SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1286-21

TROY HAINSWORTH,

Plaintiff-Appellant,

v.

CANDACE KANIA,

Defendant-Respondent.

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Submitted November 15, 2022 – Decided December 5, 2022

Before Judges Sumners and Geiger.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-1053-17.

Stephen W. Guice, attorney for appellant.

Law Offices of Ibrahim and Jackson, attorneys for respondent (Alphonso H. Ibrahim and John J. Mastronardi, on the brief).

PER CURIAM

This personal injury action arises from a rear-end motor vehicle accident. The jury entered a unanimous verdict that plaintiff failed to prove that he

suffered a permanent injury proximately caused by the accident. Accordingly, plaintiff Troy Hainsworth was not awarded any damages and his complaint was dismissed with prejudice. Plaintiff appeals from Law Division orders that: (1) denied his motion in limine to bar the opinions and de bene esse deposition testimony of defendant Candace Kania's expert witness, Dr. Stephen M. Horowitz; (2) entered judgment in favor of defendant dismissing his claims for economic and non-economic damages; and (3) denied his motion for judgment notwithstanding the verdict (JNOV) or a new trial. We affirm.

On August 27, 2015, plaintiff was stopped at a red light. While waiting for the light to change, his vehicle was struck in the rear by a vehicle driven by defendant. Plaintiff claimed the accident caused him to suffer numerous injuries, including spinal disc herniations and bulges, bilateral shoulder injuries, and bilateral cubital and carpal tunnel injuries. He subsequently underwent six surgical procedures, which included bilateral shoulder surgeries, bilateral cubital tunnel surgery, and bilateral carpal tunnel surgery. Plaintiff maintained that he never had any problems with his shoulders or elbows before the accident.

Plaintiff was insured under a GEICO automobile insurance policy with limited personal injury protection (PIP) coverage in the amount of $15,000. On June 2, 2016, GEICO advised plaintiff that the medical coverage portion of his

policy had been exhausted. Plaintiff's secondary insurer for medical bills was Medicaid. Medicaid paid medical bills and expenses totaling $42,000 and asserted a lien in that amount against any recovery in this case.

Plaintiff's GEICO policy was subject to the limitation on lawsuit option (verbal threshold) under N.J.S.A. 39:6A-8(a). As a result, he was required to prove that he suffered a "permanent injury within a reasonable degree of medical probability" that was proximately caused by the accident to be eligible to recover non-economic damages. N.J.S.A. 39:6A-8(a). "An injury shall be considered permanent when the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment." Ibid.

Defendant retained Dr. Horowitz, a Board-certified orthopedic surgeon, as her expert. Dr. Horowitz was provided with and reviewed the police accident report, plaintiff's answers to interrogatories, plaintiff's current and prior medical records, plaintiff's imaging studies, reports by Dr. Robert Labaczewski, Dr. Kishor Patil, notes by treating physicians, and operative reports. Dr. Horowitz performed a physical examination of plaintiff and issued a report. Because plaintiff contends that Dr. Horowitz issued an inadmissible net opinion, we

provide the following recounting of his findings and opinions and pertinent portions of his testimony during a de bene esse deposition.

Dr. Horowitz noted: (1) an MRI showed significant degenerative changes throughout plaintiff's cervical spine, with degenerative disc disease, significant narrowing at multiple levels, prominent osteophytes at the C3-C4, C5-C6, C6-C7, and C7-T1 levels, and a disc herniation in association with a prominent osteophyte at the C3-C4 level; (2) a right shoulder MRI showed AC joint degenerative changes; (3) a right elbow MRI was unremarkable; (4) a left shoulder MRI was fairly unremarkable but showed AC joint degenerative changes with no rotator cuff tear; and (5) a lumbar MRI showed degenerative disc disease and a bulge at the L5-S1 level but no disc herniation.

Dr. Horowitz's report noted his findings from his physical examination of plaintiff. He found no lumbar spasm, questionable discomfort on rotation, a range of motion forty percent of normal. "Sensory, motor, and reflex evaluation of both lower extremities [was] within normal limits and equal bilaterally," and plaintiff had "a negative straight leg raise test bilaterally."

Dr. Horowitz found plaintiff's cervical spine range of motion was about fifty percent of normal. "Sensory, motor, and reflex evaluation of both upper extremities [was] within normal limits and equal bilaterally." Plaintiff had "a

negative Phalen's test and negative Tinel's sign at both carpal tunnels." Dr. Horowitz found no atrophy in either hand. Plaintiff had "a negative Tinel's sign at the medial epicondyles of both elbows."

Regarding plaintiff's shoulders, Dr. Horowitz found an equally limited range of motion of both shoulders and that plaintiff had "discomfort with any attempt to passively move either shoulder." Plaintiff had "a full range of motion of both elbows." He also had "equal range of motion of both wrists."

Dr. Horowitz's report also contained a comprehensive review of plaintiff's current and prior medical records and imaging studies, which we need not repeat here. Dr. Horowitz's report included the following impressions:

- Plaintiff indicated he had some prior neck, back, and hand complaints and was treated in the past for those complaints.

- Plaintiff was on Social Security disability at the time of the accident.

- Plaintiff had a history prior chronic cervical spine pain with fibromyalgia and had received monthly pain management treatment before the accident.
- Plaintiff expressed "a prior history of neck and back complaints, but was nonspecific."

- The "neurological evaluation of [plaintiff's] upper extremities was normal and there were no signs of radiculopathy."

- The cervical MRI showed "quite significant degenerative changes throughout the cervical spine." Plaintiff "had various prominent posterior osteophytes." A cervical CT scan showed "quite significant degenerative changes." Dr. Horowitz opined that plaintiff's cervical spine diagnosis was "strain and sprain as related to the motor vehicle accident."

- Plaintiff did not express lower back complaints, but prior medical records indicated he had a "prior history for his low back." The lumbar MRI showed "degenerative changes."

- Plaintiff underwent bilateral shoulder arthroscopies in 2016, which "involved decompressions and labral repairs." Dr. Horowitz noted that a finding of a shoulder labral tear "is a common finding and can be seen commonly without a history of injury." Both shoulder MRIs were "fairly unremarkable." The rotator cuffs were "intact" but there was "somewhat limited range of motion of both shoulders." Dr. Horowitz found "contusions by history."

- Plaintiff's hands and elbows were "post bilateral cubital and carpal tunnel releases." Dr. Horowitz noted "it would be unusual to obtain a carpal or cubital tunnel syndrome from a single blow to the hand or elbow associated with a motor vehicle accident." "There [were] no imaging studies documenting an injury occurring to [plaintiff's] hands or elbows as a result of this incident." "The records also indicate that [plaintiff] may have had some prior carpal tunnel syndrome before the incident." Dr. Horowitz was "not able to draw a causal relationship between [plaintiff's] carpal or cubital tunnel syndrome and the motor vehicle accident."

Dr. Horowitz opined, within a reasonable degree of medical certainty, that

> [he was] not able to draw a causal relationship between the need for surgery for [plaintiff's] shoulders as well as his hands and elbows and the incident of [August 27, 2015]. With regards to the incident of [August 27, 2015], I am not able to identify a causal relationship between [plaintiff's] subjective complaints and the incident. With regards to the incident, it would be my opinion that [plaintiff] did not suffer a permanent injury.

During his de bene esse deposition, Dr. Horowitz testified during cross-examination regarding the cubital tunnel syndrome. He stated:

> [C]ubital tunnel syndrome is usually not traumatic, it's usually not from a single event like a car accident.
>
> If it does occur from trauma, it's usually in association with a fracture, like a fracture on the elbow. So it would be very unusual to get cubital tunnel syndrome from a car accident in the absence of trauma.
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> There's no imaging studies documenting an injury occurring to the elbows as a result of the accident. I'm not sure he even had elbow x-rays in the ER, so I'm not really able to make that relationship.
>
> Cubital tunnel syndrome most of the time when I've seen it is just not traumatic at all . . . .

Concerning plaintiff's shoulders, Dr. Horowitz testified on cross-examination:

> You know, the shoulder MRIs didn't really show anything traumatic. He had labral tears. Again, labral

> tears are commonly seen even in people . . . without injury. Again, there were no shoulder x-rays in the . . . ER, there was a delay in presentation.
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> So . . . I agree with the examiners. I mean I'm sure he had labral tears because they did surgery and they found them at surgery, but I just can't make a causal relationship between that finding and the accident.
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> . . . .
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> A car accident is trauma, but that's the whole point. The point is that I think the labral tears would have been there anyway even if he didn't have the car accident.

Plaintiff filed a motion in limine to bar the expert report and de bene esse testimony of Dr. Horowitz. Plaintiff argued that Dr. Horowitz issued an inadmissible net opinion because his opinions lacked evidentiary support and were contradicted by undisputed facts in the record. The court denied the motion.

At trial, plaintiff was permitted to testify, over defense objection, that there was a Medicaid lien asserted against him. He asserts that the court initially charged the jury that "plaintiff's claim in this case does not include any claims for medical expenses. Therefore, in determining the reasonable amount of damages due to plaintiff, you shall not speculate upon or include medical

expenses as a part of the damages."[1] Following a sidebar regarding the Medicaid lien, the court clarified that $42,000 was claimed as a Medicaid lien and instructed the jury that if they found plaintiff's injuries were related to the accident, they could award $42,000 to plaintiff for the Medicaid lien "without finding that it's a permanent injury." Plaintiff did not object to the instruction.

Following deliberations, the jury returned a unanimous "no cause" verdict against plaintiff. The court subsequently entered an order dismissing plaintiff's complaint and claim for both economic and non-economic damages with prejudice.

On October 27, 2021, plaintiff filed a motion for judgment notwithstanding the verdict (JNOV) or, in the alternative, a new trial. On November 19, 2021, the court issued a detailed statement of reasons and accompanying order denying the motion. The court provided the following reasoning:

> Here, [p]laintiff is unable to meet the standards for either a judgment notwithstanding the verdict, or a motion for a new trial. Plaintiff is unable to prove that the jury's original verdict was so out of line with the evidence that it amounts to a miscarriage of justice. The [c]ourt places great weight behind the jury's decision, and in this case, [its] decision was reasonable given the evidence that was and was not provided.

[1] The record on appeal does not include a transcript containing that charge.

Defense counsel strikes at the heart of the issue by pointing out that [p]laintiff does not provide any new evidence that would lead this [c]ourt to overturn the original verdict. Instead, [p]laintiff relies on [the] summation of the experts' testimony to argue that the jury should have found in [his] favor. However, even if all experts opinioned that [p]laintiff's injuries were proximately caused by the accident, the jury was free to evaluate the testimony and credibility of the witnesses at trial to determine if these injuries were permanent. The jury decided they were not. Therefore, [it] gave no award. The [c]ourt sees no reason to void this conclusion. The jury was charged to decide if the claimed damages of [p]laintiff were proximately caused by the accident. The [p]laintiff offered scant evidence of this throughout the trial. There was nothing more than [p]laintiff's "estimate" of $40,000 offered into evidence. No lien information whatsoever was provided [from] Medicaid for the jurors to review. Whatever may have been discussed months prior in discovery somehow never made it into evidence. Such an estimate, over objection by the [d]efense, was still allowed by the [c]ourt. Not satisfied with that gain, [p]laintiff still argues the materials received in discovery – not admitted into evidence – should have somehow been considered.

Furthermore, this [c]ourt agrees with [d]efense counsel's contention that [p]laintiff's counsel was present when the jury instructions and verdict sheet were agreed upon. This [c]ourt makes it a practice to ask if there is anything else that counsel wishes to address. Every opportunity existed for [p]laintiff to add or request more. To now object to what occurred, despite having had the opportunity to do so at the time, does not sway this [c]ourt, as it would be fundamentally unfair to provide another bite at the apple. Moreover,

> as such little evidence of the lien was presented, it becomes even more clear that the jury's decision not to render an award was reasonable.

This appeal followed. Plaintiff raises the following points:

> POINT I
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> DR. HOROWITZ'S EXPERT OPINION WAS A NET OPINION AND HAD ABSOLUTELY NO BASIS IN FACT AND, THEREFORE, PLAINTIFF'S MOTION IN LIMINE SHOULD HAVE BEEN GRANTED.
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> POINT II
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> PLAINTIFF TESTIFIED THAT HIS $15,000.00 PIP HAD BEEN EXHAUSTED AND THAT HE HAD INCURRED A $42,000.00 MEDICAID LIEN DIRECTLY AS A RESULT OF THE TREATMENT THAT HE RECEIVED FOR THE INJURIES THAT HE HAD INCURRED AS A RESULT OF THE AUTOMOBILE ACCIDENT. THE JURY WAS NOT PROPERLY INSTRUCTED REGARDING THE ECONOMIC LOSS AND THE JURY VERDICT SHEET WAS INADEQUATE AND CONFUSING. THE JURY WAS NOT INSTRUCTED THAT THE PLAINTIFF DID NOT HAVE TO PROVE PERMANENT INJURY IN ORDER TO BE COMPENSATED FOR HIS ECONOMIC LOSS.

We are unpersuaded by plaintiff's arguments, which lack sufficient merit to require extensive discussion in a written opinion. R. 2:11-3(e)(1)(E).

Plaintiff contends that Dr. Horowitz's report and de bene esse testimony should have been barred as an inadmissible net opinion. We disagree.

"The admission or exclusion of expert testimony is committed to the sound discretion of the trial court." Townsend v. Pierre, 221 N.J. 36, 52 (2015) (citing State v. Berry, 140 N.J. 280, 293 (1995)). "As a discovery determination, a trial court's grant or denial of a motion to strike expert testimony is entitled to deference on appellate review." Ibid. As noted by the Court, "we apply [a] deferential approach to a trial court's decision to admit expert testimony, reviewing it against an abuse of discretion standard." Id. at 53 (alteration in original) (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371-72 (2011)).

N.J.R.E. 703 governs the foundation for expert testimony. "The net opinion rule is a 'corollary of [N.J.R.E. 703] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data.'" Townsend, 221 N.J. at 53-54 (alterations in original) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008)). "The rule requires that an expert give the why and wherefore that supports the opinion, 'rather than a mere conclusion.'" Id. at 54 (quoting Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)). Moreover:

> The rule does not mandate that an expert organize or support an opinion in a particular manner that opposing counsel deems preferable. An expert's proposed testimony should not be excluded merely "because it

> fails to account for some particular condition or fact which the adversary considers relevant." Creanga [v. Jardal, 185 N.J. 345, 360 (2005)]. The expert's failure "to give weight to a factor thought important by an adverse party does not reduce his testimony to an inadmissible net opinion if he otherwise offers sufficient reasons which logically support his opinion." Rosenberg v. Tavorath, 352 N.J. Super. 385, 402 (App. Div. 2002). Such omissions may be "a proper 'subject of exploration and cross-examination at a trial.'" Ibid. (quoting Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 55 (App. Div. 1990), modified on other grounds, 125 N.J. 421 (1991)); see also State v. Harvey, 151 N.J. 117, 277 (1997) ("'[A]n expert witness is always subject to searching cross-examination as to the basis of his opinion.'" (quoting State v. Martini, 131 N.J. 176, 264 (1993))).
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> [Id. at 54-55.]

Applying these principles, we conclude that Dr. Horowitz's report and de bene esse testimony were not net opinions. On the contrary, the record demonstrates that he identified the factual bases and explained the reasons for his conclusions. His opinions were not speculative or mere personal views. See id. at 56. To the extent that Dr. Horowitz did not discuss certain test results in his report, it did not reduce his testimony to an inadmissible net opinion as he offered other sufficient reasons which logically supported his conclusions. See id. at 54. Instead, those omissions were the subject of extensive cross-examination during his de bene esse deposition. See id. at 54-55. The credibility

of Dr. Horowitz and the weight to be given to his opinions were for the jury to decide.

Plaintiff argues that the court did not properly instruct the jury and used a jury verdict sheet that was inadequate and confusing regarding the economic loss resulting from the $42,000 Medicaid lien. We are unpersuaded.

Plaintiff was permitted to testify as to the existence of the lien. He did not object to the jury instruction given by the court or the jury verdict sheet that was used. We therefore review for plain error.

Although unreimbursed economic losses such as medical expenses are normally recoverable even where the plaintiff does not satisfy the verbal threshold, because plaintiff did not recover any damages, he is under no obligation to reimburse the amounts Medicaid paid on his behalf. Plaintiff would only be responsible to reimburse Medicaid "from the proceeds of any settlement, judgment, or other recovery in any action or claim initiated against any such third party" found liable. N.J.S.A. 30:4D-7.1(b). Here, plaintiff recovered no damages from the defendant. There were no "proceeds of any settlement, judgment, or other recovery" on his claim against defendant. Thus, plaintiff suffered no recoverable economic loss since he does not have to reimburse Medicaid.

Accordingly, we discern no harmful error, much less plain error that was clearly capable of producing an unjust result. R. 2:10-2.

Lastly, plaintiff did not brief the issue of the denial of his motion for a JNOV or a new trial. We deem that issue waived. See Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived."). For sake of completeness, we will briefly address the issue.

"The same standard governs our review of the trial court's determination of a motion for JNOV or a new trial." Barber v. Shoprite of Englewood & Assocs., 406 N.J. Super. 32, 52 (App. Div. 2009) (citing Dolson v. Anastasia, 55 N.J. 2, 7 (1969)). "When considering a motion for JNOV or a new trial, '[t]he trial judge shall grant the motion if, 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.'" Id. at 51 (quoting R. 4:49-1(a)). "[T]he court must accept as true all the evidence which supports the position of the party defending against the motion and must accord that party the benefit of all legitimate inferences which can be deduced therefrom." Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 4:40-2 (2023). The court must not weigh witness credibility in deciding a motion for JNOV. Ibid.

"The trial judge shall grant the motion [for a new trial] if, 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." Crawn v. Campo, 136 N.J. 494, 511-12 (1994) (alteration in original) (quoting R. 4:49-1(a)). Our Supreme Court has explained:

> "The standard of review on appeal from decisions on motions for a new trial is the same as that governing the trial judge—whether there was a miscarriage of justice under the law." Risko [v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 522 (2011)]; accord R. 2:10-1 ("The trial court's ruling on such a motion shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law."). We have explained that a "miscarriage of justice" can arise when there is a "manifest lack of inherently credible evidence to support the finding," when there has been an "obvious overlooking or under-valuation of crucial evidence," or when the case culminates in "a clearly unjust result." Risko, 206 N.J. at 521-22 (quoting Lindenmuth v. Holden, 296 N.J. Super. 42, 48 (App. Div. 1996)).
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> [Hayes v. Delamotte, 231 N.J. 373, 386 (2018).]

"However, in deciding that issue, an appellate court must give 'due deference' to the trial court's 'feel of the case.'" Risko, 206 N.J. at 522 (quoting Jastram v. Kruse, 197 N.J. 216, 230 (2008)).

We discern no such miscarriage of justice. For the reasons we have stated, the motion to bar the expert report and de bene esse testimony of Dr. Horowitz

was correctly denied. The aspects of jury instructions and verdict sheet pertaining to the Medicaid lien did not result in harmful error. See R. 2:10-2 ("[a]ny error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result"). Accordingly, there was no basis to grant a JNOV or a new trial. The motion was correctly denied.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION