SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2571-21

GUADALUPE LOPEZ,

Plaintiff-Appellant,

v.

SCOTT J. STYS and
COUNTY OF ATLANTIC,

Defendants-Respondents.

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Argued October 3, 2023 – Decided October 25, 2023

Before Judges Whipple, Mayer and Paganelli.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-1132-20.

Dominic R. DePamphilis argued the cause for appellant (D'Arcy Johnson Day, attorneys; Steven K. Johnson and Dominic R. DePamphilis, on the briefs).

Alysia Remaley, Assistant County Counsel, argued the cause for respondents (Atlantic County Law Department, attorneys; Alysia Remaley, on the brief).

PER CURIAM

Plaintiff Guadalupe Lopez appeals from a March 18, 2022 order granting summary judgment in favor of defendants Scott J. Stys and the County of Atlantic on her claim for economic damages. She also appeals from the following orders: a July 9, 2021 order dismissing plaintiff's claim for noneconomic damages; an August 12, 2021 order denying plaintiff's motion for reconsideration of the July 9, 2021 order; and a February 22, 2022 order denying plaintiff's motion to re-open and extend discovery. We affirm all orders on appeal.

We recite the facts from the motion record. On April 26, 2018, Stys, a county employee, was driving a county-owned vehicle. Stys's car collided with plaintiff's car, causing her car to overturn.[1] At the scene, plaintiff complained of neck and back pain.

Plaintiff went to the local hospital, where she complained of "minimal" neck, back, chest, and left hip pain. The hospital x-rayed plaintiff's chest, hip, pelvis, and spine. The x-rays revealed no injuries or fractures. Before she left the hospital, plaintiff reported she "fe[lt] much better after medication." The hospital's discharge note stated plaintiff "ambulat[ed] without difficulty" and

[1] At the time of the accident, plaintiff had an automobile policy providing personal injury protection (PIP) benefits in the amount of $50,000. She also had Medicaid health benefits.

diagnosed plaintiff as suffering from neck pain, a chest wall contusion, and thoracic, lumbar, and hip strains.

Plaintiff's treatment purportedly related to the April 2018 accident

Between May 22, 2018 and September 24, 2018, plaintiff visited an orthopedic surgeon, Dr. Glenn Zuck, on four occasions. During her first visit, plaintiff complained of left hip and low back pain. The doctor ordered an MRI of plaintiff's lumbar spine. The August 7, 2018 MRI revealed "broad [disc] herniations [ ] centrally at L4-5 and L5-S1." While treating with Dr. Zuck, plaintiff received spinal therapy.

From October 12, 2018 through November 19, 2018, plaintiff received physical therapy. She also had trigger point injections and electrical nerve stimulation to her lumbar spine.

In October 2018, Dr. Peter Pryzbylkowski, an anesthesiologist and interventional pain specialist, diagnosed plaintiff with post-traumatic lumbar facet syndrome, disc herniations at L4-5 and L5-S1, and post-traumatic muscle spasm. He opined plaintiff's injuries were causally related to the accident. He referred plaintiff to a spinal surgeon.

On October 8, 2020, plaintiff saw Dr. Andrew Glass, a spinal surgeon. He diagnosed plaintiff with neck pain, low back pain with lumbar radiculopathy,

lumbar discogenic syndrome, and L4-5 and L5-S1 central herniations. Dr. Glass discussed the possibility of lumbar surgery with plaintiff. He also recommended a cervical MRI and an updated lumbar MRI.

Three months later, plaintiff returned to Dr. Glass complaining of the same symptoms. At that time, plaintiff had not undergone the additional imaging studies suggested by Dr. Glass. He "strongly advised" that she schedule the recommended MRIs.

Plaintiff went for the MRIs on February 1, 2021. According to Dr. Glass, the lumbar MRI revealed disc herniations at L4-L5 and L5-S1 and the cervical MRI revealed a left herniation at C5-C6 and a right herniation at C6-C7.

Plaintiff next saw Dr. Glass on February 23, 2021. At that time, Dr. Glass noted plaintiff "wishe[d] to pursue surgery in the form of L4-S1 posterior decompression with posterior reconstructive instrumented arthrodesis including L4, L5, and S1 laminectomy, facetectomy, foraminotomy, and bilateral neural decompression." At a visit about a week later, Dr. Glass noted plaintiff "wish[ed] to pursue lumbar operative intervention," but wanted to postpone spinal surgery to address insurance issues.

On June 1, 2021, plaintiff visited Dr. Richard Meagher, a neurosurgeon and spine specialist. Dr. Meagher attributed plaintiff's cervical and lumbar pain

to the April 26, 2018 car accident. He recommended plaintiff undergo a left L4-L5 microdiscectomy. He also advised plaintiff regarding the risks associated with surgery, and stated there was no guarantee the surgery would provide pain relief. Plaintiff wanted to proceed with surgery despite the risks.

On August 26, 2021, plaintiff underwent microdiscectomy surgery. On September 13, 2021, nearly six months after the discovery end date, plaintiff amended her answers to interrogatories to include Dr. Meagher's June 1, 2021 office note and billing statement in the amount of $920.00 and an August 26, 2021 billing statement for spinal surgery in the amount of $88,712.00.

Plaintiff's treatment unrelated to the April 2018 accident

Plaintiff had documented back pain prior to the April 2018 car accident.[2] Fifteen months before the April 2018 accident, plaintiff visited her family doctor, complaining of "lower back pain that's on and off, [which] started after [she] gave birth."

On May 25, 2018, unrelated to the April 2018 accident, plaintiff saw Dr. Rafat Choudhry, an internal medicine specialist. According to Dr. Choudhry's notes, plaintiff complained of prior low back problems, but denied having joint

[2] Plaintiff never told the doctors who treated her after the April 2018 accident about her prior back pain.

pain, muscle pain, back pain, or difficulty walking. Plaintiff subsequently visited Dr. Choudhry on June 27, 2018, and August 8, 2018, and had no complaints of pain on either visit.

Plaintiff's employment before and after the April 2018 accident

At the time of the car accident, plaintiff worked in the stockroom at a clothing store. She continued to work at the clothing store until June 2019, when she gave birth to her second child. Plaintiff stopped working after the birth of her second child because she lacked childcare and reportedly suffered from neck and back pain.

Between April and November 2018, plaintiff took home health aide classes and became a certified home health aide. She claimed an inability to work as a home health aide because she allegedly could not lift, reach, or bend to perform the required job duties.

Plaintiff's personal injury action

On April 16, 2020, plaintiff filed a personal injury action and defendants filed an answer on May 22, 2020. The trial court set March 18, 2021 as the discovery end date. Plaintiff did not have surgery as of the discovery end date and did not move to extend discovery before March 18, 2021.

After the close of discovery, defendants moved for summary judgment. Defendants asserted plaintiff failed to meet the permanent injury threshold under N.J.S.A. 59:9-2(d) of New Jersey's Tort Claims Act (Act), N.J.S.A. 59:1-1 to 12-3, to recover noneconomic damages. Defendants argued plaintiff failed to sustain an objective injury resulting in a permanent and substantial loss of bodily function.

After hearing arguments on defendants' motion, the judge dismissed plaintiff's noneconomic damages claim in a July 9, 2021 order and written decision. After considering the facts in the light most favorable to plaintiff, the judge determined plaintiff failed to demonstrate a substantial and permanent loss of bodily function to satisfy the second prong under N.J.S.A. 59:9-2(d).[3] The judge explained, "[p]laintiff did not sustain the type of aggravated injury found in Gilhooley[4] and Kahrar[5]." The judge found "[p]laintiff continued to work following the accident and was accommodated by her employer [at the clothing store]." He further found "[p]ermitting plaintiff to vault the high threshold based

[3] The parties agreed plaintiff satisfied the first prong under N.J.S.A. 59:9-2(d) by proving an objective permanent injury.

[4] Gilhooley v. Cty. of Union, 164 N.J. 533 (2000).

[5] Kahrar v. Borough of Wallington, 171 N.J. 3 (2002).

on the record before [the court], even when the facts are viewed in the light most favorable to [p]laintiff, would effectively run counter to the threshold, and endanger[] the legislature's intent." While the judge barred plaintiff's claim for economic damages under N.J.S.A. 59:9-2(d), he allowed plaintiff to pursue economic losses for past and future medical bills.

Plaintiff moved for reconsideration. In an August 12, 2021 order and written decision, the judge denied the motion. He found plaintiff "reiterated essentially the same arguments as she did in opposition to [d]efendants' motion for [partial] summary judgment." The judge concluded his "decision . . . comported with all of the associated law based on the individualized facts presented" and "applied the law to the facts" after viewing the facts in the light most favorable to plaintiff.

On September 7, 2021, defendants moved for summary judgment on plaintiff's economic damages claim. Defendants argued plaintiff could not recover economic damages because she failed to submit evidence of past or future medical expenses.

Plaintiff filed opposition and a second motion for reconsideration of the July 9, 2021 order. Plaintiff also moved to re-open and extend discovery. Defendants opposed plaintiff's motions.

In support of her motions, plaintiff submitted a certification attesting to her willingness to proceed with surgery to improve her quality of life. In the certification, which predated plaintiff's eventual surgery, plaintiff self-reported that her back pain caused difficulties with sleeping, exercising, caring for her children, completing household chores, and sitting or standing for long periods of time.

After hearing arguments, the judge denied plaintiff's motions in a February 22, 2022 order and written decision.

In denying the second motion for reconsideration, the judge found plaintiff repeated the same arguments raised in opposition to defendants' partial summary judgment motion and in support of her prior motion for reconsideration. The judge declined to "allow [p]laintiff to relitigate the permanency and substantial loss of bodily function of her injuries following her surgery on August 26, 2021." The judge further found plaintiff's surgery was "not new information" because plaintiff's plan to have surgery was noted in the judge's July 9, 2021, and August 12, 2021 written decisions.

In denying plaintiff's motion to re-open and extend discovery, the judge found plaintiff failed to demonstrate exceptional circumstances. He explained plaintiff's anticipated surgery was known prior to the March 2021 discovery end

date. The judge wrote, "[t]he record could not be any clearer that [plaintiff's] surgery was recommended, anticipated and expected . . . ." The judge found "[d]espite the indisputable fact that [p]laintiff's counsel, [d]efendant[s'] counsel, and this [c]ourt were all aware of this anticipated surgery . . . , there was no effort made to extend discovery during the discovery period, and no discovery extension occurred."

On March 17, 2022, the judge heard argument on defendants' motion for summary judgment on plaintiff's economic damages claim. Defendants argued plaintiff failed to produce any unpaid medical bills or invoices during discovery.

In a March 18, 2022 order and written decision, the judge granted defendants' motion for summary judgment. The judge explained plaintiff failed to present evidence of her past or future medical bills during the discovery period to pursue economic damages.

On appeal, plaintiff contends there were genuine issues of material disputed facts precluding summary judgment on her noneconomic claim. She also asserts her economic claim should have been submitted to a jury. Additionally, plaintiff claims the judge abused his discretion in denying her motions for reconsideration and motion to re-open and extend discovery. We disagree.

We "review a grant of summary judgment de novo, applying the same standard as the trial court." Norman Int'l, Inc. v. Admiral Ins. Co., 251 N.J. 538, 549 (2022) (quoting Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 511 (2019)). Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In reviewing a summary judgment order, we consider the evidence in the light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

We first consider plaintiff's argument that the judge erred in dismissing her claim for noneconomic damages. Plaintiff claims entitlement to such damages under the Act because she suffered a substantial and permanent loss of bodily function.

The Act limits the circumstances in which a public entity may be liable for noneconomic damages in the form of pain and suffering. N.J.S.A. 59:9-2(d) provides:

> No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not

> apply in cases of permanent loss of a bodily function . . . .

To recover for noneconomic damages, a plaintiff must provide "objective medical evidence that the injury is permanent." Brooks v. Odom, 150 N.J. 395, 402-03 (1997). A plaintiff may not recover for temporary injuries or "subjective feelings of discomfort." Id. at 403 (quoting Ayers v. Twp. of Jackson, 106 N.J. 557, 571 (1987)).

Under the Act, plaintiff must "satisfy a two-pronged standard by proving (1) an objective permanent injury, and (2) a permanent loss of a bodily function that is substantial." Gilhooley, 164 N.J. at 540-41. There is no bright line test to determine whether an injury presents both a permanent and substantial loss of a bodily function. See Knowles v. Mantua Twp. Soccer Ass'n, 176 N.J. 324, 331 (2003). The analysis is fact-sensitive and differs depending on the facts set forth in each case. Ibid.

In Knowles, the Court stated the requirements to recover pain and suffering damages under the Act:

> there must be a "physical manifestation of [a] claim that [an] injury . . . is permanent and substantial." An injury causing lingering pain, resulting in a lessened ability to perform certain tasks because of the pain, will not suffice because "[a] plaintiff may not recover under the Tort Claims Act for mere 'subjective feelings of discomfort.'"

> [Knowles, 176 N.J. at 332 (alterations and omission in original) (citations omitted) (quoting Ponte v. Overeem, 171 N.J. 46, 54 (2002) and Gilhooley, 164 N.J. at 540).]

The cases presenting sufficient evidence of a permanent and substantial loss of a bodily function include: Gilhooley, 164 N.J. at 542 (finding a patella fracture was an objective permanent injury causing the plaintiff "to lose forever the normal use of her knee . . . without permanent pins and wires to re-establish its integrity"); Kahar, 171 N.J. at 16 (finding reattachment of a torn rotator cuff tendon resulted in the shortened length of the tendon and impaired the plaintiff's ability to use her arm to complete normal tasks); and Knowles, 176 N.J. at 333 (finding "objective medical evidence of a permanent injury," including the lack of feeling in the plaintiff's leg).

Here, plaintiff failed to present objective evidence that her injury satisfied the Act's requirement of a permanent and substantial loss of a bodily function. Nothing in the record supported any medical restrictions imposed on plaintiff's activities of daily living.

Additionally, for nearly a year after the accident, plaintiff continued working in a clothing store. Plaintiff worked at the clothing store until July 2019, when she gave birth to her second child. Plaintiff declined to return to

work because she lacked childcare, not because of any physical limitations resulting from the April 2018 accident.

Plaintiff argues she suffered a substantial and permanent loss of bodily function based on her own subjective complaints and self-reported limitations on her activities. Giving plaintiff every reasonable inference based on the evidence presented, we are satisfied the judge properly concluded plaintiff failed to proffer objective evidence of a permanent and substantial loss of bodily function under N.J.S.A. 59:9-2(d).

We next consider plaintiff's argument the judge erred in denying her motions for reconsideration. Plaintiff claims reconsideration was necessary to assess the extent of her injuries and limitations after her August 26, 2021 surgery. She contends the July 9, 2021 order dismissing her noneconomic damage claim was premature because she planned on having surgery and did so on August 26, 2021.

We review a decision on a motion for reconsideration for abuse of discretion. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). An abuse of discretion arises "when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." U.S. Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 467-68

(2012) (internal quotation marks omitted) (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)).

Here, we are satisfied the judge properly denied plaintiff's motion for reconsideration. While plaintiff argues a change in circumstances following her August 26, 2021 surgery, counsel and the judge were well aware of plaintiff's plan to undergo surgery before the March 18, 2021 discovery end date.

Despite her expressed plan to proceed with surgery, plaintiff never filed a motion to extend discovery prior to the discovery end date. In his February 22, 2022 decision, the judge wrote:

> Counsel now, seven months after the close of discovery, seeks to re-open and extend discovery to essentially allow [p]laintiff to relitigate the permanency and substantial loss of bodily function of her injuries following her surgery on August 26, 2021. The [c]ourt notes its consideration of [p]laintiff's anticipated surgery was detailed . . . not only in the July 9, 2021 [o]rder, but also in the [o]rder denying reconsideration. This [c]ourt finds [p]laintiff's surgery is not new information. This surgery was known to all parties, as well as the [c]ourt, and was considered in detail and identified as a factual finding when summary judgment was granted.

Under these circumstances, we are satisfied the judge did not abuse his discretion by denying the reconsideration motions. Plaintiff failed to explain why she never sought to extend discovery before the discovery end date despite

advising her doctors, her attorney, and the judge that she intended to have the surgery.

Nor did the judge err in denying plaintiff's motion to re-open and extend discovery. We "generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011) (quoting Rivers v. LSC P'ship, 378 N.J. Super. 68, 80 (App. Div. 2005)). In reviewing requests for discovery extensions, the court "applie[s] a deferential standard" of review. Ibid. However, a trial court's legal conclusions are reviewed de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

In personal injury cases, a plaintiff is often involved in "ongoing medical treatment . . . as litigation is proceeding through discovery, which might result in some sudden and unexpected change in the claimant's condition." Vitti v. Brown, 359 N.J. Super. 40, 52 (Law Div. 2003). In cases where a plaintiff is "presented with the need for surgery which had not been anticipated" and "the additional treatment or new diagnosis truly requires discovery or disclosure," a court may find good cause or exceptional circumstances to re-open and extend discovery. Ibid.

To establish "exceptional circumstances," a plaintiff must satisfy four factors:

> (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.
>
> [Rivers, 378 N.J. Super. at 79 (citing Vitti, 359 N.J. Super. at 51).]

If a plaintiff fails to establish any of the foregoing factors, "permission to late file discovery should be denied." Zadigan v. Cole, 369 N.J. Super. 123, 133 (Law Div. 2004).

Here, plaintiff failed to explain why she did not move to extend or re-open discovery until nearly seven months after the discovery end date and after dismissal of her noneconomic damage claim. Counsel and the judge were aware of plaintiff's planned surgery before the March 2021 discovery deadline. Because the judge found "there was no effort made to extend discovery during the discovery period," he held plaintiff failed to establish exceptional circumstances to re-open and extend discovery. We are satisfied the judge's decision under these circumstances did not constitute an abuse of discretion.

We next consider plaintiff's claim the judge erred in dismissing her economic damages claim. She contends the collateral source statute required a jury to review her medical reimbursement claim. We disagree.

While the Act "limits damages recoverable for pain and suffering, [it] does not prevent plaintiff from seeking reimbursement for full net economic loss." Rocco v. N.J. Transit Rail Operations, Inc., 330 N.J. Super. 320, 334 (App. Div. 2000). The collateral source statute provides:

> In any civil action brought for personal injury . . . , if a plaintiff receives or is entitled to receive benefits for the injuries allegedly incurred from any other source other than a joint tortfeasor, the benefits, . . . shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award recovered by the plaintiff, less any premium paid to an insurer directly by the plaintiff or by any member of the plaintiff's family on behalf of the plaintiff for the policy period during which the benefits are payable. Any party to the action shall be permitted to introduce evidence regarding any of the matters described in this [statute].
>
> [N.J.S.A. 2A:15-97.]

Plaintiff contends the collateral source statute "places no restriction on a party introducing, for the jury's consideration, evidence of the total amount of medical bills incurred." Dias v. A.J. Seabra's Supermarket, 310 N.J. Super. 99, 102 (App. Div. 1998). Thus, plaintiff asserts she is permitted to introduce her

medical bills at trial. Plaintiff argues she is entitled to present to the jury her past medical costs in the amount of $90,322.72, future medical costs in the amount of $69,256.25,[6] and other reasonably probable medical costs.

Here, the judge found plaintiff failed to submit any unpaid medical bills during the discovery period. The medical bills for plaintiff's microdiscectomy were proffered as late amendments to plaintiff's answers to interrogatories well after the close of discovery.

Additionally, the judge rejected future medical bills as speculative. While Dr. Glass estimated the cost of future lumbar surgery, plaintiff's own medical expert disagreed with his estimate. Moreover, there is nothing in the record supporting plaintiff's intent to proceed with lumbar surgery. Based on the motion record, the judge concluded there was no ability to project future surgical costs for a jury to consider. We are satisfied the judge properly found plaintiff never "present[ed] any credible material evidence of any economic loss" to recover such damages.

Affirmed.

[6] This is the amount projected by Dr. Glass for future lumbar surgery.