

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0660-14T2

REINA LOPEZ,

Plaintiff-Respondent,

v.

MICHELLE LARSEN,

Defendant-Appellant,

and

NANCY LARSEN,

Defendant.

Argued December 1, 2015 – Decided February 2, 2016

Before Judges Fisher, Espinosa, and Currier.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-3722-11.

Matthew R. Panas argued the cause for appellant (Bright & Sponder, attorneys; Mr. Panas, of counsel and on the brief; Jill Roth and Douglas J. Nosko, on the briefs).

Sander Budanitsky argued the cause for respondent.

PER CURIAM

Defendant Michelle Larsen¹ appeals from the September 5, 2014 denial of her motion for a new trial and the subsequent judgment entered against her. Because we conclude that plaintiff Reina Lopez was required to present a comparative analysis of her injuries to the jury under Davidson v. Slater, 189 N.J. 166 (2007), and her failure to do so should have resulted in the grant of Larsen's motion for a directed verdict, we reverse the decision of the trial judge and remand the case for the entry of judgment in favor of defendant.

Lopez and Larsen were involved in a car accident on October 1, 2009. Lopez's claims were subject to the verbal threshold. In her answers to interrogatories, Lopez stated she had sustained permanent injuries to her neck with disc herniations at C4-C5 and C5-C6, a disc bulge at C5-C6, and cervical radiculopathy.

In response to an interrogatory seeking information regarding prior injuries, Lopez answered the following: "Plaintiff was involved in a prior motor vehicle accident on June 16th, 2004, in which she sustained injuries to her neck, back and right shoulder. Please see medical records and reports pertaining to the said prior accident attached." The records

¹ Nancy Larsen was dismissed from the case at the close of the evidence.

revealed that following the 2004 accident, Lopez had been seen in the emergency room and then began a course of treatment with a chiropractor for her neck injury. She was also evaluated and treated by several orthopedic doctors and referred for MRI scans.²

Iosif Goldman, M.D., D.O., opined in a final narrative report that "[b]ased on the patient's subjective complaints, clinical and objective findings and response to intensive therapy and medical care, it appears that the traumatically induced spinal and neurological injuries are serious and there is a significant and permanent limitation of use of the spine." An MRI of the cervical spine on June 25, 2004 showed a disc bulge at C5-C6. The records further reveal that Lopez continued to receive orthopedic and chiropractic care in 2006 and a second MRI was done, which revealed a disc protrusion at C5-C6.

Lopez returned to Goldman for treatment several days after the 2009 accident. In his report he noted that she had been involved in accidents in 2004 and 2006.

In April 2010, Lopez came under the care of Boris L. Prakhina, M.D., a pain management specialist; she did not advise him of her prior accidents. He reviewed an MRI from December

² We only reference the treatment that Lopez received to her neck as a result of the two accidents; injuries to other body parts are not relevant to our discussion.

2009 showing herniated discs at C4-5 and C5-6 and diagnosed her with ongoing cervical radiculopathy. Prakhina's January 2013 report stated that his conclusions were based on Lopez having sustained no prior injury to her neck; therefore, his findings of herniated discs and cervical radiculopathy were causally related to the 2009 motor vehicle accident. He found the disc herniations to be a permanent injury. Prakhina's July 2013 report reviewed the 2004 MRI film in which he found bulging discs at C3-4 and C5-6. He reiterated that Lopez's condition was caused by the 2009 accident and that she had sustained a permanent injury.

In her deposition after the 2009 accident, Lopez stated she had never been in any other automobile accident. She also denied treatment by any doctors for orthopedic injuries or pain in her neck prior to the 2009 accident.

Prakhina was the only medical expert to testify on Lopez's behalf at trial. He testified that he treated Lopez from April 29, 2010, until January 10, 2011, during which time he administered three epidural injections into her neck. His final diagnosis consisted of herniated discs at C4-C5 and C5-C6 and cervical radiculopathy, and he opined that Lopez sustained permanent injuries to her cervical spine in the 2009 accident.

Prakhina stated that he was not advised by Lopez that she had been involved in any prior accidents before he authored his reports, and he formed his opinions in those reports relying on the fact that there was no prior medical history. Prakhina testified that the medical records concerning the treatment Lopez received for the 2004 car accident would have been helpful to him in formulating his opinions and in fact, could have caused him to change his opinion.

When questioned as to the July 2013 report, Prakhina stated he had no memory of why he was asked to review the 2004 MRI films. He testified that the 2004 MRI showed bulging discs, whereas the 2009 MRI revealed herniated discs at the same levels. The doctor described "substantial changes" between the 2004 and 2009 MRIs.³ He concluded that the herniated discs in Lopez's neck were causally related to the 2009 accident.

At trial, Lopez testified she injured her neck in the 2004 accident and received extensive treatment during the five years leading up to the October 2009 accident.⁴ Lopez stated she had continued to experience neck pain radiating down her right shoulder and arm after the 2004 accident up until the 2009

³ Prakhina was never asked to review the 2006 MRI film which showed changes from the prior scan.

⁴ Lopez admitted that she was mistaken when she stated she had not been in a previous automobile accident during her deposition.

accident. She also testified she was limited in her ability to perform daily activities after 2004 leading up to the 2009 accident.

After Lopez rested her case, defense counsel moved for a directed verdict arguing that Lopez's expert failed to provide a comparative analysis of her pre- and post-accident injuries. The trial judge denied Larsen's motion.

At the charge conference, Larsen asked for the False in One - False in All jury charge based upon Lopez's contradictory testimony. The judge denied the request. Larsen also requested the following jury verdict form:

4. Do you find that Plaintiff Reina Lopez has satisfied her burden by a preponderance of the evidence based upon objective credible medical evidence that she sustained a permanent injury proximately caused by the accident on October 1, 2009?

. . . .

5. What amount of money will fairly and reasonably compensate plaintiff for any permanent injuries proximately caused by the accident?

[(Emphasis added).]

The trial judge declined the request and instead used the following form over defendant's objection that it did not include the requested "proximate cause" language.

1. Has Reina Lopez shown by the greater weight of evidence that she has sustained a

permanent injury to any body part from this accident, meaning it will not go on to heal [or] to function normally without further medical treatment?

. . . .

2. What amount would fairly and reasonably compensate Reina Lopez for her disability, impairment, loss of enjoyment of life, suffering, and pain for all of the injuries you find she has sustained from this accident?

The jury returned a verdict finding Lopez suffered a permanent injury and awarded her \$90,000. After dismissing the jury, the judge stated,

I remain a little troubled . . . whether there was adequate information provided under Davidson [v.] Slater. So I would welcome your post-trial briefs on that.
. . . .

There's a question in my mind under Davidson [v.] Slater, a Supreme Court case, whether there was a sufficient . . . compared analysis done. We did discuss it. I said it would go to the jury, but . . . I'd like to consider that again.

Larsen's motion for a new trial was denied in a written opinion of September 5, 2014. The judge stated the issue of credibility was the province of the jurors and they had found Lopez to be credible. He denied the request for remittitur and concluded that Larsen was collaterally estopped from pursuing her counterclaim for insurance fraud based upon the jury verdict in favor of Lopez. This appeal ensued.

On appeal, Larsen raises the following issues:

POINT I: THE TRIAL COURT FAILED TO GRANT A MOTION FOR DIRECTED VERDICT DESPITE CLEAR EVIDENCE THAT PLAINTIFF'S EXPERT FAILED TO MAKE A COMPARATIVE ANALYSIS IN ACCORDANCE WITH DAVIDSON V. SLATER.

POINT II: THE TRIAL COURT FAILED TO INCLUDE THE REQUISITE ELEMENT OF "PROXIMATE CAUSE" ON THE JURY VERDICT SHEET.

POINT III: THE JURY VERDICT WAS AGAINST THE WEIGHT OF EVIDENCE AND THE EXCESSIVENESS AND WRONGNESS OF THE VERDICT SHOCKS THE CONSCIENCE AND WAS A MISCARRIAGE OF JUSTICE BASED UPON PLAINTIFF'S PERVASIVE UNTRUTHFUL TESTIMONY AND THE EVIDENCE PRESENTED AT TRIAL.

POINT IV: THE TRIAL COURT FAILED TO GRANT DEFENDANT'S MOTION FOR REMITTITUR DESPITE THE JUDGMENT'S OVERRIDING SENSE OF INJUSTICE, A SHOCK TO THE COURT'S CONSCIENCE, AND THE BELIEF THAT THE AWARD FALLS OUTSIDE OF THE RANGE OF ONE THAT IS ACCEPTABLE AND APPROPRIATE.

POINT V: THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO CHARGE THE JURY WITH THE FALSE IN ONE, FALSE IN ALL CHARGE DESPITE EVIDENCE OF PLAINTIFF LYING IN HER DEPOSITION AND AT TRIAL.

POINT VI: THE TRIAL COURT IMPROPERLY DISMISSED DEFENDANT'S FRAUD COUNTERCLAIM EVEN THOUGH IT WAS BIFURCATED FROM THE TRIAL.

POINT VII: THE TRIAL COURT IMPROPERLY DENIED DEFENDANT'S MOTION FOR A NEW TRIAL DESPITE OVERWHELMING EVIDENCE THAT THE TRIAL COURT MADE NUMEROUS IMPROPER RULINGS AGAINST DEFENDANT.

We begin by addressing Larsen's argument that the judge erred in denying her motion for a directed verdict.⁵ At the close of plaintiff's case, under Rule 4:37-2(b), defendant may move for a dismissal of the action on the grounds that plaintiff has shown no right to relief under the facts and law. The "motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor." R. 4:37-2(b). Rule 4:40-1 provides that a motion for judgment may be made "either at the close of all the evidence or at the close of the evidence offered by an opponent." In deciding a motion for judgment under Rule 4:40-1, the judge must accept as true all evidence that supports the position of the non-moving party, according him or her the benefit of all legitimate inferences, and if reasonable minds could differ, the motion must be denied. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 441-42 (2005). This court applies the same standard on appeal. See Frugis v. Braciigliano, 177 N.J. 250, 269 (2003); see also Verdicchio v. Ricca, 179 N.J. 1, 30 (2004).

Larsen argues, as she did to the trial judge, that because Lopez did not provide a comparative analysis of the injuries she

⁵ Although it is unclear if the motion was made under Rule 4:37-2 or 4:40-1, our standard of review is the same.

sustained in the two accidents as required under Davidson, she is unable to meet her burden on the element of causation. Davidson, supra, 189 N.J. at 170. Larsen contends that Lopez's case should not have been submitted to the jury and that the judge should have granted a directed verdict. We agree.

In Davidson, the Court clarified that a plaintiff who pleads an aggravation of a pre-existing injury must present comparative medical evidence in order to satisfy the causation element. Ibid. Although her complaint does not allege an aggravation, plaintiff does not dispute she was claiming an aggravation of a pre-existing injury to her neck. She argues that Davidson has been met by the testimony of Prakhina, in which he found bulging discs on an MRI of 2004 and herniated discs on the 2009 film and that these changes are objective evidence sufficient to permit the issue of causation to be decided by a jury. We disagree.

Prakhina was unaware that Lopez had sustained any previous injuries to her neck. When he diagnosed her with cervical radiculopathy he was uninformed that Lopez had received that same diagnosis after the 2004 accident. Similarly, Prakhina did not know that Lopez had been diagnosed with a permanent cervical injury after the earlier accident. The doctor did not see the 2006 MRI films which revealed herniated discs at the same level

as he found in 2010. Prakhina could not testify as to whether Lopez sustained an aggravation of a pre-existing injury as he had never been provided with the prior medical records nor told about prior treatment. He was unable to offer a comparative analysis of the various injuries to Lopez because he did not have the information to do so.

By simply having the doctor look at two sets of films, and opine as to their differences, Lopez evaded her burden. The doctor was not capable of isolating the injuries that were permanent as a result of the 2009 accident because he had been given no medical records of any medical treatment she may have received prior to seeing him.

The ruling in Davidson is premised on the tort element of causation found in every negligence case. Davidson, supra, 189 N.J. at 184. "To prevail in the ordinary aggravation of injury case, therefore, plaintiffs must separate those damages caused by a particular defendant's negligence from any prior or post injuries or conditions." Reichert v. Vegholm, 366 N.J. Super. 209, 214 (App. Div. 2004). Without the doctor being given all of the applicable medical information regarding Lopez's prior injuries and treatment, he could not provide an opinion to the jury as to the causation of her injuries following the 2009 accident. Indeed, the doctor testified that the prior records

would have been helpful and might have changed his opinion. Lopez cannot skirt her burden of proof by asking the doctor to look at two MRI films in isolation and comment on the changes.⁶

Without a proper comparative medical analysis, the jury was given no information by which it might assess the injuries sustained by Lopez in several accidents. They were left only with the doctor's opinion that the herniated discs seen on the 2009 MRI were causally related to the 2009 accident and constituted a permanent injury. These were not sufficient proofs to meet the burden of proving an aggravation of an injury. With the extensive medical treatment plaintiff received for many years preceding the 2009 accident and prior MRI films showing anatomical changes at the same vertebrae as those in question, Lopez was required to present the jury with a medical analysis in order to meet her burden of proof on causation. Lopez did not present comparative medical analysis evidence sufficient to establish a prima facie aggravation of pre-existing injury cause of action. Her failure to do so must result in a directed verdict for Larsen. Reichert, supra, 366 N.J. Super. at 226.

⁶ We note the doctor was never asked whether Lopez had aggravated any pre-existing injuries or conditions in the 2009 accident.

As we find that the judge erred in not granting the motion for judgment, we do not reach the remainder of Larsen's arguments, with the exception of the following comments. A verdict sheet should contain language as to whether a plaintiff has met her burden that she sustained injuries proximately caused by the accident.⁷ It is an element of plaintiff's required proofs and follows the charge given to the jurors.

Based on our above ruling we are constrained to reverse and direct the court to enter judgment in favor of Larsen.

Reversed and remanded.

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



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⁷ See Model Jury Charge (Civil), 8.10 "Damages – Effect of Instruction" (1995).