters the damages award and further supports the verdict and the Court's correct decision to deny remittur.

Indeed, "Assigning a monetary value to pain-and-suffering compensation is difficult because that kind of harm is '*not* gauged by any established graduated scale.'" *Caldwell v. Haynes*, 136 N.J. 422, 442 (1994) (quoting *Cermak v. Hertz Corp.*, 53 N.J. Super. 455, 465 (App. Div. 1958), *aff'd*, 28 N.J. 568, (1959). In analyzing whether a damages award is excessive, a trial judge's review must be grounded in the "totality of the evidence" in the record, *Baxter, supra,* 74 N.J. at 598, which is viewed in a light most favorable to the plaintiff. *Johnson v. Scaccetti*, 192 N.J. 256, 281 (2007). Because a jury is given wide latitude in determining pain and suffering damages, the standard for granting a remittitur is high. *Johnson,* 192 N.J. at 281.

Defendant's reliance on *Berkowitz v. Soper,* 443 N.J.Super. 391 (App. Div. 2016) is unavailing. Indeed, as Defendant concedes, "the *Berkowitz* case differs from the case at bar in several important aspects[.]" *Db.* at 30. *Berkowitz* involved a litany of inappropriate conduct by the trial judge, plaintiff and plaintiff's counsel, the cumulative effect of which produced a verdict immersed in a sense of "wrongness."[9] *Berkowitz,* 443 *N.J. Super.* at 413-14

[9]As one example, the trial court in *Berkowitz* upheld a $2,000,000 jury award largely on the basis of plaintiff's life

("The record we have described at length shows this trial was saturated with incompetent, inadmissible opinion testimony from plaintiff that irreparably tainted the jury's ability to reach a sustainable verdict. Defendant's involuntary absence from the trial compounded this prejudice by leaving the jury without a countervailing account of the severity of the accident."). None of the anomalies present in *Berkowtiz* are present here. The case simply has no relevance or correlation with the facts of the instant matter and the trial court should be affirmed on these issues.

In assessing the quantum of damages in a workplace negligence case, the workers compensation lien may be helpful to the Court. Currently the worker's compensation lien is well in excess of $200,000 and it is expected to grow to nearly $500,000. (PA195 This is a significant case. Defendants have failed to clearly and convincingly demonstrate a "miscarriage of justice under the law" and that something went "terribly wrong."

Another misstatement by the defense is that Washington Munoz "suffered no life altering injuries" (Db 21). The record is clear this is a false statement. In fact both plaintiff's orthopedic and emotional harm experts clearly testified to the permanent, life altering injuries. The defense orthopedic expert in part agreed

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expectancy and socioeconomic status, despite the fact the plaintiff had not asserted a wage claim. *Id.* at 412-13.

and there was none to refute Dr. Sociodade. The motion for a new trial/remittur was properly denied. *Baxter v. Fairmount Food Co.*, 74 N.J. 588, 597-598 (1977); *Rule* 4:49-1(a).

IV. Cross Examination of Defendants' Professional Medical Testifier, Dr. Decter, about His Earnings Was Proper and Does Not Warrant a New Trial (11T 52-67)

Five days before the testimony of defense medical expert Dr. Decter, defense counsel cross examined plaintiff's workplace safety expert, Vincent Gallagher, as follows:

Q. ...Would it be fair to say that you are being, obviously, paid for your services today?
A. Yes, sir.

Q. And would it be fair to say that it's an hourly rate?
A. Yes, sir.
...
Q. Okay. All right. And are you compensated if you prepare a report?
A. Sure.
...
Q. Okay. Now, back in 2011, the hourly rate was about $225 an hour?

A. It sounds right....It's 275 now.
Q. 275 now? And how many hours a year do you bill? Well, let's do it this way. How many hours a week do you bill?

A. It varies. Probably between 25 and 35.
Q. 25 and 35. Would it be fair that it's about 100 hours a month?
A. Yes.

Q. Okay. At 285 an hour, right?
A. Right

Q. Okay. So that's about 27,500 a month, right?
A. I guess. Yeah.

Q. Okay. And it would be about $300,000 a year?
A. That's probably right.

(2T 147-148). Yet, defendants argue they should get a new trial because Dr. Decter readily testified the majority of his $800,000-$900,000 annual income is derived from testifying 98% for the defense industry. Just like defendant elicited this kind of testimony from plaintiff's liability expert, this testimony was relevant to show the motive and bias of Dr. Decter on behalf of his defense clients.

The amount he makes undermining the injuries of plaintiffs for his defense industry clientele is relevant to bias, credibility, motive, and his interest in the case outcome. *See e.g. MJC* 1.13 ("In examining each expert's opinion(s), you may consider the person's reasons for testifying [and] The amount of the expert witness' fee is a matter that you may consider as possibly affecting the believability of an expert.") The amount of an expert witness's fee and his or her history of service as an expert are admissible evidence, *Espinal v. Arias,* 391 N.J. Super. 49, 60-61 (App. Div.), *certif. denied*, 192 N.J. 482 (2007), and are therefore sufficient predicates for arguments that they affect credibility, *Colucci* v. Oppenheim, 326 N.J. Super. at 177; *Spedick v. Murphy*, 266 N.J. Super. 573 (App. Div.), *certif. denied*, 134 N.J. 567 (1993). "Whether an expert is a 'hired gun' or one whose opinions have greater foundations of objectivity is an issue to be

litigated by counsel and considered by the jury." *Cogdell v. Brown*, 220 N.J. Super. 330 (Law Div. 1987), *certif. denied*, 114 N.J. 517 (1989).

To this end, the jury charge on experts states, "In examining each expert's opinion(s), you may consider the person's reasons for testifying, if any." *MJC* 1.13 The Court here properly instructed the jury, "In deciding what to believe you may want to take into consideration...the witness' interest, if any, in the outcome of this case..." (8T13) The record reflected Dr. Decter has long been immersed in the defense testimony industry. His sale of the defense medical exam company, Examworks, and his continued involvement with it evidence his alignment with those responding to negligence claims. The focus of his work as an expert is relevant to the jury determining his interest in the outcome of the litigation. His interest is that the Plaintiff gets as little as possible so he can keep his clients happy. Any bias or interest is an inextricable element of the jury's evaluation of the soundness of the opinions expressed by an expert.

Cross examination and comments about the amount the defense experts made was addressed in *Zakrocki v. Ford Motor Co.*, 209 N.J.Super. Unpub. LEXIS 2054, 23 (App.Div. 2009). There the court found testimony about the defense experts making millions in hundreds of cases for the defendant was relevant. Furthermore, the court found the following closing argument comments were

permissible discussion of this bias, motive and interest in the outcome of the lawsuit:

> Counsel argued that "[w]hen you think about how hard it is to earn a living these days, when you really think about money, how can you ignore $ 77 million?" By contrast, Sero was "a regular guy" who did not earn that amount from just one client.
> Counsel also criticized defendants' biomechanics expert,
>
> Robert Piziali...Counsel called the testimony "ridiculous," and after noting that Piziali had misstated his fees from Ford in this and other cases as $ 6.8 million instead of $ 12.8 million, he commented that "I guess he feels like he's more honest if Ford only pays him [$] 6.8 [million] [rather] than $ 12.8 million."

Zakrocki v. Ford Motor Co., 209 N.J.Super. Unpub. LEXIS 2054, 44-45 (App.Div. 2009) The cross examination of Dr. Decter on his bias, motive and interest in the outcome of this case was for more benign than that of *Zakrocki*. The new trial motion was properly denied. *Lanzet v. Greenberg*, 126 N.J. 168, 189 (1991) (in evaluating expert credibility jury should, "[C]onsider the demeanor of the witnesses as they testif[y]...[and] size up the doctor expert witness, listen carefully to their manner of testifying, take into consideration...the interest which the witness may have in the outcome of the lawsuit.")

Furthermore, there is a difference between not delving into the financial affairs of an expert by way of discovery for privacy purposes, and that kind of information being relevant at trial. Just because under some circumstances a court may limit the discovery on privacy grounds, does not mean it is not relevant at

trial. To the contrary, its relevance is not seriously disputed here. Indeed defense counsel did the same thing five days earlier with Vincent Gallagher. (2T147 to 2T148)

But with Dr. Decter, there are no serious privacy issues. First, defendants complain they should be entitled to a new trial because- they say- Dr. Decter (readily and without any real objection) testified his annual income is $850,000 - $900,000. (9T 117-118) But for starters, the record is clear this is only the money he makes from his defense expert Examworks activities, not his total annual income. (9T 118- "That's all part of the ExamWorks number that I just gave you so....that's the number, sir.") (11T 30-33) There was never any request by him, nor direction from counsel, to not answer that question nor was any protective order sought. As Judge Carter rightly noted in denying the new trial motion:

> ...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..testified...in response to certain questions...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...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.

(11T 57-58)

In fact, we further know he was only giving his income from being an expert because- and this further shows the emptiness of the defense position - Dr. Decter regularly and readily (and in fact one might surmise, proudly) testifies that his total annual income, including from his professional testifying business, is more like $2-3 million. (See, e.g. Pa43-45, *Decter testimony in Fernandes v. DAR Construction*- Dr. Decter testified that he personally has earned over $2 million per year performing defense medical exams); (Pa128- Dr. Decter readily testified in *Molina v. Turano* that his gross income in 2010 was approximately $3 million) (11T 30-33) (See also Pa319, 350)

And with regard to his having sold Examworks and his contractual guarantee of continued testifying business from that company, that too has long been a well-known matter of public record and is relevant to show bias for his defense clientele. In fact, the details of Decter's sale of Examworks was discussed in open court in the *Fernandes* trial. The testimony and the Examworks federal SEC 10-K public reporting document showed the amount of the sale, how much Decter received, and his ongoing testimony agreement with Examworks which provides for him doing the defense exams in *Fernandes* and *Munoz*. (Pa42-43, *Fernandes testimony*) (Pa167-172).

In fact, defense counsel even cross examined plaintiff's treating physician as to his involvement with Examworks. (3T 241)

The purpose in *Fernandes*, as in this case, was to show his bias for his Examworks clientele. As noted herein, the verdict in *Fernandes* was affirmed by the Appellate Division and Supreme Court. *Fernandes v. DAR Development Corp.*, 222 N.J. 390 (2015) Defendants' reliance on cases from California and Texas about limiting *discovery* of expert's private financial information has zero bearing on this case. Everything defendants complain about being "private" have in fact long been part of the public record and Dr. Decter himself has never hesitated to testify about it.

The limited cross examination about the financial bias, motive, intent and interest in the outcome of the case was proper- just like Defendants did with Plaintiff's expert Gallagher. The motion for new trial was properly denied.

V. Defendant's New Argument about Future Medical Expenses Being Against the Weight of the Evidence has Not Been Preserved for Appeal (raised by defense for the first time on appeal)

The appellate court will not consider an argument that a jury verdict is against the weight of the evidence unless the appellant moved for a new trial on that ground. *R.* 2:10-1; *Fiore v. Riverview Medical Center*, 311 N.J. Super. 361, 362-63 (App. Div. 1998); *State v. Perry*, 128 N.J. Super. 188, 190 (App. Div. 1973), *aff'd*, 65 N.J. 45 (1974). Defendants' brief in support of its new trial motion is

included at Pa511-545. Point IX at Pa542 argued the award of past medical expenses was against the weight of the evidence. At no point did defendant argue the award of future medical expenses was against the weight of the evidence. We responded in detail to the argument about past medical expenses in our brief below at Pa 592-94. We also summarized the testimony and evidence about medical expenses in the damages facts section above. Since defendants have not preserved the issue about future medical expenses for appeal, we will not belabor the record any further, unless otherwise directed by the Court.[10]

VI. The Claim for Past Lost Earnings was Properly Submitted and Awarded and the Court Should not Have Dismissed the Future Lost Earnings Claim (11T 52-67)

A. Defendants' Claim of Prejudice and Surprise about the Wage Claim has Always been a Ruse

The Complaint and answers to interrogatories included claims for past and future lost earnings. (Pa174-179, 182-183) In October, 2016 Defendants filed a motion to dismiss the wage claim for lack of sufficient supporting documentation. The Honorable Jamie Happas, P.J.Cv. recognized clear New Jersey law that a wage claim can be based upon testimony alone and that lack of paper

[10] Pursuant to Rule 2:6-2, we are including the relevant briefs below to demonstrate and support the point made herein about the issue being raised for the first time on appeal.

evidence goes to the weight of the claim, not its admissibility. As such, Judge Happas denied the motion. (Pa186-187).

Admittedly, on November 8, 2016, Lazaro Berenguer, Esq. of our office sent a letter to defense counsel which stated, "Please note that plaintiff will not pursue a lost wage claim in this matter." (Pa189). As had been discussed several times in the record (1T 101-119) (5T 70 to 5T 84) (7T 10 to 7T 22) (11T 33-39, 61-62), due to internal mis-communication, lead counsel for plaintiff, Gerald Clark, Esq., was unaware this letter had been sent out and it was a mistake. Once he learned about it, on March 15, 2017, long before trial, Mr. Clark immediately wrote to defense counsel withdrawing the letter as follows:

> Dear Mr. Gulino:
>
> This is in response to your suggestion today that Plaintiff is not pursuing any wage loss claim in this matter. Plaintiff's sworn answers to interrogatories are quite clear that he is in fact pursuing a wage loss claim. At his deposition he was quite clear in his testimony about his inability to work at his prior occupation. To be clear, Plaintiff is pursuing his wage loss claim.
>
> Additionally, I recalled that you mentioned this at the bar panel conference on February 6, 2017. At that time, I recall telling you that I disagreed with your position that plaintiff is not pursuing a wage loss claim.
>
> To the extent we sent you a letter that would seem to contradict this, such would have been sent in error as there is no such provision in Judge Happas' Order of October 14, 2016. In fact, if I am not mistaken, your office had moved to dismiss the wage loss claim and Judge Happas denied that motion.

> If there is any additional information you need from us as a result of any confusion, please advise and we will promptly address it.
>
> Please be advised accordingly.

(Pa191)(underline added). Thus, while the letter that said we would not be pursuing a lost wage claim was sent in November, 2016, defense counsel was advised the contrary at the Bar Panel on February 6, 2017, at a court conference on March 15, 2017 and confirmed in writing that same date, that letter was a mistake and that plaintiff was in fact pursuing a wage loss claim. This position was reiterated to defense counsel at another court conference on April 27, 2017. (1T97 to 1T119) (5T70 to 5T84) (7T10 to 7T22). And while the letter said, "If there is any additional information you need from us as a result of any confusion, please advise and we will promptly address it," defendants asked for nothing. (Pa191)

Trial commenced on July 11, 2017. Thus, defendants had 155 days (over five months) from when they first learned the November 2016 letter was a mistake and that plaintiff was in fact pursuing his wage loss claim. They had 118 days (nearly four months) from the unambiguous letter of March 15, 2017. Yet they still represented to the Court that the assertion of the wage claim was a, "sudden change of heart by plaintiff's counsel that was only asserted 'at the last minute.'" (Pa539, 525)

Despite having known for months the wage claim was going to be pursued, defendants did nothing. Instead, they kept trying to pretend that letter and notices never existed so as to manufacture a claim of "prejudice" and "Shenanigans." (Pa539) They continued this charade right through trial where they then pretended the wage claim came as a complete surprise. Defense told Judge Carter, "I figured [the wage claim was] a done deal. They withdrew it. They didn't try to reassert it." (1T98). They continue this pantomime on this appeal. (Db 44- referring to it as a "late renewal of the lost wages claim..") The past wage loss claim should stand. This is especially so where there is a workers compensation lien currently in excess of $200,000 which includes wage loss indemnity and is expected to approach $500,000 over time. (Pa195).

Moreover, the Court Rules are clear claims can not be dismissed- and certainly not with prejudice as defendants say- by a simple letter to the adversary. In order to dismiss a claim, a formal pleading has to be signed by all parties and filed with the Court. R. 4:37-1(a) (claims can only be dismissed, "[B]y the filing of a stipulation of dismissal specifying the claim or claims being dismissed, signed by all parties who have appeared in the action.") Thus where a party has answered, that pleading has to be signed by the other side.

Defendant's position is that such claims can be withdrawn by letter, without a court filing. Putting aside that clearly is not

what the Rules provide, it would then also logically follow that claims can just as well be "reinstated" in the same manner. That is precisely what we did on February 6, April 27 and March 15, 2017 when we wrote, "To be clear, Plaintiff is pursuing his wage loss claim." (Pa191) (underline added).

But defendants wanted to feign surprise, prejudice and Shenanigans, so they just tried to ignore the letter and pretend it never existed. They continued this charade on the new trial motion. (Pa525- "this led to surprise and prejudice to defendants, who had been prepared their defense with the understanding that the wage loss claim had been abandoned.") Indeed, neither before the November 8, 2016 letter, nor after the March 15, 2017 letter, did defendants do anything different. This was extensively addressed below. These arguments were properly rejected then and they should be rejected now. (1T102 to 1T108) (5T70 to 5T82) (7T10 to 7T22) (11T 33-39, 61-62).

B. The Past Wage Claim was Properly Submitted to the Jury and the Future Wage Claim Should not Have Been Dismissed

The past lost wage claim was sufficiently supported in the record. (1T97 to 1T119) (5T70 to 5T83) (7T10 to 7T22) (Pa 197). There was more than enough in the record to demonstrate plaintiff is unable to return to his occupation in construction or otherwise. (4T 42-54, 87-89, 110-111, 114) (3T 225-227) (10T 24, 28-29, 36-37, 58, 66) (Pa195) (Pa197). In fact, plaintiffs' inability to work

at his prior occupation was not even seriously disputed. Furthermore, there is a substantial workers compensation lien to be paid back which includes wage loss indemnity.

The testimony of plaintiff's treating orthopedic physician supported the wage claim and his inability to work. (3T 204-285). Dr. Helbig examined Washington Munoz a week before trial. He testified:

> [T]rying to do any heavy work, any repetitive lifting, really, any overhead activity...is something he's never going to be able to do...[he is never] going to get to the point of being able to do any even medium [or] heavy labor...it's not going to happen. It's impossible.

(3T 225-227) Paula Socidade, Ph.D., testified at length about the severe and permanent emotional distress injuries suffered by plaintiff and his inability to work. (10T 4-77) She documented his inability to work and provide for his family which he was particularly distraught about. (10T 22, 24, 28, 36-38, 67-68)

The law does not require an economist or vocational expert to support a wage loss claim. *See, e.g. Adamson v. Chiovaro*, 308 N.J. Super. 70, 76-78 (App. Div. 1998); *Depinto v. ABM Janitorial Servs.*, No. A-4529-12T1, 2015 N.J. Super. Unpub. LEXIS 1364, at *12 (App. Div. 2015). As Judge Carter aptly noted here, "The case law is clear that there is no requirement that there be expert testimony. In fact, the jury charge [on wage claims] specifically addresses and has two different versions of when expert testimony is presented, and when expert testimony is not presented." (5T 77)

In *DePinto* for example, the jury awarded $1.6 million in past and future wage loss where the plaintiff could no longer return to his career as a union marble worker. Defendant argued the verdict was inconsistent and had to be thrown out because it awarded nothing for pain and suffering. Defendant also argued plaintiff was required to produce economist and vocational experts to prove his wage loss claims and inability to find another career. The Appellate Division rejected both arguments. *DePinto* at 12-14 (App.Div. 2015).

The Court cited several cases which discussed the difference between economic and non-economic awards. Given the plethora of factors well within the province of the jury, the two do not have to correlate. And like here, the Court also found the testimony of the plaintiff's treating physician as to the harms and limitations, together with the testimony of the plaintiff, sufficient to support his wage loss claim, both past and future:

> In our view, a future wage loss award of $1,248,000 is not a miscarriage of justice for a forty-year-old man with a demonstrated earnings history, who suffered serious injuries that disabled him from his previous occupation as a skilled laborer. We conclude that the testimony of plaintiff and Dr. Cifelli provided a sufficient basis in the record to sustain the award.

Depinto at 17 (App. Div. 2015) In the instant case we have even more; the testimony of <u>two</u> physicians describing the severe injuries and inability to return to his trade, the plaintiff, and

two corroborating fact witnesses.[11] *See also Lesniak v. County of Bergen*, 117 N.J. 12, 22 (1989) (a reasonable probability of future lost wages exists "when there is a permanent or lasting injury that would obviously impair the ability to earn.") Indeed, a jury is capable of making a determination as to whether a severely injured (emotionally and physically), middle aged, non-English speaking American with little education can find an alternative career. *See, e.g., Hee v. Miller*, 207 N.J. 230, 259 (2011) ("[Many things could have factored into the jury's decision that plaintiff would not be able to return to work, including her limited English language proficiency, her limited education, and lack of job skills...") Dr. Sociodade also discussed Washington's inability to find or retrain for another career. (10T 36-38) She also testified that given his major depression, driving a truck is ill advised. (10T 68)

The expert testimony was consistent with and corroborated by the testimony of Gina Oriana, Denise Munoz and Washington Munoz. (4T 25-40, 4T 42-145) Washington testified about the significant pain he has been experiencing since the incident, his injuries and extensive, ongoing treatment and how despite trying, he has not been able to go back to work. (4T 56, 85-87, 92, 132, 135) He described himself as "helpless" in trying to return to his

[11]We had seven lined up but five were disallowed because defendants said it would be cumulative. (4T 4-7, 20)

occupation. (4T 87- "I have attempted to. I have tried, but it's just not the same.")[12] He testified about his lost earnings and his most recent pay stub, which includes year to date earnings information. (4T 44-45, 51-55, 87-88) (Pa197) At no point did any defendants dispute this earnings information, including plaintiff's direct employer who produced it and which was represented by the same counsel as appellants. The past wage loss claim was properly submitted to the jury.

The Court however ultimately dismissed the future wage loss claim for lack of proof. The Court found the pay stub was not sufficient evidence. It is respectfully submitted the Court erred in this regard because the law is clear the plaintiff's testimony alone is sufficient. The last pay stub the plaintiff received is far more than the law requires. The claim should be reinstated and a supplemental trial conducted (not a new trial) limited to this (and the punitive damages issues, *see infra* § VII).[13]

It is well settled that a plaintiff need not produce documentary evidence of his net income prior to the injury to prove

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[12]Yet defendant tells this Court there was "no evidence that he tried to minimize his allegedly lost wages." (Db40). Regardless, "mitigation" is not an element of a wage loss claim, and certainly no reason to bar or throw out a verdict for it. *See generally e.g., Lesniak v. County of Bergen*, 117 N.J. 12, 22 (1989)

[13]As stated previously, if this Court were to affirm the Law Division rulings on defendants' appeal issues, then plaintiff agrees to abandon its cross appeal and accept the verdict.

a wage loss claim. Plaintiff's testimony alone is sufficient to establish his prior income. As the Appellate Division recounted New Jersey law on the issue:

> Defendant's requirement that plaintiff produce documentary evidence of her net income prior to the injury is without authority. Plaintiff's testimony alone was sufficient to establish her monthly net income. *See Ruff v. Weintraub*, 105 N.J. 233, 236 (1987); *Cross v. Robert E. Lamb, Inc.*, 60 *N.J.Super.* 53, 72 (App.Div.), *certif. denied*, 32 *N.J.* 350 (1960). *Cf. Caldwell v. Haynes*, 136 *N.J.* 422, 437 (1994). The fact that no pay stubs or tax returns were presented was a factor for the jury to consider as to the weight to be given to plaintiff's claim. ...
>
> Similarly, plaintiff was not required to present the testimony of economic or employment experts in order to recover damages for future lost wages. To recover damages for lost future wages, there "must be evidence demonstrating a 'reasonable probability that [plaintiff's] injuries will impair future earning capacity.' " *Lesniak v. County of Bergen*, 117 *N.J.* 12, 21 (1989) (quoting *Coll v. Sherry*, 29 *N.J.* 166, 176 (1959)). The Supreme Court recognized in *Lesniak* that a reasonable probability of future lost wages exists "when there is a permanent or lasting injury that would obviously impair the ability to earn." *Lesniak, supra*, 117 *N.J.* at 22.

Hawkins v. 248 Haynes St. Assocs., 142 N.J. 515, 1995 WL 378462 at *9 (App.Div. 1995). Similarly, testimony alone from a surviving member of an estate is sufficient to establish the decedent's net income. *See Langley v. Allstate Ins. Co.*, 206 N.J. Super. 365, 368-71 (App.Div. 1985) (wage claim permitted in wrongful death action despite no tax or other paper records). *See also Familia v. Univ. Hosp. of Univ. of Med. & Dentistry of New Jersey*, 350 N.J.

Super. 563 (App.Div. 2002) (wage claim in medical malpractice case permitted despite lack of tax records).

On appeal, defendants claim the verdict should be thrown out because it did not get tax returns in discovery. Yet during argument of defendants' trial motion to dismiss the wage loss claim, defense counsel stated, "I'm not asking for his tax returns. Because I know maybe that's not... discoverable....I don't want your tax returns." (1T 101, 108) Moreover, plaintiffs' direct employer, Cooper Plastering, a defendant for discovery purposes up to trial and represented by the same counsel as all other defendants, (1T 16-17) (Da14), could have supplied wage information to defense counsel.

In sum, plaintiff's tax returns and other tax documentation such as Form 1099 or W-2 statements are not required to support a wage loss claim. Plaintiff produced a single, complete pay stub stating his current and year to date gross and net earnings. This evidence was more than sufficient to support the past wage claim. Accordingly, this aspect of the verdict should be affirmed.

Plaintiff, however, contends that the trial court erred by dismissing the future wage loss claim. The trial court relied on the fact that plaintiff did not testify he would have worked until a certain age. (5T 78-79) This ruling was incorrect because the law does not require plaintiff to give such self-serving "magic words" testimony. Instead the jury is to consider the factors set forth

in the model jury charge and plug in a reasonable retirement age, such as 65. *M.J.C. 811C* ("In deciding how much your verdict should be to cover future lost earnings, think about...the nature, extent and duration of injury...age...state of health...") Indeed this issue was squarely addressed in *Webb v. Troy Corp.*, 2007 N.J.Super. Unpub LEXIS 633, 31-33 (App.Div. 2007) where the defendant claimed the future wage loss claim should have been dismissed because the plaintiff did not specifically testify he would have worked until "x." In describing supporting testimony similar to the instant matter, the Court held:

> [T]here was sufficient evidence for the jury to conclude that plaintiff would have continued working until the age of retirement. The jury heard testimony that plaintiff was a single parent with five children to care for. It also heard testimony from plaintiff that he did not "feel like a complete man" because he could not "take care of [his] family like [he] should" and could not work. It was aware that plaintiff was receiving social security disability and, according to plaintiff's expert, it was unlikely he would ever return to work. It was reasonable for a jury to conclude, based on plaintiff's testimony and the instructions given, that plaintiff would have continued to work until a reasonable retirement age of sixty-five to support his family.

Webb v. Troy Corp., 2007 N.J.Super. Unpub LEXIS 633, 31-33 (App.Div. 2007) (neither expert testimony nor statement from plaintiff on work life expectancy is necessary to prove future lost earnings.). Indeed as the record shows and recounted in the Statement of Facts, there is even more evidence Washington Munoz

would have, at a minimum, worked until the standard retirement age of 65.

Furthermore with regard to work life expectancy, just like the life expectancy charts in the Court Rule book which comes from the federal government and are recognized by courts as a matter of course and was done so here, we requested the Court also take judicial notice of the United State Bureau of Labor Statistics, work life expectancy charts. (Pa464-500) We wrote:

> We are requesting the Court reconsider the issue of future lost wages. Plaintiff need not state "magic words" about how long he would have worked. Jury can utilize a "reasonable age" based on the work history testimony. This case rather squarely addresses the issue- Webb, 2007 WL 1074753 (App.Div.2007).
>
> Furthermore, Footnote 2 to model civil charge 8.43 states:
>
> "In a case without any expert testimony, that court may, subject to *N.J. Ev. Rule* 201(b), consider whether it can take judicial notice of wage and interest rate figures compiled by recognized authorities." Attached are the BLS and authoritative work-life expectancy charts [Markov Work-Life Expectancy charts]. At 47 [Washington Munoz's] work life is about 14 years. Courts as a matter of course charges the life expectancy chart. This is no different.

(Pa464-500) Courts across the country recognize the validity of the Markov Work-Life Expectancy charts. *EEOC v. Freemen, 626 F. Supp. 2d 811, 824 (M.D. Tenn. 2009)* (Appellate Court found that the Markov Work-Life Expectancy charts are reliable); *G.M.M. v. Kimpson*, 116 *F. Supp. 3d* 126, 151 (E.D.N.Y. 2015) (same). Pursuant to New Jersey Rule of Evidence 201(b), the court may judicially

notice a fact that is not subject to reasonable dispute if (1) it is generally known within the trial court's jurisdiction, or (2) it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. *N.J.R.E. 201(a)* (providing for judicial notice of "ordinances, regulations and determinations of all governmental subdivisions and agencies thereof"); *N.J.R.E. 202(b);* (stating that an appellate court may take judicial notice of any matter specified in *N.J.R.E.* 201); *State v. Marquez*, 408 N.J. *Super.* 273, 286 n.5 (App.Div.2009) (taking judicial notice of MVC manuals), *rev'd on other grounds*, 202 N.J. 485 (2010); *see also State v. Gandhi*, 201 N.J. 161, 200 n.18 (2010) (taking judicial notice of Division of Criminal Justice training manual for police officers); *Twp. of Dover v. Scuorzo*, 392 N.J. Super. 466, 474 n.4 (App.Div.2007) (taking judicial notice of Handbook of New Jersey Assessors). Publications by the United States Bureau of Labor Statistics ("BLS"), are produced by the U.S. Department of Labor; they are the classic types of authoritative charts courts should notice. (Pa464-500) *Id.*; *See also Camden & A.R. Co. V. Williams*, 61 N.J.L. 646 (1898) (It is common knowledge that approved mortuary tables are in constant use to aid in determining the probable expectancy of human life.).

The trial court also very simply could have permitted plaintiff's counsel to recall the plaintiff to say the "magic

words" (i.e. the age that he would retire). But that request was denied, even though the defense had yet to start its case. (5T 79-83) The court also could have permitted the plaintiff to submit a simple certification or affidavit stating such. *See, e.g. State v. Menke,* 25 N.J. 66, 71 (1957) (a trial court can reopen a case to introduce additional evidence after both sides have rested); *Bondi v. Pole,* 246 N.J. Super. 236, 238-239 (App. Div. 1991) (permitting recall of plaintiff's expert in medical malpractice case to specifically state defendants deviated from the standard of care). As the late Justice Clifford reminds us, the Courts Rules "are not simply a minuet scored for lawyers to prance through on pain of losing the dance contest should they trip." *Stone v. Old Bridge Twp.,* 111 N.J. 110, 125 (1988).

Accordingly, the future wage loss claim should not have been dismissed.

VII. The Punitive Damages Claim Should Also Be Reinstated (11T 52-67)

Plaintiff also cross-appeals the Trial Court's dismissal of the punitive damages claim. Defendants' submission is replete with misstatements and distortions of the record. Yet more are the suggestions at Db4 that plaintiff did not timely seek punitive damages, the request was not made until after the compensatory verdict, and that "no brief was submitted in support" of the claim.

To the contrary, punitive damages was plead in the complaint. It was also discussed in some detail at the charge conference the day before closing arguments. (7T 44-48). We also submitted to the Court a brief on the issue that same morning (Pa597-600), about which defense counsel stated, "I got it last night." (7T 44)

Defendants also distort the issue by suggesting our request for a punitive damages phase was not made "until after the jury verdict was delivered." (Db4). Punitive damages was timely and properly raised and presented to the Court. And while it is true we did not again remind about it until after the compensatory verdict, that is because the Punitive Damages Act ("PDA") mandates a punitive damages phase only <u>after</u> a compensatory verdict. *N.J.S.A.* 2A:15-5.13. In fact we specifically stated at the charge conference, "that would only come into play if there's a [compensatory] verdict..." (7T 47) And while it is true we again raised the issue after the jury had been discharged, it was only a matter of minutes and the jury very easily could have been recalled.

And substantively, the Court should not have dismissed the claim. First, the court erred in considering only the compensatory trial evidence in deciding to dismiss the claim. The PDA is clear that punitive damages evidence is <u>not</u> admissible in the compensatory phase of the trial. *N.J.S.A.* 2A:15-5.13(b) ("Evidence relevant only to the issues of punitive damages shall not be

admissible in this [compensatory] stage.") As such at a minimum the Court should have heard the punitive damages evidence before deciding to dismiss it.

Reckless behavior is sufficient to support a punitive damages claim. *N.J.S.A. 2A:15-5.12; see also, e.g. Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610 (1997)(to justify punitive damages award defendant's conduct must be reckless); *DiGiovanni v. Pessel*, 55 N.J. 188, 190 (1970)(punitive damages justified by defendant's "conscious and deliberate disregard of the interests of others"). There are several workplace safety cases where a contractor's disregard for OSHA safety rules is sufficient to support punitive damages. *See, e.g. Santillan v. Sharmouj*, 289 F. App'x. 491(3d Cir. 2008) (developer that failed to enforce worker safety rules liable for punitives); *Arroyo v. Scottie's Prof'l Window Cleaning, Inc*, 120 N.C. App. 154 (N.C. Ct. App. 1995)

The Punitive Damages Act and Model Jury Charge set forth suggested factors that can be considered in deciding punitives. This includes the likelihood, at the relevant time, that serious harm would result from the defendant's conduct, the defendant's awareness of reckless disregard of the likelihood that serious harm would arise from his conduct, and the conduct of the defendant upon learning its conduct would likely cause harm. *N.J.S.A.* 2A:15-5.12b(4); *M.J.C.* 8.60.

Since the Court would not permit a punitive damages phase, we are hamstrung in our ability to argue the evidence supporting it. Suffice to say both defendants knew the hazard was dangerous and in violation of OSHA safety standards and their own safety manuals. The LPC safety official, Bob Beardsley, full well knows the importance of the rules. He wrote the LPC Safety Manual and teaches job safety courses. (5T 160) Upon learning his actions and that of their roofing contractor caused injury to the worker, he exclaimed "that f- - - ing roofer." (4T 96-97) But instead of doing anything to that contractor, he went ahead and fired the injured worker. (10T 57-58) (4T 134) (5T 37, 173) (Pa 247, 249-250, 453). *N.J.S.A.* 2A:15-5.12b(4) ("In determining whether punitive damages are to be awarded, the trier of fact shall consider ...The conduct of the defendant upon learning that its initial conduct would likely cause harm...") And in hindsight, Beardsley still testified the hazard, "would not be a concern to me." (5T 19) (2T 99-100)

The punitive damages claim should not have been dismissed. At a minimum the court should have heard the evidence in a punitive damages phase. We request reversal and remand for a punitive damages trial.

VIII. Defendants' Newly Concocted Arguments about Plaintiff's Closing are Frivolous and Bizarre (raised by defense for first time on appeal)

Defendants assert that Plaintiff's closing statement was so "over the top" that a new trial is warranted. Yet counsel did not interpose a single objection during or after the summation, nor raise plaintiff's summation in his motion for a new trial. These omissions standing alone should dispose of this argument on appeal. *Bradford*, *Supra*, 283 N.J. Super. at 573-74 (App Div. 1996) (the absence of a trial objection indicates trial counsel perceived no error or prejudice and prevented the trial judge from remedying any possible confusion in a timely manner). *See also Rule* 1:7-2; 2:10-2, *Official Comment*); *Fiore Supra* 311 N.J. Super., at 362-63 (App.Div. 1998); *State v Robinson*, 200 N.J. 1, 20-22 (2009).

Substantively, defendants' assertion that plaintiff's counsel violated the "Golden Rule" is simply wrong. Defendants' have taken the statement out-of-context and fail to inform this Court that the highlighted statement was a direct quote from defendant LP Ciminelli's Safety Manual governing the work site at which plaintiff was injured. (Pa400, 411)

New Jersey law is clear "it is improper for an attorney to make derisive statements about parties, their counsel or their witnesses." *Rodd v. Raritan Radiologic Associates, P.A.,* 373 N.J. Super. 154, 171-72 (App. Div 2004). This generally includes calling them liars. *Id.* Curiously, defense counsel takes offense at plaintiff's closing, but did not hesitate to venture into prohibited comments by suggesting to the jury that plaintiff's

counsel was perpetuating a fraud and labeled plaintiff a liar some 12 times as follows:

> "...the accident didn't happen as the plaintiff claimed. Remember...all of that about how the accident happened, it changed when the plaintiff got on the stand." (7T50).
>
> "So it's a strong thing to say, but the case built on lies..." (7T50).
>
> "One lie." (7T51)
>
> "That's a lie too." (7T51).
>
> "Mr. Munoz himself...he did a few things. He lied about the accident." (7T55).
>
> "So the injuries that he said he had, he lied about them. He lied about it to his employer...He lied about it when...sent...to get medical treatment. (7T55).
>
> "He lied to his own doctor." (7T57).
>
> "...we know Mr. Mella was telling the truth and we know that Mr. Munoz...wasn't." (7T58).
>
> "Now, Dr. Helbig, he was lied to as well." (7T62).
>
> "...we know...that the plaintiff changes his testimony..." (7T69).

See e.g., Rodd, 373 *N.J. Super.* 154, 171 (App. Div. 2004) ("Although attorneys are given broad latitude in summation, they may not use disparaging language to discredit the opposing party, or witness."); *Geler v. Akawie*, 358 *N.J. Super.* 437, 470-71 (App. Div.), *certif. Denied*, 177 *N.J.* 223 (2003) ("an attack by counsel upon a litigant's character or morals" is inappropriate) *Rodd v. Raritan Radiologic Associates, P.A.,* 373 N.J. Super. 154, 171-72

(App. Div 2004) ("it is improper for an attorney to make derisive statements about parties, their counsel or their witnesses.")

In short, the purported resort to the "Golden Rule" is soundly refuted by the record. Furthermore, defendants waived any exceptions to the summation due to their silence at trial and post-trial motion.

Defendants' arguments about plaintiff's closing should be disregarded.

CONCLUSION

For all these reasons it is respectfully requested the Court affirm the Law Division's denial of Defendants' Motion for New Trial/Remittitur. It is also respectfully requested the Court reverse the dismissal of the future wage loss and punitive damages claims, and remand for a trial limited to those two issues. However, if the Court affirms the Trial Court on all of defendants' issues, then plaintiff will abandon the cross-appeal.

Respectfully submitted,
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