

New Jersey Supreme Court Overturns \$1,750,000 Jury Verdict and Orders New Trial Due to Plaintiff's Attorney's Improper Comments Made During Summation

On November 21, 2005, 69 year old Camille Risko slipped and fell in defendant's automobile showroom. According to her husband, who accompanied Camille to the dealership, a plastic runner on top of the carpet was waterlogged. Plaintiff's safety expert opined that improper placement of the plastic runner over the carpet and the lack of adequate inspections created a "false sense of security" and an unreasonably dangerous condition. The condition of the floor was disputed by defendant sales manager who denied that the carpet was wet, or that there were any plastic runners on top of the carpet.

As a result of the fall, Camille sustained a fractured arm and hip. The hip injury required surgery. She spent several weeks in a rehabilitation center where she contracted *C-difficile* colitis, a severe inflammation of the colon. When the condition developed into septic shock, Camille was rushed to the hospital, where she died on January 1, 2006. Camille's husband then filed suit on behalf of himself individually, and on behalf of his wife's estate.

Plaintiff's medical expert concluded that the Camille's hip fracture was caused by the slip and fall and her subsequent death from septic shock was ultimately the result of the injuries she sustained from the accident. Although the defendants contested the connection between the fall and her subsequent death, they produced no contrary medical proof or expert testimony.

The plaintiff produced an economic expert who opined that Camille would have lived for 16 more years. Additionally, the expert found that the economic loss was \$143,988 in household services, \$328,012 in "advice, counsel, support and companionship" and \$562,307 in "passive security" constituting "sleep time and on call services" that a spouse provides. The expert defined "sleep time and on call services" as the time decedent "was there and available to plaintiff for any specific needs that may have arisen." The defendant vigorously disputed the quantification and legitimacy of "sleep time" calculations by plaintiff's expert. The jury awarded the plaintiff \$1,210,319 for "financial losses sustained by the decedent survivors" and \$539,681 for pain and suffering before her death for a total award of \$1,750,000.

The trial court granted the defendants motion for new trial on liability and damages. The Appellate Division (in a 2-1 decision) reversed the trial Court's ruling. The New Jersey Supreme Court granted certification.

In their decision, the Supreme Court highlighted some comments made by plaintiff's counsel during summation that included:

the Eighth Amendment of the Constitution of the United States in the Bill of Rights says even prisoners of war, people we hate, are not supposed to be tortured. What [the decedent] went through was torture. They didn't intend to put her through that. But now they have to pay for that... When you go to deliberate if someone for some reason has not disclosed that they have a prejudice about awarding money in a death case, please tell the judge because that would not be following the law...and if someone goes into the jury room and says...I don't believe in damages of over a million dollars, because there are people that believe that, you can never have a million dollar case. Well why? Well because I just don't believe that, it's what's called an arbitrary cap

on damages. If someone says that in the jury room, please knock, tell [the jury attendant], ask for the judge. Because what they're doing is ignoring the law.

At that point in the summation, the trial judge interrupted and called counsel to sidebar. The court noted, "I'm going to mistry this case right now." The trial judge noted to plaintiff's counsel, "You don't tell them to knock on the door. That's the point. That's the deal you don't get here. That's my job. You don't tell them when to knock on the door. I'm furious to say the least." At the end of the colloquy, the Judge advised, "You finish this and I'm going to decide tonight whether I mistry this case."

Upon receiving the Judge's instructions to continue summation, plaintiff's counsel apologized to the court and to the jury for his conduct and statements and completed his closing argument. There were no objections by defense counsel. The following morning the Judge did not request argument on whether to mistry the case and never asked the attorneys for suggested curative instructions. The Judge did not give a specific cautionary instruction designed to address the concerns he voice the previous afternoon and made no comment to the jury on the matter.

Following entry of the verdict, the defendant moved for a new trial on all issues. In support of this motion, defendants argued that plaintiff's summation created "uncertainty among jurors of a free and fair deliberation that someone may be in the jury room looking to see if there was some type of undue bias." Plaintiffs argued as to defendant's characterization that the verdict could not be less than a million dollars and challenged defendant's failure to object or request a curative instruction when the court reconvened the next morning. During their motion for a new trial, the court noted "What concerns me with this trial is two things; plaintiff's counsel's conduct and my lack of response to that. I don't think that defense counsel needed to have an objection based on my reaction when it was stated to the jury that there was an issue of caps. Certainly, my reaction would indicate that the world was ready to explode. And I think most judges would have declared a mistrial right there."

The trial judge continued "Very simply put, to tell the jury that if one person doesn't believe in the million dollar case despite the fact that there is a law in NJ that we don't have caps created what I'm going to describe as a vigilante atmosphere...the message that was sent to that jury was that if someone doesn't believe in the million dollar case that somehow they should be turned in, that somehow they should be excised from the group. And that's not what we do when juries are deciding...I think that's the atmosphere that was created. Should I have instructed them that's not the case? Yes. Did I do it? No. "The Judge concluded he was compelled to grant a new trial.

The Appellate Division reversed the trial court. The majority based its decision on the fact that defense counsel did not object to the summation and failed to request a mistrial or a corrective jury charge. The majority emphasized its displeasure with plaintiff's suggestion of a million dollar damages floor and how jurors should conduct their deliberations, but declined to characterize those comments as inflammatory or unfairly prejudicial. The Appellate Division also found mitigating conduct in the form of the apology by plaintiff's counsel and the court's instruction to the jury that determining damages was entirely up to the jury.

The Supreme Court noted that a new trial should be granted only after "having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." Additionally, the Court reiterated that a motion for new trial "should be granted only where to do otherwise would result in a miscarriage of justice shocking the conscience of the court." The Supreme Court found "We cannot tolerate the suggestion to

jurors that they would be violating the law, and will be reported to the judge, if they reject the notion that plaintiff's case could be worth more than a million dollars. The court noted that the deliberative process is the vehicle for the collective mutual decision making that reflects community views. It is therefore necessary to structure a process and create an environment so that the mutual or collective nature of the jury's deliberations is preserved and remains intact until a final determination is reached. Counsel's instructions to the jury that they should knock on the door and inform the judge hindered this "collective mutual decision making." A juror who dissented from or even questioned, the quantum of damages that was being discussed may have been discouraged from voicing his or her thoughts out of fear of being reported to the judge. Although it is true that some biases should be reported to the judge such as racial bias...disagreement as to the quantum of damages does not require such action. That appeal for vigilanteism, as perceived by the judge, crossed the line and introduced an "extraneous consideration for influence" which requires a new trial as to damages.

In trying case, it is essential that counsel know the boundaries of what can, and cannot be said during a closing argument. If counsel crosses that line, not only can a "good" verdict be overturned, but the parties can face the cost of paying for a re-trial.