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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-3399-16T3

FARAH LUBIN,

Plaintiff-Appellant,

v.

MARIA A. ALVAREZ,

Defendant-Respondent,

and

MARIA ALVAREZ-DEMARIN,

Defendant.

Submitted February 26, 2018 – Decided June 4, 2018

Before Judges Messano and Vernoia.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Docket No. L-0145-
15.

Percario, Nitti & Struben, attorneys for
appellant (Christopher F. Struben, on the
briefs).

Faust Goetz Schenker & Blee, attorneys for
respondent (James L.A. Pantages, of counsel
and on the brief).

PER CURIAM

Plaintiff Farah Lubin was stopped on the Pulaski Skyway in Jersey City when her car was struck in the rear by one driven by defendant Maria A. Alvarez. Plaintiff filed suit, alleging an injury to her left shoulder. Defendant stipulated to liability, and the trial proceeded before a jury as to whether the accident proximately caused a permanent injury, see N.J.S.A. 39:6A-8(a), and if so, what were plaintiff's damages. The jury returned a no cause verdict, and the judge entered an order of dismissal.

Plaintiff filed a motion for a new trial raising two points. She argued that although the judge ruled pretrial defendant could not introduce evidence of pre-existing injuries to other body parts caused by other accidents, the judge nevertheless permitted the defense expert, Dr. Steven Robbins, to testify about his review of a 2009 MRI of plaintiff's right shoulder. Plaintiff also argued the judge violated Administrative Directive #4-07, "Jury Selection – Model Voir Dire Questions Promulgated by Directive #21-06 – Revised Procedures and Questions," (May 16, 2007) (the Directive), by failing to ask three "open-ended questions" during jury voir dire. Defendant opposed the motion.¹

¹ Defendant also argued the motion for a new trial was untimely. See R. 4:49-1 ("A motion for a new trial shall be served not later
(footnote continued on next page)

After considering oral argument, the judge denied the motion for a new trial. She reasoned that Dr. Robbins' testimony was properly limited to comparing MRIs of plaintiff's two shoulders in support of his position that there was no permanent injury to her left shoulder. Regarding the jury voir dire, the judge concluded she had posed some open-ended questions and the overall process was fair.

Before us, plaintiff reiterates the arguments made in support of her motion for a new trial. We affirm.

Plaintiff's pretrial exchange, Rule 4:25-7(b), requested the judge comply with "all AOC directives" and attached proposed voir dire questions. Additionally, because plaintiff's claim was limited to her left shoulder injury, she requested the judge prohibit defendant from posing questions or otherwise commenting about injuries to other body parts. In particular, plaintiff

(footnote continued)

than 20 days after the court's conclusions are announced in nonjury actions or after the return of the verdict of the jury."). It was undisputed that the motion was not served within time, although plaintiff argued she had substantially complied with the Rule. In addition to the substantive reasons she expressed for denying the motion, the judge's order reflects the motion for a new trial was untimely. However, the only order listed in plaintiff's notice of appeal is the February 13, 2017 order dismissing the complaint following the jury's no cause verdict. Therefore, we do not address the later order that denied plaintiff's motion for a new trial, except to set forth the arguments plaintiff advanced, now repeated on appeal.

listed as an "anticipated problem[]" at trial, "Dr. Robbins cannot testify as to his review of MRI[s] of plaintiff's . . . right shoulder as plaintiff is not seeking compensation for those injuries." During colloquy with counsel before trial, the judge clarified that defense counsel was not going to introduce any evidence of prior or subsequent injuries, or injuries other than those plaintiff alleged were caused by the accident.

Plaintiff testified the accident caused injuries to her neck, back and left shoulder. Her neck and back resolved, but Dr. Matthew Garfinkle performed arthroscopic surgery on her left shoulder. Plaintiff claimed some limitations in her employment and every day activities. When plaintiff's counsel objected during cross-examination, alleging defense counsel's questions exceeded the scope of the judge's prior ruling, the judge excused the jury and heard argument.

The judge limited defense counsel, ruling he only could confirm that plaintiff's limitations related solely to her left shoulder and this accident. Defense counsel stated he intended to ask Dr. Robbins about his review of plaintiff's 2009 MRI of her right shoulder, something that was contained within one of the doctor's reports supplied in discovery. The judge ruled Dr. Robbins would be limited to comparing the two MRIs and opining about what they revealed.

Before plaintiff rested, Dr. Garfinkle testified by video recording regarding the surgery he performed.² On direct examination, Dr. Robbins displayed both the 2014 MRI of plaintiff's left shoulder and the 2009 MRI of her right shoulder. The doctor opined that plaintiff had similar conditions in both, attributable to "underlying, unrelated disease," and not the motor vehicle accident. Dr. Robbins claimed the condition in plaintiff's left shoulder was "the way she was born."

Plaintiff argues that permitting Dr. Robbins to testify about his review of the 2009 MRI of her right shoulder was reversible error because plaintiff made no claim of injuries regarding that shoulder, the judge's pretrial ruling properly excluded such testimony and was "law of the case", and plaintiff could not rebut the testimony because her expert testified by video recording. This argument lacks sufficient merit to warrant extensive discussion. R. 2:11-3(e)(1)(E). We add only the following.

We accord substantial deference to the trial court's evidentiary rulings and only reverse on a finding the judge mistakenly exercised her discretion. Estate of Hanges v. Metropolitan Property & Cas. Ins. Co., 202 N.J. 369, 374 (2010). Contrary to plaintiff's contention, the judge hewed closely to her

² That testimony was not transcribed and is not part of the appellate record.

pretrial ruling, limiting Dr. Robbins' testimony to a comparison of the MRIs of plaintiff's shoulders to support his opinion that the condition in her left shoulder – allegedly the result of trauma from the accident – was the same as that in her right shoulder. The judge never permitted defense counsel or the witness to render opinions about other accidents or the injuries plaintiff allegedly suffered as a result.

Turning to plaintiff's argument regarding the jury voir dire, we begin by noting that the appellate record is incomplete. The transcript of jury selection does not include the questioning of each juror, the exercise of challenges or the judge's decision to excuse certain jurors. It does not include sidebars. Our Rules require that appellant file transcripts of the "entire proceedings in the court." R. 2:5-3(b). Transcripts of the jury voir dire may be excluded "unless a question with respect thereto is raised on appeal." Ibid. Here, plaintiff raises an issue about the jury voir dire and complete transcripts should have been provided.

Plaintiff's appendix includes her proposed jury voir dire questions, consisting of five supplemental multiple choice questions and four open-ended questions, and the judge's list of twenty-five questions, which included the standard civil voir dire questions from the Directive and some additional ones tailored to the case. The limited transcript reveals that the judge finished

questioning at least one of the jurors by asking the standard biographical question and omnibus qualification questions from the Directive. Additionally, during oral arguments on plaintiff's new trial motion, the judge stated that she permitted questions at sidebar that were more expansive. We fully credit the judge's assertion, particularly since, as noted, the transcripts provided do not include any sidebars during jury selection.

In any event, plaintiff's argument is essentially that the judge's failure to strictly comply with the Directive is per se reversible error. We disagree.

The Directive addressed several issues, including a desire to make the jury selection process "more expeditious and streamlined." Directive at 2. It requires judges to "ask at least three [open-ended] questions" in addition to the biographical and omnibus questions. Id. at 4. It includes six examples of suggested open-ended questions to be used in civil cases. Id. at 8.

We noted the importance of the Directive's requirements in Gonzalez v. Silver, 407 N.J. Super. 576, 597 (App. Div. 2009). Such directives are binding on our courts. State v. Morales, 390 N.J. Super. 470, 472 (App. Div. 2007). However, while it was error in Gonzalez for the judge not to have asked the three open-ended questions required by the Directive, "we also recognize[d]

that a certain residual discretion resides in the trial judge to accommodate the individual circumstances of each case and the consensus views of counsel, even when doing so renders the voir dire procedure less than fully conforming to the Directive['s] mandates." Gonzalez, 407 N.J. Super. at 597. We specifically did not determine whether the failure to follow "the strict requirements" of the Directive "constituted reversible error." Id. at 598.

Plaintiff brings to our attention two unreported decisions in which our colleagues concluded a failure to follow the Directive's requirements required reversal. Those decisions are, of course, neither precedential nor binding upon us. R. 1:36-3. We conclude that any error, including the judge's failure to follow the Directive as in this case, does not warrant reversal "unless it is of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2.

Our careful review of the limited record provided fails to demonstrate to us that the judge's decision not to ask open-ended questions during jury voir led to an unjust result in this case.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION