FREDERICK VOSS, Plaintiff v. KRISTOFFE J. TRANQUILINO, JAIME A. TRANQUILINO, TIFFANY'S RESTAURANT, ABC CORP. 1-5 (fictitious names as true names are unknown) JOHN DOES 1-5 (fictitious names as true names are unknown) ABC CORP. (fictitious name as true name unknown) DEF CORP. 1-5 (fictitious names as true names are unknown) XYZ BAR & RESTAURANT 1-5 (fictitious name as true names unknown) and JOHN DOES 6-10 (fictitious name as true names unknown), Defendants	SUPREME COURT OF NEW JERSEY DOCKET No.: 66153 Civil Action ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: AM-0505-08T1 SAT BELOW: HON. JOSEPH F. LISA, P.J.A.D., HON. LINDA G. BAXTER, J.A.D., HON. CARMEN H. ALVAREZ, J.A.D.

NOTICE OF MOTION OF THE NEW JERSEY LAWSUIT REFORM ALLIANCE TO APPEAR AS *AMICUS CURIAE*

TO: Richard S. Ranieri, Esquire
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At a date and time to be fixed by the Court, the New Jersey Lawsuit Reform Alliance ("NJLRA") will move for an order pursuant to New Jersey Court Rule 1:13-9 to permit it to participate as *amicus curiae* in support of reversal of the decision of the Superior Court, Appellate Division. NJLRA will rely on the accompanying motion and proposed *amicus curiae* brief.

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FREDERICK VOSS, Plaintiff v. KRISTOFFE J. TRANQUILINO, JAIME A. TRANQUILINO, TIFFANY'S RESTAURANT, ABC CORP. 1-5 (fictitious names as true names are unknown) JOHN DOES 1-5 (fictitious names as true names are unknown) ABC CORP. (fictitious name as true name unknown) DEF CORP. 1-5 (fictitious names as true names are unknown) XYZ BAR & RESTAURANT 1-5 (fictitious name as true names unknown) and JOHN DOES 6-10 (fictitious name as true names unknown), Defendants	SUPREME COURT OF NEW JERSEY DOCKET No.: 66153 Civil Action ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: AM-0505-08T1 SAT BELOW: HON. JOSEPH F. LISA, P.J.A.D., HON. LINDA G. BAXTER, J.A.D., HON. CARMEN H. ALVAREZ, J.A.D.

MOTION OF THE NEW JERSEY LAWSUIT REFORM ALLIANCE TO APPEAR AS *AMICUS CURIAE*

IDENTITY OF APPLICANT

The New Jersey Lawsuit Reform Alliance ("NJLRA"), hereby, moves pursuant to New Jersey Court Rule 1:13-9 for leave to participate in this appeal as *amicus curiae* in support of a reversal of the decision rendered by the Appellate Division of the Superior Court in this case.

ISSUE INTENDED TO BE ADDRESSED

This appeal presents a question of statewide importance as to whether the Appellate Division erred, as a matter of both law and public policy, in holding that a drunk driver is not barred by N.J.S.A. 39:6A-4.5(b) ("Section 4.5(b)") from pursuing an alcoholic beverage licensee for his own self-inflicted injuries under the Dram Shop Act, N.J.S.A. 2A:22A-1 2-7.

STATEMENT OF APPLICANT'S SPECIAL INTEREST

The NJLRA is a statewide, bipartisan group of individuals, businesses, and organizations dedicated to improving the state's civil justice system. The NJLRA advocates for a balanced civil justice system that treats all parties fairly and discourages lawsuit abuse. This includes the equitable allocation of responsibility and the protection against outlandish awards. To that end, the NJLRA believes that our courts should apply and uphold well-grounded and measured legal principles, and refrain from adopting novel legal theories that are the proper subject matter of legislation. Such a system fosters predictability and public confidence in the judiciary, and motivates professionals, sole proprietors, and businesses to provide safe and reliable products and services, while ensuring that injured people are compensated fairly, and not undeservedly, for their losses.

REASONS FOR NJLRA'S PARTICIPATION

New Jersey Court Rule 1:13-9 provides that "[t]he court shall grant the motion if it is satisfied under all the circumstances that the motion is timely, the applicant's participation will assist in the resolution of an issue of public importance, and no party to the litigation will be unduly prejudiced thereby." All of these criteria are met by NJLRA.

This appeal presents an issue of great public importance. There is no question that, under the Dram Shop Act, licensed alcoholic beverage servers may be held liable for injuries sustained by innocent third-parties due to drunk drivers. The issue on appeal concerns whether the drunk driver can also bring a cause of action against the licensee for his own injuries.

This Court has stated that an appeal's "broad implications" warrant participation by *amicus curiae*. Taxpayers Ass'n of Wehymouth Twp. v. Weymouth Twp., 80 N.J. 6, 17 (1976). An *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." Bruce J. Ennis, Effective Amicus Briefs, 33 Cath. U.L. Rev. 603, 608 (1984). Courts have recognized that "the classic role of *amicus curiae*" is fulfilled by "assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped

consideration." Miller-Wohl Co. v. Commissioner of Labor & Indus., 694 F.2d 203, 204 (9th Cir. 1982).

NJLRA, and the public, has a strong interest in the reversal of the Appellate Division's decision. As a statewide organization composed of individuals, businesses, and organizations, NJLRA has a unique perspective on the impact of the Appellate Division's decision. If the Appellate Division's decision is allowed to stand, the dramatic increase in alcoholic beverage server liability will have broad implications. Contrary to the very purpose of the Dram Shop Act, the Appellate Division's decision will adversely affect the availability and affordability of liability insurance to the detriment not only of New Jersey businesses, but also the innocent persons injured by drunk drivers.

It is respectfully submitted that the participation of NJLRA will assist the Court in deciding the issue of public importance raised by this appeal. There is no known prejudice to any party by NJLRA's participation. This motion is also timely filed within 75 days of the date that this Court posted notice of its order granting leave to appeal.

CONCLUSION

Based on the foregoing, NJLRA respectfully requests this Honorable Court to grant it permission to appear as *amicus curiae* and consider its accompanying proposed Brief of *Amicus*

Curiae in support of reversing the decision of the Appellate Division.

Respectfully submitted,

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IN THE

Supreme Court of New Jersey

No. 66153

FREDERICK VOSS,
Plaintiff

v.

KRISTOFFE J. TRANQUILINO, JAIME A. TRANQUILINO, TIFFANY'S RESTAURANT, ABC CORP. 1-5 (FICTITIOUS NAMES AS TRUE NAMES ARE UNKNOWN) JOHN DOES 1-5 (FICTITIOUS NAMES AS TRUE NAMES ARE UNKNOWN) ABC CORP. (FICTITIOUS NAME AS TRUE NAME UNKNOWN) DEF CORP. 1-5 (FICTITIOUS NAMES AS TRUE NAMES ARE UNKNOWN) XYZ BAR & RESTAURANT 1-5 (FICTITIOUS NAME AS TRUE NAMES UNKNOWN) AND JOHN DOES 6-10 (FICTITIOUS NAME AS TRUE NAMES UNKNOWN),
Defendants

BRIEF OF *AMICUS CURIAE* THE NEW JERSEY LAWSUIT REFORM ALLIANCE IN SUPPORT OF APPEAL OF DEFENDANT TIFFANY'S RESTAURANT

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STATEMENT OF INTEREST

The New Jersey Lawsuit Reform Alliance ("NJLRA") is a statewide, bipartisan group of individuals, businesses, and organizations dedicated to improving the state's civil justice system. The NJLRA advocates for a balanced civil justice system that treats all parties fairly and discourages lawsuit abuse. This includes the equitable allocation of responsibility and the protection against outlandish awards. To that end, the NJLRA believes that our courts should apply and uphold well-grounded and measured legal principles, and refrain from adopting novel legal theories that are the proper subject matter of legislation. Such a system fosters predictability and public confidence in the judiciary, and motivates professionals, sole proprietors, and businesses to provide safe and reliable products and services, while ensuring that injured people are compensated fairly, and not undeservedly, for their losses. Such a balanced civil justice system provides a positive force for the economic development of the State of New Jersey.

PRELIMINARY STATEMENT

This appeal requires resolution of whether the restriction on the DWI offender's recovery for his own injuries under N.J.S.A. 39:6A-4.5(b) ("Section 4.5(b)") applies to claims under the Dram Shop Act, N.J.S.A. 2A:22A-1 2-7. The Appellate Division held that 4.5(b) does not prohibit the drunk driver from suing the licensed alcoholic beverage server that served him. The rules of statutory construction, and strong public policies against drunk driving and promoting access to affordable insurance, mandate a reversal of the Appellate Division's decision.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The NJLRA adopts and incorporates by reference herein the "Procedural History" and "Statement of Facts" set forth in Defendant/Appellant Tiffany's Restaurant's Brief in Support of Motion for Leave to Appeal Interlocutorily.

LEGAL ARGUMENT

POINT I

Section 4.5(b) of the No Fault Act Does Not Conflict with the Dram Shop Act

The Dram Shop Act codified the exclusive theory of civil liability available against licensed alcoholic beverage servers. By "***defining the limits of the civil liability of licensed alcoholic beverage servers***," the Legislature sought to make the incidence of liability more predictable. N.J.S.A. 2A:22A-2 (emphasis added). Accordingly, in a section entitled, "**Conditions for recovery of damages**," the Legislature identified the parameters under which a licensed alcoholic beverage server may be held liable as the result of the negligent service of alcohol:

> a. A person who sustains personal injury or property damage as a result of the negligent service of alcoholic beverages by a licensed alcoholic beverage server may recover from a licensed alcoholic beverage server only if:
>
> (1) The server is deemed negligent pursuant to subsection b. of this section; and
>
> (2) The injury or damage was proximately caused by the negligent service of alcoholic beverages; and
>
> (3) The injury or damage was a foreseeable consequence of the negligent service of alcoholic beverages.
>
> b. A licensed alcoholic beverage server shall be deemed to have been negligent only when the server served a visibly intoxicated person, or served a minor, under circumstances where the server knew, or reasonably should have known, that the person served was a minor.

N.J.S.A. 2A:22A-5.

The later-enacted No Fault Act identifies three classes of individuals who are barred from suing for personal injuries in automobile accident cases: (i) persons who drive without insurance; (ii) persons who drive while under the influence of alcohol or drugs; and (iii) persons who act with the intent to injure themselves or others while driving. Caviglia v. Royal Tours of America, 178 N.J. 460, 470 (2004).

Section 4.5 specifically provides:

> a. Any person who, at the time of an automobile accident resulting in injuries to that person, is required but fails to maintain medical expense benefits coverage . . . shall have no cause of action for recovery of economic or noneconomic loss sustained as a result of an accident while operating an uninsured automobile.
>
> b. ***Any person who is convicted of, or pleads guilty to, operating a motor vehicle in violation of [DWI laws], in connection with an accident, shall have no cause of action for recovery of economic or noneconomic loss sustained as a result of the accident.***
>
> c. Any person acting with specific intent of causing injury to himself or others in the operation or use of an automobile shall have no cause of action for recovery of economic or noneconomic loss sustained as a result of an accident arising from such conduct.

N.J.S.A. 39:6A-4.5. (emphasis added).

There are two goals inherent in Section 4.5: to punish non-compliant drivers and create an incentive to comply with the law. See Aronberg v. Tolbert, 413 N.J. Super. 562, 573 (2010).

As a matter of public policy, Section 4.5 is intended to deter: (i) drivers from operating uninsured vehicles, N.J.S.A. 39:6A-4.5(a); drunk driving, N.J.S.A. 39:6A-4.5(b); and the intentional use of automobiles as weapons, N.J.S.A. 39:6A-4.5(c). Caviglia, 178 N.J. at 474. As held by this Court, Section 4.5 places a precondition on the right to sue for personal injuries in automobile accident cases to coerce compliance with the law. Id.

In Caviglia, this Court held that Section 4.5(a) bars an uninsured driver, injured by another driver, from bringing suit against the other driver. In analyzing the constitutionality of Section 4.5(a), the Court rejected the Appellate Division's conclusion that Section 4.5(a) abrogated the plaintiff's common law right to sue for personal injuries suffered in an automobile accident. Id. at 473.

The Appellate Division had looked to the history of the No Fault Act and determined that, prior to the 1997 Amendments, an uninsured driver could sue the tortfeasor for noneconomic damages provided his injury was sufficiently serious to meet the verbal threshold. Caviglia v. Royal Tours of America, 355 N.J. Super. 1, 7 (App. Div. 2002). Beginning, therefore, with the proposition that Section 4.5(a) operated as an "absolute bar" of the seriously-injured uninsured driver's right to sue, the

Appellate Division concluded that it is constitutionally unsustainable. Id. at 8-10.

In reversing, this Court held that the central tenet of the Appellate Division's decision – that Section 4.5(a) abrogated a plaintiff's common law right to sue – was in error. Instead, the Court held that "Section 4.5a did nothing more than subject the right to sue for noneconomic damages in an automobile accident case to the condition that the injured motorist secure liability insurance." Caviglia, 178 N.J. at 474.

In reaching its decision, this Court noted that "[p]reconditions on the filing of lawsuits are a common feature of our laws." Id. As an example, the Court stated that, like Section 4.5(a), Section 4.5(b) does nothing more than place a restriction on the right to sue for personal injuries in an automobile accident case: "A motorist may not pursue a personal injury action if he was intoxicated at the time of the accident." Id.

Following Caviglia, Section 4.5(b) does not abrogate a driver's right to sue for personal injuries suffered in an automobile accident under the Dram Shop Act. Rather, like Section 4.5(a), Section 4.5(b) merely sets a restriction on the driver's right to sue.

Accordingly, there is no conflict between the No Fault Act and the Dram Shop Act. The Dram Shop Act merely defines the

limits of licensee liability whereas Section 4.5 merely establishes *restrictions* on the right to bring a cause of action.

The fact that Section 4.5(b) falls within a statute that concerns automobile insurance does not preclude its application to Dram Shop claims. As this Court noted in Caviglia, one public policy rationale behind Section 4.5(b) is to deter drunk driving. Caviglia, 178 N.J. at 470. "The Legislature is empowered to pass enactments that create incentives to coerce compliance with the law." Id. at 475. In plain and unambiguous terms, and without qualification, Section 4.5(b) provides that the DWI offender "shall have ***no*** cause of action" for personal injuries sustained as a result of an automobile accident. N.J.S.A. 39:6A-4.5(b)(emphasis added). To deter drunk driving, therefore, the plain meaning of "no cause of action" should be given effect regardless of the legal theory.

This is the conclusion reached by the Appellate Division in an unpublished decision, Bessor v. Colatrella, 2008 WL 4345845 (App. Div. Sept. 25, 2008), decided before Voss. In Bessor, the Court held that 4.5(b) bars a claim by a drunk driver against a landowner based on premises liability, *i.e.*, not involving automobile insurance. There, a DWI offender brought suit for injuries that he sustained when his motorcycle collided with an automobile and then crashed into a flower pot on neighboring

property. The Law Division dismissed the complaint on the basis that it is barred by Section 4.5(b). On appeal, the motorcyclist contended that Section 4.5(b) does not apply to his claim against the landowner as it does not involve automobile insurance. The Appellate Division disagreed, holding:

> In order to deter drunk driving . . . and the impact that it has upon the public and upon automobile insurance premiums, the legislature is entitled to place a bar to recovery under any theory. In other words, the public policy concerns that compelled the statutory enactment are advanced regardless of whether the theory of liability in this case relates to automobiles or premises. The conduct to be deterred, drunk driving, is the same.

Id. at *3 (citation omitted). The Voss Court erred in reaching the contrary result.

Point II

The Appellate Division Erred, as a Matter of Law, in Finding that Section 4.5(b) Does Not Apply to Dram Shop Claims

Although the Appellate Division recognized that the plain meaning of Section 4.5(b) suggests that Dram Shop claims by DWI offenders are barred, it reached the contrary conclusion on the bases that:

> (1) "The purposes of the two laws differ[s]" and 4.5(b) should be limited to losses that are subject to insurance coverage under Title 39, Voss, 413 N.J. Super. at 92;
>
> (2) 4.5(b) cannot be interpreted to bar Dram Shop claims absent legislative intent to repeal by implication a major aspect of the Dram Shop Act, id. at 90-91; and
>
> (3) Interpreting 4.5(b) as providing immunity to liquor licensees from liability to individuals that it served when

visibly intoxicated is inimical to New Jersey policy against drunk driving, id. at 93-94.

The Court's analysis is flawed in every respect.[1]

A. The Appellate Division Failed to Recognize that Both Statutes Are Designed to Deter Drunk Driving

The Appellate Division relied on Camp v. Lummino, 352 N.J. Super. 414 (App. Div. 2002), for the proposition that Section 4.5(b) applies only to cases arising under Title 39. Voss, 413 N.J. Super. at 92. As in Camp, the Appellate Division in this case failed to acknowledge the public policy rationale behind Section 4.5(b) of the deterrence of drunk driving.[2] Thus, while the Dram Shop Act concerns licensee liability insurance and Title 39 concerns automobile insurance, the Appellate Division disregarded the fact that both share the common purpose of the deterrence of drunk driving and control of insurance premiums.

B. The Appellate Division Resorted to an Implied Repealer Analysis Based on a False Conflict

Based on the premise that the Dram Shop Act confers a cause of action on the DWI offender, the Appellate Division held that it would conflict with the Dram Shop Act to give effect to the

[1]As this appeal involves a pure question of law regarding statutory construction, it is subject to *de novo* review by this Court. Manalapan Realty v. Manalapan Twp. Comm., 658 A.2d 1230 (N.J. 1995).

[2]It is submitted that Camp was wrongly-decided and should be overruled for the reasons that the Appellate Division wrongly decided this case.

plain terms of Section 4.5(b). Voss, 413 N.J. Super. at 90-91. The Court then resorted to the onerous implied repealer analysis to determine if Section 4.5(b) intended to reinsert a provision deleted from a draft of the Dram Shop Act.[3] The Appellate Division's analysis is premised on a false conflict.

As previously discussed, in Caviglia, this Court held that the Appellate Division erred in looking to the legislative history of Section 4.5(a), and concluding that Section 4.5(a) abrogated the seriously-injured uninsured driver's right to sue. This Court held, instead, that Section 4.5(a) merely imposed a restriction on the right to sue. In this case, the Appellate Division made the same mistake. Pursuant to Caviglia, Section 4.5(b) did not abrogate the plaintiff's right to sue under the Dram Shop Act, but merely set a restriction on the right to sue. Section 4.5(b) does not, therefore, conflict with the Dram Shop Act.

C. The Appellate Division's Public Policy Analysis Rewards Drunk Driving

[3]It was improper for the Appellate Division to consider the legislative history of the Dram Shop Act to interpret the No Fault Act when the plain language of Section 4.5(b) is clear and unambiguous. Marino v. Marino, 200 N.J. 315, 329(2009) ("[I]f the plain language of a statute is not clear or if it is susceptible to more than one possible meaning or interpretation, courts may look to extrinsic secondary sources to serve as their guide, but we do not resort to such tools unless needed."). Regardless of whether it was proper for the Court to consider the legislative history of the Dram Shop Act, it does not change the analysis of this case under Caviglia.

The Appellate Division bolstered its decision with the public policy rationale that, to curb drunk driving, the Legislature could not have intended to confer "immunity" on licensees for injuries sustained by patrons served while visibly intoxicated. The Voss Court's interpretation of the Dram Shop Act effectively sends a message of no personal responsibility for drunk driving. If liability is found, it will not only defeat the goal of punishing drunk drivers embodied in Section 4.5(b), but will, in essence, reward the plaintiff for drunk driving.

The Appellate Division engaged in faulty reasoning when it concluded that allowing a drunk driver to recover against a licensee for his own injuries will ***discourage*** drunk driving. The Court presumed that the greater the potential number of claims, the greater the incentive for licensees to refrain from serving visibly intoxicated patrons. While that may be true in theory, it does not necessarily follow in reality that immunity from first-party motor vehicle claims would create a disincentive for licensees to refrain from serving visibly intoxicated patrons. The licensee remains liable for third-party "innocent plaintiff" claims caused by their conduct. Licensees are no less deterred from serving visibly intoxicated patrons if that patron cannot sue for his own injuries. It defies common sense to suggest that a licensee would risk

serving an intoxicated patron simply because that patron might only harm himself and not others for which the licensee could be liable. Thus, immunizing licensees from voluntarily intoxicated plaintiffs would have no impact on the legislative goal of deterring licensees from serving visibly intoxicated persons. To the contrary, prohibiting voluntarily intoxicated persons from recovering against *any* defendant further serves the purpose of both statutes and the general public policy of combating drunk driving.

Point III

The Appellate Division's Decision Will Likely Defeat the Purpose of the Dram Shop Act to Improve the Affordability and Availability of Liability Insurance

The stated goal of the Dram Shop Act is to improve the availability and affordability of liability insurance coverage. N.J.S.A. 2A:22A-2. Common sense dictates that the inclusion of first-party motor vehicle claims within the scope of Dram Shop liability would contravene the stated purpose of the act of making licensee insurance more affordable. Thus, the specific statutory goals of both statutes – affordable/accessible insurance and deterrence of drunk driving – are met by precluding voluntarily intoxicated plaintiffs from recovering against *any* defendant.

CONCLUSION

Based on the foregoing, and the reasons set forth in the Brief in Support of Motion for Leave to Appeal Interlocutorily filed by Defendant/Appellant Tiffany's Restaurant, the NJLRA respectfully requests this Honorable Court to reverse the Appellate Division's decision and direct that judgment be entered in the Defendant's favor.

Respectfully submitted,

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FREDERICK VOSS Plaintiff(s), vs. KRISTOFFE J. TRANQUILINO, JAIME A. TRANQUILINO, TIFFANY'S RESTAURANT, ABC CORP. 1-5 (fictitious names as true names are unknown) JOHN DOES 1-5 (fictitious names as true names are unknown) ABC CORP. (fictitious name as true name unknown) DEF CORP. 1-5 (fictitious names as true names are unknown) XYZ BAR & RESTAURANT 1-5 (fictitious name as true names unknown) and JOHN DOES 6-10 (fictitious name as true names unknown) Defendant(s).	SUPREME COURT OF NEW JERSEY DOCKET No.: 66153 Civil Action ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: AM-0505-08T1 SAT BELOW: HON. JOSEPH F. LISA, P.J.A.D., HON. LINDA G. BAXTER, J.A.D., HON. CARMEN H. ALVAREZ, J.A.D.

CERTIFICATION OF FILING AND PROOF OF SERVICE

On September ___, 2010, I, the undersigned, had delivered by hand delivery an original and nine copies of Notice of Motion, Motion to Appear as *Amicus Curiae*, and proposed Brief of *Amicus Curiae* The New Jersey Lawsuit Reform Alliance to the Clerk of the Supreme Court, Hughes Justice Complex, 25 W. Market Street, Trenton, New Jersey, and two copies of the same to the following:

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

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