JEFFREY M. BELLO, Plaintiff-Respondent,

v.

MERRIMACK MUTUAL FIRE INSURANCE COMPANY, A DIVISION OF THE ANDOVER COMPANIES, Defendant-Appellant, and

CUSACK CO., INC., Defendant.

No. A-4750-10T4.

Superior Court of New Jersey, Appellate Division.

Argued January 19, 2012.
Decided July 12, 2012.

Marc L. Dembling argued the cause for appellant (**Methfessel** & **Werbel**, attorneys; Mr. Dembling, of counsel and on the briefs).

Joel Wayne Garber argued the cause for respondent (Garber Law, P.C., attorneys; Mr. Garber and Keith J. Gentes, on the brief).

Before Judges Cuff, Lihotz and St. John.

NOT FOR PUBLICATION

PER CURIAM.

Defendant Merrimack Mutual Fire Insurance Company appeals from an order denying its motion for a new trial following entry of judgment in favor of plaintiff Jeffrey M. Bello. We have reviewed each of defendant's claims of error, challenging Judge Suter's rulings made during the course of this ten day trial, and conclude there is no basis to set aside the judgment. Accordingly, we affirm.

These facts are taken from the trial record. Plaintiff purchased a homeowners insurance policy from defendant (the Merrimack policy), to insure his multi-unit residential property located in Edgewater Park. The Tudor-style residence was built in 1899 and consists of plaintiff's residence and three tenant units. The structure sits approximately seventy-five feet from the edge of the Delaware River. In the rear of the property, sitting approximately thirty-five feet below the edge of the yard, is a granite stone masonry retaining wall that runs parallel and adjacent to the river along the 210 foot width of the property. The wall, originally constructed in the late 1800's, measured nine feet high and two and a half to three feet wide and connects to similar walls on the neighboring properties.

Following a violent wind storm on March 8, 2008, plaintiff submitted a claim for damages to the roof of his residence. He later noticed two areas of damage to the retaining wall. The Merrimack policy included a provision extending coverage to structures other than buildings, but limited recovery to ten percent of the total policy value, or $100,750. Plaintiff supplemented his roof claim to include the damaged wall.

On behalf of defendant, Thomas D. Cusack, an adjuster, inspected the storm damage to plaintiff's residence and wall. Cusack determined the roof damage was covered and arranged for the engineering firm of Peter Vallas Associates, Inc. (Vallas) to assess the damaged wall.

On April 3, 2008, Daniel Seeley, an investigator for Vallas, who was not an engineer, performed an inspection of the wall and authored a report of his findings. The report stated:

> A significant amount of vegetation and vine growth exists between the steeply pitched bank and the retaining wall. Other areas of the wall there was evidence of vine growth and root extension between the rocks was noted [sic]. The wall appears to have been installed as a form of erosion protection for the earth bank sometimes

> referred to as a riprap.
>
> ....
>
> Walking along the wall there was [sic] at least two areas of significant failure and damage noted to the wall. Other areas where the wall was washed out at the bottom was observed but the major damage occurred in two areas.... Much of the stone and mortar had fallen and was found either scattered on the bank behind the wall or on the river bed.
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> ....
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> Inspections of the actual wall revealed evidence of several areas where the mortar had been repaired. There were areas where stones had fallen and the openings completely mortared over.
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> The vegetation along the steeply sloped surface behind the stone masonry wall had extended into the wall area and in areas [sic]. This type of unchecked growth inherently weakened the wall in these areas. The integrity of the wall was compromised in several areas as a result of the root growth of the vegetation.
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> ....
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> Inspections of the wall revealed areas where washouts were prominent specifically along the base of the wall... [i]n addition [to] a significant amount of root growth and vegetation behind the wall [which] has damaged the wall itself with vegetation growing through the wall and actually growing out of the wall at the time of the inspection....
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> In addition[,] lateral hydrostatic pressures exist on the stone masonry[,] which in its weakened state from the above mentioned causes is affecting the integrity of the stone masonry.
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> ....
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> The stone masonry wall would not have fallen if the overall integrity was not compromised prior to any high wind condition[s].
>
> ....
>
> Although the incident reportedly occurred during a storm that accompanied high wind conditions and there is evidence of wind damage to [plaintiff's] structure and some of the trees on the property, the stone masonry wall would not have been compromised or damaged if it was not structurally weakened prior to the storm. The primary factors of the failure resulted from significant vegetation growth behind the wall with root growth and extension through the stone masonry wall and mortar, previously failed sections where the stones were displaced or separated from the stone masonry wall, damage from freeze-thaw cycles in the winter months due to water seepage and penetration in the stone masonry wall, and lateral pressures from the steeply pitched surface behind the wall. Not only were there the two large sections of the wall that failed, but there were other areas where the wall was obviously compromised by water seepage and drainage back into the river. In these areas, the rocks had been undermined and pushed outward.

Based on these reported findings, Cusack sent a May 15, 2008 letter denying plaintiff's request for coverage of the damaged retaining wall. The letter cited exclusions from the Merrimack policy as the basis for the denial, stating:

> [W]e do not insure loss:
>
> 1. involving collapse, other than as provided in Other Coverages 10;
>
> 2. caused by:
>
> ....
>
> b. freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a[:]
>
> ....

(2) foundation, retaining wall or bulkhead; or

(3) pier, wharf or dock;

....

h. (1) wear and tear, marring, deterioration;

(2) inherent vice, latent defect, mechanical breakdown;

....

(6) settling, shrinking, bulging or expansion, including resultant cracking, of pavements, patios, foundations, walls, floors, roofs or ceilings;

Additionally, we would make reference to GENERAL EXCLUSIONS under

1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any way sequence to the loss.

....

c. Water Damage, meaning:

(1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

....

(3) water below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure.

....

2. We do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.

....

c. Faulty, inadequate or defective:

(1) planning, zoning, development, surveying, siting;

(2) design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

(3) materials used in repair, construction, renovation or remodeling; or

(4) maintenance[.]

Plaintiff challenged the denial of his claim, insisting the wind damaged the retaining wall, a covered event under the policy. He spoke to David Wilson, a claims examiner for The Andover Companies (Andover), defendant's parent company. Plaintiff admitted the wall was last repointed and repaired in 2002, prior to his purchase, but asserted he maintained the wall "every other year" by "cutting the brush back[,] which would grow over top of the wall and hang down on the wall." In a June 12, 2008 letter, Wilson advised plaintiff the prior determination would not be changed and informed him of his right to appeal the denial.

Plaintiff obtained an $85,000 estimate to repair the wall from A&M Masonry and Concrete (A&M).[1] The statement noted the damage to the wall was increasing with each passing day as the two breached areas became increasingly destabilized. The A&M estimate was not remitted to Cusack or defendant. On June 22, 2008,[2] plaintiff arranged for Delta Inspection Services NJ, Inc. (Delta) to perform an engineering inspection of the retaining wall. The undated Delta report signed by Leo Stinson, a

professional engineer, was provided to plaintiff in August 2008. Stinson's report stated the vegetation growth behind the two failed areas of the wall was "not significant," but appeared consistent with plaintiff's assertion he trimmed the growth in the Fall of 2006. Stinson concluded "the stone retaining wall was maintained by [plaintiff] as indicated by the low vegetation growth in the two failed areas and by previous reporting."

On September 18, 2008, Robert J. Monaco, a Vallas engineer, attempted to perform an inspection of the retaining wall. Once Monaco commenced his inspection efforts, plaintiff told him to "Get out. You're not here for my benefit." Plaintiff then threatened to call the police, so Monaco left prior to completing his inspection.

On October 6, 2008, plaintiff filed an internal appeal of the denial, asserting the entire wall needed to be replaced. His submission was accompanied by the slightly more than one-page Delta report and an unsigned report from Vic's Masonry and Concrete, characterizing the necessary repairs as "significant" and suggesting "[t]he repairs are needed due to the damage [that] occurred during a bad storm, which was accompanied by high wind conditions," but did not include the proposed cost of repair.

In telephone conversations and letters, Cusack discussed problems in addressing the roof contractor and sought the opportunity to re-inspect the wall. On October 9, 2008, prior to any re-inspection, Andover reversed the denial of the retaining wall claim. The form letter stated: "The decision is not supported by the facts or properly applied legal principles: Returned to Claims Dept to adjust claim."

Cusack asked plaintiff to allow an adjuster to re-inspect the wall. Plaintiff agreed, but insisted the process be videotaped. Ultimately, following re-inspection, the adjuster valued the claim at $108,813. Plaintiff disagreed the wall could be replaced for that sum. Thereafter, on January 26, 2009, defendant issued a $62,569.65 check, representing the adjuster's estimated cost, depreciated by 43% because of the wall's age.

Dissatisfied, plaintiff returned the check and secured additional estimates for the wall's replacement, including one from A&M for $425,688 and another from an unspecified company for $365,485. Plaintiff also submitted a $198,335.20 estimate from Young's Landscape Management to correct the storm damage to his backyard.

Because the parties could not agree on an amount to satisfactorily compensate plaintiff for his loss, Cusack wrote to plaintiff invoking the Merrimack policy's "appraisal" procedure. Plaintiff objected and filed his Law Division action on March 5, 2009, alleging breach of contract and consumer fraud regarding the delay in completing the storm damage repairs. No allegations of bad faith were advanced.

Defendant moved for partial summary judgment and sought an order compelling plaintiff to submit to the appraisal process as required by the policy terms. The judge granted defendant's request, ordering plaintiff to submit to the appraisal process and dismissing his claims alleging consumer fraud and seeking attorney's fees. At the conclusion of the appraisal process, plaintiff was tendered payment of $100,750, the policy limits, for the damaged retaining wall.

Thereafter, on motion, all contract claims against Cusack were dismissed. And, by an order dated October 10, 2010, the trial judge allowed plaintiff to amend his complaint to add a claim alleging defendant's bad faith in delaying the resolution of his claim.

The case proceeded to trial in February 2011. Plaintiff presented his allegations of bad faith delay in payment for the roof repairs and the bad faith denial of the wall claim. Following the close of plaintiff's case, on defendant's motion, all claims regarding the roof were dismissed.

The jury was instructed on the legal issues regarding the bad faith coverage challenge. Following deliberations, the jury awarded plaintiff $624,023.20, representing the total estimated cost to replace the wall and landscape plaintiff's yard, without setoff for sums previously paid by defendant.

Defendant moved for a new trial or, in the alternative, for entry of a judgment notwithstanding the verdict or a molded verdict. The trial judge denied defendant's requests and added $195,583.34 in attorney's fees and $31,346.41 representing costs of the suit to plaintiff's award.

On appeal, defendant argues the trial judge erred in denying several pre-trial and post-trial motions and in instructing the jury. We will consider these arguments in the order presented.

Initially, defendant alleges the trial court erred in denying its motions, made during trial and directly following the verdict, to dismiss plaintiff's bad faith claim. We disagree.

A trial court's decision on a motion for a new trial because the jury verdict is against the weight of the evidence will not be reversed "unless it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1. See also R. 4:49-1(a); Johnson v. Scaccetti, 192 N.J. 256, 280 (2007); Caldwell v. Haynes, 136 N.J. 422, 431 (1994); Baxter v. Fairmont Food Co., 74 N.J. 588, 596 (1977).

> Neither trial nor appellate courts may grant a new trial unless it clearly appears there was a miscarriage of justice. Appellate courts should give considerable deference to a trial court's decision to order [or deny] a new trial because "the trial court has gained a `feel for the case' through the long days of the trial."
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> [Boryszewski v. Burke, 380 N.J. Super. 381, 391 (App. Div. 2005) (quoting Lanzet v. Greenberg, 126 N.J. 168, 175 (1991)) (internal citations omitted), certif. denied, 186 N.J. 242 (2006).]

In correcting any clear error or mistake of the jury, the trial judge may not substitute her judgment for that of the jury merely because she would have reached a different conclusion. Dolson v. Anastasia, 55 N.J. 2, 6 (1969). Thus, a 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[.]'" Ibid. (quoting Kulbacki v. Sobchinsky, 38 N.J. 435, 445 (1962)).

"`The standard for appellate review of a trial court's decision on a motion for a new trial is substantially the same as that controlling the trial court except that due deference should be made to its feel of the case, including credibility.'" Caldwell, supra, 136 N.J. at 432 (quoting Feldman v. Lederle Lab., 97 N.J. 429, 463 (1984)). See also Johnson, supra, 192 N.J. at 282; Dolson, supra, 55 N.J. at 6-7; R. 4:49-1(a) (stating "[t]he trial judge shall grant the 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"). Beyond these "intangibles," we must make an independent determination of whether a miscarriage of justice occurred. Carrino v. Novotny, 78 N.J. 355, 360-61 (1979). Within this context we consider defendant's argument.

The standard governing a claim for bad faith denial of an property insurance claim was set forth in Pickett v. Lloyd's, 131 N.J. 457, 461 (1993). An insured may press a claim against a insurer which fails to conscientiously and timely settle a meritorious property damage claim or withholds "benefits for reasons that are not even debatably valid and the economic losses sustained by the policyholder are clearly within the contemplation of the insurance company." Ibid.

In Pickett, the Supreme Court held every insurance contract contains a covenant of good faith and fair dealing regarding performance, so a breach of that covenant could result in damages exceeding the policy limits. Id. at 467 (stating "an insurance company owes a duty of good faith to its insured in processing a first-party claim."). The Court held:

> an insurance company may be liable to a policyholder for bad faith in the context of paying benefits under a policy. The scope of that duty is not to be equated with simple negligence. In the case of denial of benefits, bad faith is established by showing that no debatable reasons existed for denial of the benefits.
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> [Id. at 481.]

In applying this standard, an insurer must have no valid reason to delay processing the objectively determinable property damage claim and must have known or recklessly disregarded that it had no reasonable basis for denying the claim. Id. at 473. Essentially, "a claimant who could not have established as a matter of law a right to summary judgment on the substantive claim would not be entitled to assert a claim for an insurer's bad faith refusal to pay the claim." Ibid.

"[A]n insurer's obligation to exercise good faith `depend[s] upon the circumstances of the particular case.'" Alan Frankel, P.A. v. St. Paul Fire & Marine Ins. Co., 334 N.J. Super. 353, 359 (App. Div. 2000) (quoting Am. Home Assurance Co. v. Hermann's Warehouse Corp., 117 N.J. 1, 7 (1989)). "The boundaries of `good faith' will become compressed in favor of the insured depending on those circumstances" presented. Am. Home Assurance, supra, 117 N.J. at 7. "It is the nature of the insured's risk that determines the obligation required by the insurer to fulfill its duty of good faith and fair dealing." Frankel, supra, 334 N.J. Super. at 360.

At the close of plaintiff's evidence, defendant moved for dismissal. The judge denied the motion, concluding Wilson's reasons for denial of coverage for the damaged wall needed to be assessed by the jury, which would consider whether that denial was debatable or whether Wilson knew there was covered wind damage to the wall and denied the claim anyway.

The judge also considered plaintiff's proofs and determined he failed to establish a claim for bad faith delay in payment for the roof repairs because his expert said there was no problem with the timeline of defendant's response. Accordingly, plaintiff's claim for bad faith delay was dismissed.

On appeal, defendant suggests the judge treated plaintiff's claim for bad faith denial of coverage as if it was also based on bad faith delay in payment. Alternatively, defendant argues the evidence showed the denial of the claim was fairly debatable and consequently, not grounded in bad faith.

In Taddei v. State Farm Indemnity Co., we commented:

> Although a fairly debatable claim is a necessary condition to avoid liability for bad faith, it is not always a sufficient condition. Rather, we are satisfied that the appropriate inquiry is whether there is sufficient evidence from which reasonable minds could conclude that in the investigation, evaluation, and processing of the claim, the insurer acted unreasonably and either knew or was conscious of the fact that its conduct was unreasonable.
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> [401 N.J. Super. 449, 462 (2008) (quoting Skaling v. Aetna Ins. Co., 799 A.2d 997, 1011 (R.I. 2002)).]

Here, there were sufficient facts supporting a jury finding that defendant knew the wall suffered wind damage, an event fully covered by the Merrimack policy, thus making the denial of coverage unreasonable. Specifically, Cusack testified that the claim for the damaged retaining wall was denied by Wilson following review of the Vallas report. Cusack learned from plaintiff that Seeley was not an engineer when plaintiff objected to the denial of the claim absent an engineer's review. Wilson, in a May 20, 2008 memo, acknowledged Seeley was not an engineer and stated he did not like doing business that way. The memo also noted the Vallas report acknowledged wind was a factor in the wall's damage, but noted other factors compromised the wall's integrity prior to the storm. Wilson conceded sudden and accidental wind damage was a covered loss under the Merrimack policy provisions and testified he intended to have an engineer re-inspect the wall damage, but did not do so prior to denying plaintiff's claim a second time.

The trial judge properly found the jury could conclude from these unrefuted facts that defendant unreasonably denied plaintiff's claim for wind damage to the retaining wall. Accordingly, the denial of the motion for a new trial will not be disturbed. R. 2:10-1.

Defendant next attacks the trial judge's denial of its application to strike a portion of plaintiff's expert evidence. Barry J. Goldstein, an expert in insurance practice and claims, addressed the unreasonableness of the depreciation discount employed by defendant when calculating the cash value of plaintiff's loss. During cross-examination, the following exchange took place between defense counsel and Goldstein:

> Q: Now, what's the standard that you feel was deviated from in this particular case with regard to the calculation of depreciation?
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> A: There is nothing in any of the material that I reviewed which indicates how they calculated 43 percent [depreciation discount.]
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> Q: Isn't it a fact that you don't know what the standard that was deviated from in this case is?
>
> A: No, I think the standard is they're supposed to set forth in the claim file how they calculated the depreciation.
>
> ....
>
> Q: How do you know what's reasonable with regard to this wall?
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> A: What would be reasonable would be setting forth some standard that was relied upon rather than just a range of 40 to 50 percent.... In this particular case the outside adjuster recommended 19 percent depreciation and the company just disregarded his opinion.... Nineteen percent might well have been reasonable.
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> ....

> Q: Did you ever fix depreciation on a wall in all your years of experience?
>
> A: No, absolutely not.

During trial, defendant sought to strike this testimony, arguing Goldstein had never applied a depreciation factor when evaluating a one-hundred-year-old retaining wall, making his unsupported testimony inadmissible as a net opinion. See Buckelew v. Grossbard, 87 N.J. 512, 524 (1981) (stating an expert must "explain the facts and assumptions on which his conclusions are based."); see also Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002) (same). The trial judge rejected this argument, concluding Goldstein's statement was based on his experience. On appeal, defendant reasserts the same challenge.

The admissibility of expert testimony is guided by N.J.R.E. 702 and 703. N.J.R.E. 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise." In addition, N.J.R.E. 703, provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing[,]" recognizes that an expert's opinion must be founded on "facts or data." See Hisenaj v. Kuehner, 194 N.J. 6, 24 (2008).

Because an expert's opinion must be founded on "facts or data," the "net opinion rule `requires an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion.'" State v. Townsend, 186 N.J. 473, 494 (2006) (quoting Rosenberg, supra, 352 N.J. Super. at 401). "The net opinion rule has been succinctly defined as `a prohibition against speculative testimony.'" Koruba v. Am. Honda Motor Co., 396 N.J. Super. 517, 525 (App. Div. 2007) (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div.), certif. denied, 154 N.J. 607 (1997)), certif. denied, 194 N.J. 272 (2008).

A net opinion "present[s] solely a bald conclusion, without specifying the factual bases or the logical or scientific rationale that must undergird that opinion." Polzo v. Cnty. of Essex, 196 N.J. 569, 583-84 (2008) (footnote omitted). The rule "frequently focuses... on the failure of the expert to explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom." Buckelew, supra, 87 N.J. at 524. It also requires the expert's opinion be based on reasonable probabilities. Ibid. "Evidential support for an expert opinion is not limited to treatises or any type of documentary support, but may include what the witness has learned from personal experience." Rosenberg, supra, 352 N.J. Super. at 403 (citation omitted).

In reviewing the trial court's evidentiary ruling, we are limited to examining the decision for an abuse of discretion. Hisenaj, supra, 194 N.J. at 12. Trial courts are "granted broad discretion in determining both the relevance of the evidence to be presented and whether its probative value is substantially outweighed by its prejudicial nature." Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999).

Defendant's argument mischaracterizes Goldstein's testimony. The opinion regarding unreasonableness was directed to defendant's apparent arbitrary use of a 43% depreciation discount of the damaged wall's total value because it was unaccompanied by explanation or justification. Based on his experience, Goldstein asserted depreciation, when applied, should be tied to a specific source. Goldstein never opined regarding an appropriate discount percentage, he merely challenged the omitted methodology applied by defendant in arriving at the final discounted value. We conclude the trial judge properly exercised her discretion on this issue.

Defendant also challenges the rejection of its request to charge the jury regarding a claimed defense. Defendant suggests it was reasonable to refer the matter to an outside adjuster, Cusack, and to rely on Cusack's opinion when denying plaintiff's claim. The trial judge declined to adopt the specific language offered by defendant. Rather, she charged the jury as follows:

> For the company to be held liable to the plaintiff, the plaintiff must prove something more than simple negligence. This means that a simple mistake alone is not enough to prove bad faith. Rather, an insurance company is liable to its insured for denying a claim where the plaintiff shows that there is no debatable reason for the denial of the benefits. Put another way, the plaintiff must show first the absence of a reasonable basis for denying the [claim] and, second, the insurance company's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.... Here reckless means that the insurance company was aware of the covered claim and consciously disregarded it. You are instructed that an insurance company is entitled to challenge a claim and litigate it if the company has a reasonable basis to deny the claim. Also, you are instructed that an insurance

> company is entitled to debate honestly the amount of damages to be paid as benefits under the claim when such issue is fairly debatable on the facts or law.

Defendant urges reversal is necessary as a matter of law because its reasonable reliance on Cusack's advice constituted an adequate explanation for denying the claim, negating bad faith. We are not persuaded.

First, the charge as given, viewed as a whole, Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 418 (1997), outlined the function of the jury, set forth the issues, "correctly state[d] the applicable law in understandable language, and plainly spell[ed] out how the jury should apply the legal principles to the facts as it may find them." Velazquez v. Portadin, 163 N.J. 677, 688 (2000) (internal citations and quotation marks omitted). Noting the charge properly conveyed the law to the jury and did not "mislead or confuse," leads us to conclude the charge cannot be said to have been prejudicially erroneous. Zappasodi v. State, 335 N.J. Super. 83, 89 (App. Div. 2000).

Second, the authority relied upon by defendant, in asserting this contention, addressed reversal of summary judgment because presentation of a claimed defense in reliance on an outside agent was a material factual dispute for the jury. See McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 563 (1993); Universal Rundle Corp. v. Commercial Union Ins. Co., 319 N.J. Super. 223, 249 (App. Div), certif. denied, 161 N.J. 149 (1999). Defendant was given the opportunity to fully vet plaintiff's assertions and explain its defenses, including its reliance on Cusack's recommendations.

Third, although the existence of the defense is a legal issue, whether the defense applied in this case is a factual dispute. Each side presented facts supporting or opposing the issue of whether defendant's conduct amounted to bad faith. As explained by the trial judge, this question was squarely presented to the jury. Nothing suggests the jury disregarded its obligation to consider the testimony of all fact and expert witnesses, who presented information regarding defendant's knowledge of the Vallas report's contents, Cusack's recommendation, the provisions of the Merrimack policy, and the various inspections of the wall damage. As we noted in our prior discussion, sufficient evidence was offered and apparently accepted by the jury as credible, supporting its finding of bad faith.

In a related point, defendant attacks the trial judge's failure to issue a curative instruction after plaintiff, in summation, stated: "[Goldstein] told you that the administrative regulation required them to have that information in the file. There was nothing, nothing in the file for Mr. Goldstein to look at to figure at how they arrived at 19 percent, 40 to 50 percent, 43 percent." Defendant immediately objected, arguing no regulatory violation was proffered. The trial judge overruled the objection, noting Goldstein testified "the regulations require that the file reflect how the depreciation was arrived at." On appeal, defendant maintains the court erred in failing to strike counsel's comment. We disagree.

Counsel's "[s]ummation commentary... must be based in truth," and counsel may not "misstate the evidence nor distort the factual picture." Bender v. Adelson, 187 N.J. 411, 431 (2006) (citations and quotation marks omitted). Accord Colucci v. Oppenheim, 326 N.J. Super. 166, 177 (App. Div. 1999), certif. denied, 163 N.J. 395 (2000). "When summation commentary transgresses the boundaries of the broad latitude otherwise afforded to counsel, a trial court must grant a party's motion for a new trial if the comments are so prejudicial that `it clearly and convincingly appears that there was a miscarriage of justice under the law.'" Bender, supra, 187 N.J. at 431 (quoting R. 4:49-1(a)).

A trial court's rulings relative to objections during summation are reviewed under the abuse of discretion standard. Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 392-93 (2009). During summation, "counsel may argue from the evidence any conclusion which a jury is free to arrive at" so long as the language used does not go beyond the bounds of legitimate argument. Spedick v. Murphy, 266 N.J. Super. 573, 590-91 (App. Div.), certif. denied, 134 N.J. 567 (1993). Moreover, "[c]ounsel may draw conclusions even if the inferences that the jury is asked to make are improbable, perhaps illogical, erroneous or even absurd[.]" Ibid.

In light of this standard, having considered Goldstein's testimony, we conclude the summation commentary falls within acceptable bounds and cannot be said to have been so prejudicial that "it clearly and convincingly appears that there was a miscarriage of justice under the law." R. 4:49-1(a).

Defendant also argues the court's denial of its motion for mistrial was error. On the trial's fourth day, the court clerk believed she observed plaintiff conversing with a juror while the court and counsel were engaged in a side bar conference. Without the jury present, the judge asked plaintiff what occurred and he denied he spoke to a juror. On the next scheduled date for trial, the jurors were questioned individually regarding whether he or she participated in or witnessed any juror speak to one of the

parties. Each juror denied knowledge of such an interaction.

However, it was learned that juror one had previously asked for plaintiff's help with her phone while waiting in the hallway for the courtroom to open and plaintiff responded he could not talk to her. Juror one also acknowledged she discussed the occurrence with other jurors, when asked "you were out there with [plaintiff], did you... talk?" She responded affirmatively to her colleagues' inquiry, stating "he helped me with my Blackberry because I was having problems with it."

The trial judge dismissed juror one and polled the panel to discern who had knowledge of the interaction between plaintiff and juror one. Several jurors confirmed the nature of the conversation as related by juror one. The court polled the panel a third time to inquire whether any juror would be prejudiced by observations of plaintiff conversing with juror one.

Defendant moved for a mistrial, stating plaintiff attempted to aid the juror or generally ingratiate himself to achieve a favorable impression. Considering each remaining juror affirmed an ability to remain fair and impartial, the judge denied the motion, satisfied no prejudice based on the interaction resulted. Defendant challenges that ruling as error.

"Generally, we defer to the trial court's decision on a mistrial motion unless there is a clear abuse of discretion." Barber v. ShopRite of Englewood & Assocs., Inc., 406 N.J. Super. 32, 51 (App. Div.), certif. denied, 200 N.J. 210 (2009). We recognize "[j]udicial discretion connotes conscientious judgment, not arbitrary action; it takes into account the law and the particular circumstances of the case before the court." Higgins v. Polk, 14 N.J. 490, 493 (1954). See also DeVito v. Sheeran, 165 N.J. 167, 198 (2000) (stating appellate review affords substantial deference to trial court's evidentiary rulings).

"`In addressing a motion for a mistrial, the judge is ordinarily in the best position `to gauge the effect of a prejudicial comment on the jury in the overall setting.'" Barber, supra, 406 N.J. Super. at 51 (quoting State v. Winter, 96 N.J. 640, 647 (1984)). "Whether manifest necessity mandates the grant of a mistrial depends on the specific facts of the case and the sound discretion of the court." State v. Allah, 170 N.J. 269, 280 (2002) (citing State v. Loyal, 164 N.J. 418, 435 (2000)). When "the court has an appropriate alternative course of action[,]" it should deny a request for a mistrial. Id. at 281 (citing Loyal, supra, 164 N.J. at 436-37). With these standards in mind, we address defendant's contentions.

Here, when confronted with the possibility of misconduct by a party and a juror, the judge cautiously and fully explored the facts and circumstances of any party-juror interactions, as well as the impact of said actions. Juror one approached plaintiff and asked for assistance with her telephone. Plaintiff immediately explained they could not speak to one another. After fully vetting the circumstances, the judge characterized the facts as "neutral." As a precaution, she dismissed the offending juror and was "satisfied that if [the remaining jurors] all tell me that they can decide this case fairly and impartially, then... we should proceed."

Not every instance of jury misconduct warrants a mistrial. We conclude the trial judge made "a probing inquiry into the possible prejudice caused by any jury irregularity" when the allegation of jury misconduct was raised. State v. Scherzer, 301 N.J. Super. 363, 487-88 (App. Div.), certif. denied, 151 N.J. 466 (1997). On this record, while the contact between juror one and plaintiff clearly violated the judge's instructions, we do not find the nature of the contact compromised defendant's right to a fair trial. We decline to interfere with the trial judge's determination that the misconduct had no capacity to lead the jury to reach conclusions contrary to the legal proofs presented.

In another point, defendant argues plaintiff's trial testimony warranted a mistrial. In the course of the trial, defendant objected to plaintiff's statements, arguing they exceeded the scope of the questions and editorialized on issues in dispute. Each time, defendant moved for a mistrial. The judge sustained the objections and immediately issued curative instructions, directing the jury to disregard plaintiff's statements. Defendant maintains the jury was prejudiced as the instructions insufficiently assured a fair trial.

During the first instance, plaintiff commented that the delay in the roof repair occurred because defendant sought multiple inspections and suggested "he had a job [and] other responsibilities" and could not "devote [his] life to getting it fixed." He then made statements regarding an instance of damage to his residence by the roofing contractor. The judge immediately directed the jury to disregard the statements, repeating plaintiff's comments regarding the damage were "not part of the case." Further, Judge Suter explained the testimony was struck from the record so the jury "may not rely upon any of that in your deliberations."

Regarding defendant's review of the initial denial of the claim for the wall repair, plaintiff volunteered his belief defendant agreed to reconsider his claim as a result of "the pressure that the State would put on them[.]" Counsel moved for a mistrial, which was denied. The judge turned to the jury stating:

> let me instruct you that in this trial there will be no evidence, no facts at all that the state brought pressure to bear on the insurance company. And so that testimony should be stricken from the record... [a]nd you're not to rely on that in any decision that you would make. There will be no facts to that effect in this case.

On other occasions, plaintiff made statements regarding the amounts determined by different appraisers, his opinion the roof was not properly repaired, further damage to the roof was occurring, that when defendant stated it would accept the claim for the wall, and that defendant "told me things before" and "a claim for the roof... hadn't been funded." At side bar, the judge told counsel plaintiff's improper conduct might "sink his case." After each instance, the judge directly and forcefully told the jury to disregard the statements as they were not responsive and the issues raised "were not in this case." After plaintiff's fifth misstatement, the court again denied the motion for mistrial and told the jury:

> let me reiterate again that there is no issue in this case about damages to the roof. There will be no testimony about improper repairs to the roof, and the only issue in this case has to do with the alleged bad faith of... defendant[.] And so to the extent that there was any testimony that dealt with the roof, that is stricken and you are not to rely upon that in your deliberations.

Defendant spent great care in cross-examining plaintiff, probing all issues and challenging his credibility.

Later, when charging the jury the judge added:

> Now any testimony that I struck from the record, and I think there were some times when I struck some things from the record, that is not evidence. If I struck it, it's out, okay? And should not be considered by you in your deliberations. And this means that even though you may remember the testimony, you're not to use it in your discussions or in your deliberations.

Following our detailed review, we conclude plaintiff's inappropriate testimony, individually or in the aggregate, did not deprive defendant of a fair trial. See Diakamopoulos v. Monmouth Med. Ctr., 312 N.J. Super. 20, 37 (App. Div. 1998) (holding too many errors related to relevant matters, including the failure to issue curative instructions, in the aggregate, rendered the trial unfair necessitating a new trial); Hofstrom v. Share, 295 N.J. Super. 186, 193 (App. Div. 1996), certif. denied, 148 N.J. 462 (1997) (noting that where an attorney persists in making unwarranted prejudicial appeals to a jury which taint the verdict, we have often held that a reversal is in order).

In this matter, it is clear the trial judge fully understood her role in maintaining the balance and fairness of the trial. In the sidebar conferences, serious consideration to each objectionable comment was made and stern warnings were issued to plaintiff. Importantly, firm, clear, and immediate instructions were issued to the jury properly instructing it on each of the issues. Moreover, any claims regarding the roof were dismissed following plaintiff's case, removing them from consideration by the jury. We have no reason to doubt the jury followed the court's instructions. See Verdicchio v. Ricca, 179 N.J. 1, 36 (2004) ("Each of those statements was improper and the trial court immediately identified each as such. The court went on to instruct the jury regarding the improper statements, declaring that they should not be considered during the deliberations on the case."). More important, we are not persuaded this record demonstrated defendant was denied a fair trial.

The final two points raised by defendant's appeal challenge the damages awarded. First, defendant asserts it was error to award attorney's fees in light of the June 12, 2009 order dismissing portions of plaintiff's complaint including a claim for attorney's fees. Second, defendant seeks to mold the verdict, reducing it by the amount previously remitted on the claim.

The trial judge viewed the award of attorney's fees as foreseeable because the damages resulted from defendant's bad faith denial of plaintiff's claim. A claim for a bad faith denial of a claim sounds in contract, such that "the familiar principles of contract law will suffice to measure the damages." Pickett, supra, 131 N.J. at 474.

Generally, shifting of attorneys' fees is disfavored. Litton, supra, 200 N.J. at 385. However, "a prevailing party can recover those fees if they are expressly provided for by statute, court rule, or contract." Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 440 (2001). Rule 4:42-9(a)(6) provides an award of attorneys fess is allowable "[i]n an action upon a liability or indemnity policy of insurance, in favor of a successful claimant." (Emphasis in original).

Defendant argues the law of the case was set when the court dismissed plaintiff's claims for attorney's fees along with the consumer fraud claims, suggesting the subsequent amendment to the complaint cannot alter the prior determination. We conclude this argument lacks merit. R. 2:11-3(e)(1)(E).

Finally, defendant maintains the court should have reduced the verdict by $100,750, to account for the policy limit paid to plaintiff to compensate for the damage to the retaining wall, limited by the Merrimack policy provisions. In post-trial motions to mold the verdict, defendant suggested the jury's questions reveal confusion on the amount of damages and they neglected to reduce the verdict by the amount paid. The trial judge rejected these contentions, stating:

> the jury heard all about the [$100,750 policy payment] and understood that [plaintiff] had been paid that money. There was testimony that he utilized some of that to try to... put some things down there to stop the damage from occurring. They obviously believed — heard that, believed all that. They gave an award.

The record contains plaintiff's testimony discussing measures undertaken to minimize additional damage to the wall and his rear yard. He discussed efforts including "backfilling the wall and trying to reduce how much water [is] getting behind whatever was left and slow the progression." Further, plaintiff described the construction of an access road to make repairs to the wall. Plaintiff was not specifically asked to quantify his monetary expenditures. However, his receipt of payment pursuant to the policy was squarely before the jury, suggesting the jury determined consequential damages were as awarded.

> Although an appellate court has a duty to canvass the record to determine whether a jury verdict was incorrect, that verdict should be considered "impregnable unless so distorted and wrong, in the objective and articulated view of a judge, as to manifest with utmost certainty a plain miscarriage of justice."
>
> Kassick v. Milwaukee Elec. Tool Corp., 120 N.J. 130, 135 (1990) (quoting Carrino v. Novotny, 78 N.J. 355, 360 (1979)).]

All damages evidence should be viewed in the light most favorable to the prevailing party, with deference given to the trial court's feel for the case. Boryszewski, supra, 380 N.J. Super. at 391.

Following our review of the record, we cannot conclude the jury's award is "so contrary to the weight of the evidence as to give rise to the inescapable conclusion that it [wa]s the result of mistake, passion, prejudice, or partiality[.]" Aiello v. Myzie, 88 N.J. Super. 187, 194 (App. Div.) (citing Hager v. Weber, 7 N.J. 201, 210 (1951)), certif. denied, 45 N.J. 594 (1965). Accordingly, we decline to disturb the jury's verdict. See Dolson, supra, 55 N.J. at 6.

Affirmed.

[1] An initial slightly lower estimate was revised to include a higher grade of cement.

[2] Delta's inspection report recites the date of inspection as both June 22 and July 22. We have chosen to use the June date, relying on plaintiff's testimony.