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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4699-16T4

ABIGAIL PERDOMO,

Plaintiff-Appellant,

v.

ZBIGNIEW ORGACKI and HALINA
ORGACKI,

Defendants-Respondents.

Submitted January 17, 2018 – Decided May 1, 2018

Before Judges Fisher and Sumners.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Docket No. L-
2197-15.

Amy L. Peterson, attorney for appellant.

Law Offices of Cindy L. Thompson, attorneys
for defendants (Leslie-Anne DeTorres, on the
brief).

PER CURIAM

In this negligence action arising from a 2013 automobile accident, we granted plaintiff leave to appeal the Law Division's order barring as a net opinion the expert report of her treating physician Dr. Wayne Petermann, a chiropractor. Because we conclude

that Petermann failed to explain how the accident could have caused plaintiff a seventy percent permanent injury to her lower back when he had previously opined a 2010 accident caused the same permanent injury, we affirm.

We briefly summarize the relevant evidence and procedural history. In December 2010, plaintiff was a passenger in an automobile involved in an accident. Three months later, while under Petermann's care, an MRI examination revealed she sustained disc bulges at L4-5 and L5-S1 that were attributable to the accident. Three years later, in November 2013, plaintiff was driving when she was rear ended by an automobile driven by defendant. A subsequent MRI performed on her spine also revealed disc bulging at L4-5 and L5-S1. Petermann, again treating plaintiff, issued an expert report that acknowledged plaintiff's prior diagnosis of a low back injury "with some degree of permanency" from the 2010 accident, and relying upon the recent MRI results, opined that she "suffered a further permanent partial impairment of her lower back that is [seventy percent] attributable to" the 2013 accident.

Upon completion of discovery, defendant moved for summary judgment arguing that plaintiff, whose claim was subject to the verbal threshold under N.J.S.A. 39:6A-8(a), failed to establish credible objective medical evidence that she sustained a permanent

injury because of the accident. In the alternative, defendant requested Petermann's expert report be barred as a net opinion.

The motion judge declined to dismiss plaintiff's complaint but instead determined Petermann's report was a net opinion, and therefore, barred. In his oral decision, the judge remarked:

I've seen vague reports before. But here[, the doctor] reaches a conclusion about a permanent injury. [Perdomo] has suffered a . . . permanent partial impairment of her lower back that is [seventy] percent attributable to this motor vehicle accident. This takes into account the fact that the patient has sustained a permanent injury to her lumbar spinal disc as evidenced by the MRI findings. Her activities of daily living have, also, been effected to some degree.

There's no other objective diagnostic testing that he did, that's included in the report. There's no explanation that says how he arrived at that [seventy] percent permanent injury that he concludes from this. And what he says is that until additional evidence or medical records become available it's my opinion that it's a [seventy] percent permanent injury from this accident. Which says to me that he hasn't reviewed anything.

We granted plaintiff leave to appeal this interlocutory order.

We review the motion judge's order to exclude Petermann's expert testimony under an abuse of discretion standard. See Townsend v. Pierre, 221 N.J. 36, 52 (2015). We recognize that under N.J.R.E. 703, an expert opinion must "be grounded in 'facts or data derived from (1) the expert's personal observations, or

(2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts.'" Id. at 53 (quoting Polzo v Cty. of Essex, 196 N.J. 569, 583 (2008)). From this evidentiary standard, the net opinion rule has developed, to "forbid[] the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." Polzo, 196 N.J. at 583. That is, an expert must "explain a causal connection between the act or incident complained of and the injury or damages allegedly resulting therefrom." Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). Expert testimony that is "based merely on unfounded speculation and unquantified possibilities" should be barred. Vuocolo v. Diamond Shamrock Chems. Co., 240 N.J. Super. 289, 300 (App. Div. 1990). Thus, experts must "give the 'why and wherefore'" of their opinions, not "mere conclusion[s]." Koruba v. Am. Honda Motor Co., 396 N.J. Super. 517, 526 (App. Div. 2007) (quoting Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div. 1996)).

Guided by these principles, we find no merit to plaintiff's contention that Petermann's expert report is not a net opinion and is well supported by his examination of her. In an apparent attempt to overcome the prior opinion that Perdomo sustained a permanent lower back injury from the 2010 accident, Petermann

opined that Perdomo's back injury is seventy percent permanently injured due to the 2013 accident. Simply put, this is a baseless conclusion because he fails to state the "why and wherefore" of this opinion. We further agree with defendant that plaintiff did not affirmatively plead her prior injury to L4-5 and L5-S1 was aggravated. Yet, even if she had, there is no proof of aggravation. In our long-standing decision in Polk v. Daconceicao, 268 N.J. Super. 568, 575 (App. Div. 1993), we held that "[a] diagnosis of aggravation of a pre-existing injury or condition must be based upon . . . an evaluation of the medical records of the patient prior to the trauma with the objective medical evidence existent post trauma." "Although Polk predated [amendments to N.J.S.A. 39:6A-8(a)], a Polk analysis continues to be required in cases governed by [the statute]. Further, a Polk analysis is required to differentiate a subsequent injury to a body part that was previously injured whether aggravation of the prior injury is alleged or not." Bennett v. Lugo, 368 N.J. Super. 466, 473 (App. Div. 2004) (citations omitted); see also Davidson v. Slater, 189 N.J. 166, 185 (2007) (requiring comparative medical evidence "as part of plaintiff's prima facie . . . 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").

Accordingly, we glean no reason to disturb the motion judge's determination that Petermann's opinion is inadmissible because it is a net opinion.

Affirmed.

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



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