NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2391-13T3

LINDA GIBBS and GENE GIBBS,
her husband,

Plaintiffs-Respondents,

v.

VIJAY CAMILLO,

Defendant-Appellant,

and

PADMA MOHANAM and ELLEN
SEATON,

Defendants.

Argued May 12, 2015 – Decided December 7, 2015

Before Judges Messano and Ostrer.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-6496-09.

Walter F. Kawalec, III, argued the cause for appellant (Marshall Dennehey Warner Coleman & Goggin, attorneys; Mr. Kawalec, on the briefs).

Adam L. Rothenberg argued the cause for respondents (Levinson Axelrod, P.A., attorneys; Mr. Rothenberg, on the brief).

The opinion of the court was delivered by

OSTRER, J.A.D.

A jury found that defendant Vijaya Camillo negligently caused an automobile collision on September 3, 2008, which left plaintiff Linda Gibbs permanently injured. The jury awarded Gibbs $1 million in compensatory damages. Defendant argues the amount is excessive and appeals from the trial court's order denying her motion for a new trial or remittitur. Defendant also argues that she should receive a new trial because the trial court erroneously admitted into evidence various medical records of plaintiff, and because plaintiff's counsel made an inappropriate argument in summation. In addition, defendant contends the court erred in awarding plaintiff fees pursuant to the Offer of Judgment Rule, Rule 4:58. Having considered defendant's arguments in light of the record and applicable principles of law, we affirm the judgment, but reverse the award of fees.

I.

We discern the following facts from the record. The automobile accident occurred on U.S. 130 in Robbinsville. Defendant, who was in a southbound lane, attempted to make a left turn across the northbound lanes of traffic. Plaintiff was in the front passenger seat of a car travelling northbound. Her mother-in-law, Ellen W. Seaton, was driving, and her son was in

a car seat in the rear. Seaton braked as defendant crossed the northbound lanes, but could not avoid a collision.[1]

Upon impact, plaintiff's knee struck the dashboard, and her head and shoulder struck the passenger window. She was transported by ambulance to a nearby hospital, where she complained of injuries to her head, face, back, and knee. She was released after several hours.

Her pain gradually worsened. She suffered from migraines and a sensation she described as seasickness. She began to experience radiating pain in her back. Over the subsequent weeks and months, she was treated by a neurologist, Martin Gizzi, M.D.; a pain management specialist, Didier Demesmin, M.D.; an orthopedist; physical therapist; and her primary care physician. Dr. Gizzi and Dr. Demesmin testified at trial.

Plaintiff testified that her neck pain resolved after about seven months, which roughly coincided with her period of physical therapy. However, her back pain persisted and her vertigo, although intermittent, continued to recur.

Plaintiff received two of three planned epidural injections from Dr. Demesmin, which had no lasting impact on her symptoms.

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[1] Plaintiff also sued Seaton and the owner of Camillo's vehicle, Padma Mohanam, who was dismissed before the jury deliberated. The jury found Camillo solely negligent, and liability is not at issue on appeal. We therefore use "defendant" to refer solely to Camillo.

Although the first injection provided some relief, she had a severe negative reaction to the second injection; as a result, the third was cancelled.

A discogram, a diagnostic procedure, indicated that plaintiff had two herniated discs at the L4-5 and L5-S1 levels. Dr. Demesmin performed an endoscopic discectomy in June 2011, in which portions of the disc were removed to relieve pressure on the spinal nerve. Plaintiff testified that she felt a "little bit" of relief from the surgery, and admitted that during the initial period after surgery, she told the doctor she felt fifty percent better. She also had a sacroiliac injection in November 2011. She had no significant interventions thereafter. She was informed her insurance would cover no further treatments because she had reached her "maximum medical."

Plaintiff testified at trial in March 2013 that she still experienced spasms and back pain, which she described as "constant" and sometimes "horrific." On a scale of one to ten, she stated her pain during the trial was a seven. She said it exceeded a ten during her menstrual cycle. The pain sometimes radiated upward, and occasionally she felt shooting pain down her right leg. But her principal complaint was the constant back pain, which she stated interfered with her sleep. She still experienced vertigo episodes, infrequently but

unexpectedly, including one recent instance while she was driving.

The pain interfered with her quality of life. Plaintiff said she became a stay-at-home mom after the birth of her special needs son. She was 46 years old at the time of trial. Her husband separated from her in 2012. Plaintiff's mother-in-law testified that the accident had a major negative impact on plaintiff's personality and outlook.

Plaintiff testified that her pain impeded her physical ability to care for her young son, who had various physical impairments and special needs. Performing simple tasks, such as walking down steps, doing laundry, cooking, housekeeping, or personal grooming had to be approached more carefully than in the past, to avoid exacerbating her pain. Her condition limited her ability to physically play with her son. She relied on assistance from her elderly parents. She underwent gastric bypass surgery before the accident to address a weight problem, but her inability to exercise as a result of her back pain led her to regain almost a third of the weight she lost as a result of the procedure. She used over-the-counter pain relief patches. She did not take prescription pain medicine. She testified that she avoided medications that would affect her

ability to drive or remain alert, because of her parenting responsibilities.

Dr. Demesmin testified that plaintiff's diagnosis was "lumbago," or low back pain, radiculopathy, multiple herniated discs, and lumbar facet syndrome. He described the treatments discussed above. He testified that while plaintiff had achieved some relief, she would never completely heal. He predicted she might have some good days, or even a week of no symptoms, but her back problems would "accelerate" over time. In light of the fact that she had no back problems prior to the accident, he attributed her permanent injury to the impact of the September 2008 collision.

Dr. Gizzi testified regarding his treatment of plaintiff. After her pain persisted despite attempts to relieve it through medication and physical therapy, he referred plaintiff to Dr. Demesmin. Dr. Gizzi described how plaintiff's vertigo was caused by the trauma of the auto accident. He also attributed plaintiff's cervical sprain, cervical headaches, lumbar disc herniation, and lumbar radiculopathy to the accident. He opined that plaintiff's symptoms were permanent, based on the fact that after three years of "maximum medical therapy, surgical therapy, she's not resolved." Dr. Gizzi also predicted that with age,

and possible "arthritic changes in the spine," "things can be expected to deteriorate."

Over the defense's objection, plaintiff introduced into evidence operative reports and other records related to her treatment, injections, discogram, and discectomy.

The defense called orthopedic surgeon Alan Sarokhan, M.D., who performed an independent medical examination of plaintiff in September 2010 and reviewed subsequent medical records. Dr. Sarokhan agreed that plaintiff received standard treatments and "most of what's in the armamentarium." He testified he would not recommend fusion surgery for plaintiff. Testifying five years after the accident, he declined to say plaintiff's injuries were permanent, stating, "I consider it an unfinished work."

The eight-member jury deliberated for about an hour and a half before returning its verdict. The jury voted 7-1 in awarding $1 million for plaintiff's pain, suffering, disability, impairment and loss of enjoyment of life caused by the accident.

The court denied defendant's subsequent motion for a new trial or remittitur. Defendant argued the damage award was excessive and that the court erred in admitting the various medical and hospital records. The court granted plaintiff's motion for fees pursuant to an offer of judgment served in

August 2011. A final order of judgment was entered December 13, 2013, in the amount of $1,244,516.39, consisting of the $1 million compensatory award; $175,316.39 in prejudgment interest; and, pursuant to the offer of judgment, $11,848.78 in litigation expenses and $69,200 in attorney's fees.

Defendant presents the following points for our consideration:

> Issue I. The Jury Verdict Of One Million Dollars Was Grossly Excessive And Requires A New Trial Or Remittitur.
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> Issue II. Judge Bergman Committed Reversible Error When He Permitted Unredacted Medical Records To Be Admitted And Sent Out With The Jury.
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> A) Error To Admit Demesmin Records.
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> B) The Additional Records Were Improperly Admitted.
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> Issue III. It Was Plain Error For Plaintiff's Counsel To Ask The Jury To Increase Any Award To The Plaintiff, In Order To Account For Inflation.
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> Issue IV. The Plaintiff Was Not Entitled To Recover Fees And Costs Under The Offer Of Judgment Rule.
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> Issue V. Because The Award of Attorney's Fees And Costs Imposed An Undue Hardship Upon The Defendant, They Should Not Have Been Permitted.

II.

A.

We consider first defendant's argument that the compensatory award grossly exceeded what the evidence justified, and that the trial court erred in denying her motion for a new trial or remittitur.

Determining damages for pain and suffering is "not susceptible to scientific precision," and requires a "high degree of discretion." Johnson v. Scaccetti, 192 N.J. 256, 279 (2007). "[T]he jury is the bedrock of our system of justice." He v. Miller, 207 N.J. 230, 251 (2011). Based on our faith in a jury, "we begin with the presumption that its verdict is correct." Id. at 249.

It is well-settled that "a trial judge should not interfere with the quantum of damages assessed by a jury unless it is so disproportionate to the injury and resulting disability shown as to shock his conscience and to convince him that to sustain the award would be manifestly unjust." Baxter v. Fairmont Food Co., 74 N.J. 588, 596 (1977). A trial judge shall grant a new trial motion, setting aside a jury's damage award, "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."

R. 4:49-1(a); see also Baxter, supra, 74 N.J. at 596 (quoting Rule). Remittitur is an alternative to a new trial, which allows a judge to "require the plaintiff to consent to a decrease in the award to a specific amount as a condition for denial of the motion" for a new trial. He, supra, 207 N.J. at 248 (internal quotation marks and citation omitted).

A court must "view the evidence in the light most favorable to plaintiff in evaluating whether remittitur is appropriate." Id. at 249. The device is not a means to bring a verdict "down into a range more to the liking of the trial or appellate court." Id. at 250. It is designed to reduce "shocking" awards to the "highest figure" the evidence could support. Ibid. "[T]he standard that our appellate courts must utilize is substantially similar to that used at the trial level, except that the appellate court must afford due deference to the trial court's feel of the case, with regard to the assessment of intangibles." Id. at 255 (internal quotation marks and citation omitted). In other words, we shall not disturb the trial court's decision on a motion for a new trial or remittitur "unless it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1.

In He, supra, the Court upheld a trial judge's decision to remit an award. 207 N.J. at 257. The Court stated that a trial

court must explain how it determined the award was excessive and how it calculated the remitted amount, including a factual analysis of how the award was different or similar to other verdicts. Id. at 250-51.

However, the He Court did not declare that the identical analysis applies when a judge denies the new trial motion and declines to remit an award at all. In making the threshold decision whether to disturb a jury award, the court need not justify the award as if it were a specific remitted amount the court selected. As noted, the jury's verdict is presumptively correct. Id. at 249. The trial court may consider comparable verdicts to justify its determination that an award does not "shock the conscience," see Caicedo v. Caicedo, 439 N.J. Super. 615, 629 (App. Div. 2015), but the court is not required to do so when the party challenging the verdict has not presented any.

Applying these standards, we do not discern error. In oral argument in support of her motion for a new trial, defendant did not refer to He or any other allegedly comparable verdict. In support of her argument before us, defendant relies mainly on the Court's decision in He, supra, affirming the trial court's

remittitur of the award in that case. Defendant argues that the facts in He were substantially similar to those in this case.[2]

The plaintiff in He suffered two herniated discs in her cervical spine that impinged on her spinal cord. 207 N.J. at 237. She alleged the injury caused chronic pain, forced her to give up her job, and negatively impacted her quality of life and relationship with her husband. Id. at 238-39. The jury awarded plaintiff $1 million. Id. at 239. The judge remitted it to $200,000. Ibid. He referred to seven cases that resulted in lower awards. He v. Miller, 411 N.J. Super. 15, 23-24 (App. Div. 2009). He also relied on his feel of the case; he doubted the extent of the plaintiff's pain, noting she was able to sit for long periods of time during the trial, without indicating she was in pain or uncomfortable. He, supra, 209 N.J. at 239-40. The plaintiff declined to accept the remitted amount, and upon retrial, was awarded $500,000. We affirmed that award on appeal, and the Court declined to review the matter. He v.

[2] Defendant also references plaintiff's willingness to accept a settlement of significantly less than the award. However, neither we nor the trial court may consider that offer in deciding a motion for remittitur. See Jastram v. Kruse, 197 N.J. 216, 233 (2008) ("[A] pre-trial settlement offer is entirely irrelevant in a remittitur case in which the fundamental inquiry is not what anyone thought the case was worth beforehand, but whether the jury could have reached the verdict on the evidence actually before it.").

Miller, No. A-1599-12 (App. Div. Sept. 2, 2014), certif. denied, 220 N.J. 268 (2015).

We are unpersuaded that the Court's decision in He established a benchmark for automobile accident cases involving herniated discs and chronic pain. No two cases are identical. He, supra, 207 N.J. at 253. Unlike in He, the trial judge in this case expressed no doubts about the authenticity of plaintiff's complaints. An experienced trial attorney before assuming the bench, the trial judge held that the amount awarded was not shocking. It was higher than some verdicts he had seen, but less than others, although the judge did not identify them.[3] He considered plaintiff's life expectancy of 33.8 years, and calculated that the jury's verdict amounted to roughly $30,000 a year.[4] He did not find the award to be excessive, in view of her back pain and vertigo and how her injuries affected her quality of life.

Viewing the record in the light most favorable to the plaintiff and deferring to the trial court's feel of the case, we conclude the award was not so disproportionate to plaintiff's

[3] In response to defendant's reliance on He, plaintiff refers to numerous jury awards, comparable in amount to plaintiff's award, involving herniated disc injuries arising out of an automobile collision.

[4] Including the post-accident years preceding the verdict, the award amounts to just slightly over $500 a week.

injuries that it clearly and convincingly constitutes a miscarriage of justice.

B.

Defendant next argues the court erred in admitting unredacted treatment and hospital records. At trial, defense counsel objected that the documents were confusing and cumulative in that they mirrored much of the testimony of Drs. Gizzi and Demesmin. In argument before the trial court for a new trial, counsel conceded there was no other basis for contending the documents were inadmissible. Counsel acknowledged it was unlikely the jury actually reviewed the documents in detail, given their brief deliberation, but contended that the jury may have been swayed merely by the volume of documents. On appeal, defendant argues that some of the records did contain objectionable hearsay under N.J.R.E. 808, including records of plaintiff's primary care physician and emergency room records.

During trial, the trial judge examined the documents before admitting them into evidence, and concluded they were not confusing. He found that the meaning of the abbreviations was self-evident, the handwriting was legible, and the testifying physicians had explained the medical terms found in the records. Plaintiff's counsel argued the records corroborated the testimony of plaintiff and Drs. Gizzi and Demesmin. The court

declined to find they were cumulative. The court also offered defense counsel the opportunity to propose redactions of sections, apparently to avoid admission of imbedded hearsay.

A trial judge may exclude relevant evidence "if its probative value is substantially outweighed by the risk of (a) . . . confusion of issues . . . or (b) . . . needless presentation of cumulative evidence." N.J.R.E. 403. The trial court's decision not to exclude the reports is entitled to great deference. "Determinations pursuant to N.J.R.E. 403 should not be overturned on appeal unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide off the mark that a manifest denial of justice resulted." Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999) (internal quotation marks and citation omitted).

Defendant has fallen short of meeting this high standard. Indeed, defendant failed to include in the record on appeal the exhibits about which she complains. We therefore cannot meaningfully review whether the exhibits were confusing. Nor can we properly consider the argument that the documents were in fact cumulative, let alone so needlessly cumulative that a denial of justice resulted. See R. 2:6-1(a)(1) (stating that the appendix "shall contain . . . such other parts of the record . . . as are essential to the proper consideration of the

issues"); Cmty. Hosp. Grp., Inc. v. Blume Goldfaden, 381 N.J. Super. 119, 127 (App. Div. 2005) ("Nor are we obliged to attempt review of an issue when the relevant portions of the record are not included.").

The failure to include the allegedly inadmissible documents also frustrates our review of defendant's newly minted argument that some records contained embedded hearsay barred by N.J.R.E. 808, which is subject to a plain error standard. See State v. Frisby, 174 N.J. 583, 591 (2002) ("Because no objection was advanced with respect to that hearsay evidence at trial, it must be judged under the plain-error standard: that is, whether its admission 'is of such a nature as to have been clearly capable of producing an unjust result.'") (quoting R. 2:10-2).

In sum, we reject defendant's argument that she is entitled to a new trial because of the admission of the various medical and hospital records.

C.

Defendant also argues she is entitled to a new trial because plaintiff's counsel allegedly urged the jury in summation, without objection, to increase its compensatory award to account for inflation.

We apply a plain error standard. R. 2:10-2. Defendant premises her argument on the principle in Friedman v. C & S Car

Service, 108 N.J. 72, 79 (1987), that "damages for future non-economic injuries should not be discounted or reduced to reflect their present value." The Court reasoned:

> The discounting to present value for such damages is artificial and unrealistic because of the imprecise and speculative nature of the elements underlying such determinations. Such a requirement would add to the time, expense, and complexity of civil trials without any corresponding enhancement of the reliability, accuracy, or fairness of damages awards.
>
> [Ibid.]

Defendant argues that, based on the same reasoning, a plaintiff may not ask a jury to increase an award to account for projected inflation.

Although the logic may be compelling, we need not decide whether Friedman compels the principle that jury awards for non-economic losses may not be increased for inflation. That is because plaintiff did not ask the jury to apply a fixed inflation formula to its damage award. Plaintiff's counsel urged the jury to consider that the award was plaintiff's sole opportunity to obtain compensation for her permanent injuries and non-economic losses. Counsel illustrated the length of time encompassed by plaintiff's more than thirty-three-year life expectancy by harking back to aspects of American culture thirty-three years earlier. He highlighted increases in the

federal budget and the cost of various consumer goods over the years. He reminded the jury to be mindful of the "value of money" and that the sum of the jury award was "for the rest of [plaintiff's] life."

This appeal to the jury simply did not invite the kind of artificial, mathematical calculation the Court criticized in Friedman. Counsel did not ask the jury to overlay an inflation factor to what is an inherently speculative and imprecise calculation.

Consistent with Model Jury Charge (Civil) § 8.11E, "Disability, Impairment And Loss Of The Enjoyment of Life, Pain And Suffering" (1996), the trial judge instructed the jury to consider that its award must compensate plaintiff for future losses:

> You must also consider their duration as any award you make must cover the damages suffered by . . . Ms. Gibbs since the accident, to the present time, and even into the future, if you find that Ms. Gibbs' injuries and their consequences have continued to present time or could reasonably be expected to continue into the future.
>
> The law does not provide you with any table, any 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.

In sum, we discern no error, let alone plain error, in plaintiff's counsel's summation.

D.

Finally, defendant challenges the award of fees and costs pursuant to Rule 4:58-1, the Offer of Judgment Rule. Defendant contends plaintiff's offer of judgment letter was not for a "sum stated" as required, and that the letter was "vitiated" by the "contemporaneous service of a Rova Farms[5] letter." Defendant also argues the court should have denied the award of fees and costs, pursuant to Rule 4:58-2, because it would impose an undue hardship on defendant.

We first describe the record pertaining to the offer of judgment. On August 18, 2011, plaintiff filed an offer of judgment with the court. The offer stated that plaintiff "hereby makes an Offer of Judgment against the defendants, Vijaya Camillo and Padma Mohanam for $100,000.00, without prejudice, with costs accrued to the date hereof." By letter dated August 16, 2011, plaintiff served a copy of the offer letter which was stamped received by defendant's counsel on August 18, 2011. By letter dated August 22, 2011, plaintiff's counsel apparently served a copy of the offer letter stamped

[5] Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474 (1974).

filed. Both letters to defendant's counsel indicated they were served by Lawyer's Service, but no certificate of service is included.

Also by letter dated August 16, 2011, and stamped received by defendant's counsel on August 18, 2011, plaintiff's counsel demanded "payment of the entire policy of insurance held by the defendants Vijaya Camillo and Padma Mohanam." Plaintiff's counsel stated, "In order to settle this claim for your policy limits, we will require the following items: 1. An Affidavit of No Additional Insurance. 2. The declaration page from defendant's insurance policy. No settlement can be made in the absence of this documentation."

By June 2013, it was apparent that defendant was insured by two insurers, for a total of $200,000. Shortly before trial, the court entered orders permitting Geico to deposit the $100,000 limits of its policy. Geico's June 17, 2013 check indicated that Chengutta K. Mohanam was its insured. On June 7, 2013, the court entered an order permitting Farmers Insurance to deposit its $100,000 policy limits, which Farmers did by a June 17, 2013, check indicating that Vijaya Camillo was its insured.

However, at oral argument on the motion for fees pursuant to the offer of judgment, plaintiff's counsel represented that Farmers had initially disclaimed liability and "there was no[t]

even a whiff of other insurance." The record on appeal includes a letter from defendant's counsel to plaintiff's counsel transmitting the declaration sheet for defendant's policy with 21st Century Insurance — apparently, an affiliate of Farmers. Defendant's counsel stated that the policy "may be excess to the GEICO policy under which I have been defending this matter." Defendant's counsel promised to transmit the full policy when he received it.

Defendant argues that the contemporaneous Rova Farms letter conveyed "the unmistakable message . . . that plaintiff would settle for the $100,000 policy limits, but the offer was conditioned on there being no other insurance." We agree.

Defendant presented a similar argument to the trial court. The court concluded that defendant had failed to present competent evidence that the Rova Farms letter followed or was contemporaneous with the offer of judgment. Moreover, the court concluded that only a duly filed offer of judgment could affect the previously filed and served offer, and that there was no evidence the Rova Farms letter was not filed.

We part company with the trial court's analysis. It is of no moment whether the letter and offer of judgment were received simultaneously, or one before the other. Both were received the same day, and reasonably should have been read together. Cf.

Lawrence v. Tandy & Allen, Inc., 14 N.J. 1, 6 (1953) (stating that where multiple writings form part of the same transaction, all of the writings must be interpreted together). Had the offer of judgment letter itself included the condition that defendant prove there was no second insurance policy, there is no question that it would not have satisfied the Rule, which requires that an offer be "for a sum stated therein (including costs)." R. 4:58-1(a). It would not be an offer for a sum stated; it would be an offer for a sum stated, subject to a condition.

Plaintiff stated definitively, "No settlement can be made in the absence of this documentation" that no other insurance existed. We recognize the Offer of Judgment Rule furthers a salutary purpose of encouraging settlement of disputes. See, e.g., Negron v. Melchiorre, 389 N.J. Super. 70, 76 (App. Div. 2006), certif. denied, 190 N.J. 256 (2007). However, plaintiff's purported offer of judgment, coupled with the letter sent the same day, made clear that the offer was subject to a non-monetary condition. As a result, it was not an offer of judgment in compliance with the Rule. Plaintiff's eventual verdict thus did not trigger the fee-shifting consequences of the Offer of Judgment Rule.

Given our disposition, we need not address defendant's remaining arguments regarding the award of fees and costs.

In sum, we affirm the judgment in all respects, except we reverse the award of fees and costs. We remand for entry of an amended final judgment that eliminates the award of fees and costs.