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February 20, 2024

VIA ELECTRONIC FILING
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
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Re: Linda B. Brehme v. Thomas Irwin, et al.
Supreme Court Docket No: 089025
Appellate Division Docket No: 3760-21
Superior Court Docket No: BER-L-7134-18
Our File No: 16-108

Honorable Justices of the Supreme Court:

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

Respondent's opposition to the Petition for Certification is largely a repeat of their Appellate Division submission. As such, we will not respond at length and will instead refer the Court back to the corresponding pages of our Appellate Division briefs.

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I. Since the Vast Majority of Petitions for Certification are Denied, Respondent Cites the Wrong Statute and Inapplicable Cases to this Court Assuming It Will Never Matter

In an attempt to smooth over the Trial Judge having disregarded the controlling statute, which was enacted at this Court's invitation, Respondent has again cited the wrong statute, just like they did in the Appellate Division. We demonstrated this at length in our 3-16-23 Reply Brief at 2-5 (*Trans. ID: E1045254-02072024*), but Respondent went ahead and did it again here, with no further explanation. The controlling statute states:

> 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 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.") (underline added). Respondent offers no explanation for any of this, assuming that since most certification petitions are denied, he never will have to.

The applicable statute 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] (underline 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.

Similar to pointing the Court to the wrong section of the statute, Respondent also mis-cites cases. To justify the trial judge disregarding the controlling precedent of this Court on future medical expenses, *Coll v. Sherry*, 29 N.J. 166 (1959), Respondent misstates the import of *Pitti v. Astegher*, 133, N.J. Super 145 (Law Div 1975), which held the exact opposite of what Respondent says:

> 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 any evidence about future medical expenses would always be speculative. 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). The trial judge should not have ignored the controlling law and the claim should not have been barred.

We also explained at pages 22-23 of our Appellate Division Opening Brief and at page 6 of our Reply Brief (*Trans. ID:E1045254-02072024*), that *Habick v. Lib. Mut. Fire Ins. Co.*, 320 N.J. Super. 244 (App. Div. 1999) has literally nothing to do with the issues on this appeal. Despite this, Respondent has copied in that section of their brief here as well.

II. There is No Basis in Fact, Procedure, Nor Law for the Claim The Judgment Funds Would Have to be Returned and a New Trial on All Issues

Respondent has not and cannot provide any basis to support the bald conclusion that the only way to have a new trial on future medical expenses would be to have a new trial on all issues. This was a tort threshold auto case. The verdict sheet had 6 questions. The first two asked whether Linda sustained any permanent

new injury or permanent aggravation of a past injury. Question 3 asked the amount for pain, disability, loss of enjoyment of life. Questions 4, 5, and 6 dealt with past and future lost earnings. (*App. Div. App., Verdict Sheet, Pa85-86*). The court would not permit the jury to answer a question about future medical expenses, even though the trial testimony about that from two medical experts was directly in line with *Model Jury Charge 8.11 (I), Future Medical Expenses* and the controlling precedent of this Court. *Coll*, 29 N.J. 166.

There is simply no logical reason why a new trial limited to the issue of future medical bills would in any way impact the 6 resolved and undisputed questions on the verdict sheet. Indeed for example, for a whole host of reasons one could have a permanent injury and lost wages, but not be likely to incur future medical bills. In fact the jury awarded $50,000 for past lost earnings, but nothing for future lost earnings. Indeed, the elements to vault the tort threshold and the elements to prove pain and suffering vs. lost wages vs. future medical expenses are all respectively different. Respondent's claim about needing a return of the paid judgment and a new trial on all issues is frivolous.

In fact, New Jersey law is chock full of cases remanded for limited issues, without the need to retry an entire case. *See, e.g. Little v. KIA Motors America, Inc.*, 425 N.J. Super. 82 (App. Div. 2012) (remanding matter for new trial consideration of limited damages element); *Padilla v. Berkeley Educational Services*, 383 N.J.

Super. 177, 184 (App. Div. 2005) (remand for new trial on emotional damages, but not economic damages); *Abbamont v. Piscataway Township Board of Education*, 269 N.J. Super. 11 (App.Div.1993), aff'd 138 N.J. 405 (1994) (compensatory damages award in employment case reinstated and case remanded for trial limited to punitive damages); *Ripa v. Owens-Corning Fiberglas Corp.*, 282 N.J. Super. 373 (App. Div.), *cert. den*, 142 N.J. 518, (1995) (wrongful death, products liability case where compensatory damage award upheld, but remand for new trial on the issues of plaintiff's right to punitive damages and the amount); *See also Rule* 4:49-1(a) and *Official Comment* (allows the trial judge to grant a new trial "as to...part of the issues." "[a] new trial may be limited to less than all components of damages...").

While it is true that some of the damage evidence from the first trial would overlap with a trial limited to future medical expenses, it does not make any difference as the elements of the respective claims are different. *Bell Atlantic Network Services, Inc. v. P.M. Video Corp.*, 322 N.J. Super. 74, 113 (App. Div. 1999) ("Although much of the evidence that was presented in the fraud trial will no doubt be repeated in a retrial of punitive damages, it will be addressed to what is, in essence, a different cause of action..."); *Lewis v. Preschel*, 237 N.J. Super. 418 (App. Div. 1989) (medical malpractice case remanded for retrial to determine proper allocation of damages awarded in first trial, despite overlapping evidence).

Indeed, no party has contested any of the jury findings and the defendant filed no motion for new trial nor cross appeal. This alone is of course fatal to their argument about a new trial on all issues and return of satisfied judgment funds. *Rules* 2:10-1; 2:4-2 Beyond that, "A jury's verdict . . . is cloaked with a 'presumption of correctness.'" *Cuevas v. Wentworth Group*, 226 N.J. 480, 501 (2016) (*quoting Baxter v. Fairmont Food Co.*, 74 N.J. 588, 598 (1977)). A party seeking to overturn the jury's verdict must present clear and convincing evidence establishing that the verdict was a miscarriage of justice. *Ibid.*

Respondent is further wrong to say we are attempting to "attack the judgment." (*Db3*). This is far from the case. We are simply seeking- as specifically permitted by this Court's decision in *Gottscho-* to add to the judgment because the trial judge incorrectly barred a discrete element of damages he had a philosophical disagreement with, despite a controlling model jury charge which is based upon this Court's ruling in *Coll v. Sherry*. *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.")

III. Certification Should be Granted to Fix the Conflict of Both the Below Decision and *Sturdivant,* with *Gottscho, Inc. v. American Marking Corp.*, 26 N.J. 229 (1958) and other Reported Decisions which Follow *Gottscho*

Respondent does not contest, nor explain, nor in any way attempt to reconcile the clear conflict of both the below decision and *Sturdivant v. General Brass & Machine Corp.*, 115 N.J. Super. 224, 227 (1971) with both *Guarantee Ins. Co., v. Saltman*, 217 N.J. Super. 604, 609 (App. Div. 1987) and *Gottscho*, 26 N.J. at 242. Instead, Respondent only offers unsupported conclusions, mis-citations of the law, and catch phrases. Indeed, Plaintiff is not trying to "have her cake and eat it to." (Db4). Rather, she was denied a critical $236,000 piece of the pie because the trial judge disagreed with the controlling statute passed at this Court's urging, and also disagreed with the applicable Model Jury Charge and this Court's decision in *Coll*, 29 N.J. 166, which permits future medical expenses.

Respondent also does not address the unsettling reality that the decision below requires a party to announce its intention to appeal before the 45 day time prescribed under *Rule* 2:4-1, and preferably on the record to the judge still hearing the case. Respondent also says nothing about the deleterious impact this unusual new rule would have on encouraging settlements and issue resolution.

Beyond this, Respondent controls the timing of when the Warrant to Satisfy is filed. Respondent again misstates the record when they say, "she [Appellant] filed the Warrant to Satisfy." (*Db2*). This is wrong. The Defendant filed it on August 8,

2022. (*Trans. ID: LCV20222862239*). If they had any question, they could have waited until the 45 day appeal period had expired. But there was no question, because plaintiff filed a letter with the Court on July 29, some **9 days before** defendant filed the Warrant to Satisfy, seeking an order on the future medical bills ruling so that we could file a notice of appeal. We wrote:

> As Your Honor is aware, we represented plaintiff Linda Brehme during the above trial. At this time, we are attempting to file an appeal regarding the barring of plaintiff's claim for future medical expenses; the Appellate Division requires that we submit an Order reflecting same. Therefore, please find an Order submitted under the 5 Day Rule.

(*Trans ID: LCV20222777474*) (underline added)[1]. Upon getting this letter, the defense went ahead and filed the Warrant to Satisfy, now claiming that self-imposed fact bars any appeal on anything outside that judgment amount. This is unfair and incorrect, has no basis in the Rules, and runs counter to this Court's holding in *Gottscho* 26 N.J. at 242.

Furthermore, given the above referenced July 29 letter, the Appellate Division clearly got it wrong, writing, "Here, plaintiff never advanced, either on the record or in writing, that she intended to pursue her claim for future medical expenses after the judge's in limine ruling. (*App. Div. Decision at 5*). Clearly, this is wrong as we

[1]Despite numerous attempts, the trial judge refused to sign any order memorializing the decision to bar future medical expenses. This required motion practice in the Appellate Division and an order permitting the appeal without any trial court order. (*Trans ID: E1045254-02072024*).

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uploaded a letter so advising on July 29. Beyond this, not only did we always maintain our disagreement with the *in limine* ruling, but we raised the issue again at the end of the trial, after *in limine* motions, in connection with the charge conference, which included full briefing on the issue. (*Pa53-65*) (*4T8:19-22*).

For all these reasons the Petition for Certification of Plaintiff/Petitioner Linda Brehme should be granted.

Respectfully submitted,

Clark Law Firm, PC
Counsel for Plaintiff/Petitioner
Linda Brehme

By: ______________________________
GERALD H. CLARK

cc: Clerk of the Appellate Division (Via Electronic Filing)
The Honorable Robert C. Wilson, J.S.C. (Via Electronic Filing)
All Counsel (Via Electronic Filing)