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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1091-16T4

PATRICIA A. CZMYR,

Plaintiff-Respondent,

v.

DARLENE S. ALDEROTY,

Defendant-Appellant.

Argued May 10, 2017 – Decided July 28, 2017

Before Judges Lihotz, Hoffman and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4731-14.

Lisa R. Marshall argued the cause for appellant (Law Offices of Viscomi & Lyons, attorneys; Ms. Marshall, on the brief).

Charles F. Kenny argued the cause for respondent (LoPiano Kenny & Stinson, attorneys; Mr. Kenny of counsel and on the brief; Caitlin Rizzo, on the brief).

PER CURIAM

Defendant Darlene S. Alderoty appeals from a Law Division order granting plaintiff Patricia A. Czmyr a new trial. During her cross-examination of plaintiff, defense counsel repeatedly

asked her, despite repeated objections, whether she remembered complaining to her doctor about neck, back, and shoulder pain on numerous occasions before the underlying accident. When plaintiff said no, defense counsel told the jury she was showing plaintiff her medical records to try to refresh her memory. Defense counsel never admitted the records under an exception to inadmissible hearsay. After the trial court issued a curative instruction, the jury returned a $3200 verdict in favor of plaintiff. Plaintiff moved for a new trial on damages, which the trial court granted, finding the $3200 award "grossly inadequate" and concluding defense counsel's inappropriate cross-examination "improperly influenced" the jury. We affirm.

I.

We discern these facts from the trial record. On October 11, 2012, plaintiff stopped her car for a red light and then "was hit from behind . . . and jolted . . . back and forth." Defendant operated the rear-ending car. According to plaintiff, when she got out of her car, "I just did not feel right, especially in my head. . . . [I]t was very fuzzy, just a nauseous type of feeling, very tight and tense, especially through the lower back up through my neck." Plaintiff did not "feel there was a need to" call an ambulance, so she drove to her original destination, her eye doctor. When plaintiff's pain increased in the days following the

accident, she scheduled an appointment to see Edward Magaziner, M.D., a pain management doctor who previously treated her following motor vehicle accidents in 1992 and 2000. At her first appointment, plaintiff presented complaints regarding her neck, lower back, center back, shoulder, and right elbow.

Dr. Magaziner saw plaintiff eight times over the course of the next year. He recommended plaintiff undergo two courses of physical therapy, which she completed from November 2012 through March 2013, and from June 2013 through July 17, 2013. Dr. Magaziner also referred plaintiff for chiropractic treatment, which she received between August 2013 and April 2014. For plaintiff's left shoulder injury, she received treatment from an orthopedist, including three injections into her left shoulder. Plaintiff testified the injections did not improve her functioning, but did provide minimal pain relief. Plaintiff said she declined her doctor's recommendation of shoulder replacement surgery, but planned to receive another injection.

Plaintiff also testified regarding prior injuries she sustained, including: a 1992 motor vehicle accident, when she incurred neck, back, and left knee injuries; a 1995 work-related accident, when she sustained a left elbow injury; and a 2000 motor vehicle accident, when she sustained neck, back, left shoulder, right hand, and right thumb injuries. Plaintiff stated that prior

to the subject accident, she felt pain in her neck, back, or left shoulder on some days, and other days she would feel no pain. She described this pain as "frustrating," but said it did not interfere with her functioning or activities of daily living. Plaintiff described her left shoulder pain before the subject accident as "intermittent," and "a seven" on a one–to-ten scale when she felt pain; however, since the accident, she experiences "constant" shoulder pain, which she rated "[a]bout a nine." Plaintiff said the injuries to her left shoulder represent her biggest complaint.

Plaintiff testified she currently takes over-the-counter medications to alleviate her pain, explaining she does not want to take narcotics. Plaintiff said she currently encounters difficulty performing various activities of daily living, such as dressing, bathing, and shaving, due to her neck, back, and left shoulder pain and other limitations, particularly if the activity involves reaching with her left arm. Plaintiff also described difficulty performing yardwork and caring for her elderly rescue dog, a golden retriever. Plaintiff stated she received no treatment for her neck, back, or shoulder for approximately two years before the subject accident.

Plaintiff also presented the videotaped de bene esse deposition of Dr. Magaziner, who testified plaintiff sustained the following injuries as a result of the subject accident: L5-S1 disc

herniation; left supraspinatus rotator cuff tear; additional ligament injury to the cervical, thoracic and lumbar spine, which will not heal to function normally; and right elbow epicondylitis, which resolved.

Dr. Magaziner acknowledged plaintiff's previous medical issues, noting she

> did have some arthritis in the shoulder. She did have arthritis in the neck and degenerative disc disease in the neck. She did have arthritis in the lower back and some disc bulges in her lower back and some degeneration in her lower back. She did have a history of what we call carpal tunnel syndrome and tarsal tunnel syndrome . . . .

On cross-examination, Dr. Magaziner acknowledged treating plaintiff for neck, shoulder, lower back, and forearm injuries after an automobile accident in 2000. He treated her every year from 2003 to 2010. On July 28, 2010, he noted plaintiff was "having a flare-up of pain in her left neck, left wrist, lumbar back[,] and left shoulder. . . . [S]he has [a] known diagnosis of cervical sprain superimposed on degenerative joint disc disease, left shoulder tendonitis, tendonitis of the left wrist superimposed on a degenerative process[,] and lumbar sprain . . . ."

Dr. Magaziner ultimately concluded plaintiff

> had an exacerbation of some previous injuries with the sprains to the neck, mid and lower back which now became chronic muscle spasms

> and [a] chronic pain situation. The shoulder injury[,] although she did have pre-existing degeneration in the shoulder, it was in this accident with the seatbelt holding yourself back and with the forces that occur with that, and we see all the time, it caused that rotator cuff . . . to tear[,] and . . . she developed a further sprain to that shoulder in terms of the AC joint that we discussed about before, and if I didn't mention it, the L5-1 disc herniation . . . .

Defendant briefly testified about the accident, which she described as "just a tap, that my bumper just tapped hers." Defendant stated her vehicle sustained "no damage," and she did not see any damage to plaintiff's car, only "a few scuff marks on the bumper."

Defendant then presented the videotaped de bene esse deposition of her medical expert, Steven Hausmann, M.D., an orthopedic surgeon. Dr. Hausmann reviewed plaintiff's MRIs from two months before the accident[1] and compared them with plaintiff's MRIs from after the accident. He concluded all of plaintiff's back and shoulder issues were degenerative, not traumatic, both before and after the accident. He found no "objective evidence that [plaintiff] sustained a permanent injury as a result of th[e] accident." He did note, however, that she had "an exacerbation

[1] The record indicates plaintiff's cardiologist ordered the MRIs in August 2012 as part of an initial cardiology workup.

of her degenerative disease, which means a temporary worsening due to the impact from the accident."

The focus of this appeal occurred during the cross-examination of plaintiff, when defense counsel asked her four times about various medical visits with her primary care doctor. Defense counsel posed these questions even though she did not intend to call the primary care doctor or any employee of his office to introduce any of the doctor's office records. Nevertheless, defense counsel proceeded with the following cross-examination:

> Q: Do you recall going on October 19th of 2012 to see your doctor for a follow up? It was a seven-month follow-up visit?
>
> A: Which doctor is that?
>
> Q: This is your primary care doctor . . . . Who is your primary care doctor?
>
> A: Is it Friedman?
>
> Q: Dr. Friedman. Yes.
>
> A: It was probably an appointment I had for months. Yes. I do follow up with him.
>
> Q: And do you remember complaining at that time of back and neck pain but no complaint of shoulder pain?
>
> A: That, I don't recall.
>
> [Defense counsel]: Okay. Your Honor, may I approach the witness?
>
> [The court]: Sure.

[Plaintiff's counsel]: Your Honor, I object.

[The court]: To her approaching the witness?

[Plaintiff's counsel]: Well, I'm anticipating the next question. I'm just trying to avoid a –

[The court]: Well, let's hear what the question is.

[Plaintiff's counsel]: Okay.

[Defense counsel]: Thank you. . . . I'll mark this as D-3.

[The court]: Okay. What is it?

[Defense counsel]: . . . . It's the medical record.

. . . .

[The court]: D-3 is, you say, her records?

[Defense counsel]: Yes.

[The court]: Okay.

[Defense counsel]: This is the medical record.

Q: And, at that time, your primary care doctor said that you –

. . . .

[The court]: That's objectionable. That's hearsay.

[Defense counsel]: Let me . . . refer you to that.

[Plaintiff's counsel]: Well, there's no question pending, right?

[The court]: I know. She's just . . . having her look at it to refresh her recollection.

[Plaintiff]: Okay.

Q: After reviewing this note, do you remember going to see your primary care doctor?

A: No. I really don't.

Q: Okay. Do you remember your doctor referring you to Dr. Magaziner?

A: I know at one point when I was at his office, we discussed things like that, but I don't remember when that was.

Q: You don't remember anything about that?

A: No.

Q: Do you remember making other complaints of back and neck pain to your primary care doctor in between that time period that you were just asked about the year before the accident, a year or two before, between 2010 and 2012? Do you remember making any complaints?

A: Just general discussion.

Q: What do you mean by "general discussion?"

A: If he – like when you go to any doctor's office, they ask, oh, if you have a pain or what's been going on, that type of thing.

Q: Do you remember going on March 19th of 2010 and complaining about back pain?

A: No.

[Plaintiff's counsel]: Your Honor, . . . I object for the same reason.

[The court]: Again, what are . . . you asking if she remembers?

[Defense counsel]: Well, I can refresh her recollection.

[The court]: No. You can't. It's not her document. So the question is, what are you asking her to recollect? If she doesn't remember, she doesn't remember.

[Defense counsel]: I'm asking if she recalls going and I thought I would have an opportunity for her to look at the notes to refresh her recollection.

[The court]: You can show her that to refresh any recollection she may have, so you can go through the same exercise again. We'll mark it as D-4.

[Defense counsel]: Okay.

[The court]: And then you can ask the witness if she remembers it.

. . . .

[The court]: Just take a look at it and tell us if you recall that visit to that doctor.

A: My name is on here. I guess I was there.

[The court]: The question is, do you recall being at that visit?

A: No. I don't.

[The court]: Okay. Next?

Q: Do you remember making a complaint to the doctor August 25th of 2010 that you were having neck and back pain here and there?

[Plaintiff's counsel]: Your Honor, –

[The court]: Again, – again, let's go to sidebar.

[Defense counsel]: Okay.

(Off-the-record discussion at side bar)

[The court]: Ladies and gentlemen of the jury, just so you understand and I am instructing you that these records are not authenticated, not to be held by a witness, so they're basically hearsay documents, which we don't know how genuine they are or not. So, therefore, that's why [h]e objected . . . [,] and the objection is appropriate because that's why they cannot even be read to the witness at this time. So I'm going to ask that [defense counsel] just continue the line of questioning[,] and we'll continue from there.

Q: Do you remember going to your doctor about January 18th of 2011 because you had injured your back while shoveling snow?

A: No. I don't.

[Plaintiff's counsel]: Your Honor, –

[The court]: Again, – well, –

[Plaintiff's counsel]: The same objection.

[Defense counsel]: Well, –

[The court]: Well, no. . . . [T]hat has nothing to do with anything other than whether or not she remembers having ever done that. The answer is, no. The question is not evidence. It's just the answer. So the answer is no, she doesn't remember any such thing.

[Defense counsel]: May –

[The court]: You may continue.

> [Defense counsel]: May I show the witness a document just to see if it will refresh her recollection?
>
> [The court]: No. It's not her document. None of her documents are here.
>
> Q: And at the time of the . . . accident in 2012, . . . do you remember if you were still feeling some pain in your neck and back around that time? You don't remember whether or not you were, correct?
>
> A: No. I don't remember that.
>
> Q: And . . . you can't say whether or not you were feeling pain in your left shoulder at the time of the 2012 accident either. Is that right?
>
> A: That's correct.

By the end of plaintiff's testimony, the court realized that defense counsel's cross-examination improperly presented plaintiff with inadmissible documents in front of the jury.[2] Recognizing the need for a curative instruction, the next morning, before summations, the judge gave the jury the following instruction:

> I . . . want to talk to you . . . before we get started about the defense [c]ounsel's

[2] At the new trial motion hearing, the judge offered the following explanation for what occurred during the cross-examination of plaintiff:

> I just think that it was unfortunate that these were records that were not authenticated. I, frankly, when they first started, I thought they were authenticated records. I thought there was no question about them being – you know, being identified and put into evidence and they weren't.

cross-examination of plaintiff and several questions you asked regarding statements allegedly made to a doctor.

I want to remind you that the questions were, in fact, improper. You have to disregard the questions and any answers that may have been given. Just because there's been no evidence presented in this case indicating that plaintiff complained to any doctor regarding any pain or injury, other than as testified to by Dr. Magaziner. What he testified to is obviously evidence in this case. You can disregard any assertion to the contrary.

While defense [c]ounsel may have been reading from some document, those documents have not been offered or admitted as evidence in this case[,] and, therefore, they're unauthenticated, unreliable, and inadmissible under our rules of court[,] and as I explained to you earlier when I gave you preliminary instructions, the questions the attorneys ask are not evidence. Only the answers are[,] and . . . if I exclude something from evidence, don't speculate or guess what it might even say. And so only the answers given by the witness are evidence. So you can at this point disregard the line of questioning from the defense [c]ounsel and the implications made from those questions.

I also want to remind you or instruct you that plaintiff's [c]ounsel's objections were proper[,] and that's to protect the jury from unreliable and inadmissible evidence. So he was obligated to make those instructions, those objections. I wanted to make sure that you understand that the plaintiff's [c]ounsel could not be considered to have making any objections to prevent you from hearing any evidence or hiding anything from you. Any evidence that's admissible will go to the jury, just so you understand.

After the defense rested, plaintiff moved for a directed verdict on liability, citing Dolson v. Anastasia, 55 N.J. 2 (1959), which the trial court granted. After the jury awarded damages of only $3200, plaintiff filed a motion for a new trial or additur. At the beginning of oral argument, the court said, "[C]learly, it's a fairly low damage award. The question is why. I mean, that's really the issue and is there anything about that questioning, which, you know, pretty much makes the jury suspicious of her[,] and that's really the issue." The court added:

> There's no question that there is evidence to support a jury verdict that she did not sustain significant long-term injuries . . . . But the problem is, to what extent is the jury verdict a reflection of that nagging credibility issue. That's the . . . crux of what [plaintiff's] argument is and, frankly, . . . at the time, . . . I thought there was a request for a mistrial, if I recall. And I . . . was willing to let the jury hear it and hope . . . maybe they would rehabilitate it[,] or he would be able to rehabilitate it. . . . [T]o me, the verdict is exceedingly low. There's no question about it.

In response to defendant's argument that defense counsel's cross-examination could not shock the jury because they knew plaintiff had neck, back, and shoulder pain before the accident, the court said, "I appreciate that, but the test is not whether . . . the jury was shocked by it. The question is whether it shocks my conscience that they came up with a number, which I

think is just grossly inadequate to even pain and suffering, frankly."

At the conclusion of oral argument, the court granted plaintiff a new trial. The court explained,

> . . . I heard the whole trial[,] and . . . I can see the jury's reaction[,] and that, to me, is a significant issue[,] and I was concerned about it[,] and . . . I said on the record or at side bar . . . we'll see what the jury does with it[,] and I think the jury was influenced by it[,] and I think they were improperly influenced by it[,] and I think [plaintiff's counsel] characterized my curative instruction as valiant, which is nice, but it just seemed ineffective[,] and that's what it comes down to.

Defendant then filed this appeal.

II.

A jury verdict is entitled to considerable deference, Risko v. Thompson Muller Auto. Grp. Inc., 206 N.J. 506, 521 (2011), and should not be set aside by a trial court unless, "after canvassing the record and weighing the evidence, . . . the continued viability of the judgment would constitute a manifest denial of justice." Baxter v. Fairmont Food Co., 74 N.J. 588, 597-98 (1977); see Risko, supra, 206 N.J. at 521 ("[A] motion for a new trial should be granted only after 'having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law.'" (quoting R. 4:49-1(a)). Trial courts must refrain

from substituting their own conclusions for that of the jury "merely because he [or she] would have reached the opposite conclusion." Ibid. (alteration in original) (quoting Dolson, supra, 55 N.J. at 6).

Appellate review is guided by a similar standard. This court reverses the grant or denial of a motion for a new trial only when "it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1; see Bender v. Adelson, 187 N.J. 411, 431 (2006).

> A "miscarriage of justice" has been described as a "pervading sense of 'wrongness' needed to justify [an] appellate or trial judge undoing of a jury verdict . . . [which] can arise . . . from [the] manifest lack of inherently credible evidence to support the finding, obvious overlooking or under-valuation of crucial evidence, [or] a clearly unjust result. . . .'"
>
> [Risko, supra, 206 N.J. at 521 (alterations in original) (quoting Lindenmuth v. Holden, 296 N.J. Super. 42, 48 (App. Div. 1996), certif. denied, 149 N.J. 34 (1997)).]

"[A] civil plaintiff has a constitutional right to have a jury decide the merits and worth of [his or] her case." Johnson v. Scaccetti, 192 N.J. 256, 279 (2007) (citing N.J. Const. art. I, ¶ 9). Our Supreme Court has long held:

> The decision on whether inadmissible evidence is of such a nature as to be susceptible of being cured by a cautionary or limiting instruction, or instead requires the more severe response of a mistrial, is one that is

> peculiarly within the competence of the trial judge, who has the feel of the case and is best equipped to gauge the effect of a prejudicial comment on the jury in the overall setting.
>
> [State v. Winter, 96 N.J. 640, 646-47 (1984).]

The same is true in civil cases, Khan v. Singh, 397 N.J. Super. 184, 202 (App. Div. 2007), aff'd, 200 N.J. 82 (2009), and for comments by counsel, State v. Yough, 208 N.J. 385, 397 (2011). "The determination of whether the appropriate response is a curative instruction, as well as the language and detail of the instruction, is within the discretion of the trial judge[.]" State v. Wakefield, 190 N.J. 397, 486 (2007) (quoting State v. Loftin (I), 146 N.J. 295, 365-66 (1996)), cert. denied, 552 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008).

N.J.R.E. 612 allows the use of a writing, such as a medical record, to refresh a witness's recollection. However, when a writing is used for this purpose, "[t]he admissible evidence is the recollection of the witness, and not the extrinsic paper." State v. Carter, 91 N.J. 86, 123 (1982). Therefore, a trial court has an obligation to prevent a witness or party "from putting into the record the contents of an otherwise inadmissible writing under the guise of refreshing recollection." State v. Caraballo, 330 N.J. Super. 545, 557 (App. Div. 2000). Notably, defendant does not argue for the application of any hearsay exceptions commonly

used to introduce prior treatment records. See, e.g., N.J.R.E. 803(c)(6) (the exception for records of regularly conducted activity); N.J.R.E. 803(c)(5) (the exception for recorded recollection); N.J.R.E. 803(c)(4) (the exception for statements for purposes of medical treatment or diagnosis). As noted, defense counsel had no plan to call the primary care doctor or any employee of his office to introduce any of the doctor's office records.

"It is improper 'under the guise of "artful cross-examination," to tell the jury the substance of inadmissible evidence.'" United States v. Sanchez, 176 F.3d 1214, 1222 (9th Cir. 1999) (quoting United States v. Hall, 989 F.2d 711, 716 (4th Cir. 1993)). "The reason for this rule is that the question of the cross-examiner is not evidence and yet suggests the existence of evidence . . . which is not properly before the jury." State v. Spencer, 319 N.J. Super. 284, 305 (App. Div. 1999).

Nevertheless, defendant argues, "[b]ased on the evidence at trial it was logical that a jury would find [plaintiff] sustained only a temporary strain and award damages accordingly." To support her argument, defendant cites Cuevas v. Wentworth, 226 N.J. 480, 486 (2016), in which our Supreme Court stated a trial judge may not rely "on personal knowledge of other verdicts and on purportedly comparable verdicts presented by the parties in deciding whether to remit a pain-and-suffering damages award."

Because the trial court declined to grant plaintiff's motion for additur and based its decision of the jury's reaction to defense counsel's improper cross-examination of plaintiff, we conclude Cuevas has no application here.

Defendant next argues, "[t]he curative instruction in this case was thorough in addressing any possible harm caused by [her counsel's] cross-examan[ination] of [plaintiff]," and "[t]here is no basis for finding that the jury did not follow the court's instruction in this case." We disagree. Defense counsel asked specific questions about three separate doctor's visits, and defense counsel strongly implied she had medical records that affirmatively answered those questions.

First, defense counsel asked whether plaintiff had complained of neck, back, or shoulder pain to her primary care physician after the accident but before seeing Dr. Magaziner. When plaintiff said she did not, defense counsel told the jury she had plaintiff's medical records and then asked whether they helped her remember. Plaintiff said no, but defense counsel effectively informed the jury that she had complained of neck, back, and shoulder pain, especially after she asked, "Do you remember your doctor referring you to Dr. Magaziner?"

Second, defense counsel asked whether plaintiff remembered complaining to her primary care physician during the two years

prior to the accident. When plaintiff said she only recalled general discussions, defense counsel asked whether she remembered going to her primary care doctor on March 19, 2010, and complaining about back pain. When plaintiff said no, defense counsel presented her with medical notes, strongly implying they proved plaintiff went to the doctor on March 19, 2010, and complained of back pain.

Third, defense counsel asked plaintiff if she complained about neck and back pain to her doctor on August 25, 2010. Once again, when plaintiff said no, defense counsel asked the court for permission to show another document to try to refresh plaintiff's memory. Although the court denied defense counsel's request, this exchange clearly informed the jury she had more medical records supporting her questions.

A trial court has an obligation to prevent a witness or party "from putting into the record the contents of an otherwise inadmissible writing under the guise of refreshing recollection." Caraballo, supra, 330 N.J. Super. at 557. These medical records were all inadmissible. Under the hearsay exception for records of regularly conducted activity, N.J.R.E. 803(c)(6), defense counsel failed to present any evidence concerning the method of preparation of the records. Defense counsel never presented proof of when the records were prepared, who prepared them, or what they meant. Under the hearsay exception for recorded recollection,

N.J.R.E. 803(c)(5), the records do not contain plaintiff's statements. Instead, they contain only statements from plaintiff's primary care physician or another medical provider. These statements may have shown the doctor's understanding of statements made to him by plaintiff, but the record does not contain any evidence supporting this conclusion.

Under the hearsay exception for statements for the purposes of medical treatment, N.J.R.E. 803(c)(4), the medical records do not contain any statements from plaintiff, only statements from her primary care physician. In the absence of testimony from the doctor who wrote the records, defense counsel failed to establish their admissibility under any hearsay exception.

This court defers to a trial court's competence when the trial court assesses whether "inadmissible evidence is of such a nature as to be susceptible of being cured by a cautionary or limiting instructor, or instead requires the more severe response of a mistrial." Winter, supra, 96 N.J. 646-47. The trial court "was concerned" after it "heard the whole trial" and saw "the jury's reaction" to defense counsel's inappropriate cross-examination. It found defense counsel's gamesmanship "improperly influenced" the jury, and its "curative instruction . . . just seemed ineffective." We defer to its factual findings and affirm its order for a new trial on plaintiff's damages.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION