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PRELIMINARY STATEMENT

This is a head on collision auto accident matter involving severe injuries to plaintiff Robin Chin. On June 14, 2007 the Court rejected defendant's argument that "[t]here are no aggravating factors [which would support a claim for punitive damages] as were present in *Dong*," and permitted plaintiff's claim for punitive damages to go forward. (*Exhibit I, Hammond punitive damages opposition brief at 2*). Since the June 14th Order plaintiff has uncovered even more evidence which supports her punitive damages claim.

Under the Punitive Damages Act, an award is appropriate when a defendant's conduct was wantonly reckless or malicious. While, New Jersey does not have a *per se* rule that driving while intoxicated alone will entitle a plaintiff to punitive damages; drunk driving accompanied by one or more aggravating factors is sufficient to allow the claim for punitive damages to proceed to a jury. *N.J.S.A. 2A:15-5.12*. In this matter there is a mountain of evidence to support plaintiff's claim that defendant's intoxication on the evening of April 13, 2004 caused him to drive his pickup truck over the centerline of Paddock Lane, in Colts Neck, New Jersey, striking plaintiff's Honda sedan head-on. (*Exhibit N, Photographs*). Defendant Hammond, a 25 year veteran of neighboring town, Holmdel's police force was intimately familiar with the likelihood that serious damage can result from driving under the influence. Despite his training as a police officer, the evidence reveals that on the evening of April 13, 2004, defendant Hammond was operating his vehicle under the influence of alcohol.

Hammond's actions after the accident to conceal his intoxicated state are only trumped by his reckless disregard in choosing to drive while intoxicated, even in spite of his years of training as a police officer. At the scene, Hammond provided false statements to the investigating officer indicating that the accident result from a mere sneeze. The concealment started with Hammond's

false statement and continued at the hospital, when -aided by a fellow officer at the hospital acting at the behest of the Holmdel police department, Hammond was extracted from the hospital before the requisite *and ordered* forensic blood alcohol testing had been performed¹.

Moreover, defendant Hammond - an officer of the law - testified under oath, in connection with this lawsuit, that the accident was caused by a mere sneeze. This curious explanation for a severe head-on collision wherein Hammond's vehicle is so significantly in the lane of on-coming traffic, resulted in plaintiff delving into Hammond's emergency room records. (*Exhibit N, Photographs*). The emergency room records revealed the truth, that defendant Hammond admitted to hospital staff that he consumed 6 beers just before the accident. Also, the certified hospital records contain a notation that Holmdel or Colts Neck police were going to come and perform a blood alcohol test. (*Exhibit C, Hammond Emergency Room Record*). However, the same never occurred - in large part due to the fact that Hammond was aided by the Holmdel police in avoiding the blood alcohol test and in effect shielded by the blue wall of silence. Hammond's concealment of his intoxication is clear. Hammond exploited (and continues to exploit) his law enforcement connections to avoid criminal prosecution.

Therefore, Hammond's reckless conduct in driving while intoxicated, his advanced knowledge as a police officer regarding the effects of driving while intoxicated and his repeated attempts to conceal his intoxication support plaintiff's claim for punitive damages.

¹ It is important to note that two blood alcohol tests were ordered. One was ordered by hospital staff, which was canceled after Hammond's treatment was concluded. However, another blood alcohol test was ordered to be performed by either Colts Neck or Holmdel police. This second test was never performed as Hammond was extracted from the scene by a friend and fellow Holmdel police officer prior to the test being performed. (*Exhibit C, Hammond Emergency Room Records*).

RESPONSE TO DEFENDANT’S STATEMENT OF MATERIAL FACTS²

1. Deny. Defendant admitted to hospital staff that he drank 6 beers on the night of the crash. In fact, not even the investigating office believed that a single sneeze caused the accident. (*Exhibit C, Hammond Emergency Room Record*) (*Exhibit D, Deposition of Dr. Lemansky*) (*Exhibit G, Report of Richard Safferstein, Ph.D.*) (*Exhibit K, Deposition of Officer Matthews at 75*).

2. Admit. However, Officer Matthew’s failure to issue a summons to defendant Hammond did not result because defendant Hammond’s actions did not warrant a summons, but rather because he *inadvertently* failed to issue a ticket. (*Exhibit L, Certification of Officer Brian Matthews*).

3. Admit.

4. Admit.

5. Deny. It is clear that Hammond gave conflicting stories as to what he told Officer Matthews at the scene. The evidence supports that Hammond’s conflicting stories result not from a lack of memory but rather a need to perpetuate his concealment of intoxication on the evening of April 13, 2004.

6. Admit. However, the medical records also make multiple references to Hammond’s intoxication. Including that Hammond admitted to hospital staff having 6 beers just before the crash, a notation of “intox”, and he was scheduled for a blood alcohol test (which was later cancelled). Moreover, the nursing triage note is was written, “Holmdel or Colts Neck PD to come to ER for lab ETOH.” ETOH refers to the police’s forensic blood alcohol test. (*Exhibit C, Hammond Emergency Room Record*).

7. Admit. Plaintiff also draws the court’s attention to the many notations documenting

² Plaintiff does not dispute the relevant procedural history as outlined by movant.

Hammond's intoxication. (*Exhibit C, Hammond Emergency Room Record*).

8. Deny inasmuch as Hammond's testimony is clear; as his two depositions contain many discrepancies and are not consistent in any regard. Admit only with respect to Hammond's deposition testimony reflects that he drank three beers on the evening of the accident, but note that this information was not offered until after plaintiff obtained a copy of Hammond's emergency room records.

9. Admit.

10. Deny. Hammond admitted drinking 6 beers just before the crash to hospital staff.

(*Exhibit C, Hammond Emergency Room Record*).

11. Admit.

12. Admit.

13. Deny. Officer Matthews' investigation concluded that:

And then I have my investigation, which doesn't infer anything to do with sneezing, other than the fact that the crash was caused by careless driving which caused him to go into the other lane. And that's why I issued a careless driving ticket to Mr. Hammond.

(*Exhibit K, Deposition of Officer Matthews at 75*).

14. Deny. It is clear from Officer Matthews' deposition that:

Q [A]s you sit here today, do you feel that Mr. Hammond gave you accurate information when you interviewed him on April 13th, 2004? ...Or do you think he left some stuff out?

A He may have left some stuff out. I mean, like I said, I'm only going by what I investigated at the scene. And, you know, I don't have anything else to go by. Now I find out that the hospital is saying something different. I mean, I don't know.

Q Well, the hospital was saying that he said he had six beers tonight. Based on that, do you feel that he gave you accurate information or do you think he left things out?

A Well, he obviously left that part out to me.

(Exhibit K, Deposition of Officer Matthews at 81-82).

15. Deny. See Response to #14 above.

16. Deny. See Plaintiff's Statement of Material Facts and Exhibits A-N.

17. Deny. Officer Matthews testified that "after someone told me the name rang a bell." but that he had "never met him, never talked to him" before. *(Exhibit K, Deposition of Officer Matthews at 84).*

18. Admit inasmuch as that the statement is consistent with Officer Matthews statement.

19. Deny. Officer Matthews testified that the accident scene was very chaotic. Once the patients were taken care of, his role as investigating officer was to do the paperwork which he did in his car. *(Exhibit K, Deposition of Officer Matthews at 86-87).* Moreover, Patrolman Foley of the Holmdel police department, responded to the scene and rendered "assistance." *(Exhibit J, 7/23/07 Hammond Deposition at 26, 28).*

20. Admit. Except to state that Detective Smythe was summoned to the hospital by the Holmdel Police Department and directed to extricate defendant Hammond from the hospital. *(Exhibit J, 7/23/07 Hammond Deposition at 26-28)*

21. Deny. The emergency room records clearly document Hammond's intoxication upon arrival at Riverview Medical Center. *(Exhibit C, Hammond Emergency Room Records).*

22. Admit as to the veracity of the fact that defendant Hammond's admission to emergency room staff that he drank six beers and been recanted at deposition, in the face of a punitive damages claim.

23. Admit.

24. Admit. Dr. Lamansky also confirms that besides Hammond admitting to drinking 6

beers on the night of the accident, he noted in the physical exam portion of the evaluation that Hammond appeared to be clinically intoxicated. (*Exhibit D, Deposition of Dr. Lemansky at 8-9*).

25. Admit, except to clarify that two blood alcohol tests were ordered. One was ordered by hospital staff and another was to be performed by either Colts Neck or Holmdel police. (*Exhibit C, Hammond Emergency Room Records*).

26. Deny. Dr. Lamansky's testimony and the hospital records make clear that there were two blood alcohol tests ordered; one by the hospital - which was not performed; and the other to be performed by either Colts Neck or Holmdel police. (*Exhibit C, Hammond Emergency Room Records*). With respect to the notion that the "blue wall of silence is a conspiracy theory" plaintiff directs the Court's attention to a recent Appellate Division cases wherein a prosecutor's remarks during closing referencing the "blue wall of silence" were found to be appropriate. The opinion also references that the "term 'blue wall' is common parlance for police officers' reluctance to incriminate their fellow officers." *State v. Morais*, 359 N.J. Super. 123, 132 (App. Div. 2003); *citing e.g., Ricciuti v. New York City Transit Authority*, 70 F. Supp.2d 300, 333-334 (S.D.N.Y. 1999) (recognizing that the "blue wall of silence is a 'distressing familiar phenomenon'" arising "when a police officer is charged with misconduct and other members of the squad remain mute, despite their personal knowledge of the facts."); *see also, Simon v. City of Naperville*, 88 F. Supp. 2d 872, 876 (N.D. Ill. 2000)(blue wall of silence is a well established phenomenon).

27. Deny. Dr. Saferstein's opinion is based on sworn testimony. Moreover, plaintiff submits that there is a significant amount of forensic evidence to support Dr. Saferstein's opinion. Moreover, the lack of a blood sample resulted from a spoliation of evidence at the hospital by either Holmdel or Colts Neck police.

PLAINTIFF'S STATEMENT OF MATERIAL FACTS

A. The Evidence Shows that Defendant's Intoxication Was the Cause of the Head-On Crash, Rather than a Sneeze.

1. This auto accident case arises from a head-on collision which occurred on April 13, 2004 on Highway 34 in Colts Neck, New Jersey when defendant James Hammond crossed the center line colliding with plaintiff Robin Chin. (*Exhibit A, Police Report*). Ms. Chin suffered severe injuries. The police report states that defendant Hammond explained his actions in causing the head on collision due to that "when he sneezed [this] forced him to look away from the roadway and then the impact occurred." (*Exhibit A, Police Report*)

2. Plaintiff's counsel was curious of a sneeze causing such a catastrophic auto accident and explored this at the defendant's first deposition. Nevertheless, Hammond "stuck to his story." It was revealed however, that Hammond himself happened to be a Holmdel police officer, a town right next to Colts Neck. (*Exhibit B, 4/12/06 Hammond Deposition at 32, 36-37*)

3. After defendant's first deposition plaintiff subpoenaed defendant's emergency records in connection with the accident to see if they would shed any light on the suspicious circumstances of this accident. Indeed, the records revealed that Hammond was under the influence of alcohol at the time he crossed the center line and caused this catastrophic head on collision. (*Exhibit C, Hammond Emergency Room Records*) (*Exhibit D, Deposition of Dr. Lemansky*) (*Exhibit G, Report of Richard Safferstein, Ph.D.*)

4. In the history taken from Hammond, he told the physician he, "Had 6 beers tonight." In the physical exam section the doctor wrote, "intox" and he was scheduled for a blood alcohol test

(which was later cancelled). In the nursing triage note it was written, "Holmdel or Colts Neck PD to come to ER for lab ETOH." ETOH refers to the police's forensic blood alcohol test. (*Exhibit C, Hammond Emergency Room Record*).

5. Via subpoena the deposition, the attending emergency room physician testified as to defendant Hammond's condition on the night of the collision and the curious circumstances surrounding what the police report said caused the accident:

Q. Taking a look at one of two of the ED record could you explain what that shows with respect to alcohol?

A. Yes. During my history taking portion of this person's examination he admitted to me to having drunk -- having drunk six beers during that evening.

Q. Okay. And what were you able to determine when you examined the patient about being under the influence of alcohol besides him telling you that he had six beers tonight?

A. I noted in the physical exam portion of the evaluation I circled as abnormal his affect as appropriate, which means that the affect was inappropriate, and he appeared to be clinically intoxicated.

Q. And what, if anything, did you see or smell that lead you or leads you to that conclusion?

A. In addition to his behavior, which appeared intoxicated, I also noted the odor of alcohol on his breath.

(*Exhibit D, Deposition of Dr. Lemansky at 8-9*)

Q. Okay. And I want to talk a little bit about -- we talked about how the triage notes indicate that the Holmdel or Colts Neck PD were going to come to the ER for lab results and then ultimately they did not come with the alcohol kit and it wasn't -- again, if you can, based on your experience in a situation like this where a person is suspected of being under the influence of alcohol and a serious accident having occurred, what is the practice and procedure that you've experienced that the police will do in terms of investigating and gathering evidence in that scenario?

...

A. It is my experience that as a routine through my interactions with many police departments that if there's any reason for an intoxicant to play a role in an automobile accident, or for that matter other situations such as an industrial accident, that -- that the police are very aggressive and get blood alcohol levels as a routine.

Q. And would you -- would you say that the fact that it was ultimately not done in this case by the police, although it's indicated there, would you characterize that as a normal usual event, unusual or how would you characterize that?

A. I would characterize that as an extremely unusual event and in fact, perhaps an oversight, maybe even a dereliction of duty.

(Exhibit D, Deposition of Dr. Lemansky at 20-22).

6. Moreover, plaintiff produced the report of Richard Safferstein, Ph.D, Chief Forensic Scientist for the State of New Jersey. Dr. Safferstein concludes from the evidence that James Hammond was under the influence of alcohol at the time of the accident. That intoxication would have significantly reduced his sense of judgment and motor functions and impaired his ability to drive his motor vehicle in a trouble free and careful manner. Mr. Hammond's alcohol-induced state markedly reduced his ability to take normal and prudent precautionary measures and was the proximate cause of the crash. *(Exhibit G, Report of Richard Safferstein, Ph.D.)*

B. Plaintiff Even More to Support Her Claim for Punitive Damages.

7. The complaint in this case originally contained a claim for punitive damages. *(Exhibit E, Complaint, First Amended)* By stipulation of the parties it was dismissed without prejudice pending further discovery.

8. In May 2007, plaintiff moved to reinstate the punitive damages claim largely based on the then newly discovered evidence concerning Hammond having caused the crash under the influence of alcohol and a number of other aggravating factors including his attempts to conceal his actions. *(Exhibit H, Order and Transcript on Motion to Reinstate Punitive Damages Claim)*

9. Counsel for Hammond strenuously opposed the motion to reinstate the punitive damages claim on the basis that , “[T]here [is] no evidence in this case to support the [punitive damages] claim.” and that the “punitive damage claim ... cannot meet the substantial burden of proof to

succeed.” Moreover, defendant Hammond argued “There are no aggravating factors [which would support a claim for punitive damages] as were present in *Dong*.” (*Exhibit I, Hammond punitive damages opposition brief at 1,2,3*).

10. The Court in no uncertain terms rejected arguments made on behalf of defendant Hammond, and found that evidence does support plaintiff’s claim for punitive damages as to Hammond. At oral argument the Court indicated that Hammond’s awareness of the reckless disregard for the way he was driving and the likelihood that serious harm would result from his conduct in conjunction with the concealment of his intoxication constituted sufficient evidence of aggravating factors to allow plaintiff to proceed with her punitive damages claim. (*Exhibit H, Order and Transcript on Motion to Reinstate Punitive Damages Claim at 16-20*).

C. Aggravating Factors: Awareness, Concealment, Coverup, and the “Blue Wall of Silence”.

11. Defendant Hammond has been a police officer since 1980. Accordingly, at the time of the crash, he had been a police officer for almost 25 years. During that time Hammond was trained in and had investigated DWI cases. As a police officer, Hammond obtained and maintained a certification regarding Breathalyser testing. Accordingly, Hammond was well aware (more than the average person) of the dangers associated with driving while intoxicated, and despite same chose to drive while intoxicated. (*Exhibit J, 7/23/07 Hammond Deposition at 16-20*).

12. Throughout discovery, defendant Hammond gave multiple different version of what he did or did not tell the investigating officer (Officer Brian Matthews) and the medical personnel at the hospital. At his first deposition he testified he did not remember speaking to the investigating officer at all at the scene. (*Exhibit B, 4/12/06 Hammond Deposition at 36*).

13. However at his second deposition, in July 2007, Hammond testified that he did in fact

speak with Officer Matthews at the scene and “told him exactly what happened.” (*Exhibit J, 7/23/07 Hammond Deposition at 15*). Yet, only 6 pages later Hammond testified he did not remember speaking with Matthews at all at the scene. (*Exhibit J, 7/23/07 Hammond Deposition at 22*)

14. At one point in his deposition Hammond testified that he never told the hospital personnel that he had 6 beers that night. (*Exhibit J, 7/23/07 Hammond Deposition at 31*). Then later defendant Hammond testified that he did not remember one way or the other whether or not he even spoke to the hospital staff:

Q Do you remember if you spoke with anyone in the hospital? Do you have a recollection of that?

A No.

(*Exhibit J, 7/23/07 Hammond Deposition at 15*) When asked at his first deposition if he told the hospital people his story about the sneeze Hammond testified, “I’m sure I did.” (*Exhibit B, 4/12/06 Hammond Deposition at 19*)

15. Hammond concealed his actions of having caused the accident under the influence of alcohol to the investigating authorities. Officer Matthews testified that as per his police training, one of the key ways to investigate a potential DWI case is to ask the driver whether they are intoxicated. Defendant Hammond denied to Officer Matthews that he had anything to drink that night. (*Exhibit K, Deposition of Officer Matthews at 44-47, 93*). Specifically, Officer Matthews testified:

Q [A]s you sit here today, do you feel that Mr. Hammond gave you accurate information when you interviewed him on April 13th, 2004? ...Or do you think he left some stuff out?

A He may have left some stuff out. I mean, like I said, I'm only going by what I investigated at the scene. And, you know, I don't have anything else to go by. Now I find out that the hospital is saying something different. I mean, I don't know.

Q Well, the hospital was saying that he said he had six beers tonight. Based on

that, do you feel that he gave you accurate information or do you think he left things out?

A Well, he obviously left that part out to me.

(Exhibit K, Deposition of Officer Matthews at 81-82)

16. The accident happened in Colts Neck some two miles away from the Holmdel border. Colts Neck had exclusive jurisdiction over the incident. At least three Colts Neck officers and numerous first aid personnel were on the scene within minutes of the crash. Nevertheless, for some unexplained reason, Patrolman Foley of the Holmdel police department, responded to the scene and rendered "assistance." *(Exhibit K, Deposition of Officer Matthews at 34, 35, 86) (Exhibit J, 7/23/07 Hammond Deposition at 26, 28)*

17. In fact, Officer Matthews testified that it is "not very often" that a Holmdel officer would be involved in a Colts Neck traffic incident such as this. *(Exhibit K, Deposition of Officer Matthews at 50)*. Days later defendant Hammond spoke to Patrolman Foley and "thanked him" for what he did for him at the scene. *(Exhibit J, 7/23/07 Hammond Deposition at 28)*. Officer Matthews all together denied knowledge of any Holmdel officers responding to the scene. *(Exhibit K, Deposition of Officer Matthews at 35)*.

18. Moreover, at the conclusion of Officer Matthew's investigation, he concluded that:

Q When you finished your investigation after about an hour having arrived at the scene, did you leave there thinking the accident was caused by some kind of sneezing event at that time?

A At that time I -- that's why I have both statements and my investigation. Actually on page two of my report. I have a driver one statement, which was the Honda, driver two statement, which was the pickup truck. And then I have my investigation, which doesn't infer anything to do with sneezing, other than the fact that the crash was caused by careless driving which caused him to go into the other lane. And that's why I issued a careless driving ticket to Mr. Hammond.

Q You did issue a careless driving ticket?

A And I just noticed I don't know why it's not there. I did issue a careless driving ticket. I just noticed that now actually.

Q How do you know you issued a careless driving ticket?

A I remember issuing it.

(Exhibit K, Deposition of Officer Matthews at 75)

19. Yet, following his deposition, Officer Matthews submitted a certification stating that, while he intended to issue a careless driving ticket to defendant Hammond, he *inadvertently* did not issue defendant Hammond a summons. *(Exhibit L, Certification of Officer Matthews)*.

20. As indicated above, the certified hospital records of defendant Hammond reveal that he was intoxicated and that the “Holmdel or Colts Neck PD to come to ER” to conduct forensic blood alcohol testing. *(Exhibit C, Hammond Emergency Room Record)*.

21. The certified hospital records indicate that a Mr. James Smythe came to the emergency room and “took responsibility” for Hammond. Since the last time the court rejected defendants’ argument that the evidence does not support a plaintiff’s claim for punitive damages, plaintiff learned that Mr. James Smythe is an officer of the Holmdel Police Department. Detective Smythe did indeed come to the emergency room. However, it was not to conduct alcohol blood tests. Rather it was, the evidence suggests, to extract Hammond from the scene before any further evidence about this alcohol induced crash could be gathered. *(Exhibit M, Deposition of Detective Smythe at 12, 14 -15)*.

22. In fact, Detective Smythe went to the hospital on the night of April 13, 2004 at the direction of the Holmdel police department:

Q: How did it come about that he [Detective Smythe] picked you up? Did you call him? Did he call you? How did that happen?

A: He received a call from headquarters.

Q: How did headquarters know about the accident?

A: Well, it's on the border, right on the border of Holmdel and Colts Neck, so there was a Holmdel officer that responded to the accident as well.

Q: Okay. Which one?

A: Patrolman. Foley.

Q: Why did headquarters contact Smythe as opposed to someone else?

A: He's my friend.

(Exhibit J, 7/23/07 Hammond Deposition at 26-28).

23. However, when Detective Smythe was questioned about how he found out about the accident, Detective Smythe, testified that:

A: I got a phone call.

Q: From who?

A: I don't remember.

(Exhibit M, Deposition of Detective Smythe at 12).

24. Accordingly, although dispatched to the hospital by the Holmdel Police, Detective Smythe took absolutely no steps to gather evidence of the alcohol intoxication that was documented by the hospital staff and instead signed Hammond out of the hospital and took him home. *(Exhibit M, Deposition of Detective Smythe at 45-46).*

25. None of the characters deposed- neither Mr. Hammond, Officer Matthews nor Detective Smythe- were able to explain as to how all the hospital personnel involved knew Hammond was intoxicated, it was written that the Holmdel or Colts Neck were to come and do forensic blood work, yet it was never done. None of them had any explanation for those admittedly highly unusual facts:

Q ...My question to you is: Can you explain here how the medical records, you know, appear to have up and down indication that he was clinically intoxicated, that it was actually even referenced that the Colts Neck or Holmdel police were to come to the emergency room to do lab blood tests, can you explain any of this?

A I need the question again.

MR. CLARK: Could you read that back? (Whereupon, the testimony was read back as requested.)

A I can't explain that.

(Exhibit K, Deposition of Officer Matthews at 72-73)

Q Well, is that your experience, that generally speaking, that the police are very aggressive when they feel alcohol has been involved in an automobile accident where there's injury and that they would take steps to get blood alcohol readings?

A Yes.

Q We also noted in the medical records that -- and I guess we can do this from Dr. Lemansky's deposition on page 16. And it's line 13.

"Question: All right, if we can turn to the triage note in the hospital record, what does this indicate here about alcohol or any alcohol testing that is done?"

And the answer is: "Well the triage nurse who first saw the patient said the patient was brought in by the rescue squad on the stretcher which is how I found him. ...The nurse also noted that there was -- she made a notation of ethyl. Whether or not there was -- well, it's actually under findings/comments. Evidently she got that information by observing the patient rather than having the patient tell her. So she observed the patient, appeared to be alcohol intoxicated, and she also made a notation here that Holmdel and Colts Neck, I guess the accident took place in Colts Neck. It may have been Holmdel Rescue Squad that brought the patient to the hospital, maybe due to the unavailability of Colts Neck First Aid personnel. But she did note that the Holmdel or Colts Neck Police were to come to the ER to do a legal ethanol draw."

And my question to you is: Can you explain why that wasn't done in this case?

A No.

Q Do you think it had anything to do with the fact that Mr. Hammond was a police officer?

A I have no idea.

(Exhibit M, Deposition of Detective Smythe at 41-43)

Q My question to you is: Would you agree with that general statement that if there's any suspicion of alcohol intoxication involvement in the accident, that the police are

very aggressive and get blood alcohol levels as a routine? Do you agree with that general statement?

A Yes.

Q Can you explain why that wasn't done here when even, you know, you say that you had, in fact, had three beers that night? Can you explain why that wasn't done here?... Do you know why the blood test wasn't done?

THE WITNESS: No....No, I can't.

(Exhibit J, 7/23/07 Hammond Deposition at 64-65)

LEGAL DISCUSSION

I. QUESTIONS OF FACT EXIST AS TO WHETHER DEFENDANT’S CONDUCT IS SUFFICIENTLY RECKLESS OR MALICIOUS; THEREFORE, PLAINTIFF’S CLAIM FOR PUNITIVE DAMAGES SHOULD PROCEED

N.J.S.A. 2A:15-5.12. “Standard of proof; determination” provides as follows:

b. In determining whether punitive damages are to be awarded, the trier of fact shall consider all relevant evidence, including but not limited to, the following:

- (1) The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct;
- (2) The defendant's awareness of reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct;
- (3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and
- (4) The duration of the conduct or any concealment of it by the defendant.

Punitive damages may be awarded to the plaintiff if plaintiff proves, by clear and convincing evidence, that defendant’s conduct was wantonly reckless or malicious.

There must be an intentional wrongdoing in the sense of an “evil-minded act” or an act accompanied by a wanton and willful disregard of the rights of another. *N.J.S.A. 2A:15-5.12*; *Nappe v. Anshelewitz, Barr, Ansell & Bonello*, 97 N.J. 37, 49 (1984); *see also Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610 (1997) (noting that to justify punitive damages award defendant’s conduct must be willfully and wantonly reckless or malicious); *DiGiovanni v. Pessel*, 55 N.J. 188, 190 (1970) (noting punitive damages may be justified by defendant’s “conscious and deliberate disregard of the interests of others”)(*quoting* William Prosser, *Handbook on the Law of Torts* § 2 (2d ed. 1955)). As such, plaintiff must prove by clear and convincing evidence a “deliberate act or omission with knowledge of a high degree of probability of harm and reckless

indifference to the consequences.” *Berg v. Reaction Motors Div.*, 37 N.J. 396, 414 (1962), codified at N.J.S.A. 2A:15-5.10.

“The defendant, however, does not have to recognize that his conduct is ‘extremely dangerous,’ but a reasonable person must know or should know that the actions are sufficiently dangerous.” *Parks v. Pep Boys*, 282 N.J. Super. 1, 17 (App. Div. 1995)(citing *McLaughlin v. Rova Farms, Inc.*, 56 N.J. 288, 306 (1970)). Willful and wanton misconduct signifies something less than an intention to hurt. *McLaughlin, supra*, 56 N.J. at 306. The standard can be established if the defendant knew or had reason to know of circumstances which would bring home to the ordinary reasonable person the highly dangerous character of his or her conduct. *Id.*

In this instant matter plaintiff presented sufficient evidence for punitive damages June 2007 when the Court granted plaintiff’s motion to reinstate the punitive damages claim. Since the reinstatement of plaintiff’s punitive damages claim, additional depositions and evidence has come to light - all of which reveal that the evidence clearly supports that defendant Hammond was intoxicated on the evening of the accident. In addition to being intoxicated defendant Hammond’s training as a police officer and 25 years of experience as a police officer render him painfully aware of the likelihood that serious harm would result from driving while intoxicated. In addition, defendant Hammond’s conduct following the accident and continued concealment of his intoxication on the evening of April 13, 2004 support plaintiff’s claim for punitive damages.

A. There is sufficient evidence upon which a jury could conclude that Hammond’s intoxication caused the crash rather than a mere sneeze.

Both the independent emergency room treating physician as well as plaintiff’s forensic expert, Dr. Safferstein, concluded that defendant was intoxicated at the time of the accident. Unlike many states, New Jersey does not have a *per se* rule that driving while intoxicated alone

will entitle a plaintiff to a punitive damages award. However, a drunk driving case that is accompanied by one or more aggravating factors is enough to allow the claim to go to the jury. *Dong v. Alape*, 361 N.J. Super. 106, 119-120 (App. Div. 2003).

The evidence reveals that defendant Hammond was taken to Riverview Medical Center immediately following the accident. In the history taken from Hammond at the hospital, he told the physician he, "Had 6 beers tonight." Furthermore, the physical exam section the doctor wrote, "intox" and he was scheduled for a medically related blood alcohol test (which was later cancelled by hospital staff). In addition to the blood alcohol test scheduled by hospital staff, the nursing triage notes revealed a notation, "Holmdel or Colts Neck PD to come to ER for lab ETOH." ETOH refers to the police's forensic blood alcohol test. (*Exhibit C, Hammond Emergency Room Record*). As is clear from a review of the hospital records, several notations are made regarding the Mr. Hammond's intoxication.

The notations regarding Mr. Hammond's intoxication were corroborated at the subpoenaed deposition of Dr. Alan Lemansky, the attending emergency room physician on the night of the crash. Dr. Lamansky testified as to defendant Hammond's condition on the night of the collision and the curious circumstances surrounding what the police report said caused the accident:

Q. Taking a look at one of two of the ED record could you explain what that shows with respect to alcohol?

A. Yes. During my history taking portion of this person's examination he admitted to me to having drunk -- having drunk six beers during that evening.

Q. Okay. And what were you able to determine when you examined the patient about being under the influence of alcohol besides him telling you that he had six beers tonight?

A. I noted in the physical exam portion of the evaluation I circled as abnormal his affect as appropriate, which means that the affect was inappropriate, and he

appeared to be clinically intoxicated.

Q. And what, if anything, did you see or smell that lead you or leads you to that conclusion?

A. In addition to his behavior, which appeared intoxicated, I also noted the odor of alcohol on his breath.

(Exhibit D, Deposition of Dr. Lemansky at 8-9)

Q. Okay. And I want to talk a little bit about -- we talked about how the triage notes indicate that the Holmdel or Colts Neck PD were going to come to the ER for lab results and then ultimately they did not come with the alcohol kit and it wasn't -- again, if you can, based on your experience in a situation like this where a person is suspected of being under the influence of alcohol and a serious accident having occurred, what is the practice and procedure that you've experienced that the police will do in terms of investigating and gathering evidence in that scenario?

...

A. It is my experience that as a routine through my interactions with many police departments that if there's any reason for an intoxicant to play a role in an automobile accident, or for that matter other situations such as an industrial accident, that -- that the police are very aggressive and get blood alcohol levels as a routine.

Q. And would you -- would you say that the fact that it was ultimately not done in this case by the police, although it's indicated there, would you characterize that as a normal usual event, unusual or how would you characterize that?

A. I would characterize that as an extremely unusual event and in fact, perhaps an oversight, maybe even a dereliction of duty.

(Exhibit D, Deposition of Dr. Lemansky at 20-22).

According to Richard Safferstein, Ph.D, Chief Forensic Scientist for the State of New Jersey who reviewed evidence in this matter, James Hammond was under the influence of alcohol at the time of the accident. That intoxication would have significantly reduced his sense of judgment and motor functions and impaired his ability to drive his motor vehicle in a trouble free and careful manner. Mr. Hammond's alcohol-induced state markedly reduced his ability to take normal and prudent precautionary measures and was the proximate cause of the crash.

(*Exhibit G, Report of Richard Safferstein, Ph.D.*) Accordingly, the evidence reveals and a jury could likely conclude that defendant Hammond was intoxicated on the night of the accident and that intoxication was the true cause of the accident, not a sneeze.

B. Defendant Hammond’s knowledge and experience as a veteran police officer coupled with the concealment of his intoxication and taking advantage of the “Blue Wall of Silence” constitute aggravating factors sufficient to support a claim for punitive damages pursuant to N.J.S.A. 2A:15-5.12.

Although a defendant’s intoxication, standing alone, is not sufficient to support a punitive damages award, a plaintiff can be entitled to punitive damages if she establishes, by clear and convincing evidence, that defendant was intoxicated, that his intoxication was a cause of the accident, *McMahon v. Chryssikos*, 218 N.J. Super. 571 (Law Div. 1986). Moreover, plaintiff must establish that one or more separate aggravating circumstances were present to establish that defendant’s conduct was accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by his conduct. *Dong v. Alape*, 361 N.J. Super. 106, 120 (App. Div. 2003).

In *Dong*, a negligence action arising from a automobile-pedestrian collision involving an allegedly intoxicated motorist, the Appellate Division held that aggravating factors existed to warrant submission of plaintiff’s punitive damages claim to the jury. Some of the aggravating factors the Appellate Division found to support plaintiff’s punitive damage claim included the defendant motorist’s drinking of an unknown quantity of alcohol on the day of the accident, his driving at an excessive speed, in erratic manner, on busy street during rush hour traffic just prior to the accident, the hit-and-run nature of the accident, his exhibition of signs associated with intoxication when stopped in traffic immediately after the accident, and his inability to remember

the accident. *Id.* at 121-22.

Aggravating circumstances must be evaluated on a case-by-case basis. *McMahon, supra*, at 580. Such circumstances must demonstrate a wanton and willful disregard of persons who foreseeably might be harmed by defendant's conduct. *N.J.S.A.* 2A:15-5.12a. The Appellate Division in *Dong* examined the *non-exclusive list* of circumstances prescribed by the Punitive Damages Act, *N.J.S.A.* 2A:15-5.12a, to determine whether the plaintiff was entitled to punitive damages. These circumstances include the *likelihood*, at the relevant time, that serious harm would result from the defendant's conduct, *N.J.S.A.* 2A:15-5.12b(1), the defendant's *awareness* of reckless disregard of the likelihood that serious harm would arise from his conduct, *N.J.S.A.* 2A:15-5.12b(2), and any *concealment* by the defendant of his conduct, *N.J.S.A.* 2A:15-5.12b(4)(*emphasis added*). As such, the Court in *Dong* concluded that the aggravating factors for which a sufficient evidential basis existed on the record warranted submission of plaintiff's punitive damages claim to the jury. *Id.* at 122.

In this instance, defendant Hammond was clearly aware that his reckless disregard of the likelihood that the serious harm at issue would arise as a result of driving while intoxicated. Having been an officer for some 25 years, defendant had extensive training as it relates to the influence of alcohol on a person's ability to safely operate a motor vehicle. He himself has investigated countless motor vehicle accidents and alcohol-related crashes. (*Exhibit J, 7/23/07 Hammond Deposition at 16-20*). He admitted to the hospital staff that he drank six beers that night and he was visibly intoxicated as documented by the health professionals. (*Exhibit C, Hammond Emergency Room Record*). No one forced him to drink and drive and certainly, more than most other individuals, Hammond was intimately aware of the likelihood that serious harm

can result from driving under the influence. His conscious choice to nevertheless do so in the face of that shows his reckless disregard for the harm he was likely to cause.

The conduct of the defendant after drinking and crossing the center line, and his attempted concealment of his actions is most troubling. At the scene defendant apparently concealed his conduct from the investigating Officer Matthews. He concocted the wild story that a single sneeze caused this catastrophic head on collision to conceal his being under the influence. Moreover, Hammond did not even receive so much as a ticket for careless driving as a result of this serious crash; in which he clearly was at fault - crossing the center line. This allegedly “*inadvertent oversight*” by Officer Matthews is just a small piece of this incredulous story of which defendant is part and parcel. (*Exhibit L, Certification of Officer Matthews*).

Hammond’s troubling concealment continued beyond the accident scene to the present day. The evidence strongly suggests he abused his law enforcement connections to avoid the gathering of critical forensic blood alcohol evidence and partook in the above documented scheme to avoid prosecution. The “term ‘blue wall’ is common parlance for police officers’ reluctance to incriminate their fellow officers.” *State v. Morais*, 359 N.J. Super. 123, 132 (App. Div. 2003); *citing e.g., Ricciuti v. New York City Transit Authority*, 70 F. Supp.2d 300, 333-334 (S.D.N.Y. 1999) (recognizing that the “blue wall of silence is a ‘distressing familiar phenomenon’” arising “when a police officer is charged with misconduct and other members of the squad remain mute, despite their personal knowledge of the facts.”); *see also, Simon v. City of Naperville*, 88 F. Supp. 2d 872, 876 (N.D. Ill. 2000)(blue wall of silence is a well established phenomenon). In the instant matter, discovery has revealed the sobering truth, that defendant Hammond took advantage of the “blue wall of silence”, to conceal his actions from plaintiff and

the public at large.

Throughout discovery, defendant Hammond gave multiple different version of what he did or did not tell the investigating officer (Officer Brian Matthews) and the medical personnel at the hospital. At his first deposition he testified he did not remember speaking to the investigating officer at all at the scene. (*Exhibit B, 4/12/06 Hammond Deposition at 36*). However at his second deposition, in July 2007, Hammond testified that he did in fact speak with Officer Matthews at the scene and “told him exactly what happened.” (*Exhibit J, 7/23/07 Hammond Deposition at 15*). Yet, only 6 pages later Hammond testified he did not remember speaking with Matthews at all at the scene. (*Exhibit J, 7/23/07 Hammond Deposition at 22*)

At one point in his deposition Hammond testified that he never told the hospital personnel that he had 6 beers that night. (*Exhibit J, 7/23/07 Hammond Deposition at 31*). Then later defendant Hammond testified that he did not remember one way or the other whether or not he even spoke to the hospital staff:

Q Do you remember if you spoke with anyone in the hospital? Do you have a recollection of that?

A No.

(*Exhibit J, 7/23/07 Hammond Deposition at 15*). Yet, when asked at his first deposition if he told the hospital personnel his story about the sneeze Hammond testified, “I’m sure I did.” (*Exhibit B, 4/12/06 Hammond Deposition at 19*)

Hammond also concealed his actions of having caused the accident under the influence of alcohol to the investigating authorities. Specifically, officer Matthews testified that defendant

Hammond denied that he had anything to drink that night³. (*Exhibit K, Deposition of Officer Matthews at 44-47, 93, 81-82*).

While it is undisputed that this accident happened in Colts Neck some two miles away from the Holmdel border, for some unexplained reason, Patrolman Foley of the Holmdel police department, responded to the scene and rendered “assistance.” (*Exhibit K, Deposition of Officer Matthews at 34, 35, 86*) (*Exhibit J, 7/23/07 Hammond Deposition at 26, 28*). Shortly thereafter, Holmdel Detective, James Smythe received a phone call from Holmdel police directing him to go to the hospital extract Hammond from the scene before further evidence about this alcohol induced crash could be gathered. (*Exhibit J, 7/23/07 Hammond Deposition at 26-28*)(*Exhibit M, Deposition of Detective Smythe at 12, 14 -15*).

Accordingly, the certified hospital records reveal Hammond was intoxicated and that the “Holmdel or Colts Neck PD to come to ER” to conduct forensic blood alcohol testing. (*Exhibit C, Hammond Emergency Room Record*). While, Detective Smythe was dispatched to the hospital by the Holmdel Police, he took absolutely no steps to gather evidence of the alcohol intoxication that was documented by the hospital staff and instead signed Hammond out of the hospital and took him home. (*Exhibit M, Deposition of Detective Smythe at 45-46*). Notably, none of the characters deposed- neither Mr. Hammond, Officer Matthews nor Detective Smythe- were able to explain as to how all the hospital personnel involved knew Hammond was intoxicated, it was written that the Holmdel or Colts Neck were to come and do forensic blood work, yet it was never done. None of them had any explanation for those admittedly highly

³ Defendant Hammond admitted during his second deposition that he had in fact been drinking on the evening of April 13, 2004.

unusual facts:

Q ...My question to you is: Can you explain here how the medical records, you know, appear to have up and down indication that he was clinically intoxicated, that it was actually even referenced that the Colts Neck or Holmdel police were to come to the emergency room to do lab blood tests, can you explain any of this?

A I need the question again.

MR. CLARK: Could you read that back? (Whereupon, the testimony was read back as requested.)

A I can't explain that.

(Exhibit K, Deposition of Officer Matthews at 72-73)

Q Well, is that your experience, that generally speaking, that the police are very aggressive when they feel alcohol has been involved in an automobile accident where there's injury and that they would take steps to get blood alcohol readings?

A Yes.

Q We also noted in the medical records that -- and I guess we can do this from Dr. Lemansky's deposition on page 16. And it's line 13.

"Question: All right, if we can turn to the triage note in the hospital record, what does this indicate here about alcohol or any alcohol testing that is done?"

And the answer is: "Well the triage nurse who first saw the patient said the patient was brought in by the rescue squad on the stretcher which is how I found him. ...The nurse also noted that there was -- she made a notation of ethyl. Whether or not there was -- well, it's actually under findings/comments. Evidently she got that information by observing the patient rather than having the patient tell her. So she observed the patient, appeared to be alcohol intoxicated, and she also made a notation here that Holmdel and Colts Neck, I guess the accident took place in Colts Neck. It may have been Holmdel Rescue Squad that brought the patient to the hospital, maybe due to the unavailability of Colts Neck First Aid personnel. But she did note that the Holmdel or Colts Neck Police were to come to the ER to do a legal ethanol draw."

And my question to you is: Can you explain why that wasn't done in this case?

A No.

Q Do you think it had anything to do with the fact that Mr. Hammond was a police officer?

A I have no idea.

(Exhibit M, Deposition of Detective Smythe at 41-43)

Q My question to you is: Would you agree with that general statement that if there's any suspicion of alcohol intoxication involvement in the accident, that the police are very aggressive and get blood alcohol levels as a routine? Do you agree with that general statement?

A Yes.

Q Can you explain why that wasn't done here when even, you know, you say that you had, in fact, had three beers that night? Can you explain why that wasn't done here?... Do you know why the blood test wasn't done?

THE WITNESS: No....No, I can't.

(Exhibit J, 7/23/07 Hammond Deposition at 64-65)

What is clear from the evidence gathered in this case is the disturbing realization that the “blue wall of silence” is alive and well in Monmouth County.

Based on the foregoing, plaintiff has submitted sufficient evidence to support her claim for punitive damages. As the Appellate Division has stated:

The need to deter driving while intoxicated is great. Too many innocent victims are killed or maimed on our highways with regularity by drunk drivers. We have described the drunk driver as “one of the chief instrumentalities of human catastrophe.”

Dong v. Alape, 361 N.J. Super. at 122. That the drunk driver in this case happened to be an officer of the law who is sworn under oath to enforce the drunk driving laws is another aggravating factor warranting punitive damages. Discovery has revealed through the deposition of 3 police officers from two jurisdictions that Hammond exploited (and continues to exploit) his law enforcement connections to avoid criminal prosecution for his actions. It would be perhaps an even greater injustice and further damaging to the public’s confidence in the system to allow him to also avoid punitive civil justice for his actions.

II. DEFENDANT HAMMOND'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED SINCE A GENUINE ISSUE OF MATERIAL FACT EXISTS

In *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 523 (1995), the Court held that a trial court should make the same type of evaluation of evidential materials in ruling on a motion for summary judgment as in ruling on a motion for judgment under Rule 4:37-2(b) or Rule 4:40-1 or a motion for judgment notwithstanding the verdict under Rule 4:40-2. The standard is "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Id.* at 523.

This is the same standard adopted by the Supreme Court of the United States in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "[T]he essence of the inquiry" under this standard is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Brill*, *supra*, 142 N.J. at 536, 666 A.2d 146 (quoting *Anderson v. Liberty Lobby, Inc.*, *supra*, 477 U.S. at 251-52, 106 S.Ct. at 2512, 91 L.Ed.2d at 214). Under this standard genuine "[c]redibility determinations ... continue to be made by a jury and not the judge." *Id.* at 540, 666 A.2d 146.

Although Rule 4:46-5(a) states that the mere allegations or denials of pleadings are not evidence which can defeat a motion for summary judgment, there is no particular form of evidential material that either party to a summary judgment is required to present. Rule 4:46-2(a) states that a motion for summary judgment may be submitted "with or without supporting affidavits, and Rule 4:46-2(c) provides that the motion shall be granted "if the pleadings, depositions, answers to

interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged."

Similarly, a party may defeat a motion for summary judgment by demonstrating that the evidential materials relied upon by the moving party, considered in light of the applicable burden of proof, raise sufficient credibility issues "to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill*, supra, 142 N.J. at 523, 666 A.2d 146; *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160, 90 S.Ct. 1598, 1609-10, 26 L.Ed.2d 142, 155 (1970) ("Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented)."

CONCLUSION

_____ For the foregoing reasons, Defendant Hammond's Motion for Summary Judgment should be denied. _____

_____ Respectfully submitted,

SARAH K. DELAHANT

Dated: April 7, 2009