

JOANNE McKOY,

Plaintiff-Appellant,

v.

JARRETT E. REESE, YOLANDER D.
BAKER, LIBERTY MUTUAL
INSURANCE COMPANY,

Defendants.

**SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION**

DOCKET NO. A-003711-23

CIVIL ACTION

On Appeal from the Law Division,
Hudson County

Docket No. HUD-L-004267-20

Sat Below:

Hon. Kimberly Espinales-Maloney,
J.S.C. and a Jury

BRIEF IN SUPPORT OF THE APPEAL

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PRELIMINARY STATEMENT

Plaintiff, Joanne McKoy, appeals from a judgment memorializing a jury verdict of no cause of action in an automobile negligence action. Defendant, Jarrett E. Reese, admitted liability for speeding and slamming into Ms. McKoy's car when making a left-hand turn. The only issue at trial was whether plaintiff sustained a permanent injury proximately caused by the collision. Medical Resonance Imaging tests taken after the collision showed plaintiff suffered herniated discs in her neck and in her lower back. Expert testimony linked those herniations to the collision. Ms. McKoy testified that she still suffers pain from the collision, and her expert testified that her injuries were permanent in nature.

Nonetheless, the jury found that Ms. McKoy did not sustain a permanent injury as a result of the collision. The reason for that finding was the trial court's erroneous evidentiary rulings allowing defendant to use the medical records of a non-testifying doctor as the cornerstone of his case. That doctor, Mazhar Elamir, M.D., was not a witness at trial. Nor did the defense seek to admit the records. Nor was there anyone from Dr. Elamir's office to authenticate the records. Nonetheless, defendant was allowed to use the records improperly to cross-examine plaintiff's medical expert, Teofilo Dauhajre, M.D. The trial court overruled plaintiff's objection that defendant was engaging in phantom impeachment, stating that because Dr. Dauhajre had "reviewed" the records, they

were “fair game.” Defendant also was allowed to use those records with his own medical expert in his case in chief because his expert “reviewed” those records. The impermissible hearsay then became the centerpiece of defense counsel’s closing argument. The trial court’s rulings allowed defendant carte blanche to engage in phantom impeachment with inadmissible hearsay and to use the impermissible hearsay statements without laying a proper foundation. The trial court’s reliance on N.J.R.E. 803(c)(4) to justify those rulings was erroneous.

This Court should reverse because defense counsel improperly placed before the jury inadmissible medical evidence in the guise of using that evidence to impeach plaintiff’s medical expert regarding plaintiff’s past medical treatment and the cause of her complaints. More egregiously, the defense medical expert simply read into the record the contents of the non-testifying doctor’s records under the pretense that the records reflected plaintiff’s statements to her treating doctor and were therefore admissible under N.J.R.E. 803(c)(4). Defendant, however, failed to establish – and the court failed to require that defendant establish – that those statements read into the record were actually made by plaintiff. The records themselves establish only that those statements were made by the doctor or his staff and that they may in part reflect their understanding of statements made by plaintiff. In the absence of testimony by Dr. Elamir concerning the source of the

statements in those notes, there was not an adequate foundation for their use.

Because of their improper use, plaintiff is entitled to a new trial.

PROCEDURAL HISTORY

On November 20, 2020, the Complaint and Jury Demand was filed in this automobile negligence action. Pa3. On January 28, 2021, an Answer was filed on behalf of defendants Yolander D. Baker, the owner of the automobile, and Jarrett E. Reese, the driver of the automobile. Pa8. On June 3, 2024, plaintiff agreed to the dismissal with prejudice of the complaint against defendant Baker.

A trial was held on June 3, 4, 6, 10 and 11, 2024, before the Honorable Kimberly Espinales-Maloney, J.S.C. Before trial, defendant Reese stipulated to his liability for the collision. On June 11, 2024, the jury found that plaintiff did not sustain a permanent injury proximately caused by the collision. Pa22. By Order dated June 24, 2024, the trial court entered a judgment of no cause of action against plaintiff. Pa1. Plaintiff timely filed this appeal. Pa24.

STATEMENT OF FACTS

On Thanksgiving Day, November 22, 2018, plaintiff, Joanne McKoy, had dinner with her family and then left the house to go to work. 3T130:1-12. A car driven by defendant, Jarrett E. Reese, hit her and pushed her car into oncoming traffic. 3T131:5-8. As a result of the impact, Ms. McKoy was jerked back and forth, her knees hit the dashboard, and she bruised her shoulders. 3T131:14-17.

She also jerked her neck, head and back and was in a lot of pain. 3T132:4-9. The fire department, police and paramedics responded to the scene of the collision. 3T133:6-7.

Ms. McKoy needed assistance to exit the car. 3T133:8-10. She was taken by ambulance to Jersey City Medical Center. 3T133:14-19. At the hospital, they took x-rays of her back, neck and shoulders. 3T134:3-4. When she was discharged, her neck, back, knees and shoulders were still hurting. 3T134:17-20. A few days after the collision, she saw Mazhar Elamir, M.D., at the Jersey City Breathing Center, who had treated her in the past for asthma and pain in her knees. 3T136:6-19. Dr. Elamir gave her a prescription for Percocet and referred her for treatment to a chiropractor, David Subin, D.C. 3T135:23-136:2. Plaintiff testified that Dr. Elamir **never** treated her for neck or back pain. 3T136:20-22. Before the collision, she never complained of neck or back pain. 3T136:25-137:3.

A few days after seeing Dr. Elamir, plaintiff started treating with Dr. Subin for pain in her neck, back, knees and both shoulders. 3T137:23-138:2; 3T138:6-7. She stopped going to Dr. Subin when she ran out of insurance coverage for the treatments. 3T138:14-17. She was referred to a pain management doctor who recommended doing injections. She was afraid of the potential risks of those injections. 3T153:6-9; 3T158:18-25. She tried another pain management doctor but did not want “anybody putting needles in [her] back.” 3T159:2-5.

As a result of the collision, plaintiff could not fully enjoy the activities she had enjoyed prior to the collision. 3T160:11-24; 3T162:21-163:1; 3T163:3-8; 3T164:1-5; 3T165:4-14; 3T168:5-9; 3T169:6-9; 3T170:9-14; 3T175:7-16; 3T176:1-10; 3T178:12-17. Ms. McKoy continues to have pain in her neck, back and shoulders. 3T179:2-7.

Dr. Subin treated Ms. McKoy for pain associated with the car crash. He is a licensed chiropractor in New Jersey who has been practicing for 40 years. 3T21:22-22:3. Ms. McKoy complained of neck, back and left hip pain, pain in both knees, her left thigh and chest injuries on the right side. 3T31:14-18. Dr. Subin testified that Ms. McKoy's injuries were caused by the auto collision. 3T32:14-15. Dr. Subin treated Ms. McKoy for almost a year. 3T34:21-25. Over the course of treatment, she improved but was not back to normal. 3T34:21-25. She had difficulty getting up and down stairs, sitting or standing for extended periods of time, playing with her grandchildren and bending down. 3T35:4-9. Overall, as a result of the collision, she was limited in her activities. 3T35:22-25. After what was supposed to be her last visit, she came back several more times because she still felt pain and her condition was aggravated by stretching, lifting, bending and physical exertion. 3T36:2-7. Dr. Subin referred Ms. McKoy for x-rays and MRIs. 3T36:10-14. He also referred her to a pain management doctor because of continuing pain. 3T36:25-37:5.

The radiologist who reviewed the diagnostic imaging and wrote the report as to his findings, Feng Tao, M.D., testified that he read Ms. McKoy's cervical (P-6A) and lumbar spine (P-6B) MRIs from March 5, 2019. 3T76:18-23.

"Immediately" after reviewing the images, he wrote his report. 3T80:4-8. The MRI findings are "objective" findings. 3T87:15-18. According to his review, he found Ms. McKoy suffered herniated discs in her cervical spine at C4-C5 and her lumbar spine at L5-S1. 3T108:6-14. Plaintiff's medical expert, Teofilo Dauhajre, M.D., a licensed, board-certified orthopedic surgeon for 30 years, concurred with Dr. Tao's findings that Ms. McKoy suffered a herniated disc at C4-C5 and a herniated disc at L5-S1. 2T186:20-25; 190:1-12. He opined that the disc herniation at C4-C5 was caused by the motor vehicle collision. 2T188:12-24. He also found that the herniated disc at L5-S1 was an "aggravation of her preexistent mild lumbar sacral spondylosis" and was caused by the collision. 2T190:1-6. Dr. Dauhajre concluded that Ms. McKoy's injuries were permanent in nature and caused by the collision. 2T203:6-14.

On cross-examination of Dr. Dauhajre, defense counsel started reading from Dr. Elamir's records (referenced as D-6 for identification). 2T234:4-25; Ca1. D-6 contains only notes regarding an alleged doctor's visit on November 26, 2018, yet defense counsel referenced other dates of service not contained in D-6. After numerous requests to obtain D-6 from defendant to see if it differed from the

exhibit in plaintiff's possession, defendant told plaintiff to put together records from her interrogatory answers and records provided by defendant as one document and call it D-6. Plaintiff was not going to make up a new exhibit and represent to this Court that it was the document used at trial. Accordingly, plaintiff refers herein to the only D-6 actually contained in the trial record.

Plaintiff's counsel objected that the statements defense counsel was reading allegedly from D-6 were hearsay without bringing in Dr. Elamir to lay the proper foundation. 2T235:23-25; 237:3-8. Plaintiff also referred the court to Manata v. Pereira, 436 N.J. Super. 330 (App. Div. 2014), for the proposition that defense counsel was engaging in phantom impeachment. 2T236:25-237:1. Plaintiff's counsel asked that the improper use of the inadmissible hearsay be stricken. 2T237:14; 238:3-8. Initially, without stating a reason, the court overruled the objection. 2T239:1-2.

Defense counsel then continued to use Dr. Elamir's records improperly, asking Dr. Dauhajre if what was stated in the records was true and the doctor replying, "That's what he wrote down." 2T239:15-22. Dr. Dauhajre did not agree with defense counsel's recitation of statements from Dr. Elamir's records because they were contrary to what Ms. McKoy had told him and there were no records showing treatment prior to the collision. 2T239:25-240:5; 241:4-8. Defense

counsel tried to intimate that those records were deliberately not provided by plaintiff, which was untrue. 2T241:9-12.

On recross, defense counsel again continued to present the hearsay statements allegedly contained in Dr. Elamir's records for their truth. For example, he asked Dr. Dauhajre to agree that Dr. Elamir "did range of motion tests." To which the doctor appropriately replied, "I wasn't there." 2T264:1-4. Defense counsel kept asking Dr. Dauhajre about what Dr. Elamir wrote, and the doctor kept replying, "I don't know why he wrote that. I wasn't there." 2T267:6-7. Defense counsel then improperly testifies, "[W]e'll leave this as a suggestion. Maybe he wrote it because that's what plaintiff was telling him." 2T267:9-11. Notably, defense counsel **never** asked plaintiff about Dr. Elamir's records or whether any of the statements contained therein were attributable to her or made by her.

The following day, counsel for plaintiff, by letter dated June 5, 2024, asked the court to reconsider its ruling allowing the use of Dr. Elamir's records to impeach Dr. Dauhajre, stating again that it was improper impeachment under Manata v. Pereira and further stating that no hearsay exception applied as addressed in the unpublished Appellate Division decision in Radbill v. Mascolo. At the continuation of the trial, on June 6, 2024, plaintiff's counsel brought up the issue of reconsideration. The court stated that she had allowed the cross because Dr. Dauhajre had "reviewed" Dr. Elamir's records so "it was fair game" but

indicated that he could argue it later. 3T7:6-22. That never happened. The trial was then adjourned to June 10, 2024.

On June 10th, the defense medical expert, Alan Miller, M.D., was asked on direct whether he reviewed Dr. Elamir's records. 4T29:18-21. Plaintiff's counsel objected and asked to be heard at sidebar stating again that those records were impermissible hearsay without Dr. Elamir or someone from his office testifying. 4T30:1-14. Defense counsel, for the first time, claimed the statements reflected Ms. McKoy's subjective complaints and that he was entitled to use them with his expert because they were part of his review. 4T30:16-20. Plaintiff's counsel argued that there was no evidence that any of those statements were actually made by plaintiff and that the statements were contradicted by plaintiff's own testimony. 4T31:4-16. On the issue of phantom impeachment, the trial court stated: "A phantom statement. Wow. . . That's interesting. But this is not a phantom statement." 4T39:21-24. On the issue of the trustworthiness of the statements, the court stated: "If we can't trust a treating doctor's records, what the heck do we trust?" 4T45:12-13. The trial court then denied the motion to reconsider the defense's use of Dr. Elamir's records in the cross-examination of Dr. Dauhajre and allowed the defense to use them with Dr. Miller, basing both decisions on the hearsay exception for statements made for purposes of medical diagnosis or treatment under N.J.R.E. 803(c)(4). 4T48:4-5. Defense counsel and Dr. Miller

then proceed to read statements allegedly from the records into the record.

4T49:19-57:20. Those records were not admitted into evidence. Nor was Dr. Elamir or anyone from his office called as a witness at trial.

In closing, the defendant used Dr. Elamir as the cornerstone of his argument stating, “You’ve heard a lot about Dr. Elamir.” 5T9:9-18. Again, Dr. Elamir never appeared at trial. Plaintiff never got to cross-examine Dr. Elamir. Yet, the defense was allowed unfettered use of his records. He used the records as evidence that “four days after the collision Ms. McKoy goes to see Dr. Elamir and makes no mention of the car collision.” 5T10:1-3. He used the records as evidence that plaintiff said that both her knees hurt “without trauma.” 5T10:13-16. “It says both knees hurting without trauma.” 5T10:25. He states, “and just in case that isn’t enough, another date of visit was April 12, 2021. Mid to low back pain without trauma.” 5T11:1-3. That visit is not contained in D-6. He also claims that Ms. McKoy told Dr. Elamir that “it’s non-radiating.” 5T11:8. He used the records not only for what they allegedly said but also for what they allegedly did not say. “And also there is no mention of being in any pain.” 5T12:10-11.

After the jury was sent out to deliberate, they had only one question. “What was the Percocet for back and/or knee.” 5T100:4-5; Pa21. That question arose out of Dr. Elamir’s records. Shortly thereafter, the jury returned with a verdict finding no permanent injury caused by the collision. 5T104:11-19; Pa22.

LEGAL ARGUMENT

POINT I

EVIDENTIARY ERRORS WARRANT A NEW TRIAL. (PA1-2)

A. Standard of Review.

Evidentiary decisions are reviewed for an abuse of discretion. Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008). In particular, “[c]ourts have a broad discretion in determining the scope of cross-examination.” State v. Silva, 131 N.J. 438, 444 (1993). An appellate court may overturn the trial court's evidentiary decision if there is a clear error of judgment or the decision lacks the support of credible evidence in the record. Estate of Hanges v. Met. Prop. & Cas. Ins. Co., 202 N.J. 369, 384 (2010); see also State ex rel. J.A., 195 N.J. 324, 340 (2008) (finding abuse of discretion in admitting hearsay statement as present sense impression); State v. Kemp, 195 N.J. 136, 149 (2008) (finding abuse of discretion in admitting N.J.R.E. 404(b) evidence). A judgment based on an evidentiary error will be reversed if the error “was ‘clearly capable of producing an unjust result.’” Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 502 (1999) (quoting R. 2:10–2); see also Kemp, 195 N.J. at 149–50 (finding admission of N.J.R.E. 404(b) evidence to be harmful error). Pertinently, however, “[w]hen the trial court fails to apply the proper test in analyzing the admissibility of proffered evidence,” appellate review is de novo. Pressler & Verniero, Current N.J. Court Rules, comment 4.7

on R. 2:10-2 (2025); see State v. Trinidad, 241 N.J. 425, 448 (2020); see also State v. Darby, 174 N.J. 509, 518 (2002) (applying de novo review when the trial court failed to analyze N.J.R.E. 404(b) evidence properly).

B. Impermissible Use of Hearsay Documents.

1. Phantom Impeachment.

Defendant first used the records of Dr. Elamir (D-6) to “impeach” plaintiff’s medical expert. Dr. Dauhajre testified that he reached his conclusions that Ms. McKoy’s injuries were permanent in nature and caused by the collision based on “the history, the physical exam and the review of the MRIs, and the review of the records.” 2T229:6-8. Part of that history, according to Dr. Dauhajre, was plaintiff’s statement that she had prior back and knee pain that had resolved at the time of the collision. 2T239:25-240:5. The defense used Dr. Elamir’s records to prove that plaintiff had allegedly suffered with chronic back and knee pain prior to the collision. That is for the truth of the matter asserted. Used as such, the statements were hearsay.

Defendant did not call Dr. Elamir or anyone from his office as a witness. Nor did defense counsel ask plaintiff about the statements in Dr. Elamir’s records. Rather, defense counsel simply read from the records and asked Dr. Dauhajre to agree that that was what the records said. For example,

Q. All right. You can read along with me too, Doctor. 59-year-old female presents for follow up of the following problems. Chronic pain, back and knee, more than six months.

A. Well, that is correct. That's what he wrote down.

[2T234:16-20.]

Plaintiff's counsel objected that the defense was impermissibly engaging in phantom impeachment and cited to Manata v. Pereira, 436 N.J. Super. 330 (App. Div. 2014). In Manata, this Court found "that a new trial is required because of evidentiary errors pertaining to the issue of liability. In particular, plaintiff's counsel engaged in improper cross-examination when he confronted defendant with a police report that counsel did not offer in evidence, but whose substance he communicated to the jury." Id. at 335. The police report at issue was based solely on plaintiff's version of events and was used on cross-examination and at closing to impugn defendant's credibility and to establish the collision happened exactly as plaintiff described. The police report was not entered into evidence, and the police officer who took the report was not called as a witness.

The court termed that tactic "phantom impeachment." Defendant employed the same tactic at bar.

Instead of seeking to introduce the police report, plaintiff's counsel engaged in a form of 'phantom impeachment.' See James McElhaney, Phantom Impeachment, 77 A.B.A.J. 82 (Nov. 1991) (**describing "phantom impeachment" as the contradiction of a witness on "key testimony – by someone who never takes the stand and who never says a word in court"**). Plaintiff's counsel, over defense objection,

presented to the jury the substance of the police report, which was represented to reflect the omission of defendant's version of the collision. Counsel accomplished that by asking defendant himself what the report stated.

[Id. at 347 (emphasis supplied).]

That is exactly what was allowed here. Defense counsel simply read each portion of the documents he considered helpful to his case and asked Dr. Dauhajre to agree that that was what the document said.

In this case, like the Manata case, the court made no finding about the reliability or trustworthiness of the impeaching medical records. Plaintiff in Manata and defendant here made no effort to introduce them into evidence. Instead, the defense used them improperly to “cross-examine” Dr. Dauhajre. The intent and prejudicial effect as evidenced by the defense closing and the one question the jury had before rendering its no cause verdict could not be more clear.

The Manata court said it best.

Put another way, “[i]t is improper ‘under the guise of ‘artful cross-examination,’ to tell the jury the substance of inadmissible evidence.” United States v. Sanchez, 176 F.3d 1214, 1222 (9th Cir.1999) (quoting United States v. Hall, 989 F.2d 711, 716 (4th Cir.1993)); see also United States v. Check, 582 F.2d 668, 683 (2d Cir.1978). “The reason for this rule is that the question of the cross-examiner is not evidence and yet suggests the existence of evidence . . . which is not properly before the jury.” State v. Spencer, 319 N.J. Super. 284, 305 (App. Div. 1999); see also State v. Bowser, 297 N.J. Super. 588, 603-04 & n.3 (App. Div. 1997) (providing example of improper cross-examination based on a police report not in evidence); Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, comment 4 on N.J.R.E. 803(c)(6) (2013).”

[Id. at 348-49 (emphasis added).]

The trial judge did not understand the phantom impeachment argument. The judge kept referring to them as “phantom statements,” and concluded, without reason or explanation, that they were not “phantom statements.” 4T39:21-24. “A phantom statement. Wow. . . That’s interesting. But this is not a phantom statement.” 4T39:21-24. That finding was incorrect and irrelevant. They were out of court statements, allegedly in unauthenticated records, being presented for the truth of the matter asserted. The point was defendant was using the records to impeach without laying a proper foundation and not allowing plaintiff to cross-examine the witness on those statements or the basis for those statements. Allowing what amounted to hearsay testimony by defense counsel was error.

2. Expert Review Was Not a Basis for Use of the Hearsay Before the Jury.

The trial court’s ruling allowing the defense to cross-examine Dr. Dauhajre with the hearsay contained in Dr. Elamir’s records because Dr. Dauhajre had “reviewed” Dr. Elamir’s records so “it was fair game” is also without merit. 3T7:6-22. Pursuant to N.J.R.E. 703, “[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject,

the facts or data need not be admissible in evidence.” Ibid. "Although the rule permits a hearsay statement ... to be referred to by a testifying expert for the purpose of apprising the jury of the basis for his opinion, it does not allow expert testimony to serve as `a vehicle for the "wholesale [introduction] of otherwise inadmissible evidence.'" Agha v. Feiner, 198 N.J. 50, 63 (2009) (alteration in original) (quoting State v. Vandeweaghe, 351 N.J. Super. 467, 481 (App. Div. 2002), aff'd, 177 N.J. 229 (2003)). The "hearsay is not admissible substantively as establishing the truth of the statement." Vandeweaghe, 351 N.J. Super. at 480 (citing State v. Farthing, 331 N.J. Super. 58, 77 (App. Div.), certif. denied, 165 N.J. 530 (2000)). Dr. Dauhajre never testified that he relied on Dr. Elamir’s records as the basis for his opinion. The same is true for the defense expert, Dr. Miller. Dr. Miller testified that he reviewed the records, not that he relied on the records. 4T29:18-21. Either way, to allow the introduction of otherwise inadmissible evidence under the guise of an expert’s review was improper, prejudicial and requires reversal.

POINT II

DEFENDANT FAILED TO LAY THE PROPER FOUNDATION TO USE STATEMENTS FROM DR. ELAMIR’S MEDICAL RECORDS. (PA1-2)

When plaintiff’s counsel objected to the use of Dr. Elamir’s records in the defense testimony of Dr. Miller because those records were impermissible hearsay

without Dr. Elamir or someone from his office testifying, 4T30:1-14, defense counsel, for the first time, claimed the statements reflected Ms. McKoy's subjective complaints and he was entitled to use them with his expert because they were part of his review. 4T30:16-20. Plaintiff's counsel argued that there was no evidence that any of those statements were actually made by plaintiff and that the statements were contradicted by plaintiff's own testimony. 4T31:4-16. On the issue of the trustworthiness of the statements, the court stated: "If we can't trust a treating doctor's records, what the heck do we trust?" 4T45:12-13. The trial court then denied the motion to reconsider the defense's use of Dr. Elamir's records in the cross-examination of Dr. Dauhajre and allowed the defense to use them with Dr. Miller based on the hearsay exception for statements made for purposes of medical diagnosis or treatment under N.J.R.E. 803(c)(4). 4T48:4-5. Defense counsel and Dr. Miller then proceeded to read the records into the record. 4T49:19-57:20.

There is no dispute that the statements the defense sought to use were hearsay. Although the records of Dr. Elamir were not being admitted in evidence themselves, statements contained in those records were being used to prove the truth of the matter asserted. Although defendant did not seek to admit the records into evidence, he still got them into evidence by having them read into the record. Their use is subject to the evidence rules governing hearsay. In this particular

case, the statements the defense sought to use were hearsay contained within a record that was hearsay.

Hearsay statements are inadmissible unless they fall within an exception. N.J.R.E. 802. Pursuant to N.J.R.E. 805, "Hearsay Within Hearsay," "[a] statement within the scope of an exception to Rule 802 shall not be inadmissible on the ground that it includes a statement made by another declarant which is offered to prove the truth of its contents if the included statement itself meets the requirements of an exception to Rule 802." Therefore, when "statements are 'hearsay-within-hearsay,' each level . . . requires a separate basis for admission into evidence." Estate of Hanges, 202 N.J. at 375 n.1. At issue in this case is the admissibility of **many** hearsay statements contained within a document that was itself hearsay. The trial court, however, never required defendant to establish the records themselves were excepted from the hearsay rule. That was error.

N.J.R.E. 803(c)(6) excepts from the hearsay rule:

"A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy."

[N.J.R.E. 803(c)(6).]

That is the business records exception. "The purpose of the business records

exception is to 'broaden the area of admissibility of relevant evidence where there is necessity and sufficient guarantee of trustworthiness.'" Liptak v. Rite Aid, Inc., 289 N.J. Super. 199, 219 (App. Div. 1996) (quoting State v. Hudes, 128 N.J. Super. 589, 599 (Cty. Ct. 1974)). To qualify under the business record exception to the hearsay rule, the proponent must satisfy three conditions: "First, the writing must be made in the regular course of business. Second, it must be prepared within a short time of the act, condition or event being described. Finally, the source of the information and the method and circumstances of the preparation of the writing must justify allowing it into evidence." State v. Sweet, 195 N.J. 357, 370 (2008) (quoting State v. Matulewicz, 101 N.J. 27, 29 (1985)), cert. denied, 557 U.S. 934 (2009). At bar, none of those conditions precedent were satisfied. The trial court erroneously treated the records as self-authenticating. No one testified regarding the authenticity of those records, how they were made or when they were made. No proper foundation was laid for their use. As such, examining witnesses regarding the contents of those records was inappropriate.

Only after establishing that Dr. Elamir's records were subject to the business records exception could defendant then try to establish that the statements he wanted to use were themselves subject to a hearsay exception because they constituted embedded hearsay. See Konop v. Rosen, 425 N.J. Super. 391, 403 (App. Div. 2012) ("We must first resolve whether the consultation report itself was

admissible under the business records exception. If it was, then the focus becomes whether Flores' notation was embedded hearsay that did not otherwise 'meet[] the requirements of an exception to Rule 802.'"). That procedure was not followed at bar.

Instead, without analysis or, at a minimum a custodian of records testifying, the trial judge stated: "If we can't trust a treating doctor's records, what the heck do we trust?" 4T45:12-13. Medical records are not self-authenticating. In Konop, the author of the report at issue "testified that he would routinely prepare consultation reports as part of his duties at the hospital. The report was used to arrange a consultation with a specialist, in this case a surgeon, for a particular patient. And, the information contained in the consultation report was generally accurate. The sources of information contained in his report were Flores' supervisors, superiors or the attending physician, McLean, none of whom were likely to supply untrustworthy information given the context, i.e., plaintiff had a perforated colon and needed emergency surgery." Id. at 404. Because of that testimony, this Court held that "[t]he consultation report was admissible as a business record under the N.J.R.E. 803(c)(6)." Ibid. **There was no such testimony at bar to lay the required foundation.**

Without any witness establishing the trustworthiness of the records, defense counsel was given free rein to use cherry-picked statements allegedly contained in

those records. Without any evidence regarding who made those statements, and despite plaintiff's testimony to the contrary, the trial court found that those statements were all allowable under N.J.R.E. 803(c)(4). That rule applies to "a Statement for Purposes of Medical Diagnosis or Treatment that: (A) is made in good faith for purposes of and is reasonably pertinent to, medical diagnosis or treatment; and describes medical history; past or present symptoms or sensations; their inception; or their general cause." N.J.R.E. 803(c)(4).

Initially, it must be noted that many of the statements used to cross-examine Dr. Dauhajre and used in Dr. Miller's direct testimony could not be considered statements covered by the hearsay exception under N.J.R.E. 803(c)(4). For example, defense counsel asked Dr. Dauhajre about certain tests Dr. Elamir allegedly administered to plaintiff. 2T264:1-4. He also used the record to state certain diagnoses made by Dr. Elamir (e.g., she was diagnosed with "osteoarthritis and arthritis"). 2T234:21-22. Defense counsel also impermissibly used the records to establish that the cause of plaintiff's pain was not the collision, asking about passages where Dr. Elamir noted "no trauma" or "without trauma." 2T265:22-24; 2T267:3. The fallacy that those statements were made by Ms. McKoy is underscored by defense counsel arguing with Dr. Dauhajre about questioning what Dr. Elamir "said," not what plaintiff said. "But her treating doctor, who has treated her for over 15 years, **said** something different. Now,

you're questioning it?" 2T241:1-3 (emphasis added).

There is only one reference in Dr. Elamir's records that could arguably be attributed directly to Ms. McKoy. "Patient requesting refill of pain medication." Ca1 (D-6 at 1). Ms. McKoy was never asked by defense counsel whether she made any of the statements alleged to be in Dr. Elamir's records. Conceivably, defendant deliberately chose not to ask Ms. McKoy about those statements so he could present them as uncontradicted and characterize them any way he wanted, i.e., as Ms. McKoy's own statements. Nor was Dr. Elamir called by the defense to testify that Ms. McKoy made those statements. Use of those statements under those circumstances was plain error and prejudicially unfair to plaintiff.

Plaintiff was denied her fundamental right to cross-examine Dr. Elamir. The opportunity to cross-examine adverse witnesses is a fundamental component of the right to due process and a fair trial. See, e.g., Alves v. Rosenberg, 400 N.J. Super 553, 563-65 (App. Div. 2008) (reversing a jury verdict and remanding for a new trial where the judge had unfairly allowed the wholesale admission of numerous hearsay statements, thereby depriving the appellant of "the opportunity for full and effective cross-examination at trial"). A "trial, although inevitably an adversarial proceeding, is above all else a search for truth," State v. Fort, 101 N.J. 123, 131 (1985), and our courts have consistently recognized that "[c]ross-examination is the most effective device known to our trial procedure for seeking

the truth." Peterson v. Peterson, 374 N.J. Super. 116, 124-125 (App. Div. 2005) (internal quotations omitted). "In the absence of this critical safeguard, 'the integrity of the fact-finding process' is compromised denying the fact finder the ability to fully and fairly assess credibility." Ibid. (internal citation omitted).

Dr. Elamir's out-of-court statements were offered for the truth of the matter asserted and were used by defendant as direct evidence that plaintiff was not credible and that her injuries were not attributable to the collision. One need look no further than the defense closing argument to see the accuracy of that statement. At closing, defense counsel used Dr. Elamir as the cornerstone of his argument. Counsel began by stating, "You've heard a lot about Dr. Elamir." 5T9:9-18. Again, Dr. Elamir never appeared at trial. Plaintiff never got to cross-examine Dr. Elamir. Nonetheless, the defense was allowed unfettered use of his records. He used the records as evidence that "four days after the collision Ms. McKoy goes to see Dr. Elamir and makes no mention of the car collision." 5T10:1-3. He used the records as evidence that plaintiff said that both her knees hurt "without trauma." 5T10:13-16. "It says both knees hurting without trauma." 5T10:25. He states, "and just in case that isn't enough, another date of visit was April 12, 2021. Mid to low back pain without trauma." 5T11:1-3. He also claims that Ms. McKoy told Dr. Elamir that "it's non-radiating." 5T11:8. He quoted before the jury the records not only for what they allegedly said but also for what they allegedly did not say.

“And also there is no mention of being in any pain.” 5T12:10-11. Plaintiff was left with no ability to test Dr. Elamir’s statements, to establish that they were his statements and not hers, to impeach Dr. Elamir or to simply ask clarification of those entries because Dr. Elamir was not produced. Dr. Elamir’s credibility was never tested. The records were never authenticated or their contents verified. The result was an unfair jury verdict.

CONCLUSION

The wholesale use as direct evidence and as impeaching evidence of medical records neither authenticated, verified or admitted in evidence was erroneous, prejudicial and denied plaintiff a fair trial as required under the common law of New Jersey. For the foregoing reasons, plaintiff is entitled to a decision vacating the Order of Judgment and remanding this matter for a new trial.

Respectfully submitted,

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DATED: December 2, 2024

Joanne McKoy,

Plaintiff/Appellant,

vs.

**Jarrett E. Reese; Yolander D.
Baker; Liberty Mutual
Insurance Company,**

Defendants/Respondents.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003711-23**

CIVIL ACTION

Submitted on: March 5, 2025

**On Appeal from:
Superior Court of New Jersey
Law Division: Hudson County
Docket No. HUD-L-004267-20**

**Sat Below:
Hon. Kimberly Espinales-Maloney, J.S.C.**

**BRIEF ON BEHALF OF DEFENDANT/RESPONDENT,
JARRETT E. REESE**

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PRELIMINARY STATEMENT

In this motor vehicle accident case, Plaintiff Joanne McKoy bore the burden of proving that as a result of her accident with Defendant Jarrett Reese, she suffered a permanent injury based on objective and credible medical evidence. In support of her claim, Plaintiff retained medical expert Dr. Teofio Dauhajre. As part of his review of the facts of this case, Dr. Dauhajre reviewed the medical records of Plaintiff's primary care physician, Dr. Mazhar Elamir, which indicated that Plaintiff had preexisting injuries.

At trial, Dr. Dauhajre's testimony directly conflicted with information contained within Dr. Elamir's records. Specifically, Dr. Dauhajre testified that Plaintiff was asymptomatic at the time of the accident. Accordingly, defense counsel impeached Dr. Dauhajre using the records themselves. This form of impeachment is not only sound from an advocacy perspective, but it is endorsed by the New Jersey Rules of Evidence and case law.

Moreover, the overwhelming balance of the evidence favored a verdict for Defendant. Plaintiff's treating doctor, medical expert, and the defense expert all agreed that, at most, Plaintiff sustained sprains and strains, conditions expected to heal over time. Such injuries do not rise to the level of a permanent injury. Accordingly, the jury returned a verdict in favor of Defendant. For those

reasons, expounded upon herein, Defendant asks this Court affirm the decision of the lower court and not disturb the jury's verdict.

STATEMENT OF FACTS

Plaintiff was involved in a motor vehicle accident with Defendant that occurred on November 22, 2018. (3T9:22-25) As a result of the accident, Plaintiff alleged injuries to her neck, back, and knees. (3T137:25-138:1) It is undisputed that Plaintiff was subject to the Limitation on Lawsuit, or “verbal threshold,” and was required to prove by a preponderance of the evidence that she sustained a permanent injury, caused by the subject accident.

To that end, the jury heard testimony from Dr. David Subin, Plaintiff's treating chiropractor. Dr. Subin testified that he was unaware – because Plaintiff failed to offer the information – that Plaintiff had preexisting knee pain, something that the jury could consider in evaluating credibility. (3T41:11-18) Dr. Subin conceded that he made an initial determination, without the benefit of objective testing, when he causally related the alleged injuries to the subject accident at the outset of Plaintiff's treatment. (3T41:19-42:6)

Plaintiff's treatment consisted solely of fifty-two visits with Dr. Subin, amounting to approximately twenty-seven hours of total treatment. (3T44:14-45:6) The jury heard further that Dr. Subin noted Plaintiff's consistent improvement at each re-evaluation, and decreased her treatment from two to

three times per week, to once a week before discharging Plaintiff from care completely. (3T45:23-46:5) Dr. Subin diagnosed Plaintiff with sprains and strains, which are conditions expected to heal over time. (3T51:4-9)

Dr. Feng Tao, a radiologist, also testified at trial. In discussing his review of Plaintiff's MRI films, Dr. Tao testified that he found evidence of lumbar degeneration, and cervical osteophytes, consistent with degeneration. (3T109:3-7; 111:10-18) Dr. Tao's testimony further called into question the causal relationship between this accident and the alleged injuries.

Plaintiff's expert witness, Dr. Teofio Dauhajre, diagnosed Plaintiff with sprains and strains as well. A critical portion of Dr. Dauhajre's testimony before the jury, however, was that the objective physical testing was negative, and his conclusion that Plaintiff was neurologically intact. (2T213:13-22)

Simply put, the jury heard adequate evidence from Plaintiff's own witnesses to conclude that Plaintiff did not sustain a permanent injury caused by the subject accident.

Following the accident, Plaintiff visited her primary care physician, Dr. Mazhar Elamir, who had previously treated her.

During the trial, Plaintiff's counsel raised the nature and extent of Plaintiff's treatment with Dr. Elamir several times on Plaintiff's direct examination on June 6, 2024. Plaintiff testified that she "had been suffering

with [her] knees” prior to the accident. (3T136:5-17) Plaintiff could not recall for how long prior to the subject accident that she had pain in her knees. (Id.)

On direct examination, Plaintiff’s counsel explicitly raised the issue with Plaintiff of whether she had previously referenced pain in other body parts, namely, the neck or back, with Dr. Elamir on any occasions prior to the accident, which Plaintiff denied. (3T137:1-3) In fact, Plaintiff denied prior complaints to other body parts multiple times on direct examination. (3T179:9-12)

Plaintiff’s expert witness, Dr. Dauhajre, testified on June 4, 2024, prior to Plaintiff’s trial testimony. On direct examination, Plaintiff’s counsel elicited the fact that Dr. Dauhajre claimed to have reviewed Dr. Elamir’s records in the course of rendering his opinion. (2T159:7-17) Dr. Dauhajre testified that Plaintiff’s low back was “completely asymptomatic prior to this accident,” relying upon Dr. Elamir’s records in making that declaration. (2T161:20-22) Dr. Dauhajre made a similar statement regarding Plaintiff’s neck pain. (2T161:5-7)

Critically, Dr. Dauhajre noted on direct examination that Plaintiff also denied prior knee symptomology or injuries. (2T162:2-163:1) Dr. Dauhajre’s improper, or incomplete, review of Dr. Elamir’s records was first raised on direct examination, opening the door to more detailed questioning of Dr.

Dauhajre's understanding of records he reviewed in reliance of forming his opinion in this matter.

Dr. Dauhajre acknowledged the importance of reviewing complete records in rendering an opinion. He testified that "[w]hen you come to a conclusion, a diagnosis, before you go onto treatment recommendations, you have to get a good history that includes past medical histories." (2T163:21-23) Dr. Dauhajre further explained that his conclusions were based on the records he reviewed – including Dr. Elamir's records – and Plaintiff's claims that she had been asymptomatic prior to this accident. (2T189:19-25; 228:13-17)

On cross-examination, Dr. Dauhajre testified that Plaintiff did not have chronic pain complaints prior to this accident, relying on his review of Dr. Elamir's records in making that declaration. (2T232:21-233:5) When questioned about the accuracy of his review, Dr. Dauhajre explicitly requested in front of the jury to review Dr. Elamir's records. (2T233:6-15)

Subsequent to his request, Dr. Dauhajre was shown Dr. Elamir's records, which reflected a visit four days after the subject accident when Plaintiff reported knee and back pain for greater than six months. (2T233:6 to 234:21) Having relied on Dr. Elamir's records in the formation of his opinion, those same records were presented to Dr. Dauhajre on cross-examination.

On re-direct examination, Plaintiff's counsel elicited additional testimony from Dr. Dauhajre that he had reviewed Dr. Elamir's records, and counsel asked specifically for Dr. Dauhajre to recite what was contained in those records. (2T262:10-18) Dr. Dauhajre testified: "I reviewed the whole record [...] the neck was never mentioned throughout the entire review of these records." (2T262:20-23)

Plaintiff's counsel further opened the door to cross-examination when he asked Dr. Dauhajre to confirm what was contained in Dr. Elamir's records regarding medications prescribed, and then when counsel asked Dr. Dauhajre to interpret what Dr. Elamir may have meant by the notation "back knee." (2T262:24-263:13)

Therefore, on re-cross examination, when Dr. Dauhajre inserted a claim that Dr. Elamir's records were electronic and self-populating, he was asked about changes in Plaintiff's subjective complaints, which highlighted separate prior complaints for the back and knee(s). (2T266:7-12-269:16)

Importantly, Dr. Dauhajre acknowledged that defense counsel's questions posed to him regarding Dr. Elamir's records were limited to Plaintiff's subjective complaints, rather than Dr. Elamir's diagnoses or conclusions. (2T269:1-4)

The defense expert, Dr. Alan Miller, was asked on direct examination whether he, like Dr. Dauhajre, reviewed Dr. Elamir's records, to which he responded affirmatively. (4T24:23-25:8) Dr. Miller was asked about Plaintiff's subjective complaints rather than Dr. Elamir's diagnoses or conclusions. (4T38:8-13)

On cross-examination of Dr. Miller, Plaintiff's counsel utilized Dr. Elamir's records in a manner consistent with what Plaintiff now claims to be improper. Specifically, Plaintiff's counsel asked Dr. Miller about Plaintiff's subjective complaints to Dr. Elamir and extended the questions beyond the bounds of how defense counsel utilized the records by raising the issue of Dr. Elamir's assessment. (4T132:18-133:8)

Plaintiff's counsel used Dr. Elamir's assessment and diagnoses as part of his cross-examination strategy of the defense expert on multiple occasions. Counsel asked Dr. Miller whether it was significant, "at least according to Dr. Elamir's records, [that he] consistently found muscle spasms, almost like once a month." (4T136:22-28)

During closing argument, defense counsel disputed Plaintiff counsel's and Dr. Dauhajre's assertions throughout the trial that Dr. Elamir's records were not reflective of Plaintiff's subjective complaints. Defense counsel highlighted portions of Dr. Dauhajre's testimony in which he conceded that the subjective

portion of Dr. Elamir's records changed during the course of Plaintiff's treatment with Dr. Elamir. (5T10:18-21)

Defense counsel also called into question Dr. Dauhajre's poor and incomplete review of Dr. Elamir's records, which directly challenged Dr. Dauhajre's credibility and the reliability of his conclusions. (5T21:16-20)

The instant appeal relies exclusively to references at trial to Dr. Elamir's records, yet ignores the fact that Plaintiff was required to prove a permanent injury, and failed to do so based on objective testing, diagnostic studies, her testimony, and that of her expert witness and treating doctor. Dr. Dauhajre conceded during his testimony that a person's spine changes over time in the absence of trauma. (2T243:20-244:7) Further, Dr. Dauhajre testified that Plaintiff's neck and back were positive for degenerative conditions that pre-existed the subject accident. (2T253:21-25 to 254:2)

Accordingly, the jury returned a unanimous verdict finding that Plaintiff did not sustain a permanent injury and found for Defendant. (5T104:11-19)¹

¹ Defendant Yolander D. Baker was dismissed at the outset of the trial by agreement of the parties. (1T3:19-4:4)

LEGAL ARGUMENT

Point I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING DEFENSE COUNSEL TO USE PLAINTIFF'S PRIMARY CARE PHYSICIAN RECORDS TO CROSS-EXAMINE PLAINTIFF'S EXPERT WITNESS, WHOSE TESTIMONY CONFLICTED WITH HIS PURPORTED REVIEW OF THE RECORDS.

(Raised below: 2T236:1-237:10)

a. The standard for this appeal is abuse of discretion.

An appellate panel reviews a trial court's evidentiary decisions for an abuse of discretion. Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008). Indeed, "from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384 (2010) (citing Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999)). Determining the scope of cross-examination is no exception; trial courts have "broad discretion" in that arena. State v. Silva, 131 N.J. 438, 444 (1993). It follows that an appellate court should "generously sustain the decision" so long as it is supported by the record. Estate of Hanges, 202 N.J. at 384.

b. Defense counsel's cross-examination of Dr. Dauhajre, Plaintiff's expert witness, was proper.

New Jersey common law favors liberal cross-examination. Indeed, the Supreme Court has stated that "[c]ross-examination is the greatest legal engine

ever invented for the discovery of truth.” State v. Silva, 131 N.J. at 444 (quoting California v. Green, 399 U.S. 149, 158 (1970)). Subject to the trial court’s discretion, “extensive cross-examination of experts is generally permitted.” Prioleau v. Kentucky Fried Chicken, Inc., 434 N.J. Super. 558, 587 (App. Div. 2014). Specifically, trial counsel may use cross-examination to attack the credibility of a witness. Parker v. Poole, 440 N.J. Super. 7, 22 (App. Div. 2015). A reviewing appellate court should not reverse such exercise of discretion unless the appellant can show “clear error and prejudice.” Prioleau, 434 N.J. Super. at 587 (quoting Glenpointe Assocs. v. Twp. of Teaneck, 241 N.J. Super. 37, 54 (App. Div. 1990)). Pursuant to this policy in favor of cross-examination, appellate courts often affirm trial counsel’s impeachment of a witness by relying on records that contradict the witness’s testimony.

For example, in State v. Garcia, the Supreme Court faced the question of whether a criminal defendant could use a video of his family members trying to speak with police at the crime scene to impeach a police officer after the officer testified that she canvassed the area for witnesses but only found the victim and his wife. State v. Garcia, 245 N.J. 412, 416-20 (2021). The Court answered in the affirmative, reasoning that N.J.R.E. 607 provides that “[f]or the purpose of attacking or supporting the credibility of a witness, any party including the party calling the witness may examine the witness and introduce extrinsic evidence

relevant to the issue of credibility.” Id. at 431 (emphasis and modification in original). Citing State v. Timmendequas, 161 N.J. 515, 596 (1999), the Court further reasoned that extrinsic evidence proving that the actual facts are other than as testified by the witness under attack is essential to the jury’s ability to determine credibility.

Similarly, in Allendorf v. Kaiserman Enterprises, the Appellate Division addressed, in passing, the issue of whether a defendant in a personal injury matter may use the Plaintiff’s medical history of fainting prior to the subject accident to impeach the Plaintiff after she testified that she was “in perfect health” and never had “any problem with blacking out” prior to the accident. Allendorf v. Kaiserman Enterprises, 266 N.J. Super. 662, 472-74 (1993). Again, the court answered in the affirmative. Like the Court in State v. Garcia, the court in Allendorf cited N.J.R.E. 607 to state that the Plaintiff’s medical history of fainting prior to the accident could be used to impeach the credibility of her testimony. Id. at 674.

A last case that provides helpful discussion is James v. Ruiz, 440 N.J. Super. 45 (App. Div. 2015). There, the court addressed “the propriety of questioning an expert witness at a civil trial, either on direct or cross-examination, about whether that testifying expert's findings are consistent with those of a non-testifying expert who issued a report in the course of an injured

Plaintiff's medical treatment” and “the propriety of counsel referring to the non-testifying expert's findings in closing argument.” Id. at 51. At the trial level, the Plaintiff tried to probe into a non-testifying radiologist’s opinions, which were summarized in a report, and which were not relied upon by the testifying experts at trial. Specifically, the non-testifying radiologist opined that the CT scan showed that the Plaintiff had a disc bulge at L4-L5. The Plaintiff’s testifying expert shared that opinion; the defendant’s testifying expert did not. The trial judge sustained multiple objections from the defendant, and the appellate panel affirmed.

The James decision provides much helpful insight into the matter at bar. In the first instance, the court distinguished complex diagnoses and routine findings. The court found that the former is generally off the table, while the latter is fair game on cross-examination. Indeed, the court limited its holding to “complex and disputed opinions.” Ibid. Still, the court thoroughly discussed the propriety of using records in a manner consistent with defense counsel in the instant matter:

We are mindful that if the proffer for the cross were less ambitious, the testimony theoretically might not involve a prohibited hearsay use under N.J.R.E. 801(c). In particular, if the sole limited purpose of this portion of the cross was to show that the defense expert's review of the patient's records was skewed or incomplete, such a line of inquiry arguably would amount to simply impeachment of the defense expert's

credibility, an attack that does not hinge upon the actual truth of the absent declarant's statements. Such impeachment to expose the weaknesses of an expert's testimony potentially might assist in the search for the truth, one of the recognized goals of our law of evidence. N.J.R.E. 102. See, e.g., State v. Basil, 202 N.J. 570, 591 (2010) (“Our legal system has long recognized that cross-examination is the greatest legal engine ever invented for the discovery of truth.”)

The probative significance of such impeachment arguably might be greater where, as here, the testifying expert has disregarded or discounted findings of a physician who is part of the patient's treatment team rather than findings of an expert physician only retained for litigation. The mere presence of a treating doctor's finding in a patient's medical file, irrespective of the actual soundness (or “truth”) of that finding, could be viewed, at least in theory, as probative, comprising a form of notice to an expert who subsequently reviews that file. A Plaintiff might plausibly want to argue that the defense expert should have been more cautious before reaching a contrary finding, having been made aware of what the treating doctor had found.

Id. at 75-76 (some citations omitted for concision).

In the instant case, defense counsel’s questioning at trial closely followed the framework as set forth by the Appellate Division. Indeed, the medical records used in this case did not contain “complex and disputed opinions.” Id. at 51. Rather, they contained “routine findings,” such as Plaintiff’s subjective complaints to her primary care physician. Id. at 63 (internal citation omitted).

At most, defense counsel used “[t]he mere presence” of Dr. Elamir’s finding, “irrespective of the actual soundness (or “truth”) of that finding,” to show that Dr. Dauhajre, at a minimum, had “a form of notice” of Plaintiff’s prior complaints of pain. Id. at 75. In sum, the records of Plaintiff’s primary care physician were used to show that Plaintiff’s expert’s review was inadequate. Defense counsel’s use of those records was proper impeachment.

Plaintiff’s appellate brief calls attention to the Supreme Court’s decision in Agha v. Feiner, 198 N.J. 50 (2009), which notably was relied upon by the court in James. Specifically, Plaintiff cites Agha to support the proposition that although hearsay statements within medical records may be reviewed by a testifying expert and subsequently heard by a jury, they cannot serve as a vehicle for the wholesale introduction of otherwise inadmissible evidence. Id. at 63; Plaintiff’s Brief 16. But the Agha Court, like the James court, considered a complex medical diagnosis. Specifically, the evidence for which the Court in Agha was concerned about “wholesale introduction” was a non-testifying radiologist’s diagnosis of a disc herniation at L5-S1 after reviewing MRI films. Id. at 63 (alteration omitted). Like the James decision, the Agha decision specifically called an MRI report “complex.” Id. at 65 n. 9. Again, the instant case involves a primary care physician’s routine findings and not complex diagnoses. The distinction between the two is that the former is generally fair

game for impeachment while the latter is not. Accordingly, defense counsel's use of Dr. Elamir's records to impeach Dr. Dauhajre was proper.

c. Manata v. Pereira, the only reported decision to ever use the term “phantom impeachment,” does not apply to this case.

To argue that defendant engaged in impermissible “phantom impeachment,” Plaintiff cites the only reported New Jersey case to ever mention it. However, that case—Manata v. Pereira, 436 N.J. Super. 330 (App. Div. 2014)—is inapposite because the facts, and therefore the court's concerns, are entirely different. There, the record was a police report, and there were questions of fairness that were considered by the court. For example, the report did not include the defendant's version of events even though he spoke to the police officer, which violated the guidelines for preparing a police crash report. Defendant also later went to the police station to amend the report to no avail. More significantly, the report's use at trial differed in two significant ways. First, Plaintiff's counsel sought to impeach defendant by omission. As discussed and considered by the court, there are certain dangers of such impeachment for which the court must guard against. Id. at 344-45. Second, Plaintiff's counsel used the report without any prior reference to it by defendant at trial. Id. at 339. To the contrary, here there was no impeachment by omission, and Plaintiff's expert reviewed the Dr. Elamir records before issuing his opinion. Moreover, there were no special issues of fairness in the instant trial like there were in

Manata. Plaintiff attempts to confuse the issues by questioning the legitimacy of the records of Plaintiff's primary care physician. Not only could the jury weigh their credibility, but the trial judge specifically found that they were trustworthy. (4T44:23-45:22)

Even more illustrative of the inapplicability of "phantom impeachment" to this case is the article that the Manata court—and Plaintiff by way of citation in her brief—relies on, James McElhaney, Phantom Impeachment, 77 A.B.A.J. 82 (Nov. 1991). The general proposition can be summarized as follows: "There it is, the Phantom Impeachment. The witness is impeached—contradicted on key testimony—by someone who never takes the stand and who never says a word in court." Id. at 82. But the context of the article is completely different than the what happened in this case's trial. The article uses two examples. First, an attorney states during cross-examination that a person in the gallery could testify that he saw the witness at a time and place that would contradict the witness's testimony. Second, another attorney in another trial states during cross-examination that a police officer not present at trial could testify that the traffic light was red, whereas the witness had just testified that it was green. In both scenarios, the cross-examining attorney threatened to use evidence entirely outside of the scope of trial to contradict the witness.

Here, however, defense counsel questioned Plaintiff's expert witness on records that he had already stated, at trial, that he had purportedly reviewed and relied upon. This form of impeachment is permissible, as stated in cases including State v. Garcia, Allendorf, Prioleau, and James, which have all been discussed above, as well as by the plain text of N.J.R.E. 607. Plaintiff's expert witness, Dr. Dauhajre, testified that he had reviewed Plaintiff's medical records. (2T229:6-8) Dr. Dauhajre further testified that Plaintiff had no injuries that existed at the time of the accident. (2T161:20-22) Defense counsel questioned him on the medical records of Dr. Elamir. (2T232:21-22) Those records—the ones Dr. Dauhajre testified he reviewed and based his opinion upon—directly contradicted Dr. Dauhajre's testimony. Defense counsel properly impeached Plaintiff's expert witness.

Point II

**PLAINTIFF'S COUNSEL OPENED THE DOOR
TO DEFENSE COUNSEL'S USE OF DR.
ELAMIR'S RECORDS IN QUESTIONING DR.
DAUHAJRE.**

(Raised below: 2T238:23-25)

Trial judges have wide discretion in controlling their courtrooms. State v. Cusumano, 369 N.J. Super. 305, 311 (App. Div. 2004). Such control includes “manag[ing] the conduct of a trial in a manner that facilitates the orderly presentation of competent evidence.” State v. Bitzas, 451 N.J. Super. 51, 76

(App. Div. 2017). Part of the presentation of evidence is the doctrine of opening the door. The doctrine states that a trial judge may exercise her discretion to admit evidence that is otherwise irrelevant or inadmissible if “the opposing party has made unfair prejudicial use of related evidence.” State v. James, 144 N.J. 538, 553–54 (1996).

One illustrative case is Gaido v. Weiser, where the appellate court affirmed a trial court’s exercise of discretion to permit a medical examiner to testify that she would have ruled the decedent’s death accidental even if she had known about prior suicide attempts. Gaido v. Weiser, 227 N.J. Super. 175, 187-88 (App. Div. 1988). The court stated that a medical examiner is no more competent than the jury to decide whether a death was by accident or suicide, but that the testimony was permitted because Plaintiff had opened the door by presenting the medical examiner to show that she had made her conclusion without making a prior inquiry into the decedent’s psychiatric history. Id. at 188-89. Notably, the court stated that “[t]he law is well-established that ‘the scope of cross-examination is a matter for the control of the trial judge and that an appellate court will not interfere with such control unless clear error and prejudice is shown.’” Id. at 189 (quoting Mazza v. Winters, 95 N.J. Super. 71, 78 (App. Div. 1967)).

For the reasons stated in the first point heading of this brief, defense counsel's use of Dr. Elamir's records to impeach Dr. Dauhajre was permissible. But even if it was not, Plaintiff's counsel opened the door to the line of questioning about Dr. Dauhajre's review of Plaintiff's medical records. On direct examination, counsel for Plaintiff elicited from Dr. Dauhajre that (1) Plaintiff treated with Dr. Elamir four days after the accident, 2T159:14-17, (2) Plaintiff's neck and lower back were asymptomatic prior to the accident, 2T161:5-7, 2T161:20-22, and (3) Dr. Dauhajre reviewed Plaintiff's historical medical records before rendering his opinion, (2T195:25-196:2, 2T202:2-3). The logical sum of those three pieces of testimony is that Plaintiff's medical records did not indicate reported pain before the accident. Defense counsel was therefore entitled to question Dr. Dauhajre about the Dr. Elamir records too. Specifically, defense counsel could—and did—seek to impeach Dr. Dauhajre by eliciting testimony that undermined the thoroughness of his review of Plaintiff's medical history. Such line of questioning fulfills the purpose of the doctrine of opening the door, which is “to prevent prejudice.” Grewal v. Greda, 463 N.J. Super. 489, 509 (App. Div. 2020). If the court did not exercise its discretion to allow defense counsel to continue Plaintiff's line of questioning regarding Dr. Elamir's records, then Plaintiff alone would unfairly and prejudicially benefit from Dr. Dauhajre's discussion of prior symptomology on direct examination.

Point III

**DR. ELAMIR'S RECORDS WERE
INDEPENDENTLY ADMISSIBLE UNDER THE
HEARSAY EXCEPTION FOR STATEMENTS
MADE FOR THE PURPOSE OF MEDICAL
DIAGNOSIS.**

(Issue was not raised below)

Not only was it proper for defense counsel to use Dr. Elamir's records to impeach Dr. Dauhajre, but it would also be proper for those records to be admitted under N.J.R.E. 803(c)(4). That Rule provides that the following evidence is excluded from the rule against hearsay: "A statement that: (A) is made in good faith for purposes of, and is reasonably pertinent to, medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause." "It has long been the rule in New Jersey that the declarations of a patient as to his condition, symptoms and feelings made to his physician for the purpose of diagnosis and treatment are admissible in evidence as an exception to the hearsay rule." Cestero v. Ferrara, 57 N.J. 497, 501 (1971).

The Appellate Division has applied this hearsay exception to the medical records of a Plaintiff's primary care physician. In Gonzales v. Hugelmeyer, the court found it to be reversible error where the trial court excluded such records from evidence. Gonzales v. Hugelmeyer, 441 N.J. Super. 451, 462 (App. Div. 2015). In that case, the Plaintiff's prior condition was a material issue at trial.

Notably, the Plaintiff's primary care physician testified in that case, but the Appellate Division's decision was unaffected by that fact. Rather, the court found that "[t]he records were highly relevant to substantiate [the Plaintiff's] pre-existing spinal injuries and condition" and "[t]he records would have provided the jurors with relevant, tangible proof that Mr. Gonzales had been suffering from serious spinal problems for many years." Ibid.

Here too, Plaintiff's primary care physician's records presented a material issue—whether any injuries sustained by Plaintiff were actually caused by the subject accident, or were rather preexisting. Pursuant to the Appellate Division's decision in Gonzales, even if defense counsel did not seek to use the records to impeach Dr. Dauhajre, they were independently admissible under N.J.R.E. 803(c)(4).

Point IV

**ANY ERROR IN PERMITTING DEFENSE
COUNSEL TO QUESTION DR. DAUHAJRE
ABOUT HIS REVIEW OF DR. ELAMIR'S
RECORDS IS HARMLESS BECAUSE THE
OVERWHELMING BALANCE OF EVIDENCE
FAVORED DEFENDANT.
(Issue was not raised below)**

R. 2:10-2 provides that an error by the trial court should be disregarded unless it was clearly capable of producing an unjust result. The appealing party bears the burden of proof. A.B. v. Y.Z., 184 N.J. 599, 603 (2005).

In the instant matter, Plaintiff was unable to sustain her burden of proving that she sustained a permanent injury. Critically, the jury heard ample evidence to reach its determination that Plaintiff did not prove a permanent injury, regardless of the testimony regarding Dr. Elamir's records.

The jury heard from Plaintiff's only treating doctor that notwithstanding the claim that her alleged injuries did not, or would not heal, her treatment consisted solely of twenty-seven hours of chiropractic care. (T44:14-45:6) The jury had the opportunity to weigh the credibility of Plaintiff's testimony with that of Dr. Subin, who noted consistent improvement in her pain levels, range of motion, and ability to perform activities of daily living. (3T46:9-49:13)

Dr. Tao, who reviewed Plaintiff's MRI films, found proof of cervical and lumbar degeneration, which would undoubtedly be unrelated to the subject accident. (3T109:3-7; 111:10-18)

The two opposing expert witnesses. Dr. Dauhajre and Dr. Miller, both agreed that Plaintiff's physical examinations were normal, objective testing was negative, and that Plaintiff was neurologically intact. (2T213:13-22) The jury had the benefit of hearing from both expert witnesses that Plaintiff sustained sprains and strains, expected to heal over time. Critically, the jury heard sufficient evidence, specifically from her treating chiropractor, to determine that Plaintiff's injuries, if any, had healed.

Accordingly, assuming *arguendo* that the trial court erred in permitting testimony regarding Dr. Elamir's records, that error proved to be harmless and unrelated to the verdict that the jury reached.

CONCLUSION

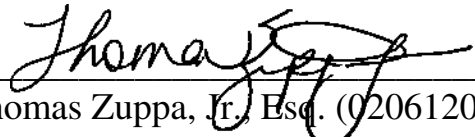
In sum, defense counsel properly impeached Dr. Dauhajre. Furthermore, the balance of the evidence in this case overwhelmingly supported a verdict in favor of Defendant. For those reasons, this Court should affirm the decision of the lower court.

Respectfully Submitted,

**Chasan Lamparello Mallon &
Cappuzzo, PC**

Attorneys for Defendant Jarrett E. Reese

By: _____


Thomas Zuppa, Jr., Esq. (020612012)

Dated: March 5, 2025

JOANNE McKOY,

Plaintiff-Appellant,

v.

JARRETT E. REESE, YOLANDER D.
BAKER, LIBERTY MUTUAL
INSURANCE COMPANY,

Defendants.

**SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION**

DOCKET NO. A-003711-23

CIVIL ACTION

On Appeal from the Law Division,
Hudson County

Docket No. HUD-L-004267-20

Sat Below:

Hon. Kimberly Espinales-Maloney,
J.S.C. and a Jury

REPLY BRIEF IN SUPPORT OF THE APPEAL

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LEGAL ARGUMENT

POINT I

DR. ELAMIR'S OFFICE NOTES WERE USED IMPROPERLY TO IMPEACH DR. DAUHAJRE.

The opposition of defendant, Jarrett E. Reese, does not dispute that statements in Dr. Elamir's record constituted hearsay within hearsay and were used for the truth of the matter asserted. Nor does defendant assert that Dr. Elamir was unavailable to testify. Defendant's position that Dr. Elamir's record was used properly to impeach Dr. Dauhajre's credibility rests on misrepresentations of the record on appeal, misstatements of the law and arguments not raised below. At trial, plaintiff's counsel objected to defense counsel reading from Dr. Elamir's record on Dr. Dauhajre's cross-examination, stating it was both "improper" and "outrageous" just to read from the records without producing Dr. Elamir as a witness or establishing the trustworthiness of the document. 2T235:17-25. In response, defense counsel stated that "I prepared for this objection, Your Honor. On direct, the question was you reviewed Dr. Subin's records and he asked if there was anything significant in those records. I'm doing the same thing. I'm asking if there was anything significant in the records he reviewed and relied on and he relied on them in his report." 2T235:1-7.

First, that is not what defense counsel asked during trial. More importantly, Dr. Dauhajre did not rely on Dr. Elamir's office note. Accordingly, it was

improper to cross-examine Dr. Dauhajre using that inadmissible hearsay. “[W]e have held, as a general if not immutable proposition, that ‘[i]t is improper to cross-examine a witness about inadmissible hearsay documents upon which the expert has not relied in forming his opinion.’ Corcoran v. Sears Roebuck & Co., 312 N.J. Super. 117, 130 (App. Div. 1998) (citing State v. Pennington, 119 N.J. 547, 577-83 (1990), overruled on other grounds by State v. Brunson, 132 N.J. 377 (1993)); see also Villanueva v. Zimmer, 431 N.J. Super. 301, 320 (App. Div. 2013) (similarly recognizing that “generally” it is improper to engage in such cross-examination).” James v Ruiz, 440 N.J. Super. 45, 76 (App. Div. 2015). The trial court’s reasoning that because Dr. Dauhajre had “reviewed” the record it was “fair game” is simply wrong as a matter of law. 3T7:6-22.

Plaintiff’s counsel’s question about Dr. Subin does not open the door to cross-examination about Dr. Elamir. They are two different doctors. Dr. Dauhajre relied on Dr. Subin’s findings; he did not rely on Dr. Elamir’s notes. Dr. Subin actually treated Ms. McKoy for injuries arising from the accident. Moreover, and most significantly, **Dr. Subin was a witness at trial. Dr. Elamir was not.**

Defense counsel started reading from Dr. Elamir’s record and told Dr. Dauhajre “you can read along with me.” 2T234:16-24. There wasn’t even a question. Dr. Dauhajre never said he relied on Dr. Elamir’s record. Factually, neither Dr. Dauhajre nor defendant’s expert, Dr. Miller, stated they relied on Dr.

Elamir's statements. Defendant's claims in that regard are a misrepresentation of the record.

Moreover, Dr. Elamir's "records," Ca1 (Defense Ex. 6), consist of one office visit made by plaintiff days **after** the accident. Defendant did **not** introduce any medical records showing any treatment by plaintiff prior to the accident.

Accordingly, all defendant's arguments about using the record to impeach Dr.

Dauhajre about plaintiff's prior treatment must fail. In fact, Dr. Dauhajre's position was he wanted to see records from prior to the accident that showed prior treatment of Ms. McKoy. "I want to see records from his -- prior to this accident from his office. . . . I have no records from any other physicians saying that she was actively being treated for her lower back and knees." 2T241:4-8. Even *arguendo* if defendant could use a medical record of another doctor for

impeachment purposes without, at a minimum, authenticating that record, he was not entitled to use a record from after the accident and claim it as proof of treatment before the accident. There are no contemporaneous records of that alleged treatment. There is no evidence or records on which to challenge Dr.

Dauhajre's testimony. The use of that record was highly prejudicial to plaintiff. It called into question Ms. McKoy's credibility without giving her the right to cross-examine Dr. Elamir. The admission and improper use constitute reversible error.

Day v. Lorenc, 296 N.J. Super. 262, 269 (App. Div. 1996).

Moreover, it was not proper impeachment because it was not within the scope of the direct examination. Dr. Dauhajre's only direct testimony about Dr. Elamir was that plaintiff saw Dr. Elamir four days after the accident, and Dr. Elamir referred her to Dr. Subin. 2T159:16-20. That testimony was based on plaintiff's statements to Dr. Dauhajre, not Dr. Elamir's office note. 3T136:6-19; 3T135:23-136:2. That testimony does not "open the door" for the defense to "cross-examine" Dr. Dauhajre by reciting before the jury statements made in Dr. Elamir's record about plaintiff's diagnosis and causation. There was no impeachable statement made by Dr. Dauhajre regarding Dr. Elamir. He did not say Dr. Elamir was incorrect in his assessment or testify in any way, shape or form regarding what Dr. Elamir did or said. What Dr. Dauhajre said was uncontested, factually accurate and supported by plaintiff's testimony. None of the questions asked on cross had anything to do with that benign direct testimony.

Because defendant knows this, he resorts to misrepresenting the record. He claims that Dr. Dauhajre testified plaintiff's low back pain was "completely asymptomatic prior to this accident, **relying on Dr. Elamir's records.**" Db4. Defendant then cites to 2T161:20-22 as proof of that assertion. That testimony unequivocally shows, however, that plaintiff was the source of the doctor's reliance, **not** Dr. Elamir. "[Plaintiff] told me that her lower back was completely asymptomatic prior to this accident." 2T161:20-22. A review of Dr. Dauhajre's

testimony reveals he did not rely on the after-the fact office visit of Dr. Elamir for plaintiff's history. Because there were no medical records prior to the accident, Dr. Dauhajre could not and did not rely on the non-existent records. He appropriately relied on plaintiff for her history. "I didn't see anything from before this accident or, you know, other visits." 2T269:22-23. Any so-called "reliance" arguments made by defendant, therefore, lack merit because "[i]t is improper to cross-examine a witness about inadmissible hearsay documents upon which the expert has not relied in forming his opinion." Corcoran v. Sears Roebuck & Co., 312 N.J. Super. 117, 130 (App. Div. 1998) (citing State v. Pennington, 119 N.J. 547, 577-83 (1990), overruled on other grounds by State v. Brunson, 132 N.J. 377 (1993)); see also Villanueva v. Zimmer, 431 N.J. Super. 301, 320 (App. Div. 2013) (similarly recognizing that "generally" it is improper to engage in such cross-examination). James, 440 N.J. Super. at 76.

Arguably, the only witness who could possibly be properly impeached by Dr. Elamir's record is plaintiff herself. However, that defense counsel did not use that record to attempt to impeach plaintiff's credibility on the issue of prior treatment is undisputed. It is completely improper to "cross-examine" Dr. Dauhajre and challenge his credibility with hearsay that he did not author, did not mention, did not reference or credit and with which he had nothing to do.

POINT II

DEFENDANT’S RULE 607 ARGUMENTS WERE NOT RAISED BELOW, SHOULD NOT BE CONSIDERED AND LACK MERIT.

For the first time on appeal, defendant raises arguments regarding the application of N.J.R.E. 607, which was not raised below. “[O]ur appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available ‘unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.’” Nieder v. Royal Indemnity Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co., Inc. v. Summer, 38 N.J. Super. 542, 548 (App. Div. 1959)). As such, defendant’s new arguments are not properly before this Court and should be ignored.

Moreover, substantively defendant’s arguments lack merit. Defendant cites to N.J.R.E. 607 and several cases that not only do not support his contentions but in fact and law refute them as they relate to this case. N.J.R.E. 607 provides, in relevant part, that “[f]or the purpose of attacking or supporting the credibility of a witness, any party including the party calling the witness may examine the witness and **introduce extrinsic evidence** relevant to the issue of credibility.” N.J.R.E. 607(a) (emphasis added). Defendant then incorrectly interprets that Rule as allowing him to impeach Dr. Dauhajre’s credibility using Dr. Elamir’s statements.

The cases defendant cites demonstrate how that Rule is not applicable to the circumstances at bar.

In State v. Garcia, 245 N.J. 412 (2021), our Supreme Court reversed the trial court's decision to prevent a defendant from using a videotape depicting the defendant's family members trying to speak with police and being rebuffed by police to impeach statements made by the prosecution witnesses "that defendant's witnesses lied about their attempt to speak and cooperate with the police at the scene." Id. at 417. Further, the Court found the use of the videotape to be justified by the prosecutor's misleading statements to the jury in summation. "In summation, the prosecutor exploited the suppression of the video to present a false narrative. The prosecutor improperly suggested to the jury that the defense witnesses made no effort to give their accounts to the police officers at the scene -- despite the excluded video's evidence to the contrary. On that unjustifiable basis, the prosecutor urged the jury to reject the defense witnesses' testimony as untrustworthy. That improper gamesmanship had the clear capacity to unfairly tip the scales in this pitched credibility contest." Ibid.

That case is clearly distinguishable from the facts and circumstances of this case. Dr. Dauhajre did not lie about Dr. Elamir. He did not try to portray him as not credible as was the case in Garcia. There the defendant's family was at the trial. They were available to authenticate the video. If defendant wanted Dr.

Elamir to rebut the history plaintiff gave Dr. Dauhajre, defendant needed to produce Dr. Elamir as a witness. The gamesmanship at bar was by defense counsel in making the non-testifying Dr. Elamir the focus of his summation. He used statements contained in unauthenticated documents not in evidence as direct evidence to dispute plaintiff's case. Plaintiff was clearly prejudiced because she could not confront and cross-examine Dr. Elamir so his hearsay statements became gospel.

Reliance by defendant on State v. Timmendequas, 161 N.J. 515 (1999), is similarly misplaced. The "extrinsic evidence" used to impeach a witness referenced in Timmendequas was the witness's own notes. "Krych identified herself on direct examination as a forensic social worker. On cross-examination, **when confronted with documents in her own writing**, she finally conceded that she was a capital mitigation specialist." Id. at 593-594. Dr. Dauhajre could have been impeached by his own notes had they been inconsistent, which they were not. He could not properly be cross-examined using a non-testifying witness's notes.

Defendant's recitation of the facts in Allendorf v. Kaiserman, 266 N.J. Super. 662 (App. Div. 1993), underscores its lack of application to this case. Defendant states that evidence of the plaintiff's prior medical history was allowed where "Plaintiff's medical history of fainting prior to the subject accident [was used] to impeach the Plaintiff after she testified she was "in perfect health" and

never had “any problem with blacking out” prior to the accident.” Db11. Again, that evidence was used to impeach the Allendorf plaintiff with her own prior medical history where she lied about that history. There is no analogous circumstance at bar. Even *arguendo* if defendant could use Dr. Elamir’s unauthenticated records to impeach, they could be used to impeach only plaintiff, not her expert doctor. Dr. Dauhajre did not lie about what plaintiff told him about her history. If plaintiff fabricated, then plaintiff could be impeached. The logic does not extend to third parties. Moreover, there was no witness on the stand with actual knowledge of the statements made in the records used by defendant.

Allendorf does not allow defendant’s misuse of the hearsay records.

Finally, defendant’s reliance on James v. Ruiz, 440 N.J. Super. 45 (App. Div. 2015), also lands wide of the mark. As a preliminary matter, James deals with the “propriety of questioning an expert witness at a civil trial, either on direct or cross-examination, about whether that testifying expert's findings are consistent with those of a non-testifying expert who issued a report in the course of an injured plaintiff's medical treatment. We also consider the propriety of counsel referring to the non-testifying expert's findings in closing argument.” Id. at 51. This Court held that

[A] civil trial attorney may not pose such consistency/inconsistency questions to a testifying expert, where the manifest purpose of those questions is to have the jury consider for their truth the absent expert's hearsay opinions about complex and disputed matters. Even where the

questioner's claimed purpose is solely restricted to impeaching the credibility of an adversary's testifying expert, spotlighting that opposing expert's disregard or rejection of the non-testifying expert's complex and disputed opinions, we hold that such questioning ordinarily should be disallowed under N.J.R.E. 403. Lastly, we hold that the closing arguments of counsel should adhere to these restrictions, so as to prevent the jury from speculating about or misusing an absent expert's complex and disputed findings.

[Ibid.]

Dr. Elamir is not an expert in this case. He did not author any expert report in this case. Further, the only reason for the defense use of those notes was to establish a disputed complex diagnosis and refute that the accident caused Ms. McKoy's injuries. The defense used the notes to establish Ms. McKoy suffered from a "chronic" condition unrelated to the accident and that any pain she had was not related to the accident. Even under the *dicta* in James, those statements from Dr. Elamir are inadmissible.

Moreover, James dealt with an expert who relied on the findings of a non-testifying expert's opinion, a circumstance also not present at bar. Dr. Dauhajre **did not rely** on Dr. Elamir's after-the-fact office visit notes for plaintiff's history. Defendant's repeated misstatements of reliance do not make it so. "[W]e have held, as a general if not immutable proposition, that '[i]t is improper to cross-examine a witness about inadmissible hearsay documents upon which the expert has not relied in forming his opinion.'" James, 440 N.J. Super. at 76 (internal citations omitted). "The law places limits on cross-examination for reasons of both

practicality and logic." State v. Silva, 131 N.J. 438, 444 (1993); see McCormick on Evidence § 49, at 182 (Strong ed., 4th ed. 1992) (noting that considerations of "confusion of the issues, misleading the jury, undue consumption of time, and unfair prejudice" may justify restricting a cross-examination that attempts to impeach a witness with extrinsic evidence)." The caselaw supplied by defendant shows that the lower court's allowance of the use of hearsay in this case was prejudicial error.

POINT III

DEFENDANT'S OTHER ARGUMENTS ARE SIMILARLY WITHOUT MERIT.

Defendant goes to great lengths trying to justify the use of Dr. Elamir's office note in cross-examining Dr. Dauhajre and using it as the centerpiece of his closing argument. The defense attempts are illogical, at best. Contrary to defendant's argument, just because plaintiff testified that she saw Dr. Elamir after the accident does not mean that defendant can cross-examine Dr. Dauhajre about it. Defendant does not dispute that he never asked Ms. McKoy about that record. Further, defendant claims that because plaintiff's counsel had to use the record on redirect to try to counter the prejudicial effects of its misuse over objection on cross, defendant was justified in using the record. Talk about putting the cart before the horse. That is absurd. Equally absurd is defendant's contention that he was somehow "forced" to emphasize Dr. Elamir in his closing because of

“plaintiff’s counsel and Dr. Dauhajre’s assertions throughout the trial that Dr. Elamir’s records were not reflective of plaintiff’s subjective complaints.” Db7. Defendant makes it seem as though the main thrust of plaintiff’s case was to discredit the non-testifying Dr. Elamir. The issue of Dr. Elamir’s credibility was raised by defendant, not plaintiff. The argument is entirely one of misdirection.

Equally false and meritless is defendant’s claim that “Dr. Dauhajre acknowledged that defense counsel’s questions posed to him regarding Dr. Elamir’s records were limited to plaintiff’s subjective complaints, rather than Dr. Elamir’s diagnoses or conclusions.” Db6. The cited passage reads as follows:

Zuppa: “This isn’t diagnosis, right? This is subjective. That’s what plaintiff is telling her treating doctor?”

Dr. Dauhajre: “Yeah, its under the subjective complaints.”

[2T269:1-4.]

That exchange obviously refers to one entry only, and the doctor’s testimony is that what defense counsel is reading is under the heading of “Subjective Complaints.” That does not establish that the **use** of the record was limited to plaintiff’s subjective complaints or the veracity of those complaints. Nor does it support the use of the hearsay.

Defendant’s misuse of the unauthenticated office note is established by the actual record. For example, defense counsel asked Dr. Dauhajre to agree that Dr. Elamir “did range of motion tests.” 2T264:1-4. He used the record to claim Ms.

McKoy's condition was "chronic" and preexisting. 2T234:16-19. He used the record to recite before the jury certain diagnoses allegedly made by Dr. Elamir (e.g., she was diagnosed with "osteoarthritis and arthritis"). 2T234:21-22.

Defense counsel also impermissibly used the records to establish that the cause of plaintiff's pain was not the collision, asking about passages where Dr. Elamir noted "no trauma" or "without trauma." 2T265:22-24; 2T267:3. He cited the records in closing argument as evidence that "four days after the collision Ms. McKoy goes to see Dr. Elamir and makes no mention of the car collision."

5T10:1-3. He used the records as evidence that plaintiff said that both her knees hurt "without trauma." 5T10:13-16. "It says both knees hurting without trauma." 5T10:25. Remarkably, also in closing, defense counsel stated "and just in case that isn't enough, another date of visit was April 12, 2021. Mid to low back pain without trauma." 5T11:1-3. There is no such office visit in the exhibit used with Dr. Dauhajre. Cal. Yet defense counsel represented it as a fact in evidence.

Defense counsel, again in closing, used the record not only for what it allegedly said but also for what it allegedly did not say. "And also there is no mention of being in any pain." 5T12:10-11. The hearsay statements used impermissibly from the hearsay record – and those from thin air – impermissibly go to disputed complex diagnosis and causation issues. None of those statements were proven to be plaintiff's statements. None of those statements were in

evidence. Most of those statements went to Dr. Elamir's diagnosis. All of that was inappropriate and prejudicial error.

Similarly meritless is defendant's claim that plaintiff's counsel "opened the door" to cross-examine Dr. Dauhajre with the hearsay record based on counsel's attempt to rehabilitate the witness on redirect. That is once again defendant trying to justify the impermissible use of hearsay in the first place by relying on what plaintiff did in response to try to counteract the prejudicial impact of that use. Plaintiff's counsel's had no choice but to use the record once defendant received carte blanche authorization to use anything in the record to "impeach" Dr. Dauhajre. It does not justify defendant's use in the first place. Plaintiff's reaction to the improper defense strategy erroneously permitted by the trial court cannot be seen as opening the door. Rather, it was an attempt to close the door.

On that score, defendant completely misperceives and misapplies the "opening the door doctrine." Preliminarily, Dr. Dauhajre mentioned Dr. Elamir in passing. He noted that plaintiff saw Dr. Elamir four days after the accident and that Dr. Elamir referred her to Dr. Subin. 2T159:16-20. That was the sum total of his testimony on direct regarding Dr. Elamir. There was no reference to diagnosis, treatment, history or examination. There was no opening the door.

The case of Hrymoc v. Ethicon, Inc., 254 N.J. 446 (2023), demonstrates exactly why that doctrine does **not** apply. Hrymoc was a products liability matter

involving "pelvic mesh" medical devices. See id. at 452. The trial court, ruling on the parties' motions in limine, **barred all evidence** of "Section 510(k) clearance" allowing the devices to be marketed without premarket clinical trials, because the 510(k) process determines substantial equivalency only, not safety and efficacy. Id. at 452-453. The Appellate Division reversed and remanded for a new trial, and the Supreme Court affirmed that ruling, holding that the exclusion of any 510(k) evidence deprived the defendant of a fair trial on the issue of negligence, particularly on the issue of the reasonableness of the manufacturer's conduct in not performing clinical trials or studies. Id. at 453. Simply put, the evidence excluded would have shown that clinical trials were not required. The plaintiff in Hrymoc took advantage of the fact that defendant could not show that and claimed defendant's lack of clinical trials was negligent.

Based on Hrymoc, then, to apply the so-called opening the door doctrine at bar, defendant first must demonstrate that it was "barred" from offering Dr. Elamir as a witness to testify about his findings and that plaintiff used that fact improperly to prejudice defendant. That is **not** the case and renders the doctrine inapplicable. There was no showing at bar that Dr. Elamir was unavailable to testify at trial. Rather, defendant chose not to call Dr. Elamir as a witness. That was defendant's choice. Tactically speaking, it was an excellent choice because defendant was able to use the hearsay document as evidence to establish Dr. Elamir's findings of "no

trauma” without having to worry about plaintiff having the right to cross examine. Clever, but ultimately unsustainable and just plain wrong.

A la Hrymoc, not only does defendant need to establish the preclusion of pertinent evidence, which he cannot, he also must show that plaintiff took unfair advantage of that preclusion. No such evidence was adduced at this trial. That slams the door shut on defendant’s contrived argument.

POINT IV

DEFENDANT’S ATTEMPT TO DISTINGUISH MANATA V. PEREIRA FAILS.

Similarly, defendant’s attempt to distinguish Manata v. Pereira, 436 N.J. Super. 330 (App. Div. 2014), fails to acknowledge the reasoning of the holding. Defendant tries to distinguish Manata by claiming that the use of the police report in that case was impeachment by “omission” and that is somehow distinguishable from use of the hearsay here. Db15. That is exactly the case at bar. Defense counsel used it to establish Ms. McKoy did not have any pain (“And also there is no mention of being in any pain.” 5T12:10-11) and never mentioned the accident (“four days after the collision Ms. McKoy goes to see Dr. Elamir and makes no mention of the car collision.” 5T10:1-3.). Defendant also claims that in Manata “[p]laintiff’s counsel used the report without any prior reference to it by defendant at trial.” Db15. Again, the same is true at bar. Plaintiff was not the first to mention his report, defendant was.

Defendant claims that “[p]laintiff attempts to confuse the issues by questioning the legitimacy of the records of plaintiff’s primary care physician. Not only could the jury weigh their credibility, but the trial judge specifically found they were trustworthy.” Db15. There are so many things wrong with that assertion. First, there was no testimony that Dr. Elamir was plaintiff’s primary care physician at the time of the accident. In fact, Ms. McKoy testified that Dr. Elamir did not want to treat her for injuries arising from the accident and, instead, sent her to Dr. Subin. 3T135:23-136:2. Second, how could the jury weigh the credibility of a doctor who did not take the stand and records that were not admitted into evidence? The suggestion defies logic. Lastly, the trial court’s decision on trustworthiness was reversible error, plain and simple. The court did not undergo any sort of required analysis regarding the trustworthiness of the records as required in Konop v. Rosen, 425 N.J. Super. 391, 403 (App. Div. 2012) (“We must first resolve whether the consultation report itself was admissible under the business records exception. If it was, then the focus becomes whether Flores’ notation was embedded hearsay that did not otherwise ‘meet[] the requirements of an exception to Rule 802.’”). Instead, the trial court’s entire analysis of trustworthiness was encapsulated in this one sentence. “If we can’t trust a treating doctor’s records, what the heck do we trust?” 4T45:12-13. The records were not self-authenticating; a more in-depth analysis of trustworthiness was required,

especially where plaintiff denied the statements allegedly attributed to her and Dr. Dauhajre did not rely on those statements in his opinion.

POINT V

N.J.R.E. 803(C)(4) DOES NOT SUPPORT THE USE OF IMPERMISSIBLE HEARSAY.

Curiously, defendant states that the issue of using Dr. Elamir's record under N.J.R.E. 803(c)(4) was not raised below. Db20. That is incorrect. That Rule was the basis for the court allowing use of the hearsay. The trial court denied plaintiff's motion to reconsider the defense's use of Dr. Elamir's records in the cross-examination of Dr. Dauhajre and allowed the defense to use them with Dr. Miller, basing both decisions on the hearsay exception for statements made for purposes of medical diagnosis or treatment under N.J.R.E. 803(c)(4). 4T48:4-5. As stated in plaintiff's Opening Brief, the trial court did not undergo any analysis of the Rule's applicability. Pb16-18.

What was not raised below was defendant's new argument relying on Gonzales v. Hugelmeyer, 441 N.J. Super. 451, 462 (App. Div. 2015). That case, however, like all the cases defendant cites, supports plaintiff's position, not defendant's. In Gonzales, the Appellate Division found error in the trial court's exclusion of a treating, **testifying** doctor's notes based on the business records exception and N.J.R.E. 804(c)(4). The key factor is the doctor was a witness at trial and could authenticate the notes and attest to what his own notes showed.

That is simply not the case at bar. The defense did not call Dr. Elamir as a witness; any statements in his notes were inadmissible hearsay. Also, in Gonzales the notes at issue were made prior to the accident at issue and dealt with prior treatment contemporaneously noted. That also is not the case here. The only note used by defendant was after the accident. There were no contemporaneous records of prior treatment.

Gonzales also stands for the proposition that the impermissible hearsay cannot be used in summation to resolve disputed issues of fact. “As we recently held in James v. Ruiz, 440 N.J. Super. 45, 72 (App. Div. 2015), trial counsel may not misuse hearsay or other inadmissible proof in summation by advocating to jurors that they treat such proof as a “tiebreaker” to resolve the competing positions of the parties.” Gonzales, 441 N.J. Super. at 461. That is exactly the way the hearsay was used here by defendant. Dr. Elamir became the defense star witness without ever appearing. That is unfair, prejudicial and error.

POINT VI

PLAINTIFF PRODUCED OBJECTIVE EVIDENCE SHOWING PERMANENT INJURIES.

Defendant’s repeated use of the phrase “sprains and strains” to belittle plaintiff’s injuries is not supported by the record. Not one but three doctors testified on plaintiff’s behalf regarding her permanent injuries as illustrated in MRIs taken after the accident. They all concluded her injuries were permanent and

caused by the accident. Dr. Subin testified that Ms. McKoy's injuries were caused by the auto collision. 3T32:14-15. Dr. Subin treated Ms. McKoy for almost a year. 3T34:21-25. Over the course of treatment, she improved but was not back to normal. 3T34:21-25. She had difficulty getting up and down stairs, sitting or standing for extended periods of time, playing with her grandchildren and bending down. 3T35:4-9. Overall, as a result of the collision, she was limited in her activities. 3T35:22-25.

The radiologist who reviewed the diagnostic imaging and wrote the report as to his findings, Feng Tao, M.D., testified that he read Ms. McKoy's cervical (P-6A) and lumbar spine (P-6B) MRIs from March 5, 2019. 3T76:18-23.

"Immediately" after reviewing the images, he wrote his report. 3T80:4-8. The MRI findings are "objective" findings. 3T87:15-18. According to his review, he found Ms. McKoy suffered herniated discs in her cervical spine at C4-C5 and her lumbar spine at L5-S1. 3T108:6-14.

Plaintiff's medical expert, Teofilo Dauhajre, M.D., a licensed, board-certified orthopedic surgeon for 30 years, concurred with Dr. Tao's findings that Ms. McKoy suffered a herniated disc at C4-C5 and a herniated disc at L5-S1. 2T186:20-25; 190:1-12. He opined that the disc herniation at C4-C5 was caused by the motor vehicle collision. 2T188:12-24. He also found that the herniated disc at L5-S1 was an "aggravation of her preexistent mild lumbar sacral spondylosis"

and was caused by the collision. 2T190:1-6. Dr. Dauhajre concluded that Ms. McKoy's injuries were permanent in nature and caused by the collision. 2T203:6-14. There was ample evidence from which a jury could find that Ms. McKoy's injuries were permanent. Because of defendant's gamesmanship, however, Ms. McKoy was deprived of a fair trial and verdict in her favor. That is not harmless error; the non-testifying Dr. Elamir pervaded the trial and was used extensively, prejudicially and erroneously in the defense summation. Like defense counsel said to the jury, "You've heard a lot about Dr. Elamir." 5T9:9-18. That use of the non-testifying witness was clearly capable of producing a miscarriage of justice.

CONCLUSION

Defendant does not dispute that Dr. Elamir's record was improperly used with the defense expert, Dr. Miller. Rather, defendant's entire argument is spent trying to justify the use of the hearsay in impeaching plaintiff's expert, Dr. Dauhajre. As amply demonstrated here and in plaintiff's Opening Brief, there is no justification. The use of the impermissible hearsay was erroneous, prejudicial and denied plaintiff a fair trial as required under the common law of New Jersey. For the foregoing reasons and those stated in the Opening Brief, plaintiff is entitled to a decision vacating the Order of Judgment and remanding for a new trial.

Respectfully submitted,

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