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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2060-16T3

PATRICIA NEWTON,

Plaintiff-Respondent,

v.

SAM'S CLUB,

Defendant-Appellant,

and

YINTAK CHONG,

Defendant.

Argued January 10, 2018 — Decided February 22, 2018

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Docket No.
L-0097-10.

Michael K. Furey argued the cause for
appellant (Day Pitney, LLP, attorneys; Michael
K. Furey, of counsel and on the brief;
Jennifer Gorga Capone, on the brief).

Edward Harrington Heyburn argued the cause for
respondent.

PER CURIAM

This is a personal injury action. Defendant Sam's Club appeals for the third time from an order denying its motion for a new trial on damages or remittitur. The facts of the underlying accident are detailed in our opinion disposing of defendant's first appeal, Newton v. Sam's Club, No. A-4910-11 (App. Div. May 2, 2013), and need not be repeated here. In that opinion, we upheld the jury's liability verdict but "remand[ed] the matter of damages to the Law Division for a complete and searching analysis, including 'a factual analysis of how the award is different or similar to others to which it is compared.'" Id., slip op. at 17 (quoting He v. Miller, 207 N.J. 230, 251 (2011)).

On remand, the trial court evaluated the damage award using the comparative-verdict methodology required by the plurality in He and again denied defendant's motion for a new trial or remittitur.¹ Defendant again appealed, contending the trial court's He analysis was flawed.

While defendant's second appeal was pending, the Supreme Court decided Cuevas v. Wentworth Group, 226 N.J. 480 (2016). In Cuevas, the court concluded "a judge's reliance on personal knowledge of other verdicts and on purportedly comparable verdicts

¹ Defendant Yintak Chong did not participate in any of the appeals. Unless otherwise stated, references to defendant include only Sam's Club.

presented by the parties in deciding whether to remit a pain-and-suffering damages award . . . is not sound in principle or workable in practice." Id. at 486. The Court held: "The standard is not whether a damages award shocks the judge's personal conscience, but whether it shocks the judicial conscience." Ibid. The Court disapproved "of the comparative-verdict methodology that allows parties to present supposedly comparable verdicts based on case summaries." Ibid. The Court explained: "In the end, a thorough analysis of the case itself; of the witnesses' testimony; of the nature, extent, and duration of the plaintiff's injuries; and of the impact of those injuries on the plaintiff's life will yield the best record on which to decide a remittitur motion." Id. at 510.

In view of the Supreme Court's disapproval of the He comparative-verdict methodology, we vacated the trial court's December 1, 2014 order, denying defendant's motion for a new trial or remittitur and remanded this matter a second time for consideration of the jury's damage award to plaintiff Patricia Newton under the principles set forth in Cuevas. Newton v. Sam's E., Inc., No. A-2199-14 (App. Div. Sep. 23, 2016) (slip op. at 3).

Before the second remand, the trial judge was reassigned to a different division in another county. As a result, another judge was assigned to the matter. After reviewing the trial

transcripts and further submissions of the parties and considering their oral argument, the judge denied defendant's motion for a new trial on damages or remittitur.

In his oral decision, the judge recounted and analyzed the testimony of plaintiff, her husband, and plaintiff's expert, Dr. David Lessing, an orthopedic surgeon, regarding plaintiff's injuries and damages. This testimony described the pain, suffering, disability, impairment, and loss of enjoyment of life plaintiff sustained as a result of the accident.² The testimony also described plaintiff's prognosis and the permanency of her injuries and scarring.

After canvassing the testimony, the judge recognized the \$1,000,000 verdict was at the high end for the damages plaintiff suffered but did not find it to be "so far wide of the range [of] verdicts that the [c]ourt should step in." The judge took into account the permanency of the injuries, the impact on her activities, and the constant significant pain plaintiff experienced, as well as plaintiff's age at the time of the accident and life expectancy of fourteen years. Noting the verdict awarded plaintiff approximately \$6000 per month for enduring "everyday constant excruciating pain," the judge concluded the verdict did

² Plaintiff asserted only non-economic damages and had no claim for lost wages, lost income, or unpaid medical expenses.

not meet the standard for granting a new trial on damages or a remittitur.

Defendant appeals from that ruling. For the reasons that follow, we affirm.

In Cuevas, the Court gave guidance to courts on the standards governing review of a jury's damages in deciding a remittitur motion. 226 N.J. at 499.

When a court is persuaded that a new trial must be granted based solely on the excessiveness of the jury's damages award, it has the power to enter a remittitur reducing the award to the highest amount that could be sustained by the evidence. The plaintiff has the choice either to accept the award as remitted by the court or to proceed with a new damages trial before another jury. A damages award that is so grossly excessive that it shocks the judicial conscience cannot stand, and therefore remittitur allows the parties the option of avoiding the unnecessary expense and delay of a new trial.

Courts, however, must exercise the power of remittitur with great restraint. That is so because in our constitutional system of civil justice, the jury—not a judge—is charged with the responsibility of deciding the merits of a civil claim and the quantum of damages to be awarded a plaintiff. The drafters of our Constitution placed their trust in ordinary men and women of varying experiences and backgrounds, who serve as jurors, to render judgments concerning liability and damages.

[Ibid. (citations omitted).]

The Court described the standard to be applied when deciding a remittitur motion:

A jury's verdict, including an award of damages, is cloaked with a presumption of correctness. The presumption of correctness that attaches to a damages award is not overcome unless a defendant can establish, clearly and convincingly, that the award is a miscarriage of justice. In deciding whether to grant a new trial or remittitur based on a purportedly excessive damages award, the court must give due regard to the opportunity of the jury to pass upon the credibility of the witnesses. A judge may not substitute his judgment for that of the jury merely because he would have reached the opposite conclusion; he is not a . . . decisive juror.

Because a jury's award of damages is presumed to be correct, when considering a remittitur motion, a court must view the evidence in the light most favorable to the plaintiff.

[Id. at 501 (citations omitted).]

"Ultimately, a damages award cannot stand if it is so grossly disproportionate to the injury suffered that it shocks the judicial conscience." Id. at 510.

Our standard for reviewing a damages award that is claimed to be excessive is the same as the trial court, however, "an

appellate court must pay some deference to a trial judge's feel of the case." Id. at 501 (citations omitted).³

We briefly summarize the pertinent facts and testimony regarding plaintiff's injuries and damages. Plaintiff suffered a laceration to her left leg, which left a thirteen-centimeter horseshoe-shaped scar. She was taken by ambulance to the emergency room at Robert Wood Johnson Hospital. The tendons in plaintiff's wound were visible but apparently not severed. After the wound was cleaned and sutured, plaintiff was discharged from the hospital.

Dr. Lessing had not treated plaintiff but examined her and reviewed the medical reports of her treating physicians. Dr. Lessing observed that plaintiff walked with a limp and that the nerve supply had been cut off to the wounded part of her leg by surrounding scar tissue on three sides. He stated plaintiff has "a defect in the . . . contra of her leg at about where the Achilles tendon joins the calf muscle." He diagnosed her with a "laceration to the posterior left calf or leg with altered sensation and a defect of the muscle tendon junction."

Dr. Lessing's prognosis was "poor," opining that

³ Here, the judge on the second remand was not the trial judge. However, the record includes the comments of the trial judge regarding the nature of plaintiff's injuries.

none of these conditions are going to get better. The nerves are not going to penetrate the scar tissue. The area within that u or horseshoe is always going to feel abnormal.

The damage to the muscle that has healed with that contracted scar making that little defect when you feel the area is always going to be scar tissue. It's not going to turn into muscle over time.

So the deficits in the muscle and the deficits in the nerve supply to that area are forever so it's not going to get better over time.

According to Dr. Lessing, plaintiff's injury was permanent and her scar would not fade away or disappear.

As to the impact of this injury on plaintiff's day-to-day life, Dr. Lessing opined

the sensory problems will be there all the time. Every time water hits it in the shower or you dry the area with a towel, it's going to be a problem.

If you wear anything that rubs up against it, possibly, you know, maybe some nylon stockings or knee socks, calf-high boots, all of these will be a problem. There's a cosmetic concern in the summertime when people wear shorts and like knee-length clothing.

The muscle on that side has been compromised so the leg is likely to tire out sooner than it would have ordinarily and sooner than the other leg will tire. This in turn will produce a limp at least towards the end of the day if not sooner.

Dr. Lessing further opined that plaintiff would have trouble cleaning the scarred area, which he characterized as a "big, ugly scar."

Plaintiff's testimony supported Dr. Lessing's expert opinion. According to plaintiff, after the accident she experienced constant pain and if she "stood on [her] leg for any length of time [she] would get excruciating pains in that area and a tightness." Plaintiff's husband stated plaintiff favors her leg at all times.

At one point, plaintiff's leg was so numb and painful she went to a pain management specialist for relief. She described her symptoms as "shooting pains . . . as if the muscles were cramping up on [her]." Plaintiff also testified that, due to the pain, she would have to pull over and stretch her leg if "[she] drove for any length of time." Plaintiff still experiences problems with her leg when she goes to bed at night.

At the time of trial, plaintiff was experiencing constant pain. Plaintiff described the pain in her leg as "a numbing, throbbing feeling," and said that to up to and including the day of trial, she was "always in pain." Plaintiff took over-the-counter medication to help with the pain, but it had not been completely effective.

Although she continued to experience pain, plaintiff did not resume a pain management or rehabilitation program. She ceased going to the gym and has limited her activities with her grandchildren, such as attending their soccer games. She can no longer wear heels or boots. Plaintiff's scar remains conspicuous, but she admitted she was "happy with the way the outside [of her leg] turned out."

Plaintiff's husband has difficulty walking and with mobility generally. He testified plaintiff was responsible for his care due to a medical condition and described the types of things plaintiff did in caring for him, but it is unclear whether plaintiff's leg injury has affected her ability to assist him on a daily basis. We note, however, plaintiff testified she provided the following assistance to her husband before the accident because of his disability:

I did really everything. I helped him when he had to get washed, his shower, I would have to help. And then I would have to help him in bed. I helped him get dressed.

And just there is a number of things that he did around the house and outside the house that he no longer can do and I tried to do it but I couldn't, I couldn't take care of everything.

But anyway as far as my husband, he depends on me every day and I have to drive and as a result of the vehicle that we've had he had major problems trying to get into it

which I would have to try to help him to get in and out.

Based on this testimony, the jury could infer plaintiff's injuries impaired her ability to assist her husband. The jury may consider the probable consequences of plaintiff's injury. See Model Jury Charges (Civil), 8.11E, "Disability, Impairment and Loss of the Enjoyment of Life, Pain and Suffering" (approved December 1996) (stating the jury may consider plaintiff's "age, usual activities, occupation, family responsibilities and similar relevant facts in evaluating the probable consequences of any injuries [the jury] find[s] [he or she] has suffered").

In his decision denying defendant's motion for a new trial or remittitur, the trial judge stated:

The plaintiff's injury had every appearance of being serious and painful to anyone viewing the photographs in evidence. I, myself, saw the photographs as they were being introduced. They were in color, and to describe them as gory is being charitable.

. . . .

The testimony was clear. [Plaintiff]'s leg tires more quickly now as a result of the injury. I saw the injury, the jury saw the injury at trial. Regardless of the fact that it was stitched, regardless of the fact that the injury had occurred some time ago, the one thing remains clear [plaintiff] has a deformed leg. Plain and simple. It required twenty-six stitches. And even as she walked from her chair at plaintiff's table, to the witness stand, she walked with a noticeable limp. The

jury saw what they saw. They ultimately came to the determination that . . . this injury was significant enough to warrant the verdict that it did

Defendant raises the following arguments on appeal: (1) a new trial should be granted because the verdict shocks the judicial conscience, is against the weight of the evidence, and was a product of sympathy, prejudice, and partiality; and (2) the trial court erred in denying a remittitur. We are unpersuaded by these arguments and affirm. Defendant further argues that because the trial judge lacked experience in personal injury litigation, this court should not defer to the trial judge's "feel of the case."

"[T]o arrive at a fair and reasonable award of compensation requires a high order of human judgment." Model Jury Charges (Civil), 8.11E. "Determining just compensation for an accident victim, particularly when the damages are not susceptible to scientific precision, as in the case of pain and suffering damages, necessarily requires a high degree of discretion." Jackowitz v. Lang, 408 N.J. Super. 495, 503 (App. Div. 2009) (quoting Johnson v. Scaccetti, 192 N.J. 256, 279 (2007)). "Judges also know that, among different juries, there will be a wide range of acceptable damages awards." Cuevas, 226 N.J. at 510.

Because civil plaintiffs have a constitutionally guaranteed right to have a jury decide the merits and value of a case,

judicial interference with a jury award must clear a high hurdle. Jackowitz, 408 N.J. Super. at 503-04. "The trial court should not disturb the jury's award unless it is 'so disproportionate to the injury and resulting disability as to shock the conscience and [convince the court] that to sustain the award would be manifestly unjust.'" He, 207 N.J. at 250-51 (alteration in original) (quoting Baxter v. Fairmont Food Co., 74 N.J. 588, 604 (1977)).

Viewed in the light most favorable to plaintiff, the evidence makes clear plaintiff suffered disfiguring scarring, numbness, ongoing constant pain, and impairment of the use of her leg. The testimony established the injuries were permanent, disabling, and have materially impaired her ability to undertake certain activities, resulting in a significant loss of enjoyment of life. Taking into account plaintiff's life expectancy and lifestyle, we do not find the damages award to be "so grossly disproportionate to the injuries suffered that it shocks the judicial conscience." Cuevas, 226 N.J. at 510. Defendant has not clearly and convincingly established that the damage award is a miscarriage of justice. To be sure, this was a high verdict, but that does not mean it was excessive. See Jastram v. Kruse, 197 N.J. 216, 235 (2008).

In light of the applicable standards, we find no error in the court's decision denying the motion for a new trial on damages or

remittitur. The judge engaged in "a thorough analysis of the case itself; the nature of the witnesses' testimony; of the nature, extent, and duration of the plaintiff's injuries; and of the impact of those injuries on the plaintiff's life." Cuevas, 226 N.J. at 510. His findings and conclusions are supported by the record.

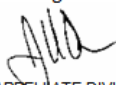
Defendant claims because the trial judge lacked experience in personal injury litigation, this court should not defer to his "feel of the case." Cuevas explicitly rejects reliance on a judge's personal experience, stating the standard for remittitur "is not whether a damage award shocks the judge's personal conscience, but whether it shocks the judicial conscience." Id. at 486. However, a trial judge is afforded "some" deference for his "feel of the case" "because '[i]t is the judge who sees the jurors wince, weep, snicker, avert their eyes, or shake their heads in disbelief,' who may know 'whether the jury's verdict was motivated by improper influences,' and who may be privy to observations that could not have been made by the jury." Id. at 501-02 (alteration in original) (citations omitted). Nonetheless, "[a] judge's 'feel of the case' based on observing a party or a witness in the courtroom is entitled to minimal weight if the jury had the same opportunity to make similar observations." Id. at 502 (citing Baxter, 74 N.J. at 600). Our decision is based on an

independent review of the trial record and not the trial judge's
"feel of the case."

Defendant's remaining arguments lack sufficient merit to
warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION