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VIA ELECTRONIC FILING
New Jersey Superior Court, Appellate Division
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I.

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Re: Linda B. Brehme v. Thomas Irwin, et al.
Appellate Division Docket No: A-3760-21
Superior Court Docket No: BER-L-7134-18
Sat Below: Hon. Robert C. Wilson, J.S.C.
Our File No: 16-108

Dear Honorable Judges of the Appellate Division:

Please accept this Reply Brief on behalf of Plaintiff/Appellant Linda Brehme in support of the above appeal.

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LEGAL DISCUSSION

I. Neither Misstating the Law Below, Nor Citing the Wrong Statute to this Court Can Change the Legislative Mandate that, "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"

The Legislature amended *N.J.S.A.* 39:6A-12 less than a year after the Supreme Court's invitation in *Haines v. Taft*, 237 N.J. 271, 294 (2019) to now unambiguously state that any medical bills not paid by PIP go on the board at trial. The defense below misstated the law to the trial judge who at that misguided urging, simply ignored the controlling statute as amended and ruled the exact opposite. The defense is doing the same kind of thing on this appeal, citing the

wrong statute to this Court. *(Db 4-5)*. The controlling statute reads in pertinent part as follows:

> 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…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 [As amended by L. 2019 c. 244 sec.1] (emphasis added). The official annotations make clear this is the section- **244-** that applies since the case *sub judice* was pending on August 1, 2019. (Section 2 of 2019, Chapter 244 states: "[t]his act shall take effect immediately and apply to causes of action pending on that date or filed on or after that date.") Respondent at pages 4 and 5 of its brief instead cites section 245, which does not have the pertinent and emphasized language of 244 above. Section 245 does not apply because here the date of incident is December, 2016. (Section 3 of L. 2019, Chapter 245 states: "[t]his act shall take effect on August 1, 2019 and shall apply to automobile accidents occurring on or after that date.") (underlined added).

Respondent points this Court to the *wrong section* because the applicable one states in pertinent part that, "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," go on the board. *N.J.S.A.* 39:6A-12 [As amended by L. 2019 c. 244 sec.1] (emphasis added). Here we have all three, any one of which makes the bills claimable at trial. The medical expenses at issue exceed the cut off coverage limits by $136,000. The $236,250 in medical expenses are unpaid by the PIP insurance company. And given the insurance company cut Linda Brehme off from any further treatment, those medical expenses are in fact uncovered. Indeed, calling these expenses "future" is at this point something of a misnomer because had the insurance company not cut her off, she would probably have had much of it already.

Respondent argues the law should be ignored because, they say, Linda did not go battle the insurance company in a separate lawsuit to compel payment of the future medical expenses. This makes no sense on multiple levels. First, there would be no standing to file a lawsuit about medical expenses for treatment which is not yet needed. Second, there is nothing in the statute that says an auto crash victim has to first find a lawyer, sue, and litigate against a billion-dollar insurance company before they can claim those expenses at trial against the person that actually caused the crash. As we stated in the moving brief *(Pb 7 at fn. 5)*, our retainer is limited to this personal injury action, not any kind of PIP insurance

lawsuit.[1] The fact of the matter is the expenses at issue remain "uncompensated" and defendant's nonsensical arguments to the contrary should be rejected. *N.J.S.A.* 39:6A-12 [As amended by L. 2019 c. 244 sec.1] (nothing in the statute shall be read to preclude the collection of "uncompensated" medical expenses at trial.)

Respondent's statement that *Pitti v. Astegher*, 133, N.J. Super 145 (Law Div 1975) says future medical expenses are not boardable in an auto case is akin to pointing this Court to wrong statute. The *Pitti* Court ruled the exact opposite:

> In the event the jury finds from appropriate medical testimony that such future medical and hospital expenses are reasonably required for the examination, treatment and care of the injuries sustained by plaintiff as a proximate result of the negligence of either or both defendants, it may award damages for future medical and hospital expenses. The test, as enumerated in *Coll v. Sherry*, 29 N.J. 166 (1959), is reasonable probability. To some extent the amount of such award, if the jury so finds it appropriate, is to be left to the good judgment of the finder of facts– the jury in this case.

Pitti v. Astegher, 133 N.J. Super at 148-149. Here, the judge below ruled *in limine* that <u>any</u> evidence about future medical expenses would be *per se* speculative, and, essentially, that therefore no one can ever have a claim for future medical expenses. But the evidence the jury actually heard about was directly in line with the model jury charge and *Coll v. Sherry*, 29 N.J. 166 (1959), which is among the many

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[1] PIP cases are notorious loss leaders and very difficult for ordinary people to secure contingency representation. If anything, the requirement should be for the tortfeasor's carrier to go subrogate against the PIP carrier.

things Respondent does not seriously contest in its cursory presentation. The trial judge should not have ignored the controlling law, the claim should not have been barred, and this case should be remanded for a new trial limited to this discrete issue.

We demonstrated in our opening brief how especially unfair it was to bar the claim for future medical expenses given Medicare would have to be paid back out of the pain and suffering recovery. Far from permitting a claim for future medical expenses resulting in a "windfall," this would in essence leave Linda with nothing. In fact, the Legislature made clear in the "*Haines*-fixing" statute that the claim for uncompensated medical bills can be made, "regardless of any health insurance coverage...including any...health care plans that assert valid liens." *N.J.S.A.* 39:6A-12 [As amended by L. 2019 c. 244 sec.1] (emphasis added). All Respondent could muster in response was the statute-ignoring falsehood, "[P]laintiff has resources available to her for payment of her medical bills." *(Db8)*.

Similarly, *Habick v. Lib. Mut. Fire Ins. Co.*, 320 N.J. Super. 244 (App. Div. 1999) was the only case Respondent cited below. We showed in our opening brief why that case has nothing to do with the issue *sub judice*, and Respondent could only make passing reference to it here.

II. Respondent's Arguments About Barring the Appeal Due to Payment of the Judgement and Alternative Request for a "Return" of those Funds and New Trial on all Issues Should be Rejected

A. It is Entirely Permissible for A Plaintiff To Accept a Partial Judgement and Appeal the Denial of a Different Element of Damages Claim.

The law is clear. It is entirely permissible for a plaintiff to accept a partial judgment and appeal the denial of a different element of a 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 estopped 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.")

Here, just like in *Gottscho,* while a warrant of satisfaction was filed on the pain and suffering claim, there was no "compromise or settlement or any express waiver or abandonment of...the appeal..." by appellant. *Gottscho, Inc., v.*

American Marking Corp., 26 N.J. 229, 242 (1958). Here, appellant has always maintained its wholly separate claim for future medical expenses. *(Pa7-73-1T52:3-53:7) (Pa74-224 - 4T8:19-22).*

Respondent's reliance on matrimonial cases where appellants contest the equitable distribution that was awarded by the trial court is misplaced. *(Db3).* Here, appellant does not in any way contest the jury verdict. *(Pb3)(Pa7-73 - 1T52:3-53:7) (Pa74-224 - 4T8:19-22).* Neither *Tassie v. Tassie* nor *Sturdivant v. General Brass & Machine Corp.*, in any way overrule the Supreme Court decision in *Gottscho v. Am. Marking Corp.*, which held that the acceptance of "the sum found by the trial court to be due, and its delivery of the warrant of satisfaction while it, at all times, continued to assert that an additional sum was due, was in nowise inconsistent and furnished no real basis for an estoppel." *Gottscho v. Am. Marking Corp.*, 26 N.J. 229, 242 (1958).

Moreover, *Sturdivant* (a workers compensation matter) is distinguishable from both this case and *Gottscho*. In *Sturdivant*, both parties recognized "the validity of the judgement and...voluntarily entered into a contract to waive or surrender their respective right to appeal." *Sturdivant v. General Brass & Machine Corp.*, 115 N.J. Super. 224, 227 (1971). That is not the case here, as appellant

contested the trial court's ruling regarding future medical expenses. *(Pa7-73 - 1T52:3-53:7) (Pa74-224 - 4T8:19-22).*

Furthermore, the divorce action of *Tassie v. Tassie* has no effect on the instant matter. In *Tassie* the Plaintiff accepted all the benefits of the judgement and complied with the financial obligations imposed upon her. *Tassie v. Tassie*, 140 N.J. Super. 517, 525 (1976). *Tassie* was distinctly unique to the divorce context:

> The overwhelming weight of authority is to the effect that an appellant having recognized the validity of a judgment and decree of divorce rendered in a court of competent jurisdiction and having jurisdiction of the persons by accepting the favorable and/or beneficial provisions thereof, financial and/or marital, accruing to him thereunder, in the absence of fraud, is estopped from questioning the validity of such judgment or decree from and after the acceptance of such benefit…from and after such acceptance, an appellant is prohibited from proceeding to perfect or maintain any appeal from the same.
>
> …
>
> If the outcome of the appeal could have no effect on the appellant's right to the benefit accepted, its acceptance does not preclude the appeal. There is no acceptance of benefits under a judgment, and hence no waiver of rights of appeal, where a party exercises a right which existed prior to the judgment and which, though recognized or confirmed by the judgment, is not merged in it.

Tassie v. Tassie, 140 N.J. Super. 517, 527, 528 (App. Div. 1976) (underlined added). Here, Linda Brehme did not in any way accept the court decision barring

future medical expenses; she always objected to it and filed this appeal. This is not a divorce matter where plaintiff signed off on the divorce decree, accepted the marital property distribution, and then later appealed it. Respondent's references and citations to these divorce matters are entirely misplaced. *Gottscho v. Am. Marking Corp.*, 26 N.J. 229, 242 (1958) ("the plaintiff's acceptance of the sum found by the trial court to be due, and its delivery of the warrant of satisfaction…was in nowise inconsistent…for an estoppel." Notably, in *Gottscho* - as in here - the appeal is confined to a single issue "and its outcome could serve to increase but not to reduce the amount of the judgment." *Gottscho v. Am. Marking Corp.*, 26 N.J. 229, 242 (1958).

B. Respondent's Alternative and Passing Request that Plaintiff "Return" the Satisfied Judgement Funds and for a New Trial on All Issues is not Properly Before this Court and Would Anyway be Wholly Unnecessary

On July 7, 2022, the trial court entered an Order for Judgement in the amount of $311,435.59 (inclusive of interest). (Pa236-237). The judgement was paid below and Warrant of Satisfaction filed pursuant to *Rule* 4:48-2. (Pa238). Plaintiff/Appellant filed a Notice of Appeal on August 12, 2022. (Pa239-246). On October 6, 2022, Defendant/Respondent filed its Case Information Statement. (Pa247-250).

At no point below did Defendant/Respondent move for a new trial nor jnov. In fact at no point, neither in its Case Information Statement nor otherwise, did Defendant ever seek the extraordinary measure of "return" of a satisfied judgement and a new trial on all issues. *(Pa247-250)*. In fact, to seek this affirmative relief, Defendant would have had to first file a motion for new trial below challenging the verdict, and then a Notice of Cross-Appeal. *Rules* 2:10-1; 2:4-2. No such thing ever happened. To the contrary, they paid the verdict and filed a warrant to satisfy. They are thus barred under *Rule* 2:20-1 from challenging the verdict on appeal.[2] *See also, e.g. Brock v. Pub. Serv. Elec. & Gas Co.*, 149 N.J. 378, 391 (1997) (An issue not raised below will not be considered for the first time on appeal.); *North Haledon Fire Co. v. Borough of North Haledon*, 425 N.J.Super. 615 (App.Div. 2012) (same).

Beyond that, the wholly unsupported conclusion that somehow there would have to be a new trial on all issues makes no sense. The jury awarded pain and suffering damages. No one has any issue with that. Judgement was entered, paid and a warrant to satisfy filed. The only issue is the trial judge's erroneous legal ruling barring future medical expenses, an entirely separate claim. As such, the

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[2] Plaintiff is not in any way challenging the verdict, just the ruling that barred the claim for future medical expenses.

only issue on remand is future medical expenses. There is simply no cognizable reason why the verdict for pain and suffering would somehow have to be thrown out, particularly some three years after it was paid and the issue not having been preserved below.

III. Conclusion

This is a clear case where the Supreme Court recognized a "restricted" reading of a statute causing the unfair result of uncompensated medical bills. The Legislature "fixed" it less than a year later. At the urging of the defense, the trial judge ignored the amendment and applied the reasoning of a case superseded by statute, to arrive at the same unfair result the amendment was meant to fix. On top of that, the trial judge decided future medical expense claims are *per se* speculative, to be barred without the need for hearing any evidence, further disregarding well settled law.

Defendant/Respondent's Point One argument, raised for the first time on appeal, is that the paid judgement should be returned and a new trial on all issues. Its Point Two argument boils down to the same thing it urged below; ignore the controlling law. Whether it is citing wholly inapplicable cases, pointing to the wrong statutory provision, or spelling the name of this Court wrong, the

presentation of the defendant/appellant is wholly without merit. It is respectfully submitted a summary reversal is in order, without the need for oral argument.

Respectfully submitted,

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