SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1422-20

SABRINA N. BLOCKER,

Plaintiff-Appellant,

and

NASIR COLE, an infant by his Guardian ad Litem, SABRINA N. BLOCKER, YUSEF COLE, an infant by his Guardian ad Litem, SABRINA N. BLOCKER,

Plaintiffs,

v.

RICHARD DELOATCH, VERNA DELOATCH and JOSEPH M. REVOLINSKY,

Defendants-Respondents,

and

DORIS HENRIQUEZ,

Defendant.

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Argued May 2, 2022 – Decided June 14, 2022

Before Judges Natali and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-2283-18.

Ernest Blair argued the cause for appellant (Law Offices of Karim Arzadi, attorneys; Ernest Blair, on the briefs).

John P. Gilfillan argued the cause for respondent Joseph M. Revolinsky (Kennedys CMK LLP, attorneys; John P. Gilfillan, of counsel and on the brief).

Helen A. Cummings argued the cause for respondents Richard DeLoatch and Verna DeLoatch (Campbell, Foley, Delano & Adams, LLC, attorneys, join in the brief of respondent Joseph M. Revolinsky).

PER CURIAM

In this automobile negligence action, plaintiff Sabrina Blocker,[1] appeals from two orders entered on March 13, 2020 granting summary judgment in favor of defendants Joseph Revolinsky, Richard and Verna DeLoatch (DeLoatch defendants), and dismissing plaintiff's complaint with prejudice. Plaintiff also appeals from a May 8, 2020 order denying reconsideration of the March 13, 2020 orders. We reverse the dispositive orders entered in favor of defendants.

[1] Blocker is the only plaintiff who is a party to this appeal.

I.

We derive the following facts from the record. On April 22, 2016, plaintiff was involved in a three-car accident in Franklin Township, with defendants Joseph Revolinsky and Richard Deloatch, who was operating a vehicle owned by Verna Deloatch (2016 accident). After the accident, plaintiff was transported to Saint Peter's University Hospital where she received emergency room treatment and was released. A few days later, plaintiff went to Robert Wood Johnson Medical Center complaining of low back pain, where she was treated and released.

Plaintiff was involved in a second accident that occurred on March 31, 2018 in New Brunswick (2018 accident) with defendant Doris Henriquez[2].

A. Dr. David Weiss

We begin with a review of plaintiff's treatment with Dr. David Weiss following the 2016 accident. In his initial progress note dated May 3, 2016, Dr. Weiss diagnosed plaintiff with an aggravation of pre-existing lumbar spine

[2] Defendant Doris Henriquez is not a party to this appeal. Plaintiff and Henriquez resolved their dispute, and a stipulation of dismissal was entered on December 15, 2020.

pathology "(bulging disc from workman's compensation injury in May 2015[3])" (2015 injury), among other diagnoses. In the September 6, 2016 progress note, Dr. Weiss noted that he reviewed an MRI of the lumbar spine performed on August 15, 2016, which revealed L5-S1 right paracentral disc herniation indenting the right anterior epidural space, as well as an aggravation of pre-existing lumbar spine pathology (2015 injury). Dr. Weiss's diagnoses remained unchanged. In the final progress note of January 16, 2017, Dr. Weiss made a diagnosis of chronic lumbosacral strain and sprain; herniated nucleus pulposus LS-S1; post-traumatic lumbar facet joint syndrome; and aggravation of pre-existing lumbar spine pathology (2015 injury). Plaintiff was discharged from treatment with a "permanent orthopedic impairment." Dr. Weiss did not review any of plaintiff's medical records or MRI films related to the 2015 injury during her treatment.

B. Dr. Michael J. Bercik

Dr. Bercik performed an orthopedic medical exam and prepared an April 12, 2019 narrative report. The report noted plaintiff, upon the advice of counsel, declined to give her medical history, but nevertheless concluded that plaintiff

[3] We have discerned from the record that Blocker was involved in an automobile accident in 2015.

complained of lower back pain related to the 2016 accident. Dr. Bercik reviewed an August 15, 2016 MRI study of the lumbar spine and a report, which noted a disc herniation at L5-S1. Dr. Bercik also reviewed a May 22, 2018 MRI study of the lumbar spine and report, which noted a disc bulging at L4-5 and L5-S1.

Dr. Bercik diagnosed Blocker with "post lumbosacral sprain" and set forth the following prognosis and comment:

> In my opinion in regard to the lumbosacral sprain apparently sustained by the [plaintiff] as a result of the motor vehicle accident of [April 22, 2016], the prognosis is good. [Plaintiff's] subjective complaints are noted above. There were no objective findings on examination to correlate with [plaintiff's] complaints. In my opinion, [plaintiff] has sustained no permanent physical impairment as a result of this injury.

An addendum report dated May 6, 2019 was served after Dr. Bercik received and reviewed additional medical records from 2014. Dr. Bercik reviewed the x-rays of the lumbar spine performed on July 15, 2014, which revealed a "grade I spondylolisthesis." The report noted a disc protrusion at L5-S1 was found in a July 23, 2014 MRI study of the lumbar spine.

Dr. Bercik prepared a second addendum report dated February 13, 2020. Dr. Bercik reviewed a June 12, 2015 MRI study of the lumbar spine, and a report, which noted a disc herniation at L5-S1. He further stated, "degenerative changes [were] noted at other levels" and "no disc herniation [was] seen." He

also stated the MRI films of the lumbar spine performed on June 12, 2015 were unchanged from the MRI films performed on July 23, 2014. Dr. Bercik opined that "plaintiff's diagnoses and prognoses in regard to the motor vehicle accident of [April 22, 2019[4]] remain[ed] unchanged from those stated in [his] previous reports."

Dr. Bercik also compared the 2016 MRI films to 2015 films and found them to be "otherwise unremarkable." Specifically, he found the "MRI films of the lumbar spine performed on [August 15, 2016] [were] unchanged from the MRI films of the lumbar spine performed on [June 12, 2015.]"

C. Dr. Wael Elkholy

Plaintiff's expert, Dr. Elkholy, conducted an evaluation after the 2018 accident and issued several narrative reports. In his February 13, 2020 report, Dr. Elkholy stated plaintiff complained of neck, lower back, and right knee pain, which she claimed, "interfered with her daily functioning and sleep." In the section titled History of Present Illness, Dr. Elkholy stated the "[i]njuries and need for surgical intervention were caused by the accident of [April 22, 2016] and were aggravated by the second accident of [March 31, 2018.]"

[4] We surmise that this was a typographical error since the accident occurred on April 22, 2016.

Dr. Elkholy reviewed the MRI of the lumbar spine performed on May 22, 2018, which revealed a "mild disc bulge, L4-L5 and L5-S1." He also reviewed the MRI of the lumbar spine performed on October 21, 2019, which disclosed:

> 1. Grade 1 anterolisthesis of L4 on L5 and L5 on S1.
>
> 2. L3-L4 annular disc bulge and bilateral facet hypertrophy impress on the thecal sac.
>
> 3. L4-L5, 2 mm central disc herniation, annular disc bule and bilateral facet hypertrophy impress on the thecal sac with narrowing of the lateral recesses bilaterally and narrowing of the neural foramina bilaterally. Disc bulge makes contact with the exiting of L4 nerve roots bilaterally.
>
> 4. L5-S1, annular disc bulge and bilateral facet hypertrophy impress on the thecal sac with narrowing of the lateral recesses bilaterally and narrowing, right worse than left. There is resulting impairment of the exiting right L5 nerve root. Disc bulge also makes contact with the exiting left L5 nerve root.

In the section titled Prognosis and Necessity of Future Medical Treatment, Dr. Elkholy opined:

> Before the accident of [April 22, 2016,] [plaintiff] had no complaints. After the accident of [April 22, 2016] and [March 31, 2018,] [plaintiff] suffered from low back pain, neck pain, and right knee pain which she is still suffering from at the current time. Subsequently, [plaintiff's] acute pain became chronic in nature and the pathology from the accident became chronic. Therefore, [plaintiff] will more likely than not require further treatment, medication, injections, and follow-up.

In the section titled Prognosis and Recommendation, Dr. Elkholy stated in relevant part:

> There is a causal relationship between the accidents of [April 22, 2016] and [March 31, 2018] and the injuries sustained in the low back, neck, and right knee. Her findings are consistent with her complaints, MRI's, and physical examination. The injuries are permanent in nature.

Dr. Elkholy issued a report dated March 31, 2020, which was an addendum to a January 20, 2020 report.[5] The report noted that Dr. Elkholy reviewed plaintiff's treatment records related to the 2016 accident. Based upon his review of those records, Dr. Elkholy's opinion expressed in the January 20, 2020 report "remain[ed] unchanged." He further opined that "plaintiff was involved in a previous [motor vehicle accident] on [April 22, 2016] injuring her lower back and receiving treatment." Dr. Elkholy related the 2016 accident to the 2018 accident by concluding "her low back pain significantly worsened after being involved in the most recent [motor vehicle accident] and her previous condition became accentuated." (Emphasis added.)

[5] This report was not an exhibit to the motion for summary judgment or reconsideration.

Plaintiff filed a complaint in April 2018 asserting a negligence claim. Plaintiff sought damages for "permanent injuries" sustained because of the 2016 and 2018 accidents. Plaintiff however did not allege that the 2016 and 2018 accidents aggravated any previously sustained injuries.

In January 2020, prior to the expiration of discovery,[6] defendant Revolinsky moved for summary judgment contending plaintiff failed to serve an expert report containing a comparative analysis of the injuries sustained prior to the 2016 accident, the injuries suffered in the 2016 accident, and the injuries sustained in the 2018 accident; and how those accidents may have aggravated or exacerbated the injuries that pre-existed. The Deloatch defendants "joined in" defendant Revolinsky's motion.

At oral argument, plaintiff served Dr. Elkholy's February 13, 2020 report. The motions were adjourned to allow defendant Revolinsky to file a responsive pleading addressing the report.

On March 13, 2020, the motion judge granted both dispositive motions and dismissed plaintiff's complaint. In a written statement of reasons, the motion judge opined that "the report of Dr. Elkholy [was] deficient under

[6] The trial court's case management order entered on January 14, 2020 set a May 15, 2020 discovery end date.

Davidson v. Slater, 189 N.J. 166 (2007), and [was] also nothing more than a mere net opinion. See Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)."

The motion judge further stated:

> Further, Dr. El[k]holy fail[ed] to even indicate any analysis as to whether or how the injuries alleged in the [April 22, 2016] accident were aggravated by the [March 31, 2018] accident. This combined with the fact that no records/studies were reviewed concerning injuries [p]laintiff clearly sustained prior to her [April 22, 2016] accident, render[ed] Dr. Elkholy's [February 14, 2020] report fatally flawed on the principle of causation, the burden allocation, and the need to prove the ultimate permanent injuries were caused by which accident and breakdown of same.

Plaintiff moved for reconsideration of the March 13, 2020 orders. In support of her motion, plaintiff relied upon various medical records from the 2016 accident and Dr. Elkholy's March 31, 2020 addendum report, which was not included in the initial opposition.

The motion judge did not conduct oral argument. Instead, he denied plaintiff's motion and provided a written statement of reasons. The motion judge found plaintiff failed to "[meet] the standard for reconsideration under [Rule] 4:49-2." The motion judge explained that his decision was based on the parties' submissions "at that time." The motion judge found plaintiff's belated

submission of the March 31, 2020 report, a "new addendum report," in support of the motion for reconsideration improper.

The motion judge also declined to utilize Rule 4:42-2(3) to "revisit [the court's] prior determination. The motion judge explained that "[the Rule] is not to be used to circumvent other [c]ourt rules, and certainly not used to allow a party a "do over" after the [c]ourt had ruled." The motion judge ruled that the "interest of justice [did] not support vacating the prior order.

This appeal followed, with plaintiff asserting that: she was not required to present a comparative analysis pursuant to Davidson regarding the injuries sustained prior to the 2016 accident, from the 2016 and 2018 accidents, and whether those accidents may have aggravated or exacerbated her 2015 injury. Plaintiff also asserts summary judgment was improperly granted because her injuries from the 2016 accident met the verbal threshold; alternatively, only noneconomic damages should have been dismissed; the court erred in denying reconsideration. Lastly, plaintiff argues the court erred in finding Dr. Elkholy's February 13, 2020 report was a "net opinion."

II.

A. Summary Judgment Motions

We apply the same standard as the trial court in our review of summary judgment determinations. Lee v. Brown, 232 N.J. 114, 126 (2018). "Summary judgment is appropriate 'when no genuine issue of material fact is at issue and the moving party is entitled to a judgment as a matter of law.'" Ibid. (quoting Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 366 (2016)). We conduct a de novo review of the court's determination of legal issues, Ross v. Lowitz, 222 N.J. 494, 504 (2015), and "its 'application of legal principles to such factual findings.'" Lee, 232 N.J. at 127 (quoting State v. Nantambu, 221 N.J. 390, 404 (2015)).

Under that standard, summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995) (quoting R. 4:46-2). "An issue of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.'"

Grande v. St. Clare's Health Sys., 230 N.J. 1, 24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)).

We must give the non-moving party "the benefit of the most favorable evidence and most favorable inferences drawn from that evidence." Est. of Narleski v. Gomes, 244 N.J. 199, 205 (2020) (quoting Gormley v. Wood-El, 218 N.J. 72, 86 (2014)). However, we owe no special deference to the motion judge's legal analysis. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018) (citing Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016)).

In New Jersey, the holder of every standard automobile liability insurance policy must select one of two tort options: the "[l]imitation on lawsuit option" or the "[n]o limitation on lawsuit option." N.J.S.A. 39:6A-8. A person covered by an insurance policy with the limitation on the lawsuit option enjoys only "a limited right of recovery" for noneconomic damages sustained in automobile collisions. DiProspero v. Penn, 183 N.J. 477, 486 (2005). When a plaintiff is covered by the limitation on lawsuit option, he or she is bound to the "verbal threshold" and may only recover in tort for non-economic damages if he or she "vaults" the threshold. Davidson, 189 N.J. at 181.

To vault the verbal threshold, a plaintiff must satisfy two burdens. First, to obtain non-economic damages, a plaintiff with the verbal threshold must show that "as a result of bodily injury, arising out of [defendants'] . . . operation, . . . or use of . . . [their] automobile[s] . . . in this State . . . [they suffered] a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement." See N.J.S.A. 39:6A-8(a). A "permanent injury" is one that "has not healed to function normally and will not heal to function normally with further medical treatment." Ibid.

Second, to obtain non-economic damages, a plaintiff with the verbal threshold must show that his or her injuries were proximately caused by defendants' negligence. Davidson, 189 N.J. at 185. "[T]he issue of a defendant[s'] liability cannot be presented to the jury simply because there is some evidence of negligence. 'There must be evidence or reasonable inferences therefrom showing a proximate causal relation between defendant[s'] negligence, if found by the jury,' and the resulting injury." Reynolds v. Gonzalez, 172 N.J. 266, 284 (2002) (quoting Germann v. Matriss, 55 N.J. 193, 205 (1970)).

Once a plaintiff proves permanent injury as to one body part, the verbal threshold imposes no impediment to recovery for non-economic damages caused

by injuries to other body parts, regardless of whether those injuries are permanent. Johnson v. Scaccetti, 192 N.J. 256, 261-62 (2007) (stating "that once a plaintiff suffers a single bodily injury that satisfies a threshold category, the jury may consider all other injuries in determining noneconomic damages").

In Polk v. Daconceicao, 268 N.J. Super. 568, 575 (App. Div. 1993), we held that when a plaintiff claims an automobile accident alleged in a complaint aggravated a preexisting injury, to avoid summary judgment plaintiff is required to provide a comparative medical analysis so that plaintiff's residuals prior to the accident might be correlated with the injuries suffered in the accident in question. Polk articulated a rule that, "[w]ithout a comparative analysis, the conclusion that the pre-accident condition has been aggravated must be deemed insufficient to overcome" the no-fault verbal threshold. Ibid.

In Davidson, our Supreme Court addressed the evidentiary burden of a plaintiff who had a history of prior injuries but did not plead aggravation in seeking damages for injuries allegedly caused by a single recent automobile collision. Id. 169. The Court concluded that the plaintiff could "carry her burden of moving forward in her non-aggravation case by demonstrating the existence of a 'permanent' injury resulting from the automobile accident without having to exclude all prior injuries to the same body part." Id. at 170.

We conclude that the motion judge erred in granting defendants' summary judgment motions. Defendants' contention that plaintiff was required to present proof as to which accident caused her injuries is unsupported by Davidson. Defendants make this argument notwithstanding the absence of an allegation of aggravation of past injuries in plaintiff's complaint.

We reject this contention and conclude that since plaintiff did not plead aggravation, she was not required to provide a comparative analysis of her past, present, and subsequent injuries in accordance with Davidson. Id. at 186. Nor was she required, as part of her prima facie case, to provide such a comparative analysis, under basic tort law principles and burden allocation when applied. Id. at 187; see also Johnson, 192 N.J. at 284.

We similarly reject defendants' contention that plaintiff's responses to defendant's interrogatories sufficiently demonstrate an aggravation of past injuries. The motion judge was not presented with plaintiff's responses and thus, the motion judgment could not consider the response. Therefore, "we limit our consideration as necessary to the motion record that existed when the order was entered." Innes v. Marzano-Lesnevich, 435 N.J. Super. 198, 208 (App. Div. 2014) (quoting Ji v. Palmer, 333 N.J. Super. 451, 463-64 (App. Div. 2000)).

Defendants, as opposed to plaintiff, should have been assigned the burden to differentiate the causative effect of the respective collisions. A "defendant, in response to an allegation that his or her negligence has caused injury, possesses the right of demonstrating by competent evidence that that injury 'could' have been caused, wholly or partly, by an earlier accident or by a pre-existing condition." Davidson, 189 N.J. at 187. Defendants are free to demonstrate such allocation before a rational factfinder.

Here, as previously discussed, plaintiff has not alleged an aggravation of pre-existing injuries, and has overcome overcame these risks and "produce[d] evidence on all basic elements of her pled tort action" despite not producing a comparative analysis, "her case may proceed to trial, except when the defendant can show that there is no genuine factual issue as to an element of the plaintiff's tort claim." Ibid.

The proofs provided by plaintiff provided sufficient causation opinions to survive summary judgment. The narrative reports relied upon by the parties were devoid of analysis of the 2015 injury. Despite defendants' assertion that Dr. Weiss diagnosed plaintiff with an aggravation of a pre-existing back injury related to the 2015 injury and plaintiff' admitted to the 2015 injury in her deposition testimony, the facts adduced during discovery do not equate to

pleading aggravation in a complaint. Additionally, Dr. Elkholy's report was limited to the 2018 accident and made no reference to the 2015 injury. While Dr. Bercik's February 13, 2020 report noted the 2015 injury, the report contains an oblique reference that the "MRI films of August 2016 were unchanged when compared to those of June 2015."

Based upon our review of the record, viewed in the light most favorable to plaintiff as the non-moving party, a reasonable factfinder could find that defendants' conduct, jointly or severally, caused plaintiff to sustain an injury arising out of the 2016 accident. Whether causation exists is a question for the factfinder.

We add the following comment. We disagree with the motion judge's determination to reject Dr. Elkholy's February 13, 2020 opinion as a net opinion since the report was not the subject of a motion before the court. Accordingly, the motion judge erred by concluding otherwise.

B. Reconsideration Motion

In light of our decision to reverse and remand the summary judgment orders, we need not address plaintiff's challenge to the reconsideration order.

We reverse the dispositive orders, and remand for further proceedings. We do not retain jurisdiction.