

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3114-22**

PAUL J. TEMBY,
Administrator, The Estate of
TARA FLORENCE TEMBY,

Plaintiff-Appellant,

v.

NICHOLAS PRIVITERA,

Defendant-Respondent.

Submitted May 14, 2024 – Decided June 26, 2024

Before Judges Rose and Perez Friscia.

On appeal from the Superior Court of New Jersey, Law
Division, Hunterdon County, Docket No. L-0401-22.

Levinson Axelrod, PA, attorneys for appellant (Michael
B. Fusco, on the brief).

Respondent has not filed a brief.

PER CURIAM

While walking across State Highway 31 in Hampton Township, Tara Florence Temby was struck and killed by an automobile driven by defendant Nicholas Privitera. The accident occurred after sunset in early October 2022. At the time of her death, Tara was forty-six years old and single with two boys, whom we call "Patrick," age eighteen, and "Donald," age nine.¹

Tara died intestate. Her brother, Paul J. Temby, was appointed administrator of the estate and, in that capacity, filed a complaint against defendant alleging Tara's death was the result of negligence and violations of the Wrongful Death Act, N.J.S.A. 2A:31-1 to -6, and the New Jersey Survival Act, N.J.S.A. 2A:15-1 to -6. Default was entered after defendant failed to answer the complaint.

Prior to the April 12, 2023 proof hearing, the estate provided a written statement to the court. As to damages, the estate indicated Tara's life expectancy was thirty-five years. The estate "reserve[d] the right to call additional witnesses" on its damages claim. The estate also admitted into evidence several

¹ Because the parties share the same surname, we use first names for clarity intending no disrespect; because we reference certain Family Part proceedings, we use pseudonyms for Tara's sons and Donald's father to protect their privacy. See R. 1:38-3(d)(12).

documents including the state trooper's police crash investigation report and Tara's death certificate. Paul was the only witness to testify at the hearing.

At the conclusion of the proof hearing, which was conducted remotely, the trial court issued an oral decision, finding defendant liable for the accident, but concluding plaintiff failed to prove damages on either claim. Immediately thereafter, the court seemingly granted plaintiff's application to call additional witnesses, but did not schedule a return date for the continuance. The court did not issue a memorializing order.

On April 18, 2023, plaintiff filed a motion to vacate the court's oral decision and recuse the judge in view of certain questions posed to Paul during the hearing. On April 25, 2023, the court issued a final judgment, dismissing plaintiff's survivorship claim, entering a \$50,000 judgment on Donald's wrongful death claim, and appointing a guardian ad litem (GAL) on Donald's behalf. On May 24, 2023, the court denied plaintiff's April 18 motion in its entirety.

Plaintiff now appeals from the May 24 order, arguing the trial court: (1) improperly appointed a GAL; (2) erroneously denied the estate's recusal motion; and (3) applied the incorrect standard of proof. Because we conclude the judge should have continued the hearing and erroneously applied the law on the

estate's wrongful death claim, we vacate the order and remand for a new proof hearing. Because the court failed to notify plaintiff of its outside knowledge of the matter prior to questioning Paul and made findings about his veracity, on remand the matter should be reassigned to a different judge.² See Entress v. Entress, 376 N.J. Super. 125, 133 (App. Div. 2005) (holding "[i]n an abundance of caution, we direct that this matter be remanded to a different judge for the plenary hearing to avoid the appearance of bias or prejudice based upon the judge's prior involvement with the matter"). Although we discern no error in the appointment of a GAL, because we vacate the judgment in its entirety, we leave the issue to the sound discretion of the new judge.

I.

We summarize the testimony adduced at the proof hearing. On direct examination, Paul testified he had no first-hand knowledge of Tara's accident. Referencing the trooper's final rest diagram, Paul identified the intersection where Tara's body was recovered and the separate locations where her sandals were found.

² In its merits brief, plaintiff notes, in view of the suspension of civil jury trials in the vicinage, it was unable to request a jury. Our order does not preclude plaintiff from requesting a jury trial on remand. See R. 4:43-2(b) (permitting the court to conduct a proof hearing "with or without a jury").

Paul also testified about Tara's sons. At the time of incident, Patrick lived and worked in Vernon; Donald lived with Tara, who was his "sole provider." Without elaborating, Paul stated Donald "was diagnosed with autism and some other conditions, but [Tara] took care of him full time." Notwithstanding her "minimal means," Tara cared for both her sons.

On cross-examination, the following exchange transpired, in pertinent part:

[THE COURT:] After your sister passed away, who took custody of D[onald]?

[PAUL:] D[errick] R[oe], the father of the child.

[THE COURT:] Are you sure about that, sir?

[PAUL:] I'm not a hundred percent sure, no.

[THE COURT:] You have to know that I took his surrender of parental rights. Are you aware of that, sir? That he surrendered --

[PAUL:] I was not aware.

[THE COURT:] -- parental rights? Where is --

[PAUL:] I was not aware.

[THE COURT:] Where is D[onald] now? Do you know where he is?

[PAUL:] I do not.

[THE COURT:] Did you ever seek custody of D[onald]?

[PAUL:] I did. Prior to this, prior to her passing.

[THE COURT:] Have you had any communication with D[onald] since your sister passed away?

[PAUL:] I did initially, but not in quite some time.

[THE COURT:] You have no idea where he lives right now, do you?

[PAUL:] I do not. I was under the impression that he was with D[errick] and they had moved to New York.

[THE COURT:] You have no idea whether he's been adopted or anything like that?

[PAUL:] No.

. . . .

[THE COURT:] Okay. Sir, do you know how long your sister might have lived after the impact?

[PAUL:] I do not.

In its oral decision, the court credited Paul's testimony regarding his relationship with Tara, but noted Paul's knowledge of the incident was "somewhat minimal since he was not present." Concerning his relationship with Donald, the court found Paul's testimony "somewhat . . . questionable" because

Paul was unaware that Donald was not in Derrick's custody and had not communicated "with D[onald] pretty much since the time of the accident."

Although the court found the estate established a negligence claim against defendant, the court was not persuaded the estate sustained its burden regarding damages. According to the court:

The question, however, remains whether . . . plaintiff was able to prove a prima facie case of a cognizable injury, that is, damages in this case. [It]'s seeking pain and suffering damages. However, there's been no evidence that [Tara] was conscious after she was struck by [defendant's] vehicle, and it's unclear to the court . . . whether she experienced any pain and suffering.

Referencing the death certificate, the court noted there was no indication in the record concerning the length of time between the impact and death. The court concluded:

[W]ithout that critical information about how long [Tara] lived and was conscious before she passed, constrains the court to enter no cause against . . . plaintiff for a lack of proofs regarding any pain and suffering because there's no evidence that [Tara] was alive after she was struck by the vehicle and was conscious enough to feel any pain and suffering before she passed away.

Immediately after the court rendered its decision, plaintiff's counsel noted the death certificate indicated Tara's cause of death was "exsanguination and . . .

the interval between onset and death was a few minutes." Counsel sought "permission to call the medical examiner as a witness to . . . authenticate the document, which [he argued wa]s direct proof of conscious pain and suffering." Although the court accepted the truth of the death certificate "as to [its] very basic information," it found no explanation as to the number of minutes that transpired between the crash and Tara's death. Although the court indicated it would permit expert testimony on this issue, it dismissed plaintiff's complaint on all counts. Counsel then asked to call both children and Donald's father. The court responded: "You can make that application, and I'll entertain it at that time. This matter is concluded."

In its written statement of reasons accompanying the April 25, 2023 final judgment, the court summarized the estate's proofs in view of the applicable law. Regarding the survivorship action, the court reiterated plaintiff failed to prove damages on its survivorship claim because "there was no indication that [Tara]" was conscious between the impact and death. The court concluded without "any expert medical testimony or report confirming that [Tara] survived the collision and experienced conscious pain and suffering during those few minutes before she died," no award was permitted.

As to the wrongful death action, however, the court apparently reconsidered its oral decision and awarded damages solely on Donald's claim, finding he was Tara's "only dependent at the time of death." Noting plaintiff produced no proof of medical, hospital, or funeral expenses, the court limited damages to the "loss of guidance, advice, and counsel that might have been rendered to D[onald] by [Tara] had she not died unexpectedly." The court entered a \$50,000 judgment, payable to the GAL on behalf of Donald, for deposit into the surrogate's account.

II.

In the context of a proof hearing, the court is obliged to view a plaintiff's proofs indulgently, and the general practice is "to require only a prima facie case." Heimbach v. Mueller, 229 N.J. Super. 17, 20 (App. Div. 1988); see also Slowinski v. Valley Nat'l Bank, 264 N.J. Super. 172, 183 (App. Div. 1993) ("A successful plaintiff in any default judgment can be required to furnish some proof on the merits of the issues to show entitlement to the relief demanded."); R. 4:43-2(b) (authorizing the court to "determine the amount of damages" through a proof hearing "as it deems appropriate").

A plaintiff nonetheless is required "to furnish proof on the issue of damages as well as liability." Johnson v. Johnson, 92 N.J. Super. 457, 464 (App.

Div. 1966). "It is axiomatic that where, following the entry of a default, a plaintiff seeks unliquidated damages, judgment should not ordinarily be entered without a proof hearing, . . . although the question of what proofs are necessary is inherently within the judge's discretion." Chakravarti v. Pegasus Consulting Grp., Inc., 393 N.J. Super. 203, 210 (App. Div. 2007). As we have stated, after a default, a plaintiff is entitled to "all of the damages" that can be "prove[n] by competent, relevant evidence." Heimbach, 229 N.J. Super. at 28.

The trial court exceeded the appropriate bounds of discretion at the proof hearing substantively and procedurally. As to the merits, the court denied plaintiff's survivorship and wrongful death claims, without continuing the matter to consider plaintiff's supplemental evidence, i.e., testimony of the medical examiner, Derrick, Patrick, and Donald. In its statement of reasons accompanying the May 24, 2023 order, the court noted plaintiff moved to vacate its April 18 oral decision and for recusal, "[i]nstead of supplementing the record with necessary proofs." In our view, however, plaintiff's request to call further witnesses at the conclusion of the April 18 proof hearing was a sufficient continuance application and, as such, the court should have scheduled a return date at that time – instead of concluding the hearing.

Moreover, we are not convinced the court properly analyzed plaintiff's wrongful death claim. In Green v. Bittner, our Supreme Court explained:

In the case of a parent's death, in addition to the usual losses clearly having a monetary value, the law allows damages to be awarded to the surviving children for the loss of guidance and counsel which they might otherwise have received from the parent. The cases do not suggest that the calculation of such damages must cease after the child reaches majority. They are based on an ongoing relationship which exists in fact, regardless of any lack of legal duty on the part of the parent to render such guidance and despite the difficulty of placing a dollar value on it. Such damages are regularly allowed despite the total lack of proof of such dollar value and of the probability that such guidance and counsel would in fact have been rendered.

[85 N.J. 1, 7-8 (1980) (emphasis added); see also Johnson v. Dobrosky, 187 N.J. 594, 609 (2006).]

In the present matter, the trial court gave short shrift to the Green factors on the estate's wrongful death claim as to Donald and erroneously applied the factors relating to Patrick.

Damages for pain and suffering are permitted under the Survival Act, but only if Tara experienced conscious pain and suffering between the time of the injury and her death. Smith v. Whitaker, 160 N.J. 221, 236 (1999). It is essential for a successful pain and suffering claim that the pain and suffering was consciously experienced. Carey v. Lovett, 132 N.J. 44, 67 (1993). Additionally,

damage awards for pain and suffering may not be based on mere speculation or conjecture. See Model Jury Charge (Civil), 1.12(O), "Damages." Satisfaction of the estate's survivorship claim will abide by plaintiff's supplemental proofs at the rehearing.

Procedurally, the court cross-examined Paul, with knowledge acquired in a prior hearing, that Derrick's parental rights to Donald had been terminated. Although the court's participation in the Family Part matter did not necessarily mandate recusal, see R. 1:12-1(d) and (g), at the very least – in fairness – the court should have advised plaintiff's counsel of its previously-acquired knowledge about the family before questioning Paul.

Although this gaffe did not ultimately affect the award of damages on Donald's wrongful death claim, in view of the court's credibility findings concerning Paul's testimony, its prior knowledge of the family nonetheless had the capacity to negatively infect the proceedings. See State v. Marshall, 148 N.J. 89, 279 (1997) (acknowledging "it is not necessary to prove actual prejudice on the part of the court, and that the mere appearance of bias may require disqualification"); see also Chandok v. Chandok, 406 N.J. Super. 595, 603-04 (App. Div. 2009). As noted, the matter will be assigned to another judge on remand.

Vacated and remanded for a new proof hearing. Jurisdiction is not retained.

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


CLERK OF THE APPELLATE DIVISION