SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4443-15T3

FRANCIS MCCORMACK, and
THERESE DUNNE as the parent
and legal guardian of the
incompetent CRYSTAL DUNNE,

Plaintiffs,

and

THERESE DUNNE,

Plaintiff-Appellant,

v.

ALTA WILSON,

Defendant-Respondent,

and

FIRST AMERICUS ENT., INC.,

Defendant.

Argued January 17, 2018 – Decided February 13, 2018

Before Judges Hoffman and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-0889-08.

Mitchell J. Makowicz, Jr., argued the cause for appellant (Blume, Forte, Fried, Zerres & Molinari, attorneys; Mitchell J. Makowicz, Jr., on the briefs).

Elias Abilheira argued the cause for respondent (Abilheira & Associates, PC, attorneys; Elias Abilheira, on the brief).

PER CURIAM

Plaintiff Therese Dunne appeals from an April 1, 2016 order memorializing a no-cause jury verdict in favor of defendant Alta Wilson, and a May 13, 2016 order denying plaintiff's motion for judgment notwithstanding the verdict (JNOV) or, alternatively, a new trial. We affirm.

I

We discern the following facts from the record. On June 8, 2006, plaintiff and defendant were involved in a motor vehicle accident. Francis McCormack drove plaintiff's car, which towed a pop-up camper. Plaintiff and her daughter were passengers in that car. They were on their way to the Pocono 500 car race. Defendant drove a tractor-trailer with her daughter in the passenger seat. Defendant's truck rear-ended the camper towed by plaintiff's car. The accident occurred during heavy traffic, in the westbound lanes of Interstate Highway I-80. According to defendant, in the area where the accident occurred, there are "five lanes and two split off."

The trial record contains conflicting accounts of how the accident occurred. Plaintiff testified as follows:

> Q: How did you become aware that something unusual is happening?
>
> A: Because we came to a full stop.
>
> Q: When you say you came to a full stop, can you describe how Mr. McCormack stopped the car?
>
> A: Slowly and gradually, with the thickness of traffic.
>
> Q: To your perception, did he slam on the brakes?
>
> A: No.
>
> . . . .
>
> Q. Then what happened?
>
> A: The car I was in came to a stop. Some long seconds later, I heard the squealing, loud squealing of brakes. I turned around to see what would be happening, and I saw an [eighteen-wheel] Peterbilt truck barreling down on us too fast.
>
> Q: Did that truck then hit the back of the camper?
>
> A: Yes.
>
> Q: What lane was your car in when the accident happened?
>
> A: I'm not sure.

Q: Had Mr. McCormack recently changed lanes before that contact, that impact took place?

A: No.

Although Mr. McCormack did not testify in court, plaintiff's counsel read the following excerpt from his deposition testimony at trial:

Q: Can you describe for us in your terms how this accident occurred?

A: A mile and a half, mile ahead . . . there was an accident in progress. Everyone on the road came to an abrupt but controlled stop. A vehicle came up behind us and hit us knocking the trailer off the back end of the car across the road, put us into a 360. Later on I found out it was a tractor trailer, Peterbilt.

Defendant testified as follows:

Q: And can you describe to me how the accident occurred?

A: I saw a car in the left far lane all of a sudden just swerve and come across and when it swerved and came across[,] the other car came across in front of me. The original car continued to cross and there was a bus. I don't know if it hit the bus or if the bus hit somebody else. I do know there was a bus.

. . . .

Q: [D]uring the [ten] minutes before the accident was [plaintiff's] car with the trailer in front of you the entire time?

A: No.

Q: At some point in time how did it come to be in front of you?

A: I thought it was caused by the other car that swerved right.

Q: . . . At some point in time did [plaintiff's] car move into your lane?

A: Yes.

Q: Which lane did it come from?

A: It came from the left to the center.

Q: Before it moved into your lane . . . was there traffic in front of you in your lane?

A: No. We were picking up speed.

Q: Okay.

A: [T]hey were moving away.

Q: Okay.

A: It left a gap.

. . . .

Q: Before [plaintiff's] vehicle moved into your lane . . . was there sufficient room between you and the next car in front of you for you to stop safely for your speed?

. . . .

A. There was enough room.

Plaintiff's counsel also read into the record the following excerpt from defendant's answers to interrogatories: "I was

traveling westbound on I-80 in Netcong, New Jersey when the accident occurred ahead on the highway. The plaintiff's vehicle swerved into my lane and braked suddenly."

Defendant provided conflicting testimony on the number of hours she had driven the day of the accident, whether she took a break to sleep, and the location of her final destination.

> Q. [O]n your direct testimony did you not say that you took half of your break and slept while you were in Brooklyn?
>
> A. Yes
>
> Q. Did you not say on your direct that you were going home that night?
>
> A. Yes.
>
> Q. Did you not say at your deposition five years ago under oath nothing about sleeping in Brooklyn?
>
> A. Yes.
>
> Q. But rather that you were almost out of time and that you were going to stop in Whitehall, Pennsylvania? Yes?
>
> A. Yes.
>
> Q. Those are two entirely different stories, aren't they?
>
> A. Yes.

Defendant acknowledged she kept a logbook containing the number of hours driven and slept; however, she discarded the logbook before trial. On cross-examination, defendant confirmed

federal law and her employer required her to maintain the logbook. She agreed that a logbook is "important because it documents all the times that you're leaving, stopping and driving and . . . documents your downtime . . . ." Defendant initially testified that she "threw everything away after two years," but when pressed, she admitted she discarded the logbook after she knew about this lawsuit. When asked to admit that she "consciously" threw out her logbook, she replied, "Not consciously, no."

Plaintiff also presented the testimony of the New Jersey State Trooper who responded to the accident scene; however, by time of trial, he had no recollection of the accident. He therefore provided testimony based upon his accident report, which indicates Mr. McCormack stated, "I hit the brakes due to the accident and was hit from behind." The report indicates defendant stated, "The car with the trailer hit the brakes and I couldn't stop in time." Two other cars were involved, one of which had minor damage. The report fails to confirm Mr. McCormack's testimony that the car he was driving did "a 360,"[1] or defendant's testimony that another car swerved right just before the collision.

[1] The trooper responded, "Yes, sir," when asked, "If somebody told you their car spun 360 degrees after the impact and the physical evidence at the scene supported that, would you put that in your police report?"

Nor does the report list defendant's daughter as a passenger in defendant's vehicle.

An ambulance took plaintiff, her daughter and Mr. McCormack to the hospital. Plaintiff complained of neck, back and shoulder pain. The hospital discharged all three in the middle of the night. They spent the rest of the night at a hotel, then rented an RV in the morning. They stopped at the impound lot holding plaintiff's car and camper before continuing on to the race.

Plaintiff claims severe injuries from the accident; however, defendant argues the injuries were pre-existing. Damages are not at issue on appeal.

At the close of the evidence, plaintiff moved for a directed verdict on liability, which the court denied, reasoning the jury needed to resolve factual issues regarding negligence. The trial judge gave the jury a Dolson[2] charge stating, "[F]ollowing another vehicle more closely than is reasonable and prudent . . . is negligence . . . on defendant's part." The jury then found defendant negligent; however, it failed to find defendant's negligence proximately caused the accident.

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[2] See Dolson v. Anastasia, 55 N.J. 2, 10-11 (1969) (holding the failure to maintain a reasonably safe distance behind the automobile ahead, in violation of N.J.S.A. 39:4-89, is negligence, not merely evidence of negligence, and the jury should be charged accordingly).

Plaintiff moved for JNOV, or alternatively for a new trial, arguing defendant's negligence must have been a proximate cause of the accident. The trial judge denied plaintiff's JNOV motion, finding reasonable minds could differ as to the cause of the accident. The judge also denied a new trial reasoning:

> [T]he [c]ourt cannot conclude . . . that it cannot conceive of any such act that was not also a proximate cause of the accident in these circumstances. Rather, the [c]ourt can conceive of a situation where a jury, based upon the evidence [and] their opportunity to assess credibility, could find that [defendant's] negligent conduct was not a substantial factor in bringing about the resulting accident. That is, the jury could have found based upon the evidence that any negligent conduct was simply remote, trivial or inconsequential. The [c]ourt can conceive a situation in which the jury found that the conduct of the operator of [plaintiff's] vehicle in swerving into defendant's lane and abruptly applying the brakes proximately caused this accident.

II

Plaintiff argues on appeal the trial judge erred in denying the motion for JNOV. We disagree.

In reviewing a trial court's denial of a motion for JNOV under Rule 4:40-2, we apply the same standard as the trial court: "[I]f, accepting as true all the evidence which supports the position of the party defending against the motion and according him [or her] the benefit of all inferences which can reasonably

and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied . . . ." Boyle v. Ford Motor Co., 399 N.J. Super. 18, 40 (App. Div. 2008) (quoting Verdicchio v. Ricca, 179 N.J. 1, 30 (2004)). However, we do not defer to the trial judge's "interpretation of the law and the legal consequences that flow from established facts." Raspa v. Office of the Sheriff, 191 N.J. 323, 334-35 (2007) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Here, "accepting as true all the evidence which supports" defendant's case, Boyle, 399 N.J. Super. at 40, the jury could have found that "the other car that swerved right," as described by defendant, caused plaintiff's vehicle to swerve into defendant's lane and abruptly brake, and that any conduct of defendant was not a substantial factor in causing the accident. While plaintiff testified that her vehicle did not swerve into defendant's lane and abruptly brake, defendant testified that plaintiff's vehicle did. Moreover, the record lacks any direct evidence that defendant followed too closely, drove too fast, or failed to pay attention. While the circumstantial evidence in this case would have supported a verdict in favor of plaintiff, it did not compel it.

Alternatively, the jury could have found defendant negligent for discarding her logbook, or for driving too many hours.

Plaintiff's counsel extensively cross-examined defendant regarding these issues, and emphasized these points during closing argument:

> And then the really interesting thing was that I asked her all about these questions of timing, how much time, when did you leave? And her answers were, you know, all of that would be in my [logbook]. And under federal . . . law [logbooks] must be kept. It's required. And I asked her, where is your [logbook]? It's gone. What happened to it? I threw it away. You threw it away? Yes. When did you throw it away? Last year, before the deposition in 2010. You threw it away in 2010? Yes. You knew this case was pending? Yes. . . . So, we know that she threw this [logbook] out a year before her deposition. And we know she threw it out after she had full and complete knowledge that this case was pending and it would be important.

Defendant disputed the suggestion of plaintiff's counsel that she "consciously" threw out her logbook. The jury could have concluded defendant committed a negligent act by discarding her logbook or by working too many hours; however, any such acts of negligence did not proximately cause the accident. Because "reasonable minds could differ" as to the cause of the accident, the trial court properly denied plaintiff's JNOV motion. See Boyle, 399 N.J. Super. at 40.

III

Plaintiff further argues the trial judge erred in denying the motion for a new trial, because the jury's verdict was inconsistent in finding negligence without proximate cause. We disagree.

A trial court 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). We apply the same standard of review as the trial court, except we "afford 'due deference' to the trial court's 'feel of the case,' with regard to the assessment of intangibles, such as witness credibility." Jastram v. Kruse, 197 N.J. 216, 230 (2008) (quoting Feldman v. Lederle Labs., 97 N.J. 429, 463 (1984)).

Proximate causation is a "combination of 'logic, common sense, justice, policy and precedent' that fixes a point in a chain of events, some foreseeable and some unforeseeable, beyond which the law will bar recovery." People Express Airlines, Inc. v. Consol. Rail Corp., 100 N.J. 246, 264 (1985) (quoting Caputzal v. Lindsay Co., 48 N.J. 69, 77-78 (1966)). In order to determine whether proximate cause exists, the proper inquiry is "'whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff' reasonably flowed from defendant's breach of duty." Clohesy v. Food Circus Supermarkets, Inc., 149 N.J. 496, 503 (1997) (quoting Hill v. Yaskin, 75 N.J. 139, 143 (1977)). See also Model Jury Charges (Civil), 6.10, "Proximate Cause – General Charge to Be Given in All Cases" (1998) ("The basic question for you to resolve is whether [plaintiff's]

injury/loss/harm is so connected with the negligent actions or inactions of [defendant] that you decide it is reasonable . . . that [defendant] should be held wholly or partially responsible for the injury/loss/harm."). The defendant's conduct must amount to a "substantial factor" in causing the claimed injury. James v. Arms Tech., Inc., 359 N.J. Super. 291, 311 (App. Div. 2003).

The issue here is whether the jury finding defendant negligent, but the negligence not a proximate cause of the accident, was "clearly and convincingly . . . a miscarriage of justice." R. 4:49-1(a). Our Supreme Court has overturned similar jury verdicts where the Court concluded no conceivable reason existed for the jury to have found negligence but not proximate cause. Neno v. Clinton, 167 N.J. 573, 588 (2001); Pappas v. Santiago, 66 N.J. 140, 143 (1974). Neno involved a vehicle-pedestrian accident where the jury found the defendant negligent, but not a proximate cause of the accident. Id. at 577, 579. We affirmed; however, one member dissented, concluding the verdict was inconsistent. Id. at 577. The Supreme Court agreed with the dissenting judge, who stated, "I cannot conceive of any such act that was not also a proximate cause of the accident in these circumstances." Id. at 588.

Accordingly, if defendant's negligence was necessarily a "substantial factor" in causing the accident, then the verdict was

inconsistent and we should set it aside. See James, 359 N.J. Super. at 311. If, however, the record supports a finding that defendant's negligence was not necessarily a substantial factor in causing the accident, the verdict was not inconsistent and should stand.

Defendant testified that "the other car that swerved right" caused plaintiff's vehicle to swerve into defendant's lane and abruptly brake, leaving her insufficient time to stop. If the jury accepted defendant's testimony on that point, the record would support a finding that any negligence of defendant was not a substantial factor in causing the accident. Consequently, this is not a case, like Neno or Pappas, where no conceivable basis existed in the record for the jury's verdict.

Plaintiff's counsel also pressed defendant on the number of hours she had driven that day and how much she had slept, as well as her failure to preserve her logbook. Therefore, alternatively, the jury could have concluded that, although defendant was negligent in driving too many hours or with too little sleep, or by discarding her logbook, any such negligent acts were not a substantial factor in causing the accident.

As a result, the jury's verdict was not "clearly and convincingly . . . a miscarriage of justice under the law," Rule

4:49-1(a), and the trial judge properly denied the motion for a new trial.

Affirmed.