SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0172-19

DAVID WOLFE and
DOMINIQUE WOLFE,
his wife,

Plaintiffs-Appellants/
Cross-Respondents,

v.

ALEXANDER VOLVOVSKY,
M.D., WESTFIELD IMAGING
CENTER, and SUMMIT
RADIOLOGICAL ASSOCIATES,
P.A.,

Defendants-Respondents/
Cross-Appellants,

and

OVERLOOK HOSPITAL and
SUMMIT MEDICAL GROUP, P.A.,

Defendants.

Argued January 26, 2022 – Decided April 29, 2022

Before Judges Gilson, Gooden Brown, and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-3204-14.

Bruce H. Nagel argued the cause for appellants/cross-respondents (Nagel Rice, LLP, attorneys; Bruce H. Nagel and Susan F. Connors, on the briefs).

Cyndee L. Allert argued the cause for respondents/cross-appellants (Dughi, Hewit & Domalewski, attorneys; Cyndee L. Allert and Ryan A. Notarangelo, on the briefs).

PER CURIAM

Plaintiff David Wolfe (David)[1] underwent a lumbar-puncture medical procedure performed by defendant Alexander Volvovsky, M.D. David and his wife Dominique Wolfe appeal from a judgment dismissing their medical-malpractice claims after a jury returned a verdict in favor of defendants. Plaintiffs argue that the trial court committed reversible error in the jury charge and verdict sheet and that the verdict was against the weight of the evidence. They also contend that a new trial should be granted because defense counsel engaged in improper tactics, the trial court improperly admitted a nursing-flow sheet into evidence, and defense counsel consented to a mistrial. Defendants

[1] We use David, meaning no disrespect, to distinguish him from his wife, who was also a plaintiff.

cross-appeal, contending that if we order a new trial, we should reverse the trial court ruling granting a conditional directed verdict on liability and causation.

Having reviewed the trial record in light of the governing law, we find no reversible error and affirm the judgment. We dismiss defendants' cross-appeal as moot.

I.

We summarize the facts and proceedings from the record developed at a seven-day trial conducted in May 2019. David had a history of suffering from migraine headaches. He had also experienced some back pain over the years.

In high school and college, David had been an active athlete, playing soccer and baseball. As a soccer goalie, he had competed at a high level and had sustained several head concussions. David also sustained two concussions when he was in his thirties. In 2009, David's nephew ran into his head, causing a concussion that resulted in David being bedridden and out of work for at least a month. In 2010, David suffered a concussion while moving furniture.

Sometime prior to September 2012, David began to have migraine headaches that were triggered by visual stimuli. Eric Cohen, M.D., David's primary neurologist, was concerned that those visual disturbances were being caused by elevated pressure in David's spine. Accordingly, Dr. Cohen ordered

a fluoroscopically-guided lumbar puncture to obtain a pressure measurement and sample of plaintiff's cerebrospinal fluid. To access the cerebrospinal fluid, a needle had to be inserted through the soft tissue and bone of David's back to puncture the thecal sac, which is protected by an outer layer of fibrous tissue known as the dura. In performing a lumbar-puncture procedure, the doctor needs to take care not to damage any nerve root with the needle.

David underwent the lumbar puncture at Overlook Medical Center on September 10, 2012, when he was thirty-six years old. Before the procedure, David completed medical forms, including a self-assessment. He reported having ailments that included fainting, migraine headaches, chronic back and neck pain, a seizure around 1982, and gout. David self-rated his pre-procedure headache pain as a two on a scale of one to ten. He also stated that his neck and back pain might limit his positioning during the lumbar-puncture procedure.

The lumbar-puncture procedure was performed by Dr. Volvovsky. David testified that as the puncture began, he experienced excruciating pain and cried out. According to David, when he cried out in pain, the medical team tilted the table head down so he would not pass out. David asked if the pain was normal, but Volvovsky said only that it was important to continue the procedure. David

also testified that, thereafter, the surgical table was releveled, the procedure continued, and he continued to cry out in pain.

When the procedure was completed, Dr. Volvovsky "bolted" from the surgery room, and David asked a nurse to call him back. The nurse, however, returned alone and related that Dr. Volvovsky had said David should be fine and he should take a Percocet pill. The nurse then gave David one Percocet pill in the recovery room.

The hospital records included a two-page "Radiology Nursing Assessment and Monitoring Flow Sheet" (Nursing-Flow Sheet). The first page of the Nursing-Flow Sheet was signed by nurse Susan Buteas and reported pre-procedure information. The second page was not signed or dated. That page stated that the procedure started at "1335" hours (that is, 1:35 p.m.) and recorded David's pre-procedure vital signs. The second page also (1) noted David's opening spinal pressure; (2) recorded his vital signs at a time initially written as "1257" but then partially overwritten to a time of "1357" (that is, 1:57 p.m.); and (3) stated that David's pain was "0/10" at that time. The time correction was not signed or dated.

Dr. Volvovsky completed and signed a Progress Report stating that David had experienced "no complications" during the lumbar puncture. A nurse noted

David's opening cerebrospinal fluid pressure at the top of the Progress Report as "9 cm," which was normal. According to that Progress Report, David's lumbar puncture took twenty-five minutes to complete.

The post-procedure recovery log stated that David received one "5mg/325mg" Percocet pill at 2:30 p.m. The pill was administered by a nurse in accordance with an order signed by Dr. Volvovsky, which read "Percocet x1 for pain PRN." "PRN" is the abbreviated Latin "Pro re nata," meaning "as needed." The recovery log also stated that David had reported his pain as two out of ten and later as three out of ten.

Dr. Volvovsky's final report summarized the lumbar-puncture procedure as follows:

> After obtaining informed consent the [patient] was placed on the fluoroscopy table in prone position. The lower back was prepped and draped in usual sterile fashion. 1% lidocaine was used for local anesthesia. Utilizing direct fluoroscopic guidance access into the spinal canal was achieved at L3-L4 level. Clear [cerebrospinal fluid] was collected and submitted for pathologic review. The opening pressure was approximately 9 cm of water. The patient tolerated the procedure well and there were no immediate complications.

A laboratory report following the procedure stated that there were no red blood cells in the cerebrospinal-fluid sample obtained from David.

Following the procedure, David was discharged from the hospital at 5 p.m. that same day. David testified that as his mother drove him home, his back pain increased, he became nauseous, and he asked his mother to pull the car over. When he arrived home, David contacted Dr. Cohen, who prescribed oxycodone. According to David, thereafter, his headache became "terrible." He also explained that over the next few days, his headaches grew worse.

On September 13, 2012, David received a blood patch, which had been prescribed by Dr. Cohen. The blood patch involved an injection of David's own blood into the area of the lumbar puncture so that the blood would clot and block any cerebrospinal fluid leaking through the dura.

Several days after the blood patch, David developed a fever and Dr. Cohen advised him that he should go to the emergency room at Overlook. David was admitted to Overlook from September 18 through September 20, 2012. While there, he underwent MRIs of his brain and lower back. According to hospital records, David reported a headache, lower-back pain, and a fever when admitted. He rated his pain as a four or five on a scale of one to ten. David also stated that his back pain had worsened since the lumbar puncture and doctor notes indicated that David had tenderness in his middle and lower back. David was diagnosed with a headache and lower-back pain.

The MRIs of David's lumbar spine and brain disclosed no abnormalities. The MRIs revealed that David's lumbar spine was in normal alignment, and he had no disc herniations or evidence of an epidural or subcutaneous fluid collection. According to a September 19, 2012 hospital progress report, David's headache had lessened to a three out of ten and his back pain had resolved.

David testified that after he had left the hospital on September 20, 2012, his back pain returned. Thereafter, Dr. Cohen referred David to several doctors, including a neuro-ophthalmologist, who prescribed eye drops that resolved David's issue with visually triggered migraines. Nevertheless, David continued to have headaches brought on by other stimuli.

Beginning in January 2013, David consulted neurologist Joseph Safdieh, M.D., regarding his headaches and back pain. Dr. Safdieh's medical notes stated that he was successful in reducing David's headaches by using Botox but was unsuccessful in eliminating David's back pain.

In September 2014, David and his wife filed a malpractice complaint against Dr. Volvovsky. Following various proceedings and discovery, the matter went to trial against Dr. Volvovsky and Summit Radiological Associates, P.A., the professional association where Dr. Volvovsky practiced.

At trial, David testified that since the lumbar-puncture procedure, he has experienced daily back pain. He explained that the pain has limited what he can do at work as an attorney and has severely limited the activities he can do with his wife and children. David's wife and brother also testified that although David had suffered from headaches before the lumbar puncture, since the procedure, David has been in constant pain and his activities have been severely restricted.

Dr. Volvovsky testified that he did not recall the lumbar-puncture procedure he had performed on David. Accordingly, he testified about how he generally performed that procedure and his standard medical practices. The doctor explained that his normal procedure was to insert a needle between vertebrae 3 and 4 of the lower spine using an oblique approach while the patient was lying on a level table. Dr. Volvovsky also explained that following a lumbar puncture he would write up his notes and dictate an official radiology report. Based on his notes and reports, Dr. Volvovsky believed that David's lumbar puncture went well with no complications.

He also testified that he did not believe that he had been told that David wanted to see him after the procedure, but he based that belief on the absence of a notation in the records. Dr. Volvovsky acknowledged that he signed an order

for David to receive one Percocet "as needed." He also testified that the order for Percocet was a standard order.

The Nursing-Flow Sheet was admitted into evidence at trial. Defendants produced a certification from the custodian of medical records at Overlook, certifying that the records provided by the hospital were true and accurate copies of the originals kept on file and that those files were kept in the normal course of the business practices of the hospital's record-services department. Plaintiffs argued that the Nursing-Flow Sheet was unreliable because the second page was unsigned and undated in violation of regulations that required medical records to be signed and dated. See N.J.A.C. 13:35-6.5. They also argued that the nurse who had signed and prepared the first page of the Nursing-Flow Sheet was not called at trial as a witness and that at her deposition she had acknowledged that she might not have been in the operating room during the whole procedure. The trial court admitted the Nursing-Flow Sheet into evidence.

Four experts testified at trial. Plaintiffs called Dr. Safdieh and Dr. Hasit Mehta, an expert in neuroradiology. Defendants called Benjamin Mark, M.D., as a neurology expert, and Daniel Lefton, M.D., as a neuroradiology expert.

Dr. Safdieh testified that he had begun treating David in January 2013. At that time, David described his medical history, which included migraine

headaches, lower-back pain, and multiple concussions. Dr. Safdieh opined that David's back pain and headaches were due to a nerve-root injury that had occurred during the lumbar-puncture procedure. The doctor explained that he based his opinion on David informing him that the lumbar puncture caused his current problems and David's testimony that he had cried out in excruciating pain during the procedure. Dr. Safdieh also acknowledged that patients with a history of migraines were predisposed to having lengthy spinal headaches after a lumbar puncture and often the spinal headaches continued even after a successful blood patch. Dr. Safdieh also explained that he had ordered several ultrasounds and MRIs of David's spine, and all those tests came back showing that the spine was normal. Ultimately, Safdieh opined that because of the lumbar-puncture procedure, David had sustained a needle-related injury to the dura, a needle-related injury to the muscle structures in the paraspinal region, and a permanent injury to multiple nerve roots in his lumbar spine. Dr. Safdieh also opined that David's back pain and migraine were likely permanent injuries.

Dr. Mehta testified as plaintiffs' neuroradiological expert concerning liability. Relying on David's description of the lumbar-puncture procedure, Dr. Mehta opined that Dr. Volvovsky had deviated from accepted standards of care by failing to stop and assess the situation when David cried out in "extreme,

unremitting pain." According to Dr. Mehta, "[s]ome pain during a procedure can happen," but excruciating pain in a screaming patient required the doctor to stop the procedure and assess the situation. Dr. Mehta acknowledged that if David had not cried out in pain, there was no malpractice.

Dr. Mehta also opined that David had sustained a nerve-root injury during the lumbar-puncture procedure. He based that opinion on David's description of the procedure and explained that if a needle hits a nerve root during a lumbar puncture, the patient will experience a very sharp, radiating pain. Dr. Mehta also explained that the absence of subsequent clinical findings confirming an injury did not mean that David had not suffered an injury. He stated that it would not be necessary to find blood in the cerebrospinal fluid to confirm the injury because the bleeding could be very limited, and a nerve-root injury would not necessarily be visible on an MRI. In summary, Dr. Mehta testified that his opinion was "[b]ased on David's description of the series of events during the procedure, to a reasonable degree of medical probability, the type and extent of pain [David] experienced during the procedure would be most consistent with a nerve root injury."

Dr. Mark testified as defendants' neurology expert. He opined that there was no nerve root injury from the lumbar puncture. He explained that his

opinion was based in part on the tests that showed that there were no red blood cells found in David's spinal fluid and on tests that revealed no structural abnormalities in David's lower back. Dr. Mark also opined that David's current headaches were not caused by the lumbar puncture. He testified that a percentage of patients develop temporary positional headaches after a lumbar puncture, even if the puncture was performed perfectly.

Dr. Mark was also of the opinion that the lumbar puncture did not cause David's persistent lower-back pain. He noted that the medical records did not reflect any sort of complication occurring during the lumbar puncture. He also explained that David's wide variety of complaints could not be explained "in relation to the [lumbar puncture] procedure."

On cross-examination, Dr. Mark agreed that it was probable that some of David's initial complaints of headaches and lower back pain in the days immediately after the lumbar puncture were related to or caused by the puncture. Nevertheless, Dr. Mark maintained that David's persistent headaches and back pain following the initial two-week period were not due to the lumbar puncture. Instead, Dr. Mark opined that David's persistent pains were likely due to his post-concussion syndrome.

Defense expert Dr. Lefton, a neurologist, opined that Dr. Volvovsky had properly performed plaintiff's lumbar puncture without nerve-root injury and that David's current problems were not related to the lumbar puncture. He pointed out that the cerebrospinal fluid that had been removed from David did not contain any blood and that nothing in the hospital records supported a conclusion of a nerve injury from the lumbar puncture.

Dr. Lefton also explained that it was common for a lumbar-puncture patient to experience some post-procedural pain related to the puncture. He acknowledged that some of David's initial post-procedural back pain could have been related to the lumbar puncture. Dr. Lefton went on to explain that the lumbar puncture did not cause all or even a portion of David's claims of ongoing back pain.

Dr. Lefton also testified that if a patient cried out in extraordinary pain during a lumbar puncture, the standard of care required the doctor to stop and assess the situation. He also explained that failure to stop would be malpractice.

At the close of evidence, plaintiffs moved for a directed verdict on liability and proximate cause. They argued that both of defendant's experts had conceded that David experienced some pain for at least eight days after the lumbar puncture and, therefore, there was some injury from the procedure. Plaintiffs

reasoned that pain meant injury and injury meant a deviation from the standard of care. They, therefore, argued that the jury should be told that liability and causation had been established and the jury needed to determine only the extent and amount of plaintiffs' damages.

The trial court initially indicated that it might grant a directed verdict on liability and causation, but it wanted to continue to review the testimony of the defense experts. Thereafter, the trial court sent the parties a proposed verdict sheet containing one fact question for the jury: "Did David Wolfe cry out in pain during the lumbar puncture?" The trial court's proposed verdict sheet went on to explain that if the jury answered "[y]es," the court had already found Dr. Volvovsky had "deviated from the applicable standard of care" and the jury should proceed to decide the amounts of damages suffered by plaintiffs.

Plaintiffs objected to the trial court's proposed verdict sheet. After further argument on May 21, 2019, the trial court granted a conditional directed verdict. The court reasoned that the jury needed to decide a single disputed fact issue: whether David had cried out in pain during the lumbar-puncture procedure. In that regard, the trial court reasoned that all the experts had agreed that the standard of care required Dr. Volvovsky to stop the procedure and assess the situation if David had cried out in pain during the procedure.

Thereafter, the trial court instructed the jury. The trial court also gave the jury a verdict sheet, which contained a fact question for the jury:

> Did David Wolfe cry out in pain during the lumbar puncture?
>
> Yes ____ No ____ Vote ____
>
> If your answer is "Yes," then the Court has already ruled that in that event, that Dr. [Volvovsky] has deviated from the applicable standard of care and you must proceed to answer questions 2 and 3 [concerning damages].
>
> If your answer is "No" return your verdict in favor of the doctor.

After hearing the closing arguments of counsel, the jury answered "No" to question one on the verdict sheet. The trial court then entered a judgment for defendants.

Following the jury's verdict, plaintiffs moved for a judgment notwithstanding the verdict and for a new trial. Plaintiffs also moved for a mistrial. After hearing arguments on those motions, the trial court entered an order denying the motions and issued a written opinion explaining its rulings. The trial court reasoned that the malpractice claim had boiled down to a single factual dispute of whether David had cried out in pain during the lumbar-puncture procedure. The court pointed out that all the experts had agreed that if

David had cried out during the procedure, the standard of care required Dr. Volvovsky to stop the procedure and assess the situation. Accordingly, the trial court found that it had correctly crafted the question to be presented to the jury and had done so based on a verdict sheet submitted by plaintiffs' counsel. The court also pointed out that defendants had never conceded liability or proximate causation but had contested those issues at trial. The court, therefore, found that there were no grounds for a judgment notwithstanding the jury verdict or a new trial.

The trial court also denied plaintiffs' motion for a mistrial. The court found that there was no showing that defense counsel had intentionally violated acceptable and professional behavior. Instead, the trial court found that both parties were "competently and zealously represented by veteran trial counsel who at times pushed the limits in terms of the examination of witnesses as will often happen in an emotionally charged trial." The trial court then reviewed the record and determined that "there is nothing from which to conclude that intentional acts of misconduct by defense counsel interfered with the ability of the jury to fairly and impartially consider the evidence. Nor has there been demonstration of misconduct by defense counsel that rises to the level of requiring a mistrial."

II.

Plaintiffs appeal from the no-cause judgment based on the jury verdict and the order denying their motions for a new trial or mistrial. They make six main arguments, contending (1) the trial court erred by submitting a question to the jury that contradicted the court's prior grant of a directed verdict; (2) the trial court made multiple errors in charging the jury; (3) the jury verdict was against the weight of the evidence and constituted a miscarriage of justice; (4) the Nursing-Flow Sheet should not have been admitted into evidence; (5) a mistrial should have been granted because defense counsel "consented" to a mistrial; and (6) a new trial is required because of defense counsel's "improper and prejudicial" tactics. Having analyzed these issues in light of the trial record and law, we discern no grounds for reversing the jury verdict.

A. The Verdict Sheet.

Plaintiffs contend that they are entitled to a new trial because the verdict sheet submitted to the jury was inconsistent with the trial court's prior grant of the directed verdict on liability and causation. The record does not support that argument.[2]

[2] In their briefs before us, plaintiffs make references to a judgment notwithstanding a verdict but do not present a coherent argument to support that

A trial court should grant a motion for a new trial only "if, 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." R. 4:49-1(a). An appellate court must adhere to essentially the same standard when reviewing the trial court's decision on a new trial motion. Hayes v. Delamotte, 231 N.J. 373, 386 (2018). In evaluating the trial court's decision, an appellate court must defer to the trial court's feel of the case but need not give any special deference to the trial court's interpretation of the law and the legal consequences that flow from established facts. Id. at 386-87.

A jury verdict should be set aside in favor of a new trial rarely and only in the case of a clear injustice. Jacobs v. Jersey Cent. Power & Light Co., 452 N.J. Super. 494, 502 (App. Div. 2017). "A jury verdict is entitled to considerable deference and 'should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination, after canvassing the record and weighing the evidence, that the continued viability of

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result. Moreover, because we find no basis for a new trial, there is similarly no basis for a judgment notwithstanding the jury verdict. See Smith v. Millville Rescue Squad, 225 N.J. 373, 397 (2016); Besler v. Bd. of Educ. of W. Windsor-Plainsboro Reg'l Sch. Dist., 201 N.J. 544, 597 (2010) (Rivera-Soto, J., concurring in part and dissenting in part).

the judgment would constitute a manifest denial of justice.'" Hayes, 231 N.J. at 385-86 (quoting Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 521 (2011)). "An appellate court may overturn a jury verdict 'only if [that] verdict is so far contrary to the weight of the evidence as to give rise to the inescapable conclusion of mistake, passion, prejudice, or partiality.'" Kassick v. Milwaukee Elec. Tool Corp., 120 N.J. 130, 134 (1990) (alteration in original) (quoting Wytupeck v. City of Camden, 25 N.J. 450, 466 (1957)).

The purpose of a verdict sheet or jury interrogatory is "to require the jury to specifically consider the essential issues of the case, to clarify the court's charge to the jury, and to clarify the meaning of the verdict and permit error to be localized." Ponzo v. Pelle, 166 N.J. 481, 490-91 (2001) (quoting Wenner v. McEldowney & Co., 102 N.J. Super. 13, 19 (App. Div. 1968)). The trial court should tailor a verdict sheet to avoid confusion by the jury. Id. at 492. Accordingly, it should "eliminate from disposition matters that are not truly in contest." Ibid.

Incorrect jury interrogatories are grounds for reversal only if they are "misleading, confusing, or ambiguous." Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 418 (1997). Jury interrogatories should be considered in the

context of the entire charge in determining whether there is reversible error. State v. Galicia, 210 N.J. 364, 388 (2012); Ponzo, 166 N.J. at 491.

Plaintiffs argue that the question posed to the jury concerning whether David had cried out in pain during the procedure was inconsistent with the trial court's determination that plaintiffs were entitled to a directed verdict on liability and causation. A review of the trial record establishes that the trial court did not grant a directed verdict on liability or causation. Although the trial court made passing references to its willingness to consider a directed verdict, it never actually granted a directed verdict and ultimately presented to the jury the issue of whether Dr. Volvovsky had committed malpractice. During the charge conference, the trial court stated that it was satisfied that the issue of defendant's negligence was a disputed issue of fact. The court went on to explain that liability depended on whether the jury believed that David had cried out in pain. If he had, the parties agreed that the standard of care required Dr. Volvovsky to stop the procedure. The parties also agreed that Dr. Volvovsky had not stopped the lumbar-puncture procedure. Consequently, the trial court reasoned that it would award plaintiff a directed verdict only if the jury found that David had cried out in pain.

Plaintiff contends that the defense experts conceded that David experienced some pain for several days after the lumbar puncture and, therefore, there was some injury from the procedure. A review of the expert's testimony rebuts that argument. The defense experts did not concede that Dr. Volvovsky had been negligent; rather, they both opined that Dr. Volvovsky had adhered to the applicable standard of care in performing the lumbar puncture. Although Dr. Mark and Dr. Lefton both acknowledged that David may have felt pain related to the procedure, both experts testified that David did not suffer any injury due to Dr. Volvovsky's actions.

It is significant to note that the question posed to the jury was based on a question taken from the a proposed verdict sheet submitted by plaintiffs' counsel. Indeed, at trial plaintiffs' counsel repeatedly argued that the issue in the case boiled down to one question: Did plaintiff cry out in excruciating pain? For example, plaintiffs' counsel stated at trial:

> This is a case that boils down to one specific question. It's a factual question. The jury can actually be asked this, because we both now agree on the standard of care per his opening yesterday. And the factual question is did [David] cry out in pain? . . . so the entire case boils down to that factual issue.

Given the testimony of the experts and considering the arguments of counsel, we discern no reversible error in the trial court's decision to tailor the

question to the jury based on the material factual dispute of whether David had cried out in pain during the lumbar-puncture procedure.

B. The Jury Charge.

A proper jury charge is essential to a fair trial. Prioleau v. Ky. Fried Chicken, Inc., 223 N.J. 245, 256 (2015). "[A] jury charge must correctly state the applicable law, outline the jury's function and be clear in how the jury should apply the legal principles charged to the facts of the case at hand." Viscik v. Fowler Equip. Co., 173 N.J. 1, 18 (2002) (citing Velazquez ex rel. Velazquez v. Portadin, 163 N.J. 677, 688 (2000)). In assessing a jury charge, an appellate court reviews the charge in its entirety to determine its overall effect and consider whether the jury, in light of all the facts, will be confused or misled. Est. of Kotsovska v. Liebman, 221 N.J. 568, 576, 591-92 (2015). Even when a charge is deemed erroneous in some regard, the verdict will be upheld if the charge was not capable of producing an unjust result. Prioleau, 223 N.J. at 257.

Plaintiffs contend that the trial court committed reversible error by failing to give "Model Jury Charge 5.50H, Alteration of Medical Records." During trial, plaintiffs argued that Dr. Volvovsky had omitted complications that occurred during David's lumbar-puncture procedure. They also contended that because the second page of the Nursing-Flow Sheet was not signed and dated, it

was incorrect and in violation of regulations governing medical records. See N.J.A.C. 13:35-6.5(b)(1)(i) and 6.5(b)(1)(ix). Those regulations state that corrections or additions to an existing medical record can be made provided each change is clearly identified as such, is dated, and is initialed by the person making the change. N.J.A.C. 13:35-6.5(b)(2).

The trial court denied plaintiffs' counsel's request, concluding that the record-alteration charge did not apply. Instead, the parties were permitted to argue to the jury about what inferences should be drawn from the records in question. We discern no reversible error in the trial court's decision. Plaintiffs did not present evidence that Dr. Volvovsky had altered his medical records or that he was involved in the completion of the Nursing-Flow Sheet. Instead, plaintiffs simply disputed Dr. Volvovsky's version of events. Indeed, their argument is simply a rephrasing of the factual dispute presented to the jury: whether it should believe David's testimony that he had cried out in pain during the procedure or whether it should believe the medical records, which did not document any complications during the procedure.

C. The Weight of the Evidence.

To establish a medical malpractice claim, the plaintiff must prove the relevant standard of care, a deviation from that standard, injury proximately

caused by that deviation, and damages suffered by the plaintiff from the doctor's negligence. Komlodi v. Picciano, 217 N.J. 387, 409 (2014) (citing Evers v. Dollinger, 95 N.J. 399, 406 (1984)).

Initially, we note that plaintiffs did not move for a new trial based on the weight of the evidence. Accordingly, this argument is barred by Rule 2:10-1. Even considering the substance of the argument, it lacks merit. The hospital records and the testimony of Dr. Volvovsky provided sufficient evidence from which the jury could conclude that David's lumbar-puncture procedure was done in accordance with the standard of care. Indeed, both of defendants' experts testified that Dr. Volvovsky had not breached the standard of care. In short, there was sufficient evidence supporting the jury verdict and the no-cause judgment was not a miscarriage of justice.

D. The Admission of the Nursing-Flow Sheet.

On the second day of trial testimony, plaintiffs' counsel argued that the second page of the Nursing-Flow Sheet should not be admitted into evidence because it was unreliable hearsay and did not comply with N.J.A.C. 13:35-6.5, a regulation requiring that the person modifying medical records initial and date the modification.

In considering that objection, the trial court reviewed the deposition testimony of Susan Buteas, the nurse who had prepared the Nursing-Flow Sheet. Buteas testified at her deposition that she had no specific recollection of David or his lumbar-puncture procedure. She also explained that the hospital records confirmed that she was present during the procedure. She confirmed she filled out the entire two-page Nursing-Flow Sheet. She also explained that she had made the change to the time on the second page but acknowledged that she had not dated or initialed that change. At her deposition, Buteas also stated that she might not have been present for the entire procedure, but she had no specific recollection of her activities that day.

The trial court ruled that the Nursing-Flow Sheet was admissible under N.J.R.E. 803(c)(6) as a certified hospital business record and there was no need for the custodian of records to testify. The trial court also reasoned that the Nursing-Flow Sheet was reliable and that any alleged violation of the regulations did not preclude its admission.

Plaintiffs argue that the trial court abused its discretion in admitting the Nursing-Flow Sheet because the nurse who had prepared it was not called to testify at trial and the second page was altered and was inherently unreliable. We review evidentiary issues for an abuse of discretion. Est. of Hanges v.

Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010). Here we discern no abuse of discretion.

Under N.J.R.E. 803(c)(6), records of regularly conducted activities may be admitted provided the writing was (1) made in the ordinary course of business; and (2) prepared within a short time of the act, condition, or event being described. Konop v. Rosen, 425 N.J. Super. 391, 403 (App. Div. 2012). "The purpose of the business records exception [to the hearsay rule] is to 'broaden the area of admissibility of relevant evidence where there is necessity and sufficient guarantee of trustworthiness.'" Ibid. (quoting Liptak v. Rite Aid, Inc., 289 N.J. Super. 199, 219 (App. Div. 1996)). The Nursing-Flow Sheet was produced in discovery as part of the certified hospital business records. Moreover, the nurse who had prepared the two-page assessment testified at a deposition and explained she had prepared the entire document. Plaintiffs' arguments concerning the lack of an initial and date on the second page did not demonstrate that the document was unreliable and do not rise to the level of reversible error.

E. The Motion for a Mistrial.

Plaintiffs assert that the trial court erred in refusing to grant their request for a mistrial and contend that defense counsel consented to a mistrial. A motion

for a mistrial should be granted only when there is "a clear showing of a mistaken use of discretion" or if "a manifest injustice would . . . result." State v. Harris, 181 N.J. 391, 518 (2004) (alteration in original) (first quoting Greenberg v. Stanley, 30 N.J. 485, 503 (1959); and then quoting State v. LaBrutto, 114 N.J. 187, 207 (1989)). The decision to deny a motion for a mistrial is within the sound discretion of the trial court and will not be reversed on appeal unless there is a showing of abuse of discretion. Id. at 518-19. Here, we discern no abuse of discretion.

Several times during the trial, plaintiffs' counsel asked for a mistrial, arguing that defense counsel had added a new theory to the case and had asked improper questions. During the sidebars concerning those applications, defense counsel stated that a mistrial should be granted. Notably, however, neither the trial court nor plaintiffs' counsel relied on those statements by defense counsel. Instead, the trial court analyzed the applications for mistrials and found that a mistrial was not warranted.

Our review of defense counsel's statements satisfies us that the statements were sarcastic and were not relied on by the trial court or plaintiffs' counsel. More importantly, the trial court appropriately ruled on the objections and ultimately did not grant a mistrial. Although we do not condone defense

counsel's remarks, they did not rise to the level warranting a mistrial. In that regard, the record is clear that defense counsel's remarks about a mistrial were made at sidebars and were not heard by the jury.

F. Defense Counsel's Alleged Misconduct.

Finally, we analyze plaintiffs' contentions that they are entitled to a new trial because defense counsel engaged in various forms of misconduct throughout the trial. Plaintiffs complained that defense counsel had acted inappropriately by (1) making improper remarks in his opening statement; (2) repeatedly asking and then withdrawing improper questions; (3) improperly injecting new defense theories that were not in the defense expert reports; (4) eliciting inflammatory testimony from Dr. Volvovsky; and (5) making improper remarks in his closing statement.

Initially, we note that at trial plaintiffs did not object to many of the alleged acts of misconduct they now raise. Consequently, we review those allegations for plain error, reversing only if the alleged misconduct was "clearly capable of producing an unjust result." R. 2:10-2; see also Baker v. Nat'l State Bank, 161 N.J. 220, 226 (1999) (noting relief under the plain-error rule is discretionary and should be sparingly employed in civil cases).

Instead of objecting at trial, plaintiffs moved for a new trial, arguing, among other things, that defense counsel's misconduct warranted a new trial. The trial court denied that motion. After reviewing the various alleged acts of misconduct, the trial court found that those allegations fell "short of establishing intentional violations of acceptable and professional behavior that precluded a fair trial. . . . [T]here [had] been [no] demonstration of misconduct by defense counsel that [rises] to the level of requiring a mistrial."

A new trial will be granted only when there is a showing of a miscarriage of justice under the law. Risko, 206 N.J. at 522; Bender v. Adelson, 187 N.J. 411, 435 (2006). In reviewing the denial of a motion for a new trial, "an appellate court must give 'due deference' to the trial court's 'feel of the case.'" Risko, 206 N.J. at 522 (quoting Jastram v. Kruse, 197 N.J. 216, 230 (2008)).

Having reviewed the alleged instances of misconduct by defense counsel, we agree with the trial judge that there was no miscarriage of justice under the law. Considered individually or cumulatively, the alleged misconduct was not capable of producing an unjust result. Instead, we agree with the trial judge that both parties were "zealously represented by veteran trial counsel" and counsel for both parties sometimes "pushed the limits" in questioning witnesses and advancing arguments. We also agree with the trial judge that defense counsel

did not overstep the bounds of professional conduct and none of the alleged misconduct prejudiced plaintiffs in a way that would warrant a new trial.

In seeking a new trial based on defense counsel's alleged misconduct, plaintiffs rely on Morales-Hurtado v. Reinoso, 457 N.J. Super. 170 (App. Div. 2018), aff'd., 241 N.J. 590 (2020). That reliance is misplaced. The multiple errors and improprieties identified in Morales-Hurtado were of a different nature and had an overall cumulative effect of depriving the plaintiff of a fair trial. 457 N.J. Super. at 191-99. Unlike the situation in Morales-Hurtado, plaintiffs' counsel were skilled advocates who effectively countered defense counsel's tactics and were not prejudiced in their ability to present plaintiffs' claims to the jury. That the jury ultimately did not accept plaintiffs' position was not due to defense counsel's tactics; rather, the jury decided what everyone agreed was the critical factual issue: whether David had cried out in pain during the procedure. Based on a fair presentation of the evidence, the jury decided that issue against plaintiffs.

III.

Having determined that none of plaintiffs' arguments warrant a reversal of the jury verdict, we need not reach defendants' cross-appeal. Defendants themselves acknowledge that their cross-appeal would be ripe if we reversed the

jury verdict and remanded for a new trial. Accordingly, we dismiss the cross-appeal as moot.

The judgment memorializing the jury verdict is affirmed.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION