SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0549-15T1

GERADE C. DOORNBOS, single,

Plaintiff-Respondent,

v.

PATRICIA A. WEHRLE,

Defendant-Appellant.

Argued November 10, 2016 – Decided March 2, 2017

Before Judges Alvarez and Manahan.[1]

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-245-11.

Joseph G. Murray argued the cause for appellant (Zimmerer, Murray, Conyngham & Kunzier, attorneys; Mr. Murray, of counsel and on the briefs).

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[1] Hon. Carol E. Higbee participated in 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 by a panel of 3 judges." The presiding judge has determined that this appeal shall be decided by two judges.

Michael P. Cahill argued the cause for respondent (Rosenberg, Kirby, Cahill, Stankowitz & Richardson, attorneys; Mr. Cahill, of counsel and on the brief).

PER CURIAM

Defendant Patricia A. Wehrle, for the second time, appeals the jury's unanimous verdict finding her liable for the injuries suffered by plaintiff Gerard C. Doornbos as the result of a motor vehicle accident. After our consideration of the legal arguments and the record, we affirm.

I.

Some discussion of the first appeal is warranted. Doornbos v. Wehrle, No. A-1992-13 (App. Div. Apr. 21, 2015). The jury at the first trial found defendant liable and awarded plaintiff $2,679,410.85 in damages. Id. at 1. We reversed and remanded for a new trial solely on the issue of liability, leaving the jury's damage award intact. Id. at 2. This appeal is from the second unanimous jury verdict finding defendant liable.

Defendant's automobile struck plaintiff as she was attempting to make a left-hand turn into eastbound traffic from a shopping center driveway. The maneuver required defendant to cross two westbound lanes of traffic. Plaintiff was in the left-hand lane of westbound traffic. He was operating his motorcycle at the time, driving at less than the speed limit.

Defendant's defense theory was that plaintiff was contributorily negligent. In support of the contention, she claimed the point of impact was the center turn lane in which her car came to rest, not the left-hand westbound lane where plaintiff and his eyewitnesses said he was travelling when the accident occurred. This jury, like the first, saw a photograph of the car's location after the collision, which defendant argued supported her position.

Among other disabling injuries, plaintiff broke his back and was unable to continue his longtime employment as a skilled machinist. He currently subsists on Social Security disability benefits as he can no longer work.

The eyewitnesses, including the driver exiting the mall immediately behind defendant, uniformly testified that she struck plaintiff while he was traveling in his lane. That witness, like the others, said the accident occurred "very fast," within a second or two of when defendant pulled out into the roadway.

The driver behind the first eyewitness agreed, and added that his attention was drawn to westbound traffic because of the loud sound of a motorcycle coming from his left. Because he was looking towards the source of the sound, he saw the car strike the motorcycle.

A witness standing outside of a car wash across the street from the incident agreed that defendant struck plaintiff while he was in his proper lane of travel. He differed in that he thought plaintiff was travelling in the right-hand westbound lane when defendant's car collided with the motorcycle.

The patrol officer who first arrived at the scene recalled defendant speaking to him twice. Defendant, when she testified, denied speaking to him at all. The officer said defendant first told him that she did not see the motorcycle. After a friend of hers arrived, ten or fifteen minutes later, defendant told the officer that she had been in the center lane when the accident occurred.

In denying defendant's motion for a new trial, the judge opined that the jury had assessed the credibility of the witnesses, including plaintiff and defendant, and made their decision accordingly. The jury believed the credible evidence presented by plaintiff, including the eyewitnesses and police officer, and disbelieved defendant.

The judge concluded that the jury must have found that defendant should have been looking more carefully and should have waited until she was certain that she had a clear passage in making the turn. He observed that the "the examinations were done thoughtfully by both counsel . . . . the case was presented to the

jury in a fair light . . . ." As a result, the judge said that he was "not going to take the place of the jury." All of the "pertinent evidence" was presented, nothing was left out, and "defendant's disinclination to agree with the jury's interpretation of the facts is not sufficient grounds for a new trial and, therefore, the motion is denied."

Defendant asserts that the trial judge erred in denying the motion for a new trial. She also contends that the matter should be remanded so she can investigate plaintiff's testimony that a friend who assisted him in tracking down eyewitnesses actually located two others that plaintiff said, "we never brought up." No objection was made at the time. No sidebar was requested. No mention was made of the two alleged additional eyewitnesses in the motion for a new trial. In other words, the issue is raised for the first time on appeal.

II.

We first address defendant's claim that the judge erred in denying her application for a new trial. She contends the jury's verdict was against the weight of the evidence and constituted a miscarriage of justice.

The standard we employ on appeal is essentially the same as that applied by the trial court. We decide whether the verdict was a miscarriage of justice. Dolson v. Anastasia, 55 N.J. 2, 6-8

(1969). In the process of applying that standard, we must accept as true the evidence which supports the jury's verdict, and any permissible inferences therefrom. Bldg. Materials Corp. of Am. v. Allstate Ins., 424 N.J. Super. 448, 486 (App. Div.), certif. denied, 212 N.J. 198 (2012); Boryszewski v. Burke, 380 N.J. Super. 361, 391 (App. Div. 2005), certif. denied, 186 N.J. 242 (2006); Bell Atl. Network Servs., Inc. v. P.M. Video Corp., 322 N.J. Super. 74, 83 (App. Div.), certif. denied, 162 N.J. 130 (1999).

This jury's verdict is supported by the testimony of plaintiff and the eyewitnesses. It established that plaintiff was struck by defendant while he proceeded in his lane of travel at less than the speed limit as she was attempting to make a left-hand turn against traffic. Even defendant's statement at the scene supports the eyewitness testimony. The patrol officer testified that defendant initially acknowledged not seeing the plaintiff before she struck him. It was only after her friend's arrival, some minutes later, that defendant claimed the accident occurred in the center turn lane, not in the westbound lane where everyone else placed the incident. Accepting as true the evidence supporting the jury's verdict and the permissible inferences drawn therefrom, it is clear that no miscarriage of justice occurred. See R. 2:10-1. The judge did not err in denying the motion for a new trial.

III.

Finally, defendant seeks to have the matter remanded for additional discovery pursuant to Rule 4:24-3, which states: "[t]he provisions of [Rule] 4:24 shall not preclude the further use of discovery proceedings, on motion and order of the court, after the entry of judgment." Rule 4:24-1(c) provides that extensions of time for discovery are permissible, even after a trial date is fixed, where exceptional circumstances are established. After the filing of the notice of appeal, defendant filed a motion with us requesting the opportunity to engage in discovery before consideration of the appeal. In order to prevail on that motion, defendant must have established the existence of exceptional circumstances, which she cannot do.

We commence our discussion by noting it would be sheer speculation to conclude that any other witnesses' observations would differ from that of the three whose identities were known to defendant, and who testified at the trial. Although we agree as a general principle that the failure to disclose the names and addresses of the witnesses is a deprivation of substantial rights, plaintiff's passing comment was the first time these alleged other witnesses were mentioned. He said only that a friend told him they existed.

The testimony of the three eyewitnesses who were produced did not conflict in any consequential respect whatsoever. All placed plaintiff in a proper lane of travel, and attributed legal responsibility to defendant.

In the administrative law context, motions for post-decision discovery require consideration of whether the applicant was aware of the information at the time of the trial, and whether the evidence would be likely to affect the outcome if included. In re Gastman, 147 N.J. Super. 101, 114 (App. Div. 1977). The same analysis is appropriate in this case, as the definition of "extraordinary" should include the potential impact on the outcome. Here, defendant did not react during the trial or include any mention of the additional witnesses in her motion for a new trial. That silence alone might be fatal to this argument——but it is also an issue lacking in substantive merit given the overwhelming eyewitness testimony. It is unlikely, had those additional witnesses been produced, that they would have said anything different from the witnesses who testified. It is highly unlikely that their testimony would have affected the outcome. Defendant has not demonstrated exceptional circumstances under Rule 4:24-1(c).

Additionally, the request for post-judgment discovery is raised for the first time on appeal. The issue is neither

jurisdictional in nature nor does it implicate the public interest. See Zaman v. Felton, 219 N.J. 199, 226-27 (2014).

Affirmed.