NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0255-16T3

NANCY JACOBS,

Plaintiff-Respondent,

v.

JERSEY CENTRAL POWER & LIGHT COMPANY,

Defendant-Appellant.

Argued November 13, 2017 – Decided December 7, 2017

Before Judges Sabatino, Ostrer and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-0813-14.

Stephen A. Rudolph argued the cause for appellant (Rudolph & Kayal, attorneys; Stephen A. Rudolph, on the briefs).

Roy D. Curnow argued the cause for respondent (Law Office of Roy D. Curnow, attorney; Roy D. Curnow and Randall J. Peach, on the brief).

The opinion of the court was delivered by

SABATINO, P.J.A.D.

In this personal injury case, defendant Jersey Central Power & Light Company ("JCP&L") appeals on multiple grounds from

the jury verdict in favor of plaintiff and the trial judge's denial of its motion for a new trial.

Plaintiff, a homeowner, tripped over or stepped in a hole left behind by a JCP&L employee, who removed a street light that had fallen at the corner by her home. The employee disconnected the light, took the pole out of the ground, and rolled up and placed the leftover wires in the hole containing the base of the light. He covered the wires with soil, still leaving an indentation in the ground. He placed an orange safety cone over the hole, but the cone disappeared within a few days. JCP&L did not return promptly to repair the light or the hole.

Almost two months later, plaintiff walked out of her home to get her mail. As she walked on the grassy area, she fell over or into the hole, injuring her knee and lower back. After treatments failed to abate her symptoms, plaintiff eventually had lumbar surgery and knee replacement surgery. She did not resume employment.

Plaintiff sued JCP&L for medical expenses, lost wages, and pain and suffering. After a five-day trial in May 2016, the jury found JCP&L eighty percent negligent and plaintiff twenty percent negligent. The jury awarded plaintiff $650,000 in damages, a sum the court molded to take into account her

comparative fault. JCP&L moved for a new trial, which the trial judge denied in a detailed written opinion.

On appeal, JCP&L raises multiple claims of trial error. Among other things, defendant argues that the court should have issued a directed verdict for JCP&L on liability because plaintiff did not present a liability expert on utility industry standards; plaintiff's orthopedic expert gave improper testimony; the court incorrectly excluded proof favorable to the defense; the jury charge was flawed; and the court should have granted the new trial motion. For reasons that follow, we affirm.

I.

We summarize the evidence and procedural history pertinent to the issues raised on appeal. The facts, although disputed in several respects, are relatively uncomplicated.

The Downed Light Pole and The Resultant Hole

During the evening of April 21, 2012, plaintiff Nancy Jacobs and Sebastian DeCandia[1] were returning to their home in Barnegat, when they noticed a streetlight pole had fallen down on the corner of their property. Plaintiff reported the downed pole to the local police department. The police dispatcher

[1] Jacobs and DeCandia have since married. He is not a co-plaintiff in this case.

contacted the public utility responsible for the streetlight, JCP&L, to inform it of the situation.

A line troubleshooter employed by JCP&L responded to the scene the following day, April 22. He disconnected the light, tested the wires, and removed the pole from the ground. He rolled up the remaining wire and placed it in the hole. He used some of the soil around the hole to cover the wires, but without filling the hole completely. He placed an orange safety cone temporarily over the hole. The employee testified that he did not mark the area with white or other paint. According to his testimony, he does not carry spray paint in his truck. Nevertheless, according to the homeowners' testimony, the spot was marked at some point with white paint in the surrounding grass.

Two days later, when DeCandia and plaintiff were leaving their home, he noticed that wires were sticking out from under the cone. DeCandia used a yardstick or ruler to push the wires back into the hole. With plaintiff's help, he took photographs of the wires and the hole, using the yardstick or ruler to measure dimensions.[2] The photos showed the safety cone and the grass perimeter around a dirt hole marked with white paint.

[2] At her deposition, plaintiff could not remember when the photos specifically were taken, and portions of her responses suggested a belief the photos were taken after her fall. However, at

DeCandia testified, "a couple of days later," the orange cone "disappeared" from their property. In addition, DeCandia stated the white paint by the hole had faded about ten days after it was marked on the grass. According to DeCandia, the fading of the paint was due both to rain and the mowing of the lawn.

DeCandia estimated he cut the grass about eight times between the time the pole fell in April 2012 and plaintiff's injury in June 2012. When cutting the grass, DeCandia treated the hole[3] the same as the rest of the lawn. He noticed "[a] little grass fell in the hole, and the hole kept getting smaller, and the grass around it kept shrinking in. The hole kept getting smaller and smaller . . . almost invisible."

A JCP&L employee, known as a Distribution Technical Supervisor, was responsible for scheduling streetlight repairs and installations. The supervisor testified that such repair jobs are scheduled "on a date basis and an area basis," with priority given to areas that need emergency power restoration.

---

trial, she acknowledged they had been taken a few days after the pole fell. In his written decision denying JCP&L's new trial motion, the judge noted that although there were certain inconsistencies or ambiguities on this topic within plaintiff's deposition testimony, defense counsel did not attempt to clear them up with follow-up questions that might have dispelled the confusion.

[3] At various places in the record and in the trial judge's opinion, the hole also is described as a "depression."

The supervisor noted that although this particular downed light was located within the geographic area of another JCP&L office, his own office accepted the repair assignment since it had more resources available at the time. The supervisor stated that his office was busy with other projects during that period, although he acknowledged that plaintiff's property was not "a low priority job[.]"

The Accident and Plaintiff's Injuries

Nearly two months after the light pole had fallen and still had not been replaced, plaintiff returned home from work at approximately 6:30 p.m. on Monday, June 18, 2012. She went outside to get the mail. She went through the garage, because the lawn sprinklers were on in the front yard. Still wearing sneakers from her job in a medical office, plaintiff walked down the driveway to the sidewalk. She noticed a discarded water bottle in the grass, and bent down to pick it up.

After plaintiff stood up and took a few steps, her right foot became stuck in the hole. According to plaintiff, by that time the grass had "completely grown over the hole," and she did not notice the hole before stepping into it. As she described the incident at trial, plaintiff "tried to catch [her] balance . . . teeter-tottered back and forth, and then [] fell back" onto her buttocks and back.

Plaintiff felt discomfort, and walked back into the house. DeCandia, who had not seen the accident, went inside and saw plaintiff sitting in a chair. He asked her, "[W]hat's going on[?]," to which plaintiff replied, "I fell in that damn hole out there getting the mail." Plaintiff took a hot bath and applied ice packs to her back. The couple did not report the fall to the police, nor to JCP&L.

Plaintiff returned to work the following Monday, June 25. However, according to plaintiff's testimony, her back began "hurting more and more. Sitting was getting harder, standing, everything. It was just . . . getting hard to function. . . . The pain . . . was increasing."

About a day or so after plaintiff's fall, a JCP&L repair crew arrived to perform work at the site. The crew discovered the location was not "mark[ed] out."[4] After ordering a new mark-out from the subcontractor, JCP&L placed another cone over the hole on June 28 and sprayed the area with white paint.

[4] According to its supervisor, JCP&L uses a subcontractor to "mark out" areas on which JCP&L employees will perform work on underground facilities. The mark-out identifies, with flags and paint, underground gas lines, water lines, and electrical lines, in order to prevent damage when digging in the area. The mark-out apparently is distinct from the white paint DeCandia and plaintiff initially saw on the grass around the hole before it faded away.

Plaintiff's Course of Treatment and Surgery

About two weeks after her fall, plaintiff saw Dr. James Altamuro, a chiropractor. According to Dr. Altamuro, plaintiff complained to him of "sharp pain, spasms in the lower right back and hips and legs," because she "fell in a hole while picking up a water bottle." She told Dr. Altamuro that "a street lamp was removed," and that the hole left behind by the corner of her house had "not been marked."

Dr. Altamuro recalled plaintiff was in "severe pain," and was "walking in a bent-forward position," and "having a hard time." He performed an orthopedic evaluation and diagnosed plaintiff with "disc lumbar myelopathy, sciatica, lumbar strain, and sacroiliac strain."

Plaintiff again saw Dr. Altamuro two days later, and reported to him that she was unable to return to work because of muscle spasms. He recommended that plaintiff undergo an MRI of her back, which was taken a few days later. After Dr. Altamuro reviewed the MRI results, he recommended plaintiff see an orthopedist. Dr. Altamuro continued to treat plaintiff for about twenty-five sessions, but "she wasn't doing much better."

In November 2012, Dr. Altamuro noted plaintiff had fallen on her knee, and was limping, which was delaying the recovery of her lower back. Plaintiff stated she fell on her knee because

her leg gave out. Plaintiff testified that she did not recall reporting this to Dr. Altamuro; however, the information is contained in his records. Plaintiff also "complained of a degradation of her condition," due to the fact she was performing more physical labor after Superstorm Sandy occurred in late October 2012. Plaintiff testified that her knee was "swelling and it was hurting more." She began limping "right after" the incident, but did not complain of knee pain to a doctor until later. Dr. Altamuro ultimately referred plaintiff for an MRI of her right knee in April 2013.

Plaintiff first saw an orthopedist at Seaview Orthopedics in June 2013, for ongoing problems with her lower back and knee. In October 2013, plaintiff received an epidural injection in her spine, which gave her temporary relief in her back. Steroid injections were applied to her knee. However, the injections failed to alleviate her pain.

Ultimately, plaintiff underwent a total right knee replacement in December 2013. Additionally, in May 2014, plaintiff underwent lumbar fusion surgery on three levels in her lower back. As of the time of trial in 2016, plaintiff remained unable to return to work.

Plaintiff testified at trial that she did not recall previously complaining in February 2009 of back spasms or

injury. Plaintiff did recall she had been treated by a chiropractor around 2005. She also acknowledged that, around 2007, she suffered a strain in her back after tripping over a "baby gate," and had been treated by Dr. Altamuro at that time for approximately two weeks.

Dr. Cary Skolnick testified for plaintiff at trial as an expert in orthopedic surgery. Dr. Skolnick practiced orthopedic surgery from 1982 to 2006. In 2006, he ceased treating patients and opened a company that evaluates and prepares reports for patients in workers' compensation and personal injury cases, as well as patients seeking a second medical opinion.

Dr. Skolnick examined plaintiff in May 2015, and reviewed her pertinent medical records. He testified that plaintiff reported to him that she had previously suffered from back spasms around 2007, and received chiropractic treatment from Dr. Altamuro. Dr. Skolnick noted plaintiff had pre-existing arthritis in her knee, which he stated was not uncommon for a woman such as plaintiff in her sixties.

Dr. Skolnick concluded that plaintiff's June 2012 fall, which occurred "with her putting her foot in the hole and twisting it and falling back," necessitated both her right knee replacement and spinal surgery. He opined that plaintiff has suffered permanent injuries as a result of the accident.

The defense presented competing medical testimony from Dr. Jay Bruce Bosniak, an expert in orthopedics and orthopedic surgery. Dr. Bosniak reviewed plaintiff's medical records and examined her in August 2015. Based on plaintiff's medical records, Dr. Bosniak found "there was a considerable amount of preexisting wear and tear or degenerative arthritic changes present at her low back, as well as at her knee, all of which were present well before the accident[.]" Dr. Bosniak testified on direct examination that "any condition or any injury in the [plaintiff's] back" is "not associated" with her June 2012 fall. However, Dr. Bosniak later acknowledged on cross examination that "the accident on top of her degenerative condition . . . caused [plaintiff's spinal] problem." He also acknowledged plaintiff's pre-accident medical records showed no complaints or treatment relating to her knee. Even so, he opined the mechanism of this accident was "not nearly enough" to have produced the need for a total knee replacement.

The Trial and Related Motions

After the close of plaintiff's case in chief, JCP&L moved for a directed verdict. The defense argued plaintiff's claims must be dismissed because she had not presented expert opinion addressing whether JCP&L had adequately secured the location of the fallen streetlight and whether its delay in repairing the

hole was reasonable. In addition, JCP&L argued that because plaintiff had problems with her knee predating the accident, and had not pled aggravation of a knee injury in her complaint, her knee-related claims must be dismissed.

The court denied defendant's motion, ruling that a liability expert was not necessary in this case, deeming the reasonableness of defendant's conduct to be a proper subject of common knowledge. The judge further ruled plaintiff's medical expert had properly testified regarding an aggravated injury to her knee.

At the end of the trial, the jury found defendant eighty percent negligent and plaintiff twenty percent comparatively negligent, and that both parties were a proximate cause of the accident. The jury awarded plaintiff $70,000 for medical expenses, $80,000 for lost income, and $500,000 for pain and suffering, resulting in a $650,000 total gross verdict for plaintiff. The verdict was reduced, upon factoring in plaintiff's comparative negligence.

Defendant filed a motion for a new trial, which the court denied in a twenty-six-page written opinion. Final judgment was entered for plaintiff in the sum of $482,487.51, reflecting a deduction for collateral source income and the addition of prejudgment interest. This appeal ensued.

II.

On appeal, JCP&L variously argues: (1) plaintiff needed a liability expert to comment on industry standards for securing downed streetlight locations and about the acceptable time frames for repairing light pole holes; (2) the court erred in excluding an office note of a treating physician containing a description of the accident that allegedly varied materially from plaintiff's other narratives of the accident; (3) Dr. Skolnick impermissibly speculated about plaintiff's undocumented pre-accident injuries; (4) Dr. Skolnick improperly testified his diagnosis was consistent with the hearsay reports of radiologists who interpreted plaintiff's MRIs; (5) the court erroneously disallowed Dr. Bosniak from commenting about Dr. Skolnick's written report; (6) the court improperly barred the defense from cross-examining Dr. Skolnick about his forensic company's finances; (7) the court misadvised the jurors they had only three options on liability outcomes; (8) the court should not have issued, sua sponte, a jury charge on aggravation; and (9) cumulative error.

In considering these arguments, we apply well-established standards of appellate review. In general, we apply a narrow scope of review to civil jury verdicts. We ordinarily do not set them aside and order a new trial unless there has been a

proven manifest injustice. See R. 4:49-1; see also Kozma v. Starbucks Coffee Co., 412 N.J. Super. 319, 324 (App. Div. 2010); Boryszewski v. Burke, 380 N.J. Super. 361, 391 (App. Div. 2005), certif. denied, 186 N.J. 242 (2006).

Most of defendant's contentions on appeal assert the trial court erred in making evidential rulings. Such rulings to admit or exclude evidence are generally subject to a wide degree of discretion. Ordinarily we will not set aside civil verdicts on this basis unless the court has abused its discretion, including with respect to issues of the admissibility of expert opinion. Hisenaj v. Kuehner, 194 N.J. 6, 16 (2008); see also Dinter v. Sears, Roebuck & Co., 252 N.J. Super. 84, 92 (App. Div. 1991) (citations omitted).

Moreover, if an issue was not raised below by a party's trial counsel, relief is not warranted unless that party demonstrates plain error by showing on appeal the error was "clearly capable of producing an unjust result." R. 2:10-2; see also State v. Macon, 57 N.J. 325, 336 (1971); Ball v. N.J. Bell Tel. Co., 207 N.J. Super. 100, 114 (App. Div.) (citing Macon, supra, 57 N.J. at 337), certif. denied, 104 N.J. 383 (1986).

With respect to defendant's two claims of flaws in the jury charge, we recognize "the critical importance of accurate and precise instructions to the jury." Washington v. Perez, 219

N.J. 338, 350-51 (2014). Nonetheless, not all defects in a jury charge inexorably require a new trial. We must consider the overall charge as a whole, whether counsel voiced any contemporaneous objection, see R. 1:7-2, and the likelihood that the flaw was so serious that it was likely to have produced an unfair outcome. Viscik v. Fowler Equip. Co., 173 N.J. 1, 18 (2002); Gaido v. Weiser, 227 N.J. Super. 175, 198-99 (App. Div. 1988), aff'd, 115 N.J. 310 (1989).

As to defendant's argument that its new trial motion was erroneously denied, we are mindful that a trial court shall not be reversed on such rulings "unless it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1; see also State v. Sims, 65 N.J. 359, 373-74 (1974). "[A] jury verdict, from the weight of evidence standpoint, is impregnable unless so distorted and wrong, in the objective and articulated view of a judge, as to manifest with utmost certainty a plain miscarriage of justice." Carrino v. Novotny, 78 N.J. 355, 360 (1979) (citations omitted). In making our own determination on appeal as to whether such a miscarriage of justice occurred, we accord substantial deference to the trial judge's assessment of "intangible aspects of the case not transmitted by the written record." Pressler & Verniero, Current N.J. Court Rules, cmt. 4 on R. 2:10-1 (2018) (citing Dolson v. Anastasia, 55 N.J. 2, 6-8

(1969)). Those intangible elements include matters of witness credibility and demeanor, and the trial judge's "feel of the case." Ibid.

Lastly, although defendant's appeal in this case mainly concerns issues that do not raise pure questions of law, we apply de novo review to such discrete legal issues. Manalapan Realty L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Applying these appellate principles to the points raised by JCP&L, we affirm the judgment for plaintiff, substantially for the cogent reasons expressed in Judge James Den Uyl's post-trial written opinion dated August 24, 2016. We add the following comments and analysis.

A.

JCP&L's first and perhaps most strenuous argument is that plaintiff was obligated to present an expert witness on liability opining about industry standards. It asserts the absence of such expert testimony requires the verdict to be set aside. The trial judge rejected this argument, and so do we.

For a plaintiff to prevail on a claim of negligence, he or she must prove "(1) a duty of care; (2) a breach of that duty; (3) proximate cause; and (4) actual damages." Townsend v. Pierre, 221 N.J. 36, 51 (2015) (quoting Polzo v. Cty. of Essex,

196 N.J. 569, 584 (2008)). A plaintiff must establish each factor by "competent proof." Ibid.

Competent proof of negligence sometimes may include expert testimony. As a general matter of evidence law, N.J.R.E. 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." (emphasis added). To be admissible:

> (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.
>
> [Landrigan v. Celotex Corp., 127 N.J. 404, 413 (1992) (citing State v. Kelly, 97 N.J. 178, 208 (1984)).]

Rule 702 is "permissive," and "[i]n the broadest of terms, if an issue to be decided by the trier of fact is of such a specialized nature that the trial court determines that the proposed expert testimony would assist the trier of fact in making its determination, then the testimony may be admitted." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 1 on N.J.R.E. 702 (2017) (emphasis added). Therefore, expert

testimony "should not be permitted unless it concerns a subject matter that is 'so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman.'" Ibid. (citing State v. Kelly, supra, 97 N.J. at 208).

As Judge Den Uyl correctly recognized, expert testimony is not always required to assess whether a particular defendant acted negligently. Indeed, expert testimony is not necessary when the jury can understand the concepts in a case "utilizing common judgment and experience." Campbell v. Hastings, 348 N.J. Super. 264, 270 (App. Div. 2002) (citation omitted). See also Mayer v. Once Upon A Rose, Inc., 429 N.J. Super. 365, 376-77 (App. Div. 2013) (holding that a liability expert on glass was not needed to opine about the inherent nature of glass to shatter if a glass vessel is held too tightly).

Basic principles of negligence law routinely call for lay jurors to evaluate if a defendant's conduct was unreasonable. Model Jury Charge (Civil), 5.10A, "Negligence and Ordinary Care" (approved before 1984). Those basic notions of reasonable behavior do not inexorably require an expert witness to testify about standards of care, particularly in cases such as this one that do not involve suit against a licensed professional covered by the Affidavit of Merit statute, N.J.S.A. 2A:53A-26 to -29.

For instance, in Butler v. Acme Markets, Inc., 89 N.J. 270, 274 (1982), the Supreme Court considered whether the defendant grocery store had breached a duty to protect its patrons from the criminal acts of third parties. The plaintiff had not presented an expert witness on the subject. Id. at 275, 283. The Court did not find the omission dispositive, observing "there is no general rule or policy requiring expert testimony as to the standard of care." Id. at 283 (emphasis omitted). Although the Court noted such expert opinion could be "an aid to a jury," it further stated that "its absence is not fatal." Ibid. See also Mayer, supra, 429 N.J. Super. at 377 (similarly observing that a glass expert "might have been helpful, but it was not essential to plaintiff's case").

By contrast, a liability expert was deemed necessary in Ford Motor Credit Co., LLC v. Mendola, 427 N.J. Super. 226, 239 (App. Div. 2012). In that case, a lessee brought her car to a repair shop and then to a car dealership for inspection and repair, after her "check engine" light had activated. Id. at 233-34. The car's engine seized eleven days after it was returned to the lessee. Id. at 234. The parties disputed the cause of the engine seizure. Ibid. We concluded that expert testimony was necessary to assess whether the repair shop and dealership had performed their functions negligently. Id. at

239. In doing so, we noted that an automobile is a "complex instrumentality," and that, over time, it has "increased in mechanical and electronic complexity," thus diminishing the general public's familiarity with its functioning. Id. at 236-37. See also Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 450 (1993) (similarly recognizing that expert testimony is required for a subject "so esoteric that jurors of common knowledge and experience cannot form a valid conclusion") (quoting Wyatt ex rel. Caldwell v. Wyatt, 217 N.J. Super. 580, 591 (App. Div. 1987)).

Here, JCP&L argues that because it is a public utility company, and heavily regulated by the State of New Jersey and the Board of Public Utilities, a jury cannot determine on its own whether the utility's actions and inactions in this case regarding the hole left on plaintiff's property were negligent. The trial judge rejected this assertion, noting this case involves matters of reasonableness and common knowledge. Defendant has identified "no particular expertise that would be necessary as in a medical malpractice case to determine whether there was a deviation from the standard of care." He added, "The jury can draw their own conclusions. But certainly, there are facts in the record that would support a reasonable inference in favor of [] plaintiff on the issue of liability."

The JCP&L troubleshooter who removed the downed pole at plaintiff's property explained to the jurors the steps he normally takes in responding to a call, noting that he is expected to make the area safe, by de-energizing the wires, placing a safety cone, and covering the hole with dirt, if available. In addition, the JCP&L supervisor explained to the jurors the utility's procedures for scheduling repairs and ordering mark-outs, as well as the customary amount of time taken to respond to incidents.

In light of this testimony, the jury appropriately was asked to assess whether defendant acted reasonably with respect to the condition in which it left plaintiff's property after removing the downed pole. The jury also appropriately was asked to ponder whether the time that elapsed until the condition was repaired — approximately two months — was reasonable. These are subjects within the common knowledge of laypersons and are capable of being decided by the jury without expert opinion.

Tellingly, although it is highly regulated, JCP&L has not identified any provision set forth in a statute, regulation, or industry guideline that specifies a standard of care addressing the specific questions of negligence posed here.[5] JCP&L has

[5] We hasten to add that mere compliance with an industry standard would not necessarily be conclusive proof of reasonable conduct. See Buccafusco v. Pub. Serv. Elec. & Gas Co., 49 N.J. Super.

failed to show that those questions are so esoteric or technical to be beyond jurors' common notions of reasonableness. Nor did JCP&L itself proffer a liability expert.

Although electrical power is undoubtedly a complex and technical subject matter that often would call for expert insight, plaintiff in this case was not harmed by an electrical shock or surge. She simply fell into or stumbled upon a hole in the ground, a hole which the jurors reasonably found to have been left unattended too long without durable warnings or barriers.

We therefore affirm the trial judge's decision allowing plaintiff to proceed to a jury without a liability expert. The judge rightly left it to the jury's common sense to decide the negligence issues, based on the evidence and general principles of reasonable care.[6]

385, 394 (App. Div.) (noting, specifically in a context involving a defendant public utility, "[a]dherence to an industry standard is not necessarily conclusive as to the issue of negligence and does not of itself absolve the defendant from liability"), certif. denied, 27 N.J. 74 (1958). As an extreme hypothetical example, if an industry standard leniently provided that a utility would not need to repair a hole left on residential property by a downed pole for, say, up to five years, a jury might rightly consider that time frame too long to be objectively reasonable.

[6] We do not foreclose the potential need for a liability expert on utility industry standards in a more complicated case. For example, such an expert might be necessary if a devastating storm or widespread power failure in our state had occurred and

B.

JCP&L next argues that the trial court wrongfully excluded proof of an August 27, 2012 office note by an orthopedic surgeon, Dr. Cary Glastein, which contained a description of the accident that allegedly varied materially from plaintiff's other narratives of the accident. In particular, Dr. Glastein's note states that plaintiff fell on "6/8/12", and that she had "tripped" when getting her mail "at nighttime." Plaintiff moved in limine before trial to exclude this note on hearsay and other grounds.

After conducting a Rule 104 hearing, Judge Den Uyl granted the motion in limine and excluded the note. The judge found the note to be inadmissible hearsay, and also that, as to its probative value, the note "has nothing to do with [Dr. Glastein's] medical opinion as to her diagnosis or prognosis or whether or not [her injuries were] causally related." The judge disallowed the note from being admitted as a prior inconsistent statement to impeach plaintiff's credibility, noting that its "marginal relevance" was "clearly outweighed by prejudice under [N.J.R.E.] 403."

---

the defendant had asserted a defense of resource allocation for dealing with the emergency. No such defense was argued in summation to the jury in this case. And, as we have noted, the downed pole and plaintiff's accident occurred months before Superstorm Sandy.

We are satisfied the trial judge did not misapply his discretion in excluding this office note entry. Hisenaj, supra, 194 N.J. at 16. We acknowledge that admission of the note would not violate the hearsay rules, if it were offered not for its truth but only for impeachment. See N.J.R.E. 801. In addition, assuming for sake of discussion there was sufficient authentication, the note appears to be a business record under N.J.R.E. 803(c)(6), and statements made by plaintiff within it would qualify as admissible statements by a party opponent under N.J.R.E. 803(b)(1).[7]

Nevertheless, the judge reasonably invoked Rule 403 in excluding the note after weighing its marginal probative value against the risks of undue prejudice and juror confusion. Plaintiff, Dr. Glastein's patient, did not review or confirm the accuracy of the note the doctor dictated. As Judge Den Uyl reasonably pointed out, the accident date recorded in the note, June 8, rather the actual date of June 18, could easily have been a typographical error. Moreover, even if plaintiff told

[7] It is debatable whether the note's recitation of the specific date of the accident, whether plaintiff "tripped" or "fell", and whether it was "nighttime" and whether the "lights were out," comprise facts that are "reasonably pertinent to [Dr. Glastein's] diagnosis or treatment" under the separate hearsay exception at N.J.R.E. 803(c)(4). The judge found that such information was not reasonably pertinent to diagnosis or treatment, and thus went beyond the "inception or general character of the cause or external source" of plaintiff's injuries admissible under the Rule. Ibid.

Dr. Glastein that she "tripped" in the hole rather than "stepped" or "fell" into it, such a minor difference of terminology is of little consequence. Likewise, the note indicating the accident happened at "night" is not manifestly inconsistent with plaintiff's testimony that she fell at about 6:30 p.m.

On the whole, the judge did not abuse his discretion in concluding that admission of the note was apt to confuse or mislead the jury. The evidential ruling caused no manifest injustice.

C.

JCP&L next argues that plaintiff's medical expert, Dr. Skolnick, provided improper testimony in several respects. In particular, JCP&L claims that Dr. Skolnick gave incorrect and speculative opinions about plaintiff's pre-accident injuries despite not having written corroboration of them in her pre-accident medical records, which had been destroyed due to age. JCP&L also contends that it is entitled to a new trial because Dr. Skolnick improperly testified that his opinions were consistent with his review of the records of a non-testifying radiologist. These arguments are unavailing.

Notably, JCP&L's former counsel failed to object to the testimony of Dr. Skolnick on these points at trial. Hence, we

review these contentions only for plain error. Pursuant to Rule 2:10-2, "[a]ny error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result."

N.J.R.E. 703 requires that an expert's opinion "be grounded in 'facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by the experts.'" Townsend, supra, 221 N.J. at 53 (quoting Polzo, supra, 196 N.J. at 583). The evidence rules thereby prohibit "speculative testimony" from an expert. Id. at 53-55; Koruba v. American Honda Motor Co., 396 N.J. Super. 517, 525 (App. Div. 2007), certif. denied, 194 N.J. 272 (2008).

During cross-examination of Dr. Skolnick, the following colloquy took place:

> [Defense Counsel]: In terms of taking the medical history, you did not inquire [of plaintiff] as to the severity of the back spasms, did you?
>
> [Dr. Skolnick]: Which back spasms?
>
> [Defense Counsel]: From the chiropractor seven years earlier.
>
> [Dr. Skolnick]: I did.
>
> [Defense Counsel]: What did she tell you?

> [Dr. Skolnick]: She told me she had back spasms. She went to the chiropractor five or six times. It got better and it all went away.
>
> [Defense Counsel]: Did you ask her how often it flared up?
>
> [Dr. Skolnick]: After that, it did not flare up?
>
> [Defense Counsel]: Did you ask her how often it flared up at that time?
>
> [Dr. Skolnick]: It was flared up for a period of a couple weeks until he treated her and she got better.
>
> [Defense Counsel]: And did you ask her whether she had it at all any time prior to that?
>
> [Dr. Skolnick]: I asked her did you have any problems with your back prior or after; . . . And she told me about the two weeks that she had seven years ago, and I documented it.

The record confirms that, in his report, Dr. Skolnick made note of plaintiff's history she had relayed to him. Applying his medical knowledge to what plaintiff had reported, Dr. Skolnick concluded plaintiff had previously suffered a temporary back strain rather than a sprain. Plaintiff reported the back injury had healed in approximately two weeks' time, whereas, as Dr. Skolnick commented, "Sprains don't necessarily always heal." Plaintiff reiterated this history in her own trial testimony.

By the time of trial, the records of Dr. Altamuro for this prior treatment of plaintiff, occurring seven or more years earlier, had been routinely destroyed. We reject defendant's contention that the chiropractor's routine destruction of plaintiff's records renders Dr. Skolnick's testimony about the prior back condition an inadmissible and speculative net opinion.

Rule 703 specifically authorizes expert witnesses to consider "facts or data" from any source reasonably used by experts in the field, regardless of whether that information is separately proven by admitted evidence. Dr. Skolnick was entitled to rely on the history that plaintiff had reported to him. The jury had an opportunity to consider the credibility of that undocumented information. Given the absence of defendant's objection, we detect no error, let alone plain error.

We likewise discern no plain error in the admission of this snippet of Dr. Skolnick's direct examination:

> [Plaintiff's Counsel]: And then, Doctor, lastly, have you had an opportunity to review the MRI reports? I believe there are two lumbar MRI reports — MRI studies and one study concerning the knee.
>
> [Dr. Skolnick]: That is correct.
>
> [Plaintiff's Counsel]: All right. Doctor, and without giving us the interpretation by the radiologist, can you tell us whether or

not your opinions are consistent with your review of those records.

[Dr. Skolnick]: They were.

Defendant contends this exchange represents impermissible "bootstrap" testimony by Dr. Skolnick, stating his opinions were consistent with the non-testifying radiologists' hearsay MRI reports. We agree the exchange comes close to exceeding the boundaries prescribed by James v. Ruiz, 440 N.J. Super. 45, 66 (App. Div. 2015), in which we held that N.J.R.E. 808 and other established hearsay principles prohibit a testifying expert from conveying to the jury, as a "conduit," the complex and disputed hearsay opinions of a non-testifying expert. We also held in James that this conduit prohibition "cannot be circumvented in the guise of questions asking about the 'consistency' or 'inconsistency' of a testifying expert's own opinions with the hearsay opinions of an expert who does not testify at trial." Id. at 71.

Even so, we detect no reversible error arising from this brief passage of Dr. Skolnick's testimony. As we have noted, defendant's trial counsel did not object to it. The failure to object "suggests that counsel 'perceived no error or prejudice, and, in any event, prevented the trial judge from remedying any possible confusion in a timely fashion.'" DiMaria Const., Inc. v. Interarch, 351 N.J. Super. 558, 570 (App. Div. 2001) (quoting

Bradford v. Kupper Assocs., 283 N.J. Super. 556, 573-74 (App. Div. 1995), certif. denied, 144 N.J. 586 (1996)), aff'd, 172 N.J. 182 (2002). The questioning did not reveal the substance of the MRI reports themselves. Moreover, unlike other situations where counsel unduly tried to capitalize on the improperly-admitted consistency testimony, plaintiff's counsel did not argue to the jury that the findings of the non-testifying radiologists were "tie-breakers" the jury should rely upon to resolve the dispute between the parties' competing experts. James, supra, 440 N.J. Super. at 72.

D.

JCP&L contends that its medical expert Dr. Bosniak should have been allowed to testify about aspects of Dr. Skolnick's written expert report discussing plaintiff's prior symptoms. This particular argument warrants little discussion.

Dr. Bosniak was permitted to testify at length concerning his opinions about the significance of plaintiff's previous injuries and treatment, in contrast to the testimony presented earlier in the trial by Dr. Skolnick. The defense was afforded an ample opportunity to set forth its position, without delving into the contents of plaintiff's expert's written report through the mouth of its own expert. The competing views of the experts were sufficiently ventilated before the jury, through their

respective spoken words on the witness stand. The judge did not abuse his discretion under Rule 403 to curtail the exploration of the pretrial expert reports, which were largely repetitive of the doctors' trial testimony.

E.

JCP&L contends that its trial counsel should have been permitted to cross-examine Dr. Skolnick about the finances of the forensic evaluation company he owns, in a further effort to show his testimony was biased. This point likewise fails to support reversal.

We recognize "[e]xtensive cross-examination of experts is generally permitted, subject to reasonably limitations imposed by the trial court in its discretion." Nowacki v. Cmty. Med. Ctr., 279 N.J. Super. 276, 290 (App. Div.), certif. denied, 141 N.J. 95 (1995). "'[T]he scope of cross-examination of a witness rests in the discretion of the trial' court and a decision to limit cross-examination will not be disturbed on appeal 'unless clear error and prejudice are shown.'" Casino Reinvestment Dev. Auth. v. Lustgarten, 332 N.J. Super. 472, 492 (App. Div.) (quoting Glenpointe Assocs. v. Twp. of Teaneck, 241 N.J. Super. 37, 54 (App. Div.), certif. denied, 122 N.J. 391 (1990)), certif. denied, 165 N.J. 607 (2000).

The trial judge here did not abuse his discretion in ruling that defense counsel's desire to probe into the finances of Dr. Skolnick's company was "getting too far afield," "confusing to the jury," unduly "prejudicial," and "setting up a sideshow." The judge also noted that, even if the testimony sought from the expert had "some marginal relevance," it must be excluded under N.J.R.E. 403.

A substantial portion of defense counsel's cross-examination of Dr. Skolnick probed into credibility and bias issues. Counsel questioned the doctor about his history as a physician, and the fact that he has not treated patients or performed surgery since 2006, and now focuses solely on providing medical evaluations. Moreover, counsel elicited from Dr. Skolnick that his company's sole purpose is to prepare medical reports, and approximately eighty percent of the time is hired by a plaintiff in a lawsuit. Dr. Skolnick was also questioned about how much his company charged for evaluations, and how much the company was paid in this particular case, as well as the company's average monthly charges.

The judge appropriately exercised his discretion in declining to allow defense counsel to delve further and query Dr. Skolnick about collateral issues that would get into his company's tax returns, net profits, and earnings. The judge's

observation that such additional queries would taking the jury "far afield" was well taken.

F.

JCP&L asserts the trial court erred in reading an aggravation charge to the jury, as there allegedly was no assertion of an aggravated injury at trial. We discern no such error.

Our opinion in Edwards v. Walsh, 397 N.J. Super. 567 (App. Div. 2007), is instructive. In that personal injury case, the plaintiff suffered from disc herniation in her spine after being involved in a car accident. Id. at 569. During the trial, the plaintiff's medical experts testified that the disc herniation was the result of the accident. Id. at 570. However, the defendant's medical expert opined that the herniation was the result of pre-existing degenerative disease. Id. at 570-71. Based on this testimony, the trial judge elected to read an aggravation charge to the jury. Id. at 572. On appeal, we held that the judge did not err in reading the aggravation charge, because "[a]lthough [the] plaintiff did not raise the issue in her direct case — indeed, plaintiff denied any pre-existing injury — defendant raised it in cross-examining[.]" Ibid. Because the defendant had put the issue of a pre-existing

condition "in play," the charge of aggravation was appropriate. Ibid.

Similar to Edwards, plaintiff in this case did not initially advance a claim of aggravation. But the defense injected the issue by attempting to attribute plaintiff's back and knee problems entirely to pre-existing injuries. For example, on cross-examination of Dr. Skolnick, defense counsel questioned him regarding his opinion on plaintiff's treatment for back spasms that she suffered around 2007. Defense counsel also brought out on cross-examination that Dr. Skolnick had noted evidence of degeneration in the MRI reports. Furthermore, defendant's own medical expert, Dr. Bosniak, testified at length regarding plaintiff's pre-existing conditions. As Dr. Bosniak opined, "there was a considerable amount of pre-existing wear and tear or degenerative arthritic changes present at her low back, as well as at her knee, all of which were present well before the accident." Dr. Bosniak concluded that plaintiff's degeneration, combined with the fall, led to the necessity of spinal fusion surgery.

These defense efforts to focus on plaintiff's pre-existing condition "opened the door" to plaintiff countering with an argument that, to the extent the jury believed her pre-existing conditions played a role in her pain and her need for surgery,

then defendant bears responsibility for causing the aggravation of those conditions.

Defendant objected during the charge conference to the court's proposed issuance of an aggravation charge to the jury. Judge Den Uyl overruled that objection. He instructed the jury that:

> The plaintiff had a degenerative condition in her spine and also at her knee. However, with respect to her back, there was more particular testimony elicited, and that is the accident aggravated this preexisting condition of degenerative disease of this — this pathology in her back. It gave rise to her back injury and, ultimately, her back fusion [surgery]. . . . [T]here was testimony elicited from Dr. Bosniak that there was a, what we call, an aggravation of a preexisting disability.

The judge then proceeded to deliver a charge on aggravation that tracked the Model Charge. Model Jury Charge (Civil), 8:11F, "Aggravation of the Preexisting Disability" (approved January 1997).

Consistent with our comparable holding in Edwards, this aggravation instruction was entirely appropriate under the circumstances.

G.

As another charge issue, JCP&L complains the trial court erred in instructing the jury about its options for finding liability, and improperly omitted the option of finding

defendant not negligent. Because defense counsel failed to object to this aspect of the charge at trial, we review the issue for plain error. R. 2:10-2.

While instructing the jury, the judge stated that defendant denied that it was negligent, disputed the nature and extent of the injuries, and further asserted that plaintiff was negligent and caused her injuries. Moreover, the judge reminded the jury that the applicable standard of proof was preponderance of the evidence, and that plaintiff bore the burden of proof of proving that defendant was negligent, but to the extent defendant alleged that plaintiff was negligent, defendant bore that burden of proof.

The judge then instructed the jury on principles of comparative negligence. The judge noted in this regard that the jury had "three options in this case." As the judge advised the jury:

> You can find that the — plaintiff was negligent. You can find the defendant was negligent. Or you can find that both parties were negligent. And it's a situation where if you find that both the plaintiff and the defendant were negligent in the proximate cause of the accident where you get into comparing and you have to assign percentages.

The judge further explained that "plaintiff has the burden of proof for . . . the issues of negligence and proximate cause as

against the defendant for this accident and also proving proximate cause to the extent that the accident was the proximate cause of her injuries." The judge also informed the jury regarding principles of duty and breach, and instructed that if the jury determined that defendant took "appropriate action" to fix the light, the verdict would be in favor of defendant. In addition, the judge instructed the jury regarding the burden of proof, and that plaintiff needed to overcome this burden in order to reach the step of allocating percentages.

When evaluating whether an alleged flaw in a jury trial compels a new trial, we must consider the charge as a whole. State v. Simon, 161 N.J. 416, 477 (1999). The alleged error must be "viewed in the totality of the entire charge, not in isolation." State v. Chapland, 187 N.J. 275, 289 (2006); see also Viscik, supra, 173 N.J. at 18.

Here, given the context of the entire jury charge, the judge did not omit the possibility that the jury could find defendant not negligent. The "three options" referenced by the judge, although they were not exhaustive,[8] lacked the capacity to mislead the jury, in light of the many other appropriate points of guidance contained in the charge.

[8] The fourth option not explicitly mentioned by the judge is that the jury could find that neither plaintiff nor defendant was negligent. However, as we have pointed out, that possibility was surely implicit from the remainder of the charge.

H.

Defendant lastly asserts that it is entitled to a new trial because of the cumulative effect of multiple alleged errors by the trial court. We disagree.

An appellate court may reverse a trial court's judgment "if 'the cumulative effect of small errors [is] so great as to work prejudice[.]'" Torres v. Pabon, 225 N.J. 167, 190 (2016) (quoting Pellicer v. St. Barnabas Hosp., 200 N.J. 22, 53 (2009)). The cumulative error doctrine provides that where a court's legal errors "are of such magnitude as to prejudice the defendant's rights or, in their aggregate have rendered the trial unfair," a new trial by jury must be granted. State v. Orecchio, 16 N.J. 125, 129 (1954). Under this doctrine, "when an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal." State v. Jenewicz, 193 N.J. 440, 473 (2008).

Nevertheless, even where a litigant alleges multiple errors, "the theory of cumulative error will still not apply where no error was prejudicial and the trial was fair." State v. Weaver, 219 N.J. 131, 155 (2014). Further, where an appellate court finds no errors in a trial, a defendant's invocation of the cumulative error doctrine is of no avail. See

State v. Rambo, 401 N.J. Super. 506, 527 (App. Div.), certif. denied, 197 N.J. 258 (2008).

For the reasons we have already stated, we are unpersuaded by each of defendant's separate claims of reversible trial errors. To the contrary, we are impressed from our review of the transcripts that the trial was fair, and that the judge deftly supervised the proceedings in a thoughtful and skillful manner. There were no proven errors, either singularly or in combination, to warrant a new trial.

Affirmed.