2014 WL 2459647 (N.J.Super.L.) (Trial Order)
Superior Court of New Jersey, Law Division.
Civil Division
Essex County

Neomi ESCOBAR, et al,
v.
NEWARK BETH ISRAEL MEDICAL CENTER, et al.

No. ESXL398010.
March 19, 2014.

Trial Order

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James S. Rothschild, Judge.

II. *Judgment Notwithstanding the Verdict*

The defendants' motion for judgment notwithstanding the verdict is denied. See the court's December 6, 2013 written opinion, annexed as Appendix I. The court in that opinion ruled on the issue of the immunity defense available to the Division and its employees and the standard to use in adjudicating the actions of the Division and its employees. The court ruled that the Division is not entitled to absolute immunity because its acts were generally ministerial acts of lower level employees and not discretionary acts of higher level employees.

The court continues to believe it was correct on its immunity ruling and also correct in deciding that certain of the Division's actions or inactions were to be adjudicated under the negligence standard and that the decision not to remove Jadiel was to be adjudicated under the palpably unreasonable standard. It would unduly lengthen this opinion for the court to repeat what it wrote on December 6, 2013, and the court will not do so.

III. *New Trial v. Remittitur*

As will be set out below, the court believes the jury erred on one of its damage awards: the costs of future medical and life care. On this issue, the jury awarded $105,000,000, rather than the $64,881,677 calculated by plaintiff's expert. The court believes the jury also erred on its allocation of responsibility between the Division employees and Mr. Velesquez. These jury errors cause the court to address the critical issue of whether it should order a new trial or utilize the less drastic remedy of remittitur. The law in this area was set out by two cases, *Fertile v. St. Michael's Med. Center*, 169 N.J. 481 (2001) and *Taweel v. Stern's Shoprite Supermarket*, 58 N.J. 227 (1971). The court will begin with *Taweel*.

In *Taweel*. Mrs. Taweel had recovered $32,400 in a supermarket slip and fall, while her husband recovered $51,916.50 for loss of consortium. The trial judge ordered remittiturs to $20,000 and $3,000 respectively, which the plaintiffs refused to accept. The trial judge then ordered a new trial as to both liability and damages. The Supreme Court wrote that “If… the award of damages is so grossly excessive as to demonstrate prejudice, partiality or passion and thus to generate the feeling that the entire verdict was tainted, a remittitur is improper. The correct procedure in such a case is an order for a new trial on all issues. So in

the present matter, if the trial court concluded that the plaintiffs' verdicts were so excessive as to infect the entire result and to visit a manifest injustice upon the defendant if allowed to stand, the remedy was an entire new trial." *Taweel*, 58 N.J. at 231 [1]

***2** The *Fertile* Supreme Court, faced with an excessive verdict of $15,000,000, remitted by the trial judge to $5,000,000, had to determine if *Taweel* was correct that "the gross 'excessiveness' of the verdict, standing above, compels a new trial on all issues." 169 N.J. at 496. The Appellate Division in *Fertile* had reversed and remanded for a new trial on all issues, partially because of trial errors and partially because the "grossly excessive verdict was indicative of the prejudicial effects of the misstatements." Id at 489. The unanimous Court held that *Taweel* should no longer be followed. Accordingly, Justice Long wrote that the trial judge could leave the liability verdict alone, and remit the damage portion, subject to plaintiff accepting same. The Supreme Court held that the fairest way to administer remittitur reductions was to reduce to "the highest figure that could be supported by the evidence." Id. at 500. It thereupon concluded that the reduction for $15,000,000 to $5,000,000 was sustainable.

In making the determination of whether to order a new trial, or order a remittitur, the court is obligated to set forth its "feel of the case." When a ruling on a motion for a new trial is appealed, a reviewing court must give "due deference" to the trial judge's "feel of the case" regarding the assessment of factors not transmitted by the written record. *Risko v. Thompson Muiler Auto. Grp., Inc.*, 206 N.J. 506, 522 (2011); *Ming Yu He v. Miller*, 207 N.J. 230, 250 (2011); *City of Long Branch v. Jui Yung Liu*, 203 N.J. 464. 492 (2010); *Pellicer ex. rel. Pellicer v. St. Barnabus Hospital*. 200 N.J. 22, 58 (2009); *Jastram ex rel. Jastram v. Kruse*, 197 N.J. 216, 230 (2008); *Caldwell v. Havnes*, 136 N.J. 422, 432 (1994); *Feldman v. Lederle Labs.*, 97 N.J. 429, 463 (1984); *Carrino v. Novotny*, 78 N.J. 355, 360 (1979); *Fritsche v. Westinehouse Elec. Corp.*, 55 N.J. 322, 330 (1970); *Dolson v. Anastasia*, 55 N.J. 2, 7 (1969); *Anderson v. A.J. Friedman Supply Co., Inc.*, 416 N.J. Super. 46, 64 (App. Div. 2010). R. 4:49-1 (a) states that a party is entitled to a new trial "if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law."

The court's "feel of the case" is that nothing happened during the trial which could enable the court to conclude that the jury was so influenced by passion, prejudice, bias, or sympathy, or that the jury was so influenced by improper factors that it would be "miscarriage of justice under the law" not to grant defendants a new trial. The court reaches this conclusion for several reasons, which it will set out as follows:

1. **Nothing the plaintiff's counsel did was in any way inflammatory. It** is always possible, is any infant injury case, for plaintiffs counsel to attempt to impermissibly influence the jury. That did not happen here. Counsel's opening and two closings [2] were delivered in a careful, matter-of-fact, manner. Counsel never raised his voice, over-dramatized, exaggerated, misstated the facts or demonized the Division. Counsel's presentations never went near the line, let alone over it. Nothing counsel said could have misled or unduly or unfairly influenced the jury.

2. **Plaintiff did not unduly play on the jury's sympathy.** Obviously, Ms. Escobar is an extraordinarily decent, loving, grandparent. She tried as hard as anyone possibly could to convince the Division to remove Jadiel from Mr. Velesquez prior to the tragedy. She has cared for Jadiel 24 hours a day for seven days a week since the tragedy occurred. To describe her as heroic is an understatement. Given the magnitude of the tragedy, and its terrible impact on the lives of both Jadiel and Ms. Escobar, she could have come across as sobbing and incoherent. Nevertheless, she testified in a calm, dignified manner and conducted herself accordingly throughout the trial. Nothing she did could be said to unduly play on the jury's sympathy.

***3** 3. **Jadiel himself was only briefly presented to the jury.** Perhaps in an exercise of caution, plaintiff's counsel only very briefly presented Jadiel to the jury. In addition, counsel presented to the jury a relatively short non objectable "day in the life" video, as well as one or two picture of Jadiel. Obviously, any jury would be sympathetic to Jadiel and his grandmother, but counsel presented Jadiel in such a brief, circumscribed manner that Jadiel's appearance could not be said to have unduly inflamed the jury's sympathy.

4. **Defendant's counsel did nothing to cause the jury to wish to punish the defendants.** Defense counsel is an experienced, highly competent attorney who not only did an excellent job, but, equally important, did nothing to cause the jury to dislike him

or his client. There is an obvious danger in a case of this kind for defense counsel to "lose the jury" by arguing that the verdict for future medical and life care should be minimal because the infant is so impaired he will not live much longer. In this case, defense counsel never lost the jury; rather, he presented the longevity argument in a skillful, careful, understated and restrained manner. To make certain the jury was not upset by counsel's argument, the court told the jury that this was counsel's job:

> THE COURT: Okay. Counsel agree that I should tell you this because you don't do this for a living. In these cases where there is an injured young person, the plaintiffs seek damages that would cover the expenses of keeping that person going and functioning and healthy during his lifetime and, as you saw in the chart up there, it's — and you heard that the plaintiffs believe that lifetime will be a considerable period of time. **Defendants have every right to -- and I expect Mr. North to question the plaintiff's expert along the lines of, isn't it possible that lifetime would be shorter.** So when you hear those questions and answers, you'll know what's being done. Both sides have every right to take their positions. All right? Go ahead, Mr. North [defense counsel].

December 4, 2013 transcript, page 83 lines 15-25 and page 84 lines 1-4.

There is also a danger in any severe brain damage case for the defendant to lose the jury by arguing, or presenting a doctor to argue, that the plaintiff is so badly hurt that he or she can not appreciate the degree his or her life has been compromised. Wisely, defendant's counsel did not present a single witness to take that position nor did defense counsel argue it.

The jury never appeared to be in any way upset by counsel. There was no way counsel's able presentation could be said to have led to any jury bias against his clients. [3]

5. **None of the defendants said anything to cause the jury to be biased against defendants.** The most important defense witness was Felix Umetiti, the caseworker assigned to the matter, and one of the three Division employees named individually herein. Mr. Umetiti, in this court's opinion, as well as the jury's, committed several negligent acts. If he had testified in a belligerent, uncaring manner, the jury might have been unduly inflamed, but Mr. Umetiti did not do so. While Mr. Umetiti was in an uncomfortable, if not barely defensible, position, be testified in a dignified, coherent manner. It may be accurate to say the jury did not agree Mr. Umetiti performed his duties well; it would not be accurate to say the jury disliked him. The court does not believe Mr. Umetiti, or any defense witness, caused the jury to lose its impartiality.

***4** 6. **The jury never appeared to be upset or inflamed.** The undersigned has been a judge for over twelve years, the bulk of which time has been in the Civil Division, with most cases involving jury trials. The undersigned has seen jurors betray their feelings of anger in any number of ways - - rolling their eyes, inappropriate laughter, smirks, etc. Nothing of the like the occurred herein. The jurors all appeared to pay respectful attention.

7. **The bulk of the jury verdict appeared to be reasonable.** The jury was asked nine liability questions. The court agreed with all nine of its answers: the Division employees were negligent in one or more matters other than the decision not to remove Jadiel from the home; that negligence proximately caused Jadiel's injuries; the Division employees did not prove that all their actions or inactions were objectively reasonable or that they acted with subjective good faith in all their actions or inactions; the Division employees were negligent in the specific matter of not removing Jadiel from the home; the failure to remove Jadiel from the home was a proximate cause of Jadiel's injuries; the Division employees did not prove that their decision to leave Jadiel in the home was not palpably unreasonable; Vanessa Merchan, Jadiel's mother, was not negligent; Luz Merchan, Vanessa's stepmother, was not negligent; Ufredo Merchan, Vanessa's father, was not negligent.

> The jury was also asked four damage questions. While the court disagreed with one answer - - damages for future medical expenses and care - - it agreed with the other three: damages for pain, suffering, disability, impairment and the loss of enjoyment of life; damages for future employment and wages; and damages for past services and care. Indeed, as will be set out in Part IV A, page 10, of this opinion, the jury computed that

> damage for pain, suffering, disability, impairment, and loss of enjoyment of life extraordinarily accurately: exactly $57,670,000, or exactly $730,000 for year of Jadiel's expected life after the beating, or exactly $2,000 for each day of Jadiel's expected life after the beating. This was obviously an intelligent group of people, trying to do its job accurately. The jury was then asked to apportion the allocation of fault attributable to the Division and Mr. Velesquez; that determination was one with which the court disagrees. The court discusses this to point out that in **fourteen** separate decisions, the jury voted in a manner not subject to criticism **twelve times.** While this does not demonstrate that the jury acted in a legally correct manner on its other two decisions, it may help demonstrate that this jury did not act in a such a prejudiced or partial manner as to justify a new trial.

The court must also address the question of whether, under *Fertile*, the court can conclude that the "gross excessiveness" of the two mistaken verdicts - - $105,000,000 for future medical care and expenses and 100% liability for the Division employees - - was such that it compelled a new trial rather than a remittitur. On the $105,000,000 award, the Court notes that it is **less than** 50% greater than the $64,881,677 set out by plaintiff's expert, while the $15,000,000 award in *Fertile* was **three times** the $5,000,000 award the Supreme Court found to be the highest justifiable award.

On the 100% apportionment to the Division employees, the court acknowledges that it is inconsistent with the court's view that Mr. Velesquez was a proximate cause of the injuries; nevertheless, a jury could be said to have acted not totally unreasonably in setting the 100% percentage since it did so immediately after hearing the court give the rather powerful *Frugis* charge. Indeed, in the only other Division case where a *Frugis* charge was given, the jury also apportioned the Division 100% responsibility. See the court's discussion of *L.A. v. DYFS*, (MER-L-1131-07), Part V, page 33, herein.

***5** For all of these reasons the court has concluded under the *Fertile* standard, that even though it must order a remittitur, it will not be a miscarriage of justice to deny a new trial. Ordering a remittitur both avoids a further trial -- which would entail all the evidence of the first trial other than the damages evidence - and would allow both parties to achieve substantial justice. The next section of the opinion will discuss the size of the remittitur.

IV. *Remittitur*

Remittitur serves "… the laudable purpose of avoiding a further trial where substantial justice may be attained on the basis of the original trial." *Bishop v. Harsk*, 191 N.J. Super. 109, 111 (Law Div. 1983) (quoting *Fisch v. Manger*. 24 N.J. 66, 80 (1957)). Remittitur is an "… enlightened aid[ ] in securing substantial justice between the parties without the burdensome costs, delays and harassments of new trial." *Id.* at 112 (quoting *Fisch*. 24 N.J. at 72)). The function of remittitur is "to bring excessive damages awarded by a jury to the level that the court knows is within the limits of a proper verdict and thereby avoid the necessity of a new trial." *Fertile v. St. Michael's Med. Ctr.*, 169 N.J. 481, 490-92 (2001). As noted above and explained below, the court must remit two aspects of the damages in this case: future medical expenses and life care and the apportionment between Mr. Velesquez and the Division and its employees. It will not remit the awards for pain, suffering, disability, impairment and loss of the enjoyment of life; future employment wages; or past services and care.

A. Pain, Suffering, Disability, Impairment and Loss of Enjoyment of Life

As set forth above, the jury awarded Jadiel $57,670,000 for pain, suffering, disability, impairment, and loss of enjoyment of life.

Defendant concedes that Jadiel's injuries are severe and devastating, but argues that this award is excessive and so greatly exceeds awards in similar cases as to shock the conscience. Defendant further argues that the excessive damages award leaves no conclusion but that the jury acted out of passion and emotion rather than an objective analysis of the evidence presented.

Plaintiff argues that the award does not "shock the conscience" given Jadiel's horrific permanent injuries; he suffers as many as 10 seizures a day, is blind, and must be continually pulled, prodded, stretched, suctioned, and fed. The award compensates him, plaintiff alleges, for not only his pain and suffering, but also for his loss of enjoyment of life. Plaintiff states that Jadiel has been robbed of practically every pleasure one experiences in life.

Both attorneys cited case law with other verdicts involving young children allegedly sustaining the same or similar injuries, but with differing verdict sizes. The court will now discuss each one.

In *Pellicer*, *supra*, a four month old baby sustained irreparable injuries as a result of postoperative oxygen deprivation resulting in brain injury, blindness, spastic quadriparesis, and global developmental delay. The Appellate Division in *Pellicer* determined not to set aside a $50 million jury verdict for pain, suffering, and loss of enjoyment of life. The Supreme Court reversed and remanded, but the Court did not reverse the award because the award was excessive. Rather, the Court held that the trial was tainted by cumulative errors and concerns about the improprieties that infected the trial. (Among the major errors, the jury selection process in that case resulted in a jury panel that could not fairly and dispassionately evaluate the case.)

***6** The Court's analysis of the $50,000,000 pain and suffering verdict deserves to be quoted in full:

Standing alone, if that verdict had been awarded by a fairly impaneled, dispassionate, and unbiased jury, based on adequate and appropriate testimony and evidence, **the award might well be sustainable.** In the end, however, our concerns about the improprieties that infected this trial call the verdict into question because this historic and extraordinary damage award cannot be separated from those errors. *See Fertile*, supra, 169 N J. at 499 (holding that, rather than remittitur, "[t]o justify a new trial on all issues, what is required is trial error … or some other indicia of bias, passion or prejudice, impacting on the liability verdict").

Pellicer, 200 N.J. at 59.

In *Verni v. Harry M. Steven, Inc.*, 387 N.J. Super. 160 (App. Div. 2006), a two year old plaintiff was injured and is now a ventilator dependent quadriplegic requiring significant medical care for the rest of her life. The plaintiff was awarded $30 million for her pain and suffering, but the Appellate Division reversed and remanded for a new trial. The plaintiff in *Verni* has no cognitive deficits, eats normally, and attends public high school. The Appellate Division did not reverse and remand for a new trial because the damages were excessive, but rather reversed and remanded because of multiple errors in the course of the trial. (The Appellate Division held that the trial judge erred in admitting evidence that was irrelevant to the central issue in a claim, resulting in sufficient prejudice. The trial judge also erred by providing an erroneous damages instruction that advised the jury that it could consider and provide compensation for the minor plaintiff's shortened life expectancy.)

In *He v. Miller*. 207 N.J, 230 (2011), plaintiff motorist, Mrs. He, was injured in an automobile accident with the defendant motorist. The plaintiff suffered from two herniated discs in her cervical spine and three herniations in her lumbar spine with evidence of pre-existing degenerative disc disease. The plaintiff was treated for her pain with prescription narcotics, cortisone epidural injections into her cervical and lumbar spine and 30 to 40 acupuncture treatments. However, these treatments provided only temporary relief. According to the Supreme Court,

> the jury found that the defendant was negligent and was the sole proximate cause of the accident. It then awarded plaintiff $110,000 in damages for her past lost wages and $500,000 for her future lost wages. The jury also found that plaintiff had sustained a permanent injury in the accident and returned a non-economic award [for pain and suffering] in the amount of $1,000,000 for plaintiff and an award in the amount of $100,000 for her husband, the co-plaintiff, on his per quod claim [for loss of consortium].

Id at 239.

The trial court granted defendant's remittitur motion and reduced the non-economic award to $200,000 and the per quod award to $20,000. The trial court found that this award constituted a "manifest injustice that shocks the judicial conscience." The Appellate Division found that the trial court inadequately supported its remittitur order, reversed the remittitur, and directed the jury's verdict to be reinstated. In 2009, the Supreme Court ordered that

***7** the matter is remanded to the Law Division for a complete and searching analysis under [*Johnson v. Scaccetti*, 192 N.J. 256, 281 (2007)], including a 'factual analysis of how the award is different or similar to others to which it is compared[,]' and, thereafter, the Appellate Division is to reconsider its judgment in light of the findings developed on remand.

Id. at 241 (quoting *He v. Miller*, 199 N.J. 538, 539 (2009) (citation omitted)).

The trial court then issued a written opinion analyzing factually comparable cases and awards to further explain its reasoning in ordering a remittitur. The trial court again held that the award for pain and suffering was "shockingly high" and ordered a remittitur. The Appellate Division again reversed and reinstated the original verdict.

After an exhaustive analysis, the Supreme Court, hearing the case a second time, reversed the Appellate Division and reinstated the trial judge's remitter. [4] The Supreme Court held that the "jury's award cannot stand because the trial court's explanation of its reasons for reaching that conclusion [to remit] and the factual basis on which [the trial court] acted were sufficient, and the appellate panel's contrary view was based on a misapplication of our settled precedents." Id. at 236. Thus, the remittitur was reinstated; Ms. He ended up with $200,000 for pain and suffering and Mr. He ended up with $20,000 for loss of consortium.

In *He*, Justice Hoens set out the standards on remittitur. Her analysis, which governs the court's ruling herein, will be set out in full:

We have encouraged trial courts to use remittitur when warranted so as to avoid the unnecessary expense and delay of a new trial. The power of remittitur is not to be exercised lightly, however, because we repose enormous faith in the ability of juries to equate damages with dollars to 'make the plaintiff whole, so far as money can do.' We rely on juries to perform that task while recognizing that '[a]ssigning a monetary value to pain-and-suffering compensation is difficult because that kind of harm is 'not gauged by any established graduated scale.' But a jury's authority is not unbounded and we have explained that '[o]ur role in assessing a jury verdict for excessiveness is to assure that compensatory damages awarded to a plaintiff 'encompass no more than the amount that will make the plaintiff whole[.]'

A trial court, faced with a jury verdict that the court concludes is excessive, may order a new trial or, alternatively, remittitur, bearing in mind that its power is 'limited.' The trial court should not disturb the jury's award unless it is 'so disproportionate to the injury and resulting disability as to shock the conscience and [convince the court] that to sustain the award would be manifestly unjust.' As this Court has described the standard to be applied, the verdict may only be set aside if it is 'wide of the mark' and pervaded by a sense of 'wrongness.'

Id. at 248-49 (citations omitted).

In *Johnson v. Scaccetti*. 192 N.J. 256 (2007), a motorist and her husband filed a negligence action for back injuries and chipped teeth. The jury awarded $2,500,000 in damages for the wife's pain and suffering and $500,000 for the husband's loss of consortium. The trial court held that the award was grossly excessive and remitted it to $1,500,000 to the injured motorist and $250,000 to her husband. The Appellate Division reversed the remittitur and reinstated the jury award. 192 N.J. at 261. The Supreme Court affirmed the Appellate Division's decision. According to the Court, "the trial court acknowledged that the jury acted in good faith and that 'the verdict was [not] tainted by sympathy or prejudice." ' *Id.* at 283. The Supreme Court indicated that the trial court did not provide sufficient reasons to justify a remittitur, which "is reserved to correct only a manifest miscarriage of justice," and held that although the jury award was "undoubtedly high, perhaps overly generous," but it did not shock the conscience. *Id*.

***8** In *Kowalski v. Palav*, 2010 N.J. Super. Unpub. LEXIS 2128 (App. Div. 2010)[5], the plaintiff infant, who suffered from cerebral palsy and blindness as a result of the defendant doctor's negligence, required "lifelong supervision and skilled nursing care either at home or in an institutional setting." Id at 29. The child's "life expectancy w[ould] not be significantly shortened." *Id.* According to the Appellate Division, "[t]he jury unanimously found that 20% of [the infant's] injuries would have occurred even in the absence of [the doctor's] negligence ...." The jury awarded the infant $19.25 million, but the "court molded the verdict to $15.4 million plus interest and medical bills, for a total of $18,942,279.33." Id 29-30. The trial judge denied a motion for a new trial. The Appellate Division remanded for a new trial on both issues of liability and damages because the trial judge erred in failing to limit testimony, not giving a definitive limiting instruction and failing to allow defendant to introduce a report into evidence. The Appellate Division did not rule on the size of the verdict.

In addition to the four cases discussed above, counsel have brought to the court's attention several cases of verdicts and settlements with verdicts of more than $1 million for varying forms of brain damage with injuries arguably similar to Jadiel's. The cases are set out below.

In *Novak v. State of New Jersey* (BUR-L-1003-03), defendant DYFS allegedly failed to follow its own procedures regarding placement of infant plaintiff with immediate family and supervision of foster parents. The infant was physically abused in the foster home and suffered from severe brain damage, cerebral palsy, and blindness as a result of violent shaking and a fractured skull. The infant required lifelong daily care with an approximate 60-year life expectancy. The foster parents settled prior to trial for the $300,000 limits of their homeowner's policy. The jury rendered a gross award of $21,000,000.[6]

In *Kim v. Newark Beth Israel Hospital* (ESX-L-1906-08), the plaintiff contended that the defendant negligently failed to order a timely caesarean delivery upon signs of fetal distress resulting in hypoxia and cerebral palsy. The infant suffered from spastic quadriplegia and profound brain damage. The parties entered into a high/low agreement of $5,500,000/$ 16,750,000 during jury deliberations. The jury awarded the plaintiff $18,571,000, including $167,000 for past care costs, $16,600,000 for future care costs, $1,500,000 for lost wages, and $250,000 for pain and suffering. The case then settled at $16.75 million in accordance with the high/low agreement.

In *Patterson v. Irvington Board of Education* (ESX-L-001093-09), the plaintiff, an Irvington High School student, was severely beaten by a fellow student. He suffered a traumatic brain injury and became a spastic quadriplegic. The young man was wheelchair bound and incapable of communicating except, arguably, through eye movement. He was nonverbal; his mother testified he had some vague recognition ability, but that was unclear. The plaintiff received limited occupational schooling after the accident. The trial testimony in *Patterson* indicated the plaintiff, who was then 21, had a shortened life expectancy of 30 years because of the beating. The jury awarded $ 10,000,000 for future health care, $3,250,000 for pain, suffering, disability, impairment, and loss of enjoyment of life; $2,000,000 for future loss of income, $744,000 for a Medicare lien, and $350,000 to plaintiff's mother for lost services for a grand total of $16,344,000.[7]

***9** In *Davis v. Newark Public School District* (ESX-L-1455-11), the defendant allegedly caused plaintiff, a multiple sclerosis sufferer, to form a "black hole" on her brain due to extreme stress which exacerbated her condition. The jury awarded $15,000,000, made up of $820,000 front pay; $105,000 back pay; $75,000 pension loss; $7,000,000 pain, suffering disability, impairment, and loss of the enjoyment of life; $4,000,000 for the aggravation of a pre-existing illness and permanent injury; and $3,000,000 in punitive damages.

In *Long v. Shore Memorial Hospital, et al.* (ATL-L-16785), the infant plaintiff was allegedly injured by the defendant nurse, who negligently failed to interpret the fetal monitor and negligently failed to summon a doctor for a timely cesarean delivery. The child suffered a severe hypoxic insult causing permanent extensive brain damage, cerebral palsy, and spastic hemiplegia. The case settled prior to trial for $6,250,000.

In *Speich v. Teitelbam* (MON-L-1836-04), the defendants, a physician and a hospital, allegedly failed to institute rehydration therapy to repair gastroschesis, causing severe brain damage to infant plaintiff. The plaintiff suffered from cerebral palsy, cortical blindness, and was unable to swallow. The case settled prior to trial for $4,000,000.

In *Choi v. Markham* (BER-L-507-05), the infant plaintiff was allegedly injured by the failure of defendants, gynecologist and nurse, both to properly interpret the fetal monitor and timely perform a cesarean delivery. The infant suffered from severe seizures and cerebral palsy. The case settled prior to trial for $3 million, which included medical expenses and the plaintiff mother's emotional distress.

In *Gonzales v. Cipriano* (MON-L-5641-05), the infant plaintiff suffered from cerebral palsy, hypoxic-ischemic encephalopathy, and could not walk or feed himself, allegedly as a result of defendants (obstetrician and assisting nurse) failing to interpret the fetal monitor and perform a timely caesarean delivery. The case settled for $2,450,000, of which $1,850,000 was paid on behalf of the doctor and $600,000 was paid on behalf of the nurse.

In *Ervolino v. Walk* (ESX-L-5834-03), the infant plaintiff was allegedly injured as a result of defendant doctors' negligent failure to read the external fetal monitor. The infant suffered perinatal asphyxia, spastic quadriparesis and an inability to speak. The infant cannot sit up independently, cannot verbally communicate, is not toilet-trained, and had no meaningful physical development. The case settled prior to trial for $2,200,000 ($1,200,000 from the defendant obstetrician-gynecologist and $1,000,000 from the hospital).

In *March v. Kauff* (SSX-L-1009-021. the infant plaintiff suffered from cerebral palsy and seizure disorder allegedly as a result of defendant doctor's negligence in failing to promptly perform a cesarean delivery. The infant was fed from a tube and required 24-hour nursing care. The parties settled for $1,250,000; there was no admission of liability. [8]

The case most comparable to this is *Pellicer*. The court will focus on *Pellicer* for three reasons. First, Casey Pellicer's injuries were similar to those of Jadiel Velesquez. While the court would never imply that the injuries in the other cases were less than horrific, it is at least arguable that Casey Pellicer and Jadiel Velesquez suffered injuries of the most severe kind possible, short of death. Second, this court is quite intimately familiar with Casey Pellicer's injuries since this court tried the *Pellicer* case on remand from the Supreme Court. [9] And third, *Pellicer* did lead to Supreme Court review.

***10** This court will not engage in the odious task of comparing each of Casey Pellicer's injuries to those of Jadiel Velesquez. Rather, it will merely conclude that a Supreme Court which did not state the $50,000,000 award for pain, suffering, disability, impairment, and loss of enjoyment of life in *Pellicer* had to be remitted, would not likely remit the $57,670,000 award in this strikingly similar case for pain, suffering, disability, impairment, and loss of enjoyment of life.

Another way to review the award for pain, suffering, disability, impairment and loss of enjoyment of life in this case is to refer to R. 1:7-1(b) which allows utilization of a time-unit analysis. Utilizing that Rule, the court notes that Jadiel Velesquez will live for *19* years after the beating (he was three months old when he was beaten). See Court Rules, Appendix I and see the court's discussion, in Part IV, D 1, pages 20-25 of this opinion which refers to that issue in more detail. Suffice it to say, plaintiff's experts used the 79 year longevity figure and there was no substantial evidence to the contrary. The jury award of $57,670,000 for pain, suffering, disability, impairment, and loss of enjoyment of life amounts to $730,000 ($57,670,000/79) per year. Put differently, the award amounts to $2,000 ($730,000/365) per day for day of Jadiel's life after the beating. Would any reasonable person wish to be brutally beaten like Jadiel and then be in Jadiel's horrific condition for those periods of time for virtually any amount of money? The court believes that to ask that question suggests the answer. [10]

Finally, is there any way this court could logically conclude that the jury should have awarded $ 1,000 per day rather than $2,000 per day? Such a reduction would be arbitrary and not supportable.

Accordingly, although this court has decided that while the $57,670,000 award is near or at the outer limits of what New Jersey courts would allow, there is no basis to remit that award, given the extraordinarily calamitous nature of Jadiel Velesquez' injuries.

B. Future Employment and Wages

The jury awarded Jadiel $1,410,343 in damages for Future Employment and Wages. Defendants do not argue against this award. The court finds that the jury used sound judgment and this reasonable amount awarded will not be remitted.

C. Past Services and Care

The Jury awarded Jadiel $1,892,160 for the past services and care given by Noemi Escobar. Defendants do not argue against this award. The court finds that this amount is fair and reasonable and will not be remitted.

D. Future Medical Expenses and Life Care

1. The Life Expectancy Issue

The jury awarded $105,000,000 for Jadiel's future medical expenses and life care. This amount is undisputedly incorrect, both on the basis of the medical and scientific trial testimony, and simple arithmetic. Indeed, even plaintiff does not argue that the jury award was correct. Plaintiff merely argues that a few cases have allowed jury verdicts higher than plaintiff's experts:
To make things clear, the high end estimate of $81 million for a residential facility and the $72 million estimate for future in-home life care were not ceilings - - they were just estimates of the high end range for the costs based on “very conservative” estimates for the residential facility and for in-home nursing care. Thus, the jury had the discretion to increase these numbers if it accepted Mr. Provder's testimony that these cost estimates are very conservative and that the actual numbers will likely be higher. See *Jastram ex rel. Jastram v. Kruse*, 197 N.J. 216, 229 (2008) (“[T]he evaluation of damages is a matter uniquely reposed in the jury's good judgment.” (emphasis added)). In fact, the $105 million award is merely 29% above the estimated cost for the residential facility care - - an amount certainly within the jury's discretion. Our courts have routinely held that jury awards that exceed the plaintiff's claimed future life care costs by 20% or more are not excessive. *See, e.g.*, *Gonzalez v. Agarwal*, 2006 WL 158641, at *11 (App. Div.), certify. Denied, 186 N.J. 604 (2006) (”find[ing] no error in [a] jury's award of future healthcare costs, although it was [26%] higher than the sum to which plaintiff's life care expert testified” because “a twenty percent deviation between the expert's evaluation and the jury verdict … might easily be justified.” (attached to Mazie Cert. as Exhibit “H”); Hudgins v. Serrano, 186 N.J. Super. 465, 481 (App. Div. 1982) (“A deviation of as much as 20% might easily be understood and justified.”).

***11** Plaintiff's Brief, January 8, 2014, page 15.

The **reason** the jury erred has to do with Jadiel's life expectancy. To understand the jury's error requires a brief explanation of how plaintiff constructed its damage claim for Jadiel's future medical expenses and life care. The pillar of plaintiff's claim, and the only issue on what the parties disagreed, is plaintiff's assertion that Jadiel will live at least until the age of 79, which is the expected life span under Appendix I of the Court Rules for a four year old. On the basis of this 75 years of future care needed for Jadiel, plaintiff's economic expert, Dr. Frank Tinari computed that home care for Jadiel would amount to $64,881,677 and facility care would amount to $62,570,225. [11]

The court will not at this point address the question of whether Jadiel will be cared for at home or in a facility. It will leave that discussion to Part IV, D 2, pages 25-27 of the opinion since the difference between the two is $ 2,311,452, which is only a 3.56% differential. Similarly, the court will not at this point address the question of whether Jadiel's care should be calculated at the median or the maximum figures given by plaintiff's life care expert, Edmond Provder. It will leave that discussion to Part

IV, D 3, pages 27-29, since very little money is involved in that differential. The **key** to the question of why the jury erred on the life care issue, which must be discussed at this time is **Jadiel's life expectancy.** As plaintiff's counsel cogently observed "… the **difference is on life expectancy."** *See* the December 4, 2013 transcript, page 32 lines 12 to 13.

The only testimony on Jadiel's life expectancy was provided by plaintiff's expert, Dr. Daniel Adler. The critical portion of that testimony should be quoted at length:
Q Would you agree that if you — if Jadiel's head control were poor rather than modest, that his life expectancy would be into the 30's?

A I don't believe that that's a proper conclusion. **I would agree that he has an exaggerated risk of a shortened life expectancy,** but it would also be my medical opinion that if you count through that risk with proper care, **that children like Jadiel, Jadiel himself survive and I take care of individuals just like Jadiel who are older than 30 and my practice and experience is that they do survive** and if you take good care of them, they live a long time.

Q I thought you told us that in your office practice, you don't have any individual with Jadiel's degree of disability impairment who is over the age of 20?

A I consider the individuals at the residential facility to be part of my practice. I don't see those people come to my office, that's correct, but I'm also a pediatric neurologist, at least in terms of my office practice and I cut off patients either arbitrarily or they realize they need to see adult neurologist for their problem at like 20 to 25, so I wouldn't. But in the facility, that doesn't happen.

***12** Q Now, do you recall at your deposition when you were asked, what would you believe it is and it being life expectancy if he has poor head control as opposed to modest? Do you recall that?

A I don't remember the number from the deposition, but **I believe I acknowledge life expectancy risks -- the risk of a shorter life expectancy would then exist.** Q Do you recall that you testified that I would say -- I would say, three decades, 20's and beyond with no head control, I don't believe that -- and then you go onto say, I don't believe that's true?

A Well, I think that's consistent with what the literature says. I mean, that's -- we would discuss the 2008 data. You know, the high -- the group with the highest risk now from living into the middle of the second decade, now, at least according to their data, lives into the third decade and that was just ten years later and, you know, here we are six years after that. I don't believe the -- I don't believe that these characteristics that we're talking about do anything other than assign a person, a place of either high risk or no risk and I'm -- I don't believe that I've discounted anything in my opinion here. **I've acknowledged at least a 10, if not 20 percent reduction in life expectancy in my opinion about 60's to 70's. So I'm certainly not saying Jadiel -- I'm not saying he cannot but, you know, from a probability standpoint, to see him alive in his mid-80's would be unexpected but not impossible.**

See Defendant's cross examination, December 4, 2013 transcript, page 105 line 20 to page 107 line 23.
Q Okay. And when you talked about -- we're only talking about -- let's just make things very clear. Nobody knows how long anyone in this room will live, correct?

A Correct.

Q And when you talk about life expectancy, the average male life expectancy for someone born Jadiel's age or when he was born four years ago is somewhere, what, the mid to late 80's, something like that?

A I think, 84.5 years is the Department of Labor data.

Q All right. And what you've done here is, is you don't know nor does anybody really know how long Jadiel will live is that because **he has these problems with swallowing and secretions primarily and the fact that he is immobile, his projected statistical life is going to be shortened in some fashion?**

A Correct.

Q Okay. You giving an opinion that based upon your read of the statistics, based upon your examination of Jadiel, based on what you know in medical science, that it's likely that he will certainly live into his 40's and beyond, correct? A Correct. That was my --

Q Now, you define that as expected to be somewhere in the 60's or 70's with good care?

A Correct. I've come here and defined what I meant by beyond.

See Plaintiff's redirect, December 4, 2013 transcript, page 108 lines 22 to page 109 line 24.

In fairness to the plaintiff, plaintiffs expert did say that it is possible that “better nutrition, better ability to manage seizures, … better technology” as well as the general rule that “the longer they live, the longer they will live” could conceivably elongate Jadiel's life expectancy:
Q Okay. And, again, he doesn't have a terminal illness but, rather, he has a higher risk of complications, different than someone who is healthy, right?

***13** A Correct. All the data does is collect facts that are associated with a shortened life. For example, mental retardation, that's a bad term, but impaired cognitive abilities associated with a shortening of life expectancy. But it's not being cognitively impaired that causes you to pass away. It's that you have bad judgment and you do things that are dangerous and that leads you to pass early. Except, in this boy, that's not going to be relevant. That piece of statistic is not relevant because he's not going to make independent decisions, Jadiel. People are going to make decisions for him. So that piece of statistics can be tossed away. What I'm saying to the jury is that, yes, he has risks, but all of them are met by proper care and treatment and the risks will be limited, if not eliminated, completely.

Q And the statistics we're talking about, this third decade or 40's and beyond and all of that, those are medians. That's the middle, correct?

A Correct.

Q There are half as many people that live longer, correct?

A Correct.

Q And included in these statistics are people who have had very poor care?

A Correct. And the other thing about the statistics is that in those - in that half who passed, they really passed very quickly after the event that causes them to become brain damaged and then once you get past the first two or three years, you come into the group of survivors and then, you know, the data becomes somewhat different and the data of Shavelle and Strauss discounts the possibility that these people, individuals like Jadiel can get better over time. So they pick a point in time and they say, here are these individuals if they stay like this, this is the expected outcome.

Q So -- and we've said this before and I want you just to clarify this, the better the care, the more likely you're going to be in the higher end of these statistics?

A Yes. The longer you live, the more brain development you have, the better function you have. You -- the risks of these complications is greater in younger children than it is in older individuals. So time is relevant, meaning how far Jadiel lives into the future is relevant. I mean, the general statement, which is true, **the longer they live, the longer they will live.**

Q The longer they live, the longer they will live. And the better the care, the longer they live?

A That assumes that they have good care from the onset.

Q And, of course, nobody knows 10, 20, 30, 40, 50 years from now what technology is going to be and what medicine is going to be, what improvements there will be to care and life expectancy and avoiding these risks, correct?

A Correct. I mean, that's already been seen in the past two decades, for example, **better nutrition, better ability to manage seizures, better -- you know, better technology.**

See Plaintiff's redirect, December 4, 2013 transcript, page 109 line 25 to page 112 line 16.

Even agreeing that there is a theoretical possibility that Jadiel could live beyond *19* years, such a possibility is so slight that any jury award using more than 79 years would have to be stricken as overly speculative. Before a damage award can be affirmed, the record must support a reasonable estimate of damages based upon more than mere speculation. *Klawitter v. City of Trenton*, 395 N.J. Super. 302, 336 (App. Div. 2007); *Rickards v. Sun Oil Co.*, 23 N.J. Misc. 89, 93 (Sup. Ct. 1945); *Feldmesser v. Lemberger*, 101 N.J.L. 184, 187 (1925). In fact, "the law abhors damages based on mere speculation." *Caldwell v. Haynes*, 136 N.J. 422, 442, (1994); *Grunwald v. Bronkesh*, 131 N.J. 483, 495 (1993); *Mosley v. Femina Fashions, Inc.*, 356 N.J. Super. 118, 128 (App. Div. 2002); *Lewis v. Read*, 80 N.J. Super. 148, 174 (App. Div. 1963).

Since there is nothing in the transcript taking Jadiel past the age of 79, or giving plaintiff a need for more than 75 years of future medical expenses and life care for Jadiel - - and since plaintiff, has already explained in uncontradicted terms the costs of that future medical expenses and life care - - the $105,000,000 verdict cannot stand. At the yearly costs set out by plaintiff, Jadiel would have to **live to 132** to use up the $105,000,000. [12] Defendant's expert accountant states the following in his certification:

***14** Based on the cost of the alternative life care plans prepared by Mr. Provder for facility care and home care, and based upon the same assumptions made by Dr. Tinari with regard to the projected rate of inflation and appropriate discount rate, **$105,000,000 would fully fund the Provder facility plan for approximately 130 years through 2141 and would fund the Provder home care plan for approximately 127 years through 2139.**

ertification by Paul M. Gazaleh on December 23, 2013 (attached to this opinion as Appendix II). [13]

No human being has ever lived to 132. [14] It is beyond speculative to believe that a severely impaired child will be the first to do so. The verdict cannot stand.

The verdict for future medical expenses and life care must be remitted to "the highest figure that could be supported by the evidence." [15] *Fertile*, 169 N.J. at 500. The next two sections of the opinion will address the mathematical computation necessary to achieve that goal.

2. The Home Care or Facility Care Issue

With the 79 year life expectancy or 75 year further life span of Jadiel being set as the rates limit the jury could reasonably consider - - and, therefore, the outer limit of what the court can allow - - the court must decide whether it should remit to the **plaintiff's home care figure or the plaintiff's facility care figure.**

Financially, the court's decision on whether to use the plaintiff's home care cost figure as opposed to the plaintiff's facility care cost figure could cut either way. Plaintiff's life care planner, Mr. Provder, provided minimum and maximum costs for the subparts of both the home care plan and the facilities plan. *See* Plaintiff's Exhibit P-105. Dr. Tinari, plaintiff's economic expert, used the median costs of both Mr. Provder's home care plan and facilities plan, carried out over 75 years (and then increased by inflation and decreased by a discount rate). See Plaintiff's Exhibit P-103. Using the median figures, Dr. Tinari calculated the 75 year cost of plaintiff's home care plan at $64,881,677 and plaintiff's facility care plan at $62,570,225. Id. Ironically, using the maximum costs, the facility care plan actually costs more than the home care plan over 75 years. See the plaintiff's expert's re-calculation using the maximum figures, annexed as Appendix III. [16]

***15** Regardless of whether the court's decision to use the home care plan or the facilities care plan benefits the plaintiff or defendant, the court must make the decision on the record before it. The record before the court clearly establishes that the home care figures must be used, rather than the facilities care figure. There are four reasons the home care plan must be used. First, **Jadiel is now living at home.** Second, Ms. Escobar has stated that **she wants to continue to live with Jadiel.** Plaintiffs counsel noted during the trial "[n]ow, I know that Noemi and Jose [Vanessa's stepfather] do not ever want Jadiel to live in a residential facility." *See* the December 4, 2013 transcript, page 57 lines 24 to 25 to page 58 line 1. Third, it is entirely speculative if, and when, Ms. Escobar, a young, very vigorous, capable person in her early 40's, will become incapable of caring for Jadiel. [17] Fourth, even if Ms. Escobar becomes incapable of caring for Jadiel, there is no reason to believe another family member could not do so.

Thus, the court concludes that the appropriate measure of plaintiff's recovery for future medical expenses and life care must be the cost of home care over the projected 75 years Jadiel is expected to live.

3. The Median or Maximum Cost Issue

Since the court determined that a) Jadiel's future life span is 75 years, and b) Jadiel will more than likely be cared for at home, rather than a facility, the court must determine c) whether the covered calculation is to be made at the projected **median** cost of home care or the projected **maximum** cost.

The court instructed the jury under the Past and Future Medical and Life Care Expenses charge that "[the jury] may accept none, some, or all of the elements of the life care plan, and [the jury] may award more or less than the amounts estimated by the experts for Jadiel's past and future care."

Plaintiff has presented an alternative argument to prevent a substantial remittitur of the $105,000,000 verdict for Jadiel's future care. Accepting a 75 year life expectancy, plaintiff's counsel argues that the plaintiff's experts, in presenting the figures for home care and facility care, were giving conservative estimates based on median figures of future costs. Plaintiff quotes Edmund Provder, the plaintiff's life care planner, on the costs of facilities:
A Well, the range of costs, as I indicated before, on the facilities varies. Some of them are in kind of a rural area. Some of them are kind of in an Urban type of an area. The range of cost varies between the amount of care that's provided at the facility, how much care the person is going to need, whether they provide any types of recreational facilities or any types of things that could stimulate him. **So there's a range, and that's why we provide the range.**

And I know from experience that, if anything, that these again are more conservative figures because these are what they quote you and, in my experience, when I've had somebody in a facility, it's been more than the quote. So, if anything, we have a conservative estimate of what those costs are going to be.

See Plaintiff's direct examination, December 4, 2013 transcript, page 58 lines 7 to 22.
Plaintiff again quotes Mr. Provder on home costs:

Q -- even though there are so many other things. What -- why is this a conservative estimate for the cost?

A Because, based on my experience in working in the New Jersey area for over 35 years, it's very difficult to get a nurse at this rate for somebody who is as severely impaired as Jadiel and because they have such a great responsibility to them, there's no back up. He can have a seizure disorder. He can have all sorts of complications, and the person cannot -- themselves. **So this is what the agencies quote us. However, in my experience, this is very conservative.**

***16** *See* Plaintiff's direct examination, December 4, 2013 transcript, page 56 lines 9 to 20.

Plaintiff goes on to argue that when the jury was informed by plaintiff's economic expert, Dr. Frank Tinari, that the cost of facility care was $62,570,225 and the cost of home care was $64,881,677, *see* Plaintiff's Exhibit P-103, Dr. Tinari was using only conservative or **median** figures for each component cost to arrive at those totals. If the jury had carefully perused plaintiff's exhibit P-105 and utilized the higher numbers, which Mr. Provder had provided, it could have found that Mr. Tinari's totals were too low.

The court's analysis must begin with a recognition that Mr. Provder did set out the minimum and maximum costs for each subcategory of care Jadiel will require. *See* Plaintiff's Exhibit P-105 for several illustrations. For example, Mr. Provder projects therapeutic modalities as follows:
a) Case Manager/Rehabilitation Counselor: $2,400-$8,640 per year

b) Family Education and Counseling: $3,600-54,200 per year

c) Physical Therapy: $12,000-$61,920 per year

d) Occupational Therapy: $12,816-$37,152 per year

e) Feeding Therapy: $18,000-$46,512 per year

f) Speech Therapy: $15,840-545,792 per year

g) Vision Therapy: $4,080-$6,240 per year

h) Nutritionist: $300-$552 per year

Plaintiffs Exhibit, P-105, page B-2. These totals range from $69,036 to $211,000 for a difference of $141,972 per year. More dramatically, there are significant differences between the low and high costs for the home care and facility care costs. *See* Plaintiff's Exhibit, P-105, page B-14. For example, the home care cost is comprised of a professional nurse (ranging from $350,400-$473,040 per year) and a home attendant (ranging from $105,120-$122,640 per year). The facility care cost is comprised of the cost of the residential facility (ranging from $284,700-$660,285 per year). The difference between the

minimum and maximum numbers are $122,640, $17,520 and $375,585 respectively. Furthermore, the median figures for the professional nurse, home attendant, and facility costs are $411,720, $113,880 and $472,492.50 respectively. The differences between the median figures and the high figures are $61,320, $8,760, and $187,792.50. The differences between the median and maximum in many of the categories are obviously not insubstantial. [18]

Focusing on the median and high calculations for Jadiel's total home care costs, the cost of home care was $64,881,677, using the median figures, and $75,868,321, using the high figures.

Since the court's task is to remit to "the highest figure that could be supported by the evidence,"' (*Fertile*, 169 N.J. at 500), it must use the **highest figures.** The formula, then is: Jadiel's future life expectancy times the highest home care figures equals "the highest figure that could be supported by the evidence," (*Fertile*, 169 N.J. at 500). Dr. Tinari has calculated the amount as $75,868,321. *See* Appendix III of this opinion for the calculation. [19]

V. *Apportionment*

***17** The court determined - - and no one disagreed or could have disagreed - - that Joshua Velesquez (a) harmed Jadiel and (b) was a proximate cause of Jadiel's injuries. The jury, despite being informed of the court's ruling and being informed that Mr. Velesquez pleaded guilty to harming Jadiel, allocated zero percent responsibility to Mr. Velesquez.

The decision cannot stand. Mr. Velesquez had the last clear chance to keep Jadiel safe. Everything he did to harm Jadiel was done **after** the Division acted. [20] By analogy, under the doctrine of "intervening or superseding cause," if anyone were 100% liable for Jadiel's injury, it would be Mr. Velesquez. *See Lynch v. Scheininger*, 162 N.J. 209 (2000), where the Supreme Court states:

The Restatements definition of superseding cause is simple and straightforward:

> A superseding cause relieves the actor from liability, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm. Therefore, if in looking back from the harm and tracing the sequence of events by which it was produced, it is found that a superseding cause has operated, there is no need of determining whether the actor's antecedent conduct was or was not a substantial factor in bringing about the harm. [Restatement (Second) of Torts § 440 comment b (1965).]

162 N.J. at 226. [21]

Indeed, under Jury Charge 6.14 it is arguable that an allocation of zero percent **to the Division** could have been sustainable; a verdict of zero percent **to** Mr. Velesquez could never be sustained.

In addition, the Jury Charge 6.10 defines a proximate cause as follows:
(to jury)

… you must find that [name of plaintiff or defendant] negligent conduct was a substantial factor in bringing about the resulting accident or injury/loss/harm. By **substantial,** I mean that the cause is **not remote, trivial, or inconsequential.**

Black's Law Dictionary defines "substantial" as:

Of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing real; not seeming or imaginary; not illusive; solid; true; veritable. Something worthwhile as distinguished from something without value or merely nominal.

Black's Law Dictionary defines "remote" as: "[a]t a distance; afar off; inconsiderable; slight." *Black's Law Dictionary* defines "trivial" as: "[t]rifling; inconsiderable; of small worth or importance."

In *Frugis v. Bracigliano*, 177 N.J. 250 (2003) plaintiffs, parents of elementary school children, sued the principal of the school for negligence, intentional infliction of emotional distress, false imprisonment, and invasion of privacy, and sued the Board of Education for negligent hiring, negligent supervision, and vicarious liability. The defendant principal photographed students in provocative poses in his office and violated N.J. Admin Code tit. 6 § 22-5.4(c) by covering the window to his office door during his 8-year tenure. The trial court dismissed the punitive damages and negligent hiring claims against the Board on summary judgment. "Before closing arguments, the trial court directed a liability verdict in favor of plaintiffs on their negligence and negligent supervision claims against the Board and on their negligence, intentional tort, and 42 U.S.C.A. § 1983 claims against [the principal]. The trial court declined to submit to the jury the issue of apportionment of liability between the Board and [the principal] and the issue of lost future income in calculation any award for [the plaintiffs]." Id. at 267. The jury awarded damages for negligence of $275,000 to one plaintiff and $117,000 to his parents, and $275,000 to the other plaintiff and $109,250 to his parents. The trial court therein entered judgment on all claims against the principal.

***18** The Appellate Division reversed the trial court's directed verdict against the Board and held that a reasonable fact-finder could have found that the Board was not negligent. *Id.* The Appellate Division also held that N.J.S.A. 59:9-3.1 mandated apportionment of liability between the Board and the principal and that the trial court erred by not submitting the issue to the jury. *Id.* at 268. The Appellate Division "affirmed the trial court's decision to withhold plaintiff's lost-future-income claims from the jury, for lack of sufficient expert testimony as to their future earning capacities." *Id.*

The Supreme Court reinstated the directed verdict against the Board and held "that the uncontested proofs, when viewed in their totality, are so overpowering that a reasonable trier-of-fact could not find an absence of negligence on the Board's part." *Id.* at 273. The Supreme Court affirmed the Appellate Division's ruling that the apportionment should have been submitted to the jury and remanded to the trial court for a trial on apportionment of fault between the Board and the principal. The Supreme Court acknowledged that N.J.S.A. 59:9-3.1 must be applied while not substituting its public policy preferences for the Legislature's mandate placing limitations on the liability of public entities. Id. at 274. The jury should be "instructed on the heightened duty of school boards to ensure students' safety from foreseeable harms, particularly those presented by the intentional acts of school personnel." Id. at 282.

Finally, the Supreme Court ordered a two part trial as follows:

> The use of such powerful instructions carries the potential of creating prejudice to school boards in the liability and damages portion of a trial. Accordingly, the better practice would be to have the jury first determine who, if anyone, is at fault among the parties, and then to determine the total damages award. Last, the jury should be charged on apportionment of damages and determine the allocation of fault. The jury should be instructed in advance of that two-phase procedure to be followed by the court. We refer to the Supreme Court Committee on Model Jury Charges (Civil) the preparation of a model charge on apportionment consistent with this opinion.

Id. at 285.

The court herein followed the *Frugis* factors and gave a jury instruction mutually agreeable to both counsel. After hearing the instruction, the jury found zero liability for Mr. Velesquez.

Mr. Velesquez's actions injuring Jadiel were obviously substantial. Once there was a finding that Mr. Velesquez's actions were a substantial or consequential factor, and were neither remote nor inconsequential, an allocation of zero percent cannot stand. There are three trial court verdicts which reach verdicts post *Frugis*, which serve as interesting guide posts.

In *Patterson v. Irvington Board of Education*, (ESX-L-001093-09) the jury found that the defendant, Board of Education, was negligent in failing to alert the door monitors of Denzel Ebron's suspension. The jury also found the Board was negligent in failing to monitor and was a proximate cause of the plaintiff's injuries when Ebron beat up the plaintiff. The jury further found Ebron was at fault and was a proximate cause of the injuries. The jury found that the Board was 80% responsible and Ebron was 20% responsible.

In *L.A. v. DYFS*, (MER-L-1131-07) the jury found that DYFS was negligent in allowing a young child's father to abuse a two year old plaintiff. The jury found DYFS was negligent and was a proximate cause of the injuries. In that case, Judge Inness directed a verdict that the father was liable and a proximate cause of the injuries - - which is precisely what the court ordered herein as to Joshua Velesquez. The *L.A.* jury rendered an apportionment of 100% to DYFS and 0% to the father. The case then settled.

***19** In *Novak v. State of New Jersey*, (BUR-L-1003-03) the jury found that DYFS was liable for leaving the child with abusive foster parents, who settled prior to the trial for the policy limits. The jury then apportioned 70% against the foster parents and 30% against the State (10% for each of the caseworkers).

Thus the three post *Frugis* cases, provide very little consistent guidance since the intentional tortfeasors were found 0%, 20%, and 70% liable. Since the cases do differ from the one before this court and there was no Appellate Division review, the court cannot rely on these cases for its decision.

In the only non *Frugis* case, where allocation was re-adjusted, the trial judge adjusted the 50% - 50% jury verdict to 80% - 20%. See *Bishop v. Harsk*, 191 N.J. Super. 109 (Law Div. 1983). *Bishop* involved a motorist plaintiff who proceeded to turn right at a green light, but stopped short because the car in front signaled left, at which point the plaintiff was hit from behind by the defendant's vehicle. The defendant contended that she did not see the plaintiffs car until right before the accident and also did not see plaintiff's brake lights. It was clear that the 50% - 50% jury verdict could not stand since the defendant hit the plaintiff from behind. The trial judge changed the allocation to 80% on the defendant and 20% on the plaintiff. While *Bishop* establishes that a court may use additur or remittitur on allocation, it is not on point because the case a) did not involve the State, b) did not involve an intentional tortfeasor, c) did not obtain the Appellate Division review.

The court is then left with a decision as to the appropriate remedy. It will not order a new trial for the reasons explained in Part III above. It could, on the other hand, order a remittitur. The question is: what is the appropriate remittitur? One place to look could be the lowest amount any New Jersey ever considered to be a proximate cause. The court has found two cases allowing 3% allocation.

In *Velasquez v. Jiminez*, 336 N.J. Super 10 (App. Div. 2000), the defendant doctor attempted to perform a vaginal delivery, and the baby's head was delivered, but the delivery was unsuccessful because the baby's shoulders were caught against the plaintiff's pubic bone. Given the emergency, the principal defendant doctor called another doctor for assistance, who determined that a caesarean section delivery was required and that the baby's head had to be put back in. Rather than holding the baby's head and cord, the principal defendant doctor let go and performed the surgery on her own rather than waiting for assistance. The assisting doctor went to find an assistant and stopped to scrub before going into the operating room. The baby was delivered with no heart rate as a result of acute asphyxia and was in a coma in critical condition. The baby suffered from severe cerebral palsy, would never walk or talk, and needed constant care. He died three years later as a result of pneumonia. The jury found the principal defendant doctor 92% negligent and allocated 3% liability to the assisting doctor and 5% on plaintiff's preexisting condition.

The Appellate Division "rejected the argument that the substantial factor test for proximate causation is linked to the percentage of negligence attributed to a particular defendant." *Id.* at 31. The jury had found that the 3% liable doctor's deviation from accepted standards of medical care increased the risk and was a substantial factor in the plaintiff's death. The court upheld the 3% apportionment to this assisting doctor because the jury's finding on proximate cause was consistent with its finding that the 3% liable doctor was negligent. "This testimony was more than a scintilla and provided a sufficient basis to support the jury's finding of 3% negligence." *Id.* at 33.

***20** The only other reported New Jersey case where a defendant was held liable for a very small percentage, *Sacco v. Mariarz*, 2008 N.J. Super. Unpub. LEXIS 701 (App. Div. 2006), also resulted in a defendant held to be only 3% liable. The principal defendant in *Sacco* was a man involved in:

> fraud and civil racketeering in connection with a transaction involving a race horse. In 1993, Arthur Marotta, who is not a party to this litigation, instituted a separate state court action raising breach of contract allegations against the Saccos arising out of similar transaction involving race horses.

Id. at 2. The less important defendant was a lawyer who arguably negligently handled a previous matter. The lawyer, whose negligence was at most peripheral, was found to be 3% responsible for the damage.

To compare the purported negligence of the two minor defendants in *Velasquez* and *Sacco* to Mr. Velesquez' actions herein demonstrates how much greater was Mr. Velesquez' contribution to Jadiel Velesquez' injuries. This court cannot seriously consider allocating only 3% of the responsibility for Jadiel Velesquez' injuries to the man who violated the criminal law by physically beating and almost killing Jadiel. He is, at a minimum, a primary, major defendant herein; no one could contend he was a minor figure in the tragedy, let alone a 3% figure, like the assistant doctor in *Velasquez* or the prior lawyer in *Sacco*.

There were three Division defendants listed on the Jury Verdict Sheet: Felix Umetiti, Nussette Perez, Deborah Powell. Each had a different role on this tragedy. Mr. Umetiti was the hand-on day-to-day caseworker assigned the Escobar matter. Ms. Perez was Mr. Umetiti's direct supervisor; when Mr. Umetiti was not available, she was the direct contact. Ms. Powell was Mr. Perez's supervisor. Other than doing so in an arbitrary manner - - Mr. Umetiti was most responsible because he had the most direct involvement or Ms. Powell was the most responsible because she was the highest level person involved - - it is difficult to apportion blame, fault, or causation among the three defendants, and the jury was not asked to do so.

The only non-Division defendant against whom the jury had to apportion causality was Mr. Velesquez. (The jury found Vanessa Merchan, Luz Merchan, and Ufredo Merchan not liable; the court had already found Mr. Velesquez both liable and a proximate cause of the injuries.) As set out above, the jury found that the Division wrongdoers were 100% responsible and Mr. Velesquez 0% responsible.

Most cases contain fact patterns susceptible to apportionment. This is, unfortunately, a case not easily susceptible to apportionment. Logically, each of the four defendants was responsible for the one individual injury Jadiel suffered. That is, if Mr. Umetiti had performed his duties in a non-negligent manner, Jadiel would have been removed from the home and not injured. The same can be said for Ms. Perez and Mr. Powell. If Mr. Velesquez had not attacked Jadiel, the boy would have been uninjured. For the injury to have occurred, each of the four had to have acted negligently (or in Mr. Velesquez's case, worse than negligently). Put differently, the injury was caused by all four people. To try to compare or apportion results in the risk of arbitrariness. The only non-arbitrary apportionment the court can conceive the court can conceive of in this case is per capita, making each of the four responsible parties 25% liable.

***21** If one substitutes the word "parties" for the word "accidents" the present situation would be virtually the same as that discussed by the Supreme Court in *Campione v. Soden*, 150 N.J. 163 (1996):

Although rare, a case may arise where damages cannot be apportioned between two or more accidents. One longstanding judicial response has been to hold each culpable defendant jointly and severally liable for the unapportionable damages. See,

e.g., Fowler V. Harper & Fleming James, Jr., The Law of Torts § 10.1, at 4-5 (2d ed. 1986) (noting increasing tendency to hold parties jointly and severally responsible for indivisible harms caused by independent but concurring tortious acts); Roy D. Jackson, Jr., Joint Torts and Several Liability, 17 Tex.L.Rev. 399, 407-08 (1939) (noting that most American jurisdictions have applied joint and several liability where damages are "patent[ly] impossible" to apportion); William L. Prosser, Joint Torts and Several Liability, 25 Cal.L.Rev. 413, 439 (1937) (noting that, if no logical basis for apportionment of damages exists, joint and several liability applies). At least one jurisdiction has established that a trial judge commits reversible error when he allows a jury to attempt to apportion damages for an "unapportionable" injury. See Ex parte City of Huntsville, 456 So.2d 72, 74 (Ala. 1984), overruled on other grounds by Diemert v. City of Mobile, 474 So.2d 663 (Ala. 1985); see also Brown v. Philadelphia College of Osteopathic Med., 449 Pa.Super. 667, 674 A.2d 1130, 1137 (1996) (finding that trial court is to determine as matter of law whether defendants are joint tortfeasors and therefore subject to joint and several liability); cf. Pure Gas & Chem. Co. v. Cook, 526 P.2d 986, 989 (Wyo.1974) ("That a jury cannot properly apportion damages between joint tortfeasors has almost universal recognition.").

150 N.J. at 175-76.

While *Campione* is not 100% on point because it did not involve a State-entity and was therefore not governed by the Tort Claims Act limitation on State liability applicable to cases such as this case and Frugis, its reasoning is applicable: if apportionment is logically impossible, a court can hold each culpable defendant equally liable.

The court is aware that its position would be attacked as arbitrary in that if one, two or four Division employees were on the verdict sheet, Mr. Velesquez's share would be 50% (in the case of one Division employee), 33.333% (in the case of two Division employees), or 20% (in the case of four Division employees). So be it. The fact of the matter is that the court and jury believed that three Division employees arguably acted in a negligent manner, which negligence proximately caused the injury. [22] The court concluded that to limit the number of the Division employees on the verdict sheet to one or two, or to increase the number to four, would have been inconsistent with the *facts of the case*. Three Division employees and one non-employee did proximately cause the injury. The least arbitrary apportionment or allocation on the *facts of the case* under *Campione*, is 25%, 25%, 25%, and 25%.

VI. *Supervised Fund*

***22** Defendants argues that the court should adopt a remedy that is similar to a remedy adopted by the New Jersey Supreme Court in *Avers v. Twp. of Jackson*, 106 N.J. 557 (1987). In *Avers*, the Supreme Court held that it was appropriate to use a court-supervised fund established by the defendant from which plaintiffs would seek payment of expenses as they were incurred. *Id.* The Court held that it would be a highly appropriate exercise of the Court's equitable powers and that "[i]n litigation involving public-entity defendants,… the use of a fund to administer medical surveillance payments should be the general rule, in the absence of factors that render it impractical or inappropriate." *Id.* at 609 10.

However, as plaintiff argues, in *Avers* residents brought a mass tort case against the town when their water was contaminated by toxic pollutants from a town operated landfill. The jury awarded an allowance to cover the cost of their future medical surveillance due to their increased risk of cancer and other diseases. The Supreme Court held that its situation was limited "to administer medical surveillance payments in mass exposure cases." This case is neither a mass tort case nor involves an increased risk of diseases. Instead, as discussed above, the court reduced the $105,000,000 to $75,868,321 by reducing the life expectancy from 132 years to 79 years, avoiding any windfall. Therefore, the court will not order a use of a fund to administer medical surveillance payments for Jadiel.

VII. *Conclusion*

For the foregoing reasons, defendant's motions for judgment notwithstanding the verdict and new trial are denied. A remittitur is ordered as to the life care plan and the apportionment of damages between the Division and Mr. Velesquez. The remittitur on the life care plan shall reduce the $105,000,000 award to $75,868,321. The $57,670,000 for pain, suffering, disability, impairment, and loss of enjoyment of life will remain unchanged, as will the $ 1,892,160 for past services and care and the $1,410,343 for loss of future wages. The leaves a total amount of $136,840,824. Reducing this amount by the least arbitrary apportionment of 25%, gives a total of $102,630,618. Plaintiffs counsel is to prepare the appropriate order.

Very Truly Yours,

<<signature>>

JAMES S. ROTHSCHILD, JSC

Footnotes

1 The Supreme Court then reviewed the facts of the case before it and decided that verdicts were not grossly excessive and that a reversal was mandated. Thus, as the Court later acknowledged in *Fertile, supra,* "the cited language [in *Taweel*] is dictum" 169 N.J. at 494.

2 As explained below, both counsel were given the opportunity to make both their usual closings and an additional closing under the procedure set forth by the Supreme Court in *Frugis v. Bracigliano*, 177 N.J. 250 (2003).

3 At the conclusion of every jury trial, the court invites those jurors who wish to meet with the court to come into chambers to tell the court if they enjoyed their job and what suggestions they could give the court to make jury service more pleasant. The suggestions usually involve better acoustics and more comfortable chairs. The court never asks the jurors why they voted as they did. In this case, the five or six minute conversation went as follows (quotations approximate): "We want to thank both lawyers for their very clear explanations, particularly in their closings." "Do you all feel this way?" "Yes, sir." "Thank you." "Thank you, Judge for also making the case so easy to follow." None of the jurors even suggested any ill will towards defense counsel.

4 Justice Albin, joined by Chief Justice Rabner, dissented.

5 The court is aware R. 1:36-3 prohibiting it from relying on unpublished opinions and is not relying on *Kowalski* for its ruling here. However, since there are not many published opinions concerning horrific injuries, and the Supreme Court in *He* did not criticize a trial judge for the use of unpublished opinions for comparison purposes, the court will refer to *Kowalski* herein, solely for comparison purposes.

6 The apportionment aspect of *Novak* between the foster parents and DYFS will be discussed subsequently in Part V, page 33 of this opinion.

7 The apportionment aspect of *Patterson*, concerning the student who beat Mr. Patterson and the Board, will be discussed subsequently in Part V page 33 of this opinion.

8 Recently, an Essex County jury awarded plaintiff $15,819,294.93 in *Baker v. New Jersey Transit* ESX-L-6516-11, (March 13, 2014). The $15,819,294.93 was made up of $12,000,000 for pain and suffering for the 40 year old plaintiff, $3,606,611 for future medical and life care, and $202,683 for outstanding medical expenses. The court has not included *Baker* in the above list since the plaintiff's injuries were arguably more orthopedic than pure brain damage.

9 The *Pellicer* retrial settled after 8 days of trial.

10 The court is aware that "[t]he so-called 'golden rule' argument, that is, asking the jury to award an amount it would want for itself in similar circumstances, remains interdicted." PRESSLER & VERNIERO, CURRENT RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY, 94 Comment 1:7-l [2.2.2] (2014). Nevertheless, the court sees no reason it can not utilize similar reasoning, at least by analogy.

11 Dr. Tinari added inflation and discounted to arrive at present value. Counsel agreed not to give the inflation-discount charge to the jury. *See* the December 4, 2013 transcript, page 32 lines 8 to 16, and see particularly lines 12 to 13 where plaintiff's counsel accurately stated, "You're not going to charge the jury on discounting."

12 The mathematical exercise was performed by defendant's accountant, Paul Gazaleh. He took Dr. Tinari's numbers and, like Dr. Tinari, added inflation and took out the discount rate. The court's arithmetic comes very close.

13 Since Jadiel was born in 2009, he will be 132 years old in 2141 and 130 years old in 2139.

14 The longest lived person in these modern times expired at 123 years old. See GUINNESS WORLD RECORDS, http://www.guinriessworldrecords.com/records 5000/oldest-person/ (last visited Mar. 19, 2014); WIKIPEDIA, http://en.wikipedia.org/wiki/Oldest_people (last visited Mar. 19, 2014).

15 It will not advance this opinion for the court to address at any length the jury error which led to the $105,000,000 figure. Suffice it to say, the error was somewhat anomalous since, as set out above, the jury calculated Jadiel's past care, future wages, and pain, suffering, disability, impairment, and loss of the enjoyment of life accurately. The court must assume the jury wanted to give Jadiel and Mrs. Escobar every possible cushion to protect against future needs if Jadiel survives for a very long time. That decision might be morally admirable, but it is not legally sustainable.

16 Although this was not admitted into evidence, Dr. Tinari recalculated the total costs using Mr. Provder's high figures. This is simply arithmetic and no one objected to the report.

17 The speculative and conjectural nature of using facilities care cost is admitted even by plaintiff's experts who arbitrarily selected 17 years as the cut off between the time Jadiel would be cared for at home and the time Jadiel would be cared for at a facility. *See* Plaintiff's Exhibit P-105. To guesstimate Jadiel will be kept at home until he is 21 years old and then at a facility for 58 more years is far too speculative for this court.

18 For each of those numbers, Dr. Tinari used the median numbers.

19 The court is not implying that the jury did these calculations. The court is just following the *Fertile* command to remit to "the highest figure that could be supported by the evidence." *Fertile*. 169 N.J. at 500.

20 Mr. Velesquez apparently abused Jadiel at least once before the event in question, but the prior abuse did not result in any of the damages claimed and awarded.

21 The court quotes *Lynch* not to argue that Mr. Velasquez should have been 100% liable but to demonstrate that he could not be 0% liable.

22 That three Division employees all erred is not inconsequential. If one of the three had done his or her job in a non-negligent manner, Jadiel presumably would not have been hurt.

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