SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2214-21

TYMIR GILBERT, an infant by his Guardian Ad Litem, SAMANTHA SMIKLE, and SAMANTHA SMIKLE, individually,

Plaintiffs-Respondents,

v.

VALENTIN WINNYK and ROSALIE WINNYK,

Defendants-Appellants.

Argued April 19, 2023 – Decided June 8, 2023

Before Judges Currier and Mayer.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-3688-18.

Thomas W. Matthews argued the cause for appellants (Bennett, Bricklin & Saltzburg, LLC, attorneys; Thomas W. Matthews, of counsel and on the brief).

Peter C. Gordon argued the cause for respondents (Andrew S. Maze, PC, attorneys; Andrew S. Maze and Peter C. Gordon, on the brief).

PER CURIAM

In this personal injury action arising out of a motor vehicle accident, a jury found defendant[1] sixty percent responsible for the accident and plaintiffs'[2] damages. Defendant appeals from the March 4, 2022 order denying her motion for judgment notwithstanding the verdict (JNOV) or, alternatively, for a new trial. We affirm.

We derive our facts from the trial testimony.

Nine-year-old Tymir was riding his bike on the sidewalk along Roosevelt Avenue when he turned left to cross the street. He said he looked both ways before he entered the street and "almost made it across the first lane" before he was hit by defendant's car. He could not remember if he was able to see the traffic coming from his left. He testified he did not come out of a driveway when he crossed the street; he was on the sidewalk and went over a curb to go

[1] Defendant Rosalie Winnyk was the driver of the vehicle. The claims against the owner of the car—defendant Valentin Winnyk—were dismissed with prejudice.

[2] Plaintiff Tymir Gilbert is a minor. His mother, Samantha Smikle, instituted suit on Tymir's behalf and individually. We refer to them individually by first name and collectively as plaintiffs.

into the street. Tymir recalled the car hitting the bike pedal and back wheel. He was thrown off the bike onto the ground.

After jury selection and prior to opening statements, defense counsel requested a proffer from plaintiffs regarding Samantha's testimony. Because the parties stipulated to damages, defendant sought to limit Samantha's testimony. She had not witnessed the accident and only arrived at the scene after it occurred. After plaintiffs' counsel outlined Samantha's proposed testimony, the court advised it would address specific objections raised during the testimony.

Samantha testified she was driving in her car with a passenger when she noticed police had blocked off the street ahead of them. The passenger said it appeared someone on a bike had been hit by a car. The passenger then jumped out of the stopped car because he thought the person on the ground looked like Tymir. Samantha parked her car and ran to the scene. She saw Tymir lying on the ground and an officer kneeling next to him. Samantha described the area of the accident as "active."

Defense counsel only objected once during Samantha's direct examination when plaintiffs' counsel asked Samantha about her familiarity with the area. The judge overruled the objection. On cross-examination, Samantha stated the

accident did not occur at an intersection, and there was a house and an apartment building between the scene of the accident and the corner.

Defendant produced the police officer who responded to the scene. He had no specific recall of the event other than the information written in his report. According to the report, defendant told the officer: "The child on the bicycle just came out of [nowhere] from behind the parked car. [She] also stated that, 'I could not stop before I hit him.'" The officer further testified that Tymir said "he was crossing the road when he got hit." The officer measured the drag marks from the bike as six feet from the point of impact to the final resting place of the bike.

Defendant testified she was traveling on Roosevelt Avenue "going between [twenty] and [twenty-two] miles per hour"; the traffic was "relatively busy"; and there were cars "six, seven car lengths ahead of [her]." Her husband, Valentin, was a passenger in the car. She said she did not see Tymir on the bicycle "until he was directly in front of [her]." Defendant further stated Tymir emerged from "right behind . . . a parked car." When she saw Tymir, she "[s]lammed" on the brakes, but the car did not stop until after the impact with the bicycle. She did not move her car after it stopped. Defendant told the officer, "the bicyclist had come out from behind the parked vehicle and I did[]

[not] see him until it was too late for me to . . . stop without hitting him." She also testified she was concerned by the presence of children on the other side of the street, with one child in particular who was bouncing a ball on the sidewalk. For that reason, she said she was driving below the twenty-five mile an hour speed limit.

When asked on cross-examination whether she was concerned that the child bouncing the ball was going to run out into the street, defendant said, "No, I[] [a]m not saying that. I[] [a]m saying I was aware of the peripheral vision area and I saw this one child bouncing a ball and that concerned me."

Valentin Winnyk also testified. He said he saw a child appear from his right side from between two cars. He stated defendant braked when she saw the bicycle.

After the completion of testimony, defendant moved for a directed verdict under Rule 4:40-1 asserting,

> I do[] [not] believe there[] [ha]s been any evidence presented by . . . plaintiff that my client violated [a] duty of care that was owed to . . . plaintiff. There[] [ha]s been no evidence that my client was speeding, there has been no evidence that my client was distracted, and there[] [i]s no evidence that my client did anything wrong. So reasonable minds could not differ that she was not negligent . . . .

The court found there was a material question of fact for the jury to resolve regarding fault for the happening of the accident. The court denied the motion.

Defendant also requested the court charge the jury with N.J.S.A. 39:4-66(b) (the driveway statute). Defense counsel argued the photo marked by Tymir showed the location where he entered the road "was about two inches from the driveway" and therefore the jury should determine where Tymir went into the street. The judge declined to charge the statute, stating Tymir testified he went off the curb into the street.

After deliberating, the jury found both parties were negligent; attributing sixty percent of liability to defendant and forty percent liability to Tymir.

Thereafter, defendant moved for JNOV under Rule 4:40-2(b), and alternatively for a new trial under Rule 4:49-1(a). Defendant asserted Tymir's testimony regarding his entry into the road was not credible and the court erred in permitting Samantha to testify.

The court denied the motion. In the March 4, 2022 written statement of reasons, the court stated "[Rule] 4:49-1 requires that, in order for a [j]udge to grant a motion for a new trial, the [j]udge must find that it clearly and convincingly appears that there was a miscarriage of justice. Movant falls extremely short of that requirement."

On appeal, defendant contends the court erred in denying the motions for JNOV and a new trial, permitting Samantha to testify, and denying the request to charge the driveway statute.

"In reviewing a . . . motion for judgment under Rule 4:40-1, we apply the same standard that governs the trial courts." Smith v. Millville Rescue Squad, 225 N.J. 373, 397 (2016). A motion for judgment at the close of all evidence under Rule 4:40-1, and a motion for JNOV under Rule 4:40-2(b) are judged "by the same evidential standard," which is "[i]f, accepting as true all the evidence which supports the position of the party defending against the motion and according [them] the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied . . . ." Verdicchio v. Ricca, 179 N.J. 1, 30 (2004) (third alteration in original) (quoting Est. of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000)). Such motions "should only 'be granted where no rational juror could conclude that the plaintiff marshaled sufficient evidence to satisfy each prima facie element of a cause of action.'" Smith, 225 N.J. at 397 (quoting Godfrey v. Princeton Theological Seminary, 196 N.J. 178, 197 (2008)).

"A jury verdict is entitled to considerable deference and 'should not be overthrown except upon the basis of a carefully reasoned and factually

supported (and articulated) determination, after canvassing the record and weighing the evidence, that the continued viability of the judgment would constitute a manifest denial of justice.'" Hayes v. Delamotte, 231 N.J. 373, 385-86 (quoting Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 521 (2011)). A court will not "substitute [its] judgment for that of the initial finder of fact." Tichenor v. Santillo, 218 N.J. Super. 165, 169 (App. Div. 1987) (citing Dolson v. Anastasia, 55 N.J. 2, 6 (1969)). Therefore, to disturb a jury verdict as being against the weight of the evidence, it must be "so distorted and wrong, in the objective and articulated view of a judge, as to manifest with utmost certainty a plain miscarriage of justice." Id. at 169-70 (quoting Carrino v. Novotny, 78 N.J. 355, 360 (1979)). In other words, "[t]o overturn a jury verdict, 'the verdict must shock the judicial conscience.'" Dutton v. Rando, 458 N.J. Super. 213, 224 (App. Div. 2019) (quoting Caldwell v. Haynes, 136 N.J. 422, 432 (1994)).

Defendant asserts the court erred in denying the Rule 4:40-1 motion because there was no evidence to support a finding of negligence against her. We disagree.

Rule 4:40-1 provides "[a] motion for judgment, stating specifically the grounds therefor, may be made by a party either at the close of all the evidence

or at the close of the evidence offered by an opponent." If such a motion is denied and the case is submitted to the jury,

> the motion may be renewed in accordance with the procedure prescribed by [Rule] 4:49-1 (new trial) . . . . A motion so renewed may include in the alternative a motion for a new trial, and every motion made by a party for a new trial shall be deemed to include, in the alternative, a renewal of any motion for judgment made by that party at the close of the evidence.
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> [R. 4:40-2(b).]

Rule 4:49-1, motion for a new trial, states

> [a] new trial may be granted to all or any of the parties and as to all or part of the issues on motion made to the trial judge . . . . The 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.
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> [R. 4:49-1(a).]

Our Supreme Court has defined a miscarriage of justice as a "pervading sense of 'wrongness' needed to justify [an] appellate or trial judge undoing of a jury verdict . . . [which] can arise . . . from manifest lack of inherently credible evidence to support the finding, obvious overlooking or under-valuation of crucial evidence, [or] a clearly unjust result. . . ." Risko, 206 N.J. at 521

(alterations in original) (quoting Lindenmuth v. Holden, 296 N.J. Super. 42, 48 (App. Div. 1996)).

We discern no reason to disturb the court's denial of defendant's JNOV and new trial motions. After giving plaintiffs all reasonable inferences, they presented enough evidence for a jury to find defendant was negligent in the operation of her car. Defendant testified she was aware of children playing on the opposite side of the street, particularly a child with a ball; as plaintiffs' counsel suggested, a jury could find defendant was distracted by the children, preventing her from seeing Tymir ride into the street in front of her. In addition, the responding police officer testified the area of the accident was busy and there were six-foot drag marks behind the bicycle. From this evidence, a jury could find defendant was distracted by the conditions on the road and she was driving faster than she stated. There is no sound basis to disturb the jury's findings relating to defendant's negligence as there was evidence from which a jury could conclude defendant was partially at fault for the accident.

Defendant also contests the court's denial of her request to charge the driveway statute. We find the argument lacks merit.

"[A]ppropriate and proper charges to a jury are essential for a fair trial." Velazquez ex rel. Velazquez v. Portadin, 163 N.J. 677, 688 (2000) (quoting State

v. Green, 86 N.J. 281, 287 (1981)). The question of the legal adequacy of a jury instruction is an issue of law reviewed de novo. Fowler ex rel. Edenfield v. Akzo Nobel Chems., Inc., 251 N.J. 300, 323 (2022). But "[a] jury instruction that has no basis in the evidence is insupportable, as it tends to mislead the jury." Prioleau v. Ky. Fried Chicken, Inc., 223 N.J. 245, 257 (2015) (quoting Dynasty, Inc. v. Princeton Ins. Co., 165 N.J. 1, 13-14 (2000)).

The driveway statute, N.J.S.A. 39:4-66(b), reads:

> [T]he operator of a vehicle emerging from [a] . . . driveway . . . shall stop the vehicle immediately prior to entering or crossing a highway, and shall proceed to enter or cross the highway only after yielding the right of way to the traffic on the highway, if the traffic is so close as to constitute an immediate hazard.

A jury instruction must be tailored to the "theories and facts" that were presented in the case. Velazquez, 163 N.J. at 689. An instruction that is not so tailored can lead the jury to make improper decisions by applying inapplicable or incorrect law to the wrong set of facts and constitutes reversible error. See id. at 688-89. To be tailored to the theories and facts of the case, the jury charge must be based on the evidence presented at trial.

As the trial judge noted, Tymir testified he rode his bicycle off the curb onto Roosevelt Avenue and did not enter the street from a driveway. His mark on a photo of the scene demonstrating where he entered the road was consistent

with his testimony. Therefore, there was no basis in the evidence for the court to charge the jury with the driveway statute. The court properly charged the jury as to the respective responsibilities of a bicyclist and a driver of a motor vehicle as well as N.J.S.A. 39:4-97, careless driving.

We turn to defendant's assertion that the court erred in permitting Samantha to testify because "the sole purpose of the testimony was to evoke sympathy." We review an evidentiary ruling by a trial court for an abuse of discretion. State v. Prall, 231 N.J. 567, 580 (2018). "[T]he decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." Ibid. (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). We will not set aside such rulings absent a "clear error of judgment" on the part of the trial judge. Ibid. (quoting State v. J.A.C., 210 N.J. 281, 295 (2012)).

We discern no abuse of discretion. Samantha's testimony was brief. She explained where Tymir was going at the time of the accident. She told the jury how she learned Tymir had been in an accident and what she saw at the scene. The court's decision to permit Samantha to testify in a limited manner was not "so wide of the mark that a manifest denial of justice resulted." See State v.

Medina, 242 N.J. 397, 412 (2020) (quoting State v. Brown, 170 N.J. 138, 147 (2001)).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION