SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3463-16T3

JANNETH PADILLA,

Plaintiff-Appellant,

v.

SPENCER MATTLE,

Defendant-Respondent.

Argued February 27, 2018 – Decided May 15, 2018

Before Judges Fasciale and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-5311-14.

Michael Confusione argued the cause for appellant (Hegge & Confusione, LLC, attorneys; Michael Confusione, of counsel and on the brief).

Christopher Marcucci argued the cause for respondent (Margolis Edelstein, attorneys; Diane Magram, of counsel; Christopher Marcucci, on the brief).

PER CURIAM

Janneth Padilla, individually, and Ary Sanchez,[1] a minor, by and through Padilla, his natural parent and guardian ad litem, appeal from a March 6, 2017 order entering a judgment of no cause of action, dismissing their complaint after a jury trial. We find no merit in plaintiff's arguments and affirm.

Plaintiff claimed permanent injury to her neck and back from a motor vehicle accident, offering medical expert testimony that she suffered

> post-traumatic cervicalgia with cervical radiculopathy which is damage causing pain from a trauma to the neck with a problem with the nerve root as it leaves the neck into the arm in the setting of disc herniations at those three levels, C4-5, C5-6 and C6-7,[2] and secondarily of course I diagnosed low back pain after trauma as well although that had obviously by that stage significantly improved with her with both time and chiropractic therapy.

Plaintiff first argues the trial judge erred in failing to sua sponte instruct the jury on the issue of a preexisting injury she suffered in a motor vehicle accident in 2010. Without the instruction, she argues, the jury could have determined her claimed

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[1] Ary Sanchez's claims were dismissed by an order entered June 30, 2015, which is not the subject of this appeal; only the March 6, 2017 order is listed on the notice of appeal and the civil case information statement.

[2] Cervical vertebrae.

disc herniations were caused not by defendant, but during the 2010 accident.

Because plaintiff expressed no objection to the judge's charge, we review it for plain error, that is error "clearly capable of producing an unjust result." R. 2:10-2. The rationale underlying the plain error rule is that a court should not countenance an unjust result "because of the oversight of the advocate." Jurman v. Samuel Braen, Inc., 47 N.J. 586, 591 (1966) (quoting In re Appeal of Howard D. Johnson Co., 36 N.J. 443, 445 (1962)). Conversely, a reviewing court ought not be taken in by appellate counsel's efforts to exaggerate "[o]versight[s] and inadvertencies of the court deemed to be harmless and unimportant" by trial counsel. Ibid. (first alteration in original) (quoting Valls v. Paramus Bathing Beach, Inc., 46 N.J. Super. 353, 357 (App. Div. 1957)). Moreover, we have recognized "a judge may not force upon a plaintiff an alternate theory of recovery that the plaintiff chooses to forgo" by instructing the jury on that theory. Witter by Witter v. Leo, 269 N.J. Super. 380, 394 (App. Div. 1994).

Plaintiff posits the preexisting injury issue was raised by defense counsel's cross-examination of plaintiff's medical expert and the defense medical expert's testimony. Plaintiff's expert, however, did not review any records from the 2010 accident. And the defense expert testified his review of the 2010 records

revealed plaintiff complained of neck pain but denied head, chest and low-back injuries; and x-rays "showed some straightening of the normal lordotic curvature, the normal curvature of the neck was straight which sometimes is from muscle spasm, and there were no fractures or other findings."

Significantly, defense counsel made no mention of the defense expert's testimony during summation. Counsel's only mention of the 2010 accident was that plaintiff complained of neck pain after the accident; counsel tried to explain possible reasons why plaintiff had no "further treatment": her work and children; and that she was hit from the rear in 2010 but in the present accident, she was hit from the side. Instead, counsel focused on the defense expert's testimony about the lack of evidence of permanent injury in the records, including MRI and CT myelogram studies, and the doctor's findings after tests and examination that were "nonconcordant" with the permanent injuries plaintiff claimed. Defense counsel also pointed to degenerative changes admitted by plaintiff's expert.

In her merits brief, plaintiff admits her counsel argued that plaintiff would have treated more if the injuries sustained in the 2010 accident were "significant"; and that the 2010 accident was "a red herring." Following that tack, plaintiff's counsel did not

request the instruction plaintiff now contends should have been given.

Plaintiff forewent the aggravation of pre-existing injury theory. She did not plead an injury aggravation in her complaint, and she did not offer any required comparative medical evidence regarding same.[3] And, clearly, plaintiff chose to ignore defense counsel's brief remarks about the "red herring" 2010 accident and attempted to convince the jury that plaintiff's disc herniations — of which there was no prior objective proof — were the result of the present accident.

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[3] See Davidson v. Slater, 189 N.J. 166, 185-86 (2007) (citations omitted), which held:

> When aggravation of a pre-existing injury is pled by a plaintiff, comparative medical evidence is necessary as part of a plaintiff's prima facie and concomitant verbal threshold demonstration in order to isolate the physician's diagnosis of the injury or injuries that are allegedly "permanent" as a result of the subject accident. Causation is germane to the plaintiff's theory of aggravation of a pre-existing injury or new independent injury to an already injured body part. In such matters, a plaintiff generally bears the burden of production in respect of demonstrating that the accident was the proximate cause of the injury aggravation or new permanent injury to the previously injured body part. Such evidence provides essential support for the pled theory of a plaintiff's cause of action and a plaintiff's failure to produce such evidence can result in a directed verdict for defendant.

It is fair to infer — because the instruction was not requested and there was no objection to the jury charge — that "the error belatedly raised here was actually of no moment." See McKenney ex rel. McKenney v. Jersey City Med. Ctr., 330 N.J. Super. 568, 601 (App. Div. 2000), rev'd in part on other grounds, 167 N.J. 359 (2001). As in McKenney, "[w]e are convinced that the trial court did not commit error. But even if we are wrong in that conclusion, we are entirely satisfied that the error was not capable of producing an unjust result." Ibid.

Plaintiff also contends that a herniated disc is a permanent injury as a matter of law, and that the issue should not have been submitted to the jury. We determine that argument, based on inapposite cases holding that evidence of a herniated disc was sufficient to overcome the verbal threshold, is without sufficient merit to warrant discussion in this written opinion. R. 2:11-3(e)(1)(E). The conflicting evidence, including the medical experts' differing interpretations of the radiological studies, was properly submitted to the jury. We also agree with defendant that plaintiff's present contention that the verdict "disregard[ed] the substantial credible evidence and shocks the conscience of the court" is, in effect, an argument that the verdict was against the weight of the evidence — an argument precluded here because plaintiff did not move for a new trial. R.

2:10-1. Again, even if we are mistaken in that regard, the jury's consideration of that conflicting evidence, as well as evidence of plaintiff's post-trauma activities militates against our conclusion that there was a clear miscarriage of justice requiring reversal. Ibid.

Affirmed.