RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3187-21

C.W.,[1]

Plaintiff-Appellant,

v.

ROSELLE BOARD OF EDUCATION,

Defendant-Respondent,

and

NEW JERSEY BOARD OF EDUCATION,

Defendant,

and

ROSELLE BOARD OF EDUCATION,

Third-Party Plaintiff,

v.

GILBERT YOUNG, JR.,

Third-Party Defendant.

APPROVED FOR PUBLICATION
February 21, 2023
APPELLATE DIVISION

[1] We use initials to protect plaintiff's privacy. R. 1:38-3(c)(9).

_____

Argued November 30, 2022 – Decided February 21, 2023

Before Judges Currier, Mayer and Enright.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Union County, Docket No. L-0153-20.

J. Silvio Mascolo argued the cause for appellant (Rebenack, Aronow & Mascolo, LLP, attorneys; J. Silvio Mascolo, of counsel and on the briefs).

Roshan D. Shah argued the cause for respondent (Anderson & Shah, LLC, attorneys; Roshan D. Shah and Todd S. McGarvey, of counsel and on the brief; Erin Donegan, on the brief).

The opinion of the court was delivered by

CURRIER, P.J.A.D.

On leave granted, we consider whether plaintiff, an alleged victim of sexual abuse by a teacher, is barred from seeking pain and suffering damages under the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to -12.3, because he has not incurred the requisite amount of medical expenses. Despite the Legislature's recent amendments to the TCA regarding child sexual abuse claims, it did not eliminate the statutory threshold regarding medical expenses. Therefore, we affirm the trial court's order barring plaintiff from seeking pain and suffering damages.

In 2020, plaintiff instituted suit against defendant Roselle Board of Education (defendant or Roselle) alleging he was sexually abused by a schoolteacher employed by Roselle on two instances in 2004 and 2005. Plaintiff was sixteen years old at the time of the abuse.

In his answers to interrogatories, plaintiff stated he sustained permanent physical and mental injuries from the abuse. He said, "any penetration causes [him] severe pain and makes [him] uncomfortable, even in consensual relationships." He explained he has difficulty developing romantic relationships and he developed anxiety and depression.

Plaintiff was not treated by any healthcare professional as a result of the sexual abuse. He did not incur any medical expenses.

In the summer of 2021, Jon R. Conte, Ph.D., conducted a psychological evaluation of plaintiff and subsequently issued a report. Dr. Conte "noted that [plaintiff] has an extremely difficult time discussing the sexual abuse . . . . [H]is memory is poor but there was an obvious emotional component to his difficulty discussing the abuse. He said he does not like to think about it and tries very hard not to most of the time." The expert stated plaintiff indicated he had "hopes" of getting involved with psychotherapy.

Dr. Conte further stated that plaintiff's "vulnerabilities rendered the impact of the abuse by [the schoolteacher] more significant and are a

contributing factor to his subsequent functioning. His self-report in the testing indicates significant current difficulties with identity, relatedness (including distrust of others, social isolation), affect regulation, and depression." Dr. Conte concluded that plaintiff "should be helped to develop affect regulation skills before trauma-informed therapy."

On December 23, 2021, Dr. Conte provided a supplemental report in response to a defense psychological expert report. Dr. Conte stated that plaintiff "has been permanently changed and harmed as a result of the sexual abuse he suffered at the hands of a former teacher."

Defendant moved for summary judgment. The court granted the motion in part, dismissing plaintiff's intentional infliction of emotional distress claim. The court did not dismiss the claims for negligence and negligent infliction of emotional distress, finding there was an issue of material fact whether plaintiff established a permanent injury. The judge did not address defendant's argument that plaintiff did not meet the TCA's $3,600 medical expenses threshold.

Defendant moved for reconsideration. On April 20, 2022, the court granted the motion in part, finding plaintiff was barred under the TCA from seeking pain and suffering damages, but denied defendant all other forms of relief. In a written statement of reasons, the judge noted that Dr. Conte did not

opine that plaintiff would incur at least $3,600 in medical expenses. The judge stated in a footnote:

> Plaintiff conceded at oral argument that for the [c]ourt to hold that [p]laintiff has vaulted the threshold despite the absence of a certification of $3,600 of medical expenses, the [c]ourt would have to create new law. However, it is axiomatic that although a trial court can []"discover" what the law has always been it cannot create new law. State v. Knight, 145 N.J. 233, 249 (1996). N.J.S.A. 59:9-2(d) is clear and unambiguous on its face that the $3,600 medical expense threshold is a strict prerequisite to vault the verbal threshold under the TCA. Because this [c]ourt "ascribes to the statutory words their ordinary meaning and significance," DiProspero v. Penn, 183 N.J. 477, 492 [] (2005), [p]laintiff's failure to vault the verbal threshold's medical expense requirement is fatal to his claims for pain and suffering damages. See J.H. v. Mercer C[n]ty. Youth Det[.] Ctr., 396 N.J. Super. 1, 20 (App. Div. 2007); Lascurain v. City of Newark, 349 N.J. Super. 251 (App. Div. 2002); Thorpe v. Cohen, 258 N.J. Super. 523, 527-28 (App. Div. 1992).

We granted plaintiff leave to appeal.

On appeal, plaintiff contends he has satisfied the medical expense threshold under N.J.S.A. 59:9-2(d). He further asserts that barring a plaintiff in a civil child sexual abuse case from seeking pain and suffering damages under the TCA is contrary to the legislative intent of the Act. And, for the first time, plaintiff contends the court's order precluding pain and suffering damages violates the legislative intent of the Child Victims Act (CVA), L. 2019, c. 120.

We review a trial court's decision on a motion for summary judgment de novo, the same standard used in the trial court. Stewart v. N.J. Tpk. Auth./Garden State Parkway, 249 N.J. 642, 655 (2022). We must 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 v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). A motion for summary judgment must be granted "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." R. 4:46-2(c).

Plaintiff contends he met the medical expense threshold under N.J.S.A. 59:9-2(d). He asserts that because Dr. Conte concluded plaintiff "will in all likelihood need future treatment," "[a] rational fact finder could conclude that [p]laintiff's future psychological treatment and therapy as a result of the childhood sexual abuse will exceed the $3[,]600 medical expense threshold." Plaintiff relies on J.H. v. Mercer Cnty. Youth Det. Ctr., 396 N.J. Super. 1, 21 (App. Div. 2007), to assert the medical expense threshold of N.J.S.A. 59:9-

2(d) may be satisfied by both current and future medical expenses that exceed $3,600.

N.J.S.A. 59:9-2(d) provides:

> No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $3,600.00.

As we recently stated, this provision "does not purport to free a public entity from liability. It instead limits the damages that may be awarded once a public entity is held liable by precluding damages for pain and suffering unless certain circumstances are met." E.C. by D.C. v. Inglima-Donaldson, 470 N.J. Super. 41, 55 (App. Div. 2021).

In considering this statute, we have stated it "preclud[es] 'recovery for pain and suffering based on subjective evidence or minor incidents,' but [allows] recovery when 'there are aggravating circumstances such as the permanent loss of a bodily function, a permanent disfigurement, or dismemberment, and the medical expenses exceed [$3,600].'" Willis v. Ashby, 353 N.J. Super. 104, 109 (App. Div. 2002) (quoting Collins v. Union Cnty. Jail, 150 N.J. 407, 413 (1997)). This reasoning is derived from the 1972 Task Force Comment (Task Force Comment) advising the statute

> reflects the policy judgment that in view of the economic burdens presently facing public entities a claimant should not be reimbursed for non-objective types of damages, such as pain and suffering, except in aggravated circumstances—cases involving permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of [$3,600]. The limitation that pain and suffering may only be awarded when medical expenses exceed [$3,600] insures that such damages will not be awarded unless the loss is substantial.

Our Supreme Court has stated the Task Force Comment is "a substantial guide to the Legislature's intent." Costa v. Josey, 79 N.J. 535, 539 (1979).

Plaintiff's reliance on J.H. is unavailing. There, the plaintiff incurred $1,300 in medical expenses for psychotherapy and medical management after he was sexually abused by a detention center worker. 396 N.J. Super. at 4, 8. The trial court granted the defendants partial summary judgment, finding in part that the plaintiff's common-law claims were barred under N.J.S.A. 59:9-2(d) because he did not meet the medical expense threshold. Id. at 5. In support of the plaintiff's motion for reconsideration, the plaintiff's psychiatrist opined that the plaintiff had permanent emotional damage, and "treatment would merely be an attempt to ameliorate the situation and prevent his condition from becoming worse." Id. at 8. The psychiatrist opined that the plaintiff would incur $30,000 in future treatment costs. Id. at 9. The court denied the plaintiff's motion for reconsideration. Id. at 5.

On appeal, we affirmed the judge's ruling granting summary judgment on the common law claims because the plaintiff had not established he suffered a permanent injury or that he would reach the $3,600 monetary threshold "as a result of future treatment." Id. at 21. We determined the expert's projected future costs was a net opinion. Ibid. Therefore, the plaintiff had not met the $3,600 threshold and could not pursue his claims.[2] Ibid.; see also Nieves v. Public Defender, 241 N.J. 567, 571-72, 584-85 (2020) (affirming the trial court's decision to grant the defendant's summary judgment motion, thereby denying the plaintiff damages for pain and suffering under the TCA, where the plaintiff "had not demonstrated permanent psychological injury accompanied by physical symptoms and had failed to produce evidence of $3,600 in medical expenses").

Here, in its March 7, 2022 order denying defendant summary judgment, the court found that because plaintiff "was sexually abused as a minor, he [was] entitled to a presumption of permanent and/or substantial injury for purposes of the TCA." The court did not address the medical expenses limitation. On reconsideration, the court found plaintiff had not met the statutory monetary threshold.

[2] We reversed the court's grant of summary judgment on plaintiff's claims brought under the Child Sexual Abuse Act, N.J.S.A. 2A:61B-1. Id. at 22.

We need not address the permanency prong as it is not an issue before us. We only consider whether Dr. Conte's report was sufficient to satisfy the TCA medical expense limitation.

We disagree with plaintiff that Dr. Conte's statement that "plaintiff should be helped" rises to an opinion that plaintiff must and will undergo treatment. Plaintiff has sought no treatment in the fifteen years since the abuse occurred. While we do not fault plaintiff in any way, any claim of costs for future medical treatment is speculative. Dr. Conte also opined plaintiff's need for psychotherapy arose from his "complex trauma history with significant adversities over most of his life." Like the psychiatrist in J.H., Dr Conte did not relate plaintiff's need for medical treatment directly to the sexual abuse. See J.H., 396 N.J. Super. at 21.

Plaintiff and Dr. Conte did not present any evidence of the cost of past, present, or future medical expenses incurred as a result of the sexual abuse by the teacher. Therefore, plaintiff did not meet the requisite monetary threshold under the TCA to defeat summary judgment on his claims of pain and suffering.

In the alternative, plaintiff contends a medical threshold should not be required in cases of child sexual abuse. Plaintiff relies on the TCA's

legislative history, including the Task Force Comment, and our courts' interpretations of the statute.

Plaintiff asserts the language in the Task Force Comment reflects the Legislature's intent for the monetary threshold to only bar recovery for "non-substantial losses." And that New Jersey courts have recognized the harm caused by child sexual abuse is substantial.

In addition, plaintiff argues that because "childhood sexual abuse disclosure at or near the time of abuse is rare," "requir[ing] victims . . . to meet a monetary threshold would require them to actively seek medical and/or psychological treatment," which is unjust and contrary to the purpose of the TCA.

We are unpersuaded. The Task Force Comment plainly states: "[t]he limitation that pain and suffering damages may only be awarded when medical expenses exceed [$3,600] insures that such damages will not be awarded unless the loss is substantial."

We acknowledge that, in considering the TCA in cases involving child sexual abuse, New Jersey courts have concluded that the harm sustained by a child who is sexually molested meets the requirement of N.J.S.A. 59:9-2(d) regarding a permanent loss of a bodily function even when the injury only manifests itself in psychological symptoms. See Collins, 150 N.J. at 420-21;

A.C.R. by L.R. v. Vara, 264 N.J. Super. 565, 571-72 (Law Div. 1992). However, the monetary threshold is a separate requirement from the permanency of the injury both in the statute and as interpreted in case law.

The issue of whether the plaintiff met the medical expense threshold was not before the Collins Court. Therefore, the Court did not find the monetary threshold was inapplicable to child sexual abuse cases. Nor has any court subsequent to Collins found that the monetary threshold is not applicable to child sexual abuse cases. Therefore, it remains clear that, to obtain pain and suffering damages under the TCA, a plaintiff must demonstrate the permanent loss of a bodily function and that the medical treatment expenses are in excess of $3,600. N.J.S.A. 59:9-2(d).

Plaintiff also asserts that it is unjust to require a child victim of sexual assault to seek treatment to satisfy the monetary threshold. We disagree.

Although a plaintiff must demonstrate $3,600 of medical costs, in J.H. we did not foreclose the possibility of future treatment costs satisfying the monetary threshold. 396 N.J. Super. at 21. We found that the expert did not provide sufficient evidentiary support for the alleged future treatment costs, estimated at $30,000. Ibid. Here, plaintiff has not incurred any medical costs in the fifteen years since the abuse and no expert has opined he will seek such treatment and what the cost might be. Moreover, plaintiff is only barred from

seeking pain and suffering damages under N.J.S.A. 59:9-2(d). He is not foreclosed from other available damages under the statute.

For similar reasons, we do not accept plaintiff's argument that requiring him to prove a medical threshold is contrary to the legislative intent of the CVA. Plaintiff refers to comments made by lawmakers indicating the CVA is intended to address a child abuse victim's opportunity to pursue a claim. However, in codifying the CVA, the Legislature enacted N.J.S.A. 59:2-1.3 to amend the TCA and remove immunity for public entities and employees where a sexual assault or other sexual crime formed the basis for the complaint. Child Victims Act, L. 2019, c. 120, § 7 (codified as amended at N.J.S.A. 59:2-1.3). The Legislature did not eliminate or amend the medical expense threshold provision. The medical threshold requirement, a non-immunity provision, remained intact.

As we stated in E.C., "N.J.S.A. 59:9-2(d) is not an immunity but only a limitation on liability since it states that '[n]o damages shall be awarded against a public entity or public employee for pain and suffering resulting from an injury,'" except that "this limitation on the recovery of damages" does not apply to the "permanent loss of a bodily function . . . where the medical treatment expenses are in excess of $3,600.00." 470 N.J. Super. at 54-55

(quoting N.J.S.A. 59:9-2(d)). Thus, the provision "remains applicable in cases [involving sexual misconduct by a public school teacher]." Id. at 54, 56.

The statutory language and the intent behind the statute are both clear. Although the CVA intended to expand a sexual abuse victim's available remedies in court, the Legislature did not eliminate the medical threshold required under the TCA for a child sexual abuse case. See Ibid. The trial court properly granted defendant summary judgment on plaintiff's claim for pain and suffering damages.

Affirmed.