Superior Court of New Jersey - Appellate Division
Letter Brief
Appellate Division Docket Number: A003319-22T4

Xinan Yan And Xiaoying Wu
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05/21/2024

Letter Brief on behalf of: Xinan Yan and Xiaoying Wu

Xinan Yan and Xiaoying Wu Plaintiff

V.

Phyllis M.Chase Defendant

Case Type: Civil
County/Agency: Mercer
Trial Court/Agency Docket No: MER-L-618-21
Trial Court Judge/Agency Name: R.Brian McLaughlin,J.S.C

Dear Judges:

Pursuant to R. 2:6-2(b), please accept this letter brief in support of my appeal in this matter.

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TABLE OF JUDGMENT(S), ORDER(S), RULING(S), AND DECISION(S) ON APPEAL

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TABLE OF AUTHORITIES

Case/Other Authority	Category	Brief Page Number

LIST OF PARTIES

Party Name	Appellate Party Designation	Trial Court/ Agency Party Role	Trial Court/Agency Party Status
Xinan Yan and XIaoying Wu			

PRELIMINARY STATEMENT

TABLE OF PROCEDURAL HISTORY

Date	Event/ Proceeding	Filed By	Result	Appendix Page Number/ Transcript
03/24/2021	Complaint	Plaintiff	Filed	-
05/04/2021	answer	Defendant	Filed	-
12/12/2022	Motion	Defendant	Filed	-
01/10/2023	opposition	Plaintiff	Filed	-

STATEMENT OF FACTS

On March 29.2019 at approximately 2:26pm plaintiffs Xinan Yan & Xiaoying Wu were driving their vehicle (2017 Toyota Camry) on Rt.27 Southboud.

At or about the same time, Defendant PHYLLIS M.CHASE was driving her vehicle making a right turn on Rt.27 from the parking lot of 4951.

Defendant's vehicle struck Plaintiff's vehicle. The police report (page 40) shows that Defendant was found responsible for the crash because plaintiff has right away of traffic. Plaintiff's vehicle was totaled as a result collision.

Plaintiffs suffered permanent injuries as result of collision. The report by Dr.Ari Cohn,DC, who confirmed the performance of the plaintiffs' injuries.

Plaintiffs keep seeing the doctor for the treatment

(page 47, page 163)and every period of time,

the progressive insurance company will give the plaintiffs some treatment opinions through IME. (page 44)

Plaintiffs can not got a full-time work as a result of collision because it is necessary to visit the doctor two to three times a week.(page 61, page 45, page 175, page 209, page 226)

Plaintiffs can not take care of their two daughter and can not live a good married life as a result of collision .Because of the financial problems and Physical discomfort it brings.

LEGAL ARGUMENT

POINT 1

THE TRIAL COURT MISAPPLIED THE STANDARD FOR

SUMMARY JUDGMENT UNDER RULE 4:46-2(C)

After every point heading, the filer shall include, in parenthesis, the appendix or transcript page number where the ruling in question and argument was raised in the trial court or agency below. If the argument was not made to the trial court or agency, please write: "Not raised below."

Not Raised Below

Write and explain the detailed legal argument for this point heading. Use Ctrl+e to show/hide the editing toolbar (bold, italics, underlining allowed. Text limited to Courier New.)

The court failed to view the evidence (such as police report and medical payments detail etc,)in the light most favorable to the Plaintiffs, as mandated by *Brill v. Guardian Life Ins. Co. of Am.*

Substantial issues of material fact regarding the permanence of Plaintiffs' injuries were present, which should have precluded summary judgment.

POINT 2

MISINTERPRETATION OF PERMANENT INJURY REQUIREMENT

UNDER N.J.S.A. 39:6-8(A)

After every point heading, the filer shall include, in parenthesis, the appendix or transcript page number where the ruling in question and argument was raised in the trial court or agency below. If the argument was not made to the trial court or agency, please write: "Not raised below."

Not Raised Below

Write and explain the detailed legal argument for this point heading. Use Ctrl+e to show/hide the editing toolbar (bold, italics, underlining allowed. Text limited to Courier New.)

Legal Standard for Permanent Injury: New Jersey law does not strictly require objective evidence like MRI's or CT scans to prove permanent injury, particularly in cases involving soft tissue or chronic pain.

**Sufficiency of Medical Evidence: **The narrative reports from Dr. Ari Cohn, DC, which were dismissed by the trial court, should be considered competent evidence. Dr. Cohn's statements regarding the permanence of injuries, supported by his medical observation and treatments, are sufficient to establish a prime facile case of permanent injury.

CONCLUSION

Plaintiffs therefore respectfully asks that this court reverse the trial

court's order granting summary judgment to defendant and the plaintiff should be granted compensation for medical expenses and damages resulting from the traffice accident.

Respectfully
submitted,
Xinan Yan
S/Xiaoying Wu

Dated: May 21, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A -003319-22T4

XINAN YAN & XIAOYING WU
Plaintiff,
v.
PHYLLIS M. CHASE,
Defendant

LETTER BRIEF IN RESPONSE TO APPELLANTS' BRIEF AND APPENDIX

Before the Honorable Thomas W. Sumners, Jr. C.J.A.C.

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STATUTES AND REGULATIONS

RESPONDENT'S APPENDIX

[1] Inclusion of Respondent's Notice of Motion in Limine to Bar Outstanding Medical Expense and Property Damage in Respondent's Appendix is permitted by R. 2:6-1(a)(2). Appellants' Brief impliedly contends that the Trial Cout should not have dismissed their claim for property damage and unpaid medical expenses (economic damages). However, Appellant's Brief did not mention or document that Respondent had raised the issue below or document how the Trial Court addressed the issue.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A -003319-22T4

XINAN YAN & XIAOYING WU
Plaintiff,
v.
PHYLLIS M. CHASE,
Defendant

LETTER BRIEF IN RESPONSE TO APPELLANTS' BRIEF AND APPENDIX

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Counsel for Defendant/Respondent

The following letter brief is submitted on behalf of the Respondent, Phyllis M. Chase, in accordance with R 2:6-2(b).

RESPONSE TO APPELLANTS' PRELIMINARY STATEMENT

Appellants' Brief refers to a "Preliminary Statement". It does not contain one.

RESPONSE TO APPELLANTS' STATEMENT OF FACTS

1. Admitted.

2. Admitted.

3. Admitted that there was a collision between plaintiffs' and defendant's vehicle and that the police officer found that defendant was at fault. Respondent

denies that police officer's conclusion on liability is admissible evidence or is germane to the issue on Appeal. The fact that a collision occurred and the officer's opinion on "fault" are not dispositive of any issue raised by respondent's summary judgment motion or the Appeal. Admitted that damage estimates refer to fact that plaintiff's vehicle was "totaled". The fact that damage estimates refer to a "totaled" vehicle is not dispositive of any issue raised on defendant's summary judgment motion or on the present Appeal.

4. Denied that plaintiffs produced objective credible medical evidence of permanent injury in response to defendant's summary judgment motion.

5. Denied. Appellants contend that they "keep seeing doctors". The brief supporting defendant's motion for summary judgment (which was based on discovery exchanged during the time allotted by the trial court for discovery) refers to a discovery end date of July 29, 2022, and that plaintiffs' treatment ended earlier (Yan and Wu on November 8, 2021) (Pa26). The narrative reports of plaintiffs' medical expert Ari Cohen, D.C., confirm that both plaintiffs were discharged by him on August 16, 2021 (Pa47 and Pa163). Plaintiffs never moved to extend discovery to address continuing treatment, either in response to defendant's motion for summary judgment, or at any other time. Therefore, respondent objects to plaintiffs' reference to treatment administered after the dates identified in respondent's

summary judgment brief and to "continuing treatment" which was not part of the record below.

6. This paragraph referring to Progressive Insurance Company and an "IME", cannot be admitted or denied because it is unintelligible. Neither party produced evidence of an IME obtained by Progressive Insurance Company for Judge Mclaughlin's consideration in deciding defendant's motion for summary judgment.

7. Plaintiffs' subjective complaint of an inability to secure work because of the need to pursue treatment is not dispositive of any issue raised on defendant's summary judgment motion or on the Appeal. No claim of lost wages was alleged in the case below. The narrative reports of plaintiffs' expert Ari Cohen make no reference to inability to work or occupational disability.

8. Plaintiffs' subjective complaints involving difficulty with childcare, inability to live a "good married life", "financial difficulties" and "physical discomfort" are not dispositive of the question whether objective credible medical evidence of permanent injury was presented in opposition to the motion or whether a rational fact finder could reasonably decide there was a permanent injury based on plaintiff's proofs. The contentions addressed in Paragraph 8 of Appellants' Statement of Facts were not addressed in the narrative reports of their medical expert, Ari Cohen, D.C. (Pa47 and Pa163).

RESPONDENT'S PROCEDURAL HISTORY AND GENERAL STATEMENT

1. Defendant incorporates the general statement and statement of facts included in the brief submitted to the trial court in support of defendant's motion for summary judgment (Pa26). Additional facts are provided by Respondent to address Appellants' implied and baseless contention that the trial court erred in dismissing plaintiffs' economic claim for unpaid medical expenses and property damage are set forth as follows.

2. Appellants' brief refers indirectly to a claim for unpaid medical expenses and property damage (economic damages) (Unnumbered paragraph 3 of Appellants' Statement of Facts and first paragraph of Appellants' Legal Argument). These claims were addressed in a separate motion in limine to bar evidence of outstanding medical expenses and property damage returnable March 31, 2023, which is not addressed in Appellants' brief (Da1).

3. On March 10, 2024, defendant moved to bar evidence of unpaid medical expenses because plaintiffs never established that PIP was exhausted and, and evidence of unpaid medical expenses collectible under plaintiffs' PIP coverage, N.J.S.A. 39:6A-12. (Da1).

4. In the same motion, defendant moved to bar evidence of property damage based on accord and satisfaction because, property damage had already been

settled and adjusted by New Jersey Manufacturers Insurance Company who insured the defendant (Da1).

5. Plaintiffs' counsel opposed the motion to bar evidence of unpaid medical expenses and property damage largely on procedural grounds on March 14, 2024 (Da15).

6. On May 17, 2023, Judge Mclaughlin entered an Order granting summary judgment and dismissing the entire case. The May 17, 2023 Order and written decision does not address the claim for economic damages or respondent's motion addressing it. (Pa1).

7. On May 17, 2024, Judge McLaughlin entered a separate Order denying defendant's motion in limine as "moot" because the entire case was dismissed by the Order granting defendant's summary judgment motion. Defendant interpreted the two May 17, 2024 Orders as a joint ruling on the merits dismissing all claims for economic and non-economic damages (Da17).

LEGAL ARGUMENT

POINT I

APPELLANTS' BRIEF FAILS TO SUPPORT OR EXPLAIN THE CONTENTION THAT THE TRIAL COURT MISAPPLIED THE STANDARD FOR SUMMARY JUDGMENT.

The arguments contained in defendant's summary judgment brief are incorporated herein as if set forth at length (Pa26).

Appellants contend that the trial judge misapplied the standard for summary judgment without referring to the standard or support for the contention that the standard was misapplied. Under *Brill v Guardian Life Ins. Co. of America*, 142 N.J. 520 (1995), this standard is now expressed in terms of a prima facie case or defense and the movant is entitled to judgment, if on the full motion record, the adverse party, who is entitled to have the facts and inferences viewed most favorably to it, has not demonstrated the existence of a dispute whose resolution in his favor will ultimately entitle him to judgment. When deciding a motion for summary judgment under *Rule* 4:46–2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed

issue in favor of the non-moving party. This assessment of the evidence is to be conducted in the same manner as that required under *Rule* 4:37–2(b).

Both Appellants are subject to the limited tort threshold and so an award of monetary damages is predicated on meeting their burden, to prove a permanent injury by objective credible medical evidence, N.J.S.A. 39:6A-8. To establish that their injuries surmount the verbal threshold, N.J.S.A. 39:6A-8(a). requires Plaintiffs to prove that they have sustained at least one of the following:

> ....Death; dismemberment; significant disfigurement or significant scarring; displaced fractures; loss of a fetus; or a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement

To defeat the motion under the *Brill* standard, plaintiffs were required to produce credible medical evidence sufficient that a rational factfinder could resolve the alleged disputed issue in their favor. In the absence of competent expert opinion, Plaintiff cannot prove that the accident caused any permanent injuries. See *Espinal v. Arias*, 391 N.J. Super. 49, 58 (App. Div.), certif. denied, 192 N.J. 482 (2007); *Garcia v. Lawrence*, No. A-3566-18T2, 2020 N.J. Super. Unpub. LEXIS 1516 (App. Div. July 28, 2020); *Asuncion v. Farrell*, No. A-2258-08Tl, 2009 N.J Super. Unpub. LEXIS 1681 (App. Div. June 25, 2009). See also *Lesniak v. County of Bergen*, 117 N.J. 12, 31 (1989), citing *Clifford v. Opdyke*, 156 N.J. Super. 208, 212 (App. Div.

1978). "The need for expert testimony is particularly strong in cases involving the verbal tort threshold for injuries resulting from an automobile accident." R. Biunno, H. Weissbard and A. Zegas, New Jersey Rules of Evidence (2021-2022 ed.), Comment 702[1] at 761, citing *Oswin v. Shaw*, 129 N.J. 290, 320 (1992) and *Amaechi v. Clark*, 268 N.J. Super. 186, 192-193 (Law Div. 1992). Stated simply, credible evidence was not adduced in discovery or produced in response to the motion and that is why the trial judge granted summary judgment.

Appellants do not contest that radiological testing in the form of CT scans, MRIs or even x-rays were not performed. They argue that New Jersey law does not require objective evidence "like MRIs or CT scans to prove permanent injury". Appellants cite no case law to support their position on the law but, even if their interpretation of the law is correct, the absence of objective radiological evidence together with additional factors unique to this case were properly considered by the trial court in granting the motion and dismissing the cases. As the Supreme Court has stated:

> . . .. Under. . . .[the "credible medical evidence"] standard, which is a critical element of the cost- containment goals of AICRA5, the necessary objective evidence must be "derived from accepted diagnostic tests and cannot be 'dependent entirely upon subjective

> patient response.'" *Davidson [v. Slater*, 189 N.J. 166, 181 (2007] (quoting N.J.S.A. 39:6A-8(a)).

Agha v. Feiner, 198 N.J. 50, 60-61 (2009). Plaintiffs contend that they each sustained a permanent injury and, at the same time, concede that their treating physicians saw no need to order as much as a simple x-ray to identify the anatomic cause or source of their complaints.

A rational factfinder is a factfinder who can be expected to apply reason and logic in reaching a conclusion. Dr. Cohen has opined that both Appellants suffered permanent loss of use of function of their spine, but how can that opinion be reconciled with his failure to schedule a simple x-ray or more advanced study to objectively identify cause of the complaints. A lay person knows that radiological studies are performed to identify an objective basis or explanation for subjective symptoms and to ensure that the treatment plan that follows is rational and based on an accurate diagnosis.

In granting summary judgment, Judge McLaughlin noted, "The uncontroverted motion record is bereft of any evidence of objective medical testing-e.g., x-rays, CT scans, MRIs or EMG's-having been conducted with respect to either plaintiff". In an age where use of MRIs and CT scans are commonplace in the diagnosis of spinal injuries, no physician in this case thought the injury required or warranted a simple radiology study. The only rational inference to be drawn from

the fact that radiological studies were not conducted is that no medical or clinical justification for such studies was identified on examination or in response to plaintiffs' subjective complaints. To recover damages, plaintiffs' medical expert would need to both "credibly" opine that both of his patients suffered permanent loss of use of function of a body part or organ while at the same time acknowledging that the injuries did not warrant radiologic testing. Applying logic to their task, a rational factfinder would be unable to reconcile a dire prognosis of permanent injury with the casual failure to order a precautionary x-ray. Applying the credible medical evidence standard, testimony that radiology studies were not performed as a clinical response to a purported "permanent injury", simply makes no sense.

Judge Mclaughlin also referred to the "virtually identical" one paragraph reports of chiropractor, Dr. Cohen, which refer to the chronicity of symptoms but do not refer any objective testing confirming a basis or foundation for the claim of loss of function. Rule 4:17-4(e) requires that a narrative medical report provide a "complete statement of (the expert's) opinion and the basis therefore," as well as facts and data supporting the opinion. Respondent's brief addresses the "virtually identical reports of Dr. Cohen below in Point II.

Appellants refer to the failure to consider the "police report and medical payment detail", but there is no explanation how or why either should have changed

the Court's decision in entering the May 17, 2023 Order from which Appellants' appeal.

POINT II

THE TRIAL COURTS DECISION WAS NOT BASED SOLEY ON THE ABSENCE OF OBJECTIVE RADIOLOGICAL STUDIES.

As Judge Mclaughlin noted in his decision, the reports of Dr. Cohen, (plaintiffs' only medical expert), describe a scenario where the individual injuries of Xinan Yan and Xiaoying Wu are "mirror images" of one another. Their complaints, pattern of treatment and even the times when they experienced resolution and recurrence of their symptoms are, as Judge McLaughlin put it, "virtually identical".

Although each of the reports is a paragraph in length the similarities are outlined as follows. Both plaintiffs were diagnosed with "joint dysfunction in the right shoulder" and radiating pain in the lower back (Wu also report radiating neck pain).

According to Dr. Cohen, Wu was initially discharged from treatment on October 7, 2019, with symptoms resolved. Her husband, Yan, was initially discharged on November 4, 2019, a month later, also reporting that his symptoms were resolved.

Wu returned on February 10, 2020, reporting that all her symptoms had returned. Yan returned (12) days later, on January 29, 2020, also reporting that all his symptoms had returned.

On March 16, 2020, Wu returned to Cohen and reported that all her symptoms were resolved. Yan also returned on March 16, 2020, and reported that all his symptoms were resolved.

Then, more than a year later, June 11, 2021, Wu returned and reported that all her symptoms had returned. Three weeks later on July 2, 2021, Yan returned and reported that all his symptoms had returned. Both plaintiffs received additional treatment and were discharged the same day on August 6, 2021.

In adjudicating the summary judgement motion, the trial judge was required to determine if plaintiffs' proofs were sufficient to establish prima facie case under the limited tort threshold (N.J.S.A. 39:6A-8), where plaintiffs' burden is to present "objective, credible medical evidence of the injury", *DiProspero v Penn*, 183 N.J. 477 (2005). The question before the trial judge was whether a "rational factfinder" could ascribe reason and credibility to an identical pattern of treatment where both plaintiffs' individual symptoms waxed, waned and returned at the same time on multiple occasions. Applying common sense and fundamental logic, the trial judge rightly determined that Dr. Cohen's bizarre description of the parallel course followed by his two patients was a departure from reality. Stated simply, "incredible" medical evidence is the opposite of credible medical evidence.

POINT III

PLAINTIFFS' EXPERT OPINION IS A NET OPINION

An expert's opinion must be based on evidence that is credible. Any such opinion is entitled only to such weight as allowed by the facts and reasoning upon which that opinion is predicated, and bare conclusions are inadmissible. *Buckelew v. Grossbard,* 87 N.J. 512, 524 (1981). In this regard, the New Jersey Supreme Court has held:

> The opinions of experts must be based either upon the facts within their own knowledge which they detail to the jury or upon hypothetical questions embracing facts supported by the evidence upon which the expert opinion is sought. When the opinion is so lacking in proper foundation as to be worthless it is not admissible. Expert opinion is valueless unless it is rested upon the facts which are admitted or proved. In other words, a hypothetical question cannot be invoked to supply the substantial facts necessary to support the conclusion.

Stanley Co. of America v. Hercules Powder Co., 16 N.J. 295, 305 (1954). See also, *Johnson v. Salem Corp.*, 97 N.J. 78, 81 (1984), wherein our Supreme Court held that expert testimony was inadmissible because its underlying reasoning was infirm.

If an expert opinion is unsupported by factual evidence or simply offers unsubstantiated personal opinions, it amounts to nothing more than a "net opinion" which not only can be given no weight by this Court, it must be precluded from being offered at trial. See, *Lanzet v. Greenberg*, 126 N.J. 168, 186 (1991); *Buckelew v. Grossbard,* 87 N.J. 512, 524 (1981); *Parker v. Goldstein*, 78 N.J. Super. 472, 484 (App. Div.), cert. den., 40 N.J. 225 (1963)("an opinion is no stronger than the facts

which support it"). In *Buckelew*, our Supreme Court held as follows with regard to net opinions:

> The "net opinion" rule appears to be a mere restatement of the established rule that an expert's bare conclusions, unsupported by factual evidence, is inadmissible. It frequently focuses . . . on the failure of the expert to explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom.

Buckelew, 87 N.J. at 524. (Citations omitted.)

The reasoning behind this rule is simple: an expert's testimony that reaches conclusions unsupported by factual evidence or otherwise fails to illustrate the factual premise for its conclusions is neither reliable nor useful to the trier of fact. *Glen Wall Assocs. V. Wall Twp.*, 99 N.J. 265, 280 (1985).

Clearly, Dr. Cohen's report failed to fulfill the threshold requirements of N.J.R.E. 703. Undeniably, it contained nothing but a "net opinion".

POINT IV

PLAINTIFF'S CLAIMS FOR UNPAID MEDICAL EXPENSES AND PROPERTY DAMAGE WERE PROPERYLY DISMISSED BY THE TRIAL COURT

Appellants' brief refers indirectly to a claim for unpaid medical expenses and property damage (economic damages). These claims were addressed in a motion in limine to bar evidence of outstanding medical expenses and property damage returnable March 31, 2023 (Da1). Respondents rely on the same arguments raised below on the present Appeal.

On March 10, 2024, defendant moved to bar evidence of unpaid medical expenses because plaintiffs never established that PIP was exhausted and, therefore, unpaid medical expenses that were collectible under PIP and inadmissible under N.J.S.A. 39:6A-12. (Da1).

In the same motion, defendant moved to bar evidence of property damage based on accord and satisfaction because, property damage had already been settled and adjusted by New Jersey Manufacturers Insurance Company who insured the defendant (Da1).

Plaintiffs' counsel opposed the motion to bar evidence of unpaid medical expenses and property damage largely on procedural grounds on March 14, 2024 (Da15).

On May 17, 2023, Judge Mclaughlin entered the Order from which Appellants' appeal dismissing the entire case (Pa1). The Order from which the Appellants appeal did not address the claim for economic damages or respondent's motion addressing it (Pa1).

On May 17, 2023, Judge McLaughlin entered a separate Order denying defendant's motion in limine as "moot" because the entire case was dismissed by the Order granting defendant's summary judgment motion. Defendant interpreted the two May 17, 2023 Orders as a ruling on the merits dismissing claims for economic and non-economic damages (Da17).

CONCLUSION

For the foregoing reasons it is respectfully submitted that Plaintiffs are not entitled to recover either non-economic damages or economic damages in this matter. Accordingly, the Order entered by the trial court that granted summary judgment in favor of Defendant must be affirmed.

ORAL ARGUMENT is requested.

Respectfully submitted,

JOHN J. GENTILE, ESQUIRE

Dated: August 12, 2024