SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3956-15T3

RAHAT JAHN and AKBAR JAHN,

Plaintiffs-Appellants,

v.

FRANK J. MONTANINO,

Defendant-Respondent.

Submitted October 5, 2017 – Decided February 21, 2018

Before Judges Rothstadt and Gooden Brown.

On appeal from Superior County of New Jersey, Law Division, Middlesex County, Docket No. L-4658-13.

Garces, Grabler & LeBrocq, PC, attorneys for appellants (Michelle M. Tullio and Arlindo B. Araujo, on the brief).

Law Offices of Robert A. Raskas, attorneys for respondent (Michael J. Kavanagh, on the brief).

PER CURIAM

In this automobile negligence case, Rahat Jahn and her husband, Akbar Jahn,[1] (collectively plaintiffs), appeal from the April 6, 2016 judgment of zero damages entered by the Law Division following a jury trial on damages only, wherein the jury found Rahat[2] did not sustain a permanent injury. We affirm.

We only recite the facts relevant to the issues raised on appeal, namely, the admissibility of the defense expert's opinion on permanency[3] and the rejection of plaintiffs' proposed open-ended voir dire question. The underlying automobile accident occurred on July 22, 2011, and involved vehicles operated by Rahat and defendant, Frank Montanino. On July 19, 2013, plaintiffs filed a complaint against defendant alleging economic and non-economic damages.[4] After reviewing her medical records, Francis DeLuca, M.D., F.A.C.S., a defense expert in the field of orthopaedic surgery, examined Rahat on July 10, 2014.

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[1] The parties' briefs and Notice of Appeal misspelled Akbar's name. We will disregard this typographical error and use the spelling he provided during his testimony.

[2] We refer to the Jahns by their first names to avoid any confusion caused by their common surname. We intend no disrespect.

[3] Because plaintiffs sued for noneconomic damages, the verbal threshold statute required them to prove permanent injury. See N.J.S.A. 39:6A-1.1 to -35.

[4] In the complaint, Akbar alleged loss of consortium and companionship from the injuries to his wife.

In his report, Dr. DeLuca found Rahat's "examination to be normal[,] both orthopaedically and neurologically[,] with no evidence of any focal neurologic deficit or radiculopathy." Dr. DeLuca saw "no indication for any further or future treatment or testing."

Over the course of discovery, Dr. DeLuca furnished five addendums to his July 10, 2014 report, based on additional medical records he received and reviewed. In all of the addendum reports, Dr. DeLuca's opinion "remain[ed] unchanged[,]" finding Rahat's examination to be "normal." In one addendum dated October 21, 2014, Dr. DeLuca analyzed Rahat's MRI films and opined "[t]he cervical and lumbar MRI films show[ed] evidence of preexisting degenerative changes, unrelated and unaffected by the subject motor vehicle accident[,]" and showed "no evidence of any trauma or injury."

On September 14, 2015, six months after his last addendum report, Dr. DeLuca underwent a de bene esse deposition. During his testimony, plaintiffs' counsel objected to Dr. DeLuca offering any expert opinion "as to whether [Rahat's] medical condition as a result of the car accident [was] permanent or not." Plaintiffs contended that Dr. DeLuca never gave "an opinion one way or the other" regarding permanency "in any of the reports that he issued." Dr. DeLuca clarified that he

found, within a reasonable degree of medical certainty, that "[Rahat] ha[d] a normal examination; entirely normal as related to this accident. So when somebody has a normal examination, they have no residual permanency."

Following the deposition, on October 19, 2015, plaintiffs moved in limine to redact portions of Dr. DeLuca's testimony. On March 21, 2016, the trial judge heard oral argument on the motion. In rendering his decision, the judge considered the surprise and prejudicial effect of admitting Dr. DeLuca's testimony. In this regard, the judge queried whether it was plaintiffs'

> [P]osition that after having [Dr. DeLuca's] report since 2014 and seeing his five or six addendums, all of which . . . continue to say, "Normal, normal, normal, normal, normal" . . . she has nothing wrong with her at all. Is there really a surprise to you that rises to the level of . . . undue prejudice at the [de bene esse deposition], when he adds the next sentence, which is that, "My opinion is she did not sustain a permanent injury in this accident[?]"

After plaintiffs' counsel responded affirmatively, the judge denied plaintiffs' motion, reasoning:

> The fact of the matter is the report was initially issued on July 10 of 2014. Dr. DeLuca spends two or three pages saying that, from his perspective, every aspect of [Rahat] is normal. He talks about it orthopedically; he talks about it neurologically . . . . He talks about she doesn't need further treatment and he talks

> about it being normal. The statute does define "permanent injury" as being . . . an injury that does not or will not heal to function normally.

The judge acknowledged that Dr. DeLuca's initial report did not contain a separate "[o]pinion" section, which the judge described as "more traditional." However, the judge concluded that the language in the initial report, coupled with the repetition of "my opinions remain unchanged" and the examination was "normal" in all of the addendums, demonstrated that Dr. DeLuca repeatedly presented his opinion as to permanency and belied plaintiffs' claims of surprise or prejudice. The judge explained,

> I really don't think that it can be said that you were surprised . . . to learn that his "formal opinion" as you want to deem it at his [de bene esse deposition], when he said no permanency, is a surprise in light of how these reports are worded and what his, again, "opinions" were in all of his reports consistently from as early as July of 2014.

The parties appeared for trial the following day. Before the jury voir dire, plaintiffs requested that the judge ask the potential jurors, "[d]o you have an opinion one way or the other as to whether the extent of property damage to a car is needed in order to determine whether someone can be injured in a car accident?" The judge denied the request, reasoning that the issue was "already . . . covered . . . by the model [jury]

charge." The judge explained further, "I think your concerns are[] also addressed by some of the other questions in their totality."[5]

Thereafter, the judge granted plaintiffs' motion for a directed verdict on the issue of liability, finding "no question of material fact that would prevent this [c]ourt from granting summary judgment." A jury trial on damages only was conducted from March 22 to March 24, 2016. During the final charge to the jury, tracking Model Jury Charge (Civil), 5.34, "Photographic Evidence in Motor Vehicle Accidents" (2009), the judge gave the following instruction:

> Now in this case a number of photographs of . . . the vehicles involved in the accident . . . show the damages or depicted condition of the vehicles after the impact. As judges of the facts, you may attribute such weight to the photographs as you deem appropriate, taking into consideration all the other evidence in this case.
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> In some accidents resulting in extensive vehicle damage, the occupants may suffer minor injuries or no injuries at all. In other accidents where there is no or

[5] The other questions referred to by the judge are not part of the record and were not supplied by plaintiffs. We presume the jurors were asked the Civil Model Jury Selection Questions, as promulgated by the Directive. 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.

> little apparent vehicle damage, the occupants may suffer serious injuries. In reaching your decision in this matter, you are to give the photographs whatever weight you deem appropriate . . . in determining whether [Rahat] sustained injuries as a result of the accident.

The jury returned a verdict, finding that Rahat failed to prove by a preponderance of the evidence that she suffered a permanent injury proximately caused by the accident, and the judge entered a memorializing judgment from which this appeal is taken. On appeal, plaintiffs renew their argument that "Dr. DeLuca failed to opine, one way or the other, as to whether [Rahat] sustained any permanent injuries from the automobile accident." They assert they were surprised and prejudiced "since it was never made known to them, during the course of discovery, as to his opinion on the ultimate issue of permanency." They contend the judge erred in denying their motion to strike the objectionable testimony. We disagree.

We review a trial court's evidentiary rulings under an abuse of discretion standard. Villaneuva v. Zimmer, 431 N.J. Super. 301, 310 (App. Div. 2013) (citing Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008)). We will only reverse a trial court's evidentiary ruling if the decision whether to admit or bar evidence "was so wide off the mark that a manifest denial of

justice resulted." Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999) (quoting State v. Carter, 91 N.J. 86, 106 (1982)).

Rule 4:17-4(e) provides, in pertinent part, that a party utilizing an expert at trial must provide a report containing "a complete statement of that person[']s opinions and the basis therefor." When an expert's report is furnished, "the expert's testimony at trial may be confined to the matters of opinion reflected in the report." McCalla v. Harnischfeger Corp., 215 N.J. Super. 160, 171 (App. Div. 1987) (quoting Maurio v. Mereck Constr. Co., Inc., 162 N.J. Super. 566, 569 (App. Div. 1978)).

The trial judge has discretion to bar expert testimony on a subject not covered in the written reports provided in discovery. Ratner v. Gen. Motors Corp., 241 N.J. Super. 197, 202 (App. Div. 1990) (citing Nicholl v. Reagan, 208 N.J. Super. 644, 651 (App. Div. 1986)). "Imposition of the sanction of exclusion of evidence under . . . [Rule] 4:17-4(e) . . . is always subject to the sound discretion of the trial judge." Skibinski v. Smith, 206 N.J. Super. 349, 354-55 (App. Div. 1985). In weighing whether to impose or suspend the sanction of exclusion,

> [t]he factors which would "strongly urge" the trial judge, in the exercise of his discretion, to suspend the imposition of sanctions, are (1) the absence of a design to mislead, (2) absence of the element of surprise if the evidence is admitted, and

> (3) absence of prejudice which would result from the admission of the evidence.
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> [Ratner, 241 N.J. Super. at 202 (quoting Westphal v. Guarino, 163 N.J. Super. 139, 145-46 (App. Div.), aff'd o.b., 78 N.J. 308 (1978)).]

In Ratner, we permitted testimony not contained in the expert's report after applying these factors. Id. at 202. Although the evidence was unquestionably a surprise, we determined the preclusion of the testimony would have resulted in a denial of justice and reversed the trial court's decision barring it. See id. at 202-07.

A court should only bar expert testimony when it is entirely distinct from the facts and conclusions in the report. See Mauro v. Owens-Corning Fiberglas Corp., 225 N.J. Super. 196, 206 (App. Div. 1988), aff'd sub nom. Mauro v. Raymark Indus., Inc., 116 N.J. 126 (1989). In Mauro, the expert testified to statistics and data to support his findings of the plaintiff's enhanced medical risk without including them in his report. Ibid. The trial court barred the testimony, and we affirmed, finding that allowing the testimony to be introduced at trial surprised and prejudiced the plaintiff. Ibid.

However, even an intent to mislead or surprise the opposing party can be negated by the expert's availability for a pretrial deposition. See Congiusti v. Ingersoll-Rand Co., Inc., 306 N.J.

Super. 126, 133 (App. Div. 1997). In Congiusti, although it found the expert's testimony went beyond the scope of his report, the trial court admitted the testimony because it determined there was no prejudicial effect. Ibid. We agreed and affirmed, "especially as plaintiffs chose not to depose the witnesses to flesh out any questions they may have had concerning the . . . opinions expressed in the reports." Ibid.

Here, we discern no abuse of discretion by the judge in permitting Dr. DeLuca to testify to permanency. The only difference between Dr. DeLuca's reports and his de bene esse deposition testimony was that he explicitly used the term "permanency" during the latter. These circumstances are entirely distinguishable from cases like Mauro, where the expert introduced statistics and data at trial that were not in his reports. Plaintiffs in this case cannot seriously contend they were surprised to hear Dr. DeLuca testify that he found no permanent injury after they were given reports where he repeatedly used the word "normal" to describe Rahat's condition.

Next, plaintiffs contend that the exclusion of their proposed open-ended voir dire question "unduly influenced the [jury's] finding of no permanent injury." Plaintiffs assert that the question would have "eliminated the existence of a disqualifying state of mind to allow for intelligent exercise of

preemptory challenges," and "[b]y disallowing the question," the judge "did not adequately probe the possibility of prejudice" and thereby abused his discretion. We disagree.

"Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges." Mu'Min v. Virginia, 500 U.S. 415, 431 (1991). Trial judges control the scope of the voir dire inquiry, which is left "to the sound discretion of the trial judge who should balance the plaintiff's claim of need and the basis therefor against the possibility of prejudice to the defendant." Roman v. Mitchell, 82 N.J. 336, 348-49 (1980); R. 1:8-3. As such, we accord deference to the trial court's determination under the abuse of discretion standard. Roman, 82 N.J. at 348-49; State v. Simon, 161 N.J. 416, 466 (1999) (holding that a judge's decisions during voir dire will not be reversed, absent abuse of discretion).

Here, we note that there is no argument or indication that the judge failed to adhere to Directive #4-07 by asking each juror at least three open-ended questions that required answers in narrative form. 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.

Indeed, 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)).

Instead, the judge here rejected plaintiffs' proposed additional open-ended voir dire question as redundant, after considering the other questions as well as the jury instruction, Model Jury Charge (Civil), 5.34, "Photographic Evidence in Motor Vehicle Accidents" (2009), both of which expressly addressed the issue of the correlation between the extent of property damage to a car and injury sustained in a car accident. We discern no abuse of discretion in the judge's determination.

Affirmed.