SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0472-21

ALTON NICHOLS,

Plaintiff-Appellant,

v.

DUKE LINDEN, LLC, DUKE REALTY LIMITED PARTNERSHIP, DUKE REALTY CORPORATION, WAYFAIR, LLC, WAYFAIR, INC., BRIGHTVIEW LANDSCAPES, LLC, and CARUSO LANDSCAPING,

Defendants-Respondents.

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Argued February 8, 2023 – Decided July 17, 2023

Before Judges Accurso and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-0971-18.

Gregg S. Sodini argued the cause for appellant (Cutolo Barros, LLC, and Robert K. Marchese, Esq., PC, attorneys; Gregg S. Sodini and Robert K. Marchese, on the briefs).

Harry D. McEnroe argued the cause for respondent BrightView Landscapes, LLC (Tompkins, McGuire, Wachenfeld & Barry, LLP, attorneys; Richard Barber, of counsel; Harry D. McEnroe, of counsel and on the joint brief).

Richard Barber argued the cause for respondents Duke Linden, LLC, Duke Realty Limited Partnership, and Duke Realty Corporation (Haworth Barber & Gertsman, LLC, attorneys; Richard Barber, of counsel; Harry D. McEnroe, of counsel and on the joint brief).

Anthony R. Fiore, Jr., argued the cause for respondent Caruso Landscaping (Gage Fiore LLC, attorneys; Anthony R. Fiore, Jr., of counsel and on the brief).

PER CURIAM

Plaintiff Alton Nichols appeals from summary judgment dismissing his complaint, on our remand, against defendants Duke Linden, LLC, Duke Realty Limited Partnership, Duke Realty Corporation, BrightView Landscapes, LLC, and Caruso Landscaping, LLC. As we explained in our prior opinion, plaintiff slipped on a snowy day making a delivery to leased premises owned by the Duke defendants in Linden.[1] Nichols v. Duke Linden, LLC, A-0472-21 (App.

[1] The Wayfair defendants were the lessee. Nichols v. Duke Linden, LLC, A-0472-21 (App. Div. Jul. 15, 2021) (slip op. at 3). They obtained summary judgment in 2020, from which plaintiff has not appealed. Any reference to defendants is to respondents only.

Div. Jul. 15, 2021) (slip op. at 3). The Duke entities had hired BrightView to clear the snow and ice, and BrightView in turn "subcontracted the work to Caruso." Ibid.

After the close of discovery, with arbitration and trial dates already set, defendants moved for summary judgment, contending the failure of plaintiff's orthopedic expert "to provide a sufficient comparative analysis isolating the doctor's diagnosis of the injuries plaintiff suffered in this accident from his prior injuries and conditions, [made] the doctor's conclusion that the accident precipitated plaintiff's total knee replacement no better than a net opinion." Id. at 4-5. Relying on Davidson v. Slater, 189 N.J. 166, 186 (2007), the trial judge essentially agreed. Id. at 5, 7 n.3.

The judge, however, did not enter summary judgment for defendants. Id. at 5. Instead, he "denied the motions without prejudice, permitting plaintiff thirty days, later extended to ninety, 'to provide an updated report from [plaintiff's doctor] that includes an appropriate comparative analysis,'" ostensibly relying on Rule 1:1-2. Id. at 5-6 (alterations in original). We granted defendants' motion for leave to appeal and reversed, "remand[ing] for the judge to decide the summary judgment motions on the record as it stood on the return date." Id. at 11.

After hearing oral argument on the motions on remand, the judge entered summary judgment for defendants, dismissing plaintiff's complaint. In a carefully reasoned written opinion, the judge rejected plaintiff's argument that he didn't need to offer comparative medical analysis segregating the injuries he suffered in this slip and fall to prove his aggravation claim, because his treating physician opined plaintiff needed a total knee replacement as a result of this accident and the comparative standard applies only in verbal threshold cases. The judge wrote the Supreme Court settled the question in Davidson when it made clear "[t]he need for a plaintiff to produce a comparative medical analysis remains dependent on traditional principles of causation and burden allocation applicable to tort cases generally." Davidson, 189 N.J. at 184.

The judge accordingly determined plaintiff was required to produce a comparative medical analysis to support his pleaded aggravation claim. The judge found, however, that the reports of plaintiff's expert, his treating physician, were "devoid of any comprehensive analysis of plaintiff's extensive medical history concerning the preexisting conditions in his left knee and lower back[,] which plaintiff specifically allege[d] were 'aggravated' by the slip and fall accident." Because the reports offered nothing beyond "conclusory statements as to the cause of the plaintiff's injuries without

discussing plaintiff's prior medical history," the court deemed the expert's report a net opinion, leaving plaintiff unable to establish a prima facie case of negligence.

Plaintiff appeals, reprising his argument he didn't need a comparative analysis to prove his aggravation claim, and if he did, his treating physician's report sufficed. He adds that "if the trial court had concerns about the adequacy" of plaintiff's expert report, the judge should have conducted an N.J.R.E. 104 hearing instead of dismissing his case. Our review of the summary judgment record convinces us that none of these arguments is of sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Plaintiff pleaded the accident on the Duke defendants' premises aggravated prior injuries he'd suffered to his back and left knee, resulting in the need for a total knee replacement. As the trial judge explained, because plaintiff pleaded an aggravation claim it was his burden to "medically segregat[e] a claimed aggravation of a pre-existing injury from the fresh injury." Davidson, 189 N.J. at 187.

The treating physician's failure, however, to have considered plaintiff's decades-long history of complaints and prior injuries to his left knee, including his two prior arthroscopic surgeries to that knee, in concluding plaintiff's fall

on the Duke defendants' property was "causally related to the need for total joint replacement and treatment," makes his report a classic example of a net opinion, "[t]hat is, an expert's bare opinion that has no support in factual evidence or similar data." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011).

As plaintiff's treating physician's report was properly stricken as a net opinion, we agree with the trial judge that plaintiff did not carry his burden to establish a prima facie case of negligence, and thus summary judgment was appropriately awarded to defendants and plaintiff's complaint against them dismissed. We cannot find the court erred in not conducting a N.J.R.E. 104 hearing on the admissibility of the treating physician's opinion that plaintiff never requested, particularly as plaintiff has always insisted his expert did not need to conduct a comparative analysis. The Court warned sixteen years ago that "the plaintiff who does not prepare for comparative medical evidence is at risk of failing to raise a jury-worthy factual issue about whether the subject accident caused the injuries." Davidson, 189 N.J. at 188.

Affirmed.