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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6458-06T5

MARLENE FRENDA and FRANK FRENDA,
her husband,

Plaintiffs-Appellants,

v.

MCELRONE SALES, INC. and JOHN J.
MCELRONE,

Defendants-Respondents.

Argued May 27, 2008 - Decided June 26, 2008

Before Judges Lintner and Sabatino.

On appeal from the Superior Court of
New Jersey, Law Division, Bergen County,
L-4703-05.

William L. Gold argued the cause for
appellants (Bendit Weinstock, attorneys;
Mr. Gold, on the brief).

Donald L. Crowley argued the cause for
respondents (Methfessel & Werbel, attorneys;
Mr. Crowley, on the brief).

PER CURIAM

Plaintiffs, Marlene Frenda[1] and her husband, appeal from an adverse judgment and denial of her motions[2] for new trial or directed verdict following a jury's determination that defendant John J. McElrone[3] was negligent but not a proximate cause of the accident. On appeal, plaintiff asserts: (1) as there was no issue of proximate cause respecting defendant's[4] conduct, it should not have been submitted to jury and, thus, on retrial the only issue to be decided is allocation of damages; (2) the judge erred in precluding plaintiff from cross-examining defendant's accident reconstruction expert on whether defendant's conduct, if negligent, would have been a proximate cause of the accident; and (3) plaintiff was diligent in pursuing her discovery request to have defendant's vision examined.

We conclude that plaintiff should have been permitted to pursue, on cross-examination, defendant's expert's opinion concerning the issue of proximate cause for the accident as it related to defendant's conduct, and the preclusion represented a

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[1] As Marlene Frenda suffered the injuries, we refer to her as plaintiff.

[2] Plaintiff filed a post-trial motion for a new trial and a directed verdict, as well as a motion for reconsideration following denial of the initial motions.

[3] As McElrone Sales, Inc. was the owner of the vehicle, we refer to John J. McElrone as defendant.

miscarriage of justice mandating a new trial on whether defendant's negligence was a proximate cause of the accident. Accordingly, we reverse the judgment and remand for a new trial on that issue.

On October 15, 2004, between 5:30 p.m. and 6:30 p.m., plaintiff was driving southbound on the Garden State Parkway in Paramus, when she got a flat tire. It was raining heavily. Realizing that she did not have her cell phone, she left her vehicle and walked down a grassy hill on the side of the Parkway to access a nearby hotel and call for help. In order to get to the hotel, plaintiff needed to cross Fromm Road, starting at the northbound side. She did so, first looking right then left, and then walking across the street, holding a yellow umbrella over her head. She did not look to her right again while crossing the street. Meanwhile, defendant, who was seventy-five years old, was driving southbound on Fromm Road. Defendant did not see plaintiff until he was approximately six feet away from her. Defendant applied his brakes but was unable to avoid hitting plaintiff.

The accident was witnessed by Melissa Mirrer and her mother, Laurie Mirrer. Melissa was a passenger in Laurie's car and was talking on her cell phone to her sister when she heard her mother say, "Oh, my God, that lady, she's going to get hit."

Upon witnessing the accident, Melissa ran from her mother's vehicle to help plaintiff. Plaintiff sustained a left open tibia fracture, a right segmental tibia fracture, and a fracture of her right clavicle and pelvis. Her tibia fractures required surgery.

Defendant called Ira S. Kuperstein, a licensed civil engineer, to testify as an accident reconstruction expert on his behalf.[5] Kuperstein testified that defendant should have seen plaintiff approximately 100 feet before the accident. In addition, Kuperstein stated that it would have taken approximately eighty-five feet for defendant to have stopped his car, given his speed and the weather conditions. He testified on direct, consistent with his report, that plaintiff's actions in failing to make observations to her right when she was crossing the roadway were a direct and proximate cause of the accident. At trial, plaintiff conceded that her action in crossing without looking was negligence and a proximate cause of the accident.

On appeal, plaintiff first asserts that there was no issue of proximate cause and, therefore, the jury should not have been asked to decide it. She maintains that because defendant failed

[5] Much of Kuperstein's testimony is designated indiscernible in the transcript.

to present any evidence that plaintiff's injuries were caused by anything other than the accident there was no need to have the jury decide proximate cause. The trial judge correctly found that, although defendant conceded that plaintiff's injuries resulted from the accident, he did not concede liability, i.e., that he was either negligent or his negligence was a proximate cause of the accident.

In routine tort cases where there is no issue of whether the injuries resulted from the accident, "[w]hen charging proximate cause on liability, use accident/incident/event, as appropriate." Model Jury Charge (Civil), § 6.11, "Proximate Cause – Routine Tort Case Where No Issues Of Concurrent Or Intervening Causes, Or Foreseeability of Injury or Harm" n.1 (2007). It is only when there is a question of whether certain distinct injuries were sustained as a result of the accident that the jury should be given separate interrogatories and asked to decide whether the particular type of alleged injury was caused by the accident. See Ponzo v. Pelle, 166 N.J. 481, 491-92 (2001). Here, there was no such contest and, therefore, the jury was correctly instructed to determine whether defendant's negligence was a proximate cause of the accident. Model Jury Charge (Civil), § 7.30(D), "Comparative Negligence (Auto) -- All Issues" (2007).

In giving his opinion at trial, defendant's expert implicated a lack of proximate cause and negligence on the part of defendant. On direct, Kuperstein responded in the negative to defense counsel's question as to "whether . . . [defendant] performed any improper observations." He also testified that defendant did not have sufficient time to stop his vehicle because

> the perceptual reaction was so great as to preclude him from having [visibility] in the context of a violation of expectancies and the weather conditions to preclude him from seeing in enough time or [being] reasonably aware of a driver to conclude that there were not so reasonably alert and aware as to cause the accident. (Emphasis added).

It is in the light of this testimony that we consider plaintiff's contention that she should not have been precluded from cross-examining Kuperstein on the issue of whether defendant's conduct was a proximate cause of the accident. On cross-examination, plaintiff asked, "[n]ow, Doctor, if the jury finds [defendant] was negligent or (indiscernible) that would be a proximate cause of the accident, wouldn't it?" Objecting, defense counsel argued that the question asked embraced "a legal issue," and that "it's for the jury to decide." When plaintiff counsel pointed out that Kuperstein testified that plaintiff's conduct was a proximate cause of the accident, defendant's attorney inaccurately responded, "I don't think he said that."

After defense counsel argued, "[y]ou can't ask him[, it's] the ultimate decision," the judge sustained the objection.

In his written opinion rendered following plaintiff's motion for reconsideration, the judge addressed the contention that plaintiff was entitled to a new trial based upon being precluded from cross-examining Kuperstein on whether defendant's actions might have been a proximate cause of the accident. The judge repeated the question asked, with emphasis added: "Dr., if the jury finds [the defendant] was negligent by not seeing her, that would be a proximate cause [of] the accident, wouldn't it?" He then acknowledged, "[t]hough it is well established that an expert may answer questions going to the ultimate issue of the case, this may only occur where the opinion will aid the jury." The judge noted that it would have been proper to have asked "whether the defendant's negligence may be or could have been a cause of the accident, and then proceeded to develop his theory with Dr. Kuperstein as to whether he considered this possibility vis-à-vis his report and/or prior deposition testimony." He concluded, however, that the question as to its form had a potential to invade the jury's deliberation and had "the near certainty of confusing the jury with wholly improper expert testimony." He also determined that plaintiff failed to lay a proper foundation for the question.

Kuperstein testified regarding proximate cause as it related to the actions of both plaintiff and defendant. On direct, Kuperstein opined that plaintiff's failure to look to her right was a direct and proximate cause of the accident. More importantly, in stating his opinion regarding the ability of defendant to stop, he implied that, had defendant made appropriate observations at 100 feet, he would not have been able to stop in time and avoid striking plaintiff, thus negating defendant's actions as a proximate cause of the accident.

It is true that neither the question as phrased by plaintiff's counsel nor the objection as raised by the defense met the model of lucidity. It is apparent, however, from our reading of the trial transcript, that the question was not precluded because it embraced the ultimate issue. N.J.R.E. 704 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The question as phrased by plaintiff's counsel did not seek recitation of a legal conclusion but instead sought his opinion on the ultimate issue of proximate cause.

We agree with the judge's post-trial perception that the question could have been phrased differently, certainly more clearly, and that it suffered to some extent by the form in

which it was presented. We part company with the judge's decision that impropriety in the form of the question should be the basis for denying plaintiff's motion for a new trial. This is especially true here where the issue of defendant's proximate cause was hotly contested and Kuperstein had already expressed his opinion on causation as it related to the sufficiency of time in which defendant could have stopped his vehicle under the then circumstances. Instead of sustaining defendant's substantive based objection, had the judge determined that the question lacked the proper foundation or suffered as a matter of form, he should have asked counsel to rephrase the question. See, e.g., In re PSE&G S'holder Litig., 320 N.J. Super. 112, 118 (Ch. Div. 1998) (quoting R. 4:14-3(c) in the context of depositions, stating that "'[a]n objection to the form of the question shall include a statement by the objector as to why the form is objectionable so as to allow the interrogator to amend the question.'"; see also State v. Marshall, 123 N.J. 1, 191-92 (1991) (upholding the rephrasing of defense counsel's question that originally called for a legal conclusion); State v. Vaszorich, 13 N.J. 99, 111 (no error in requiring defense counsel to rephrase opinion question posed to expert witness), cert. denied, 346 U.S. 900, 74 S. Ct. 219, 98 L. Ed. 400 (1953). Precluding plaintiff from exploring Kuperstein's opinion

regarding proximate cause as it related to defendant represents, in our view, a sufficient miscarriage of justice to warrant a new trial.

On remand, the liability aspect of the trial should be limited to whether defendant's negligence is a proximate cause of the accident. Negligence and proximate causation are separate and distinct elements. See Camp v. Jiffy Lube # 114, 309 N.J. Super. 305, 309 (App. Div.), certif. denied, 156 N.J. 386 (1998). The jury's verdict as to whether defendant's actions were a proximate cause of the accident is fairly separable from the issue of defendant's negligence such that the interest of justice would be served by a limited trial. Terminal Constr. Corp. v. Bergen County Hackensack River Sanitary Sewer Dist. Auth., 18 N.J. 294, 341 (1955); see also Correa v. Maggiore, 196 N.J. Super. 273, 286 (App. Div. 1984); Corridon v. City of Bayonne, 129 N.J. Super. 393, 398 (App. Div. 1974). In doing so, the testimony may encompass the same facts that were previously presented in establishing both plaintiff's and defendant's negligence. The jury, however, should be advised that plaintiff has been previously determined to be negligent, which negligence was a proximate cause of the accident, and defendant has been previously determined to be negligent.

Finally, we need not address to any great extent plaintiff's contention that denial of her motion to have defendant examined by an eye expert following the conclusion of the discovery period was error because exceptional circumstances existed and she diligently pursued the request. Plaintiff asserts on appeal that she should have been entitled to have defendant submit to "an eye examination to determine whether the defendant had any problem seeing particularly at night, which would have impacted upon his ability to have reacted."

At trial, Kuperstein testified that defendant should have seen plaintiff at approximately 100 feet. Defendant testified that he was ten feet away from plaintiff when he saw her and applied the brakes. The jury undoubtedly considered those facts in concluding that defendant was negligent. Defendant's inability to see would not impact on the issue of proximate cause, that is, whether he could have stopped and avoided striking plaintiff had he seen her at the earliest point in time that he could have under the existing conditions. It is cross-examination on that issue that is relevant to the issue of proximate cause or lack thereof that should have been permitted. We therefore need not further address the discovery issue raised.

Reversed and remanded.