NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3401-14T3

MICHAEL MEGLINO, JR.,
and SUSAN MEGLINO,

Plaintiffs-Appellants,

v.

LIBERTY MUTUAL INSURANCE
COMPANY,

Defendant-Respondent,

and

WILMOT ELLIOT,

Defendant.

Submitted May 3, 2016 — Decided August 2, 2016

Before Judges St. John and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-1025-13.

M. Mark Mendel, Ltd., attorneys for appellants (John J. Del Casale, on the brief).

Law Offices of Styliades & Jackson, attorneys for respondent (Christine M. Mercado-Spies, on the brief).

PER CURIAM

Plaintiffs Michael Meglino, Jr. and Susan Meglino appeal from a February 26, 2015 order of judgment entered in favor of

defendant Liberty Mutual Insurance Company (LMIC) following a jury verdict awarding plaintiffs $50,000 in economic damages, but finding that Mr. Meglino did not sustain permanent injuries from a motor vehicle accident. Having reviewed the arguments in light of the record and applicable law, we affirm.

I.

On February 27, 2007, Mr. Meglino was on his way to his job as a contractor when his vehicle was rear-ended in a collision caused by Wilmot Elliot. At the time, Mr. Meglino was insured under a policy with LMIC, which provided underinsured motorist (UIM) coverage.

On February 17, 2009, plaintiffs filed a first-party lawsuit against Elliot, which settled in April 2011, for $60,000 of the available $100,000 of coverage provided by Elliot's policy. Plaintiffs then filed a claim for UIM benefits with LMIC. The case was arbitrated on December 19, 2012, and the issue of liability was conceded. That same day, the arbitration panel awarded plaintiffs $135,000 in damages, which was rejected by LMIC on January 30, 2013.

On March 4, 2013, plaintiffs filed a complaint in the Law Division against LMIC and Elliot seeking "damages, pre-judgment interest, and costs of suit." Elliot was later dismissed as a party to the UIM suit under Rule 1:13-7. The case proceeded to

compulsory arbitration and, in September 2014, an award of $80,000 was entered.

Plaintiffs appealed the arbitration award and demanded a trial de novo on damages. The case proceeded to trial on January 5, 6, and 7, 2015. At trial, the videotaped deposition testimony of plaintiffs' experts, Drs. Selina Xing and Gary Goldstein, was played for the jury, and Mr. Meglino also testified. The videotaped deposition of LMIC's expert witness, Dr. Jeffrey Daniels, was also played for the jury.

On January 8, 2015, the jury, by a vote of seven-to-one, found that plaintiffs did not establish that Mr. Meglino suffered permanent injuries from the February 2007 motor vehicle accident, but awarded them $50,000 in economic damages. This appeal ensued.

On appeal, plaintiffs contend the court erred by (1) prohibiting plaintiffs from bringing to light at trial the fact that their expert, Dr. Xing, was originally retained by LMIC in the previous PIP suit; (2) prohibiting plaintiffs from referring to LMIC as the defendant in the UIM case, and instead referring to counsel for LMIC as "counsel for Elliot" when addressing the jury; and (3) that the jury's verdict was against the weight of the evidence.

II.

First, we address plaintiffs' argument that the court erred by prohibiting them from identifying Dr. Xing as having been initially retained by LMIC in the first-party action. "A trial court's evidentiary rulings are 'entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment.'" Belmont Condo. Ass'n, Inc. v. Geibel, 432 N.J. Super. 52, 95 (App. Div.) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)), certif. denied, 216 N.J. 366 (2013). Having reviewed the court's decision, we are satisfied that the court was within its discretion to prohibit the contested testimony.

Dr. Xing performed a personal injury protection (PIP) independent medical examination (IME) of Mr. Meglino on July 21, 2009, on behalf of LMIC as part of the first-party action against Elliot. During her taped deposition testimony on June 23, 2014, Dr. Xing testified that she performed the PIP IME examination on behalf of "defendant" LMIC.

Before trial, LMIC objected to the testimony regarding Dr. Xing's original retention, citing Fitzgerald v. Stanley Roberts, Inc., 186 N.J. 286 (2006). The trial judge initially admitted the evidence, but noted: "I'm going to re-read Fitzgerald, and if I change my mind, well, I'll let you know tomorrow." Before

trial commenced the following day, the judge stated that, having re-read the case, he was changing his ruling. The judge prohibited any mention that Dr. Xing was originally hired by LMIC in the first-party litigation.

In Fitzgerald, the Court considered the consequences that follow when a testifying expert witness changes sides during a litigation: a so-called "Red Rover expert." Fitzgerald, supra, 186 N.J. at 303. The Court held that, although a party may call an adversary's testifying expert, it is generally impermissible to elicit testimony regarding the expert's original retention by the adverse party. Id. at 302-03. The Court explained:

> taking into account that it is the expert's opinion and not his retention that should be the focus of the jury, and balancing the risk of unfair prejudice to the original retaining party against any incremental enhancement of the Red Rover expert's credibility, we adopt the approach of those courts that generally restrict inquiry regarding the circumstances of the Red Rover witness' initial retention.
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> [Id. at 305-06.]

In support of its holding, the Court noted that "there are many reasons why a witness, hired as a party's expert, may change his or her original view of the case," and, in some cases, "the change of sides has nothing whatsoever to do with the adverse party or, indeed, the merits of the case." Id. at 305. The Court further noted that "the mere change of sides of

the Red Rover witness may lead the jury to view him as something of a super-expert, whether that is warranted or not, and to assess the testimony less critically than would otherwise be the case." Ibid. The Court explained that "it is the credentials of the expert and the opinion that he renders that should be the critical path to the jury's acceptance or rejection of his view." Ibid.

Plaintiffs argue that Fitzgerald is distinguishable because a "pre-requisite" of the Court's decision was "that the proffered expert's opinion change from one side of the dispute to the other." They maintain that Dr. Xing does not qualify as a "Red Rover" expert because she never altered her opinions as to the nature, cause, or permanency of Mr. Meglino's injuries.

The trial judge rejected plaintiffs' argument, noting that "the thrust of the Fitzgerald opinion was a balancing of the equities, a balancing of the . . . relevance of the testimony versus the prejudice that the . . . testimony might create[.]" We agree with the trial court's reasoned interpretation of Fitzgerald.

The concerns articulated by the Fitzgerald Court are equally applicable in a case such as this, where the expert has changed sides without changing her opinion. As the Court noted, "the mere change of sides has a powerful negative effect on the

jury's evaluation of the party, or the attorney, who originally retained the witness," and "such prejudice is often the very purpose for which the proffer [of the evidence] is made." Ibid.

III.

Next, we address plaintiffs' argument that the trial judge erred by prohibiting plaintiffs from naming LMIC as the defendant in the UIM case. Having reviewed the arguments, we discern no error in the court's decision.

Before proceeding to trial on plaintiffs' UIM complaint, Elliot, the original tortfeasor, was dismissed as a party under Rule 1:13-7. Subsequently, at the UIM trial on damages, LMIC stepped into the place of Elliot. The trial judge referred to counsel for LMIC as "counsel for Elliot" before the jury, and prohibited any reference to LMIC as the named defendant at trial.

During trial, plaintiffs raised an argument that LMIC "should not be permitted to step into the shoes of a party who's not even a party to the litigation." However, plaintiffs' challenge is squarely answered by Bardis v. First Trenton Ins. Co., 199 N.J. 265, 269 (2009), where the Court addressed the issue of "whether, in a jury trial arising out of [UIM] coverage, the insurer should be identified as the defendant."

The Court declined to adopt a rule "compelling the insurer in a UIM trial to be identified as the defendant[,]" holding that,

> "in the context of a UIM trial, in which the circumstances of the underlying accident are the focus, we are persuaded that the insurer's identity is ordinarily irrelevant. Nonetheless, we leave it to the sound discretion of the trial judge to conclude, and to act accordingly, if circumstances in a particular trial suggest otherwise.
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> [Id. at 277.]

In support of its holding, the Court noted its concern "that references to insurance coverage might distract jurors from a fair evaluation of the evidence[,]" and may "motivate an award of damages based on a jury's perception of an insurer as having 'deep pockets.'" Id. at 275. The Court further reasoned that, although a UIM claim is of a contractual nature and arises "out of the insurance policy issued to [the] plaintiff by his own insurer," it

> has little to do with the contract of insurance and everything to do with the accident in which [the] plaintiff was involved: It is only the happenstance of the tortfeasor's minimal coverage as compared with plaintiff's injuries that brings [the plaintiff's] insurer, with its more generous UIM coverage, into the courtroom.
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> [Id. at 275-76.]

In light of Bardis, we are satisfied that the trial judge appropriately exercised his discretion in prohibiting plaintiffs

from referring to LMIC as the defendant, and allowing LMIC to step into the shoes of Elliot for purposes of the UIM damages trial.

IV.

Finally, we decline to address plaintiffs' argument that the jury's verdict was against the weight of the evidence because that issue is not properly before us on appeal. Rule 2:10-1 makes a motion for a new trial a prerequisite for the review of a jury verdict, and provides, in part:

> In both civil and criminal actions, the issue of whether a jury verdict was against the weight of the evidence shall not be cognizable on appeal unless a motion for a new trial on that ground was made in the trial court.

A motion for a new trial must "be served not later than 20 days after . . . the return of the verdict of the jury." R. 4:49-1(b). "Absent a new trial motion on that ground, the claim that the damages verdict was against the weight of the evidence is not cognizable on appeal." Ogborne v. Mercer Cemetery Corp., 197 N.J. 448, 462 (2009) (citing R. 2:10-1); see also Garnes v. Passaic Cty., 437 N.J. Super. 520, 526 n.1 (App Div. 2014) (noting that "a claim that the verdict was against the weight of the evidence cannot be raised on appeal if it was not raised by way of motion for a new trial in the trial court.").

Plaintiffs did not move for a new trial in the trial court and, thus, plaintiffs' argument is not cognizable on appeal.

Affirmed.