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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0874-13T2

CRYSTAL BURKERT,

Plaintiff-Respondent/
Cross-Appellant,

v.

HOLCOMB BUS SERVICE, INC.
and SAYE THOMAS YOR YOR,

Defendants-Appellants/
Cross-Respondents,

and

MICHAEL TAGGART,

Defendant.

Argued December 8, 2014 - Decided May 13, 2015

Before Judges Lihotz, St. John, and Rothstadt.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-5222-10.

Michael J. Marone argued the cause for appellants/cross-respondents (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; Mr. Marone and Richard J. Williams, Jr., of counsel and on the briefs;, Anthony J. Fredella, on the briefs).

George J. Badey, III, argued the cause for respondent/cross-appellant (Badey, Sloan & DiGenova, PC, attorneys; Mr. Badey and Michael H. DiGenova, on the briefs).

PER CURIAM

Defendant Holcomb Bus Service, Inc. appeals from a final judgment in favor of plaintiff Crystal Burkert for injuries she sustained in a motor vehicle accident. Defendant maintains numerous errors require the jury verdict and judgment be vacated and a new trial granted. Following our review we agree plaintiff's counsel's comments, particularly during summation, exceed the bounds of permissible advocacy, were prejudicially improper, and require reversal.

I.

On December 7, 2007, at approximately 3 p.m., a drunk driver struck plaintiff while she walked home. Plaintiff's school bus dropped her off approximately three-tenths of a mile from her home, despite having a designated bus stop directly outside the front of her residence on Commissioners Road in South Harrison. On the afternoon of the accident, however, pressure from other students riding the bus and comments made by the bus driver, Saye Thomas Yor Yor, resulted in plaintiff departing at a nearby bus stop located at the intersection of Lincoln and Commissioners Roads.

Commissioners Road is a two-lane roadway, with a posted speed limit of forty-five miles per hour and no sidewalk. As plaintiff walked along the side of the road, she was struck by a vehicle operated by Michael Taggart, who had been drinking and passed out at the wheel. Chemical tests later confirmed Taggart had a blood alcohol concentration of 0.23%.

The impact knocked plaintiff twenty to twenty-five feet through the air into the wooded thicket, which abutted Commissioners Road. She experienced a loss of consciousness, estimated by witnesses to be between five to ten minutes, and was airlifted to Cooper Trauma Center where doctors diagnosed her with multiple injuries, including a fractured pelvis and sacrum.

Defendant was contracted by the local school district to provide bus transportation services for students. According to plaintiff, her bus pass required she be picked up and dropped off outside of her home. Both defendant's internal policies and the school district's rules precluded dropping a student at a location other than his or her designated bus stop. Nevertheless, plaintiff stated, Yor Yor, who was the regular route driver, dropped her off at the intersection of Lincoln and Commissioners Roads three or four days per week. Plaintiff testified:

> At the beginning of the school year, the first time an incident occurred where the bus driver wanted me to get off at the stop sign, I got off and I told my mom about it that night. My mom . . . told me that I needed to make the bus driver take me to my house, because . . . that was my stop, and it wasn't safe for me to walk on the street. So the next day . . . when I was on the bus and I told him to take me to my house, he did. But the . . . kids on the bus called me names, and they . . . bullied me.

Plaintiff estimated it took Yor Yor between five to ten minutes to drop her at her designated bus stop and return to the main bus route. In the following exchange on direct, plaintiff explained what would typically occur:

> [PLAINTIFF]: If I didn't voluntarily get off -- if I just sat on the bus and stayed there, [Yor Yor] used to look in the mirror and say, "Is Crystal on the bus?" But to me it was apparent that he was calling attention to me, because I said hello to him every day when I got on the bus. . . .
>
> Q. What would he -- tell us how he said it. What would he do? Would he . . . open the door?
>
> A. He . . . would leave the door open, and ask the kids on the bus, "Is Crystal on the bus today?"
>
> Q. And then what would happen?
>
> A. If I didn't get off the bus there were instances that I can recall when he . . . told me that it was nice weather and [asked] why couldn't I walk?

> Q. All right. So after this happened with the kids and the bullying or the pressure, what did you do the next time?
>
> A. The . . . next time that it happened, I just got off the bus.

Plaintiff had no memory of being struck by Taggart's vehicle and described the last thing she remembered on the day of the accident:

> My bus driver stopped at this corner to the stop sign and opened the door. He waited for me to get out of the bus. At that point, I was so tired of being bullied and called names, I just got up and got off of the bus. The last thing that I remember was being right by my neighbor's house, walking down the street.

Plaintiff's medical experts described her injuries. Among them was Marc L. Kahn, M.D., an orthopedist, who testified plaintiff suffered bulging and herniated discs in her lumbar spine with radiculitis and non-displaced fractures of her pelvis. None of plaintiff's injuries required surgical treatment, but posed on-going permanent problems. Also, James L. Hewit, M.D., a psychiatrist, diagnosed plaintiff as suffering a mild form of traumatic brain injury.

Defendant conceded Yor Yor made an error in judgment and admitted he should not have allowed plaintiff to exit the bus at a place other than her designated bus stop. At trial,

defendant's proofs sought to place primary blame on Taggart, who settled with plaintiff prior to the trial.

Defendant called Taggart as a witness. He testified to the places he stopped to drink and the number of beers he consumed prior to the accident. At his last stop, the bartender suggested he eat something or drink coffee because "he was falling asleep." Taggart declined, left the bar, headed northbound on Commissioners Road, and fell asleep behind the wheel. After striking a sign, he awoke and realized his vehicle was partially off the roadway to the right. Panicking, he sharply turned the wheel of the car to the left in an attempt to correct the path of the vehicle. Unable to control his car, Taggart's vehicle crossed the center line into the oncoming traffic lane and struck plaintiff as she walked southbound.

Other evidence presented by defendant challenged the extent and nature of plaintiff's damages. Defendant called the responding police officer, who described the scene, and medical experts, who offered their opinion on the effects of plaintiff's injuries.

During deliberations, the jury submitted this question: "[D]oes the percentage of fault have anything to do with the award of damages regarding questions 5 and 6?" Question 5 on the verdict sheet asked the jury to allocate a percentage of

liability between defendant and Taggart; Question 6 concerned the fair amount of damages. The judge responded by repeating the instruction he gave when initially charging the jury. Shortly thereafter, the jury returned a $5 million verdict for plaintiff, finding defendant and Yor Yor negligent as joint tortfeasors and such negligence was the proximate cause of plaintiff's injuries. The jury apportioned 75% of the fault to defendant and 25% to Taggart.

Defendant moved for a new trial, arguing the verdict was against the weight of the evidence and its amount shocked the conscience. In support of its motion, defendant cited multiple instances during the trial where plaintiff's counsel displayed hostility towards defendant and defense counsel. Defendant maintained the cumulative effect of these statements prejudiced the jury and constituted grounds warranting a new trial. Alternatively, defendant also sought remittitur.

The trial judge examined the challenged comments and denied defendant's motion for a new trial. Finding many of the contested remarks appropriate, the judge concluded those which were inappropriate either resulted in sustained objections and were stricken from the record or were corrected by curative instructions. Regarding defendant's challenge to the jury award, however, the judge found the verdict excessive and

remitted the award by fifty percent. Attorney's fees and pre-judgment interest were computed and added to the final judgment. Defendant appealed. Plaintiff cross-appealed.

II.

On appeal, defendant raises numerous arguments seeking to vacate the verdict and award a new trial. Defendant maintains its motion for a new trial should have been granted because "the individual and cumulative effect of plaintiff's counsel's misconduct inflamed the jury and prejudicially impacted the verdict"; the jury's apportionment of fault was against the weight of the evidence; and the jury's damage award was excessive. On cross-appeal, plaintiff maintains remittur was improperly granted.

A.

Defendant argues the verdict was against the weight of the evidence and was the result of passion, partiality, or prejudice caused by the impermissible conduct of plaintiff's counsel. Identifying each offending remark, defendant contends the improper comments "pervaded every aspect of the jury trial in this matter" from opening statements to summations and were so prejudicial and inflammatory that they obviously influenced the "shocking" jury verdict apportioning 75% liability to defendant

and its driver. We provide the context of the cited comments to aid understanding of defendant's arguments.

1.

We first review the challenged comments uttered during plaintiff's opening statement. We also note, immediately prior to commencement of trial, defendant challenged plaintiff's proposed use of exhibits and photographs during opening as seemingly "compris[ing] more of a closing argument than an opening statement." The judge provided the parameters for reference to proposed evidence. Plaintiff's opening remarks introduced the basic facts of the case and plaintiff's counsel made the first of several objected-to comments:

> The evidence will show, and we will prove, that this accident was caused by [defendant] and by Michael Taggart -- by both of them. The evidence is going to show that this tragedy has permanently robbed Crystal of so much of life's promise.
>
> Michael Taggart has stood up and taken responsibility for this. He made a terrible mistake. He drove drunk. He fe[l]l asleep at the wheel. He caused this accident, and Michael Taggart has owned up to it. And he's apologized, and he's almost been in tears, and said he wishes he could trade places with Crystal. The man has done a terrible thing and he's owned up to it.
>
> But for over five years now, [defendant] has refused to take responsibility. They're trying to blame everything on Michael Taggart and that's why we're here. <u>That's why Crystal needs you in</u>

> this case. It's your job to hold [defendant] responsible, too. If Crystal was not at that spot on the road, the accident never happens.
>
> [Emphasis added.]

At that point, defendant objected, and during the ensuing sidebar, the trial judge warned counsel he was crossing the line by including arguments improper for opening statements. Nevertheless, this statement followed: "So when [Yor Yor] opens that door and he leaves the door open while the bus sits there -- "Is Crystal on the bus?" He's encouraging these kids to bully her." Before defendant could object, the judge sua sponte called another side bar, where he again warned plaintiff's counsel:

> THE COURT: You clearly . . . crossed the line here. You're arguing a . . . closing statement[,] what they did and they should not do. Just them what you're going to show. I mean . . . this whole line is a closing argument. So, move on.

The proscribed conduct did not end, and a third objectionable statement was uttered by counsel when discussing plaintiff's accident-related back problems:

> It's not fun. It hurts every day. Crystal has pain every day. And it's not going to get better, and it may get worse as she gets older.
>
> If they do an operation, it weakens this, and she could have other problems, but . . .

> [DEFENSE COUNSEL]: Objection, Your Honor. . . . [T]here's nothing in this case about that.

The judge sustained the objection and ordered the remarks stricken. Almost immediately thereafter, counsel continued, stating:

> Now, in addition to the lower back injury to the bruised lungs, she had a broken pelvis -- three fractures of her hips.
>
> This will -- it's not only a really bad injury, but it also underscores the . . . level of impact[,] the unconsciousness[,] the lung contusion[,] and breaking her hip on a seventeen[-]year[-]old girl is not easy. You really need to get whacked very hard to break your hip. It's not like an elderly person with osteoporosis falls and breaks their hip.
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Yes. Bad. Sustained.

Despite yet another warning regarding his commentary, counsel concluded his opening remarks by stating:

> Michael Taggart stood up and took responsibility for this, the evidence will show. You'll see him in this courtroom. Apologized for it. He made a terrible mistake and he owned up to it.
>
> But for over five years now, [defendant] ha[s] refused to take responsibility and they just try to blame everything on Michael Taggart. That's why we're here.

> Crystal's injuries are for life. All of us are going to go back to our lives when this trial is over . . . [interrupted by objection] but Crystal can't.

The judge again admonished counsel to "not make an argument."

2.

Improper comments were also made by counsel when objecting. During cross-examination of plaintiff regarding the pain she experienced following the impact, plaintiff's counsel objected, referring to defendant's line of questioning as "stupid" on two occasions. Defendant also challenged plaintiff's recollection of taunting statements made by schoolmates on the bus, to which plaintiff's counsel objected and asked "what are we gaining by making . . . her cry like this?" A later speaking objection openly and acerbically characterized the entire line of questioning as a "scathing cross-examination." The judge reprimanded counsel for his "untoward" comments and instructed the jury to "disregard counsel's comments."

When the defense called one of the investigating police officers to inform the jury of the initial accident scene, plaintiff's counsel engaged in the following cross-examination:

> Q. Yor Yor was never charged with any crime in this case, correct?
>
> A. I don't believe so, no.
>
> Q. And we've established that he gave a false statement to the police.

[DEFENSE COUNSEL]: Objection, Your Honor.

The judge sustained the objection and ordered the "gratuitous statement" stricken.

3.

The final set of challenged comments occurred during summation. Defendant suggests these are reversible per se.

First, defendant points to counsel's statements about allocation of liability between defendant and Taggart, emphasizing its effect on the damage award against defendant and arguing it represents a de facto "ultimate outcome charge." The opposed remarks are highlighted:

> Please remember, every percentage point that you allocate to Taggart is one less percentage point that you can allocate to [defendant].
>
> . . . .
>
> But whatever award you award here will be times by [sic] the percentage of negligence of [defendant] and Crystal will only get that percentage of whatever you award. So whatever you award will be reduced by the amount or the percentage of Taggart. Okay? The [j]udge will explain that to you as well.
>
> . . . .
>
> If you do the math, the number for [defendant] will be much, much higher than the number for Taggart. I'm not allowed to suggest a specific number, but I'm asking you to do that math. Please do that math.

> And Crystal will only receive the percentage that [defendant] has of your ultimate award.
>
> [Emphasis added.]

Defendant next asserts plaintiff issued a call-to-arms by urging the jury to "send a message" through its verdict, stating:

> Your verdict needs to stand for all time, not just for . . . a couple of years, a few years. It's 56.2 years. Please don't reward [defendant] for coming in here and making us do this. Don't reward them for making us do this. Send a message to [defendant] --

Upon objection, the judge ordered the remark stricken.

Defendant also argues plaintiff's summation regarding fixing damages invoked the "golden rule," another misstep defendant states warrants reversal:

> [Plaintiff's] family loves her very much. Her family is here in the [c]ourtroom today. Her mom's been [here] every single minute of this trial, just like you, just like me, just like [defense counsel], and the [j]udge, and Crystal. She's powerless. Her dad's powerless. They're powerless today to help Crystal, because only you can. Only you can.
>
> . . . .
>
> Crystal's mom and dad are here and it's got to be horrible for them. They're powerless to help their daughter, because you all have the power.

In addition, defendant asserts plaintiff's counsel repeatedly attacked defense counsel's character: insinuating he was insincere ("Now, if [defense counsel] was sincere, when he said 'We were wrong . . . .'"); disingenuous ("I would submit to you that making those kinds of arguments were [sic] just disingenuous . . . ."); and suggested defense arguments were "almost a joke" and "laughable."

Finally, plaintiff's summation is contested as impermissibly utilizing the "time-unit rule," suggesting the verdict be computed by awarding compensation per hour or per day endured by plaintiff. Specifically, plaintiff's counsel enumerated the costs spent for defendant's experts, highlighting one expert received $1600 per hour, which was followed by asking the jury: "So, how much for one day with all of Crystal's mental and physical permanent injuries? . . . What's one day worth?"

Following summations, and out of the jury's presence, defendant moved for a mistrial, which was denied. The trial judge considered the challenged remarks "fleeting" and insufficient to "rise to the level of" misconduct. When the jury returned, however, the judge issued the following curative instruction:

> During the course of the plaintiff's counsel's closing, he made a comment that you may recall that . . . there was an objection to and I struck.

> And that comment was that you had to "send a . . . message." That is not for you to send a message here. It is for you to do your sworn duty to be fair and impartial in this case. You're not to consider that comment in any way, shape, o[r] form during the course of your deliberations.

Completing deliberations, the $5 million plaintiff's verdict was rendered. Following post-judgment motions, defendant appealed and plaintiff cross-appealed.

B.

We underscore a jury verdict is entitled to substantial deference, Risko v. Thompson Muller Auto. Grp. Inc., 206 N.J. 506, 521 (2011), and should not be set aside by a trial judge unless, "after canvassing the record and weighing the evidence, . . . the continued viability of the judgment would constitute a manifest denial of justice." Baxter v. Fairmont Food Co., 74 N.J. 588, 597-98 (1977). See Risko, supra, 206 N.J. at 521 ("[A] motion for a new trial should be granted only after 'having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law.'" (quoting R. 4:49-1(a)). Trial judges must refrain from substituting their own conclusions for that of the jury "merely because he [or she] would have reached the opposite

conclusion . . . ." Ibid. (alteration in original) (quoting Dolson v. Anastasia, 55 N.J. 2, 6 (1969)).

Appellate review is guided by a similar standard. We reverse the grant or denial of a motion for a new trial only when "it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1. See Bender v. Adelson, 187 N.J. 411, 431 (2006).

> A miscarriage of justice has been described as a pervading sense of wrongness needed to justify [an] appellate or trial judge undoing of a jury verdict . . . [which] can arise . . . from [the] manifest lack of inherently credible evidence to support the finding, obvious overlooking or under-valuation of crucial evidence, [or] a clearly unjust result. . . .'"
>
> [Risko, supra, 206 N.J. at 521 (alterations in original) (citation and internal quotation marks omitted).]

"[A] civil plaintiff has a constitutional right to have a jury decide the merits and worth of [his or] her case." Johnson v. Scaccetti, 192 N.J. 256, 279 (2007) (citing N.J. Const. art. I, ¶9). Arguments made during summations "must be 'fair and courteous, grounded in the evidence, and free from any potential cause to injustice.'" Risko, supra, 206 N.J. at 522 (quoting Jackowitz v. Lang, 408 N.J. Super. 495, 504-05 (App. Div. 2009)). Although trial counsel is generally afforded "broad latitude" when making arguments because an attorney is an

advocate and, thus, "expected to be passionate," judges must intervene when statements "cross the line beyond fair advocacy and comment, and have the ability or capacity to improperly influence the jury's ultimate decision making." Ibid. (citations and internal quotation marks omitted). This includes "'[u]nfair and prejudicial appeals to emotion,'" and "'insinuations of bad faith on the part of [those] defendants who sought to resolve by trial validly contested claims against them.'" Jackowitz, supra, 408 N.J. Super. at 505 (alteration in original) (quoting Geler v. Akawie, 358 N.J. Super. 437, 468-69 (App. Div.), certif. denied, 177 N.J. 223 (2003)).

Further, while "trials must be conducted fairly and with courtesy toward the parties, witnesses, counsel, and the court," Geler, supra, 358 N.J. Super. at 463, litigants are "'not entitled to a perfect [one].'" Risko, supra, 206 N.J. at 518 (quoting State v. Swint, 328 N.J. Super. 236, 261 (App. Div.), certif. denied, 165 N.J. 492 (2000)). "Fleeting comments" and "the [f]ailure to make a timely objection" will not warrant a new trial unless plain error can be shown. Jackowitz, supra, 408 N.J. Super. at 505 (citing R. 2:10-2).

Here, we must consider whether the cited statements, individually or cumulatively, could impermissibly "shift the jury's focus from a fair evaluation of the evidence to pursue

instead a course designed to inflame the jury, [by] appealing repeatedly to inappropriate and irrelevant considerations." Pellicer v. St. Barnabas Hosp., 200 N.J. 22, 55-56 (2009).

Several of defendant's arguments rest on well-established principles defining the limits of acceptable advocacy. For example, we have held in civil matters involving a demand for compensatory damages it is "clearly inappropriate" to urge the jury to "send a message," directing it to punish the defendant for wrongdoing. Jackowitz, supra, 408 N.J. Super. at 508; see also Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 390 N.J. Super. 557, 569 n.3 (App. Div. 2007) (noting our general disapproval of exhortations to send a message), aff'd, 194 N.J. 212 (2008). When an argument's "focus was not on the happening of the accident but on punishing defendant for the accident" and reflects a design "to exact punishment against defendant," the commentary crosses the line to inappropriate and unacceptable advocacy that undermines the jury's impartial review of the evidence. Jackowitz, supra, 408 N.J. Super. at 508.

Further, counsel may not use disparaging language to discredit or denigrate the opposing party. See Rodd v. Raritan Radiologic Assocs., P.A., 373 N.J. Super. 154, 171 (App. Div. 2004); Geler, supra, 358 N.J. Super. at 467. Arguments may not include "insinuations of bad faith" by a defendant who proceeds

to trial to resolve "validly contested claims." Geler, supra, 358 N.J. Super. at 469.

Finally, when discussing the jury's role in fixing damages, invoking the so-called "golden-rule," that is, asking the jury to award an amount it would want for similar pain and suffering, "remains interdicted." Dehanes v. Rothman, 158 N.J. 90, 97-98 n.1 (1999). See also Geler, supra, 358 N.J. Super. at 464 ("The Old Testament's 'golden rule' that you should do unto others as you would wish them to do unto you may not be applied in this context); Henker v. Preybylowski, 216 N.J. Super. 513, 520 (App. Div. 1987).

Here, defendant did not deny the actions of its driver, it disputed causation and challenged damages. Knowing the jury was to apportion fault if it were found liable, defendant maintained Taggart was solely responsible for the accident. Relying on its experts, defendant also contested the gravity and permanency of plaintiff's injuries.

Having reviewed the record, it is very clear plaintiff's counsel did not accept any defense was appropriately proffered.[1]

[1] Even now, counsel fails to recognize the impropriety of his comments as well as their impact upon the jury's deliberations. The tenor and text of plaintiff's brief exceeds zealous representation. Plaintiff's merits brief is replete with untoward indecorous remarks. For example, he refers to defendant's brief as "describing a delusional case" based on (continued)

We conclude this one-sided view, voiced through objectionable remarks, infected the deliberative process.

During opening, counsel's comments strayed widely from concisely relating the evidence; instead, counsel interjected his own interpretation of the facts. From the start, plaintiff's counsel declined to heed the admonitions of the trial judge to cease making these arguments. See Manzi v. Zuckerman, 157 N.J. Super. 63, 66 (App. Div. 1978) ("The purpose of [opening] statements is to do no more than inform the jury in a general way of the nature of the action and the basic factual hypothesis projected, so that they may better be prepared to understand the evidence." (citation and internal quotations omitted)).

Further, the cited comments plaintiff's counsel made during trial testimony fuel a negative connotation fostered toward defendant. Certainly, "it is improper for an attorney to make derisive statements about parties, their counsel, or their witnesses." Szczecina v. PV holding Corp., 414 N.J. Super. 173,

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(continued)
"made-up facts" or states the appeal was awash with recently advanced arguments as "only after it lost did [defendant] rewrite history, magnify the minutiae, and claim that it was deprived a fair trial." Plaintiff also suggests defendant's claims should be disregarded because it also inflamed the jury against Taggart and made inappropriate speaking objections during the trial. We find this "he did it too" defense rings hollow and is specious.

178 (App. Div. 2010). Suggesting counsel's line of questioning is "stupid," merely because one disagrees is offensive and unprofessional. The role of a legal advocate is to provide "[r]easoned analysis of the evidence and the credibility of testimony." Geler, supra, 358 N.J. Super. at 467. Puerile name-calling is condemned.

Perhaps these examples singularly, and even viewed together, may have been insufficient to set aside the verdict. However, when they are viewed alongside the improper remarks made in plaintiff's summation, we are convinced the jury's verdict was inappropriately influenced by counsel's unacceptable comments.

Both in opening and in closing, plaintiff's counsel repeatedly suggested defendant wrongfully "refused to take responsibility" and forced plaintiff to wait five years then undergo a trial. Defendant, as well as plaintiff, has a right to air its position before an impartial factfinder for determination. The exercise of that right must not be portrayed as offensive or warranting punishment. Further, blaming defendant because proceedings stretched more than five years is untenable.

In his opening, counsel also implored the jury to "send a message," suggesting defendant must be punished for not

accepting liability for its role in the accident (as contrasted to the penitent Taggart). Jackowitz, supra, 408 N.J. Super. at 508. This need to punish defendant impermissibly continued to be hammered by plaintiff throughout closing.

Next, the inaccurate comments addressed to the apportionment of liability between defendant and Taggart were egregious. Plaintiff misled the jury to consider the ultimate outcome of its verdict by suggesting plaintiff could only recover against defendant, despite Taggart's liability.

The law "favors the apportionment of fault among responsible parties." Boryszewski v. Burke, 380 N.J. Super. 361, 374 (App. Div. 2005), certif. denied, 186 N.J. 242 (2006). A jury is to determine "which parties were at fault and the degree of their negligence . . . grounded in the evidence presented at trial." Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 125 (2004). See also Steele v. Kerrigan, 148 N.J. 1, 35 (1997) (stating fault should be apportioned "based on all of the evidence pertaining to each party's role in the incident"). However, a jury is not to be concerned with "how a plaintiff will collect a damage award." Brodsky, supra, 181 N.J. at 122. See also Brodsky v. Grinnell Haulers, Inc., 362 N.J. Super. 256, 271 (App. Div. 2003), ("Whether and how a plaintiff recovers a damage award is none of the jury's concern, and should not be

part of its deliberations."), aff'd in part, rev'd in part on other grounds, 181 N.J. 102 (2004). As the Court instructed in Brodsky, when the jury is assessing the comparative negligence of two jointly liable defendants:

> An ultimate outcome charge explaining how the Comparative Negligence Act [N.J.S.A. 2A:15-5.1 to -5.8] operates between joint tortfeasors will not advance any of the legislative purposes of the Act. The Act calls for the jury to make a good-faith allocation of the percentages of negligence among joint tortfeasors based on the evidence—not based on the collectability or non-collectability of a judgment. We cannot untether the jury from the dictates of the statute and allow it to determine the percentage of the defendants' fault based on its own intuitive notion of equity. The determination of each defendant's percentage of negligence must represent each defendant's degree of fault for causing the accident. We cannot conceive that the Legislature intended the jury to be provided with information that would permit it to manipulate that evidence-driven paradigm in exchange for an outcome-based one dependent on the jury's own innate sense of fairness.
>
> [Brodsky, supra, 181 N.J. at 121.]

To tell the jury plaintiff's compensation depended on the amount of the award against defendant was significantly prejudicial as it implied the only funds available for her recovery resulted from defendant. We determine these remarks led the jury to shift a portion of the liability to defendant solely based on its ability to pay and the corresponding belief

Taggart could not. See Weiss v. Goldfarb, 154 N.J. 468, 481 (1998) (finding an ultimate outcome charge in a negligence suit against joint tortfeasors "is not only irrelevant but has the clear potential of being highly prejudicial" because it could "shift to other defendants some percentage of negligence that the jury thought should rightfully be assessed against [a co-defendant with immunity from damages]").

Also, it is necessary to caution against comments inviting the jury step into the shoes of plaintiff's parents as an improper appeal to emotion. See Jackowitz, supra, 408 N.J. Super. at 505. These remarks added to the improprieties in this trial.

We recognize this trial was lengthy. Further, the trial judge repeatedly directed the jury to disregard improper statements, struck others, and issued curative instructions in the face of the most egregious remarks. Nevertheless, we find these efforts ineffective to purge the taint of prejudice from counsel's improper and overzealous commentary. See Szczecina, supra, 414 N.J. Super. at 184-85.

Cautionary instructions have little effect to cure jury prejudice resulting from the "repeated exposure of a jury . . . to prejudicial information." Geler, supra, 358 N.J. Super. at 471 (alteration in original) (citation and quotation marks

omitted). "[W]here an attorney persists in making unwarranted prejudicial appeals to a jury which taint the verdict," reversal is necessary because the comments had the capacity to improperly influence the jury's ultimate decision-making, both in the amount of the verdict as well as the defendant's share of liability. Hofstrom v. Share, 295 N.J. Super. 186, 193 (App. Div. 1996), certif. denied, 148 N.J. 462 (1997).

We disagree with the trial judge the improper remarks peppered throughout this trial were harmless. Rather, the cumulative effect of counsel's inappropriate commentary, undeterred by cautionary and curative instructions, improperly inflamed the jury's passion, affected its deliberations, and had "the ability or capacity to improperly influence [its] ultimate decision making." Risko, supra, 206 N.J. at 522 (citation and internal quotation marks omitted). See also Pellicer, supra, 200 N.J. at 51-53 (holding trial errors, which individually would not mandate reversal, may require such a result when viewed in the aggregate).

The trial judge's denial of defendant's motion for a new trial was a miscarriage of justice. R. 2:10-1. The verdict must be set aside in favor of a new trial. In view of our conclusion, we need not consider defendant's remaining arguments

in support of its request for a new trial. Nor need we address plaintiff's challenge to remittur.

Reversed and remanded for a new trial.