MARCELINO HINOJOSA and ROSA HINOJOSA, H/W, Plaintiffs-Appellants,

v.

CAROLINE CASTALDO and WOODBRIDGE BOARD OF EDUCATION, Defendants-Respondents,

and

TOWNSHIP OF WOODBRIDGE and/or COUNTY OF MIDDLESEX and/or STATE OF NEW JERSEY, TAWANNA TOSADO, ALAN GINTER and GRANGE INSURANCE COMPANY, Defendants.

No. A-0821-11T3.

Superior Court of New Jersey, Appellate Division.

Submitted September 4, 2012.
Decided June 6, 2013.

Law Offices of Karim Arzadi, attorneys for appellants (Mr. Arzadi, on the brief).

Methfessel & Werbel, attorneys for respondents (Michael Poreda, of counsel and on the brief).

Before Judges Alvarez, Nugent and Ostrer.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

Plaintiffs, Marcelino Hinojosa and Rosa Hinojosa, appeal from the Law Division order dismissing the personal injury and per quod complaint they filed under the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to:12-3. They also appeal from the Law Division order denying their motion for reconsideration. The trial court dismissed their complaint after determining that the injuries Marcelino Hinojosa sustained when a school bus struck his Lexus did not meet the TCA's threshold for recovering pain and suffering damages. We affirm.

On February 12, 2008, plaintiff, Marcelino Hinojosa[1], a forty-year old crane operator, was injured in an accident when a bus driven by a Woodbridge Board of Education (the Board) employee slid on the downhill slope of a snow and ice-covered road, and collided with the Lexus driven by plaintiff. When the bus collided with the Lexus, plaintiff's seat moved forward and his right knee struck the car's dashboard. Several minutes later, plaintiff felt pain throughout his neck and back. Plaintiff telephoned a friend to take him home, because his car was too damaged to drive. After the responding police officer arrived and investigated the accident, plaintiff's friend drove plaintiff home, and then plaintiff's daughter took him to the Raritan Bay Medical Center's emergency room.

According to the hospital records, plaintiff complained of pain in his low back and right knee. Medical personnel x-rayed those areas. The doctor who interpreted the x-rays reported that the lumbar spine x-rays revealed a mild levoscoliosis, but no acute fracture or dislocation. The doctor reported that the right knee x-ray showed osteoarthritis, probable suprapatellar effusion, but no acute fracture or dislocation. The doctor suggested that "[i]f clinically warranted, MRI may be obtained to further evaluate this patient." After plaintiff was given Motrin, a prescription for more medication, and an immobilizer to wear around his knee, he was discharged with a diagnosis of a knee sprain and a lumbar strain or sprain.

During the next eight months, through October 2008, plaintiff visited with a chiropractor, Michael Carlesimo, more than forty times to receive treatment for his injuries, which the chiropractor diagnosed as "strain/sprain injuries to the thoracic and lumbar spine, and right knee pain." The treatment consisted of "spinal manipulation and multiple physical

medicine modalities, which include[d] high volt galvanic electric muscle stimulation, moist heat, cryotherapy, myofascial trigger point therapy, hydrotherapy, and massage therapy."

While receiving chiropractic treatment, plaintiff also received acupuncture therapy and physical therapy, consulted with other doctors, and underwent additional diagnostic testing. In March and April 2008 plaintiff consulted with Alfred Tawadrous, M.D. Plaintiff also consulted on three occasions with an orthopedic surgeon, Francis A. Pflum, M.D. and once with Marc A. Cohen, M.D., FAAOS, FACS, another orthopedic surgeon.

MRI studies of plaintiff's lumbar spine and right knee were completed on February 19, 2008. The lumbar MRI disclosed a mild disc bulge of the intervertebral disc at L3-L4 "with facet prominence crowding the thecal sac"; a disc bulge at L4-L5 "with facet arthrosis and bony spurring indenting the thecal sac; and a disc bulge at L5-S1 with facet arthrosis and some foraminal narrowing bilaterally." The right knee MRI was interpreted as follows:

> IMPRESSION:
>
> 1. Osteoarthrosis, medial and lateral compartments of the joint with chondromalacia, degenerative meniscal changes, and tear of the medial meniscus, posterior horn region as well as marginal spurring and subchondral cyst formation.
>
> 2. Probable posttraumatic changes of the tibial plateau also seen.
>
> 3. Joint and suprapatellar bursal effusion with popliteal cyst.

In addition to the MRI studies, a nerve conduction study dated March 8, 2008 was "consistent with L5-S1 radiculopathy on the right side." Dr. Tawadrous recommended that the study be repeated "in one year if symptoms persist." The motion record does not reflect a repeat study.

In a report dated November 6, 2008, plaintiff's chiropractor stated plaintiff's final diagnosis was thoracic and lumbar sprain/strain; myospasms; and myalgia. The chiropractor then reiterated as final diagnoses the interpretations of the doctor who read the MRI studies.

The chiropractor explained in his report that plaintiff's tests showed his "ability to perform daily activities, activities that must rely on proper muscle strength and flexibility of normal motion, has been impaired." The chiropractor thought it likely that plaintiff's condition would deteriorate in time. Finally, the chiropractor concluded that plaintiff's injuries were "of permanent nature."

Dr. Tawadrous diagnosed plaintiff's conditions as sprain and strain of the cervical, thoracic and lumbosacral spine, with myofascial pain syndrome in those areas; lumbosacral disc bulge and radiculopathy; and osteoarthritis and internal derangement of the right knee. His last report, dated April 19, 2008, did not comment on the probable duration of plaintiff's injuries. Dr. Pflum, an orthopedic surgeon, wrote reports in March, April and May of 2008. He documented plaintiff's ongoing knee complaints, but also noted "a history of arthroscopy of the right knee [twelve] years ago at Robert Wood Johnson Emergency Room. He improved after the arthroscopy and had no pain in his right knee prior to the accident." The doctor noted that in

March 2008 plaintiff reported his knee was not getting better. In his May report, Dr. Pflum wrote that plaintiff was working as a crane operator. The doctor explained to plaintiff the risks and benefits of different types of treatment, including no treatment. According to Pflum's report, plaintiff wished to have "arthroscopic surgery on his right knee, including an arthroscopically assisted anterior cruciate ligament and reconstruction with allograft."

Dr. Cohen, an orthopedic surgeon with whom plaintiff consulted on one occasion in April 2008, assessed plaintiff's condition as "[p]ersistent low back strain with lumbosacral radiculopathy, likely lumbar herniated disc." The report does not indicate that Dr. Cohen considered the MRI studies before making his diagnosis.

When deposed, plaintiff testified about the consequences of his injuries. He said this his right knee swelled when he walked. He could not sit "for too long," and when he was "trying to do [a] squat, [he was] not able to bend [his] knee too

often, too much." Prior to the accident, he was able to squat, but can no longer do so. He also testified that he is unable to go to the park and walk, because his knee swells. He is also unable to play soccer, which he used to play once in a while, and he cannot play basketball with his son anymore.

Additionally, plaintiff is unable to lift heavy objects.

Following his accident, plaintiff continued to work and was eventually given a position that paid more money. Although he received higher pay, he worked less overtime. Plaintiff claims his employer gave him the new position because it required less bending.

The Board had defendant examined by Steven H. Fried, M.D., an orthopedist, who stated in an April 19, 2011 report that plaintiff had suffered no permanent orthopedic injuries as a result of the accident. Dr. Fried believed that plaintiff's ongoing complaints and findings were due to "pre-existing degenerative change[s] in [his] neck, back, and right knee." In forming his opinion, he reviewed a CT scan of plaintiff's lumbar spine "post-discogram dated 2/23/06," which showed evidence of "disc degeneration throughout the lumbar spine, most marked at L4-5 and L5-S1"; two of the levels where disc bulging was shown on the February 2008 MRI. According to Dr. Fried, the CT scan also showed "an annular tear at L5-S1."

Plaintiff filed a complaint against the Board, its bus driver, and others, seeking, among other things, compensation for the injuries he sustained in the accident. Plaintiff also alleged he "was prevented, is, and will in the future be prevented from pursuing his usual course of conduct and employment."

During discovery, plaintiff served interrogatory answers in which he represented that he had missed one day of work, which had been paid as vacation time. He claimed no other loss of income. Although he stated that he had incurred expenses for transportation to doctors, over-the-counter medication, and insurance deductible and co-payments, he provided no dollar amount for any of those items.

Following completion of discovery, the Board and its driver moved for summary judgment. The court granted the motion.

The court explained that in order to vault the TCA's threshold for recovering pain and suffering damages, plaintiff had to demonstrate by objective medical evidence that he suffered a permanent injury that was substantial. The court concluded that the MRI studies, which showed "anomalies" of plaintiff's right knee and spine, were objective evidence of a permanent injury or injuries. Nonetheless, the court also concluded, plaintiff had provided no evidence to support a finding he had suffered a loss of bodily function that was substantial. For that reason, the court granted defendant's motion.

Plaintiff moved for reconsideration. In support of his motion, he submitted a note and a form from a new doctor, Richard A. Boiardo, M.D. Plaintiff had obtained the documents after the court granted defendants' summary judgment motion. Handwritten on the note was the following: "patient needs in doctor's medical opinion a knee replacement." Handwritten on the form was the following: "need to review CT scan results for [right] knee." The handwritten note continued:

> 2/12/2008 — restrained driver when his vehicle was hit head on by an out of control school bus. Pt tried to reverse to avoid the school bus — [right] knee into dashboard and chest into steering and neck was jerked around — went home then ER due to the knee being swollen — x-ray, immobile, meds and told to see an ortho — was getting treated by a chiropractor — and p.t. x1 month for the knee which helped a lot but still having a lot of pain in the knee so he sought out on orthopedic for an opinion.

Plaintiff asserted in his motion for reconsideration that the doctor's documents were "new evidence" that warranted reconsideration of the court's previous decision granting summary judgment. The court denied plaintiff's motion.

In an oral decision, the court explained that Dr. Boiardo "was not a doctor who [has] been named as an expert in this case. He apparently must be a new doctor that the plaintiff consulted with." The court commented that the form concerning plaintiff's consultation with Dr. Boiardo was not signed, and questioned whether the doctor made the handwritten entries. As to the "note," the court characterized it as "a note [] such as you might use to give somebody a

work excuse or a gym excuse." Describing the note as consisting of letterhead on the top and a checklist, the court commented on the handwritten notation concerning plaintiff's need for a knee replacement and then stated that it was signed by Dr. Boiardo in "[t]otally different handwriting."

Commenting on the procedural posture of the case, the court recounted the history of discovery, remarked that the case had been scheduled for trial, and noted that plaintiff had neither named Dr. Boiardo as an expert witness nor moved to reopen discovery for that purpose. For those reasons, and because Dr. Boiardo's documents did not state any causal relationship between the injuries sustained in the accident and the purported need for a total knee replacement, the court concluded plaintiff had not satisfied the standard for reconsideration. The court entered an order confirming its denial of plaintiff's motion for reconsideration and plaintiff filed this appeal.

Plaintiff presents the following points for our consideration:

> POINT I
>
> THE SUMMARY JUDGMENT ON PLAINTIFF'S ECONOMIC LOSS CLAIM SHOULD BE REVERSED BECAUSE THE VERBAL THRESHOLD DOES NOT APPLY TO IT
>
> POINT II
>
> THE SUMMARY JUDGMENT ON PLAINTIFF'S NON-ECONOMIC LOSS CLAIMS SHOULD BE REVERSED BECAUSE HE RAISED A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER HIS INJURIES WERE SUBSTANTIAL
>
> POINT III
>
> THE DENIAL OF PLAINTIFF'S MOTION FOR RECONSIDERATION WAS ERRONEOUS AND THE CASE SHOULD BE REMANDED

A trial court must grant a summary judgment motion 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); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529-30 (1995). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). If the evidence submitted on the motion "`is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)).

When a party appeals from a trial court order denying a summary judgment motion, we "employ the same standard [of review] that governs the trial court." Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010) (alteration in original) (quoting Busciglio v. DellaFave, 366 N.J. Super. 135, 139 (App. Div. 2004)) (internal quotation marks omitted). Thus, we must determine whether there was a genuine issue of material fact, and if not, whether the trial court's ruling on the law was correct. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). We review legal conclusions de novo. Henry, supra, 204 N.J. at 330.

Central to the parties' arguments is N.J.S.A. 59:9-2(d) which 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, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $3,600.00. For purposes of this section medical treatment expenses are defined as the reasonable value of services rendered for necessary surgical, medical and dental treatment of the claimant for such injury, sickness or disease,

including prosthetic devices and ambulance, hospital or professional nursing service.

Plaintiff first argues that his economic loss claim should not have been dismissed on summary judgment. Plaintiff never presented his economic loss argument to the trial court. Although the complaint pled a cause of action for economic loss, neither the trial court nor defendants would have perceived that plaintiff was asserting such a claim in opposition to defendants' summary judgment motion.

Plaintiff's interrogatory answers stated that he had missed one day of work immediately following the accident, but it was paid as vacation time. Although he asserted that he had incurred transportation expenses for doctor visits, over-the-counter medications, and insurance deductibles and co-payments, he never provided a dollar amount and he never provided proof that he had incurred those expenses. He now claims that he has numerous outstanding medical bills; but he did not make that claim before the trial court, and does not explain now, why his own automobile insurance company did not pay his medical bills.

"It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available `unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959), certif. denied, 31 N.J. 554 (1960)). Plaintiff's questionable claim involves neither the jurisdiction of the trial court nor a matter of great public interest. Accordingly, we decline to consider it.

Plaintiff next argues that he has created a triable issue as to whether he is entitled to recover damages for pain and suffering under N.J.S.A. 59:9-2(d). He contends that he produced sufficient evidence of permanent loss of a bodily function to defeat the summary judgment motion and have a jury decide that issue.

The Supreme Court has developed a two-prong standard that a plaintiff must satisfy "in order to vault the pain and suffering threshold under the [TCA]." Gilhooley v. Cnty. of Union, 164 N.J. 533, 540-41 (2000). A plaintiff must prove that he suffered "(1) an objective permanent injury, and (2) a permanent loss of a bodily function that is substantial." Id. at 541. When a trial court considers whether a plaintiff has suffered a "permanent loss of a bodily function that is substantial," it must engage in a fact-sensitive analysis. Knowles v. Mantua Twp. Soccer Ass'n, 176 N.J. 324, 331 (2003).

The Supreme Court has recognized as examples of injuries that satisfy the threshold "injuries causing blindness, disabling tremors, paralysis and loss of taste and smell." Gilhooley, supra, 164 N.J. at 541. An injury requiring a prosthetic or other medical device to replace the natural function of a body part or organ satisfies the threshold. Id. at 542-543. On the other hand, "[a]n 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 [TCA] for mere subjective feelings of discomfort.'" Knowles, supra, 176 N.J. at 332 (quoting Gilhooley, supra, 164 N.J. at 540).

Here, plaintiff's chiropractor was the only expert who rendered an opinion that plaintiff had sustained a permanent injury in the accident. The chiropractor based his opinion in large part upon the MRI studies. Although the MRI study of plaintiff's lumbar spine showed that his intervertebral discs were bulging in three locations, the chiropractor did not consider the pre-accident, 2006 CT scan that showed disc degeneration throughout plaintiff's lumbar spine before plaintiff's 2008 accident. The chiropractor's expert report was of questionable validity. "In order for such a report to have any bearing on the appropriateness of summary judgment it must create a genuine issue of fact." Brill, supra, 142 N.J. at 544. If an expert's report "is based on a factually inaccurate and unjustifiable assertion, ... [the] report does not create a genuine issue of material fact for precluding the grant of summary judgment." Ibid.

Even accepting the chiropractor's opinion that plaintiff's thoracic and lumbosacral sprains and strains, and their accompanying symptom complex are permanent, plaintiff's injuries are not "significant" within the meaning of the TCA. See Brooks v. Odom, 150 N.J. 395, 406 (1997) (plaintiff who suffered residual post-traumatic myositis and fibromyositis of the cervicodorsal and lumbosacral spine, as well as post-traumatic headaches, objectively evidenced by findings on x-ray and EMG, did not meet the threshold where plaintiff had missed only eight days of work and could still function,

albeit with pain, as a teacher's aide and homemaker).

Nor does the chiropractor's opinion that plaintiff's knee symptoms were permanent create a triable issue. Within two months of the accident, plaintiff's orthopedic surgeon suggested that plaintiff undergo surgery to repair the torn meniscus in his knee. Although plaintiff claims he agreed to have the surgery, the surgery had not been scheduled by the time the court decided the summary judgment motion more than two years later. Thus, when the time the summary judgment motion was decided, the status of plaintiff's knee was that it was symptomatic but surgery was a possible cure. Plaintiff did not claim that he declined to have surgery due to risks inherent in the procedure, and no doctor expressed an opinion that plaintiff's knee injury would be permanent even if he had it surgically repaired. Under those circumstances, the chiropractor's opinion did not create a triable issue as to whether plaintiff had suffered a significant permanent injury.

In his third and final argument, plaintiff argues the court erroneously denied his motion for reconsideration. We disagree.

A motion for reconsideration is addressed to the "sound discretion of the [c]ourt, to be exercised in the interest of justice." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)) (internal quotation marks omitted). Reconsideration is reserved for "cases which fall into that narrow corridor" where the prior decision was "based upon a palpably incorrect or irrational basis," or failed to consider or appreciate "probative, competent evidence," or where a "litigant wishes to bring new or additional information to the [c]ourt's attention which it could not have provided on the first application." D'Atria, supra, 242 N.J. Super. at 401.

Here, the trial court did not fail to consider or appreciate any of the arguments plaintiff made when he opposed defendants' summary judgment motion. Rather, he consulted with a third, new, orthopedist who issued not a report, but a form for an office visit and a note, without having any of plaintiff's medical records or diagnostic tests available. Plaintiff provided no reasonable explanation why he did not provide competent medical expert reports documenting his need for a knee replacement before discovery ended, before trial started, or in opposition to defendants' summary judgment motion.

More significantly, the doctor's note and form, which plaintiff submitted with his motion for reconsideration, did not include an opinion within reasonable medical probability that plaintiff's need for a knee replacement was caused by the accident involving the school bus. The documents were not competent evidence that would have defeated defendants' summary judgment motion. They certainly did not satisfy the reconsideration standard. The court acted entirely within its discretion in so deciding.

Affirmed.

[1] Because the claims of Rosa Hinojosa are derivative of Marcelino Hinojosa's claims, we refer to Marcelino Hinojosa as "plaintiff."