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SUPREME COURT OF NEW JERSEY

BARBARA ORIENTALE AND MICHAEL ORIENTALE, PLAINTIFFS-APPELLANTS, vs. DARRIN L. JENNINGS AND ALLSTATE NEW JERSEY INSURANCE COMPANY, DEFENDANTS-RESPONDENTS.	SUPREME COURT OF NEW JERSEY DOCKET NO.: A-43-17 (079953) CIVIL ACTION APPELLATE DIVISION DOCKET NO.: A-879-14 (TEAM 1) SAT BELOW: Hon. Carmen Messano, P.J.A.D., Hon Marianne Espinosa, J.A.D., Hon Michael A. Guadagno, J.A.D. On Appeal from: Superior Court of New Jersey Law Division, Middlesex County Docket No.: MID-L-3476-12 SAT BELOW: Hon. Philip Lewis Paley, J.S.C.

BRIEF OF THE NEW JERSEY BUSINESS & INDUSTRY ASSOCIATION AS *AMICUS CURIAE* WITH ANNEXED APPENDIX

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PRELIMINARY STATEMENT

On October 9, 2018, This Court heard oral argument in this matter. Thereafter, This Court invited amicus participation of a number of organizations, including the New Jersey Business and Industry Association ("NJBIA") on four specific issues concerning additur and remittitur. This Brief is submitted by NJBIA in support of its motion for leave to appear amicus curiae to address the issues upon which The Court has invited participation.

IDENTITY OF *AMICUS CURIAE* AND INTEREST IN CASE

Founded in 1910, NJBIA is the nation's largest single statewide employer organization, with more than 19,000 member companies in all industries and in every region of our State. NJBIA members employ approximately 1,000,000 people in New Jersey. The members of the NJBIA range from very small businesses to large companies from every sector of New Jersey's economy. Its mission is to provide information, services, and advocacy for its member companies to build a more prosperous New Jersey. NJBIA's members include most of the top 100 employers in the State, as well as thousands of small to medium-sized employers. One of NJBIA's goals is to reduce the costs of doing business in New Jersey, including unwarranted litigation burdens, in an effort to promote economic growth and to create jobs to the benefit of all of New Jersey. NJBIA submits this

brief as amicus curiae to provide a broader perspective than has been provided by the parties regarding the policy implications of allowing both parties to object to a Trial Court's additur or remittitur, and whether when setting an additur or remittitur, the Court should set the damages amount as either the lowest amount, or highest amount, respectively, reasonably supported by the record, or whether the standard should be a reasonable amount supported by the record.

As discussed in greater length below, fundamental fairness requires that any holdings of This Court concerning additur or remittitur should be equally applied to both principles. Under the current law, when a Trial Court grants an additur, the plaintiff does not have the right to object to the additur; conversely, when the Trial Court grants a remittitur, the defendant does not have the right to object to the remittitur. See, e.g., Tronolone v. Palmer, 224 N.J. Super. 92, 97 (App. Div. 1988). Any modification of this existing law - to allow a plaintiff to object to an additur or to allow a defendant to object to a remittitur - frustrates the purposes of additur and remittitur. Additur and remittitur are procedural devices that benefit the parties and the Courts by saving the time, uncertainty and expense of a new trial. Additur and remittitur also foster finality of litigation, which often benefits the parties, and surely benefits the Courts. As the largest

business trade association in New Jersey, NJBIA has a significant interest in both reducing the time and expense that its members spend in the court system, and in the efficient operation of the court system. Accordingly, as the current law often reduces the time and expense of a new trial to all parties to a lawsuit and the court system, and reduces Court backlog, NJBIA believes there should be no change to the current law on which parties can object to additur and remittitur.

This Court has previously held that in fixing the amount of additur, the Trial Court should set the amount at the lowest amount a reasonable jury could award, and that in fixing the amount of remittitur, the Trial Court should set the amount at the highest amount a reasonable jury could award. See, e.g., Cuevas v. Wentworth Grp., 226 N.J. 480, 499 (2016). This Court's rationale for its earlier holdings was to give some affect to the decision of the jury. However, an order for additur or remittitur is entered only upon a finding that the conclusion of the jury was a miscarriage of justice and wholly unsupported by the record, and therefore that the conclusion of the jury as to the quantum of damages was fundamentally flawed. Against that background, the conclusion of the jury as to the quantum of damages should not receive any deference and should have no impact on the amount of an additur or a remittitur. Rather, in setting the amount of an additur or a remittitur,

NJBIA suggests that the current law should be changed to hold that the amount of an additur or remittitur should be the amount that a reasonable jury would award based upon the trial record.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

On October 9, 2018, This Court heard oral argument in this Matter. Thereafter, in an October 30, 2018 Order, This Court requested Supplemental Briefing from the parties on four issues:

1) Should both parties have the right to object to a trial court's additur, or should only the defendant have that right?

2) Should both parties have the right to object to a trial court's remittitur, or should only the plaintiff have that right?

3) In additur, should the court set the damages amount as the lowest amount reasonably supported by the record, or a reasonable amount supported by the record?

4) In remittitur, should the court set the damages amount as the highest amount reasonably supported by the record, or a reasonable amount supported by the record?

By letter dated November 1, 2018, Mark Neary, the then Clerk of This Court, wrote to certain trade associations, including NJBIA, and forwarded This Court's October 30, 2018 Order. In his letter Mr. Neary stated that This Court was "inviting amicus participation" in this matter.

ARGUMENT

POINT I

THE LEGAL PRINCIPLES APPLIED TO ADDITUR AND REMITTITUR SHOULD BE APPLIED EQUALLY

This case involves additur. Accordingly, this brief addresses the legal issues related to additur, and largely does not address remittitur. However - and to be clear - the legal principles applied to additur should be the same legal principles applied to remittitur, and vice versa. That is simple fairness. Plaintiffs and the *Amici* aligned with Plaintiffs have not pointed to any other State that applies different legal principles to additur and remittitur on the issues in this appeal. Further, applying different legal principles to additur and remittitur may constitute equal protection and due process violations.

Accordingly, and consistent with New Jersey jurisprudence, while NJBIA's brief will address the legal issues largely related to additur per the specific issues on appeal, it is NJBIA's position that these legal principles should apply equally to remittitur.

POINT II

WHEN A TRIAL COURT GRANTS ADDITUR, ONLY THE DEFENDANT SHOULD HAVE THE RIGHT TO OBJECT TO THE TRIAL COURT'S ADDITUR

New Jersey jurisprudence should be upheld in accepting an additur: an order for additur should be entered if agreed to by

the defendant without providing the plaintiff a right to object to the additur. NJBIA contends that the status quo be maintained in a remittitur as well and that a remittitur should be entered if agreed to by the plaintiff without seeking the defendant's approval. While the analysis below will address additur, as indicated in Point I, supra, the same legal principles should apply to remittitur.

An additur benefits both the parties and the Courts in saving the time, expense, and uncertainty of a new trial. Specifically, as to a plaintiff, the additur mechanism saves the plaintiff: (1) the time and expense of re-trying the case; (2) the delay of a new trial; and (3) the risk that if the case were re-tried, the second jury may award an amount lower than otherwise would be set by the Trial Court in granting an additur, requiring the plaintiff to again seek a new trial. As to the Courts, additur saves the Trial Court from the unnecessary time and expense of a second trial. See, e.g., Cuevas v. Wentworth Grp., 226 N.J. 480, 499 (2016). Additionally, many of the vicinages have a significant number of backlogged cases and when an additur is accepted by the defendant, a Trial Judge is "freed up" to conduct other trials and important functions, including settlement conferences. Additur also benefits the Appellate Division in that it reduces the likelihood of an appeal - and by its very nature, an appeal

concerning the quantum of damages would require the Appellate Division to engage in the time consuming task of reviewing virtually the entire trial record.

The Court should not overrule precedent to allow both a plaintiff and a defendant to object to an additur. See, e.g., Tronolone, 224 N.J. Super. at 97 ("The option to consent to an additur or risk the outcome of a new trial is defendant's. Plaintiff's choice is to accept the increased award or appeal."). Allowing a plaintiff to object to an additur frustrates the salutary purposes of additur and the Courts' overall goal of finality. This Court has often recognized the benefits of finality in finding a "strong public policy in favor of the settlement of litigation," Gere v. Louis, 209 N.J. 486. 500 (2012), and the "finality" of lawsuits, Paciorkowski v. Minichiello, A-4628-04T5, 2007 WL 506318, at *4 (N.J. Super. Ct. App. Div. Feb. 20, 2007). See also Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008) (stating "[t]he settlement of litigation ranks high in our public policy") (internal citations omitted).

Further, giving a plaintiff the right to object to the additur would require both parties to *consent* to the additur. Requiring consent reduces the usefulness of additur by giving the plaintiff a right the parties always have: the right to settle a case. Parties always have a right to enter into a

settlement, but if The Court were to give the right to object to an additur to both parties, instead of just the defendant, it would, as a practical matter, impose a settlement on the parties insofar as the additur would only be accepted if both parties agreed with the amount decided by the Trial Court. Attempting to force a settlement, when the parties are always able to voluntarily settle the matter, will discourage the Court's goal of finality of judgments and will increase the likelihood of second trials.

If both parties were given the right to object to an additur, it could present the following issues to plaintiffs: (1) the jury on the re-trial might award an amount less than the amount of the additur requiring the plaintiff to again seek a new trial; or (2) on appeal, the Appellate Division may determine that the Trial Court erred in granting any post-trial relief to the plaintiff on damages (either a new trial or an additur), and reinstate the jury's verdict. The increase of second trials caused by a plaintiff's potential right to object to an additur would pose an additional expense and be time consuming for the parties and the Courts. Inevitably, certain cases would be appealed, resulting in additional burdening of our Appellate Courts.

In most post-trial motions, the plaintiff usually moves for a new trial, or in the alternative for an additur. It may not

be clear from existing case law whether a Trial Court can award an additur even if the plaintiff only requests a new trial, and does not request an additur. But see, Kapsis v. Port Auth. of NY & NJ, 313 N.J. Super. 395, 406-407 (App. Div.), certif. den., 157 N.J. 544 (1990). It is NJBIA's position that This Court should reaffirm the principle that a plaintiff does not have the right to object to an additur. The Court, however, may want to consider clarifying the case law and holding that a plaintiff has the sole right to request an additur, and that the Trial Court does not have the authority to grant an additur in the absence of a specific request by the plaintiff. Such a holding would give the plaintiff control over whether the Trial Court will grant an additur at all, thereby eliminating any perceived unfairness to a plaintiff in not having the right to object to an additur.[1] However, if the plaintiff choses to request an additur, for the foregoing reasons, the plaintiff should not be allowed to object to the additur.

Accordingly, based upon the above policy considerations, and consistent with New Jersey jurisprudence, only the defendant

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[1] Other possible changes to existing law to reduce the perceived unfairness to a plaintiff in not having the right to object to an additur would be to allow as of right appeals of Orders granting an additur, rather than requiring that the Plaintiff file a notice for leave to appeal the additur order. However, it is plain that such a change to existing law would increase the Appellate Division's already significant work load.

should have the right to object to an additur and only a plaintiff should have the right to object to remittitur.

POINT III

WHEN GRANTING AN ADDITUR THE COURT SHOULD SET AS DAMAGES A REASONABLE AMOUNT SUPPORTED BY THE RECORD

Under the current law, a court granting an additur is required to set the amount of the additur at the lowest amount that a reasonable jury could award. Johnson v. Rehders, A-6556-05T5, 2007 WL 2790773, at *3 (N.J. Super. Ct. App. Div. Sept. 27, 2007) ("in the context of additur, Fertile v. St. Michael's Med. Ctr., 169 N.J. 481, 500 (2001) suggests that we should increase a deficient jury award to the lowest figure that reasonably can be supported by the proofs."); see, Fertile, supra, 169 N.J. at 500 ("where a jury's damages award is deemed excessive, a court should remit the award to the highest figure that could be supported by the evidence") (internal quotations omitted). That rule is based upon flawed reasoning and should be abandoned. In fixing the amount of an additur, NJBIA believes the standard that the Trial Judge should apply is as follows: the amount that a reasonable and proper functioning jury would award based on the evidence and witnesses at trial. This same standard should be applied to remittitur. While the analysis below primarily addresses additur, as indicated in

Point I, supra, the same legal principles, and standard, should apply to remittitur.

Tn 1988, the Appellate Division decided Tronolone v. Palmer, 224 N.J. Super. 92 (App. Div. 1988). In Tronolone, the Appellate Division held that in determining the amount of an additur, the Trial Court should determine "the amount that a reasonable jury, properly instructed, would have awarded," i.e., the amount of the additur should be the amount that a reasonable jury would award based upon the evidence that the Trial Court saw and heard. Tronolone, supra, 224 N.J. Super. at 103. Thereafter, in 2001 in Fertile v. St. Michael's Med. Ctr., supra, This Court held that in fixing the amount of remittitur, the Trial Court should remit the award to the highest amount that could be supported by the evidence presented at trial. Fertile, 169 N.J. at 500.

Both the Tronolone and the Fertile decisions set forth the rationale for their holdings. The Tronolone Court discussed the conflicting policy goals when choosing between having the additur be the lowest amount that the jury could award or having the additur be the amount that a reasonable jury would award:

> The difficulty in finding the true rule is that there are two contrary policies at work, one diminishing the *additur* amount and the other tending to inflate it. The first policy is the practical one which looks to the purpose of ordering an *additur* - to save the court and the parties the time,

> uncertainty and expense of a new trial. If the court's primary purpose is to resolve the dispute, perhaps it should try to fix an amount which defendant will accept and from which plaintiff will not appeal. Doing that may require the court to order a low *additur* to accommodate defendant's elation and plaintiff's deflation at the outcome of the first trial.
>
> The contrary policy recognizes that it was plaintiff who was wronged by the shockingly low damage verdict; that such a verdict is not the result of a reasonable evaluation of the evidence, and that in correcting the wrong done to plaintiff the *additur* amount should not be lessened in deference to the jury's improper conclusions. In other words, if the jury's verdict was so wrong as to require correction by a new trial or *additur,* the court should not resolve facts and inferences against plaintiff on the thesis that the jury must have done so. The jury, after all, either misunderstood its function or the evidence before it. For one reason or another, the jury was very, very wrong. In addition, since it was plaintiff who was prejudiced, nothing justifies putting plaintiff to the additional burden of appealing an *additur* whose amount reflects the jury's insupportable verdict. The first policy may be practical, but it improperly gives continuing effect to a damage verdict so unsound that it shocks the court's conscience and requires correction. The second policy may not resolve so many cases, but it will not unfairly treat a party already seriously wronged.

Tronolone, supra, 224 N.J. Super. at 103-104.

In Fertile, This Court noted that "different approaches" had been developed for determining the proper amount of a remittitur order - one approach is to award the lowest amount supported by the record, a second approach is to award the

highest amount supported by the record, and the third approach is to award damages in between the highest and lowest amounts supported by the record. Fertile, supra, 169 N.J. at 500. In holding that the trial court should set the amount of a remittitur at the highest amount supported by the record, the Fertile court reasoned as follows:

> Because the process of remittitur is essentially to "lop-off" excess verdict amounts, Dimick v. Schiedt, 293 U.S. [474,] 486 [(1935)], and not to substitute the court's weighing and balancing for that of the jury, remitting the award to the highest figure that could be supported by the evidence is the most analytically solid approach. Indeed, commentators have concluded that such an approach "tampers least with the intentions of the jurors, who by implication wanted to fully compensate the plaintiffs . . . ." Irene Deaville Sann, Remittiturs (and Additurs) in the Federal Courts: An Evaluation With Suggested Alternatives, 38 Case W. Res. L.Rev. 157, 191 (1987/88); Moore's Federal Practice, § 59.26[4][b](3d ed. 1997); see also Slade v. Whitco Corp., 811 F. Supp. 71, 77 (N.D.N.Y.) (noting that, of the three alternative methods for computing remittitur, method that reduces verdict only to maximum that would be upheld by trial court if not excessive is least intrusive standard), aff'd by, 999 F.2d 537 (2d Cir. 1993).

Fertile, supra, 169 N.J. at 500.

The reasoning of Tronolone is sound. The core rationale in Fertile for fixing the amount of an additur at the lowest amount a jury could award is to give some recognition of, and deference

to, the amount that the jury awarded at the trial. Fertile, supra, 169 N.J. at 590. See also Cuevas, supra, 226 N.J. at 486 ("a jury verdict is presumed to be correct and entitled to substantial deference"); see also He v. Miller, 207 N.J. 230, 251-52 (2011), abrogated on other grounds by Cuevas v. Wentworth Grp., 226 N.J. 480 (2016) ("the jury's views of the facts and the credibility of the witnesses as expressed in its verdict are entitled to deference from both the trial and appellate courts."). This reasoning is not sound. Additur can be considered only if the plaintiff meets the standard for a new trial under Rule 4:49-1(a). See, e.g, Helfgott v. Joseph Konopka Funeral Home, LLC, A-5082-16T3, 2018 WL 3339820, at *5 (N.J. Super. Ct. App. Div. July 9, 2018) (holding that "because the plaintiff did not meet the standard for a new trial under Rule 4:49-1(a), additur could not be considered."). A new trial or additur is granted only in those limited cases in which the Trial Court concludes that " . . . it clearly and convincingly appears that there was a miscarriage of justice under the law." R. 4:49-1(a). Hence if an additur is granted, the Trial Court has found that the jury committed a fundamental error, i.e., that something went seriously wrong during the jury deliberations. E.g., Baxter v. Fairmount Food Co., 74 N.J. 588, 596 (1977) (remittitur should be granted when the award represents a "miscarriage of justice"); Cuevas, supra, 226 N.J

at 499-500 (new trial should be ordered when Damage award "shocks the . . . conscience" of The Court). See also Kozma v. Starbucks Coffee Co., 412 N.J. Super. 319, 326 (App. Div. 2010) ("additur can only be ordered when a new trial on the damages issue would be warranted" when the jury's award is "plainly wrong or shocking to the conscience of the court"); Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64, 84 (App. Div. 2007) (a Trial Court can order a new trial or additur when the jury's award is "plainly wrong and shocking to the judicial conscience"); Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 4:49-1(a) (2018) (noting that "neither additur nor remittitur can be ordered unless a new trial, at least on the damages issue, would be warranted").

Accordingly, because additur is ordered only when the Court finds a new trial to be warranted, there should be no direct or indirect deference given to the jury's improper damage award. Indeed, when the jury's verdict was so flawed that it requires a new trial or an additur, there is simply no reason to resolve facts and inferences against the plaintiff on the thesis that the jury that decided the case must have made those inferences. It is impossible to discern from the trial record what inferences the jury may have drawn and why it reached an unsupported low verdict. In addition, insofar as Trial Courts are not allowed to interview jurors after a verdict is rendered,

there is no way for the Trial Court to determine why and how the jury erred in reaching its verdict. Davis v. Husain, 220 N.J. 270, 280 (2014) ("*Ex parte* discussions between the trial court and jurors are inappropriate and improper, both during trial and after the jury is discharged . . . [i]nquiring into any juror's thought process is a significant intrusion into the deliberative process."). Indeed, the jury's flawed verdict could have been reached for any number of reasons, including the jury having willfully ignored the Trial Court's jury charge.

When the Court orders an additur, it is because that jury misunderstood its function and for whatever reason seriously erred. A plaintiff who is entitled to a new trial or an additur due to a fundamental mistake of the jury should not be burdened with any deference to that jury's unsupportable verdict. Instead, if the Trial Court were to fix the additur at a reasonable amount supported by the record, a plaintiff who has already been seriously wronged by the inadequate verdict would be fairly treated. More significantly, ordering an additur at an amount a reasonable jury would have awarded based on the evidence and witnesses at trial provides a wholly rational basis for the amount of the additur.

Accordingly, based upon the foregoing reasons, the Trial Court should set the damages award in either an additur or a remittitur at a reasonable amount supported by the record.

CONCLUSION

For the foregoing reasons, NJBIA requests that This Court hold that only a defendant has the right to object to a Trial Court's additur and only a plaintiff has the right to object to a Trial Court's remittitur. Both parties should not have the right to object to either procedural devices. NJBIA also requests that This Court hold that the Trial Court should set the amount of the additur or remittitur at a reasonable amount supported by the record that a reasonable jury, properly instructed, would award based on the evidence and witnesses at trial.

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Dated: December 13, 2018

2018 WL 3339820
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Craig HELFGOTT, Plaintiff-Appellant,
v.
JOSEPH KONOPKA FUNERAL HOME, LLC, and Mank Realty, LLC, Defendants-Respondents.

DOCKET NO. A-5082-16T3
|
Argued May 22, 2018
|
Decided July 9, 2018

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5346-15.

Attorneys and Law Firms

Gregg Alan Stone argued the cause for appellant (Kirsch, Gelband & Stone, PA, attorneys; Gregg Alan Stone, of counsel and on the brief; Ronald J. Morgan, on the brief).

Clifford J. Giantonio argued the cause for respondents (Law Offices of Viscomi & Lyons, attorneys; Clifford J. Giantonio, of counsel and on the brief).

Before Judges Yannottiand Mawla.

Opinion

PER CURIAM

*1 Plaintiff Craig Helfgott appeals from an order of judgment entered by the trial court on June 6, 2017, and an order dated July 7, 2017, which denied his motion for a new trial or, alternatively, for additur. We affirm.

I.

Plaintiff filed a complaint against Joseph Konopka Funeral Home, LLC (JKFH), alleging that on January 10, 2014, he suffered severe and permanent injuries when he slipped and fell on the sidewalk abutting certain property on Palisade Avenue in North Bergen. Plaintiff later filed an amended complaint, naming Mank Realty, LLC (Mank) as an additional defendant. Plaintiff alleged that JKFH and Mank (collectively, defendants) were negligent in failing to inspect and maintain the subject sidewalk free of any dangerous conditions, including accumulated snow and ice.

At trial, plaintiff testified that on January 10, 2014, while walking on the sidewalk adjacent to the JFKH property, he slipped and fell on the icy pavement and injured his ankle. Police responded to the scene, and plaintiff was transported to a medical center. The following day, plaintiff underwent surgical open reduction with internal fixation to his right ankle. The surgeon inserted an eight-hole metal plate with eight screws. Plaintiff was thirty-six years old at the time.

Plaintiff remained at home and was non-weight bearing for about a month. In that time, plaintiff only took one prescribed medicine, Vicodin, for pain. Plaintiff remained out of work until mid-February 2014. He began physical therapy and continued to be non-weight bearing except during physical therapy. He was on crutches through February and March 2014.

In April 2014, plaintiff started to place weight on his injured ankle when he was not in physical therapy. Initially, plaintiff used a "walking boot," but he removed the boot when he went to sleep. He testified that he had pain while trying to sleep because he had to elevate his foot to keep it from swelling.

On March 28, 2014, plaintiff underwent a second surgical procedure to remove two screws from his ankle. After the second surgery, plaintiff was able to flex his foot. He had physical therapy three times a week for sessions that lasted an hour and a half. Plaintiff continued physical therapy until late May 2014. He also performed certain exercises at home.

Plaintiff testified that he had made "a decent recovery," but his ankle was not fully recovered. He "had a fair bit of flexibility back," but his ankle still got fatigued, and at those times, the ankle did not feel stable. He was still experiencing pain.

Plaintiff said that in July 2014, members of his family noticed he had an irregular gait. His right foot was "lagging a little bit." After receiving an MRI, his doctor

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said his foot was "pronating," which is like "tilting." At the doctor's suggestion, plaintiff obtained orthotics, which are orthopedic inserts. At the time of trial, plaintiff was still using the orthotics.

Plaintiff described his complaints. He has regular stiffness in his ankle when he wakes up and at the end of the day. During the day, plaintiff's ankle stiffens up if he does not flex and exercise it regularly. Plaintiff said he is not able to walk as much as he used to, and if he walks a lot, his foot gets tired and starts to hurt.

*2 Plaintiff admitted, however, that he did "a fair bit of walking" on a recent vacation. He told his doctor that during the vacation, he walked up to twelve miles each day, but had pain afterwards. During his deposition, plaintiff said he walked a "decent amount" on that trip.

Plaintiff also testified that he has difficulty running. Although his gait has evened out, his right foot lags when he attempts to run. Plaintiff told his doctor that after he runs, his ankle is sore. Plaintiff described the pain as a two out of ten, with one the lowest amount of pain and ten the highest.

Plaintiff stated that his ankle hurts a lot when he climbs steep hills, and he is not able to go hiking. Plaintiff said that after the screws were removed, he has not done any hiking. However, at his deposition, plaintiff testified about climbing in a hilly, wooded area, but he insisted he had not been talking about hiking.

Plaintiff testified that the physical therapy had helped, and by mid-May 2014, he had recovered to the extent expected. Plaintiff did not feel any pain while he was testifying, but he said he feels pain "underneath the ankle bone on the inside." At his deposition, plaintiff did not specifically identify the place where he feels pain.

Plaintiff testified that he feels pain generally in his ankle. He takes over-the-counter medication, specifically Advil, "maybe a couple [of] times a week," to help with the soreness. He stated that his ankle still is stiff and does not "flex up and down."

Plaintiff was asked the last time he saw a doctor for his ankle. He could not recall, but testified he saw a doctor in January 2015. He also testified he may have seen a doctor once since that time. According to plaintiff, the doctor told him he could not do anything more for him.

Dr. Sean Lager, an orthopedic surgeon, testified for plaintiff. Dr. Lager diagnosed plaintiff with: (1) status post-right ankle fracture of the lateral malleolusand dislocation; (2) status post-open reduction with internal fixation of the right lateral malleolus and syndesmosis; (3) status post-removal of the right ankle syndesmotic hardware; (4) posterior tibial tendinitis and pronation; and (5) injury to the peroneal tendon and deltoid ligament. Dr. Lager testified that plaintiff had suffered "a high energy injury." He said it was as though the "energy [had] exploded" and "a small bomb" had gone off. He stated that the bone that sits at the bottom of the ankle "slammed" into the tibia.

Dr. Lager further testified that in April 2015, plaintiff had an x-ray, which showed osteoarthritis in the ankle joint. The doctor stated that the arthritis would worsen as plaintiff ages. He opined to a reasonable degree of medical probability that plaintiff's injuries are permanent. He said plaintiff's future prognosis included three options: (1) an ankle fusion; (2) total ankle replacement; or (3) continued conservative treatment.

Dr. Lager acknowledged that when plaintiff returned to see him on February 26, 2014, he only had occasional soreness after therapy. Plaintiff reported that the pain was a one out of ten. Plaintiff also had some tenderness when his incision was touched.

Plaintiff returned to see Dr. Lager on May 27, 2014, and he was full weight-bearing. On July 8, 2014, plaintiff also was full weight-bearing, but he complained of some difficulty with running and stiffness. He said the pain in his ankle was a two out of ten. The doctor recommended an anti-inflammatory, but he was unsure whether plaintiff followed his recommendation.

*3 Dr. Lager noted that on July 29, 2014, plaintiff complained of right ankle pain, especially after a lot of activity. Plaintiff did not experience pain when the doctor pushed on the right deltoid ligament. According to the doctor, the deltoid ligament was stretched out and the ankle or foot was more pronated. The doctors recommended orthotics to balance the ankle so plaintiff would be anatomically correct while walking. Plaintiff obtained orthotics shortly thereafter.

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Dr. Lager also discussed the report of plaintiff's physical examination, which another doctor performed on September 15, 2016. The report indicated that plaintiff had no swelling, bruising, asymmetries, or deformities in the ankle. The examination report indicated that plaintiff reported no pain to his ankle when it was pressed or squeezed. He had a full range of motion.

The examination report noted that plaintiff had taken an extended vacation, during which he walked up to twelve miles each day. Plaintiff reported he had pain afterwards, but at the time of the examination, he was pain-free. Plaintiff was diagnosed with a deltoid ligament sprain. Dr. Lager testified that this meant the ligament "likely healed in with some scar tissue," but he did not think it was functioning the way it was supposed to function.

Dr. Lager noted that as of March 31, 2016, plaintiff was not taking any pain medications. Plaintiff reported pain, stiffness, and soreness. He was taking Advil, and said the pain was a one or two out of ten. In the report, the doctor wrote that plaintiff would probably never be one hundred percent, "but there is medical treatment he may be able to [have] in the future that could help with some of [his] symptomatology."

Defendants presented testimony from Dr. Charles Carozza, who is also an orthopedic surgeon. He testified that plaintiff had suffered a permanent injury, and the plate and the screws are permanently in plaintiff's ankle. Dr. Carozza said plaintiff's injuries had resulted in residual disability, meaning a functional impairment to the ankle that is "going to last."

Dr. Carozza performed a physical examination of plaintiff on May 31, 2016. He stated that plaintiff had no apparent distress, and he walked with a normal gait. The doctor said this was a good indication that plaintiff did not have any pain. He noted that plaintiff reported he occasionally feels some medial pain or palpation over a tendon, rather than the ankle itself. Dr. Carozza found that plaintiff had some discomfort in the posterior tibialis tendon.

Dr. Carozza also noted that he found plaintiff had no real discomfort over the medial or lateral operative site. The doctor did not feel any screw heads; they were buried in place. Plaintiff had full "dorsiflexion, which means he could cock his foot all the way back up." Plaintiff had full "plantarflexion," which means he "could put his foot down like a ballerina."

Plaintiff also had full "inversion" and "eversion." There was no pain on all range of motion. The doctor found no "ligamentous [in]stability," and he found no "effusion of the ankle," or "actual fluid in the joint." The doctor explained that effusion is an early sign of post-traumatic osteoarthritis.

Dr. Carozza opined that plaintiff did not suffer a tear of the peroneal tendon. In his examination, he saw no indication that plaintiff's deltoid ligament was attenuated or stretched. He testified that plaintiff had an excellent surgical procedure and an excellent result. Although he said plaintiff might develop osteoarthritis, Dr. Carozza saw no sign that plaintiff was developing that condition. Dr. Carozza noted that arthritis is not always caused by trauma.

*4 Dr. Carozza further testified that plaintiff might not need fusion surgery. His condition could worsen, but he could also be healthy and have the same complaints he had at that time. There were no signs of a significant loss of motion, and the muscle tone was good. Plaintiff has flat feet, but "that's the way he's made." The doctor acknowledged that plaintiff had some scarring from the surgery, which was minor.

Dr. Carozza opined to a reasonable degree of medical certainty that plaintiff has some mild, subjective complaints. The only positive finding was an incision and some circumference enlargement of the ankle. He said plaintiff has reached maximum medical improvement from treatment, and further treatment is not necessary. He opined that plaintiff has a "minimal amount of residual disability."

The jury found that defendants were negligent and solely responsible for plaintiff's fall and his resulting injury. The jury awarded plaintiff $35,000 for pain and suffering, disability, impairment, and loss of the enjoyment of life. The trial judge molded the verdict to include the stipulated amount of plaintiff's medical expenses, which totaled $56,725.85.

Plaintiff thereafter filed a motion for a new trial or, in the alternative, additur. The trial judge denied the motion, and this appeal followed.

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II.

On appeal, plaintiff argues that the jury's award of $35,000 is grossly inadequate, shocks the conscience, and results in a miscarriage of justice. He further argues that the judge's decision denying his motion for a new trial was based on the judge's mistaken belief that both medical experts did not find that he suffered a permanent injury. Plaintiff contends the trial judge should have granted his motion for a new trial or, in the alternative, additur. 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)). That presumption is not overcome unless the party "clearly and convincingly" establishes that the award represents a "miscarriage of justice." Ibid.(quoting Baxter, 74 N.J. at 596); see also R. 4:49-1(a). Furthermore, in deciding whether to grant a motion for a new trial, the court must give "due regard to the opportunity of the jury to pass upon the credibility of the witnesses." Ibid.(quoting Ming Yu He v. Miller, 207 N.J. 230, 248 (2011)).

Moreover, a jury's damages award should not be overturned unless it "shock[s] the judicial conscience." Id. at 503(quoting Johnson v. Scaccetti, 192 N.J. 256, 281 (2007)). An award meets that standard if it is "wide of the mark," "pervaded by a sense of wrongness," and is "manifestly unjust." Ibid.(quoting Johnson, 192 N.J. at 281). The standard is "objective in nature and transcends any individual judge's personal experiences." Ibid.

It is well-established that in deciding a motion for a new trial under Rule 4:49-1(a), the judge

> may not substitute his judgment for that of the jury merely because he would have reached the opposite conclusion.... "[The trial judge must] canvass the record, not to balance the persuasiveness of the evidence on one side as against the other, but to determine whether reasonable minds might accept the evidence as adequate to support the jury verdict...." [T]he trial judge takes into account, not only tangible factors relative to the proofs as shown by the record, but also appropriate matters of credibility, [which are] peculiarly within the jury's domain, so-called "demeanor evidence," and intangible "feel of the case" which [the judge] has gained by presiding over the trial.
>
> *5 [Dolson v. Anastasia, 55 N.J. 2, 6 (1969).]

The standard of review for determining whether a damages award shocks the judicial conscience is the same for trial and appellate courts. Cuevas, 226 N.J. at 501. However, in reviewing the trial court's determination, "an appellate court must pay some deference to a trial judge's 'feel of the case.' " Ibid.(quoting Johnson, 192 N.J. at 282).

Here, the trial judge determined that the jury's verdict did not shock the judicial conscience and was not a miscarriage of justice. In the written statement appended to the order denying the motion for a new trial or additur, the judge wrote that the jury had the right to reject the credibility of any fact or expert witness and to accord the trial testimony whatever weight it deemed appropriate. The judge noted that his role was not to second-guess the jury's credibility assessments, or weigh the persuasiveness of the evidence, but rather to determine whether a reasonable jury could accept the evidence presented as support for its verdict. The judge found that there was no evidence the jury's verdict was the product of misunderstanding, bias, or prejudice.

The record supports the judge's determination that plaintiff did not meet the standard under Rule4:49-1(a) for a new trial. He did not "clearly and convincingly" establish the damages award was "a miscarriage of justice." Ibid. Plaintiff notes that both medical experts testified that he has sustained a permanent injury. However, the experts disagreed regarding the impact of the injury.

As we have explained, Dr. Carozza testified that when he examined plaintiff, he found plaintiff had a normal gait. There were no lingering abnormalities with the ankle, which was a good indication plaintiff was not suffering any pain. According to Dr. Carozza, plaintiff had full range of motion with no pain. Plaintiff's expert, Dr. Lager, also testified that in September 2016, plaintiff had full range of motion. Plaintiff had some scarring from the surgery, but it was minor.

Furthermore, based on plaintiff's testimony, the jury could reasonably find that plaintiff did not have a substantial disability or impairment, and the injury did not

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have a substantial adverse impact on his ability to engage in his normal activities. Plaintiff initially denied that he could go hiking, but at his deposition, he testified about walking up hills. He also testified that after the accident, he went on an extended vacation during which he walked up to twelve miles each day.

The record therefore supports the trial judge's determination that the jury could reasonably find, based on the testimony presented and its assessment of the credibility of the witnesses, that a damages award of $35,000 was sufficient to compensate plaintiff for his pain and suffering, disability, impairment, and loss of the enjoyment of life.

The judge also correctly determined that because plaintiff did not meet the standard for a new trial under Rule 4:49-1(a), additur could not be considered. See Ming Yu He, 207 N.J. at 248; Caldwell v. Haynes, 136 N.J. 422, 443 (1994). See also Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 4:49-1(a) (2018) (noting that "neither additur nor remittitur can be ordered unless a new trial, at least on the damages issue, would be warranted").

*6 Plaintiff argues that in denying his motion for a new trial, the judge erroneously stated that both medical experts had testified that his ankle repair was successful and caused no "lasting impact" upon him. Plaintiff correctly notes that both medical experts testified that plaintiff had sustained an injury that was permanent. However, based on plaintiff's testimony and the testimony of both doctors, the jury could reasonably find that although the injury had a "lasting impact" upon plaintiff, the impact was minimal and warranted an award of $35,000 for pain and suffering, disability, impairment, and the loss of the enjoyment of life.

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2018 WL 3339820

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2007 WL 2790773
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

George JOHNSON, as guardian ad litem of Matthew S. Johnson, a minor; and George Johnson, individually, Plaintiff-Appellant,
v.
Christopher REHDERS, an individual; and Robin Rehders, an individual, Defendants-Respondents.

Argued Sept. 10, 2007.
|
Decided Sept. 27, 2007.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, L-521-04.

Attorneys and Law Firms

Stephen F. Lombardi argued the cause for appellant (Lombardi & Lombardi, attorneys; Stephen F. Lombardi and Joseph A. Lombardi, on the brief).

Stephen A. Rudolph argued the cause for respondents (Monte & Rudolph, attorneys; Michael J. Lynch, on the brief).

Before Judges LINTNERand SABATINO.

Opinion

PER CURIAM.

*1 This appeal concerns the sufficiency of damages awarded by a jury to a minor in a dog bite case. On November 6, 2003, plaintiff, [1] Matthew S. Johnson, was visiting the home of defendants, Christopher and Robin Rehders, when he was bitten in the face by defendants' mixed breed dog "Rusty." At the time of the incident, Matthew was the age of fourteen or fifteen. [2]

Matthew's father, George Johnson, was promptly notified about what had occurred. He drove to defendants' house and picked up Matthew, whose face was bleeding. Matthew's mother then took him to the emergency room of a local hospital. There, a plastic surgeon, Gregory Greco, M.D., attended to Matthew's facial wounds. The wounds consisted of two bite marks near Matthew's mouth and chin.

Dr. Greco closed the two wounds with fifty to sixty stitches. The procedure, which took approximately forty-five minutes, was complicated by difficulty in getting the injected anesthetic to sufficiently numb Matthew's face. Matthew testified that the procedure "hurt really bad." After several injections, the anesthesia finally took hold and the stitches were sewn.

During the next several days, Matthew felt acute pain in his face. He could not speak or eat normally and he did not leave his home.

Ten days later, on November 16, 2003, Dr. Greco removed the stitches. Matthew also found this procedure painful, but not as painful as the original suturing. He was advised that further medical attention to his scars would be needed after some time had passed. Matthew was also instructed to apply moisturizer and sunscreen to the scars, and to massage them periodically.

In June 2004 Matthew underwent a vascular laser procedure to attempt to reduce the persistent redness in and around his scars. The laser treatment also was painful and felt akin to the sensation of bee stings. The area turned purple for a few weeks and then slowly faded in color.

About a year after Rusty's attack, Matthew's scarring matured to its present condition. He remains with two curved scars near his mouth and chin, one that is about two centimeters in length, and the other that is about four and a half centimeters long.

In his de bene esse deposition, Dr. Greco opined that the scars caused by the dog bite were permanent in nature. He noted that, with more plastic surgery, the scarring might be abated by about fifty percent. The expected costs of such additional plastic surgery were estimated at $5000, plus facility and anesthesia fees of about $1600. Alternatively, Dr. Greco indicated that Matthew could have two dermabrasions performed to, in effect, sand down the scars, at a total cost of about $3000. To date, Matthew has not elected to have either of those procedures.

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In his testimony, Matthew recounted that he continues to have physical sensations around his scars, that he has to apply sunscreen to them for outdoor activities, and that he feels the need to explain the cause of his scars in social settings.

*2 Defendants acknowledged their responsibility for Rusty's dog bite under the strict liability statute, *N.J.S.A.* 4:19-16. The sole issue at trial was the measure of damages proximately caused to Matthew by the bite.

Plaintiff's counsel presented to the jury Matthew's testimony, as well as Dr. Greco's videotaped deposition. Plaintiff also moved into evidence three photographs taken of Matthew's face: one taken by his father on the day of the incident, another taken after the stitches were removed but before the laser procedure, and a third taken after the laser procedure. The jury also viewed Matthew's scars as he walked near the jury rail, with the consent of the parties. Defendants called no witnesses and offered no proofs, deciding not to call a plastic surgeon that had examined Matthew on their behalf.

After the judge charged the jury, it returned a lump-sum damages verdict of $5000. Plaintiff then moved for a new trial, or, in the alternative, for additur. The trial judge denied plaintiff's motion, and this appeal followed.

On appeal, plaintiff contends that the damages awarded by the jury were manifestly inadequate and disproportionate to his injuries. Additionally, plaintiff contends that a new trial should be granted because of allegedly prejudicial remarks made by defense counsel[3] during his opening statement and summation. Although we are unpersuaded that defense counsel's remarks were so prejudicial as to warrant a new trial, we agree that the damages award was manifestly insufficient and warrants redress.

R. 4:49-1 provides that a trial judge shall grant a motion for a new trial "if, 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." *See also Baxter v. Fairmont Food Co.,*74 *N.J* . 588, 598 (1977). Although courts must accord deference to the jury's role as fact-finder, "[i]n [the] pursuit of ultimate justice ... a trial judge must intervene to correct an injustice when a damage award is patently inadequate or excessive...." *Love v. Nat'l R.R. Passenger Corp.*, 366 *N.J.Super.* 525, 533 (App.Div.) (granting a new trial on damages where the verdict failed to award an indisputably-injured plaintiff any sums for pain and suffering, apart from his documented lost wages), *certif. denied*, 180 *N.J.* 355 (2004). On appeal, we apply that same polestar of injustice. *Ibid.; see also Von Borstel v. Campan,* 255 *N.J.Super.* 24, 28 (App.Div.1992).

With respect to the valuation of this teenager's scars, and the pain and suffering he experienced from the dog bite and his ensuing medical procedures, we are substantially guided by *Tronolone v. Palmer,*224 *N.J.Super.*92 (App.Div.1988). *Tronolone* involved a passenger in a car that struck a utility pole. The plaintiff suffered two deep lacerations around his right eye from the impact, one about an inch-and-a-half long and the other measuring about two-and-a-quarter inches. *Id.* at 95. Plaintiff's right ear also required a skin graft slightly over an inch in length. *Id.* at 96. Plaintiff had plastic surgeryinvolving seventy-one stitches, but was left with residual scars. *Ibid.* It was uncertain whether further medical procedures would have improved plaintiff's appearance. *Ibid.*The defense offered no competing damages proofs. *Ibid.*

*3 After the jury in *Tronolone* awarded plaintiff only $750 in damages for the injuries to his face and ear, plaintiff moved for a new trial, or, alternatively, for additur. The trial judge granted a modest additur of $2750, raising the award to $3500. *Ibid.* On appeal, we agreed that the original verdict was manifestly inadequate and warranted relief. However, we also concluded that the $2750 additur ordered by the trial judge was "an impermissible underevaluation of plaintiff's damages." *Id.* at 104. In particular, we noted that the plaintiff was a young man and that his scars left him with what was described as a perpetual frown. *Ibid* . We noted that we could have exercised our original jurisdiction and enhanced the additur amount ourselves to a fair and reasonable sum, but that "the unrevealing record" did not enable such an award because the photographs of plaintiff in the record were taken only a short time after his surgery and did not "accurately show the final result." *Ibid.* Accordingly, we vacated the judgment in *Tronolone* and remanded for a new trial. *Ibid.*

Here, we are convinced that the jury's $5000 award to Matthew for his two permanent facial scars from the

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dog bite, and for his attendant pain and suffering, was manifestly inadequate and unjust. If the $5000 award was reached by the jury to compensate Matthew solely for the costs of prospective surgery, such thinking would ignore his separate claims for pain and suffering, an incomplete valuation approach that we decried in *Love, supra,* 366 *N.J.Super.* at 532-33.[4] Conversely, if the jury somehow had injected notions of comparative fault into their assessment and discounted the damages accordingly, that would have been contrary to the compensatory policies underlying *N.J.S.A.* 4:19-16 . The judge's bench comments in denying plaintiff's post-trial motion are rather general and do not offer more specific insight as to the strength of the evidence or the adequacy of the verdict.

In the present case, unlike in *Tronolone,* we have had the benefit of personally observing Matthew's present condition, with the consent of both counsel, at the appellate oral arguments. Those observations showed that Matthew's scars, particularly the lower one, remain quite prominent almost four years after the dog bite. We also have the benefit of the three photographs placed into evidence showing the progression of the injuries and the scarring. *See Soto v. Scaringelli,* 189 *N.J.* 558, 576 (2007) (recommending the preservation of an "accurate photographic record" of scarring to enable "meaningful appellate review").

In the reciprocal context of remittitur, the Supreme Court in *Fertile v. St. Michael's Med. Ctr,* 169 *N.J.* 481 (2001), instructed that where a jury's damages award is deemed excessive, a court should remit the award to "the highest figure that could be supported by the evidence," rather than to arrive at a figure that the court itself would have reached based upon its own "weighing and balancing." *Id.* at 500. "[S]uch an approach 'tampers least with the intentions of the jurors....' " *Ibid.* (quoting Irene Deaville Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation With Suggested Alternatives,* 38 *Case W. Res. L.Rev.* 157, 191 (1987/88). On the flip side, in the context of additur, *Fertile* suggests that we should increase a deficient jury award to the lowest figure that reasonably can be supported by the proofs. Accordingly, we undertake that assessment, aided by the record proofs and our own observations of plaintiff in court.

*4 Recognizing the extent and persistent nature of Matthew's injuries, his youth, and the policies underlying the dog bite statute, and also recognizing the costs and burdens associated with a new trial, we exercise our original jurisdiction under *R.* 2:10-5 and order an additur of $20,000, for a net award of $25,000, plus prejudgment interest. If defendants timely reject that sum on remand, a new trial on damages shall be conducted. *Bitting v. Willett,* 47 *N.J.* 6, 9 (1966).

The judgment of the Law Division is vacated, and the matter is remanded for the entry of a revised judgment, or for a new trial if so elected by defendants, consistent with this opinion.

All Citations

Not Reported in A.2d, 2007 WL 2790773

Footnotes

1 Matthew's father is listed as a plaintiff, both as his guardian ad litem and also individually. However, the father did not testify at trial and there were no proofs of his own damages independent of his son's. Hence, we shall refer to Matthew as the "plaintiff" for sake of simplicity.

2 The record does not disclose Matthew's actual date of birth, and the briefs do not agree on his age.

3 The first remark was a reference in the defense's opening that Matthew and the defendants' son were friends. The judge sustained a relevancy objection from plaintiff concerning this comment, although no curative instruction was issued. The other item was defense counsel's assertion in closing that Matthew's father had "posed" him for a photograph in the hospital parking lot. No objection to this particular remark was made, although the judge had sustained an earlier objection to defense counsel asking Matthew on cross-examination whether litigation had been contemplated at the time when the photo was taken. We do not perceive that any of these remarks, in and of themselves, were so prejudicial to require new trial on those grounds. *See, e.g., Wild v. Roman,* 91 *N.J.Super.* 410, 419 (App.Div.1966) (finding no reversible error in a context where more egregious remarks impugning the plaintiff had been made during the defense summation). Here, the remarks of defense counsel substantially responded to comments made by plaintiff's attorney in his own presentation.

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4 Plaintiff's counsel has suggested to us that the jury may have been swayed by Dr. Greco's disclosure on cross-examination that his expert fee for litigation was $5000, but we will not speculate as to whether its award was affected by that number, particularly since the costs of Matthew's future plastic surgery also coincided with that sum.

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

Tracy James PACIORKOWSKI,
Plaintiff-Respondent,
v.
Angelo MINICHIELLO, Defendant/
Third-Party Plaintiff-Appellant,
v.
Steven Minichiello, Third-
Party Defendant-Respondent.

Submitted Nov. 29, 2006.
|
Decided Feb. 20, 2007.

Synopsis
Background: Defendant property investor moved to set aside settlement agreement entered into with plaintiff property investor in action that alleged, among other things, that defendant embezzled funds. The Superior Court, Law Division, Hudson County, found in favor of plaintiff investor. Defendant investor appealed.

Holdings: The Superior Court, Appellate Division, held that:

[1] evidence was sufficient to support trial court's findings that defendant property investor was not under duress when he agreed to settlement;

[2] plaintiff property investor did not breach terms of settlement agreement; and

[3] terms of settlement agreement were not unconscionable.

Affirmed.

West Headnotes (3)

[1] **Compromise and Settlement**
Fraud or Duress

Evidence was sufficient to support trial court's findings that defendant property investor was not under duress when he agreed to settlement with plaintiff property investor; defendant was experienced in real estate transactions, and he had the benefit of counsel during the mediation.

Cases that cite this headnote

[2] **Compromise and Settlement**
Performance or Breach of Agreement

Plaintiff property investor did not breach terms of settlement agreement with defendant property investor by failing to deposit the property purchase funds in escrow within 90 days given defendant investor's failure to perform his end of the negotiated bargain by promptly conveying the subject premises to plaintiff.

Cases that cite this headnote

[3] **Compromise and Settlement**
Validity

The terms of settlement between plaintiff property investor and defendant property investor, in which defendant investor agreed to give plaintiff the properties in exchange for $25,000, were not unconscionable, even though defendant investor allegedly made substantial investments in the properties, where the defendant investor had received direct and indirect benefits from taking control of the properties and using their value as collateral for various other personal or business purposes.

Cases that cite this headnote

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On appeal from the Superior Court of New Jersey, Law Division, Hudson County, L-1489-99.

Attorneys and Law Firms

Schuman Hanlon, attorneys for appellant (David K. DeLonge, on the brief).

Joseph H. Cerame, attorney for respondent Tracy James Paciorkowski.

Steven Minichiello, respondent, did not file a brief.

Before Judges COLLESTERand SABATINO.

Opinion

PER CURIAM.

*1 Defendant/third-party plaintiff Angelo Minichiello ("appellant") seeks reversal of the Law Division's entry of judgment against him, after a nonjury trial, enforcing a mediated settlement agreement relating to properties that appellant managed and expended funds on in Jersey City. We affirm.

In or about 1992, appellant, his son Steven Minichiello ("third-party defendant" or "Steven") and his son's friend Tracy Paciorkowski ("plaintiff" or "Tracy") [1] decided to collaborate on the purchase of a rental property located at 44 Hopkins Avenue in Jersey City. Appellant invested (or, as respondents contend, loaned them) $70,000, and the two respondents together invested approximately $65,000, to purchase the premises at a foreclosure sale. Not long thereafter, appellant and Steven jointly acquired a second rental property nearby at 46 Hopkins Avenue in Jersey City. Because appellant had experience as a contractor, the parties agreed that he would renovate and operate both properties. In that capacity, appellant claimed to have spent about $150,000 of his own funds in improvements.

Over time, disputes arose among the parties concerning the two properties. These disputes led Tracy to bring suit in 1999 against appellant, alleging among other things, that he had embezzled funds by using fraudulent accounting practices. The complaint also contended that appellant, without the knowledge of Tracy or Steven, had placed the properties in his sole name and also at various times in the names of his wife, two other sons, various nieces and nephews, and a business that he owned. Appellant did so allegedly using forged powers of attorney. The complaint sought to obtain exclusive title to the properties. Appellant filed a counterclaim against Tracy, along with a third-party complaint against Steven, seeking to recover monies that he had invested in the properties and for allegedly-uncompensated services that he performed.

The Law Division referred the case to court-annexed mediation pursuant to *R.* 1:40-4. An attorney was appointed by the court as mediator, and he convened the parties and their attorneys at his law offices for the mediation.

The parties and their respective counsel met with the mediator for approximately four hours over the course of two days. On the first day, appellant made several offers to buy out respondents' interests in the properties, which apparently have appreciated substantially since their acquisition in the 1990's. Respondents declined those offers. The parties' negotiations resumed the following day. Eventually respondents communicated what they deemed to be a final proposal, through the mediator, to purchase the two properties for $25,000 and to extinguish appellant's monetary claims and his alleged interests in the properties. That proposal was presented by the defendant to appellant while he was in the company of his wife and his attorney.

Appellant agreed to the settlement offer. The settlement terms were set forth in a one-page handwritten agreement dated July 10, 2002 consisting of six paragraphs. The agreement provided, among other things, that appellant would "immediately transfer" the two properties to respondents. In exchange, Steven agreed to pay appellant $25,000 through counsel "within 90 days." Appellant also agreed to place affidavits of title in escrow pending the receipt of the $25,000 payment. The parties further agreed to dismiss the litigation "immediately," without any admissions of liability. They also agreed to maintain the confidentiality of the settlement. [2]

*2 The settlement agreement was signed by all three parties at the mediation. The agreement also was executed by their respective counsel "as to form."

Appellant failed, as promised, to deed the two properties to respondents "immediately." Instead, he filed a motion

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with the Law Division seeking to set aside the settlement as allegedly produced by duress in the mediation and thus unenforceable. He also claimed that respondents had breached the settlement agreement. These allegations, which were denied by respondents, caused the Law Division to hold a bench trial on the issues in November 2004. Appellant was the principal witness at the trial. [3]

After considering the testimony, and various documentary exhibits, the trial judge concluded that appellant had failed to establish "by a preponderance of the credible evidence, that he was forced to sign [the settlement agreement] and only signed it under pure duress." The judge further rejected appellant's claim that the terms of the settlement were unenforceable. Instead, the trial judge declared the settlement valid. The judge also rejected appellant's claim that even if the settlement is enforceable, respondents had breached it by failing to pay him the $25,000 within ninety days. The judge reasoned that respondents' payment obligation was conditioned on appellant's prompt transfer of title to them, which he indisputably had failed to accomplish. Accordingly, the judge entered judgment for respondents and directed him to convey the premises and to execute the appropriate conveyance documents. The judge did, however, reject respondents' demand that certain tax liens on the realty be paid out of the $25,000 sum.

In appealing the Law Division's ruling, Angelo Minichiello raises the following points:

POINT I

THE SETTLEMENT WAS UNCONSCIONABLE AND THE RESULT OF DURESS

A. Threats Of Criminal Prosecution

B. The Settlement Was Unconscionable

POINT II

THE ALLEGED SETTLEMENT DOCUMENT IS UNCLEAR AND INCOMPLETE

A. The Settlement Agreement Did Not Include Necessary Parties And Was Unenforceable

B. Section 5 Is Unclear

C. Plaintiff's Claims Regarding Tax Liens

POINT III

PLAINTIFF, NOT DEFENDANT, BREACHED THE TERMS OF THE SETTLEMENT

We have carefully considered these contentions and find them unpersuasive.

Our standard of review of a trial judge's factual findings in a non-jury trial is, of course, limited. Such findings are "binding on appeal when supported by adequate, substantial and credible evidence." *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 *N.J.* 474, 484, 323 A.2d 495 (1974). We will not disturb those findings unless they are "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." *Id.* (quoting *Fagliarone v. Twp. of North Bergen*, 78 N.J.Super. 154, 155, 188 A.2d 43 (App.Div.), *certif. denied*, 40 *N.J.* 221, 191 A.2d 61 (1963)).

*3 In attempting to persuade the trial judge to invalidate the settlement agreement, appellant contended that the mediator and also his own attorney [4] pressured him to sign the agreement. He contended that they urged him to do so to avoid being exposed to potential prosecution for fraud and forgery. He further complained that the mediator pointed out that he owed fees to his attorney, fees which would increase if the matter went to trial. Appellant also contended, without corroborating documentary proof from a physician, that he was in poor health during the mediation session, which he supposedly contributed to his inability to resist the entreaties of his attorney and of the mediator to settle. He also claimed that the mediator and his counsel failed to explain to him that he could terminate the mediation session.

[1] The trial judge, who had the unique opportunity to observe appellant at length during the trial and to evaluate his demeanor, found his allegations of duress to be incredible. In her detailed bench ruling, the judge initially noted that appellant is experienced in real estate transactions:

> [T]his Court finds that, number one, Mr. [Angelo] Minichiello had some experience in the areas of real estate and the transfer of documents in regard to properties.

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> It appears from other arguments that he's subsequently transferred certain documents to certain entities controlled by him. A clear chain of title was never provided to this Court. But this Court finds that although he is 74 years old, he does not appear, to this Court, to be unsophisticated in regard to real estate transactions.

The trial judge also underscored that appellant had the benefit of the representation of counsel throughout the mediation session. Although the judge recognized that appellant eventually became critical of his former attorney, she noted that he did not file any charges against the attorney and had not sought to arbitrate his legal fees, some of which remained unpaid.

The judge considered appellant's claim that he was not feeling well during the mediation, and that his wife supported that recollection in her own testimony. The court also considered the testimony of appellant and his wife that there had been discussion within the mediation about Tracy potentially filing criminal charges against appellant if the civil litigation did not settle. The trial judge appropriately recognized that had such threats of criminal prosecution actually been uttered, they could support a finding of duress. *See Rubenstein v. Rubenstein,* 20 *N.J.* 359, 367, 120 A.2d 11 (1956) (noting that duress may be established by wrongful pressure).

Nonetheless, the trial judge was persuaded that appellant's claims of wrongful threats did not "ring true":

> [I]f there is compulsion, then there is no actual consent, based on common law principles, one of which is the fear of imprisonment. In this regard, even the references to imprisonment, this Court finds, as they were put on the record by Mr. [Angelo] Minichiello, frankly, did not ring true. Mr. Minichiello had indicated that for the entire first day of the negotiations, he was making offers to the plaintiff. That simply doesn't sit right with someone who is so afraid of imprisonment that he will sign anything given to him proposed by, in this case, the plaintiff, Mr. Paciorkowski, simply to avoid imprisonment.

*4 The trial court elaborated further on her crucial finding of appellant's lack of credibility:

> In regard to the testimony of Mr. [Angelo] Minichiello that he only signed the agreement under duress, this Court finds that Mr. Minichiello's testimony was simply not credible. Because of the nature of this case, which is basically a father and a son, as well as the son's close[s]t friend, and the wife of Mr. Minichiello, and the mother of Steven Minichiello, that credibility was going to be a-an important issue.
>
> This Court took pains to carefully observe Mr. Minichiello's demeanor, his facial expressions, how he acted on the stand, and how he reacted to questions. This Court finds that there were inconsistencies in his testimony and that it is not credible that two members of the Bar, neither of whom has been in any way involved in any sort of subsequent accusations about this settlement prior to this case, would have acted the way Mr. Minichiello described.
>
> Granted Mr. Minichiello's counsel, Mr. DeLonge, argued very strongly that it is, basically, the purpose of a mediator to settle cases, and that, usually, cases are best settled when both sides are unhappy. Neither side feels that it has a total advantage. Even giving that caveat, the description of what went on in [the mediator's] office is simply not credible.
>
> This Court finds, therefore, that Mr. Minichiello has not established, by a preponderance of the credible evidence, that he was forced to sign this document and only signed it under pure duress.

From our own independent review of the record, we are satisfied that there is an ample basis in the record to support the trial judge's credibility findings. Although the record does not contain transcribed testimony from any of the other mediation participants or from the mediator himself,[5] we share the trial judge's perception that appellant's post-settlement contentions of duress in the mediation do not square with his conduct in tendering numerous settlement proposals during the mediation.

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Indeed, there is some suggestion in the record (one which appellant did not specifically refute on cross-examination) that when appellant received a $20,000 counter-proposal from respondents in the mediation, he allegedly demanded a $5,000 enhancement, to which the respondents agreed. The allegations of coercion also are weakened by appellant's failure to pursue other recourse against his attorney, including but not limited to a legal malpractice claim. We accordingly defer to the trial judge's considered assessment that the appellant's claims of duress are simply not credible. See *Rova Farms, supra,*65 *N.J.* at 483-84, 323 A.2d 495.

As a matter of law, we emphasize the strong public policies favoring the settlement of lawsuits, and the finality of litigation. *See, e.g., Brown v. Pica,*360 *N.J.Super.*565, 570, 823 A.2d 899 (Law Div.2001), *appeal dismissed,* 360 *N.J.Super.* 490, 823 A.2d 854 (App.Div.2003). To be sure, a settlement agreement is a contract and, like any other contract, may be set aside where there is clear proof of wrongful pressure to settle that is "sufficient in severity or in apprehension to overcome the mind or will of a person of ordinary firmness[.]" *Rubenstein, supra,*,20 *N.J.* at 365, 120 A.2d 11; *see also Peskin v. Peskin,*271 *N.J.Super.*261, 276, 638 A.2d 849 (App.Div.), *certif. denied,* 137 *N.J.*165, 644 A.2d 613 (1994) (setting aside a divorce settlement because of a wife's undue pressure on her husband to settle, coupled with a trial judge's insistence on a response from the husband to her settlement proposal or else he would be held in contempt, led the husband to capitulate, after which the husband was hospitalized for two weeks for psychiatric treatment for severe depression). However, no such persuasive showing of undue pressure was made by appellant in this trial, one in which the judge, as she noted, carefully observed appellant's "demeanor, his facial expressions, how he acted on the stand[,] and how he reacted to questions."

*5 We have also duly considered the parties' letter submissions regarding our recent opinion in *All Modes Transport, Inc. v. Hecksteden,*--- *N.J.Super.* ----, 2006 *N.J.Super. Lexix* 342 (A-0361-05T5)(Decided December 27, 2006). In *All Modes Transport,* we held that a judge erred in interrupting the trial testimony of a party and in warning him that the court would refer his matter to prosecuting authorities if his continued examination revealed substantial evidence that he committed tax fraud. *Id.* at 5. Upon rendering that admonition, the trial judge urged that the parties give further consideration to settlement, which did, in fact, ensue after a recess. *Id.* at 5-6. Unlike this case, the risk of the party's criminal prosecution in the absence of settlement was indisputably expressed in *All Modes Transport* and in fact transcribed.

Under those distinguishable circumstances, we held in *All Modes Transport* that the judge's undisputed allusion to criminal prosecution, made after interrupting the litigant's testimony, exerted improper pressure on the litigant to settle his case. *Id.* at 17-18. *See also R.P.C.*3.4(g) . In the present case, however, the trial judge specifically found that no such threats had been made during the mediation, despite appellant's claim to the contrary. Moreover, there is no corroborating proof of such threats beyond the bare testimony of plaintiff's wife. The legal principles announced in *All Modes Transport* are simply inapplicable here, in view of the trial judge's unambiguous credibility findings.

[2] Finally, we sustain the trial judge's sound determination that respondents did not breach the settlement agreement themselves by failing to deposit the purchase funds in escrow within ninety days, given appellant's own failure to perform his end of the negotiated bargain by promptly conveying the subject premises. We likewise reject appellant's claim that the settlement terms were unconscionable.

[3] As a substantive matter, the amounts which appellant allegedly invested in the properties, while substantial, do not make the settlement terms patently unfair. That is so, particularly in view of the direct and indirect benefits appellant presumably derived by taking control of the properties and by using their value as collateral for various other personal or business purposes. *See Minoia v. Kushner,*365 *N.J.Super.* 304, 313, 839 A.2d 90 (App.Div.), *certif. denied,* 180 *N.J.* 354 (2004) (rejecting a claim of unconscionability where an experienced businessman employed by a real estate developer settled a claim for unpaid compensation for $160,000 even though he was allegedly owed in excess of $350,000, noting that "[a]fter-thoughts about how much more he might have been able to receive do not render the settlement agreement he decided to accept unconscionable"). The alleged take-it-or-leave-it nature of the final offer of respondents on the second day of the mediation does not alone make the appellant's acceptance of that offer unconscionable. *Muhammad v. County Bank of Rehoboth Beach,*189 *N.J.* 1, 27-30, 912 A.2d 88 (2006) (an agreement must be both

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procedurally and substantially unconscionable to be set aside under the doctrine of unconscionability).

*6 We have fully considered the remaining arguments of appellant, and find that they lack sufficient merit to warrant further discussion in this written opinion. *R.* 2:11-3(e)(1)(E).

Affirmed.

All Citations

Not Reported in A.2d, 2007 WL 506318

Footnotes

1 For simplicity, we shall refer to plaintiff Tracy Paciorkowski and third-party defendant Steven Minichiello collectively as "respondents."

2 Inasmuch as appellant subsequently challenged the bona fides of the settlement in public court filings, a bench trial was conducted in open court, *see R.* 1:2-1, and the parties filed papers on this appeal without a sealing order, we regard the confidentiality provision as mutually waived. Indeed, the deeds required in connection with the settlement would obviously be a matter of public record.

3 The trial court's opinion also refers to testimony from appellant's wife and from Tracy, which was not transcribed. Counsel entered into a stipulation that summarizes the untranscribed testimony of those two additional witnesses, which we have duly considered as part of our review.

4 Appellant was represented by an attorney at the mediation different than the attorney now representing him on this appeal

5 We note that mediators are immune from subpoena by litigants for subsequent proceedings in cases in which they have served *See R.* 1:40-4(c). The *Rule* is based upon sensible policy reasons to encourage the participation of qualified mediators in the court's mediation program, in which they customarily devote substantial pro bono time.

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