SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5173-16T4

HUSSEIN M. AGIZ,

Plaintiff-Respondent/
Cross-Appellant,

v.

HELLER INDUSTRIAL PARKS, INC.,

Defendant-Appellant/
Cross-Respondent,

and

GEORGIA PACIFIC HARMON RECYCLING, LLC, JOHN WILEY & SONS, INC., LAGASSE BROTHERS, INC., UNITED STATIONERS, INC., TAYLORED SERVICES, LCC, ADI LOGISTICS, CELEBRITY INTERNATIONAL, NFI DISTRIBUTION, a/k/a NATIONAL DISTRIBUTION CENTER, DNP INTERNATIONAL, OVED APPAREL CORPORATION, and JONATHAN J. BONILLA,

Defendants.

Argued telephonically March 14, 2018 –
Decided May 7, 2018

Before Judges Reisner, Hoffman and Gilson.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4520-13.

William H. Mergner, Jr., argued the cause for appellant/cross-respondent (Leary, Bride, Tinker & Moran, attorneys; William H. Mergner, Jr., of counsel; David J. Dering, of counsel and on the briefs).

Andrew L. O'Connor argued the cause for respondent/cross-appellant (Nagel Rice LLP, attorneys; Bruce H. Nagel, Robert H. Solomon and Andrew L. O'Connor, of counsel and on the briefs).

PER CURIAM

On July 12, 2012, a drag racing car collided with a motorcycle operated by plaintiff Hussein Agiz, then eighteen years old. In the accident, plaintiff sustained severe injuries, including a brain contusion and the amputation of his right arm and right leg. In 2013, plaintiff filed suit against various parties.

In 2016, at the conclusion of an eight-day trial, a jury found defendant Heller Industrial Parks, Inc. (Heller) forty percent liable, and defendant Jonathan Bonilla[1] sixty percent liable. The jury awarded plaintiff $2,301,313 for pain and suffering and $4,355,515 for future medical expenses and care.

[1] After Bonilla failed to answer plaintiff's complaint, the trial court entered a default against him. Plaintiff also sued a number of Heller's tenants and the Township of Edison; according to plaintiff's brief, plaintiff "settled with most of the tenant defendants, and the others are no longer in the case."

Plaintiff filed a motion "for additur or a new trial on damages only." On May 26, 2017, the court issued an order denying additur and granting plaintiff a new trial regarding non-economic damages only. The court reasoned the jury discounted a larger amount using a present value calculation to arrive at an uneven amount for pain and suffering, and such a calculation violated the jury charge. Before the new trial, Heller sought leave to appeal, contending the record lacked sufficient evidence to support the conclusion that the jury used a present value calculation to arrive at its pain and suffering award. Plaintiff sought leave to cross-appeal, contending the judge erred by not finding the pain and suffering award shocked the judicial conscience and by not granting additur. We granted both applications. For the reasons that follow, we affirm the order granting plaintiff a new trial regarding non-economic damages only. We also affirm on the cross-appeal.

I

We begin by summarizing the most pertinent trial evidence. At all relevant times, Heller managed and maintained the Heller Industrial Complex (the Complex), located on approximately ten acres of land in Edison. The Complex includes over nine million square feet of warehouse space, and Heller employs approximately fifty people based there. Between fifty and sixty tenants rent

warehouse space at the Complex, employing several thousand employees on a daily basis.

The record indicates that drag racing regularly occurred within the Complex, often on Saw Mill Pond Road, the location of plaintiff's accident. In the three years before plaintiff's accident, the Edison Police Department filed approximately thirty-five incident reports documenting reports of drag racing within the Complex.

The exact circumstances of the accident remain unclear. Plaintiff testified he has no recollection of the accident whatsoever. On cross-examination, plaintiff agreed he went to the complex "to watch and talk to these guys who were working with their bikes and maybe . . . do some practice riding." Plaintiff recalled going to the Complex four or five times before his accident.

Bonilla, the driver who struck plaintiff, testified he never saw plaintiff's motorcycle or any other motorcycles before the collision. While he admitted to drag racing that night, he said he did not know the person who raced against him. When asked if he previously came to the Complex for racing, Bonilla replied, "I've attended racing events there, but this was my first time racing there."

K.R., a witness called by Heller, claimed she attended a "car meet"[2] at a shopping center the evening of plaintiff's accident. After learning that two individuals agreed to race, she and a group of persons followed the individuals to the Complex. According to K.R., the racers were Bonilla and Louis Estrella; she met Bonilla for the first time at the car meet, and she already knew Estrella. K.R. estimated that twenty to twenty-five persons watched the race. Before plaintiff's accident, she saw two motorcycles in the area and witnessed one motorcycle travel in between two cars racing in the opposite direction. She could not remember if she witnessed that during the first race she watched, but she did during the second race. Regarding the third race, she "remember[ed] looking down at [her] phone," as she "was texting"; she then heard motorcycles "taking off", followed by "brakes screeching," and then "a crash." K.R. described the motorcycle she saw travel between the drag racing cars as "black or gray."[3]

Bonilla testified that he raced only once — not against Estrella — and denied that a motorcycle raced in the opposite direction between the cars. Estrella also testified and denied

[2] According to K.R., at a car meet, "[e]veryone just parks their car and shows off their car, [they] just walk around and see every vehicle that's there and meet people . . . ."

[3] Plaintiff described his motorcycle as "a light blue."

that he raced at all that evening, but he did admit watching races at the Complex for "[m]aybe a half an hour." He denied seeing any accidents. When asked if any of the races he observed involved Bonilla, he replied, "I don't remember seeing him there."

Plaintiff's friend S.Z. also testified, recalling that he went with plaintiff to the Complex "to watch some stunt bikers." He testified the stunt bikers gathered in a different area than the drag-racing cars. He said plaintiff left the area of the stunt bikers and headed toward the drag-racing area. He described plaintiff as a "really safe" driver, and never saw him operate his motorcycle in an unsafe way.

Plaintiff testified regarding his extensive injuries. He underwent eleven surgeries, including the amputation of his right arm and right leg. Notwithstanding his amputations, plaintiff presented positive testimony concerning his efforts to resume his normal activities. He continues to play sports and even received a golf scholarship for amputees; he continues to socialize with friends; he attends college for biomedical engineering and hopes to make his own prosthetics in the future. Despite encountering problems with his prosthetic arm, he expressed hope that "with time" this will improve. Regarding getting dressed every day, he explained, "[T]hings I can't do right now are putting on a watch, tying my shoe, changing socks on my prosthetic . . . ."

Plaintiff testified he experiences "phantom pain" due to his missing arm "all the time"; for his missing leg, he gets "nerve shockings every now and then." He tries not to take pain medications because he believes they are "bad" for him; in addition, they do not help with his phantom pain.

Plaintiff also entered his extensive medical records into evidence. According to the operative report from his initial surgery, plaintiff

> was involved in a motorcycle accident . . . . He presented with a complete amputation of the right upper extremity that involves a massive degloving injury to the entire forearm deeming the distal right upper extremity unsalvageable. He also presented with a near complete amputation through the right femur with a grade IIIC open fracture.

The remaining records document the extensive treatment plaintiff received during his five-week hospitalization, including ten more surgeries.

Following his release from the hospital, plaintiff received inpatient care for approximately three months at two rehabilitation centers. The records from these centers document the extensive course of physical therapy and occupational therapy plaintiff received and the problems he encountered with phantom pain, stump pain, muscle weakness, fatigue and numbness.

Plaintiff also presented testimony from Dr. Carl Mercurio, a board certified orthopedic surgeon, who described plaintiff's injuries and surgeries. Based upon a physical examination of plaintiff and his review of plaintiff's medical records, Dr. Mercurio testified that plaintiff

> truly represent[s] the definition of multiple trauma. Multiple trauma means multiple system injury and in his case, he had almost every system involved in this . . . traumatic event. He had the skin, he had his brain, he had the vascular system, he had his lungs, he had his abdomen and . . . also the musculoskeletal system. He . . . showed the true . . . definition of multiple traumatized patient.

Dr. Mercurio further explained that plaintiff sustained a "significant injury to the head," including "a contusion of the brain" and "bleeding in one of the ventricles."

Dr. Mercurio also reviewed the eleven surgical procedures that plaintiff underwent during his month-long stay in the hospital. He explained that plaintiff's right arm required amputation because

> it was not salvageable. . . . No matter how much they tried to reattach the nerves or the blood vessels, it was not going to be saved. . . . [T]he nerves that come out of the spinal cord . . . actually popped off . . . right out of the spinal cord.

Plaintiff then called a rehabilitation counselor, who presented a "life care plan" regarding plaintiff's future medical

treatment and expenses. Plaintiff also called an economist, who took the medical expenses from the life care plan, projected those expenses into the future using inflation, and discounted them back to the time of trial using present values.

During closing argument, in addressing pain and suffering damages, plaintiff's counsel suggested the jury consider plaintiff's life expectancy and an amount per day or per hour that would compensate plaintiff for the rest of his life. During the jury charge, the court informed the jury they could use plaintiff's suggested time-unit method of calculating pain and suffering damages, or "any other method." The court also told the jury they could consider plaintiff's life expectancy of fifty-eight and a half years. The court then addressed future medical expenses, instructing the jury, "Once you decide how much medical care plaintiff will need in the future, you must then consider the effects of inflation and interest." The court went on to explain inflation, interest, discounting, and present value.

The court also instructed the jury that Bonilla was deemed negligent and a proximate cause of the accident. Regarding liability, the jury only needed to determine if Heller was negligent and if so, whether Heller's negligence was a proximate cause of the accident.

The jury found Heller negligent and that its negligence proximately caused the accident. As noted, the jury attributed sixty percent of the negligence to Bonilla and forty percent to Heller. The jury foreperson then announced the separate amounts awarded to compensate plaintiff for his pain and suffering — $2,301,313 — and for his future medical expenses and care — $4,355,515.

At that point, plaintiff's counsel requested the judge poll the jury to confirm the pain and suffering award; before that occurred, defense counsel requested a sidebar. The judge then temporarily excused the jury. The fact that the pain and suffering award ended in an uneven number prompted discussion the jury may have returned a "quotient verdict."[4] After a brief discussion of Shankman, the judge and the attorneys agreed the judge would poll the jury and ask if each juror agreed with the verdict, but not inquire further unless "something comes up."

The judge then polled the jury on the liability percentages and both damage awards. Each of the seven jurors confirmed the accuracy of the verdicts but stated nothing further. The judge

[4] A quotient verdict occurs when deliberating jurors commit to accept, as their final decision, the average of their respective personal assessments of monetary damages prior to calculating that average. Shankman v. State, 184 N.J. 187, 198 (2005) (citation omitted). Quotient verdicts are illegal. Id. at 201.

made no inquiry regarding the unusual circumstance of the jury's award for pain and suffering ending in an uneven number.

Plaintiff then filed the post-judgment motion under review. The trial judge heard extensive oral argument in December 2016. The judge noted "there is no question that [plaintiff] had a catastrophic loss. . . . [H]e lost an arm and a [leg]." Plaintiff's counsel argued the significance of the pain and suffering verdict ending in an odd number:

> [I]n over a hundred jury verdicts . . ., I've never had in the pain and suffering line item any verdict other than with zeros at the end. It does not exist.
>
> [F]or . . . medicals, yes. For life care plans, yes.
>
> [But] [y]ou don't have a pain and suffering award that ends with an odd number as we had. You just don't have it.

Heller's counsel did not dispute this assertion nor did the court.

During argument, the judge appeared to accept the assertion of plaintiff's counsel that the uneven number for pain and suffering damages demonstrated that the jury violated the court's instructions by reducing plaintiff's pain and suffering damages to present value. Regarding this explanation, the judge then asked defense counsel, "[C]ould they do that?" Defense counsel responded, "[Jurors] can pretty much do whatever they want except

for the quotient verdict . . . . [T]here is nothing wrong with them doing that. They're absolutely allowed to do that."

On May 26, 2017, the judge issued an order denying additur and granting plaintiff a new trial for pain and suffering damages only, on the basis the jury violated its charge in the calculation of the damages. After citing Risko v. Thompson Muller Automotive Group, Inc., 206 N.J. 506, 521 (2011), where the Supreme Court defined a "miscarriage of justice" as a "pervading sense of 'wrongness,'" the judge stated,

> [T]he [c]ourt is of the opinion, based upon the verdict and a review of the evidence presented at trial by plaintiff's expert witness on economic losses, that the jury . . . improperly utilized the economic analysis of the expert on economic losses to apply to non—economic losses. This [c]ourt is further of the opinion that the non-economic loss verdict is neither a quotient verdict nor a compromised verdict. The [c]ourt finds that the verdict . . . does not comport with the [c]ourt's instructions . . . . Such a verdict results in a manifest injustice to the plaintiff . . . . The [c]ourt is of the opinion that a clearly unjust result has occurred.

The judge then granted plaintiff a new trial on non-economic damages only and further provided, "The prior award for economic damages stands and shall not be re-tried."

II

Although neither party argues the pain and suffering verdict represented a quotient verdict or compromise verdict, we review the case law concerning these types of errant verdicts for completeness and as background information relevant to the issues under review.

As noted, a quotient verdict occurs when deliberating jurors commit to accept, as their final decision, the average of their respective personal assessments of monetary damages prior to calculating that average. Shankman, 184 N.J. at 198. 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. Generally, "[p]roof of such averaging is, alone, insufficient to have unearthed an illegal quotient verdict." Id. at 201.

In Shankman, the Court instructed trial judges — when confronted with circumstances suggesting that a damages award may represent an improper quotient verdict — to not rest solely upon the jury polling process to vitiate concerns of impropriety. Id. at 203. The Court held that it was insufficient for the trial judge in that case to poll each juror about whether he or she "agreed with" the damages verdict. Id. at 196-98. Instead, the

Court held the trial judge should have asked the jurors whether the jurors had made an advance agreement to accept an averaged figure, at least when the judge "ha[d] been asked to do so by counsel." Id. at 203. In Cavallo v. Hughes, 235 N.J. Super. 393, 398 n.2 (App. Div. 1989), we declined to vacate a potential quotient verdict where counsel "failed to request any follow-up questions." However, we recommended "in future cases when similar issues arise that the trial judge specifically inquire whether there was a prior agreement." Ibid.

"Compromise verdicts result from the improper mix of issues involving liability with those involving damages." Id. at 397 (citing Hendrikson v. Koppers Co., 11 N.J. 600, 609 (1953)). An improper compromise verdict usually occurs when "a close call on liability in favor of the plaintiff result[s] in a low verdict on damages . . . ." Id. at 396-97. That is, the jury is unsure on liability, so finds the defendant liable, but compromises by issuing a low amount of damages. See Esposito v. Lazar, 2 N.J. 257, 262 (1949) (finding the jury resolved the doubt regarding defendant's liability by awarding inadequate damages); see also Hendrikson, 11 N.J. at 609 ("Only in those cases where the verdict is clearly free from compromise should a new trial be limited to the question of damages only.").

Based upon Shankman and Cavallo, the trial judge here should have specifically asked the jurors whether they had made an advance agreement to accept an averaged figure. At the same time, the judge should have inquired whether the jurors discounted their pain and suffering award to present value. This would have allowed the court to determine with certainty whether the jury had returned a quotient verdict or had discounted their pain and suffering award to present value.[5]

III

We now turn to the trial judge's decision ordering a new trial. The decision whether to grant a motion for a new trial is left to the sound discretion of the trial judge and will be reversed only for an abuse of discretion. Baumann v. Marinaro, 95 N.J. 380, 389 (1984). A trial court may order a new trial when "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." R. 4:49-1(a). We are essentially guided by the same standard, except we give substantial deference to the trial judge, who

[5] We understand the trial judge's hesitancy to invade the deliberative process of the jury; however, it is possible to minimize the extent of such an intrusion by making only a limited inquiry that would not delve into views put forth by any deliberating juror.

observed the same witnesses as the jurors, and who developed a "feel of the case." Dolson v. Anastasia, 55 N.J. 2, 7 (1969). We consider the verdict "in the light most favorable to the prevailing party." Crego v. Carp, 295 N.J. Super. 565, 578 (App. Div. 1996).

On appeal, Heller argues that the decision of the trial court to grant a new trial on pain and suffering failed to view the evidence in a light most favorable to the non-moving party, and further improperly invalidated the verdict of the jury without clear and convincing evidence of any impropriety. We are not persuaded.

Instead, we agree with plaintiff that the trial judge's ruling in this case simply followed the law that when "the jury fail[s] to follow the instructions of the court . . . a new trial . . . must be granted." Leland v. Henderson, 18 N.J. Misc. 702, 704 (1940). We presume the jury will follow all instructions given. State v. Ross, 229 N.J. 389, 415 (2017) (citing State v. Loftin, 146 N.J. 295, 390 (1996)). However, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital . . ., that the practical and human limitations of the jury system cannot be ignored." State v. Brown, 180 N.J. 572, 587 (2004) (Albin, J., dissenting) (quoting Bruton v. United States, 391 U.S. 123, 135 (1968)).

We reject Heller's argument that the trial court engaged in "nothing more than pure speculation" when it determined the jury applied the testimony of plaintiff's expert on economic losses to discount to present value plaintiff's pain and suffering damages. To the contrary, the judge here carefully considered the possible explanations for the rare occurrence of a pain and suffering award ending in an uneven number and reasonably concluded that improper discounting by the jury represented the only logical explanation for this anomalous result in this case involving catastrophic injuries. Heller presented no alternative explanation for the pain and suffering award ending in an uneven number, but instead argued that jurors "can pretty much do whatever they want," including the application of discounting methods without instruction from the court. This argument lacks sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Rule 1:7-1(b) states that during closing statements "any party may suggest to the trier of fact . . . that unliquidated damages be calculated on a time-unit basis without reference to a specific sum." On this point, our Supreme Court noted "the adoption of Rule 1:7-1(b) does not mandate or permit the discounting of damages for future pain and suffering." Friedman v. C & S Car Serv., 108 N.J. 72, 78 (1987). The Court in Friedman specifically held, "[D]amages for future non-economic injuries

should not be discounted or reduced to reflect their present value." Id. at 79. The Court reasoned, "[D]iscounting to present value for such damages is artificial and unrealistic because of the imprecise and speculative nature of the elements underlying such determinations." Ibid. We conclude the Court's holding in Friedman precludes a jury from discounting pain and suffering damages.

Here, plaintiff's attorney suggested to the jury during his closing argument they could calculate pain and suffering by multiplying the number of days or hours plaintiff is expected to live times "the value of living a single day or single hour less than a full human being." In addition, plaintiff presented an economist as an expert witness to explain how to discount economic losses to determine the present value of all future medical expenses. According to the judge, during deliberations the jury had the charts used by plaintiff's expert economist in her testimony.

After reviewing all of the evidence, including the expert's present value charts, the trial judge concluded the jurors used the economist's present value calculations regarding economic losses to discount to present value their verdict for pain and suffering. In its final order, the court ordered a new trial on non-economic damages only on grounds the jury violated the jury

charges by applying the present value calculation offered for economic damages to non-economic damages.

We discern no abuse of discretion by the trial court in granting plaintiff a new trial limited to pain and suffering damages. We further note that a review of the final jury charge provides additional support for the judge's conclusion that the jury reduced its pain and suffering verdict to present value.

We note two problems with the court's jury charge that likely caused the jury to discount its pain and suffering award. The first problem occurred when, after charging the jury regarding pain and suffering damages, the judge charged the jury regarding future medical expenses. After informing the jury as to the factors to consider in determining plaintiff's future medical expenses, the judge stated, "Once you decide how much medical care plaintiff will need in the future, you must then consider the effects of inflation and interest." The judge then informed the jury regarding inflation, interest, discounting and present value, and explained, "Your goal is to create a fund of money which will be enough to provide plaintiff future medical care which should be used up at the end total of need." At no point during any part of the entire charge did the judge emphasize or make clear that the jury should only discount its award for future medical

expenses. Nor did the judge even raise this point when he reviewed the verdict sheet with the jury.

A second problem occurred during the part of the charge concerning the use of the time-unit rule by plaintiff's counsel during his closing argument. The judge told the jury, in relevant part:

> You may consider the nature and character and seriousness of any injury, discomfort, or disfigurement. You must also consider their duration as any award you make must cover damages suffered by [plaintiff] since the accident to the present time and even into the future if you find that [plaintiff's] injuries and the consequences have continued to the present time and can reasonably be expected to continue into the future.
>
> Now, [plaintiff's counsel] offered one method of valuating his clients damage, it's the time unit analysis. His comments are not evidence. You're not bound by them, but you can utilize this method or any other method [in] evaluating [plaintiff's] damages.
>
> [(Emphasis added).]

The second quoted paragraph was the trial judge's effort to summarize the information contained in the following two paragraphs of the model jury charge regarding the time unit rule:

> Our Rules of Court permit counsel to argue to the jury the appropriateness of applying a time unit calculation in determining damages for pain and suffering, disability, impairment and loss of enjoyment of life. Counsel are not permitted to mention specific amounts of money for the calculation

> of such damages. They are permitted, however, to argue that you may employ a time unit calculation, that is, to consider an amount of money in relation to an amount of time, when determining such damages.
>
> I charge you, Ladies and Gentlemen, that the argument of counsel with reference to calculation of damages on a time-unit basis is argument only and is not to be considered by you as evidence. Counsel's statements are a suggestion to you as to how you might determine damages for pain and suffering, disability, impairment and loss of enjoyment of life. You are free to accept or reject this argument as you deem appropriate. I remind you that you are to make a determination on the amount of damages based on the evidence presented and the instructions I have given you on damages.
>
> [Model Jury Charges (Civil), 8.11G(ii), "Time Unit Rule" (approved April 2015).]

While the charge employed by the court correctly told the jurors they could accept or reject the time-unit argument advanced by plaintiff's counsel, the charge went on to tell the jurors they could utilize "any other method" in evaluating plaintiff's damages. This errant comment,[6] together with the absence of any clear instruction from the court that the jurors should not discount their pain and suffering award, further supports the strong likelihood the jurors discounted their pain and suffering award to present value. We conclude the trial court failed to

[6] At the retrial, the court should follow the model jury charge and only deviate where necessary.

provide clear instructions to the jury regarding discounting and time unit calculations. This failure "had the capacity to affect the verdict," requiring a new trial. Poliseno v. General Motors Corp., 328 N.J. Super. 41, 63 (App. Div. 2000).

Based upon our review of the record, we discern no basis to disturb the order under review. The record provides adequate support for the finding of the court that the jury improperly applied testimony regarding discounting and present value in determining its award for plaintiff's pain and suffering damages. The error that occurred resulted in a miscarriage of justice, considering plaintiff's catastrophic injuries, his life expectancy, and the significant impact this error likely had upon the jury's verdict. Because the trial judge determined the jury violated his instructions, we discern no error in the court ordering a new trial on non-economic damages. We also discern no error in the court denying an additur and not addressing other issues raised in plaintiff's post-trial motion. Any arguments raised by either party not specifically addressed in this opinion lack sufficient merit to warrant discussion a written opinion. R. 2:11-3(e)(1)(E).

Affirmed and remanded.