

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1912-13T4

AIDA BASCOPE,

Plaintiff-Appellant,

v.

VANESSA KOVAC,

Defendant-Respondent,

and

JONATHAN VASQUEZ and  
ANGEL TORRES,

Defendants.

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Argued October 22, 2014 – Decided November 26, 2014

Before Judges Fuentes, Ashrafi, and  
O'Connor.

On appeal from Superior Court of New Jersey,  
Law Division, Bergen County, Docket No.  
L-8169-11.

Peter J. Koulikourdis argued the cause for  
appellant (Koulikourdis and Associates,  
attorneys; Mr. Koulikourdis and Rosemary N.  
Gushiken, on the brief).

John S. Guerin argued the cause for  
respondent (Harwood Lloyd, L.L.C.,  
attorneys; Warren C. Farrell, of counsel and  
on the brief; Paul E. Kiel, on the brief).

PER CURIAM

Plaintiff Aida Bascope appeals from a jury's verdict in favor of defendant Vanessa Kovac in this personal injury case after a motor vehicle accident. We affirm.

On October 7, 2009, defendant struck plaintiff's car from the rear on an exit ramp of the Garden State Parkway. Plaintiff was taken by ambulance to a hospital emergency room, where she was examined and released the same day. About six weeks later, she saw orthopedist Mark J. Ruoff, M.D., and was treated over a period of several months. In September 2011, plaintiff filed a personal injury lawsuit alleging she sustained permanent injuries as a result of the accident.

Plaintiff presented her case in a three-day trial held in November 2013. The defense conceded that Kovac's negligence caused the accident. The jury was asked to decide whether the accident in fact caused permanent injury to plaintiff and what money damages, if any, plaintiff was entitled to recover.

During the trial, plaintiff's counsel requested that the court instruct the jury in accordance with civil model jury charge 8.11(F), which pertains to aggravation of a pre-existing condition or disability. The court denied plaintiff's request, concluding that the instruction was not appropriate because plaintiff had not produced objective evidence of a pre-existing condition. The jury deliberated and returned a verdict that

plaintiff failed to prove a permanent injury proximately caused by the accident. On appeal, plaintiff argues that the trial court erred in denying her request for the aggravation instruction.

The court's obligation to instruct the jury properly on the applicable law is well-established in our cases. "The jury charge 'should set forth an understandable and clear exposition of the issues.'" Moquill v. Cb Commercial Real Estate Grp., 162 N.J. 449, 464 (2000) (quoting Campos v. Firestone Tire & Rubber Co., 98 N.J. 198, 210 (1984)). We must examine the evidence presented and the jury charge as a whole to determine whether the trial court's rejection of the requested instruction prejudiced plaintiff's right to a fair determination of the issues.

We begin by noting that plaintiff's claims were subject to the so-called verbal threshold of the Automobile Insurance Cost Reduction Act (AICRA), N.J.S.A. 39:6A-1.1 to -35. In the circumstances of this case, the "limitation on lawsuit option," N.J.S.A. 39:6A-8(a), required that plaintiff prove a permanent injury caused by the motor vehicle accident in order to recover non-economic personal injury damages such as emotional, mental, and physical pain and suffering. Davidson v. Slater, 189 N.J. 166, 174 (2007).

In her complaint, plaintiff alleged the accident was the sole cause of her injuries. She did not allege that any pre-existing condition or disability was aggravated by the accident. In her interrogatory answers, she confirmed that she "does not claim an aggravation, acceleration or exacerbation of a previous injury, disease, illness or condition." Moreover, the report prepared by plaintiff's medical expert at trial, Dr. Ruoff, did not contain any conclusion or other statement that the accident had aggravated a pre-existing condition of plaintiff.

By choosing not to plead or pursue damages for aggravation of a pre-existing condition, plaintiff avoided any requirement that she affirmatively produce evidence comparatively analyzing her prior condition and the impairment and disability she alleged was caused by the car accident. See id. at 186. The first time that plaintiff offered a theory that her pre-existing condition was aggravated by the trauma of the accident was in the middle of the trial.

Plaintiff and three members of her family testified that she never complained about any back or neck pains before the accident. After the accident, plaintiff was seen by Dr. Ruoff because of pain in her back, neck, and right leg. When physical therapy was unsuccessful, Dr. Ruoff referred plaintiff for magnetic resonance imaging studies (MRIs) of her cervical and

lumbar spine. An MRI taken in January 2010 revealed no disc herniation of the cervical spine. According to Dr. Ruoff, the MRI of the lumbar spine showed "two of the lower discs, the L4-5 and the L5-S1, were narrowed and she had some, what we call stenosis or some narrowing of the -- the area where the nerve exits the spine at the L5-S1 level."

On direct examination, Dr. Ruoff testified as follows regarding how the MRI findings correlated with plaintiff's complaints of pain:

DR. RUOFF: Those findings indicate pathology that there's -- there's something abnormal with respect to her back. The degenerative -- the loss of height of the disc probably represents some pre-existing degenerative changes that were there at the time of the accident, but they were probably aggravated by the -- by the impact. It can cause pain in a number of ways. . . .

PLAINTIFF'S COUNSEL: Doctor, a person such as [plaintiff] who has this ongoing degenerative process, does it make them more susceptible to pain or injury?

DR. RUOFF: Depending on the -- the trauma. Many people have changes such as this and don't have symptoms. And she apparently had no symptoms prior to this -- this accident.

PLAINTIFF'S COUNSEL: And, Doctor, would a motor vehicle accident such as you've described and what the patient has described cause the back, the lower back, to be -- then become symptomatic -- symptomatic?

DR. RUOFF: Yes. The impact from a rear-end collision and then a front-end collision can

certainly cause enough trauma to -- to affect the -- that condition.

[(Emphasis added).]

On cross-examination, Dr. Ruoff explained the natural deterioration of the spine: "[E]very disc when you're born is probably about 80 percent water. As you go through life, the disc will lose some of its water content. Some people, it happens faster than others. Injuries can accelerate that." Defense counsel asked whether "the loss of water content is a natural degenerative condition, aging condition[,]" to which the doctor replied "yes." Dr. Ruoff further testified that a disc's loss of water is usually a "slow process," but "[i]t can be accelerated by an injury."

The doctor also testified about the results of an electromyography (EMG) study to which he had referred plaintiff when her complaints persisted. The EMG was positive for a "right L5 radiculopathy, meaning that the fifth nerve root, the L5 nerve root on the right side had findings that were consistent with damage." Dr. Ruoff's cross-examination included the following additional testimony related to a pre-existing condition:

DR. RUOFF: Well, there's the -- at L5-S1, there's neuroforaminal stenosis or severely stenotic on the left. The right foramen is mild -- mildly narrowed. I believe that the

-- the foraminal stenosis is, I think the pathology, the compression of the nerve.

DEFENSE COUNSEL: And that was pre-existing; isn't that right?

DR. RUOFF: Yes.

DEFENSE COUNSEL: So the L5 radiculopathy was probably pre-existing, wouldn't you say?

DR. RUOFF: Well, she had no symptoms prior to that and . . .

DEFENSE COUNSEL: Okay. Well, how do you know that, Doctor?

DR. RUOFF: I have no evidence that indicates she had prior treatment for anything and the patient . . . verbally told me that she had no problems prior to that.

Dr. Ruoff testified that the motor vehicle accident was the cause of permanent injury to plaintiff, and also stated his opinion that:

within a reasonable degree of medical probability . . . [plaintiff] has some pre-existing degenerative disc disease. It was asymptomatic because she had no pain prior to that and . . . the impact caused an injury to the disc – further injury to the disc which led to the symptoms which are the back pain and the pain radiating into her leg.

Defendant's medical expert, Dr. Joseph Willner, examined plaintiff in September 2012. He testified that the disc at the L5-S1 level was narrowing, and that the condition existed before the accident. In his opinion, the accident did not cause

permanent injury to plaintiff. Dr. Willner explained that x-rays taken at the emergency room on the day of the accident revealed changes to plaintiff's discs, but these changes were not caused by trauma. He stated that plaintiff had a degenerative condition of her spine unrelated to the accident and that the condition would keep getting worse in the future. He also indicated that he "discounted" the EMG results because he found them to be inconsistent with plaintiff's MRI and physical exam, as well as inconsistent with her complaints on the day of the accident. In the emergency room, plaintiff had complained of back pain on her left side, not any pain in her right leg.

The model jury instruction requested by plaintiff provides:

In this case, evidence has been presented that [plaintiff] had an illness/injury(ies)/condition before the accident/incident – that is [describe the alleged preexisting injury]. I will refer to this condition as the preexisting injury. There are different rules for awarding damages depending on whether the preexisting injury was or was not causing plaintiff any harm or symptoms at the time of this accident.

Obviously, the defendant in this case [is] not responsible for any preexisting injury of [plaintiff]. As a result, you may not award any money in this case for damages attributable solely to any preexisting illness/injury(ies)/condition.

. . . .



If you find that [plaintiff's] preexisting illness/injury(ies)/condition was not causing her any harm or symptoms at the time of the accident, but that the preexisting condition combined with injuries incurred in the accident to cause her damage, then [plaintiff] is entitled to recover for the full extent of the damages she sustained.

[Model Jury Charge (Civil) 8.11(F), "Aggravation of the Preexisting Disability" (Approved 1997).]

The issue before us is whether plaintiff was entitled to have the jury instructed in accordance with this charge.

A jury instruction must be based on the evidence. An instruction "that has no basis in the evidence is insupportable [and] tends to mislead the jury." Dynasty, Inc. v. Princeton Ins. Co., 165 N.J. 1, 13-14 (2000) (quoting Lesniak v. Cnty. of Bergen, 117 N.J. 12, 20 (1989)).

Our Supreme Court has indicated that "[w]hen aggravation of a pre-existing injury is pled by a plaintiff, comparative medical evidence is necessary as part of a plaintiff's prima facie and concomitant verbal threshold demonstration in order to isolate the physician's diagnosis of the injury or injuries that are allegedly 'permanent' as a result of the subject accident." Davidson, supra, 189 N.J. at 185. However, "[w]hen a plaintiff does not plead aggravation of pre-existing injuries, a comparative analysis is not required to make that demonstration." Id. at 170.

Here, plaintiff did not plead or pursue before the trial compensation for an aggravation of her pre-existing disc condition. Her expert's report did not conclude that the accident aggravated the pre-existing condition. Nevertheless, aggravation of a pre-existing condition may become an issue, and the trial judge may charge the jury about aggravation, if either party raises the issue during the litigation. Edwards v. Walsh, 397 N.J. Super. 567, 572 (App. Div. 2007).

The Supreme Court recognized in Davidson that defendants in verbal threshold cases are likely to seek evidence of prior injuries and conditions as a defense to a plaintiff's claims that the trauma of a motor vehicle accident is responsible for the plaintiff's complaints. Davidson, supra, 189 N.J. at 188. The Court stated: "the plaintiff who does not prepare for comparative medical evidence is at risk of failing to raise a jury-worthy factual issue about whether the subject accident caused the injuries." Ibid. (citing Hardison v. King, 381 N.J. Super. 129, 137 (App. Div. 2005)). In anticipation of defense evidence disputing proximate cause of a permanent injury, a plaintiff may need to gather objective evidence of her medical condition before the accident. The Court stated in Davidson: "At the very least, plaintiff will be forced to address causation before the fact-finder and properly may be held to the

theory of the case as pled." Ibid. (citing Jardine Estates, Inc. v. Koppel, 24 N.J. 536, 542 (1957); Rothman Realty Corp. v. Bereck, 73 N.J. 590, 598 (1977)).

Here, the trial court held plaintiff to the theory of the case as she had pleaded it and presented it in discovery. Aggravation of a pre-existing condition was not properly before the jury because plaintiff did not plead or pursue it before the trial, and because she did not obtain objective comparative evidence to support such a claim when the defense challenged her proof of probable cause at the trial. In the absence of objective comparative evidence, she was not entitled to modify her theory of recovery in the middle of the trial and have the jury instructed with respect to aggravation of a pre-existing condition.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION