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BARBARA ORIENTALE AND MICHAEL ORIENTALE, Plaintiff/Petitioners, v. DARREN L. JENNINGS AND ALLSTATE NEW JERSEY INSURANCE COMPANY, Defendant/Respondents.	SUPREME COURT OF NEW JERSEY Docket No. A-43-17 (079953) CIVIL ACTION On Appeal From: Appellate Division Docket No.: A-879-14T1 Sat Below: Hon. Carmen Messano, P.J.A.D. Hon. Marianne Espinosa, J.A.D. Hon. Michael A. Guadagno, J.A.D

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

The New Jersey State Bar Association (NJSBA) was founded in 1899 to, in part, aid in the administration of justice. Its mission includes serving as the voice of New Jersey attorneys with regard to the law, legal profession and legal system, and promoting access to the justice system and fairness in its administration.

There are approximately 18,000 attorneys who are members of the NJSBA and whose practices involve every area of the law, including representing clients in resolving their civil disputes.

The NJSBA has a special interest in this case because it impacts a litigant's constitutional right to have a dispute resolved by a jury when an application for additur or remittitur is made seeking to change the amount of damages awarded by a jury in a civil trial. NJSBA members represent all parties in disputes and can provide the Court with a unique and balanced perspective to ensure the process by which additur or remittitur is permitted represents a fair and even-handed approach that preserves the parties' constitutional rights.

In this case, the Court requested supplemental briefing from the parties and from amicus curiae to address four separate inquiries. The NJSBA submits the following answers to the Court's inquiry:

1. Should both parties have the right to object to a trial court's additur, or should only the defendant have that right?
    a. Both parties should have that right.
2. Should both parties have the right to object to a trial court's remittitur, or should only the plaintiff have that right?
    a. Both parties should have that right.
3. In additur, should the court set the damages amount as the lowest amount reasonably supported by the record, or a reasonable amount supported by the record?
    a. Damages should be set at a reasonable amount supported by the record.
4. In remittitur, should the court set the damages amount as the highest amount reasonably supported by the record, or a reasonable amount supported by the record?
    a. Damages should be set at a reasonable amount supported by the record.

This Court has grappled with disputes regarding the propriety of both additur and remittitur with increasing frequency over the past decade. Central to these disputes is the question of whether and under what circumstances it is appropriate for the court to substitute its judgment regarding the proper quantum of damages to be awarded for that of the jury

as well as the appropriate limitations and procedures to do so. Litigants have argued that these doctrines jeopardize their right to a trial by jury, particularly when the jury simply gets it wrong resulting in a palpable miscarriage of justice.

Because in both additur and remittitur the court ultimately substitutes its judgment for that of the jury, and because these doctrines have the capacity to prejudice the right of both parties to a fair assessment of damages by a jury, both plaintiffs and defendants must be given the right to object to a trial court's entry of additur or remittitur and insist on a new trial on damages.

If the law of additur and remittitur is modified, the NJSBA submits that the proper quantum of damages a trial court should award, in both the additur and remittitur contexts, is a reasonable amount supported by the record. The range of reasonable awards can be broad and this Court should instruct trial judges to be guided by the record evidence when arriving at a just damages award. Finally, this Court should instruct trial courts that, in choosing a number they should be guided by the laudable purposes of additur and remittitur, to avoid the costs of a re-trial where substantial justice can be attained on the basis of the first trial record.

LEGAL ARGUMENT

Point I

Both Parties must have an opportunity to object to a trial court's order of additur or remittitur and insist on a new trial on damages only.

Article I, paragraph 9 of our Constitution provides that "[t]he right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons. The Legislature may provide that in any civil case a verdict may be rendered by not less than five-sixths of the jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury." The jury, and not a judge, is charged with the responsibility of deciding the merits of a claim, and the quantum of damages that should be awarded to a plaintiff. Johnson v. Scaccetti, 192 N.J. 256, 279 (2007). Jury verdicts are 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)). This presumption of correctness attaches to the entirety of the verdict, unless a party can clearly and convincingly show that the award is a miscarriage of justice. Ibid.; see also R. 4:49-1(a).

Where a damages award is excessive, courts may invoke remittitur to avoid a new trial. Jastram v. Kruse, 197 N.J. 216, 231 (2008). Under our current law, "[a] court utilizing remittitur should 'remit[] the award to the highest figure that

could be supported by the evidence' because 'the process of remittitur is essentially to 'lop-off' excess verdict amounts, and not to substitute the court's [judgment] for that of the jury.'" Ibid. (quoting Fertile v. St. Michael's Med. Ctr., 169 N.J. 481, 500 (2001)). Where a damages award is plainly inadequate, a trial court may use additur to add to the plaintiff's recovery. See Tronolone v. Palmer, 224 N.J. Super. 92, 99-102 (App. Div. 1988).

Additur was subject to constitutional attack in Fisch v. Manger, 24 N.J. 66 (1957). This Court held that "the practices of remittitur and additur violate none of our constitutional interdictions and, if fairly invoked, serve the laudable purpose of avoiding a further trial where substantial justice may be attained on the basis of the original trial." Id. at 80. Following Fisch, remittitur and additur have been employed by our trial courts over the years, with changes being made in how an award ought to be calculated. Compare He v. Miller, 207 N.J. 230 (2011) (tacitly endorsing the trial court's reliance on comparative verdicts and prior experience as a litigator and judge) with Cuevas, 226 N.J. at 486 ("[A] judge's reliance on personal knowledge of other verdicts and on purportedly comparable verdicts presented by the parties in deciding whether to remit a pain-and-suffering damages award . . . is not sound in principle or workable in practice.").

In the federal courts, remittitur is permitted, but additur is prohibited by the Seventh Amendment of the United States Constitution. See Dimick v. Schiedt, 293 U.S. 474, 486-87 (1935). The Dimick Court explained its reasoning as follows:

> The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts. In dealing with questions like the one now under consideration, that distinction must be borne steadily in mind. Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact. Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess -- in that sense that it has been found by the jury -- and that the remittitur has the effect of merely lopping off an excrescence. But where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict. When, therefore, the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial, how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may, by assessing an additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept "an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess."
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> [Id. at 486-87.]

The NJSBA respectfully submits that imposition of an altered quantum of damages either via additur or remittitur, without consent, infringes upon each party's constitutionally protected right to have their dispute resolved by a jury. Each necessarily involves the judge substituting his or her judgment regarding the proper quantum of damages for that of the jury where the trial court has already found that the damages award shocks the judicial conscience. See Cuevas, 226 N.J. at 513. The NJSBA submits that there is no principled reason to honor a judicially determined portion of a jury award, without the consent of both parties, where the jury's damage calculation clearly and convincingly demonstrates a miscarriage of justice. Because entitlement to a new trial on damages is a necessary precondition to an additur or remittitur remedy, the trial court should not rely on any portion of the damages award that has been deemed defective for purposes of providing the court's own damages number. The jury in the first trial has already demonstrated that it could not capably and justly assign a damages award. This demonstrated inability to award a just and legally sustainable sum taints the entirety of the damages award regarding any damages category deemed deficient. A closer examination of the current state of the law illustrates the unfairness.

Remittitur can be conceptualized in two ways. The first is that it lops off the impermissible portion of the award. The second is that remittitur substitutes the judge's view of the proper quantum of damages. This Court's current precedents tell trial judges to award the highest permissible sum to the plaintiff on a remittitur application. See Jastram, 197 N.J. at 231. In other words, the trial court is called upon to make a legal determination as to what is the highest amount of damages that can be sustained on the record before the trial court. In cases where damages are unliquidated (as in the vast majority of tort cases involving emotional distress or pain and suffering damages, or the rarer matters in which punitive damages are awarded), our courts have never been able to identify any objective standard for determining the precise point at which a damages award crosses the line from valid to excessive. While drawing this line is a judicial function, where to draw the line will be dependent on the particular judge. Just as reasonable jurors may disagree as to what constitutes a just damages award under the circumstances, reasonable trial judges may also disagree as to what amount constitutes an excessive award. Because there can be no definitive legal standard as to what exact quantum of damages is excessive in any particular case, the court's downward adjustment of damages in a remittitur case

involves it substituting its view of the facts for that of the jury.

While remittitur may "serve the laudable purpose of avoiding a further trial," it does so at the expense of the defendant's right to a fair and legally sustainable jury determination of damages. A threshold determination for a remittitur remedy is that the jury's damages verdict constitutes a clear and convincing injustice. Granting a remittitur while only permitting the non-aggrieved party (in this case the plaintiff) to object to the entry of judgment has the effect of doubling that miscarriage of justice. In such a case, a verdict that was never rendered by a jury is imposed on the defendant without its input. In remittitur, the harm to the plaintiff is less severe, as the plaintiff has the option to consent to the amended award. A defendant, however, has no such option, and merely loses the right to a jury determination of damages altogether.

The NJSBA respectfully submits that where judicial economy and litigation expenses are competing with the parties' constitutional right to a jury determination of damages, doubts must be resolved in favor of preserving the right to jury determination of damages. It is patently unfair that the only party who has the right to insist upon a new trial when a miscarriage of justice has occurred is the party that benefited

from the injustice in the first place. Fundamental fairness dictates that defendants in remittitur cases must be given an opportunity to object to the trial court's remittitur, and insist on a new trial on damages only.

From the NJSBA's perspective, an additur works the identical injustice as remittitur, the only difference being the identity of the constitutionally compromised party. In additur, the court, having determined that the plaintiff has been the victim of a miscarriage of justice, imposes on plaintiff, without an opportunity for input, an alternative award agreeable to the defendant. In an additur case, just as in a remittitur case, one of the parties did not receive a just and fair determination of their dispute by a jury trial, as provided for by the State Constitution. Providing for an additur, subject only to the non-aggrieved party (in this case, the defendant) objecting, compounds the miscarriage of justice by wrongly foreclosing a jury's determination of the fair quantum of damages altogether.

In essence, both additur and remittitur necessarily spring from a finding that one of the parties was the victim of a miscarriage of justice. A decision to grant additur or remittitur is akin to forcing the aggrieved party to waive its right to a jury determination of damages. This Court has previously determined (regarding the Constitutional requirement

of a 5/6th verdict) that a litigant is permitted to waive the rights granted to them under Article I, paragraph 9, but implicit in that ruling must be a requirement that they actually do waive that right. LaManna v. Proformance Ins. Co., 184 N.J. 214, 225-26 (2005). The current procedure for additur and remittitur necessarily requires the waiver of that right to trial by jury by one party without its consent.

The NJSBA strongly believes that a fundamental component of access to justice is a party's unfettered right to a jury trial, and that this constitutionally protected right should not be compromised for the sake of the expense of trial or judicial economy, unless the decision to waive that right is voluntarily undertaken by the parties - especially the aggrieved party. The NJSBA respectfully submits that absent conditioning the additur or remittitur upon the consent of all parties, the current procedures are essentially impermissibly forced waivers of the right to trial by jury.

POINT II

Trial courts must award a reasonable amount supported by the record in both remittitur and additur applications, at all times guided by the laudable goals of both doctrines, to avoid unnecessary re-trials.

If this Court adopts the position that no litigant will be consigned to accepting an unsatisfactory additur or remittitur, the NJSBA believes that the question as to how those damages may be decided becomes less critical. The appellate courts, including this Court, will no longer be vexed by the constant struggle to provide guidance for the trial courts regarding the appropriate, objective manner by which a trial judge must evaluate a trial record for purposes of granting an additur or remittitur. This Court has grappled with the extent to which it is appropriate to use comparable verdicts for purposes of analysis and found the process troubling. See Cuevas, 226 N.J. at 486-87. Likewise, this Court has grappled with the reality that not all judges have the same background and experience in evaluating damages and found it troubling. See He, 207 N.J. at 244; Cuevas, 226 N.J. at 502-05. If the award is not binding, none of these issues create the potential for error.

Under such circumstances, the NJSBA believes the parties and the court system are best served by the trial court making its best effort to determine an award that it believes is reasonable. Traditionally, in remittitur the trial court had to

set the verdict as the highest that the record may sustain. See, e.g., Jastram, 197 N.J. at 231; Fertile, 169 N.J. at 500. However, as explained above, this has the effect of depriving the parties of their right to a jury determination of liability and damages. Because the defendant may object to remittitur, and insist on a damages-only re-trial if not satisfied with the trial court's number, the requirement that trial courts set the verdict as the highest permissible number no longer has any utility. That is because setting the highest possible figure will not serve remittitur's laudable goal of preventing further re-trials. The same principle applies with equal force to additur.

In attempting to arrive at a reasonable figure, a remittitur or additur order functions in much the same way as a non-binding arbitration award. This Court has frequently touted such proceedings as being a critical and successful tool in resolving cases without added expense to the parties or unnecessary expenditure of judicial resources. See R. 1:40-1, et seq.; see also Civil CDR Program Resource Book, New Jersey Courts (September 2015), at 2-1, njcourts.gov/courts/assets/civil/civilcdrresourcebook.pdf?cacheID=DtXWHZy ("The purpose of arbitration is to provide an informal process for resolving civil cases in an economic and expeditious manner"). Against this backdrop this Court should have a high level of confidence

that a reasonable non-binding award by a judge with a full record to consider will arrive at a number that both parties have a high potential to accept.

Moreover, in order for a non-binding additur or remittitur to be useful in avoiding retrial, assuming both parties consent to same, the NJSBA respectfully submits that a figure based on a reasonable assessment has the greatest potential for gaining the acceptance of the parties, thereby resolving the case without a retrial. At a minimum, a reasonable remittitur or additur provides a critical guidepost for the parties in settlement negotiations following the first, ultimately flawed trial. Following the initial trial, with knowledge of the costs and time commitment necessary for the second trial, and with the benefit of the trial court's reasoned opinion as to the proper value of damages, the parties may be in a better position to settle the case than they otherwise would have been with only the court's amended verdict. This information will help the litigants settle a case prior to the second trial, and will further the purpose at the heart of additur and remittitur: to avoid unnecessary re-trials.

CONCLUSION

For all the foregoing reasons, the NJSBA submits that this Court should permit all parties to a remittitur or additur order the right to object to same, and insist on a new trial on damages. Additionally, when fixing an additur or remittitur award trial courts should enter an amount reasonably supported by the record, at all times guided by the purpose of these doctrines, to resolve cases without the expense of unnecessary re-trials.

Respectfully submitted,

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