SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2637-21

LAVANT JONES,

Plaintiff-Respondent,

v.

RITE AID and RITE AID CORPORATION,

Defendants-Appellant.

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Submitted March 29, 2023 – Decided July 17, 2023

Before Judges Enright and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-1965-18.

Bolan Jahnsen Dacey, attorneys for appellants (Daniel S. Jahnsen, on the briefs).

Rosenbaum & Associates, PC, attorneys for respondent (John F. Hanahan, on the brief).

PER CURIAM

In this slip and fall personal injury case tried before a jury, defendant Rite Aid of New Jersey, Inc. (Rite Aid) (improperly plead as Rite Aid and Rite Aid Corporation) appeals from the April 25, 2022 final judgment entered by the Law Division in favor of plaintiff Lavant Jones in the amount of $724,872.82. After carefully reviewing the record and the arguments presented, we affirm, finding no basis to disturb the judgment entered in plaintiff's favor.

I.

We discern the following facts and procedural history from the record. In February 2017, plaintiff slipped and fell inside the vestibule of defendant's Willingboro store. Plaintiff slipped on a plastic tablecloth and brochure that had blown off a display table setup by defendant to promote a flu vaccine program. The table displayed a cardboard sign that advertised flu vaccines, brochures, flu vaccine sign-up sheets, and a "heavy" bottle of hand sanitizer placed on the tablecloth. Plaintiff claimed because of the fall, she sustained injuries to her neck, right shoulder, back, wrists and hands.

On January 18, 2022, pursuant to the New Jersey Supreme Court's January 7, 2021 Order and Directive #02-21 (COVID-19 – Electronic Evidence in Virtual Civil Jury Trials – Supreme Court's January 7, 2021

Order), a four-day virtual jury trial was held. Neither party objected to proceeding with a virtual civil jury trial. The judge experienced with the "challenges and difficulties" of virtual proceedings and provided the parties with lengthier pretrial conferences and assistance with Zoom.

At trial, plaintiff testified she walked into the store with her eyes focused straight ahead. She said she fell because she "[got] tangled up with a tablecloth, and [she] believe[d], cardboard." Plaintiff denied seeing the display table near the entrance or the blue tablecloth prior to the fall. Video from defendant's surveillance camera admitted into evidence confirmed the location of the display table in the vestibule and the blue plastic tablecloth a few feet from the table. Plaintiff denied receiving any assistance from or speaking to any Rite Aid employee after her fall. She subsequently purchased pacifiers for her granddaughters and left the store.

Immediately following the fall, plaintiff complained of pain in her "upper shoulder and . . . lower back." She also complained of pain to her neck, arm and eventually her leg. Plaintiff was taken to the hospital the same day. While at the hospital, x-rays were taken of plaintiff's injuries. She was given pain medication and instructed to follow up with her doctor.

Plaintiff followed up with her primary care physician and then received chiropractic treatment and therapy. Plaintiff received therapy for her neck, back, and shoulders from March 7, 2017, through September 14, 2018. She described her symptoms as "real sharp pain that [was] shooting down to both of [her] legs." At night, she testified her legs got so numb that she did not want to move. Plaintiff also described intense pain in her shoulder to the point where she "could barely lift [her] shoulder, [her] arm up and the pain would shoot down. [H]er fingers would get numb, like, tingly and numb at the end of them."

Plaintiff was referred to orthopedist, Dr. Ranelle, for further evaluation and treatment. She treated with Dr. Ranelle between April 2017 and December 2020. Thereafter, plaintiff began treatment with a different orthopedist, Dr. Lawrence Barr.

Plaintiff testified because of "ongoing [neck and low back] pain and limitations," she was housebound. She was no longer independent and relied on her adult children to do her shopping, cooking, cleaning, and laundry. Additionally, plaintiff claimed that she was unable to lift or engage in any activities with her grandchildren or travel.

Plaintiff presented videotaped testimony from Dr. Barr. Based on his examination of plaintiff's injuries and a review of her medical records, Barr opined plaintiff's fall in February 2017 caused a contusion, left lumbar radiculopathy, and right shoulder impingement syndrome which resulted in surgery to the right shoulder. He explained that as a complication from shoulder surgery, plaintiff developed a wound infection which resulted in a four-day hospital admission. Additionally, plaintiff's EMG showed she had carpal tunnel syndrome in both hands, and she underwent right carpal tunnel surgery.

Dr. Barr also described plaintiff's prior medical history of chronic neck and low back pain for which she was taking narcotics. Plaintiff also had "issues" with her right shoulder and had a couple MRIs of the right shoulder several years before the February 2017 incident. Barr opined the February 2017 fall caused and aggravated plaintiff's back pain and resulted in carpal tunnel and right shoulder surgeries in February 2019.

Dr. Barr testified that plaintiff was susceptible to future injury to her right shoulder. He opined plaintiff's injuries were permanent, she had an "increased risk of future injuries," and it was "unlikely" she would ever be "pain free."

Defendant presented the testimony of two employees, Janice White and Tyesha Freshwater. At the time of plaintiff's accident, White was the store manager. She was deposed and testified at trial the display table had been set up for flu season. She said before the incident occurred in February 2017, she was aware that items had blown off the table at times. However, she testified that she was "surprised" the tablecloth had blown off the table because of the size and weight of the hand sanitizer bottle.

Freshwater, a cashier, stated Rite Aid corporate office directed store management to set up the display table by the entrance doors. She explained the hand sanitizer was placed on the table to hold down the blue tablecloth, cardboard sign, and other items to prevent the wind from blowing them off the table. According to Freshwater, the hand sanitizer only worked for a "minute" because the doors were "constantly" opened, and the "strong wind" knocked items off the table.

Freshwater testified she was stationed at the checkout counter near the front entrance when she heard a commotion. She went over to see what caused the commotion. Freshwater saw plaintiff lying on the ground next to the blue tablecloth that came off the table.

Defendant also presented videotaped testimony of orthopedist, Dr. Ronald Gerson. Dr. Gerson testified that his review of the Emergency Room records from the date of the accident revealed only complaints of mild right shoulder pain and mild low right back pain. He stated plaintiff had a "significant" car accident in 2005, with "very extensive injuries" – a femur fracture, chin laceration, and pain in the cervical spine, chest, abdomen, and right shoulder. Plaintiff underwent surgery to the right femur because of the car accident. She received a discharge diagnosis of cervical spine strain and right shoulder contusion. Based on his review of plaintiff's 2005 accident, he opined plaintiff's bilateral carpal tunnel symptoms were not related to plaintiff's fall. Gerson similarly opined based on the "high" dosages of narcotics taken by plaintiff before the fall, plaintiff's lower back pain was pre-existing and unrelated to the fall.

Dr. Gerson also opined that plaintiff's carpal tunnel symptoms were related to her diabetes and not the 2017 fall. He stated Dr. Rannelle's medical notes between April and August 2017 did not contain findings regarding carpal tunnel. He "believed" plaintiff was first diagnosed by a neurologist with carpal tunnel in December 2017 after an EMG study was conducted.

Regarding plaintiff's shoulder, Dr. Gerson opined plaintiff's shoulder surgery was "pretty typical" and a "pretty standard procedure for degenerative conditions of the shoulder" related to the 2005 car accident.

Dr. Gerson opined plaintiff sustained sprains and strains of her right shoulder and lower back from the 2017 fall. In addition, Gerson testified there were no indications that the carpal tunnel and right shoulder surgeries were causally related to the 2017 fall.

At the charge conference, plaintiff's counsel requested the mode of operation jury charge without objection from defense counsel.

Upon the conclusion of the four-day trial, the jury found that plaintiff sustained a permanent injury as a result of the fall and awarded her $700,000 in damages, plus prejudgment interest. A $17,000 medical lien also was added to the award.

On February 10, 2022, defendant moved for a new trial pursuant to Rule 4:49-1, arguing the jury verdict was "grossly" disproportionate to plaintiff's injuries and the mode of operation charge was erroneous and resulted in prejudice. Defendant also moved for an order directing judgment pursuant to Rule 4:40-2, seeking a remittitur of the award. Moreover, for the first time, defendant objected to the virtual trial.

After hearing oral argument on March 18, 2022, the trial judge denied defendant's motion in an oral opinion, finding it failed to prove the jury's verdict was a miscarriage of justice under Rule 4:49-1. The judge rejected defendant's argument that the jury "disregard[ed] the proofs." She stated that she could not "clearly and convincingly find that the jury award was plainly wrong, constitute[d] a manifest injustice, or was so disproportionate to the injury to shock the conscience, based on the evidence." She also found it was within the jury's purview to "completely believe all of the complaints and all of the testimony that [plaintiff] presented." While the judge explained the verdict was a "surprise" and "in excess of what would have been expected [in that case]," she did not find that the verdict shocked the conscience to warrant a new trial.

The judge further found the award "appear[ed] to be somewhat excessive given the nature of the injuries" and remittitur "could be appropriate." Citing Orientale v. Jennings, the judge determined the "best approach" was to schedule a settlement conference because both parties must consent to remittitur. 239 N.J. 569, 593 (2019).

As to the mode of operation jury charge, the trial judge concluded the charge was appropriate because the brochures were part of the "self-service"

setup and used for "self-service purposes." The judge explained the display was "created by [Rite Aid] for . . . [business] purpose[s]" to "bring [customers] into the store" to "[sell] flu shots" and to "administer flu vaccines." The judge found that there was a nexus between "the self-service and touching the [items] on the display [table], the hand sanitizer and the brochures mov[ing] around, the sign-up sheets," and the blowing wind that "allowed for the mode of operation charge."

The trial judge then addressed defendant's challenge to the virtual trial proceedings. At the outset, the judge noted she was "bound" by the Supreme Court's instructions. In denying defendant's motion, the judge explained:

> I cannot find that there was any – any error or injustice here. Rather, I find that the – the virtual jury trial was a mechanism by which we could continue to service justice by allowing trials to go forward during a very difficult time.
>
> And, so, for that reason, I'm not going to award a new trial, based on the virtual proceedings.

The matter did not resolve during the settlement conference and on April 25, 2022, the trial judge entered judgment in the amount $724,872.82 ($717,000.00, plus prejudgment interest).

II.

On appeal, defendant contends the trial judge erred in giving the mode of operation jury charge and denying its motion for a new trial on damages because the trial court determined the award was excessive. Defendant further argues the trial judge's offer to discuss remittitur was an implicit determination that the jury award was "grossly excessive," and the virtual trial proceeding resulted in prejudice.

Our review of a motion for a new trial pursuant to Rule 4:49-1 and a motion for judgment notwithstanding a verdict pursuant to Rule 4:40-2 requires that "we apply the same standard that governs the trial courts." Smith v. Millville Rescue Squad, 225 N.J. 373, 397 (2016); see also Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 522 (2011). We will disturb the trial court's ruling only if "it clearly and convincingly appears that there was a miscarriage of justice under the law." R. 4:49-1(a); Risko, 206 N.J. at 521 ("[A] motion for a new trial should be granted only where to do otherwise would result in a miscarriage of justice shocking to the conscience of the court." (internal quotation omitted)). A miscarriage of justice may "arise . . . from manifest lack of inherently credible evidence to support the finding, obvious overlooking or undervaluation of crucial evidence, [or] a clearly

unjust result." Risko, 206 N.J. at 521. (alterations in original) (quoting Lindenmuth v. Holden, 296 N.J. Super. 42, 48 (App. Div. 1996)).

"On a motion for a new trial, all evidence supporting the verdict must be accepted as true, and all reasonable inferences must be drawn in favor of upholding the verdict." Boryszewski ex rel. Boryszewski v. Burke, 380 N.J. Super. 361, 391 (App. Div. 2005). The court's function is mechanical and it "is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969).

Jury Award and Remittitur

We first address defendant's contention that because "the trial court determined damages were excessive," the denial of a new trial on damages was error. We disagree.

"A jury's verdict, including an award of damages, is cloaked with a 'presumption of correctness.'" Cuevas v. Wentworth Grp., 226 N.J. 480, 501 (2016) (quoting Baxter v. Fairmont Food Co., 74 N.J. 588, 598 (1977)). "[T]he trial court may not disturb a damages award entered by a jury unless it is so grossly excessive or so grossly inadequate 'that it shocks the judicial conscience.'" Orientale, 239 N.J. at 595. "If a damages award meets that

standard, then the court must grant a new trial," but "has the option of recommending to the parties a remittitur or an additur in lieu of a new trial," which "requires the mutual consent of the parties." Id. at 596. Moreover, "[j]udicial review of the correctness of a jury's damages award requires that the trial record be viewed in the light most favorable to plaintiffs." Cuevas, 226 N.J. at 485.

The record is devoid of any indication that the jury impermissibly rendered an excessive damages award because plaintiff's fall aggravated preexisting conditions and also resulted in two surgeries. The record demonstrates the jury was instructed, in accordance with the model jury charge, to determine the reasonable amount of damages due to plaintiff and not to speculate upon or include medical expenses as a part of the damages. Model Jury Charges (Civil), 8.10, "Damages – Effect on Instruction" (Dec. 1995). "We presume the jury followed the court's instructions." State v. Smith, 212 N.J. 365, 409 (2012) (citing State v. Loftin, 146 N.J. 295, 390 (1996)).

We agree with the trial judge's finding that the jury's award of damages does not shock the judicial conscience. During closing argument, plaintiff's counsel used the time unit rule. The time-unit rule, Rule 1:7-1(b), permits an

attorney to "suggest to the trier of fact, with respect to any element of damages, that unliquidated damages be calculated on a time-unit basis without reference to a specific sum." Accordingly, plaintiff's counsel pointed out that plaintiff, then fifty-three years old, had a life expectancy of thirty-one years, and asked the jury to "take into account" that plaintiff was "going to be living with [the injuries]" and "she's even more susceptible to further injury." Viewing the evidence in the light most favorably to plaintiff, we see no reason to disturb the trial court's finding that the amount of the award did not shock the judicial conscience.

We are also satisfied the trial judge did not abuse her discretion is denying remittitur. As noted above, the amount of damages did not shock the court's conscience despite the trial judge's surprise. Moreover, the jury considered the evidence and testimony presented during the trial, which formed the basis for the award. There was nothing improper about the trial judge's decision to conduct a conference to discuss remittitur accordance with Orientale.

In sum, we affirm the trial judge's denial of defendant's motion for a new trial, as the record does not show there was a miscarriage of justice.

Mode of Operation Jury Charge

In order to prove a claim of negligence, a plaintiff must demonstrate: (1) a duty of care, (2) that the duty has been breached, (3) proximate causation, and (4) injury. Townsend v. Pierre, 221 N.J. 36, 51 (2015) (citing Polzo v. County. of Essex, 196 N.J. 569, 584 (2008)). A plaintiff bears the burden of proving negligence, see Reichert v. Vegholm, 366 N.J. Super. 209, 213 (App. Div. 2004), and must prove that unreasonable acts or omissions by the defendant proximately caused his or her injuries. Underhill v. Borough of Caldwell, 463 N.J. Super. 548, 554 (App. Div. 2020) (citing Camp v. Jiffy Lube No. 114, 309 N.J. Super. 305, 309-11 (App. Div. 1998)).

In the context of a business invitee's slip and fall at a defendant's premises, the required elements of a negligence claim are well established. A plaintiff must prove by a preponderance of the evidence: (1) defendant's actual or constructive notice of a dangerous condition; (2) lack of reasonable care by defendant; (3) proximate causation of plaintiff's injury; and (4) damages. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 434 (1993) (citing Handleman v. Cox, 39 N.J. 95, 111 (1963)).

The mode of operation doctrine applies when a "dangerous condition is likely to occur as the result of the nature of the [defendant's] business, the

property's condition, or a demonstrable pattern of conduct or incidents." Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003). Specifically, when the defendant's business has a "self-service method of operation," the defendant is required to anticipate debris falling on the ground because of "the carelessness of either customers or employees." Id. at 564.

The New Jersey Model Jury Charges (Civil), 5.20F-11, "Mode of Operation Rule" (approved Mar. 2000, revised Nov. 2022) defines a self-service setting as one in which customers are permitted "to handle products and equipment . . . unsupervised by employees." Ibid. The charge reads:

> A proprietor of business premises that permits its customers to handle products and equipment in a self-service setting, unsupervised by employees, increases the risk that a dangerous condition will go undetected and that patrons will be injured. In self-service settings, patrons may also be at risk for injury from the manner in which the business's employees handle the business' products or equipment, or from the inherent quality of the merchandise itself.

A plaintiff is relieved of proving that the defendant had actual or constructive knowledge of the dangerous condition only upon proving:

> (1) the defendant's business was being operated as a self-service operation; (2) that the plaintiff's accident occurred in an area affected by the business's self-service operations; and (3) that there is a reasonable factual nexus between the defendant's self-service

> activity and the dangerous condition allegedly producing the plaintiff's injury.
>
> [Ibid.]

If plaintiff successfully demonstrates that the mode of operation rule applies, then "an inference of negligence arises that shifts the burden to the defendant to produce evidence that it did all that a reasonably prudent business would do in the light of the risk of injury that the self-service operation presented." Ibid.

"It is fundamental that '[a]ppropriate and proper charges to a jury are essential for a fair trial.'" Prioleau v. Ky. Fried Chicken, Inc., 223 N.J. 245, 256 (2015) (alteration in original) (quoting Velazquez ex rel. Velazquez v. Portadin, 163 N.J. 677, 688 (2000)). The jury charge is "a road map that explains the applicable legal principles, outlines the jury's function, and spells out 'how the jury should apply the legal principles charged to the facts of the case at hand.'" Toto v. Ensuar, 196 N.J. 134, 144 (2008) (quoting Viscik v. Fowler Equip. Co., 173 N.J. 1, 18 (2002)).

Guided by these principles, we reject defendant's contention that the trial court erred in charging the jury on mode of operation. Here, the judge properly concluded that facts supported the mode of operation jury charge. She noted it was within the jury's purview to accept plaintiff's testimony and

evidence. The judge determined there was a reasonable factual nexus between the self-service defendant provided, its display table items, the heavy hand sanitizer bottle used to prevent items from blowing off the table because of the wind and defendant's advertisements and brochures for flu shots and vaccines to support the mode of operation charge. Moreover, plaintiff testified she fell because of the blue tablecloth and brochure.

Defendant failed to demonstrate that the blue tablecloth and brochure landed on the floor for reasons unrelated to the wind. Additionally, defendant's store personnel testified they were aware of the wind blowing items off the table. As the motion judge rightly determined, the mode of operation charge was appropriate because the brochure on the display table was part of the "self-service" setup and used for defendant's "self-service purposes."

Virtual Jury Trial

To the extent defendant contends it was prejudiced as a result of the virtual trial format, this argument was not raised before the trial judge. We generally decline to consider questions or issues not presented below when an opportunity for such a presentation is available unless the questions raised on appeal concern jurisdiction or matters of great public interest. Nieder v. Royal

Indem. Ins. Co., 62 N.J. 229, 234 (1973). We are satisfied neither exception applies here.

Additionally, we are satisfied that the virtual format of the trial did not violate defendant's due process rights nor unduly prejudice defendant. Here, defense counsel did not object to the virtual format prior to the start of the jury trial. Further, the record reflects despite the extraordinary circumstances of COVID, the parties were provided assistance in navigating the Zoom platform before and during the trial. The judge maintained the formality of the proceedings, followed all necessary protocols, adeptly handled and considered objections made by defense counsel, and properly considered all the evidence.

To the extent we have not specifically addressed any remaining arguments raised by defendant, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.