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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2235-16T1

IFRAIN VELEZ,

Plaintiff-Respondent,

v.

MARGARET BUTCH,

Defendant-Appellant.

Argued February 7, 2018 – Decided March 9, 2018

Before Judges Alvarez and Nugent.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Docket No.
L-11309-14.

Elizabeth C. Flanagan argued the cause for
appellant (Purcell, Mulcahy, Hawkins &
Flanagan, LLC, attorneys; Elizabeth C.
Flanagan, of counsel and on the briefs;
Alyssa K. Weinstein, on the briefs).

John R. Gorman argued the cause for
respondent (Lutz, Shafranski, Gorman &
Mahoney, PA, attorneys; John R. Gorman, of
counsel and on the brief).

PER CURIAM

This personal injury action arose out of a collision
between the parties' automobiles that occurred when defendant

made a left turn in front of plaintiff. Defendant appeals from an order denying her motion for a new trial and for an order vacating the judgment the court entered on the jury's verdict. The jury awarded plaintiff \$125,000 in damages, to which the court added a monetary sanction, interest, and costs.

On appeal, defendant argues the court erred by directing a verdict in plaintiff's favor on defendant's claim that plaintiff was negligent. Defendant also alleges the court erred by misstating the law when it charged the jury on the concepts of permanent injury and aggravation of a pre-existing injury. Finding no merit in defendant's arguments, we affirm.

Plaintiff commenced this action by filing a complaint alleging he sustained injuries in an automobile accident caused by defendant's negligence. Defendant answered and alleged, among other separate defenses, plaintiff's comparative negligence. The case was tried before a judge and jury during the first three days in November 2016.

Following the close of all the evidence, the court granted plaintiff's motion for a directed verdict that he was not negligent and dismissed defendant's comparative negligence defense. The court found no evidence from which the jury could have inferred plaintiff was negligent. After the court dismissed defendant's comparative negligence defense, plaintiff

moved for a directed verdict on liability. The court granted the motion.

The jury determined plaintiff had sustained a permanent injury and returned a damage verdict in his favor. Defendant filed a motion for a new trial, which the court denied. This appeal followed.

Four witnesses testified at trial: plaintiff, his wife, his medical expert, and defendant's medical expert. Plaintiff was the only witness to give an account of the accident. He testified it happened on Buckelew Avenue in Jamesburg, a few blocks from the home where he had lived for approximately thirty-three years. Northbound Buckelew Avenue – plaintiff's direction of travel – has two lanes at its intersection with Pergola Avenue. At the same location, southbound Buckelew Avenue – defendant's direction of travel – has two lanes, one for through traffic and one for traffic turning left. There are no traffic lights, stop signs, or other traffic control devices for traffic travelling north and south on Buckelew Avenue. The speed limit is thirty-five miles per hour.

On the day of the accident the weather was clear and the road was dry. Plaintiff was driving his Nissan Altima at a speed of thirty miles per hour when defendant, driving her Toyota, made a sharp left turn in front of him to turn onto

Pergola Avenue. She did not stop before turning left. When defendant turned in front of him, plaintiff slammed on the brakes and grabbed the wheel but could not avoid the collision. According to plaintiff, "[l]ike one second" elapsed from the time defendant turned sharply in front of him until the impact.

Plaintiff's Altima sustained damage to the passenger side of the front bumper and the front of the car near the passenger-side headlight. Defendant's Toyota sustained damage to the rear passenger side. The damage to defendant's car did not extend to the rear passenger side taillight.

Plaintiff's medical expert, an orthopedic specialist, testified plaintiff sustained permanent injuries to his neck and back as a result of the accident. The doctor testified plaintiff sustained "a chronic post-traumatic cervical and lumbar strain and sprain patterns"; "dis[c] herniations at C4-5, C6-7"; and "cervical facet joint syndrome." The doctor also testified plaintiff "sustained aggravation of pre-existing, quiescent, age-related degenerative dis[c] disease and osteoarthritis of [the] cervical spine." The pre-existing condition was asymptomatic before the accident.

In addition, the expert testified plaintiff sustained a "dis[c] herniation at L4-L5, a lumbar radiculopathy confirmed by . . . EMG." Plaintiff also sustained a lumbar facet joint

syndrome. Plaintiff's "pre-existing, age-related, multi-level degenerative dis[c] disease in the lumbar spine" was aggravated as the result of the injuries plaintiff sustained in the accident.

Plaintiff's orthopedic expert acknowledged a possibility that plaintiff's herniated cervical and lumbar discs could have pre-dated the accident and been caused by the degenerative conditions seen in plaintiff's cervical and lumbar spine on magnetic resonance imaging (MRI) scans.¹ The doctor explained that from plaintiff's viewpoint, the symptoms and impairment are the same regardless of whether the herniated discs pre-dated the accident, because the chronic pain and consequent impairment are the same. Nonetheless, the doctor maintained the trauma from the accident was the direct cause of plaintiff's herniated discs.

Plaintiff presented proofs as to the course of his medical treatment, including an emergency room hospital visit the day after the accident; chiropractic treatment and physical therapy;

¹ An MRI scan "uses a large magnet and radio waves to look at organs and structures inside your body." MRI Scans, MedlinePlus: Trusted Health Information for You, <https://medlineplus.gov/mriscans.html> (last visited February 20, 2018). They are especially useful for examining the spinal cord. Ibid.

and trigger point injections.² Plaintiff and his wife testified about the extent to which plaintiff's injuries impaired his functional ability and prevented him from engaging in numerous pre-accident activities. Plaintiff's medical expert opined that such impairments were consistent with the injuries to plaintiff, who was sixty-seven years old at the time of trial. The expert's final conclusion was that plaintiff "has a permanent orthopedic impairment with a permanent disability."

Defendant presented the testimony of an orthopedic surgeon who had examined plaintiff at her request. He disputed plaintiff's expert's testimony. According to defendant's orthopedic surgeon, the condition of plaintiff's lumbar and cervical discs, seen on the MRI scans, was due to longstanding disc and bone degeneration, not the trauma from the accident. Defendant's doctor opined plaintiff "did not sustain any permanent injury to his neck or back in that accident."

When defendant rested, plaintiff moved for a directed verdict, seeking dismissal of defendant's comparative negligence

² Plaintiff's expert explained trigger point injections as the use of small needles filled with lidocaine and sometimes a steroid that are "inject[ed] [at the] trigger points [to] calm them down." He further stated "if you find what is called an area of hyperirritability, you roll the skin, you'll find an area of hyperirritability. You mark it. You inject it so that you can break that up [with the trigger point injections]."

defense. The court noted it had listened to defendant's testimony and replayed it earlier in the morning. Giving defendant the benefit of all reasonable inferences from the evidence, the court determined there was no basis to impose liability on plaintiff.

Following the court's ruling, plaintiff moved for a directed verdict on liability. The court found plaintiff's testimony as to how the accident occurred established defendant's liability. Even giving defendant the benefit of all reasonable inferences, no reasonable juror could find otherwise.

Plaintiff was subject to the limitation on lawsuit threshold, N.J.S.A. 39:6A-8(a), and was therefore required to prove he sustained a permanent injury in order to recover for noneconomic loss. The trial court explained the issue to the jury in its charge:

In order to recover damages in this case, as the attorneys have explained to you, the plaintiff must prove by a preponderance of the evidence that he sustained injuries which fit into a particular category, that of a permanent injury within a reasonable degree of medical probability, other than scarring o[r] disfigurement.

If you find that the injuries caused by the accident do not come within this category, then your verdict must be for the defendant.

However, if you find that the injuries caused by the accident do come within this category, your verdict must be for the plaintiff. In this case, the plaintiff alleges that he suffered permanent injury as a result of the motor vehicle accident. An injury shall be considered permanent when the body part or organ, or both, has been – has not healed to function normally, and will not heal to function normally with further medical treatment.

Later, when charging the jury on damages, the court explained:

In this case, evidence has been presented that the plaintiff had a condition before the accident that is described as a cervical spine and/or lumbar spine age – age-related architectural change, also known as degeneration. I will refer to this condition as his preexisting injury.

And there are different rules that apply for awarding damages, depending on whether the preexisting injury was or was not causing the plaintiff any harm or symptoms at the time of the accident.

Obviously the defendant in this case is not responsible for any preexisting injury of the plaintiff. As a result, you may not award any money in this case for damages attributable solely to the preexisting condition.

But I want to explain to you what happens if the plaintiff was experiencing symptoms of the preexisting condition at the time of the accident. . . . If the injuries sustained in this accident aggravated or made plaintiff's preexisting injury more severe, then the plaintiff may recover for any damages sustained due to an aggravation or worsening of a preexisting condition, but only to the extent of that aggravation.

Plaintiff has the burden of proving what portion of his condition is due to his preexisting injury. Plaintiff is entitled to damages only for that portion of his injury attributable to the accident.

If you find that the plaintiff's preexisting condition was not causing him any harm or symptoms at the time of the accident, but that the preexisting condition combined with injuries incurred in the accident to cause him damage, then plaintiff is entitled to recover for the full extent of the damages that he sustained.

But I want to explain to you what happens if plaintiff had a predisposition or weakness which was causing no symptoms or problems before the accident but made him more susceptible to the kind of medical problems he claims in this case.

If the injuries sustained in this accident, combined with that predisposition to create the plaintiff's medical condition, [then plaintiff is] entitled to recover for all of the damage sustained due to that condition.

You must not speculate that an individual without such predisposition or latent condition would have experienced less pain, suffering, disability and impairment.

The court further explained:

Here you should understand that if the plaintiff has proven by a preponderance of the evidence that he sustained at least one permanent injury as I have defined that permanent injury to you, as a proximate result of the July 24th, 2013 collision, which may include the aggravation of a preexisting condition, then you may compensate him for all of his claimed

injuries, even if you find one or more of those injuries standing alone is not a permanent injury.

In other words, if you determine that the plaintiff suffered at least one permanent injury which may include the aggravation of a preexisting condition, then all of his accident-related injuries are eligible for compensation, even if you find that one or more are not permanent.

On appeal, defendant first argues the trial court erred by directing a liability verdict in favor of plaintiff. She contends reasonable jurors could conclude from the photographic evidence defendant had almost entirely completed her turn and cleared the intersection when the impact occurred, and that "jurors could have concluded that it was not possible that [p]laintiff failed to see [d]efendant's vehicle until one second before impact, as he testified." Defendant also asserts the jury could have disbelieved plaintiff's testimony regarding his speed in view of "his testimony that he 'slammed' on his brakes but was still travelling [sic] at about the same speed as he was when he first observed [d]efendant's vehicle."

Last, defendant argues she was prejudiced by the directed verdict and its implications that "she had not only acted unreasonably in causing the accident, but also in contesting the issue in court, thereby wasting the jury's time."

Plaintiff responds that defendant's argument is based on a misstatement of the evidence, namely, that plaintiff failed to observe defendant's Toyota until one second before impact. Plaintiff testified not that he first saw the Toyota one second before impact, but rather one second elapsed between the time defendant suddenly turned and the impact. Plaintiff asserts neither the photographs nor his familiarity with the intersection negates the fact defendant made a sudden left turn in front of him and he had insufficient time to react and avoid the accident. Plaintiff rejects defendant's claim she was somehow prejudiced because she pled plaintiff's comparative negligence but could not prove it.

A party is authorized by Rule 4:40-1 to make a motion for judgment at the close of all the evidence. A trial judge considering such a motion must apply this "evidential standard: 'if, accepting as true all the evidence which supports the position of the party defending against the motion and according [such party] the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied[.]'" Smith v. Millville Rescue Squad, 225 N.J. 373, 397 (2016) (second alteration in original) (quoting Verdicchio v. Ricca, 179 N.J. 1, 30 (2004) (citation omitted)). If, however, "the evidence and

uncontradicted testimony is 'so plain and complete that disbelief of the story could not reasonably arise in the rational process of an ordinarily intelligent mind, then a question has been presented for the court to decide and not the jury.'" Sackman v. New Jersey Mfrs. Ins. Co., 445 N.J. Super. 278, 291 (App. Div. 2016) (quoting Frugis v. Braciigliano, 177 N.J. 250, 270 (2003) (citation omitted)).

When "reviewing a trial court's decision on a motion for a directed verdict, this court 'appl[ies] the same standard that governs the trial courts.'" Id. at 290-291 (alteration in original) (quoting Frugis, 177 N.J. at 269).

Applying these principles to the facts the parties developed in the case before us, we reach the same conclusion the trial court reached: there was no triable issue as to defendant's negligence or plaintiff's comparative negligence.

We begin our analysis with the longstanding proposition that the mere happening of an accident raises no presumption of negligence. Malzer v. Koll Transp. Co., 108 N.J.L. 296, 297 (1931). Negligence will not be presumed; rather, it must be proved. Rocco v. N.J. Transit Rail Ops., Inc., 330 N.J. Super. 320, 338-39 (App. Div. 2000). There is a presumption against negligence, and the burden of establishing it is on the party

asserting the negligence of another. Buckelew v. Grossbard, 87 N.J. 512, 525 (1981).

Generally, to prove negligence, a plaintiff must establish a defendant did not take the "precautions a reasonably prudent [person] in the position of the defendant would have taken." Fantini v. Alexander, 172 N.J. Super. 105, 108-09 (App. Div. 1980) (quoting Sanzari v. Rosenfeld, 34 N.J. 128, 134 (1961)). This principle applies to motor vehicle negligence claims. Ambrose v. Cyphers, 29 N.J. 138, 144 (1959); see also Model Jury Charge (Civil), §5.30A "General Duty Owing" (1999). In addition, in motor vehicle negligence claims, proof "that a party has violated 'a statutory duty of care . . . is a circumstance which the jury should consider in assessing liability." Eaton v. Eaton, 119 N.J. 628, 642 (1990) (quoting Waterson v. General Motors, 111 N.J. 238, 263 (1988)).

A driver making a left turn in front of traffic has an elevated duty of care. When a driver seeks to make a left turn across the path of other traffic, the driver has a "duty to await an opportune moment for the turn and 'exercise an increased amount of care in proportion to the increased danger' involved in the turn." Zec v. Thompson, 166 N.J. Super. 52, 55 (App. Div. 1979) (quoting Ambrose, 29 N.J. at 150).

If a plaintiff proves a defendant's negligence, the factfinder's inquiry does not necessarily end there. "Unless public policy dictates otherwise, whenever a plaintiff's conduct contributes to an event negligently caused by a defendant, the plaintiff's comparative fault should be submitted to the factfinder for determination." Del Tufo v. Twp. of Old Bridge, 147 N.J. 90, 111 (1996). A defendant has the burden of demonstrating a plaintiff's negligence. See Buckley v. Est. of Pirolo, 101 N.J. 68, 79-80 (1985).

In the case before us, the undisputed evidence established defendant violated her duties to wait for an opportune moment to make her left turn and exercise an increased amount of care when turning across traffic. Plaintiff's testimony established defendant, without warning, turned suddenly in front of him. The photographic evidence and damage to the vehicles supported plaintiff's proofs that defendant turned left in front of him, and defendant never argued otherwise. Plaintiff's uncontradicted testimony and the photographic evidence were "so plain and complete that disbelief of the story could not reasonably arise in the rational process of an ordinarily intelligent mind." Frugis, 177 N.J. at 270 (quoting Ferdinand v. Agric. Ins. Co., 22 N.J. 482, 494 (1956)).

On the other hand, defendant did not sustain her burden of proving plaintiff's comparative negligence. Her argument to the trial court, as well as the argument in her appellate brief on this point, are based on a faulty factual premise: plaintiff did not see defendant's car until one second before impact. That was not plaintiff's testimony. Rather, he testified perhaps one second elapsed between the inception of defendant's sudden left turn and the impact between the cars.

Defendant presented no evidence as to the distance between her car and plaintiff's at the inception of her turn, the distance traversed by her car during the interval between the inception of her left turn and impact, or her speed. She provided no explanation of a driver's reaction time.³ Absent competent evidence of such facts, the jury would have been left to speculate about whether plaintiff had failed to make proper observations or violated some other duty imposed on the drivers of motor vehicles on our roadways. Indisputably, "[s]peculation cannot supply the place of proof." Moore v. Chesapeake & O.R. Co., 340 U.S. 573,

³ Reaction time "is that period of time which elapses from the instant the mind perceives the peril placed in the path of the vehicle until the physical reaction of applying the brakes, or turning the vehicle from the path of danger, can be made." B. Finberg, Annotation, Judicial Notice of Drivers' Reaction Time and of Stopping Distance of Motor Vehicles Traveling at Various Speeds, 84 A.L.R.2d 979 (2017).

578 (1931) (citing Galloway v. United States, 319 U.S. 372, 395 (1943)); accord Shelhammer v. Lehigh V.R. Co., 14 N.J. 341, 344 (1954) (explaining mere speculation is not enough to establish negligence and proximate cause).

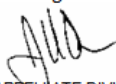
We are also unpersuaded by defendant's argument that she was prejudiced by the directed verdict and the implication she had acted unreasonably both in causing the accident and in contesting her liability. Obviously, a trial court should not submit to the jury claims or defenses unsupported by competent evidence merely because a party has pled a cause of action or affirmative defense she cannot prove.

In her second point, defendant argues the court gave erroneous or confusing jury instructions concerning whether plaintiff had sustained a "permanent injury" and when plaintiff was permitted to recover for pre-existing conditions. We have considered the argument and determined it to be without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only that the challenged portions of the charge, when considered in the context of the instructions in their entirety, were neither misleading nor confusing. Moreover, neither party objected to the portions of the charge defendant now claims as error. The parties were present when the court charged the jury and were able to hear its delivery, including the court's

tone and inflection. The parties' failure to object to the charge at trial raises the presumption that the instructions were adequate, see State v. Macon, 57 N.J. 325, 333, (1971), and, more importantly, that trial counsel perceived no prejudice affecting a client's substantial rights, State v. Wilbely, 63 N.J. 420, 422 (1973).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION