

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1737-13T4

LARRY D. CLANTON, an Individual,

Plaintiff-Respondent/Cross-
Appellant,

v.

NISSAN NORTH AMERICA, INC., NISSAN
MOTOR CO. LTD., NISSAN TECHNICAL
CENTER NORTH AMERICA, INC.,

Defendants/Third-Party
Plaintiffs-Appellants/Cross-
Respondents,

and

SANSONE NISSAN, INC.,

Defendant/Third-Party
Plaintiff,

v.

ANTHONY LEVITO and ALL AROUND
FENCE, INC.,

Third-Party Defendants.

HIGH POINT INSURANCE a/s/o LARRY D.
CLANTON, WILLIAM CLANTON, JR.,

Plaintiff,

v.

NISSAN NORTH AMERICA, INC., NISSAN
MOTOR CO., LTD., NISSAN RESEARCH &
DEVELOPMENT,

Third-Party Plaintiffs,

v.

ANTHONY LEVITO and ALL AROUND
FENCE, INC.,

Third-Party Defendants.

Argued February 10, 2015 – Decided September 10, 2015

Before Judges Ostrer, Hayden and Sumners.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Essex County, Docket Nos. L-10082-07 and L-2100-08.

Gerard Cedrone argued the cause for appellants/cross-respondents (Lavin, O'Neil, Cedrone & DiSipio, attorneys; Mr. Cedrone and Jo E. Peifer, of counsel and on the briefs).

Cynthia A. Walters argued the cause for respondent/cross-appellant (Budd Larnier, P.C., attorneys; Ms. Walters, on the briefs).

PER CURIAM

This is a product liability case. It involves the crashworthiness of a 2003 Nissan Altima. The jury found that defendant Nissan¹ failed to design a reasonably safe vehicle, and awarded plaintiff substantial compensatory damages. Nissan

¹ We use "Nissan" to refer collectively to defendants-appellants Nissan North America, Inc., Nissan Motor Co. Ltd., and Nissan Technical Center North America, Inc.

appeals, asserting various errors concerning discovery and evidentiary rulings, jury instructions, collateral source, and pre-judgment interest. Plaintiff cross-appeals from the court's dismissal of his punitive damages claim. Having reviewed the parties' arguments in light of the record and applicable principles of law, we affirm on the appeal, except as to the court's refusal to reduce the damage award by the amount of a disability pension as a collateral source; and we remand on the cross-appeal for a statement of reasons.

I.

On July 17, 2006, plaintiff Larry D. Clanton was driving his 2003 Altima on the Garden State Parkway when a seventy-three-pound tire and wheel assembly² came loose from a Ford truck traveling in the opposite direction. The wheel struck the hood of plaintiff's car, which was traveling in the fast lane at the speed limit of sixty-five m.p.h.³

² We will refer to the wheel and tire assembly as the "wheel."

³ In addition to Nissan, plaintiff originally sued the driver of the truck, Anthony J. Levito, and his employer, All Around Fence, Inc., for negligent maintenance of the truck. In March 2008, plaintiff released his claims against Levito and All Around Fence (and their apparent insurer) in return for a payment of \$342,000. Plaintiff stipulated and agreed "that the facts, as currently known, reflect a complete defense by releasee Levito and All Around Fence to any claim of liability for the occurrence of the accident and injuries of Mr. Clanton, the releasor. . . ."

The parties disputed what happened after the wheel struck the hood. But, the jury's verdict reflects it found plaintiff's version persuasive. Plaintiff's experts asserted the wheel next struck the roof header, a structural member of the car's roof, above the windshield. The header separated from the side rail, the structural member above the side window. The roof header and roof then collapsed into the passenger compartment. It struck plaintiff in the head, and caused substantial head and spinal injuries. Plaintiff's diagnostic radiologist, Louis J. Perl, M.D., opined that the nature of plaintiff's spinal injuries demonstrated he was struck downward onto his head. Plaintiff's expert in automobile crashworthiness engineering and other disciplines, Donald Phillips, P.E., testified that the wheel pushed the roof down, and the roof with the headliner and visor hit plaintiff in the head. Thus, plaintiff contended the design of the roof, which did not sufficiently withstand the wheel's impact, was a cause of plaintiff's injuries.

Nissan contended the wheel struck plaintiff through the windshield, before it hit the header. Nissan highlighted that a description of the accident in Phillips' initial report stated that the wheel contacted plaintiff's head. Nissan's medical expert in clinical injury and other disciplines, James Raddin, Jr., M.D., supported that contention, opining that plaintiff

ducked down immediately, exposing the top of his head before the wheel struck. He based his conclusion on his analysis of plaintiff's spinal injuries. He also relied on his examination of physical evidence, including plaintiff's hat, the headliner and visor, which he stated showed no evidence of contact with plaintiff's head; and the absence of glass in plaintiff's face. Plaintiff's witnesses disputed this interpretation of the evidence.

Plaintiff's experts opined that Nissan defectively designed the Altima plaintiff was driving. Specifically, they asserted that the joint between the header and side rails was designed in such a way that it could not withstand the force of the wheel. They asserted the header and side rail were not adequately attached to each other. Rather, they were principally attached through the use of a system of welded tabs. Phillips testified that the roof was not reasonably fit, suitable and safe for foreseeable collisions with animals, birds, people, tires, or trees that might be involved in a frontal impact with the roof. Plaintiff also relied on the expert testimony of an engineer with a background in metallurgical engineering and failure analysis, Craig D. Clauser. He also concluded that the Altima's roof header was defectively designed, and should not have

separated from the side rail. He suggested alternative designs that he asserted would have avoided the separation.

Nissan disputed the claim that Nissan's design was unsafe. Nissan presented opinions that the Altima's design was protective of passengers. An engineer who testified as an expert in automotive design and performance, crash testing, and occupant safety, Kenneth F. Orlowski, opined that no design is injury proof; and designs must reasonably address the possibility of various kinds of accidents. He asserted that deformation to the roof caused by the energy exerted by the wheel against the fast-moving car was beyond what almost any passenger vehicle could prevent. Orlowski stated that over-engineering to prevent one kind of accident may make a car less safe for other kinds of accidents. This view was echoed by Mark Snyder, Nissan's director of engineering strategic planning administration. Snyder had worked on the Altima since January 2000 and asserted responsibility for the Altima's ultimate design.

The parties presented competing evidence regarding the roof design of other vehicles. During discovery, Nissan identified two Toyotas and a Honda as having a design similar to that of the Altima. Evidence was presented of crash tests, some prepared for the purpose of this case, and/or roof structures,

of Volvos, a Saab, Mercedes, BMW, Chevrolet Impala, Ford Taurus, Honda Accord, Toyota Corolla and Camry, Ford F-250 and Ford Ranger pick-up trucks. The jury viewed multiple test videos, and participated in a field inspection of the crash-tested Impala and Honda and plaintiff's Altima.⁴

Plaintiff's experts highlighted the fact that the header and side rail separated in plaintiff's collision. In crash tests involving collisions between a suspended wheel and a BMW, Impala, Taurus, and an earlier version of the Altima, the header and side rail did not separate. Although the header in these other vehicles was deformed as it absorbed the energy of the impact, the force was also transmitted to the side rail; the "A pillar" located at the front corner of the vehicle; and transferred to other components of the car. Plaintiff's experts contended these alternative designs were more protective than the design of plaintiff's Altima. For example, the Impala roof would have intruded several inches less into the passenger compartment, and prevented plaintiff's serious injuries. Clauser suggested alternative designs that he asserted would have avoided the separation, noting their implementation in an earlier Altima, as well as the BMW, Mercedes, Taurus and Impala. The jury was presented with a photograph of plaintiff, seated in

⁴ The videos are not part of the record on appeal.

the crash-tested Impala, with the bent roof header inches away from his head.

Plaintiff's experts also highlighted that the roof design of the 2003 Altima was different from those of prior generations of the vehicle. The design was developed in Japan for implementation in the vehicle's manufacture in the United States; the roof design was not used in the comparable Nissan vehicle made contemporaneously in Japan for the Japanese market. Plaintiff asserted that Nissan's documents pertaining to the origins of the design were destroyed. Plaintiff contended that Nissan did not adequately test the Altima's roof, and that federal roof tests did not address the kind of frontal impact on the roof that occurred in plaintiff's accident and could occur in other collisions with tires, animals, trees and other objects. Nissan countered that it met not only federal standards but its own internal standards.⁵

Defense experts conducted a crash test of a 2008 Honda which they asserted had a roof design similar to the 2003

⁵ Witnesses for both parties referred to a federal standard test for roof strength – FMVSS216, or Federal Motor Vehicle Safety Standards 216 – which involved placing pressure on the corner of the roof near the side rail. Snyder testified that Nissan did not test roof strength any way other than the FMVSS216, except for a "snow load test", although roof strength was assessed through other tests involving impacts with the front, side and rear of the vehicle.

Altima. They claimed to weld the joint as plaintiff's expert Phillips suggested should have been done in the Altima — and the Honda still did not perform well. Nissan was challenged for not performing a test on a retrofitted Altima. Orlowski contended no other reasonable design could have withstood the energy exerted by the seventy-three-pound wheel on plaintiff's fast-moving vehicle. Orlowski presented evidence of crash tests of Ford trucks with alternative designs that performed poorly in a test collision with a suspended wheel. Orlowski also challenged the contention that the other vehicles performed significantly better than the Altima, contending there was significant roof deformation in all tests.

The parties also questioned the comparability of the tests. Nissan suggested plaintiff's crash tests utilized significantly less energy than exerted in plaintiff's collision, thereby minimizing the impact on the vehicle. Plaintiff contended that the point of impact on the roof in defense tests differed from the point of impact in plaintiff's accident, increasing the resulting deformation. Also, a collision to a stationary test wheel would cause greater damage than a collision with a rolling wheel.

The jury heard evidence of plaintiff's damages, the permanent impact of his injuries on his quality of life, and the

fact that he was unable to return to work. Before the collision, he was employed by the U.S. Postal Service, and also worked for DHL. He was forced to take disability pension until his pre-injury retirement age. At the conclusion of the trial, the judge sua sponte, summarily dismissed plaintiff's claim for punitive damages, which had not been bifurcated.

The jury found by a vote of seven-to-one that Nissan failed to design a vehicle that was reasonably safe, and the failure was a proximate cause of plaintiff's injuries.⁶ Although plaintiff released his claim against the driver of the truck and his employer, Nissan presented evidence of their negligence at trial. The jury also found them negligent and their negligence was a proximate cause of plaintiff's injuries. The jury allocated eighty-five percent of the fault to Nissan, and the balance to the truck driver and his employer. The jury awarded a total of \$4,200,446 in damages before allocation, consisting of \$324,470 in past lost wages, \$572,976 in future lost wages, \$1 million in future medical expenses, and \$2,303,000 for pain, suffering, disability impairment and loss of the enjoyment of life.

⁶ From openings to verdict, the trial consumed eighteen trial days. The jury reached its verdict the same day it was charged by the court.

The court declined to reduce the judgment based on Nissan's contention that plaintiff's disability pension payments should be deemed a collateral source. The court increased the prejudgment interest rate by two percent, except for a six-month delay that the court attributed to plaintiff.

This appeal and cross-appeal followed.

II.

Defendants contend that they are entitled to a new trial because plaintiff's counsel appealed to racial prejudice against Japanese. Defendants also argue the trial court erred when it compelled the disclosure of expert invoices, and permitted cross-examination regarding an alleged preliminary report and mediation communications, and plaintiff's counsel referred to the alleged report in summation. Defendants also assert the trial court erred in its jury instruction regarding allocation of fault; its refusal to consider plaintiff's disability pension as a collateral source; and in increasing prejudgment interest. We consider first defendants' argument regarding appeals to racial prejudice.

A.

As we discussed above, the jury was exposed to evidence and opinions regarding alternative roof designs of other vehicles. Plaintiff alleged that the roof designs of a BMW, Mercedes,

Taurus, Impala, and the earlier Altima were preferable to the design of the 2003 Altima, as well as that of a Honda, and two Toyotas. The jury also heard evidence that the challenged designs of the 2003 Altima were implemented on the American-made, not Japanese-made versions.

The court ordered pre-trial that "there will be no racially based comments or statements that may evoke anti-Japanese sentiment" during the trial. In a motion for a new trial, defendants contended that plaintiff's counsel's opening and closing statements, and questioning of witnesses, violated the court's order and deprived defendants of a fair trial. The trial judge disagreed. We discern no error in the trial court's determination.

In reviewing a trial court's denial of a motion for a new trial, we apply the same standard as the trial judge – "whether there was a miscarriage of justice under the law" – although we "must give due deference to the trial court's feel of the case." Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 522 (2011) (internal quotation marks and citation omitted).

Fundamental to a fair trial, a party may not appeal to racial prejudice. See Tartaqlia v. UBS PaineWebber, Inc., 197 N.J. 81, 129-30 (2008) (stating that use of unsupported stereotypes and innuendo can amount to plain error warranting a

new trial); Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 496 (1999) ("There can be no dispute that evidence of bigotry can have a damaging effect on the fairness of a legal proceeding."). The key question is whether the reference to nationality was relevant to the claims in the case, or gratuitously injected to inflame bias, passion, or prejudice against a party. See C.R. McCorkle, "Statement by counsel relating to race, nationality, or religion in civil action as prejudicial," 99 A.L.R. 2d 1249, 1254-56 (1965) (stating, based on survey of authority, that mistrial or other relief may be granted if references are "irrelevant and unjustified and calculated or tending to arouse racial, national or religious prejudice or feeling," but relief is unwarranted if the reference has a "legitimate bearing on the issues, merits, or testimony," was made "for the purpose of illustrating a point, or identifying the person referred to," was responsive to opposing counsel, or was an "insignificant or innocuous incident of the trial").

Based on our review of the record, we are satisfied that the references to Japan or the Japanese in this case were generally tied to expert testimony and evidence regarding comparative designs, and differences in the design of models for the Japanese and U.S. markets. In the course of a lengthy opening statement, plaintiff's counsel stated the following:

And our experts are going to tell you that these two issues, the -- and the bottom header are made up of two pieces, which by the way this is very typical of cars manufactured in Japan. --^[7] indicated that this is -- some of the Japanese vehicle and our expert will explain that to you.

But this -- design with tabs is something nobody knows about. I've asked every expert in this case and, unless they change their testimony, they're going to tell you that -- about a number of roof designs in this case --

[(Emphasis added by defendants).]

Several comments later, plaintiff's counsel previewed the crash tests of the various vehicles. She referred to the tests of the Impala and Taurus, and noted that in discovery, Nissan produced structures of a Honda and two Toyotas, and ran a test of the Honda. Nissan highlights the following underlined sentences, which are properly understood when considered in context:

Now, the defense went a little further and they produced some roof structures from some other vehicles that they said were -- actually, they said all the structures were the same. Our experts are going to explain how they weren't. But they produced structures of a Honda, 2007, and two Toyota[s] . . . and they said, all these structures are the same and they all --

⁷ Although dashes in a transcript may simply indicate a pause or a sentence fragment by the speaker, it appears that the dashes here, and elsewhere in the transcript, reflect that words were spoken but were either unintelligible or simply unrecorded.

exactly the same way and through that point, they ran a crash test with a Honda, the same way, 80 miles an hour -- That -- worse than the --

Now, the only roofs we aren't [sic -- apparently meant to be "are"] sure about are the roofs that were produced in this case. We don't have any -- every car in the universe. So when you put -- when our expert lines them up, you're going to see the Ford Taurus, the Chevy Impala, the Volvo, the earlier Nissan, all [sic] Mercedes, the BMW. They're all in the -- and you know what you're going to see over here? You're going to see the Altima, the Honda, and the Toyota, and our experts are going to explain to you why these cars are well designed and why these cars not.

And we're going to show you demonstrative exhibits that will show how this car performed much better than what I did here. Now, where in the heck did this design come from? I already explained that a lot of the Japanese vehicles use these three cars designs in the lower -- process. Where did that come from, the -- design, and what was the thinking? What was Nissan's thinking at the time that --

Well, you know what? We're probably never going to know because Nissan's design for this American sold vehicle was engineered in headquarters in Japan and all of their documents that related to the design of this vehicle are gone. They were not produced in this case. And Mr. [Snyder], the corporate designee, will explore Nissan U.S.A, not Nissan Japan, but this design was created and engineered in Japan, valuated in Japan, and then it was sent over to the United States ready to -- and that's where Mr. [Snyder] came in. His responsibility was for the redesign of -- he received these -- He said he had nothing to

do with the concepts, decisions about construction, thickness, material size, -- It was all handed over.

At the end of opening statements, Nissan moved for a mistrial, which the court denied. However, the judge instructed the jury,

[D]uring the plaintiff's counsel's opening there was a comment that signified Japanese cars at least in terms of headers are not safely designed.

I just want to point out one, she was referring to one [of] her expert's comments which, you know, may or may not be correct. We'll find out during the trial; and two, even that expert said he did not know about all Japanese cars. So this ca[se] did not concern any allegation that other Japanese cars are less safe.

It's a very specific case which we're going to focus on what's at issue.

We are satisfied that the judge's instruction corrected any misimpression the jury may have drawn from plaintiff's counsel's opening. On one hand, plaintiff's counsel's references to Japan and Japanese vehicles, were generally factual although they arguably overgeneralized; the statements previewed testimony that in fact was elicited that the design of the Toyota and Honda were flawed. The same could be said about the references to the source of the design of plaintiff's vehicle, and its manufacture in the United States.

We discern no error in the trial court's response. We presume the jury followed the court's instructions. See State v. Miller, 205 N.J. 109, 126 (2011); see also City of Linden v. Benedict Motel Corp., 370 N.J. Super. 372, 398 (App. Div.) ("[A] clear and firm jury charge may cure any prejudice created by counsel's improper remarks during opening or closing argument."), certif. denied, 180 N.J. 356 (2004). We discern no clear abuse of the trial court's discretion to deny the extraordinary remedy of a mistrial. See Greenberg v. Stanley, 30 N.J. 485, 503 (1959) (stating "the denial of a mistrial will not be found erroneous on appeal unless there is a clear showing of a mistaken use of discretion by the trial court").

Defendants' argument fares no better, when we view the totality of references to Japan or the Japanese – including not only the opening remarks, but also plaintiff's counsel's subsequent questioning of witnesses, as well as remarks in summation. Defendants complain about three isolated exchanges of questioning over the course of an eighteen-day trial. Defendants cite questioning of Snyder, to establish that Nissan produced a car similar, but not identical to the Altima, in Japan, that did not utilize the challenged design. The testimony was relevant, demonstrating that there were acceptable, alternative designs available to Nissan.

Defendants also point to the direct examination of plaintiff's expert, Clauser, who was asked to opine if the Toyota, Honda and Nissan Maxima would have performed as did the Altima. In response to an objection that the other makers' designs were not relevant, plaintiff's counsel argued that defendants produced those exemplars in discovery. Plaintiff elicited opinions about the other vehicles to blunt a potential state-of-the-art defense. The opinions were relevant, and their probative value outweighed any potential prejudice. Moreover, the judge instructed the jury that it should give no weight to who produced the exemplars in discovery.

Defendants also argue that plaintiff insinuated a malicious motive on all Japanese automakers when counsel asked defense expert Orlowski whether "Honda . . . has different designs and different structures for the American market than the Japanese market." We agree that the question was of slight relevance, except to demonstrate that alternative designs were available; Honda was not a defendant and the question conceivably may have supported the conclusion that Japan-based automakers as a group sent unsafe designs to the United States market. However, defense counsel did not object to the question, and Orlowski answered he did not know. We are unprepared to conclude that this exchange tipped the balance in favor of a new trial.

Although defendants find fault with plaintiff's comments in summation, they must be viewed in the context of defense counsel's summation that preceded it. Although the transcript apparently omits significant portions of counsel's remarks, counsel essentially accused plaintiff of fomenting anti-Japanese prejudice:

[A]nd then they pull out [a] series of tests where the roof - and then there's - references to the - Japanese - Mr. Phillips told you about his involvement and the U.S.'s involvement in design and the - factory. But, yes, Nissan has got a Japanese - So why - Japanese, Japanese, Japanese, Japanese? Why? Why do you - What are we trying to - It shouldn't have to do with anything here. Should prejudice have anything to do with - all kinds of prejudice, but should that - prejudice against the corporation, should that have a place here when the law tells you that - to the fact that there's Japanese - Should that prejudice enter this room?

Plaintiff's counsel responded that her intent was not to attack the Japanese, but to contrast acceptable designs including the earlier Altimas, and unacceptable designs, including the Toyota and Honda produced in discovery. She discussed the shortcomings of the other vehicles, and then stated:

Now, I am not anti-Japanese by any means. I have no feelings about the Japanese at all, and I don't even know about any of their other cars. The defense produced all of these cars in this case. We

didn't. They produced the Honda as an example of a car that they said was similar to the Altima, and then they produced the Toyota roofs, which are basically identical to what you just saw as being basically equivalent to the Altima roof and, of course, we have the Altima.

We don't know about other Japanese cars. We don't know about Japanese cars sold in Japan. We don't know about even other American cars. But out of the ones that we looked at and the ones that were produced by both sides in this case, the only ones that had strong roofs were the earlier Altimas, the BMW, the Mercedes, the Ford, and the Impala.

Counsel's remarks were fair comment and expressly disavowed any anti-Japanese sentiment, noting that plaintiff restricted its opinions to the limited universe of exemplars presented in the case.⁸

We also are unpersuaded by the challenge to counsel's references in summation to Snyder's testimony, and her argument that defendants had failed to present a compelling reason,

⁸ In this respect, counsel's disavowals of prejudice must be viewed in a different light from those disingenuous disavowals that led to reversal in LeBlanc v. Am. Honda Co., 688 A.2d 556 (N.H. 1997). Apparently unprompted by any prior comment, the plaintiff's counsel stated, "What's this case about? It's not about Honda making great automobiles or Sony making good Walkmans. But also it's not about Pearl Harbor or the Japanese prime minister saying Americans are lazy and stupid." Id. at 559. Counsel added, "What this case is about is not American xenophobia; it's about corporate greed." Ibid. The plaintiff's counsel also elicited totally irrelevant testimony comparing the color of the vehicle and the color of the flags of Japan and the United States. Ibid.

through documents or testimony from Nissan in Japan, as to why it shifted from the design used in the prior Altima, to a new design that was, in plaintiff's view, inadequately tested, and unsafe. The references to Japan were made in the context of this discussion.

In sum, we reject Nissan's argument that it was entitled to a new trial because of alleged appeals to racial prejudice.

B.

Nissan challenges the court's decision compelling it to disclose, after in camera review, the invoices of its testimonial experts; and plaintiff's use of the information in the invoices in cross-examination.⁹ We are unconvinced.

We review for an abuse of discretion a court's decisions regarding discovery, see Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011), and its evidentiary rulings. Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008). After reviewing the invoices in camera, the trial court found that they did not

⁹ The invoices were not offered into evidence, and despite defendants' arguments regarding the prejudice their release caused, defendants have not included the invoices in the record on appeal, hampering consideration of their claim. See R. 2:6-1(a)(1) (stating a party on appeal is obliged to provide the court with "such other parts of the record . . . as are essential to the proper consideration of the issues"); see also Society Hill Condo. Ass'n v. Society Hill Assocs., 347 N.J. Super. 163, 177-78 (App. Div. 2002).

contain any privileged attorney work product or attorney-client communications. We discern no basis to disagree.

We are unpersuaded by defendants' argument that their testimonial experts' invoices were privileged as "communications between counsel and the expert constituting the collaborative process in preparation of the report." R. 4:10-2(d)(1). Collaborative process communications, "including all preliminary or draft reports . . . shall be deemed trial preparation materials." R. 4:10-2(d)(1). Consequently, they are subject to only limited discovery under the exceptional circumstances outlined in Rule 4:10-2(c). R. 4:10-2(d)(1). An invoice is certainly a "communication." But, if all that is stated in the invoice is when, how long, and where an expert worked, and the applicable rate, then such communication likely falls short of "communications . . . constituting the collaborative process." Ibid. We are presented with no evidence in the record that the invoices produced in this case included anything more of substance.

Production of invoices enables a party to test the opposing expert's assertion of what it was paid, which is discoverable. See R. 4:17-4(3) (requiring production of compensation information). An invoice that reflects the amount of time spent by an expert — for example, if an expert spent little time — may

also be relevant to question the thoroughness of an expert's evaluation, and the expert's ultimate opinion.

We are unpersuaded by the argument that the court erred by allowing plaintiff to utilize the information in the invoices for an improper purpose. Plaintiff's counsel questioned one defense expert regarding whether an additional crash test was conducted that was not disclosed. Counsel relied on the invoice that reflected three days of work, but two days of tests that were reported. The witness explained that the first day was occupied with setting up the tests. The court affirmed the witness's answer, stating "no third test" and directed counsel to move on. We discern no error, let alone harmful error, particularly given the court's comment.

Plaintiff's counsel also utilized invoices to probe and challenge the basis for Dr. Raddin's opinion, expressed in a 2010 report, that plaintiff ducked before the tire crashed through the windshield and struck him on the top of the head. Dr. Raddin asserted that the nature of plaintiff's injuries, as depicted in the radiology studies, supported his opinion about how plaintiff was struck. Dr. Raddin stated he relied on the report of defense radiology expert Amy Mumbauer, M.D. When confronted with the fact that the only disclosed report of Dr. Mumbauer was issued in 2011, Dr. Raddin asserted that he relied

on a report Dr. Mumbauer wrote in 2010, which was later revised, although he did not disclose that reliance in his own report; no 2010 Mumbauer report was produced in discovery; and the invoices apparently did not reflect preparation of such a report in 2010.

The court instructed the jury that under New Jersey law, an expert may discard preliminary reports. We need not address whether that is necessarily true when a second expert relies on a first expert's draft. Arguably, the draft then becomes part of the "facts and data considered in forming the opinions" of the second expert, which is discoverable. See R. 4:17-4(e).

In any event, plaintiff's cross-examination of Dr. Raddin, and of Dr. Mumbauer, was designed to question Dr. Raddin's credibility as to whether he did rely on a report by Dr. Mumbauer in 2010; and whether Dr. Mumbauer's 2011 report was a post hoc justification for Dr. Raddin's opinion. We perceive no error.

Defendants also argue that release of the invoices violated the mediation privilege, N.J.R.E. 519, to the extent the invoices pertained to pre-suit consultations. The privilege covers communications "during a mediation or . . . made for the purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator." N.J.S.A. 2A:23C-2. The mediation privilege is

subject to waiver. See Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 215 N.J. 242, 261-62 (2013). Even assuming for argument's sake that an invoice of a consulting expert retained for a mediation may be deemed a mediation communication, to the extent an expert relies on the facts and data of his or her previous work in formulating opinions in the subsequent litigation, those facts and data would be discoverable under Rule 4:17-4(e). See N.J.S.A. 519(a)(c) ("Evidence or information that is otherwise admissible or subject to discovery shall not become inadmissible or protected from discovery solely by reason of its disclosure or use in mediation.").

C.

Defendants argue that a new trial is required because plaintiff's counsel made false statements when she discussed plaintiff's claim against Levito and his employer, and the issue of Dr. Raddin's alleged reliance on a later-superseded report by Dr. Mumbauer. We are guided by settled principles. "Counsel is to be given broad latitude in summation, but comment must be restrained within the facts shown or reasonably suggested by the evidence adduced." Geler v. Akawie, 358 N.J. Super. 437, 467 (App. Div.) (internal quotation marks and citations omitted), certif. denied, 177 N.J. 223 (2003); Colucci v. Oppenheim, 326

N.J. Super. 166, 177 (App. Div. 1999), certif. denied, 163 N.J. 395 (2000). "Counsel [in summation] may not misstate the evidence nor distort the factual picture." Geler, supra, 358 N.J. Super. at 467 (internal quotation marks and citations omitted). On the other hand, "counsel may draw conclusions even if the inferences that the jury is asked to make are improbable, perhaps illogical, erroneous or even absurd, unless they are couched in language transcending the bounds of legitimate argument, or there are no grounds for them in the evidence." Colucci, supra, 326 N.J. Super. at 177.

Plaintiff's counsel did not cross the line in her remarks about Levito. Defense counsel argued in summation that Levito was negligent in maintaining his vehicle, and caused the accident. Plaintiff's counsel explained:

I want to talk to you about Mr. Levito. We don't have a claim against Mr. Levito. It's not our position that he did anything wrong. We might have started the case with a claim against him, but after six years or however many years and conducting depositions, listening to the testimony, it's not our position that he did anything wrong when this tire came off his car.

Counsel discussed the concept of a rebuttable presumption arising out of the fact that a tire came off his vehicle; but then she argued that the evidence demonstrated he exercised reasonable care.

The statement, "We might have started the case with a claim against him," was obviously intended to create some "distance" between the past act and current circumstances, but it could not reasonably have been interpreted to raise doubt about the fact that a claim was made. Plaintiff himself testified that he filed a claim against Levito. Moreover, while the jury did not learn that plaintiff had settled with Levito for a substantial sum, both counsel agreed that the court should be silent on the issue of settlement in its instructions to the jury. As did the trial court, we are unpersuaded that plaintiff's counsel's comments warrant a new trial.

We reach the same conclusion with respect to plaintiff's counsel's comments in summation challenging the credibility of Dr. Raddin and Dr. Mumbauer. Suffice it to say that plaintiff's comment was not objectionable in view of the testimony. Dr. Raddin asserted he relied in 2010 on a 2010 report of Dr. Mumbauer that was revised in 2011. Dr. Mumbauer's invoices reflected work in 2007. Although the court directed the jury that an expert is free to destroy preliminary reports, plaintiff's counsel was still free to challenge Dr. Raddin's claim that his opinion was indeed based on a prior report by Dr. Mumbauer. Counsel was also free to suggest that Dr. Mumbauer's 2011 report was prepared as an after-the-fact justification for

Dr. Raddin's conclusion; and to urge the jury to reject the defense theory of the accident as one created to defend the lawsuit.

D.

Defendants argue that the court erred when it declined to reduce the damages awarded by the collateral source consisting of plaintiff's federal disability pension. We agree.

As an employee of the U.S. Postal Service, plaintiff received a disability pension benefit that would continue until he reached retirement age, when he would receive a regular retirement pension under the Federal Employee Retirement System (FERS), including benefits under the Thrift Savings Plan (TSP). Defendants submitted an analysis that the value of past and future disability pension payments totaled \$166,937.¹⁰

The disability pension constitutes a collateral source that should generally be deducted pursuant to N.J.S.A. 2A:15-97 which states:

In any civil action brought for personal injury . . . if a plaintiff receives or is entitled to receive benefits for the injuries allegedly incurred from any other source other than a joint tortfeasor, the benefits, other than workers' compensation benefits or the proceeds from a life

¹⁰ Plaintiff's expert apparently calculated the value of the disability pension at \$182,691. However, defendants seek the lesser amount of the two estimates.

insurance policy, shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award recovered by the plaintiff. . . .

However, plaintiff argued that the value of this collateral source was more than offset by the reduction in plaintiff's FERS and TSP benefits. Plaintiff's expert Kris Kucsma explained that as a result of plaintiff's injury, he lost the benefit of additional years of service and pay increases, which would have increased his defined pension benefit according to the formula based on years of service and average salary. Kucsma calculated the present value of this loss at \$239,241. Kucsma also asserted that plaintiff lost \$37,893 in the value of government contributions to the plaintiff's TSP account.

Plaintiff's counsel argued to the trial court that the verdict sheet did not ask the jury to calculate lost pension benefits as a result of an oversight. Consequently, those damages — \$239,241 and \$37,893 — were not addressed by the jury. Counsel argued that the omitted pension-related damages should offset the collateral source deduction sought by defendants. The court agreed.

We are persuaded the court erred. First, it is speculative to assume that the jury would have awarded the \$239,241 and \$37,893 in pension losses estimated by plaintiff's expert. The

issue was not explicitly presented to the jury in an interrogatory. The jury conceivably could have declined to award some or all of that amount. For example, defense counsel pointed out on cross-examination that plaintiff, before the accident, had ceased making his maximum TSP contribution, which triggered the four percent matching federal contribution that plaintiff's expert assumed.¹¹

Second, it is by no means clear that the jury did not consider pension losses as a form of lost wages. In the direct examination of Kucsma, counsel did not clearly distinguish pension benefits from the general category of lost wages. After Kucsma offered estimates of plaintiff's lost earnings at the Postal Service and DHL, plaintiff's counsel inquired "in terms of the future — and — and — past and future lost earnings, is there anything else?" Kucsma then identified and discussed Social Security disability benefits as a collateral source. Counsel then asked, "Is there anything else that you (indiscernable) consider with respect to the earnings, any fringe benefits or anything like that?" That question prompted the discussion of retirement benefits. Moreover, Kucsma

¹¹ The federal government automatically paid one percent of plaintiff's salary into his TSP account. An additional contribution of four percent was contingent upon plaintiff's own contributions.

described the lost government contributions to plaintiff's TSP account as a form of lost wages, stating that plaintiff lost "an extra 5 percent pay put into that savings account each year."

The basis of the jury's verdict is not self-evident. Kucsma testified that plaintiff lost \$472,615 in Postal Service earnings, and \$220,361 in DHL earnings, for a total of \$692,976. The jury awarded \$572,976 — \$120,000 less. While plaintiff may argue that the jury simply discounted the DHL number — particularly since defense counsel questioned whether plaintiff would have lost his job with DHL in any event as a result of business conditions at DHL — we cannot speculate as to how the jury reached its final number. Conceivably, the jury considered the pension losses as well as the lost earnings and reached a number that it viewed as fair. As the court instructed the jury, it was free to "consider all or none of the opinions of the expert in determining a fair figure to compensate Mr. Clanton for his future lost earnings." The court instructed the jury that it should not "automatically accept" the expert's figures.

We avoid inquiries into a jury's deliberations, and shall not speculate as to the basis for its verdict.

The tradition of the common law does not permit us to speculate upon the foundations of a jury verdict. "[A]n individualized assessment of the reason for [a jury

verdict] would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake."

[State v. Grunow, 102 N.J. 133, 148 (1986) (quoting United States v. Powell, 469 U.S. 57, 66, 105 S. Ct. 471, 478, 83 L. Ed. 2d 461, 469 (1984).]

In short, we cannot conclude with certainty the jury omitted consideration of plaintiff's claims for pension-related damages, and would have awarded an amount greater than the collateral source. If there was an error in failing to separately instruct the jury to calculate pension losses, it may not be corrected by speculating as to what the jury would have done, and then using that figure as an offset against a collateral source.

We remand to the trial court to amend the judgment after crediting defendants for the collateral source amount of plaintiff's disability pension.

E.

Defendants' remaining points on appeal may be briefly addressed.

Defendants contend the court erred by granting plaintiff's motion to increase the prejudgment interest rate an additional 2% per annum. We disagree.

Rule 4:42-11(b) provides that "[p]re-judgment interest shall be calculated in the same amount and manner provided for

by paragraph (a) of this rule," governing post-judgment interest. In turn, paragraph (a)(iii) states that for "judgments exceeding the monetary limit of the Special Civil Part," entered after September 1, 1996, the amount shall equal the amount set forth in subparagraph (ii) – which refers to the State of New Jersey Cash Management Fund rate – "plus 2% per annum." R. 4:42-11(a). Thus, the two percent amount applies to pre-judgment interest. See DialAmerica Marketing, Inc. v. KeySpan Energy Corp., 374 N.J. Super. 502, 508 (App. Div.) (noting the Rule "adds two percent per annum to the rate specified for prejudgment interest on judgments exceeding the monetary limit of the Special Civil Part") (quoting Rule 4:42-11(a)(iii)), certif. denied, 184 N.J. 212 (2005); Pressler & Verniero, Current N.J. Court Rules, comment 1.1 on R. 4:42-11 (2015).

Defendants also assert, as plain error, the court's instruction that defendants had the burden of proof on the issue of allocation of causative fault. The court charged the jury, as follows:

So, if you find that [plaintiff] has proven that there were reasonably safer alternative design[s] available, which would have made the vehicle crash worthy, then you must determine whether plaintiff also proved these designs would have lessened the -- extent of [his] injury. Or eliminated the injury in its entirety.

If you find that [plaintiff] met that burden you will find in favor of him, because the plaintiff need not quantify it or put a percentage on the extent to which the design or manufacturing defects added to all of his final injuries.

Nissan says all or part of the injuries could have occurred anyway. Now, . . . this is Nissan, not Mr. Clanton, has the burden of proving what part or percentage of his injuries would have occurred, even if reasonable alternative safer designs had been supplied in the vehicle.

If Nissan can prove an apportionment can reasonably be made, separating those injuries Mr. Clanton would have suffered anyway, even in a crash worthy vehicle, from those enhanced injuries he did suffer, due to the absence of, allegedly, reasonably safer designs -- then Nissan's liability would be limited only to that portion or percentage of the injuries Nissan proved is related to the increased or enhanced harm.

On the other hand, if you find that Nissan has not met its burden of proving plaintiff's injuries can be reasonably apportioned, then Nissan . . . would be responsible for all the harm or injury. So, on [question] five [of jury verdict sheet] - - the burden of apportionment is on Nissan.

Question five of the jury verdict sheet asked the jury to "allocate the percentage each contributed to the occurrence of Mr. Clanton's injuries" assuming both Nissan, and Levito and All Around Fence, Inc. were found liable in response to earlier questions.

We recognize "the critical importance of accurate and precise instructions to the jury." Washington v. Perez, 219 N.J. 338, 350 (2014). The challenged paragraphs of the court's charge are consistent with those in Model Jury Charge (Civil), § 5.40E, Products Liability Crashworthiness--Special Issues (May 2001), which places the burden on the defendant:

If the defendant vehicle manufacturer/designer claims that all or part of the injuries would have occurred anyway, then the defendant, and not the occupant of the vehicle, has the burden of proving what part/percentage of the plaintiff occupant's injuries would have occurred even if reasonable alternative safer designs had been supplied in their vehicle. If the defendant can prove that an apportionment can be reasonably made, separating those injuries the occupant would have suffered anyway, even in a crashworthy vehicle, from those enhanced injuries the plaintiff occupant suffered due to the absence of reasonably safer designs, then the defendant's liability would be limited only to that portion/percentage of the injuries the defendant proves is related to the plaintiff's increased or enhanced harm. On the other hand, if you find that the defendant car manufacturer/designer has not met its burden of proving that plaintiff's injuries can be reasonably apportioned, then the defendant would be responsible for all of the occupant's harm or injury.

In sum, we discern no error, let alone plain error, in the court's instruction. See Polisen v. Gen. Motors Corp., 328 N.J. Super. 41, 55 (App. Div.) ("[I]f the defendant seeks credit against the verdict for an injury that it claims resulted, in

part, from the first collision, defendant shall have the burden of proof on that issue."), certif. denied, 165 N.J. 138 (2000); Green v. Gen. Motors Corp., 310 N.J. Super. 507, 528–29 (App. Div.) (placing the burden of apportionment on defendant, "where it properly belongs"), certif. denied, 156 N.J. 381 (1998); Restatement (Second) of Torts § 433B(2) (1965).

III.

Finally, we consider plaintiff's cross-appeal from the trial court's dismissal of its punitive damages claim. The court did so sua sponte in the charge conference after the close of proofs. Evidence on punitive damages was not bifurcated. See N.J.S.A. 2A:15-5.13 (stating that punitive damages phase may be bifurcated at the request of a defendant). Nonetheless, plaintiff's counsel anticipated a separate closing after the jury's verdict on liability and compensatory damages.

In striking the punitive damages claim, the judge stated, "The first decision is the most obvious one that no one could conceivably disagree with, punitives are out." Plaintiff's counsel objected, and the judge stated he would not provide a lengthy statement of reasons at that time.

Post-trial, the court rejected plaintiff's argument that it had erred. The judge engaged in an exchange with counsel. The judge expressed reasons why he believed no reasonable jury could

conclude that punitive damages were warranted, and invited plaintiff's counsel's response. However, the court did not provide a final statement of reasons.

The judge reviewed some of the evidence on the merits of the liability claim, and stated he believed "defendant put on an extraordinarily strong case that . . . they designed this car and this header very, very carefully." The judge recognized the jury disagreed. "[T]he jury . . . had a right to disagree with the defendant, and did so. But to -- to say that they acted egregiously . . . it's preposterous." The judge stated he believed the jury would reject the claim quickly and if it did not, he would have set it aside.

The judge asked, "[T]he worst you could say about these people is that at a certain angle, maybe there's a deformation of a few inches more. And that's egregious conduct?" Counsel responded that the jury had concluded that the design was not reasonable. The judge asserted that the shortcomings in the design did not prove egregiousness. Plaintiff's counsel contended that Nissan destroyed design documents, which defense counsel disputed, asserting design documents were produced, referring to Snyder's testimony. Plaintiff's counsel also asserted that Nissan never explained the reason for its new design; and suggested it was done to allow for robotic welding,

which saved Nissan money. The judge was unswayed, stating his sense of the evidence was that "it was [a] fairly negligible, simple task."

On appeal, plaintiff urges us to review the court's decision de novo and reverse. Plaintiff argues that a reasonable jury could find that the conduct of Nissan — Nissan Motor Co. Ltd. in particular — justified an award of punitive damages. Plaintiff relies upon his allegations regarding: the shortcomings of the design; its uniqueness; the destruction of documents regarding the origins of the design; the failure to adequately test it; and Nissan's comparatively greater concern about the performance of structures that were subject to third-party tests, which could be utilized for marketing.

In response, Nissan asserts that we should review the trial court's decision for an abuse of discretion. Nissan also disputes each of the alleged grounds for punitive damages. Contrary to plaintiff's claim that the header lacked attachment to the side rail, Nissan cites evidence in the record that the header was indeed attached. Nissan notes that voluminous design documents were produced in discovery; and the Altima was extensively tested.

We begin with a review of the Punitive Damages Act (PDA), which vests in a trial judge the power to reduce or eliminate an award of punitive damages.

Before entering judgment for an award of punitive damages, the trial judge shall ascertain that the award is reasonable in its amount and justified in the circumstances of the case, in light of the purpose to punish the defendant and to deter that defendant from repeating such conduct. If necessary to satisfy the requirements of this section, the judge may reduce the amount of or eliminate the award of punitive damages.

[N.J.S.A. 2A:15-5.14(a)].

Although the trial judge did not identify the source of his authority to strike the punitive damages claim, we assume for the purposes of our analysis that the court's decision was grounded in this broad power.¹²

A deferential standard of review applies to a trial court's decision to set aside a punitive damage claim pursuant to its power under N.J.S.A. 2A:15-5.14(a). We have previously reviewed a trial court's exercise of its authority under N.J.S.A. 2A:15-5.14(a) for an abuse of discretion. Applying that standard of

¹² We recognize that section 5.14(a) power may be exercised, according to its terms, after a jury finding on punitive damages, but before entry of judgment. However, we discern no impediment to the exercise of this authority at the close of evidence, if the court is convinced that any award of punitive damages would not be justified or reasonable.

review in Saffos v. Avaya Inc., 419 N.J. Super. 244, 264 (App. Div. 2011), we affirmed a judge's decision to reduce, but not eliminate, a punitive damages award under N.J.S.A. 2A:15-5.14. In Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 390 N.J. Super. 557, 565 (App. Div. 2007), aff'd, 194 N.J. 212 (2008), we applied the same abuse-of-discretion standard of review in affirming a trial court's decision not to reduce an award under N.J.S.A. 2A:15-5.14.¹³ Cf. Cooper Indus. v. Leatherman Tool Grp., Inc., 532 U.S., 424, 433, 121 S. Ct. 1678, 1683-84, 149 L. Ed. 2d 674, 684-85 (2001) (noting that in the absence of a constitutional issue, federal appellate court applies abuse-of-discretion standard when reviewing a trial court's scrutiny of jury award of punitive damages).

This deferential standard of review of a trial judge's reduction or elimination of a punitive damage award is in keeping with the apparent purpose of this provision of the PDA, which empowers trial judges to independently assess the evidence and determine if an award is reasonable in amount, and justified under the circumstances. The purpose of the PDA was to provide the court with broader authority to review punitive damages

¹³ We nonetheless remanded for a new trial on the amount of punitive damages because the court instructed the jury that it could consider general deterrence. Tarr, supra, 390 N.J. Super. at 568-69.

awards than it had under the Rules allowing it to dismiss a claim or grant judgment notwithstanding the verdict.¹⁴ When the trial court is vested with what is essentially a fact-finding role, we generally defer to the court's findings. Cf. Maudsley v. State, 357 N.J. Super. 560, 690 (App. Div. 2003) (reviewing for abuse of discretion, trial court's denial of punitive damages in non-jury trial).

In urging a more rigorous standard of review, plaintiff misplaces reliance on Baker v. National State Bank, 353 N.J. Super. 145 (App. Div. 2002), and Rusak v. Ryan Automotive, L.L.C., 418 N.J. Super. 107 (App. Div. 2011). Applying the reasoning of Cooper, supra, 532 U.S. at 440, 121 S. Ct. at 1687-88, 149 L. Ed. 2d at 689-90, we held in Baker that an appellate court reviews de novo a trial court's determination that a punitive damages award violated a defendant's substantive due process rights. Baker, supra, 353 N.J. Super. at 152-53; see also BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574-75, 116 S.

¹⁴ A review of the history of section 5.14 indicates that it was included in the legislation as a means of controlling punitive damages awards; by its terms, it authorizes only the reduction, or elimination, not the increase of an award; and it was included initially as an alternative to a more extreme cap on damages than was ultimately enacted. See S.1296 (First Reprint) § 6 (Nov. 10, 1994); see also Dong v. Alape, 361 N.J. Super. 106, 118 (App. Div. 2003) ("The legislation evinces a pervasive legislative intent to curb, rather than expand, the availability of punitive damages.").

Ct. 1589, 1598-99, 134 L. Ed. 2d 809, 826 (1996) (setting forth the factors for deciding substantive due process challenge).

Based on considerations of institutional competence, we held an appellate court on balance was better suited than a trial court to apply the BMW factor pertaining to penalties imposed in comparable cases. Baker, supra, 353 N.J. Super. at 153. Rusak relied on Baker, and did not expressly address the standard of review of a court's exercise of its power under N.J.S.A. 2A:15-5.14.

Here, the trial court did not set aside the punitive damages award on substantive due process grounds. Cf. Baker v. Nat'l State Bank, 161 N.J. 220, 231 (1999) (distinguishing between review of a punitive damages award under PDA and under substantive due process standard of BMW v. Gore). Therefore, the Baker-Rusak standard of review does not apply.

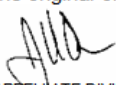
Having concluded that the exercise of authority under section 5.14 is subject to an abuse of discretion standard of review, we are nonetheless constrained to remand to the trial court for a more extensive statement of reasons. While an abuse of discretion "defies precise definition," Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002), essential to our review, particularly after an extensive trial, is the court's careful analysis of the evidence, and the court's application of the

legal standards thereto. See Curzi v. Raub, 415 N.J. Super. 1, 28 (App. Div. 2010); R. 1:7-4(a). The judge obviously believed strongly in his conclusion, which we presume was based not only on his analysis of the testimony, and evidence, but his feel of the case and the witnesses, in a lengthy trial. However, the court did not sufficiently set forth its reasoning, or expressly apply the statutory standards governing whether an award of punitive damages is warranted, see N.J.S.A. 2A:15-5.12(a), (b), in support of the conclusion that punitive damages would not be reasonable or justified. See N.J.S.A. 2A:15-5.14(a).

IV.

In sum, on Nissan's appeal, we affirm the judgment of liability and award of compensatory damages, except that we remand for the court to reduce the judgment to account for the collateral source of plaintiff's disability pension. On plaintiff's cross-appeal, we remand to the trial court for a more extensive statement of reasons in support of its decision to strike plaintiff's punitive damages claim. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION