LINDA B. BREHME; **Plaintiff-Appellant,** **v.** **THOMAS IRWIN; NEW JERSEY MANUFACTURERS INSURANCE COMPANY; JOHN DOES 1-5; ABC CORPORATIONS 1-5,** **Defendants-Respondents;**	**SUPERIOR COURT OF NEW JERSEY** **APPELLATE DIVISION** **Docket No: A-3760-21** **Civil Action** **ON APPEAL FROM:** **SUPERIOR COURT OF NEW JERSEY** **BERGEN COUNTY-LAW DIVISION** **Docket No.: BER-L-7134-18** **Sat Below:** **The Honorable Robert C. Wilson, J.S.C.**

BRIEF OF PLAINTIFF/APPELLANT LINDA BREHME

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Preliminary Statement

This is a hard impact rear end auto crash trial where plaintiff Linda Brehme sustained significant injuries to her spine and wrists. She required extensive medical treatment including a spinal fusion. At trial plaintiff presented the video testimony of Dr. Joshua Landa, a spine surgeon, and Dr. Richard Kim, a wrist specialist. They both testified within a reasonable degree of medical probability that her symptoms would continue and that it is reasonably probable she will need ongoing medical treatment into the future. The total amount of estimated future medical expenses testified to by Drs. Landa and Kim was $236,250.

New Jersey Model Jury Charge 8.11I specifically permits a jury to award future medical expenses in these situations. *M.J.C.* 8.11I ("If it is reasonably probable that plaintiff will incur medical expenses in the future then you should also include an amount to compensate the plaintiff for those medical expenses.") The testimony of both Drs. Landa and Kim were directly in line with this jury charge and the underlying case law. But the trial judge disregarded it all and before hearing any evidence, barred the claim because, "future medical expenses here are speculative." (1T at 52). Plaintiff had an auto insurance policy with $250,000 in PIP medical benefits. But about $150,000 of that was exhausted before the insurance company cut her off. In 2019 the Supreme Court interpreted *N.J.S.A.* 39:6A-12 to say that whenever there are PIP medical benefits, medical bills are never admissible in an auto trial, even if the medical bills exceed the amount of PIP coverage. In other words, if a plaintiff

incurred $100 in medical bills, but only had $25 in available PIP coverage, the plaintiff could not claim that $75 shortfall at trial. *Haines v. Taft*, 237 N.J. 271 (2019).

To correct this obvious unfairness, after *Haines* the Legislature amended *N.J.S.A.* 39:6A-12 to unambiguously state that any medical bills beyond available PIP benefits are collectible at trial. Despite this, the trial judge here disregarded the amended version of *N.J.S.A.* 39:6A-12 and further barred the claim for future medical bills because, "*N.J.S.A.* 39:68-12 specifically states that all uncompensated medical expenses not covered by Personal Injury Protection Limits applicable to the injured party are not compensable and not admissible." (1T at 52). In fact *N.J.S.A.* 39:6A-12 states the exact opposite. *N.J.S.A.* 39:6A-12 ("Nothing in this section shall be construed to limit the right of recovery...of uncompensated economic loss...including all uncompensated medical expenses...All medical expenses that exceed, or are unpaid or uncovered by any injured party's medical expense benefits personal injury protection limits...are claimable by any injured party...")

This was a verbal threshold trial. The jury found Linda Brehme sustained permanent injury and awarded her $225,000 in pain and suffering and $50,000 in past lost wages for a total of $275,000. The jury was specifically told they were not to award any future medical expenses, even though they heard that testimony from Drs. Landa and Kim. As a result, Linda will have to pay for her future medical care from this crash through Medicare (assuming it's even available). Under the Medicare lien

statute, 42 U.S.C. §1395, she will likely have to reimburse Medicare back the $236,000 in future medical care out of the $275,000 verdict, leaving her a paltry $39,000 in compensation (in reality zero given costs and counsel fees) for this heavy rear end spinal fusion crash.

The trial court erred in barring the claim for future medical bills. The claim is permitted under Model Jury Charge 811(I) and *N.J.S.A.* 39:68-12. It was supported by competent expert medical testimony. Doing so resulted in a stark unfairness and a windfall for the defense which could not offer anything legitimate to support barring the claim.

Despite several requests, the trial judge declined to memorialize his rulings in an order. This required appellate motion practice and an order to proceed without it. The decision should be reversed and the matter remanded for a new trial limited to the issue of future medical expenses.

Procedural History/Statement of Facts[1]

The Complaint was filed on October 5, 2018. (Pa1 to 4). Trial started on June 20, 2022 in Bergen County before the Hon. Robert C. Wilson, J.S.C. On June 20, 2022, without hearing any evidence, the trial court *in limine* barred plaintiff's claim for future medical expenses concluding it was speculative. (Pa39-52)[2] (1T52:3-53:7). The Court ruled:

> The Court has to rule about future medical expenses. Future medical expenses are not compensable, where certainly the PIP hasn't been exhausted. In fact, future medical expenses here are speculative. There is more coverage. We would get into that area that I've been already urged not to do, which [sic] to speculate.

(1T52:3-9).

On June 27, 2022, the trial court denied plaintiff's renewed application to permit future medical expenses which was made after the evidence about it was heard. The judge's reasoning was that such claims could not be permitted because then everyone would make the claim in every case. (Pa53-65) (4T8:19-22).

The jury heard testimony and saw photographic evidence depicting the extensive and total loss damage to the vehicles. (Pa66-69). They also heard testimony about Linda Brehme's (1) lack of ongoing treatment to her spine for 23 years prior to

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[1]Due to the simplicity of this appeal and to avoid unnecessary repetition, the Procedural History and Statement of Facts sections have been combined.

[2]Appellant's appendix includes briefs submitted to the trial court, as permitted by *Rule* 2:6-1(a)(2), as the trial court did not issue an Order and it is anticipated that there may be an issue of what was raised at the trial level.

the crash; (2) no problems, treatments or complaints about low back prior to the crash; (3) no problems or treatments to her wrists prior to crash; (4) immediate complaints of pain at the crash site and; (5) emergency room visit via ambulance. There was also testimony that after the crash Linda underwent 12 MRIs, 13 x-rays, 10 CT scans, 2 EMGs, spent 20 days in the hospital, attended 57 doctor's visits, 77 medical appointments and 241 physical therapy visits just to try to get better. (4T76:1-108:12).

The jury also heard testimony that due to her significant low back pain, Linda underwent a complex anterolateral discectomy and fusion to her lumbar spine. There was also testimony that down the road she will probably need wrist surgery. In sum, the expert medical testimony was that as a direct result of this crash, Linda's probable future spine treatment will cost $258,750 and her probable wrist treatment $10,000, all in today's dollars, not adjusted for inflation. (P73) (P74-78) (P79-83).

On June 28, 2022, the jury found that Linda Brehme sustained permanent injuries and awarded $275,000 (i.e. $225,000 for pain, suffering, disability, impairment and loss of enjoyment of life, and $50,000 for past lost wages). (Pa85-86)[3]. On or about July 7, 2022, the trial court entered an Order for Judgment in the amount of $311,435.59 (inclusive of interest).(Pa5 to 6). A Warrant to Satisfy Judgment was entered on August 8, 2022. (Pa84). Plaintiff/Appellant filed its Notice of Appeal and Case Information Statement on August 11, 2022.[4]

[3] 1T, June 20, 2022; 2T, June 21, 2022; 3T, June 22, 2022; 4T, June 27, 2022; 5T, June 28, 2022

[4]

However, said filing was marked deficient as the trial judge declined several requests to enter a written order. On or about August 29, 2022, Appellant filed a motion to proceed with its appeal without a written order. (Pa6 to 15) (Pa16 to 37). The motion was granted and a briefing schedule issued. (Pa38).

Plaintiff/Appellant Linda Brehme now seeks a reversal of the decision barring the claim for future medical expenses and a new trial limited to this issue.

It is entirely permissible for a plaintiff to accept a partial judgment and appeal the denial of a different element of damages claim. *Guarantee Ins. Co., v. Saltman,* 217 N.J. Super. 604, 609 (App. Div. 1987) ("[W]e reject Guarantee's contention that defendants, having executed upon and obtained satisfaction of the judgment in the amount of $11,248.80 is estoppped from pursuing this appeal. The 'acceptance of the sum found by the trial court to be due, and [the]delivery of a warrant for satisfaction while [defendants] at all times continued to assert that an additional sum was due, was in no wise inconsistent and furnished no real basis for an estoppel.)' *Adolph Gottscho, Inc., v. American Marking Corp.,* 26 N.J. 229, 242 (1958). (A party may accept the sum to which he is in any event entitled and still pursue a request for a determination on appeal which would increase that sum.")

Legal Discussion

I. Future Medical Expenses Are Recoverable In Personal Injury Cases, Including Auto (1T52:3-7;4T8:19-22)

The trial judge disregarded both the *Model Jury Charge* and case law in barring the claim for future medical expenses. Under the *N.J. Model Civil Jury Charges*:

> Plaintiff has a right to be compensated for any **future medical expenses** resulting from the injuries brought about by defendant's wrongdoing.
>
> If it is reasonably probable that plaintiff will incur medical expenses in the future then you should also include an amount to compensate the plaintiff for those medical expenses. In deciding how much to award for future medical expenses think about the factors mentioned in discussing the nature, extent and duration of plaintiff's injury. Also consider plaintiff's age today, his/her general state of health before the accident, and how long you reasonably expect the medical expenses to continue. Obviously, the time period covering plaintiff's future medical expenses cannot go beyond that point when it is expected that he/she may recover from his/her injuries. You should also consider the plaintiff's life expectancy in assessing future medical expenses.

N.J. Model Civil Jury Charge § 8.11(I) (citing *Coll v. Sherry*, 29 N.J. 166, 174 (1959)) (bold added). A claim for future medical expenses in an automobile incident has been expressly approved by the Supreme Court. *See Coll,* 29 N.J. at 169.

Nothing in the Model Civil Jury Charge says a plaintiff who might have some PIP coverage left over cannot claim future medical expenses, including where, as here, the PIP carrier has cut off its insured from any further benefits. In fact, the PIP carrier was not a party to this suit and neither the propriety of its decision to cut off Linda Brehme nor the need for future treatment was litigated in any forum.[5] To the contrary

[5] Despite the unsupported statement by defense counsel (1T48:6-49:11), Clark Law Firm's retainer with Linda Brehme has always been limited to this personal injury case and at no time did we represent her in connection with any PIP matters.

plaintiff presented trial testimony from two Board Certified physicians there is a reasonable probability of future medical treatment and the estimated cost of that. It is well settled law that a plaintiff can recover these damages. *See e.g. Coll, supra,* at 174; *Kimble v. Degenring*, 116 N.J. L 602, 604 (1936); *see also Parker v. Esposito*, 291 N.J. Super 560, 567 (App. Div.) *certif. den.*, 146 N.J. 566 (1996).

Defendant is wholly unable to cite any law for the proposition that a jury should not be allowed to award future expense damages where the plaintiff had previously been cut by the PIP insurance company. The PIP carrier has never been a party to this suit and there is no evidence nor finding as to the propriety of its decision to stop paying for her medical treatment. Even if they did not cut her off, her future medical expenses exceed- by about $136,000- the amount left on the PIP policy before she was cut off. Either way, barring the claim for future medical expenses was wrong.

Here Appellant Linda Brehme was severely injured from a hard rear-end crash. She presented competent expert evidence about her probable need for future medical care, including surgery. The court erred in barring that claim.

a. The Court Erred in Ruling Future Medical Expenses are Speculative and the Testimony of Appellant's Physicians, Dr. Landa and Dr. Kim, Was Directly In Line With *Model Civil Jury Charge* 8.11(I)(1T43:22-52:2)

The trial court ruled that future medical expenses would be speculative on a motion in limine (1T52:6-7) before hearing any evidence ruling:

> In this case, in effect, we would be repealing the no-fault insurance law and that in all cases where there is speculation of future medical needs and treatment, that issue would then go to all jurors because it will always be argued that there are residual effects from the automobile accident that will require future medical and certainly, that is not the law in this State right now.

(4T8:23-9:5). However, a claim for future medical expenses cannot be made in every case. The claim has to be supported by the evidence and expert testimony. Contrary to the trial judge's finding, future medical expenses are not *per se* speculative. They are permitted under the rubric of *Model Jury Charge* § 8.11(I) and *Coll v. Sherry*, 29 N.J. 166, 174 (1959) upon which the charge it is based.

Plaintiff presented expert medical evidence from Drs. Joshua Landa and Richard Kim. They explained in detail her serious medical injuries from the crash and the probable need for and cost of related future treatment. This evidence meets the standard of *N.J. Model Civil Jury Charges* 8.11(I). Dr. Kim testified:

> Q. And what treatment do you think [Linda] will probably need or will probably need in the future to treat the injuries from this crash?
> A. She will likely need surgery at least for her carpal tunnel syndrome.
> ...
> Q. ...And what is the estimated cost of the tunnel release surgery that you explained before in terms of the surgeon's fees, the facility and the anesthesiology?
> A. Carpal tunnel syndrome surgery, about five to ten thousand dollars.

(Pa75-79). Dr. Kim further detailed what the surgery entails with the help of a demonstrative exhibit and connected the injury to the crash. *Id.* at 22:22-26:22.

Dr. Joshua Landa was asked:

> Q. [P]lease explain what future [you] would recommend she have that she would benefit from and/or that's probable that will need or should get in the future and the estimated cost of that.

(Pa79-83). Dr. Landa then went into detail describing the physical therapy, diagnostic testing, doctor follow-ups, and injections Linda would probably need, the frequency of this care, and the estimate cost of same. *(Pa79-83)*. This was not speculation. All his opinions were within a reasonable degree of medical probability. *(Pa79-83)*. If anything, given the testimony was in today's dollars and not increased for inflation, the numbers are low.

The future medical expenses here are not speculative, but readily derived from the testimony of both Drs. Kim and Landa which was within a reasonable degree of medical probability. Regarding Linda's wrist, she will probably need surgery costing about $10,000. Dr. Landa testified that Linda will need physical therapy 2-3 times a year, diagnostic testing, follow ups with her doctors, and spinal injections 3 times a year. This will cost Linda approximately $12,500 a year in medical treatment. (*Pa56-65) (1T41:12-53:7) (4T4:14-9:8).*

According to the New Jersey life expectancy chart, Linda was 64 years old at the time of the crash and had a life expectancy of 20.7 years. Linda was receiving treatment until July 24, 2019 when her PIP carrier refused to pay for any more care. (4T6:14-21). Subtracting the time Linda was receiving benefits, there remains 18.1

years of future medical expenses. Using this, the estimated future medical expenses Linda Brehme will need from being slammed in the rear total $236,250.00. *(Pa56-65) (1T41:12-53:7) (4T4:14-9:8).*

$236,250.00 in future medical expenses was not the product of speculation. It was based upon a reasonable degree of medical probability by two experts, exactly as the Model Jury Charge contemplates. *M.J.C. 8.11(I)*. Despite the law, trial court expressed something of a philosophical disagreement with the concept of an innocent plaintiff being compensated for the cost of future care because otherwise:

> [I]n all cases where there is speculation of future medical needs and treatment, that issue would then go to all jurors because it will always be argued that there are residual effects from the automobile accident that will require future medical and certainly, that is not the law in this State right now.

(4T8:23-9:5). This negative circular reasoning is not in line with the law and should be reversed.

Essentially the trial judge ruled there can never be a future medical expense claim in an automobile crash because then everyone would make such claims. For starters, as was demonstrated, this claim was not speculative.

Second, there is not in fact future medical expense claims in all auto cases and doing so in the absence of evidence would be subject to sanctions. Third, if this were in fact valid reasoning, then there would be no need for a future medical expense model charge. And fourth, under this reasoning there should never be any future

medical bills claim in any case, because if such is permitted it will always be made. Trial courts are supposed to follow well settled Supreme Court precedent. *Coll v. Sherry*, 29 N.J. 166, 174 (1959) (future medical expenses are permitted in personal injury auto cases).

The whole purpose of tort law is to compensate those injured by the negligence of others, and thereby encourage responsible conduct. *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 448 (1993); *see also Prosser and Keeton on Torts* § 4 (5th Ed.1984) (noting that "prophylactic" factor of preventing future harm is a primary consideration in tort law). So when someone is minding their own business at a stop light, slammed in the rear, and will probably incur future medical expenses, they should be allowed to recover that. *Coll*, 29 N.J. at 174 (1959); *M.J.C. 8.11(I)*

The trial court ruling here throws the baby out with the bath water, goes against well settled law, and should be reversed. There should be a new trial limited to future medical expenses.

II. The Trial Court Erred in Ruling *N.J.S.A.* 39:6A-12 Bars Any Claim for Medical Expenses Not Paid by PIP Because the Statue Says the Exact Opposite. (1T43:22-52:2)

N.J.S.A. 39:6A-12, as amended in 2019 in response to *Haines v. Taft*, 237 N.J. 271 (2019), clearly states in pertinent part:

§ 39:6A-12. Inadmissibility of evidence of losses collectible under

> **personal injury protection coverage [As amended by L. 2019, c. 244, § 1]**
>
> Nothing in this section shall be construed to limit the right of recovery, against the tortfeasor, of uncompensated economic loss...including all uncompensated medical expenses not covered by the personal injury protection limits applicable to the injured party and sustained by the injured party. All medical expenses that exceed, **or** are unpaid **or** uncovered by any injured party's medical expense benefits personal injury protection limits, regardless of any health insurance coverage, are claimable by any injured party as against all liable parties, including any self-funded health care plans that assert valid liens.

N.J.S.A. 39:6A-12 (emphasis added). However, the trial judge here ruled the exact opposite:

> The Court is mindful that *N.J.S.A.* 39:68-12 specifically states that all uncompensated medical expenses not covered by Personal Injury Protection Limits applicable to the injured party are not compensable and not admissible.

(1T52:10-14). This was clear error and should be reversed. Indeed, *N.J.S.A.* 39:6A-12 "was intended to ensure that an 'injured person who was the beneficiary of the PIP payments could not and should not recover from the tortfeasor the medical, hospital and other losses for which he had already been reimbursed.'" *N.J. Transit Corp. v. Sanchez*, 242 N.J. 78, 93 (2020) (quoting *Cirelli v. Ohio Cas. Ins. Co.*, 72 N.J. 380, 387 (1997)) (underline added).

Even before the Legislature amended the statute in 2019 in response to *Haines* to unambiguously state that any medical bills beyond available PIP benefits are collectible at trial, New Jersey courts considering *N.J.S.A.* 39:6A-12 had traditionally

followed this common sense approach, including as to future medical expenses. *See Wise v. Marienski*, 425 N.J. Super. 110 (Law Div. 2011) (holding *N.J.S.A.* 39:6A-12 does not preclude recovery of medical expenses beyond those collectible or paid under standard personal injury protection plans, thus evidence pertaining to a plaintiff's medical expenses above those payable to PIP is admissible); *Pitti v. Astegher*, 133 N.J. Super. 145, 148-49 (Law. Div. 1975) ("[i]n the event the jury finds from appropriate medical testimony that such future medical and hospital expenses are reasonably required ... it may award damages for future medical and hospital expenses."); *Munoz v. Langer Transport Corp.*, 2005 WL 2447880 (App. Div. 2005) (holding that future medical expenses recoverable in automobile injury case).

The evidentiary standard for determining such future medical expenses had always been reasonable probability, as enumerated in *Coll v. Sherry*, 29 N.J. 166 (1959); *see also Kimble v. Degenring*, 116 N.J.L. 602, 604 (1936). In *Coll*, the court determined that "[i]f the prospective consequences may, in reasonable probability, be expected to flow from the past harm, plaintiff is entitled to be indemnified for them." *Id.* at 175. A claim for future medical expenses applies in the context of an automobile collision, which was the case in *Coll*. *Id.* at 169. The amount of such a damage award may be determined by a jury based on the evidence presented of the reasonable probability that future treatments may be required. *Pitti, supra*, at 149; *see also see*

also Munoz v. Langer Transport Corp., 2005 WL 2447880 (App. Div. 2005) (holding that future medical expenses recoverable in automobile injury case).

a. Linda Brehme Does Not Have An "Immutable Right" To PIP which Cut Her Off and Regardless There Is Only About $100,000 Left, Leaving a $136,000 Shortfall and Barring the Claim Here Directly Violates *N.J.S.A.* 39:6A-12. (1T43:22-52:2)

The possibility that some kind of health insurance might cover future medical treatment is also no reason to bar the claim. In *Puzio v. Mimms*, 2006 N.J. Super. Unpub. LEXIS 821 1(App. Div. 2006) the defendants sought a reduction in a damages award based on the plaintiff's future entitlement to health insurance and other benefits. The Court in *Puzio* held that "'[F]uture collateral benefits are deductible only to the extent that they can be determined with a reasonable degree of certainty.'" *Id.* at 34 (quoting *Parker v. Esposito*, 291 N.J.Super. 560, 567 (App.Div.) (citations omitted), *certif. denied*, 146 N.J. 566 (1996). The Court therefore held:

> Judge Dumont denied defendants' request for a hearing because there was no evidence that plaintiffs' medical insurance was reasonably certain to continue because of the "problems with medical insurance, job loss, job change, [and] constant policy changes." As for social security and other governmental benefits, he found that "while it may be more certain that there will be Medicare and SSI in the future, neither one of those is fixed at this point and there's no indication, frankly, when those things will be fixed." Further, any Medicaid benefits may be subject to a lien or repayment.
>
> We agree with the judge's conclusion that Michael's entitlement to future benefits, either from his parents' health insurance coverage or from governmental programs, was not immutable as of the date of judgment

> in his favor. Because his entitlement to future benefits was not determinable with a reasonable degree of certainty, they do not provide a basis for reduction of the award in this case.

Puzio at 34-35 (underline added). The Court affirmed the trial judge's conclusion that plaintiff's entitlement to future benefits from health insurance coverage was not fixed as of the date of the judgment. *Id.* at 42-43; *see also Fayer v. Keene Corp.*, 311 N.J. Super. 200 (App Div. 1998)(only benefits to be paid post-judgment to which plaintiff has an established, enforceable legal right when judgment entered and not subject to modification based on future unpredictable events or conditions should be treated as offsets; future collateral benefits are deductible only to extent that they can be determined with reasonable degree of certainty).

In analyzing the case, the Court in *Puzio* referred to *Parker*, *supra*, 291 N.J.Super. 560. *Parker* involved a plaintiff pedestrian who was injured when he was struck by the side-view mirror of a van. The jury verdict included $550,000 for future lost income, however, the Court gave defendants credit against judgment for future lost income under the collateral source statute based on future disability benefits the pedestrian would receive. In reversing the Appellate Division held that future collateral benefits are deductible under collateral source statute to the extent they can be determined within a reasonable degree of certainty on the date of the entry of judgment. The Appellate Division in Parker found:

> Applying these principles we conclude that the statute requires deduction of benefits to be received by a plaintiff after judgment. The statute by its terms requires deduction of benefits a plaintiff "is entitled to receive." The statute's purpose is to prevent double recovery, thereby giving some relief from the increasing costs of liability insurance. This purpose is furthered by requiring deduction of future benefits. *See Thomas, supra*, 282 N.J.Super. at 569; *accord Buchman v. Wayne Trace Local School Dist.*, 73 Ohio St.3d 260, 652 N.E.2d 952, 958, *reconsideration denied*, 74 Ohio St.3d 1410, 655 N.E.2d 188 (1995).
>
> We are persuaded, however, that plaintiff's entitlement to future benefits must be determined and fixed when judgment is entered on the verdict. In the present case, the trial court reduced the award for future loss of income by the amount plaintiff is to receive through December 31, 1997 from his former employer's disability policy. The balance of the award is to be held in escrow until a determination, sometime in 1998, of the future benefits, if any, plaintiff will receive through the disability policy or social security. Presumably, there will be periodic reviews of plaintiff's benefit status thereafter. We conclude that court administration of a plaintiff's award beyond entry of judgment is an impractical and unreasonable construction of the statute, and one not intended by the Legislature.
>
> Of course, determining the statutory deductions when judgment is entered, thereby requiring a look into the future, creates the risk of a wrong decision. Anticipated future benefits may not be realized, thereby depriving the injured party of all or part of the jury's award. We are persuaded, therefore, that the phrase "if a plaintiff ... is entitled to receive benefits" refers only to those benefits to be paid post-judgment to which plaintiff has an established, enforceable legal right when judgment is entered and which are not subject to modification based on future unpredictable events or conditions. In other words, future collateral benefits are deductible only to the extent that "they can be determined with a reasonable degree of certainty." *Buchman*, supra, 652 N.E.2d at 958.

Parker at 566-567. (underline added). Similarly here, plaintiff's possible future health

insurance benefits- the only one of which is Medicare- cannot be determined with any degree of certainty. Plaintiff does not today have "an established, enforceable legal right" to any medical benefits years from now. *Parker, supra*, at 567. In the case *sub judice* the PIP carrier will not pay for any more treatment as they cut Linda Brehme off. And even if they did not cut her off, the future bills exceed what would have been left on the policy by about $136,000.

Simply put, the Courts and Legislature made clear long ago that *N.J.S.A.* 39:6A-12 was to cover only those bills which have already been reimbursed by the PIP carrier. The Legislature and the Courts are aware of the potential of future medical expenses arising from a motor vehicle crash and declined to amend *N.J.S.A.* 39:6A-12 to include the words "future," "future medical expenses," or any other words or phrases to foreclose compensation for future medical treatment, despite having recently amended the statute in 2019 in response to the *Haines* decision. And in September 2021, the Note to Judge under Collateral Sources in Model Civil Jury Charge 8.11A was amended to make it even more clear that gross medical expenses are submitted to the jury, subject to molding after the verdict. Specifically, it states:

> *N.J.S.A.* 2A:15-97 places no restriction on a party introducing, for the jury's consideration, evidence of the total amount of medical bills incurred. Any required adjustment in a party's ultimate recovery is to be made by the court, after the jury has considered the full amount incurred. *See Dias v. A.J. Seabra's Supermarket,* 310 N.J. Super. 99 (App. Div. 1998). The methodology set forth in

> *Thomas v. Toys "R" Us, Inc., supra,* is an example of the correct methodology.

Model Jury Charge 8.11A.

Additionally, under *N.J.S.A.* 39:6A-13.1, there is a two year statute of limitations to commence an action for payment of benefits commencing after the last payment of benefits. Here since Linda Brehme was cut-off by PIP on June 24, 2019, the statute of limitations has expired and it will not pay any more medical bills. This is especially so as to future medical treatment plaintiff will probably need. This has not been paid, nor will it be paid, under any PIP policy. Linda Brehme does not have any "immutable right" to future medical benefits now and the trial court's decision should be reversed.

Far from receiving any double recovery (which the PIP and collateral source statutes are meant to avert), here the plaintiff actually has a $236,000 uncompensated loss she was not even allowed to ask the jury for. And even if it were to be paid in the future by Medicare, it would have a lien out of her pain and suffering recovery, leaving her with, for all intents and purposes, nothing.

The Court's ruling regarding future medical issues inexplicably followed *Haines v. Taft*, 237 N.J. 271 (2019), which was superceded by statute. In *Haines* the Court interpreted *N.J.S.A.* 39:6A-12 to not allow excess medical treatment above PIP limits to be sought at trial. *Id.* at 292-293. In closing the Supreme Court invited the Legislature to change it:

> Should the Legislature disagree with our restrained interpretation of its statutory scheme, we invite the Legislature to make its intention to introduce fault-based suits into the no-fault medical reimbursement scheme more explicit.

Haines at 294. The Legislature did so later that same year, amending *N.J.S.A.* 39:6A-12 to now state:

> **Nothing in this section shall be construed to limit the right of recovery, against the tortfeasor, of uncompensated economic loss** as defined by subsection k. of section 2 of P.L.1972, c.70 (C.39:6A-2), including **all uncompensated medical expenses not covered by the personal injury protection limits applicable to the injured party and sustained by the injured party**. **All medical expenses that exceed, or are unpaid or uncovered by any injured party's medical expense benefits personal injury protection limits**, regardless of any health insurance coverage, are claimable by any injured party as against all liable parties, including any self-funded health care plans that assert valid liens.

Ibid. (emphasis added). The trial court below accepted the defendant's invitation to reversible error by following *Haines* and ignoring the statute that superceded it:

> The Court is mindful that *N.J.S.A.* 39:68-12 specifically states that all uncompensated medical expenses not covered by Personal Injury Protection Limits applicable to the injured party are not compensable and not admissible.

(1T52:10-21). *N.J.S.A.* 39:68-12 says the exact opposite. It plainly permits all uncompensated medical expenses not covered by PIP to be introduced and awarded at trial; it was specifically amended to state the exact opposite of Judge Wilson's interpretation.

Parker v. Esposito, 291 N.J.Super. 560, 567 (App. Div.) (citations omitted), *certif. denied*, 146 N.J. 566 (1996) is further instructive that the possibility of some future

medical coverage does not justify barring a future medical expense claim. The *Parker* Court held:

> We are persuaded, however, that plaintiff's entitlement to future benefits must be determined and fixed when judgment is entered on the verdict. In the present case, the trial court reduced the award for future loss of income by the amount plaintiff is to receive through December 31, 1997 from his former employer's disability policy. The balance of the award is to be held in escrow until a determination, sometime in 1998, of the future benefits, if any, plaintiff will receive through the disability policy or social security. Presumably, there will be periodic reviews of plaintiff's benefit status thereafter. We conclude that court administration of a plaintiff's award beyond entry of judgment is an impractical and unreasonable construction of the statute, and one not intended by the Legislature.
>
> Of course, determining the statutory deductions when judgment is entered, thereby requiring a look into the future, creates the risk of a wrong decision. Anticipated future benefits may not be realized, thereby depriving the injured party of all or part of the jury's award. We are persuaded, therefore, that the phrase "if a plaintiff ... is entitled to receive benefits" refers only to those benefits to be paid post-judgment to which plaintiff has **an established, enforceable legal right when judgment is entered and which are not subject to modification based on future unpredictable events or conditions**. In other words, future collateral benefits are deductible only to the extent that "they can be determined with a reasonable degree of certainty." *Buchman*, supra, 652 N.E.2d at 958.

Parker at 566-567. (emphasis added). Similarly here, Appellant has no immutable right to any future health benefit. The $236,250.00 in future medicals exceeds the theoretically remaining PIP coverage of approximately $100,000. So even if PIP theoretically continued paying, and it will not, then plaintiff would still be short $136,250.

The trial court's decision left Appellant with a massive shortfall for the injuries she sustained as a direct result of defendant's negligence. Preventing Appellant from

recovering for these future medical expenses was akin to resurrecting *Haines*. This is neither fair nor just and directly contradicted by the statute that superseded it.

b. *Habick v. Lib. Mut. Fire Ins. Co.*, 320 N.J. Super 244 (App. Div. 1999) Does Not Support Defendant's Position and Has Nothing To Do With The Issues *Sub Judice*.

The trial court's reliance on *Habick v. Lib. Mut. Fire Ins. Co.*, 320 N.J. Super. 244 (App. Div. 1999), at the misguided urging of the defense, was also misplaced. First, the *Habick* matter dealt with plaintiff's "application to vacate or modify a PIP arbitrator's determination that certain medical treatment was not required as a result of accident-related injuries, see *N.J.S.A.* 39:6A-4, and declaring that plaintiff would be bound by that ruling in her pending UM arbitration arising out of the same accident." *Id.* at 245. The case had nothing to do with the question of whether a jury should determine the value of future medical expenses.

Second, the majority of the case dealt with the Court's interpretation of the Arbitration Act, *N.J.S.A.* 2A:24-1 *et seq. Id.* at 248-255. This is a non-issue here. There has been no previous litigation which has determined the extent of Appellant's injuries nor the extent of her future medical costs. This matter is entirely different from *Habick* where binding arbitration had taken place prior to the complaint being filed.

Third, *Habick* does not stand for the proposition that any treatment after an adverse PIP finding should be precluded as defendant said below. (1T48:20-49:17). Instead, it deals with the Court finding that the "law division judge erred in failing to

recognize that the arbitrator's award went beyond the scope of his authority and therefore warrants modification..." *Id.* at 254. Further, the collateral estoppel doctrine is inapplicable as there has never been any kind of PIP litigation nor arbitration finding. *Habick v. Lib. Mut. Fire Ins. Co.*, 320 N.J. Super. 244 (App. Div. 1999) does not in any way support the result below and defendant should not have misstated its import to the trial court.

III. Under 42 *U.S.C.* §1395, Appellant Would Likely Have to Reimburse Medicare for Her Future Medical Expenses out of Her Pain and Suffering Award (1T43:22-52:2)

If any of Linda Brehme's future medical care is paid by Medicare- and she has no other option- then under 42 *U.S.C.* §1395y(b)(2)(B)(ii) she would likely have to reimburse Medicare out of her pain and suffering recovery. With costs and counsel fees, this would as a practical mater leave her with nothing. Moreover, the law allows Medicare the right of action to recover its payments from any entity, including the provider, supplier, physician or Appellant herself. 42 *C.F.R.§ 411.24(g).* Additionally, New Jersey's Collateral Source statute (*N.J.S.A.* 2A:15-97) does not apply because Medicare payments are conditional and federal law preempts state law. *Perreira v. Rediger*, 169 N.J. 399 (2001).

Not even allowing her to claim future medical expenses at trial was the wrong decision. Appellant is not double dipping. To the contrary, she would likely have to pay the $236,000 in future medical bills out of her $275,000 recovery. This is an unfair with

no support in the law. *See also Puzio v. Mimms*, 2006 N.J. Super. Unpub. LEXIS 821 at 34 (App. Div. 2006) (permitting future medical expenses in part because even if there were Medicare benefits, such "may be subject to a lien or repayment.")

The trial court decision resulted in a stark unfairness, an unjustifiably uncompensated loss and a windfall for the defense. This was the very thing the Supreme Court invited the Legislature to correct in the *Haines* decision. *Haines*, 237 N.J. at 294 ("Should the Legislature disagree with our restrained interpretation of its statutory scheme, we invite the Legislature to make its intention to introduce fault-based suits into the no-fault medical reimbursement scheme more explicit.") The Legislature accepted this invitation and amended *N.J.S.A.* 39:6A-12 later that same year. The trial court inexplicably disregarded this and should be reversed.

Conclusion

For all these reasons it is respectfully requested this Court reverse the decision of the trial court which barred the claim for future medical expenses. Defendant has paid and plaintiff has accepted the balance of the jury verdict judgment and provided a warrant to satisfy. As such the new trial should be limited to the issue of future medical expenses only.

Respectfully submitted,
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