2016 WL 782967
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

Alan PICKETT, Plaintiff–Appellant,
v.
SHOPRITE OF EAST NORRITON, PA and Brown Superstores, Defendants–Respondents.

Argued Jan. 21, **2016**.
|
Deicided March 1, **2016**.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L–000805–12.

Attorneys and Law Firms

Josue J. Baptiste argued the cause for appellant (Jean Baptiste & Associates, LLC, attorneys; Mr. Baptiste, on the brief).

John J. Grossi, III argued the cause for respondents (Carey & Grossi, attorneys; Mr. Grossi, on the brief).

Before Judges FUENTES, KOBLITZ and GILSON.

Opinion

PER CURIAM.

***1** Plaintiff Alan Pickett appeals from a July 28, 2014 order denying his motion for reconsideration of an earlier order precluding his expert, Dr. Ki Soo Hwang, from testifying in court and dismissing his personal injury case with prejudice. We affirm.

This appeal arises out of a work-related **slip** and **fall** on black ice outside a ShopRite store. Plaintiff, a New Jersey resident, was employed as a truck driver of JED Trucking & Warehousing, Inc. On February 21, 2010, he made a delivery to defendant ShopRite of East Norriton, Pennsylvania.[1] According to plaintiff, while there, he fell twice on black ice and injured his neck and back. Approximately eight months later, shortly after he returned to work, plaintiff suffered a second work-related accident and severely aggravated his lower back injury. This second incident did not take place on defendants' property and defendants have no responsibility for that second injury.

Following his first injury in February 2010, plaintiff underwent a course of "conservative treatment" with Dr. Hwang. As part of that treatment, plaintiff received a magnetic resonance imaging (MRI)[2] scan of his lumbar spine on April 1, 2010. Plaintiff received the only copy of the MRI film but later misplaced it. The radiology imaging center's files were corrupted and no other films were available. Given defendants' lack of access to the MRI film, the motion judge ruled that plaintiff was barred from introducing the MRI study for any purpose at trial, writing on the order: "The Defendant has the right to view the MRI film that appears to be in the possession of the Plaintiff. Without the ability to review that evidence and to submit it to an expert for review the Defense is severely and unduly prejudiced."

The case proceeded to trial in June 2014. Both parties' *in limine* motions were heard after jury selection had begun. Defendant moved to bar the testimony of Dr. Hwang, plaintiff's medical expert. Defendant contended that the doctor's proposed expert opinion was inadmissible because, first, the doctor's report did not apportion plaintiff's injuries between the two accidents. Defendant further argued that the doctor could not specify an apportionment of damages because the doctor was barred from relying on the April 2010 MRI, which he relied on in his report. The trial court granted the motion to preclude the doctor's testimony. Without the doctor's testimony available to plaintiff, the court also granted defendant's motion to dismiss with prejudice pursuant to *Rule* 4:37–2(b). Plaintiff's subsequent motion for reconsideration was denied.

On appeal, plaintiff argues that the trial court abused its discretion by dismissing plaintiff's case with prejudice, while other less stringent remedies existed. He also argues that the court erred by barring reference to the first MRI report, by precluding Dr. Hwang's testimony, and by placing the burden of proof as to apportionment of damages on plaintiff.

***2** We note initially that plaintiff appealed only from the July 2014 order denying reconsideration. We review the denial of a motion for reconsideration to determine whether the trial court abused its discretionary authority. *Cummings v. Bahr*, 295 *N.J.Super.* 374, 389 (App.Div.1996). Reconsideration should only be used "for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based

upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence." *Id.* at 384 (quoting *D'Atria v. D'Atria*, 242 *N.J.Super.* 392, 401–02, (Ch. Div.1990)).

"[T]he admission or exclusion of evidence is within the discretion of the trial court." *State v. Torres*, 183 *N.J.* 554, 567 (2005). The trial court is generally given deference in evidentiary determinations. *State v. Nelson*, 173 *N.J.* 417, 470 (2002). When reviewing the evidentiary ruling of the trial court, we employ a deferential standard of review, and reverse only when there has been an abuse of the trial judge's discretion. *State v. Brown*, 170 *N.J.* 138, 147 (2001). Thus, a trial judge's discretionary evidentiary rulings may only be disturbed if the judge's decision was "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." *Flagg v. Essex Cty. Prosecutor*, 171 *N.J* . 561, 571 (2002) (quoting *Achacoso–Sanchez v. Immigration & Naturalization Serv.*, 779 *F.*2d 1260, 1265 (7th Cir.1985)).

Here, the trial court's decision to bar all reference to the initial MRI was well within the court's discretion. Consequently, it was not an abuse of discretion to prohibit plaintiff from using the April 2010 MRI analysis at trial. In his report, Dr. Hwang stated the second injury was far more serious than the first, explaining at one point that plaintiff's symptoms were "primarily related to the [second] accident." However, the doctor generally attributed plaintiff's significant damages to both injuries and did not apportion them, opining in his report that plaintiff's "lumbar spine injury is permanent in nature" and that his "prognosis for a full recovery to his pre-injury status is poor." Dr. Hwang opined in summary:

> The patient's presenting symptoms, his persisting symptoms, the necessity for surgical intervention and his loss of work and subsequent loss of in [sic] attendant loss of wages are all directed [sic] related to the work-related accidents of February 21, 2010 and October 28, 2010.

Dr. Hwang, who treated plaintiff from the time of the first accident through the time of plaintiff's two surgeries after the second accident, was in a particularly good position to opine as to the apportionment of damages. Dr. Hwang, however, only made general statements indicating the second accident caused most of plaintiff's injuries, but failed to sufficiently specify the percentage attributable to the first accident.

***3** As a general rule, "the plaintiff bears the burden of proving the defendant's negligence and that such negligence was the proximate cause of the plaintiff's injury." *Fernandes v. DAR Dev. Corp.*, 222 *N.J.* 390, 404 (2015). In meeting that burden, a plaintiff seeking recovery for an injury caused by successive accidents must apportion damages between each responsible party. *See Reichert v. Vegholm*, 366 *N.J.Super.* 209, 214 (App.Div.2004) (acknowledging that "[t]he general rule does not change when [the] plaintiff's injuries or conditions are aggravated by a subsequent accident"). The burden to allocate damages is placed on "the party in the best position to present evidence." *Ibid.; see Borough of Fort Lee v. Banque Nat'l de Paris*, 311 *N.J.Super.* 280, 289 (App.Div.1998) (stating that a party with "better access to the relevant proofs" possessed the "burden to apportion responsibility"). We further recognize that a defendant should only be responsible for the harm he or she caused. *Reichert, supra*, 366 *N.J.Super.* at 213. Thus, in successive accident cases where a plaintiff seeks to recover from the original tortfeasor, the plaintiff must provide comparative medical evidence "to isolate the physician's diagnosis of the injury or injuries" that are attributable to that tortfeasor's negligent conduct. *See Davidson v. Slater*, 189 *N.J.* 166, 185–86 (2007).

"Normally, apportionment of damages requires expert testimony." *Schwarze v. Mulrooney*, 291 *N.J.Super.* 530, 541 (App.Div.1996). Plaintiff's apportionment must be "specific enough for a jury to reasonably apportion responsibility for the injuries." *Dziedzic v. St. John's Cleaners & Shirt Launderers, Inc.*, 53 *N.J.* 157, 161 (1969); *see also Boryszewski v. Burke*, 380 *N.J.Super.* 361, 375 (App.Div.2005) (stating that the trial court determines "whether the jury is capable of apportioning damages" (quoting *Campione v. Soden*, 150 *N.J.* 163, 184 (1997))), *certif. denied*, 186 *N.J.* 242 (2006).

Plaintiff was in the best position to apportion responsibility between his two injuries. Dr. Hwang was limited in his testimony to his report. *See Washington v. Perez*, 219 *N.J.* 338, 362 (2014) (stating that "any facts or data that support the expert's opinion must be disclosed in his or her report"). Because plaintiff could not satisfy his burden of proving damages, we see no reason to disturb the trial court's dismissal pursuant to *Rule* 4:37–2. *See R.* 4:37–2(b) (permitting dismissal when "the plaintiff has shown no right to relief"). Given that jury selection had begun, more than twenty-seven months after the complaint was filed, it would have been unreasonable to reopen discovery to allow plaintiff to supplement his proofs, nor was such relief requested by plaintiff at the

time of trial.[3]

Affirmed.

All Citations

Not Reported in A.3d, 2016 WL 782967

Footnotes

1 ShopRite of East Norriton, Pennsylvania is owned and operated by defendant Brown's Super Stores, Inc. *See Brown's Super Stores Inc.,* ShopRite, http://www.shoprite.com/member_browns/ (last visited Jan. 27, **2016**).

2 Magnetic resonance imaging, or MRI, is "a noninvasive diagnostic technique that produces computerized images of internal body tissues and is based on nuclear magnetic resonance of atoms within the body induced by the application of radio waves." *Magnetic Resonance Imaging,* Merriam–Webster, http://www.merriam-webster.com/dictionary/magnetic%20resonance%20imaging (last visited Jan. 27, **2016**).

3 At trial plaintiff sought a stay pending appeal, which was denied by the court.

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