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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3042-13T2

JUNE SALLEE,

Plaintiff-Appellant,

v.

EDWARD STAGNITTI and THE
MILL AT SPRING LAKE HEIGHTS,

Defendants-Respondents.

Argued January 6, 2015 – Decided June 2, 2015

Before Judges Nugent and Manahan.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3908-08.

Dennis A. Drazin argued the cause for appellant (Drazin & Warshaw, attorneys; Mr. Drazin, of counsel; John R. Connelly, Jr., on the brief).

Susan Karlovich argued the cause for respondent the Mill at Spring Lake Heights (Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, attorneys; James C. Orr, of counsel; Ms. Karlovich, of counsel and on the brief).

PER CURIAM

Plaintiff, June Sallee, appeals from a jury verdict finding no cause for action in favor of defendant, The Mill at Spring Lake Heights (The Mill). Plaintiff argues the court erroneously

permitted opinion testimony from The Mill's expert engineer. Plaintiff also argues the trial court abused its discretion by denying her motion for a new trial. We affirm.

On May 8, 2008, plaintiff left The Mill, a lakeside restaurant. While on the property of The Mill, she was struck by a vehicle operated by defendant, Edward Stagnitti. Plaintiff suffered multiple severe injuries to her head and legs. Stagnitti stated just after the accident that he blacked out and lost control of his vehicle. There were no eyewitnesses to the accident. Plaintiff said she was struck while traversing the pedestrian walkway adjacent to the upper level parking lot of The Mill, but does not recall the exact location. Notably, the location was never specifically determined during trial, nor was definitive proof adduced that plaintiff was on the sidewalk when she was struck.[1]

Dr. Wayne F. Nolte, Ph.D., P.E., was retained as a liability expert by plaintiff. During the trial, Dr. Nolte testified that he inspected and photographed the scene of the accident, as well as reviewed police reports and witness statements. Premised upon the assumption that the point of impact was the pedestrian walkway, Nolte opined that The Mill

[1] Stagnitti gave different versions of the events surrounding the accident during discovery. Unfortunately he died before the trial.

should have used bollards, i.e., cylindrical cement barriers, as safety precautions around the walkway. Nolte testified that the lack of bollards was a contributing cause of the accident.

In contravention to Nolte, Scott Derector, P.E., The Mill's expert, testified that bollards were not required and if bollards were installed, they would not have prevented the accident. Derector testified that there was no property maintenance code or ordinance requiring bollards. According to Derector, his opinion was predicated upon United States Military studies on bollard systems. At the time of this testimony, plaintiff objected. The court ruled Derector was permitted to testify since Nolte's testimony "opened the door." The Mill's counsel agreed to elicit testimony from Derector about the bollards without referencing the military studies. Derector then provided the following testimony:

> Q: If you could just tell the ladies and gentlemen of the jury, based upon your experience and training, as an individual certified in the area of civil engineering, without reference to anything, just your training and experience, as to why the proposed bollard by Mr. Nolte, in your opinion, would not work.
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> A: In my opinion, the concrete and the mechanism right here, would not support the design in which he stated that a vehicle driving at 60 miles per hour would be able to stop, be stopped, by something of this size.

Q: Okay, and can you tell the ladies and gentlemen of the jury, as you understand this accident, how it occurred, what vehicle speed or speeds Mr. Stagnitti's vehicle was traveling?

A: It's my understanding that when the vehicle hit the flagpole, which was in and around the same area, he was driving approximately 50 miles per hour.

Q: And did you have an understanding as to the weight of that vehicle?

A: It's approximately 3,500 to 4,000 pounds.

Q: . . . Is there a formula or basis from a mathematical standpoint where you can calculate the rate of speed and the weight of the vehicle that would support your opinion that the bollard would not have prevented the accident?

A: . . . Kinetic energy is the formula of one half mass times the velocity squared. So when we talk about the mass, the mass of the vehicle would stay the same. But when we talk about velocity, that's the most important thing. So a vehicle that's going 30 miles per hour, is actually squared in its velocity, and a vehicle that is going 50 miles per hour is squared in its velocity. So the difference in velocity is not 20 miles per hour. It's actually 2.8 times more kinetic energy going into a bollard than a vehicle driving at 30 miles per hour.

Q: What is the effect of that kinetic energy as that vehicle strikes the bollard at those velocities?

A: Well, a bollard is trying to withstand the forces of a vehicle coming in its direction. And it's what we call an overturning moment. It wants to overturn

> and pull out whatever is in the ground. The larger the kinetic energy, the more force that this bollard will try to withstand.
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> Q: And in your opinion, based on the velocity of the vehicle and its weight, do you have an opinion as to whether that proposed bollard would have withstood the impact?
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> A: I do . . . it would not have.

After the jury's verdict, plaintiff filed a motion for a new trial as to the liability of The Mill. In reaching its determination, the court concluded Derector's mention of the U.S. Military publication was a "harmless statement." The court stated:

> I can't say, having looked at this record that the decision by the jury was so outrageous under the circumstances, because there was no question Mr. Stagnitti bore primary liability for the happening of the accident. After all, he ran down [plaintiff].
>
> Unfortunately, he didn't know why, he changed his story a couple of times prior to his passing. Certainly that was exploited by the plaintiff. But there really was nothing that directly tied The Mill in and of itself other than theoretical and circumstantial evidence. And under the circumstances I don't believe it's appropriate for this court to step in, become the eighth juror and say no, they were wrong and grant a new trial under the circumstances.

Plaintiff raises the following points on appeal:

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE MILL'S LIABILITY EXPERT TO PRESENT ON THE SEVENTH DAY OF TRIAL PREVIOUSLY UNDISCLOSED AND IRREPARABLY PREJUDICIAL OPINION TESTIMONY.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE PLAINTIFF'S MOTION FOR A NEW TRIAL.

The admissibility of expert testimony lies in the sound discretion of the trial court. Carey v. Lovett, 132 N.J. 44, 64 (1993); Muise v. GPU, Inc., 371 N.J. Super. 13, 58 (App. Div. 2004). The scope of review of a trial judge's evidential rulings requires we grant substantial deference to the judge's exercise of that discretion. DeVito v. Sheeran, 165 N.J. 167, 198 (2000). Rulings on evidence will not provide a basis for reversal unless they reflect an abuse of that discretion. Benevenga v. Digregorio, 325 N.J. Super. 27, 32 (App. Div. 1999), certif. denied, 163 N.J. 79 (2000). Reversal is not warranted unless the trial judge's ruling was "so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982).

We initially address plaintiff's argument that Derector should not have been permitted to testify regarding the bollards. Plaintiff argues she was "ambushed" at trial by this

testimony. The Mill argues, notwithstanding, that Nolte's opinion was a "net opinion," and Derector's opinion was permissible as rebuttal to Nolte's testimony.

Rule 4:17-4(e) provides that an expert's report "shall contain a complete statement of that person's opinions and the basis therefor; [and] the facts and data considered in forming the opinions[.]" Pursuant to N.J.R.E. 703, an expert's opinion must be based on "facts, data, or another expert's opinion, either perceived or made known to the expert, at or before trial." Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002) (emphasis added). In Conrad v. Robbi, 341 N.J. Super. 424, 440-441, (App. Div.), certif. denied, 170 N.J. 210 (2001), we held a trial judge has the discretion to exclude:

> [e]xpert testimony that deviates from the pretrial expert report . . . if the court finds "the presence of surprise and prejudice to the objecting party." Velazquez ex rel. Velazquez v. Portadin, 321 N.J. Super. 558, 576 (App. Div. 1999), rev'd on other grounds, 163 N.J. 677 (2000). In New Jersey, "[i]t is well settled that a trial judge has the discretion to preclude expert testimony on a subject not covered in the written reports furnished in discovery." Ratner v. Gen. Motors Corp., 241 N.J. Super. 197, 202 (App. Div. 1990). As a result, an abuse of discretion standard of review is utilized in appellate oversight of a trial judge's decision to allow or to exclude such testimony. Velazquez, supra, 321 N.J. Super. at 576. In [Westphal v. Guarino, 163 N.J. Super. 139, 146 (App. Div.), aff'd, 78 N.J. 308 (1978)], we identified a number of

> factors for a Law Division judge to consider in exercising his or her discretion. [They include] (1) the absence of a design to mislead, (2) absence of the element of surprise if the evidence is admitted, and (3) absence of prejudice which would result from the admission of evidence.
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> [Ibid.]

Although a trial judge may exclude expert testimony on a subject not covered in the expert's written reports or any other discovery material, Mauro v. Raymark Indus., Inc., 116 N.J. 126, 145 (1989), "[a] party cannot claim to be surprised by expert testimony, when it contains 'the logical predicates for and conclusions from statements made in the report.'" Conrad, supra, 341 N.J. Super. at 441 (quoting Velazquez, supra, 321 N.J. Super. at 576).

In response to plaintiff's objection during the trial to Derector's testimony, the court held:

> All right, we all heard the testimony, I don't know what his report said, but [Dr. Nolte] did say on the stand, a 42-inch bollard with a 42-inch . . . base into the ground, would have prevented the accident. If his report says, there are pictures of bollards that would have done it, and they're all different types, I mean, I've seen different types. Not that that matters. But if that's the first time he actually said specifically, this type would get the job done, would have prevented the accident, I think he's opened the door.

We agree. "The doctrine of opening the door allows a party to elicit otherwise inadmissible evidence when the opposing party has made unfair prejudicial use of related evidence." State v. James, 144 N.J. 538, 554 (1996); see also State v. Rucki, 367 N.J. Super. 200, 207 (App. Div. 2004). The doctrine also "provides an adverse party the opportunity to place evidence into its proper context." Alves v. Rosenberg, 400 N.J. Super. 553, 564 (App. Div. 2008).

Here, we conclude that Nolte's testimony did "open the door" regarding the absence of bollards and the cause of the accident. It would be inherently unfair, if not unduly prejudicial, to deny The Mill the opportunity to rebut this "causation" testimony. Nor could plaintiff claim surprise as she raised the bollard issue as an essential part of her direct case. Further, when the court's determination to permit the testimony is considered in light of the discretion afforded to such decisions, we perceive no error.

We next address plaintiff's argument that there was a miscarriage of justice based upon Derector's testimony which required a new trial. Rule 4:49-1(a) states, "[t]he trial judge shall grant the motion 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 Dolson v. Anastasia, 55 N.J. 2, 7 (1969). The judge should weigh the evidence, but should avoid substituting his or her judgment for that of the jury. Baxter v. Fairmont Food Co., 74 N.J. 588, 598 (1977). We apply the same standards used by the trial court in evaluating a new trial motion, "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, such as witness credibility." Jastram v. Kruse, 197 N.J. 216, 230 (2008) (internal quotation marks and citation omitted).

Jury verdicts carry a "presumption of correctness." Romano v. Galaxy Toyota, 399 N.J. Super. 470, 477 (App. Div.), certif. denied, 196 N.J. 344 (2008). As such, they "should be set aside in favor of new trials only with great reluctance, and only in cases of clear injustice." Boryszewski v. Burke, 380 N.J. Super. 361, 391 (App. Div. 2005), certif. denied, 186 N.J. 242 (2006); see also Caldwell v. Haynes, 136 N.J. 422, 432 (1994) (noting that a verdict may only be interfered with if it is clearly against the weight of the evidence and "shock[s] the judicial conscience"). The verdict must be considered "in the light most favorable to the prevailing party." Crego v. Carp, 295 N.J. Super. 565, 578 (App. Div. 1996), cert. denied, 149 N.J. 34 (1997). A "miscarriage of justice" has been defined as

a "pervading sense of 'wrongness.'" Baxter, supra, 74 N.J. at 599 (quoting State v. Johnson, 42 N.J. 146, 162 (1964)).

Applying the standard articulated in Rule 4:49-1(a) and controlling decisions of law, the court held that the jury's decision did not constitute a miscarriage of justice. Again, we agree.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION