UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: DAVOL, INC. / C.R. BARD, INC. POLYPROPYLENE HERNIA MESH PRODUCTS LIABILITY LITIGATION	**Case No. 2-18-md-2846** **JUDGE EDMUND A. SARGUS, JR.** **Magistrate Judge Kimberly A. Jolson**

This document relates to:

***Milanesi, et al. v. C.R. Bard, et al.*, No. 2:18-cv-1320**

PLAINTIFFS' MOTION FOR NEW TRIAL ON DAMAGES OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

Plaintiffs Antonio Milanesi and Alicia Milanesi, through Co-Lead Counsel for the Plaintiffs' Steering Committee ("PSC"), respectfully move this Court for a new trial on damages under Federal Rule of Civil Procedure 59.

Defendants improperly convinced this Court that the doctrine of avoidable consequences is not an affirmative defense and thus the Court did not instruct the jury that the burden of proof was on Defendants as to the mitigation of damages. Under Florida Law, mitigation of damages/avoidable consequences is an affirmative defense for which defendants—not plaintiffs—bear the burden of proof at trial. The damages calculation of the jury was therefore based upon an erroneous instruction of law pertaining to damages and the reduction of damages, which prejudiced Plaintiffs, likely affecting the damages award to both Mr. Milanesi and Mrs. Milanesi.

For these reasons and those set forth in the following Memorandum in Support, the Court should grant Plaintiffs a new trial on damages pursuant to Federal Rule of Civil Procedure 59.

Dated: May 13, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system.

/s/ David J. Butler
Plaintiffs' Liaison Counsel

UNITED STATES DISTRICT COURT
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MEMORANDUM OF AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR NEW TRIAL ON DAMAGES OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

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COME NOW ANTONIO MILANESI AND ALICIA MILANESI, Plaintiffs herein, and file this Memorandum of Authorities in Support of Plaintiffs' Motion for New Trial on Damages or, in the Alternative, Motion for New Trial, showing this Honorable Court that Plaintiffs are entitled to the requested relief for the reasons presented below.

SUMMARY OF ARGUMENT

Post-judgment relief under Federal Rule of Civil Procedure 59(a) encompasses the grant of a new trial limited to the issues of damages where the issue for which relief is sought concerns solely the jury's award of damages: such is the case and the relief sought with Plaintiffs' current motion. Because Defendants' incorrectly argued and persuaded this Court that they did not have the burden of proof for their affirmative defense concerning mitigation of damages/avoidable consequences, the resulting jury instruction did not inform the jury that Defendants bore the burden of proving that affirmative defense. Because that misallocation of the burden of proof could have affected the jury's calculation of damages, this Court should order a new trial on damages. The jury already has determined fault and causation and the new trial should be limited to damages only.[1] As a result, on retrial, this Court should not permit any argument or evidence that anyone other than Defendants were the cause or a cause of Plaintiffs' damages.

ARGUMENT AND CITATION OF AUTHORITIES

I. THE POST-TRIAL RELIEF IN FEDERAL RULE OF CIVIL PROCEDURE 59 ENCOMPASSES THE GRANT OF A NEW TRIAL ON DAMAGES.

Federal Rule of Civil Procedure 59 allows a trial court to grant a new trial on any issue for which a new trial has been granted in a prior federal action. Fed. R. Civ. P. 59(a)(1); *Mike's Train*

[1] Because of the limited scope of issues to be retried, Plaintiffs estimate that the new trial on damages could be tried in a week's time.

House, Inc. v. Lionel, LLC, 472 F.3d 398, 405 (6th Cir. 2006). Among the many issues which may compel a new trial is when there is a demonstrable error related to the award of damages. *See id.* at 413. Although much of the case law on this matter concerns excessive damages, a new trial may be appropriate when the jury awards *inadequate* damages as well. *See, e.g., Pittington v. Great Smoky Mountain Lumberjack Feud, LLC*, 880 F.3d 791, 800-01 (6th Cir. 2018); *Acuity Mut. Ins. Co. v. Frye*, 471 F. App'x 431, 435 (6th Cir. 2012), *Ventas, Inc. v. HCP, Inc.*, 647 F.3d 291, 322 (6th Cir. 2011); *Estate of Riddle v. Southern Farm Bureau Life Ins. Co.*, 421 F.3d 400, 410 (6th Cir. 2005); *Bell v. Johnson*, 404 F.3d 997, 1003-04 (6th Cir. 2005).

When ordering a new trial due to an erroneous damages award, courts have the option to award a new trial only on the issue of damages, or on all issues. Fed. R. Civ. P. 59(a)(1). It is well-accepted within the federal circuits, including the Sixth Circuit, that when the error does not extend to the determination of liability, the new trial should be limited to only the issue of damages. *See, e.g,. Pittington*, 880 F.3d at 800-01; *see also Kerman v. City of New York*, 374 F.3d 93 (2d Cir. 2004); *Racicky v. Farmland Ind., Inc.*, 328 F.3d 389 (8th Cir. 2003); *Hoot v. Contra Costa Cnty.*, 25 F. App'x 565 (9th Cir. 2001); *Elock v. Kmart Corp.*, 233 F.3d 734 (3d Cir. 2000); *Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265 (5th Cir. 1998); *Rosario v. Livaditis*, 963 F.2d 1013 (7th Cir. 1992).

One issue that can warrant a new trial on damages alone is when there is an improper application of the law that only affects damages. *See, e.g., Pittington*, 880 F.3d at 800-802 (reversing denial of new trial on damages due to trial court improperly shifting burden of proof on mitigation of damages from defendant to plaintiff). If an erroneous jury instruction affects only the award of damages, a new trial on the issue of damages is appropriate. *Grimm v. Leinart*, 705 F.2d 179, 182-183 (6th Cir. 1983) (reversing an award of punitive damages on basis of erroneous

instruction and ordering either a remittitur of the punitive damages award or a new trial solely on the issue of punitive damages); *Werbungs Und Commerz Union Austalt v. Collectors Guild, Ltd.*, 930 F.2d 1021, 1027-28 (2d Cir. 1991) (remanding for a new trial on damages where erroneous jury instruction concerned only the calculation of damages).

II. DEFENDANTS IMPROPERLY CONVINCED THIS COURT THAT THE AVOIDABLE CONSEQUENCES DOCTRINE IS NOT AN AFFIRMATIVE DEFENSE AND, AS A RESULT, THE COURT DID NOT INSTRUCT THE JURY THAT IT IS AN AFFIRMATIVE DEFENSE FOR WHICH THE DEFENDANTS BEAR THE BURDEN OF PROOF.

In their Answer and Defenses to the Master Long Form Complaint, asserted as "Separate Defenses" were two defenses (Numbers 13 and 23) relating to failure to mitigate damage. (MDL ECF No. 84, at pp. 37-39.) In Defense Number 23, Defendants assert: "Plaintiff failed to mitigate damages, which limits Plaintiff's recovery, if any, in whole or in part." (*Id.* at p. 39.) In their individual Answer and Notice of Defenses to Mr. Milanesi's Short-Form Complaint, Defendants generally echoed their "failure to mitigate" defenses in Mr. Milanesi's individual case. (*Milanesi* ECF No. 20, at pp. 4-5.) At trial, Plaintiffs specifically requested that the Court charge the jury that the mitigation issue was an affirmative defense for which Defendants bore the burden of proof. (*See* Plaintiffs' Special Request to Charge the Jury #1 and #2, *Milanesi* ECF No. 366, at p. 6.) During arguments on this special request, Defendants strenuously argued that the avoidable consequences doctrine was not an affirmative defense and the Court agreed; the jury, therefore, never was charged that the Defendants had the burden of proving the issues related to the mitigation of damages. Because Florida law shows that whether referred to as "mitigation of damages" or the "doctrine of avoidable consequences", the notion is an affirmative defense for which the Defendants bore the burden of proof, the damages calculation of the jury was based upon an erroneous instruction of law pertaining to damages and the reduction of damages. After

the jury was not instructed that the Defense Issue of Avoidable Consequences was an affirmative defense for which the Defendants bore the burden of proof to reduce the jury's calculation of damages, the jury returned a verdict on the Negligence – Design Defect claim for Plaintiffs in the amount of $250,000.00 and for Alicia Milanesi's consortium claim in the amount of $5,000.00. (*Milanesi* ECF No. 380, attached hereto as Exhibit "A".) This Court, therefore, should order that this case be retried on damages alone with an instruction to the jury that Defense Issue of Avoidable Consequences is an affirmative defense for which the Defendants bear the burden of proof by a preponderance of the evidence.

A. Florida Follows the Majority Rule that Mitigation of Damages/Avoidable Consequences is an Affirmative Defense for which the Defendant Bears the Burden of Proof at Trial.

The defense of "mitigation of damages" now is a misnomer in Florida law. The defense of "mitigation of damages" actually encompassed two distinct sub-types: (1) where the plaintiff acted unreasonably in some fashion at the time of the initial injury; (2) where the plaintiff did not act unreasonably at the time of the initial injury but did not act reasonably after the time of the initial injury and thereby made his damages worse than they otherwise would have been. The first subtype of "mitigation of damages" now has been subsumed by the comparative negligence defense and the second subtype of "mitigation of damages" now has been subsumed by the doctrine of avoidable consequences defense. *Cf. Ridley v. Safety Kleen Corp.*, 693 So.2d 934, 943 (Fla. 1996) (clarifying that the "mitigation of damages" defense is replaced with comparative negligence defense where the defense centers on the plaintiff's conduct at the time of injury, such as failure to wear a seatbelt) *with System Components Corp. v. Florida Dept. of Transp.*, 14 So. 3d 967 (Fla. 2009) (clarifying that the "duty to mitigate" damages after the initial harm is not an actual duty but instead is the defense known as the "doctrine of avoidable consequences"). Just as the comparative

negligence subtype of the mitigation defense is an affirmative defense that must be pled and proven by the party asserting the defense, *see, e.g., Jacobs v. Westgate*, 766 So. 2d 1175, 1180 (Fla. 3d DCA 2000), the doctrine of avoidable consequence is an affirmative defense, which must be pled and proven by the party asserting the defense, as is shown in detail below.

In this case, the focus of the argument on the mitigation jury charge was the Florida Supreme Court's case in *System Components Corp.* As the Court is aware, that case was an eminent domain case that applied the doctrine of avoidable consequences. 14 So. 3d at 971-73, 982-85. The Florida Supreme Court spelled out how the notion of "mitigation of damages" and "avoidable consequences" got mushed together in Florida but then pieced out the clear statement of the avoidable consequences doctrine:

> The doctrine of avoidable consequences, which is also somewhat inaccurately identified as the "duty to mitigate" damages, commonly applies in contract and tort actions. *See generally* 19 Fla. Jur. 2d, *Damages*, §§ 103-04 (2004). There is no actual "duty to mitigate," because the injured party is not compelled to undertake any ameliorative efforts. The doctrine simply "prevents a party from recovering those damages inflicted by a wrongdoer that the injured party *could have* reasonably avoided." The Florida Bar, *Florida Civil Practice Damages* § 2.43, at 2-30 (6th ed. 2005) (emphasis supplied) (citing *Sharick v. SE Univ. of Health Scis., Inc.*, 780 So. 2d 136 (Fla. 3d DCA 2000); *Graphic Assocs. Inc. v. Riviana Rest. Corp.*, 461 So. 2d 1011 (Fla. 4th DCA 1984)). The doctrine does not permit damages reduction based on what could have been avoided through Herculean efforts. *See, e.g., Thompson v. Fla. Drum Co.*, 651 So. 2d 180, 182 (Fla. 1st DCA 1995) ("Extraordinary efforts on the part of a plaintiff to mitigate are not required"), *approved*, 668 So. 2d 192 (Fla. 1996). Rather, the injured party is only accountable for those hypothetical ameliorative actions that could have been accomplished through "ordinary and reasonable care," without requiring undue effort or expense. *Graphic Assocs.*, 461 So. 2d at 1014 (the doctrine "prevents a party from recovering those damages inflicted by a wrongdoer which the injured party 'could have avoided *without undue risk, burden, or humiliation*.'") (emphasis supplied) (quoting Restatement (Second) of Contracts § 305(1) (1979))); *Royal Trust Bank of Orlando v. All Fla. Fleets, Inc.*, 431 So.2d 1043, 1045 (Fla. 5th DCA 1983) (substantially similar).

Id. at 982.

The Florida courts applying post-breach or post-tort mitigation of damages doctrine both before and after the *Systems Components* case consistently have identified the doctrine of avoidable consequences as an affirmative defense. *See, e.g., Penton Business Media Holdings, LLC vs. Orange County*, 236 So. 3d 495, 497 (Fla. 5th DCA 2018) (internal quot. and cit. omit.) (referring to the "affirmative defense" based on the "doctrine of avoidable consequences" and at summary judgment stage, the "moving party must also disprove the affirmative defenses or establish that they are insufficient as a matter of law"). "Although this defense is sometimes mistakenly identified as invoking a 'duty to mitigate', the defense is actually based on the doctrine of avoidable consequences, which simply 'prevents a party from recovering those damages inflicted by a wrongdoer that the injured *could have* avoided.'" *Id. (quoting Sys. Components*, 14 So.3d at 982) (emphasis in *Penton* orig.).

Under the state law of Florida, courts historically have regarded the doctrine under the prior "mitigation" nomenclature as an affirmative defense which must be pled and proven by the defendant. *See, e.g., Juvenile Diabetes Research Foundation vs. Rievman*, 370 So. 2d 33, 34-36 (Fla. 3d DCA 1979) (while plaintiff has the burden of proof in a contract action to prove a prima facie case that he or she has been damaged, the burden shifts with regard to the duty to mitigate damages: "By the overwhelming weight of authority in this country, the defendant employer has the burden of proof at trial to establish the above reduction in mitigation of damages as thus measured by the greater weight of the evidence"); *see also Maxfly Aviation, Inc. v. Gill*, 605 So. 2d 1297, 1300 (Fla. 4th DCA 1992); *Azemco (North America), Inc. v. Brown*, 553 So. 2d 1245, 1246 (Fla. 3d DCA 1989); *Mack v. Garcia*, 433 So. 2d 17, 18 (Fla. 4th DCA 1983); *Graphic Assocs., Inc. v. Riviana Restaurant Corp.*, 461 So. 2d 1011, 1014 (Fla. 4th DCA 1984). Likewise, the Federal trial courts throughout Florida consistently have identified mitigation/avoidable

consequences as an affirmative defense under state law. *See, e.g., PNC Bank, N.A. v. Family Internal Medicine, P.A.*, 2014 WL 12618714, *3 (M.D. Fla. 2014); *Mitchell v. Smith*, 2011 WL 13315134, *7 (N.D. Fla. 2011); *Employers Reinsurance Corp. v. School Bd. Of Broward County, Florida*, 2006 WL 8432130, *5 (S.D. Fla. 2006).

Though Mr. Milanesi's case is not a contract case, the doctrine that defendants chose to assert against his damages claims sounds in contract principles. For contract and business claims, Florida's standard jury instruction for "Mitigation of Damages" sets forth the charge for the "avoidable consequences doctrine", cites *System Components* discussed, *supra*, and shows that the defense *is an affirmative defense for which the defendant bears the burden of proof*:

> **504.9 MITIGATION OF DAMAGES**
>
> **If** (defendant) **breached the contract and the breach caused damages,** (claimant) **is not entitled to recover for those damages *which* (defendant) *proves (claimant) could have avoided* with reasonable efforts or expenditures. You should consider the reasonableness of the claimant's efforts in light of the circumstances facing [him] [her] [it] at the time, including [his] [her] [its] ability to make the efforts or expenditures without undue [risk] [burden] [or] [humiliation].**
>
> **If** (claimant) **made reasonable efforts to avoid the damages caused by the breach, then your award should include reasonable amounts that [he] [she] [it] spent for that purpose.**

Fla. Std. Jury Instr. (Contract & Business) 504.9; *see also In re Standard Jury Instructions - - Contract and Business Cases*, 116 So. 3d 284, 339 (Fla. 2013) (authorizing and approving FSJI (Contract & Business) 504.9). There is no case discussing the doctrine of avoidable consequences that expressly rejects it is an affirmative defense but instead finds (as Defendants' argued) that it is: "just part of the damages calculation." (04/13/22 Rough Trial Tr., at 10:18-23, attached hereto as Exhibit "B".)

Thus, Florida follows the "majority rule" on mitigation/avoidable consequences: it is the defendant who bears the burden of proving that the plaintiff was unreasonable in failing to mitigate damages:

> Mitigation of damages is an affirmative defense that recognizes that a plaintiff's conduct following the defendant's negligence may be a reason for reducing damages, but it does not necessarily bar all recovery, and this context distinguishes mitigation of damages from those other affirmative defenses or special pleas, which, if proven, constitute an absolute defense to the claim. The affirmative defense of failure to mitigate damages has two elements and as to both the defendant bears the burden of proof by a preponderance of the evidence: first, the defendant must prove that the plaintiff failed to exercise reasonable care to mitigate his or her postinjury damages; second, the defendant must prove that the plaintiff's failure exercise reasonable care caused the plaintiff to suffer an identifiable area of harm not attributable to the defendant's negligent conduct. A defendant's burden to prove that the plaintiff has not used reasonable diligence to mitigate damages includes proof of causation, that is, the defendant must prove that the plaintiff's unreasonable postinjury conduct has increased the plaintiff's harm, and if so, by how much.

25 C.J.S. Damages § 184; *see also The Weitz Co., LLC v. Surfside Pavers, Inc.*, 2013 WL 11260393, *3 (Nineteenth Cir. Court, Florida) (Florida trial court referring to "failure to mitigate damages" or "doctrine of avoidable consequences" as an affirmative defense, which "must be proved by the greater weight of the evidence") (citing 25 C.J.S. Damages § 184 and *Maxfly Aviation*, 605 So. 2d at 1300).

Similarly, Federal employment law borrowing from state tort law also shows that the defense of mitigation/avoidable consequences is an affirmative defense for which the burden of proof rests on the defendant in the particular case. *See, e.g., Pennsylvania State Police v. Suders*, 542 U.S. 129, 131 (2004) (holding that Title VII accommodates the "'avoidable consequences'" doctrine which "'borrows from tort law'" and "the defending employer bears the burden to prove that the plaintiff-employee unreasonably failed to avoid or reduce harm) (quoting *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) and citing the companion case of *Faragher v.*

Boca Raton, 524 U.S. 775, 807 (1998)); *see also Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1286-87 (11th Cir. 2000) (in admiralty action, holding that "failure to mitigate is an affirmative defense").

B. The Jury Never Was Instructed that Defendants Had the Burden of Proof on the Affirmative Defense of Avoidable Consequences.

During arguments on the jury instructions, Defendants' counsel incorrectly but strenuously argued that the avoidable consequences doctrine was not an affirmative defense and the Court agreed based on the fact that the *Systems Component* case did not speak to whether the doctrine was an affirmative defense for which the defendant bore the burden of proof. (Exh. "B", at 10:16-16:15; 04/13/22 Rough Trial Tr., at p. 129:5-18, attached hereto as Exhibit "C".) The jury, therefore, never was instructed or otherwise informed that the Defendants had the burden of proving the elements of their affirmative defense. Below is the Instruction the Court gave to the jury on the Defendants' Avoidable Consequences Affirmative Defense:

> **Instruction No. 25**
>
> **DEFENSE ISSUE ON AVOIDANCE OF CONSEQUENCES**
>
> Defendants claim that Mr. Milanesi could have reduced his future damages by undergoing an additional surgery to repair his recurrent hernias, and that such refusal was unreasonable. There is no actual duty to mitigate or reduce his damages because Mr. Milanesi is not required to undertake any corrective efforts. The law simply prevents Mr. Milanesi from recovering those damages inflicted by Defendants that Mr. Milanesi could have reasonably avoided. The law does not permit damage reduction based on what could have been avoided through extraordinary efforts. Rather, Mr. Milanesi is only accountable for corrective actions that could have been accomplished through ordinary and reasonable care, without requiring undue effort or expense.

(Court's Final Jury Instructions at p. 25, attached hereto as Exhibit "D"; Exh. "C" at p. 129:5-18.) As there was no Affirmative Defense instruction anywhere in the jury charges, the only discussion of burden the jury heard in the instructions was that Mr. Milanesi had the burden of proof throughout:

> **Instruction No. 13**
>
> **BURDEN OF PROOF**
>
> Unless I instruct you otherwise, the burden of proof in this case is on the Plaintiffs, Mr. and Mrs. Milanesi, to prove their claims and any damages by a preponderance of the evidence, which I will define for you.

(Exh. "D" at p. 13 & *passim;* Exh. "C" at p. 123:6-9.)

C. Because the Jury Never Learned that Defendants Had the Burden of Proof on their Avoidable Consequences Defense, and Because that Defense Pertains Solely to Damages, the Jury's Damages Award to Mr. and Mrs. Milanesi Could Have Been Affected and Therefore a New Trial is Warranted.

Because the Florida application of the avoidable consequences defense is, like in most states, an affirmative defense for which the asserting defendant bears the burden of proof, and because there was no instruction to the jury in that regard, the burden on that defense was misallocated. "Incorrect jury instruction as to the burden of proof is fundamental and highly prejudicial and requires a new trial." *Waldorf v. Shuta*, 896 F.2d 723, 730 (3d Cir. 1990) (internal quot. and cit. omit.). Where the burden of proof has been misallocated during jury instructions, prejudice is presumed to result unless the legal issue is in one of those "limited circumstances" where there was overwhelming evidence on one side of the topic to which the misallocated burden pertained. *See, e.g., Blackorby v. B.N.S.F. Railway Co.*, 936 F.3d 733, 738-39 (5th Cir. 2019).

Thus, where the jury charge misallocating the burden of proof *could have affected the outcome of the case*, a new trial is warranted. *See, e.g., Hanover Ins. Co. v. American Eng'g Co.*, 105 F.3d 306, 314 (6th Cir. 1997) (ordering a new trial because jury instruction that "radically altered Hanover's burden of proof in establishing reformation of a written contract" could not be considered harmless error); *U.S. Securities & Exchange Comm'n v. Snyder*, 292 Fed. App'x 391, 407 (5th Cir. 2008) (holding that defendant was entitled to a new trial as a result of jury instruction that misallocated burden of proof because "the jury may have rejected Snyder's theory of defense based on his failure to meet a burden of proof that was not his"); *Cf. Allen v. Chance Mfg. Co.*, 873 F,2d 465, 469-70 (1st Cir. 1989) (ordering a new trial because erroneous jury instruction on proximate case could have affected the jury's deliberations and verdict); *see also Hudson v. Prudential Prop. & Cas. Ins. Co.*, 450 So.2d 565, 568 (Fla. 2d DCA 1984) (holding that because the burden of proving an exception to coverage shifted to the insurer after insured proved that a loss had occurred on the insured's property, and the jury was not so instructed, new trial was warranted); *Mejia v. Citizens Prop. Ins. Corp.*, 161 So.3d 576, 579 (Fla. 2d DCA 2014) (same).

On all fours with the issue before this Court is the Sixth Circuit case, *Jones v. Consolidated Rail Corp.*, 800 F.2d 590 (6th Cir. 1985). In *Jones*, the plaintiff injured his back while working for the defendant as a "trackman" for that railroad. *Id.* at 591. The railroad's company physician determined that the plaintiff could not return to the heavy labor duties of a trackman and he was not, therefore, reemployed in that position and had not worked since he lost that position. *Id.* at 591-92. He then brought suit against the railroad defendant under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, alleging that the negligence of a supervisor caused his back injuries. *Id.*

At trial, the plaintiff "alleged that he was completely unable to work at any type of employment." *Id.* at 592. The defendant presented evidence that the state disability bureau asked the plaintiff to appear for evaluation of his skills and potential for rehabilitation. *Id.* The evidence presented showed that the plaintiff refused to appear for any skills/rehabilitation evaluation with the disability bureau "because he did 'not want to be bothered.'" *Id.* The company doctor testified that, though the plaintiff could not do the heavy duty of a trackman, "he could do lighter or more sedentary work such as driving or being a janitor." *Id.* The plaintiff also testified that he had not applied anywhere for a job. *Id.*

With regard to the mitigation of damages defense asserted by the defendant railroad, the trial court instructed the jury:

> An injured party is under a legal obligation to mitigate his damages, that is, to minimize the economic loss resulting from his injury, by resuming gainful employment as soon as such can be done, if such is available. If he does not resume available employment even though he is physically able to do so, such person may not recover damages for earnings lost after the date on which he was or reasonably could have been able to return to some form of gainful employment to the extent that such damages could have been mitigated.

Id. at 593. At no point did the trial court instruct the jury that the defendant had the burden of proof for the mitigation of damages defense. *Id.* After deliberations, the jury returned a general verdict in the plaintiff's favor in the amount of $168,736.00. *Id.* at 592.

The plaintiff appealed to the United States Court of Appeal for the Sixth Circuit. *Id.* The issue on appeal was whether the trial court erred by failing to instruct the jury that the defendant bore the burden of proving the mitigation defense and, if so, whether a new trial was warranted as a result of the erroneous jury instruction. *Id.* at 592-93. The Sixth Circuit in *Jones* answered both questions in the affirmative, reversed the judgment, and ordered a new trial. *Id.* at 594-95.

In so ruling, the *Jones* court found that the defendant had the burden of proving the mitigation defense, even though the plaintiff had the burden of proving his damages:

> We agree that the defendant did have the burden of proof concerning plaintiff's failure to mitigate damages. The manner of determining damages in an action under FELA must be settled according to general principles of law as administered in the federal courts. We recognize the general principle that a plaintiff has the burden of proving his damages. We also acknowledge the well-established rule that an injured plaintiff has a duty to mitigate his damages. However, once it is established that a duty to mitigate is present, the burden nevertheless falls on the wrongdoer to show that the damages were lessened or might have been lessened by the plaintiff. *See generally* Annot., 134 A.L.R. 242, 243 (1941) (citing many federal and state cases in support of this rule).

Id. at 593 (cits. omit.).

Because the defendant bore the burden of proving the plaintiff failed to mitigate his damages, the Sixth Circuit then turned to the jury charges to ascertain what was said about that allocation of burden and determined: "The jury instructions failed to place this burden of proof on the defendant." *Id.* at 594. The *Jones* court stated that because the jury never was informed that the defendant had the burden of proof on the mitigation defense,

> it seems unlikely that the unguided jury was able to perceive the correct placement of the burden of proof. Because this may have affected the damages award, the district court's failure to instruct on the burden of proof is reversible error. *See, e.g., Castillo v. Givens*, 704 F.2d 181, 195 (5th Cir.) (burden of proof always of major importance), *cert. denied*, 464 U.S. 850, 104 S.Ct. 160, 78 L.Ed. 147 (1983).

Id.

Just as was the case in *Jones*, and as discussed *supra,* Defendants bore the burden of proof for Florida's mitigation defense of avoidable consequences and the jury was not so instructed. As the Court will recall, from opening statements to closing arguments, the Defendants in this case featured their blame of Mr. Milanesi for his current and future problems because he had chosen not to have another hernia mesh implanted after his Ventralex was removed and his small bowel resected in 2017. As Mr. Brown forecast to the jury in opening statements:

> In November of 2017, he developed a hernia that will continue to grow because there is no patch there. And he has seen multiple doctors who specialize in hernia repair and each has advised that he should have the hernia surgically repaired using mesh. Mr. Milanesi has chosen not to follow his doctors' advice. And that is what the evidence will show.

(03/22/22 Rough Trial Tr., 68:19-24, attached hereto as Exhibit "E".)

On this salient topic, the issues pertinent to the damages are two: (1) was Mr. Milanesi being reasonable or unreasonable by deferring a fourth surgery; and (2) which party had the burden of proving that issue? Because it was the Defendants who had the burden and the jury never was instructed that the Defendants had the burden of proving that Mr. Milanesi was being unreasonable, undoubtedly this could have affected the award of damages not only to Mr. Milanesi but to Mrs. Milanesi on her consortium claim, because much of the evidence in that regard concerned Mr. Milanesi's inability to help with the lifting and movement of Mrs. Milanesi's brother, Miguel, and their resultant hard choice of taking him back to a nursing home in Argentina where he could be looked after properly. Further, the issue of Mr. Milanesi's decision not to have the fourth intra-abdominal surgery was a "close issue": *i.e.,* the evidence was not so slanted to one side or the other that it fairly can be said that the misallocation of the burden of proof was "harmless". *See, e.g., Aero Intern., Inc. v. U.S. Fire Ins. Co.*, 713 F.2d 1106, 1112 (5th Cir. 1983) ("[i]n a case as close as this one, allocation of the burden of proof is crucial - - oftentimes, dispositive").

Consider the testimony from Defendants' hernia surgeon expert, Dr. Kevin Gillian, who agreed that but for the original Ventralex's failure and explant, Mr. Milanesi never would have been in the position of having an explant and resection and then having to decide whether to undergo a fourth intra-abdominal surgery:

> Q: So if he had not had the removal of that explant and the three and a half inches of bowel and then the second surgery for the enterolysis for the bowel

obstruction, then - - and say the Ventralex was still in there doing its job, then Mr. Milanesi would not be in the position of having to decide whether he undergoes a fourth intraabdominal surgery. That's just true, isn't it?

A: I would agree.

(04/12/22 Rough Trial Tr., 245:19-246:1, attached hereto as Exhibit "F".)

Dr. Gillian also testified that there are risks of hernia mesh implant surgery that, while rare, are significant and it would not be unreasonable for a patient to decline to accept those risks:

Q: There are many - - when you talk with patients, a patient about a fourth intraabdominal surgery, as with all surgeries, there are many risks with a surgery, right?

A: Every surgical procedure has risks, yes.

Q: And I believe you testified before that the risk of any operation, the list would be in exhaustible, right?

A: I don't know that I've said inexhaustible, but every patient has risk, every patient brings risk to the field and the surgeon tries to mitigate those risks before they proceed with the operation so the operation is safe.

Q: There are many risks - - for instance, there's really three different - - at least three different layers of risk you have to think about. One is the risk of anesthesia, one is the risk of the surgery itself, the cutting process, and if you're leaving a foreign body in there, that's another layer of risk, right?

A: Those are some of the risks to be considered.

Q: And there's more beyond that, but just from a kind of simplistic point of view, from a patient's point of view, those would be among the risks that would be discussed, right?

A: Yes.

Q: So for instance, when you meet with a patien[t], you tell them about the risk of the operation but the hospital then talks about the risks of anesthesia, right?

A: The anesthesiology team talks to them.

Q: So you know just from anesthesia, the patient is going under to have a fourth intraabdominal surgery there is a risk that patient might not wake up from anesthesia, right?

A: That is extraordinarily unusual and we work very hard to prevent that from happening.

Q: But you cannot eliminate that risk, can you?

A: You cannot eliminate the risk, but you can mitigate it to the best of your ability.

Q: Right, like with anything. A patient could have a stroke because of the anesthesia, right?

A: It's always theoretically possible. It's unusual in this day and age.

. . .

Q: Or they can go into organ failure. That happens. While it may be unusual and rare, that patient it's one out of one times, right?

A: It - - can it happen? Yes.

Q: And now from the operation itself, the surgery itself, first of all, you agree that because Mr. Milanesi was on an anticoagulant for a year after he had his heart stent that is not a patient you would want to do a hernia surgery on it if it can be avoided while he's on the anticoagulant, right?

A: I would disagree with that because I operate on people every week who are anticoagulated for various reasons. We have mechanisms for making that process safer. We operate on people - - anticoagulants are used quite a big in this country for various reasons. Atrial fibrillation, for blood clots in your legs. People have heart stents, et cetera. A lot of people are on blood thinners. We don't just not operate because you're on blood thinners. We have strategies to accommodate that.

Q: Despite those strategies to accommodate that, one of your own patients you treated for inguinal hernia died after you operated on him, didn't he?

A: Yes.

Q: So it is a risk despite all your best efforts, right?

A: Yes.

Q: Never made it out of the hospital did he?

A: No.

Q: And so in addition to anticoagulant, there is a risk of the opposite which is a risk of thrombosis, you can throw a clot while you're on the operating table, can't you?

A: Yes.

Q: And that can then cause you to have a heart attack or a stroke, right?

A: Yes.

Q: And then after the risks, the patient has to also consider what other risk of the thing being left inside me on top of all of these other two layers of risk, right?

A: I would agree.

Q: Now, after a patient tells you if you would explain all of these risks like we talked with our jury about, and they say, we'll it's not an emergency hernia surgery I'm going to defer it. You would never tell that patient you are being unreasonable would you?

A: No.

(Exh. "F", 240:2-243:9.)

With the affirmative defense burden properly placed on the Defendants, this testimony from the Defendants' own expert is much more impactful than was the case where the jury believes based on the instructions given that the Plaintiff still has the burden of proving that his decision to avoid surgery was reasonable, regardless of what the Defendants' expert said. As the Sixth Circuit held in *Jones*: "***Because this may have affected the damages award***, the district court's failure to instruct on the burden of proof is reversible error." 800 F.2d at 594 (emphasis added). In order to address this incorrect instruction to the jury, and as this misallocation of the burden of proof pertains solely to damages, this Court should grant Plaintiffs' motion and award a new trial solely on the issue of damages. Fed. R. Civ. P. 59(a)(1); *Pittington*, 880 F.3d at 800-01. Upon retrial (assuming the Defendants still wish to present the Defense Issue of Avoidable Consequences) this

should instruct the jury that the Defense Issue of Avoidable Consequences is an affirmative defense for which the Defendants bear the burden of proof by a preponderance of the evidence.

III. BECAUSE THE JURY REJECTED DEFENDANTS' THEORY THAT DR. GILL WAS THE PROXIMATE CAUSE OF PLAINTIFFS' DAMAGES AS TO THE NEGLIGENT DESIGN COUNT, AND BECAUSE DEFENDANTS WAIVED IDENTIFYING DR. GILL AS A *FABRE* DEFENDANT, ON RETRIAL THIS COURT SHOULD EXCLUDE ANY REFERENCE TO DR. GILL AS A CAUSE OF PLAINTIFFS' DAMAGES.

Any new trial on damages that this Court orders under the prior sections of this Motion should exclude all evidence and argument relating to Defendants' waived apportionment defense that seeks to shift fault to Dr. Karanbir Gill.

Throughout the trial, Defendants pointed the finger at Dr. Gill, arguing that he was at fault for Mr. Milanesi's harm. They speculated—without identifying any support in the testimony or medical records—that Dr. Gill might not have properly cleared the implantation site or might have pulled too hard on the device's placement straps. (*See, e.g.*, Exh. "E", 64:23–25, 65:15–24, 95:12–97:11; 03/24/22 Rough Trial Tr., 207:6–208:9, attached hereto as Exhibit "G"; Exh. "F", 163:21–164:3; Exh. "C", 53:7–14, 90:3–15, 91:6–13, 92:23–93:14.) And they argued and presented testimony from their expert Dr. Gillian who opined that Dr. Gill should have used a smaller patch to repair Mr. Milanesi's hernia. (*See, e.g.*, Exh. "E", 64:15–22, 95:12–97:11; Exh. "G", 212:20–213:1; Exh. "F", 166:22–167:10, 208:22–209:3; Exh. "C", 73:22–74:16, 81:5–10, 90:16–91:5.)

Defendants' counsel set the stage for shifting blame to Dr. Gill in opening statements: "No one is doubting that Dr. Gill thought he had put the patch in completely flat. . . . But even though he had done this surgery a number of times, it's critical that each step of the implantation process is followed each time or you may get an outcome like occurred here." (Exh. "E", 66:4–12). That Dr. Gill was purportedly at fault for Mr. Milanesi's damages was the central theory of Defendants'

case—a theory that Defendant repeated frequently to the jury. (*See, e.g.*, Exh. "E", 64:15–65:24, 95:12–97:11; Exh. "G", 207:6–208:9, 212:20–213:1; Exh. "F", 163:21–164:3, 166:22–168:10; Exh. "C", 52:22–53:21, 80:19–81:10, 90:3–91:13.) Summarizing the case, counsel for Defendants stated in his closing argument that "the question" and "the disagreement" in the case was the dispute about whether polypropylene came into contact with Mr. Milanesi's bowel because of the mesh pulling off the abdominal wall or because the mesh was implanted improperly. (Exh. "C", 52:22–53:21.)

Defendants, however, waived any defense or argument that the jury should apportion a percentage of fault to Dr. Gill when they declined to ask the Court for an apportionment jury instruction or to include Dr. Gill on the verdict forms as a non-party *Fabre* defendant. *See Fabre v. Marin*, 623 So. 2d 1182, 1185 (Fla. 1993). Accordingly, Defendants specifically chose to utilize an "empty chair" defense and argue that Dr. Gill was the sole proximate cause of the Plaintiffs' damages (as they are entitled to do) without naming Dr. Gill as a *Fabre* defendant. *See Vila v. Philip Morris USA, Inc.*, 215 So.3d 82, 85-86 (Fla. 3d DCA 2016).

Under Florida law, however, a defendant seeking to have a jury apportion fault to a non-party, such as Dr. Gill, it can do so only by timely and properly requesting that the non-party *Fabre* defendant be listed on the verdict form. Fla. Stat. § 768.81(3)(a)(2)[2]; *Nash v. Wells Fargo Guard Servs., Inc.*, 678 So. 2d 1262, 1264 (Fla. 1996) ("If the pleading and proof requirements are met, a jury instruction should be given regarding the apportionment of fault and the nonparty

[2] Under the *Erie* doctrine, because the *Fabre* doctrine concerns procedure utilized in a substantive manner, and because the proper use of the *Fabre* defendant procedure has the potential to diminish the recovery of a plaintiff, it is "outcome affective" as described in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427-428 (1996) and thus is regarded as substantive law under the *Erie* doctrine. Accordingly, Florida's Federal courts follow and apply the *Fabre* defense process, where applicable. *See, e.g., Guy v. Schwing Bioset, Inc.*, 2020 WL 1035509, **1-2 (M.D. Fla. 2020).

should be included in the appropriate section of the verdict form."). This requirement allows the jury to apportion fault between the parties and the named non-party. *Fabre*, 623 So. 2d at 1185 ("Clearly, the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as a defendants."); *Millette v. Tarnove*, 435 F. App'x 848, 854 (11th Cir. 2011).

The Florida Supreme Court Standard Jury Instructions Committee has crafted jury instructions and a verdict form for this precise situation—where a defendant seeks to apportion fault to a non-party, such as Dr. Gill. *See Nash*, 678 So. 2d at 1264 (noting the Florida Supreme Court's approval of an earlier version of a standard jury instruction and verdict form on apportionment of fault). Florida Model Jury Instruction 501.4 provides:

> **In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of** (claimant) or (defendant(s)). **The court in entering judgment will make any appropriate reduction(s).**
>
> *When a Fabre issue is involved:*
>
> **In determining the total amount of damages, you should [also] not make any reduction because of the [negligence] [fault], if any, of** (identify any additional person or entity who will be on verdict form). **The court in entering judgment will make any appropriate reductions.**

Fla. Std. Jury Instr. (Civ.) 501.4 (emphasis in original). Providing this instruction is critical in any case where the jury is asked to apportion fault to a non-party. As the Note on Use for the instruction explains: "When the jury is instructed to apportion fault, and a *Fabre* issue is involved, [t]he second paragraph of this instruction should be used to inform the jury of the appropriate procedure, so that the jury does not make inappropriate adjustments to its verdict." Fla. Std. Jury Instr. (Civ.) 501.4, Note on Use.

Florida Model Verdict Form 1, in turn, shows how an apportionment defense should be presented to the jury. Fla. Model Verdict Form 1. The model form first asks the jury to determine if there was negligence on the part of the defendant or plaintiff. *Id.* The model form next asks the jury to determine if a particular non-party "was a contributing legal cause of the [loss] [injury] [or] [damage]" to the plaintiff. *Id.* (emphasis deleted). The model form then directs the jury to "[s]tate the percentage of any negligence [or fault], which was a legal cause of [loss] [injury] [or] [damage] to [the plaintiff] that you charge to" the defendant, plaintiff, and named non-party. *Id.* (emphasis deleted). The model form concludes by instructing the jury to "not make any reduction because of the negligence" allocations because "the court in entering judgment will make an appropriate reduction in the damages awarded." *Id.* (emphasis deleted).

The Note on Use for Model Verdict Form 1 emphasizes the importance of allocating fault to all the potentially negligent actors. The Note explains: "The verdict form should list all persons or entities among whom the jury may apportion fault. This will permit the trial court to allocate damages, determine setoffs, if appropriate, and facilitate appellate review." Florida Model Verdict Form 1, Note on Use.

Plaintiffs moved in limine to exclude evidence or argument that Mr. Milanesi's damages were caused by Dr. Gill. Plaintiffs explained in their Motion in Limine No. 10 that Defendants had failed to properly plead or identify Dr. Gill as a *Fabre* defendant. (Pl.'s MIL No. 10, *Milanesi* ECF No. 208, PageID 14804–05.) Defendants responded by insisting that they had not yet decided whether they would request that Dr. Gill be included on the verdict form as a *Fabre* defendant. (Defs.' Mem. in Opp. to Pl.'s MIL No. 10, *Milanesi* ECF No. 245, PageID 15727.) Based on Defendants' representation, the Court denied as moot Plaintiffs' request for exclusion under *Fabre*. (MIL Op. & Order No. 25, *Milanesi* ECF No. 295, PageID 17086.) The Court stated, however,

that if Defendants decide "to request to add Dr. Gill to the verdict form as a *Fabre* defendant," the Court would "address the issue in the context of trial." (*Id*).

Though Defendants argued extensively that Dr. Gill was at fault for Mr. Milanesi's injury, they never asked the Court for an apportionment instruction or to add Dr. Gill to the verdict forms as a *Fabre* defendant and instead chose to ask the jury find him, the empty chair, to be the sole cause of Mr. Milanesi's injuries. Defendants' strategy, however, has consequences. By failing to follow Florida law on allocating fault to non-parties, Defendants waived any defense they might have had that was based on apportioning fault to Dr. Gill. *See* Fla. Stat. § 768.81(3)(a)(2); *Nash*, 678 So. 2d at 1264; *Fabre*, 623 So. 2d at 1185. The jury rejected Defendants' argument that Dr. Gill was the sole proximate cause of the Milanesi's damages and Defendants cannot now seek to reopen the issue of proximate causation when the sole issue to be tried are the proper calculation of damages (rather than who is the cause of those damages).[3]

The jury has already determined that Defendants acted negligently. (Jury Verdict, ECF No. 380, PageID 19072 (finding in favor of Plaintiffs on their Negligence—Design Defect claim).) A new trial is therefore required only on the discrete issue of damages. *See ITT Hartford Ins. Co. of the Southeast v. Owens*, 816 So. 2d 572, 577–79 (Fla. 2002) (ordering a new trial on only contested damages issues). The new trial on damages focus on determining the amount of damages Plaintiffs are entitled to—as the jury already has adjudicated breach of duty and proximate cause.[4]

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[3] Because Defendants waived apportionment by declining to request that Dr. Gill be listed as a *Fabre* defendant on the verdict forms, and there never was any attempt at trial to assert a comparative negligence defense against Mr. Milanesi, there will be no need to "compare" the acts or negligence of anyone against the acts and negligence of Defendants. As a result, the new trial's duration will be a matter of several days rather than several weeks.

[4] To be clear, Plaintiffs are not seeking a new trial on damages based on any *Fabre*-related rulings of the Court. Rather, Plaintiffs seek a new trial for the reasons explained in the prior sections of this Motion. Plaintiffs preset this argument to show that any new trial on damages must exclude

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court to Order a new trial on damages pursuant to Federal Rule of Civil Procedure 59.

Dated: May 13, 2022

Respectfully submitted,

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all evidence or argument relating to Defendants' waived defense attempting to apportion any fault to Dr. Gill.

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system.

/s/ David J. Butler
Plaintiffs' Liaison Counsel