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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1864-15T4

ANGELA BURLEY,

Plaintiff-Appellant,

v.

ERIK LARSEN,

Defendant-Respondent.

Argued December 20, 2016 – Decided April 24, 2017

Before Judges Leone and Vernoia.

On appeal from the Superior Court of New
Jersey, Law Division, Mercer County, Docket
No. L-1310-12.

Andrew Van Wagner argued the cause for
appellant (Simon & Simon, P.C., attorneys; Mr.
Van Wagner, on the brief).

C. Robert Luthman argued the cause for
respondent (Weir & Associates, LLC, attorneys;
Mr. Luthman, of counsel and on the brief).

PER CURIAM

Plaintiff appeals a December 3, 2015 Law Division order granting defendant's motion in limine to redact plaintiff's expert's de bene esse deposition testimony that plaintiff suffered

from lumbar radiculopathy, and granting defendant's motion for an involuntary dismissal of the complaint with prejudice. Based on our review of the record under the applicable law, we affirm.

I.

Plaintiff filed a complaint alleging she suffered personal injuries in a May 2010 automobile collision caused by defendant's negligence. Plaintiff's auto insurance policy contained a limitation on lawsuits under the Automobile Insurance Cost Reduction Act (AICRA), N.J.S.A. 39:6A-1.1 to -35. As a result, plaintiff was required to prove she sustained a permanent injury as defined in N.J.S.A. 39:6A-8(a) in order to recover noneconomic damages. To sustain her burden, plaintiff relied on the opinions of her treating physician, Dr. Rajan Gupta, M.D., whose testimony concerning her claimed injury is the subject of this appeal.

Gupta first treated plaintiff for a back injury prior to the May 2010 accident. In May 2008, plaintiff sought treatment from Gupta for lower back pain caused by a yard-work accident (2008 accident). Gupta characterized plaintiff's 2008 injury as "low back pain" and diagnosed her with "lumbar spondylosis, facet syndrome, lumbar strain," and "myofascial pain." He treated plaintiff for the injuries from May 2008 through April 2010.

Immediately following the May 2010 accident, plaintiff sought further treatment with Gupta. Gupta examined plaintiff and found

she suffered back injuries including "lumbar disc disease" and "lumbar radiculopathy." Over the course of the following fifteen months, Gupta attempted several forms of treatment including trigger point injections on two occasions, and transforaminal epidural injections on one occasion.

Gupta supplied two February 18, 2014 reports for use in plaintiff's pending lawsuit. The first report (initial report) included Gupta's medical opinion that plaintiff sustained permanent injuries to her lower back as a result of the 2008 yard accident. The second report was entitled the "Revised Narrative Report" (revised report) and addressed plaintiff's treatment with Gupta before and after the May 2010 accident, and included Gupta's opinions about plaintiff's injuries resulting from the 2010 accident.

In the revised report, Gupta opined that "[b]ased on [plaintiff's] symptoms, physical examination and diagnostic studies [plaintiff] was diagnosed" with "lumbar spondylosis, facet syndrome, lumbar radiculopathy, lumbar disc disease, lumbar strain," and "myofascial pain." Gupta concluded that plaintiff "aggravated her injuries in the lumbar spine," and "she will need further treatment in [the] future with medications and injections." The revised report also stated that Gupta relied upon an MRI report issued by another doctor in making his diagnoses.

Gupta testified during his videotaped de bene esse deposition about plaintiff's treatment before and after the May 2010 accident, and opined that plaintiff suffered two permanent injuries as a result of the accident: lumbar disc herniation and lumbar radiculopathy. Gupta explained that plaintiff suffered a lumbar disc herniation as a result of the May 2010 accident and that the disc herniation caused plaintiff's lumbar radiculopathy.

Defense counsel interposed numerous objections during Gupta's testimony, one of which challenged Gupta's reliance on the MRI report as the basis for his diagnosis that plaintiff had a herniated disc. Following Gupta's deposition, defendant filed a motion in limine to strike Gupta's testimony that plaintiff suffered a lumbar disc herniation. Defendant argued Gupta's testimony was inadmissible under James v. Ruiz, 440 N.J. Super. 45 (App. Div. 2015), because his finding plaintiff suffered the disc herniation was based solely on his review of an MRI report, and he had not reviewed the MRI.¹

¹ Defendant also sought redaction of Gupta's testimony concerning the permanency of plaintiff's alleged injuries because the revised report did not include an opinion on permanency. The judge denied the motion, finding defendant was not prejudiced by the revised report's failure to reference permanency because Gupta's medical record notes, which were provided to defendant during discovery, stated that plaintiff's injuries were permanent. The denial of the motion is set forth in the court's October 4, 2015 order.

The court granted defendant's motion to strike Gupta's testimony concerning the lumbar disc herniation. The court found that Gupta's opinion plaintiff suffered a disc herniation was based on his review of the MRI report, and his testimony therefore constituted "a bootstrapping of [a] non-testifying expert's opinion," in violation of the principles in Agha v. Feiner, 198 N.J. 50 (2009), Brun v. Cardoso, 390 N.J. Super. 409 (App. Div. 2006), and James, supra, 440 N.J. Super. at 67. The judge memorialized his decision in an October 4, 2015 order.²

At the commencement of the trial, the court heard an additional motion in limine filed by defendant. The motion sought an order striking Gupta's testimony that plaintiff suffered from lumbar radiculopathy. Defendant argued the court's October 4, 2015 order striking Gupta's testimony about the disc herniation rendered his testimony that plaintiff suffered lumbar radiculopathy an impermissible net opinion. Defendant argued that because Gupta could not testify about the disc herniation, which Gupta said caused the lumbar radiculopathy, his opinion plaintiff suffered lumbar radiculopathy as a result of the accident lacked a proper foundation and was inadmissible.

Plaintiff's counsel argued Gupta's testimony was admissible because Gupta made the diagnosis based on objective medical

² Neither party appealed the October 4, 2015 order.

evidence independent of the disc herniation, including Gupta's physical examinations of plaintiff and his diagnostic intervention. The court disagreed, finding that because its October 4, 2015 order "redact[ed] any reference to disc herniation in [] Gupta's" testimony, "the basis for the continuation of testimony regarding lumbar radiculopathy was not permitted." The court found "there was no objective credible medical evidence for [] Gupta to base his opinion that lumbar radiculopathy existed, since [Gupta testified the] condition stems from the lumbar disc herniation." The court determined that "by redacting any reference to lumbar disc herniation . . . [p]laintiff [is] unable to present any alleged lumbar radiculopathy or objective credible medical proof that a permanent injury existed."³ The court granted defendant's motion to redact Gupta's testimony that plaintiff suffered lumbar radiculopathy.

Defense counsel then moved for an involuntary dismissal pursuant to Rule 4:37-2(b) because without Gupta's testimony about the lumbar radiculopathy, plaintiff had no evidence she suffered a permanent injury as a result of the May 2010 accident. Plaintiff's counsel acknowledged that because of the court's orders redacting Gupta's testimony, plaintiff was unable to

³ The judge made his findings in an oral opinion following argument on defendant's motion at trial, and in a written statement amplifying his reasons pursuant to Rule 2:5-1(b).

establish she sustained a permanent injury and "it would be pointless" to proceed through trial. On December 3, 2015, the trial judge entered an order redacting Gupta's testimony to exclude "all references" to lumbar radiculopathy, and granting defendant's request for an involuntary dismissal of the complaint with prejudice. Plaintiff appealed.

II.

Plaintiff's negligence claim is subject to the "limitation on lawsuit option" under AICRA that permits her to maintain an action for noneconomic loss only if she "sustained a bodily injury which results in 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." N.J.S.A. 39:6A-8(a). Where, as here, the action is premised on a claim of permanent injury, the plaintiff must prove the injured "body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment."

Ibid.

Proof of a permanent injury cannot be based solely on an injured party's subjective complaints. Ibid.; see also Davidson v. Slater, 189 N.J. 166, 181 (2007). To satisfy the statutory threshold, there must be a certification as to the injury by a

licensed physician, whose "opinion must be based on 'objective clinical evidence' derived from accepted diagnostic tests and cannot be 'dependent entirely upon subjective patient response.'" Davidson, supra, 189 N.J. at 181 (quoting N.J.S.A. 39:6A-8(a)); see also Agha, supra, 198 N.J. at 60-61; N.J.S.A. 39:6A-4.7; N.J.A.C. 11:3-4.5.

The requirement that alleged permanent injuries must be verified by valid, objective diagnostic procedures was "intended to ensure that only honest and reliable medical evidence and testing procedures would be introduced to prove that an injury meets the threshold." DiProspero v. Penn, 183 N.J. 477, 489 (2005); see also Davidson, supra, 189 N.J. at 189. Although subjective complaints of pain may suffice if "verified by physical examination and observation . . . [of] objectively demonstrable conditions such as 'swelling, discoloration, and spasm,' . . . a physician's 'observations' of a patient's subjective responses [cannot be transmuted] into objective clinical evidence." Agha, supra, 198 N.J. at 61 n.5 (quoting Oswin v. Shaw, 129 N.J. 290, 320 (1992), superseded by statute, N.J.S.A. 39:6A-8(a), as recognized in DiProspero, supra, 183 N.J. at 481).

Here, plaintiff does not challenge the court's October 4, 2015 order striking Gupta's testimony that plaintiff suffered a herniated disc and the herniated disc was the cause of the lumbar

radiculopathy. Plaintiff no longer claims she suffered a disc herniation as a result of the May 2010 accident. The only permanent injury plaintiff claims she suffered as a result of the accident is lumbar radiculopathy.

Plaintiff, however, argues the court erred by striking Gupta's testimony concerning lumbar radiculopathy because Gupta's diagnosis was not founded solely on the disc herniation. Plaintiff claims alternative objective medical evidence supported the diagnosis, including Gupta's observations of plaintiff's symptoms such as weakness and decreased range of motion, and his "diagnostic intervention" including trigger point and epidural lumbar injections targeting plaintiff's condition. Plaintiff contends the October 4, 2015 order striking Gupta's testimony concerning the disc herniation did not prevent Gupta from testifying about other objective medical evidence establishing lumbar radiculopathy. Plaintiff claims the court erred by ruling otherwise. We disagree.

"The admission or exclusion of expert testimony is committed to the sound discretion of the trial court." Townsend v. Pierre, 221 N.J. 36, 52 (2015). We therefore apply a "deferential approach to a trial court's decision to admit [or preclude] expert testimony, reviewing it against an abuse of discretion." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011). A trial court's decision to preclude expert testimony is only overturned

"when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" U.S. Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 467 (2012) (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)).

Based on our review of the record, we discern no abuse of discretion in the court's decision to strike Gupta's testimony concerning plaintiff's alleged lumbar radiculopathy. To be sure, Gupta testified that his lumbar radiculopathy diagnosis was based on information independent of the disc herniation. He testified that plaintiff's complaints about weakness and limited range of motion, and his interventional treatment provided objective medical evidence supporting his diagnosis. The judge, however, concluded that the only objective medical evidence supporting Gupta's opinion was the MRI, and that because the October 4, 2015 order barred his testimony concerning the MRI, plaintiff could not establish any "objective credible medical proof" of lumbar radiculopathy.

In his decision, the judge relied on the following colloquy during Gupta's deposition:

Q. And did you review the MRI report that was created in this case?

A. I did.

Q. And what did that show?

A. It showed there was a change from the previous MRI. There was a dis[c] herniation at L5-S1.

. . . .

Q. And so you diagnosed [plaintiff] with radiculopathy in this case, correct?

A. Yes.

Q. And what was the cause of that radiculopathy?

A. The cause of the radiculopathy was irritation of the nerve root at the L5-S1 due to the dis[c] herniation as we found in the MRI also.

Gupta also testified that his "diagnosis of radiculopathy in this case [was] based upon there being a dis[c] herniation caused by the [May] 2010 accident."

Although the court's decision to strike Gupta's testimony was based on its finding there was a lack of objective medical evidence independent of the MRI supporting Gupta's radiculopathy diagnosis, we address an alternative basis requiring the same result.⁴ The dispute concerning the sufficiency of the purported evidence establishing plaintiff suffered from lumbar radiculopathy pertains solely to whether plaintiff suffered from the condition. In our

⁴ On appeal, we determine the validity of the court's order not its reasoning. See Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001) (explaining "appeals are taken from orders and judgments and not from . . . reasons given for the ultimate conclusion").

view, however, it is unnecessary to reach the issue because even assuming there was objective medical evidence establishing plaintiff suffered from lumbar radiculopathy, the October 4, 2015 order prevented Gupta from testifying that the radiculopathy was caused by the May 2010 accident.

Defendant conceded liability and the parties proceeded to trial only on the issues of causation and damages. To sustain her burden at trial, plaintiff was required to prove she suffered from lumbar radiculopathy⁵ and that it was caused by the May 2010 accident. DiProspero, supra, 183 N.J. at 493 (explaining that AICRA "requires a plaintiff to prove that the defendant caused" a permanent injury). Plaintiff relied exclusively upon Gupta to provide the expert testimony required to sustain her burden of proving the permanency of her alleged injury and that it was caused by the accident.

The record showed it was Gupta's opinion that plaintiff suffered a disc herniation in the May 2010 accident and that the disc herniation was the cause of plaintiff's lumbar radiculopathy. Gupta's opinion that plaintiff's radiculopathy was caused by the May 2010 accident was therefore wholly dependent upon the existence

⁵ She was also required to prove the lumbar radiculopathy was a permanent injury. N.J.S.A. 39:6A-8(a). As noted, the court denied defendant's motion to bar Gupta from testifying about the permanency of the injury, and the denial was not appealed, so we do not consider the issue.

of the herniated disc, which he testified both resulted from the May 2010 accident and caused the radiculopathy. Gupta, however, was precluded by the court's October 4, 2015 order from testifying about the disc herniation,⁶ and therefore could not testify about what he otherwise determined caused the radiculopathy. Thus, the October 4, 2015 effectively precluded Gupta from testifying that plaintiff's lumbar radiculopathy was caused by the May 2010 accident.

We are satisfied the court correctly granted defendant's motion to redact Gupta's lumbar radiculopathy diagnosis from his de bene esse deposition testimony because the October 4, 2015 order, which is not challenged here, effectively prevented Gupta from testifying that the purported injury was caused by the May 2010 accident. Because Gutpa could not testify that the purported injury was caused by the May 2010 accident, there was no logical basis supporting the admission of his testimony at the trial. See Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 49 (App. Div. 1990) (explaining the "need for supporting data and a factual basis for the expert's opinion is especially important when the opinion is seeking to establish a cause and effect relationship."), modified on other grounds, 125 N.J. 421 (1991).

⁶ We note again that the October 4, 2015 order is not challenged on this appeal.

Moreover, we are convinced Gupta's putative testimony concerning the lumbar radiculopathy would have constituted an impermissible bootstrapping of the findings contained in the MRI report, James, supra, 440 N.J. Super. at 67, and an impermissible net opinion on the issue of causation, see Hisenaj v. Kuehner, 194 N.J. 6, 23-24 (2008) (explaining in a verbal threshold case that a medical expert must provide the "why and wherefore" of his or her opinion regarding the cause of an injury). In any event, the court's order barring the testimony was not an abuse of discretion.

The court also correctly determined that because Gupta could not rely on the MRI report, his radiculopathy diagnosis was not otherwise supported by any "objective clinical evidence." N.J.S.A. 39:6A-8. Other than the MRI report, Gupta's diagnosis was based solely on plaintiff's subjective reports of pain, weakness, and limited range of motion. Under similar circumstances, our Supreme Court has ruled that radiculopathy was not shown by objective diagnostic procedures because it "was diagnosed by the straight leg raising test," other subjective diagnostic procedures "including range of motion tests, and [the plaintiff's] subjective symptomology (pain and tingling)," unlike "an MRI examination, a recognized objective diagnostic device." Davidson, supra, 189 N.J. at 189-90.

Gupta testified that his use of injections constituted "diagnostic intervention" providing the basis for a "conclusive objective diagnosis" of radiculopathy. However, "[m]erely because a doctor claims that his findings are based on 'objective' testing does not transform such findings into credible, objective medical evidence." Phillips v. Phillips, 267 N.J. Super. 305, 317 (App. Div. 1993). Gupta explained that plaintiff's subjective statements concerning the reduction of her pain following the injections provided the basis for his radiculopathy diagnosis. Plaintiff's statements, however, do not constitute "objective clinical evidence," N.J.S.A. 39:6A-8, supporting Gupta's diagnosis. Such evidence "must be 'derived from accepted diagnostic tests and cannot be "dependent entirely upon subjective patient response.'" Agha, supra, 198 N.J. at 60 (quoting Davidson, supra, 189 N.J. at 181).⁷ Here, Gupta's radiculopathy diagnosis was wholly dependent on plaintiff's subjective responses. Ibid. The court


⁷ N.J.S.A. 39:6A-8 provides that "medical testing shall be performed in accordance with medical protocols . . . and the use of valid diagnostic tests." Moreover, "valid diagnostic tests shall be based on . . . a level of general acceptance by the relevant provider community." N.J.S.A. 39:6A-4.7. All testing must be "rendered in accordance with commonly accepted protocols and professional standards and practices which are commonly accepted." N.J.S.A. 39:6A-4. Injections are not on the list of valid diagnostic tests. N.J.A.C. 11:3-4.5.

therefore correctly determined there was no objective medical evidence supporting Gupta's diagnosis.

We find no merit in plaintiff's argument that the court erred in granting defendant's motion for an involuntary dismissal under Rule 4:37-2(b). The argument is based on the contention that the court erred by striking Gupta's testimony. We have rejected that contention for the reasons stated.:

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

Because we conclude the court correctly granted defendant's motions, it is unnecessary that we address defendant's argument that Gupta's testimony should have been barred because he failed to conduct a "comparative analysis" of the back injuries plaintiff suffered in the 2008 accident with the injuries she sustained in the 2010 accident as required under Polk v. Daconceicao, 268 N.J. Super. 568, 575 (App. Div. 1993), because Gutpa's revised report stated that the 2010 accident caused an aggravation of plaintiff's injuries. See Davidson, supra, 189 N.J. at 185 (finding that where it is claimed an accident aggravated a prior injury, a comparative analysis of pre- and post-accident injuries is required to prove the accident caused a permanent injury under N.J.S.A. 39:6A-8(a)). The issue was not decided by the motion court and its resolution is not required for the disposition of this appeal.