Ceasar v. Flemington Car

Superior Court of New Jersey, Appellate Division
April 1, 2014, Submitted; April 23, 2014, Decided
DOCKET NO. A-1464-12T3

Reporter
2014 N.J. Super. Unpub. LEXIS 911 *; 2014 WL 1613422

CARLA A. ***CEASAR***, ERNA D. ALLEN, and the ESTATE OF ROY E. ALLEN, Plaintiffs-Respondents/Cross-Appellants, and CHEYENNE ***CEASAR***, a minor, by her Guardian Ad Litem CARLA A. ***CEASAR***, Plaintiff, v. ***FLEMINGTON*** CAR AND TRUCK COUNTRY and ATLANTIC TIRE & SERVICE, Defendants, and ***FLEMINGTON*** BUICK CHEVROLET PONTIAC GMC, Defendant-Appellant/Cross-Respondent.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

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Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-7665-09.

Core Terms

tire, plaintiffs', inspection, award of punitive damages, replacement, injuries, records, permanent, rear, punitive damages, trial judge, recommended, summation, damages, tread, prior service, reprehensibility, dealership, prognosis, vehicle's, repeated, defense counsel, bald spot, circumstances, depth, oil, cross-examination, indifference, mistrial, reckless

Counsel: Bonner Kiernan Trebach & Crociata, LLP, attorneys for appellant/cross-respondent (Alan G. White, Alexander H. Gillespie and Becky L. Caruso, on the brief).

Niedweske Barber Hager, LLC, attorneys for respondents/cross-appellants (Kevin Barber and Christopher ***W***. Hager, on the brief).

Judges: Before Judges Fisher, Espinosa and Koblitz.

Opinion

PER CURIAM

On April 12, 2009, plaintiff Carla ***Ceasar*** was at the wheel of a 2004 Chevrolet Trailblazer, driving south on Route 95 in Virginia, when the right rear tire blew out, causing the vehicle to roll over multiple times. The accident caused injuries to Carla and some of the vehicle's other passengers. Carla, on her own behalf and on behalf of her minor child, Cheyenne, as well as Carla's mother (Edna Allen), and her father, the late Roy E. Allen,[1] who was also the owner of the vehicle, commenced this action for damages against defendants Atlantic Tire & Service (Atlantic Tire) and ***Flemington*** Buick Chevrolet Pontiac GMC (***Flemington***).

Atlantic settled with plaintiffs; the claims against ***Flemington*** went to **[*2]** trial. Judge ***W***. Hunt Dumont presided over a thirteen-day

[1] Roy Allen passed away prior to trial from an unrelated illness.

trial at the conclusion of which the jury rendered a verdict, finding ***Flemington*** negligent and its negligence the proximate cause[2] of damages sustained by Carla, Erna and Roy. Specifically, the jury awarded $1,100,000 to Carla, $450,000 to Erna, $350,000 to Roy's Estate, and $100,000 to Erna on her loss of consortium claim. Judge Dumont then permitted the jury to consider whether the evidence demonstrated ***Flemington*** acted with reckless disregard for the safety of others; the jury found that the evidence met that standard and awarded plaintiffs $5,500,000 in punitive damages. In post-trial proceedings, the judge reduced the punitive award to $3,000,000.

Flemington appeals, arguing trial errors during the compensatory phase, as well as the judge's ruling in permitting the jury to determine whether punitive damages should be awarded and the excessiveness of the award, even as later reduced by the judge. Plaintiffs argue, in support of their cross-appeal, that the trial judge erred in reducing **[*3]** the punitive damage award.

We briefly describe some of the facts and circumstances upon which this lawsuit was based.

The jury heard testimony that Roy Allen purchased the vehicle, when it was new, from ***Flemington*** in July 2004. He also purchased extended warranties - the General Motors (GM) Major Guard Protection Plan and the GM Smart Care Protection Plan. When the accident occurred nearly five years later, the Major Guard Plan still covered parts and labor for repairing "specific components for specific reasons," while the Smart Care Plan covered basic maintenance, i.e., oil changes and tire rotation. From the time of purchase until December 2008, ***Flemington*** serviced or inspected the vehicle twelve times. On six of those occasions, the tires were rotated. The jury heard testimony from Carla and Erna that Roy was diligent in having the vehicle serviced in accordance with the manufacturer's recommendations.

On January 16, 2009, Roy brought the vehicle to ***Flemington*** for an oil and filter change, new wiper blades, a top off of fluids, a tire pressure check, and a "Goodwrench Multipoint Vehicle Inspection." In keeping with ***Flemington***'s general practice, GM-certified technician Damian Romano **[*4]** instead conducted an MPI EDGE Inspection which, according to Stephen Jellen, ***Flemington***'s parts and service director, was more "extensive" because it included the inspection Roy requested as well as other safety checks. At that time, Romano visually inspected each tire and measured all tread depths at 7/32nds of an inch.

Romano's findings were set forth in a "Know Your Vehicle Fitness Inspection and Treatment Plan" report, which was provided to Roy. In the words of the report, ***Flemington*** represented it was providing the customer with "peace of mind" by conducting: "a rigorous vehicle inspection and diagnostic check"; a review of the vehicle's current and previous maintenance; a database search to uncover pertinent information about the vehicle "based on its mileage and time on the road"; and a treatment plan. Pursuant to Roy's authorization, Romano changed the oil and oil filter, topped off fluids, and installed new front and rear wiper blades. Roy also authorized a four-wheel alignment due to "abnormally worn front tires." According to Jellen, this meant that the tires had "feather[ed]," i.e., worn unevenly, and that it may have been - as he stated during his trial testimony - that **[*5]** at least one tire had a bald spot requiring replacement.

[2] The jury also determined that Atlantic was negligent but that its negligence was not a proximate cause of damages sustained by plaintiffs.

Roy authorized Romano to rotate the front tires to the rear. Jellen, as well as ***Flemington***'s service manager, John Villamil, testified that it was an industry practice to place a vehicle's best tires at its rear for traction and control purposes.[3] The Know Your Vehicle report also noted that one tire was "bad in front shimmy and left pull had to rotate." According to Jellen, because that notation belied Romano's tire inspection findings, Jellen believed a former service advisor, Mark Peterson, improperly added this notation.[4]

Jellen also testified that appropriate diagnostic testing would have occurred had Roy complained about a shimmy and vibration. Although Roy was given a copy of the Know Your Vehicle report, he was not given a copy of the MPI report, which noted that all four tires had failed inspection. Jellen, however, explained during his testimony that the failed inspection referred to the uneven **[*6]** wear of the front tires - a condition remedied by the four-wheel alignment.

On February 6, 2009, less than a month after the prior service, Roy brought the vehicle to ***Flemington*** because of a fuel odor. He also requested a multiple point inspection. Because the vehicle had been examined a short time before, Romano conducted an abbreviated inspection. Pursuant to Roy's authorization, Romano replaced the fuel sender. The Know Your Vehicle and MPI reports noted that the tires passed inspection. Neither Villamil nor Jellen could explain the discrepancy regarding the tires between the January and February MPI reports. Jellen testified that the inconsistency suggested that both Peterson and Romano had failed to properly perform their duties.

In anticipation of driving to Florida with his family, Roy brought the vehicle to ***Flemington*** on April 9, 2009 - three days before the accident - to ensure the vehicle was safe to drive. In addition to requesting a multiple point inspection, an oil and oil filter change, a top off of fluids and a tire pressure check, Roy also reported that the rear of the vehicle bounced when driven over bumps. Villamil testified that Roy's complaint was vague, and service **[*7]** advisor Kevin Green should have sought clarification; Villamil did not know whether Green sought clarification. Villamil and a GM-certified technician, Deogarcia Galarza, who was assigned to Roy's vehicle that day, explained that this type of complaint suggested an issue with suspension or shock absorbers, not tires. Galarza testified he was not informed at the time about Roy's complaint.

Galarza measured each tire's tread depth at 5/32nds to 6/32nds of an inch, and he recorded this finding in the Know Your Vehicle Inspection report. Both Jellen and Green testified that Galarza's measurement with respect to at least one tire was inaccurate since the rear driver's side tire had been replaced by defendant Atlantic Tire in March 2009. Galarza's report also noted that all the tires were "worn out" because they were below minimum tread depth; Jellen, however, explained that Galarza's "worn out" finding **[*8]** was inconsistent with his tread depth measurements because they were above 3/32nds of an inch, which GM considered to be the minimum tread depth before tire replacement. On the MPI report prepared at the time, the caution box was checked in the categories of tire tread depth and wear pattern/damage.

Roy authorized an oil and oil filter change as well as an automatic transmission fluid exchange. He declined the recommended tire

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[3] As ***Flemington***'s service manager from 2001 to June 2011, Villamil supervised the technicians and service advisors, who were the liaisons between customers and technicians.

[4] Peterson was terminated in June 2009 for poor performance.

rotation and flush of the front and rear differentials.

According to Green, he was not aware of the January 2009 maintenance conducted on the vehicle, and he had not reviewed the prior Know Your Vehicle Inspection reports, which he acknowledged violated company policy. Green testified that had he reviewed the prior service records he would have recommended a tire replacement on April 9, 2009, but he did not recall whether he reviewed Roy's prior maintenance and service records. He also testified no employee at the time directed him to do so. Both Villamil and Jellen testified that Green should have recommended tire replacement based upon Galarza's observation that all tires fell below minimum tread depth.

As noted above, Roy, Erna, Carla and Carla's two children, **[*9]** Cheyenne and Sage, were traveling in Roy's Trailblazer to Florida on Route 95 on April 12, 2009. Carla replaced Roy as the driver somewhere near Richmond, Virginia. At some point not long after, "there was a bang[] and the car just sort of lowered on one side, and it just started fishtailing back and forth across the road," before it flipped over multiple times, shattering the front windshield.

Gary Derian, a mechanical engineer, testified for plaintiffs as an expert in tire failure analysis and vehicle tire maintenance. He examined the vehicle and concluded, based on the condition of the roof and windshield, as well as the scuffed shoulders on the other tires, that the vehicle had rolled over due to the blowout of the right rear passenger tire.[5] Upon inspection of the failed tire, Derian observed a hand-sized bald spot lacking tread that he believed "indicat[ed] that the tire had a separation between the steel belts for thousands of miles before it finally failed." He concluded that the lack of tread on approximately twenty-five percent of the failed tire's surface caused its blowout.

For the reasons **[*10]** that follow, we reject ***Flemington***'s arguments that: (1) plaintiffs' counsel improperly mentioned the result of a report rendered by a defense expert, whom ***Flemington*** decided not to call to testify, that could only be cured by a mistrial, which the judge denied; (2) the judge erred in permitting Erna's treating chiropractor to testify about Erna's prognosis; (3) other various trial errors or their cumulative effect require a new trial; and (4) the judge erred in permitting the jury to consider whether ***Flemington*** acted with reckless indifference in considering the propriety of a punitive damage award.[6] And we also reject (5) both ***Flemington***'s and plaintiffs' arguments regarding the quantum of punitive damages ultimately imposed.

I

Plaintiffs presented evidence that the accident caused Carla deep scalp lacerations that were surgically repaired. It took eight months for Carla's hair to grow back, and she sustained permanent hair loss in some places. Carla also complained of daily headaches and involuntary shaking of her left hand. She presented expert testimony that she suffers from post-traumatic migraine headaches, **[*11]** scalp pain and numbness, insomnia, hearing loss, tinnitus, vertigo, and post-traumatic Parkinsons in her left hand.

Flemington argues that the trial judge erred in denying a request for a mistrial because, during cross-examination of ***Flemington***'s neuropsychological expert, Dr. David Masur, plaintiffs' counsel mentioned both

[5] This was not the tire that had been purchased from Atlantic Tire the month before.

[6] This is not the order in which ***Flemington*** presented its arguments in its brief.

Flemington's non-testifying expert, Dr. S. Thomas Westerman, and Westerman's report, which opined that the accident had caused Carla's migraine headaches. Specifically, plaintiffs' counsel asked Masur whether he knew ***Flemington*** had hired Westerman "who issued a written report that . . . there were migraine headaches caused to Carla by this accident." Defense counsel objected, to which the judge responded that Masur could be asked whether he was aware Westerman had rendered a written report. When asked that question, Masur said "[n]o." The judge then instructed the jury to "disregard anything that was contained in the question about what was in [Westerman's] report."

After Masur's cross-examination and outside the presence of the jury, defense counsel repeated his objection, arguing the question about Westerman's opinion "poisoned this case." Judge Dumont denied the **[*12]** request for a mistrial, but he also gave an additional instruction in the words requested by defense counsel:

> [L]et me state something that I made reference to before, and this deals with a Dr. Westerman. And as you may recall, there was a sidebar conference with counsel in which we discussed an issue on Dr. Westerman, and then I said after the sidebar that you should disregard any reference to Dr. Westerman, or whatever he may have put in a report. So, let me be doubly clear on this. Yes, there was a reference to Dr. Westerman in a question by [plaintiffs' counsel]. And any reference to that doctor is to be disregarded by you, and you are not to draw any inference whatsoever from what Dr. Westerman may have concluded. You are not to conclude that any testimony of Dr. Westerman would either favor the plaintiff or the defendant. Either party is free to produce Dr. Westerman, and you are not to speculate or consider what his testimony would have been. If neither party chooses to produce him, as they may, you are not to consider it at all.

Flemington argues that the mention of Westerman was "deliberate, inflammatory and improper," and that the judge abused his discretion in denying the **[*13]** request for a mistrial. We disagree.

It is within the discretion of a trial judge to determine whether to grant a mistrial. *State v. Jackson, 211 N.J. 394, 407, 413, 48 A.3d 1059 (2012)*. The question turns on whether continuance of the trial and submission of the case to the jury would result in manifest injustice. *Wright v. Bernstein, 23 N.J. 284, 296, 129 A.2d 19 (1957)*. Further, in considering the denial of a mistrial, our review depends "very largely on the 'feel' of the case which the trial judge has at the time." *Greenberg v. Stanley, 30 N.J. 485, 503, 153 A.2d 833 (1959)*. We are satisfied that counsel's brief reference to Westerman's report did not warrant a mistrial. To the contrary, the judge immediately directed the jury to disregard the comment in a cautionary instruction, which the jury presumably understood and followed. *See Bardis v. First Trenton Ins. Co., 199 N.J. 265, 284, 971 A.2d 1062 (2009)*. The judge's instruction was thorough and no doubt alleviated any possible harmful effect by the brief reference to the content of Westerman's report.

II

Flemington also contends the trial judge erred in denying its motion to bar Erna's treating chiropractor, Dr. Archer Irby, from testifying. There are two aspects to this argument: (a) **[*14]** the extent to which Irby was permitted to testify; and (b) counsel's use of that testimony in his summation.

A

During the trial, ***Flemington*** moved to exclude

Irby's testimony because he was not identified as an expert in plaintiffs' discovery responses and a report was not provided. The trial judge denied that motion, correctly stating "[t]reating physicians can testify." ***Flemington*** also objected to Irby's proffered testimony about his continuing treatment of Erna and the permanency of her injuries. Judge Dumont overruled that objection as well, finding that Irby was permitted to testify about Erna's "diagnosis, his treatment, and prognosis," but he also cautioned that Irby was "not allowed to give an opinion on permanency."

Consequently, Irby testified that Erna's shoulder, neck, and back injuries were caused by the rollover accident because Erna "said that she had no pain or discomfort . . . leading up to . . . the accident." Irby also testified he intended to continue treating Erna after trial, and that her prognosis was "fair."

Even though Irby was not named as an expert, the judge's decision to allow him to testify about his diagnosis, treatment and prognosis was a matter of discretion **[*15]** that was not abused here. *Hisenaj v. Kuehner, 194 N.J. 6, 12, 942 A.2d 769 (2008)*. Indeed, it is well-established that treating physicians are permitted to testify as fact witnesses. *Stigliano v. Connaught Lab., Inc., 140 N.J. 305, 314, 658 A.2d 715 (1995)*. And, pursuant to *N.J.R.E. 701*, the testimony of a lay witness "in the form of opinions or inferences may be admitted if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue." Nevertheless, "[l]ay testimony may not usurp the function of expert opinion." *Alpine Country Club v. Demarest, 354 N.J. Super. 387, 394, 807 A.2d 257 (App. Div. 2002)*.

The trial judge properly limited Irby's testimony to his diagnosis, treatment and prognosis. *See Carchidi v. Iavicoli, 412 N.J. Super. 374, 381, 990 A.2d 685 (App. Div. 2010)* (holding that a treating physician may testify about diagnosis, treatment, and prognosis of the patient without being qualified as an expert witness); *Ginsberg v. St. Michael's Hosp., 292 N.J. Super. 21, 32, 678 A.2d 271 (App. Div. 1996)* (observing that "[i]t is well settled that treating physicians may testify as to any subject relevant to the evaluation and treatment of their patients"). **[*16]** Furthermore, "[b]ecause the determination of the cause of a patient's illness is an essential part of diagnosis and treatment, a treating physician may testify about the cause of a patient's . . . injury." *Stigliano, supra, 140 N.J. at 314*.

Ultimately, the scope of Irby's testimony, in light of plaintiffs' failure to name him as an expert or provide a report, was a matter left to the sound discretion of the experienced trial judge. Even if there were greater substance to ***Flemington***'s contention that Irby was functioning as an expert witness when testifying, we are not convinced that ***Flemington*** was prejudiced. Irby was identified in discovery as Erna's treating physician. Erna also executed an "Authorization for Health Information Disclosure" form in 2010, and ***Flemington*** could have obtained any additional relevant documentation. Consequently, Irby's testimony should not have surprised ***Flemington***. We are also mindful that ***Flemington*** provided for the jury its own expert orthopedic surgeon's de bene esse deposition testimony regarding Erna's claims.[7]

B

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[7] ***Flemington*** also claims that the judge permitted Irby to offer an improper opinion regarding the permanency of Erna's injuries when he testified **[*17]** that he planned to continue treating her. We disagree. This testimony did not address whether Erna's injuries were permanent, only that Irby intended to continue her treatment, the duration of which he did not specify.

Flemington argues that what it claims was the judge's error in permitting Irby to testify about Erna's prognosis was compounded when the judge allowed plaintiffs' counsel to comment on the "permanency" of Erna's injuries during summation. Specifically, plaintiffs' counsel made the following argument in his summation:

> Let's talk about the injuries. *The permanent injuries* that Erna sustained as a result of this accident. We had Dr. Irby come in, a treating physician. . . . And what did you hear from Dr. Irby? You heard Erna's been treating all the time, she's never going to be - she's never stopped treating. She's here to try and get better.
>
> And what did Dr. Irby diagnose? . . . . Constant shoulder, neck, back, chest pain . . . . *That's not going away.*
>
> He performed three separate MRI[s] which revealed herniated disks[.] That's undisputed. Nobody got up here and said those MRI[s] didn't exist. That is *the permanent physical injuries* that Erna suffered as a result of this.
>
> [Emphasis **[*18]** added.]

Defense counsel objected and requested that the judge instruct the jury "that there has been no medical opinion testimony offered in this case that Erna . . . has a permanent injury," and that "there is no claim for permanent injuries for Erna." He argued that the jury should be told that "any reference to the same in closing statements should be disregarded." Judge Dumont denied ***Flemington***'s request but proposed instead to instruct the jury "that there was no opinion on permanency, however, . . . the testimony did indicate that she's still under treatment, that her injuries are still there, and that her prognosis is fair." When the judge gave defense counsel the option of either the judge's proposed instruction or no instruction, defense counsel chose the latter.

Because the trial judge did not err in allowing Irby to testify about Erna's prognosis, *Carchidi, supra, 412 N.J. Super. at 381*, he did not err in allowing counsel to comment on that testimony. We agree that plaintiffs' counsel misstated or distorted that evidence by arguing there was a "permanent" injury, but we are also satisfied that the prejudice would have been ameliorated by the proposed instruction eschewed by **[*19]** defense counsel and, in fact, was ameliorated by the later instruction that counsel's arguments do not constitute evidence.

Lastly, in a one-sentence footnote in its appeal brief, ***Flemington*** claims the judge improperly instructed the jury on Erna's life expectancy since no evidence regarding the permanency of her injuries was admitted. Because this argument was not properly presented, *see R. 2:6-2(a)(5)*, we do not consider it. *Almog v. Israel Travel Advisory Serv., Inc., 298 N.J. Super. 145, 155, 689 A.2d 158 (App. Div. 1997), appeal dismissed, 152 N.J. 361, 704 A.2d 1297, cert. denied, 525 U.S. 817, 119 S. Ct. 55, 142 L. Ed. 2d 42 (1998).*

III

Flemington contends the cumulative effect of these and other alleged errors deprived it of a fair trial. ***Flemington*** also argues that other specific errors occurred regarding: (a) the presentation and scope of Derian's de bene esse deposition testimony; (b) plaintiffs' counsel's various remarks during summation; and (c) plaintiffs' counsel's appeal to the jury's emotions throughout trial. We find no error, and thus no cumulative error warranting a new trial.

A

Without objection, Derian's de bene esse deposition testimony was played for the jury. Due to a technological problem,

[*20] however, the cross-examination was not visually recorded. Before Derian's cross-examination was played, the judge instructed the jury that

> there won't be any video of the witness. Apparently, there was some glitch in the technology during this procedure, and I don't know what happened and I'm not going to try and find out.
>
> But at this point, you're going to hear the audio and you will also see the printed form of his testimony at the same time you're hearing the audio. You just won't see his picture, but nevertheless, you've had more than an hour's worth of looking at the actual witness, so I think you've gotten a good idea as to, you know, his demeanor as we say.

Flemington claims the judge committed plain error by playing Derian's cross-examination without any visual recording because it "eviscerate[d] the jury's ability to perform the critical function of evaluating [his] demeanor on cross-examination." Because ***Flemington*** failed to raise this issue in the trial court, it has not been properly preserved for our review. *Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234, 300 A.2d 142 (1973)*; *In re Wheeler, 433 N.J. Super. 560, 624, 81 A.3d 728 (App. Div. 2013)*.

Even if we were to consider this issue on its merits, **[*21]** we note that the jury was not entirely deprived of watching Derian testify; it saw the recording of him during more than an hour of direct examination. The jury also heard Derian's voice during cross-examination, and thus it had the opportunity to assess his demeanor by listening for verbal cues. Moreover, there was little the judge could do to ameliorate the problem. This circumstance was not "clearly capable of producing an unjust result." *R. 2:10-2*.

B

Flemington argues that the trial judge erred in not granting its motion to strike portions of Derian's testimony relating to accident reconstruction, a field in which he had no expertise. Derian was qualified as an expert in tire failure analysis and vehicle tire maintenance.

Specifically, ***Flemington*** complains about Derian's testimony that he observed that the left front tire had a "shoulder scuff consistent with the loss of control where the vehicle yawed and went sideways on the highway." He further explained those observations coupled with his view of the damaged tire supported his opinion that a "tire failure . . . caused the vehicle to go out of control and roll over." In denying ***Flemington***'s motion to strike that testimony, the **[*22]** judge agreed with plaintiffs' argument that Derian was qualified to render that opinion because he had "decades of experience working on and with vehicles [and had] inspected the vehicle crash."

The judge's decision in this regard was a matter residing in his sound exercise of discretion. *Hisenaj, supra, 194 N.J. at 12*. An expert's "role is to contribute the insight of his [or her] specialty." *In re Hyett, 61 N.J. 518, 531, 296 A.2d 306 (1972)*. The record does not suggest that Derian's opinion that the tire's failure triggered the vehicle's rollover exceeded his area of expertise. It did not concern what accident reconstructionists typically testify about. *See State v. Locascio, 425 N.J. Super. 474, 491, 42 A.3d 179 (App. Div.)* (observing that "[a]ccident reconstructionists commonly testify about certain physical aspects of an accident such as vehicle mass, the direction of skid marks, vehicle dimensions, dents, paint transfers, road surface textures, and physics principles such as inertia, velocity, coefficients of friction, and the operating characteristics of vehicles"), *certif. denied, 212 N.J. 459, 56 A.3d 394 (2012)*. Rather, the testimony concerned his

expertise in tire failure analysis.

C

Flemington also contends, as **[*23]** plain error, that various remarks during plaintiffs' summation deprived it of a fair trial. We disagree.

We initially observe that ***Flemington*** did not object to any of these comments. ***Flemington***, however, claims we should excuse its counsel's failure to object because of the deterrent effect of the judge's comment, in the jury's presence, that plaintiffs' counsel "can say what he wants." We disagree. Moreover, ***Flemington*** took Judge Dumont's comment out of context. What happened was that when defense counsel objected to that portion of plaintiffs' counsel's summation regarding the elements of negligence, the judge said: "He can say what he wants. . . . . I will tell them what the law is." This comment could not reasonably be viewed as foreclosing further objections to plaintiffs' counsel's summation. We, thus, examine the specific arguments regarding plaintiffs' summation by applying the plain-error standard.

First, ***Flemington*** argues that plaintiffs' counsel improperly referred to Jellen as a liar. Specifically, counsel restated Green's testimony that it was not a requirement for service advisors to review a vehicle's prior service and maintenance history. Counsel then said that Jellen **[*24]** "lied to this jury" about that requirement and "to the extent that . . . Jellen had any testimony that was credible it should be rejected." Although it would have been preferable for counsel to have chosen a different term, *see* Rodd v. Raritan Radiologic Assocs., P.A., 373 N.J. Super. 154, 171, 860 A.2d 1003 (App. Div. 2004), we do not find counsel's argument to be "unduly harsh," *ibid.*, and conclude counsel's choice of words fell within the bounds of fair comment. Moreover, the reference was fleeting in light of plaintiffs' overall summation during which counsel highlighted the inconsistencies in defense witnesses' testimony.

Flemington also claims plaintiffs' counsel misstated the evidence by improperly representing that Romano was incompetent and that the accident caused Roy's dementia. Again, we disagree. Jellen testified that Romano missed a bald spot on one of Roy's tires, which caused the accident. And there was expert testimony that the accident caused Roy to develop dementia. Counsel's remarks were grounded in the evidence.

In addition, ***Flemington*** claims that plaintiffs' counsel personally attacked its counsel when commenting about ***Flemington***'s voluntary dismissal of its counterclaim during **[*25]** trial. Specifically, plaintiffs' counsel stated:

> This dealership had a repeated opportunity, from June of 2008 right before three days to the accident, to fix the vehicle, and they failed to do it.
>
> So, if anyone goes back in the jury room and says, oh, we should have leniency for this company, they admitted liability, they now accept that they made a mistake, I submit, no differently than us, that should be rejected.
>
> *[Y]ou'll also see that unlike their closing [sic], they no longer have a counterclaim against Carla. They dismissed the counterclaim. The evidence in this case was so overwhelming that the counterclaim against Carla went away.*
>
> *And that too should not be factored into your deliberations. You shouldn't feel leniency for the dealership because, well, now they've finally agreed that Carla had no responsibility whatsoever for this situation.*
>
> [Emphasis added.]

Counsel's comment did not suggest that

Flemington deserved to be punished because it had effectively admitted liability. Plaintiffs' counsel was entitled to refer to the voluntary dismissal of the counterclaim to ensure that the jury did not mistakenly consider the dismissal a basis for feeling leniency toward **Flemington**.

Flemington **[*26]** also argues that plaintiffs' counsel was improperly permitted to replay a portion of Derian's recorded de bene esse deposition testimony during his summation. **Flemington**, however, did not identify in its appeal brief the portion that was replayed. And the transcript is not helpful. Upon the Clerk's Office request, plaintiffs identified the following as the replayed portion:

> I can tell that when **Flemington** looked at his vehicle, inspected the vehicle in June of 2008 when it had 44,453 miles. I know that at that inspection this accelerated wear zone had about 3/32 of an inch of tread and the tire away from the wear zone had 6/32.
>
> So there was a clear spot wear in the tire that would have been visible to an inspector back [o]n June 6[,] 2008, okay, almost a year before the crash. In August of 2008, the 47,000 miles, it would have had between 2 and 3/32 of an inch in the spot wear.

Flemington cites no facts or authority to support its argument that playing this testimony during summation was improper. **Flemington** objected to it, but during the ensuing colloquy, the judge's reasoning for overruling the objection was not transcribed, and **Flemington** has not since attempted to fill in the recording **[*27]** gap pursuant to Rule 2:5-5(a).[8] The circumstances suggest that we conclude the matter has not been preserved for appellate review.

In considering the merits, however, we recognize that even if there are circumstances where the overemphasis of selected parts of testimony during summations may be prejudicial, *see* State v. Muhammad, 359 N.J. Super. 361, 380-81, 820 A.2d 70 (App. Div.), *certif. denied*, 178 N.J. 36, 834 A.2d 408 (2003); Condella v. Cumberland Farms, Inc., 298 N.J. Super. 531, 536-37, 689 A.2d 872 (Law Div. 1996), the playback here was not unduly long as to essentially permit plaintiffs to present Derian's testimony a second time. Muhammad, supra, 359 N.J. Super. at 380. And plaintiffs' counsel certainly cannot be accused of misstating or distorting the evidence by referring to Derian's verbatim testimony in this fashion. Moreover, the judge instructed the jury of its obligation to determine the facts from their own recollection. *See* id. at 382. Because of the judge's instructions, the brevity of the excerpt, **[*28]** and the absence of distortion, the judge did not abuse his discretion in allowing a short portion of the testimony to be replayed.

D

Finally, for the first time on appeal, **Flemington** claims that plaintiffs improperly focused on the family tragedy caused by the accident by highlighting Erna's testimony about how the accident caused Roy's dependence on her and an expert's testimony about cancer's effect on a patient's quality of life. Because **Flemington** failed to raise this issue in the trial court, the question must be considered pursuant to the plain error standard. R. 2:10-2.

We find no error, let alone plain error. Testimony about how the accident affected the quality of plaintiffs' lives was relevant to their

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[8] Rule 2:5-5(a) provides that "[a] party who questions whether the record fully and truly discloses what occurred in the court . . . below shall . . . apply on motion to that court . . . to settle the record."

claim of damages.

IV

The parties' arguments concerning the punitive damage award require that we first consider whether the judge should have permitted the jury to consider making such an award.

We reject the argument that the trial judge erred in submitting to the jury the question of whether ***Flemington***'s conduct warranted the imposition of punitive damages. That decision rested in the judge's sound discretion. *Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 390 N.J. Super. 557, 565, 916 A.2d 484 (App. Div. 2007)*, **[*29]** *aff'd*, *194 N.J. 212, 943 A.2d 866 (2008)*; *see also Saffos v. Avaya Inc., 419 N.J. Super. 244, 264, 16 A.3d 1076 (App. Div. 2011)*; *Maul v. Kirkman, 270 N.J. Super. 596, 619-20, 637 A.2d 928 (App. Div. 1994)*. That discretion must be tempered by the judge's duty to "take account of the applicable law and the particular circumstances of the case to the end that a just result is reached." *Master Auto Parts, Inc. v. M. & M. Shoes, Inc., 105 N.J. Super. 49, 53, 251 A.2d 135 (App. Div. 1969)*. We are abundantly satisfied that Judge Dumont correctly applied the legal standards embodied in the Punitive Damages Act, *N.J.S.A. 2A:15-5.9 to -5.17* (the PDA), and that he did not abuse his discretion in submitting the matter for the jury's consideration.

The PDA provides, in relevant part, that punitive damages may be awarded:

> only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.
>
> [*N.J.S.A. 2A:15-5.12(a)*.]

In **[*30]** moving to dismiss the punitive damages claim, ***Flemington*** argued that its failure to detect a tire bald spot constituted negligence or, at most, gross negligence, not reckless indifference to customer safety. Because plaintiffs did not contend that ***Flemington***'s acts or omissions were actuated by actual malice, the question turned on whether there was evidence to support the allegation of "wanton and willful disregard," which the Legislature has defined as "a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission." *N.J.S.A. 2A:15-5.10*. As guidance in making the determination, the PDA requires the trier of fact to consider the following factors:

> (1) The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct;
>
> (2) The defendant's awareness of reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct;
>
> (3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and
>
> (4) The duration of the conduct or any concealment of it by the defendant.
>
> [*N.J.S.A. 2A:15-5.12(b)*.]

Judge **[*31]** Dumont acted well within his discretion in permitting the jury to consider whether the evidence demonstrated that ***Flemington*** knowingly and wantonly disregarded a high probability of injury when it failed to recommend tire replacement on April 9, 2009. We have already provided some of the details of the testimony and other evidence as to that circumstance. Briefly, we repeat that, on that day, Green admittedly failed to follow a company policy that required review of Roy's

prior service records. Had he done so, he would have recommended tire replacement. In addition, both Villamil and Jellen agreed that Green should have recommended tire replacement based upon Galarza's observation that all tires purportedly fell below minimum tread depth.

According to Derian's unrefuted testimony, the bald spot that caused the accident should have been detected no later than January 16, 2009. Instead of detecting it then, ***Flemington*** recommended a four-wheel alignment due to "abnormally worn front tires," which Jellen testified meant that they had worn unevenly (i.e., "feathered"). When questioned whether "abnormally worn front tires" may have meant that at least one had a bald spot requiring replacement, **[*32]** Jellen responded in the affirmative.

In short, there was sufficient evidence for the jury to conclude that ***Flemington*** was wantonly indifferent to a high probability of injury when it failed to recommend tire replacement on April 9, 2009.

V

Flemington also contends the judge's reduced award of $3,000,000 was so excessive that it violated its substantive due process rights. In their cross-appeal, plaintiffs claim that the judge erred by reducing the punitive damages award by what they refer to as an "arbitrary" amount.

In examining the size of the punitive damage award, the judge found there was evidence to support the claim that ***Flemington***'s conduct was reprehensible by applying the five factors delineated in *State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419, 123 S. Ct. 1513, 1521, 155 L. Ed. 2d 585, 602 (2003)*:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

In **[*33]** applying these standards, Judge Dumont recognized that

> the harm in this case was physical as opposed to economic. It evinced an indifference to or a reckless disregard for the health and safety of five family members en route to a Florida vacation[.] [D]efendant's conduct involved repeated actions. It was not a single mistake, nor an isolated incident, and the harm was the result of trickery or deceit. It cannot be characterized as a mere accident.

The judge made these additional findings:

> The ***Flemington*** dealership knew that a dangerous rear tire on an SUV like Roy Allen's Chevy Trailblazer could cause a blowout and vehicle rollover.
>
> The plaintiff[s]' liability expert, Gary Derian[,] testified about the industr[y's] knowledge of how rear tire blowouts on SUV[s] could cause rollovers, and serious personal injuries. Yet, in spite of this, ***Flemington***'s service performance with respect to the tires from June, 2008 to April, 2009, on Roy Allen's vehicle, as it relates to this case, was abysmal.
>
> In January, 2009, all the tires on the Allen vehicle failed according to an internal checklist of the dealership, yet this fact was kept from the plaintiff. . . . Instead, the tire that ultimately blew **[*34]** out was rotated from the front to the rear of the vehicle.
>
> Three weeks later, on February 6th, 2009, the same tires that failed on . . . January 16, 2009, were passed as acceptable. This

finding on February 6th is clearly inconsistent with the prior service on January 16, and proved that the January service record was not reviewed by the dealer when the car was brought in, in February.

In April, 2009, Roy Allen brought the vehicle back to the dealership for the third time within a four month period, and complained about how the rear of the vehicle was driving. He did this on April 9, three days before the accident[.]

Not only were the prior service records not reviewed and, in fact, ignored by the dealership, but the technician on April 9th missed the flatter bald spot on the tire where the blowout occurred.

Roy's complaint about how the rear of the car was driving was not properly addressed, and when coupled with the history of faulty tire inspections evinced not only a pattern of repeated conduct, but also trickery and deceit by the dealership.

Why? Well, because . . . [the Know Your Vehicle Inspection report] promises a "vigorous inspection[] and diagnostic check," . . . [and] represents **[*35]** that prior service records will be reviewed on each service, that a customer's database will be searched to uncover anything that the customer should know, and finally that the dealer will create a treatment plan, and report on service needs.

Not only was this not done here, but Roy was led to believe that it was done.

. . . .

As a result of this misrepresentation, trickery and deceit was evident from the record. The evidence showed that the defendant did no such rigorous inspection, or search of Roy's prior service records, including on April 9th his last service appointment before the trip to Florida.

Service [a]dvisor Kevin Green, admitted that he never searched the vehicle's history, and if he had, he would have recommended new tires for the vehicle.

. . . .

Galarza . . . testified that no one at the dealership directed him to review the prior service records, and that he had no knowledge of the vehicle's history prior to April 9th, not having previously worked on the car.

Moreover, the service manager, John Villamil, . . . testified that the tires should have been replaced by at least April 9, if not before.

The dealership's actions in servicing a vehicle, at least with respect to the **[*36]** tires, were patently indifferent to the consequences of those actions, including the likelihood of personal injuries to the entire family on April 12, when en route to Florida.

The judge stated that he "struggled with the issue of reasonableness" because neither federal nor state authority provided a "bright line test[]." He agreed with ***Flemington*** that "where the size of the compensatory damages [award] is greater, this may call for a reduction in the size of the punitive damage award, even though the award here was within the limits of the [PDA]." The judge concluded that "under all the circumstances of this case, and after giving it a great deal of thought, . . . the punitive damage award should be modified . . . to $3 million."

"When a punitive-damage award is made, a trial judge is required to determine whether the jury's award is 'reasonable' and 'justified in the circumstances of the case'; if not, the judge must reduce or eliminate the award." *Saffos, supra, 419 N.J. Super. at 263* (quoting *N.J.S.A. 2A:15-5.14(a)*). In so acting, a judge must consider that the purpose of punitive damages is to "punish the defendant and to deter that defendant from repeating" the

conduct. N.J.S.A. 2A:15-5.14(a). **[*37]** That is, N.J.S.A. 2A:15-5.10 defines "punitive damages" as "damages awarded against a party in a civil action because of aggravating circumstances in order to penalize and to provide additional deterrence against a defendant to discourage similar conduct in the future."

Plaintiffs claim the judge's reprehensibility analysis was flawed because he failed to consider defendant's fraudulent conduct of "presenting its alleged financial condition to the jury in a financial report prepared during trial based on purposefully incomplete financial information from [d]ealership management, and repeated misrepresentations thereafter to [the judge] that the award imperiled its continued existence as a business operation." The degree of reprehensibility of a defendant's misconduct need not be considered in determining whether a punitive damages award should be reduced or eliminated. *See* N.J.S.A. 2A:15-5.14(a). Rather, that factor must be considered when an award is challenged on due process grounds. Saffos, supra, 419 N.J. Super. at 266. In any event, the judge's reprehensibility analysis did not fail to account for ***Flemington***'s alleged fraudulent conduct during the punitive damages phase of the **[*38]** trial, as reprehensibility refers to the misconduct that the jury determined warranted punitive damages in the first place.

Finally, ***Flemington*** claims the judge erred by finding that its conduct was reprehensible and, therefore, even the reduced award is unconstitutionally excessive. Appellate review of whether a punitive damages award is so excessive as to violate a party's constitutional rights is de novo. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 431, 121 S. Ct. 1678, 1683, 149 L. Ed. 2d 674, 683-84 (2001); Baker v. Nat'l State Bank, 353 N.J. Super. 145, 152-53, 801 A.2d 1158 (App. Div. 2002).

"The *Due Process Clause of the Fourteenth Amendment* imposes limits on 'the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages. That clause makes the *Eighth Amendment's* prohibition against excessive fines and cruel and unusual punishments applicable to the States.'" Saffos, supra, 419 N.J. Super. at 265 (quoting Cooper Indus., supra, 532 U.S. at 433-34, 121 S. Ct. at 1684, 149 L. Ed. 2d at 685). Because "defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding," **[*39]** the United States Supreme Court has expressed "increased 'concern[] over the imprecise manner in which punitive damages systems are administered.'" *Ibid.* (quoting Campbell, supra, 538 U.S. at 417, 123 S. Ct. at 1520, 155 L. Ed. 2d at 601).

As a result, courts must consider the following three guideposts when reviewing a punitive damages award for excessiveness:

> (1) the degree of reprehensibility of the defendant's misconduct;
>
> (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and
>
> (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.
>
> [Campbell, supra, 538 U.S. at 418, 123 S. Ct. at 1520, 155 L. Ed. 2d at 601 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575, 116 S. Ct. 1589, 1598-99, 134 L. Ed. 2d 809, 826 (1996)).]

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." Gore, supra, 517 U.S. at 575, 116 S. Ct. at 1599, 134 L. Ed. 2d at 826.

"The existence of any one of [the five reprehensibility] factors weighing in favor of a plaintiff may not be sufficient **[*40]** to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Campbell, supra, 538 U.S. at 419, 123 S. Ct. at 1521, 155 L. Ed. 2d at 602*.

"Our PDA requires courts to consider similar factors." *Saffos, supra, 419 N.J. Super. at 267*. Here, the evidence supports the claim that ***Flemington***'s conduct was reprehensible and the consequence was physical. The unrefuted testimony established that the bald spot that caused the tire blowout was detectable by January 16, 2009. Thus, defendant's failure to detect it and recommend tire replacement in January, February, and April 2009 involved repeated actions, and ***Flemington***'s multiple representations that it provided Roy with "a rigorous vehicle inspection" could be viewed as trickery and deceit. Moreover, the deceitful misconduct involved Green's failure to review Roy's prior service records on April 9, despite ***Flemington***'s representations in its Know Your Vehicle Inspection reports that it had. And had Green done so, the accident would not have occurred because Green admittedly would have recommended tire replacement. The evidence also demonstrated plaintiffs were financially vulnerable.[9]

N.J.S.A. 2A:15-5.14(b) states that a punitive damages award cannot exceed five times the compensatory damages awarded. Nevertheless, "[***w***]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell, supra, 538 U.S. at 425, 123 S. Ct. at 1524, 155 L. Ed. 2d at 606*. Regarding the disparity between the actual harm to plaintiffs and the modified punitive damages award, *id. at 418, 123 S. Ct. at 1520, 155 L. Ed. 2d at 601*, the actual harm ($2,000,000) was two-thirds of the modified punitive damages award ($3,000,000), producing a ratio quite compatible with the intent of the PDA.

Contrary to plaintiffs' contention, the judge's reduction of the punitive damages award was not "arbitrary," nor did it lose its capacity to punish or deter. Judge Dumont properly considered "the applicable law and the particular circumstances of the case," *Master Auto Parts, Inc., supra, 105 N.J. Super. at 53*, and his observations were supported by credible evidence, as **[*42]** well as his own feel of the case, *Ming Yu He v. Miller, 207 N.J. 230, 250, 24 A.3d 251 (2011)*, to which we are expected to give due deference, *id. at 265-66*.

Applying these standards, we find no abuse of the judge's discretion when he reduced the jury's punitive damages award to $3,000,000.

Affirmed.

End of Document

[9] We note that ***Flemington*** **[*41]** has stated in its brief that it is "not ask[ing] [us] to consider its financial condition in reducing the punitive damages award."