

2015 WL 2359829

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UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Crystal EVANS, Plaintiff–Respondent,

v.

MEADOWLANDS HOSPITAL, [Dr. Romero](#), M.D.,

Dr. Sabo, M.D., Bernard Reimer, M.D., Jersey  
City Radiology, and Dr. Altai, M.D., Defendants,  
and

Dr. Peter F. DiPaolo, M.D., Defendant–Appellant,  
and

Jersey City Medical Center, Liberty Health  
System, Jody Digiacomio, M.D., Dr. Abai,  
M.D., Dr. Lal, M.D., Dr. Asensio, M.D., and  
Dr. Demos, M.D., Defendants–Respondents.

A-1314-12T1

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Argued May 5, 2015.

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Decided May 19, 2015.

## Synopsis

### Synopsis

**Background:** Patient brought medical malpractice action against orthopedic surgeon and others, alleging failure to timely treat patient that led to amputation of her left leg. The Superior Court, Law Division, Essex County, entered judgment on jury verdict in favor of patient. Surgeon appealed.

**Holdings:** The Superior Court, Appellate Division, held that:

[1] trial counsel's opening statements did not warrant mistrial;

[2] surgeon's counsel should have been permitted to use nurse's notes to refresh emergency room doctor's recollection;

[3] error in limiting use of notes was harmless;

[4] any error in inability to use notes during cross-examination of expert was harmless;

[5] redacted version of hospital's root cause analysis (RCA) was inadmissible; and

[6] high-low settlement agreements between patient and others did not prejudice surgeon.

Affirmed.

**Procedural Posture(s):** On Appeal.

West Headnotes (6)

### [1] Trial 🔑 Particular statements or remarks

Trial counsel's opening statements did not warrant mistrial, in patient's medical malpractice action against orthopedic surgeon and others; trial judge agreed that comment about drinking alcohol was inappropriate and instructed jury that what lawyers told them was not evidence, read limiting instruction prepared by surgeon's counsel, and, during final charge, again instructed jurors that what attorneys said in opening statements was not evidence, and statement that surgeon's counsel was too defensive was not so egregious as to raise question as to whether jury's verdict resulted from statement, rather than merits of case.

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### [2] Witnesses 🔑 Records in general

Orthopedic surgeon's trial counsel should have been permitted to use nurse's notes to refresh emergency room doctor's purported recollection about what nurse allegedly told him, in patient's medical malpractice action against surgeon and others; doctor testified that he did not have any recollection of nurse telling him to get another orthopedic doctor or to transfer patient to another facility, and, since doctor had prior knowledge of what nurse told him and his memory was impaired, he should have been allowed to examine any document to refresh his memory. [N.J. R. Evid. 612](#).

**[3] Appeal and Error** 🔑 Refreshing memory of witness

Trial court's error in limiting use of nurse's notes on cross-examination to refresh recollection of emergency room doctor was harmless, in patient's medical malpractice action against orthopedic surgeon and others, even though doctor testified that he did not recall nurse telling him to get another orthopedic doctor or to transfer patient to another facility; doctor was fully aware, given his own finding on examination of patient, that he could have called vascular surgeon, if orthopedic surgeon's counsel believed that surgeon told nurse to obtain vascular consult and that nurse had relayed that information to doctor, counsel was free to call nurse as witness to make that point but elected strategically not to call her, and review of notes revealed only that surgeon may have requested that hospital call another orthopedic surgeon, not a vascular surgeon. [N.J. R. Evid. 612](#).

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**[4] Appeal and Error** 🔑 Refreshing memory of witness

Any error in trial counsel's inability to use nurse's notes during cross-examination of expert, who was diplomate of American Board of Emergency Medicine, was harmless, in patient's medical malpractice action against orthopedic surgeon and others; while expert testified that patient's emergency room doctor did not have independent obligation to call for vascular consult but it would have been a good idea to do so, he did not testify that he reviewed and relied on notes in rendering his expert opinion, and surgeon's counsel could have asked expert whether his opinion, that doctor had complied with accepted emergency room standards, would have changed, assuming that surgeon had told nurse to obtain vascular consult and doctor failed to follow through with that call.

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**[5] Evidence** 🔑 Proof of genuineness in general**Evidence** 🔑 Preliminary Evidence; Foundation

Redacted version of hospital's root cause analysis (RCA) was inadmissible as business record or party admission, in patient's medical malpractice action against orthopedic surgeon and others; foundational requirements of admission were not met, as there was no testimony that factual portion of RCA was prepared within short time of events in question or that circumstances of preparation of RCA justified its admission into evidence. N.J.S.A. 2A:84A, App. A, [Rules of Evid., N.J.R.E. 803\(b\), 803\(c\)\(6\)](#).

**[6] Compromise, Settlement, and Release** 🔑 Settlement with fewer than all defendants; "Mary Carter" agreements

High-low settlement agreements, in which others agreed to pay patient minimum recovery in return for her agreement to accept maximum sum regardless of trial outcome and parties agreed to accept any outcome between limits, entered into between patient and others were not prejudicial to orthopedic surgeon's defense, in patient's medical malpractice action against surgeon and others; agreements did not shift liability so that others would have been paying nothing, and surgeon was in adversarial position against others from very beginning of trial, as they pointed finger of blame at surgeon.

[More cases on this issue](#)

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-6310-07.

**Attorneys and Law Firms**

[Jeffrey M. Pollock](#)<sup>1</sup> argued the cause for appellant Peter F. DiPaolo, M.D. ([Fox Rothschild](#), L.L.P., attorneys; Mr. [Pollock](#), of counsel and on the brief, [Michael Coco](#), on the brief).

[Roy J. Konray](#) argued the cause for respondent Crystal Evans (Tobin Kessler Greenstein Caruso Wiener & Konray, P.C., attorneys; Mr. Konray and [Douglas S. Grossbart](#), on the brief).

Haley Grieco argued the cause for respondents Jersey City Medical Center and Liberty Healthcare System, Inc. (Mattia & McBride, attorneys; [Philip F. Mattia](#), on the brief).

[Sam Rosenberg](#) argued the cause for respondent Jody DiGiacomo, M.D. (Reiseman Rosenberg Jacobs & Heller, P.C., attorneys; Mr. Rosenberg, of counsel and on the brief).

[Michael J. Lunga](#) argued the cause for respondents Dr. Babak Abai, Dr. Brajesh Lal, and Dr. Juan Asensio–Gonzalez.

[Michael R. Ricciardulli](#) argued the cause for respondent Nicholas Demos, M.D. (Ruprecht Hart Weeks & Ricciardulli, L.L.P., attorneys; Mr. Ricciardulli, of counsel and on the brief, Brion D. McGlinn, on the brief).

Before Judges [YANNOTTI](#), [FASCIALE](#) and [WHIPPLE](#).

## Opinion

PER CURIAM.

**\*1** In this medical malpractice case involving allegations of failure to timely treat plaintiff leading to substantial medical complications, defendant Peter F. DiPaolo, M.D., an on-call orthopedic surgeon, appeals from an October 9, 2012 judgment entered in plaintiff's favor after a six-week jury trial. We affirm.

### I.

Plaintiff dislocated her left knee, which led to a stretching of her popliteal artery, a vascular condition that posed a significant risk if the stretched artery was not treated within approximately six to eight hours. During the trial, at which thirteen experts and numerous other witnesses testified, the parties hotly disputed the facts surrounding the medical treatment that plaintiff received.

We discern the following facts adduced at the trial, emphasizing the timeline and complications that developed from the delayed treatment.

### A.

At 2:40 p.m., plaintiff fell causing the dislocation of her knee. She arrived at defendant Meadowlands Hospital (the “hospital”) in Bergen County, where defendant Bernard Reimer, M.D., the emergency room doctor, and Nurse Nancy Harrington<sup>2</sup> assessed plaintiff's medical condition. Dr. Reimer observed a major deformity regarding plaintiff's knee, noticed a diminished pulse in her left foot, and diagnosed an acute vascular emergency.

Dr. Reimer determined that plaintiff required treatment from an orthopedic surgeon. The hospital had on-call arrangements with various doctors, and Dr. Reimer determined the on-call orthopedic surgeon was Dr. DiPaolo. According to the arrangement that Dr. DiPaolo had with the hospital, he was on call year-round and obligated to call the emergency department within twenty minutes of receiving a page and arrive at the hospital within sixty minutes thereafter.

Dr. Reimer attempted unsuccessfully to reach Dr. DiPaolo. At 3:45 p.m., Dr. Reimer paged Dr. DiPaolo without a response. At 4:18 p.m., Dr. Reimer paged Dr. DiPaolo again, but was unable to reach him. At 4:50 p.m., Dr. Reimer had discovered that plaintiff's anterior knee dislocation caused her popliteal artery to stretch. At 4:56 p.m., Dr. Reimer paged Dr. DiPaolo for a third time without any reply.

After receiving no response to three pages, Dr. Reimer directed a nursing supervisor to help locate Dr. DiPaolo and, at 5:02 p.m., Dr. DiPaolo's answering service patched him through to Dr. Reimer, who explained to Dr. DiPaolo that plaintiff had a dislocated left knee, stated that she “needed to be attended to right away,” and that her “pulse [was] good.”

Dr. DiPaolo advised Dr. Reimer not to reduce the knee unless plaintiff's pulse changed, and indicated that he would leave his residence in Toms River, New Jersey, for the hospital. At 5:30 p.m., around the time when he allegedly had left Toms River, Dr. DiPaolo informed Dr. Reimer that he should perform a knee reduction if plaintiff's pulse decreased. Dr. Reimer performed that procedure restoring “full pulses plus or minus.”

**\*2** At 6:25 p.m., while allegedly driving to the hospital, Dr. DiPaolo instructed Nurse Harrington to admit plaintiff into the hospital under his care. Dr. DiPaolo testified at trial that he told the nurse to obtain a consult with a vascular surgeon,

although the parties disputed that testimony and no such order appears in the hospital chart. Dr. Reimer last saw plaintiff at 6:50 p.m., at which point plaintiff was stable, had positive pulses, and good blood flow in her left leg.

At 7:00 p.m., Dr. Hana<sup>3</sup> replaced Dr. Reimer as the emergency room physician. Around this time, Nurse Harrington was unable to detect a pulse in plaintiff's left leg, and plaintiff had been complaining that her leg was extremely cold and uncomfortable. Dr. DiPaolo, who had not yet arrived at the hospital, ordered an [angiogram](#) to help him establish the level of blood flow in the leg.

At approximately 7:00 p.m., Dr. Melcho Romero, the on-call radiologist for the hospital, received a call from a nursing supervisor requesting the [angiogram](#). Dr. Romero suggested that plaintiff be transferred to Jersey City Medical Center ("JCMC"), a level two trauma center, which had the proper equipment to perform the [angiogram](#) on plaintiff. Dr. Romero understood that after plaintiff underwent the [angiogram](#) at JCMC, she would return to the hospital. Dr. Hana authorized the transfer to JCMC.

At 7:49 p.m., an ambulance arrived at the hospital to transport plaintiff to JCMC. At 8:07 p.m., Dr. DiPaolo, who had still not arrived at the hospital, learned that plaintiff would be transferred to JCMC. Dr. DiPaolo, who did not have privileges at JCMC and assumed that plaintiff would remain at JCMC for continued care, said he turned around and returned to Toms River.

Plaintiff arrived at JCMC at 8:20 p.m. Dr. Romero performed the [angiogram](#) and, at 10:00 p.m., noted in plaintiff's chart that the popliteal artery was completely blocked. Dr. Romero left JCMC expecting that plaintiff would return to the hospital for continued medical treatment.

Meanwhile, Dr. Hana asked Dr. Nicholas Demos, a general surgeon at the hospital, if he would perform bypass surgery on plaintiff. Dr. Demos recommended that plaintiff remain at JCMC, explaining that eight hours had passed since plaintiff's accident and that JCMC was better equipped to meet plaintiff's needs. Dr. Demos had assumed that JCMC had a vascular surgeon available to perform the surgery, but that was not the case.

At 11:15 p.m., Dr. DiPaolo called Dr. Jody DiGiacomo, an on-call trauma surgeon at JCMC, and requested that plaintiff remain at JCMC. Dr. DiGiacomo admitted plaintiff into

JCMC and, at 11:30 p.m., discovered that plaintiff had no pulse in her leg, concluded that plaintiff's leg "might be dying," and called Dr. Bakir Altai, a vascular surgeon at JCMC. Because Dr. Altai was unavailable, Dr. DiGiacomo attempted to transfer plaintiff to the University of Medicine and Dentistry of New Jersey ("UMDNJ").

Dr. Brajesh Lal, a UMDNJ vascular and general surgeon, explained to Dr. DiGiacomo that the transfer process would take too long and that more than six hours had passed since plaintiff's accident. Dr. DiGiacomo then called Dr. Juan Asensio-Gonzalez, an on-call trauma surgeon at UMDNJ, requesting that plaintiff be transferred to UMDNJ because JCMC was unable to locate a surgeon to do the bypass surgery. Dr. Asensio-Gonzalez believed that plaintiff needed immediate surgery at JCMC, not UMDNJ.

**\*3** At 1:40 a.m., Dr. DiGiacomo surgically removed a clot in plaintiff's leg to temporarily restore blood flow while waiting for a vascular surgeon to perform bypass surgery at JCMC. The surgery to remove the clot was unsuccessful because a catheter would not pass through the area of the obstruction. At 5:00 a.m., Dr. DiGiacomo called Dr. Demos, informed Dr. Demos that he was unable to remove the clot, and asked if Dr. Demos would come to JCMC to perform the bypass surgery, which Dr. Demos agreed to do.

At 8:00 a.m., Dr. Demos started the surgery, which took approximately four and one-half hours. Although plaintiff regained a pulse to her left leg, the clot re-developed. Four days later, Dr. DiGiacomo amputated plaintiff's leg above the knee.

## B.

Plaintiff filed this complaint against the hospital, JCMC, Dr. DiGiacomo, Dr. DiPaolo, Dr. Romero, Dr. Asensio-Gonzalez, Dr. Lal, Dr. Demos, and other entities and physicians. Plaintiff filed a first amended complaint naming Dr. Reimer as a defendant. She filed a second and third amended complaint adding additional parties and causes of action.

During the discovery phase of the case, plaintiff requested that the hospital produce a document that the parties referred to as the hospital's root cause analysis ("RCA") of plaintiff's injuries. The judge reviewed the RCA in camera, found

that part of it was discoverable, and ordered the hospital to produce a redacted version of the RCA to the parties.

At the beginning of the trial, Dr. DiPaolo moved for a mistrial arguing that counsel for plaintiff and Dr. Reimer made improper comments in their opening statements. The judge denied the motion. During the trial, the judge ruled that the redacted RCA was inadmissible. Also during the trial, the judge precluded the use of Nurse Harrington's two and one-half pages of notes prepared sometime between the treatment of plaintiff and before trial (the "Harrington notes"). The Harrington notes were undated, unsigned, and did not include a timeline, but purportedly memorialized what she remembered about the events surrounding plaintiff's medical treatment.

At some point before the jury returned its verdict, plaintiff entered into a high-low settlement agreements with Drs. Reimer, Demos, and Romero. The jury found that Drs. DiPaolo, Reimer, and Romero committed malpractice, awarded plaintiff a total of \$5.59 million in damages, and apportioned liability sixty-eight percent to Dr. DiPaolo, twenty-two percent to Dr. Reimer, and ten percent to Dr. Romero.<sup>4</sup> The claims against the other defendants were either dismissed by the judge or received a verdict of no cause of action.<sup>5</sup>

Dr. DiPaolo filed a motion for a new trial, which the judge denied. The court awarded a final judgment against Dr. DiPaolo in the amount of \$5,256,767.72, including prejudgment interest, and attorneys' fees and costs.<sup>6</sup>

## C.

On appeal, Dr. DiPaolo argues that the judge erred by (1) denying his motion for a mistrial and new trial after counsel for plaintiff and Dr. Reimer made improper remarks in their opening statements to the jury; (2) excluding from admission into evidence the redacted RCA, precluding use of the Harrington notes to refresh the recollection of Dr. Reimer,<sup>7</sup> and preventing use of the Harrington notes on cross-examination of Dr. Reimer's expert, Dr. James Giglio; and (3) rejecting his argument that the high-low settlement agreements prejudiced Dr. DiPaolo. He also contends that the verdict was against the weight of the evidence and a new trial is warranted due to cumulative trial errors.

## II.

**\*4 [1]** We begin by addressing Dr. DiPaolo's contention that counsel made improper remarks in their opening statements to the jury warranting a mistrial.

We review a trial court's decision to grant or deny a motion for a mistrial using an abuse of discretion standard. *Khan v. Singh*, 397 N.J.Super. 184, 202, 936 A.2d 987 (App.Div.2007), *aff'd*, 200 N.J. 82, 975 A.2d 389 (2009). We use the same standard when reviewing an order granting or denying a motion for a new trial. *Jackowitz v. Lang*, 408 N.J.Super. 495, 504, 975 A.2d 531 (App.Div.2009). We may not grant a new trial "unless it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1; *Caldwell v. Haynes*, 136 N.J. 422, 432, 643 A.2d 564 (1994). We give considerable deference to a trial court's decision on a motion for a new trial because " 'the trial court has gained a feel for the case through the long days of the trial.' " *Boryszewski v. Burke*, 380 N.J.Super. 361, 391, 882 A.2d 410 (App.Div.2005) (quoting *Lanzet v. Greenberg*, 126 N.J. 168, 175, 594 A.2d 1309 (1991)), *certif. denied*, 186 N.J. 242 (2006).

Applying these standards, we conclude that there was no basis for granting a mistrial or new trial. Plaintiff's counsel said in his opening statement to the jury:

The claim against Dr. DiPaolo is, of course A), he should have showed up; B) he should have immediately-or if he couldn't show up, if something was going on, if there was a reason he couldn't come. He ... had too much to drink, whatever the reason is[,] just man up and say I can't make it, find somebody else to cover me. But he didn't do that. He just kept calling in on his phone when he felt like it and not very often.

Dr. DiPaolo's counsel did not immediately object to these remarks.

The following day, Dr. Reimer's counsel presented his opening argument and told the jury:



The orthopedic doctor never said I can't come, I'm not coming. I'm sick. I can't show up. I've been drinking, I shouldn't show up. I mean, never said I'm not coming. Always said, I'm coming. I'm coming. Supposedly calling from his car.

Dr. Reimer's counsel further remarked that Dr. DiPaolo was "a little greedy" because he was on-call with the hospital "24 hours a day, seven days a week, 365 days a year," and stated "Do you think that anybody can realistically do that?" Dr. Reimer's counsel also referred to Dr. DiPaolo's counsel as defensive because he used his words carefully.

At the close of the opening statements, Dr. DiPaolo's counsel moved for a mistrial or, alternatively, a curative instruction. The judge agreed that the comment about drinking alcohol was improper and, before the first witness testified, instructed the jurors that what lawyers tell them was not evidence. The judge then read a limiting instruction prepared by Dr. DiPaolo's counsel:

In particular I wanted to point out one statement, however. During the opening [statements] there was a suggestion made that Dr. DiPaolo may have been drinking. There is no evidence to support that statement. There will never be any evidence to support that statement. Therefore, you must put that statement out of your mind and not consider it ... during the course of this trial.

**\*5** Once a statement is made it's very difficult to disregard it. However, I instruct you that it is your duty as jurors to do everything in your power to not allow this improper comment to play any role in your consideration of this case.

During the final charge, the judge again instructed the jurors that what the attorneys said in their opening statements was not evidence.

We conclude that although the comments were objectionable, they were brief. "Fleeting comments, even if improper, may not warrant a new trial, particularly when the verdict is fair." *Jackowitz, supra*, 408 N.J.Super. at 505, 975 A.2d 531. We further note that Dr. DiPaolo's counsel failed to object to the first set of comments. A failure to timely object indicates that counsel did not believe that the comments were

prejudicial when they were made, and deprives the court of the opportunity to take immediate curative action. *Ibid*.

The judge also gave strong instructions to the jury before and after the testimony began. "[A] clear and firm jury charge may cure any prejudice created by counsel's improper remarks during opening or closing argument." *City of Linden v. Benedict Motel Corp.*, 370 N.J.Super. 372, 398, 851 A.2d 652 (App.Div.), *certif. denied*, 180 N.J. 356, 851 A.2d 650 (2004). Such is the case here. We must presume that the jury followed those instructions. *McRae v. St. Michael's Med. Ctr.*, 349 N.J.Super. 583, 599, 794 A.2d 219 (App.Div.2002).

Finally, we do not consider the related comment, that Dr. DiPaolo's counsel was "too defensive," as an attack on his integrity. We understand that "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, 178, 997 A.2d 1079 (App.Div.2010). Unlike the unique facts in *Szczecina*, the comments here were not so egregious as to raise a question as to whether the jury's verdict resulted from counsel's statements, rather than the merits of the case. *Id.* at 183–84, 997 A.2d 1079 (explaining that the comments in the opening and closing statements accusing the entire defense team of "spinning the evidence," and inviting the jury to "send a message," were so egregious as to warrant a new trial). As a result, the comments related to the perceived defensiveness of Dr. DiPaolo's counsel did not warrant a new trial.

### III.

Dr. DiPaolo contends that the judge erred by precluding his counsel from using the Harrington notes to refresh the recollection of Dr. Reimer, barring use of the Harrington notes during the cross-examination of Dr. Giglio, and excluding from admission into evidence the redacted RCA.

We review evidentiary rulings of the trial court for abuse of discretion. *State v. Marrero*, 148 N.J. 469, 483–84, 691 A.2d 293 (1997). Unless there has been "a clear error of judgment," we will not upset those rulings. *State v. Koedatich*, 112 N.J. 225, 313, 548 A.2d 939 (1988), *cert. denied*, 488 U.S. 1017, 109 S.Ct. 813, 102 L. Ed.2d 803 (1989). We will disregard errors that are not "clearly capable of producing an unjust result" under the doctrine of harmless error. *R. 2:10–2; State v. R.B.*, 183 N.J. 308, 330, 873 A.2d 511 (2005).

A.

**\*6 [2]** We begin by addressing the Harrington notes. Dr. DiPaolo's argument as to the Harrington notes relates solely to the judge's limitation that they not be used on cross-examination to refresh the recollection of Dr. Reimer, and to otherwise use the notes on cross-examination of Dr. Giglio.

(i)

In general, if a witness has prior knowledge of a subject, and his or her memory of that subject is impaired, the “witness may examine *any* document to refresh [his or her] memory.” *State v. Carter*, 91 N.J. 86, 122, 449 A.2d 1280 (1982) (emphasis added); Biunno, Weissbard & Zegas, *Current N.J. Rules of Evidence*, comment 3 on *N.J.R.E. 612* (2014). “[T]he ‘admissible evidence is the [refreshed] recollection of the witness, and not the extrinsic paper.’” *Lautek Corp. v. Image Bus. Sys. Corp.*, 276 N.J.Super. 531, 545, 648 A.2d 488 (App.Div.1994) (quoting *Carter*, *supra*, 91 N.J. at 123, 449 A.2d 1280).

Dr. Reimer testified on cross-examination:

Q: Doctor, do you recall Nurse Harrington telling you to get another orthop [e]dic [doctor] or transfer [plaintiff to another facility] ... ?

A: No.

Dr. Reimer was not asked if he remembered whether Nurse Harrington told him that Dr. DiPaolo allegedly told her to call another doctor, be it a vascular surgeon or orthopedist. Nevertheless, Dr. DiPaolo's trial counsel should have been permitted to use the Harrington notes to refresh Dr. Reimer's purported recollection about what Nurse Harrington allegedly told Dr. Reimer.

**[3]** The inability to use the Harrington notes, however, was at best harmless. Dr. Reimer was fully aware, given his own findings on examination of plaintiff, that he could have called a vascular surgeon. Dr. Reimer testified that he had diagnosed plaintiff with diminished pulses in her left foot when he first examined her in the hospital, knowing that a decreased pulse involved the vascular system. He testified on cross-examination that during his initial examination of plaintiff, there existed a vascular compromise, acute [vascular injuries](#) required a vascular surgical consult, associated [vascular](#)

[injuries](#) existed in fifty percent of knee dislocations, and that he had the opportunity to call an on-call vascular specialist to deal with plaintiff's stretched artery.

If Dr. DiPaolo's trial counsel believed that Dr. DiPaolo told Nurse Harrington to obtain a vascular consult, and that Nurse Harrington had relayed that information to Dr. Reimer, then his trial counsel was free to call Nurse Harrington as a witness to make that point. She was available to testify and Dr. DiPaolo's counsel was on notice that he would not be permitted to use the Harrington notes on cross-examination of Dr. Reimer. Trial counsel elected strategically not to call Nurse Harrington as a witness.

Dr. DiPaolo additionally testified that he told Dr. Reimer to obtain a vascular consult and to call Dr. Vizzone, another orthopedic surgeon.<sup>8</sup> Our review of the Harrington notes reveals only that Dr. DiPaolo may have requested that the hospital call Dr. Vizzone, not a vascular surgeon. Even so, Dr. Vizzone was called and unavailable to treat plaintiff.

**\*7** Thus, the Harrington notes do not indicate that Dr. DiPaolo instructed Nurse Harrington to obtain a vascular consult when plaintiff first presented to the hospital. Accordingly, the limitation on the use of the Harrington notes was harmless.

(ii)

**[4]** We also conclude that the inability to use the Harrington notes during cross-examination of Dr. Giglio was harmless error, if any error at all.

Dr. Giglio, a Diplomate of the American Board of Emergency Medicine, testified that plaintiff presented to Dr. Reimer with “vascular compromise” and an “acute [vascular injury](#).” Although he indicated that Dr. Reimer did not have an independent obligation to call for a vascular consult, Dr. Giglio testified that it would have been a “good idea” to do that. According to Dr. Giglio, plaintiff needed “an evaluation of her vascular status both before and after the [knee] reduction.”

Dr. Giglio did not testify that he reviewed and relied upon the Harrington notes in rendering his expert opinion. The parties deposed Nurse Harrington and purportedly questioned her about the Harrington notes. It appears that Dr. Giglio may have reviewed Nurse Harrington's deposition testimony, but

we have not been provided with a copy of her deposition testimony and cannot determine whether she testified during her deposition that Dr. DiPaolo told her to inform Dr. Reimer to obtain a vascular consult. Certainly, Dr. DiPaolo's trial counsel could and did use Nurse Harrington's deposition testimony when cross-examining Dr. Giglio.

As to Dr. Giglio, we also note that Dr. DiPaolo's trial counsel could have asked Dr. Giglio on cross-examination whether his opinion, that Dr. Reimer's had complied with accepted emergency room standards, would have changed, assuming hypothetically that Dr. DiPaolo had told Nurse Harrington to obtain a vascular consult and Dr. Reimer failed to follow through with that call. Thus, the inability to use the Harrington notes was harmless.

#### B.

[5] Regarding the exclusion of the redacted RCA into evidence, we conclude that the judge did not err.<sup>9</sup> We reject Dr. DiPaolo's contentions that the RCA is admissible pursuant to *N.J.R.E.* 803(c)(6) (business records) and *N.J.R.E.* 803(b) (party admission).

We have reviewed the redacted form of the RCA, which is undated and unsigned. At oral argument before us, Dr. DiPaolo's counsel indicated that Dr. DiPaolo sought to introduce the redacted RCA into evidence to prove solely that Dr. DiPaolo advised Dr. Reimer to call Dr. Vizzone, who was unavailable to treat plaintiff, or other orthopedic doctors.

There exists an insufficient foundation to admit the redacted RCA into evidence under any of the subsections of *N.J.R.E.* 803(b). The same is true for *N.J.R.E.* 803(c)(6), which authorizes the admission into evidence of:

A statement contained in a writing or other record of acts, events, conditions, and, subject to *Rule* 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of

information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

\*8 To introduce a document under the business records exception to the hearsay rule, the proponent must satisfy three conditions:

First, the writing must be made in the regular course of business. Second, it must be prepared within a short time of the act, condition or event being described. Finally, the source of the information and the method and circumstances of the preparation of the writing must justify allowing it into evidence.

[*State v. Sweet*, 195 N.J. 357, 370, 949 A.2d 809 (2008) (quoting *State v. Matulewicz*, 101 N.J. 27, 29, 499 A.2d 1363 (1985), cert. denied, 557 U.S. 934, 129 S.Ct. 2858, 174 L. Ed.2d 601 (2009)).]

None of these foundational requirements were met. There was no testimony that the factual portion of the RCA was prepared in the regular course of the hospital's business, that it was prepared within a short time of the events in question, or that the circumstances of the preparation of the RCA justified its admission into evidence. Rather, the sources of information or the method, purpose or circumstances of its preparation indicated that it was not trustworthy.

#### IV.

[6] We reject Dr. DiPaolo's argument that the high-low settlement agreements entered into between plaintiff and Drs. Demos, Reimer, and Romero were prejudicial to his defense.

A high-low agreement is used in negligence cases where a defendant agrees to pay the plaintiff a minimum recovery in return for the plaintiff's agreement to accept a maximum sum regardless of the trial outcome. *Benz v. Pires*, 269 N.J. Super. 574, 578, 636 A.2d 101 (App.Div.1994). The parties also agree to accept any outcome between these limits. *Id.* at 578–79, 636 A.2d 101. “A high-low agreement protects a plaintiff from the danger of receiving less than the floor amount and protects a defendant from exposure to a judgment higher than the agreed ceiling.” *Id.* at 579, 636 A.2d 101.



High-low agreements are treated as settlements. *Shafer v. Cronk*, 220 N.J.Super. 518, 521–22, 532 A.2d 1131 (Law Div.1987). As such, we enforce an agreement “absent a demonstration of fraud or other compelling circumstances [.]” *Pasacarella v. Bruck*, 190 N.J.Super. 118, 124–25, 462 A.2d 186 (App.Div.) (citation and internal quotation marks omitted), *certif. denied*, 94 N.J. 600, 468 A.2d 233 (1983).

Certain agreements that “secretly and unfairly allies one defendant with plaintiff to the prejudice of the other defendant” have been “restricted or invalidated in many jurisdictions[.]” *Benz, supra*, 269 N.J.Super. at 578–79 n. 2, 636 A.2d 101. These agreements have become known as “Mary Carter” agreements from the case of *Booth v. Mary Carter Paint Co.*, 202 So.2d 8 (Fla.Dist.Ct.App.1967). A “Mary Carter” agreement refers to a contract where “one or more, but not all, co[-]defendants settle with the plaintiff and obtain a release, along with a provision granting them a portion of any recovery from the nonparticipating co[-]defendants.” *Black’s Law Dictionary* 1064 (9th ed.2009). Such agreements generally have three characteristics:

\*9 (1) the liability of the settling defendant is limited and the plaintiff is guaranteed a minimum recovery; (2) the settling defendant remains a party to the pending action without disclosing the full agreement to the nonsettling defendants and/or the judge and jury; and (3) if judgment against the nonsettling defendant is for more than the amount of settlement, any money collected will first offset the settlement so that the settling defendant may ultimately pay nothing.

[*England v. Reinauer Transp. Cos., L.P.*, 194 F.3d 265, 274 (1st Cir.1999) (citation and internal quotation marks omitted).]

Here, the judge rejected Dr. DiPaolo's argument for a new trial on the basis of the high-low settlement agreements. The judge stated in a written opinion that

Dr. DiPaolo contends that the high[-]low agreements between plaintiff and co-defendants should have been made known to the jury on the question of witness bias. [Dr.] DiPaolo argues that with respect to the high-low agreement entered into between plaintiff and Dr. Demos, [Dr.] DiPaolo was prejudiced because the agreement was not disclosed to Dr. DiPaolo until after Dr. Demos testified, and the allegedly friendly interaction between plaintiff's counsel and Dr. Demos during his cross[-]examination made Dr. Demos “appear to the jury as a ‘Good Samaritan’

who then could not effectively be cross-examined by the defense.” Dr. DiPaolo then argues that as the result of the high-low agreement between plaintiff and Dr. Reimer, plaintiff was able to exert significant control over the presentation of Dr. Reimer's case.

With respect to Dr. Demos, there is no evidence that a high-low agreement executed with plaintiff constituted a “Mary Carter” agreement.<sup>[ 10 ]</sup> With respect to Dr. Reimer, Dr. DiPaolo has failed to produce any evidence that plaintiff exerted any control over Dr. Reimer's witnesses. Regardless, Dr. DiPaolo has failed to establish that clear prejudice resulted from either of these high-low agreements. Dr. DiPaolo had ample opportunity to cross-examine both Dr. Demos and Dr. Reimer, and the Court holds that any inability of Dr. DiPaolo's counsel to cross-examine either Dr. Demos or Dr. Reimer with respect to any aspect of their high low-agreement did not result in clear prejudice to Dr. DiPaolo.

[ (Footnote omitted).]

We see no reason to disturb the judge's conclusions. The settling parties did not reach “Mary Carter” agreements because liability did not shift so that the settling defendants would be paying nothing. Moreover, Dr. DiPaolo was in an adversarial position against Drs. Demos, Reimer, and Romero from the very beginning of the trial because those doctors pointed the finger of blame at Dr. DiPaolo. Thus, even if there was the potential for prejudice, it did not exist here. *See, e.g., Monti v. Wenkert*, 287 Conn. 101, 947 A.2d 261, 274–77 (Conn.2008) (noting that a non-disclosed settlement agreement did not result in prejudice when non-agreeing defendants were adversaries from the beginning of the litigation and “[k]nowledge of the agreement could not have changed the defendant's incentive to cross-examine witnesses zealously or to pursue as vigorously as possible his original strategy”).<sup>11</sup>

V.

\*10 Finally, after reviewing the record and the briefs, we conclude that Dr. DiPaolo's remaining arguments, that cumulative errors warrant a new trial and the verdict is against the weight of the evidence, are without sufficient merit to warrant discussion in a written opinion. R. 2:11–3(e)(1)(E).

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2015 WL 2359829

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Footnotes

- 1 Mr. Pollock was not trial counsel.
- 2 Nurse Harrington was not named as a party in this case.
- 3 Dr. Hana's first name is not included in the record.
- 4 The award included: \$400,000 for past pain, suffering, disability, and loss of enjoyment of life; \$4,000,000 for future pain, suffering, disability, and loss of enjoyment of life; \$200,000 for past medical bills; \$825,000 for future medical bills; and \$165,000 for past lost income.
- 5 JCMC and the hospital did not appear on the verdict sheet because all counsel agreed that the court would decide the issue of vicarious liability "sometime after the jury's verdict was announced." The judge entered judgment against the hospital in a molded amount of \$309,446.60, "based on the statutory cap of \$250,000.00 for its vicarious liability for the actions of [Dr.] Reimer ... together with pre-judgment interest of \$59,446.60."
- 6 The judge honored the high-low settlement agreements between plaintiff and Drs. Reimer and Romero, and entered judgments against them in the amount of \$900,000 and \$600,000 respectively.
- 7 At oral argument before us, Dr. DiPaolo's counsel indicated that he was not challenging the judge's ruling to exclude the Harrington notes from admission into evidence. We conclude, however, that any such contention would have been without sufficient merit to warrant discussion in a written opinion. *R.* 2:11–3(e)(1)(E).
- 8 Dr. Vizzone was not a party to the lawsuit.
- 9 On appeal, no party has argued that the RCA was privileged and therefore not discoverable. We note that there was no testimony that the purported RCA was prepared in accordance with the New Jersey Patient Safety Act ("PSA"), *N.J.S.A. 26:2H–12.23* to –12 .25. The PSA was enacted "to reduce the incidence of medical errors that may endanger patients in health care facilities." *C.A. ex rel. Applegrad v. Bentolila*, 219 *N.J.* 449, 451 (2014). "The Act imposed new requirements for evaluating and reporting of adverse events, and created a statutory privilege shielding specific communications from discovery in litigation." *Id.* at 451–52 (citing *N.J.S.A. 26:2H–12.25b*, c, e, g). "The Act sought to encourage health care workers to candidly disclose their observations and concerns, and promote self-critical evaluation by professional and administrative staff." *Id.* at 452.
- 10 We add that counsel for Dr. Demos verified during oral argument before us that Dr. DiPaolo's trial counsel, not the attorney for plaintiff, had requested that Dr. Demos's expert refrain from offering expert testimony on causation because that doctor's opinions were contrary to those of Dr. DiPaolo's expert.
- 11 Although this decision of the Connecticut Supreme Court is not binding on us, we find its analysis persuasive.