LOURDES MARRERO, Plaintiff-Appellant,

v.

SUNIL J. WIMALAWANSA, UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, ROBERT WOOD JOHNSON MEDICAL SCHOOL, Defendants-Respondents.

No. A-3922-11T2.

Superior Court of New Jersey, Appellate Division.

Argued December 18, 2012.
Decided July 9, 2013.

Dominic F. Amorosa argued the cause for appellant (Dominic F. Amorosa and Schiller & Pittenger, P.C., attorneys; Mr. Amorosa, of counsel and on the briefs; Jay B. Bohn, on the briefs).

Eric L. Harrison argued the cause for respondent Sunil J. Wimalawansa (**Methfessel & Werbel**, attorneys; Mr. Harrison, of counsel and on the brief; Michael Poreda, on the brief).

Walter F. Kawalec, III, argued the cause for respondent University of Medicine and Dentistry of New Jersey, Robert Wood Johnson Medical School (Marshall, Dennehey, Warner, Coleman & Goggin, attorneys; Mr. Kawalec and Richard L. Goldstein, on the brief.)

Before Judges Fisher, Waugh, and St. John.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

Marrero v. WIMALAWANSA, NJ: Appellate Div. 2013

Plaintiff Lourdes Marrero appeals orders entered by the Law Division in connection with her whistleblower and tort claims against defendants Sunil J. Wimalawansa and the University of Medicine and Dentistry of New Jersey (UMDNJ). We affirm, but also remand to the Law Division for entry of a judgment for $100 in nominal damages.

I.

We discern the following facts and procedural history from the record on appeal.

Marrero, a radiologic technician, began working at UMDNJ's division of endocrinology twenty hours per week on a part-time basis in 2002. Marrero's job was to administer bone-density scans, known as DXA scans.[1] Wimalawansa, a medical doctor, was then chief of the endocrinology division and Marrero's supervisor. Wimalawansa read and interpreted the DXA scans administered by Marrero and other technicians.

Several months after Marrero started working at UMDNJ, new technology was installed that enabled Marrero to transmit the scan results directly from her computer to the computer in Wimalawansa's office. After Wimalawansa read the scan, he prepared a report, which was placed in the patient's file and distributed to the requesting physician by Marrero. Marrero was then responsible for sending a form to UMDNJ's billing department, which would bill the patient's insurance company or other payor.

In the summer of 2003, Wimalawansa complained to Marrero that he was experiencing computer problems that impaired his ability to read scans and issue the reports. He requested Marrero to contact UMDNJ's information

technology department to arrange a repair. Marrero suggested that Wimalawansa come to her office and read the scans on her computer pending resolution of the problem. According to Marrero, Wimalawansa answered her suggestion in a "very nasty" manner. Marrero contacted the IT department, but the problem remained unresolved indefinitely.

By July 2003, Marrero observed that Wimalawansa was late in preparing reports. She and Wimalawansa communicated about the ongoing technological problems, and she informed him that she had received several telephone calls from doctors waiting for reports on their patients. At some point in 2003, Marrero reported Wimalawansa's reporting delays to Alec Cohen, an assistant to Wimalawansa's supervisor. Marrero met with Cohen and again complained about Wimalawansa's delays in April 2005.

When Wimalawansa learned that Marrero had complained to Cohen, he warned her to stop speaking with Cohen about the problem. According to Marrero, Wimalawansa made comments to her in front of others, such as "I do not want to hear what you have to say, all you do is speak garbage." Marrero testified that Wimalawansa would occasionally come into her office and tell her "very aggressively, I want to talk to you, and would... glare" at her. Whenever Wimalawansa asked to speak with her privately, Marrero requested that a nurse be present.

In 2007, Marrero made an internal complaint in which she alleged that Wimalawansa had been altering the dates on medical records since June 2006, and that he sometimes lost medical images when doing so. She further alleged that Wimalawansa failed to read patient scans in a timely manner. Her allegations were substantiated after an internal investigation by UMDNJ.

In August 2007, Marrero sought other employment. She decided to switch jobs because she was feeling pressure from Wimalawansa and believed she might lose her job. Marrero found another job and submitted her resignation in September, to be effective in October.

Apparently due to various internal allegations or disagreements among UMDNJ administrators, Wimalawansa was removed as chief of the endocrinology division in February 2008, but he continued to work for the division and remained in charge of the DXA unit. Also in February, Louis Amorosa, M.D., who succeeded Wimalawansa as chief of the endocrinology division, contacted Marrero and invited her to return to UMDNJ as a DXA scan technician. Marrero accepted, and returned in August 2008. On her return, Marrero was supervised by Julia Grimes, D.O.

Marrero asserts that Wimalawansa harassed her after she returned to UMDNJ and tried to have her terminated in retaliation for her role in the earlier investigation of his conduct. According to Marrero, Wimalawansa regularly glared at her when he saw her in the workplace, which re-ignited her fear and anxiety about losing her job.

On October 6, 2008, Wimalawansa wrote an email to Cohen and four others, which stated in part:

> Meanwhile, you hired the DXA technologist [Marrero] who was terminated last year due [to] the combination of her refusal to decrease work-hours voluntarily and due to her poor quality of work. You and I discussed this many times last year; especially her inability to improve even after I sent her for three independent full-day outside specific DXA training courses, for which I paid her tuition fees of about $4,500. You as a former experienced radiology person, agreed with these, especially her lack of capabilities of properly carrying out DXA BMD testing studies in our patients.
>
> ... I am copying this to HR for her input and I request an investigation into the validity of this appointment of this part time DXA technologist[] (which is in fact not warranted).

According to Marrero, the assertion that she was terminated for cause was false. She points to the fact that Wimalawansa had given her good evaluations during the period he was her direct supervisor.

In an October 10 email to Cohen and others, Wimalawansa complained that there was not enough work for two technicians and that having two was a "financial scandal." Wimalawansa asked Cohen to "advi[s]e the HR immediately to eliminate the new DXA (and the reading faculty) hires (before the division waste[d] further resources), as there is

absolutely no DXA volume or any other reason to justify these two inappropriate hires." Marrero was "the new DXA."

Wimalawansa's October 16 email to Cohen made additional complaints. After alleging that Marrero forgot to show up for patient scans, Wimalawansa wrote:

> This highly inappropriate (due to multiple reasons) per-diem DXA technologist hire needs to be terminated immediately. I request Alec Cohen as the responsible person, to inform this to HR this week; without further wasting funds and the credibility.

Although Marrero did not receive the three emails until after this litigation began, she heard from a co-worker that Wimalawansa was "starting to push [her] out" again. According to Marrero, she became more nervous and fearful that she would lose her job after she learned about Wimalawansa's efforts. She claims Wimalawansa sent the emails to a nurse who worked with her, hoping the nurse would tell her about their contents.

In December, Wimalawansa taped a note to the DXA computer table used by Marrero and another technician when they administered scans. The note stated that only the other technician was to administer scans on his patients and that any violation of the rule would be "a serious ethical issue." According to Marrero, this caused her further anxiety and embarrassment because patients who read it questioned her credentials.

In April 2009, Wimalawansa sent an email to five individuals, including Cohen and the chief operating officer of UMDNJ, in which he criticized Amorosa and asserted it was inefficient to have three part-time staff members in the division. He stated, in part, that

> two of them were laid off before in part due to poor quality of work, none of these positions were advertised nor interviewed; hence I was told by the HR that these three appointments are non-complaint with the UMDNJ policies/regulations (i.e., they were appointed by the HR on trust basis as per the "word"/request of Mr. Cohen).

Marrero found a portion of the email on her desk a few days after Wimalawansa sent it. According to Marrero, Wimalawansa's false statement that she was laid off for poor quality of work caused her distress.

In June, Wimalawansa sent an email to a UMDNJ official alleging an ongoing issue of food being eaten in the bone density unit, which he maintained was against policy. The email stated, in part:

> Yesterday, again the technologist Ms. Lourdes Marrara [sic], and today a physician (Julia Grimes, DO), having food there (right now). If this is inappropriate and a... violation of set policies and procedures, please arrange to stop this habit immediately, as neither one seems to [u]nderstand this.

Marrero asserts that this allegation was false and an effort to have her disciplined. She subsequently received an email from the University official, who reiterated the UMDNJ policy prohibiting eating in laboratories and stated that personnel violating the policy "are subject to disciplinary action."

In September, Wimalawansa sent a memorandum to twelve people, including Marrero, state regulators, and some of Marrero's superiors at UMDNJ. It stated, in part:

> As with the previous 8 years, I will continue to be the contact person for all compliance, health and safety, and other issues related to this DXA [machine], including the user authorization. There-fore, as per the above-mentioned (and REHS), all users must be reported to me. There had been several occasions where some users have violated established policies and procedures including eating and drinking in the DXA room. They were informed several times not to do so, and subsequently, violators were formally warned by the health and safety officers from the UMDNJ.
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> ....
>
> Moreover, please note that just because someone attended `a paid DXA course' or applied for a radiation

> license, does not mean that he or she has sustained adequate knowledge to use the machine nor to create DXA reports....
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> ... I am well aware of the rules and regulations that pertain to DXA machines, and in particular in the state of New Jersey. Violations of such will not be tolerated.

According to Marrero, the memorandum, specifically the quoted sections, was intended to harass her. She asserts that the references to "a paid DXA course" and lack of "adequate knowledge to use the machine" were defamatory.

Marrero filed a complaint against Wimalawansa in July 2009. She alleged libel per se and intentional infliction of emotional distress. In August, she filed an amended complaint to include additional claims and to add UMDNJ as a defendant. The amended complaint alleged violation of the Conscientious Employee Protection Act (CEPA)[2] and intentional infliction of emotional distress against both defendants, libel per se against Wimalawansa, negligent hiring and violation of the Worker Health and Safety Act[3] against UMDNJ, and tortious interference with economic advantage against Wimalawansa.

Following discovery, the defendants brought motions for summary judgment. In April 2011, the motion judge dismissed the CEPA claims against both defendants and dismissed all other causes of action against UMDNJ. Marrero moved for reconsideration, arguing that newly discovered emails sent by Wimalawansa after she had returned to UMDNJ but unknown to her prior to filing the complaint demonstrated that harassing activity continued through her second period of employment. After re-opening discovery, the judge reinstated the CEPA claims against both defendants.

The case was tried before a jury in January and February 2012. At the conclusion of Marrero's case in chief, the defendants moved for an involuntary dismissal of the CEPA claims. They argued that Marrero failed to demonstrate any actionable conduct on the part of defendants within the one year limitations period established for CEPA claims. N.J.S.A. 34:19-5. The trial judge granted the motion and dismissed the CEPA claims.

The judge permitted Marrero's remaining claims against Wimalawansa to go to the jury. The jury returned a verdict in favor of Marrero on the libel claim. However, the jury awarded Marrero no damages on that claim. The jury found in favor of Wimalawansa on the intentional infliction and tortious interference claims.

Marrero's subsequent motions for (1) judgment against both defendants on the CEPA claim or, alternatively, a new trial on the CEPA claim and (2) a new trial on damages for the libel claim were denied. This appeal followed.

II.

On appeal, Marrero argues that the trial judge erred (1) in granting defendants' motion for an involuntary dismissal of her CEPA claims at the close of her case, (2) in evidential rulings during the trial that she asserts prejudiced her claim for damages, and (3) in denying her motion for a new trial on the issue of damages.

A.

We turn first to the issue of whether the judge erred in granting a directed verdict on the CEPA claims.

Motions for involuntary dismissal in accordance with Rule 4:37-2(b), as well as motions for judgment occurring at the close of evidence, Rule 4:40-1, or after the verdict, Rule 4:40-2(b), are governed by a similar standard: "[I]f, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied. ..." Verdicchio v. Ricca, 179 N.J. 1, 30 (2004) (quoting Estate of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000)). Reviewing courts apply the same standard. Barber v. ShopRite of Englewood & Assocs., Inc., 406 N.J. Super. 32, 52 (App. Div.), certif. denied, 200 N.J. 210 (2009). It is well-established that our review of a judge's conclusions of law is plenary. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial

court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.").

CEPA protects an employee from retaliation by an employer for whistle blowing. "CEPA is a civil rights statute and is analyzed using the framework for retaliatory discharge claims under Title VII and the New Jersey Law Against Discrimination (`LAD')." Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 377 (Law Div. 2002), aff'd, 362 N.J. Super. 245 (App. Div.), certif. denied, 178 N.J. 32 (2003).

A valid CEPA claim has four requirements: (1) the employee "reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation..., or a clear mandate of public policy"; (2) the employee "performed a `whistle-blowing' activity" specified in N.J.S.A. 34:19-3; (3) the employer took "an adverse employment action" against the employee; and (4) "a causal connection exists between the whistle-blowing activity and the adverse employment action." Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).

Employer actions that fall short of employee "discharge, suspension, demotion, transfer, or loss of income" may be considered adverse employment action, but only in certain circumstances. Cokus, supra, 362 N.J. Super. at 378. "Although actions short of termination may constitute an adverse employment action within the meaning of the statute, `not everything that makes an employee unhappy is an actionable adverse action.'" Ibid. (quoting Montandon v. Farmland Indus., 116 F.3d 355, 359 (8th Cir. 1997)). Moreover,

> [i]n some situations, it is possible for retaliatory harassment to amount to adverse employment action. ... Harassment can rise to such level when the harassment constitutes a constructive adverse employment action. Thus, adverse employment action would be proven if defendants create such an intolerable situation that plaintiff is forced to transfer to a less desirable position. But, generally, harassment alone is not an adverse employment action.
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> [Shepherd v. Hunterdon Developmental Ctr., 336 N.J. Super. 395, 419 (App. Div. 2001) citations omitted), aff'd in part, rev'd in part, 174 N.J. 1 (2002).]

Giving Marrero the benefit of all favorable inferences from the evidence adduced at trial, as we are required to do by Verdicchio, supra, 179 N.J. at 30, we begin our analysis with the assumption that Marrero's complaints to her superiors about Wimalawansa during her first period of employment at UMDNJ constituted whistleblowing within the meaning of N.J.S.A. 34:19-3(a) and that Wimalawansa's actions involving Marrero during her second period of employment were taken by him in retaliation for her earlier whistleblowing. Consequently, Marrero has satisfied the first and second elements outlined in Dzwonar, supra, 177 N.J. at 462. With regard to the fourth factor, Wimalawansa's actions were clearly motivated by a desire to retaliate. The question before us is whether the facts in the record, viewed most favorably to Marrero, would warrant a finding of the third Dzwonar element, an adverse employment action. If they do, then Marrero presented a prima facie claim under CEPA and the trial judge erred in granting defendants' motion for involuntary dismissal.

We begin by noting our agreement with the trial judge that reliance on any retaliatory actions by Wimalawansa that took place during Marrero's first period of employment is barred by the one-year statute of limitations contained in N.J.S.A. 34:19-5. Marrero left UMDNJ at a time when she knew or should have known that she engaged in whistleblowing and that Wimalawansa, who was then her direct supervisor, was engaged in activity that could be described as retaliatory. Indeed, she attributes her departure to Wimalawansa's conduct and characterizes it as effectively terminating her employment, suggesting a con-structive discharge. "[I]n a constructive discharge situation, the period of limitations begins to run on the date that the resignation is tendered." Daniels v. Mut. Life Ins. Co., 340 N.J. Super. 11, 13 (App. Div.), certif. denied, 170 N.J. 86 (2001). Marrero's failure to file a timely claim based upon that allegedly retaliatory conduct bars any claim premised on that conduct.

Marrero argues that there was a continuing violation of CEPA that encompassed Wimalawansa's conduct during both periods of employment, as a result of which her complaint was not untimely with respect to Wimalawansa's earlier conduct. We disagree.

The continuing violation doctrine provides that "[w]hen an individual is subject to a continual, cumulative pattern of tortious conduct, the statute of limitations does not begin to run until the wrongful action ceases." Wilson v. Wal-Mart Stores, 158 N.J. 263, 272 (1999). "[T]he cumulative effect of a series of discriminatory or harassing events represents a single cause of action for tolling purposes and... the statute of limitations period does not commence until the date of the final act of harassment." Id. at 273.

"The underlying purpose of the continuing violation doctrine is `to permit a plaintiff to include acts whose character... was not apparent at the time they occurred.'" Stoney v. McAleer, 417 N.J. Super. 574, 579 (App. Div. 2010) (quoting Hall v. St. Joseph's Hosp., 343 N.J. Super. 88, 101 (App. Div. 2001), certif. denied, 171 N.J. 336 (2002)) (internal quotation marks omitted). "It is not intended, however, to permit a party to `aggregate[e]... discrete... acts for the purpose of reviving an untimely act... that the victim knew or should have known was actionable.'" Ibid. (quoting Roa v. Roa, 200 N.J. 555, 569 (2010)). Thus "the continuing violation doctrine is appropriate in the context of a continual, cumulative pattern of tortious conduct, as opposed to the occurrence of discrete... acts." Id. at 579 (internal quotation marks and citations omitted).

In this case, there were two discrete periods of employment and we are satisfied that Marrero had sufficient information when she resigned from her initial employment at UMDNJ to have filed a CEPA action based on that conduct. Consequently, she cannot invoke the continuous violation doctrine to preserve her claims from the earlier period. To hold otherwise would permit Marrero to "aggregate[e]... discrete... acts for the purpose of reviving an untimely act... that the victim knew or should have known was actionable," Roa, supra, 200 N.J. at 569, in contravention of our holding in Stoney, supra, 417 N.J. Super. at 579.

Although Wimalawansa was Marrero's direct supervisor during her first period of employment, he was not her supervisor during her second period of employment. She acknowledged at trial that he was not involved at all in her evaluation or supervision after she returned to UMDNJ. In fact, according to Marrero, Wimalawansa never spoke to her.

While the evidence at trial, viewed in Marrero's favor, would certainly support her assertion that Wimalawansa was attempting to have her employment terminated in retaliation for her conduct as a whistleblower, it is clear that he was markedly unsuccessful in those endeavors. Marrero was not fired, suspended, demoted, disciplined, or transferred, nor was her compensation diminished. See N.J.S.A. 34:19-2(e).

Marrero argues, however, that she was subjected to a hostile work environment sufficient to constitute an "adverse employment action... in the terms and conditions of employment" within the meaning of N.J.S.A. 34:19-2(e). Adverse employment action can be sustained under a theory of hostile work environment, but, as already noted, only under limited circumstances.

Such a "hostile work environment claim requires severe or pervasive conduct that objectively alters the conditions of employment and is hostile or abusive." Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 28 (2002) (internal quotation marks omitted). In other words,

> to sustain a claim of hostile work environment based upon an employee engaging in whistleblowing activities under CEPA, a plaintiff must establish that the conduct complained of would not have occurred but for his or her whistleblowing activities, and that it was severe or pervasive enough to make a reasonable person in the employee's shoes believe that the conditions of employment had been altered and the working environment had become hostile and abusive to the point that the conduct in question is the equivalent of an adverse action.
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> [Cokus, supra, 362 N.J. Super. at 387.]

Marrero testified that Wimalawansa frequently glared at her when he was within sight. Staring, glaring, and conduct that can be characterized as boorish do not qualify as severe or pervasive conduct. Shepherd, supra, 174 N.J. at 25-26; Cokus, supra, 362 N.J. Super. at 382-83. In addition, talking to others about a whistleblower "behind closed doors[] neither creates a hostile environment nor adverse action under CEPA." Cokus, supra, 362 N.J. Super. at 382-83.

Marrero was not a recipient of the emails sent by Wimalawansa on October 6, October 10, October 16, and April 1. It is implicit in the definition of a hostile work environment that the aggrieved party be aware of the hostility at the time it was taking place. The fact that a third person told Marrero that Wimalawansa was trying to push her out, and that Marrero saw a portion of the April 1 email, does not provide the required pervasiveness or severity of conduct required for a hostile work environment.

Wimalawansa also did not send Marrero a copy of the June 19 email about her and a doctor allegedly eating in the bone density unit. However, this email resulted in a notice to Marrero informing her that eating in UMDNJ laboratories was a policy violation, and advising that personnel who violate policy are subject to discipline.

Because Wimalawansa was not Marrero's supervisor, Marrero was not aware of most of Wimalawansa's efforts to have her terminated at the time they were taking place. Her actual work environment, albeit unpleasant in many respects, did not "become hostile and abusive to the point that the conduct in question [was] the equivalent of an adverse action." Id. at 387. Consequently, we find no error in the trial judge's decision to grant the motion for involuntary dismissal.

B.

We now turn to Marrero's arguments with respect to the judge's evidentiary rulings.

Our scope of review of a trial judge's evidential rulings requires that we grant substantial deference to the judge's exercise of 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).

Marrero argues that the trial judge made two evidentiary errors. First, she argues that two letters Wimalawansa wrote to the New Jersey State Board of Medical Examiners (Board) and a responding letter from the executive director of the Board's Division of Consumer Affairs to Wimalawansa were improperly admitted over Marrero's objection. Wimalawansa's letters were written in response to a letter from Marrero's attorney to the Board requesting that the Board discipline Wimalawansa based on his altering dates on medical records and his failure to timely read DXA scans. The letters contained a number of statements criticizing Marrero. The Board's response indicated it had not found "any basis to initiate disciplinary action" against Wimalawansa.

Marrero asserts that the letters were admitted for their truth in an effort to show that she was not a credible witness. She argues that the jury likely concluded that, because the Board did not order an investigation, it did not believe her. Marrero points to the fact that she was unable to cross-examine the Board's executive director to ask why the Board declined to investigate.

Marrero objected to all three letters involving the Board on the grounds of relevancy, and to the Board's response on hearsay grounds, as well. They were hearsay. Although we question the admission of the letters on grounds of both relevance and their hearsay nature, we are satisfied that any error was harmless and not "clearly capable of producing an unjust result." R. 2:10-2. Marrero's argument that the jury likely concluded from those exhibits that the Board did not find her to be credible because it did not order an investigation is unconvincing.

Second, Marrero contends that the trial judge improperly excluded evidence that Wimalawansa had been indicted by a federal grand jury in Texas in 2002. The indictment, which charged Wimalawansa with injecting a virus into the computer system while he worked at the University of Texas, was dismissed without prejudice in 2005. Marrero contends that the indictment demonstrated that UMDNJ was aware of "red flags" concerning Wimalawansa, which, she argues, "should have caused a higher state of alertness" when she complained about his conduct. She also argues that an internal UMDNJ memoranda, written by Cohen and Kotis, itemizing other complaints against Wimalawansa, were business records and should have been admitted as an exception to the hearsay rule to show UMDNJ was aware of additional red flags.

We conclude that the trial judge did not abuse his discretion by excluding proof that Wimalawansa had been indicted on charges unrelated to any issue in the litigation, especially in light of the fact that the indictment was subsequently dismissed. The memoranda itemizing other complaints against Wimalawansa were not business records under N.J.R.E. 803(c)(6) for the purposes of this case. In addition, evidence of other wrongs is generally inadmissible under N.J.R.E. 404(b). The judge's decision to exclude those exhibits was not, in our view, error, and certainly not "so wide of the mark that a manifest denial of justice resulted." See Carter, supra, 91 N.J. at 106.

Consequently, we find no reversible error with respect to the trial judge's evidentiary rulings.

C.

Finally, we turn to Marrero's argument that the judge should have granted her motion for a new trial on the issue of damages.

Marrero contends that the jury's failure to award even nominal damages necessarily means it ignored the jury charge and rendered an inconsistent and illegal verdict. Marrero also asserts that misleading statements in Wimalawansa's summation, specifically, assertions that she had not proven any actual damages, contributed to the jury's error.

Rule 2:10-1 states:

> In both civil and criminal actions, the issue of whether a jury verdict was against the weight of the evidence shall not be cognizable on appeal unless a motion for a new trial on that ground was made in the trial court. The trial court's ruling on such a motion shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law.

To determine whether there was a miscarriage of justice under the law, an appellate court employs "a standard of review 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, such as witness credibility." Jastram v. Kruse, 197 N.J. 216, 230 (2008) (quoting Feldman v. Lederle Labs., 97 N.J. 429, 463 (1984)).

The trial judge charged the jury as follows with respect to damages:

> If the plaintiff has established the essential elements of her claim as explained in these instructions, she is entitled to compensatory damages for all the detrimental effects of the defamatory statement relating to plaintiff's reputation which were reasonably to be foreseen and which are the direct and natural result of the defamatory statement....
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> ....
>
> Plaintiff is seeking recovery for those damages which the law presumes to follow naturally and necessarily... from the defamatory statement and which are recoverable by plaintiff without proof of causation and without proof of actual injury.
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> ....
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> For these reasons you are permitted to award general damages to compensate Ms. Marrero for injuries to reputation which you reasonably believe she has sustained.
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> In determining the amount of damages, consider the manner in which the defamation was disseminated and the extent of its circulation; the injury to the character and reputation of the plaintiff; the mental anguish, suffering and emotional distress experienced by the plaintiff.
>
> You may also take into consideration the nature of her occupation and the extent to which she may reasonably be expected to find that the defamation has interfered with her successful pursuit of that

occupation.

Marrero argues that, because damages are presumed in a libel case, the jury's failure to award any damages requires a new trial. Although damages are presumed in some such cases,[4] the presumption is "a procedural device which permits a plaintiff to obtain a damage award without proving actual harm to [her] reputation," in part because of "the difficulty of proving the effects of the defamatory statement and [because] harm normally results from such a statement." W.J.A. v. D.A., 210 N.J. 229, 239-40 (2012).

Nevertheless, there is no requirement that a jury award compensatory damages. The jury may, instead, award "nominal damages," which are awarded

> in a defamation case to a plaintiff who has not proved a compensable loss. Nominal damages are "awarded for the infraction of a legal right, where the extent of the loss is not shown, or where the right is one not dependent upon loss or damage.". ... Such an award is a "judicial declaration that the plaintiff's right has been violated." It serves the purpose of vindicating the plaintiff's character by a verdict of a jury that establishes the falsity of the defamatory statement.
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> [Id. at 240-41 (internal quotation marks and citations omitted).]

Because there is no requirement that a libel plaintiff be awarded compensatory damages, defense counsel's argument that they had not been proven was not improper.

The charge did not include an explanation of the difference between compensatory and nominal damages. As a result, the jury awarded no damages rather than nominal damages. We see no basis to order a new trial on the issue of compensatory damages, and consequently affirm the denial of the motion for a new trial. However, we remand to the Law Division for an award of $100 in nominal damages.

In summary, we affirm the orders on appeal, but remand for entry of a judgment for nominal damages.

Affirmed and remanded.

[1] DXA stands for duel-energy x-ray absorptiometry.

[2] N.J.S.A. 34:19-1 to-14.

[3] N.J.S.A. 34:6A-1 to-50.

[4] See Rocci v. Ecole Secondaire Macdonald-Cartier, 165 N.J. 149, 156-57 (2000) (plaintiff obligated to prove actual damages for libel about matter of public concern).