SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3891-14T2

RICHARD J. GRECO,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY and STATE OF NEW JERSEY DEPARTMENT OF TRANSPORTATION,

Defendants-Respondents,

and

DIPTIBEN DESAI, KIRAN DESAI, FILOMENIA ZALEWSKI, DONALD C. ZALEWSKI, COUNTY OF MIDDLESEX, WOODBRIDGE TOWNSHIP, COUNTY OF MIDDLESEX ROAD DEPARTMENT, WOODBRIDGE TOWNSHIP POLICE DEPARTMENT, ERIN V. WILLIS and AMBREEN BAIG,

Defendants.

Argued November 2, 2016 – Decided March 6, 2017

Before Judges Accurso and Manahan.[1]

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[1] Hon. Carol E. Higbee was a member of the panel before whom this case was argued. The opinion was not approved for filing prior to Judge Higbee's death on January 3, 2017. Pursuant to R. 2:13-2(b), "Appeals shall be decided by panels of 2 judges designated by the presiding judge of the part except when the presiding judge determines that an appeal should be determined

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On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4134-12.

Christopher J. Koller argued the cause for appellant (Charles I. Epstein, attorney; Mr. Koller, on the brief).

Kevin J. Fleming, Deputy Attorney General, argued the cause for respondents (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Mr. Fleming and Marti B. Alhante, Deputy Attorney General, on the brief).

PER CURIAM

In this Title 59 matter, plaintiff Richard J. Greco appeals from a jury verdict against defendant State of New Jersey, Department of Transportation, which awarded him damages for medical expenses and lost wages but denied any recovery for pain and suffering because plaintiff had not "sustain[ed] an injury which constitutes a permanent loss or limitation of a bodily function that is substantial." Because plaintiff is precluded from arguing the verdict is against the weight of the evidence by his failure to file a motion for new trial, see R. 2:10-1,

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by a panel of 3 judges." The presiding judge has determined that this appeal remains one that shall be decided by two judges. Counsel has agreed to the substitution and participation of another judge from the part and to waive reargument.

and we find no error in the jury instructions to which plaintiff did not object, we affirm.

Plaintiff was injured when he fell off his motorcycle exiting Route 9 onto Green Street in Woodbridge. Sand on the exit ramp caused him to lose control of the bike and collide with broken sand attenuator barrels owned and maintained by the Department of Transportation. He testified that when he came off the motorcycle, his left leg struck the wall of the overpass and his right leg hit the ground and "maybe part of the broken barrel." The jury found the State sixty percent liable for the happening of the accident and plaintiff forty percent liable, and awarded him $210,000 in lost wages and $40,000 in medical expenses, but nothing for pain and suffering.

Plaintiff claims the judge erred in describing the "body function claimed lost" in her charge to the jury. In order to evaluate his claim, we review the evidence presented to the jury regarding the injuries he suffered in the accident.

Although plaintiff declined treatment at the scene, he went to the hospital a few hours later after experiencing pain in his left knee. He tried to return to his job as a truck driver a few days later but could not get through the day. He has never returned to work.

After some months of conservative treatment, plaintiff consulted an orthopedist, Dr. Ryan, who concluded plaintiff had suffered a partial tear of his left ACL (anterior cruciate ligament), effusion, bone bruising, medial meniscus tear and a medial collateral ligament strain. Dr. Ryan performed an arthroscopic ACL reconstruction of plaintiff's left knee. Seven months after the surgery, Dr. Ryan discharged plaintiff, finding he had full range of motion and was pain-free.

Plaintiff returned to Dr. Ryan a year later complaining of pressure, stiffness and swelling in his left knee that worsened with activity. Dr. Ryan noted inflammation over the patella femoral joint and "a small spur in the middle area of his knee called the intercondylar notch." He diagnosed "patella chondromalacia which is wear of the kneecap, and a symptomatic scar band in his knee." Asked at trial about his prognosis for plaintiff at that point, the doctor responded that if plaintiff "stayed in his current position, he would have persistent symptoms and pain."

Plaintiff testified that after Dr. Ryan discharged him, he not only continued to experience a grinding sensation in his left knee when he bent it under pressure, but his right knee had begun to hurt as well. A different orthopedist, Dr. Longobardi, performed a second ACL reconstruction of plaintiff's left knee

using a cadaver ligament. Plaintiff was on crutches for eight to ten weeks after that surgery and attended physical therapy for ten to eleven months.

Still experiencing symptoms many months after his second ACL reconstruction, plaintiff sought an opinion from another orthopedist, Dr. Freeman. Dr. Freeman testified that plaintiff had suffered "post-traumatic changes to the medial femoral condyle of the [left] knee," which required another surgery. Dr. Freeman performed the surgery, a microfracture procedure, which consisted of drilling holes in the bone to create a bleeding response to create more cartilage. After the surgery, plaintiff experienced pain underneath his left kneecap requiring a series of lubricating injections. Dr. Freeman testified that nine months after plaintiff's third surgery, the left knee was better but plaintiff was "having a lot of clicking and popping" in the right knee. An MRI of plaintiff's right knee revealed inflammation of the right knee cartilage. Plaintiff began having lubricating injections to the right knee as well. Dr. Freeman testified that a person with plaintiff's type of injury would not be able to perform the daily activities of a truck driver.

Plaintiff testified he has constant pain in both knees, even when he sleeps. He claimed he could not go back to work

after the accident, although cleared by his doctors, because he cannot lift or carry things, cannot walk up and down the stairs and must regularly use a cane.

The State also presented the testimony of an orthopedist, Dr. Egan, who examined plaintiff in anticipation of trial. Dr. Egan claimed plaintiff complained of "some pain" in his left knee when he "stepped heavy on it." Plaintiff also complained of pain in his right knee from overuse. Dr. Egan found plaintiff's reconstructed ACL "worked well," and that plaintiff had excellent mobility and excellent gait dynamics and "no loss of mobility of either lower extremity." Based on his examination, Dr. Egan expressed the opinion that if plaintiff "continued with his postoperative rehabilitation[,] there should be no reason that he would not be able to achieve a full, complete, and successful recovery."

The judge conducted four charge conferences on the record with counsel. She explained the instructions she intended to give, which closely tracked the model charges, and provided counsel with a copy of a proposed verdict sheet. Neither party expressed any disagreement with any aspect of the charge. In the course of delivering model charge 8.70, "Tort Claims Act Threshold for Recovery of Damages for Pain and Suffering," the judge explained that in order to recover for pain and suffering,

plaintiff had to prove he "suffered a permanent loss of a bodily function." The judge addressed the body function claimed lost by saying:

> Now, with respect to a permanent injury, the plaintiff claims that he has suffered a permanent loss of the use of his knees, so the loss — so he needs to prove that he — a permanent loss of that particular function, the use of his knees, and the loss need not be total, but it must be substantial. Mere limitation is insufficient. And so by that I mean the plaintiff must prove his loss by a demonstration of objective credible medical evidence of permanent injury because damages for temporary injury are not recoverable.
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> The proof must be both objective and credible. Objective means that the evidence must be verified by physical examination, diagnostic testing, and/or observation and credible evidence means that evidence that is believable. The plaintiff may not recover for mere subjective feelings of discomfort.

The corresponding question on the verdict sheet read: "Did the Plaintiff, Richard Greco, as a result of the accident of June 17, 2010 sustain an injury which constitutes a permanent loss or limitation of a bodily function that is substantial?" The jury answered that question in the negative by a vote of eight to zero.

On appeal, plaintiff claims the court's description of the "bodily function claimed lost," "a permanent loss of the use of

his knees," was an inaccurate description of his claim. He contends he did not "claim a permanent loss of use of both knees," and that the court's reference to both knees "was erroneous and misleading" because "Greco did not claim a permanent loss of the use of his right knee."

Plaintiff further contends he "did not suffer the 'permanent loss of use of his knees' but rather an objective permanent injury to his left knee, which permanent injury constituted a permanent loss of the functioning of his left knee that was substantial." He argues that his testimony and that of his doctors established that permanent injury, and the court's error in focusing on the "use" of both knees as opposed to the "function" of his left knee constituted plain error. We disagree.

As plaintiff concedes, he did not object to the court's description of the bodily function he claims he lost, even when given the opportunity after hearing the charge read to the jury. We thus review his objection to the court's charge under a plain error standard, meaning we disregard any error unless "clearly capable of producing an unjust result." R. 1:7-2; R. 2:10-2; Mogull v. CB Commercial Real Estate Group, Inc., 162 N.J. 449, 464 (2000). Stated differently, although "'a manifestly unjust result shall not be ordered because of the oversight of the

advocate,' [c]onversely, however, '[o]versight and inadvertencies of the court deemed to be harmless and unimportant by the attorney at the trial cannot . . . be normally exaggerated on appeal.'" Jurman v. Samuel Braen, Inc., 47 N.J. 586, 591 (1966) (internal quotations omitted). Instead, we infer "'a degree of passive indifference, if not acquiescence.'" Ibid.

"A jury is entitled to an explanation of the applicable legal principles and how they are to be applied in light of the parties' contentions and the evidence produced in the case." Prioleau v. Ky. Fried Chicken, Inc., 223 N.J. 245, 256 (2015) (quoting Viscik v. Fowler Equip. Co., 173 N.J. 1, 18 (2002)). Although it is axiomatic that accurate and understandable jury instructions are essential to a fair trial, see Velazquez ex rel. Velazquez v. Portadin, 163 N.J. 677, 688 (2000), a party is not entitled to have a jury charged in the words of his choosing, Kaplan v. Haines, 96 N.J. Super. 242, 251 (App. Div. 1967), aff'd, 51 N.J. 404 (1968), overruled on other grounds, Largey v. Rothman, 110 N.J. 204 (1988).

Further, as our Supreme Court has observed, "not every improper jury charge warrants reversal and a new trial." Prioleau, supra, 223 N.J. at 257. "As a general matter, we will not reverse if an erroneous jury instruction was 'incapable of

producing an unjust result or prejudicing substantial rights.'" Mandal v. Port Auth. of N.Y. & N.J., 430 N.J. Super. 287, 296 (App. Div.) (quoting Fisch v. Bellshot, 135 N.J. 374, 392 (1994)), certif. denied, 216 N.J. 4 (2013).

Examining this charge as a whole, and "giving due consideration to surrounding language to determine its true effect," id. at 296, we find no error, much less one capable of producing an unjust result. First, the record establishes that plaintiff elicited testimony about the effect of the accident on both his knees, although obviously emphasizing his left knee. Both counsel also addressed plaintiff's claimed injury to both knees in their closings, with plaintiff's counsel telling the jury "[h]e's still treating on both knees, both legs. He's in pain every day, 24 hours a day." Accordingly, we reject plaintiff's claim that the judge mischaracterized his claimed loss by referring to plaintiff's "knees" instead of to plaintiff's left knee.

We also reject as without merit plaintiff's claim that the court's focus on the "loss of use" of plaintiff's knees as opposed to "loss of function" of those knees prejudiced his substantial rights. N.J.S.A. 59:9-2d precluded plaintiff from an award for pain and suffering unless he could prove by objective medical evidence that he had "sustain[ed] a permanent

loss of the use of a bodily function that is substantial." Brooks v. Odom, 150 N.J. 395, 406 (1997).

The court's instruction to the jury that plaintiff needed "to prove . . . a permanent loss of that particular function, the use of his knees," and that such "loss need not be total, but it must be substantial," is completely in accord with the Brooks standard. That instruction, coupled with the corresponding question on the verdict sheet, also read to the jury as part of the charge, which asked whether plaintiff "sustain[ed] an injury which constitutes a permanent loss or limitation of a bodily function that is substantial," explained the legal principle and how it was to be applied in light of the plaintiff's contentions and the evidence adduced at trial. See Prioleau, supra, 223 N.J. at 256. Plaintiff was entitled to nothing more, particularly in light of his failure to seek other wording or object when the charge was read to the jury. See Kaplan, supra, 96 N.J. Super. at 251. In no event could we find the court's reference to the loss of use of plaintiff's knees as opposed to the loss of use of the function of plaintiff's knees led this jury to a result it otherwise would not have reached. See Viscik, supra, 173 N.J. at 18.

Plaintiff's remaining arguments, that the proofs established he suffered "'an objective permanent injury' to his

left knee and 'the permanent loss of a bodily function that is substantial,'" amount to nothing other than a contention that the jury's verdict denying him damages for pain and suffering was against the weight of the evidence. Although we may well agree with plaintiff that the proofs he presented at trial would likely be sufficient to satisfy the pain and suffering threshold of N.J.S.A. 59:9-2d under the cases on which he relies, Knowles v. Mantua Twp. Soccer Ass'n, 176 N.J. 324 (2003), Kahrar v. Borough of Wallington, 171 N.J. 3 (2002), Gilhooley v. Cnty. of Union, 164 N.J. 533 (2000) and Leopardi v. Twp. of Maple Shade, 363 N.J. Super. 313 (App. Div. 2003), appeal dismissed, 187 N.J. 486 (2005), such a showing would only entitle plaintiff to present his proofs to a jury. See Knowles, supra, 176 N.J. at 335 (finding the plaintiff's evidence satisfied the statute's threshold, thereby permitting a jury to determine his entitlement to damages for pain and suffering).

Plaintiff was afforded the opportunity to present his proofs on pain and suffering to the jury, which found them wanting. The record provides us no reason to question that finding. See Dolson v. Anastasia, 55 N.J. 2, 6-7 (1969). More important, plaintiff did not preserve his right to ask that we do so. See Fiore v. Riverview Med. Ctr., 311 N.J. Super. 361, 362-63 (App. Div. 1998) (holding "there must be

strict enforcement of the prohibition of Rule 2:10-1 against this court considering an argument that a jury verdict is against the weight of the evidence when no motion for a new trial was made").

Affirmed.