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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5685-07T3

MING YU HE and JINFANG HE,

Plaintiffs-Appellants,

v.

ENILMA MILLER,

Defendant-Respondent,

and

RANDY MILLER,[1]

Defendant.

Argued December 1, 2008 - Decided March 27, 2009

Before Judges Lisa and Sapp-Peterson.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-2270-05.

August R. Soltis argued the cause for appellants.

Michael J. Marotte argued the cause for respondent (Schenck, Price, Smith & King, LLP, attorneys; Mr. Marotte, of counsel; Sandra Calvert Nathans, on the brief).

PER CURIAM

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[1] The claims against Randy Miller, owner of the vehicle, were dismissed with prejudice prior to trial.

Plaintiffs Ming Yu He and Jinfang He appeal from the trial court order remitting plaintiffs' jury verdict for pain and suffering from $1,000,000 to $200,000 and the per quod award of $100,000 to $20,000. We reverse.

The jury's award arises out of a motor vehicle accident that occurred on October 28, 2003. The evidence presented to the jury, if credited, disclosed that plaintiff[2] was struck head-on. The impact drove her vehicle into a wooded area off the roadway where it struck a tree. Plaintiff was knocked unconscious as a result of the impact. Plaintiff was transported via ambulance to a nearby hospital where x-rays were taken. No fractures were found and she was discharged that same day. The next day, she consulted with Dr. Joseph D. Salamone, a chiropractor, who administered stretching-type treatments which plaintiff found painful. After three visits, she concluded that chiropractic treatments would not help and ceased her treatment with Dr. Salamone.

Several days later, on November 6, 2003, plaintiff consulted Dr. Robert Kramberg, who later served as plaintiff's expert medical witness in the area of physical medicine and rehabilitation. Dr. Kramberg's initial examination of plaintiff

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[2] Although both Ming Yu He and Jinfang He are plaintiffs in this action, for ease of reference, use of the singular "plaintiff" refers to Ming Yu He.

revealed that she had limited range of motion of the cervical spine and lower back, flattening of the lumbar spine, back spasms, bruising and injury to her left knee, and slightly abnormal nerve sensation on one side. Dr. Kramberg wrote plaintiff several prescriptions for anti-inflammatory medication, muscle relaxants, and painkillers. He also started her on a physical therapy program which included heat and ice treatments, electrical stimulation, ultrasound treatments, and various stretching exercises.

On December 1, 2003, during plaintiff's second visit, Dr. Kramberg noted that plaintiff still complained of neck and lower back pain, as well as left knee pain. He ordered Magnetic Resonance Imaging (MRI) testing of plaintiff's cervical and lumber spine,[3] which was performed on December 22, 2003. The MRI revealed that plaintiff had four herniated or ruptured discs[4]

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[3] The upper part of the spine is comprised of the seven cervical vertebrae, designated C1 to C7, located in the neck. See Stedman's Medical Dictionary A17-A18, 2118 (28th ed. 2006). The lumbar vertebrae, designated L1 to L5, are located in the region of the back between the ribs and the pelvis. Id. at A17-A18, 1121, 2118. Beneath the lumber vertebrae are the sacral vertebrae, designated S1 to S5, which fuse to form the sacrum. Id. at A17-A18, 2119. Below the saccrum is the tailbone or coccyx. Id. at 403. A hernia is a "[p]rotrusion of a part or structure through the tissues normally containing it." Id. at 879; see also Johnson v. Scaccetti, 192 N.J. 256, 263 nn. 4-6 (2007).

[4] Dr. Kramberg testified that plaintiff's MRIs revealed she had herniated or ruptured discs at C4-C5 and C5-C6 in the cervical
(continued)

which had come out of proper alignment. Later, Dr. Kramberg performed an electromyography (EMG) test, which involved attaching plaintiff to a computer and introducing "electrical stimulation at various levels of the nerves going down her arm" to "calculate how long does it take for that shock to go down the arm." During the second part of that test, Dr. Kramberg performed an electromyogram, which involved inserting needles into "various muscles" of her legs, arms, neck, and lower back to detect damage to those muscles. The EMG confirmed that the herniated discs were causing compression of the nerves, affecting plaintiff's arms, legs, and back, and that she "clearly was suffering from radiculitis or radiculopathy from the herniated discs both in the cervical and the lumbosacral spine." Dr. Kramberg testified that such a condition would produce symptoms like "[p]ain, numbness, weakness, tingling, [and] limitation of motion." He further testified that the results of the EMG correlated with the MRI and plaintiff's complaints of pain to make it "pretty much a textbook case."

When the physical therapy failed to work, Dr. Kramberg referred plaintiff to Dr. Jay Lee, who performed over thirty or forty acupuncture treatments on her hands, neck, waist, and

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(continued)
spine (neck) and L4-L5 and L5-S1 in the lumbar spine (lower back).

back, but those treatments provided only temporary relief. Dr. Lee performed two epidural procedures in which he anesthetized plaintiff and injected her with cortisone directly into her cervical spine. Plaintiff experienced a bad reaction to the cervical epidurals and did not see any significant improvement. Later, Dr. Kramberg performed three additional epidural injections of cortisone into plaintiff's lumbar spine. Because plaintiff's leg became swollen, she ceased the treatment.

In April 2007, Dr. Kramberg referred plaintiff to a neurosurgeon, Dr. Frank Gamache, Jr. On April 17, plaintiff underwent another set of MRIs of her lumbar and cervical spine, the results of which were consistent with the findings from the first series of MRIs, revealing herniated discs that compressed the spinal cord and impinged on her nerve root. Dr. Gamache, however, did not recommend surgery. Dr. Kramberg testified that whether or not a spinal patient is referred to surgery depends on the particular patient and particular injury, and based upon his experience, Doctor Gamache recommended surgery for only two or three out of every ten patients referred to him. Dr. Kramberg opined that "not all patients do well with surgery. And once you have a failed surgery, there's nothing else you can do for that patient. They wind up on lifetime narcotic pain medication."

Additionally, Dr. Kramberg concluded that after five years of unavailing treatment, plaintiff's pain was "chronic [and] permanent." He testified that she continued to have limited range of motion, and he believed she was medically incapable of performing her job as a housekeeper at a hotel. He continued to prescribe pain medication (Vicodin) to plaintiff and she last saw him in January 2008. In Dr. Kramberg's opinion, based upon the MRI and EMG results, the physical examination, plaintiff's complaints, and the fact that plaintiff had been completely asymptomatic prior to the accident, her injuries were causally related to the October 28, 2003 accident.

Dr. Kramberg acknowledged that plaintiff's diagnostic testing revealed "a little bit of arthritic degeneration on the vertebrae, but [was] pretty much consistent with her age, being in her 40's." He characterized the arthritic condition as part of the "normal aging process." On cross-examination, defense counsel questioned Dr. Kramberg concerning whether plaintiff's continued pain could be the result of normal disc degeneration or whether it must have been from the accident:

> Q: Is there a way of telling if the herniations were a result of the degeneration?
>
> A: No.
>
> Q: Okay. So other than the fact that she was involved in an accident, this condition could have been preexisting?

> A: Taking into account, again as I stated, that the patient never had a prior injury to her neck and back, never had a prior MRI scan to compare it to, having this injury, having the subjective complaints continually, the clear objective findings on physical examination that are corroborated by the diagnostic testing, it's clearly related to the accident.
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> . . . .
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> Q: . . . What I'm saying is, could this condition have been preexisting?
>
> A: Possibility, yes. But probability, not.

Dr. Louis Rizio, an orthopedic surgeon, testified on behalf of the defense. He conducted a physical examination of plaintiff on March 27, 2007. Prior to his examination, he reviewed plaintiff's previous history through her treatment records, as well as her MRI and EMG test results. Dr. Rizio testified that "there's a good suspicion that a lot of these findings [from the MRI and EMG exams] are degenerative and preexisting." He explained that "there's really no way of ascertaining, based on these films, whether or not the disc herniations are a result of the degenerative changes or not."

As to lost wages, plaintiff presented an occupational assessment expert, Ellen Radar Smith, M.S., who evaluated plaintiff's work history, language skills, and educational background, and conducted several physical tests. Smith opined

that plaintiff's cervical and lumbar conditions preclude her from returning to her job cleaning up to fourteen rooms a day at a New York City hotel, and that her physical limitations, limited English, and lack of transferable job skills would likely preclude her from finding other employment. Smith expressed the view that plaintiff, at home, was only capable of taking care of herself.

Plaintiff testified as to how the accident and her resulting injuries impacted upon her activities of daily living. She indicated that she experienced neck and back pain "on a daily basis[,]" which often spread and caused headaches and pain in the legs and hands, and sometimes caused her to lose her grip and drop things. She was no longer able to work at the job she held for thirteen years and could not perform most normal household duties such as grocery shopping, cooking a full meal, gardening, vacuuming, cleaning, or participating in activities with her children. She also testified she was no longer able to swim or ride a bicycle.

Plaintiff's husband and daughter provided similar testimony as to plaintiff's home life. Both plaintiff and her husband testified that they brought their parents to the United States from China so that they would not have to work in their old age and their daughter could take care of them, in accordance with the Chinese custom of filial piety. Now, according to

plaintiffs, the situation had been reversed, with the grandparents taking care of plaintiff by helping out with the chores she could no longer perform. They both also testified that they have been completely unable to have sexual relations since the accident because their attempts to do so were continually foiled by the onset of back and neck pain for plaintiff. Plaintiff told the jury that since the accident, she felt "useless."

The jury returned a unanimous verdict in favor of plaintiffs on the issue of liability. The jury awarded plaintiff $110,000 for past lost wages, $500,000 for future lost wages, and $1,000,000 for pain and suffering. The jury also awarded plaintiff's spouse $100,000 for his derivative per quod claim for loss of consortium. The total jury award amounted to $1.71 million.

Defendant filed a motion for new trial pursuant to Rule 4:49-1, or, in the alternative, for remittitur, arguing that the jury award was excessive and should not be upheld. Following oral argument, the court denied the motion on the issue of liability and the jury's award of $110,000 for past lost wages and $500,000 for future lost wages. The court, however, remitted the pain and suffering award to $200,000 and the per quod award to $20,000. The court reasoned:

> Based upon the fact that surgery was never recommended for [plaintiff], that she has degenerative dis[c] disease, that she is able to care for herself, drive a motor vehicle and perform light housekeeping, as well as the fact that she did not appear to be experiencing pain and suffering during the course of the trial and was able to sit for long periods of time during the trial, I find that the jury award of $1M to [plaintiff] for her injuries constitutes a manifest injustice that shocks the judicial conscience.
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> The Court, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, finds that it clearly and convincingly appears that there was a miscarriage of justice under the law. Accordingly, defendant's motion for remittitur is granted and the award will be reduced from $1M to $200,000.
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> Furthermore, in regard to the per quod claim . . . . [b]ased upon the reasons I've previously set forth in regard to the remittitur of [plaintiff's] pain and suffering claim, I find . . . it clearly and convincingly appears that there was a miscarriage of justice under the law and that the $100,000 jury verdict -- just verdict to [plaintiff's spouse] for loss of his spouse's services, society and consortium shocks the judicial conscience. Accordingly, the defendant's motion for remittitur in regard to the award to [plaintiff's spouse] is granted and the award will be reduced from $100,000 to $20,000.

The court's order granting remittitur provided that in the event plaintiffs refused to accept the reduced award, a new trial would be conducted on all issues. The court noted that a retrial on all issues would be required pursuant to Caldwell v.

Haynes, 136 N.J. 422, 442 (1994), as an excessive pain and suffering or per quod award would not be "'fairly separable'" from the past and future lost wage awards. Plaintiffs rejected the remittitur and filed a notice of motion for leave to file an interlocutory appeal of the court's remittitur decision. We granted leave to appeal on July 25, 2008. On July 18, 2008, the trial court issued an amplification of its prior opinion pursuant to Rule 2:5-1(b), further explaining its conclusion that a new trial would be necessary on all damages issues because the damages components were not "'fairly separable.'"

On appeal, plaintiffs contend:

> POINT I
> THE TRIAL JUDGE ERRED IN REMITTING THE JURY AWARDS FOR MING YU HE'S PAIN AND SUFFERING AND FOR JINFANG HE'S PER QUOD CLAIMS.
>
> POINT II
> THE TRIAL JUDGE ERRED IN ORDERING A NEW TRIAL ON ALL DAMAGES IN THE EVENT THAT PLAINTIFFS DID NOT ACCEPT THE REMITTITUR.

I.

The court's authority to reduce damages awarded by a jury is limited to cases in which "the quantum of damages assessed by a jury . . . is so disproportionate . . . as to shock [the] conscience" and require a new trial because "'it clearly and convincingly appears that there was a miscarriage of justice under the law.'" Baxter v. Fairmont Food Co., 74 N.J. 588, 596

(1977) (quoting Rule 4:49-1(a)); see Fritsche v. Westinghouse Elec. Corp., 55 N.J. 322, 330 (1970). As a reviewing court considering plaintiff's claim that the trial court erred by granting a remittitur, we give deference to the trial court's "feel for the case" and opportunity to assess credibility but otherwise apply the same standard as the trial court, namely, whether the damages awarded were so clearly excessive in light of the evidence, the jurors must have made a mistake that resulted in a miscarriage of justice. Baxter, supra, 74 N.J. at 596-600 (citing Fritsche v. Westinghouse Elec. Corp., supra, 55 N.J. at 330). It is appropriate for the trial court to reach such a conclusion when there is no evidence to support the quantum of damages awarded. Id. at 599. As the Supreme Court stated in Johnson v. Scacetti:

> The use of remittitur is encouraged whenever possible to avoid the unnecessary expense and delay of a new trial. Accordingly, when a defendant moves for a new trial, successfully claiming that a jury awarded excessive damages, the trial court has the option of denying the motion on the condition that the plaintiff consent to the reduction of the award to a specified amount. In the absence of consent, a new damages trial is ordered.
>
> Because a jury is given wide latitude in determining pain and suffering damages, the standard for granting a new trial or remittitur is necessarily high. The judge may not substitute his judgment for that of the jury merely because he would have reached the opposite conclusion; he is not a

> thirteenth and decisive juror. A trial court should not order a new trial or remit a jury's damages award unless it is so clearly disproportionate to the injury and its sequela (here plaintiff's pain and suffering and loss of enjoyment of life) that it may be said to shock the judicial conscience. The verdict must be wide of the mark and pervaded by a sense of wrongness. In other words, the trial court must be clearly and convincingly persuaded that it would be manifestly unjust to sustain the award.
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> In deciding whether to grant a remittitur, the court must accept the evidence in the light most favorable to the plaintiff, and must articulate its reasons for reducing a damages award by reference to the trial record. Although the court may rely on its knowledge of other injury verdicts, if it does so, it must give a factual analysis of how the award is different or similar to others to which it is compared.
>
> On appeal, the standard of review for determining the excessiveness of a damages award is the same standard applicable to the trial court, with one significant exception. An appellate court must pay deference to the trial court's feel of the case, given that, on appeal, review is confined to the cold record. However, [t]he feel of the case factor, while entitled to deference, is the only element distinguishing the standard governing appellate review from that controlling trial court reaction to a jury verdict.
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> [Johnson, supra, 192 N.J. at 280-82 (internal citations and quotations omitted).]

Here, the sole basis for the court's decision to remit the pain and suffering and per quod awards is the fact that no doctor recommended that plaintiff undergo surgery, she was still

able to care for herself, drive a vehicle, had degenerative disc disease, did not visibly appear to be experiencing pain and suffering during the course of the trial, and was able to sit for long periods during the trial. The fact of plaintiff's injuries was not disputed. The objective evidence revealed disc herniations, and although there was also undisputed evidence of degenerative disc disease, plaintiff's witnesses causally related plaintiff's injuries to the accident. While defendant's witnesses disputed this opinion, the jury was free to accept or reject the testimony of defendant's experts. Poliseno v. Gen. Motors Corp., 328 N.J. Super. 41, 59 (App. Div.), certif. denied, 165 N.J. 138 (2000); Southbridge Park, Inc. v. Borough of Fort Lee, 201 N.J. Super. 91, 94 (App. Div. 1985); Middlesex County v. Clearwater Vill., 163 N.J. Super. 166, 173-74 (App. Div. 1978), certif. denied, 79 N.J. 483 (1979). It is apparent, from its verdict, that the jury found the proofs presented by plaintiffs more persuasive.

As juries are repeatedly instructed in civil trials:

> The law does not provide you with any table, schedule or formula by which a person's pain and suffering disability, impairment, loss of enjoyment of life may be measured in terms of money. The amount is left to your sound discretion. You are to use your discretion to attempt to make the plaintiff whole, so far as money can do so, based upon reason and sound judgment, without any passion, prejudice, bias or sympathy. You each know from your common experience the

> nature of pain and suffering, disability, impairment and loss of enjoyment of life and you also know the nature and function of money. The task of equating the two so as to arrive at a fair and reasonable award of damages requires a high order of human judgment. For this reason, the law can provide no better yardstick for your guidance than your own impartial judgment and experience.
>
> You are to exercise sound judgment as to what is fair, just and reasonable under all the circumstances. You should, of course, consider the testimony of [plaintiff] on the subject of his/her discomforts. You should scrutinize all the other evidence presented by both parties on this subject, including, of course, the testimony of the doctors who appeared.
>
> [Model Jury Charge (Civil), 8.11, "Damages Charges — General E. Disability, Impairment and Loss of the Enjoyment of Life, Pain and Suffering" (1996).]

In defendant's motion for a new trial or, alternatively, remittitur, defendant's attorney referenced a number of recent jury verdicts as evidence that the jury's award for pain and suffering and the per quod award was excessive:

> We have to talk a little bit about plaintiff's injuries, Your Honor, and I think one of the central issues that I think we can get past quite quickly is whether or not Your Honor should rely on other jury verdicts that we have pointed out. Your Honor's own experience trying cases, specifically in the Morris County area, because that is the basis upon which Your Honor has to decide whether or not this verdict was excessive. There is no other yardstick but Your Honor's experience, perhaps augmented by some of the information we've provided about other verdicts that

have been decided, two in particular in Morris County which were very similar, one called Regan v. Eddy (phonetic) which was decided on September 29th, 2006 involved herniations of C5-C6, C6 and C7 for a 51 year old kindergarten teacher. As in our case, there was no surgery. That's an important issue, Your Honor. Your Honor certainly knows that juries, as can be imagined, when there's surgical intervention, tend to award more money. No surgery for plaintiff in our case, no surgery for plaintiff in the Regan case. That Morris County jury awarded $150,000.

> The case of Asterita (phonetic), also in Morris County, involved a pedestrian who was struck in a parking lot, had dis[c] herniations at L3-L4 and L4 and L5, underwent surgery. That plaintiff was awarded $200,000, a more substantial verdict but clearly because of the surgery.
>
> Your Honor, we have cited a number of other cases outside of Morris County. We believe the Morris County cases are important but other cases in other counties, some of these other counties are typically known to be more liberal, and Your Honor may consider that, where awards for dis[c] herniations are between $50,000 and $100,000.
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> We, in fact, cited 13 cases that we thought were comparable to the case here. Some of those cases involved dis[c] herniations and bulges and I can go through the list, I've highlighted them. I don't want to burden the record, Your Honor.

The court acknowledged reading the papers, but in its decision made no reference to any of the verdicts referenced, or to the court's particular experience in presiding over similar cases from which vastly different verdicts emerged. In Johnson,

supra, the Court stated approvingly that "[a]lthough the [trial] court may rely on its knowledge of other injury verdicts, if it does so, it must give a factual analysis of how the award is different or similar to others to which it is compared." That was not done here. 192 N.J. at 281 (citing Fertile v. St. Michaels Med. Ctr., 169 N.J. 481, 500-01 (2001)).

Moreover, while the factors upon which the court focused led it to conclude the pain and suffering and per quod awards were excessive, those same factors apparently did not lead the court to conclude that the jury's verdict relative to past and future lost wages was excessive. At their core, past and future loss of wages requires proof that plaintiff's injuries are causally related to plaintiff's inability to engage in her pre-accident employment responsibilities. Thus, plaintiff's inability to work is inextricably linked to the nature of injuries and the effect those injuries have upon continued employment. Consequently, we find it difficult to understand that the court could accept the jury's award for past and future lost earnings but not its award for pain and suffering and the per quod verdict.

In short, "[t]he jury's award is undoubtedly high, perhaps overly generous. Nonetheless, the trial court failed to articulate sufficient reasons to justify a remittitur, which we have said is reserved to correct only a 'manifest miscarriage of

justice.'" Johnson, supra, 192 N.J. at 283 (quoting Baxter, supra, 74 N.J. at 598). As we observed earlier, the jury was confronted with differing opinions on the question of whether plaintiff's injuries were causally related to the accident, making this case largely a battle of the experts, State v. Raso, 321 N.J. Super. 5, 15 (App. Div.), certif. denied, 161 N.J. 332 (1999), which is not atypical in any trial where expert testimony is proffered. The jury could have reasonably reached a different verdict had it accepted the opinion of defendant's expert over that of plaintiff. In a close case, however, the tie must go to the jury. Johnson, supra, 192 N.J. at 283 (quoting Baxter, supra, 74 N.J. at 598 (stating that "In the American system of justice the presumption of correctness of a verdict by a jury has behind it the wisdom of centuries of common law merged into our constitutional framework.")). Based upon the record before us, we conclude the trial court failed to accord plaintiffs all reasonable favorable inferences and that had it done so, it would not have concluded that a miscarriage of justice occurred. We are therefore constrained to reverse the order granting remittitur and to reinstate the jury's award for pain and suffering and its verdict on the per quod claim.

II.

In view of our decision, plaintiff's remaining point that the court erred in ordering a new trial on all damages is moot.

Reversed.

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

CLERK OF THE APPELLATE DIVISION