

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4640-16T1

JANE DOE,

Plaintiff-Appellant,

v.

R.J.L.,

Defendant-Respondent,

and

A.L. and J.L.,

Defendants.

Submitted April 11, 2018 – Decided April 26, 2018

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Docket No.
L-4667-15.

Daniel B. Shapiro, attorney for appellant.

Bruno & Ferraro, attorneys for respondent
(Robert A. Ferraro and John W. Ferraro, on the
brief).

PER CURIAM

Plaintiff Jane Doe appeals the summary judgment dismissal of her complaint against her father for allegedly violating the New Jersey Sexual Abuse Act (the Act), N.J.S.A. 2A:61B-1, and committing several torts.¹ On this appeal, we must decide whether plaintiff's flashbacks of the alleged abuse establish a claim to submit to a jury. We conclude they do not. Because the flashbacks were prompted in the first instance when plaintiff was undergoing therapy, and because plaintiff's expert and defendants' expert agree the flashbacks do not establish a probability, but merely a possibility, that plaintiff was sexually abused, plaintiff has not established a claim to be decided by a jury. We therefore affirm the trial court's order granting defendant summary judgment.

This action's procedural history is not complicated. Plaintiff filed a four-count complaint against her father and paternal grandparents. She alleged her father violated the Act, falsely imprisoned her, and intentionally and negligently caused her emotional distress. After defendant answered and the parties completed discovery, defendant filed a summary judgment motion, which the trial court granted. This appeal followed.

¹ The trial court also granted summary judgment to plaintiff's paternal grandparents. Plaintiff has expressly stated she has not appealed the dismissal of the complaint as to them. For that reason, we refer to her father as either her father or "defendant" and, except as otherwise necessary, confine our discussion to plaintiff's proofs against him.

These are the facts. Plaintiff's parents divorced when she was nine years old. She resided with her mother until age eleven, when she left due to parental-child strife and moved in with her paternal grandparents, with whom her father lived. Under a court order, the grandparents were required to supervise plaintiff's parenting time with her father due to his drug addiction. After two years and nine months, plaintiff returned to her mother's home. She completed high school and went on to attend college.

During plaintiff's sophomore year at college, her best friend sustained fatal injuries in an automobile accident. Following the accident, the friend remained in a coma for a week before she died. Plaintiff testified at her deposition, "I watched my friend die in front of me." Due to the onset of severe emotional trauma following her friend's death, plaintiff eventually dropped out of school and returned home.

After returning home, plaintiff saw a therapist twice. Plaintiff told the therapist she was having anxiety attacks, was afraid to go outside, was afraid that somebody was going to come into her apartment, and could not get "through [her] days." The therapist diagnosed her with anxiety, post-traumatic stress disorder and agoraphobia. During plaintiff's second visit, the therapist asked if anything traumatic had happened to plaintiff, other than her friend's death. Plaintiff could recall nothing

else. Yet, a February 9, 2015 note in the therapist's records states, "[client] experienced flashbacks of being afraid of her father coming up the stairs to touch her sexually. [Client] discontinued therapy very soon after, against therapist's advice."

On the same day – February 9, 2015 – plaintiff began treatment with a licensed psychologist. According to the psychologist's notes, during the initial session, plaintiff "disclosed that she was having vague flashbacks of her father being on top of her and her feeling his breath on her neck." The treating psychologist reported that before plaintiff's fifth session, plaintiff "had a more detailed flashback and related the details." Plaintiff "disclosed that she had a flashback of her father entering her bedroom at his house, climbing into her bed, and having intercourse with her."

The treating psychologist further reported:

During the next week, again outside of therapy, [plaintiff] experienced another flashback, which she disclosed during the following session." The psychologist noted plaintiff "shared that the flashbacks were similar, except in her second flashback she was in bed with her father in his bedroom at his house. She reported that her flashback was of her father having intercourse with her.

After the first flashback occurred, plaintiff told her mother about it, and her mother contacted the prosecutor's office. The

Special Victims Unit investigated the case. During a detective's interview with plaintiff, plaintiff recounted how the issue of sexual abuse arose. She explained that after her friend's death, she saw a therapist. The night after a therapy session, plaintiff discussed the session with her maternal grandmother. Plaintiff told her grandmother she had no recall of events during the time she lived with her father. Plaintiff related how the therapist:

thought that was weird, so my grandmother had asked me if I've even been sexually assaulted and that brought back that I have a fear of my father and only my father[] sexually assaulting me and that I never wanted to be alone with my father because I always had that fear that it had happened.

In response to the detective's question, plaintiff said her grandmother brought up the issue of sexual assault "[b]ecause it was weird that I just blocked out those couple years that I lived with my father." Plaintiff next explained that she stopped seeing the therapist and started treatment with a psychologist. Plaintiff said the first flashback was triggered during a session with her treating psychologist, and a second flashback occurred one day while driving. She described the incidents for the detective and later described a third incident.

Detectives obtained plaintiff's consent to electronically intercept a telephone conversation between her and her father. She telephoned her father one evening and told him about her

memories of the sexual assaults. He repeatedly denied ever touching her.

Defendant was not charged with sexually assaulting his daughter. She filed the civil action against him in May 2015.

During her deposition, plaintiff testified she first mentioned her father to the treating psychologist during her fourth visit. The psychologist had asked about traumatic events and started naming holidays. When the psychologist mentioned Christmas Eve, plaintiff started having a flashback of her father sexually assaulting her.

Plaintiff testified the flashback "was very vague at the time." She recalled telling the treating psychologist, "I saw my father coming into my room in the middle of the night and getting into bed with me and having sex with me." The room was upstairs in plaintiff's grandparents' house. Plaintiff recalled what the room looked like, what her bedsheets looked like, what she was wearing, and what he was wearing. He had gym shorts on. She had a t-shirt. Plaintiff recalled she was eleven years old at the time.

Plaintiff testified the second assault took place in the basement of her grandparents' home, which was her father's room. Plaintiff also said she recently had begun to experience a third

flashback but "stopped the flashback . . . because I was out with my friends."

Plaintiff's treating psychologist apparently refused to appear for a deposition. The trial court entered an order that specified a deadline for her deposition. The order provided that in the event the treating psychologist did not appear for a deposition by the deadline, she would be precluded from testifying at trial. The order also provided that if the treating psychologist did not appear for the deposition, other experts would be precluded from relying on the treating psychologist's evaluation of plaintiff. The treating psychologist apparently did not appear for her deposition.

Plaintiff's attorney retained a forensic psychologist as an expert. Following three interviews with plaintiff, phone contacts with the therapist and treating psychologist, extensive testing, and consideration of substantial documentary evidence, plaintiff's forensic psychologist wrote a report concerning her evaluation. In the report, the psychologist stated: "[Plaintiff] is alleging a history of sexual abuse by her father. It is difficult for this examiner to opine as to the accuracy of this allegation."

The forensic psychologist explained that though plaintiff said she had flashbacks of two experiences of vaginal penetration by her father, she was unable:

[T]o provide any description with any detail of the events leading up to these isolated memories, or of the events following them. She could not provide a description of how this experience felt physically. She did not give any indication that her father engaged in any grooming behavior, nor that he told her to keep what he did a secret.

Further, the psychologist noted that the events described by plaintiff were "isolated, unexpected, unexplained, and without a context." According to the psychologist, "[t]hese facts do not indicate the abuse did not occur, but, in their absence, it is difficult to say it did occur."

The forensic psychologist enumerated factors "that would support [plaintiff's] allegation of sexual abuse by her father," but cautioned, "in this examiner's opinion the data at this point lead to this as a possibility but not a probability."

The forensic psychologist added that while plaintiff's "current presentation is consistent with a history of sexual abuse, sexual abuse is not the only possible explanation of her symptoms."

The psychologist wrote:

The specific alternative hypothesis is that [plaintiff's] current symptoms are related to her on-going exposure to a very conflictual relationship between her parents. It is this examiner's opinion within a reasonable degree of psychological certainty that [plaintiff] experienced both her parents as making their love and attention conditional upon her alliance with them. She appears to have been caught in a very intense family

drama, and responded then and even now with impulsive decisions designed to please one or the other. She did not develop the ability to recognize and tolerate mixed feelings toward each, nor to be able to step back and evaluate situations based on her own perceptions When she began to have flashbacks in the winter of 2015, she went immediately to file criminal charges and then a civil complaint, without processing this in treatment, even though she was in treatment at the time. Subsequently, in the summer of 2015, she stated to her father and his family that the decision to take this action was done under the influence of her mother. She then told this examiner, in 2016, that she told her father and his family that her mother was responsible for the legal action because she knew she had to say that in order to appease them in order to get monetary support.

The psychologist cautioned that "[w]hile none of this proves or disproves that the allegations are true, it speaks to the level of conflict she continues to be in within her family." The psychologist thought it possible that many of plaintiff's current difficulties were related to the history of family tension. The psychologist concluded:

It is not clear to this examiner, within a reasonable degree of psychological certainty, whether or not [plaintiff] was sexually abused or whether her current symptoms are primarily related to such abuse or primarily related to the history of parental conflict and polarization. When individuals with a history of sexual abuse begin to address that history, it typically takes a period of time for them to process and understand what has happened, what its impact has been, and to develop the focus and strength to pursue the issue

legally. It is this examiner's opinion that [plaintiff] is not ready to do this currently. She is confused, unfocused, anxious, and depressed. With intensive work in therapy over a period of at least six months, she may eventually be stronger and more focused, and better able to report what has happened to her as well as to examine her ambivalence, her reactions, and her needs. At that time, depending upon the outcome of her own examination, she may be better equipped to proceed legally.

Plaintiff's forensic psychologist issued a supplemental report in November 2016 after meeting with plaintiff again and reviewing additional material. The supplemental report focused much on the issue of plaintiff's flashbacks. According to plaintiff's forensic psychologist:

In [plaintiff's] case, the memory she reports has come in the form of "flashbacks". Flashbacks are a type of memory in which an event from the past is experienced as occurring in the present. The individual feels she is reliving the event, that it is happening again. Typically, the person experiences sensations (visual, auditory, olfactory, gustatory, touch, kinesthetic) that were experienced at the time of an actual event. Typically, flashbacks are triggered by stimuli that are, in some way, related to the content of the flashback, e.g., a visual image, a smell, a sound, etc. Flashbacks often do not have much of a context, in that the individual cannot give a sequential account of what happened before or after the scene described in the flashback. In this way, a flashback can be different from a narrative memory, in which such context is often maintained.

The doctor then concluded:

Without either the sensory experiences or the sequential context, it is also possible that some transposition has occurred so that another sexual episode is being attributed to her father or something frightening with her father that is non-sexual has become sexual in her mind. Therefore, this examiner cannot say with a reasonable degree of psychological certainty that the experience [plaintiff] is reporting did, in fact, happen the way she believes it did. The absence of both the sensory memories and a sequence of events makes it difficult to know whether this is a memory of a dissociated experience or a thought or idea that has made its way into her awareness that has some other source.

Plaintiff's paternal grandparents also retained a psychologist (the defense psychologist) to evaluate plaintiff. The defense psychologist interviewed plaintiff, administered psychological testing, and considered extensive documentation, records, and reports. The defense psychologist arrived at conclusions similar to those reached by plaintiff's forensic psychologist.

The defense psychologist noted "the chaotic and high conflict context in which [plaintiff] was raised." The psychologist "came to the conclusion of reasonable psychological certainty that [plaintiff] presents with [d]epression, [a]nxiety, and [p]osttraumatic [s]tress [d]isorder symptoms that are multi-determined and not from a single identifiable stressor or trauma

per se." The defense psychologist added: "There is no way that anyone would be able to draw a definitive line of certainty between [plaintiff's] psychopathology and her sexual abuse allegations."

The defense psychologist also noted problems with phenomena such as flashbacks. She explained:

Since her return from . . . [c]ollege, [plaintiff] has been in fairly consistent psychotherapy, and it is difficult to ascertain how much of the memory retrieval work she has done may have been suggestible. The whole controversy regarding repressed memories is a hotly debated issue in the field of psychology, with overt attempts at soliciting this type of recall being cautioned against by some researchers. In fact, this work has been criticized for creating false memories by blending actual memories with outside influences, including the influence of the therapeutic work. It has been concluded that it is impossible to distinguish repressed memories from false ones without corroborative evidence. It is also well known from the research in psychology that memories are influenced by a number of suggestible sources that can be external and environmentally induced. Some research has indicated that memories associated with strong emotions are usually easier to recall and many traumatized victims are working to eradicate the intrusive memories that are difficult to forget.

The defense psychologist concluded "there is not anything that was unearthed in this [e]valuation that would confirm that [plaintiff's] angst is reasonably attributable to sexual abuse at the hand of her father, or anyone else for that matter."

Based on the foregoing evidence, the trial court granted summary judgment to defendant. In a written rider to its order, the trial court deemed undisputed "that [p]laintiff first experienced a flashback only after, and during, therapy sessions." The court acknowledged the parties' dispute about whether the "line of inquiry" that triggered the flashbacks should qualify as "third-party means of memory stimulation." Nonetheless, the court found dispositive that "none of the treating therapists or experts could say with a reasonable degree of certainty that [p]laintiff's symptomatology and distress were the result, at least in part, [of] the alleged sexual abuse."

The court went on: "Here, an expert is required because an average juror would not understand the process and circumstances by which [p]laintiff began having flashbacks during therapy in her late teens during psychotherapy when the alleged abuse occurred when [p]laintiff was approximately eleven or twelve years old." The court dismissed with prejudice plaintiff's claim under the Act. In light of the dismissal of that claim, the court also dismissed plaintiff's remaining claims against her father.

On appeal, plaintiff argues that because her memory was not retrieved through medication, hypnosis, or a specialized process that requires an expert's explanation, the trial court erred in granting summary judgment to defendant. Defendant counters that

expert testimony is required because an ordinary juror would not understand the process by which plaintiff began having flashbacks during therapy. In addition, defendant insists the suggestive nature of the psychotherapy that prompted plaintiff's flashbacks is unreliable in the absence of expert testimony.

We review appeals from summary judgment orders under the same standards as the trial court. Lee v. Brown, 232 N.J. 114, 116 (2018). "Summary judgment is appropriate 'when no genuine issue of material fact is at issue and the moving party is entitled to a judgment as a matter of law.'" Ibid. (quoting Steinberg v. Sahara Sam's Oasis, L.L.C., 226 N.J. 344, 366 (2016)). A trial court's determination that a party is entitled to summary judgment as a matter of law is not entitled to any "special deference," and is subject to de novo review. Cypress Point Condo. Ass'n v. Andria Towers, L.L.C., 226 N.J. 403, 415 (2016) (citation omitted).

Applying the summary judgment standard to the record before us, we conclude the trial court properly granted summary judgment to defendant. Preliminarily, we note that to the extent the trial court's opinion suggests summary judgment was appropriate because plaintiff could not prove damages, we disagree. To be sure, plaintiff was required to prove that her post-traumatic stress syndrome and other psychological conditions were caused by sexual abuse in order to recover damages for those conditions. She had

no expert that could do so. Nonetheless, the Act provides that "[a] plaintiff who prevails in a civil action pursuant to this act shall be awarded damages in the amount of \$10,000, plus reasonable attorney's fees, or actual damages, whichever is greater." N.J.S.A. 2A:61B-1(h).

Thus, the dispositive question is whether plaintiff is required to produce expert testimony to explain to the jury how she was able to recall the alleged sexual abuse. Our Supreme Court has addressed that issue. Phillips v. Gelpke, 190 N.J. 580 (2007). The Court has distinguished two situations. The first situation is that in which plaintiff's memory, though subject to credibility attacks, has not been triggered by external factors. Stated plainly, if the plaintiff's case consists of "I forgot, and then I remembered," the credibility of the plaintiff's memory is an issue for the jury to decide. Id. at 592. The second situation is that in which the plaintiff's memory has been "prodded by medication . . . or hypnosis . . . or other third-party means of memory stimulation that requires explanation to assist a fact-finder in its evaluation." Ibid. The Court included extensive psychotherapy in the second situational category. Ibid. The Court noted Gelpke was not a case that involved the second type of situation. "Rather, plaintiff's case was dependent on the jury's favorable assessment of her asserted memory of prior events

that she recollected without any extrinsic memory retrieval techniques." Ibid.

Here, there are some discrepancies between the notes of the first therapist plaintiff consulted and her treating psychologist on the one hand, and statements plaintiff made on the other, concerning whether defendant's memory was prodded by "extrinsic retrieval techniques." The therapist's and treating psychologist's notes suggest plaintiff may have had a flashback of sexual abuse before she started therapy. In contrast, plaintiff told a detective the first flashback of sexual abuse was triggered during a session with her treating psychologist. Moreover, in her deposition, plaintiff testified she first mentioned her father to her treating psychologist during the fourth visit, when the psychologist had asked about traumatic events and started naming holidays for plaintiff to think about. When the therapist mentioned Christmas Eve, plaintiff started having a flashback of her father sexually assaulting her.

The parties were precluded from relying on the notes of the treating psychologist. The statements plaintiff made during the police interview and her deposition establish that the first flashback of sexual abuse was triggered during a therapy session. Moreover, it was made in the context of a teenage patient – who had been subjected as a child to traumatic parental conflict –

receiving therapy after suffering psychoses following the loss of her best friend. In other words, plaintiff's case is not "dependent on the jury's favorable assessment of her asserted memory of prior events that she recollected without any extrinsic memory retrieval techniques." Ibid.

The need for expert testimony is particularly apparent here. Plaintiff's first flashback was prodded during a therapy session and the only psychologists who have addressed the issue have concluded after extensive evaluation and testing that the flashbacks are unreliable and may have been triggered by causes other than sexual abuse. Had plaintiff independently recalled the sexual abuse, the experts' opinions would be issues relevant only to the credibility of plaintiff's memory. Such is not the case. Plaintiff's flashbacks were triggered during therapy after plaintiff had suffered serious emotional trauma unrelated to any alleged sexual abuse. We thus conclude summary judgment was properly granted to defendant.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION