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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6580-06T1

JENNIFER A. KAMINSKI,
individually and as Guardian
ad Litem for ZACHARY SHEEHAN
and THEODORE SHEEHAN,

Plaintiff-Respondent,

v.

VIRGINIA S. MAYER,

Defendant-Appellant.

DOCKET NO. A-2694-07T1

JENNIFER A. KAMINSKI,
individually and as Guardian
ad Litem for ZACHARY SHEEHAN
and THEODORE SHEEHAN,

Plaintiff-Respondent,

v.

VIRGINIA S. MAYER, and
ESTATE OF VIRGINIA S. MAYER,

Defendants-Respondents,

and

FIRST TRENTON INDEMNITY COMPANY

Defendant/Intervenor-
Appellant.

Argued September 17, 2008 - Decided December 15, 2008

Before Judges Parrillo, Lihotz and Messano.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3404-04.

Stephen R. Katzman argued the cause for appellant Virginia S. Mayer in A-6580-06T1 (Methfessel & Werbel, attorneys; Mr. Katzman, of counsel and on the briefs; Keith J. Murphy on the briefs).

Susan Stryker argued the cause for appellant First Trenton Indemnity Company in A-2694-07T1 (Clyde & Co US LLP, attorneys; Ms. Stryker, of counsel and on the briefs; Doreen J. Piligian, on the briefs).

Jacqueline DeCarlo argued the cause for respondent Jennifer A. Kaminski in A-6580-06T1 (Hobbie, Corrigan, Bertucio & Tashjy, P.C., attorneys; Norman M. Hobbie, of counsel; Ms. DeCarlo, on the brief).

Methfessel & Werbel, attorneys for respondent Virginia S. Mayer, in A-2694-07T1, have not filed a brief.

Hanna & Anderson, attorneys for respondent Estate of Virginia S. Mayer, in A-2694-07T1, have not filed a brief.

PER CURIAM

These are back-to-back appeals, which we have consolidated for purposes of this opinion, that arise from an underlying automobile negligence action. Defendant, Estate of Virginia S. Mayer (Estate), appeals from entry of judgment after a jury verdict finding decedent Virginia S. Mayer (Mayer) completely liable and awarding plaintiff, Jennifer A. Kaminski,[1] $2,320,000

[1] Plaintiff had filed her personal injury complaint not only on her own behalf but also as guardian ad litem for her sons, Zachary and Theodore Sheehan.

in damages for injuries suffered as a result of Mayer's negligence and from the order denying defendant's motion for a new trial, or, in the alternative, remittitur. Defendant intervenor, First Trenton Indemnity Company (First Trenton), appeals from the Law Division's post-judgment order amending the order of judgment to substitute the Estate as the proper party defendant, Mayer having passed away four months prior to trial and the proper substitution not having been timely made. We affirm in all respects.

On Saturday, November 22, 2003, at around twelve o'clock noon, plaintiff was leaving an elementary school craft fair with her two young sons and was preparing to enter her car, which was legally parked within the marked fog lane of northbound Route 71 in Sea Girt. The children entered the car from the sidewalk, and plaintiff walked around to enter the driver's door. As she was about six inches from her car, within the fog line, facing the driver's door and about to unlock it, plaintiff was struck by a vehicle driven by Mayer, and fell onto the shoulder of the road. According to plaintiff, she never stepped into the road.

The responding police officer observed that driving conditions that day were clear, and that in the area of the accident, Route 71 is a straight level roadway with no visual obstructions for over one hundred feet back. The width of Route 71 northbound is eleven feet, seven inches from the center line

to the fog line; and the width of Mayer's car was seventy inches, or five feet, ten inches.

At the time of the accident, Mayer was eighty years old and ill with cancer. She passed away prior to trial but had been deposed earlier. According to Mayer, when she approached Sea Girt there was a fair going on and a lot of people around, then "all of a sudden, Ms. Kaminski was in front of [her], [and] that was it." She could not recall specifics, like what plaintiff's car looked like, but thought plaintiff was partially in the road next to her car and in front of Mayer's car. While she initially stated that plaintiff must have been standing partially across the fog line, Mayer acknowledged not seeing plaintiff until immediately on, or within half a second of, impact. In response to questioning about her position on the roadway, Mayer answered, "I certainly wouldn't have been driving totally on the shoulder."

Mayer's version was disputed by Claire Watters, who was present at the scene of the accident. Her car was parked behind plaintiff's car at the time, and Watters was standing next to her vehicle when the accident occurred. When she looked at Route 71 northbound to ensure it was safe to enter her car, three cars were traveling towards her and, "[w]hat struck [her], what caught [her] attention was the car in the center was markedly more to the right and out of alignment with the other

two cars." As Mayer's misaligned vehicle approached, it veered closer to the parked cars, so that Watters waited to enter her own, which was larger than plaintiff's vehicle. In fact, Watters was surprised her car was not scraped by Mayer's as it passed.

Watters did not directly observe plaintiff being hit but heard a thump and "saw the tail end of her flying and then her son yelling for her." Watters had not heard a car horn honk or breaks screeching before plaintiff was hit, nor had she observed Mayer's car veer away from the parked cars.

Plaintiff sustained a number of injuries as a result of the accident including, among others, a lip laceration; a knocked out tooth forced back into her mouth; facial abrasions; a large cut on her left leg; bruising to the right leg; pain in the neck, jaw, elbow, pelvis, right knee and right hip; and severe headaches. Some of these injuries, according to her treating physicians, have resulted in permanent damage.

Specifically, Dr. Steven Dudick, a plastic surgeon, treated plaintiff's facial injuries. She presented with multiple contusions, abrasions, bruises, and scrapes on her face, chin, and cheeks. These injuries left pigmented areas and lines on her face and some "traumatic tattooing," which is caused by debris healing in the wound. Some of this could be aided with laser resurfacing of this skin.

More significantly, plaintiff had an "avulsion laceration" of the lower lip, meaning a chunk of tissue was missing from the lip, and there was a distally based flap, which is essentially a U-shaped piece of skin getting blood flow from only the bottom portion of the U. Plaintiff's avulsion was complex, meaning skin and muscle were missing, and its repair required reconstruction of the muscle layers, mucosa, and inner and skin portions of the lip. Dr. Dudick had to debride plaintiff's lip, i.e., cut away the dead and bruised tissue, and then advance the tissue from either side of the laceration to make up for the skin loss. The result was that plaintiff was left with a firm scar on her lower lip and a small mass on the inner portion of the scar that could be an inclusion cyst.

Dr. Dudick also treated plaintiff for the trauma to her left and right thighs. Her right thigh had palpable bumps, formed by scar tissue from bruising, which might soften over time, and hyperpigmentation. Plaintiff's left thigh had a four centimeter-long, hypertrophic, or elevated, scar on it, and a depression formed by atrophy of the fat cells, which occurs after a bad bruise or hematoma seeps blood into the tissue. The hypertrophic scar was about one-quarter of an inch wide, and had a red, purplish color.

During surgery, Dr. Dudick excised much of the scar and a firm mass located near it, leaving plaintiff with "the best

possible scar for the area." In treating the other condition in her left thigh, Dr. Dudick transplanted fat cells from plaintiff's abdomen and injected them into the depression, leaving plaintiff with a red area that would fade some in the next year. Overall, the depression and scars were permanent, but the hyperpigmentation improved with time, leaving fine spider veins over the areas of contusion. In Dr. Dudick's opinion, the scars present four years post-accident would remain for the rest of her life.

Dr. Michael Sclafani, an orthopedic surgeon, treated plaintiff's right knee and neck injuries. After the accident, plaintiff's right knee was swollen with moderate effusion, or fluid in the knee joint. An examination showed the right knee had a Grade III, or complete, medial collateral ligament tear. The tear meant plaintiff's bones would shift apart when walking and allow the knee to buckle unless fixed. An MRI further revealed a tear in the medial meniscus, which is the cartilage between the bones, irreparable save for surgery, and a bruise of the lateral tibia plateau, which meant plaintiff's knee was hit so hard it bled into the bone.

After some physical therapy, plaintiff underwent arthroscopic surgery on the right knee to remove the cartilage tear and also repair irregularities found on plaintiff's kneecap cartilage. The medial collateral ligament tear healed itself.

According to Dr. Sclafani, once cartilage is torn and removed, a patient does not return to a pre-injury condition, and plaintiff here will have permanent problems with her knee, i.e., constant clicking and grinding, secondary to the loss of cartilage, such as early on-set arthritis, possibly even requiring a total knee replacement.[2]

Dr. Patrick McDermott treated plaintiff for her dental injuries three weeks after the accident, when she first presented at his office with a left maxillary central incisor, upper front tooth, that had been avulsed, knocked out, and reimplanted at the hospital with a semi-rigid splint wiring it to her other teeth. All four of plaintiff's front teeth were still mobile at the initial appointment. In fact, the evulsed tooth, number nine, was misaligned, extruded down and tipped inwards toward the tongue, resulting in additional trauma each time plaintiff bit down.

In order to immobilize tooth number nine, the semi-rigid splint was removed, and Dr. McDermott bonded teeth eight, nine, ten and eleven together for rigidity. Plaintiff was also given a night guard because she was clenching her teeth and a daytime splint to hold her teeth together. One year later, plaintiff's

[2] Plaintiff also suffered neck pain from the accident. An MRI revealed bulges in plaintiff's neck, light neural foraminal narrowing at C4-C5 with some impingement, and degenerative disc disease that could have been accelerated by the accident.

front teeth had discolored due to the trauma, and tooth nine was still mobile which required the doctor to permanently splint it to the surrounding teeth to prevent total decay. Because they are joined, plaintiff can no longer floss her teeth normally.

Plaintiff further had numbness in her mouth and tip of her tongue and clicking in her jaw so was referred to a temporomandibular joint (TMJ) specialist. In the long term, plaintiff will, in all likelihood, loose tooth number nine and has a high probability of losing tooth number ten.

Dr. Alvin Krass, a psychologist, first saw plaintiff two-and-one-half months after the accident, when she presented with loss of concentration and memory and inability to recognize familiar objects. Plaintiff was diagnosed with post-traumatic stress disorder with panic attacks and ongoing anxiety resulting from the accident.

Plaintiff underwent psychotherapy in 2004, stopped, and returned in 2005 because she was having difficulty concentrating, conflicted social relationships, and anxiety over her children and dealing with their concerns. Plaintiff's symptoms subsided and then recurred in 2006 and 2007, and included anxiety that she would not be able to fulfill her responsibilities as a full-time instructor at Brookdale Community College because of her memory problems. Dr. Krass concluded that plaintiff's symptoms were chronic in nature.

Among her neuropsychological injuries were problems in concentration, memory function, ability to handle calculation issues, and a general sense of unease.

At the time of the accident, plaintiff was a thirty-six year-old single mother raising two young children. She led an active life and was involving in running and the martial arts. Prior to the accident, she never experienced problems spelling, speaking, or memorizing; nor did she suffer from depression or anxiety.

Plaintiff sued Mayer for negligence. Prior to trial, plaintiff moved in limine to admit certain portions of Mayer's deposition regarding her taking methadone three times daily for pain, and her use of an aide on weekdays to drive her to and from doctor's appointments. The judge refused to admit the methadone testimony but allowed reference to Mayer's driver aide.

At the close of evidence, plaintiff moved for a directed verdict on liability and permanency of damages. The judge denied the motion as to liability, deeming this a comparative negligence case that should be decided by a jury. However, the judge entered a directed verdict for plaintiff on the issue of permanency of injuries, finding plaintiff's proofs had, without question, vaulted the verbal threshold of the Automobile

Insurance Cost Reduction Act (AICRA), N.J.S.A. 39:6A-1.1 to -35. He concluded:

> I find that without question that the plaintiff has suffered permanent injuries. And the injuries do without question comply with the statute. I'm going to direct the verdict on the issue of permanency and the other thing that's going to go to this jury is going to be the issues of liability, negligence and comparative negligence. I'm not even going to send an interrogatory to them on the issue of permanency with the box checked off. And that's my ruling.

As noted, the jury returned a verdict finding Mayer 100% at fault and awarding plaintiff $2,320,000 in damages. Defendant subsequently moved for a new trial or, in the alternative, remittitur of the jury's damages award. As to the former, defendant maintained that it was prejudicial error to admit evidence of Mayer's driver aide and that the permanency of plaintiff's injuries was a factual question for jury resolution. The judge rejected these contentions, denying the motion for a new trial as well as remittitur. As to liability, the judge reasoned:

> This was a situation where, with reference to the issue of liability I think [plaintiff's counsel's] comment to the jury that defendant should not have been on the road is fair comment. Her testimony in the deposition clearly indicated that there was serious misgivings about her ability to operate a motor vehicle. And it was certainly germane to the issue here.

> This is an accident that happened in broad daylight, in the middle of the day in a high traffic area where there was a lot of activity around the school. The defining witness in this case, insofar as liability is concerned, is Mrs. Wat[t]ers. She's the one who made the observation that the Mayer vehicle . . . was significantly misaligned to the rest of the line of traffic. And there was an ample photographic record of the roadway in question.
>
> And basically my take on it is that Mrs. Kaminski, I think was blindsided. I think she was hit from the rear, because that's the only way you could account for some of the injuries that she sustained. And that Mrs. Mayer was 100 percent responsible. I don't find that there was anything that Mrs. Kaminski did that caused this accident. [Defense counsel] argued this case to the jury on the issue of liability, and they found otherwise. I'm not going to disturb that.
>
> And I find that there is absolutely more than ample evidence in the record to indicate that Mrs. Mayer . . . was responsible for the injuries that were sustained.

As for plaintiff's injuries, the judge reiterated those he considered to be permanent in nature including a chunk of lip missing, necessitating surgery to put the bottom of her mouth back together; a tooth driven out of her mouth that had to be bonded to other live teeth; a dent on her thigh where fat cells atrophied that necessitated reverse liposuction, a permanent J-shaped scar on her face, and chronic post-traumatic stress disorder. The court further compared a photograph of plaintiff

from before the accident with her radically different appearance at trial. Thus, as to permanency of injuries and damages, the court stated:

> [Plaintiff] clearly had permanent physical injuries that no reasonable man could disagree with. And that's why I decided to direct a verdict on that. I found that there was absolutely no evidence whatsoever to the contrary. And every one of the injuries that I indicated is a full and permanent injury. This is not some nebulous soft tissue case . . . .
>
> This woman suffered severe and blunt trauma[,] and it has affected her. It affected her then, it affected her during the course of treatment, it was clearly visible to me during the course of trial. And I think that this woman has a lot of baggage as time goes on, both physical and emotional. And therefore, this is the reason why the only issues I wanted this jury to decide was issues of liability and issues of damages.
>
> The amount of damages in this case was left to the sole and exclusive discretion of the jury. They were charged pursuant to the normal charge that I give. And a part of that charge is that the law can give the jury no better yardstick to measure damages than their own common sense, and it is left to their sound discretion. The jury in this case came in with what they believed to be the appropriate amount of compensation for this person for her injuries.
>
> I find nothing in the record that shocks the conscience of the [c]ourt and I am therefore not going to disturb the verdict. The motion is denied.

Post-judgment, on October 4, 2007, plaintiff moved to amend the order of judgment to substitute the Estate of Virginia S. Mayer as defendant. Initially, the Estate opposed plaintiff's motion, intimating that a substitution would cause it to be irrevocably prejudiced, and be contrary to due process, since it was not given a chance to assert a position at trial. However, the Estate eventually reached an agreement with plaintiff whereby it would withdraw its opposition, join in plaintiff's request for modification, and assign its rights to plaintiff to pursue a bad faith claim against First Trenton for the excess verdict in return for being relieved of financial liability.[3]

After granting First Trenton's motion to intervene, and hearing argument, the judge granted plaintiff's application to amend the order of judgment to substitute the Estate as the proper party defendant. The court concluded:

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[3] As noted, Mayer passed away on January 30, 2007, prior to the commencement of trial. Aware of Mayer's passing, plaintiff's counsel sent a settlement demand letter to decedent's counsel, dated February 1, 2007, asking him to contact the attorney or representative of the Estate and forward plaintiff's demand letter. Thereafter, First Trenton, the company that insured Mayer under an automobile insurance policy with a maximum policy limit of $500,000, wrote to the Estate on February 12, 2007, informing that plaintiff valued her injuries in excess of the insurance policy limit and further advising the Estate to notify any excess insurance carrier. No further action towards settlement, or substitution of the Estate as a party, appears to have been taken. Following denial of Mayer's motion for a new trial/remittitur, First Trenton deposited its $500,000 policy limits with the court.

That [the assignment] having been done, I don't understand how basically -- and I let First Trenton intervene because it's got a duty to defend and indemnify the defendant. I let it intervene to see how it can assert a standing in this regard. But I just disagree that you have the standing to take the position of the estate once the estate has taken the steps that it has to assign its rights to the plaintiff.

If [the Estate] were here today griping about it, I probably wouldn't even be speaking to you.

. . .

But it seems to me that the moment before that trial was to start or shortly before that trial was to start, if somebody had said hey, we should amend, this has to be amended to the estate of, and if the issue arise, well, call the estate rep and see if they have any objection to it. Big deal. It wouldn't be a problem.

But the case went forward. And nobody objected. Nobody screamed. Nobody raised any issues. And I'd like to think that people weren't playing games at the time. I just think it, to me it was what I would think is a mechanical oversight and it happened.

And this was one of those cases where in the meantime, a verdict came in, it was in excess of the policy limit.

I will stick my neck out and say that if the verdict came in at $490,000, I would stick my neck out and say if there were an appeal, the appeal would be maybe that the verdict is excessive. But I'd be shocked if anybody said the verdict was a nullity even if the lady was dead.

. . . .

So I just find that what happened here, we wouldn't be in this problem and we wouldn't be in this predicament but for the fact of a verdict in excess of the policy limits. And I just don't find that the First Trenton has the right to object to what [Estate's counsel], on hindsight, has done on behalf of the estate.

I just find that at this time, it's a clerical amendment. It has some significance, but it's a clerical amendment. So that's how I'm going to rule.

On defendant's appeal, the Estate argues the following:

I. THE TRIAL COURT ERRED BY ALLOWING THE ADMISSION OF DEPOSITION TESTIMONY INFORMING THE JURY THAT THE DEFENDANT USED AN ASSISTANT TO DRIVE HER TO DOCTOR APPOINTMENTS SEVERAL WEEKDAYS EACH WEEK THEREBY PERMITTING THE JURY TO INFER THAT THE DEFENDANT WAS INCAPABLE OF DRIVING.

a. The admission of deposition testimony concerning Ms. Mayer's use of an assistant several weekdays each week was improper as such evidence had no probative value on the issue of Ms. Mayer's negligence in causing the accident and was substantially outweighed by its prejudice.

b. The prejudice caused by the improper admission of deposition testimony concerning Ms. Mayer's use of a weekday driver several weekdays per week tainted the jury's comparative negligence finding.

II. THE TRIAL COURT ERRED BY FINDING THE PLAINTIFF'S INJURIES TO BE PERMANENT AS A MATTER OF LAW, THUS REMOVING THE

ISSUE OF PERMANENCY UNDER THE VERBAL THRESHOLD FROM THE JURY.

III. THE COURT ERRED BY DENYING DEFENDANT[']S MOTION FOR A NEW TRIAL OR IN THE ALTERNATIVE, REMITTITUR, BECAUSE THE JURY AWARD WAS SO GROSSLY EXCESSIVE THAT IT SHOCKED THE CONSCIENCE AND WAS THE PRODUCT OF PASSION, PREJUDICE AND/OR PARTIALITY.

On intervenor's appeal, First Trenton raises the following issues:

I. THE COURT RULES DO NOT AUTHORIZE AN AMENDMENT OF THE JUDGMENT TO SUBSTITUTE THE ESTATE AS DEFENDANT UNDER THE FACTS AND CIRCUMSTANCES PRESENTED HERE.

a. Plaintiff's motion to alter or amend the judgment pursuant to R. 4:49-2 was untimely.

b. There is no basis to provide plaintiff with relief from the judgment under R. 4:50-1.

c. The substitution of a party constitutes more than relief from a clerical error under R. 1:13-1.

d. Rule 4:9-2 does not authorize the post-trial amendment of a judgment to substitute a party.

II. MOREOVER, THE TRIAL COURT ERRED IN ALLOWING THE POST-JUDGMENT AMENDMENT TO SUBSTITUTE THE ESTATE FOR DEFENDANT WHERE BOTH PLAINTIFF AND THE ESTATE FAILED TO COMPLY WITH R. 4:34-1.

a. Plaintiff should have moved to amend and served the estate with the complaint under R. 4:34-1.

b. Plaintiff's judgment against the deceased is void.

c. In the alternative, because plaintiff essentially elected to proceed to trial against the policy, plaintiff's recovery is limited to the policy limits.

III. FINALLY, THE TRIAL COURT LACKED THE JURISDICTION TO AMEND THE JUDGMENT FOLLOWING THE FILING OF AN APPEAL BY DEFENDANT.

We will address each appeal separately.

I
(a)

At the in limine motion hearing, to support admission of Mayer's deposition testimony on the use of a weekday driver aide, plaintiff's counsel argued thus:

> [PLAINTIFF'S COUNSEL]: Exactly. It's not a de bene esse. But she was very ill. She looked ill. She looked weak. The only reason I knew she had an aide is the aide was in there with her, and [defense counsel] said, she's here with her aide. And when I'm taking the dep, you could see the woman was laboring, She answered the questions, she's laboring. And she's dead now.
>
> I think the jury ought to have the benefit of knowing what condition she was in at the time of the crash. She's physically, she was deteriorating. She was in a weakened condition. I don't want a misimpression created where she was like an 80 year old Jack LaLanne, she's doing jumping jacks.
>
> She had aides taking her to doctors during the week. This happened on a Saturday. I[n] our opinion, she shouldn't

> have been driving. And then shortly after this, apparently, they took the car from her, or she sold the car, or whatever. But I have questions –

The judge agreed. On appeal, defendant contends the admission of this testimony, and counsel's reference to it on summation, was prejudicial error. We disagree.

In order for evidence to be admitted at trial, it must be relevant. State v. Wilson, 135 N.J. 4, 13 (1994). Relevant evidence has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. All relevant evidence is admissible at trial, unless excluded by a specific rule. N.J.R.E. 402. Of course, "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence." N.J.R.E. 403. On appeal, we review a trial court's evidentiary ruling for abuse of discretion, upholding the lower court's determination "'unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide [of] the mark that a manifest denial of justice resulted.'" State v. Lykes, 192 N.J. 519, 534 (2007) (alteration in original) (quoting Verdicchio v. Ricca, 179 N.J. 1, 34 (2004)).

To be evidential, the information sought to be elicited must be causally related to the happening of the accident, "since a permissible inference of causality is indispensable to its relevancy." Mattero v. Silverman, 71 N.J. Super. 1, 9 (App. Div. 1961), certif. denied, 36 N.J. 305 (1962). Such linkage was lacking in Mattero where the defendant sought to admit information that the plaintiff was not a licensed driver, but merely had his learner's permit, and was driving in violation of a statute requiring those with permits to drive only with licensed drivers. Id. at 6-7. In holding this evidence inadmissible, we noted the lack of any other evidence of the plaintiff's inexperience, id. at 10; that it would be "entirely conjectural or speculative" to infer that plaintiff's inexperience was the proximate cause of the accident, ibid.; and that the jury should have assessed the "plaintiff's contributory negligence solely on the basis of the manner in which he operated his vehicle at the time of the accident." Ibid.

Similarly inadmissible was evidence of a driver's consumption of alcoholic beverages several hours prior to an automobile accident, absent further proof the alcohol affected defendant's driving ability. Gustavson v. Gaynor, 206 N.J. Super. 540, 542 (App. Div. 1985), certif. denied, 103 N.J. 476 (1986). While obviously "evidence of intoxication is relevant

to the issue of negligent driving[,]" id. at 544, evidence of prior drinking is usually only admissible where there is some supplementary proof that the alcohol consumption affected driving ability, such as driving at excessive speeds or drunken behavior at the accident scene. Id. at 544-45. We concluded that:

> [t]he mere fact that a driver had consumed some alcoholic beverages is by itself insufficient to warrant an inference that the driver was intoxicated and that the intoxication was of such a degree as to render him unfit to drive at the time of the accident. The admission of such testimony without supporting evidence is unduly prejudicial in view of its capacity to inflame the jury.
>
> [Id. at 545.]

So too, in a products liability action involving a vehicle's alleged defective accelerating mechanism, we reversed a trial court's admission of evidence of the side effects of certain drugs the plaintiff was taking because there was no other evidence that plaintiff suffered from those side effects. Ratner v. General Motors Corp., 241 N.J. Super. 197, 205-06 (App. Div. 1990). We reasoned:

> [t]he existence of the cornucopia of possible side effects listed in the PDR did not have a tendency to prove any material fact in this case. There was no suggestion in this record that plaintiff suffered any of the side effects listed in the PDR or that the accident was in any way attributable to such side effects. Indeed,

> if the jury had returned a verdict which, in some way, reflected its belief that plaintiff's side effects caused this accident, we would be compelled to set the verdict aside as sheer speculation. Moreover, the trial judge's so-called "limiting instruction" served no purpose. If, as he said, the reading from the PDR was not to suggest that plaintiff suffered from side effects which may have caused the accident, it had no meaning at all and should have been excluded.
>
> [Id. at 205-06.]

Here, unlike Mattero, Gustavson and Ratner, there was supplementary evidence of Mayer's erratic driving at the time of the accident, which the jury could reasonably infer was related to the reason for a weekday driver, namely her advanced age and ill health. Specifically, Watters testified that she saw Mayer's car significantly misaligned with the two other vehicles coming down the road, such that the witness believed it safer to wait for Mayer to pass before entering her own car, which was parked behind plaintiff's. In fact, Watters testified that it appeared as if Mayer's car veered closer to the parked cars as it approached. Indeed, the best Mayer could say in defense was that she did not believe she was driving entirely on the shoulder of the road. Given its nexus to Mayer's health and physical condition at the time of the accident, the use of a weekly driver's aide has probative value as to the happening of the accident, lending a permissible inference of causality.

In fact, its relevancy to Mayer's health and therefore the incident in question is heightened by the unavoidable absence of Mayer from trial and therefore the inability of the jury first-hand to observe her physical condition as well as credibility. And whatever prejudice defendant may have suffered from inclusion of this evidence was not undue since the defense had every opportunity to rebut the suggested inference, but declined the invitation. Thus, given its probative value, we cannot say that the trial judge so abused his discretion in striking the balance in favor of admitting the challenged portion of Mayer's deposition. N.J.R.E. 403. Having committed no error, much less reversible error, in its admission, plaintiff's counsel's dual references to Mayer's use of a driver's aide on summation were neither improper nor prejudicial. See Diakamopoulos v. Monmouth Med. Ctr., 312 N.J. Super. 20, 32 (App. Div. 1998).[4]

[4] Moreover, the judge appropriately instructed the jury:

> The lawyers, they sit here and they are the advocates for their clients.
>
> In their opening statements and in their summations, they have given you their views of the evidence and their arguments in favor of their client's position.
>
> While you may consider their comments, nothing the attorney says is evidence. Their comments are not binding upon you. Persuasive, yes, binding no. The role of the jury, you sit here as judges of the

(continued)

Even if the admission of this evidence were error, we are satisfied it was harmless, see State v. Macon, 57 N.J. 325, 337-38 (1971), in light of the overwhelming proof that Mayer was entirely blameworthy. Plaintiff testified she was sure that she did not step onto Route 71, over the fog line, as she attempted to enter the car. In stark contrast to plaintiff's certainty, Mayer was only able to surmise that plaintiff may have been partially in the road when the accident happened, although she also admitted that she only noticed plaintiff in front of her immediately or less than half a second before impact. It was therefore entirely reasonable for the jury to infer that Mayer never saw plaintiff before impact and therefore did not actually know whether plaintiff was in the road. In any event, plaintiff's version was supported by the eyewitness account of an independent observer who testified that Mayer was driving erratically at the time of the accident, significantly out of line with the other cars in the road, so much so that the witness was waiting until Mayer passed to enter her car, and that Mayer was veering even closer to the parked cars as she approached.

(continued)

> facts. You alone have the responsibility of deciding the factual issues in this case.

I
(b)

Defendant next argues the court erred in directing a verdict for plaintiff as to the permanency of her injuries under AICRA, because there was a genuine issue of material fact and reasonable minds could differ, Dolson v. Anastasia, 55 N.J. 2, 5 (1969). Again we disagree.

In an action to recover for noneconomic losses where, as here, the verbal threshold applies,

> an injured person may not maintain a lawsuit for nonecomonic damages "unless that person has sustained a bodily injury which results in death; dismemberment; significant disfigurement or significant scarring; displaced fractures; loss of a fetus; or a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement."
>
> [Soto v. Scaringelli, 189 N.J. 558, 563 (2007) (quoting N.J.S.A. 39:6A-8(a)).]

"An injury shall be considered permanent when the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment." N.J.S.A. 39:6A-8(a).

If an injured party in an automobile accident sues for noneconomic damages and is subject to the verbal threshold, he or she need "'satisfy only one of AICRA's six threshold categories[.]'" Soto, supra, 189 N.J. at 563-64 (alteration in original) (quoting DiProspero v. Penn, 183 N.J. 477, 481-82

(2005)). The AICRA category involved here is "significant disfigurement or significant scarring."

The Soto Court explained the meaning of "significant disfigurement or significant scarring" under AICRA:

> a plaintiff bears the burden of demonstrating that, on an objective basis, the disfigurement or scarring substantially impair[s] or injure[s] the beauty, symmetry, or appearance of a person, rendering the bearer unsightly, misshapen or imperfect, deforming her in some manner. We further hold that, in making that objective determination, a number of factors are relevant, including appearance, coloration, existence and size of the scar, as well as, shape, characteristics of the surrounding skin, remnants of the healing process, and any other cosmetically important matters.
>
> [Id. at 574 (internal citations and quotations omitted) (alterations in original).]

For a scar to vault the verbal threshold under AICRA and rise to the level of "permanent significant disfigurement," "the disfigurement must be more than a trifling mark discoverable on close inspection, and that a disfigurement becomes serious when it substantially detracts from the appearance of the person disfigured[.]" Falcone v. Branker, 135 N.J. Super. 137, 147 (Law Div. 1975). A scar is a "significant disfigurement" "if a reasonable person viewing the plaintiff's [condition] in its altered state would regard the condition as unattractive, objectionable, or as the subject of pity or scorn[.]" Soto,

supra, 189 N.J. at 572 (alterations in original) (quoting Puso v. Kenyon, 272 N.J. Super. 280, 288 (App. Div. 1994)).

If the evidence of plaintiff's injuries could, if believed by the factfinder, satisfy AICRA's verbal threshold requirement, then "any disputed issues regarding the nature and extent of those injuries must be decided by the jury." Oswin v. Shaw, 129 N.J. 290, 313 (1992). However,

> in the absence of any factual dispute the court shall resolve the question of whether plaintiff's injuries meet the verbal threshold. Therefore, if the plaintiff moves for a partial summary judgment on the verbal-threshold issue and the court resolves that question in the plaintiff's favor -- that is, the trial court determines as a matter of law that under no view of the medical evidence could a factfinder conclude that the plaintiff had failed to meet the requirements of at least one of the verbal-threshold categories -- then the jury's task (assuming it finds liability in the plaintiff's favor) is limited to a determination of the noneconomic losses.
>
> [Id. at 313-14.]

And, material disputes of fact must be shown "by credible, objective medical evidence." Id. at 314. To be sure, it remains plaintiff's burden to establish the absence of a material dispute of fact. Soto, supra, 189 N.J. at 564. The Soto Court explicitly stated:

> in order to resist a claim that a plaintiff's injuries do not vault AICRA's "significant disfigurement or significant scarring" limitation on lawsuit threshold, a

> plaintiff, at a bare minimum, must (1) present the plaintiff's disfigurement or scarring for direct observation by the trial court; (2) ensure that the record contains the trial court's description of the disfigurement or scarring; and (3) create and preserve for meaningful appellate review an accurate photographic record of the plaintiff's claimed disfigurement or scarring.
>
> [Id. at 575-76.]

On appeal from the grant of a directed verdict at the close of evidence, we accept as true all evidence supporting the party opposing the motion, and accord that party the benefit of all favorable inferences. If reasonable minds could differ, the motion should have been denied. Dolson v. Anastasia, 55 N.J. 2, 5 (1969).

Here, in addition to her own testimony, plaintiff presented the expert testimony of four of her treating physicians: plastic surgeon Dr. Dudick; orthopedic surgeon Dr. Sclafani; psychologist Dr. Krass; and dentist Dr. McDermott. Conversely, defendant offered no evidence, expert or otherwise, to refute the medical testimonies of plaintiff's physicians. Plaintiff also presented her scars to the jury and judge during trial for observation. As is apparent from the record, plaintiff's scarring and disfigurement – the permanent hook-shaped mark on her face and the permanent dent impression in her left thigh that reverse liposuction tried to mitigate – were clearly

visible to the court and readily discernable without further searching. In comparing her present appearance to that depicted in pre-accident photographs, the trial judge graphically described and explicitly detailed plaintiff's scarring, as well as his reasons for finding reasonable minds could not differ as to the permanency of these injuries:

> The photographic record in this case is significant in terms of describing the injuries. This woman had to have plastic surgery, Dr. Dudick testified that there's tissue missing and he had to sew her mouth back together.
>
> There was a tooth that was basically driven back into her mouth, which had to be bonded to other live teeth.
>
> . . .
>
> She's got facial scarring, there's a photograph . . . of this plaintiff two years before the accident at a birthday party for I assume one of her children. . . . The scarring is evident on her face. She has got the dental problems.
>
> Then she has this hook-shaped scar on her [l]ip which is also readily discernible. There's no question. But she's also compounded with the fact that there was a compression and atrophy of the fat cells in her thigh because of the collision, and they have to harvest fat cells and do basically a reverse liposuction to inject them into her thigh to try to build it back up again, because she had a depression and as recently as I believe, a week before this trial started she was undergoing one of these procedures.

We agree with the judge's determination of permanency as a matter of undisputed fact and of law under AICRA.

Of course, once a plaintiff has satisfied just one of AICRA's six categories, he or she vaults the verbal threshold as to all injuries. Johnson v. Scaccetti, 192 N.J. 256, 279 (2007) ("if a plaintiff establishes that one of her injuries satisfies the lawsuit threshold, she is entitled to have the jury consider in calculating noneconomic damages all of her injuries proximately caused by the automobile accident, regardless of whether any independently vaulted the threshold"). Thus, it was unnecessary for the trial judge to identify any other permanent injury. Nevertheless, we discern from the record undisputed proof that plaintiff's right knee medial meniscus (cartilage) tear also qualified as a permanent injury under AICRA. While plaintiff's other right knee injuries – a severed medial collateral ligament and irregularities of the kneecap – either healed or were smoothed over in surgery – plaintiff's torn cartilage was not repairable. According to the undisputed medical proofs, once the torn piece is removed during surgery, the patient never regains the portion excised and never returns to the pre-injury state. Indeed, since surgery, plaintiff's right kneecap constantly clicks and grinds and she is unable to participate in activities previously enjoyed.

The record lacks any "credible, objective medical evidence" that plaintiff's scars will disappear or that her knee will function normally again. See Oswin, supra, 129 N.J. at 314. Absent such proof, and given the visibility of plaintiff's scarring, we discern no material issue of fact from which reasonable minds could differ as to the permanency of plaintiff's injuries. Oswin, supra, 129 N.J. at 313-14; Dolson, supra, 55 N.J. at 6.

I
(c)

Defendant contends the trial judge erred in denying its motion for a new trial or, in the alternative, remittitur. We disagree.

The standard that controls our disposition is well-settled. We do not reverse a trial court's ruling on a motion for a new trial "unless is clearly appears that there was a miscarriage of justice under the law." R. 2:10-1; Baxter v. Fairmont Food. Co., 74 N.J. 588, 599 (1977)). We defer to the trial court's determination of a witness's credibility and demeanor. Dolson, supra, 55 N.J. at 7; see also Carey v. Lovett, 132 N.J. 44, 66 (1993) (noting that appellate courts defer to the trial court's "feel of the case"). As do trial courts, we also defer to the quantum of damages that a jury assesses "unless it is so disproportionate to the injury and resulting disability shown as

to shock [the] conscience and to convince [the judge] that to sustain the award would be manifestly unjust." Taweel v. Starn's Shoprite Supermarket, 58 N.J. 227 (1971); see also Ryan v. KDI Sylvan Pools, Inc., 121 N.J. 276 (1990); Baxter, supra, 74 N.J. at 596. The trial court assesses excessiveness of damages by "consider[ing] the evidence in the light most favorable to the prevailing party in the verdict." Caldwell v. Haynes, 136 N.J. 422, 432 (1994). As noted, jury verdicts should stand unless they are clearly against the weight of the evidence and shock the judicial conscience. Ibid.; see also Horn v. Vill. Supermarkets, Inc., 260 N.J. Super. 165, 178 (App. Div. 1992), certif. denied, 133 N.J. 435 (1993); Carey v. Lovett, supra, 132 N.J. at 66.

We discern no miscarriage of justice in the jury findings of liability and damages. As to the former, the only evidence of comparative negligence was from Mayer whose surmise that plaintiff must have been standing in the road was rendered implausible by her later admission that she only noticed plaintiff immediately, or less than half a second, before impact.

As to the quantum of damages, plaintiff and her four treating physicians testified to a litany of injuries sustained to plaintiff's lips, cheeks, chin and both legs as a result of being struck from behind, pushed into her car and over its hood,

and falling to the ground. As a result, a chunk of her lip was missing and Dr. Dudick had to reconstruct it by pulling the sides together. Yet to date, plaintiff suffers from frequent blisters on the scar inside of her mouth. The trauma to plaintiff's cheeks and chin left traumatic tattooing, whose appearance had to be improved with laser resurfacing, and a permanent hook-shaped scar. Plaintiff's scarring was still clearly visible at trial.

Plaintiff's thighs were both traumatized by the injury. On her right thigh, plaintiff had lumps and patches of hyper pigmentation. On the left thigh, plaintiff had a large, thick scar which had to be excised by surgery. She was also left with a permanent depression in the thigh where the fat cells atrophied from the trauma, which was eventually mitigated by a reverse liposuction procedure.

Plaintiff's mouth also sustained significant damage. One of her front teeth was knocked completely back into her mouth and had to be permanently bonded to the remaining teeth. The teeth in that area were loosened by the accident and eventually grayed from the trauma. Since the accident, plaintiff suffers from TMJ and must wear a mouth guard night and day. Dr. McDermott opined that she will most likely loose the tooth that was evulsed in the accident.

Plaintiff's right knee was injured in the accident, and she began to experience neck pain, too. The right knee sustained a tear to the medial collateral ligament and the medial meniscus and additional trauma to the bone and kneecap cartilage. Surgery was performed to smooth out irregularities in plaintiff's cartilage and remove the piece of torn cartilage, because it cannot repair itself. According to plaintiff, her knee, to date, constantly clicks and grinds, her neck is still painful, and she is unable to lead the lifestyle she once led.

In addition, there is evidence that the accident also caused plaintiff to suffer psychological and emotional injury, such as loss of concentration, loss of memory, and inability to recognize familiar objects. Though plaintiff currently works as a full-time professor, she has been diagnosed with chronic post-traumatic stress disorder with panic attacks and ongoing anxiety and has been in and out of counseling since the accident. Her neuropsychological injuries include problems in concentration, memory function, ability to handle calculation issues and a general sense of unease.

Based on this evidence, the jury's award of $2,320,000 was neither clearly excessive nor shocking to the conscience. Caldwell, supra, 136 N.J. at 432. Given the nature and extent of the injuries sustained, and the resultant disabilities, it was not so disproportionate as to warrant remittitur. McRae v.

St. Michael's Med. Ctr., 349 N.J. Super. 583, 597 (App. Div. 2002) (citing Baxter, supra, 74 N.J. at 598).

II

Intervenor, First Trenton, argues that the trial court improperly allowed the substitution of parties post-judgment. We disagree.

Death of a party during pendency of an action is governed by Rule 4:34-1, which provides in part:

> "[i]f a party dies and the claim is not thereby extinguished, the court shall on motion order substitution of the proper parties. The motion for substitution may be made by the successors or representatives of the deceased party or by any party, and notice thereof shall be served on parties as provided by R. 1:5-2 and on persons not parties in the manner provided by either R. 4:4 (service of original process) or, if the court directs, R. 4:67-3 (service of orders to show cause).
>
> [R. 4:34-1(b).]

In Stroman v. Brown, 194 N.J. Super. 307, 309 (App. Div. 1984), the defendant died during the pendency of an action in New Jersey, which sought to enforce a judgment entered against her in Pennsylvania. No one called the defendant's death to the attention of the trial judge, so the case proceeded to judgment as if the defendant were still alive. In voiding the New Jersey judgment, we reasoned:

> [t]he claim against Marguerite based on the Pennsylvania judgment was not extinguished by her death, but that claim cannot be heard unless those having an interest in her estate or their representatives are first made parties pursuant to R. 4:34-1(b). See Palko v. Palko, 73 N.J. 395, 398 (1977). Due process requires that they be given notice and an opportunity to be heard in order for a judgment against Marguerite's estate to be valid.
>
> [Id. at 313.]

Here, unlike Stroman, all parties and the trial judge were aware of Mayer's demise before trial. In fact, prior to trial, the judge specifically inquired of Mayer's counsel whether he was representing Mayer's estate but inadvertently overlooked the need for party substitution when counsel responded in the negative. Moreover, the Estate presumably also received notice of the litigation. In any event, unlike Stroman, where the estate was deprived of its right to defend itself, here the Estate ultimately waived any potential due process defenses, voicing no objection to the substitution and assigning its rights to any bad faith claim against First Trenton to plaintiff.

Assuming, without deciding, that because of its putative financial stake in the outcome of this litigation, First Trenton has standing to assert rights personal to, but not exercised by, the Estate, the late substitution of the Estate as the proper

party defendant was nevertheless proper under Rule 4:9-2. That rule specifies, in pertinent part:

> [w]hen issues not raised by the pleadings and pretrial order are tried by consent or without the objection of the parties, they shall be treated in all respects as if they had been raised in the pleadings and pretrial order. Such amendment of the pleadings and pretrial order as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend shall not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings and pretrial order, the court may allow the pleadings and pretrial order to be amended and shall do so freely when the presentation of the merits of the action will be thereby subserved and the objecting party fails to satisfy the court that the admission of such evidence would be prejudicial in maintaining the action or defense upon the merits.
>
> [R. 4:9-2.]

A trial court has broad discretion to permit amendment to conform the evidence, and that authority is required to be liberally exercised. Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 457 (1998). Of course, such discretion must be exercised with due regard to the opportunity of the opposing party to meet the evidence, where a "beyond the issues as framed" objection to the evidence is made. Pressler, Current N.J. Court Rules, comment on R. 4:9-2 (2009). See also Rivera v. Gerner, 89 N.J. 526 (1982); Colucci v. Oppenheim, 326

N.J. Super. 166, 179 (App. Div. 1999), certif. denied, 163 N.J. 395 (2000). "The opposing party will ordinarily be deemed to have been on notice sufficient to meet that evidence if the issue has been injected into the case prior to trial even if in a technically deficient manner." Pressler, supra, comment on R. 4:9-2. See, e.g., Winslow v. Corporate Express, Inc., 364 N.J. Super. 128, 140 (App. Div. 2003) (issue of legal fraud adequately raised by deposition testimony); 68th St. Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 561 (Law Div. 1976), aff'd o.b., 150 N.J. Super. 47 (App. Div.) (a legal theory advanced neither in the pleadings nor pretrial order may nevertheless be resorted to in the ultimate determination of the controversy where it has been fully aired at trial and in post-trial briefs).

We previously affirmed an order of the trial court allowing a plaintiff to amend an order of judgment originally issued against DeWalt Products Corporation (DPC), to substitute Black & Decker, Inc. (Black & Decker) as the proper party defendant, where Black & Decker was the successor in interest to DPC. Bussell v. DeWalt Products Corp., 259 N.J. Super. 499, 503-04 (App. Div. 1992), certif. denied, 133 N.J. 431 (1993). In Bussell, the plaintiff filed a products liability complaint against DPC, which was served on Black & Decker, and answered by a law firm hired by Black & Decker's insurance carrier. Id. at

508. In fact, interrogatories propounded by plaintiff on DPC were answered by Black & Decker's claims administrator; letters from defense counsel indicated that Black & Decker was controlling discovery requests; and a handwritten memorandum from defense counsel was entitled "Bussell v. DeWalt-Black & Decker." Id. at 508-09. In light of Black & Decker's overwhelming participation in the case and its control of the defense, it could not object to being substituted as the proper party defendant instead of DPC because its due process rights had not been violated. Id. at 510.

Similar to Bussell, here a party not named in the original pleadings (the Estate) is being substituted for a party (Mayer), who is no longer viable. Granted, Black & Decker fully participated in the defense of the products liability action. But we see no difference where, as here, the party substituted in waives its right to be heard and, in effect, consents to the replacement. Thus, under these circumstances, we discern no abuse of discretion in granting plaintiff's post-judgment substitution motion under Rule 4:9-2.

On A-6580-06T1, the orders of July 6, 2007 entering judgment, and of August 3, 2007 denying the motion for a new trial/remittitur, are affirmed.

On A-2694-07T1, the order of January 9, 2008, substituting the Estate as the proper party defendant is affirmed.

MESSANO, J.A.D., concurring.

I write separately to express my firm conviction that the admission of defendant's deposition testimony as to her use of an aide to drive her to doctor appointments, and the subsequent comment by plaintiff's counsel in summation regarding this testimony, was a mistaken exercise of the trial judge's broad discretion. However, I agree with my colleagues that the error was "harmless," (ante, slip. op. 24), given the substantial proof otherwise introduced as to defendant's negligent operation of her car and the injuries plaintiff suffered as a result. I therefore concur in the result.

"'Relevant evidence' means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. The determination as to whether any evidence is relevant rests upon "the logical connection between the proffered evidence and a fact in issue." Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 15 (2004) (internal quotations and citations omitted). If the proffered evidence is relevant, it is generally admissible, "[e]xcept as otherwise provided in [the Rules of Evidence] or by law[.]" N.J.R.E. 402. Therefore, if defendant's use of an aide to drive her to her doctors' appointments three times per week tended to prove that she operated her car negligently on the day of this accident, it was properly admitted. However, because I

conclude there was no "logical connection" between those two propositions, in my opinion the admission of the evidence was improper.

I recite at length the actual deposition testimony of defendant as it was taken on November 30, 2005, slightly more than two years after the accident, and nineteen months before trial.

> Q. Your attorney has been kind enough to bring to my attention that you have an aid in the room with you?
>
> A. Yes.
>
> Q. She is going to sit in the deposition in case you need anything?
>
> A. Yes.
>
> Q. What's her name?
>
> A. Susan Bender.
>
> Q. For how long have you had Susan Bender as your aid?
>
> A. Over two years.
>
> Q. When you say over two years, is that more than two years?
>
> A. I'll say more than two years.
>
> Q. Is it more than three years?
>
> A. No.
>
> . . . .
>
> Q. Does Susan live with you?
>
> A. No, she does not.

Q. What is the extent of her assistance?

A. She comes three days a week for three hours and she takes me to the doctor and she does various things for me.

Q. To help you?

A. Yes.

Q. Back in November of 2003 when this crash occurred, Susan was your aid back then?

A. Yes.

Q. What days of the week did she come back then?

A. Probably the same.

Q. What are those days?

A. Monday, Wednesday and Friday or Monday, Tuesday and Friday, it varies.

Q. Well you mentioned that your aide takes you to the doctor. When you say doctor, you mean doctor or doctors?

A. Doctors.

. . . .

Q. Do you still drive a car?

A. No, I do not.

Q. When did you stop driving a car?

A. I stopped last December, a year.

. . . .

Q. . . . [A]nd why did you stop?

> A. Well, I had the accident and I was moving to Seabrook.[1]
>
> . . . .
>
> Q. . . . Why did you wait so long to stop driving, did someone tell you that you had to stop driving?
>
> A. No.
>
> Q. Did a doctor tell you you shouldn't be driving?
>
> A. No.[2]

As the record discloses, plaintiff's counsel never asked defendant why she needed an aide only on the days that she visited her doctors and not on any other days. He never, for example, inquired whether the aide was utilized because defendant's visits to the doctors, and whatever occurred at that time, somehow resulted in a temporary impairment of her ability to operate her car. He never asked why defendant did not use the aide to drive on other occasions, and he never directly asked defendant if she believed she was otherwise capable of operating her car. In fact, the deposition disclosed that defendant continued to drive for another year after the accident, apparently without incident, before she stopped driving altogether.

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[1] This was an adult independent living community that defendant had moved to after the accident.

[2] The underlined portions are those actually read to the jury by plaintiff. Defendant also read some limited portions of the transcript on the defense case, plaintiff read still others on rebuttal, but neither of those readings is relevant to the issue presented.

Although the name of the aide was fully disclosed at the deposition, plaintiff apparently never sought to depose her or made any attempt to contact her before or after defendant's death and inquire as to the services she provided to defendant and the reason for them.

Some of the exchange that took place with the judge when plaintiff moved in limine to read the deposition testimony at trial is quoted by my colleagues. See ante, slip. op. at 19. The comments of plaintiff's counsel regarding defendant's condition at the deposition – "she was very ill"; "[s]he looked weak"; "[defendant] was laboring"; "she was deteriorating" – were irrelevant to any decision regarding the admissibility of the deposition testimony. The deposition occurred years after the accident and there was no proof whatsoever that defendant was in the same condition on the day of the accident as she was on the day she was deposed. Most telling, however, was counsel's assertion in his argument to the judge that, "I[n] our opinion, she shouldn't have been driving."

Indeed, that was the crux of the issue. Was defendant in such an impaired state of health on the day of the accident that she should not have been driving at all? There was no evidence, however, that defendant's driver's license had ever been suspended or revoked because of her age or ill-health. See N.J.A.C. 13:21-8.4(a)(2) (prohibiting the "obtaining or holding" of a valid driver's license if the driver has a "mental or physical defect" making him "incapable of operating a motor vehicle in a safe manner"). The opinion of

plaintiff's counsel that defendant "shouldn't have been driving" simply does not make it so.

This theme was reiterated when, in his summation, plaintiff's counsel made the following comments:

> This happened on a Saturday. This woman was 80 years old and obviously needed someone to drive her three days a week to doctor visits. That's what she said, three days a week. Monday, Tuesday, Thursday or Monday, Wednesday, Friday. The aide was there to drive.
>
> . . . .
>
> If the defendant were making proper observations, this never happens. She kept her car in control, it never happens. But if this were Monday or Tuesday, Wednesday, Thursday, Friday, she's not driving. The aide is.
>
> It's a Saturday. I submit to you she shouldn't have been on the road because she didn't have her vehicle under control.

There was no objection from defense counsel. However, this is rationally explained by the desire not to highlight yet again the deposition testimony, to which defense counsel's timely objection had been previously overruled.

In my opinion, our prior decisions in Mattero, supra, Gustavson, supra, and Ratner, supra, all support the conclusion that the deposition testimony lacked the requisite relevancy to the issue before the jury, i.e., did defendant operate her vehicle in a negligent manner on the day of the accident? As my colleagues have noted, in Mattero, we reversed the defendants' no cause verdict based

upon 1) the admission of evidence regarding the plaintiff's status as an unlicensed driver in possession of a learner's permit, and 2) the judge's erroneous instruction citing the statute requiring a licensed driver to accompany one driving with a permit. supra, 71 N.J. Super. at 10-11. We determined that "since the operator's negligence is to be determined by the facts existing at the time of the accident, mere lack of an operator's license is not in itself evidence of negligence in the operation of a motor vehicle, in the absence of some causal connection between the injury and the failure to have the license." Id. at 7-8 (emphasis added).

In Gustavson, the plaintiff and the defendant were involved in a motor vehicle accident as they passed each other driving in opposite directions. Supra, 206 N.J. Super. at 542. Each contended that the other had strayed over the center line resulting in the collision of each car's front left fender with the other. Id. at 542-43. Over objection, the plaintiff was permitted to introduce testimony that the defendant had consumed two or three beers, five or six hours before the accident, that he had gone to a bar to see his friend's band play, that alcohol was served in the bar, and that the defendant was only seventeen and below the legal drinking age at the time. Id. at 543. We noted that this evidence, in conjunction with the plaintiff's counsel's summation comments, "conceivably permitted the jury to consider that defendant was under the influence of alcohol at the time of the accident and that this condition caused him to veer

into plaintiff's lane." Id. at 544. The jury found plaintiff forty-five percent negligent, and defendant fifty-five percent negligent. Ibid. In reversing, we noted that "[t]he mere fact that a driver had consumed some alcoholic beverages is by itself insufficient to warrant an inference that the driver was intoxicated and that the intoxication was of such a degree as to render him unfit to drive at the time of the accident." Id. at 545 (emphasis added).

Finally, in Ratner, the plaintiff's products liability claim against a car manufacturer was based upon an asserted unintended acceleration of her car. 241 N.J. Super. at 200. We reversed a no cause verdict by concluding, in part, that is was improper for the judge to have permitted a defense medical expert to read from the Physician Desk Reference (PDR) as to the possible side-effects of drugs plaintiff was taking for hypertension. Id. at 205. We noted, "[t]here was no suggestion in this record that plaintiff suffered any of the side effects listed in the PDR or that the accident was in any way attributable to such side effects." Ibid.

A common thread can be distilled from all three cases. Proof of a particular fact, a driver being unlicensed, consuming alcohol, or ingesting hypertension medications, is not relevant to prove the essential fact at issue, the negligent operation of a vehicle, unless there is a "logical connection" between the two facts. I concede that the deposition testimony in this case was sufficient to establish the habit that defendant followed on the days that she

visited her doctors. N.J.R.E. 406(a). But, proof of that habit was not probative of how defendant operated her car on the day of the accident because it did not lead to the logical inference that she was too ill or infirm to drive at other times.

My colleagues seek to distinguish Mattero, Gustavson, and Ratner, by arguing that unlike the facts presented in those cases, in this case "there was supplementary evidence of [defendant's] erratic driving at the time of the accident, which the jury could reasonably infer was related to the reason for a weekday driver, namely her advanced age and ill health." Ante, slip. op. at 23. There are two problems, however, with this analysis.

First, whether the jury could reasonably infer from the deposition testimony that defendant used her aide to drive her to and from her doctors' appointment as an accomodation for her "advanced age and ill health" is debatable. Defendant's decision not to drive to these sessions may have been just as likely required by the medical result of what occurred every time she saw her doctors. We simply do not know. If plaintiff's counsel had inquired at the deposition, we might be in a better position to understand defendant's reason for employing an aide only on those occasions. It

is undisputed that defendant drove herself on other occasions, without incident, both before and after this accident.[3]

Second, and more importantly, in all three of the cited cases, there was indeed other evidence of the parties' negligent or erratic operation of the vehicle on the day in question. In Ratner, the defendant offered expert accident reconstruction testimony that the accident occurred because the plaintiff mistakenly pressed the accelerator and did not depress the brake as she claimed. Supra, 241 N.J. Super. at 201. In Mattero, though the record is less clear, the vehicle immediately in front of the plaintiff's car successfully avoided a collision with the defendant's momentarily-stopped tractor-trailer, but the plaintiff was unable to make similar observations and execute a similar evasive maneuver. Supra, 71 N.J. Super. at 6. And in Gustavson, we noted the plaintiff's claim of negligence was that the defendant had veered "two or three feet out of [his] lane," but that such "driving on a curving road at night [wa]s not so erratic as to suggest that the driver was probably intoxicated." Supra, 206 N.J. Super. at 546.

The last portion of this comment from Gustavson demonstrates that the manner in which the vehicle was operated on the day in question is the critical issue, not because it supports the

[3] Defendant acknowledged in another portion of her deposition that she had been involved in a motor vehicle accident approximately one year before this one, but testified she was involved in no other accidents.

admissibility of the proffered evidence, but rather because it demonstrates that the proffered evidence, in that case the drinking of some beer, only becomes admissible if it is relevant to the happening of the accident. Just as in Gustavson, where the plaintiff's asserted negligent operation of the defendant's vehicle -- swerving over the dividing line by two or three feet -- cannot bootstrap the evidence of defendant's prior ingestion of alcohol to make it relevant, so too in this case defendant's actual operation of the car on the day in question cannot become the lynchpin for determining the relevancy of her deposition testimony.

The proof at trial was indeed substantial that defendant operated her car in a negligent fashion on the day of the accident. However, it is equally clear that she was not operating it in a manner that bespoke incompetence. She was not driving at an excess speed, she proceeded in the line of travel with other vehicles, and she pulled over immediately after the accident. She clearly failed to make reasonable observations of plaintiff entering her car, and she clearly inappropriately judged the distance between her own car and the cars parked within the fog line, though this was only a matter of a few feet at best. Unfortunately, accidents like this happen far too frequently on our congested roadways. In short, the evidence of how defendant drove on the day in question cannot be used as the "supplementary evidence" that supports admission of the deposition testimony and creates the "logical connection" between

defendant's use of an aid on certain days and her negligence at the time of the accident.

Even if I am mistaken about the relevancy of this evidence, I would nevertheless conclude that it should have been excluded pursuant to N.J.R.E. 403, which permits "relevant evidence" to be excluded "if its probative value is substantially outweighed by the risk of (a) undue prejudice . . . ." See Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 494-502 (1999)(noting the marginal relevance of deposition readings that portrayed plaintiff as a racist on issues of credibility and damages was outweighed by inherent prejudice and required reversal of no cause verdict). For these reasons, I believe the judge mistakenly exercised his discretion in permitting the deposition reading.

I further disagree with my colleagues' assertions that 1) the deposition reading's relevancy was "heightened by the unavoidable absence of [defendant] from trial and . . . the inability of the jury first hand to observe her physical condition as well as credibility"; and 2) "whatever prejudice defendant may have suffered from inclusion of this evidence was not undue since the defense had every opportunity to rebut the suggested inference, but declined the invitation." Ante, slip. op. at 23. As noted above, defendant's condition at the time of the deposition was not relevant to her condition on the date of the accident, two years earlier, and, her condition at trial, nearly four years after the accident, assuming

she had survived, strikes me as equally irrelevant proof that she was unable to properly operate her car on the day in question.

Had plaintiff introduced evidence of defendant's physical or mental condition at the time of the accident, it clearly would have relevancy. Plaintiff, however, eschewed the opportunity when she produced Kevin Davenport, the police officer who responded to the accident while defendant was still present. He testified that he "made a decision to drive [defendant] home due to the fact that she was upset of the events that took place." He was not asked about, nor did he testify to, any conclusions regarding defendant's overall ill health or advanced age as being precipitating reasons for her negligent operation of the car.

As to defendant's ability to "rebut the suggested inference," clearly any use of the deposition transcript itself to accomplish this was limited. Since the deposition was purely a discovery deposition, there was no obligation upon defendant's counsel to ask questions clarifying the reasons for the use of her aide on the days she visited her doctors. See Hearon v. Burdette Tomlin Mem'l Hosp., 213 N.J. Super. 98, 104 (App. Div. 1986)(noting "[w]here a party's witness is being deposed, the party is not required, and for strategic purposes may not desire, to fill in any gaps omitted or glossed over by the deposing party"). Perhaps defendant could have anticipated the inference plaintiff's counsel made explicit during summation and called a witness on her case to rebut the implication.

Whether that would have been permitted on the eve of trial is highly speculative.

In my opinion, plaintiff's inability to call defendant as a witness at trial does not augment the evidence's relevance. Rather, plaintiff obtained a benefit from defendant's absence at trial because she was now permitted to argue a fact, i.e., that defendant was too ill or infirm to drive on the day of the accident, when there was no evidence to support that conclusion except a deposition reading regarding her use of an aid on other limited occasions.

Having stated my differences with my colleagues' view of the admissibility of the deposition testimony, I conclude by noting my agreement with the result they have reached. The evidence in this case as to defendant's negligent operation of the vehicle was substantial. Plaintiff's testimony that she was not in the lane of travel when she was struck was not significantly affected by cross-examination. Watters' testimony regarding the operation of defendant's vehicle immediately before the accident left little doubt as to the cause of the collision. The injuries plaintiff suffered were significant and defendant produced no medical witnesses to rebut plaintiff's proofs. In short, while I believe it was error to permit plaintiff's counsel to read portions of defendant's deposition regarding the use of an aide, I conclude it was not "clearly capable of producing an unjust result." R. 2:10-2.

I therefore concur in the result.

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

CLERK OF THE APPELLATE DIVISION