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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.

APPROVED FOR PUBLICATION
AS REDACTED
December 7, 2017

APPELLATE DIVISION

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 Offices of Roy D. Curnow, attorneys; 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 (continued)

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

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(continued)
a belief the photos were taken after her fall. However, at 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."

jobs are scheduled "on a date basis and an area basis," with priority given to areas that need emergency power restoration. 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-

[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.

out from the subcontractor, JCP&L placed another cone over the hole on June 28 and sprayed the area with white paint.

Plaintiff's Course of Treatment and Surgery

[At the direction of the court, the published version of this opinion omits this portion discussing plaintiff's course of treatment and surgery. See R. 1:36-3.]

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 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.

[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. 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.

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]

> **[At the direction of the court, the published version of this opinion omits the discussion of additional issues in Parts II(B) through II(H). See R. 1:36-3.]**

Affirmed.

[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 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.