

HELEN E. JOHNSON, Plaintiff-Appellant,
v.
DELINIA C. GARDNER, Defendant-Respondent.

No. A-2438-08T1

Superior Court of New Jersey, Appellate Division.

Submitted October 27, 2009

Decided December 4, 2009

Stark & Stark, attorneys for appellant (Michael G. Donahue, of counsel and on the brief).

Methfessel & Werbel, attorneys for respondent (Gerald Kaplan, on the brief).

Before Judges Lihotz and Ashrafi.

PER CURIAM.

Plaintiff Helen Johnson appeals from an order of December 5, 2008, granting summary judgment to defendant and dismissing her personal injury complaint arising out of a motor vehicle accident. We affirm.

On January 24, 2006, plaintiff, who was fifty-eight years old, broke her right index finger when an unidentified driver using defendant Delinia Gardner's car ran a stop sign and collided with her car. She was treated in an emergency room and released. An x-ray of the right hand confirmed a "[f]racture of the base of the proximal phalanx of the 2nd digit." The radiologist's report also found "[d]egenerative change of the proximal interphalangeal joint of the 3rd digit[.]" and noted "[m]arked deformity of the carpal bones, which I suspect likely is related to degenerative change."

Plaintiff followed up with an orthopedist, John P. Nolan, Jr., M.D., who saw her two times, on January 25 and February 16, 2006. Dr. Nolan issued a report dated June 9, 2006, which described the condition of plaintiff's hand in laymen's language as "fracture of the base of the right index finger." He also wrote that "[s]he had a history of rheumatoid arthritis, Type II diabetes and osteoporosis[.]" and that, on the last visit, plaintiff "was continuing to have some stiffness in the finger with diminished range of motion." Dr. Nolan further reported:

It is my opinion, as a result of the finger fracture, she is likely to have some residual stiffness and diminished range of motion of the hand. This is superimposed upon a preexisting rheumatologic condition . . . [S]he had advanced destruction of the radiocarpal joints, as well as degenerative changes in the MP and PIP joints of several digits. . . .

It is my impression that Ms. Johnson has sustained a fracture as a result of the motor vehicle accident and this appears to have increased the stiffness in PIP joint of a hand that already had a preexisting arthritic condition. As such, it is likely, given her medical condition, that stiffness will remain permanent.

In January 2008, plaintiff filed this lawsuit seeking money damages for the injury to her finger.

Plaintiff's auto insurance policy contained the lawsuit threshold under the Automobile Insurance Cost Reduction Act (AICRA), N.J.S.A. 39:6A-1.1 to -35. Therefore, she was required to prove one of the six kinds of injuries listed in N.J.S.A. 39:6A-8a to recover compensation for non-economic damages such as disability, impairment, and pain and suffering. Because no diagnosis described the injury as a displaced fracture, which is one of the six types of qualifying injury, plaintiff's only alternative was to show that she suffered "a permanent injury." *Ibid.*; see Kennelly-Murray v. Megill, 381 N.J. Super. 303, 312-13 (App. Div. 2005).

She was also required to file a certification from a physician attesting that she had sustained an injury as described in the statute. N.J.S.A. 39:6A-8a. Plaintiff filed a certification by Dr. Nolan dated September 5, 2008, again stating that plaintiff suffered a fracture at the base of her finger, the fracture increased stiffness in the joint, and the stiffness was permanent. Nothing in the certification indicated that there was any further treatment or examination by Dr. Nolan after February 16, 2006, just

twenty-three days after the accident.

Defendant moved for summary judgment, contending that the report and certification of plaintiff's doctor were not sufficient to establish by objective medical evidence that plaintiff had suffered a permanent injury caused by the accident. The trial court agreed and granted summary judgment dismissing plaintiff's complaint. Plaintiff appeals, arguing that genuine factual disputes exist that should have precluded summary judgment on the issue of permanent injury caused by the accident.

In reviewing a grant of summary judgment, an appellate court applies the same standard under Rule 4:46-2(c) that governs the trial court. See Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007). The court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). In this case, the alleged disputed issue is whether the car accident caused a permanent injury to plaintiff's finger or hand.

Until the Supreme Court interpreted AICRA in DiProspero v. Penn., 183 N.J. 477 (2005), a minor injury, even if permanent, did not overcome the lawsuit or verbal threshold under AICRA or its predecessor. See, e.g., Tierra v. Salazar, 356 N.J. Super. 586, 588 (App. Div. 2003); Sherry v. Buonansonti, 287 N.J. Super. 518, 522 (App. Div.), cert. denied, 144 N.J. 588 (1996). Both before and after enactment of AICRA in 1998, appellate decisions held that a plaintiff subject to the threshold must prove an injury causing a serious impact in plaintiff's life. See, e.g., Oswin v. Shaw, 129 N.J. 290, 318 (1992); James v. Torres, 354 N.J. Super. 586, 593-96 (App. Div. 2002), cert. denied, 175 N.J. 547 (2003); Cavanaugh v. Morris, 273 N.J. Super. 38, 40 (App. Div. 1994). In DiProspero, *supra*, the Supreme Court concluded that the plain, unambiguous language of AICRA does not include serious impact as an element of a plaintiff's proofs. 183 N.J. at 493, 498, 506. Consequently, even a broken finger with minor impact on a plaintiff's life can be the basis for bringing a lawsuit under AICRA if all the requirements of the statute are otherwise satisfied.

One of those requirements is that an injury that is not listed in a specific category of the statute be "a permanent injury within a reasonable degree of medical probability." N.J.S.A. 39:6A-8a. The statute provides that "[a]n injury shall be considered permanent when the body part . . . has not healed to function normally and will not heal to function normally with further medical treatment." *Ibid.* Additionally, AICRA requires that the permanent injury be proven by credible, objective medical evidence. *Ibid.*; Serrano v. Serrano, 183 N.J. 508, 516 (2005). Subjective complaints or responses to physical examination are not enough. Cf. DiProspero, *supra*, 183 N.J. at 489, 495 (AICRA retained holding of Oswin v. Shaw, *supra*, 129 N.J. at 319, that proofs may not be "based solely on subjective complaints of pain").

In many cases alleging permanent injury under AICRA, the defendant disputes proximate cause of the injury and the resulting consequences alleged by the plaintiff. Defendants often point to pre-existing conditions of the same body part, or other accidents or trauma, to refute the plaintiff's allegations that the accident in dispute caused the permanent injury and its residual consequences.

Until recently, the plaintiff had the burden of producing a comparative analysis of causation where the evidence showed a pre-existing condition or other potential cause of injury to the same part of the body. See Polk v. Daconceicao, 268 N.J. Super. 568, 575 (App. Div. 1993). In Davidson v. Slater, 189 N.J. 166 (2007), the Supreme Court dispensed with proof of a comparative analysis to satisfy the lawsuit threshold. It held that, unless the plaintiff pleads a claim based on aggravation of a pre-existing condition, the plaintiff is under no obligation to segregate the causes of his or her complaints as between the motor vehicle accident and pre-existing conditions or other causes. *Id.* at 187-88.

In this case, plaintiff's complaint does not plead aggravation of pre-existing arthritic condition of her fingers. It broadly pleads defendant's negligence and proximate cause of injury resulting from the car accident. Therefore, traditional principles of proximate causation are applicable. *Id.* at 184. Plaintiff was required to prove that the car accident proximately caused permanent injury to her finger or hand. *Id.* at 185 (citing Germann v. Matriss, 55 N.J. 193, 205 (1970); W. Page Keeton, et al. Prosser & Keeton on the Law of Torts § 41, at 269 (5th ed. 1984)).

Pleading injury generally, however, does not free plaintiff entirely of presenting sufficient evidence for the jury to conclude that the car accident rather than some other source is the proximate cause of the permanent injury for which she seeks compensation. Here, the objective medical evidence, the x-ray of plaintiff's right hand, revealed both a fracture at the base of her index finger and a degenerative arthritic condition. In Davidson, *supra*, 189 N.J. at 188, the Court noted 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." In other words, while plaintiff is not required to produce a comparative analysis to make a prima facie case, the jury must still have sufficient objective medical evidence to conclude rationally that the permanent condition is one caused by the accident rather than a pre-existing condition.

Here, the parties do not dispute that the accident caused the fracture at the base of plaintiff's right index finger. But neither Dr. Nolan's report nor his certification, which may be considered in combination, see *id.* at 188-89, states that the fracture itself is a permanent injury. Both refer to the stiffness in the finger joint as the permanent residual consequence of plaintiff's arthritic hand and the fracture.

More significant, neither the report nor the certification expressly attributes the permanency of the stiffness in the joint to the car accident. Dr. Nolan attributes stiffness to the pre-existing "rheumatologic condition" of plaintiff's hand upon which the fracture was "superimposed." Both the report and certification imply that plaintiff had stiffness in the joint before the accident by stating that the car accident and the fracture increased the stiffness.

Plaintiff's evidence is insufficient to withstand summary judgment because Dr. Nolan's report and certification do not make any reference to objective medical evidence proving the stiffness or, more particularly, any increase in stiffness. The degree of stiffness appears to be a subjective complaint of plaintiff, which is not sufficient to prove a permanent injury. See Davidson, *supra*, 189 N.J. at 189; DiProspero, *supra*, 183 N.J. at 489, 495.

Also, Dr. Nolan's last examination of plaintiff occurred less than a month after the accident, and, at that time, he concluded only that it was "likely" that plaintiff would have some "residual stiffness" and that the "stiffness will remain permanent." Plaintiff presented no additional objective medical evidence to establish that the increased stiffness in her finger persisted beyond the first month after the accident.

Because Dr. Nolan concluded that plaintiff had a pre-existing arthritic condition and that the car accident only increased the stiffness of the finger joint, without any objective medical evidence to establish that increase or its permanency, his report and certification are not sufficient to satisfy the lawsuit threshold. The trial court was correct in granting summary judgment to defendant.

Affirmed.

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