SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4887-15T1

CARITZA SOLER TORRES,

Plaintiff-Respondent,

v.

KHAMIS SUMREIN and NAJAH SUMREIN,

Defendants-Appellants,

and

ALKARAK TRADING, LLC,

Defendant.

Argued November 13, 2017 – Decided December 7, 2017

Before Judges Sabatino and Ostrer.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-5438-14.

Mark S. Kundla argued the cause for appellants (Hardin, Kundla, McKeon & Poletto, PA, attorneys; Mark S. Kundla, of counsel and on the briefs; Joseph A. DiPisa, on the briefs).

Robert H. Baumgarten argued the cause for respondent (Ginarte, O'Dwyer, Gonzalez,

Gallardo & Winograd, LLP, attorneys; Robert H. Baumgarten, on the brief).

PER CURIAM

Following a trial in this premises liability case, a jury found defendants, the owners of a commercial building, negligent with respect to the hazardous condition of a stairway on which plaintiff, a retail customer, fell down as she left the premises. After the jurors returned their initial verdict reflecting internal inconsistencies, they received additional instructions from the court. The jury then deliberated further and issued a second verdict, finding the owners' negligence the sole proximate cause of plaintiff's accident. The jury awarded plaintiff substantial non-economic damages for her pain and suffering, plus a modest sum for lost wages.

The property owners now appeal the liability portion of the verdict, principally arguing they were prejudiced by: (1) the misuse at trial of proof of subsequent remedial measures undertaken after plaintiff's accident; and (2) confusing errors in the original verdict form that resulted in the jury returning inexplicably inconsistent successive verdicts. Because these contentions have merit and the trial errors were not manifestly harmless, we remand for a new trial on liability issues only, leaving the jury's calibration of damages intact.

I.

Defendants Khamis Sumrein and Najah Sumrein (collectively, "the Sumreins") own a one-story commercial building on Orange Street in the City of Newark. The Sumreins constructed the building in 1992. At the time of plaintiff's August 2012 accident, the Sumreins were leasing the premises to co-defendant Alkarak Trading, LLC ("Alkarak"). Alkarak operated a retail store in the building.[1] The building has a short flight of stairs leading down from the retail area's entrance and exit door that opens out onto the public sidewalk.

On the afternoon of August 12, 2012, plaintiff, Caritza Soler Torres, briefly entered the building and walked up the stairs to the store. She made a purchase and then began to leave the

[1] As clarified to us by defense counsel, he represented all three defendants (Khamis Sumrein, Najah Sumrein, and Alkarak) at trial. The lease obligated Alkarak to provide liability coverage and list the Sumreins as additional insureds on the policy. Alkarak's insurer has agreed to provide liability coverage for all defendants up to $1,000,000. In its second verdict, the jury found that Alkarak was not negligent, a finding that plaintiff has not provisionally cross-appealed. Defense counsel now solely represents the Sumreins on the appeal, seeking to set aside the liability verdict against them, but not contesting the award of damages, which is within the policy limits. Defense counsel represents there is no conflict of interest with respect to his former client Alkarak, in light of these circumstances.

building.[2] As plaintiff was leaving the store, her cell phone rang. Plaintiff answered the call, transferred the cell phone to a different hand, holding a small bag in her other hand, and continued walking. Upon reaching the door leading outside, plaintiff opened it, missed the top stair, and fell onto the sidewalk.

Plaintiff fractured her right ankle as a result of her fall. She was taken from the scene by an ambulance and treated at a local hospital. Surgery was performed and plates and screws were permanently installed in plaintiff's ankle. She was unable to work for at least six months. Plaintiff presented expert medical testimony at trial from an orthopedic surgeon, who substantiated her injuries and course of treatment.

Plaintiff testified that she had not noticed any indication as she was leaving the building to alert her that there was an additional step leading from the doorway to the sidewalk. According to plaintiff, "[e]verything was the same color as the sidewalk." There were no warning signs posted advising visitors to watch their step as they traveled through the door, down the

[2] Plaintiff's actions in exiting and missing the stair as she left the building were recorded on a twelve-second surveillance video, which was played several times for the jurors. The parties have furnished the video recording, which we have reviewed, as part of the record on appeal.

stairs, and out onto the sidewalk. Plaintiff insisted that she was not in a hurry as she left the building, that she was looking straight ahead as she proceeded forward, and that she was paying attention and was not distracted by the incoming call on her cell phone.

To support her contention that the configuration of the entranceway was hazardous at the time of the accident, plaintiff presented expert testimony from a licensed professional engineer.[3] The engineer identified several conditions of the premises that were dangerous and, in his opinion, non-compliant with the applicable building code. He asserted that the entrance's configuration, with the door swinging out beyond the stairs, violated the code. The expert explained that "[i]n a properly designed safe structure, when the door opens over a stairway there should be a landing that allows you to open the door and step out." Here, there was no such landing that extended beyond the radius of the door. Instead, the stairs abruptly ended, such that users would need to go immediately down the steps and then onto the sidewalk.

[3] The expert inspected the accident site and also examined various discovery materials, including the twelve-second excerpt from the surveillance video.

The engineer further noted that the uniform appearance of the stairs, which matched the color of the sidewalk, increased the risk of a visitor falling. He opined that the stairs should have had yellow-colored striping or markings to signal the change in elevation, thereby reducing the risks of a patron falling.

The expert supported plaintiff's contention that the hazardous condition of the stairway configuration and lack of warnings were factors in causing her accident. On cross-examination, the expert acknowledged that the video shows that plaintiff was on her cell phone at the moment she fell, but he noted that the premises' hazardous conditions were "stronger" contributing factors in causing the accident.

The record shows that the premises were altered in several respects after plaintiff's accident. Among other things, Maher Alqaralleh, the owner of Alkarak, painted the stairway steps yellow about two years after the incident. According to Alqaralleh, the stairs were not painted for safety reasons, but rather for aesthetic reasons – to match the yellow color of the store's sign, entrance door frame, and security gate. In addition, Alqaralleh placed a "Watch Your Step" sign, post-accident, on the front door. He asserted that the sign was not installed to point out any "particular hazard," but only "to let the customer know this is the door to enter the store and exit the store." In addition, an

ATM sign that had partially blocked a customer's view of the stairs was removed by an ATM sales representative, allegedly for reasons unrelated to safety.

Alqaralleh testified that approximately 140 to 150 people typically enter the store each day. Before plaintiff's accident, no customer had ever complained about the condition of the stairs or the doorway. Since the time the store first opened in 2008, no building inspectors or other governmental bodies had issued any code violation notices for the premises. Alqaralleh specifically denied that anyone told him to paint the stairs yellow after plaintiff's accident.

Khamis Sumrein, the co-owner of the building, testified that Alkarak, as the tenant, was responsible for the store's entrance and steps. Sumrein[4] noted in this regard that the tenant was the party who had painted the steps yellow after the accident and who had posted the "Watch Your Step" sign. Sumrein acknowledged that, as an owner of the building, he has a shared responsibility for the "structural integrity" of the building, including the steps. He denied, however, that any structural changes had been made to the premises following the accident.

[4] All references to "Sumrein" in the singular shall refer to Khamis Sumrein rather than his wife, co-defendant Najah Sumrein.

After considering these and other proofs from the five-day trial, the jury reported an initial verdict finding: the Sumreins negligent and a proximate cause of the accident; Alkarak negligent but not a proximate cause of the accident; and plaintiff comparatively negligent, but also not a proximate cause of the accident. Turning to the last liability question on the verdict form, the jurors allocated 70% fault to the Sumreins, 15% fault to Alkarak, and 15% comparative fault to plaintiff. By a five to one vote, the jurors awarded $500,000 for past and future pain and suffering plus $9,000 in lost wages.

At that point, counsel requested a sidebar and expressed concerns that the jurors may have been confused, because they should not have allocated any percentage of fault to Alkarak and plaintiff, having found neither of those parties a proximate cause of the accident. After colloquy with counsel concerning this apparent inconsistency, the court explained the situation to the jurors and advised them to resume deliberations:

> All right, ladies and gentlemen of the [j]ury, there's, you, apparently, have found that [Alkarak's owner, Maher Alqaralleh] and Alkarak Trading, LLC, were negligent, by a 5 to 1 vote; but, in question four, you found that their negligence, meaning [Maher Alqaralleh] and Alkarak Trading, LLC, was not a proximate cause of the accident. <u>So, either their negligence was a proximate cause of the accident and you enter a percentage for the negligence that they contributed to the</u>

> happening of the accident or they were not, their negligence was not the proximate cause of the negligence and therefore, their percentage should be zero. So, I'm returning you to the [j]ury room to make the verdict consistent, meaning question four and question seven (c) [on the verdict sheet], must be consistent. Yes?

This instruction spurred a juror to request the court to clarify the definition of proximate cause. The court did so, and then sent the jurors back to resume deliberations.

Later that same day, the jurors returned with a second verdict. This time the jurors found that only the Sumreins were negligent, and that neither Alkarak nor plaintiff were negligent. The jurors again determined that the Sumreins were a proximate cause of the accident. The jurors issued a slightly revised computation of damages, this time awarding plaintiff $425,000 for past and future pain and suffering, and the same $9,000 amount for wage loss. The court entered a final judgment consistent with the outcome of the second verdict.

The Sumreins now appeal[5] the liability aspect of the verdict, contending that plaintiff's counsel improperly presented and misused evidence of subsequent remedial measures in violation of

[5] As we have noted, Alkarak has not appealed, having been deemed in the second verdict to not be liable. Defense counsel has conceded both in correspondence to this court and at oral argument, that no new trial on damages is warranted.

N.J.R.E. 407, and that the flaws in the verdict sheet clearly confused the jurors and led to an untenable final verdict.

II.

A.

We first consider defendants' arguments concerning the subsequent remedial measure doctrine. N.J.R.E. 407 directs that "[e]vidence of remedial measures taken after an event is not admissible to prove that the event was caused by negligence or culpable conduct. However, evidence of such subsequent remedial conduct may be admitted as to other issues." Rule 407 codifies our state's "strong public policy encouraging prompt remedial measures[.]" Szalontai v. Yazbo's Sports Café, 183 N.J. 386, 402 (2005). "The theory behind [Rule 407] is that a person should not be penalized for correcting a potentially deleterious situation." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, comment 1 on N.J.R.E. 407 (2017).

Subject to considerations of unfair prejudice and other countervailing factors under N.J.R.E. 403, evidence of remedial conduct may be admitted under N.J.R.E. 407 for other purposes, including the impeachment of the credibility of a witness, or issues concerning a defendant's ownership or control of the instrumentality that produced plaintiff's injury. See Kane v. Hartz Mountain Indus., 278 N.J. Super. 129, 148 (App. Div. 1994),

aff'd o.b., 143 N.J. 141 (1996); Lavin v. Fauci, 170 N.J. Super. 403, 407 (App. Div. 1979).

The pertinent chronology of events relating to the Rule 407 issues is as follows. During the course of discovery, defendant Khamis Sumrein provided certified responses to the standard form interrogatories for personal injury "fall down" cases. One of those interrogatories, Question 8, asked defendants to "[s]tate whether any repairs were made to the premises or property after plaintiff's injury. YES ( ) or NO ( )." See Uniform Interrogatories, Pressler & Verniero, Current N.J. Court Rules, Form C(2) Uniform Interrogatories to be Answered by Defendant in Falldown Cases Only: Superior Court, https://www.gannlaw.com/CourtRules/APPENDIX/App-02-C(2).pdf (2017). Despite the changes that had been made to the stairway after plaintiff's accident, Sumrein answered this query "No." On direct examination at trial, Sumrein asserted that he did not regard the yellow stair-painting by Alkarak to be a safety-oriented subsequent remedial measure.

Before the start of the jury trial, defendants moved in limine to bar all testimony and evidence relating to changes made to the property after the accident comprising subsequent remedial measures pursuant to N.J.R.E. 407. The court denied the motion, on the basis that such evidence should be allowed to impeach the credibility of defendants' testimony. The court agreed with

plaintiff that this "line of questioning" can be used to show an alleged inconsistency between defendant's interrogatory answers and the actual events that transpired.

Plaintiff's counsel called Khamis Sumrein as part of his case in chief. During that direct examination, plaintiff's counsel asked Sumrein if any structural changes had been "made to the doorway of the step leading into the store" after Alkarak's lease began in 2008. Sumrein denied that any such structural changes had been made. Plaintiff's counsel then showed Sumrein a series of photographs taken of the building in 2012 before the accident took place. Sumrein acknowledged that those photos fairly and accurately represented the condition of the property. Plaintiff's counsel then asked Sumrein if any "repairs" to the property had been made after the accident. Sumrein responded, "No." Plaintiff's counsel pressed on further, asking Sumrein to admit that, after the accident, the steps were "painted bright yellow." Sumrein responded that the tenant had painted the steps "to match the frame" of the doorway, and that the painting has "nothing to do with" the safety of the entryway.

Plaintiff's counsel further confronted Sumrein with the post-accident addition of the "Watch Your Step" sign. Sumrein responded that he thought the tenant had put the sign there, and that he had "no idea" why the tenant had done so. Plaintiff's counsel also

got Sumrein to acknowledge that the ATM sign at the bottom of the door was removed after the accident, which Sumrein attributed to a decision made solely by the ATM company. He further maintained that the ATM sign "has nothing to do with the step" involved in the accident.

On cross-examination by defense counsel, Sumrein repeated that he had not undertaken any measure involving the "structural integrity" of the store. He testified that the tenant is "responsible for what happens in the interior of the store," and that he never had discussions with the tenant about the signs within the premises.

Plaintiff's counsel pursued this topic further in examining Alkarak's principal, Maher Alqaralleh. He got Alqaralleh to admit that he had painted the stairs yellow after the accident, but Alqaralleh denied that it was done for a safety reason. In addition, plaintiff's counsel got Alqaralleh to concede that he had posted the "Watch Your Step" sign, but Alqaralleh denied that it was to prevent the "particular hazard" concerning the steps.

During his closing argument, plaintiff's counsel capitalized on defendants' admissions about these post-accident measures. However, instead of arguing this evidence was relevant to the credibility of the defense witnesses, plaintiff advanced a substantive argument: that the post-accident measures were repairs

undertaken to change an unsafe condition to a safe one. As he told the jury:

> This accident occurred on August 12, 2012. Sometime after the accident, we know, sometime after the accident, we know, according to defendants, it was two years; but sometime after the accident, we know they made, they made some changes, right? They deny any of the changes relate to safety; but they did make some changes. So, what did they do?
>
> These steps, those steps, which were gray, having trouble finding all of the exhibits, hang on, one second. Here we go. Okay, that shows it. They're gray, right? Same color as the sidewalk up here. So, after the accident, we know, they painted the steps yellow, right, but nothing to do with safety, painted yellow, to the other one. It's bright, but nothing to do with safety. We know, after the accident, they removed one of the signs. I think that's great; because, as he said, as you're approaching the door, you're looking. You know, as you're walking, you don't look. You don't walk like this. Who walks like this? You walk like that. A reasonable person walks like that, they're going to walk into the person ahead of them.

Plaintiff's counsel repeated this substantive line of attack a few minutes later with regard to the post-accident installation of the "Watch Your Step" sign:

> [Defendants'] got an obligation to keep it safe. Again, I have to ask you to rely on your common sense. What makes sense to you? Should they, on the day of the accident, had a caution sign? Would that have prevented the accident? Well, they put one up after the

> accident, right? But it's got nothing to do with safety.[6]
>
> Do you think if the caution sign was there that day, this accident would've happened? Do you think that Ms. Soler Torres would have seen that caution sign? I think so, right at eye level, as you're approaching. She'll see it. That accident wouldn't have happened. They would've had a sign --. Instead, they got the bottom of the door, closed up.

On appeal, defendants urge that this use of evidence of post-accident measures violated N.J.R.E. 407, and is likely to have unfairly swayed the jurors in imposing liability. We agree.

We review this evidentiary issue mindful that trial judges must be accorded a substantial degree of discretion on appellate review of their evidentiary rulings. We generally do not set aside a trial judge's evidentiary rulings unless the appellant demonstrated the judge abused his or her discretion. See Hisenaj v. Kuehner, 194 N.J. 6, 16 (2008). Moreover, a mistaken ruling on a question of evidence does not compel reversal unless the error is so harmful that it was "clearly capable of producing an unjust result[.]" R. 2:10-2.

As a preliminary matter, we do not think the trial court misapplied its discretion in denying defendants' motion in limine

[6] This assertion is obviously sarcastic. Plaintiff's theory is the opposite: that the measures were undertaken for safety.

under N.J.R.E. 407, and in allowing plaintiff to present evidence of subsequent remedial measures for the limited purpose of witness impeachment.[7] As we have already noted, such impeachment falls within a recognized exception under Rule 407. Furthermore, defendants had an obligation to answer the form interrogatories honestly and forthrightly. R. 4:17-4(a); R. 4:17-1. Sumrein's certified interrogatory answer — attesting that "no" post-accident repairs were made to the premises — was fair game for plaintiff to impeach, by showing the incredibility of his contention that the subsequent measures had "nothing" to do with safety.

The critical problem here lies not with the court's justifiable pretrial ruling on the motion in limine, but with what ensued thereafter. First, the court did not provide any limiting instruction to the jurors under N.J.R.E. 105, explaining to them that they could only consider the subsequent measures for impeachment purposes and not as proof of negligence. Such a limiting instruction is an important caveat, which will guide the jurors and prevent misuse of the Rule 407 exception. See Biunno,

[7] We need not consider whether the evidence of repairs alternatively could have been used to establish "ownership or control" of the condition of the stairway or doorway under that separate exception to Rule 407. Defense counsel did not advocate in his closing argument that any of his three clients (the two Sumreins and Alkarak) lacked such control, and the Sumreins' ownership of the building was undisputed.

Weissbard & Zegas, Current N.J. Rules of Evidence, comment 2 on N.J.R.E. 407 (2017) ("If subsequent remedial conduct evidence is properly admissible for some fact in issue other than the existence of negligence or culpable conduct on a particular occasion, the trial court should instruct the jury pursuant to [Rule] 105 as to the limited effect to be given to the evidence of subsequent conduct."). See also Ryan v. Port of N.Y. Auth., 116 N.J. Super. 211, 219-20 (App. Div. 1971) (emphasizing the importance of a trial court's careful instructions to jurors about how to use evidence correctly, including warning them not to make improper inferences of negligence based on the admission of a defendant's answers to interrogatories with respect to post-accident remedial measures).

We recognize that defense counsel did not request such a limiting instruction here. Even so, the point remains whether the absence of an instruction was harmful in the surrounding context of the trial itself. Cf. Harris v. Peridot Chem. (NJ), Inc., 313 N.J. Super. 257, 296-97 (App. Div. 1998) (holding, in the circumstances presented, an unclear limiting instruction under Rule 407 was not so egregious as to justify a rerun of the trial); Millison v. E.I. du Pont de Nemours & Co., 226 N.J. Super. 572, 597-98 (App. Div. 1988) (finding that the absence of a limiting instruction was harmless since it was compensated for by opposing

counsel's presentation of the case), aff'd o.b., 115 N.J. 252 (1989).

Aside from the lack of an instruction — an omission which otherwise might be deemed harmless in this case — the fundamental problem here is that plaintiff's counsel did not follow through and use the subsequent remedial measure evidence solely for impeachment or credibility purposes. In fact, plaintiff's counsel only alluded momentarily and generically to defendant's interrogatory answers. He did not confront Sumrein on the witness stand with his response to Form Interrogatory #8. Instead, as we have shown, plaintiff's counsel repeatedly referred to the post-accident yellow step-painting, the new warning sign, and the removal of the ATM display as substantive proof of negligence. This misuse of the evidence violates N.J.R.E. 407 and the important public policies that underlie that rule. See, e.g., Szalontai, supra, 183 N.J. at 402 (2005) (underscoring those public policies); Dixon v. Jacobsen Mfg. Co., 270 N.J. Super. 569, 587 (App. Div.) (same), certif. denied, 136 N.J. 295 (1994).

The tenor of plaintiff's case and her counsel's repeated comments in summation were plainly aimed at doing exactly what Rule 407 forbids. Such misuse penalized defendants for taking remedial measures — even though they did not acknowledge them as

such — to make the entrance's configuration safer after plaintiff's mishap.

We note that defense counsel said nothing about the subsequent measures in his own summation. Hence, the improper portions of plaintiff's ensuing summation cannot be justified on the grounds of fair rebuttal advocacy. Instead, plaintiff's summation was designed to underscore for the jurors the stark visual contrast between how the premises looked before the accident and how they looked after remedial measures were undertaken. That line of attack had little, if anything, to do with witness impeachment, except perhaps for the innuendo that defendants were being absurd in claiming the post-accident changes had nothing to do with safety. The thrust of the attack was about proving culpability for the accident itself by focusing on "before-and-after" comparisons. That is precisely what Rule 407 disallows, and it easily could have unfairly prejudiced defendants in the jurors' eyes.

B.

The second troublesome aspect of this case stems from the wording of the verdict form and the related jury instructions.

Before the end of the trial,[8] defense counsel requested that the court reject the verdict sheet that had been proposed by plaintiff's counsel and adopt his own alternative version that combined the defendants together. The court rejected defense counsel's request and used a version of the form that separated out the findings with respect to each of the defendants individually.

Unfortunately, the verdict form provided to the jurors had typographical errors. When those errors came to light during deliberations through two successive notes from the jury, the trial court brought the jurors back into the courtroom and made oral corrections to the form.[9] After those errors were corrected, the jurors issued the first verdict, which we have already described above, containing internally inconsistent findings. Specifically, Question #7 of the first verdict illogically ascribed percentages of fault to co-defendant Alkarak and to plaintiff, despite the jurors finding respectively in Questions

[8] Although this disagreement does not appear to have been recorded or transcribed from the charge conference, the parties' briefs each confirm the disagreement was voiced before the court finalized the verdict form.

[9] In all fairness to the trial court, these typographical errors likewise had not been spotted by either trial counsel before the jurors noticed them.

#4 and #6 that negligence of Alkarak and of plaintiff was not a proximate cause of the accident.

When counsel called this inconsistency to the court's attention, the court attempted to fashion an impromptu solution by explaining the problem to the jurors and instructing them to resume deliberations. As we have noted, at that point, a juror asked the court to explain once again the definition of proximate cause, and the court obliged.

The second verdict returned by the jurors raises substantial concerns about whether the jurors were still confused by the verdict form and perhaps by the overall charge. Having initially found Alkarak 15% at fault and plaintiff 15% at fault in the first verdict, the jurors allocated no fault to either of those parties in the second verdict, shifting the entire 100% to the Sumreins, while at the same time reducing the gross award of damages for pain and suffering. The jurors rescinded their earlier finding that both Alkarak and plaintiff were negligent. This sequence of events is arguably indicative of "reasoning backwards" by the jurors, in an effort to approximate the net outcome they reached the first time, since the second damages award would not be subject to a 15% reduction for plaintiff's comparative fault.

A cardinal principle of our system of civil justice is that "[a]ppropriate and proper charges to a jury are essential for a

fair trial.'" Velazquez v. Portadin, 163 N.J. 677, 688 (2000) (alteration in original) (quoting State v. Green, 86 N.J. 281, 287 (1981)); see also Washington v. Perez, 219 N.J. 338, 350 (2014) (noting that "[o]ur law has long recognized the critical importance of accurate and precise instructions to the jury"). "A charge is a road map to guide the jury, and without an appropriate charge a jury can take a wrong turn in its deliberations[.]" Das v. Thani, 171 N.J. 518, 527 (2002) (quoting State v. Martin, 119 N.J. 2, 15 (1990)).

"In examining whether mistakes made in jury instructions require intervention, a court must determine whether the charge, 'considered as a whole, adequately conveys the law and is unlikely to confuse or mislead the jury, even though part of the charge, standing alone, might be incorrect.'" Maleki v. Atlantic Gastroenterology Assoc., P.A., 407 N.J. Super. 123, 128 (App. Div. 2009) (quoting Fischer v. Canario, 143 N.J. 235, 254 (1996)). "This same approach is taken with regard to mistakes in a jury verdict sheet." Ibid. (citing Mogull v. CB Commercial Real Estate Group, Inc., 162 N.J. 449, 467-68 (2000)).

There are substantial grounds here to conclude that the "road map" provided to the jurors on the verdict form unfortunately was sufficiently flawed as to have led the deliberations to take a metaphorical wrong turn. Apart from the typographical errors that

prompted notes from the jury seeking clarification, the initial sequencing of questions and the associated instructions seemingly led the jurors to issue an internally-inconsistent first verdict, and then to attempt in the second verdict to rectify their mistake with new findings essentially replicating their original net outcome.

That said, we disagree with defendants that the outcome on liability here is manifestly against the weight of the evidence. The Sumreins were the owners of the building, and the jurors could rationally have placed full responsibility upon them rather than their tenant for the premises' dangerous conditions. Likewise, the jurors had a rational basis for finding, despite defense counsel's advocacy, that plaintiff's use of a cell phone as she walked out of the building played little or no role in causing her to fall.

Nevertheless, the process by which the jurors utilized an admittedly-flawed verdict form calls into serious question our confidence in the ultimate outcome. Because we lack such confidence, we conclude that the cumulative impact of the misuse of subsequent remedial measure evidence, coupled with the multiple problems with the verdict form and the sequential verdicts, requires this liability verdict to be set aside. See Biruk v. Wilson, 50 N.J. 253, 263 (1967) (applying principles of cumulative

error in setting aside a civil verdict); see also Schueler v. Strelinger, 43 N.J. 330, 347-50 (1964) (similarly illustrating a civil instance of cumulative error requiring a reversal). A new trial on liability as to all parties, including Alkarak,[10] shall accordingly be conducted, with the damages award remaining intact, unless plaintiff on retrial is determined to be more than 50% at fault. See N.J.S.A. 2A:15-5.1 to -5.2.

The balance of defendants' arguments lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Reversed and remanded for a new trial on liability only.

[10] Given the jury's initial verdict, finding Alkarak was negligent and 15% liable, we cannot overlook the realistic possibility that the ultimate assessment of Alkarak's liability at zero was tainted by confusion or result-oriented revision.