NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0192-14T3

PAULA A. BAKELY and
CLIFFORD P. BAKELY,
Husband and Wife,

Plaintiffs-Appellants,

v.

FREDERICK J. KATZ and
ELAINE M. KATZ,

Defendants-Respondents.

Submitted January 19, 2016 – Decided July 22, 2016

Before Judges Messano and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-2657-12.

Laufer, Dalena, Cadicina, Jensen and Boyd, LLC, attorneys for appellants (James C. Jensen, of counsel and on the brief).

Law offices of Kevin M. McGowen, attorneys for respondents (William M. Fanning, on the brief).

PER CURIAM

Plaintiff Paula A. Bakely appeals from the Law Division's order granting defendants Frederick J. and Elaine M. Katz summary judgment on the basis that plaintiff's claim for personal injuries, sustained in an auto accident, did not

satisfy the statutory requirements for non-economic losses.[1] Having considered the parties' arguments in light of the record and applicable legal standards, we affirm.

We view facts from the record below in the light most favorable to plaintiff, the non-moving party. Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)). On January 4, 2011, plaintiff was a passenger in an automobile involved in an accident with an automobile driven by defendant Frederick Katz. After receiving treatment for left shoulder and arm pain, plaintiff's treating physician noted that he did not "think there are any interventions which can help (surgical or injection)." Plaintiff maintains that she still suffers from injuries related to the automobile accident.

Plaintiff's subsequent personal injury action involved the verbal threshold of the Automobile Insurance Cost Reduction Act (AICRA), N.J.S.A. 39:6A-1.1 to -35. In accordance with N.J.S.A. 39:6A-8(a), plaintiff's treating physician submitted a certificate of merit that she had a permanent injury resulting from the accident.

[1] Plaintiff's husband, Clifford P. Bakely, who filed a per quod claim, also appeals. However, we only make reference to her claims as his claims are dependent upon her ability to prove non-economic losses.

Following discovery, defendants moved for summary judgment contending plaintiff failed to establish a permanent injury to satisfy the verbal threshold. After hearing argument, Judge Robert J. Brennan issued an oral decision granting summary judgment. Citing Rogozinski v. Turs, 351 N.J. Super. 536 (Law Div. 2002), and Rios v. Szivos, 354 N.J. Super. 578 (App. Div. 2002), the judge rejected plaintiff's contention that permanency was established through her treating physician's certification. Furthermore, the judge thoroughly reviewed all of plaintiff's medical records, finding there was no indication that any doctor opined within a reasonable degree of medical probability that she sustained a permanent injury from the automobile accident based upon objective testing. Judge Brennan also noted that plaintiff's records indicated the accident aggravated a pre-existing neck injury, but provided no comparative medical analysis to prove aggravation of a pre-existing condition as required by Davidson v. Slater, 189 N.J. 166, 185 (2007). This appeal followed.

Plaintiff contends on appeal that the motion court erred in granting summary judgment because there were substantial facts in dispute as to whether plaintiff suffered a permanent injury. She argues that her physician's certificate of merit establishes that her injuries were permanent in nature. In addition, she

maintains that even though her medical records did not mention the term "permanency," her physician's notation that surgery or injections would not help her injury satisfies the verbal threshold. Furthermore, plaintiff argues that the motion court did not properly assess her burden to provide proof that the accident aggravated her pre-existing injuries. Plaintiff's contentions are without merit.

We begin with a review of the applicable legal principles that guide our analysis. A physician's certification of permanency in accordance with N.J.S.A. 39:6A-8(a) does not establish a permanent injury to satisfy the verbal threshold in order to defeat a motion for summary judgment. Rogozinski, supra, 351 N.J. Super. at 552; Rios, supra, 354 N.J. Super. at 580. In order to vault the verbal threshold, a physician must certify that, "the automobile accident victim suffered from a statutorily enumerated injury." Davidson, supra, 189 N.J. at 181 (citing N.J.S.A. 39:6A-8(a)). That opinion must be based on "objective clinical evidence," N.J.S.A. 39:6A-8(a), a standard that is the equivalent of the "credible, objective medical evidence" standard described in Oswin v. Shaw, 129 N.J. 290, 314 (1992). DiProspero v. Penn, 183 N.J. 477, 495 (2005). Under that standard, which is a critical element of the cost-containment goals of AICRA, the necessary objective evidence

must be "derived from accepted diagnostic tests and cannot be 'dependent entirely upon subjective patient response.'" Davidson, supra, 189 N.J. at 181 (quoting N.J.S.A. 39:6A-8(a)).

If the objective evidence depends on diagnostic and medical testing, those tests "may not be experimental in nature or dependent entirely upon subjective patient response." N.J.S.A. 39:6A-8(a). The Legislature intended these rigorous standards to ensure that a plaintiff could use only "honest and reliable medical evidence and testing procedures" to prove that the injury met the threshold. DiProspero, supra, 183 N.J. at 489.

Here, plaintiff failed to satisfy the verbal threshold. She did not provide a physician's opinion that her injuries were permanent based upon the use of objective medical evidence. Her treating physician's certificate of merit is insufficient. Moreover, plaintiff provides no comparative medical analysis to prove aggravation of a pre-existing condition. We therefore hold summary judgment was properly granted by Judge Brennan.

Affirmed.