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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1991-13T4

CAROLYN KOSTERA,

Plaintiff-Respondent,

v.

BACHARACH INSTITUTE
FOR REHABILITATION,

Defendant/Third-Party
Plaintiff-Appellant,

and

PHILADELPHIA INDEMNITY
INSURANCE COMPANY,

Third-Party Defendant-
Respondent,

and

BORDEN PERLMAN INSURANCE
AGENCY,

Third-Party Defendant.

Argued April 28, 2015 – Decided August 6, 2015

Before Judges Messano, Hayden and Tassini.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-3018-10.

Timothy M. Crammer argued the cause for appellant (Crammer, Bishop & O'Brien, attorneys; Mr. Crammer, on the brief).

David J. Colleran argued the cause for respondent Carolyn Kostera (The Colleran Firm, attorneys; Mr. Colleran, on the brief).

Paul J. Soderman argued the cause for respondent Philadelphia Indemnity Insurance Company (Law Office of Paul J. Soderman, LLC, attorneys; Mr. Soderman, on the brief).

PER CURIAM

Early on the morning of February 9, 2010, plaintiff Carolyn Kostera slipped and fell on a patch of ice on a walkway owned and maintained by defendant, Bacharach Institute for Rehabilitation (BIR), a non-profit corporation organized exclusively for hospital purposes. On the day of her fall, plaintiff was employed by Atlantic Cape Community College (ACCC) as a part-time, adjunct clinical nursing instructor, and she was preparing for her duties providing ACCC's nursing students with training and clinical experience at BIR. Pursuant to a written agreement with ACCC, BIR permitted the nursing students to "obtain the necessary clinical observations and experience" at the facility.[1]

Plaintiff suffered a tri-malleolar fracture of her left ankle and injuries to connecting ligaments that required multiple surgeries and ultimately resulted in a complete ankle

[1] At oral argument before us, BIR's counsel advised that the students did not "treat" BIR's patients.

fusion. Plaintiff brought suit, claiming BIR was negligent in its maintenance of the premises.

ACCC had procured a comprehensive general liability policy (the policy) from Philadelphia Indemnity Insurance Company (PIIC). BIR demanded coverage under the policy, but PIIC refused, resulting in BIR naming PIIC as a third-party defendant. Ultimately, the Law Division judge denied BIR's motion for summary judgment and granted PIIC's motion for summary judgment, dismissing the third-party complaint.

BIR also moved twice before trial to limit any award of damages to $250,000, pursuant to the Charitable Immunity Act (CIA), N.J.S.A. 2A:53A-7 to -13, specifically, N.J.S.A. 2A:53A-8, which provides:

> Notwithstanding the provisions of [N.J.S.A. 2A:53A-7], any nonprofit corporation . . . organized exclusively for hospital purposes shall be liable to respond in damages to such beneficiary who shall suffer damage from the negligence of such corporation . . . to an amount not exceeding $ 250,000, together with interest and costs of suit . . . .

The judge denied BIR's requests, and the case proceeded to trial. The jury determined that BIR was negligent, and its negligence was a proximate cause of plaintiff's injuries. It awarded plaintiff $4,000,000 in damages. BIR's motion for a new trial was denied, and this appeal followed.

BIR argues that it is entitled to a new trial on liability as a result of errors in the jury charge, and a new trial on damages because the judge permitted plaintiff's vocational expert to express "net" opinions and barred defense counsel from utilizing "judicially noticeable interest and inflation rates" in summation. Additionally, BIR argues the damage award was excessive and against the weight of the evidence. BIR also contends that plaintiff was a "beneficiary" of its "charitable endeavors," and any award of damages should be capped pursuant to the CIA. Lastly, BIR argues it was an "insured" and an "additional insured" under the PIIC policy.

We have considered these arguments in light of the record and applicable legal standards. We affirm.

I.

When BIR first moved to limit damages under the CIA, it furnished a copy of the agreement with ACCC, as well as the certification of BIR's president, Richard J. Kathrins. Kathrins stated that BIR was a non-profit "organized exclusively for hospital purposes" since 1924. ACCC and BIR first entered into a "Nursing and/or Allied Health Program Agreement" (the Agreement) in January 1996.

We quote at length from the preamble of the 2010 version of the Agreement that was in effect on the date of the accident.

> WHEREAS, . . . [ACCC] wishes to have the students in the Nursing/Allied Health Program obtain the necessary clinical observations and experience at [BIR] for the students enrolled in the Nursing/Allied Health Programs,
>
> WHEREAS, [BIR] is willing to provide the facilities for clinical observations and experiences at [BIR] for the students enrolled in the Nursing/Allied Health Programs,
>
> WHEREAS, [BIR] acknowledges that it is of benefit to [BIR] to have the students of [ACCC] present in [BIR] to the extent that said students may further be rendering of various services by [BIR][.]
>
> THEREFORE, in consideration of the premises and covenants herein made, it is agreed between [ACCC and BIR] as follows[.]

BIR agreed to "make appropriate facilities available to [ACCC]," but ACCC would control "all phases of the Program administration," including the assignment of faculty. ACCC's staff would "plan the assignments and schedules in cooperation with the Directors of specific departments of [BIR]." ACCC's students were required to abide by "existing rules and regulations of [BIR]" and be covered under ACCC's "professional liability coverage." BIR agreed to medically treat the students at their own expense in the event of an emergency, and to provide the students and faculty with lockers for personal items, conference room space and "available instructional materials."

The Agreement specifically provided that the students and faculty were not employed by BIR, nor were they "agents" of BIR "in any situation." BIR agreed to obtain "patient consent" before permitting student participation in patient care. ACCC agreed to "save harmless [BIR] from any and all professional liability by reason of the presence of the actions of the students and faculty . . . when present in or on the property of [BIR]." ACCC also agreed to "provide insurance to cover such liability" in an agreed-upon amount if requested by BIR. Lastly, the Agreement provided:

> The parties [] recognize that in the performance of this agreement, the greatest benefits will be derived by promoting the interest of both parties, and each of the parties [], therefore, enter into this agreement with the intention of cooperating with the other in carrying out the terms of the agreement in such manner as will best promote the interests of both and render the highest service to [BIR], [ACCC], and the individual students.

One day before the argument on its motion, BIR also supplied the court with its certificate of incorporation, which stated that BIR was "organized and [would] be operated exclusively for charitable, educational and scientific purposes within the meaning of" the Internal Revenue Code. One of BIR's specific purposes was to "promote, advance and engage . . . in instruction, education and research . . . including but not

limited to [] nurses." In opposing BIR's motion, plaintiff primarily argued that she was on the premises as part of her employment and, as such, she was "unconcerned in and unrelated to and outside of the benefactions of" BIR. N.J.S.A. 2A:53A-7(b).

In a comprehensive written opinion, the judge concluded that "plaintiff's injury occurred while BIR was engaged in charitable works and there [was] no question but that one of the purposes for the creation of BIR . . . was education." He determined that although the nursing students were "benefactors of the charitable endeavors of BIR," there was insufficient proof that plaintiff was "a direct beneficiary." He denied BIR's motion "without prejudice to [its] right to re-new [sic] the application."

BIR renewed the motion one month later. In support of that motion, BIR attached plaintiff's January 2010 "Employee Assignment Form" from ACCC, which revealed she was being paid fifty dollars per hour for one hundred and sixty hours of work during the spring 2010 semester, and the stated location of plaintiff's teaching assignment was BIR. Additionally, plaintiff's work schedules for spring 2010 demonstrated that, with rare exception, her days on duty and the overwhelming

percentage of her hours were to be spent at BIR.[2] In her deposition testimony, plaintiff acknowledged that her employment by ACCC was limited to "being an adjunct professor . . . at [BIR]." BIR argued that this additional information demonstrated that plaintiff "did . . . directly benefit from [BIR's] charitable endeavors."

In opposition, plaintiff filed a certification stating that her employment by ACCC was only one position she held in the nursing field, and she was "financially secure" without the compensation she received from ACCC. Plaintiff also stated that she never requested to be assigned to BIR, received no remuneration from BIR, and was "compelled to go" to BIR "by virtue of [her] employment with ACCC."

Following argument, the judge issued an oral opinion in which he again displayed a thorough knowledge of precedent. He concluded that plaintiff "was not a direct beneficiary of [BIR's] charitable endeavors" and denied the motion.

A.

"In reviewing the denial of [a charity's] immunity motion, we consider the trial court's determination de novo because [its] asserted right to charitable immunity under the statute

[2] Plaintiff's fall 2009 schedule demonstrated she spent almost all of her hours at another hospital in the area.

raises questions of law." Estate of Komninos v. Bancroft Neurohealth, Inc., 417 N.J. Super. 309, 318 (App. Div. 2010); accord Auerbach v. Jersey Wahoos Swim Club, 368 N.J. Super. 403, 410 (App. Div.), certif. denied, 180 N.J. 458 (2004). The issue before us is discrete, and, like the trial judge, we acknowledge a number of decisions addressing the subject, albeit none in a factual context that is on all fours with that presented here. The precise contours of the existing legal landscape are indeed difficult to discern.

We begin with consideration of the statutory scheme itself. The CIA extends immunity for "damages to any person" resulting from the negligence of "trustees, directors, officers, or volunteers" of any "nonprofit corporation, society or association organized exclusively for hospital purposes," "where such person is a beneficiary, to whatever degree, of the works of such nonprofit corporation, society or association." N.J.S.A. 2A:53A-7(b) (emphasis added). The "immunity from liability [does] not extend to any person . . . where such person is one unconcerned in and unrelated to and outside of the benefactions of such corporation, society or association." Ibid. (emphasis added). Notwithstanding these provisions, "any nonprofit corporation . . . organized exclusively for hospital purposes shall be liable to respond in damages to" its

beneficiaries up to "an amount not exceeding $250,000." N.J.S.A. 2A:53A-8.

As the Court recently explained, "[w]hether a nonprofit organization is entitled to charitable immunity or subject to the limitation on damages afforded to those institutions organized exclusively for hospital purposes turns on the purpose of the institution, not the use to which the facility is put on any given day." Kuchera v. Jersey Shore Family Health Ctr., 221 N.J. 239, 242 (2015). "The immunity bestowed by the CIA extends to the buildings and other facilities actually used for the purposes of the qualifying organization, such as a hospital." Id. at 248 (citing N.J.S.A. 2A:53A-9). In this case, the parties do not dispute that if plaintiff was a beneficiary, BIF is subject to the limited immunity provided by N.J.S.A. 2A:53A-8.[3]

"The CIA serves two primary purposes. First, immunity preserves a charity's assets. Second, immunity recognizes that

[3] We need not address therefore, whether BIR was "organized exclusively for hospital purposes," N.J.S.A. 2A:53A-7(b), an issue squarely confronted in Kuchera, supra, 221 N.J. at 249-55. Nor do the parties dispute that the education of future nurses was consistent with BIR's hospital purposes. See id. at 254 ("The modern hospital in New Jersey may also include a teaching component. The education of medical students, physicians, nurses, and other health professionals is a significant core hospital purpose related to the provision of quality health care to patients.").

a beneficiary of the services of a charitable organization has entered into a relationship that exempts the benefactor from liability[,]" or in this case, limits the benefactor's liability. Kuchera, supra, 221 N.J. at 247 (emphasis added) (citation omitted).

> By the plain language of N.J.S.A. 2A:53A-7 and -8, a hospital is subject to limited liability under section 8 if it is formed as a nonprofit corporation, society, or association, is organized exclusively for hospital purposes, was promoting those objectives and purposes at the time the plaintiff was injured, and the plaintiff was a beneficiary of the activities of the hospital.
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> [Id. at 249.]

As we said twenty-five years ago, "[b]y the enactment of N.J.S.A. 2A:53A-8, the legislature determined that, as a matter of social policy, an injured beneficiary of the hospital's works, can shift only a limited share of the consequences of the hospital's negligence to the hospital itself." Johnson v. Mountainside Hosp., 239 N.J. Super. 312, 325 (App. Div.), certif. denied, 122 N.J. 188 (1990). Importantly, "the CIA is remedial legislation and should be liberally construed so as to further the legislative purpose of immunity." Kuchera, supra, 221 N.J. at 248; N.J.S.A. 2A:53A-10. Whether on the day of the accident plaintiff "was a beneficiary of the activities of the

hospital" is the issue before us, resolution of which implicates the expressed legislative policies that undergird the CIA.

B.

The Court has said,

> The established test for determining whether a party is a beneficiary of the works of a charity has two prongs. The first is that the institution pleading the immunity, at the time in question, was engaged in the performance of the charitable objectives it was organized to advance. The second is that the injured party must have been a direct recipient of those good works.
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> [Ryan v. Holy Trinity Evangelical Lutheran Church, 175 N.J. 333, 350 (2003) (quotation marks and citations omitted).]

We recently characterized the second prong as "distinguish[ing] between 'persons benefiting from the charity,' and persons who contribute to the charity 'by virtue of their attendance or participation,'" Kain v. Gloucester City, 436 N.J. Super. 466, 480 (App. Div.) (quoting Roberts v. Timber Birch-Broadmoore Athletic Ass'n, 371 N.J. Super. 189, 196 (App. Div. 2004)), certif. denied, 220 N.J. 207 (2014), but the issue is more complex. Whatever separates a "beneficiary" from a non-beneficiary for purposes of the CIA, one thing is clear:

> In assessing who is a beneficiary of the works of a charity, that notion is to be interpreted broadly, as evidenced by the use of the words "to whatever degree" modifying the word "beneficiary" in the statute. Those who are not beneficiaries must be

> "unconcerned in and unrelated to" the benefactions of such an organization.
>
> [Ryan, supra, 175 N.J. at 353 (quoting Gray v. St. Cecilia's School, 217 N.J. Super. 492, 495 (App. Div. 1987)).]

Thus, for purposes of the CIA, plaintiff was a beneficiary if on the day in question she was a "direct recipient," "to whatever degree," of the "good works" that BIR was advancing at the time, but she was not a beneficiary if she was "unconcerned in and unrelated to" those good works. Id. at 350, 353; see also N.J.S.A. 2A:53A-7(b).

As already noted, the judge in this case reasoned that plaintiff was not a "direct" recipient of BIR's good works. We have said that in examining whether one is a beneficiary, "[t]he controlling relationship is that between the plaintiff as an individual and the defendant entity." Auerbach, supra, 368 N.J. Super. at 414-15. We have also repeatedly said, however, that "[b]eneficiary status '[does] not depend upon a showing that the claimant personally received a benefit from the works of the charity,' but rather 'whether the institution pleading the immunity . . . was engaged in the performance of the charitable objectives it was organized to advance.'" Hehre v. DeMarco, 421 N.J. Super. 501, 508 (App. Div. 2011) (second and third alterations in original) (quoting Anasiewicz v. Sacred Heart Church of New Brunswick, 74 N.J. Super. 532, 536 (App. Div.),

certif. denied, 38 N.J. 305 (1962)), certif. denied, 209 N.J. 99 (2012); accord Auerbach, supra, 368 N.J. Super. at 414; Rupp ex rel. Rupp v. Brookdale Baptist Church, 242 N.J. Super. 457, 463 (App. Div. 1990).

The Court has recognized that, for purposes of the CIA, a plaintiff was a beneficiary of an entity's good works even though his or her presence on the premises resulted from a relationship with another person or entity, and not the charity itself. We summarized such situations as follows: "When the injured party is a direct recipient of the charity's good works or accompanies a beneficiary to the event, the charitable immunity defense is available." Kain, supra, 436 N.J. Super. at 480 (emphasis added) (citation and internal quotation marks omitted).

In Ryan, supra, for example, the plaintiff, a member of a nonprofit group, The Mothers' Center, that held its weekly meetings at a church that charged a small fee, was injured when struck in the head by a door that came off its hinges. 175 N.J. at 337-39. The Mothers' Center was entitled to immunity under the CIA. Id. at 349. The Court then considered whether the plaintiff was a beneficiary of the church's charitable works for purposes of the CIA. Id. at 350. The Court concluded: "The Mothers' Center receives benefits through its members. [The

plaintiff] was a member of the Mothers' Center and was physically present on the premises of [the church] for the purpose of receiving the benefits conferred by that church on the Mothers' Center and the partakers of its programs." Id. at 353-54. The Court held that the church was immune. Id. at 354.

In Bieker v. Community House of Moorestown, 169 N.J. 167, 171 (2001), while the plaintiff was playing basketball in a nonprofit organization's gymnasium, his minor son, who had accompanied his father as a spectator, strayed and was injured. The Court remanded the matter to the trial court to resolve factual questions as to whether the nonprofit was entitled to immunity under the CIA. Id. at 179-80. However, the Court also held, that "[t]he child was plainly a recipient of Community House's 'benefactions,' even if only as a companion of his father and a spectator at his father's basketball game." Id. at 180 (citation omitted).

We have reached similar conclusions in a variety of factual circumstances. For example, in Kain, supra, 436 N.J. Super. at 471, the plaintiff was injured while chaperoning his sons' Boy Scout troop during a sailing lesson aboard a ship operated by a charitable nonprofit entity. We held that "[i]n his capacity as both a parent and a chaperone for the group receiving the benefit of the educational sail, [the plaintiff] cannot qualify

as one 'unconcerned in and unrelated to the benefactions of'" the charitable entity. Id. at 481 (quoting Ryan, supra, 175 N.J. at 353).

In Lax v. Princeton University, 343 N.J. Super. 568, 569-70 (App. Div. 2001), the plaintiff fell while attending a concert at a hall owned by the university and rented to a non-profit chamber symphony. Citing the Court's reasoning in Bieker, we held that the university was immune under the CIA. Id. at 573. See also Gray, supra, 217 N.J. Super. at 493-95 (mother who was on the premises to pick up her son after class was a beneficiary of parochial school's benefactions); Bixenman v. Christ Episcopal Church Parish House, 166 N.J. Super. 148, 150-53 (App. Div. 1979) (member of Greek Orthodox parish that paid nominal fee for use of the defendant-church's premises was beneficiary of the defendant-church's "benefactions"); Pomeroy v. Little League Baseball of Collingswood, 142 N.J. Super. 471, 475 (App. Div. 1976) (non-profit baseball league immune for injuries sustained by spectator at game); Anasiewicz, supra, 74 N.J. Super. at 537-38 (church was immune for injuries suffered by a non-parishioner guest at wedding).

C.

Plaintiff's primary contention is that none of these cases involved someone who was on the premises of the charity as a

result of his or her employment. Indeed, although plaintiff's status as a recipient of BIR's benefactions was derived from her relationship with the student nurses and ACCC, her status as an employee of ACCC differentiates her from those plaintiffs in the numerous cases cited above where immunity applied. In this case, plaintiff relies primarily upon two cases that highlight that factual distinction and which she argues compel us to affirm the judge's determination of this issue.

In Mayer v. Fairlawn Jewish Center, 71 N.J. Super. 313, 315 (App. Div. 1961), aff'd in part, rev'd in part on other grounds, 38 N.J. 549 (1962), the plaintiff, an employee of the Development Corporation for Israel, was promoting the sale of bonds at a dinner on the premises of the defendant. In describing the relationship between the plaintiff's employer and the defendant on the night of the accident, we said "that the sale of the bonds and the use of the hall therefor, represented a co-operative effort by [the defendant] and the Development Corporation to achieve a common objective." Id. at 316-17.

In affirming the trial court's rejection of the defendant's asserted immunity, we held:

> [The] [p]laintiff was not a member of Center. He had no concern or relation with its benefactions. He was not even a resident of the community. He was "outside" of its "benefactions." His attendance at the Center building on the night of the

> accident was in the performance of his job for his employer and not as a recipient of Center's beneficence or philanthropy. . . . To hold that, because of his employment, plaintiff derived an indirect advantage from the activities of Center and that, therefore, he was a beneficiary of the "works" of Center so as to render it free from liability . . . , is to ascribe to the [CIA] a meaning completely foreign to its declared purpose and unwarrantedly to extend its protective scope.
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> [Id. at 321.]

In affirming this portion of our decision, the Court said:

> We desire to emphasize further plaintiff's capacity as an employee of Development Corporation of Israel. Assuming, arguendo, his employer was a recipient of Center's benefactions, Mayer's status on the premises cannot be measured by that of his employer. His rights so far as the statutory immunity is concerned depended upon his own individual relation with the Center. True, he was on the premises under the aegis of his employer, and by virtue of the employer's arrangement became an implied invitee of the Center. But he was there in fulfillment of his function and obligation as an employee to engage in the employer's work at the direction of the employer, and not for the purpose of receiving personally the philanthropy of the Center. Under the circumstances present he was a stranger to the charity and the statute does not stand in the way of recovery.
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> [Mayer, supra, 38 N.J. at 553-54 (emphasis added) (citations omitted).]

The Mayer Court cited a number of out-of-state decisions in support of its conclusion, and one New Jersey decision, Rose v.

Raleigh Fitkin-Paul Morgan Memorial Hospital, 136 N.J.L. 553 (E. & A. 1948). In Rose, decided before enactment of the CIA, the Court of Errors and Appeals concluded that a private duty nurse who was injured by the negligence of a charitable hospital was not "a participant in the hospital's bounty," because she was paid by her patient, not the hospital, her presence was advantageous to the hospital because of a serious nursing shortage, and she was an invitee of the hospital. Id. at 556-57.

Plaintiff also relies on Glowacki v. Underwood Memorial Hospital, 270 N.J. Super. 1 (App. Div. 1994). There, the plaintiff, a pediatric nurse employed by a Philadelphia hospital, was dispatched by her employer to assist in the transport of a critically ill baby from a New Jersey hospital and was injured in the process. Id. at 5-6. We dismissed as "without merit" the hospital's argument that it was subject to the CIA's limitation on damages, id. at 12 (citing R. 2:11-3(e)(1)(E)), holding the "[p]laintiff was not a beneficiary within the contemplation of the statute." Ibid. (citing Mayer, supra, 71 N.J. Super. 313; Mayer, supra, 38 N.J. 549).

In Ryan, supra, 175 N.J. at 354, the Court summarily rejected the plaintiff's reliance on Mayer. Noting that Mrs. Ryan was not employed by the Mother's Center, and in explaining

its holding in Mayer, the Court said that Mayer's "rights depended on his individual relation with the [Jewish] Center." Ibid. Mayer was not a beneficiary under the CIA because "[h]e was present on the premises . . . at the direction of his employer and in fulfillment of his function as an employee, not for the purpose of receiving personally the philanthropy of the [Jewish] Center." Ibid. (emphasis added).

D.

Applying the two-prong test for beneficiary status, it is clear that plaintiff suffered her injury while BIR "'was engaged in the performance of the charitable objectives it was organized to advance.'" Id. at 350 (quoting Anasiewicz, 74 N.J. Super. at 536). Educating medical professionals, including nurses, was within the benefactions BIR bestowed as a hospital. Kuchera, supra, 221 N.J. at 254. The Agreement reflected BIR's decades-old relationship with ACCC, its student nurses and its faculty. BIR permitted the students and faculty, both of which were integral parties to the educational benefits BIR bestowed, to use the facility's locker rooms, conference rooms and instructional material.

The second prong of Ryan's test is more difficult to apply under the facts of this case. To be a beneficiary, the "injured party [must be] a direct recipient" of the hospital's good

works. Ryan, supra, 175 N.J. at 350 (citing DeVries v. Habitat for Humanity, 290 N.J. Super. 479, 487-88 (App. Div. 1996), aff'd o.b., 147 N.J. 619 (1997)). To serve the remedial purposes of the CIA, beneficiary status must be "interpreted broadly," such that one who enjoys the benefactions "to whatever degree" satisfies the statute. Id. at 353. Only those "'unconcerned in and unrelated to the benefactions of [the] organization'" are "not beneficiaries." Ibid. (citation omitted). As the cited cases amply demonstrate, our consideration of whether plaintiff was a direct beneficiary of BIR's benefactions requires a fact-sensitive analysis. See DeVries, supra, 290 N.J. Super. at 488-93 (discussing various factual patterns in determining an injured party's beneficiary status).

In Mayer, supra, the Court clearly stated that the plaintiff was not a beneficiary of the Jewish Center's benefactions because "he was there in fulfillment of his function and obligation as an employee to engage in the employer's work at the direction of the employer, and not for the purpose of receiving personally the philanthropy of the Center." 38 N.J. at 554. In Ryan, supra, the Court seemed to implicitly reaffirm that the employee of a third party who is injured on the premises of a charity is not a beneficiary of

that charity, even though the employer was receiving the benefactions of the charity. 175 N.J. at 354.

We note, however, some significant factual differences between plaintiff and the plaintiffs in Mayer and Glowacki. The plaintiff in Mayer happened to be at the Jewish Center because his employer ordered him to attend a dinner; otherwise, he was a "stranger to the charity." Mayer, supra, 38 N.J. at 554. Similarly, the plaintiff in Glowacki had no relationship to the hospital where she was injured; she was simply there because her employer dispatched her to that location on that day. Glowacki, supra, 270 N.J. Super. at 5.

That plaintiff was at BIR when she fell, however, was not a fortuitous event or mere happenstance. As she acknowledged under oath, that semester, plaintiff's job as an adjunct professor was to go to BIR to teach and supervise ACCC's nursing students. If, for example, plaintiff reported to BIR on the day of her accident simply to make observations of the students or the facility, without the likelihood of returning on a regular basis, then her status would be akin to the plaintiffs in Mayer and Glowacki.

Plaintiff's presence at BIR, however, was integral to the benefactions BIR bestowed, i.e., the education of student nurses. BIR did not provide instruction; ACCC did, and

plaintiff was the chosen employee to provide that instruction. Simply put, plaintiff may have served as an adjunct professor at some other facility; but, when she fell, plaintiff was an adjunct professor whose job was to teach student nurses at BIR because the hospital had chosen to bestow its benefactions upon ACCC's student nursing program.

Whether these factual distinctions compel the conclusion that plaintiff's relationship with BIR was qualitatively different from the plaintiffs' in Mayer or Glowacki, and whether despite being an employee of ACCC, plaintiff was a "direct recipient" of BIR's benefactions, is not for us to answer. "As an intermediate appellate court, we are bound to follow and enforce the decisions of the Supreme Court." Kaye v. Rosefielde, 432 N.J. Super. 421, 470-71 (App. Div. 2013), certif. granted, 217 N.J. 586 (2014). Under existing precedent, plaintiff's status of an employee of ACCC placed her outside BIR's charitable endeavors.

E.

We address another contention plaintiff fleetingly raises in her brief. She argues the Agreement recognized that the presence of ACCC's student nurses and instructors at BIR benefitted the facility and reflected BIR's intention to

"maintain separation and autonomy from" the students and faculty.

We have said that a plaintiff cannot be a beneficiary for CIA purposes if she "was conferring a benefit rather than receiving one." DeVries, supra, 290 N.J. Super. at 493; accord Kain, supra, 436 N.J. Super. at 481 (citation omitted). However, but for vague phrases contained in the Agreement's preamble, there is nothing to support the assertion that BIR obtained any benefit from the student nursing program. For example, there is nothing in the record that demonstrates the presence of student nurses and ACCC faculty somehow permitted BIR to reduce its staff or benefitted the quality of patient care.[4] We fail to see why BIR's stated intention to remain autonomous from ACCC reflects anything other than an attempt to limit its liability for the actions of the students and faculty.

In sum, we conclude that plaintiff was not a direct beneficiary of BIR's benefactions for purposes of the CIA. Therefore, BIR's pre-trial motions to limit its liability under the statute were properly denied.

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[4] During argument on BIR's motion for a new trial, its counsel acknowledged that there might be some "incidental" benefit to the hospital because ACCC students and faculty might observe something and bring it to the attention of BIR's staff. However, as he argued before us, counsel contended the preamble was an attempt to save the Agreement from being "a contract without consideration."

II.

A.

We next consider BIR's argument that because the jury verdict was excessive and against the weight of the evidence, its motion for a new trial or remittitur should have been granted. The standards governing consideration of BIR's motion were properly cited by the trial judge.

A trial judge "shall grant [a motion for a new trial] 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). "A trial court, faced with a jury verdict that . . . is excessive, may order a new trial or, alternatively, remittitur, bearing in mind that its power is 'limited.'" He v. Miller, 207 N.J. 230, 249 (2011) (quoting Carey v. Lovett, 132 N.J. 44, 66 (1993)). "The trial court should not disturb the jury's award unless it is 'so disproportionate to the injury and resulting disability as to shock the conscience and [convince the court] that to sustain the award would be manifestly unjust.'" Ibid. (quoting Baxter v. Fairmont Food Co., 74 N.J. 588, 604 (1977) (alteration in original)). "[T]he verdict may only be set aside if it is wide

of the mark and pervaded by a sense of wrongness." Ibid. (internal quotation marks and citation omitted).

"[U]nder Rule 2:10-1, an appellate court only can reverse a trial judge's decision to deny a motion for new trial where 'it clearly appears that there was a miscarriage of justice under the law.'" Jastram v. Kruse, 197 N.J. 216, 230 (2008). "That inquiry requires employing a standard of review substantially similar to that used at the trial level, except that the appellate court must afford 'due deference' to the trial court's 'feel of the case,' with regard to the assessment of intangibles, such as witness credibility." Ibid. (quoting Feldman v. Lederle Labs., 97 N.J. 429, 463 (1984)).

We conclude that the trial judge properly denied BIR's motion for a new trial or remittitur based upon the size of the verdict. Plaintiff was fifty-nine years old on the date of the accident. She experienced a total of seven surgical interventions to repair her ankle. Ultimately, they were unsuccessful in the sense that, as of trial more than three years later, plaintiff walked with a cane and wore an orthopedic brace to ambulate independently with a limp. She was declared disabled for purposes of Social Security benefits and was no longer in the work force, although BIR strenuously challenged

the reasonableness of plaintiff's decision not to seek other sedentary work.

Plaintiff's life care expert, Jody Masterson, testified regarding expenses required to permit plaintiff to maintain her daily activities. Plaintiff's vocational economic expert, Robert Wolf, Ed.D., opined that plaintiff's future economic losses, including wages and costs associated with any continued employment, would be between $536,471 and $812,137. Wolf also opined that based upon Masterson's estimates, plaintiff's future "life care costs" would be $1,690,969, if she continued to live independently, or $2,006,829, if she entered residential assisted living.

In short, viewed in a light most favorable to plaintiff, see Johnson v. Scaccetti, 192 N.J. 256, 281 (2007), the evidence supported an award of more than $2.8 million dollars in economic damages. The trial judge's review of the jury's quantification of less precise pain and suffering damages must be guided by consideration of

> The nature and extent of the injury, the medical treatment that the plaintiff underwent and may be required to undergo in the future, the impact of the injury on the plaintiff's life from the date of injury through the date of trial, and the projected impact of the injury on the plaintiff in the future.
>
> [Jastram, supra, 197 N.J. at 229.]

The jury's award of $4 million dollars in total damages was not a miscarriage of justice under the law.[5]

B.

BIR also contends it was entitled to a new trial on damages as the result of two rulings made during trial. We have said that the same "miscarriage of justice under the law" standard in Rule 4:49-1(a) applies,

> whether the motion is based upon a contention that the verdict was against the weight of the evidence, or is based upon a contention that the judge's initial trial rulings resulted in prejudice to a party. Whether to grant the motion is within the trial court's discretion. On appeal, we consider essentially the same standard.
>
> [Hill v. N.J. Dep't of Corr., 342 N.J. Super. 273, 302 (App. Div. 2001) (citing Crawn v. Campo, 136 N.J. 494, 510-12 (1994); R. 2:10-1), certif. denied, 171 N.J. 338, (2002).]

[5] The jury verdict sheet did not break down the various elements of plaintiff's claim for damages, so the trial court was unable to consider the specific amounts that comprised the overall award. It is clearly preferable for the trial court to submit jury interrogatories that ask for quantification of the individual elements of plaintiff's damages. See Model Jury Charge (Civil), § 8.10B "Sample Verdict Sheet for a Personal Injury Case" (1998); see also Bussell v. DeWalt Prod. Corp., 204 N.J. Super. 288, 295 (App. Div. 1985) ("[T]o avoid the [prejudgment interest] problem and facilitate trial and appellate court inquiry as to alleged verdict excessiveness, the court . . . might [] consider requiring the jury to separately assess and report the components of the lump sum verdict.")

Before trial, BIR moved to bar the introduction of Wolf's videotaped deposition. We gather from the concise written opinion of the trial judge that BIR argued Wolf's opinion was a "net opinion" because the expert testified that "a zero discount rate" should apply to any calculation of plaintiff's future medical expense claim and wage loss claim, and he refused to provide specific facts upon which he based his opinion. The judge, who had reviewed the transcript of Wolf's deposition, noted the opinion was based upon Wolf's experience, a 2010 government economic report, and "present historic low interest rates." The judge concluded that Wolf's opinion regarding the zero discount rate was not a net opinion and denied BIR's motion.

During his testimony, Wolf opined that plaintiff had suffered "a total vocational disability" because of her injuries, and he opined regarding her future economic damages. Wolf was subjected to vigorous cross-examination by BIR's counsel. It suffices to say that Wolf refused to explain the precise rates of inflation and interest he utilized to come to his conclusion, stating, "I identified a zero percent net discount rate. I gave a rationale for it. It's valid." He further explained:

> [T]here will be an offset between interest rates and increases in medical costs. If

> those increases in medical costs are two or three or four percent, the assumption can be that a risk-free investment could generate that amount of money. In all probability, when you look at current interest rates, and even increases in the [] [p]rice [i]ndex for various medical costs, we're not looking at any discount rate, we're looking at a real growth rate. So there's been an underestimate of my estimates of economic losses.

BIR did not produce an expert to rebut Wolf's testimony; however, in the context of a continuing discussion of the jury charge, BIR's counsel requested that the judge take judicial notice of various statistical data, including the average rate of return on United States Treasury securities, the average rate of inflation according to the Consumer Price Index, the average annual increase in wages for health care workers, and the average hourly wage for health care workers in the area. Counsel argued that Wolf refused to supply the rates he used to conclude a zero percent net discount was appropriate, and counsel should be permitted to argue to the jury that these statistical averages should be utilized.

The judge agreed that the information could be judicially noticed pursuant to N.J.R.E. 201(a). However, the judge reasoned the problem was "the relevancy of the fact in the absence of an expert witness . . . to testify that that is the appropriate method to use in discounting the present value."

The judge permitted defense counsel to argue that Wolf failed to explain a basis for his opinion, and he agreed to permit counsel to argue the average wages for health care workers in the area was a specific figure, much less than that used by plaintiff's life care expert and relied upon by Wolf. Defense counsel again moved to strike Wolf's opinion as a net opinion, and the judge denied that motion. BIR also submitted a proposed jury instruction that provided several pages of explanation as to the jury's obligation to discount any award for future economic damages to present value, and provided a table by which the jury could make such a calculation. The judge, instead, gave instructions that followed the model jury charge.

BIR renewed its arguments when it moved for a new trial. The judge noted Wolf's expressed disagreement during his testimony with the use of at least some of the data cited by BIR. The judge further explained, "[I]t seems to me that if I allowed [BIR's counsel] to make the argument that the jury should use some other discount rate, they were going to be relying on [BIR counsel] on economics and without some testimony in the case I did not think it was appropriate." He denied the motion for a new trial on this ground.

Before us, BIR argues that the judge should have granted a new trial based upon the improper admission of Wolf's net

opinion testimony and the refusal to permit its counsel to comment during summation on facts which the judge acknowledged were subject to judicial notice. We reject the claim that a new trial is warranted.

We find no error at all as to the admission of Wolf's testimony. In reviewing a trial court's decision to admit or reject expert testimony on net opinion grounds, we apply a "deferential approach" and review the decision "against an abuse of discretion standard." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371-372 (2011) (citing Kuehn v. Pub Zone, 364 N.J. Super. 301, 319-21 (2003), certif. denied, 178 N.J. 454 (2004)). A net opinion is a "bare opinion that has no support in factual evidence or similar data." Id. at 372 (citations omitted). Despite BIR's assertions to the contrary, Wolf's opinions were properly admitted.

Although we review the judge's evidential decisions and his control of counsel's summation under an abuse of discretion standard, Litton Indus. v. IMO Indus., 200 N.J. 372, 392-93 (2009), we apply de novo review if the judge failed to apply the proper test in analyzing the admissibility of certain evidence. Konop v. Rosen, 425 N.J. Super. 391, 401 (App. Div. 2012). Here, the judge concluded that while it was proper to take judicial notice of the government data proffered by BIR, the

factual evidence once noticed lacked relevancy without accompanying expert testimony. We disagree.

It suffices to say that Wolf adamantly asserted with little detail that a zero discount rate was appropriate. At the least, BIR was entitled to challenge that assumption regarding interest and inflation rates by impeaching Wolf's credibility through extrinsic evidence. N.J.R.E. 607. Nevertheless, we are certain that neither the judge's ruling nor his decision not to give BIR's proposed charge resulted clearly and convincingly in a miscarriage of justice. R. 4:49-1(a).

The judge appropriately instructed the jury as to its ability to accept or reject Wolf's testimony and to critically assess the information the expert relied on. "As the Court has recognized, in calculating a pecuniary loss, '[a] jury's common knowledge and experience is always available to help it assess whether an aggregate sum or "bottom-line" figure presented by counsel or an expert represents fair and just compensation.'" Beim v. Hulfish, 216 N.J. 484, 504 (2014) (alteration in original) (quoting DeHanes v. Rothman, 158 N.J. 90, 102 (1999)). Additionally, the judge essentially followed the model jury charges on future economic damages, telling the jury to consider whether applying a discount factor was appropriate if it chose to make any award. See State v. R.B., 183 N.J. 308, 325 (2005)

("The process by which model jury charges are adopted in this State is comprehensive and thorough; our model jury charges are reviewed and refined by experienced jurists and lawyers."). We find no basis to reverse the denial of BIR's motion for a new trial on damages.

C.

BIR claims it is entitled to a new trial on liability because of errors in the jury instructions. In particular, BIR contends it was error to charge the jury that plaintiff was an "invitee" on the premises and to provide the jury with Model Jury Charge (Civil), § 5.10B "Forseeability (As Affecting Negligence)."

The duty imposed upon the owner of premises is typically predicated on the status of the claimant at the time of injury: whether she is a trespasser, licensee, or invitee. Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 43 (2012). "The invitee comes by invitation, express or implied, generally for some business purpose of the owner. The licensee is permitted to come upon the property, and does so for his own purposes." Id. at 43 (citations omitted). The owner's duty to a licensee is less onerous than that owed to an invitee or guest. Id. at 44 (citing Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 434 (1993)).

We think it is clear from the facts of the case that plaintiff and the student nurses were invitees of BIR. While it is true that plaintiff was on the premises to serve the purposes of ACCC, her presence there was in response to BIR's invitation to the participants of the college's nursing program. See Snyder v. I. Jay Realty Co., 30 N.J. 303, 312 (1959) (citation omitted) (noting invitees "come by invitation" and licensees "are those who are not invited but whose presence is suffered").

BIR did not object to the judge providing the model charge on foreseeability. "[I]t is well established that the question of whether plain error occurred [in a jury charge] depends on whether the error was clearly capable of producing an unjust result." Baker v. Nat'l State Bank, 161 N.J. 220, 226 (1999). "Relief under the plain error rule, R. 2:10-2, at least in civil cases, is discretionary and 'should be sparingly employed.'" Ibid. (quoting Ford v. Reichert, 23 N.J. 429, 435 (1957)); see also Mogull v. CB Commer. Real Estate Grp., 162 N.J. 449, 466 (2000) ("It is difficult to find that a charge that follows the Model Charge so closely constitutes plain error."). BIR's argument is predicated upon the selective choice of certain words, as opposed to a fair reading of the charge as a whole. Although a separate charge on foreseeability may have been

unnecessary under the facts of this case, we find no plain error as a result of the decision to provide the instructions.

III.

Lastly, BIR challenges the grant of summary judgment to PIIC and dismissal of BIR's third-party complaint seeking declaratory relief under the PIIC policy. "An appellate court reviews an order granting summary judgment in accordance with the same standard as the motion judge." Bhagat v. Bhagat, 217 N.J. 22, 38 (2014) (citing W.J.A. v. D.A., 210 N.J. 229, 237-38 (2012); Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010)). We "review the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law." Ibid. (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); R. 4:46-2(c)).

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Brill, supra, 142 N.J. at 540.]

We then decide "whether the motion judge's application of the law was correct." Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 231 (App. Div.), certif. denied, 189 N.J. 104 (2006). "The 'trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" Town of Kearny v. Brandt, 214 N.J. 76, 92 (2013) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Interpretation of an insurance contract is a matter of law subject to our de novo review. Sealed Air Corp. v. Royal Indem. Co., 404 N.J. Super. 363, 375 (App. Div.) (citation omitted), certif. denied, 196 N.J. 601 (2008). "In considering the meaning of an insurance policy, we interpret the language according to its plain and ordinary meaning." Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010) (internal quotation marks and citations omitted). "If the terms are not clear, but instead are ambiguous, they are construed against the insurer and in favor of the insured, in order to give effect to the insured's reasonable expectations." Ibid. (citations omitted).

Whether ambiguous or not, when a court construes the terms of a policy of insurance, it "'should not write for the insured a better policy . . . than the one purchased.'" Longobardi v. Chubb Ins. Co. of N.J., 121 N.J. 530, 537 (1990) (quoting Walker

Rogge, Inc. v. Chelsea Title & Guar. Co., 116 N.J. 517, 529 (1989)); see also Flomerfelt, supra, 202 N.J. at 441 ("[W]hen considering ambiguities and construing a policy, courts cannot write for the insured a better policy of insurance than the one purchased.") (internal quotation marks and citation omitted).

It is undisputed that BIR was not a named insured under the basic provisions of ACCC's policy with PIIC, and that ACCC provided BIR with a "Certificate of Liability Insurance" listing BIR as an additional insured under the policy. One endorsement, entitled "Blanket Additional Insured – Designated" (the Blanket Endorsement), amended the policy's definition of who was an insured, "to include as an additional insured [the party named in the certificate] but only with respect to liability for 'bodily injury' . . . caused, in whole or in part, by [ACCC's] acts or omissions or the acts or omissions of those[] acting on [ACCC's] behalf."

A second endorsement, entitled "General Liability Deluxe Endorsement – Schools" (the Schools Endorsement), listed various "Additional Insured[s]," one of which was generically described as a "Funding Source." The Schools Endorsement, however, provided that "[e]ach of the following is also an insured[.]" (Emphasis added). Under the subsection "Funding Source," the endorsement added as "an insured":

> Any person or organization with respect to their liability arising out of:
>
> (1) Their financial control of you; or
>
> (2) Premises they own, maintain or control while you lease or occupy these premises. This insurance does not apply to structural alterations, new construction and demolition operations performed by or for that person or organization.

BIR argues that the policy provided coverage, whether as an "insured" or an "additional insured." PIIC contends that BIR may have been an additional insured, but none of the provisions of the policy provide coverage for BIR's own negligence. We agree with PIIC and affirm the grant of summary judgment dismissing BIR's third-party complaint.

It is clear that although the Blanket Endorsement made BIR an additional insured under the policy, BIR was provided coverage only for the negligent acts or omissions of the named insured, i.e., ACCC, and not for its own negligence. See Rosario v. Haywood, 351 N.J. Super. 521, 528-31 (App. Div. 2002) (holding that a similar "blanket additional insured" endorsement did not provide the additional insured coverage for its negligence).

BIR alternatively contends that the Schools Endorsement made it an "insured" under the policy, because ACCC's students

and faculty were "occupying" BIR's premises when plaintiff fell. We disagree.

The policy did not define the term "occupy," but we have said that "[a] word or phrase is not automatically rendered ambiguous simply because the policy fails to define it." Priest v. Roncone, 370 N.J. Super. 537, 544 (App. Div. 2004) (citation omitted). "Whether the term is ambiguous depends on the context in which it is being used." Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 176 (1992).

BIR argues that plaintiff and her students clearly "occupied" some space at the facility. However, given the context of the endorsement language, it is clear that while plaintiff and the students may have occupied some physical space while present at the facility, they did not "occupy" the facility. They did not possess or control any aspect of BIR's premises or operation. The Agreement provides that the students and faculty would have access to lockers and conference rooms, but ACCC did not lease those portions of the facility from BIR, and there is no indication that they possessed those facilities to the exclusion of others. Moreover, the construction urged by BIR would lead to the absurd result that the policy would insure BIR for its own negligence whenever an ACCC student or employee ventured onto BIR property in any context.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION