NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5769-13T3

DENNIS GUEVARA,

Plaintiff-Appellant,

v.

JOHN J. BLUISH, JR.,

Defendant-Respondent,

and

JANE M. BLUISH,

Defendant.

Argued October 27, 2015 – Decided November 19, 2015

Before Judges Fisher and Rothstadt.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-582-12.

Denise M. Mariani argued the cause for appellant (Stark & Stark, attorneys; Ms. Mariani, of counsel and on the brief).

Rudolph & Kayal, attorneys for respondent (Stephen A. Rudolph, on the brief).

PER CURIAM

In this appeal of a defense verdict in his personal injury action, plaintiff argues the trial judge erred in refusing to instruct the jury that it could draw an adverse inference

because of defendant's failure to call a medical expert despite having plaintiff submit to an examination pursuant to Rule 4:19. A similar argument was thoroughly considered and rejected in Washington v. Perez, 219 N.J. 338 (2014).[1] Consequently, we affirm.

The action has its genesis in an auto accident on August 11, 2010, when a vehicle in which plaintiff was a passenger was rear-ended on the New Jersey Turnpike by a vehicle driven by defendant John J. Bluish, Jr. Plaintiff commenced this action for damages based on his contention that he suffered a rotator cuff tear which required surgery. During discovery, plaintiff attended at defendants' request a medical examination performed by Dr. Alan J. Sarokhan. Defendants,[2] however, never named Dr. Sarokhan as an expert and, when the case was tried, the only expert testimony heard by the jury came from Dr. Frederick S. Song, plaintiff's expert.

[1] The Supreme Court's decision in Washington was unavailable to the judge and the parties because it was not decided until a few months after the trial here. But our opinion in Washington, which drew the same conclusion that favors the defense here, was considered and properly relied on by the trial judge. See Washington v. Perez, 430 N.J. Super. 121 (App. Div. 2013).

[2] The claims against defendant Jane Bluish, the owner of the vehicle operated by defendant John J. Bluish, Jr. (defendant), were dismissed prior to trial.

At trial, the parties stipulated defendant was negligent in causing the auto accident. The major bone of contention was whether the accident caused the injuries allegedly sustained by plaintiff. The jury returned a verdict in favor of defendant by unanimously responding "no" to the first question on the verdict sheet: "Has the plaintiff . . . proven by a preponderance of the objective credible medical evidence that he sustained a permanent injury as a direct and/or [sic] proximate result of the accident of August 11, 2010?" Consequently, judgment was entered in favor of defendant.

Plaintiff appeals, arguing:

> I. THE TRIAL COURT ERRED IN NOT GIVING THE ADVERSE INFERENCE CHARGE, IN NOT INSTRUCTING THE JURY ON WHAT TO DO WITH THE TESTIMONY THAT PLAINTIFF WAS EXAMINED BY A DOCTOR AT THE DEFENDANT'S REQUEST AND IN NOT ALLOWING PLAINTIFF TO MAKE ANY COMMENT ON DEFENDANT'S ABILITY OR FAILURE TO CALL DR. SAROKHAN.
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> II. THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL OR GIVING A PROPER CURATIVE INSTRUCTION AS TO DEFENDANT'S IMPROPER ARGUMENT IN HIS OPENING STATEMENT.
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> III. PLAINTIFF WAS DENIED A FAIR TRIAL DUE TO DEFENDANT'S REPEATED AND IMPROPER ARGUMENT OF MEDICAL OPINIONS NOT SUPPORTED BY EXPERT OPINION AND IN VIOLATION OF THE LAW OF THE CASE EXPRESSED BY [ANOTHER] JUDGE [PRIOR TO TRIAL] WHICH EXCLUDED THE MEDICALLY UNSUPPORTED ARGUMENT THAT A PRIOR INJURY MAY HAVE CAUSED PLAINTIFF'S ROTATOR CUFF TEAR.

We find insufficient merit in these arguments to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following brief comments.

As mentioned, plaintiff sought the judge's instruction to the jury that it could draw an inference against defendant for choosing not to call Dr. Sarokhan to testify. In Washington, we ordered a new trial because the judge there gave an adverse inference charge in similar circumstances, 430 N.J. Super. at 130-31, and the Supreme Court affirmed that determination, 219 N.J. at 364. The only difference between what mistakenly occurred in the trial court in Washington v. Perez and what plaintiff sought at trial was that defendant here did not name Dr. Sarokhan as an expert. We find that distinction to be irrelevant; that a defendant identified in interrogatory answers an expert who was never called to testify, or obtained an expert report but never named the expert as a potential witness, or forewent the right to have a plaintiff examined by a physician, makes no difference. It was plaintiff's burden to prove causation by a preponderance of the evidence; defendant was not required to testify or to call any fact or expert witness on his own behalf, and it would have been unfair and inappropriate for the judge to give his imprimatur to plaintiff's factual contentions by advising the jurors they could assume defendant's

decision not to call any such witnesses or take advantage of his rights as a litigant would have proven damaging to defendant's position.[3] Washington, supra, 430 N.J. Super. at 131; Wild v. Roman, 91 N.J. Super. 410, 415 (App. Div. 1966). We, thus, reject Point I.

We also find no merit in plaintiff's Points II and III. Defense counsel's arguments in both his opening and closing statements constituted fair comment about Dr. Song's testimony. Indeed, defendant's closing statement is particularly noteworthy for its extensive quoting from Dr. Song's testimony in making the case that the rotator tear was likely not caused by the auto accident. The only possible error that may have occurred resulted from the pretrial ruling made by another judge that prevented defendant from eliciting testimony that plaintiff did not advise Dr. Song of a 2007 injury to the same body part and an emergency room visit at that time; to the extent that determination may have been erroneous, it too favored plaintiff and does not present a ground for upsetting this verdict.

Affirmed.

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[3] The only error occurred when the judge permitted plaintiff's counsel to elicit plaintiff was twice examined by Dr. Sarokhan. The jury could have assumed when Dr. Sarokhan did not appear at trial that his testimony would not help defendant — the very inference about which the judge correctly refused to instruct the jury. This error, however, favored plaintiff and thus presents no basis for appellate intervention.

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

CLERK OF THE APPELLATE DIVISION