

Not Reported in A.2d, 2006 WL 552428 (N.J.Super.A.D.)
(Cite as: 2006 WL 552428 (N.J.Super.A.D.))

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UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

Luann DeLUCA, Individually and as Guardian for
Gabrielle Spallino and Michael Spallino, Plaintiffs-
Respondents/ Cross-Appellants,
and
Marc Spallino, Plaintiff,

v.

DEMWOOD FLOORING, INC., Defendant/
Third-Party Plaintiff-Appellant/Cross-Respondent,
v.

Arthur Shalit, Sidebrook Associates, Third-Party
Defendants-Cross-Respondents,
and

Jerry Berzak and Fleetwood Flooring Company,
Third-Party Defendants.
Argued Feb. 14, 2006.
Decided March 8, 2006.

Background: Tenant, individually and on behalf of her children, filed a complaint against subcontractor who was finishing floors in building that alleged that subcontractor negligently caused a fire in building, and subcontractor filed a third-party complaint against building owners, contractor, and flooring company. The Superior Court, Law Division, Essex County, jury determined that subcontractor, contractor, flooring company, and building owners were negligent, it assessed 40% of the damages to subcontractor, 20% to building owners, and 40% to contractor and flooring company, and it awarded tenant \$350,000, daughter \$175,000, and son \$100,000. Subcontractor appealed and tenant cross-appealed.

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

- (1) jury award of \$350,000 in damages to tenant was not excessive and did not represent a miscarriage of justice;
- (2) jury award of \$175,000 in damages to tenant's daughter was not excessive and did not represent a miscarriage of justice;
- (3) tenant was not required to present expert testimony on the issue of daughter's emotional distress before daughter could recover damages;
- (4) trial court was not required to treat tenant's negligence claims against subcontractor as claims for negligent infliction of emotional distress; and
- (5) subcontractor's contribution claims against contractor and flooring company were not barred by the Joint Tortfeasors Contribution Act.

Affirmed.

West Headnotes

[1] Damages 115 ↪ 140.7

115 Damages
115VII Amount Awarded
115VII(E) Mental Suffering and Emotional
Distress
115k140.7 k. Particular Cases. Most Cited
Cases

Evidence 157 ↪ 571(10)

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(10) k. Damages. Most
Cited Cases
Jury award of \$350,000 in damages to tenant was not excessive and did not represent a miscarriage of justice, in tenant's action against subcontractor for negligence after subcontractor started a fire in apartment building that trapped tenant and her children in their apartment; tenant's counselor testified that fire caused an exacerbation of a pre-existing

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anxiety disorder in tenant, that after the fire she began to suffer from post traumatic stress disorder, and that her condition was permanent and would affect tenant for the rest of her life. R. 4:49-1(a).

[2] Damages 115 ↪140.7

115 Damages

115VII Amount Awarded

115VII(E) Mental Suffering and Emotional Distress

115k140.7 k. Particular Cases. Most Cited Cases

Jury award of \$175,000 in damages to tenant's daughter was not excessive and did not represent a miscarriage of justice, in tenant's action against subcontractor for negligence after subcontractor started a fire in apartment building that trapped tenant and her children in their apartment; daughter testified that the fire caused her emotional harm, tenant, daughter's siblings, and daughter's aunt all testified as to the effect the fire had on daughter, and daughter stated that she felt the effects of the fire for one year. R. 4:49-1(a).

[3] Damages 115 ↪140.7

115 Damages

115VII Amount Awarded

115VII(E) Mental Suffering and Emotional Distress

115k140.7 k. Particular Cases. Most Cited Cases

Jury award of \$100,000 in damages to tenant's son was not excessive and did not represent a miscarriage of justice, in tenant's action against subcontractor for negligence after subcontractor started a fire in apartment building that trapped tenant and her children in their apartment; son testified that the fire caused him severe emotional distress. R. 4:49-1(a).

[4] Damages 115 ↪192

115 Damages

115IX Evidence

115k183 Weight and Sufficiency

115k192 k. Mental Suffering and Emotional Distress. Most Cited Cases

Tenant was not required to present expert testimony on the issue of daughter's emotional distress before daughter could recover damages, in tenant's action against subcontractor for negligence after subcontractor started a fire in apartment building that trapped tenant and her children in their apartment; the issue of daughter's emotional distress was not so esoteric that jurors, drawing on their own common judgment and experience, could not form a valid judgment about it, and there was no bar to daughter's family members testifying about her emotional distress.

[5] Damages 115 ↪57.18

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.13 Negligent Infliction of Emotional Distress

115k57.18 k. Particular Cases. Most Cited Cases

Trial court was not required to treat tenant's negligence claims against subcontractor, which were based on subcontractor negligently starting a fire in apartment building that resulted in tenant and her children being trapped in their apartment, as claims for negligent infliction of emotional distress, as argued by subcontractor; tenant's claims were not limited to emotional distress resulting from subcontractor's negligence, and tenant also sought compensation for physical injuries, pain and suffering, disability, impairment, and loss of enjoyment of life that was proximately caused by subcontractor's negligence.

[6] Contribution 96 ↪5(6.1)

96 Contribution

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96k2 Common Interest or Liability
 96k5 Joint Wrongdoers
 96k5(6) Particular Torts or Wrongdoers
 96k5(6.1) k. In General. Most Cited

Cases

Subcontractor's contribution claims against contractor and flooring company were not barred by the Joint Tortfeasors Contribution Act provision that provided "[N]o person shall be entitled to recover contribution under [the Act] from any person entitled to be indemnified by him in respect to the liability for which the contribution is sought"; even if contractor was entitled to indemnification under common law, subcontractor sought contribution for damages sustained as a result of contractor's negligence. N.J.S.A. 2A:53A-3.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. ESX-L-8255-02. Stephen R. Katzman argued the cause for appellant/cross-respondent (Methfessel & Werbel, attorneys; Mr. Katzman and Benjamin R. Messing, on the brief).

Adam M. Slater argued the cause for respondents/cross-appellants (Nagel, Rice & Mazie, attorneys; Mr. Slater, on the brief).

Reilly, Supple & Wischusen submitted a brief on behalf of third-party defendants/cross-respondents (Richard C. Wischusen, on the brief).

Before Judges C.S. FISHER, YANNOTTI and HUMPHREYS.

PER CURIAM.

*1 Defendant Demwood Flooring, Inc. (Demwood) appeals from an order of judgment entered on January 25, 2005 in favor of plaintiffs Luann DeLuca (Luann), Gabrielle Spallino (Gabrielle), and Michael Spallino (Michael) and an order entered February 18, 2005 denying Demwood's motion for a new trial or remittitur. Plaintiffs cross-appeal from the February 18, 2005 order, which denied their

motion seeking a reapportionment of damages. We find no merit in the appeal or the cross-appeal and, therefore, we affirm.

I.

This action arises from a fire that occurred in an apartment building in Caldwell, New Jersey on August 3, 2001. Arthur Shalit (Shalit) and Sidebrook Associates (Sidebrook) are the owners of the building. At the time of the fire, Luann was residing in an apartment on the third floor of the building with her three children: Gabrielle, who was ten years old; Michael, who was eighteen years of age; and Marc Spallino (Marc), who was fifteen. Shalit had retained Jerry Berzak (Berzak) and Fleetwood Flooring Company (Fleetwood) to refinish floors in the building. Berzak contracted with Demwood to do the work. Demwood was owned by Demir Santos (Santos) and Clemio DaSilva (DaSilva).

On August 3, 2001, Santos was refinishing the floor in an apartment across the hall from plaintiffs' apartment. DaSilva was using clear lacquer for the job and he was apparently aware that any flame could ignite fumes from the lacquer. Previously, DaSilva told Santos to be certain that any pilot light was turned off in the area where he was working. At around 9:30 a.m., fire broke out near the apartment where DaSilva was working.

At the time, Luann, Gabrielle and Michael were in their apartment across the hall. Gabrielle saw the fire and she informed her mother. Michael was talking to his girlfriend on the phone when he heard Luann and Gabrielle screaming and he came to see what was happening. Michael went into the hall and saw the fire. There was thick smoke in the hallway and the stairway was engulfed by flames. Luann, Gabrielle and Michael were trapped in the apartment for about twenty to twenty-five minutes before they were able to escape from a window down a ladder.

On August 26, 2002, plaintiffs filed a complaint in

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the Law Division naming Demwood as defendant. Plaintiffs alleged that one of Demwood's employees had "negligently utilized a flammable floor product" and caused the fire. Plaintiffs asserted that, as a result of Demwood's negligence, they suffered certain damages. Plaintiffs also alleged that they had sustained certain economic losses.

Demwood filed an answer denying liability. Demwood filed a third-party complaint naming Shalit, Sidebrook, Berzak and Fleetwood as third-party defendants. Demwood alleged that any damages sustained by plaintiffs were the proximate result of the negligence of the third-party defendants. Demwood also asserted that it was entitled to contribution from the third-party defendants pursuant to the Joint Tortfeasors Contribution Act, *N.J.S.A. 2A:53A-1 to -5*.

*2 At trial, Michael testified that after he discovered the fire, and saw that there was no way to escape down the staircase, he went with his mother and sister to a bedroom in the rear of the apartment. They could feel the growing intensity of the fire as they waited in the room. Michael said that he could not breathe because of the smoke and fear. He said that he was "shaken and sad." Michael feared that they would not be rescued in time. About ten minutes later, Michael saw a police officer outside of the building and he called out to him from the window. The officer ran to the back of the building and retrieved a ladder. Michael testified that, while they waited for the officer to return, he held his mother and sister out the window so they could breathe. Luann and Gabrielle were crying "uncontrollably."

The ladder did not quite reach to the window. Michael lowered Gabrielle to the top rung of the ladder. Luann was the next out of the apartment. Michael was the last of the three to leave. Luann, Gabrielle and Michael were given oxygen at the building and then taken to St. Barnabas Medical Center for treatment for smoke inhalation and lacerations.

Luann stated that, while she was trapped in the

apartment during the fire, she was in a state of panic. She stated, "I thought we were dead." Luann asserted that as the time passed, the heat increased and it was difficult to breathe. She said that after the fire, she felt "out of it." Luann said that she cried for a long period of time. Several days after the fire, she returned to the building but she was too distressed to go in.

Luann also testified that, after her divorce, she treated with a therapist. In the time immediately preceding the fire, she had not seen the therapist but after the fire, she returned for therapy to deal with what she described as panic attacks. Luann said that she began to have flashbacks and she felt as if she was experiencing the fire again. Her therapist suggested various means to deal with the anxiety, such as focusing on positive thoughts, taking relaxing breaths and listening to certain tapes.

Despite the anxiety attacks, Luann returned to her work as a waitress/restaurant manager within a few weeks. Luann testified that she had to return to work so that she could pay the family's bills. She said, "I have three kids that depend on me. They don't have a father. So I just keep doing what I have to do. But when I get into bed at night, that's why I don't sleep."

Plaintiffs lived with Luann's sister and her parents for several weeks after the fire. Luann's sister Mary Grace Marchese (Marchese) described Gabrielle as "absolutely" different after the fire. Gabrielle would wake up every night crying. After Gabrielle moved out of her house, Marchese saw her regularly. She said that Gabrielle was "afraid of everything. She just still always wanted her mother around."

Marc was working when the fire occurred. He testified that after the fire his mother looked "like she had no idea what to do." He said that Gabrielle did not want to talk. She did not want to do anything. Marc stated that Gabrielle had lost most of her possessions. She did not know where the family would be living and whether she would have to change

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schools. Marc stated, "It was a lot ... of things for a little girl to have running through her mind." Marc said that Michael also was "bad." The front of Michael's hair had been burned back in the fire. "Everyone," he said, "was pretty much in bad shape."

*3 Joseph Benjamin Bizzarro (Bizzarro) testified as an expert witness for Luann. Bizzarro is a licensed family and marriage counselor and he was qualified as an expert in the field of counseling and therapy. Bizzarro testified concerning his treatment of Luann. He stated that before her divorce, Luann had been suffering from panic disorder and agoraphobia. Luann made progress in treatment and she stopped seeing Bizzarro in the latter part of 1998. Luann treated with Bizzarro during and after her divorce and she returned to see Bizzarro after the fire.

Bizzarro stated that after the fire Luann reported experiencing panic attacks. Luann told him that she believed that she was experiencing a recurrence of her prior anxiety condition. Luann treated with Bizzarro from August 2001 through December 2003. Bizzarro diagnosed Luann as suffering from Post Traumatic Stress Disorder (PTSD). Bizzarro explained that his diagnosis was based on Luann's initial exposure to a life threatening event and her subsequent response to the fire, including recurring recollections of the event. Bizzarro stated that Luann's condition is permanent and will affect her for the rest of her life.

Demwood called Stanton Peele, Ph.D., and he was qualified as an expert in the field of psychology. Peele stated that he examined Luann and, in his opinion, she was not suffering from PTSD. Peele concluded that Luann did not fit the *DSM-IV* criteria for PTSD.^{FN1} He also stated that Bizzarro's diagnosis was erroneous because Bizzarro diagnosed PTSD but he did not perform a psychological test to determine whether Luann was suffering from any other psychological disorders.

FN1. The *DSM-IV* is the *American Psychiatric Association, Diagnostic and Statistic-*

al Manual of Mental Disorders, (4th ed.1994).

After the evidentiary portion of the trial was concluded, and counsel made their final arguments, the judge instructed the members of the jury that they must first determine whether plaintiffs had proven that Demwood was negligent. The jurors also were required to determine whether Demwood had proven that any of the third-party defendants were negligent. The judge stated that if the jury were to find that more than one party was negligent, the jury must compare the negligence of those parties by ascribing percentages of responsibility for the happening of the fire.

The judge also instructed the jury on damages. The judge explained that plaintiffs were seeking damages for their alleged pain, suffering, disability, impairment and the loss of the enjoyment of life.^{FN2} The judge stated that only Luann was asserting a claim for permanent injuries. The jury could, however, consider awarding damages to Michael and Gabrielle for any temporary injuries that they sustained as a proximate result of the negligence of the other parties. The judge added that the law:

FN2. The parties stipulated as to the amount of economic losses sustained by all plaintiffs, including Marc.

recognizes a proper item of recovery the pain, physical and mental suffering, discomfort, and distress that a person may endure as a natural consequence of the injury. The measure of damages is what a reasonable person would consider to be adequate and just under all the circumstances to compensate a particular plaintiff.

*4 The jury found that Demwood, Shalit/Sidebrook and Berzak/Fleetwood were negligent and their negligence was a proximate cause of the fire. The jury assessed Demwood 40% of the responsibility for the happening of the fire. Shalit and Sidebrook were assessed 20% and Berzak and Fleetwood were assessed 40%. The jury awarded Luann \$350,000; Gabrielle, \$175,000;

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and Michael, \$100,000.

After the judge entered an order of judgment reflecting the verdict, Demwood filed a motion for a new trial on the issue of damages or a remittitur of damages. Plaintiffs filed a cross-motion to reappportion the damages assessed against Berzak and Fleetwood to Demwood. The judge denied the motions and this appeal and cross-appeal followed.

II.

We turn first to the contentions raised by Demwood in its appeal. Demwood argues that: 1) the damage awards by the jury are grossly disproportionate to the injuries sustained by the plaintiff causing a miscarriage of justice under the law; 2) the trial judge erred in permitting family members to testify about Gabrielle's psychological condition caused by the fire when no expert testimony was presented on the issue of causation; and 3) the judge should have barred the claims for negligent infliction of emotional distress when the physical injuries were superficial and short term and there was no evidence that the emotional distress resulted in physical injury or psychological sequelae. We disagree.

A trial court may order a new trial when "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). However, a trial judge should set aside a damage award as excessive only in the clearest of cases. *Caldwell v. Haynes*, 136 *N.J.* 422, 431-32, 643 A.2d 564 (1994)(citing *Fritsche v. Westinghouse Elec. Corp.*, 55 *N.J.* 322, 330, 261 A.2d 657 (1970)).

When determining whether an award of damages is excessive, the trial judge must consider the evidence in a light most favorable to the prevailing party. *Id.* at 432, 643 A.2d 564 (citing *Taweel v. Starn's Shoprite Supermarket*, 58 *N.J.* 227, 236, 276 A.2d 861 (1971)). To warrant a new trial, the ver-

dict must be against the weight of the evidence. *Ibid.* (citing *Horn v. Village Supermarkets, Inc.*, 260 *N.J.Super.* 165, 178, 615 A.2d 663 (App.Div.1992), *certif. denied*, 133 *N.J.* 435, 627 A.2d 1141 (1993)). In addition, "[t]he verdict must shock the judicial conscience." *Ibid.* (citing *Carey v. Lovett*, 132 *N.J.* 44, 66, 622 A.2d 1279 (1993)).

If a trial judge determines that a new trial is warranted, the scope of the new trial "depends on the nature of the injustice." *Fertile v. St. Michael's Med. Center*, 169 *N.J.* 481, 490, 779 A.2d 1078 (2001). If the trial error affects liability, a new trial should be ordered on all issues. *Id.* at 490-91, 779 A.2d 1078. However, "[w]here the quantum of damages is the sole source of the court's determination that a denial of justice has taken place, other remedies are available including remittitur and additur." *Id.* at 491, 779 A.2d 1078.

*5 When the trial judge finds that a new trial is warranted because the damages awarded by the jury are excessive, the judge may order remittitur, which requires the plaintiff to consent to a decrease in the award to a specified amount as a condition for denying the defendant's motion for a new trial. *Id.* at 491, 779 A.2d 1078 (citing S.T. Rayburn, *Statutory Authorization of Additur and Remittitur*, 43 *Miss. L.J.* 107 (1972)). "Remittitur is designed to bring excessive damages awarded by a jury to the level that the court knows is within the limits of a proper verdict and thereby avoid the necessity of a new trial." *Ibid.* However, there must first be a finding that defendant is entitled to a new trial under the standards set forth in *R.* 4:49-1(a).

An appellate court may not reverse the denial by the trial court of a motion for a new trial unless "it clearly appears that there was a miscarriage of justice under the law." *R.* 2:10-1. "The standard for appellate review of a trial court's decision on a motion for a new trial is substantially the same as that controlling the trial court except that due deference should be made to its 'feel of the case' including credibility." *Feldman v. Lederle Lab.*, 97 *N.J.* 429, 463, 479 A.2d 374 (1984)(quoting from *Dolson v.*

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Anastasia, 55 N.J. 2, 6, 258 A.2d 706 (1969)).

[1] We are convinced that the trial judge in the case correctly found that the jury's award of \$350,000 to Luann was not excessive and does not clearly and convincingly represent a miscarriage of justice under the law. R. 4:49-1(a). The evidence shows that Luann sustained personal injuries in the fire and as a consequence the jury could find that she experienced some pain and suffering, disability or impairment of a temporary nature related to those injuries. In addition, there was sufficient evidence from which a jury could find that Luann sustained psychological injuries that are permanent in nature.

As we pointed out previously, Bizzarro testified that Luann sustained in the fire an exacerbation of a pre-existing anxiety disorder. In addition, after the fire, Luann began to suffer from PTSD. Bizzarro testified that this condition is permanent and will affect Luann for the rest of her life. When the matter was tried, Luann's life expectancy was 30 years. Luann also testified about the impact that the psychological disorders have had on her life. We are convinced that, based on the totality of this evidence, the jury could reasonably find that Luann was entitled to damages in the amount of \$350,000 for her pain and suffering, disability, impairment and loss of the enjoyment of life.

[2] We are also convinced that there is sufficient evidence in the record to support the judge's findings that the jury's award of \$175,000 to Gabrielle is not excessive and does not represent a miscarriage of justice. R. 4:49-1(a). Gabrielle sustained physical injuries in the fire and the jury could find that Gabrielle suffered some pain and suffering, impairment and disability of a temporary nature due to these injuries. Moreover, there was evidence from which the jury could find that Gabrielle also had suffered emotional distress as a result of the incident.

*6 Gabrielle testified that the fire had caused her some emotional harm. She explained the impact that the fire had upon her. Luann, Michael, Marc

and Marchese also testified about the effect the fire had on Gabrielle. Because Gabrielle said that she felt the effects of the fire for about a year, the judge properly limited the evidence of Gabrielle's injuries to that period of time. The judge also made clear in his instructions that the jury could not award Gabrielle damages for any permanent injury. We are satisfied that, based on the totality of this evidence, the jury could reasonably find that Gabrielle had sustained damages in the amount of \$175,000 for her pain and suffering, disability, impairment and loss of the enjoyment of life.

[3] We are likewise convinced that there is sufficient evidence to support the jury's award of \$100,000 to Michael. Michael also sustained personal injuries in the fire. He too was entitled to an award for any pain and suffering, disability and impairment he sustained even if it was of short duration. Moreover, Michael testified that the fire caused him severe emotional distress. Even if Michael's physical injuries were relatively minor and his emotional distress was temporary, he was entitled to compensation for those injuries. In the circumstances, the award of \$100,000 for his pain and suffering, disability, impairment and loss of the enjoyment of life is not excessive.

Demwood argues, however, that the verdicts were tainted because the jury somehow came to believe that Berzak and Fleetwood were not insured because they did not participate in the trial. Demwood suggests that the jury awarded "extra" damages to compensate plaintiffs because they understood that plaintiffs could not collect damages awarded against Berzak and Fleetwood. The contention is without merit. Demwood's counsel informed the jury that Berzak had not filed an answer. But there is no basis in the record for the assumption that the jury believed Berzak did not appear because Berzak was not insured and chose to award "extra" damages to address the situation.

[4] Demwood additionally argues that the award to Gabrielle is flawed because her family members were permitted to testify about her emotional dis-

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tress and she did not present any expert testimony to support her claim. We disagree. "Generally, in tort actions, expert testimony is indispensable only when the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment about it." *J.W. v. L.R.*, 325 N.J.Super. 543, 547, 740 A.2d 146 (App.Div.1999) (citing *Butler v. Acme Markets, Inc.*, 89 N.J. 270, 283, 445 A.2d 1141 (1982)). We held in *J.W.* that the plaintiff could testify as to the emotional distress she experienced when she was sexually abused by her father. *Ibid.* We held that expert testimony was not required "to establish causation of that kind of pain and suffering any more than it does to consider the testimony of pain suffered by a person whose broken arm healed, but who says it has ached ever since and no longer enables him to lift weighty objects." *Ibid.* See also *Geler v. Akawie*, 358 N.J.Super. 437, 457, 818 A.2d 402 (App.Div.), *certif. denied*, 177 N.J. 223 (2003) (holding that an expert was not needed to present testimony to support claim for emotional distress resulting from inadequate genetic counseling).

*7 In this case, the jury did not require expert testimony to determine whether Gabrielle suffered severe emotional distress because she had been trapped in a burning building thinking that there was no way out. Surely, the matter was not so esoteric that jurors, drawing upon their own common judgment and experience, could not "form a valid judgment about it." *J.W.*, *supra*, 325 N.J.Super. at 547, 740 A.2d 146 (citing *Butler, supra*, 89 N.J. at 283, 445 A.2d 1141).

Moreover, there is no bar to family members testifying about a plaintiff's emotional distress. The family members in this case obviously had first-hand knowledge of the effect the fire had upon Gabrielle's emotional health. We are satisfied that the trial judge did not err in allowing the family members to testify concerning Gabrielle's emotional reaction to the fire.

[5] Demwood additionally contends that the judge erred in failing to treat plaintiff's claims as claims

for the negligent infliction of emotional distress. When an action is brought for the negligent infliction of emotional distress, the plaintiff must show that defendant's negligence caused "fright or shock severe enough to cause substantial injury in a person normally constituted." *Decker v. Princeton Packet*, 116 N.J. 418, 429, 561 A.2d 1122 (1989) (quoting from *Caputza v. The Lindsay Co.*, 48 N.J. 69, 76, 222 A.2d 513 (1966)).

However, in this case, plaintiffs did not assert claims for the negligent infliction of emotional distress. Their claims were not limited to emotional distress resulting from defendant's negligence. Plaintiffs were seeking compensation for the physical injuries as well as any pain and suffering, disability, impairment and loss of the enjoyment of life that was proximately caused by defendant's negligence. Plaintiffs' emotional distress was a part of damages sought on that claim. See *Geler, supra*, 358 N.J.Super. at 453, 818 A.2d 402 (holding that damages for emotional distress are the same as damages for pain and suffering and may be awarded upon "proper proofs" in tort actions).

In sum, we are satisfied that the damages awarded in this case are not excessive. The judge properly found that the damage awards did not shock the judicial conscience. We must give substantial deference to the findings of the trial judge where, as here, he presided over the trial and was able to bring his "feel of the case" to his assessment of the damage awards. *Dolson, supra*, 55 N.J. at 6, 258 A.2d 706. We therefore are convinced that the judge properly denied Demwood's motion for a new trial or remittitur.

III.

[6] In their cross-appeal, plaintiffs contend that the judge erred in allowing Demwood to obtain contribution from Berzak and Fleetwood through its third-party action because Berzak and Fleetwood were entitled to common law indemnity from Demwood. Plaintiffs assert that Demwood's third-party

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action should not have been permitted to proceed because, under the Joint Tortfeasors Contribution Act, "[N]o person shall be entitled to recover contribution under [the Act] from any person entitled to be indemnified by him in respect to the liability for which the contribution is sought." *N.J.S.A.* 2A:53A-3. Plaintiffs argue that the 40% liability assessed against Berzak and Fleetwood should be re-allocated to Demwood, or the allocation between Demwood and the property owners should be re-tried only.

*8 We disagree. Even were we to assume that Berzak was entitled to indemnification from Demwood under the common law, such indemnification would only be for Demwood's negligence and not Berzak's negligence. Here, Demwood sought contribution for the damages sustained by plaintiffs as a result of Berzak's negligence. Demwood was not seeking contribution from Berzak for any liability for which Berzak may have been entitled to indemnification under the common law. Therefore, Demwood's contribution claim is not barred by *N.J.S.A.* 2A:53A-3.

Plaintiffs raise other issues in their cross-appeal. They contend that: 1) the judge erred in precluding evidence that a cigarette could have started the fire; 2) the judge erroneously excluded a photograph of Demwood's truck; and 3) a judgment of liability should be directed against Demwood. Plaintiffs do not seek a new trial on the basis of these alleged trial errors. They raise these contentions in the event the judgment is reversed and the matter is remanded for trial. In view of our decision to affirm the judgment for plaintiffs, these issues are now moot.

In summary, we affirm the order of judgment entered in this action on January 25, 2005, and we affirm the order entered February 18, 2005 denying Demwood's motion for a new trial and plaintiffs' motion to reallocate damages.

Affirmed.

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