**IN THE COURT OF APPEALS**
**TWELFTH APPELLATE DISTRICT**

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| NICKY POTEET | * | Warren County Case No. 18CV091634 |
| **Plaintiff-Appellee,** | * | **CASE NO.: CA2021-08-071** |
| | * | |
| **v.** | * | **Oral Argument Requested** |
| JEAN M. MACMILLAN | * | |
| **Defendant-Appellant.** | * | |

# BRIEF OF PLAINTIFF-APPELLEE NICKY POTEET

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## Statement of the Case

### A. Procedural Posture

This damages-only trial started February 22, 2021, and ended February 24, 2021. On February 24, 2021, the jury returned a seven-to-one verdict awarding Nicky Poteet $825,000 in damages. In a unanimous eight-to-zero verdict, the jury determined that Ms. Poteet sustained a permanent and substantial physical deformity, meaning that Ms. Poteet's damage award was not subject to caps. Ms. Poteet's award was reduced to judgment on March 1, 2017. On March 29, 2017, Ms. MacMillan filed a motion for judgment notwithstanding the verdict and motion for a new trial, which the trial court denied on July 13, 2021. Ms. MacMillan filed her Notice of Appeal on August 9, 2021.

### B. Statement of Facts

On November 15, 2017, Defendant/Appellant Jean MacMillan struck Plaintiff/Appellee Nicky Poteet with her car in the Franklin Public Library parking lot in Franklin, Ohio. (T.p. Day 2, p. 17:11-13). The impact and force fractured Appellee's leg in multiple places. *Id.* at p. 17:17-19). As a result of the impact, Appellee sustained a compound fracture and Appellee's bone was sticking out of her leg. *Id.* Due to the severity of her injuries, Appellee had no choice but to lay on the ground in immense pain waiting for EMS to arrive. (Pl. Ex. 1, p 7). Appellee was rushed to the emergency room at Kettering Medical Center and was diagnosed with both a tibiotalar and fibula fracture. (Pl. Ex. 2a). Due to the nature and extent of Appellee's injuries, she was required to undergo two separate surgical procedures. A first surgery was performed, and Appellee's leg was stabilized with an external fixator. (T.d. 131 p. 10: 17-24). Appellee was required to remain in this external fixator and remain non-weightbearing for eighteen days, until December

5, 2017, when she underwent open/reduction internal fixation surgery in order to attempt to repair the damage done in the crash. *Id.* at p. 27:13-18. The surgery required replacing parts of Appellee's natural bone and tissue with plates and screws. *Id.* at p. 38:10-15.

Appellee faced a long and painful road to recovery. She diligently performed at-home therapy exercises in order to recover some of her function of her leg and ankle. (T.p. Day 2, p. 21:9-23). Her ankle, however, was never the same. Aside from her continued pain, Appellee's ankle joint no longer functioned as it did before. *Id.* at pp. 24-25.

Months before trial, on October 13, 2020, Appellant stipulated that she was negligent in operating her motor vehicle at the time of the crash, that her negligence was the sole cause of the crash, and that the crash in turn "caused injury" to Appellee. (T.d. 69).

Trial began on February 22, 2021. Kelsey Slivinksi, Appellee's daughter, testified to Appellee's noticeable limp and continued pain since the crash. (T.p. Day 1, pp. 71-73). Dr. Venkatarayappa, Appellee's treating surgeon, testified to the permanent hardware in Appellee's tibia as a result of the crash. (T.d. 131, pp. 43:23-44:4). He testified that Appellee's fibula fracture healed with a permanent malunion. *Id.* at p. 38-39). He stated that Appellee may need a fusion surgery or ankle replacement surgery in the future depending on her continued pain. *Id.* at p. 120:20-23. Finally, he testified that Appellee had a permanent surgical scar at the incision site. *Id.* at p. 45:2-5.

Appellee testified to her continued pain and swelling. (T.p. Day 2, pp. 24-27). She described the loss mobility and loss of control in her ankle since the crash. *Id.* at p. 24:10-13. She testified that she has never been able to drive due to her albinism and its effect on her eyesight, thus walking was critical for her. *Id.* at pp. 15-16. While she did not do in-person physical therapy, she testified that she was diligent in performing the suggested

home-therapy exercises each day since her discharge from the hospital. *Id.* at p. 21:9-23. Kailey Slivinski, Appellee's other daughter, explained what her mother had lost as a result of her injuries: nature walks, trips to haunted houses, and the ability to easily walk to get groceries and other necessities. *Id.* at 67:1-17.

Dr. Paley testified and confirmed that Appellee's fibula is fractured and shortened as a result of the crash. (T.d. 130 pp. 15, 31). He also confirmed her tibiotalar malunion and her resulting loss of mobility. *Id.* at p. 35. Dr. Paley explained to the jury that the ankle fusion surgery that Appellee may yet need to undergo would "obliterate" her ankle joint and result in a further loss of mobility. *Id.* at pp. 72-76. Dr. Paley agreed that Appellee has permanent scarring. *Id.* at 69:6-10.

Dr. Feibel, Appellant's expert, confirmed that Appellee has permanent plates & screws in her leg, along with a tibiotalar malunion and fibula fracture. (T.d. 136 p. 63:12-22). Dr. Feibel stated that the tibiotalar malunion could not be fixed. *Id.* at p. 57.

## Argument

### I. DEFENDANT-APPELLANT'S FIRST ASSIGNMENT OF ERROR:

**The Trial Court erred in granting a Directed Verdict in Appellee's favor on the issue of whether Appellee sustained a permanent injury as a result of the accident**

***Issue Presented for Review and Argument:***

**The trial court's directed verdict on permanency was proper**

The trial court's directed verdict as to the permanency of Appellee's injuries and the corresponding jury instruction were warranted because, even viewing the evidence in the light most favorable to the Defendant, reasonable minds could only conclude that Appellee's injuries were permanent. "A motion for a directed verdict should be granted

when, after construing the evidence most strongly in favor of the party against whom the motion is directed, 'reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party.'" *Rieger v. Giant Eagle, Inc.*, 157 Ohio St.3d 512, 2019-Ohio-3745, 138 N.E.3d 1121, ¶ 9, quoting *White v. Leimbach*, 131 Ohio St.3d 21, 2011-Ohio-6238, 959 N.E.2d 1033, ¶ 22, quoting *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶ 4. "Before granting a motion for a directed verdict in accordance with Civ.R. 50(A)(4), the reasonable-minds test requires the court to determine whether there is any evidence of substantive probative value that favors the nonmoving party." (Citation omitted.) *Id.* While Ohio courts have not provided a more specific definition for what constitutes a "permanent" injury, Black's Law defines the term as "[a] completed wrong whose consequences cannot be remedied for an indefinite period." INJURY, *Black's Law Dictionary* (11th ed. 2019).

The evidence at trial was unequivocal: Appellee's injuries cannot be remedied for an indefinite period, and are thus permanent.

**a. All experts agree that Appellee's injuries are permanent**

All of the experts that opined on this issue testified that Appellee's injuries and resulting physical condition were permanent:

> Q. Okay. It's a fact that the hardware in Nicky's ankle is permanent, correct?
> A. Yes.
> Q. It's a fact that she didn't have a metal plate and over a half dozen screws in her ankle before this crash, correct?
> A. That's correct.
> Q. Okay. And it's a fact that three years post-surgery, there's a malunion at the tibiar -- tibiotalar joint, correct?
> A. That's correct.

(Video Deposition of Dr. Feibel, T.d. 136 p. 63:12-22)

> Q. In light of the permanent alterations to the internal structure of Nicky's ankle, chronic pain, her reduced mobility, the fact that she now walks with a limp and has this permanent hardware, do you have an opinion as to whether Nicky Poteet suffered a permanent and substantial physical deformity as a result of this crash?
> A. I do.
> Q. And what is your opinion?
> A. I think left to stand as is, these deformities are permanent and so is the loss of motion and the scarring.

(Video Deposition of Dr. Paley, T.d. 130 pp. 70-71.)

> Q. Do you have an opinion, within a reasonable degree of medical certainty, as to whether or not the hardware that you implanted in Nicky's lower right leg is permanent?
> A. Yeah, it is intended to be permanent.

(Video Deposition of Dr. Venkatarayappa, T.d. 131 pp. 43-44.)

> Q. So, with someone such as Nicky who has the injury that she has sustained, why is it that patients like her oftentimes will have complaints of pain or stiffness after overuse?
> ***
> A. Because patient has damage to her cartilage, the joint surface, which almost always this type of injury will result in damage to the joint surface, and that will result in ongoing or chronic pain and limitations of movement.

*Id.* at p. 46:9-21.

> Q. In this case, has Nicky shown signs of chronic pain?
> A. Yes.

*Id.* at p. 46:2-4.

Contrary to Appellant's assertion that there was "disagreement," Appellant's Br. p. 10, among the experts as to the permanency, the evidence was undisputed that at least one if not both of Appellee's fractured healed in a deformed manner. In fact, Appellant admitted that "[a]ll three experts agreed that Appellee's fibula healed in slightly deformed manner." *Id.* Both Dr. Paley and Dr. Feibel, Appellant's own expert, also unequivocally confirmed that Appellee had a malunion at her tibiotalar joint. (T.d. 130 p. 35:2-22; T.d.

136 p. 63:19-22). While Dr. Venkatarayappa did not testify as to a tibiotalar malunion, he testified that "[d]epending on how much the pain is affecting her activities of daily living," (T.d. 131 p. 121:1-5), Appellee could in the future require a surgical "fusion or ankle joint replacement." *Id.* at p. 120:20-23. As Dr. Paley explained, a fusion surgery would be a trade of pain for mobility, and the ankle joint would be completely obliterated in the surgery:

> Q. By fusing the ankle joint, does that - - it takes away some pain, but does it also reduce mobility?
> A. Yes, there will be no longer. It obliterates the entire joint...[t]here will be no more motion...[m]any patients can walk better, but not perfect.

(T.d. 130 p. 76:5-21). Dr. Feibel stated that the "malunion doesn't need to be fixed" and then goes on to say that in fact "you couldn't fix the malunion at this point." (T.d. 136 p. 57:21-22). Dr. Feibel testified that he did not recommend a fusion surgery, *Id.* at p. 58:2-4, but he admitted that it would be difficult for him to answer whether the tibiotalar joint malunion was currently affecting Appellee's ability to walk or weight-bear. *Id.* at p. 58:6-12. Thus, it is clear that the tibiotalar malunion is permanent, and that even potential future surgeries merely trade one problem (pain) for another (decreased mobility).

The foregoing uncontroverted expert testimony presented to the jury at trial demonstrates that reasonable minds could only come to one conclusion: Appellee's injuries were permanent.

**b. The lay witness testimony supported the expert testimony on permanency.**

Appellee's daughter Kelsey Slivinksi testified at length regarding how Appellee's collision-related injuries still cause her daily pain and impact her ability to walk:

> A. [M]y mom always walks with a limp now, that's obvious.

(T.p. Day 1 p. 71:23-24).

> Q. [D]o you ever see anything that makes you think that she appears in pain?
> A. Oh yeah***there's a specific noise that she makes and rubs her leg.

(T.p. Day 1 p. 72:17-25).

> Q. The longer you see your mom on her feet at work, does her walk or limp become more pronounced?
> A. Yes.

(T.p. Day 1 p. 73:14-17).

Appellee also described her ongoing injuries in detail:

> Q. [D]o you seem to fall more than you did before the crash?
> A. Yes...[m]y foot just - - it don't pick up. The ability - - I don't have control over it.

(T.p. Day 2 p. 24:5-11).

> A. I still have leg pain every day, swelling, sleepless nights because of numbness. Swelling, it's just - - I mean the list - - I mean it could go on.

(T.p. Day 2 p. 25:22-25).

> Q. ...Are you ever free from pain now?
> A. No

(T.p. Day 2 p. 26:11-13).

> Q. Do you walk 20 minutes now very easily?
> A. No.
> Q. What about being on your feet for long periods, is that difficult?
> A. Yes.

(T.p. Day 2 p. 27:9-14).

> A. Pain, swelling. It's ongoing issues that I still have from this day.

(T.p. Day 2 p. 40:1-2). The defense did not call any witnesses to dispute Plaintiff's fact witnesses. Moreover, Appellee's last medical treatment for her ankle was on August 28, 2020, which is 1017 days after the wreck. (Pl. Ex. 5). In the August 28, 2020, visit with Premiere Orthopedics, Dr. Ventaktarayappa noted that she was still in pain and that her pain was "aggravated by walking/overuse," and confirmed on physical examination that her "pain is worsened with dorsiflexion." *Id.* Moreover, Dr. Ventaktarayappa confirmed that Appellee showed signs of suffering from chronic pain. (T.d. 131 p. 46:2-4).

Appellant's position turns on the argument that "the fact that Appellee fractured her ankle and had permanent hardware in her leg does not necessarily mean that she sustained a permanent injury. People undergo joint replacements, and insertion of hardware, every day, and make complete recoveries with no residual problems." Appellant's Br. p. 9. It seems that Appellant believes that replacing parts of one's natural, organic bone structure with man-made materials–permanently–is not "permanent" unless it creates "residual problems." This "residual problems" definition of permanency is as artificial, unnatural, and fabricated as the screws and plates inside Appellee's ankle. No legal definition of "permanent" includes this artificial "residual problems" qualifier. It does not matter whether the plates and screws inside of Appellee are creating "residual problems." The fact that these replacement parts are "completed wrong[s] whose consequences cannot be remedied for an indefinite period" means that Plaintiff's injury, and the hardware used to treat it, are permanent. INJURY, *Black's Law Dictionary* (11th ed. 2019).

Appellant's arguments that Appellee "never sought a second opinion," Appellant's Br. p. 13, "did not pursue" additional treatment modalities, *Id.* at p. 14, and had an alleged gap in treatment, *Id.* at p. 13, do not affect whether her internal hardware or malunion

are permanent; rather they go to Appellee's duty to mitigate her damages. The trial court instructed the jury on Appellee's duty to mitigate her damages, and the jury was allowed to consider evidence of Appellee's failure to mitigate. (T.p. Day 3 p. 102). There was no testimony that shorter intervals of treatment or more treatment overall would have prevented the installation of permanent surgical hardware or allowed Appellee to keep her original bone and tissue. Thus, evidence of treatment gaps or treatment not pursued is not "substantive probative evidence" that changes whether Appellee's injuries are permanent; rather, that evidence is relevant to Appellee's alleged failure to mitigate her damages. As Appellant points out, a jury is presumed to have followed the instructions given by the trial court. Appellant's Br. p. 23 (citing *Silver v. Jewish Home of Cincinnati*, 12th Dist. Warren No. CA2010-02-15, 2010-Ohio-5314 ¶ 41). The jury heard Appellant's arguments about Plaintiff's alleged failure to mitigate her damages, is presumed to have followed the trial court's instruction on that issue, and, presumably, reduced their award to Appellee by any amounts they deemed were attributable to her failure to mitigate.

Finally, *Hicks v. Freeman*, 12th Dist. Warren No. CA99-12-140, 2000 WL 1336854 (Sept. 18, 2000), cited by Appellant, does not stand for the proposition that the trial court may not direct a verdict as to permanency. *Hicks* did not involve an injured party with internal hardware or with multiple malunions. Unlike in the present case, *Hicks* did not involve a trial in which experts on both sides agreed that the plaintiff suffered from permanent injuries, to wit: internal hardware, scarring, and tibiotalar and fibular malunions.

To overcome a directed verdict, Appellant needed to produce some "substantive probative" evidence showing that Appellee's injuries are not permanent—meaning that the injuries could be remedied within a definite period. Appellant presented no such

evidence. No expert testified that the plates and other hardware in Appellee's leg could eventually be swapped back out for her natural bone and tissue. Nor did any expert testify that Appellee's malunions would resolve. No witness testified that Appellee is no longer in pain. In the present case, reasonable minds could only reach one conclusion, that Appellee's injuries were permanent. Thus, the trial court properly directed a verdict as to permanency and Appellant's first assignment of error should be overruled.

## II. DEFENDANT-APPELLANT'S THIRD ASSIGNMENT OF ERROR:

**The Trial Court erred when it included additional language in the jury instruction in the jury instruction regarding what constitutes a permanent and substantial physical deformity, which was prejudicial to Appellant.**

***Issue Presented for Review and Argument*:**

**The trial court properly instructed the jury that "outward surgical scars and internal modifications to the body can be a permanent and substantial physical deformity."**

Generally, the trial court should give jury instructions requested by the parties "'if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction.'" *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828, quoting Markus & Palmer, Trial Handbook for Ohio Lawyers (3 Ed.1991) 860, Section 36:2. "'It is within the sound discretion of the trial court to determine whether a jury instruction is relevant.'" *Silver v. Jewish Home of Cincinnati*, 12th Dist. No. CA2010-02-015, 190 Ohio App.3d 549, 2010-Ohio-5314, 943 N.E.2d 577, ¶ 80, quoting *Enderle v. Zettler*, Butler App. No. CA2005–11–484, 2006-Ohio-4326, 2006 WL 2390515, ¶ 35. "'If, taken in their entirety, the instructions fairly and correctly state the law applicable to the evidence presented at trial,

reversible error will not be found merely on the possibility that the jury may have been misled.'" *Id.*, at ¶ 81, quoting *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 410, 629 N.E.2d 500, citing *Ohio Farmers Ins. Co. v. Cochran* (1922), 104 Ohio St. 427, 135 N.E. 537. Here, the instruction that "[o]utward surgical scars and internal modifications to the body **can be** a permanent and substantial physical deformity[,]" (T.p. Day 3 p. 102) **(emphasis added)**, clearly is a correct statement of the law and reasonable minds could (and did) reach the conclusion sought by the instruction.

**a. The instruction was a correct statement of the law.**

The Northern District of Ohio has already rejected the assertion that scars and internal modifications **cannot** be "permanent and substantial physical deformities" under R.C. 2315.18:

> Defendants allege the courts have established that, as a matter of law, internal modifications of a person's body structure and surgical scars cannot qualify as permanent and substantial physical deformities. Contrary to the Defendants' contention, courts have left the determination of the nature of a plaintiff's injuries to the triers of fact.

*Ohle v. DJO Inc.*, No. 1:09-CV-02794, 2012 WL 4505846, at *4 (N.D. Ohio Sept. 28, 2012). Several other Ohio state and federal courts have found that injuries comprised of scarring and internal modifications should go to the jury for determination of permanent and substantial physical deformity. *e.g. Johnson v. Stachel*, 2020-Ohio-3015, ¶ 76 (5th Dist.), 154 N.E.3d 577, 597, *appeal allowed*, 2020-Ohio-4232, ¶ 76, 159 Ohio St. 3d 1487, 151 N.E.3d 634, and *cause dismissed*, 2020-Ohio-5319, ¶ 76, 160 Ohio St. 3d 1455, 157 N.E.3d 781 ("The Court is unpersuaded by Defendant's analogies to cases that hold scarring must be visibly severe in order to qualify as a 'substantial physical deformity.' Plaintiff's injury is not merely aesthetic or superficial – it is a structural change to his

skeletal system. The complete removal of a joint is not insubstantial merely because it is not visible to the human eye."); *Schmid v. Bui*, No. 5:19-CV-1663, 2020 WL 8340144 (N.D. Ohio Sept. 16, 2020) (allowing the jury to decide whether "six surgeries involving metal plates, nails, or other devices...scarring...other physical distortions" and a "prosthetic hip" constituted a permanent and substantial physical deformity). *Bransteter v. Moore*, No. 3:09 CV 2, 2009 WL 152317, at *2 (N.D. Ohio Jan. 21, 2009) (allowing the jury to decide whether "a perforated bowel with several surgeries resulting in a scar" constituted a permanent and substantial physical deformity).

Here, this Court did not instruct the jury that they **must** find that Appellee suffered a permanent and substantial physical deformity. This Court did not instruct the jury that if they determined that Appellee suffered scarring and other internal modifications, then they must determine that Appellee suffered a permanent and substantial physical deformity. Rather, this Court merely instructed the jury as to a plainly permissible consideration under Ohio law: "outward surgical scars and internal modifications to the body **can be** a permanent and substantial physical deformity." (T.p. Day 3 p. 102) **(emphasis added)**.

**b. Reasonable minds could reach the conclusion sought by the instruction.**

The jury heard testimony that Appellee both (1) had outward surgical scars and internal modifications to her body, and (2) suffers from a permanent and substantial physical deformity. Thus, the jury could properly conclude that both were true. Specifically, in addition to the testimony regarding permanency cited supra, the jury heard the following testimony regarding Appellee's substantial physical deformity:

> Q. In light of the permanent alterations to the internal structure of Nicky's ankle, chronic pain, her reduced mobility,

the fact that she now walks with a limp and has this permanent hardware, do you have an opinion as to whether Nicky Poteet suffered a permanent and substantial physical deformity as a result of this crash?
A. I do.
Q. And what is your opinion?
A. I think left to stand as is, these deformities are permanent and so is the loss of motion and the scarring.

(T.d. 130 pp. 70-71).

Q. And what's the, I guess, clinical significance or impact, if you will, on Nicky when you have a deformed talar joint that is not in an optimal place?
A. Well, they have chronic pain, they have deformity, they have persistent problems that she was complaining of, they have problems with shoewear, they have problems with motion, because you can't generate the correct biomechanical response from the tendons to pull hard enough to elevate it, you have a mechanical block here. So every time her ankle comes up, okay? It bangs into the front right there. And had this been moved forward, you could see how close that is to the front, that sloping dome, it allows it to come up and to clear. Now, she comes up, okay?· Bangs right into the front of that, that's what prevents her motion. There's no amount of physical therapy in the world that will correct that.

*Id.* at p. 35:2-22.

Q. Okay. And it's a fact that three years post-surgery, there's a malunion at the tibiar tibiotalar joint, correct?
A. That's correct.

(T.d. 136 p. 63:19-22).

Q. Does Nicky have a permanent scar at the incision site?
A. With my previous recollection, yes.

(T.d. 131 p. 45:2-5).

Q. And why do you say that?
A. Because of the presence of deeper plates (sic.) And also the scar -- scarring of the wound, which is partly surgical and partly open have lower resistance for infection, which will – it can potentially contract infection later down the line.

*Id.* at p. 43:8-15.

> Q. And, Doctor, based on your review of the records and your physical examination of Nicky Poteet, does she have permanent scars from both surgeries?
> A. She does.

(T.d. 130 p. 69:6-10). The foregoing testimony establishes more than enough for "reasonable minds" to conclude that Appellee had outward surgical scars, had internal modifications to her body, and suffered a permanent and substantial physical deformity. Thus, the instruction was proper.

### c. The trial court's instruction was more limited than Appellant asserts.

Contrary to Appellant's assertion, upholding the instruction in this case does not require this Court to determine whether "a disc bulge, or a stretched tendon, or any fracture that heals even slightly differently than it was before," Appellant's Br. pp. 17-18, can constitute a permanent and substantial physical deformity. Nor does upholding the instruction in this case require this Court to find as a matter of law that outwards scars and internal modifications to the body **always constitute** a permanent and substantial physical deformity. Rather, the instruction of the trial court that Appellee asks this Court to uphold merely states that "outward surgical scars and internal modifications to the body **can be** a permanent and substantial physical deformity." (T.p. Day 3 p. 102) **(emphasis added)**.

Appellee has incorrectly characterized Appellant's position as saying that *Bransteter*, *Cawley*, *Ross*, and *Ohle* stand for the proposition that outward scarring and internal modifications always constitute a permanent and substantial physical deformity. Appellant's Br. pp. 18-19. To the contrary, Appellee's position is that outward scarring and internal modifications **can** constitute a permanent and substantial physical

deformity—meaning that it is a jury question—not that it **must** constitute a permanent and substantial physical deformity. Appellant had the opportunity to argue to the jury that Appellee's injuries were not a permanent and substantial physical deformity, and she took advantage of that opportunity. (T.p. Day 3 p. 80) ("The last thing I want to address is the issue of permanent physical deformity."). The jury simply disagreed with Appellant's position.

The other cases cited by Appellant do not compel a different result. *Weldon v. Presley* turned on whether a four-centimeter scar **alone** could constitute a permanent and substantial physical deformity. *Weldon v. Presley* N.D.Ohio No. 1:10 CV 1077, 2011 WL 3749469, *7, *report and recommendation adopted*, N.D.Ohio No. 1:10 CV 10772011 WL 3754661. Appellee's injuries in this case, however, included both internal modifications and scarring, thus *Weldon* is not instructive in Appellee's case. *Sheffer v. Novartis* is similarly inapplicable because it involved neither outward scarring nor internal modifications to the body, and "[n]otably, Plaintiffs point[ed] to no evidence to support a finding that either statutory exception applies." *Sheffer v. Novartis*, S.D.Ohio No. 3:12-CV-238, 2014 WL 10293816, *2. This is clearly distinguishable from the present case in which Appellee presented overwhelming expert and lay testimony as to the permanent and substantial nature of her injuries.

Thus, the trial court properly instructed the jury that outward scars and internal modifications to the body can constitute a permanent and substantial physical deformity. Appellant's third assignment of error should be overruled.

## III. DEFENDANT-APPELLANT'S SECOND ASSIGNMENT OF ERROR: The Trial Court erred when it denied Appellant's Motion for a Directed Verdict on the issue of whether Appellee sustained a permanent and substantial physical deformity such that the statutory cap set forth in ORC 2315.18 did not apply

***Issue Presented for Review and Argument*:**

**Appellant was not entitled to a directed verdict on permanent and substantial physical deformity**

Reasonable minds could, and did, come to the conclusion that Appellee's injuries constitute a permanent and substantial physical deformity; thus a directed verdict in Appellant's favor would have been improper. The most significant evidence supporting Appellee's permanent and substantial physical deformity–Appellee's internal hardware, permanent scarring, and malunions–has already been cited in detail *supra*. This evidence was more than sufficient to bring the matter to the jury, who then decided in a unanimous eight-to-zero vote that Appellee's injuries constituted a permanent and substantial physical deformity. (T.d. 146).

Appellant incorrectly states that "the jury could only speculate as to whether" Appellee's ankle "was visibly deformed." Appellant's Br. p. 20. The August 28, 2020, x-ray of Appellee's ankle shows the permanent metal plate and 8 screws inside Appellee's ankle and leg. *See* Exhibit 10-i. This x-ray also demonstrates the malunion at the front, base of Appellee's tibia, which Appellant's own expert, Dr. Feibel, confirmed. (T.d. 136 p. 63:19-22). Dr. Paley explained the significance of this malunion by testifying that the slope of Appellee's tibia sits too far forward. (T.d. 130 p. 35:6-22). As a result, when Appellee raises her foot, it bangs into the sloping dome at the front of her tibia. *Id.* The jury also received the picture of Appellee's leg post-surgery. (Pl Exhibit 10-d). Appellee's treating surgeon then testified that she has a permanent scar:

> Q. Does Nicky have a permanent scar at the incision site?
> A. With my previous recollection, yes.

(T.d. 131 p. 45:2-5). Dr. Paley also testified that Appellee has permanent scarring:

> Q. And, Doctor, based on your review of the records and your physical examination of Nicky Poteet, does she have permanent scars from both surgeries?
> A. She does.

(T.d. 130 p. 69:6-10). No expert testimony was offered to show that Appellee did not have a permanent scar. Nor did any lay witness testify that Appellee no longer had a scar. While Appellant makes much of the fact that Appellee did not show her scar in the trial, this is not a legal requirement. Appellant cites no caselaw or statute requiring that a plaintiff lift her pant leg and remove her shoe on the stand in order to prove that she has a scar. While such a *Philadelphia* [1]-style moment may have made for good courtroom drama, it is not a legal requirement.

Furthermore, Defense Counsel argued this point extensively in closing, yet the jury still decided, unanimously, that a permanent and substantial physical deformity exists:

> They haven't given you anything other than pictures that were taken over three years ago. So they haven't met that burden here. And I would submit to you, it's up to you guys to decide. You don't have to find that that exists. So it's up to you guys to decide have they met that burden by a preponderance of the evidence? You don't know what the ankle looks like now. We may know - - maybe there was a photograph here or there from a year ago or two years ago. But we don't know what it looks like now.

(T.p. Day 3, pp. 82-83). Defense Counsel made her point in closing, but the jury simply rejected it.

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1 *Philadelphia* – a 1993 film and legal thriller starring Denzel Washington and Tom Hanks. In the pivotal courtroom scene, plaintiff's counsel (Washington) asks his client (Hanks) to lift his shirt and show his bodily lesions to the jury. *Philadelphia* Plot, IMDb, (Oct. 19, 2021, 12:57 P.M.), https://www.imdb.com/title/tt0107818/plotsummary?ref_=tt_stry_pl#synopsis

Finally, Appellant makes frequent reference to the opinion *Simpkins v. Grace Brethren Church of Delaware*, Ohio, 149 Ohio St.3d 307, 2016-Ohio-8118, ¶ 58, and some of the cases cited therein, but the opinion of *Simpkins* received the vote of only two Justices, and one more Justice concurred in the judgment only. *Id.* Two Justices dissented, and two others would have dismissed the case as being improvidently granted. *Id.* Thus, Appellee submits that only the judgment of *Simpkins*, not the opinion, is controlling law in Ohio. Neither the opinion of *Simpkins*, nor Appellant's argument that via *Simpkins* the Ohio Supreme Court has implicitly adopted the reasoning of *Weldon v. Presley*, N.D.Ohio No. 1:10 CV 1077, 2011 WL 3749469, and *Williams v. Bausch & Lomb Co.*, 2010 U.S. Dist. LEXIS 62018 (S.D. Ohio, 2010), controls in the present case.

Reasonable minds could come to the conclusion that Appellee suffered a permanent and substantial physical deformity. A directed verdict on this point would therefore have been improper. Appellant's second assignment of error should be overruled.

## IV. DEFENDANT-APPELLANT'S FOURTH ASSIGNMENT OF ERROR:

**The Trial Court erred when it refused to instruct the jury regarding proximate cause**

***Issue Presented for Review and Argument*:**

**Appellant was not entitled to an instruction on proximate cause**

**a. Causation was stipulated before trial.**

Appellant was not entitled to a jury instruction on proximate cause because the parties stipulated to causation before trial. "'A stipulation, once entered into, filed, and accepted by the court, is binding upon the parties and is a fact deemed adjudicated for purposes of determining the remaining issues in that case.'" *State v. Murray*, 2009-Ohio-

6174, 186 Ohio App. 3d 185, 927 N.E.2d 24, ¶ 19 (12th Dist.), quoting *State v. McCullough*, Putnam App. No. 12–07–09, 2008-Ohio-3055, 2008 WL 2485366, ¶ 20. "'A party who has agreed to a stipulation cannot unilaterally retract or withdraw it.'" *Id.* Finally,

> [a]n admission of liability in a personal injury case sends the pleadings to the four winds except as to the nature and scope of the injuries on the one side and the denial thereof on the other. Negligence and proximate cause go out of the case as if by magic, and nothing remains for the jury to do except fix the amount of damage. This is the sole and only issue left in the case.

*Cleveland Ry. Co. v. Kozlowski*, 128 Ohio St. 445, 449, 191 N.E. 787, 788–89 (1934).

Months prior to trial, the parties entered into the following written stipulations that were filed with the trial court:

> 2) Defendant Jean MacMillan was negligent in failing to yield the right-of-way to Plaintiff Nicky Poteet at the time of the November 15, 2017 accident;
> [...]
> 5) Defendant Jean MacMillan's negligence in the November 15, 2017 accident caused injury to Plaintiff Nicky Poteet

(T.d. 69). The stipulations had no qualifications that denied causation for certain injuries. For the first time at trial, and again in her brief, however, Appellant argued that she did not stipulate to causing "all" injuries. Appellant's Br. p. 23. The plain meaning of the terms in the stipulation, however, show that causation for the injuries alleged by Appellee was stipulated before trial.

"A negligence claim requires proof of the following elements: duty, breach of duty, causation, and damages." (Citation omitted.) *Anderson v. St. Francis-St. George Hosp., Inc.*, 77 Ohio St.3d 82, 84, 671 N.E.2d 225, 227 (1996). "Legal cause" means "proximate cause," CAUSE, *Black's Law Dictionary* (11th ed. 2019), which in turn means "a cause that is legally sufficient to result in liability." *Id.* "Injury" means "[a]ny harm or damage."

INJURY, *Black's Law Dictionary* (11th ed. 2019). Damages are "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." DAMAGES, *Black's Law Dictionary* (11th ed. 2019). Thus, stipulations two and five removed from the jury's consideration three of the four elements of negligence: duty, breach & causation. The only element remaining for trial was damages.

The Ohio Supreme Court has already determined that in a damages-only trial, inserting a proximate cause instruction is reversible error. *Cleveland* at 451. In *Cleveland,* the trial court gave the following instruction:

> Now, in this case the defendant concedes liability; that being the situation, we go to a consideration of the second point, which is the question of damages. Now to make out her case she must not only show the negligence which is admitted, but she must show that the injuries, if any, which she sustained were caused as the proximate result of the negligence of the defendant.

*Cleveland Ry. Co. v. Kozlowski,* 128 Ohio St. 445, 191 N.E. 787 (1934), synopsis. There was no objection to this particular instruction, but on appeal the Ohio Supreme Court held that it was plain error to include it, because "[n]egligence and proximate cause were not in the case at all. She was not required to prove facts that were admitted, although the trial court in his charge said that she was." *Cleveland Ry. Co. v. Kozlowski,* 128 Ohio St. 445, 450, 191 N.E. 787, 789 (1934).

As the stipulations were entered into before trial, accepted by the trial court, and filed on the docket, Appellant could not unilaterally withdraw the stipulations during trial in order to put the issue of proximate cause back in play for the jury. Causation was "deemed admitted," and per the Ohio Supreme Court "negligence and proximate cause go out of the case, as if by magic." To include the Appellant's requested proximate cause instruction would have been plain error.

### b. Appellant's remaining arguments are addressed by the duty-to-mitigate instruction.

The trial court's instruction on Appellee's duty to mitigate her damages addressed the evidence that Appellee claims necessitated a proximate cause instruction. The trial court instructed the jury that:

> The defendant claims the plaintiff failed to mitigate her damages. If the defendant proves by the greater weight of the evidence that the plaintiff did not make reasonable efforts under the facts and circumstances in evidence to avoid loss caused by the defendant's negligence, you should not allow damages that could have been avoided by the reasonable efforts to avoid loss.

(T.p. Day 3, p. 102). The evidence that Appellant alleges necessitated a proximate cause instruction was that Appellant's ongoing issues "were due to her failure to pursue treatment." Appellant's Br. p. 27. Appellee further argues that the failure to include a proximate cause instruction told the jury "in effect, to award money for any pain or limitations she experienced after she broke her ankle regardless of whether the ongoing issues were due to Appellant's negligence." *Id.* To the contrary, the trial court's instruction on Appellee's duty to mitigate expressly told the jurors that they "should not allow damages that could have been avoided by the reasonable efforts to avoid loss." (T.p. Day 3, p. 102).

Appellant's citation to two cases outside of this District does not compel a different result. The holding of *Edwards v. Louy* did not directly address whether a proximate cause instruction is appropriate when the parties have stipulated causation before trial; rather, it addressed the appropriate jury instruction when the defendant alleges overtreatment, and the defendant's wish to avoid paying medical bills associated with the alleged overtreatment. *Edwards v. Louy*, 6th Dist. Lucas No. L-01-1367, 2002-Ohio-

3818, ¶¶ 10-12. In *Edwards*, the jury "was told, in effect, to award all of the medical expenses if some of them were necessary." *Id.* at ¶ 12. Here, Appellant is not alleging overtreatment, but rather Appellee's alleged failure to pursue helpful treatment—an allegation covered by the trial court's instruction on Appellee's duty to mitigate.

The holding of *Evans v. Hunter* is also inapposite as the parties in that case only stipulated that the tortfeasor's negligence caused the crash, not that the crash caused injury. *Evans v. Hunter*, 5th Dist. Richland No. 17CA61, 2018-Ohio-1498, ¶ 2 ("the parties stipulated to Hunter's negligence in causing the automobile accident"). The plaintiff's counsel in *Evans* moved for a directed verdict on the issue of the proximate cause of the plaintiff's injuries during the trial, *Id.* at ¶ 39, which would not have been necessary had proximate cause been established by stipulation before trial. Thus, *Evans* is not instructive in the present case in which the parties stipulated to causation before trial.

The trial court properly excluded an instruction on proximate cause because the parties had stipulated causation. The only issue for trial was Appellee's damages, the jury was instructed on Appellee's duty to mitigate her damages, and the jury was told not to allow damages that Appellee could have avoided by reasonable effort. Appellant's Fourth Assignment of Error should be overruled.

## V. DEFENDANT-APPELLANT'S FIFTH ASSIGNMENT OF ERROR:

**The Trial Court erred in precluding Appellant from presenting evidence at trial that Appellee was incarcerated following the accident, when this evidence would have been relevant to challenge Appellee's proffered explanation for why she did not continue to receive treatment, and whether she actually performed home therapy as instructed**

***Issue Presented for Review and Argument*:**

**The trial court properly excluded evidence of Appellee's prior incarcerations**

Evidence that Appellee was previously incarcerated was not relevant, and even if it was, the probative value of that evidence was substantially outweighed by the danger of unfair prejudice to the jury. The trial court excluded evidence of Appellee's previous incarceration expressly because "the prejudicial effect far outweighs the probative value." (T.p. Day 2, p. 12). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ohio Evid. R. 401. "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice." Ohio Evid. R. 403(A). Furthermore, "'[a] trial court's decision to admit or exclude evidence will not be reversed by a reviewing court absent an abuse of discretion.'" *State v. Fester*, 12th Dist. No. CA2019-05-043, 2021-Ohio-410, 167 N.E.3d 1021, ¶ 43, *appeal not allowed*, 163 Ohio St.3d 1441, 2021-Ohio-1896, 168 N.E.3d 1209, quoting *State v. McLaughlin*, 12th Dist. Clinton No. CA2019-02-002, 2020-Ohio-969, 2020 WL 1244797, ¶ 42. Evidence that Appellee was incarcerated was not relevant to any element of her negligence claim. The introduction of that evidence would only have served to unfairly prejudice the jury against Appellee by suggesting that, as a former inmate, she was unworthy of compensation for her injuries.

Appellant argues that Appellee's incarceration was relevant to her alleged failure to mitigate her damages, but the evidence relevant to that affirmative defense was actually admitted by Appellant at trial. The only evidence excluded was the unfairly prejudicial evidence that Appellee had previously been incarcerated. For example, on cross examination of Appellee Defense Counsel was permitted to ask extensive questions relevant to a failure-to-mitigate affirmative defense:

> Q. [I]n February of 2018 Dr. Indresh did recommend that you go to physical therapy, right?
> A. Correct.
> Q. And instead of actually going to formal physical therapy you chose to do home exercises on your own; is that right?
> A. Yes.

(T.p. Day 2, p. 33:7-13).

> Q. [Y]ou would agree that [Dr. Venkatarayappa] did tell you to come back in three months?
> A. Correct.
> Q. And it sounds like you just decided not to come back after that point; is that fair?
> A. Correct.

(T.p. Day 2, p. 35:12-17).

> Q. Even though you had pain and swelling and trouble walking, you didn't think you needed to see anyone?
> A. No.

(T.p. Day 2, p. 40:6-9).

> Q. Well, Ms. Poteet, you would agree with me, though, that you're standing here and you're telling the jury that this injury has affected to you to the point that you can't walk anywhere and that you feel like you've lost your liberty and you've lost your independence. And you think this affects you every single day, but you haven't gone to see any other doctor, correct?
> A. Correct.

(T.p. Day 2, pp. 42-43).

> Q. Okay. But you haven't sought any more treatment?
> A. No.

(T.p. Day 2, p. 47:21-23). Defense Counsel was then permitted to argue this evidence extensively in closing:

> Then, the only other treatment she has is 14 months after that***Wouldn't you expect someone in that position to do everything that they could to try to get better?

(T.p. Day 3, pp. 73-74).

> And that's what I told you about at the beginning of the case. That one of the arguments that we were going to make is if she did need treatment, that she didn't get it. That she didn't do what was reasonable to try to get better.

(T.p. Day 3, pp. 75-76)

> First of all, you heard her testimony that she just didn't go back and get treatment. And you heard all three doctors talk about options that would have been available had she come back.

(T.p. Day 3, p. 76:9-13). Appellant did not need additional evidence that Appellee spent time incarcerated in order to make the aforementioned points regarding Appellee's alleged failure to mitigate.

Furthermore, regardless of what was said in opening statement, there was no testimony or evidence at trial that Appellee "failed to attend physical therapy or pursue additional treatment because she could not drive", Appellant's Br. p 29,—a point that Defense Counsel made in closing argument:

> [O]ne of the things I want to bring up is, you know, they may try to say, well, she couldn't go get treatment. She couldn't get there. She needed rides. But she never said that on the stand...[s]he never said it was because she couldn't get there.

(T.p. Day 3, p. 74:10-18). Thus, Appellant was able to introduce into evidence everything relevant to the failure-to-mitigate defense. Appellant did not have to "impeach" testimony that Appellee did not attend physical therapy or treatment due to a lack of transportation, because, as Defense Counsel pointed out, Appellee never testified to that. The probative value of additional evidence that Appellee was incarcerated would therefore have been substantially outweighed by the danger of unfair prejudice to the jury. This evidence was properly excluded, and Appellant's fifth assignment of error should be overruled.

## VI. DEFENDANT-APPELLANT'S SIXTH ASSIGNMENT OF ERROR:

**The Trial Court erred in precluding Appellant from presenting evidence at trial that Appellee had a substance abuse problem, when such evidence would have been relevant to challenge Appellee's proffered explanation for why she did not continue to receive treatment**

***Issue Presented for Review and Argument*:**

**The trial court properly excluded evidence of substance abuse.**

The proffered evidence of Appellee's substance abuse was irrelevant, and any asserted probative value was substantially outweighed by the danger for unfair prejudice. As with the evidence of incarceration, the trial court excluded evidence of substance abuse for this reason. (T.p. Day 2, p. 12). The trial court further stated that admitting evidence of substance abuse in this case would have "just contribute[d] more to punishing someone for having a disease." (T.p. Day 2, p. 13:6-7). The trial court's ruling is subject to an abuse of discretion standard of review. *State v. Fester*, 12th Dist. No. CA2019-05-043, 2021-Ohio-410, 167 N.E.3d 1021, ¶ 43, *appeal not allowed*, 163 Ohio St.3d 1441, 2021-Ohio-1896, 168 N.E.3d 1209.

Several Ohio appellate courts agree with the trial court's rationale for excluding the evidence of substance abuse. The 10th District Court of appeals ruled in favor of the plaintiff on this issue in a medical malpractice action. *Dellenbach v. Robinson*, 95 Ohio App. 3d 358, 376, 642 N.E.2d 638, 650 (10th Dist. 1993). In that case, the defense attempted to introduce evidence that the plaintiff abused prescription drugs, but the court held that the evidence was inadmissible:

> Defendants attempted to paint a picture of plaintiff as a drug abuser to destroy her credibility***Assuming plaintiff was abusing her prescription drugs, that is irrelevant to the liability and damages issues in this case. Evid.R. 402 excludes all irrelevant evidence. The records, testimony and summary should have all been excluded

> because they are irrelevant, and the prejudicial effect was strong. In addition, such evidence is inadmissible under Evid.R. 404(B). Nor is it admissible under Evid.R. 608(B), which precludes extrinsic evidence of specific instances of a witness's conduct unless it is "clearly probative of truthfulness or untruthfulness"

*Id.* The 5th District Court of Appeals has also ruled that Rule 403 mandated the exclusion of evidence of substance abuse in a tort case in which liability and causation were not at issue:

> [W]e find that the trial court did not err in denying appellant the opportunity to present evidence of the decedent's use of narcotics because the probative value of such evidence is substantially outweighed by the danger of unfair prejudice.
> ***
> The only issue for the jury to determine in this matter was the amount of damages. All issues relating to liability and causation had been resolved. We concur with appellee that, by introducing such evidence, appellant 'hoped to inflame and prejudice the jury with drug test results.' If such evidence had been admitted, the jury might have been inclined to hold the decedent responsible for the accident when the issue of liability was not before them.

(Citation omitted.) *Dieble v. Auto Owner's Ins. Co.*, 5th Dist. Stark No.2004 CV 01060, 2007-Ohio-3429, ¶¶ 35-36. The 3rd District Court of Appeals has similarly held. *Geesaman v. St. Rita's Med. Ctr.*, 2009-Ohio-3931, ¶ 42 (3d Dist.), 183 Ohio App. 3d 555, 570, 917 N.E.2d 867, 879 ("even assuming arguendo that there was some relevance to past drug use, its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the juror").

Appellant argues that evidence of substance abuse is relevant to "challenge Appellee's explanation for why she stopped treating with Dr. Venkatarayappa" and to show that Appellee's pain complaints "were not motivated by discomfort, but by a desire to continue to obtain narcotic pain medication." Appellant's Br. pp. 31-32. The reasons or motivations that Appellee may have had for failing to mitigate are not relevant,

however; the only relevant inquiry is **did** Appellee fail to mitigate her damages, not **why** she did, or did not. Even if there was some relevance as to why Appellee allegedly failed to mitigate her damages, the probative value of a substance abuse-related reason is substantially outweighed by the danger of unfair prejudice to the jury. Defense Counsel exhaustively examined whether or not Appellee failed to mitigate her damages, as discussed *supra*. As stated *supra*, a jury is presumed to have followed the court's instructions given by the trial court. *Id.* at p. 23 (citing *Silver v. Jewish Home of Cincinnati*, 12th Dist. Warren No. CA2010-02-15, 2010-Ohio-5314 ¶ 41). Appellant has alleged no error by the trial court on its failure to mitigate instruction. And the jury had ample opportunity to consider Appellee's failure to mitigate in determining the amount of her damages.

Any reference, evidence or argument relating to Appellee's substance abuse was irrelevant and unfairly prejudicial. The evidence was properly excluded. Appellant's sixth assignment of error should be overruled.

## VII. DEFENDANT-APPELLANT'S SEVENTH ASSIGNMENT OF ERROR: The Trial court erred by denying Appellant's Motion for a Judgment Notwithstanding the Verdict and/or Motion for a New Trial

***Issue Presented for Review and Argument*:**
**The trial court properly denied Appellant's motion for judgment notwithstanding the verdict and motion for a new trial**

"The decision to grant or deny a motion for a new trial is reviewed on appeal under an abuse of discretion standard of review." (Citation omitted.) *A N Bros. Corp. v. Total Quality Logistics, L.L.C.*, 12th Dist. No. CA2015-02-021, 2016-Ohio-549, 59 N.E.3d 758, ¶ 57. The decision to grant or deny a motion for a judgment notwithstanding the verdict is reviewed on appeal *de novo*. *Id.* at ¶ 23. The issues challenged by trial counsel for Appellant in her Motion for Judgment Notwithstanding the Verdict and/or Motion for a

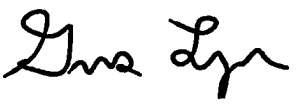
New Trial are all issues that were addressed in the prior six assignments of error. Appellee submits that based on the arguments presented supra, the trial court properly denied the Motion for Judgment Notwithstanding the Verdict And/Or Motion for a New Trial. Appellant's seventh assignment of error should therefore be overruled.

## Conclusion

As a result of the November 15, 2017, crash, Appellee suffered a permanent and substantial physical deformity. The trial court properly directed a verdict that Appellee's injuries were permanent because of the uncontroverted expert and lay testimony at trial. Regardless of whether Appellee will require additional future surgeries, her injuries are permanent. The trial court properly instructed the jury that outward scars and internal modifications to the body can be a permanent and substantial deformity consistent with Ohio law. The jury, hearing the uncontroverted evidence regarding Appellee's internal plates, screws, malunion and scarring, determined that Appellee sustained a permanent and substantial physical deformity. Appellant did not produce evidence to overturn this unanimous jury verdict.

Appellant's own pretrial stipulation removed proximate cause from the jury's consideration and it would have been plain error to include it. The trial court also properly removed from the jury's consideration evidence of substance abuse and incarceration as substantially more prejudicial than probative; the argument that Appellant sought to pursue with these inflammatory topics was properly addressed by the evidence and jury instruction on Appellee's duty to mitigate her damages. As a result of the foregoing, the trial court properly denied Appellant's motion for judgment notwithstanding the verdict and motion for a new trial. The verdict of the jury and judgment of the trial court should be affirmed.

Respectfully Submitted,



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been served upon the following via email on this 25th day of October 2021:

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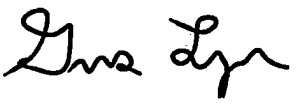

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