SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0879-14T1

BARBARA ORIENTALE, and
MICHAEL ORIENTALE,

Plaintiffs-Appellants,

v.

DARRIN L. JENNINGS,

Defendant,

and

ALLSTATE NEW JERSEY
INSURANCE COMPANY,

Defendant-Respondent.

Argued September 20, 2016 – Decided July 25, 2017

Before Judges Messano, Espinosa and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-3476-12.

Jonathan H. Lomurro argued the cause for appellants (Lomurro, Munson, Comer, Brown & Schottland, LLC, attorneys; Mr. Lomurro, of counsel and on the briefs; Christina Vassiliou Harvey, on the briefs).

Kenneth N. Lipstein argued the cause for respondent.

PER CURIAM

Plaintiffs appeal from an order that awarded them additur in lieu of a new trial, challenging the amount of the award. We affirm.

I.

Following a motor vehicle accident, plaintiff Barbara Orientale[1] settled with the negligent driver for $100,000, the policy limit of his insurance policy. She then filed suit against her own insurer, defendant Allstate New Jersey Insurance Company, under the underinsured motorist provision of her policy to obtain further recovery for her injuries and for her husband's loss of consortium claim.

Following a damages only trial, the jury found plaintiff had suffered a permanent injury and awarded her $200 in damages. The jury awarded no money on the loss of consortium claim. In light of the $100,000 recovery from the tortfeasor, the verdict was molded to a "No Cause for action."

[1] Our references to "plaintiff" are to Barbara Orientale.

Plaintiffs filed a motion "for a new trial on the value of plaintiff's injuries"[2] and at oral argument, agreed that their request was, in the alternative, for additur.

The trial judge found the $200 award constituted a miscarriage of justice and that, pursuant to Rule 4:49-1(a), additur was appropriate.[3] He determined [t]he lowest verdict that a reasonable jury could have reached based on the proofs in this case" was $47,500, and therefore added $47,300 to the jury award of $200. Because the amount did not exceed the $100,000 obtained from the tortfeasor and the order was entered as a "No Cause for action."

In this appeal, plaintiffs argue the trial court applied the wrong standard for additur and erred in the analysis used to determine the additur amount. Plaintiffs argue further that this court should either make its own additur award based upon the comparable verdicts supplied to the trial judge or remand for a new trial on damages in front of a different judge. Plaintiffs contend the trial judge erred in basing the additur amount "upon

---

[2] Plaintiffs' motion did not articulate any grounds for a new trial regarding the loss of consortium claim and the trial judge noted he "[did not] consider the application for a new trial or additur to address consortium." Plaintiffs did not contend otherwise.

[3] Defendant consented to the additur award granted by the trial judge and did not cross-appeal. Accordingly, it has presented no argument on appeal regarding liability, the jury's finding as to permanency or the trial judge's decision that the $200 jury verdict should be set aside.

the lowest value that a reasonable jury could find." Citing Tronolone v. Palmer, 224 N.J. Super. 92, 103 (App. Div. 1988), they argue the trial court was required to "attempt the difficult task of determining the amount that a reasonable jury, properly instructed, would have awarded." Plaintiffs argue that, in selecting the lowest amount a jury would find, the trial judge failed to adhere to this standard; the trial judge erred in weighing the evidence; and the amount of the additur had no basis in any of the cases reviewed by the trial court.

After reviewing these arguments in light of the record and applicable legal principles, we conclude that plaintiffs' challenge to the additur award lacks merit and, therefore, their remaining arguments are moot.

II.

"Additur and remittitur are legitimate mechanisms justified by the desirability of avoiding the expense and delay of a new trial" when the amount of a damages verdict constitutes a manifest injustice that may be corrected without disturbing a liability verdict. Id. at 97-98. Because they present mirror images of remedies designed to cure the same ill — a damages verdict that constitutes a manifest injustice — the principles applicable to a court's review of an excessive verdict for purposes of remittitur also apply to the review of "a shockingly low damage verdict."

Id. at 98. In Cuevas v. Wentworth Grp., 226 N.J. 480 (2016), the Supreme Court described the fundamental principles governing remittitur. As applied to additur, those principles are:

> [A] jury verdict is presumed to be correct and entitled to substantial deference, that the trial record underlying a [additur] motion must be viewed in the light most favorable to the [defendant], and that the judge does not sit as a decisive juror and should not overturn a damages award falling within a wide acceptable range – a range that accounts for the fact that different juries might return very different awards even in the same case.
>
> [Id. at 486.]

A.

In Fertile v. St. Michael's Med. Ctr., 169 N.J. 481, 500 (2001), the Court approved the approach taken by the trial judge here within the context of a remittitur award, stating:

> Because the process of remittitur is essentially to "lop-off" excess verdict amounts, and not to substitute the court's weighing and balancing for that of the jury, remitting the award to the highest figure that could be supported by the evidence is the most analytically solid approach.

The Court observed, "commentators have concluded that such an approach tampers least with the intentions of the jurors, who by implication wanted to fully compensate the plaintiffs." Ibid. (citation and internal quotation marks omitted); see also Jastram ex rel. Jastram v. Kruse, 197 N.J. 216, 228 (2008) (noting the court's role "in assessing a jury verdict for excessiveness is to

assure that compensatory damages awarded to a plaintiff encompass no more than the amount that will make the plaintiff whole" (citation and internal quotation marks omitted)). Applying these principles to the determination of an additur award, the award should be "the [lowest] figure that could be supported by the evidence." Fertile, supra, 169 N.J. at 500. Whether additur or remittitur, the goal is to bring the award within the "broad range of acceptable outcomes." Cuevas, supra, 226 N.J. at 508.

Thus, the standard applied by the trial judge — that he should determine the "the lowest verdict that a reasonable jury could have reached based on the proof in this case" — was correct.

B.

At the time the motion was decided, the judge was guided by our Supreme Court's decision in He v. Miller, 207 N.J. 230, 258-59 (2011), which held that a trial judge could — and, arguably, should — rely on the judge's personal knowledge of verdicts from private practice and "comparable" verdicts submitted by the parties to a remittitur motion. In keeping with that holding, the trial judge afforded the parties an opportunity to provide comparable verdicts and referred to those verdicts in setting forth the reasons for the amount of the additur award.

In Cuevas, supra, 226 N.J. at 486, which was decided after the motion was decided here, the Court noted and did not alter the

"fundamental principles governing remittitur jurisprudence" articulated in He and described above. However, the Court concluded that the method endorsed in He to implement those principles was "not sound in principle or workable in practice." Ibid. The Court specifically disapproved reliance upon the trial "judge's personal knowledge of" other verdicts and "the comparative-verdict methodology that allows parties to present supposedly comparable verdicts based on case summaries." Ibid.

The Court directed trial courts to "focus their attention on the record of the case at issue." Id. at 505. The Court acknowledged "different juries and judges may have different views on the issue of adequate compensation for pain and suffering -- all reasonable and falling within a broad range of acceptable outcomes." Id. at 508. Although we apply the same standard for reviewing the damages award as the trial court, we "must pay some deference to a trial judge's 'feel of the case.'" Id. at 501 (quoting Johnson v. Scaccetti, 192 N.J. 256, 282 (2007)).

The trial judge here recited each of the "comparable" verdicts presented to him by counsel. However, he noted the "wide divergence" in the results "suggests that predicting what a jury might do in any particular case is a fool's errand," because of the differences in each case, lawyer, jury, judge, county and year. It is evident from the transcript that the judge did not

reach his conclusion as to the appropriate amount of the additur award by relying upon the methodology rejected by the Supreme Court in Cuevas.

In his decision, the trial judge first reviewed the evidence regarding plaintiff's injuries and the impact on her life, noting the following:

At the time of the accident, plaintiff was forty-five years old with a life expectancy of 34.7 years. She had a thirteen-year old daughter and a ten-year-old son. Because her husband was permanently disabled and unable to work, she was the only income earner. She continued to work at the job she had before the accident, a delicatessen clerk in a supermarket, and was "able to ameliorate the physicality of the job through the assistance of her [fellow] employees." She bore the responsibility for "the bulk of the family functions" and, despite "constant and unremitting pain," she "continue[d] to vacuum, clean, move furniture when required, maintain the yard, [and] do the laundry." Her ability to participate in her children's activities, such as attending their events, "was severely compromised . . . because she [could not] sit for a long period."

The trial judge described plaintiff's pain as "constant and unremitting," "sometimes of an extreme nature," often requiring her to sleep in a recliner. He noted that she continued with pain

management therapy as a result. The trial judge also reviewed the medical testimony and noted the jury's finding that plaintiff suffered a permanent injury reflected its assessment that the medical testimony she proffered was credible.

The trial judge provided reasons why he determined "any additur awarded will be on the lower edge of the [c]ourt's discretion," which included the following:

> Ms. Orientale through necessity has continued to work through all the pain and discomfort, she is not bedridden. The jury may have weighed this factor heavily.
>
> [T]he reviewing court must assume that the jury found the credibility of some of plaintiff's witnesses low, particularly the day to day [e]ffects of Ms. Orientale's life.

At another point in his decision, the trial judge commented on the jury's failure to award any damages to plaintiff's husband on the loss of consortium claim: "A jury had every right to conclude that his testimony on that claim was overstated or inflated or less than credible," and that there could be a spillover effect when the jury discounted the credibility of one witness in assessing other witnesses. He concluded,

> Considering this court's feel of the case[,] . . . the lowest verdict that a reasonable jury could have reached based on the proofs in this case, in consideration of the cases cited above in New Jersey is $47,500. That is to say, the jury has already awarded $200, I'm adding $47,300.

We are satisfied that, despite the trial judge's reference to the "comparable" verdicts supplied to him, the award he chose was anchored in his familiarity with the record and "feel of the case." In his approach, he acknowledged the presumption of correctness due the jury verdict. In reviewing the evidence, he noted the jury had found credible plaintiffs' proofs regarding permanency and also cited reasons why the jury may have found less credible the testimony of other witnesses. The resulting award does not shock the judicial conscience. See Cuevas, supra, 226 N.J. at 485.

Giving appropriate deference to the trial judge's feel of the case, we discern no grounds for disturbing the additur award here.

Affirmed.