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This opinion shall not "constitute precedent or be binding upon any court." 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-1572-21**

ELAINE KELLY,

Plaintiff-Appellant/  
Cross-Respondent,

v.

NORMA I. MARCANO and  
MAX A. MARCANO,

Defendants-Respondents/  
Cross-Appellants.

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Argued October 31, 2022 – Decided February 16, 2023

Before Judges Currier, Enright, and Bishop-Thompson.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-3371-17.

John D. Gagnon argued the cause for appellant/cross-respondent (Rabb Hamill, PA, attorneys; John D. Gagnon, of counsel and on the briefs).

Kevin J. McGee argued the cause for respondents/cross-appellants (Tango, Dickinson,

Lorenzo, McDermott & McGee, LLP, attorneys;  
Kevin J. McGee and Daniela Pepe, on the brief).

PER CURIAM

In this personal injury action, a jury found plaintiff Elaine Kelly suffered a permanent injury, see N.J.S.A. 39:6A-8(a), as the result of a motor vehicle accident on July 8, 2016. The jury unanimously found the accident was caused by the negligence of defendant Max Marcano and plaintiff was not comparatively negligent. The jury awarded plaintiff \$140,000 in damages. Defendant moved for a new trial, which was granted.

On appeal, plaintiff contends the trial judge misapplied the law in granting a new trial. Defendants cross-appeal from the denial of the motion to bar plaintiff's expert's testimony opining that the automobile accident aggravated the pre-existing degenerative disc disease in her spine. Defendants assert the court's ruling caused an "unjust result" and constituted reversible error. Defendants also contend the following cumulative errors warranted a new trial: the initial denial of defendant's motion in limine to bar testimony regarding the exhaustion of plaintiff's medical benefits; the improper comments made by plaintiff's counsel during his opening statement; the denial of defendants' motion to bar plaintiff's expert testimony regarding aggravation; plaintiff's expert's presence in the courtroom during oral argument; the jury

instruction on aggravation of pre-existing condition under Model Jury Charge (Civil) 8.11F; and the improper denial of three peremptory challenges.

We discern the following procedural history. Trial was initially scheduled for December 14, 2020, but adjourned and relisted for trial on April 12, 2021. Neither party consented to an expedited jury trial (EJT). Plaintiff contends that during a pre-trial telephonic conference on March 31, 2021, plaintiff advised the trial judge her expert was unavailable the week of the trial. The trial was adjourned to June 21, 2021.

An Order for Virtual Jury Trial was entered on May 3, 2021, which contained several provisions which identified the trial as an EJT. Notably, Paragraph 1(H) stated:

Pursuant to agreement of the parties in the EJT order entered in this matter each party is limited to three (3) preemptory [sic] challenges.

The order also provided in Paragraph 3(C) "[t]he order of the proceedings" would include a period of time for "review of EJT packets by jurors." Paragraph 4(H) stated the only evidence provided to the jury would be limited to "the EJT packets as directed by the court" which would be provided to the jury "[i]n hard copy binders delivered by the court to each juror."

Defendants' subsequent request for an adjournment was granted and trial was adjourned to September 13, 2021. Another pretrial conference was held on August 23, 2021. A second Order for Virtual Jury Trial was entered on August 24, 2021 which mirrored the previous order.

The trial commenced on November 1, 2021. After the voir dire conference, jury selection began via Zoom with only one prospective juror appearing at a time on the television screen during additional voir dire questioning. Defense counsel exercised three peremptory challenges.

On several occasions during jury selection, the judge asked counsel whether they had "any follow up" questions. While both counsel used such opportunities to ask additional questions, only defense counsel exercised peremptory challenges. Following the second peremptory challenge, plaintiff's counsel raised a Gilmore<sup>1</sup> objection regarding the defense challenges.

The judge questioned eight potential jurors in the virtual jury box. Defense counsel did not have any follow-up questions after the judge concluded the biographical questions. Plaintiff's counsel found the jury acceptable as constituted.

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<sup>1</sup> State v. Gilmore, 103 N.J. 508 (1986).

Following the charge conference on November 5, 2021, defense counsel moved for a mistrial based on the virtual trial format. Defense counsel asserted the disadvantages in the virtual jury selection, the "reduction" to three peremptory challenges, and the technical difficulties throughout the virtual trial impacted the presentation of defendant's case.

In opposition, plaintiff's counsel argued the jurors appeared to have "[paid] attention" as defense counsel put on his case. Plaintiff's counsel also argued he didn't think "defense counsel used [all of the] peremptory challenges." After defense counsel confirmed all peremptory challenges were used, appearing somewhat perplexed, plaintiff's counsel then inquired if each party "only [had] three challenges" because he thought "[they had] six."

The confusion continued when defense counsel referred the court to the May 3 and August 24, 2021 orders which stated each party only had three challenges. Plaintiff's counsel again stated, "[he] was under the impression [each party had] six the whole time." The judge denied defendants' motion.

After a brief recess, colloquy continued regarding the number of peremptory challenges designated in the pre-trial orders. The judge acknowledged the "[c]ourt's mistake" and the trial continued. After the

verdict, plaintiff submitted a proposed final order of judgment and affidavit of services for counsel fees.

Defendants moved for a new trial pursuant to Rule 4:49-1 contending the trial court's mistaken denial of three peremptory challenges denied defendants a "substantial right" and warranted a new trial under Wright v. Bernstein, 23 N.J. 284 (1957). Defendants also contended the trial judge erred in denying their motion to bar the plaintiff's expert's testimony opening on plaintiff's aggravated condition and the automobile accident. Lastly, defendants contended the cumulative errors that occurred throughout the trial from "plaintiff's opening statement to the reading of the jury charges" constituted reversible error.

In opposition, plaintiff argued that even if the trial order created a misunderstanding regarding peremptory challenges, because defense counsel was silent during jury selection, it was harmless error under Catando v. Sheraton Poste Inn, 249 N.J. Super. 253 (App. Div. 1991). Plaintiff cross-moved for counsel fees.

The judge rendered an oral opinion and concluded "if there [w]as a miscarriage of justice under the law," there was a "mistake" made by the court in the order which was "inappropriately entered." The judge also found a new

trial was necessary based on the "issues with regard to the challenges" and "misunderstandings" by counsel. For those reasons, the judge granted a new trial.

We review the trial court's decision on a motion for a new trial under the same standard governing the trial judge—whether "it clearly and convincingly appears that there was a miscarriage of justice under the law." Hayes v. Delamotte, 231 N.J. 373, 386 (2018) (quoting R. 4:49-1(a)). A jury verdict will not be reversed "unless it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1. In reviewing a trial judge's decision on a motion for a new trial, we view the evidence in the light most favorable to the party opposing the new trial motion. Caldwell v. Haynes, 136 N.J. 422, 432 (1994). "[W]hen evaluating the decision to grant or deny a new trial, 'an appellate court must give "due deference" to the trial court's "feel of the case.'"" Hayes, 231 N.J. at 386 (quoting Risko v. Thompson Muller Auto. Grp. Inc., 206 N.J. 506, 522 (2011)).

Applying these principles, we discern no basis to disturb the trial judge's decision to grant defendants' motion for a new trial. After reviewing the record, we find the parties did not consent to an EJT and the judge

appropriately acknowledged the error limiting each party to three peremptory challenges in the order for a virtual trial.

We are convinced defendants were deprived of a fair trial when they were only accorded six peremptory challenges. As we noted in Wright, the right of peremptory challenge is a right of rejection rather than selection. 23 N.J. at 293-94. Accordingly, we are satisfied the trial judge appropriately concluded the jury verdict resulted in a miscarriage of justice as required by Rule 4:49-1(a).

In light of our decision, we need not address the issues raised in the cross- appeal.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION