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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-5714-14T1

JACQUELINE HEREDIA,

Plaintiff-Appellant,

and

NICOLE TORRES,

Plaintiff,

v.

NATALIA A. PICCININNI,

Defendant-Respondent.

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Argued October 27, 2016 – Decided February 15, 2017

Before Judges O'Connor and Whipple.

On appeal from Superior Court of New Jersey,  
Law Division, Atlantic County, Docket No. L-  
2182-13.

Oliver T. Barry argued the cause for appellant  
(Barry, Corrado & Grassi, P.C., attorneys; Mr.  
Barry, on the briefs).

Stephen A. Rudolph argued the cause for  
respondent (Rudolph & Kayal P.A., attorneys;  
Mr. Rudolph, on the brief).

Michael J. Epstein argued the cause for amicus curiae New Jersey Association for Justice (The Epstein Law Firm, P.A., attorneys; Mr. Epstein, of counsel and on the brief; Michael A. Rabasca, on the brief).

New Jersey State Bar Association, attorneys for amicus curiae New Jersey State Bar Association (Miles S. Winder, III, of counsel and on the brief; Lauren D. Fraser, John E. Gregory, Liana M. Nobile and Michael R. Paglione, on the brief).

PER CURIAM

In this automobile negligence action, plaintiff Jacqueline Heredia appeals from a September 2, 2015 judgment and an August 7, 2015 order denying her motion for new trial.<sup>1</sup> Plaintiff contends the trial judge erred when he failed to ask prospective jurors open-ended questions, as mandated by Directive #4-07, (the Directive) depriving her of the opportunity to conduct meaningful jury voir dire. Additionally, plaintiff argues the trial judge erred when he declined to charge the jury with the aggravation of injury charge found in Model Civil Jury Charge 8.11F.

It is an abuse of discretion for trial courts not to ask at least three open-ended questions of prospective jurors during jury

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<sup>1</sup> Plaintiff originally filed a Notice of Appeal of the June 23, 2015 jury verdict of no cause of action; however, she subsequently filed an amended Notice of Appeal to reflect she was appealing from the September 2, 2015 final judgment denying her motion for a new trial.

selection, as mandated by the Directive; therefore, we vacate the judgment, and reverse and remand for a new trial.

In her complaint, plaintiff alleged she and defendant were involved in a car accident, during which plaintiff sustained bodily injury.<sup>2</sup> The limitation on lawsuit option (the so-called "verbal threshold") applies in this case. See N.J.S.A. 39:6A-8. Before trial, defendant stipulated liability. In preparation for jury selection, plaintiff submitted five open-ended questions to be asked of prospective jurors:

1. What are your feelings regarding the proposition that accidents resulting in serious damage to a vehicle may result in no bodily injuries and accidents resulting in little damage to a vehicle may result in serious bodily injuries?
2. Describe by way of an example an experience in your life that illustrates your ability to be fair and open-minded in this case.
3. Who are the two people that you least admire and why?
4. What would you do about the homeless situation?
5. What would you do about those without medical insurance?

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<sup>2</sup> Nicole Torres was a passenger in plaintiff's car at the time of the accident. Torres also filed a complaint against defendant but ultimately settled before the trial was over.

The trial judge declined to include any of plaintiff's proposed open-ended questions in the list of questions. The judge found the first question "redundant." As for the second question, the judge stated he would be asking many open-ended and non-leading questions when asking prospective jurors seated in the box about their biographical background; therefore, the judge found it inappropriate to ask the question. The judge rejected the third, fourth, and fifth questions because the questions did not "add to anything" or were irrelevant.

As the array entered the courtroom for jury selection, each prospective juror received the Civil Model Jury Selection Questions, as promulgated by the Directive, without any open-ended questions. The judge asked each juror seated in the box multiple biographical questions required by the Directive.<sup>3</sup> During jury selection, plaintiff used only two of her six peremptory challenges. See R. 1:8-3(c). Plaintiff's counsel advised the court on four separate occasions the jury was satisfactory.

Trial commenced on June 18, 2015. Plaintiff called Dr. Young Lee, an anesthesiologist specializing in pain management. Dr. Lee testified plaintiff told him she had never been in a motor vehicle

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<sup>3</sup> These questions included, among others, how they received their news, what their favorite television shows were, if they have any bumper stickers on their car, how they spend their time, and if there was anything else they thought the lawyers should know.

accident prior to June 3, 2011. Dr. Lee also testified plaintiff had disk herniation and while pain management could control the pain, the herniation was permanent. Plaintiff also called Dr. James Panaia, a chiropractor, who testified plaintiff had a permanent disk herniation. Lastly, plaintiff called radiologist Dr. Ralph Dauito, who stated MRIs taken after the accident revealed disk herniation that would never heal to function normally.

Defendant called orthopedic surgeon, Dr. Robert Ponzio. Dr. Ponzio testified plaintiff suffered a cervical strain and sprain injury, and opined plaintiff's injuries were permanent. Dr. Ponzio testified plaintiff had disc bulging, but he considered her condition to be unrelated to the accident. Because plaintiff had no prior history of pain, Dr. Ponzio conceded on cross-examination it was possible to have degeneration in the spine without symptoms of pain or discomfort, and a single traumatic event could cause previously asymptomatic conditions to become symptomatic. Dr. Ponzio testified disc herniation is a permanent injury.

At trial, plaintiff argued the judge erroneously denied her request to charge Model Civil Jury Charge 8.11F, aggravation/activation of preexisting asymptomatic conditions, based upon the testimony of Dr. Ponzio. The trial judge denied the request because neither Dr. Ponzio nor any other expert witness

testified an underlying condition was aggravated as a result of the accident.

The jury returned a verdict of no cause of action on the non-economic losses but awarded plaintiff economic damages of \$18,534.41, representing the full value of plaintiff's outstanding medical bills. Plaintiff filed a motion for new trial on July 9, 2015, arguing the trial judge should have asked the open-ended voir dire questions she proposed, as well as charged the jury on aggravation of preexisting injury. After hearing arguments on August 7, 2015, the trial judge denied the motion. This appeal followed.

I.

On appeal, plaintiff argues the trial court improperly disregarded the Directive by failing to ask open-ended questions during voir dire. We agree a trial judge must ask open-ended questions pursuant to this Directive. We are therefore constrained to vacate the judgment, and reverse and remand for a new trial, to be conducted in accordance with the Directive.

The Directive provides direction from our Supreme Court about how to conduct the voir dire process. See Administrative Directive #4-07, "Jury Selection – Model Voir Dire Questions Promulgated by Directive #21-06 – Revised Procedures and Questions" (May 16, 2007),

[http://www.judiciary.state.nj.us/directive/2007/dir\\_04\\_07.pdf](http://www.judiciary.state.nj.us/directive/2007/dir_04_07.pdf).

The purpose of the Directive is to "empanel a jury without bias, prejudice, or unfairness." Gonzalez v. Silver, 407 N.J. Super. 576, 596 (App. Div. 2009) (citing State v. Morales, 390 N.J. Super. 470, 472 (App. Div. 2007)). Among other things, pursuant to the Directive, the trial judge is required to ask each juror at least three questions that require answers in narrative form. Ibid.

Specifically, the Directive directs, in pertinent part, the following:

In addition to the printed questions, the judge shall also inform the jurors in the box and the array that jurors will also be individually asked several questions that they will be required to answer in narrative form.

. . . .

The judge will then ask [the] juror each of the open-ended questions, to which a verbal response shall be given and for which appropriate follow up questions will be asked.

. . . .

Some open-ended questions must be posed verbally to each juror to elicit a verbal response. The purpose of this requirement is to ensure that jurors verbalize their answers, so the court, attorneys and litigants can better assess the jurors' attitudes and ascertain any possible bias or prejudice, not evident from a yes or no response, that might interfere with the ability of that juror to be fair and impartial. Open-ended questions also will provide an opportunity to assess a juror's reasoning ability and capacity to

remember information, demeanor,  
forthrightness or hesitancy, body language,  
facial expressions, etc.

. . . .

The judge must ask at least three such questions, in addition to the biographical question and the two omnibus qualifying questions. This is a minimum number and judges are encouraged to ask more where such action would be appropriate.

The Directive is binding upon all trial courts. See Gonzalez, supra, 407 N.J. Super. at 598.

Here, the trial judge asked what he considered open-ended questions; he defined open-ended questions as "questions that call for something other than an yes or no response." However, the questions the judge referred to were either the required biographical or omnibus questions. Such questions may offer some insight into the perspective of prospective jurors, but they do not satisfy the mandate to ask open-ended questions. The Directive unequivocally states the trial judge must ask at least three open-ended questions. While the trial judge was within his discretion to reject plaintiff's proposed open-ended questions, it was an abuse of discretion not to ask any other open-ended questions as



directed by the Directive.<sup>4</sup>

We next turn to the question of whether the error warrants reversal of the trial judgment of no cause for action and the denial of a motion for new trial. We have previously said judges have an affirmative obligation to adhere to administrative directives governing the voir dire process, but counsel also has a duty to raise objection to the jury selection process. Gonzalez, supra, 407 N.J. Super. at 596. We have also said there must be a "miscarriage of justice" that resulted from the failure to follow the Directive in order to reverse a judgment. Ibid. Rule 2:10-2 provides "[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 . . . ." Plaintiff here requested voir dire questions ultimately rejected by the court, with assurances open-ended questions would be asked.

Accordingly, we apply the harmless error rule to determine whether the trial court's failure to ask additional open-ended questions was of "such a nature as to have been clearly capable

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<sup>4</sup> Appended to the Directive are examples of open-ended questions that may be used. The New Jersey Judiciary Jury Selection Manual contains additional questions. The examples are not the only questions that may be used. The court and parties may create their own questions. See Administrative Directive #4-07, "Jury Selection – Model Voir Dire Questions Promulgated by Directive #21-06 – Revised Procedures and Questions" (May 16, 2007), [http://www.judiciary.state.nj.us/directive/2007/dir\\_04\\_07.pdf](http://www.judiciary.state.nj.us/directive/2007/dir_04_07.pdf).

of producing an unjust result." R. 2:10-2. Based upon our review of the record, we cannot conclude the voir dire was sufficiently comprehensive to ensure an impartial jury was ultimately empaneled; the omission of required open-ended questions was not harmless.

## II.

Plaintiff also argues the trial judge erred by refusing to instruct the jury pursuant to Model Civil Jury Charge 8.11F. We disagree.

Model Civil Jury Charge 8.11F states in relevant part,

If you find that [plaintiff's] preexisting illness/injury(ies)/condition was not causing him/her any harm or symptoms at the time of the accident, but that the preexisting condition combined with injuries incurred in the accident to cause him/her damage, then [plaintiff] is entitled to recover for the full extent of the damage he/she sustained.

[Model Jury Charge (Civil), 8.11F "Aggravation of the Preexisting Disability" (1997).]

For an aggravation charge to be appropriate, plaintiff must provide evidence to support aggravation of a pre-existing injury. See Edwards v. Walsh, 397 N.J. Super. 567, 572 (App. Div. 2007). However, if defendant raises the issue on cross-examination, the charge would also be appropriate. Ibid. It is therefore the plaintiff's burden to "prepare for comparative medical evidence" or be "at risk of failing to raise a jury-worthy factual issue

about whether the subject accident causes the injuries." Davidson v. Slater, 189 N.J. 166, 188 (2007).


The failure to instruct the jury correctly constitutes reversible error, Velazquez v. Portadin, 163 N.J. 677, 688 (2000) (citing Patton v. Ambio, 314 N.J. Super. 1, 10 (App. Div. 1998)); however, the trial judge here correctly charged the jury. Plaintiff's witnesses testified plaintiff did not have a prior condition and the injuries she incurred were caused by the accident. Additionally, plaintiff's counsel stated prior to jury selection plaintiff was not making a claim of aggravation of a pre-existing condition.

During trial, plaintiff's counsel asked hypothetical questions during cross-examination of Dr. Ponzio to which he responded it is possible to have degeneration of the spine without symptoms, and it is possible for a single incident to cause the conditions to become symptomatic. Dr. Ponzio did not testify plaintiff had a preexisting condition exacerbated by the accident. Counsel's questions merely elicited from Dr. Ponzio that it was "possible." Additionally, plaintiff presented no evidence of having a preexisting condition. The trial judge therefore properly denied plaintiff's request to charge the jury with Model Civil Jury Charge 8.11F.

Because we reverse on other grounds, we need not address plaintiff's arguments about the cumulative effect of the trial court's errors.

Judgment vacated. Reversed and remanded for a new trial consistent with this opinion.

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

  
CLERK OF THE APPELLATE DIVISION