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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5827-09T2

PHYSICIAN'S GROUP
MANAGEMENT, INC.,

Plaintiff-Respondent,

v.

RICHARD J. CLAPS, MD &
ASSOCIATES, PA,

Defendant-Appellant.

Argued: May 11, 2011 - Decided: June 14, 2011

Before Judges Axelrad, R. B. Coleman and Lihotz.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-3659-08.

Stephen A. Rudolph argued the cause for appellant (Rudolph & Kayal, attorneys; Mr. Rudolph, on the briefs).

Giovanni De Pierro argued the cause for respondent (Ambrosio, De Pierro & Wernick, LLC, attorneys; Mr. DePierro and Edward Grossi, on the brief).

PER CURIAM

In this breach of contract action, defendant Richard J. Claps, M.D. & Associates, PA (Claps) appeals from an order of

the trial court denying its motion for a new trial after the jury returned a verdict in favor of plaintiff, Physician's Group Management, Inc. (PGM). The verdict was comprised of underpayments for billing services and for lost profits following breach by improper termination. On appeal, Claps argues there was a miscarriage of justice based on: (1) improper remarks by PGM's counsel during summation; (2) an inadmissible net opinion of PGM's expert; (3) improper exclusion of a January 11, 2005 letter faxed by Claps' representative to PGM; (4) an erroneous verdict sheet that improperly contained an express dollar amount and language stating "or other amount agreed upon by the jury," which permitted the jury to speculate as to damages; (5) a quotient verdict on lost opportunity costs; and (6) a biased, impassioned and sympathetic verdict for underpayments. Based on our analysis of the record and applicable law, we perceive of no legal basis to disturb the verdict.

I.

On May 2, 2008, PGM filed suit against Claps and Dr. Douglas Noble,[1] for payment of services rendered and damages based on breach of the parties' January 6, 2003 written

[1] The claims against Dr. Noble individually were dismissed prior to trial.

agreement. PGM filed an amended complaint on April 30, 2009. Claps filed responsive pleadings to both complaints as well as a counterclaim that was apparently dismissed through a pretrial order.

Following a six-day trial, the jury returned a verdict on May 10, 2010, in favor of PGM and awarded $417,698.88 in damages, comprised of $228,818 for "Under-Payments on Book Accounts" and $188,880.88 for "Exclusivity Provision/Lost Profits." Claps timely moved for a new trial and, following oral argument, Judge Claude Coleman issued a bench opinion denying the motion, memorialized in an order of July 23, 2010. An order entering judgment was issued the same day, awarding prejudgment interest in addition to the jury verdict. This appeal ensued.

The trial court granted Claps a stay, conditioned on posting a bond for full satisfaction of the judgment, with costs and interest, which it apparently did not do. On November 29, 2010, Claps filed for bankruptcy and we placed the appeal on the inactive list. We reactivated the appeal after receiving a March 16, 2011 letter from Claps' counsel with an order of the Bankruptcy Court granting relief from the automatic stay to proceed with state court litigation.

II.

The following testimony and evidence was presented during trial. PGM is a company that provides billing services to physicians and is run by Albert Saviano. Claps is a radiology practice, and its sole shareholder is Dr. Noble. On January 6, 2003, the parties executed a written agreement commencing on that date whereby PGM would provide billing services to Claps and would receive 7.5% of all net amounts collected. The contract also contained an exclusivity clause for the two locations in existence at the time of the contract, Union Hospital and the Imaging Center at Morristown. The term of the agreement was set forth as follows:

> This Agreement . . . shall continue in effect until 12/31/03, and shall automatically renew for an additional one year period on that date unless notice is served by either party. This agreement may be terminated by either party giving (90) days written notice to the other party at any time after 12/31/03.
>
> If either party terminates in accordance with the terms of this agreement, PGM shall continue to act as the exclusive billing agent for the Client during the notice period and the obligations of each party shall be the same as if such notice had not been served. As of the date this Agreement actually terminates, the Client shall not be obligated to submit additional billing to PGM for collection, but PGM shall be permitted to collect on those accounts in its possession and shall be compensated

> therefore as if this Agreement had not been terminated.

Initially, PGM sent Claps monthly invoices for services rendered and Claps made payment. The situation changed, however, in early 2005. Saviano testified that in early 2005, he unilaterally began to extend a "hardship credit" to Claps through 2007, which was 7.5% of the 7.5% fee because Dr. Noble said he was overleveraged and was having difficulty paying PGM's invoices. There was nothing in writing regarding the length, amount, conditions, or terms of this hardship credit. Saviano initially testified he did not expect the discounted amount back and just expected payment of the invoices. However, he later stated the hardship credit was a deferred one, which he expected to ultimately receive as per the parties' written contract. PGM continued to send Claps monthly invoices at the contract rate of 7.5%. According to Saviano, until January 25, 2008, Claps never questioned nor objected to the rate charged on the invoices.

Saviano also explained about checks he returned to Claps beginning in November 2007, and explanatory correspondence, saying he did not cash the checks because they were improperly calculated at 5.5% of the net invoice. He also testified that a revised contract was sent by Claps' bookkeeper, Jill Gault, in January 2008 but was dated February 1, 2005, which had a sliding scale payment schedule.

Dr. Noble testified there was a rate negotiation at the end of 2004 into early 2005, so he instructed Gault to pick a round number close to the actual invoice and pay that until a new rate was agreed upon. According to Dr. Noble, the parties reached an agreement in April 2005 which fixed the rate at 5.5% for the Morristown location and 7% for the Union Hospital location; however, this new rate was not reduced to writing. Dr. Noble claimed he never saw the bills for 2005, 2006, or 2007, nor were the bills ever discussed with him. He later said he spoke to PGM's office manager, Mary Rose Hine, by telephone more then once about the new rate of 5.5%. Hine, however, testified she did not handle billing and any issues about a billing rate would be sent to Saviano.

During Dr. Noble's testimony, defense counsel sought to introduce a purported January 11, 2005 fax from Dr. Noble to Saviano that suggested, in general terms, there were negotiations between the parties. The sidebar where the admissibility of the document was discussed was only partially recorded, after which the court found the document "[i]nadmissible without some showing that the document was sent."[2]

[2] Most of the transcripts contain a statement that "[d]ue to inadequate recording devices used during proceedings which (continued)

Gault testified that Dr. Noble instructed her to begin submitting "rounded, flat" payments to PGM in early 2005, until a time when Claps and PGM reached a new agreement. However, after she was informed by Dr. Noble that an agreement had been reached, she continued to pay as she had been paying. Gault testified she continued to pay a flat rounded amount by recalculating the percentages based on the alleged new percentages, and then coming up with a balance due and remitting an amount "slightly less" than that which was due. This is evidenced by a chart of the payments admitted into evidence. Gault also testified that she sent the new contract to Saviano after he returned a check, stating the amount was incorrect. Gault had told him the amount was based on a new contract, of which Saviano indicated he had no knowledge. She sent him a letter dated January 25, 2008, representing that the 5.5% and 7% figures "were originally agreed upon by Dr. Noble and yourself three years ago."

On February 4, 2008, PGM sent Claps a letter stating that it was "suspending all services" pending payment of the invoiced amounts for November and December. Saviano testified that he

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(continued)
compromised the quality of tapes provided for transcription, transcript provided to best of transcribers ability." Claps did not make a motion to reconstruct the record pursuant to R. 2:5-3(f).

was attempting to get Dr. Noble's attention to pay the outstanding bills. In reality, PGM did not suspend all services as it continued to collect on old accounts. Dr. Noble testified, however, that he "[c]learly and unequivocally" understood this letter to be a termination of the contract. Accordingly, Claps did not send any new bills to PGM for collection thereafter and it engaged a new billing company in the summer of 2008.

PGM presented Joseph Wojak, CPA, as an expert witness on damages and forensic accounting, who prepared reports dated July 28, 2009 and February 9, 2010. Wojak prepared a report based on a review of PGM's records and interviews of personnel who prepared those records, including Saviano. According to Wojak, his review of the pertinent records showed that Claps did not even pay the reduced invoiced amount in full for 2005, 2006, 2007, and 2008. Wojak calculated underpayments at $228,818 based on the contractual rate, not the discounted rate.

Wojak also opined there were damages for lost opportunity to provide services in 2008, 2009, and 2010 because the contract was never terminated and Claps violated the exclusivity clause by sending its business elsewhere. Wojak projected lost profits based on actual collections over a twelve month cycle (April 2007 through April 2008). He calculated lost opportunity

damages of $132,700 for 2008, $180,000 for 2009, and $16,800 for January 2010, totaling $329,500. In total, Wojak calculated PGM's damages at $558,318.

At the close of evidence, Claps moved to strike Wojak's testimony as "net opinion." Claps argued Wojak's damage calculations were incorrect because he included the hardship credit, which Saviano testified he did not want to recover, and he incorrectly claimed no checks were sent from Claps to PGM in 2008. Thus, the defense argued Wojak's numbers were "not based on facts in this case."

Judge Coleman denied the motion, finding Wojak's testimony was not a net opinion. The judge noted Wojak explained how he reached his conclusions "based on the facts as he knew them to be." Furthermore, Wojak testified to the amount PGM received from Claps, noting that PGM had not cashed some of the checks.

The jury verdict sheet addressed the issue of damages as follows:

> 3. What amount of damages, if any, has Plaintiff PGM, Inc. proven by a preponderance of the evidence were caused by Defendant's breach of contract?
>
> Under-Payments on Book Accounts
>
> $0.00; $228,818.00; or other amount agreed upon by the jury:
>
> Exclusivity Provision/Lost Profits

$0.00; $329,500; or other amount agreed upon by the jury:

The jury found in favor of PGM, unanimously awarding damages of $228,818 for under-payments and $188,880.88 by a seven to one vote for lost profits. The jurors were polled to ensure they agreed with the verdict and were discharged.

III.

We review a denial of a motion for a new trial pursuant to Rule 4:49-1 under the same standard used by the trial court. Von Borstel v. Campan, 255 N.J. Super. 24, 28 (App. Div. 1992). A trial court may only grant a motion for a new trial when, "having given due regard to the opportunity of the jury to pass upon credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice . . . ." R. 4:49-1(a). "[T]he trial judge must . . . canvas the record not to balance the persuasiveness of the evidence on [each side], but to determine whether reasonable minds might accept the evidence as adequate to support the jury verdict." Dolson v. Anastasia, 55 N.J. 2, 6 (1969) (citation omitted).

We will not reverse a trial court's ruling on a motion for a new trial "unless it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1. In making this determination, we must accept as true the evidence supporting the jury's verdict and all permissible inferences

drawn therefrom to determine whether to uphold the verdict. Boryszewski v. Burke, 380 N.J. Super. 361, 391 (App. Div. 2005), certif. denied, 186 N.J. 242 (2006); Bell Atl. v. P.M. Video Corp., 322 N.J. Super. 74, 83 (App. Div.), certif. denied, 162 N.J. 130 (1999). However, we otherwise make our own independent determination of whether a miscarriage of justice occurred. Carrino v. Novotny, 78 N.J. 355, 360 (1979); Baxter v. Fairmont Food Co., 74 N.J. 588, 597-98 (1977); Dolson, supra, 55 N.J. at 6-8.

Claps first argues error by the trial in denying its motion for a new trial based on his adversary's "disparaging, inflammatory and improper personal attacks" on Dr. Noble and Gault during summation. Specifically, Claps references the comment of PGM's counsel that Dr. Noble and Gault "were both lying on the stand," and the two separate comments that the witnesses' testimony about the purported new agreement was "not credible, it's all lies." Defense counsel requested a sidebar after the summation, during which he apparently moved for a mistrial. The court did not view the comments as "a personal attack" and denied the motion.

Claps relies heavily on our decision in Szczecina v. PV Holding Corp., 414 N.J. Super. 173, 184-85 (App. Div. 2010), where we held the "egregious" and "pervasive" nature of

counsel's statements during opening and summation overstepped the bounds of appropriate advocacy and warranted a new trial. The challenged statements consisted of: (1) alleging the defense's "'game plan' was to have a spokesman, the defense lawyer, get 'spin doctors' and pay them to blame plaintiff and 'muddy up the waters'"; (2) referring to "spin doctors" thirty-eight times; (3) referring to the defense experts as "paid agreers" on four occasions; (4) calling defense counsel "spokesman" thirteen times; (5) using the term "game plan" on seven occasions; and (6) referring to the medical defense witnesses as a "tag team" and "hired guns," and accusing them of "intentionally muddying up the waters." Id. at 180.

A trial court's rulings during summation are reviewed under the abuse of discretion standard. Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 392-93 (2009). During summation, "counsel may argue from the evidence any conclusion which a jury is free to arrive at" so long as the language used does not go beyond the bounds of legitimate argument. Spedick v. Murphy, 266 N.J. Super. 573, 590-91 (App. Div.), certif. denied, 134 N.J. 567 (1993). Moreover, "[c]ounsel may draw conclusions even if the inferences that the jury is asked to make are improbable, perhaps illogical, erroneous or even absurd[.]" Ibid.

However, while "attorneys are given broad latitude in summation, they may not use disparaging language to discredit the opposing party, or witness, or accuse a party's attorney of wanting the jury to evaluate the evidence unfairly, of trying to deceive the jury, or of deliberately distorting the evidence." Rodd v. Raritan Radiologic Assocs., 373 N.J. Super. 154, 171 (App. Div. 2004) (internal citations omitted). Where an attorney's closing argument is "filled . . . with derisive and derogatory comments regarding [the adverse party], their counsel, their witnesses and their evidence in general, the cumulative effect" can result in a miscarriage of justice. Geler v. Akawie, 358 N.J. Super. 437, 468 (App. Div.), certif. denied, 177 N.J. 223 (2003). However, "[f]leeting comments, even if improper, may not warrant a new trial, particularly when the verdict is fair." Jackowitz v. Lang, 408 N.J. Super. 495, 505 (App. Div. 2009).

In Geler, supra, the record was replete with disparaging comments made during closing:

> Defendants' case was described as "rotten" and as "garbage"; their arguments, again, as "garbage," as "hogwash," designed "[t]o confuse, to muddle, put up smoke screens." Defendants' testimony was called a "joke," "bunk," "nonsense," and an "outrage." Defense counsel's factual explanation of the difference between the tests performed on men and women was characterized as a "Red Herring," a "smoke screen," designed to

> throw the jury "off track." Defendant's expert . . . was described as "wily and wiggly"; his opinions as "cute," "nonsense," "garbage," "absurd," and "not worth a hill of beans."
>
> [358 N.J. Super. at 468.]

Moreover, the plaintiff's counsel utilized "[u]nfair and prejudicial appeals to emotion through use of charged images . . . ." Ibid.

During summation in the present case, Claps' counsel stated that Wojak was brought to court to "deceive" the jury, he described Saviano's testimony as being "all a lie," and in comparing Wojak's and Saviano's testimony, he stated that they "got their stories mixed up." It is preferable and more professional for counsel to describe a challenge to witnesses' credibility using a term other than "lying," nevertheless, the comments here fell within the bounds of fair comment on the evidence and were a fair response to his adversary's summation. See Brennan v. Demello, 191 N.J. 18, 33 (2007). Moreover, the three references were "fleeting" and essentially innocuous in the context of the overall summation during which PGM's counsel highlighted the inconsistencies in defense witnesses' testimony and the conflicting testimony and evidence. Accordingly, Judge Coleman properly concluded the challenged summation was not an impermissible ad hominem attack on the party and witnesses and

did not abuse his discretion in denying a mistrial or new trial. Furthermore, the verdict seems fair as it comported with the expert's estimations but was also less than the expert's full damages calculation. See Jackowitz, supra, 408 N.J. Super. at 505.

Judge Coleman also cautioned the jury that the attorneys' comments are not evidence and instructed that it was the jury's duty to "decide which witnesses to believe and which witnesses not to believe." This instruction was sufficient to cure any potential for the challenged comments to have infected the jury's verdict. See City of Linden v. Benedict Motel Corp., 370 N.J. Super. 372, 398 (App. Div.) (holding that "a clear and firm jury charge may cure any prejudice created by counsel's improper remarks during opening or closing argument"), certif. denied, 180 N.J. 356 (2004).

Claps next challenges Wojak's testimony as an inadmissible net opinion based on "incorrect and flawed data." We discern no abuse of discretion by Judge Coleman in this ruling. See Harris v. Peridot Chem. (N.J.), Inc., 313 N.J. Super. 257, 297-299 (App. Div. 1998) (applying abuse of discretion standard for reviewing trial court's determination that expert opinion was not net opinion).

"An expert's conclusion is considered to be a 'net opinion,' and thereby inadmissible, when it is a bare conclusion unsupported by factual evidence." Creanga v. Jardal, 185 N.J. 345, 360 (2005); N.J.R.E. 703. An expert is thus required "'to give the why and wherefore' of his or her opinion, rather than a mere conclusion." Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002) (quoting Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div.), certif. denied, 145 N.J. 374 (1996)). An expert's "conclusions . . . based on the facts supplied to him by others and his own training and experience" do not constitute a net opinion. Troum v. Newark Beth Isr. Med. Ctr., 338 N.J. Super. 1, 27 (App. Div.), certif. denied, 168 N.J. 295 (2001).

The record amply supports that Wojak had "supporting data or facts for th[e] estimate . . . ." See Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo, 345 N.J. Super. 1, 11 (App. Div. 2001). The forensic accountant testified he relied on "company prepared documents" and personnel interviews in creating his report, analyzed the invoices, and performed straightforward mathematical calculations to determine the damages, amply providing the "why and wherefore" for his opinion, as required by Rosenberg, and "supporting data or facts" for the estimate, consistent with

Brach. Claps' arguments that Wojak failed to deduct the hardship credit from damages because Saviano claimed he did not wish to recover such hardship credit goes to the witnesses' credibility and the weight of his expert opinion, not its admissibility. See Lanzet v. Greenberg, 126 N.J. 168, 186 (1991) (holding that the court's function is to determine the admissibility of an expert's opinion, and it is then up to the jury to determine the credibility, weight, and probative value of the testimony). The jury heard all the testimony as to the hardship credit and was free to reduce the damage award calculated by PGM's expert accordingly.

Claps next challenges the trial court's denial of its request to admit into evidence a letter it purportedly faxed to Saviano on January 11, 2005. According to Claps, the document was critical to demonstrate that there were discussions between the parties at that time. The only part of the court's ruling contained in the transcript is that the document was "[i]nadmissible without some showing [it] was sent," which suggests the evidence was excluded because it was not properly authenticated.

Claps offers no basis for us to reverse Judge Coleman's discretionary ruling and to conclude it was a miscarriage of justice warranting a new trial. See Estate of Hanges v. Metro.

Prop. & Cas. Ins. Co., 202 N.J. 369, 374 (2010) (holding that generally "an evidentiary determination made during trial is entitled to deference and is to be reversed only on a finding of an abuse of discretion"). Pursuant to N.J.R.E. 901, evidence may be admitted only if it is properly authenticated and identified. This rule extends to essentially all manner of writings, including letters and telegrams. Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, comment 1 on N.J.R.E. 901 (2011). Therefore, it logically extends to fax transmissions. See N.J. Div. of Youth & Family Servs. v. J.T., 354 N.J. Super. 407, 413-14 (App. Div. 2002) (applying N.J.R.E. 901 to a fax), certif. denied, 175 N.J. 432 (2003). A writing can be authenticated indirectly by testimony that one received the letter in question. Biunno, Weissbard & Zegas, supra, comment 3(b) on N.J.R.E. 901.

Here, the fax in question contained no data confirming it was sent or any time stamp demonstrating receipt by Saviano, who did not acknowledge receiving it; thus it was not properly authenticated. Furthermore, even if the document were wrongfully excluded, the error was harmless. In the four sentence fax, Dr. Noble noted that he had a conversation with Saviano in which he thanked him "for [his] time to discuss [their] agreement for the future[,]" emphasized his "strong

feelings for [his] specific proposed new relationship[,]" and indicated he was "[l]ooking forward to hearing from [him] shortly." The parties did not dispute that there were discussions; the issue is whether Saviano agreed to a lower rate. The fax does not evidence such an agreement.

We turn now to Claps' arguments regarding the verdict sheet and the verdict. Defense counsel claims that after the jury charge, he objected to the verdict sheet; his adversary disputes this. As previously noted, the recordings of the trial were compromised, including the day of the jury charge, and defense counsel did not move to settle the record. Assuming counsel did object, the adequacy of a jury's interrogatories or verdict sheet is reviewed under the same standard as instructional error; it will not be disturbed where the verdict sheet "is unlikely to confuse or mislead the jury, even though part of the" sheet "might be incorrect." Wade v. Kessler Inst., 172 N.J. 327, 341 (2002) (citation omitted). If counsel did not object, this issue is reviewed under the plain error standard, which is applicable to verdict sheets. Mogull v. CB Commer. Real Estate Group, Inc., 162 N.J. 449, 467-68 (2000); R. 2:10-2 (requiring such error be "clearly capable of producing an unjust result"). Consequently, the proper inquiry is "whether the interrogatories were so misleading, confusing, or ambiguous that

they produced an unjust result." Mogull, supra, 162 N.J. at 468.

The general principles of jury interrogatories are well settled. "The purposes of submitting interrogatories to the jury are to require the jury to specifically consider the essential issues of the case, to clarify the court's charge to the jury, and to clarify the meaning of the verdict and permit error to be localized." Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 419 (1997) (citation and internal quotation marks omitted). "[I]n reviewing an interrogatory for reversible error, [an appellate court] should consider it in the context of the charge as a whole. An accurate and thorough jury charge often can cure the potential for confusion that may be present in an interrogatory." Ponzo v. Pelle, 166 N.J. 481, 491 (2001) (internal citation omitted).

With these general standards in mind, we address Claps' arguments that it is entitled to a new trial because the verdict sheet improperly contained, as one of its choices, an express dollar amount of damages (Wojak's calculation) and, as another choice, a space for it to write in another "damage amount agreed upon by the jury."

Claps cites no law,[3] and we can find none, prohibiting the use of an express dollar amount or language permitting the jury to fill in an agreed upon figure. Therefore, assuming defense counsel did object, the issue is whether the verdict sheet was likely "to confuse or mislead the jury[.]" See Wade, supra, 172 N.J. at 341.

Some errors or ambiguities on the verdict sheet will not constitute reversible error where, "in the context of the entire trial," it is apparent the jury was not confused. Maleki v. Atl. Gastroenterology Assocs., P.A., 407 N.J. Super. 123, 132-34 (App. Div. 2009). In Maleki, the verdict sheet mistakenly referred to "defendants" instead of "defendant." Id. at 126. We concluded the typographical error did not constitute plain error, persuaded, in part, that the jury was not confused because it failed "to pose any question . . . about . . . the verdict sheet . . . ." Id. at 134.

Reviewing the verdict sheet within the context of the jury charge as a whole, we are not convinced the challenged language was error or improperly invited the jury to speculate as to damages. The jurors were given three options as to damages

[3] Parties to an appeal are obligated to support their arguments by citation to legal authority. R. 2:6-9. See also Muhammad v. Cnty. Bank of Rehoboth Beach, 379 N.J. Super. 222, 242 (App. Div. 2005), reversed on other grounds, 189 N.J. 1 (2006); State v. Hild, 148 N.J. Super. 294, 296 (App. Div. 1977).

caused by Claps' breach of contract in each of the categories: $0, the expert's number, and some "other amount agreed upon by the jury." Both the verdict sheet and the judge's instruction made clear the jury was free to select no damages or different figures than those calculated by PGM's expert.

Moreover, as in Maleki, the jury did not ask any questions, which would negate an argument that they were confused by the verdict sheet. It is further apparent the jurors were not confused or misled by the wording of the verdict sheet because, for the loss of business damages, they awarded less than Wojak's calculation, which demonstrated an understanding they were not bound by those calculations.

Furthermore, New Jersey "do[es] permit considerable speculation by the trier of fact as to damages." V.A.L. Floors, Inc. v. Westminster Cmtys., Inc., 355 N.J. Super. 416, 424 (App. Div. 2002). This refers to the monetary amount of the damages; what may not be based on speculation is the fact that damage did occur. Ibid. If Claps were correct that instructing the jury to decide on a number it agrees upon is error, no jury would ever be permitted to decide a damages award because verdict sheets in cases where the jury is to decide damages necessarily ask what amount would compensate a party for a loss. See, e.g., Wade, supra, 172 N.J. at 337 (asking jury to determine "[w]hat

amount of money would fairly compensate the plaintiff . . . for her loss of past and future earnings"); Mogull, supra, 162 N.J. at 467 (asking jury to decide "[w]hat amount of money would fairly and reasonably compensate the plaintiff for damages proximately caused by" by defendant); Maleki, supra, 407 N.J. Super. at 126 n.1 (asking jury to decide "[w]hat sum of money would fairly and reasonably compensate Plaintiff for the losses that she incurred as a result of the breach of contract by Defendants").

Claps also cannot establish procedurally or substantively that the jury reached an impermissible quotient verdict as to loss of business damages. A quotient verdict occurs when

> there [is] a preliminary agreement or understanding among the jurors that each will select a figure as representing his opinion of value or damage and that the sum of said amounts divided by the number of jurors will be accepted by each as his or her verdict, and is in fact so accepted.
>
> [Shankman v. State, 184 N.J. 187, 198 (2005) (alteration in original) (citation omitted).]

Quotient verdicts are illegal in New Jersey because they are at odds with the "essential jury function" because such agreements have the "capacity to foreclose all subsequent discussion, deliberation, or dissent among jurors[.]" Id. at 200-01.

However, proof of an agreement by jurors to average their views of damages is, standing alone, insufficient to constitute an illegal quotient verdict. Id. at 201. Rather, absent a prior agreement there is nothing impermissible "with a jury taking the sum of each juror's separate estimate and dividing it by the number of jurors, so long as the jury ultimately agrees by the required number that the final [determination] represents its collective appraisal of the issue to be decided." Cavallo v. Hughes, 235 N.J. Super. 393, 398 (App. Div. 1989).

In order "to prove that a quotient verdict has been rendered, the aggrieved party must establish that through a positive prior agreement, the jurors bound themselves to abide by the results of the quotient process." Id. at 397-98 (citation and internal quotation marks omitted). Counsel is to make "a specific request . . . to inquire further," after which "the trial court [is] duty bound to engage in further inquiry and to remove doubt about an illegal quotient verdict from the record." Shankman, supra, 184 N.J. at 203.

Here, the jury was polled after it announced the loss of business verdict. At no time did defense counsel object to the verdict or request that the court ask further questions to determine if a quotient verdict had been reached, as required by

Cavallo. Furthermore, nothing in the record suggests the jury's verdict was a quotient verdict.

Claps' final challenge to the jury verdict is the claim that the underpayments award was based on bias, passion, and sympathy. Claps specifies neither improper pleas to the sympathies of the jury, attempts by PGM's counsel to stir their passions, nor claims of any specific bias that affected the jury's verdict. Instead, Claps points to Saviano's testimony that he waived the hardship credit, PGM's interrogatory answers that estimated damages lower then Wojak's calculation, and PGM's damages chart that shows damages of $160,895.64 through April 2008.

A party is entitled to a fair verdict, not a perfect one. See Ming Yu He v. Miller, ___ N.J. ____ (2011) (slip op. at 39) (noting that "our law does not require exactitude" in a damages award); D.G. ex rel. J.G. v. N. Plainfield Bd. of Educ., 400 N.J. Super. 1, 18 (App. Div.) (holding "[a] litigant is entitled to a fair trial, not a perfect one"), certif. denied, 196 N.J. 346 (2008); Dolan v. Sea Transfer Corp., 398 N.J. Super. 313, 332 (App. Div.) (holding that a party cannot seek to upset a fair verdict absent plain error), certif. denied, 195 N.J. 520 (2008).

There is a very high bar to set aside a verdict based on a claim of bias, passion, or sympathy. See Pellicer ex rel. Pellicer v. St. Barnabas Hosp., 200 N.J. 22, 58 (2009) (noting reliance "on trial courts and their firsthand 'feel of the case' as it bears on an analysis of whether the jury's verdict was motivated by improper influences") (citation omitted); Fertile v. St. Michael's Med. Ctr., 169 N.J. 481, 499 (2001) (holding that "passion, prejudice, or bias warranting a new trial . . . generally cannot be established merely by the excessiveness of a damages award, regardless of its size," rather, "what is required is trial error, attorney misconduct or some other indicia of bias, passion or prejudice").

Claps fails to carry its burden. There was ample evidence upon which the jury could reach its award. Merely because the jury accepted Wojak's damage calculation as to the underpayments is not a sound basis for reversal of this verdict.

Affirmed.